

## CHAPTER 402

## UNIFORM COMMERCIAL CODE — SALES

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Cross-reference: See definitions in s. 401.201.

**402.101 Short title.** This chapter shall be known and may be cited as uniform commercial code — sales.

## SUBCHAPTER I

SHORT TITLE, GENERAL CONSTRUCTION  
AND SUBJECT MATTER

**402.102 Scope; certain security and other transactions excluded from this chapter.** Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an

unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

A consignment that involves a delivery of goods to a merchant who has been induced to accept them by an agreement from the consignor that permits their return in lieu of payment if they are not resold is a security consignment governed by ch. 409, as contrasted to a true consignment. *Clark Oil & Refining Co. v. Liddicoat*, 65 Wis. 2d 612, 223 N.W.2d 530 (1974).

A mixed contract for goods and services is subject to this chapter if the predominant factor is a transaction of sale, with labor incidentally involved. *Van Sistine v. Tollard*, 95 Wis. 2d 678, 291 N.W.2d 636 (Ct. App. 1980).

A contract for development of computer software is primarily a service contract and is not subject to the Uniform Commercial Code. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 434 N.W.2d 97 (Ct. App. 1988).

This chapter does not just apply to a sale as that term is defined in s. 402.106 (6), but to the more general aspect of commerce: “transactions in goods.” The reach of Uniform Commercial Code (UCC) article 2, adopted as this chapter, goes considerably beyond the confines of the type of transaction that the UCC itself defines to be a sale, namely, the passing of title from a party called the seller to one denominated a buyer for a price. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2011 WI App 101, 335 Wis. 2d 151, 801 N.W.2d 781, 09–1212.

**402.103 Definitions and index of definitions. (1)** In this chapter unless the context otherwise requires:

(a) “Buyer” means a person who buys or contracts to buy goods.

(b) “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) “Receipt” of goods means taking physical possession of them.

(d) “Seller” means a person who sells or contracts to sell goods.

**(2)** Other definitions applying to this chapter or to specified sections thereof, and the sections in which they appear are:

- (a) “Acceptance” — s. 402.606.
- (b) “Banker’s credit” — s. 402.325.
- (c) “Between merchants” — s. 402.104.
- (d) “Cancellation” — s. 402.106 (1).
- (e) “Commercial unit” — s. 402.105.
- (f) “Confirmed credit” — s. 402.325.
- (g) “Conforming to contract” — s. 402.106.
- (h) “Contract for sale” — s. 402.106.
- (i) “Cover” — s. 402.712.
- (j) “Entrusting” — s. 402.403.
- (k) “Financing agency” — s. 402.104.
- (L) “Future goods” — s. 402.105.
- (m) “Goods” — s. 402.105.
- (n) “Identification” — s. 402.501.
- (o) “Installment contract” — s. 402.612.
- (p) “Letter of credit” — s. 402.325.
- (q) “Lot” — s. 402.105.
- (r) “Merchant” — s. 402.104.
- (s) “Overseas” — s. 402.323.
- (t) “Person in position of seller” — s. 402.707.
- (u) “Present sale” — s. 402.106.
- (v) “Sale” — s. 402.106.
- (w) “Sale on approval” — s. 402.326.
- (x) “Sale or return” — s. 402.326.
- (y) “Termination” — s. 402.106.

**(3)** The following definitions in other chapters apply to this chapter:

- (a) “Check” — s. 403.104.
- (b) “Consignee” — s. 407.102.
- (c) “Consignor” — s. 407.102.
- (d) “Consumer goods” — s. 409.102.
- (dm) “Control” — s. 407.106.
- (e) “Dishonor” — s. 403.502.

(f) “Draft” — s. 403.104.

**(4)** In addition ch. 401 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

**History:** 1983 a. 189 s. 329 (24); 1995 a. 449; 2001 a. 10; 2009 a. 322.

**402.104 Definitions: “merchant”; “between merchants”; “financing agency”. (1)** “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

**(2)** “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (s. 402.707).

**(3)** “Merchant” means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.

**History:** 1983 a. 189; 1991 a. 316; 2009 a. 322.

Because the status of “merchant” under sub. (3) does not attach to the casual or inexperienced seller, whether a farmer is a merchant rests upon the individualized facts of the case. *Harvest States Cooperatives v. Anderson*, 217 Wis. 2d 154, 577 N.W.2d 381 (Ct. App. 1998), 97–2762.

A County As a Merchant Under the Uniform Commercial Code. Goldstein. 1980 WLR 194.

**402.105 Definitions: transferability; “goods”; “future goods”; “lot”; “commercial unit”. (1)** (a) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

(b) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(c) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (ch. 408) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in s. 402.107 on goods to be severed from realty.

(d) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

**(3)** There may be a sale of a part interest in existing identified goods.

**(4)** An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.

**History:** 1983 a. 189.

**402.106 Definitions: “contract”; “agreement”; “contract for sale”; “sale”; “present sale”; “conforming” to**

**contract; “termination”; “cancellation”.** In this chapter unless the context otherwise requires:

(1) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Contract” and “agreement” are limited to those relating to the present or future sale of goods.

(4) “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time.

(5) A “present sale” means a sale which is accomplished by the making of the contract.

(6) A “sale” consists in the passing of title from the seller to the buyer for a price (s. 402.401).

(7) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

**History:** 1983 a. 189.

#### 402.107 Goods to be severed from realty: recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in sub. (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any 3rd-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to 3rd parties of the buyer’s rights under the contract for sale.

**History:** 1973 c. 215; 2005 a. 253.

### SUBCHAPTER II

#### FORM, FORMATION, AND READJUSTMENT OF CONTRACT

#### 402.201 Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by the party’s authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of sub. (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of sub. (1) but which is valid in other respects is enforceable:

(a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) If the party against whom enforcement is sought admits in that party’s pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this paragraph beyond the quantity of goods admitted; or

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted (s. 402.606).

**History:** 1991 a. 316.

Receipt and acceptance of goods consistent with an oral contract is part performance sufficient to take the oral contract out of the statute of frauds even though the conduct is not inconsistent with some other dealings arguably had between the parties. *Germer v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319 (1977).

The statute of frauds was not satisfied when the only indication of a purchase contract between the parties was the unexplained notation “purchase price” in a document prepared by one party in response to the other’s request for an appraisal. *First Bank v. H.K.A. Enterprises, Inc.*, 183 Wis. 2d 418, 515 N.W.2d 343 (Ct. App. 1994).

Not every contract for the sale of goods over \$500, nor every modification thereof, strictly complies with the requirements of the statute of frauds, and it would be unreasonable to declare categorically all such contracts unenforceable. The Uniform Commercial Code and Wisconsin case law recognize exceptions to the statute of frauds, including waiver and performance. An attempt at modification contemplates a completed oral modification of a written contract that prohibits oral modification. The inquiry into whether there has been an attempt at modification sufficient to operate as a waiver of the statute of frauds is closely related to the inquiry to determine whether there was a valid oral modification. *Royster–Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, 290 Wis. 2d 264, 714 N.W.2d 530, 03–1534.

