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Uniform Commercial Code Survey, Sales

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Sales

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Scope of Article 2

Article 2 applies to "transactions in goods"[1] and defines "goods" to include tangible personal property that is movable at the time it is identified to the contract.[2] Courts tend to read section 2-102 more narrowly than its text invites, applying Article 2 only to present sales of goods and to contracts for the future sale of goods.[3]

In mixed-sales transactions, such as those involving goods and services, most courts apply a predominant purpose test. Under this test, Article 2 applies if the transaction is predominantly about the sale of goods but Article 2 does not apply if the transaction is predominantly about the provision of services.[4] Several courts struggled with this issue over the past year.

In *Florists' Mutual Insurance Co. v. Lewis Taylor Farms, Inc.*,[5] the court examined whether a contract to grow seeds into seedlings for sale to farmers was one for the sale of goods.[6] Lewis Taylor Farms, Inc. ("LTF"), is a "greenhouse operation" that grows seeds (some of which are provided by farmers) to seedling plants and then sells the seedlings to farmers. LTF contracted to provide some pepper plants to DL&B Enterprises, Inc. DL&B supplied some of the seeds for one variety of pepper

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1. *See* U.C.C. § 2-102 (2002). Neither Article 2 nor Article 1 defines "transaction." Citations to U.C.C. Article 2 are to the version of Article 2 prior to the amendments promulgated in 2003.

2. *See* U.C.C. § 2-105(1) (2002).

3. While "transactions" appears to include more than just present and future sales, a narrower reading is not without support in Article 2. Section 2-106 begins, "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods." U.C.C. § 2-106(1) (2002). Because most of the substantive provisions in Article 2 apply to contracts or agreements, it is logical for courts to focus on contracts or agreements for the present or future sale of goods. *See, e.g.*, Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1174–75 (10th Cir. 2008) (holding Article 2 "transactions" include distribution agreement for beer).

4. *See, e.g.*, Export Dev. Can. v. Elec. Apparatus & Power, L.L.C., No. 03 Civ. 2063 (HBP), 2008 WL 4900557, at *11 (S.D.N.Y. Nov. 14, 2008).

5. No. 7:05-CV-50 (HL), 2008 WL 875493 (M.D. Ga. Mar. 27, 2008).

6. *See* U.C.C. § 2-105(1) (2002) ("'goods' means all things . . . which are movable at the time of identification to the contract").

and LTF supplied the seeds for two other pepper varieties. The contract required DL&B to pay LTF per seedling, with the price being higher for those seedlings for which LTF had provided the seed. Although the LTF invoice did not itemize the cost of the seeds separately from the cost of growing the seed to seedling, the cost of the seeds was less than 30 percent of the contract price. After DL&B received diseased seedlings from LTF, DL&B brought an action for, among other things, breach of the warranty of merchantability. LTF moved for summary judgment, claiming that the contract was outside the scope of Article 2 and thus there was no implied warranty of merchantability. The court used the predominant purpose test to hold that because (i) DL&B provided most of the seeds, (ii) the cost of the seeds and the services were divisible even though not segregated in the invoice, and (iii) the context indicated that DL&B emphasized the growing of the plants in conversations, the contract was one predominantly for services, not goods.[7] Therefore, the common law governed the parties' duties and there were no implied warranties of quality.

In *Wall Street Network, Ltd. v. New York Times Co.*,[8] a court considered a breach of contract claim arising out of an Internet marketing agreement between New York Times Co. ("NYT") and Click2Boost, Inc. ("C2B"). "Under the agreement, C2B was to solicit subscribers for home delivery of the New York Times newspaper by means of 'pop up ads' at Internet websites . . . ."[9] The ads prompted users for their zip code and, if that zip code was suitable for home delivery of the newspaper, the ad prompted the user to subscribe. NYT agreed to pay C2B for each subscription. After NYT terminated the agreement two weeks early due to alleged deficiencies in the subscriptions submitted by C2B, C2B's assignee, Wall Street Network, Ltd., brought suit. The court ruled that the contract between NYT and C2B was not a sale of "goods" because the agreement was "for the placement of advertising."[10] The court observed that even though C2B was paid a fee for each submitted subscription, C2B was not selling the names and addresses of the potential subscribers, but was merely forwarding information from those who chose to respond to the advertisements.[11]

STATUTE OF FRAUDS

An agreement to buy and sell goods for a price of $500 or more must normally be evidenced by one or more signed writings to be enforceable.[12] In *Mark*

7. *Florists' Mut. Ins. Co.*, 2008 WL 876493, at *10–11.
8. 66 U.C.C. Rep. Serv. 2d (West) 261 (Cal. Ct. App. 2008).
9. *Id.* at 262.
10. *Id.* at 264.
11. *Id.* at 265. *But see* Inter-Ams. Ins. Corp., Inc. v. Imaging Solutions Co., 185 P.3d 963, 969 (Kan. Ct. App. 2008) (holding computer programs were goods subject to Article 2 even though the seller also provided system installation and information conversion services because the services would not have been needed if the buyer had not purchased the system); Jannusch v. Naffziger, 883 N.E.2d 711, 714–15 (Ill. App. Ct. 2008) (finding Article 2 applied to sale of concession business because significant tangible assets were involved even though the buyer also received contract rights to work at certain events as part of the sale).
12. *See* U.C.C. § 2-201 (2002). *See also* Zoroufie v. Lance, Inc., No. 07-2016 STA-tmp, 2008 WL 2669105, at *3 (W.D. Tenn. June 27, 2008) (holding oral agreement for commissions on sandwich cracker sales was not enforceable because it was not in writing).

Maghsoudi Enterprises, Inc. v. Tufenkian Import/Export Ventures, Inc.,[13] Gallerie One was in the business of selling fine carpets. Pursuant to an alleged oral agreement to become a dealer of Tufenkian carpets, Gallerie One purchased carpet samples for $75,000 from Tufenkian and Tufenkian agreed to fill later Gallerie One orders for its carpets. After selling carpets to Gallerie One for about sixteen months, Tufenkian sent a letter advising Gallerie One that it would no longer fill orders for Gallerie One customers. Shortly afterward, Tufenkian opened its own store close to the Gallerie One location. Gallerie One brought suit on a number of claims, including breach of contract. The court dismissed the contract claim because Gallerie One had failed to provide any writings evidencing the alleged contract.[14] Although Gallerie One had introduced two letters, one was Tufenkian's termination of the business relationship and the second was Gallerie One's response regarding return of merchandise and samples; neither letter indicated a contract or its terms.[15]

Even when there is no writing signed by the person against whom enforcement is sought, the statute of frauds will not bar an action if the defendant is a merchant who received but did not object to a written confirmation.[16] The court in *Mitsubishi International Corp. v. Interstate Chemical Corp.*[17] considered a claim by Interstate Chemical Corp. ("Interstate") that Interstate's contract to purchase a barge from Mitsubishi International Corp. ("MIC") did not satisfy the statute of frauds. The court concluded that the oral conversation of the parties followed by MIC's confirmatory e-mail message met the merchants-must-read-their-mail exception, and Interstate's attempt to cancel the purchase of the barge came too late because it was more than ten days after the e-mail.[18] Moreover, any inconsistency between the e-mail message and the oral conversation regarding the delivery date did not render the message ineffective because the other terms, including the quantity, were specified in the message.[19]

Although the statute of frauds normally requires a written reference to quantity,[20] there are exceptions to the quantity requirement. In *Gordon Tantum*,

13. No. 08-C-441, 2008 WL 4449881 (N.D. Ill. Sept. 30, 2008).

14. *Id.* at *5.

