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SPECIFIC PERFORMANCE AS A SELLER REMEDY FOR BUYER'S BREACH OF A SALES CONTRACT—THE AVAILABILITY OF JUDICIAL PURCHASE ORDERS

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When might a court issue a decree ordering specific performance as a remedy available to a seller for a buyer's breach of a contract for sale of goods? The Sales Article of the Uniform Commercial Code does not acknowledge that specific performance is a remedy available to a seller aggrieved by a buyer's breach. Instead, specific performance is identified as a potential remedy for a buyer of goods aggrieved by a seller's breach. The only analogous remedy available to aggrieved sellers is afforded in an action to recover the price of the goods. Because receipt of the purchase price is the seller's primary objective in concluding a contract for sale of goods, the seller's recovery of damages measured by the price of the goods will be sufficient in most cases to put the aggrieved seller "in as good a position as if the [buyer] had fully performed" when the facts satisfy any of the alternative requirements that U.C.C. section 2-709(1)(a) or (b) imposes. The question whether specific performance is a remedy available to aggrieved sellers of goods has received only passing attention in the secondary authorities. This article identifies those situations in

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1. Unif. Commercial Code § 2-703 (1962). "This ... is an index section which gathers together ... all of the various remedies open to a seller for any breach by the buyer. ... [Section 2-703 lists] all of the available remedies for [a buyer's] breach [of a contract for sale of goods]." U.C.C. § 2-703 cmt. 1 (1962) (emphasis added).

2. U.C.C. § 2-716 (1962). Captioned a "Buyer's Right to Specific Performance ... [Section 2-716 provides that] (1) Specific performance may be decreed where the goods are unique or in other proper circumstances." Id.

3. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7-2, at 454 n.2 (5th ed. 1996) ("The action for the price is, of course, the analogue to the buyer's action for specific performance").

   (1) When the buyer fails to pay the price as it becomes due the seller may recover ... the price (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

Id.

5. U.C.C. § 1-305(a) (2001) ("The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed ... ").

6. U.C.C. § 2-709(1)(a)-(b) (1962); see supra note 4.

7. See, e.g., WHITE & SUMMERS, supra note 3, § 7-2, at 454 n.2; Harold Greenberg, 1998 Survey of the Uniform Commercial Code in Indiana, 32 IND. L. REV. 1119, 1119-1123 (1999); Gregory M. Travalio, Measuring Seller's Damages for Breach of Long-Term Gas Purchase Contracts, 14 E. MIN. L. FOUND. § 23.03[5], at 23-33 (1993) (acknowledging that an aggrieved seller might be entitled to an injunction against a buyer's breach of a long-term gas purchase contract, thereby "forcing the buyer to purchase the gas from the seller under the contract"); 67 AM. JUR. 2D § 556, at 747 (1985 ed.) ("under
which achievement of the remedial ideal\(^8\) is possible only if a court issues a
decree ordering specific performance of a buyer’s contractual duties on behalf of
an aggrieved seller of goods.

Specific performance should be available to an aggrieved seller of goods
when none of the seller remedies identified in UCC sections 2-702 to 2-710 will
be adequate to protect the expectation interest of the seller.\(^9\) In such cases, the
seller should be afforded the opportunity to obtain a decree ordering specific
performance of the breaching buyer’s duties under the contract or a prohibitory
injunction enjoining the buyer from breaching its duties under the contract. The
determinative factor in deciding whether specific performance or an injunction
against breach would be an appropriate remedy for a seller injured by a buyer’s
breach is whether an award of one or more of the seller remedies identified in
Article 2 “would be adequate to protect the expectation interest of the injured
[seller].”\(^10\) If not, then the seller should have a right to specific performance
coextensive with the right that UCC section 2-716(1) affords to buyers in various
circumstances.\(^11\)

Among the cases in which specific performance would be an appropriate
remedy for an aggrieved seller of goods are those in which the seller is not
entitled to bring an action for the price. For example, when a buyer repudiates a
long-term output or requirements contract,\(^12\) an action for the price will not
always be available to the aggrieved seller as a remedy for breach.\(^13\) An action
to recover the price of the contract goods is not available to the seller if the buyer
repudiates its remaining duties under such an executory contract before the

\(^8\) U.C.C. § 1-305(a) (2001); see supra note 5.

\(^9\) U.C.C. § 1-305(a) (2001) (“The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . .”); U.C.C. § 1-103(b) (2001) (“Unless displaced by . . . particular provisions of [the Uniform Commercial Code], the principles of law and equity . . . supplement its provisions”). RESTATEMENT (SECOND) OF CONTRACTS § 344(a) defines a promisee’s “expectation interest” as the “interest in having the benefit of [the promisee’s] bargain by being put in as good a position as [the promisee] would have been in had the contract been performed.”

\(^10\) RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1982) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party”).

\(^11\) The caption to UCC section 2-716 establishes that a buyer may have a “[r]ight to [s]pecific [p]erformance.” U.C.C. § 2-716 (1962); see U.C.C. § 1-107 (2001) (“Section captions are part of [the Uniform Commercial Code]”) and U.C.C. § 1-107 cmt. 1 (2001) (“Section captions are a part of the text of the Uniform Commercial Code”). UCC section 2-716(1) provides that “[s]pecific performance may be decreed where the goods are unique or in other proper circumstances.” U.C.C. § 2-716(1) cmt. 1 (1962).

\(^12\) U.C.C. § 2-306(1) (1962) (“A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith . . .”).

\(^13\) Cf. U.C.C. § 2-716 cmt. 2 (1962) (when a buyer seeks specific performance, “Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation . . .”).
goods have been accepted, before the risk of their loss has passed to the buyer, and before some or all of the goods have been produced or identified to the contract. Yet that repudiation gives the injured seller an immediate right to bring an action for breach of the sales contract. When the buyer’s repudiation of the whole contract occurs before the seller has begun to produce or acquire some or all of the goods, the seller might not be able to be made whole by obtaining any of the remedies explicitly afforded to aggrieved sellers in sections 2-702 through 2-710 of Article 2. In that event, a court should be willing to order specific performance or to issue an injunction against the buyer’s continuing breach as the only remedies that might be capable of securing the seller’s unique entitlement under a long-term output or requirements contract.