When a letter confirmed an oral agreement under sub. (2), subject to completion of formal memorializing documents, the bargain was enforceable even though the document was not executed. *Lambert Corp. v. Evans*, 575 F.2d 132 (1978).

The statute of frauds is not applicable in an action based on promissory estoppel. *Janke Construction Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (1974).

The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel. *Edwards*. 62 MLR 205 (1978).

#### 402.202 Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(1) By course of dealing or usage of trade (s. 401.303) or by course of performance (s. 402.208);

(2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

**History:** 2009 a. 320.

**402.203 Seals inoperative.** The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

**402.204 Formation in general.** (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Even if the parties’ writings do not constitute a contract, a contract may be found through the parties’ conduct. *Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.*, 27 F.3d 268 (1994).

Shrinkwrap license agreements contained in computer software packages are enforceable unless their terms are objectionable on general contract grounds. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (1996).

Offer and acceptance are defined more liberally under the Uniform Commercial Code than under Wisconsin common law. *C.G. Schmidt, Inc. v. Permasteelisa North America*, 825 F.3d 801 (2016).

Contract Formulation Under Article 2 of the Uniform Commercial Code. *Edwards*. 61 MLR 215 (1977).

**402.205 Firm offers.** An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed 3 months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Although a bid for pipe did not meet the “firm offer” requirement, the facts pleaded and relied upon by the contractor to support its claim and to which the supplier responded in entering its defense gave rise to the doctrine of promissory estoppel. *Janke Construction Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (1974).

**402.206 Offer and acceptance in formation of contract.** (1) Unless otherwise unambiguously indicated by the language or circumstances:

(a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Offer and acceptance are defined more liberally under the Uniform Commercial Code than under Wisconsin common law. *C.G. Schmidt, Inc. v. Permasteelisa North America*, 825 F.3d 801 (2016).

**402.207 Additional terms in acceptance or confirmation.** (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of chs. 401 to 411.

**History:** 1979 c. 89; 1991 a. 148, 304, 315.

A seller’s “acknowledgment of order” that purports to deny liability for damages for defects becomes part of the contract only if it is assented to by the buyer. *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

When an offer to purchase contained the term “FOB, our truck, your plant, loaded,” the offeree’s response stated “as is, where is,” and the parties had no prior oral agreement, there was no valid contract, and the court could not reach the issue of whether additional or different terms in response to an offer destroyed an agreement between parties. *Koehring Co. v. Glowacki*, 77 Wis. 2d 497, 253 N.W.2d 64 (1977).

By signing an order form that provided that the buyer of a machine would indemnify and hold the seller harmless, the buyer expressly agreed to the provisions, whether or not there was a previously existing contract and whether or not the buyer read the order form before signing. *Deminsky v. Arlington Plastics Machinery*, 2001 WI App 287, 249 Wis. 2d 441, 638 N.W.2d 331, 01–0242.

Affirmed on other grounds. 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411, 01–0242.

An invoice is a written confirmation of a request for work by one party, the performance of work by the second, and the cost of the work agreed upon. While interest may not have been discussed originally, adding it to the bottom of the invoice constitutes the addition of a term not previously discussed between the parties, making the interest an additional part of the agreement unless one of the exceptions in sub. (2) applies. This section eliminates the traditional “meeting of the minds” requirement. *Mid-State Contracting, Inc. v. Superior Floor Co.*, 2002 WI App 257, 258 Wis. 2d 139, 655 N.W.2d 142, 02–0761.

The question under sub. (2) (c) was not whether the defendant acquiesced to interest added to the bottom of invoices without inclusion in a contract, but whether the defendant objected to stop it. *Mid-State Contracting, Inc. v. Superior Floor Co.*, 2002 WI App 257, 258 Wis. 2d 139, 655 N.W.2d 142, 02–0761.

This section recognizes that, in practice, parties’ forms may not be identical, a party might later add divergent terms, and the parties may not always read each other’s forms. This section allows for enforcement of the parties’ agreement, including the added terms. An invoice falls within the ambit of this section. It is a written confirmation of a request for work by one party, the performance of work by the second, and the cost of the work agreed upon. If purchase orders and order confirmations were immovable bookends to a contract, ensuing transactions between the parties would be composed of a cumbersome, inefficient series of mini-contracts. That is what this section seeks to avoid. *Converting/Biophile Laboratories, Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, 296 Wis. 2d 273, 722 N.W.2d 633, 05–1628.

What constitutes “supplementary terms” under sub. (3) is not limited to provisions under this chapter, but includes any terms arising under the Uniform Commercial Code and necessarily encompasses those sections relating to course of performance under s. 402.208, course of dealing, and usage of trade under s. 401.205. *Dresser Industries, Inc. v. Gradall Co.*, 965 F.2d 1442 (1992).

When a contract specified “free alongside” (FAS) terms, the buyer’s confirmation form containing inconsistent terms did not relieve the buyer of liability for goods properly delivered FAS. *Melrose International Trading Co. of Canada v. Patrick Cudahy Inc.*, 482 F. Supp. 1369 (1980).

The UCC Battle of the Forms: Answers to Common Questions. Richardson. Wis. Law. Mar. 1996.

**402.208 Course of performance or practical construction.** (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (s. 401.303).

(3) Subject to s. 402.209 on modification and waiver, such course of performance is relevant to show a waiver or modification of any term inconsistent with such course of performance.

**History:** 2009 a. 320.

The requirement of “conformity” does not subject the seller to performing the contract to the satisfaction of the buyer, but only to the terms of the contract. *H.B. Fuller Co. v. Kinetic Systems, Inc.*, 932 F.2d 681 (1991).

A single occasion of conduct does not constitute a “course of performance” within the meaning of this section. *Maritime–Ontario Freight Lines, LTD. v. STI Holdings, Inc.*, 481 F. Supp. 2d 963 (2007).

**402.209 Modification, rescission and waiver.** (1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of s. 402.201 must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of sub. (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be

required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Not every contract for the sale of goods over \$500, nor every modification thereof, strictly complies with the requirements of the statute of frauds, and it would be unreasonable to declare categorically all such contracts unenforceable. The Uniform Commercial Code and Wisconsin case law recognize exceptions to the statute of frauds, including waiver and performance. An attempt at modification contemplates a completed oral modification of a written contract that prohibits oral modification. The inquiry into whether there has been an attempt at modification sufficient to operate as a waiver of the statute of frauds is closely related to the inquiry to determine whether there was a valid oral modification. *Royster–Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, 290 Wis. 2d 264, 714 N.W.2d 530, 03–1534.

A dealership agreement is primarily for the sale of goods, making this section applicable. *American Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381 (1995).

**402.210 Delegation of performance; assignment of rights.** (1) A party may perform that party’s duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his or her original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by the contract, or impair materially the other party’s chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of the assignor’s entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller’s interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer’s chance of obtaining return performance within the purview of sub. (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but:

(a) The seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer; and

(b) A court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of “the contract” is to be construed as barring only the delegation to the assignee of the assignor’s performance.

(5) An assignment of “the contract” or of “all my rights under the contract” or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by the assignee to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his or her rights against the assignor demand assurances from the assignee (s. 402.609).

History: 1991 a. 316; 2001 a. 10.