15. *Id.*

16. *See* U.C.C. § 2-201(2) (2002). There is also an exception for specially manufactured goods. *See id.* § 2-201(3)(a); *see also* R.D. Weis & Co., Inc. v. Children's Place Stores, Inc., No. 08 Civ. 4245 (WCC), 2008 WL 4950962, at *4 n.2 (S.D.N.Y. Nov. 19, 2008) (denying motion to dismiss because application of the specially manufactured goods exception to statute of frauds could not be determined until after discovery).

17. No. 08 Civ. 194 (JSR), 2008 WL 2139137 (S.D.N.Y. May 20, 2008). Although the court initially denied the motion for summary judgment of Mitsubishi International, the court later granted the motion. *See* Mitsubishi Int'l Corp. v. Interstate Chem. Corp., No. 08 Civ. 194 (JSR), 2008 WL 4387392, at *4 (S.D.N.Y. Sept. 24, 2008).

18. *Mitsubishi Int'l Corp.*, 2008 WL 2139137, at *2. The court did not discuss whether Interstate's effort to "cancel" should be viewed as actually confirming the existence of a prior oral agreement, rather than as an objection to the existence of a deal. *See also* Ardus Med., Inc. v. Emanuel County Hosp. Auth., 558 F. Supp. 2d 1301, 1307 (S.D. Ga. 2008) (holding oral contract to sell hospital pumps satisfied statute of frauds where hospital did not object to written invoice delivered with the pumps within ten days).

19. *Mitsubishi Int'l Corp.*, 2008 WL 2139137, at *2 n.1.

20. *See* U.C.C. § 2-201(1) (2002).

Inc. v. Chef Solutions, Inc.,[21] the court considered contract claims brought by a potato dealer against its buyer, a manufacturer of potato products that claimed the alleged contracts were unenforceable beyond the minimum quantity referenced in the writings. Rejecting the manufacturer's motion for summary judgment, the court disagreed. First, the court observed that Article 2 allows for parties to have "'open-quantity' contracts intended to accommodate situations in which the producer's output or the purchaser's needs are unclear, and the parties seek maximum flexibility."[22] Second, the court noted that all of the contracts referenced a written schedule that detailed the quantity to be purchased, but that none of the schedules had been attached.[23] This left open the possibility that the agreement would be unenforceable, if no such schedules existed, or enforceable up to the quantity listed on the schedules, if they were produced and admitted.[24] Finally, the court noted that either the defendant's own schedules for the potato quantities or other testimony already in the record might satisfy the "admissions exception" to the statute of frauds.[25]

Contract Formation

Sections 2-204 through 2-207 govern contract formation under Article 2. While much litigation and scholarly attention centers on section 2-207, *Jannusch v. Naffziger*[26] turned on the application of section 2-204. Gene Jannusch, operator of a concession business, discussed the sale of the business, including a truck, service trailer, and equipment, to Lindsey and Louann Naffziger for $150,000. The Naffzigers paid Jannusch $10,000, with the balance to be paid upon receipt of a loan. The Naffzigers took possession of the business assets and worked a number of concession events, but title to the truck and trailer remained in Jannusch's name. The parties did not sign a written agreement and the Naffzigers returned the equipment to Jannusch.

When Jannusch sued for breach, the Naffzigers argued that no contract was finalized for the purchase of the business assets because so many contract terms were left out of the oral understanding. For instance, the parties had said nothing about covenants not to compete, liens, financing, or how to allocate the price between goodwill and equipment. The court of appeals, disagreeing with the trial court, ruled that although the parties could have "fleshed out" the terms of the sale, they agreed to the essential contract terms when they agreed to the purchase price and specific items to be transferred.[27] The court observed that the Naffzigers

21. 66 U.C.C. Rep. Serv. 2d (West) 414 (D.N.J. 2008).
22. *Id.* at 418–19.
23. *Id.* at 419.
24. *Id.*
25. *Id.* at 421.
26. 883 N.E.2d 711 (Ill. App. Ct. 2008). The court concluded that Article 2 applied because the contract was predominantly for goods. *Id.* at 714–15.
27. *See id.* at 715–16. *See also* Jones v. Baran Co., LLC, 660 S.E.2d 420, 425 (Ga. Ct. App. 2008) (granting summary judgment to buyer on a contract for sale of a limited quantity Mercedes at the manufacturer's suggested retail price even where some terms left open).

took possession of the assets, used the assets as their own, and took other actions indicating they were doing more than "pursuing buying the business."[28] The court followed the language of section 2-204, noting that conduct can demonstrate an agreement, even where the parties could not remember any specific date on which they concluded the agreement.[29]

In *Belden Inc. v. American Electronic Components, Inc.*[30]—a case hinging on section 2-207—the court held that the buyer's purchase order for wire was an offer, but that no contract was formed by the parties' writings because the seller's acceptance was made expressly conditional on the buyer's assent to a limit on consequential damages available to the buyer.[31] Nevertheless, the parties formed a contract by their conduct of selling and making payment on wire. The court rejected the seller's arguments that the damages limitation in the seller's acknowledgement was part of the contract. First, the court rejected the seller's argument that the language of section 2-207(2) incorporates the limitation on damages because it does not amount to a material alteration, holding that because the contract was one formed under section 2-207(3), subsection (2) did not apply.[32] The court reasoned that the application of section 2-207(2) in such cases would render section 2-207(3) meaningless when the writings did not establish the contract.[33] Second, the seller argued that the limitation on damages contained in its acknowledgment amounted to a course of performance binding on the buyer under section 2-207(3) because the parties had completed more than 100 transactions over the years. The court disagreed, concluding that the buyer's failure to respond to the seller's acknowledgment did not amount to a course of performance.[34] Rather, the seller needed the buyer's assent to the limitation on damages, but did not receive that assent.[35] Finally, the court ruled that no course of dealing was established when the buyer accepted a refund or credit on other transactions and did not seek consequential damages; such evidence showed merely that the buyer did not seek consequential damages, not that it had agreed to waive a right to them.[36] As a result, the contract was formed, but the seller's additional term did not become part of the parties' contract.[37]