The courts in two pre-Code cases acknowledged that specific performance or an injunction against breach were remedies available to aggrieved sellers of goods in appropriate circumstances. Considering the Sales Article policy of making the specific performance and an injunction against breach judicial remedies that are available more often than they have been in the past, it is unlikely the drafters intended to reject the holdings in those two pre-Code cases, notwithstanding the absence from Article 2 of any section that explicitly affords to an aggrieved seller a right to specific performance or an injunction against the buyer’s breach. On the contrary, those equitable remedies should still be available under supplementary principles of equity whenever they must be granted in order to put “the aggrieved party... in as good a position as [it would have been in] if the other party had fully performed.” Although specific performance is not listed among the remedies available to an aggrieved seller in

14. U.C.C. § 2-709(1)(a) (1962) (“(1) When the buyer fails to pay the price as it becomes due the seller may recover... the price (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer”).

15. U.C.C. § 2-709(1)(b) (1962) (“(1) When the buyer fails to pay the price as it becomes due the seller may recover... the price (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing”). See also U.C.C. § 2-501(1) (1962) (“The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers...”).

16. U.C.C. § 2-703 (1962) (“Where the buyer... repudiates with respect to... the whole [contract], then... the aggrieved seller may [pursue one or more of the seller remedies catalogued in subparts (a) through (f)]

17. See cases cited infra notes 18 and 37.

18. United Fuel Gas Co. v. Columbian Fuel Corp., 165 F.2d 746 (4th Cir. 1948); Allen W. Hinkel Dry Goods Co. v. Wichison Indus. Gas Co., 64 F.2d 881 (10th Cir. 1933). Cf. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 38 F.2d 444 (10th Cir. 1930) (lessee of gas pipeline held entitled to specific performance of lessor’s duty to lease pipeline that lessee required to supply its customers).


The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court’s sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with specific performance of contracts of sale.

Id.

20. U.C.C. § 1-103(b) (2001). See infra text accompanying notes 23, 45, and 79.

21. U.C.C. § 1-305(a) (2001); see supra note 9.
UCC section 2-703, no particular provision of Article 2 explicitly displaces the equitable principle that circumstances may make specific performance or an injunction against breach an appropriate remedy for a buyer's breach of a contract for sale of goods.

One of the pre-Code cases supporting the proposition that specific performance might be a remedy available to an aggrieved seller of goods is Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co. The defendant-buyer in that case entered into a three-year contract to purchase its requirements of gas from a seller. The seller transferred the contract to the plaintiff. The plaintiff then constructed a pipeline and distribution system in order to supply the buyer's requirements under the contract, and the plaintiff made arrangements with affiliated companies to obtain a supply of gas adequate to meet the buyer's requirements during the three-year term of the contract and any extensions of the contract term. The plaintiff-transferee performed its obligations under the contract, but the defendant-buyer repudiated. The plaintiff filed suit and applied for a temporary injunction prohibiting the defendant from breaching the contract pending a trial on the merits of the plaintiff's claim.

The Tenth Circuit Court of Appeals affirmed the district court's order granting plaintiff a temporary injunction. The plaintiff had no adequate remedy at law. It would have been almost impossible to determine the amount of damages plaintiff would have to recover in order to be compensated for the loss caused by the defendant's repudiation, considering the "nature of the contract [a long-term requirements contract], the lack of a general market for gas, and the uncertainties inherent in the natural gas business." The court noted that the contract deals with a commodity not readily obtainable or saleable in the general market, the [plaintiff] Gas Company's patrons belong to a limited class, the Gas Company and its affiliates have expended large sums of money to enable it to carry out its contracts to furnish gas, the contract here involved had thirty-seven months to run when the order appealed from was made, and the damages for breaches during such future

22. U.C.C. § 2-703 (1962) provides,
Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may (a) withhold delivery of such goods; (b) stop delivery by any bailee as hereafter provided (Section 2-705); (c) proceed under the next section respecting goods still unidentified to the contract; (d) resell and recover damages as hereafter provided (Section 2-706); (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709); (f) cancel.

Id.


24. 64 F.2d 881 (10th Cir. 1933).

25. Id. at 882.

26. Id.

27. Id. The plaintiff was a public utility whose rates were subject to regulation by the state Public Service Commission. Id. at 883.

28. Id. at 882.
period would be exceedingly difficult of ascertainment.\textsuperscript{29}

The court also concluded that the plaintiff would suffer "certain and irreparable injury" if a trial on the merits of the claim were to establish that the preliminary injunction had been erroneously withheld, whereas "any injury to the [defendant] . . . resulting from the temporary injunction, should the final decree be in its favor, will be fully compensated for by the bond required by the trial court. It follows that the balance of injury as between the parties favored the issuance of the order."\textsuperscript{30}

The opinion does not directly support the availability of specific performance as a remedy for a seller of goods. The court distinguished the prohibitory injunction plaintiff ultimately sought from a decree ordering the defendant specifically to perform its duties under the contract:

An injunction against the breach of a contract is a negative decree of specific performance. The power and duty of a court of equity to grant such [an] injunction is broader than its power and duty to grant a decree of specific performance, since an injunction to restrain acts in violation of a lawful contract will be granted, even when specific performance would be denied because of the nature of the contract.\textsuperscript{31}

Nevertheless, the same factors that persuaded the court to affirm the prohibitory preliminary injunction the trial court had issued also would have supported the issuance of a mandatory preliminary injunction ordering the defendant to continue performing its duties under the contract.\textsuperscript{32} Issuance of a prohibitory injunction is an indirect method of getting the breaching party to perform its duties under the contract.\textsuperscript{33} Specific enforcement of a decree ordering the defendant to continue purchasing its natural gas requirements from the plaintiff for the duration of the contract term would not have "impose[d] . . . burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from

\textsuperscript{29} Id. at 884.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 883 (citations omitted).
\textsuperscript{32} \textit{Cf.} \textsc{Restatement (Second) of Torts} § 936 (1979):

(1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all the factors in the case, including the following primary factors: . . . (b) the relative adequacy to the plaintiff of injunction and of other remedies, . . . [and] (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied . . .

(2) The appropriateness of an interlocutory injunction against a tort is determined in light of the factors listed in Subsection (1), . . . but depends primarily upon the following special factors: (a) the extent of the threat of irreparable harm to the plaintiff if the interlocutory injunction is not granted, [and] (b) the consequences that the interlocutory relief may have upon the defendant . . .