### SUBCHAPTER III

#### GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

**402.301 General obligations of parties.** The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

**402.302 Unconscionable contract or clause.** (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Unconscionability requires an absence of meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other. To find unconscionability requires a certain quantum of both procedural and substantive unconscionability. Procedural unconscionability bears on a meeting of the minds, while substantive unconscionability pertains to the reasonableness of the contract terms themselves. *Deminsky v. Arlington Plastics Machinery*, 2003 WI 15, 259 Wis. 2d 587, 657 N.W.2d 411, 01–0242.

Discussing the conspicuousness necessary for an effective warranty disclaimer. *H.B. Fuller Co. v. Kinetic Systems, Inc.*, 932 F.2d 681 (1991).

**402.303 Allocation or division of risks.** Where this chapter allocates a risk or a burden as between the parties “unless otherwise agreed”, the agreement may not only shift the allocation but may also divide the risk or burden.

**402.304 Price payable in money, goods, realty, or otherwise.** (1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which that party is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller’s obligations with reference to them are subject to this chapter, but not the transfer of the interest in realty or the transferor’s obligations in connection therewith.

History: 1991 a. 316.

**402.305 Open price term.** (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

(a) Nothing is said as to price; or

(b) The price is left to be agreed by the parties and they fail to agree; or

(c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a 3rd person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for that party to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other party may at his or her option treat the contract as canceled or fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price is fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

History: 1991 a. 316; 1997 a. 35; 2005 a. 253.

An implied contract by a dairy plant to pay the competitive price to milk producers does not permit the plant to pay a lower price since the mere absence of misrepresentation or deceit does not establish good faith; an open price contract still requires fair dealing. *Columbus Milk Producers’ Cooperative v. Department of Agriculture*, 48 Wis. 2d 451, 180 N.W.2d 617 (1970).

Under this section, which allows parties to a contract for the sale of goods to conclude the contract agreeing to settle the price at a subsequent date, the contract price is a reasonable price at the time of delivery if the parties are unable to agree. *Schmieder v. Standard Oil Co. of Indiana*, 69 Wis. 2d 419, 230 N.W.2d 732 (1975).

**402.306 Output, requirements and exclusive dealings.**

(1) 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, except that no quantity

unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

A “pay as used” proposal to purchase inventory was analogous to a “requirements contract.” *Lambert Corp. v. Evans*, 575 F.2d 132 (1978).

**402.307 Delivery in single lot or several lots.** Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

**402.308 Absence of specified place for delivery.** Unless otherwise agreed:

(1) The place for delivery of goods is the seller’s place of business or if the seller has none the seller’s residence; but

(2) In a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(3) Documents of title may be delivered through customary banking channels.

History: 1991 a. 316.

**402.309 Absence of specific time provisions; notice of termination.** (1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

In this case, although the parties’ agreements showed that the defendant did not promise to meet a strict deadline, that didn’t mean that the defendant’s delays could not qualify as a material breach. Under sub. (1), even when no time for performance is identified in a sales agreement, a party must complete performance in a reasonable time. *Oregon Potato Co. v. Kerry Inc.*, 575 F. Supp. 3d 1064 (2021).

**402.310 Open time for payment or running of credit; authority to ship under reservation.** Unless otherwise agreed:

(1) Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(2) If the seller is authorized to send the goods the seller may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (s. 402.513); and

(3) If delivery is authorized and made by way of documents of title otherwise than by sub. (2) then payment is due regardless of where the goods are to be received at the time and place at which the buyer is to receive the documents; or at the time the buyer is to receive delivery of the electronic documents and at the seller’s place of business or, if none, the seller’s residence; and

(4) Where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History: 1991 a. 316; 2009 a. 322.

**402.311 Options and cooperation respecting performance.** (1) An agreement for sale which is otherwise suffi-

ciently definite (s. 402.204 (3)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer’s option and except as otherwise provided in s. 402.319 (1) (c) and (3) specifications or arrangements relating to shipment are at the seller’s option.

(3) Where such specification would materially affect the other party’s performance but is not seasonably made or where one party’s cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

(a) Is excused for any resulting delay in his or her own performance; and

(b) May also either proceed to perform in any reasonable manner or after the time for a material part of his or her own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

History: 1991 a. 316.

**402.312 Warranty of title and against infringements; buyer’s obligation against infringement.** (1) Subject to sub. (2) there is in a contract for sale a warranty by the seller that:

(a) The title conveyed shall be good, and its transfer rightful; and

(b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under sub. (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or herself or that the person selling is purporting to sell only such right or title as the person selling or a 3rd person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any 3rd person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

History: 1971 c. 40; 1991 a. 316; 2005 a. 253.

**402.313 Express warranties by affirmation, promise, description, sample.** (1) Express warranties by the seller are created as follows:

(a) Any 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.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

History: 1991 a. 316.

Discussing express warranties. *Ewers v. Eisenzopf*, 88 Wis. 2d 482, 276 N.W.2d 802 (1979).

Strict Liability of the Bailor, Lessor and Licensor. *Wiseman*. 57 MLR 111 (1973).

**402.314 Implied warranty: merchantability; usage of trade.** (1) Unless excluded or modified (s. 402.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that

kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged, and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (s. 402.316) other implied warranties may arise from course of dealing or usage of trade.

An unincorporated organization of band mothers who sold food at a fund-raising luncheon were not merchants as contemplated by sub. (1). *Samson v. Riesing*, 62 Wis. 2d 698, 215 N.W.2d 662 (1974).

Evidence that the goods break or physically deteriorate after delivery may be relevant to whether the goods were fit at the time of delivery for the ordinary purpose for which they are used, but consideration of that evidence for that purpose does not impose an express warranty for future performance. *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487, 02–2192.

A party may sue for breach of implied warranties under the Uniform Commercial Code although it does not take possession of the goods if it is the party who contracts to buy the goods. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2011 WI App 101, 335 Wis. 2d 151, 801 N.W.2d 781, 09–1212.

When circumstances rendered a breach of good faith and of a fiduciary obligation chargeable to the buyer, the buyer was barred from asserting causes based on a breach of the warranty of merchantability, or on the seller's claimed fault, to recover from the seller that portion of the claim disallowed, with the buyer's consent, by the shipper. *Greisler Brothers, Inc. v. Packerland Packing Co.*, 392 F. Supp. 206 (1975).

The Implied Warranty of Merchantability and the Remote Manufacturer. *Anzino*. 101 MLR 505 (2017).

Status of Products Liability in Wisconsin. *Coyne*. WBB Aug. 1970.

**402.315 Implied warranty: fitness for particular purpose.** Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under s. 402.316 an implied warranty that the goods shall be fit for such purpose.

A party may sue for breach of implied warranties under the Uniform Commercial Code although it does not take possession of the goods if it is the party who contracts to buy the goods. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2011 WI App 101, 335 Wis. 2d 151, 801 N.W.2d 781, 09–1212.

When expansion joints corroded soon after installation in a steam system, but the defendant manufacturer was unaware of the corrosive agent in the steam, this section did not allow recovery. *Wisconsin Electric Power Co. v. Zallea Brothers, Inc.*, 606 F.2d 697 (1979).