Another case requiring interpretation of section 2-207 was *Tacoma Fixture Co., Inc. v. Rudd Co., Inc.*[38] In that case, Tacoma Fixture Co., Inc. ("Tacoma"), "regularly ordered paint and varnish from Rudd Co., Inc. (Rudd)."[39] The terms and

28. *Jannusch*, 883 N.E.2d at 716.
29. *Id.*
30. 885 N.E.2d 751 (Ind. Ct. App. 2008).
31. *Id.* at 757.
32. *Id.* at 758.
33. *Id.*
34. *Id.* at 760.
35. *Id.*
36. *Id.*
37. *Id.*
38. 174 P.3d 721 (Wash. Ct. App. 2008).
39. *Id.* at 721.

conditions, contained in Rudd's invoice, included a warranty disclaimer, limitation of remedies, a forum selection clause, and an attorney's fees provision. The invoice also stated that Tacoma's "assent shall be deemed complete if no contrary written notice is sent by purchaser within five (5) days of receipt."[40] After Tacoma had problems with Rudd products, it brought suit to recover for, among other things, breach of express and implied warranties. Rudd moved for summary judgment to enforce its invoice terms. The court denied Rudd's motion and the appellate court affirmed. The court of appeals held that the contract was formed when Tacoma placed the order and Rudd shipped the goods, and that the additional terms contained in Rudd's invoice were merely proposals for additions to the contract because they were material alterations.[41] Therefore, the additional terms did not become part of the contract.[42] The court stated, "Rudd could not change the contract by essentially saying to [Tacoma]", "Unless you say 'no' within five days, you mean 'yes.'"[43]

Contract Modification

Article 2 expressly recognizes both the enforceability of a clause prohibiting subsequent oral modification[44] and the possibility that the parties may waive such a clause.[45] In *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Finance Corp.*,[46] the court granted the buyer's motion to dismiss the seller's claim for breach of a contract to buy an airplane. The parties' written agreement contained a provision requiring future modifications to be in a writing signed by both parties. After it became apparent that the seller would be unable to deliver the aircraft by the appointed date, the buyer sent the seller an e-mail message indicating a willingness to agree to a later delivery date if the parties agreed on financial compensation for the resulting time delay. However, the parties did not agree to any compensation. The court ruled that because the financial compensation condition was not satisfied, the buyer had not waived its right to insist on timely delivery.[47] Accordingly, because the seller failed to deliver the aircraft on time, the buyer was not liable for breach.[48] The court also ruled that the buyer did not breach the obligation of good faith by rejecting the nonconforming tender even if its rejection was motivated by a decline in the market value of the airplane.[49]

40. *Id.* at 724.
41. *Id.*
42. *Id.*
43. *Id.*
44. U.C.C. § 2-209(2) (2002).
45. *Id.* § 2-209(4).
46. 567 F. Supp. 2d 579, 593 (S.D.N.Y. 2008).
47. *Id.* at 594.
48. *See id. See also* Eberspaecher N. Am., Inc. v. Van-Rob, Inc., 65 U.C.C. Rep. Serv. 2d (West) 203, 210–16 (E.D. Mich. 2008) (holding assent to modification cannot be inferred from party's sole action of continuing with agreement).
49. *Austrian Airlines*, 567 F. Supp. 2d at 600.

Open Price Term

Section 2-305 allows parties to contract before they have agreed upon a price.[50] If the agreement is silent as to price, then the price is a reasonable price at the time of delivery.[51] In *Sara Corp. v. Sainty International America Inc.*,[52] the court ruled that because the parties' agreement was silent as to the price of apparel samples, the court should fix a reasonable price.[53] The seller argued that it was entitled to fix the price for the sample apparel items so long as it did so in good faith. The court disagreed, holding that the seller's determination was not binding on the court; it was merely evidence of what the seller believed was a reasonable price for the samples.[54]

Warranties

Privity

Privity of contract is generally required to assert successfully a breach of contract action.[55] In a warranty context, however, the traditional notions of privity are sometimes relaxed.[56] In addressing a privity issue, the Indiana Court of Appeals held that vertical privity was not required to assert a claim against a manufacturer for breach of the implied warranty of merchantability but was required to bring an action for breach of the implied warranty of fitness for a particular purpose.[57]

The case involved the estate of a child who had died from an inadvertent overdose of medication administered by a nurse. The estate sued the manufacturer of the graduated medicine cup used to provide the medicine based on strict liability in tort and breaches of the implied warranty of merchantability and warranty of fitness for a particular purpose. The plaintiffs alleged the cup was unfit to measure medications that required precise dosages, such as the codeine administered to the decedent child, and the manufacturer did not adequately warn regarding this defect.

In its analysis of the contract claims, the court recognized that the implied warranties are imposed by law to protect buyers of goods and must be liberally

50. U.C.C. § 2-305(1) (2002).

51. *Id.*

52. No. 05 Civ. 2944 (JCF), 2008 WL 2944862, at *9–12 (S.D.N.Y. Aug. 1, 2008).

53. *Id.*

54. *Id.* at *9–10 (failing to discuss U.C.C. § 2-305(2) (2002), which allows for the parties to agree for one of them to set the price). *But see* Dixie Gas & Food, Inc. v. Shell Oil Co., No. 03 C 8210, 2008 WL 631106, at *5–6 (N.D. Ill. Mar. 3, 2008) (holding with respect to agreement containing an open price to be fixed by the seller, the seller must fix the price in good faith).

55. *See, e.g.*, Hyundai Motor Am., Inc. v. Goodin, 822 N.E.2d 947, 952–56 (Ind. 2005); Kovach v. Alpharma, Inc., 890 N.E.2d 55, 68–69 (Ind. Ct. App. 2008).

56. *See* U.C.C. § 2-318 (2002) (permitting states to adopt one of three alternatives to permit persons other than immediate buyer of goods to pursue action against seller of goods, thus addressing horizontal privity issue by statute); *id.* cmt. 3 (discussing how issue of vertical privity, or against whom in the distribution chain buyer can pursue breach of warranty claim, is left to courts).