\textsuperscript{33} E. Allan Farnsworth, \textit{Farnsworth on Contracts} § 12.5, at 744 (4th ed. 2004):

Instead of ordering specific performance, a court may, by injunction, direct a party to refrain from doing a specified act. . . . Often . . . a prohibitory injunction is used as an indirect means of enforcing a duty to act. Instead of ordering that the act be done, as a court would in granting specific performance, the court orders forbearance from inconsistent action.

\textit{Id.}
its denial."  

In a subsequent pre-Code case, United Fuel Gas Co. v. Columbian Fuel Corp., a seller of natural gas sought and obtained an order of specific performance against a breaching buyer. The parties had concluded a five-year contract for sale at a fixed price of the seller's output of natural gas produced on specified acreages. The court sustained the plaintiff-sellers' claim for specific performance, noting that:

Since plaintiffs have made large expenditures for the purpose of collecting the gas and delivering it to defendant, by way of laying pipe lines, etc., and have placed themselves in a position where they would suffer irreparable damage if defendant should fail to carry out the contracts, there would seem to be no reason why equity should not afford them protection. The jurisdiction to decree specific performance or otherwise protect in equity rights under contracts relating to the sale of gas and oil is well established where an award of damages will not afford adequate relief.

The sparse pre-Code case law acknowledging the availability of specific performance or an injunction against breach as remedies available to aggrieved sellers of goods in appropriate circumstances is confirmed by an equally sparse case law under the Code. The limited case law is attributable to the unusual circumstances that must be present before either of those equitable remedies will be appropriate.

The first Code case to acknowledge that specific performance may be decreed on behalf of an injured seller of goods is Central Illinois Public Service Co. v. Consolidated Coal Co. The facts of the case were complicated. The parties entered into a long-term contract under which the buyer, a supplier of electric power to customers in central Illinois, originally agreed to purchase the coal it would require to run a generating station it expected to construct in Coffeen, Illinois, from the seller, the owner of coal reserves in the Coffeen area. The buyer constructed the Coffeen generating station in part because of the readily available source of coal that the seller's reserves provided. Under the terms of the parties' original contract, the seller was obligated to construct a mine next to the site of the buyer's generation station and to design that mine in such a way as to permit the buyer to save the cost of transporting coal to its station by hoisting coal from the seller's mine and delivering it to the adjacent station's stockpile by conveyor belt. As the parties anticipated, the output from

34. RESTATEMENT (SECOND) OF CONTRACTS § 366 (1982). See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975) (any difficulties a court might have supervising compliance with a decree ordering specific performance of a long-term contract to supply the buyer's requirements of propane gas were tolerable).
35. 165 F.2d 746 (4th Cir. 1948).
36. Id. at 750.
39. Id. at 60-64.
the seller's mine became a function of the buyer's purchases. The coal taken from the mine could only be transported to the buyer's adjacent generating station because the conveyor belt did not permit the seller to load large quantities of coal into carriers for delivery to other buyers, and the buyer received and consumed untreated coal from the seller's mine, which eliminated the need for the seller to construct a costly coal processing plant, which would have been necessary in order for the seller to supply other buyers. The parties' original long-term requirements contract provided the buyer with an inexpensive supply of coal and ensured that the seller would be able to recoup the $23 million investment it had made by constructing and developing the mine in such a way as to preclude the seller from selling most of the mine's output to any other buyer. Despite disagreements concerning the quality of the coal the seller delivered and the buyer accepted, the parties modified the contract and performed their respective duties under it for approximately fifteen years when the buyer abruptly and prematurely exercised a reserved right of termination.

The seller sought and the federal district court issued a preliminary injunction prohibiting the buyer from breaching the contract by failing to purchase from the seller the minimum quantity of coal the parties had agreed upon when they modified their original requirements contract. The court rejected the buyer's basic argument that a trial court does not have the power to grant the preliminary injunction the seller sought because specific performance is not available to an injured seller of goods as an ultimate remedy for a buyer's breach. Although the text of UCC section 2-703 does not explicitly provide that specific performance is a remedy potentially available to a seller aggrieved by a buyer's breach of a contract for sale of goods, the court concluded that the catalogue of seller remedies in section 2-703 is not exhaustive. The court ignored the suggestion in a comment to section 2-703 that "[t]his section...gathers together...all of the various remedies open to a seller for any breach by the buyer." Instead, the court emphasized the absence of any case law supporting the argument that specific performance is not a remedy available to a seller of goods under any circumstances, as well as the existence of the pre-Code cases in which courts granted specific performance to sellers in appropriate circumstances. Having decided that the catalogue of seller remedies in section 2-703 does not exhaust the remedial possibilities for the injured seller of goods, the court cited UCC section 1-103 in support of its conclusion that principles of equity supplement the catalogue of seller remedies in section 2-703 and make...
specific performance a potentially available remedy in the unusual circumstances presented by the facts before the court.\textsuperscript{46}

"Having tentatively determined that specific performance could be granted to a seller in appropriate circumstances, the Court... [then addressed] the question of whether preliminary injunctive relief should issue in [the instant] case."\textsuperscript{47} It recited the elements that an applicant for a preliminary injunction must establish in order to obtain a preliminary injunction.\textsuperscript{48} Among those elements are factors that are equally relevant in deciding whether a court will grant specific performance to an aggrieved seller following a trial on the merits of the seller’s claim.

The court had to decide whether to grant a preliminary injunction prohibiting the buyer from breaching the contract and effectively ordering the buyer to continue purchasing 1.7 million tons of coal per year from the seller pending resolution of their dispute in a trial on the merits of the seller’s claim. The court first concluded that the seller had demonstrated “a reasonable likelihood of success on the merits” of its claim.\textsuperscript{49} In support of that conclusion the court emphasized the seller’s dependency on the contract. “The agreement between the parties contain[ed] elements, in some respects, of a joint venture.”\textsuperscript{50} The seller’s rights under the sales contract were functionally unique.