**402.316 Exclusion or modification of warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to s. 402.202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to sub. (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding sub. (2), all of the following apply:

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls

the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as the buyer desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to the buyer.

(c) Except as provided in s. 95.195, there is no implied warranty that cattle, hogs, sheep or horses are free from sickness or disease at the time a sale is consummated if all state and federal regulations pertaining to animal health are complied with by the seller, unless the seller knows at the time a sale is consummated that the cattle, hogs, sheep or horses were sick or diseased.

(d) An implied warranty can be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with ss. 402.718 and 402.719 on liquidation or limitation of damages and on contractual modification of remedy.

**History:** 1981 c. 128; 1989 a. 277.

A disclaimer of implied warranties under sub. (2) made after sale would be ineffective. *Taterka v. Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653 (1978).

**402.317 Cumulation and conflict of warranties express or implied.** Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(1) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk displaces inconsistent general language of description.

(3) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

**402.318 Third-party beneficiaries of warranties, express or implied.**

A seller's warranty whether express or implied extends to any natural person who is in the family or household of the seller's buyer or who is a guest in that buyer's home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

**History:** 1991 a. 316; 2007 a. 97.

Privy of contract is required in implied warranty cases, and the availability of punitive damages depends on the facts proved rather than the formal theory of recovery alleged. *Drake v. Wham-O Manufacturing Co.*, 373 F. Supp. 608 (1974).

The Implied Warranty of Merchantability and the Remote Manufacturer. *Anzino*. 101 MLR 505 (2017).

**402.319 F.O.B. and F.A.S. terms.** (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:

(a) When the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in s. 402.504 and bear the expense and risk of putting them into the possession of the carrier; or

(b) When the term is F.O.B. the place of destination, the seller must at the seller's expense and risk transport the goods to that place and there tender delivery of them in the manner provided in s. 402.503;

(c) When under either par. (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at the seller's expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with s. 402.323 on the form of bill of lading.

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only

in connection with the stated price, is a delivery term under which the seller must:

(a) At the seller's expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within sub. (1) (a) or (c) or (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under s. 402.311. The seller may also at the seller's option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

**History:** 1991 a. 316.

When a contract specified "free alongside" (FAS) terms, the buyer's confirmation form containing inconsistent terms did not relieve the buyer of liability for goods properly delivered FAS. *Melrose International Trading Co. of Canada v. Patrick Cudahy Inc.*, 482 F. Supp. 1369 (1980).

**402.320 C.I.F. and C. & F. terms.** (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at the seller's expense and risk to:

(a) Put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) Load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) Obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) Forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

**History:** 1991 a. 316.

**402.321 C.I.F. or C. & F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival.** Under a contract containing a term C.I.F. or C. & F.:

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must rea-

sonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in sub. (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

**402.322 Delivery "ex-ship".** (1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed:

(a) The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) The risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

**402.323 Form of bill of lading required in overseas shipment; "overseas".** (1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within sub. (1) a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

(a) Due tender of a single part is acceptable within the provisions of s. 402.508 (1) on cure of improper delivery; and

(b) Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

**History:** 2009 a. 322.

**402.324 "No arrival, no sale" term.** Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

(1) The seller must properly ship conforming goods and if they arrive by any means the seller must tender them on arrival but the seller assumes no obligation that the goods will arrive unless the seller has caused the nonarrival; and

(2) Where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (s. 402.613).

**History:** 1991 a. 316.

**402.325 "Letter of credit" term; "confirmed credit".** (1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored,



the seller may on reasonable notification to the buyer require payment directly from the buyer.

(3) Unless otherwise agreed the term “letter of credit” or “banker’s credit” in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term “confirmed credit” means that the credit must also carry the direct obligation of such an agency which does business in the seller’s financial market.

**History:** 1991 a. 316.

**402.326 Sale on approval and sale or return; rights of creditors.** (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) A “sale on approval” if the goods are delivered primarily for use; and

(b) A “sale or return” if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer’s creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer’s possession.

(4) Any “or return” term of a contract for sale is to be treated as a separate contract for sale within s. 402.201 and as contradicting the sale aspect of the contract within s. 402.202 on parol or extrinsic evidence.

(5) If a person delivers or consigns for sale goods that the person used, or bought for use, for personal, family or household purposes, these goods do not become the property of the deliverer or consignee unless the deliverer or consignee purchases and fully pays for the goods. This subsection does not prevent the deliverer or consignee from acting as the deliverer’s or consignor’s agent to transfer title to these goods to a buyer who pays the full purchase price. Any payment received by the deliverer or consignee from a buyer of these goods, less any amount that the deliverer or consignor expressly agreed could be deducted from the payment for commissions, fees or expenses, is the property of the deliverer or consignor and is not subject to the claims of the deliverer’s or consignee’s creditors.

**History:** 1991 a. 316; 1997 a. 279; 2001 a. 10.

Enumerating and discussing factors relevant to determining whether goods are delivered “for sale.” *Armor All Products v. Amoco Oil Co.*, 194 Wis. 2d 35, 533 N.W.2d 720 (1995).

Whether a transaction is a “sale on approval” must be determined by an objective examination of the transaction documents and the parties’ performance, rather than examination of the parties’ subjective intent. *Houghton Wood Products, Inc. v. Badger Wood Products, Inc.*, 196 Wis. 2d 457, 538 N.W.2d 621 (Ct. App. 1995), 95-0004.

When a good is used in the manufacturing process where it undergoes transformation and is subsequently resold, it is not delivered for “use” under sub. (1). *Houghton Wood Products, Inc. v. Badger Wood Products, Inc.*, 196 Wis. 2d 457, 538 N.W.2d 621 (Ct. App. 1995), 95-0004.

**402.327 Special incidents of sale on approval and sale or return.** (1) Under a sale on approval unless otherwise agreed:

(a) Although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) After due notification of election to return, the return is at the seller’s risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed:

(a) The option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) The return is at the buyer’s risk and expense.

**402.328 Sale by auction.** (1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in the auctioneer’s discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until the auctioneer announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract a bid until the auctioneer’s announcement of completion of the sale, but a bidder’s retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller’s behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at the buyer’s option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

**History:** 1991 a. 316.

## SUBCHAPTER IV

### TITLE, CREDITORS, AND GOOD FAITH PURCHASERS

**402.401 Passing of title; reservation for security; limited application of this section.** Each provision of this chapter with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other 3rd parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (s. 402.501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by chs. 401 to 411. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to ch. 409, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes the seller’s performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

(a) If the seller is to deliver a tangible document of title, title passes at the time when and the place where the seller delivers such documents and, if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or

(b) If the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a “sale”.

**History:** 1979 c. 89; 1991 a. 148, 304, 315, 316; 2005 a. 253; 2009 a. 322.

Title to a vehicle passes to the buyer when the seller completes performance of the contract with reference to the transfer of physical possession, despite the seller’s retention of the certificate of title. *National Exchange Bank of Fond du Lac v. Mann*, 81 Wis. 2d 352, 260 N.W.2d 716 (1978).