57. *Kovach*, 890 N.E.2d at 68–70.

construed to effectuate that policy.[58] Stating that the implied warranty of merchantability was a "broad warranty, covering the consumer's reasonable expectations that a good will be fit for its ordinary use," this court noted that the Indiana Supreme Court had previously eliminated the privity requirement and permitted a consumer to recover against a manufacturer for breach of this warranty.[59] Nevertheless, the Indiana Court of Appeals ruled that the elimination of the privity requirement only applied to the warranty of merchantability and not the warranty of fitness for a particular purpose.[60] In doing so, the court noted that the previous decision specifically discussed the warranty of merchantability, indicating that ordinary consumers were entitled to a merchantable good that was fit for its ordinary purpose, and did not address the warranty of fitness.[61] Second, the warranty of fitness requires the seller to have knowledge (or reason to know) of the buyer's intended purpose for the good and thus is more suited to negotiated contracts.[62] Holding a manufacturer liable for breach of the implied warranty of fitness for a particular purpose when the manufacturer does not know or have reason to know of the ultimate consumer's use of the good would therefore be inconsistent with the provisions of the statute.[63] Furthermore, the estate could not meet the privity requirement by alleging the medical facility that bought the cup was its agent.[64] As a result, the court reversed the entry of summary judgment for the manufacturer on the implied warranty of merchantability claim but affirmed summary judgment on the implied warranty of fitness for a particular purpose count.[65]

Warranty Creation and Disclaimers

Whether a seller's statements made during negotiations or through advertising constitute an express warranty is a common point of contention between disgruntled buyers and their sellers. The U.S. District Court for the District of New Jersey refused to dismiss a claim that Ford Motor Company's description in advertising and public statements of its E-350 van as a fifteen-passenger vehicle qualified as an express warranty that the van was fit to transport fifteen people.[66] Ford argued that its statements were merely "classic examples of non-actionable opinion, or puffing."[67] While the plaintiffs conceded, and the court concurred, that Ford's statements that the van was a "very safe vehicle" and "America's Most

58. *Id.* at 68.
59. *Id.* at 68–69.
60. *Id.* at 69.
61. *Id.*
62. *Id.* (citing U.C.C. § 2-315 (2002)).
63. *Id.*
64. *Id.* at 70.
65. *Id.* at 71–72.
66. *In re* Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), 66 U.C.C. Rep. Serv. 2d (West) 726, 731 (D.N.J. 2008) (internal quotation marks omitted).
67. *Id.* at 729.

Trustworthy" were merely puffing, the court regarded Ford's statements about the number of passengers the vehicle could accommodate not as subjective statements of value but as objective representations about the vehicle.[68] Because whether the particular statements did in fact create an express warranty was a jury question, the court denied Ford's motion to dismiss the express warranty claim.[69]

The opposite result was reached in *Salazar v. D.W.B.H., Inc.*,[70] in which the Supreme Court of New Mexico ruled that the comment by an employee of an automobile repair shop to a customer indicating she should return the car if she had any problems with the used engine the shop had installed did not constitute an express warranty.[71] The trial court had found that this statement qualified as an express warranty but the state supreme court agreed with a lower appellate court that it did not.[72] The court noted that an express warranty can be made after a contract is formed, but must still be part of the basis of the bargain.[73] This statement, the court concluded, was merely a part of "good customer service," not part of the basis of the bargain.[74]

The court did, however, reverse the court of appeals and reinstated the trial court's verd[illegible] the plaintiff against the dealer on the basis of the implied warranty of [illegible]bility.[75] The court of appeals had found that this warranty was disclaimed by an exclusion of warranty provision in a document provided to and signed by the customer when she picked up her car. The provision was in "extremely small print," set off to one side on the page with the heading "Exclusion of Warranties" in all capital letters.[76] The court of appeals found that this made the disclaimer conspicuous as a matter of law, but the supreme court disagreed because [illegible] letters used for the title were smaller than other capital letters on the [illegible] significantly, the court concluded that the customer had not signed the acknowledgment of the disclaimer, and therefore did not assent to the provision.[78] While the customer had signed another portion of the document to authorize repairs, she had not signed under the disclaimer.[79]

68. *Id.*

69. *Id.* at 731.

70. 192 P.3d 1205, 1208–09 (N.M. 2008).

71. U.C.C. section 2-313 provides, in relevant part, "An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." U.C.C. § 2-313(1)(a) (2002).

72. *Salazar*, 192 P.3d at 1206.

73. *Id.* at 1209 (citing U.C.C. § 2-313 cmt. 7 (2002), which indicates that precise time affirmation of promise is made is not material).

74. *Id.*

75. *Id.* at 1211.

76. *Id.* at 1209.

77. *Id.* at 1210.

78. *Id.*

79. The exclusion provision stated "the *undersigned* purchaser understands and agrees that the dealer makes no warranties of any kind." *Id.* at 1210.

NOTICE

U.C.C. section 2-607(3)(a) requires that a buyer must give the seller notice of a breach of warranty within a reasonable time from when the buyer discovers or should have discovered the breach or the buyer is barred from any remedy.[80] In a class action against Ford Motor Company for breach of warranty with respect to Ford's fifteen-passenger vans, in which consumers alleged the vans were susceptible to rollover because of a defective design, the court dismissed the breach of warranty claims in some states but not in another state because the latter state applied a more liberal notice requirement to consumer buyers.[81] In this action, the plaintiffs failed to plead that they had given Ford notice. Although none of the plaintiffs had rolled over or suffered anything other than purely economic loss, they claimed damages for the diminution in the value of their vehicles and the cost of purchasing or leasing replacement vehicles. The court looked at each state's law to ascertain the standard for determining the appropriate notice to be given to a manufacturer that is being sued by a remote buyer for breach of warranty.[82]

With respect to Alabama, the court recognized that pre-litigation notice was not generally required for breach of warranty actions involving personal injury.[83] The court found, however, the notice requirement applied when the loss was purely economic and filing a complaint did not constitute notice for purposes of section 2-607.[84] Although the Alabama plaintiffs claimed that Ford had actual knowledge of the problem with the vans, and that such knowledge should be sufficient, the court disagreed.[85] It concluded that Ford's knowledge of the problem generally did not give it notice that there was a problem with the plaintiffs' vans.[86]

In interpreting Arkansas law, the court noted that Arkansas courts had also ruled that a complaint could not be notice under the U.C.C.[87] Because Arkansas had recognized two purposes behind the notice requirement—avoidance of stale claims and the opportunity to minimize damages—and had refused to eliminate the notice requirement in another context, the court ruled that Arkansas would be unlikely to waive the notice requirement in this case.[88] This was particularly true because Ford may have been able to minimize damages if given timely notice of the claims. The court also found Illinois would require notice of the claims prior to the filing of the complaint.[89]

The court concluded that California courts, on the other hand, would permit the buyers to proceed.[90] The court considered a California case, *Greenman v. Yuba Power*

80. U.C.C. § 2-607(3)(a) (2002).
81. *In re* Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), 66 U.C.C. Rep. Serv. 2d (West) 726, 732 (D.N.J. 2008).
82. *Id.* at 732–42.
83. *Id.* at 734–35.
84. *Id.* at 735–36.
85. *Id.* at 736.
86. *Id.*
87. *Id.* at 737 (citing Williams v. Mozark Fire Extinguisher Co., 888 S.W.2d 303, 306 (Ark. 1994)).
88. *Id.*
89. *Id.* at 740.
90. *Id.* at 738–39.