The court then concluded that the seller would suffer irreparable injury if the court refused to preserve the status quo by granting the requested preliminary injunction and the seller eventually prevailed on the merits of its claim against the buyer. The buyer breached its contractual duty to give the seller a five-year advanced notice of the buyer’s intention to terminate the contract; the buyer gave only a one-day notice that it would refuse to accept any further deliveries from the seller’s mine. That notice forced the seller to shut down its mine and prevented it from making arrangements to supply other buyers.\textsuperscript{51} The buyer’s agreement to purchase untreated coal taken from the mine left the seller without any washing facilities that it would have had to construct in order to accommodate the majority of buyers who would only purchase coal that had been washed. Moreover, the delivery of coal from the mouth of the mine to the buyer’s stockpile via a conveyor belt left the seller with no loading or trucking facilities that would be required to service other buyers.\textsuperscript{52} Finally, the seller had made a substantial capital investment in reliance upon the parties’ original long-

\begin{itemize}
  \item \textsuperscript{46} Central Illinois Public Service Co., 527 F. Supp. at 65.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Compare id. ("In order to obtain a preliminary injunction, the petitioner must establish: (1) a reasonable likelihood of success on the merits; (2) irreparable injury and lack of an adequate remedy at law; (3) that the threatened harm to the petitioner outweighs the harm the injunction may cause the non-moving party; and (4) that the granting of the injunction will not disserve the public interest") (citations omitted), with RESTATEMENT (SECOND) OF TORTS § 936(2) (listing the special factors relevant in determining the propriety of granting an interlocutory injunction against a tort).
  \item \textsuperscript{49} Central Illinois Public Service Co., 527 F. Supp. at 65.
  \item \textsuperscript{50} Id. at 66.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
\end{itemize}
The court then addressed the balance of the hardships. It minimized the hardship that the buyer would suffer if the preliminary injunction eventually proved to have been erroneously granted by requiring the seller to post a $145 million bond to compensate the buyer and its customers for the reparable loss they might suffer pending resolution of the dispute on the merits. Moreover, the buyer could not have been expected to suffer any significant damage by preservation of the status quo “pending an expedited trial on the merits.” The buyer had for sixteen years been using coal from the seller’s mine at a lower cost than the buyer incurred at most of its other power generating stations. Any loss the buyer would sustain by being ordered to continue purchasing coal from the seller pending a trial on the merits of the seller’s claim would be “outweighed by the harm to [the seller] if [the buyer were] allowed to terminate this contract upon only one day’s notice.”

Finally, the court took account of the public interest in deciding whether to grant the preliminary injunction that the seller sought. It acknowledged the seller’s point that approximately 500 people will have lost their jobs [at the seller’s mine] with virtually no notice in the event an injunction does not issue. [Moreover,] millions of dollars per month will be eliminated from the rural . . . area economy. The economic devastation to the people and community is apparent. On balance, the Court determines that the issuance of a preliminary injunction will not disserve the public interest.

Restated as an affirmative proposition, the interest of third persons (the seller’s 500 workers) and the public (members of the local community) would be furthered by issuance of the prayed for preliminary injunction.

53. Id. at 67. See RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1982). “Specific performance or an injunction [against breach of a contract duty] will not be ordered if damages would be adequate to protect the expectation interest of the injured party.” Id. See RESTATEMENT (SECOND) OF CONTRACTS § 360 (1982). “In determining whether the remedy in damages would be adequate, the following circumstances are significant: (a) the difficulty of proving damages with reasonable certainty, [and] (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages . . . .”


55. Id.

56. Compare id., with RESTATEMENT (SECOND) OF CONTRACTS § 364(2) (1982) (“Specific performance or an injunction will be granted . . . if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief . . . .”).

57. Compare Central Illinois Public Service Co., 527 F. Supp. at 67, with RESTATEMENT (SECOND) OF CONTRACTS §§ 364(2), 365 (1982). “Specific performance or an injunctive relief will be granted . . . if denial of such relief would be unfair because it would cause unreasonable hardship or loss . . . to third persons.” RESTATEMENT (SECOND) OF CONTRACTS § 364(2) (1982). “Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.” RESTATEMENT (SECOND) OF CONTRACTS § 365 (1982).

58. Compare RESTATEMENT (SECOND) OF TORTS § 936(1)(f) (1979) (“The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of . . . the interests of third persons and of the public”), with RESTATEMENT (SECOND) OF TORTS § 936(2) (1979) (“The appropriateness of an interlocutory injunction against a tort is determined in light of the factors listed in Subsection (1) . . . but depends primarily upon the following special factors: . . . [including] (d) the
Based upon the ultimate conclusion that the seller had established all of the elements necessary to support the issuance of the preliminary injunction the seller sought, the court granted that provisional remedy. Because the standards governing the propriety of issuing a preliminary injunction are more exacting than the standards governing the eventual issuance of a decree ordering specific performance, the district court's opinion in *Central Illinois Public Service Co. v. Consolidated Coal Co.* provides convincing support for the proposition that specific performance may be a remedy available to an injured seller when the circumstances warrant that relief.

The availability of specific performance as a judicial remedy for a seller of goods was again acknowledged in *Jay County Rural Electric Membership Corp. v. Wabash Valley Power Association, Inc.* The facts giving rise to the parties' dispute and the procedural history of the case may be briefly summarized. The seller was a wholesale supplier of electricity to members of its cooperative, including the buyer. The seller sold electricity to its members at wholesale prices, and the buyers resold that electricity to their retail customers. The buyer contracted to purchase all its requirements of electricity from the seller for several decades. The buyer withdrew from the cooperative and purported to terminate the requirements contract when it identified a supplier from whom the buyer could purchase its wholesale requirements of electricity at lower prices than the buyer was paying to the seller. The buyer brought an action against the seller, seeking a judicial declaration that the buyer was entitled to withdraw from the cooperative and terminate the requirements contract. The defendant-seller responded by moving for a temporary restraining order and a preliminary injunction that would require the buyer to continue purchasing its wholesale requirements of electricity from the seller while the litigation was pending; the seller also filed a counterclaim seeking an order of specific performance. The trial court issued a temporary restraining order after the seller posted a million dollar bond. Following a hearing on the seller's motion for a preliminary injunction, the trial court issued the preliminary injunction, and the buyer filed a successful petition for an interlocutory appeal from the trial court's order granting the preliminary injunction.

The issue on appeal was whether the trial court acted arbitrarily or clearly abused its discretion by issuing the preliminary injunction. "The trial court's discretion to grant or deny a preliminary injunction is measured by several factors:"

(1) whether the movant's remedies at law are inadequate, thus causing public interest.