**402.402 Rights of seller’s creditors against sold goods.** (1) Except as provided in subs. (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer’s rights to recover the goods under ss. 402.502 and 402.716.

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void, if as against the creditor a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant–seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller:

(a) Under the provisions of ch. 409; or

(b) Where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

**History:** 1991 a. 316.

**402.403 Power to transfer; good faith purchase of goods; “entrusting”.** (1) A purchaser of goods acquires all title which the purchaser’s transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

(a) The transferor was deceived as to the identity of the purchaser; or

(b) The delivery was in exchange for a check which is later dishonored; or

(c) It was agreed that the transaction was to be a “cash sale”; or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor’s disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by chs. 407 and 409.

**History:** 1991 a. 316; 2009 a. 110.

A person with a voidable title in property, having the power to pass title to a good faith purchaser under this section, may transfer a security interest in that property. *National Pawn Brokers Unlimited v. Osterman, Inc.*, 176 Wis. 2d 418, 500 N.W.2d 407 (Ct. App. 1993).

Discussing “voidable titles” under sub. (1) (a). *Met–Al, Inc. v. Hansen Storage Co.*, 844 F. Supp. 485 (1994).

Buyer in Ordinary Course of Business Under Article 9 of the Uniform Commercial Code (and Related Matters). Skilton. 1974 WLR 1.

**402.501 Insurable interest in goods; manner of identification of goods.** (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and the buyer has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

(a) When the contract is made if it is for the sale of goods already existing and identified;

(b) If the contract is for the sale of future goods other than those described in par. (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) When the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in the seller and where the identification is by the seller alone the seller may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

**History:** 1991 a. 316.

**402.502 Buyer’s right to goods on seller’s repudiation, failure to deliver, or insolvency.** (1) Subject to subs. (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which the buyer has a special property under s. 402.501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) In all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price.

(2) The buyer’s right to recover the goods under sub. (1) (a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating the buyer’s special property has been made by the buyer, the buyer acquires the right to recover the goods only if they conform to the contract for sale.

**History:** 1991 a. 316; 2001 a. 10.

**402.503 Manner of seller’s tender of delivery.** (1) Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably necessary to enable the buyer to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular:

(a) Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within s. 402.504 respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that the seller comply with sub. (1) and also in any appropriate case tender documents as described in subs. (4) and (5).

(4) Where goods are in the possession of a bailee and are to be delivered without being moved:

(a) Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) Tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in ch. 409 receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all 3rd persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) The seller must tender all such documents in correct form, except as provided in s. 402.323 (2) with respect to bills of lading in a set; and

(b) Tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes nonacceptance or rejection.

History: 1991 a. 316; 2005 a. 253; 2009 a. 322.

**402.504 Shipment by seller.** (1) Where the seller is required or authorized to send the goods to the buyer and the contract does not require the seller to deliver them at a particular destination, then unless otherwise agreed the seller must:

(a) Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) Promptly notify the buyer of the shipment.

(2) Failure to notify the buyer under sub. (1) (c) or to make a proper contract under sub. (1) (a) is a ground for rejection only if material delay or loss ensues.

History: 1991 a. 316.

**402.505 Seller's shipment under reservation.** (1) Where the seller has identified goods to the contract by or before shipment:

(a) The seller's procurement of a negotiable bill of lading to the seller's own order or otherwise reserves in the seller a security interest in the goods. The seller's procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) A nonnegotiable bill of lading to the seller or the seller's nominee reserves possession of the goods as security but except in a case of conditional delivery (s. 402.507 (2)) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within s. 402.504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document of title.

History: 1991 a. 316; 2009 a. 322.

**402.506 Rights of financing agency.** (1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or pur-

chase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular.

History: 2009 a. 322.

**402.507 Effect of seller's tender; delivery on condition.** (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to the buyer's duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, the buyer's right as against the seller to retain or dispose of them is conditional upon the buyer's making the payment due.

History: 1991 a. 316.

**402.508 Cure by seller of improper tender or delivery; replacement.** (1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of the seller's intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if the seller seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History: 1991 a. 316.

**402.509 Risk of loss in the absence of breach.** (1) Where the contract requires or authorizes the seller to ship the goods by carrier:

(a) If it does not require the seller to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (s. 402.505); but

(b) If it does require the seller to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) On the buyer's receipt of possession or control of a negotiable document of title covering the goods; or

(b) On acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) After the buyer's receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in s. 402.503 (4) (b).

(3) In any case not within sub. (1) or (2), the risk of loss passes to the buyer on the buyer's receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to s. 402.327 on sale on approval and s. 402.510 on effect of breach on risk of loss.

History: 1991 a. 316; 2009 a. 322.

**402.510 Effect of breach on risk of loss.** (1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance the buyer may to the extent of any deficiency in the buyer's effective insur-

ance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to the buyer, the seller may to the extent of any deficiency in the seller's effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

History: 1991 a. 316.

**402.511 Tender of payment by buyer; payment by check.** (1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to s. 403.310 on the effect of an instrument on an obligation, payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

History: 1995 a. 449.

**402.512 Payment by buyer before inspection.**

(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless:

(a) The nonconformity appears without inspection; or

(b) Despite tender of the required documents the circumstances would justify injunction against honor under s. 405.109 (2).

(2) Payment pursuant to sub. (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any remedies available to the buyer.

History: 1991 a. 316; 2005 a. 213.

**402.513 Buyer's right to inspection of goods.**

(1) Unless otherwise agreed and subject to sub. (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Unless otherwise agreed, expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to s. 402.321 (3) on C.I.F. contracts, the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

(a) For delivery "C.O.D." or on other like terms; or

(b) For payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

**402.514 When documents deliverable on acceptance; when on payment.** Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than 3 days after presentment; otherwise, only on payment.

**402.515 Preserving evidence of goods in dispute.** In furtherance of the adjustment of any claim or dispute:

(1) Either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(2) The parties may agree to a 3rd party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

History: 2005 a. 253.

## SUBCHAPTER VI

### BREACH, REPUDIATION AND EXCUSE

**402.601 Buyer's rights on improper delivery.** Subject to s. 402.612 on breach in installment contracts and unless otherwise agreed under ss. 402.718 and 402.719 on contractual limitations of remedy, if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(1) Reject the whole; or

(2) Accept the whole; or

(3) Accept any commercial unit or units and reject the rest.

**402.602 Manner and effect of rightful rejection.**

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to ss. 402.603 and 402.604 on rejected goods:

(a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) If the buyer has before rejection taken physical possession of goods in which the buyer does not have a security interest under s. 402.711 (3), the buyer is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) The buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by s. 402.703 on seller's remedies in general.

History: 1991 a. 316.

Section 402.608 (2) provides that a revocation of acceptance must occur within a reasonable time after the buyer discovers a nonconformity, and sub. (2) (b) requires a buyer who rejects goods to hold the goods for a sufficient time for the seller to remove them. A truck purchaser who used the vehicle for 18 months, then transferred it back to the dealer and sought relief ten months after the transfer did not reject the vehicle in a timely manner or hold it as required and was not entitled to relief. *Smyser v. Western Star Trucks Corp.*, 2001 WI App 180, 247 Wis. 2d 281, 634 N.W.2d 134, 00-2482.