Products, Inc.,[91] in which the California Supreme Court had held that notice was not required in an action by an injured consumer against a manufacturer with whom the consumer had not dealt.[92] The *Ford* court found the California buyer in this case, a not-for-profit religious organization, was more analogous to the injured consumers in *Greenman* and not to the sophisticated developer in another case in which the California Court of Appeal had required the buyer to give notice to a remote seller.[93]

Breach

Obligation of Good Faith

Courts in several cases addressed claims for breach of contract based on a party's failure to act in good faith. In *Bellco Drug Corp. v. Global Supply Force, Inc.*,[94] the court dismissed a buyer's breach of contract counterclaim filed in response to the seller's suit to recover for unpaid shipments. The buyer, Global Supply Force, alleged that the seller, Bellco Drug, acted in bad faith by withholding shipments of ordered pharmaceuticals and suspending the buyer's line of credit. The parties' purchase agreement required Global to pay for all goods sold under the contract within thirty days[95] and provided that Bellco retained the right, in its sole discretion, to change credit terms, require payment before shipment, or to stop shipments. Global alleged that after the signing of the purchase agreement, the parties had entered into a course of performance that was inconsistent with the agreement: Global had not been paying "[n]et 30 days" on its account and Bellco had acquiesced in this performance.[96] Nevertheless, Bellco had stopped shipments four different times, each time demanding advance payment for future shipments and requiring regular payments to reduce the outstanding indebtedness of $900,000, finally stopping all shipments and ultimately filing suit to recover for the unpaid balance.

As the basis of its counterclaim, Global alleged that Bellco's refusal to ship and extend further credit to Global was done in bad faith. Because Bellco acquiesced in Global's repeated late payments, Global argued that Bellco was estopped from asserting a breach of contract action against Global and that Bellco was in breach of the parties' contract.[97]

The court recognized that the obligation of good faith and fair dealing was implied in the contract and may operate "in aid and furtherance of other terms

91. 377 P.2d 897, 900 (Cal. 1963) (noting that between immediate parties to a sale, notice requirement is a sound commercial rule but it becomes a "booby-trap for the unwary" as applied to personal injury action against a remote seller).

92. *Ford Motor Co.*, 66 U.C.C. Rep. Serv. 2d (West) at 738.

93. *Id.* at 739 (distinguishing Fieldstone Co. v. Briggs Plumbing Prods., Inc., 62 Cal. Rptr. 2d 701, 708 (Cal. Ct. App. 1997), in which the court held that a sophisticated development company that had built thousands of homes over several decades was required to give notice).

94. No. 07-4872, 2008 WL 2901595 (E.D. Pa. July 25, 2008).

95. The court noted that the agreement did not indicate if the thirty days began to run at the time of order, shipment, or delivery. *Id.* at *1.

96. *Id.* at *2.

97. Besides its breach of contract claim, Global also counterclaimed on counts of fraud, negligent misrepresentation, intentional interference with contractual relations, and interference with prospective business relations. The court dismissed all of Global's counterclaims. *Id.* at *12.

of the contract."[98] However, it ruled that the obligation of good faith cannot be inconsistent with the contract's express terms.[99] Accordingly, the court held that because the parties' agreement expressly gave Bellco the right to stop shipments and alter the credit terms "in its sole discretion," the obligation of good faith could not be construed to impair these contractual rights of Bellco.[100] The court noted that Global did not base its breach of contract action on the theory that the terms of the parties' agreement were modified through the course of performance but chose to rely on the implied obligation of good faith instead.[101]

Similarly, the court in *Autry Petroleum Co. v. BP Products North America, Inc.*[102] held that a claim for breach of the implied obligation of good faith was not actionable as a separate and independent cause of action. The buyers in the case, jobbers who acted as intermediaries in the distribution of petroleum fuel to retail outlets, alleged that the seller, BP Products, promised—through its course of performance—a 1 percent prompt payment discount but then increased the price of fuel it charged to jobbers to offset the discount, thereby depriving the jobbers of the benefit of the discount. The jobbers argued that the seller breached its obligation to set a price in good faith under U.C.C. section 2-305 and breached the general obligation of good faith under section 1-203.[103] In granting summary judgment for BP, the court noted the latter provision does not support an independent cause of action; rather, the implied duty of good faith becomes part of the contract.[104] If a party could not prevail on a breach of contract action apart from the obligation of good faith, the party cannot succeed based on the other party's alleged failure to act in good faith.[105]

Conversely, the U.S. District Court for the District of New Jersey permitted a claim for breach of the obligation of good faith and fair dealing to proceed to a jury in *Metex Manufacturing Corp. v. Manson*.[106] The parties in that case contracted through a series of purchase orders for Manson Environmental Corporation ("MEC") to provide coated wire mesh substrates that Metex would then sell to Engineered Exhaust Systems ("EES") for use as catalysts in engine mufflers.[107]

98. *Id.* at *3.

99. *Id.*

100. *Id.* at *4. This interpretation seems consistent with the official comments, which state that the obligation of good faith "does not support an independent cause of action for failure to perform or enforce in good faith. . . . [T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached." U.C.C. § 1-304 cmt. 1 (2008).

101. *Bellco Drug Corp.*, 2008 WL 2901595, at *5.

102. 65 U.C.C. Rep. Serv. 2d (West) 11, 17 (M.D. Ga. 2008).

103. *Id.* at 12. Former U.C.C. section 1-203 is now found in U.C.C. section 1-304. U.C.C. § 1-304 (2008) (imposing an obligation of good faith in the performance and enforcement of contracts under the U.C.C.).

104. *Autry Petroleum Co.*, 65 U.C.C. Rep. Serv. 2d (West) at 17.

105. *Id.* at 15. The court also found that BP did not breach any contract provisions with respect to the setting of the fuel price and the prompt payment discount. *Id.*

106. 65 U.C.C. Rep. Serv. 2d (West) 421, 421 (D.N.J. 2008).

