

Damages under Manufacturing and Supply Agreements

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key points (page 95)

- generally applicable UCC rules on damages:
 - resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive
 - to recover consequential damages, parties must have had reason to know of the damages at the time of contracting, and the damages could not reasonably be prevented by cover or resale
 - liquidated damages are permitted as long as amount is reasonable in light of anticipated or actual harm caused by the breach, difficulties in proving loss, and infeasibility of otherwise obtaining an adequate remedy

key points, cont.

- consider how a “battle of the forms” may affect the parties
- agreement of the parties regarding damages will govern unless unconscionable or violates law
- make sure you understand the commercial relationships involved
- anyone in the chain of distribution of a product may be found independently liable under a product liability theory

seller's remedies (page 96)

- PA UCC, 13 Pa.C.S. § 2703, gives the seller the following remedies in general:
 - (1) withhold delivery
 - (2) stop delivery by any bailee
 - (3) proceed under section 2704 to identify goods to the contract notwithstanding breach or to salvage unfinished goods
 - (4) resell and recover damages
 - (5) recover damages for nonacceptance, or in a proper case the price
 - (6) cancel

seller's damages (page 97)

- measure of damages for seller under the PA UCC, 13 Pa.C.S. § 2708, is:
 - the difference between (1) the market price at the time and place for tender and (2) the unpaid contract price
 - plus any incidental damages
 - commercially reasonable charges, expenses or commissions incurred in stopping delivery, in transportation, care and custody of goods after the breach, in connection with return or resale of the goods or otherwise resulting from the breach
 - less expenses saved in consequence of the breach by buyer

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buyer's remedies (page 98)

- where seller fails to make delivery or repudiates or buyer rightfully rejects or justifiably revokes acceptance, the PA UCC, 13 Pa.C.S. § 2711, provides that:
 - buyer may cancel and, whether or not buyer has done so, may in addition to recovering so much of the price as has been paid:
 - "cover" and have damages relating to cover; or
 - recover damages for nondelivery
- where the seller fails to deliver or repudiates, buyer may also:
 - if the goods have been identified, recover them under certain circumstances
 - in a proper case, obtain specific performance or replevy the goods

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buyer's damages (page 99)

- for non-delivery, rightful rejection or justifiable revocation of acceptance, the measure of damages is:
 - the difference between (1) the market price at the time when buyer learned of the breach and (2) the contract price
 - plus any incidental and consequential damages
 - less expenses saved



buyer's damages, cont.

- in connection with accepted goods:
 - the measure of damages for breach of warranty is the difference at the time and place of acceptance between (1) the value of the goods accepted and (2) the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount
 - the buyer may also recover the loss resulting in the ordinary course of events from the breach of the seller as determined in any manner which is reasonable

buyer's damages, cont.

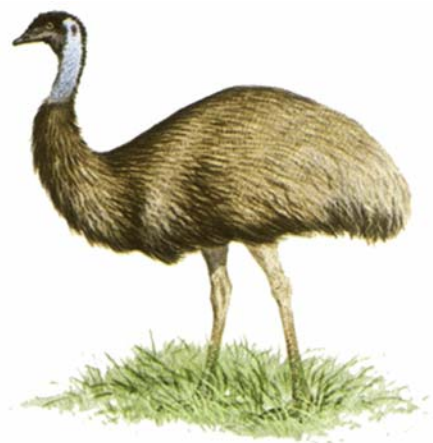
- incidental damages of buyer include:
 - expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected
 - any commercially reasonable charges, expenses or commissions in connection with effecting cover
 - any other reasonable expense incident to the delay or other breach
- consequential damages of buyer include:
 - any loss resulting from general or particular requirements and needs of which the seller *at the time of contracting had reason to know* and which *could not reasonably be prevented by cover or otherwise*
 - injury to person or property proximately resulting from any breach or warranty

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case study 1

- in July, buyers bought what they thought was a “proven breeder pair” of emus
- in October, at the start of breeding season, buyers learned they had bought two males
- on appeal, sellers claimed that (1) rejection did not occur within a reasonable period of time and (2) damages were not calculated properly



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- the court found the description of the pair was an express warranty (the seller's agents had assured the buyers that the pair had successfully bred)
- determining the sex required an invasive physical examination that could be dangerous to the farmer and could result in sterility
- damages were measured at the time and place the breach was discovered (the time of revocation of acceptance)



- relevant pricing information:
 - buyers paid \$12,500
 - in October:
 - 2 males worth \$15,000
 - breeder pair worth \$28,000
- so general damages were \$13,000 (\$28,000 - \$15,000)
- buyers also awarded damages for profits that would have been earned on the chicks that were expected to have been produced by a breeder pair during the missed breeding season



Smith v. Penbridge Assocs., Inc., 440 Pa. Super. 410 (1994).

case study 2

- buyer contracted to purchase a Caterpillar Certified Rebuild tractor
- seller delivered a Beckwith Rebuild
 - in a Caterpillar Rebuild, every part on a list is replaced, but in a Beckwith Rebuild, only unusable parts are replaced



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- jury found that buyer accepted the Beckwith Rebuild and did not reject it
- contract provided that the exclusive remedy for breach of warranty was repair or replacement of defective parts
 - trial and appellate courts found that the goods were non-conforming instead of defective
 - thus the courts concluded the exclusive remedy would fail of its essential purpose
 - buyer awarded the difference in value at the time and place of acceptance between the goods as accepted and as warranted



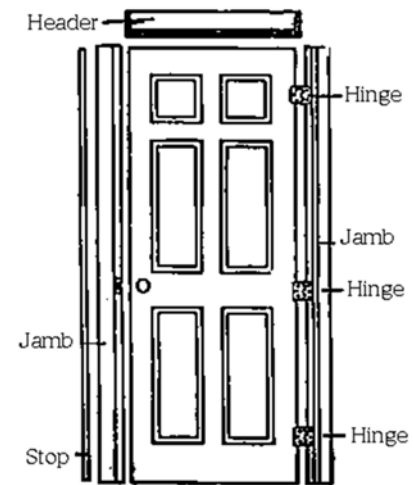
Atwell v. Beckwith Machinery Co., 872 A.2d 1216 (Pa. Super. 2005).