60. Id. at 907-08.
61. Id. at 908. When the contract was made in 1977, the agreed upon term was for forty years. Id. at 908 n.1. The parties modified the requirements contract by supplementary agreement in 1982 to extend the contract term until 2028. Id.
62. Id. at 908, 913.
63. Id. at 908.
64. Id. at 909 (emphasis added).
irreparable harm pending resolution of the substantive action if the injunction does not issue; (2) whether the movant has demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) whether the threatened injury to the movant outweighs the threatened harm the grant of the injunction would occasion upon the nonmovant; and (4) whether, by the grant of the preliminary injunction, the public interest would be disserved.65

Each of the listed requirements is also relevant in a court's eventual determination of whether the seller is ultimately entitled to a decree ordering specific performance of the buyer's duties under the contract.66 The inadequacy of a claimant's remedies at law is relevant both in deciding whether an applicant for a preliminary injunction can be expected to suffer irreparable harm if that provisional remedy is withheld pending a resolution of the claim on its merits,67 as well as in deciding whether the claimant is entitled to specific performance.68 A movant or applicant for a preliminary injunction can establish it has at least a reasonable likelihood of success on the merits of its claim for specific performance only if specific performance is a remedy that is ultimately available to the movant or applicant.69 A court balances the hardships each party can be expected to suffer both in deciding whether to grant a preliminary injunction70 and in deciding whether there are "other circumstances" besides the uniqueness of the goods that might persuade a court to decree specific performance of a contract for sale of goods.71 Whether the public interest would be disserved by the grant of a coercive judicial remedy is a factor relevant in deciding both whether to grant a preliminary injunction72 and whether to decree specific performance of a contract duty.73

The Jay County court held that the seller-counterclaimant had established its remedies at law were not adequate to protect its rights under the all-requirements contract.74 Two reasons supported that holding. First, although

65. Id.
66. Compare Jay Cnty., 692 N.E.2d at 909, with Greenberg, supra note 7, at 1120 (suggesting that "[t]he issue of whether specific performance is available to a seller as a remedy for the buyer's breach is directly intertwined with [only] two of the four requirements for obtaining a preliminary injunction: inadequate remedy at law and reasonable likelihood of success on the merits, the other two being balance of harm and the public interest") (emphasis added).
67. See RESTATEMENT (SECOND) OF TORTS § 936(2)(a) (1979) (one of the special factors relevant in determining the propriety of issuing an interlocutory injunction against a tort is "the extent of the threat of irreparable harm to the plaintiff if the interlocutory injunction is not granted").
68. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1982) ("Specific performance or an injunction [against breach of a contract duty] will not be ordered if damages would be adequate to protect the expectation interest of the injured party").
70. RESTATEMENT (SECOND) OF TORTS § 936(2)(a), (b) (1979).
71. U.C.C. § 2-716(1) (1962) ("Specific performance may be decreed where the goods are unique or in other proper circumstances") (emphasis added).
73. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 365 (1982) ("Specific performance [of a contract duty] or an injunction [against breach of a contract duty] will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy").
the buyer's alleged breach of the contract could be expected to cause the seller to suffer only economic injury, the trial court was justified in concluding that an award of damages is not sufficient to make the seller whole when it would be extremely difficult for the seller to prove the amount of its damages with reasonable certainty.\textsuperscript{75} The trial court was also justified in concluding the seller's remedy at law was inadequate because the buyer did not have assets sufficient to permit the seller to collect an award of damages.\textsuperscript{76} Even if the seller had established it would lose revenue in a provable amount unless the buyer was required to continue performing under the contract, thereby obviating the argument that the amount of the seller's loss was not provable with reasonable certainty, the seller's remedy at law was still inadequate, because "[a] judgment for damages arising during the pendency of jurisdiction is rendered meaningless when the collection of damages by the injured party is impossible, uncertain, or unusually difficult."\textsuperscript{77}

The court next considered the buyer's argument that the trial court was not justified in concluding the seller had demonstrated a probability of success on the merits of its counterclaim.\textsuperscript{78} One of the bases for that argument was that specific performance is not an appropriate remedy for the buyer's breach of the parties' sales contract. The court cited \textit{Central Illinois Public Service Co. v. Consolidated Coal Co.} in support of its conclusion that the catalogue of seller remedies in UCC section 2-703 is not exhaustive, and specific performance is a remedy available to an injured seller of goods under supplementary principles of equity that apply on the authority of UCC section 1-103(b).\textsuperscript{79}

The court shared the trial court's conviction that "the uniqueness of the interrelationship [between the seller and its members] and the length of the contract" made the seller's damages unquantifiable.\textsuperscript{80} The relationship between the seller and all of its members, including the buyer, made the parties' all-requirements contract functionally unique. The seller was an electric generation and transmission cooperative which sold wholesale electricity to its members. The buyer was a member of the cooperative. The buyer and the seller were both nonprofit corporations. All the members of the system purchased electricity from the cooperative and resold it at retail to their customers.\textsuperscript{81} The interdependent nature of the relationship among the members of the cooperative made the enforceability of the all-requirements contract each member made with

\textsuperscript{75}. \textit{Id.} at 909. \textit{See RESTATEMENT (SECOND) OF CONTRACTS} § 360(a) (1982) (one of the circumstances that is significant "[i]n determining whether the remedy in damages would be adequate [to protect the expectation interest of the injured party is] (a) the difficulty of proving damages with reasonable certainty").

\textsuperscript{76}. \textit{Jay Cnty.}, 692 N.E.2d at 909. \textit{See RESTATEMENT (SECOND) OF CONTRACTS} § 360(c) (1982) (one of the circumstances that is significant "[i]n determining whether the remedy in damages would be adequate [is] (c) the likelihood that an award of damages could not be collected").

\textsuperscript{77}. \textit{Jay Cnty.}, 692 N.E.2d at 910.

\textsuperscript{78}. \textit{Id.}

\textsuperscript{79}. \textit{Id.} at 913 (citing \textit{IND. CODE} § 26-1-2-703, § 26-1-1-103).

\textsuperscript{80}. \textit{Id.}

\textsuperscript{81}. \textit{Id.} at 907.
the seller crucial to the success of the cooperative venture.\textsuperscript{82} The court distinguished the all-requirements contract in the instant case from a typical requirements contract made at arms' length between unrelated private parties for profit.