107. The purchase orders expressly provided that the parties' remedies would be governed by the U.C.C. in effect in New Jersey. This provision may have been necessary to invoke application of the

MEC assured Metex that it could coat the substrates to meet the specifications in Metex's contract with EES. After 575,000 of the product had been delivered, Metex determined, through independent laboratory testing, that the goods did not conform to the parties' contract. EES demanded that Metex take remedial action because the goods Metex supplied EES failed engine performance tests. Ultimately, MEC and its principal, Manson, conceded that the goods did not conform to the contract and that MEC could not coat the substrates correctly. Metex sued for misrepresentation, breach of the contract, and breach of the obligation of good faith and fair dealing.

In ruling on MEC's motion for summary judgment on Metex's claim for breach of the obligation of good faith, the court noted that this implied obligation is breached when "'[t]he breaching party exercises its discretionary [contracting] authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract.'"[108] Metex alleged, and apparently produced some evidence, to show that despite Manson's personal assurances that MEC could coat the parts as required under the contract, Manson did not have the intent, ability, or resources to perform the contract when it was formed. The court found this was sufficient to permit the issue of Manson's and MEC's bad faith to go to a jury, noting "a finding of bad faith is a determination best left to the jury."[109]

Adequate Assurance of Due Performance

The court discussed the interrelationship between a request for adequate assurance of performance under U.C.C. section 2-609[110] and a buyer's right to cancel the contract for the seller's breach under section 2-711.[111] In *Rensselaer*

U.C.C. for two different reasons. First, Metex is a New York corporation headquartered in New Jersey. MEC is a Canadian corporation with its main facility in Canada. Assuming this transaction was a sale of goods, then the U.N. Convention on Contracts for the International Sale of Goods ("CISG") would have applied in the absence of a clear indication that the parties wanted domestic law other than the CISG to govern. Second, the court's description of the parties' relationship suggests that a significant component of the parties' bargain was MEC's service of coating the wire mesh for Metex's use. Indeed, it appears that Metex provided the mesh substrates for MEC to coat before Metex sold the mesh to EES. The court even referred to MEC as a "coater," as opposed to a supplier or seller. *Id.* at 422. If the contract was for the provision of services, not a sale of goods, then Article 2 would not apply. *See supra* notes 4–11 and accompanying text.

108. *Id.* at 425 (quoting Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1130 (N.J. 2001)) (second alteration in original).

109. *Id.* The court also denied Metex's motion for summary judgment on the breach of contract claim, finding that although there was no dispute about the existence and breach of the contract, the issue of damages and the reasonableness of Metex's efforts to mitigate damages was a disputed issue of fact to be left to the jury. *Id.* For more on the obligation to mitigate damages under Article 2, see U.C.C. § 2-715 (2002) (providing that consequential damages are only recoverable to the extent they cannot be avoided); U.C.C. § 1-305 cmt. 1 (2008) (noting the "Uniform Commercial Code elsewhere makes it clear that damages must be minimized").

110. U.C.C. § 2-609 (2002) (providing mechanism through which party with reasonable grounds for insecurity about other party's performance may request adequate assurance of future performance).

111. *Id.* § 2-711 (permitting buyer to cancel contract when seller fails to deliver goods or buyer rightfully rejects or revokes acceptance of non-conforming goods).

Polytechnic Institute v. Varian, Inc.,[112] RPI agreed to purchase a nuclear magnetic resonance system and shield from Varian. The system was to be the centerpiece of a new biotech building at RPI. RPI became convinced that the system's appearance would be different than envisioned when the system was ordered and that it would not fit into the building that was being constructed to house it. RPI cancelled the contract and demanded the return of the $900,000 payment it had made. Varian returned $533,000, retaining $367,000 as damages caused by RPI's cancellation. RPI sued for the return of the remainder of the price paid, arguing it rightfully rescinded the contract under section 2-711 because it had reason to believe the system would not fit properly in the biotech building. The court correctly determined that RPI's proper action would have been under section 2-609 when it became concerned about Varian's ability to perform the contract.[113]

RPI's basis for canceling the contract was that a similar system and shield installed at McGill University appeared to be different from the system shield represented on Varian's web site. While this may have given RPI grounds for insecurity about Varian's ability to provide the proper goods under the contract, RPI never requested assurance with respect to the appearance of the goods and could not cancel the contract on this basis.

RPI argued it was also concerned that the system and shield would not fit in the allotted twenty-one feet of space in the building because Varian's web site specifications indicated the shield needed twenty-two feet of space. While RPI had sought assurance from Varian that the goods would fit in the planned location, Varian had responded by providing a scaled drawing showing the system would fit in the available space. Although RPI argued that the assurance Varian gave was not adequate, the court found ample evidence in the record of e-mails and notes between the parties that indicated RPI was satisfied at the time by Varian's assurances the system would fit; therefore, this could not be the basis of RPI's cancellation under section 2-609.[114] Accordingly, the court held that RPI had wrongfully cancelled its order for the system, thereby breaching the contract.[115]

Installment Contracts

Unlike in a single delivery contract, in which any nonconformity justifies rejection of the goods,[116] in an installment contract, the buyer may only reject if the nonconformity substantially impairs the value of that installment and cannot be cured,[117] and may cancel the contact only if the breach with respect to one or more installments substantially impairs the value of the entire contract.[118]

112. 66 U.C.C. Rep. Serv. 2d (West) 152 (N.D.N.Y. 2008).
113. *Id.* at 154–55.
114. *Id.* at 155–56.
115. *Id.*
116. *See* U.C.C. § 2-601 (2002).
117. *See id.* § 2-612(2).
118. *See id.* § 2-612(3).

Moreover, a buyer who accepts a nonconforming tender without seasonably notifying the seller of the cancellation reinstates the contract.[119] The court in *ASi Industries GmbH v. MEMC Electronic Materials, Inc.*[120] applied these rules in a rather unusual setting.

The seller, MEMC, argued it had breached an installment contract and that its breach substantially impaired the contract to the buyer. Because this occurred more than one year before the buyer's claim for breach was filed, the seller argued the action was barred by a contractual provision requiring all actions under the contract to be brought within one year of when the action accrued.[121] It was undisputed that the seller did not make regular shipments as required by the parties' installment contract with only two full shipments and three partial shipments of the nineteen required under the contract made. The seller further made it clear to the buyer in September 2004 that it would be unable to provide the ordered goods for the remainder of 2004. The seller argued that it was this point in time at which the buyer's cause of action accrued, making the buyer's commencement of the suit in July 2006 untimely.