When a seller refused to accept a return of goods upon notice of breach by the buyer, and the buyer thereafter used the goods for three months, the buyer could not recover for breach of warranty. *Concrete Equipment Co. v. William A. Smith Contracting Co.*, 358 F. Supp. 1137 (1973).

**402.603 Merchant buyer's duties as to rightfully rejected goods.** (1) Subject to any security interest in the buyer (s. 402.711 (3)), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in the merchant buyer's possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under sub. (1), the buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding 10 percent of the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

**History:** 1991 a. 316; 2009 a. 177.

**402.604 Buyer's options as to salvage of rightfully rejected goods.** Subject to s. 402.603 on perishables, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to the seller or resell them for the seller's account with reimbursement as provided in s. 402.603. Such action is not acceptance or conversion.

**History:** 1991 a. 316.

**402.605 Waiver of buyer's objections by failure to particularize.** (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes the buyer from relying on the unstated defect to justify rejection or to establish breach:

(a) Where the seller could have cured it if stated seasonably; or

(b) Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents.

**History:** 1991 a. 316; 2009 a. 322.

**402.606 What constitutes acceptance of goods.**

(1) Acceptance of goods occurs when the buyer:

(a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity; or

(b) Fails to make an effective rejection (s. 402.602 (1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by the seller.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

**History:** 1991 a. 316.

When a buyer accepts goods, the seller need not prove that the goods were not defective in an action to recover the purchase price. *Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939 (1982).

**402.607 Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.** (1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.

(3) Where a tender has been accepted:

(a) The buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) If the claim is one for infringement or the like (s. 402.312 (3)) and the buyer is sued as a result of such a breach the buyer must so notify the seller within a reasonable time after the buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which the buyer's seller is answerable over:

(a) The buyer may give the buyer's seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so the seller will be bound in any action against the seller by the seller's buyer by any determination of fact common to the 2 litigations, then unless the seller after reasonable receipt of the notice does come in and defend, the seller is so bound.

(b) If the claim is one for infringement or the like (s. 402.312 (3)) the original seller may demand in writing that his or her buyer turn over control of the litigation to the original seller including settlement or else be barred from any remedy over and if the original seller also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.

(6) Subsections (3), (4) and (5) apply to any obligation of the buyer to hold the seller harmless against infringement or the like (s. 402.312 (3)).

**History:** 1991 a. 316.

Under the facts of the case, a two-month delay in giving notice was not unreasonable. *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 319 N.W.2d 855 (1982).

Ordinarily, what constitutes a reasonable time is a question of fact for a jury. However, a delay may be for such a long period that as a matter of law the court must hold that the notice was not given within a reasonable time. Absent evidence of circumstances excusing or justifying the delay, ten months is not a reasonable time to delay giving notice as a matter of law. *Wilson v. Tuxen*, 2008 WI App 94, 312 Wis. 2d 705, 754 N.W.2d 220, 07-1964.

Sub. (3) (a) requires pre-suit notice. One of the purposes of the notice requirement is to enable the seller to take corrective action and avoid litigation. Thus, service of a summons and complaint cannot function as the notice required by sub. (3) (a). *Brame v. General Motors LLC*, 535 F. Supp. 3d 832 (2021).

A buyer must give a seller notice of an alleged breach even if the seller would not have cured the breach after receiving the notice. *Brame v. General Motors LLC*, 535 F. Supp. 3d 832 (2021).

**402.608 Revocation of acceptance in whole or in part.**

(1) The buyer may revoke the buyer's acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer if the buyer has accepted it:

(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of such nonconformity if the buyer's acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if the buyer had rejected them.

**History:** 1991 a. 316.

Sub. (2) provides that a revocation of acceptance must occur within a reasonable time after the buyer discovers a nonconformity, and s. 402.602 (2) (b) requires a buyer who rejects goods to hold the goods for a sufficient time for the seller to remove them. A truck purchaser who used the vehicle for 18 months, then transferred it back to the dealer and sought relief ten months after the transfer did not reject the vehicle in a timely manner or hold it as required and was not entitled to relief. *Smyser v. Western Star Trucks Corp.*, 2001 WI App 180, 247 Wis. 2d 281, 634 N.W.2d 134, 00-2482.

When the trial court found that the plaintiff's employees were told by the defendant that a part of a system purchased from the defendant would not work and there was no evidence presented at trial as to any further discussion of additional work, the plaintiff could not reasonably assume that the nonconformity would be cured, making revocation under subs. (1) (a) and (2) unavailable. *Viking Packaging Technologies, Inc. v. Vassallo Foods, Inc.*, 2011 WI App 133, 337 Wis. 2d 125, 804 N.W.2d 507, 10-2067.

**402.609 Right to adequate assurance of performance.**

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until the demanding party receives such assurance may if commercially reasonable suspend any performance for which the demanding party has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

**History:** 1991 a. 316.

**402.610 Anticipatory repudiation.** When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

(1) For a commercially reasonable time await performance by the repudiating party; or

(2) Resort to any remedy for breach (ss. 402.703 or 402.711), even though the aggrieved party has notified the repudiating party that the aggrieved party would await the latter's performance and has urged retraction; and

(3) In either case suspend the aggrieved party's performance of the contract or proceed in accordance with s. 402.704 on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

**History:** 1991 a. 316.

A party doesn't repudiate by asking for a contract modification, but, if a seller informs a buyer that the seller simply won't be able to perform at the promised time, that may qualify as a repudiation. In this case, the parties' contracts included estimated fulfillment dates, not strict deadlines. But the seller was still required to perform within a reasonable time, and the estimated dates provided a benchmark for determining what an unreasonable delay would be. If the seller's new projected fulfillment date was outside the scope of what would be a reasonable time for performance, that would qualify as repudiation. What constitutes a reasonable time under the circumstances is a question of fact. *Oregon Potato Co. v. Kerry Inc.*, 575 F. Supp. 3d 1064 (2021).

**402.611 Retraction of anticipatory repudiation.**

(1) Until the repudiating party's next performance is due the repudiating party can retract the repudiation unless the aggrieved party has since the repudiation canceled or materially changed position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under s. 402.609.

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

**History:** 1991 a. 316.

**402.612 "Installment contract"; breach.** (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within sub. (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole; but the aggrieved party reinstates the contract if the aggrieved party accepts a nonconforming installment without seasonably notifying of cancellation or if the aggrieved party brings an action with respect only to past installments or demands performance as to future installments.

**History:** 1991 a. 316.

**402.613 Casualty to identified goods.** Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (s. 402.324) then:

(1) If the loss is total the contract is avoided; and

(2) If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at the buyer's option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

**History:** 1991 a. 316.

**402.614 Substituted performance.** (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

**402.615 Excuse by failure of presupposed conditions.**

Except so far as a seller may have assumed a greater obligation and subject to s. 402.614 on substituted performance:

(1) Delay in delivery or nondelivery in whole or in part by a seller who complies with subs. (2) and (3) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(2) Where the causes mentioned in sub. (1) affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among the seller's customers but may at the seller's option include regular customers not then under contract as well as the seller's own requirements for further manufacture. The seller may so allocate in any manner which is fair and reasonable.