The contract of a single member is interrelated with the contracts of each of the remaining members. [The buyer's] termination of the contract not only has a negative effect upon [the seller], it also has a negative effect on the remaining members [of the cooperative] who will have to have to bear the increase in their costs occasioned by the termination. The cooperative nature and length of the interrelated contracts, coupled with the extreme difficulty of determining damages arising from termination of the contract and the inability of [the buyer] to pay the damages if quantified, make it very possible that the grant of specific performance is the only proper remedy in this case. Accordingly, the trial court did not err in concluding that there was a likelihood that [the seller] would prevail on its counter-claim for specific performance.\textsuperscript{83}

The appellate court next held that the trial court had not abused its discretion "in concluding that any injury occasioned by the grant of the injunction was outweighed by the injury to [the seller] if the injunction was not granted."\textsuperscript{84} The buyer could have been expected to suffer a quantifiable economic injury if the preliminary injunction proved to have been erroneously granted, and the buyer would be entitled to redress for that injury by recovering damages against the million dollar bond the trial court required the seller to post.\textsuperscript{85} On the other hand, the trial court concluded that the seller would suffer irreparable injury if the buyer were permitted to purchase its power requirements from another source. The trial court had thus considered the difficulty of proving the amount of the seller's loss with reasonable certainty and the buyer's likely inability to pay any more than nominal damages if the buyer were found liable for breach of the all-requirements contract following a trial on the merits. The trial court had also taken account of the impairment of the seller's ability to plan and operate as a supplier of power that would result if members of the seller cooperative were free to withdraw from it. Any such withdrawal of one member would require other members of the cooperative to absorb the withdrawing buyer's share of the fixed cost, which in turn might induce other members to avoid their all-requirements contracts and withdraw from the cooperative.\textsuperscript{86} Moreover, the withdrawal of any member from the cooperative might cause the cooperative to default on loans it had received from the Rural Utilities Service, "with potentially disastrous results for the system."\textsuperscript{87}

Finally, the appellate court upheld the trial court's determination that grant

\begin{footnotes}
\textsuperscript{82} Id. at 913.
\textsuperscript{83} Id. at 913-14.
\textsuperscript{84} Id. at 914.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\end{footnotes}
of the preliminary injunction would serve the public interest.\textsuperscript{88} If the buyer were permitted to withdraw from the cooperative and purchase its requirements from another source, the buyer’s fixed costs would be shifted onto the remaining members of the cooperative, thereby jeopardizing the cooperative’s ability to make debt service payments to the taxpayer-funded Rural Utilities Service. Any delay in passing on to the buyer’s customers the savings the buyer could realize from purchasing its power requirements from a cheaper source during the pendency of the preliminary injunction would be covered by the bond the seller had posted, whereas the buyer might be unable to pay damages sufficient to compensate the seller for the loss it might suffer pending a trial on the merits of its counterclaim. If the preliminary injunction proved to have been erroneously withheld, the remaining members of the cooperative would have had to pass on the shifted costs to their customers. All of these factors supported the trial court’s conclusion that “the public interest would not be disserved by the grant of the preliminary injunction.”\textsuperscript{89}

The Jay County court concluded the plaintiff-buyer could not meet its burden of establishing that the trial court had abused its discretion in granting the preliminary injunction sought by the seller.\textsuperscript{90} The same criteria that informed the trial court in deciding to grant the preliminary injunction could be expected to be equally relevant on remand in the trial court’s eventual determination whether to order the buyer specifically to perform its remaining duties under the long-term all-requirements contract.

The revision of UCC section 2-716(1) in the proposed amendment of Article 2 is consistent with the proposition that specific performance is a remedy potentially available to a seller of goods in the kind of unusual circumstances that were present in the pre-Code and Code case law. The most recent amendments proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws were adopted in 2005. The proposed amendment of UCC section 2-716 changes the language in the existing UCC section 2-716 caption from “Buyer’s Right to Specific Performance” to “Specific Performance.”\textsuperscript{91} A revised Comment explains that “[t]he caption has been amended to make it clear that either party may be entitled to specific performance.”\textsuperscript{92} Consistent with that change, the proposed amendment of UCC section 2-703 permits a seller aggrieved by a buyer’s breach of a contract for sale of goods to “obtain specific performance under Section 2-716 . . . .”\textsuperscript{93} Moreover, the text of UCC section 2-716(1) has been revised to

\begin{itemize}
\item 88. Id. at 914-15.
\item 89. Id. at 915.
\item 90. Id.
\item 91. SELECTED COMMERCIAL STATUTES, Amendments to Article 2, U.C.C. § 2-716, at 961 (2009 ed.) (emphasis added).
\item 92. Id., U.C.C. § 2-716 cmt. 1(a), at 962 (emphasis added).
\item 93. Id., U.C.C. § 2-703(2)(k), at 950. Revised Comment One notes that “[t]he subsection does not address the extent to which other law provides additional remedies or supplements the statutory remedies in Article 2 (see Section 1-103).” Id. The revised Comment gives marginal support for the proposition that the catalogue of seller remedies provided in existing UCC section 2-703 is not intended to have been
provide that "[i]n a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy."94 According to a revised Comment, "a court may decree specific performance if the parties have agreed to that remedy. The parties' agreement to specific performance can be enforced even if legal remedies are entirely adequate."95

The text of revised section 2-716(1) provides, however, that "even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money."96 An aggrieved seller is therefore still relegated to bringing an action for the price of the goods if the facts fall within UCC section 2-709(1)(a) or (b).97 Revised Comment 2 provides an abbreviated paraphrase of existing Comment 2.98

Uniqueness should be determined in light of the total circumstances surrounding the contract and is not limited to goods identified when the contract is formed. The typical specific performance situation today involves an output or requirements contract rather than a contract for the sale of an heirloom or priceless work of art. A buyer's inability to cover is evidence of "other proper circumstances."99

Although no state legislature has yet adopted the proposed amendment of Article 2, the text of proposed UCC section 703(g), as well the caption and text of proposed UCC section 2-716 reflect the position of the drafting organizations that a court may decree specific performance on behalf of an aggrieved seller of goods in appropriate circumstances.100 Despite the paucity of the supporting case law and commentary, every

exhaustive and may be supplemented by additional remedies. Id.

94. Id., U.C.C. § 2-716(1), at 961.
95. Id., U.C.C. § 2-716 cmt. 3, at 962 (emphasis added).
96. Id., U.C.C. § 2-716(1), at 961.
97. Existing UCC section 2-709(1) provides that
[w]hen the buyer fails to pay the price as it becomes due the seller may recover . . . the price (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances."