The difficulty with this argument, the court noted, was that the seller had made and the buyer had accepted two shipments after this time, in November 2004 and July 2005.[122] As a result, under U.C.C. section 2-612(3), the buyer reinstated the contract and had no claim for breach of the whole contract at that point.[123] Furthermore, the parties had continued to negotiate with the expectation that the seller would ultimately be able to perform the contract. As long as the buyer was accepting the seller's improper performance or assenting to the seller's expression of its intent to perform, the buyer was not an aggrieved party entitled to sue under section 2-612.[124] It was not until October 2005, less than a year before suit was filed, that the seller finally indicated that further shipments were being cancelled, giving rise to the buyer's cause of action.[125]

Excuse

Under both the U.C.C. and the CISG, a seller's performance can be excused when performance becomes impracticable.[126] The U.S. District Court for the Southern District of New York in *Macromex SRL v. Globex International, Inc.*[127]

119. *Id.*

120. 65 U.C.C. Rep. Serv. 2d (West) 88 (E.D. Mo. 2008).

121. The term was in the seller's standard Terms and Conditions attached to the seller's acceptance of the buyer's purchase order. Although the buyer disputed whether the term was part of the contract, presumably under section 2-207, the court assumed the term was included in the contract for purposes of the motion for summary judgment. *Id.* at 89.

122. *Id.* at 91.

123. *Id.* at 90–91 (citing U.C.C. § 2-612(3) (2002)).

124. *Id.* at 91.

125. *Id.*

126. *See* U.C.C. §§ 2-613, 2-614, 2-615 (2002); United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://cisgw3.law.pace.edu [hereinafter CISG].

127. 65 U.C.C. Rep. Serv. 2d (West) 1033, 1036–37 (S.D.N.Y. 2008).

upheld an arbitrator's ruling that a seller's performance was not excused because suitable substitute performance was available in an international sale governed by the CISG.

The U.S. seller argued that its contract to ship chicken parts to Romania could not be performed because prior to delivery, the government of Romania banned the importation of chicken unless the chicken could be certified. It was not possible for the seller to get the chickens certified in a timely manner; therefore the seller claimed excuse based on force majeure. The court upheld the arbitrator's interpretation of Article 79 of the CISG as requiring the use of substitute performance when reasonably available.[128]

Article 79 of the CISG excuses the seller's non-delivery if the non-delivery was caused by an impediment beyond the seller's control that was unforeseeable and could not reasonably be avoided.[129] The arbitrator concluded that the sudden decision by the Romanian government to ban the importation of chickens into the country was an unforeseeable impediment beyond the seller's control that likely caused the seller's failure to deliver the chicken parts.[130] However, the arbitrator determined that the seller could have reasonably avoided the breach by delivering the goods to another country, Georgia, as requested by the buyer. The arbitrator, having found no guidance in the party's contract or in authorities under the CISG on the avoidance issue, looked to U.C.C. section 2-614, which expressly requires a party to use a reasonable substitute when the agreed unloading facilities become unavailable.[131] The arbitrator therefore decided that the seller's non-delivery was avoidable by simply following the buyer's request for delivery to Georgia.

The seller, relying on the official comments to section 2-614, argued on appeal that that section was inapplicable. Instead, the relevant rule was in section 2-615 because the place of delivery was not incidental to the agreement but went to the heart of the contract.[132] The court determined, however, that section 2-614 was unambiguous and applied whenever unloading places become unavailable through

128. *Macromex SRL*, 65 U.C.C. Rep. Serv. 2d (West) at 1036–37.

129. CISG art. 79 provides:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

CISG, *supra* note 126.

130. *Macromex SRL*, 65 U.C.C. Rep. Serv. 2d (West) at 1035.

131. *See* U.C.C. § 2-614 (2002). Article 7(2) permits the use of other sources of private law when the CISG does not address the disputed matter. CISG, *supra* note 126, art. 7(2) (providing "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law").

132. *See Macromex SRL*, 65 U.C.C. Rep. Serv. 2d (West) at 1036; *see also* U.C.C. § 2-614 cmt. 1 (2002) (stating that the distinction between section 2-614 and the sections excusing performance, sections 2-613 and 2-615, is whether the impossibility of performance is incidental to the contract or "goes to the very heart of the agreement").

the fault of neither party.[133] Although that provision typically applies when a particular unloading facility in a country becomes unavailable, rather than when all of a country's facilities are unavailable, there was no reason it could not require delivery to a different country, particularly if the seller would not be burdened by additional fees in so delivering.[134] The court further reasoned that the distinction between incidental matters and those that go to the heart of the agreement was really between surmountable and insurmountable obstacles to performance.[135] The court stated that nonperformance without substitute is only justified when the impediment to performance cannot be overcome.[136] Because the seller had the product and could not deliver it as originally agreed but could readily deliver it to a port in a nearby country, as requested by the buyer, the seller was not entitled to avoid the contract under Article 79 of the CISG as the arbitrator correctly held.[137]

Remedies

Specific Performance

In two cases, buyers sought preliminary injunctions to prevent sellers from refusing to make further deliveries under supply contracts. In *E.I. Du Pont de Nemours & Co. v. Bayer Cropscience L.P.*,[138] the court denied the buyer's request for a preliminary injunction to prevent the seller from terminating the contract because the buyer could not show a reasonable likelihood of success on the merits. Pursuant to the contract, DuPont contracted to buy a proprietary chemical from Bayer Cropscience ("BCS") through 2015 and to mix the chemical with certain herbicides to make the herbicides safer for use on crops. A dispute arose when DuPont mixed the chemical with a herbicide different from the one specified in the agreement. BCS complained that DuPont had exceeded the license granted in the agreement and also had breached by not adequately recognizing BCS's proprietary interest in its chemical in DuPont's patent applications and advertisements for the treated herbicides. DuPont denied it was in breach of contract. Despite discussions and correspondence exchanged on the matter, neither party conceded its position. Because BCS had threatened to terminate the contract if DuPont did not remedy the alleged breach, DuPont filed suit seeking a declaratory judgment that it was not in breach, specific performance of the contract, and both temporary and permanent injunctions preventing BCS from terminating the supply contract. In opposing the request for a preliminary injunction, BCS contended that DuPont's use of the BCS chemical breached the agreement and its failure to recognize BCS's interest in the chemical in the patent applications and publications gave DuPont "unclean hands."[139]

133. *Macromex SRL*, 65 U.C.C. Rep. Serv. 2d (West) at 1036.
134. *Id.* at 1036–37.
135. *Id.* at 1037.
136. *Id.*
137. *Id.*
138. 958 A.2d 245, 247 (Del. Ch. 2008).
139. *Id.* at 250.