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case study 3

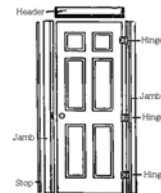
- buyer contracted for 42 doors to be delivered six weeks after the contract date
- buyer signed contract with another company to deliver and install the doors
- seller refused to perform, allegedly at the manufacturer's request
- buyer sought an injunction



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- held that buyer was not entitled to an injunction because money damages would be sufficient to compensate the buyer
 - another source for the doors was available at twice the price
- buyer allowed to recover the difference between the contract price and the cost of substitute doors
 - court noted that if “cover” proved not to be possible, damages could include lost profits



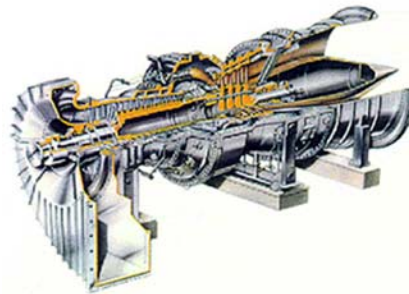
Warehouse Technology, Inc. v. Lift Inc., 2006 Phila. Ct. Com. Pl. LEXIS 47 (2006).

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case study 4

- in 1969, NYSEG bought an electric generator from Westinghouse
- in 1984, Westinghouse told NYSEG that a seal needed to be replaced, which was done
- the seal was defective and the generator was out of service for three months



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- NYSEG sought lost profits as damages
- contract provided that:

“Repair, adjustment, reperformance, modification or replacement ... shall constitute fulfillment of all liabilities of Westinghouse to purchaser under the warranties set forth in this article.

“... under no circumstances shall Westinghouse’s total liability ... exceed the price of the product or part on which such liability is based.

“... the remedies provided herein ... are exclusive and neither Westinghouse nor its suppliers or subcontractors of any tier will under any circumstances be liable under any theory, including but not limited to claims for service interruptions, or for any indirect, special, incidental or consequential damages.”



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- the exclusive remedy provision was held to be enforceable
- court reaffirmed that, under Pennsylvania law, there is no cause of action in tort for recovery of purely economic loss
- the “economic loss” doctrine provides that there is no cause of action in tort where there is no personal injury or damage to other property alleged – recovery for defects in the goods is by warranty claim



New York State Electric & Gas Corp. v. Westinghouse Electric Corp., 50 Pa. D. & C.3d 1 (Allgh. Cty. 1987).



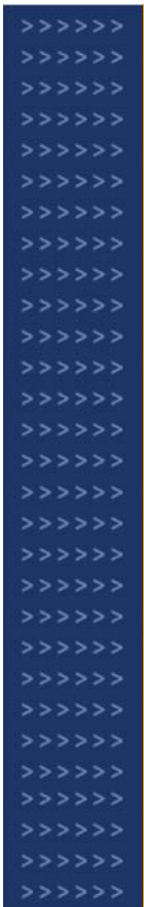
case study 5



- in response to buyer’s inquiry, seller faxed a price quotation with its standard terms, including a limitation on buyer’s remedies to repair and replacement
- seller notified buyer that the castings were nonconforming, but buyer instructed seller to make delivery



- buyer had sold the castings to a customer before placing the order with seller
- the contract provided:
 - “Defective goods may be returned to the Seller after inspection by the Seller and upon receipt of definite shipping instructions from the Seller. Goods so returned will be replaced or repaired without charge. ...
 - “The foregoing shall constitute the exclusive remedy of the Buyer and the sole responsibility of the Seller. ...”



- buyer later sought either to avoid paying for the castings or a set-off for its costs in modifying the castings
 - buyer was ordered to pay for the castings, although it could pursue other remedies
 - the limitation on remedies prevented buyer from setting off its expenses of modification
- Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217 (Pa. Super. 2002).

case study 6

- buyers were mini-mart owners who purchased gasoline from ARCO
- buyers were required by contract to sell only ARCO gasoline (meaning they could not “cover” or mitigate)
- from 1982 to 1985, ARCO only supplied its “oxinol” blend, which caused problems for motorists



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- buyers demonstrated rise in sales from 1973 until 1982, when sales began to fall dramatically
- buyers sought lost profits as consequential damages
- PA Supreme Court held that buyers could recover general damages and three types of consequential damages:
 1. loss of primary profits
 2. loss of secondary profits
 3. loss of good will (or prospective damages)



AM/PM Franchise Assoc. v. Atlantic Richfield Co., 526 Pa. 110 (1990).

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- the warranty disclaimed implied warranties of merchantability and fitness for a particular purpose
 - the court found that the disclaimer was not conspicuous and thus invalid, but that the claims under the implied warranties were time-barred
 - the warranty also limited replacement labor costs to within the first year after installation
 - court found the limitation was not conspicuous and thus not valid
 - homeowner was entitled to recover the cost to replace the shingles
- Antz v. GAF Materials Corp.*, 719 A.2d 758 (Pa. Super. 1998).