(3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under sub. (2), of the estimated quota thus made available for the buyer.

**History:** 1991 a. 316.

An impracticability defense requires a defendant to show three things: 1) a contingency occurred; 2) the contingency made performance impracticable; and 3) the nonoccurrence of that contingency was a basic assumption upon which the contract was made. The third element requires the defendant to show that its inability to perform is because of circumstances beyond the defendant's control and not within the defendant's ability to foresee. The question is whether the contingency should have been foreseen, not whether the defendant actually knew the problem was coming. *Oregon Potato Co. v. Kerry Inc.*, 575 F. Supp. 3d 1064 (2021).

The impracticability defense is generally reserved for events caused by a third party or acts of nature, for example, war, embargo, local crop failure, loss of a supplier, fires, sickness, and death. *Oregon Potato Co. v. Kerry Inc.*, 575 F. Supp. 3d 1064 (2021).

The Legal Domino Effect: COVID-19 & Contracts. Gegios & Duroni. Wis. Law. May 2020.

**402.616 Procedure on notice claiming excuse.**

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under s. 402.615 the buyer may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under s. 402.612 relating to breach of installment contracts, then also as to the whole:

- (a) Terminate and thereby discharge any unexecuted portion of the contract; or
- (b) Modify the contract by agreeing to take the buyer's available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

History: 1991 a. 316.

## SUBCHAPTER VII

### REMEDIES

**402.701 Remedies for breach of collateral contracts not impaired.** Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

**402.702 Seller's remedies on discovery of buyer's insolvency.** (1) Where the seller discovers the buyer to be insolvent the seller may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under s. 402.705.

(2) Where the seller discovers that the buyer has received goods on credit while insolvent the seller may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within 3 months before delivery the 10-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under sub. (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under s. 402.403. Successful reclamation of goods excludes all other remedies with respect to them.

History: 1991 a. 316.

A holder of a security interest in after-acquired collateral qualifies as a good faith purchaser under sub. (3). *House of Stainless, Inc. v. Marshall & Ilsley Bank*, 75 Wis. 2d 264, 249 N.W.2d 561 (1977).

When a bank, as the transferee of the seller, did not rely on a balance sheet that misrepresented the buyer's insolvency and had no knowledge of the facts prior to the sale or delivery, it could not exercise the seller's right of reclamation. *Shapiro v. Union Bank & Savings Co.*, 458 F.2d 938 (1972).

**402.703 Seller's remedies in general.** 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 (s. 402.612), then also with respect to the whole undelivered balance, the aggrieved seller may:

- (1) Withhold delivery of such goods;
- (2) Stop delivery by any bailee as provided in s. 402.705;
- (3) Proceed under s. 402.704 respecting goods still unidentified to the contract;
- (4) Resell and recover damages as provided in s. 402.706;
- (5) Recover damages for nonacceptance (s. 402.708) or in a proper case the price (s. 402.709);
- (6) Cancel.

**402.704 Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.** (1) An aggrieved seller under s. 402.703 may:

- (a) Identify to the contract conforming goods not already identified if at the time the aggrieved seller learned of the breach those goods are in the aggrieved seller's possession or control;
- (b) Treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

History: 1991 a. 316.

**402.705 Seller's stoppage of delivery in transit or otherwise.** (1) The seller may stop delivery of goods in the possession of a carrier or other bailee when the seller discovers the buyer to be insolvent (s. 402.702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until:

- (a) Receipt of the goods by the buyer; or
- (b) Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
- (c) Such acknowledgment to the buyer by a carrier by reshipment or as a warehouse; or
- (d) Negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History: 1983 a. 500 s. 43; 1991 a. 316; 2009 a. 322.

**402.706 Seller's resale including contract for resale.**

(1) Under the conditions stated in s. 402.703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under s. 402.710, but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in sub. (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of the seller's intention to resell.

(4) Where the resale is at public sale:

(a) Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) If the goods are not to be within the view of those attending the sale the notification of sale must state the place where the

goods are located and provide for their reasonable inspection by prospective bidders; and

(d) The seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (s. 402.707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of that person's security interest, as defined in s. 402.711 (3).

**History:** 1991 a. 316.

**402.707 “Person in the position of a seller”.** (1) A “person in the position of a seller” includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of the agent's principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (s. 402.705) and resell (s. 402.706) and recover incidental damages (s. 402.710).

**History:** 1991 a. 316.

**402.708 Seller's damages for nonacceptance or repudiation.** (1) Subject to sub. (2) and to s. 402.723 with respect to proof of market price the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in s. 402.710, but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in sub. (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in s. 402.710, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

**402.709 Action for the price.** (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under s. 402.710, 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.

(2) Where the seller sues for the price the seller must hold for the buyer any goods which have been identified to the contract and are still in the seller's control except that if resale becomes possible the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (s. 402.610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under s. 402.708.

**History:** 1991 a. 316.

**402.710 Seller's incidental damages.** Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

**402.711 Buyer's remedies in general; buyer's security interest in rejected goods.** (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (s. 402.612), the buyer may cancel and whether or not the buyer has done so may in addition to recovering so much of the price as has been paid:

(a) “Cover” and have damages under s. 402.712 as to all the goods affected whether or not they have been identified to the contract; or

(b) Recover damages for nondelivery as provided in s. 402.713.

(2) Where the seller fails to deliver or repudiates the buyer may also:

(a) If the goods have been identified recover them as provided in s. 402.502; or

(b) In a proper case obtain specific performance or replevy the goods as provided in s. 402.716.

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (s. 402.706).

**History:** 1991 a. 316.

**402.712 “Cover”; buyer's procurement of substitute goods.** (1) After a breach within s. 402.711 the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as defined in s. 402.715, but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar the buyer from any other remedy.

**History:** 1991 a. 316.

**402.713 Buyer's damages for nondelivery or repudiation.** (1) Subject to s. 402.723 with respect to proof of market price, the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in s. 402.715, but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

**402.714 Buyer's damages for breach in regard to accepted goods.** (1) Where the buyer has accepted goods and given notification (s. 402.607 (3)) the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under s. 402.715 may also be recovered.

**History:** 1991 a. 316.



The economic loss doctrine, when it applies, bars recovery in tort for damages resulting from a product not performing as intended, including damages to the product itself or economic losses caused by the defective product. The economic loss doctrine does not bar the recovery of damages for injury to persons or other property resulting from a defective product; in fact s. 402.715 (2) (b) specifically allows it when caused by a breach of warranty. *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487, 02–2192.

The measure of damages when a buyer alleges that a product was defective and not worth what was paid for it at the time of acceptance is the difference between the warranted value of the product and its actual value at the time and place of acceptance. The “special circumstances” clause of sub. (2) does not completely bar a breach of warranty claim because the defective product was used for a period of time and later resold for more than its fair market value. However, the price of the defective product upon resale may be relevant as circumstantial evidence of the actual value of the product in its defective condition at the time and place of acceptance. *Mayberry v. Volkswagen of America, Inc.*, 2005 WI 13, 278 Wis. 2d 39, 692 N.W.2d 226, 03–1621.