The court first enunciated the three traditional requirements for granting a preliminary injunction: (1) a reasonable probability of ultimate success on the merits, (2) immediate and irreparable harm that will result if the preliminary injunction is not issued, and (3) the balance of hardships weighs in the moving party's favor.[140] In turning to the requirement of reasonable probability of success on the merits, the court noted that a standard of clear and convincing evidence applied since DuPont requested the remedy of specific performance on the contract.[141]

The court then turned to the contract language and considered the purpose underlying the parties' entire agreement. The court noted that the language, if read literally, supported DuPont's use of BCS's chemical.[142] However, the court further explained that by looking at the entire arrangement, it was clear that the agreement included a limited license to use the chemical and BCS retained all other rights with respect to it.[143] Nothing in the agreement expressly allowed DuPont's use and the parol evidence offered did not demonstrate a reasonable likelihood that DuPont's interpretation of the agreement would prevail at trial.[144] Because DuPont could not establish that it was reasonably likely to be entitled to entry of an order of specific performance after a trial on the merits, the court denied its request for a preliminary injunction.[145]

The U.S. District Court for the Eastern District of Michigan dissolved a state court preliminary injunction after the case was removed to federal court in *Eberspaecher North America, Inc. v. Van-Rob, Inc.*[146] This court based its decision on the second requirement for a preliminary injunction: irreparable harm.[147] Van-Rob agreed, in a requirements contract, to supply specifically engineered and specially made mufflers on a "just-in-time" basis to Eberspaecher North America ("ENA"), which then used the mufflers to manufacture automotive exhaust systems for sale to Chrysler.[148] Frequent shipments were required under the contract because ENA

140. *Id.* at 251.

141. *Id.* at 252. The court used the "clear and convincing" standard from previous decisions in Delaware and North Carolina, as North Carolina law governed the substantive aspects of the contract claims. *Id.* at 252 n.24. The court did not discuss U.C.C. section 2-716, the section that governs the grant of specific performance in a contract for the sale of goods. *See* U.C.C. § 2-716 (2002). While section 2-716 does not indicate a particular burden of proof required for a grant of specific performance, its comments state that the section's purpose is to further a more liberal approach to the grant of specific performance, while still recognizing the need for the exercise of the court's sound discretion. *See id.* § 2-716 cmt. 1.

142. *E.I. Du Pont*, 958 A.2d at 254.

143. *Id.*

144. *Id.* at 255. In fact, BCS had previously entered into an agreement with another company giving it exclusive rights to mix the chemical with the disputed ingredient in the DuPont herbicide.

145. *Id.* at 256. The court did find that DuPont would suffer irreparable harm because the BCS chemical was irreplaceable in DuPont's herbicides. *Id.* at 258. However, the court found that the balance of hardship did not weigh in favor of DuPont because if BCS was enjoined and then prevailed at trial, it would suffer substantial hardship because it produced an herbicide that competed with DuPont's and it would lose its competitive advantage during the pendency of the action. *Id.*

146. 544 F. Supp. 2d 592 (E.D. Mich. 2008).

147. *Id.* at 602.

148. *Id.* at 593.

maintained less than a three-day supply of mufflers.[149] ENA alleged that the slightest delay in delivery of the mufflers could cause its and Chrysler plants to shut down in a matter of days and that Van-Rob was the only supplier of mufflers that met Chrysler specifications. The dispute arose over whether Van-Rob was entitled to pass on the increased cost of materials, as an "Alloy Surcharge," to ENA.[150]

The court found that ENA would not suffer irreparable harm and therefore was not entitled to the continuation of the preliminary injunction.[151] In the court's view, a showing of irreparable harm is the single most important requirement for the issuance of a preliminary injunction.[152] Despite the possibility of a shut down that would idle hundreds of ENA and Chrysler employees, the negative impact on ENA's suppliers, and the possibility that ENA would be liable for millions of dollars in penalties to Chrysler, the court concluded that money damages could adequately compensate ENA if it ultimately prevailed on its breach of contract claim.[153] Although ENA alleged it could not afford to pay Van-Rob's higher prices, it provided no evidence of its inability to pay. ENA could simply pay the higher prices charged and then seek money damages at trial, which would adequately compensate it for its damages. Because money damages would be adequate to compensate ENA, equitable relief was not proper.

Statute of Limitations

Plaintiffs who delay filing a lawsuit only to come up against the statute of limitations often make creative arguments to avoid the dismissal of their suits as time barred. In *Trans-Spec Truck Service, Inc. v. Caterpillar Inc.*,[154] the U.S. Court of Appeals for the First Circuit rejected the argument that a promise to repair a defect in truck engines manufactured by Caterpillar, Inc. ("Caterpillar"), made in Caterpillar's extended service contract, constituted a warranty of future performance, thus delaying the commencement of the limitations period to discovery of the breach.[155] The key to determining whether a warranty is one for future performance rests with an examination of the warranty language.[156] The court distinguished between warranties that explicitly guarantee the performance of the good in the future and a warranty to repair or replace, which merely recognizes that the good might not perform and offers to repair it if it fails.[157]

149. *Id.*
150. *Id.* at 594.
151. *Id.* at 602.
152. *Id.* at 603–04.
153. *Id.* at 603.
154. 524 F.3d 315 (1st Cir. 2008).
155. *Id.* at 322–25. The four-year statute of limitations generally commences when the breach occurs, which for a warranty is generally on tender of delivery of the good. U.C.C. § 2-725 (2002). The statute of limitations does not begin to run on tender of delivery if "a warranty explicitly extends to future performance of goods and discovery must await the time of such performance." In that case, the period begins to run when the breach is or should have been discovered. *Id.* § 2-725(2).
156. *Trans-Spec Truck Serv.*, 524 F.3d at 323.
157. *Id.*

The court in *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*[158] took up whether tolling of the four-year statute of limitations is permitted on the ground of "fraudulent concealment." The court concluded that the plaintiffs' claims were timely in that Article 2 does not alter tolling of the statute of limitations that otherwise exists under state law.[159] Because both California and New Jersey law recognize tolling for fraudulent concealment, the court held the claims were not time barred.[160] Moreover, the plaintiffs had pled fraudulent concealment sufficiently to withstand a motion to dismiss because it was not readily apparent in the complaint that the claims were time barred.[161]

158. 66 U.C.C. Rep. Serv. 2d (West) 726, 749 (D.N.J. 2008). *See also* CR3 of Ind., L.L.C. v. Specialty Surfaces Int'l, Inc., No. 1:07-cv-0991-DFH-JMS, 2008 WL 3914092, at *18–19 (S.D. Ind. Aug. 19, 2008) (recognizing that equitable estoppel might toll the statute of limitations under Indiana law).

159. *Id.* at 747.

160. *Id.* at 742–45.

161. *Id.* at 749.