Id.
99. SELECTED COMMERCIAL STATUTES, amended UCC § 2-716 cmt. 2.
100. Greenberg, supra note 7, at 1123 ("As the drafters observed in 1996: 'A seller may obtain specific performance of the buyer's agreement to accept and to pay for the goods in appropriate cases. This simply affirms what some courts have always done, especially in long term supply contracts").
authority that has addressed the question supports the unremarkable proposition that specific performance is a remedy available to an aggrieved seller of goods in all appropriate circumstances. The same factors that inform a court in deciding whether to order specific performance in any other action for breach of contract are equally relevant when a seller urges a court to order specific performance of a breaching buyer's duties under a contract for the sale of goods.\textsuperscript{101}

Preeminent among those relevant factors is whether the aggrieved seller can persuade the court that the seller's remedies at law are not adequate to protect the seller's expectation interest. Courts have traditionally insisted that the claimant must establish the inadequacy of any award of damages to protect the claimant's expectation interest in order to make a prima facie showing of entitlement to specific performance.\textsuperscript{102} Even if the claimant's inability to establish the inadequacy of its remedies at law does not necessarily foreclose the grant of specific performance,\textsuperscript{103} the claimed inadequacy of the claimant's damages remedy—often framed in terms of an allegation that the claimant would suffer irreparable harm if the court refused to order specific performance\textsuperscript{104}—is at the very least a relevant factor the court takes into account in balancing the costs and benefits the respective disputants would incur and realize if specific performance were granted or withheld.\textsuperscript{105}

Whether a court applies the traditional rule or employs a factor-based approach, a number of circumstances will be significant when a court decides whether a seller's remedies at law are inadequate to protect its expectation interest or, framing the same question in an alternative locution, whether the seller would suffer irreparable harm if the court refused to order specific performance.\textsuperscript{106} According to the Restatement (Second) of Contracts, those significant circumstances include "(a) the difficulty of proving damages and reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected."\textsuperscript{107}

The difficulty a seller can be expected to have in proving the amount of its compensatory damages with reasonable certainty has been an influential factor in

\textsuperscript{101} Cf. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1982) (acknowledging the availability of specific performance as a judicial remedy available to a vendor for a purchaser's breach of a contract for the sale of land).

\textsuperscript{102} See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1982) ("Specific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party").


\textsuperscript{104} Id. § 2.5(3), at 135 ("It is probably fair to say that the adequacy test has been evolving from a rule to a factor in the court's balance of costs and benefits").

\textsuperscript{105} Id. § 2.5(1), at 125 ("Where the issue is remedial, the inadequacy and irreparability rules mean the same thing").

\textsuperscript{106} RESTATEMENT (SECOND) OF CONTRACTS § 360 (1982).
all of the opinions that have acknowledged the potential availability of specific performance as a remedy for an aggrieved seller of goods. Sellers can be expected to meet that burden of persuasion when a buyer breaches by repudiating an output contract or a requirements contract and the case comes to trial before expiration of the contract term. Thus, an aggrieved seller can be expected to have as much difficulty establishing the amount of its loss with reasonable certainty when a buyer repudiates a long-term requirements contract as an aggrieved buyer can be expected to have in establishing the amount of its loss when a seller repudiates a long-term requirements contract.

A second circumstance that is significant in determining whether the remedy in damages would be adequate to protect the expectation interest of the injured party is the difficulty of procuring a suitable substitute performance by means of money awarded as damages. Even when the parties have agreed that the seller will sell a fixed annual quantity of the subject goods over the course of a long-term supply contract, the seller’s performance of its duties under that contract might make it especially difficult to procure a substitute performance from other buyers when the buyer repudiates a long-term supply contract.

A third circumstance that is significant in deciding whether an injured seller’s remedies at law are inadequate to protect its expectation interest is the likelihood that an award of damages could not be collected. That factor is also relevant when the court considers whether to grant a seller’s application for a preliminary injunction requiring the buyer to continue purchasing its requirements of the subject goods pending a trial on the merits of the seller’s claim.


110. See cases cited supra notes 107-08.

111. See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975).

112. Id. at 66. Seller would have had difficulty procuring substitute buyers because the Hillsboro Mine was designed to produce raw coal for the Coffeen Station and there are no washing facilities at the plant. Few purchasers of coal today seek raw coal, but instead want to purchase washed coal. The Mine was designed to deliver coal to [the buyer] via conveyor belt, thus there are no trucking or loading facilities at this Mine.

113. Id.

114. Id.

115. See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975).


117. Id. at 66. Seller would have had difficulty procuring substitute buyers because the plant.

The case law reveals two other factors that may be relevant in assessing the adequacy of an award of damages to vindicate an injured seller’s expectation interest in a contract for sale of goods. One of those factors is the prospect that the seller might not be able to recoup any considerable investment it made in the enterprise with the buyer if the seller were relegated to an award of damages. The other factor is any interdependency created by the contractual relationship between the buyer and the seller. The relationship between the parties might make the seller’s entitlement under the contract unique even though the goods are not unique. Thus, for example, when a seller’s output becomes a function of the buyer’s requirements, the contract becomes the functional equivalent of an exclusive dealing contract, and the difficulty of determining the financial position the injured seller would have occupied if the buyer had used best efforts to promote the sale of the goods concerned makes the adequacy of the seller’s damages remedy doubtful. Similarly, when the buyer is a member of a cooperative organized by the seller, the incalculable impact that permitting the buyer to withdraw from the contract would have on the seller’s capacity to plan and operate the cooperative may contribute to making an award of damages inadequate to protect the seller’s expectation interest.

In addition to considering the alleged inadequacy of the seller’s damages remedy, a court can be expected to take account of other accepted factors when deciding whether to issue a decree ordering specific performance of a buyer’s duties under a contract for sale of goods. Those factors include (but are not limited to) the relative hardship each party could be expected to suffer if the specific performance were ordered or refused, the effect that such an order would have on the interests of third persons and the public, and the difficulty.
A court may be inclined to grant a seller’s application for a preliminary injunction requiring the buyer to continue purchasing the contract goods from the seller pending litigation if the hardship the seller can be expected to suffer should the preliminary injunction prove to have been erroneously withheld outweighs the hardship the buyer can be expected to suffer should the preliminary injunction prove to have been erroneously granted. The seller can be expected to suffer greater hardship than the buyer when an erroneous refusal to grant the preliminary injunction would cause irreparable—irremediable—harm to the seller, and when an erroneous grant of the seller’s application for a preliminary injunction would cause only reparable—remediable—harm to the buyer. When the buyer can be expected to suffer only pecuniary loss if the preliminary injunction proves to have been erroneously granted, the buyer can recover against the undertaking (or bond) that the seller is required to provide in order to be entitled to a preliminary injunction. The court also balances the hardships when it decides whether “other . . . circumstances” make it “proper” to grant specific performance as an ultimate remedy for the injured seller.