**402.715 Buyer’s incidental and consequential damages.** (1) Incidental damages resulting from the seller’s breach 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 and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller’s breach include:

(a) 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; and

(b) Injury to person or property proximately resulting from any breach of warranty.

Litigation expenses are not recoverable under this section. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

Interest charges are proper incidental damages. A punitive damages award was upheld. *Owens v. Meyer Sales Co.*, 129 Wis. 2d 491, 385 N.W.2d 234 (Ct. App. 1986).

The economic loss doctrine, when it applies, bars recovery in tort for damages resulting from a product not performing as intended, including damages to the product itself or economic losses caused by the defective product. The economic loss doctrine does not bar the recovery of damages for injury to persons or other property resulting from a defective product; in fact sub. (2) (b) specifically allows it when caused by a breach of warranty. *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487, 02–2192.

Discussing damages. *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (1985).

**402.716 Buyer’s right to specific performance or replevin.** (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer’s right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

**History:** 1991 a. 316; 2001 a. 10.

**402.717 Deduction of damages from the price.** The buyer on notifying the seller of the buyer’s intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

**History:** 1991 a. 316.

**402.718 Liquidation or limitation of damages; deposits.** (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer’s breach, the buyer is entitled to restitution of any amount by which the sum of the buyer’s payments exceeds:

(a) The amount to which the seller is entitled by virtue of terms liquidating the seller’s damages in accordance with sub. (1); or

(b) In the absence of such terms, 20 percent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer’s right to restitution under sub. (2) is subject to offset to the extent that the seller establishes:

(a) A right to recover damages under this chapter other than sub. (1); and

(b) The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purpose of sub. (2); but if the seller has notice of the buyer’s breach before reselling goods received in part performance, the seller’s resale is subject to the conditions laid down in s. 402.706 on resale by an aggrieved seller.

**History:** 1991 a. 316; 2009 a. 177.

The unreasonableness of liquidated damages is properly a matter of defense. The defendant could not raise the question of unreasonable liquidated damages by demurrer. *Northwestern Motor Car, Inc. v. Pope*, 51 Wis. 2d 292, 187 N.W.2d 200 (1971).

If a stipulated damages clause is valid, mitigation of damages is not applicable to determine damages. *Wassenaar v. Panos*, 111 Wis. 2d 518, 331 N.W.2d 357 (1983).

The test to determine whether a stipulated damages provision is enforceable is whether the clause is reasonable under the totality of the circumstances, and the party seeking to avoid enforcement bears the burden to show the clause is unreasonable. To determine reasonableness, a court considers the following factors: 1) whether the parties intended to provide for damages or for a penalty; 2) whether the injury caused by the breach would be difficult or incapable of accurate estimation at the time of entering into the contract; and 3) whether the stipulated damages are a reasonable forecast of the harm caused by the breach. *Convenience Store Leasing & Management v. Annapurna Marketing*, 2019 WI App 40, 388 Wis. 2d 353, 933 N.W.2d 110, 17–1505.

**402.719 Contractual modification or limitation of remedy.** (1) Subject to subs. (2) and (3) and to s. 402.718 on liquidation and limitation of damages:

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chs. 401 to 411.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

**History:** 1979 c. 89; 1991 a. 148, 304, 315.

A commercial contract clause that limited consequential damages was unconscionable. *Trinkle v. Schumacher Co.*, 100 Wis. 2d 13, 301 N.W.2d 255 (Ct. App. 1980).

The remedy under sub. (2) was proper when a damage clause provided damages that were, under the circumstances, unconscionably low. *Phillips Petroleum Co. v. Bucyrus–Erie Co.*, 131 Wis. 2d 21, 388 N.W.2d 584 (1986).

A purchaser cannot claim that a warranty provision has failed of its essential purpose merely because a potential claim did not arise until after the warranty period had expired. *Wisconsin Power & Light Co. v. Westinghouse Electric Corp.*, 830 F.2d 1405 (1987).

In interpreting subs. (2) and (3), the Wisconsin Supreme Court has adopted the “dependent approach.” Under the dependent approach, if a litigant proves a limited remedy fails of its essential purpose under sub. (2), any accompanying consequential damages disclaimer is per se unconscionable under sub. (3). *Sanchelima International, Inc. v. Walker Stainless Equipment Co.*, 920 F.3d 1141 (2019).

A damage disclaimer is not enforceable if the remaining exclusive remedy fails of its essential purpose. *Rich Products Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937 (1999).

**402.720 Effect of “cancellation” or “rescission” on claims for antecedent breach.** Unless the contrary intention clearly appears expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for the antecedent breach.

**402.721 Remedies for fraud.** Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

**402.722 Who can sue 3rd parties for injury to goods.** Where a 3rd party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

(1) A right of action against the 3rd party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, the plaintiff’s suit or settlement is, subject to the plaintiff’s own interest, as a fiduciary for the other party to the contract;

(3) Either party may with the consent of the other sue for the benefit of whom it may concern.

**History:** 1991 a. 316; 2005 a. 253.

**402.723 Proof of market price: time and place.** (1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (ss. 402.708 or 402.713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at the time or place other than the one described in this chapter offered by one party is not admissible unless and until that party has given the other party such notice as the court finds sufficient to prevent unfair surprise.

**History:** 1991 a. 316.

**402.724 Admissibility of market quotations.** Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

**402.725 Statute of limitations in contracts for sale.**

(1) An action for breach of any contract for sale must be commenced within 6 years after the cause of action has accrued. By the original agreement the parties, if they are merchants, may reduce the period of limitation to not less than one year. The period of limitation may not otherwise be varied by agreement.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by sub. (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before chs. 401 to 409 or before ch. 410 or 411 became effective.

**History:** 1979 c. 89; 1991 a. 148, 304, 315.

A stringent standard applies in determining whether a warranty explicitly extends to future performance. There must be specific reference to a future time in the warranty, satisfied when a warranty guarantees a product for a particular number of years, or for a less precise, but still determinable, period. *Selzer v. Brunsell Brothers, Ltd.*, 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806, 01–2625.

Implied warranties cannot, by their nature, explicitly extend to future performance. The statute of limitations will always start to run against claims based on implied warranty from the time when delivery of the goods is tendered. *Selzer v. Brunsell Brothers, Ltd.*, 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806, 01–2625.

While all warranties in a general sense apply to the future performance of goods, the future performance exception in sub. (2) applies only when the warranty explicitly extends to future performance. Evidence that the goods break or physically deteriorate after delivery may be relevant to whether the goods were fit at the time of delivery for the ordinary purpose for which they are used; but consideration of that evidence for that purpose does not impose an express warranty for future performance. *City of Stoughton v. Thomasson Lumber Co.*, 2004 WI App 6, 269 Wis. 2d 339, 675 N.W.2d 487, 02–2192.

The county was a “merchant” under s. 402.104 for purposes of the limitation under sub. (1). *County of Milwaukee v. Northrop Data Systems, Inc.*, 602 F.2d 767 (1979).

Wisconsin law was applied despite a contrary choice of law provision in the contract. *Office Supply Co. v. Basic/Four Corp.*, 538 F. Supp. 776 (1982).