The court must take account of the impact that the grant or denial of a preliminary or a permanent injunction can be expected to have on third persons and the public. Thus, a court may decide to grant a seller’s application for a preliminary injunction requiring the buyer to continue purchasing contract goods from the seller pending a resolution of their dispute on the merits when a refusal to grant that relief would cause the seller’s employees to lose their jobs and would have an injurious impact on the local economy. Applying a negative expression of this factor, the court may decide that issuance of such a preliminary injunction “will not disserve the public interest.” Applying an affirmative expression of this factor, the court may decide that issuance of the preliminary injunction would advance important interests of third persons and the public.

persons and of the public” as among the primary factors a court should take into account in determining the propriety of granting an injunction against a tort).


128. Id.

129. FED. R. Civ. P. 65(c). See, e.g., Jay Cnty. Rural Elec. Membership Corp. v. Wabash Valley Power Ass’n, 692 N.E.2d 905, 914 (Ind. Ct. App. 1998) (concluding that “any damages payable to [the buyer] will be covered by the million dollar bond” that the trial court required the seller to post before the court would grant the preliminary injunction the seller sought).

130. Cf. U.C.C. § 2-716(1) (1962) (“Specific performance may be decreed were the goods are unique or in other proper circumstances”) (emphasis added).

131. 1 DOBBS, supra note 103, § 2.4(5) at 110-11.

132. 1 DOBBS, supra note 103, § 2.4(5) at 111-13.

133. Central Illinois Public Service Co., 527 F. Supp. at 67 (noting under the heading of “The Public Interest” that “approximately 500 people will have lost their jobs with virtually no notice in the event an injunction does not issue [and] [m]illions of dollars per month will be eliminated from the rural . . . area economy”).

134. Id.
In deciding whether to order specific performance of a buyer’s duties under a contract for sale of goods, the court takes account of any difficulty it might be expected to encounter in enforcing its order and supervising the buyer’s compliance with it. Courts have detected no insuperable difficulty in enforcing specific performance orders and supervising the enjoined party’s compliance with those orders in cases where buyers of goods have sought specific performance of seller duties under long-term requirements contracts. Moreover, any difficulty a court might have in supervising a buyer’s compliance with a decree ordering the buyer specifically to perform its duties under a long-term requirements contract could be avoided if the court issues an injunction prohibiting the buyer from purchasing its requirements of the goods from any other source rather than a mandatory injunction requiring the buyer to purchase its good faith requirements from the injured seller.

Another factor supporting the grant of specific performance on behalf of an injured seller of goods is the desirability of sparing the parties and the courts from having to litigate a multiplicity of suits in order to protect the seller’s expectation interest. When a buyer repudiates a long-term requirements contract, the seller might be entitled to bring an action for the price of goods the buyer has already accepted or of goods that have already been identified to the contract. The seller is not, however, entitled to bring an immediate action for the price of goods that the buyer has not accepted or that have not been identified to the contract. Because the uniqueness of the seller’s entitlement under such a long-term requirements contract makes it impossible to determine the seller’s anticipated loss with reasonable certainty, the seller would have to bring successive actions for the price if specific performance were not available to the seller as a remedy for the buyer’s repudiation.

A final point supports the proposition that specific performance is a remedy available to a seller of goods in appropriate circumstances. Three of the four courts that have acknowledged the availability of the specific performance remedy granted the injured seller’s application for a preliminary injunction requiring the buyer to continue purchasing the subject goods from the seller or enjoining the buyer from purchasing its requirements of the subject goods from...
another source\textsuperscript{142} pending litigation of the seller's claim. Because the requirements an applicant for a preliminary injunction must meet are more demanding than the standards governing that applicant's entitlement to a permanent injunction,\textsuperscript{143} the willingness of those courts to grant the seller's application for a preliminary injunction implies that the seller will have comparatively less difficulty convincing a court to order specific performance as an ultimate remedy for the buyer's breach. Moreover, notwithstanding the absence of any reference to temporary restraining orders or preliminary injunctions from the Code sections listing the remedies available to aggrieved buyers\textsuperscript{144} and sellers,\textsuperscript{145} no court has ever expressed any doubt that those provisional remedies are available to litigants under supplementary principles of law and equity.\textsuperscript{146}

A court can be expected to issue a decree ordering specific performance of a buyer's duties under a contract for the sale of goods in all appropriate circumstances. If a comparison of all of the seller's possible judicial remedies for the buyer's breach persuades the court that an award of damages would not provide a remedy that is as practical and efficient in securing the seller's entitlement as a decree ordering specific performance would be,\textsuperscript{147} the court should be predisposed to grant that equitable remedy. No court has ever held that the absence of an explicit reference to specific performance in UCC section 2-703 precludes the grant of that remedy in appropriate circumstances, however infrequently those circumstances have arisen in the past and can be expected to arise again in the future. When a court grants a seller's application for a preliminary injunction or a seller's prayer for specific performance, it issues a judicial purchase order which the case law and the controlling factors confirm may be necessary in order to effectuate the seller's entitlement under a contract for sale of goods.

\textsuperscript{142} Allen W. Hinkel Dry Goods Co., 64 F.2d at 884.
\textsuperscript{143} Compare \textit{Restatement (Second) of Torts} § 936(1) (1979), with \textit{Restatement (Second) of Torts} § 936(2) (1979) (propriety of granting an interlocutory injunction against a tort is determined in light of all the primary factors that are relevant in determining the propriety of granting a permanent injunction against a tort, as well as in light of several special factors).
\textsuperscript{144} U.C.C. § 2-711 (1962).
\textsuperscript{145} U.C.C. § 2-703 (1962).
\textsuperscript{146} U.C.C. § 1-103(b) (2001).
\textsuperscript{147} \textit{Jay Cnty.}, 692 N.E.2d at 909.