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Loss of Goodwill and Business Reputation as Recoverable Elements of Damages Under Uniform Commercial Code § 2-715-The Pennsylvania Experience

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Comments

LOSS OF GOODWILL AND BUSINESS REPUTATION AS RECOVERABLE ELEMENTS OF DAMAGES UNDER UNIFORM COMMERCIAL CODE § 2-715— THE PENNSYLVANIA EXPERIENCE

Under the Uniform Commercial Code a buyer is provided with an arsenal of remedies upon a breach of contract by a seller. In case of breach by the seller, the buyer is entitled to recover losses resulting from the seller's breach.[1] If the seller's breach involves a breach of warranty the Code provides that the buyer may recover

> 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.[2]

If the buyer can establish special circumstances he may also recover incidental and consequential damages.[3]

This Comment will examine recovery of loss of good will and business reputation in damages under the consequential damages provision of the Uniform Commercial Code. The Comment will analyze the refusal of Pennsylvania courts to permit recovery for loss of good will under the Code and prior statutory enactments in light of the decisions of courts of other jurisdictions.

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1. UNIFORM COMMERCIAL CODE § 2-714(1) [hereinafter also referred to as the Code].
2. UNIFORM COMMERCIAL CODE § 2-714(2).
3. UNIFORM COMMERCIAL CODE § 2-714(3).

BUYER'S RIGHT TO CONSEQUENTIAL DAMAGES

The right of an aggrieved buyer to recover consequential damages is specifically provided for under the Code.[4] Section 2-715(2)(a) of the Code provides:

> (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.

The Code provision is substantially similar to the prior provisions of the Uniform Sales Act.[5] Under the Code a seller would be liable for consequential damages whenever he had reason to know particular or general requirements of the buyer at the time of contracting.[6] The burden of establishing consequential damages rests with the aggrieved buyer.[7] The Code requires the buyer to prove such damages in any manner which is reasonable under the circumstances but rejects "mathematical precision in the proof of loss" as a prerequisite to recovery of consequential damages.[8]

THE PENNSYLVANIA VIEW

The Pennsylvania courts have adhered to a narrow interpreta-

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4. UNIFORM COMMERCIAL CODE § 2-715(2).

5. *Compare* UNIFORM SALES ACT § 69(6), (7) *with* UNIFORM COMMERCIAL CODE § 2-715(2)(a). The UNIFORM SALES ACT § 69 provided:

> (6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
>
> (7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

The Uniform Sales Act was the precursor to the Uniform Commercial Code. On enactment of the Uniform Commercial Code, a state which had previously adopted the Uniform Sales Act, would expressly repeal the prior Uniform Sales Act. See, UNIFORM COMMERCIAL CODE § 10-102; PA. STAT. ANN. tit. 12A, § 10-102(2).

6. UNIFORM COMMERCIAL CODE § 2-715, comment 3. It should be noted that the seller need not possess actual knowledge of the buyer's general needs, reason to know of the buyer's needs is sufficient. *Id.*

7. UNIFORM COMMERCIAL CODE § 2-715, comment 3.

8. UNIFORM COMMERCIAL CODE § 2-715, comment 4, states:

> The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

Section 1-106(1) of the Code provides:

> The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

The official comments to Section 1-106(1) clearly indicate rejection of "any doctrine that damages must be calculable with mathematical accuracy." UNIFORM COMMERCIAL CODE § 1-106, comment 1.

tion of a forty-year old case decided under the Uniform Sales Act, which denied recovery of damages for loss of good will. Over the enusing years the Pennsylvania courts have attempted to justify their denial of recovery for loss of good will on the grounds that such injury is too speculative,[9] that plaintiff has not actually suffered any loss,[10] that the Uniform Commercial Code was not intended to permit such recovery,[11] and that loss of good will cannot be gauged by the diminution in value of any specific property.[12] The Pennsylvania view has been criticized by the courts[13] and by the commentators.[14] It is submitted that the Pennsylvania view is not supported by prior court decisions under the Uniform Sales Act nor under the Uniform Commercial Code.

The origin of the Pennsylvania view may be traced to *Michelin Tire Co. v. Schulz.*[15] In *Michelin* the plaintiff was the manufacturer of automobile tires and the defendant was a Philadelphia tire dealer who purchased tires from the plaintiff. Plaintiff sued to recover the balance due on the purchase price of tires purchased by defendant. The defendant admitted the purchase of plaintiff's products but sought a counterclaim in excess of $5,000 for the alleged lack of durability of the tires purchased.[16] The Pennsylvania Supreme Court found defendant's counterclaim to be fatally defective in that the counterclaim failed to allege any specific defect in the tires purchased.[17] The court also found that there was no warranty of quality breached by the plaintiff, because the plaintiff did not impart a warranty of quality to his tires.[18] The court recognized that plaintiff had made certain representations in advertising brochures but found that such representations did not constitute a warranty.

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9. *See, e.g.*, Kassab v. Central Soya, 432 Pa. 217, 237 n.12, 246 A.2d 848, 857 n.12 (1968); Harry Rubin & Sons, Inc. v. Consolidated Pipe Company, 396 Pa. 506, 512-13, 153 A.2d 472, 476 (1959); Michelin Tire Co. v. Schulz, 295 Pa. 140, 144, 145 A. 67, 68 (1929). *Cf.* Neville Chemical Co. v. Union Carbide Corp. 422 F.2d 1205, 1228 (3d Cir. 1970); Smith v. Firestone Tire and Rubber Company, 255 F. Supp. 905, 908 (E.D. Pa. 1966).

10. Michelin Tire Co. v. Schulz, 295 Pa. 140, 144, 145 A. 67, 68 (1929).

11. Harry Rubin & Sons, Inc. v. Consolidated Pipe Company, 396 Pa. 506, 512-13, 153 A.2d 472, 476 (1959).

12. Kassab v. Central Soya, 432 Pa. 217, 237 n.12, 246 A.2d 848, 857 n.12 (1968).

13. *See, e.g.*, Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1227 (3d Cir. 1970).

14. *See, e.g.*, Peters, *Remedies for Breach of Contracts*, 73 YALE L.J. 199, 276-277 (1963). *See also*, C. MCCORMICK, DAMAGES, § 176 at 676 (1935).

15. 295 Pa. 140, 145 A. 67 (1929).

16. *Id.* at 140-41, 145 A. at 67-68.

17. *Id.* at 141, 145 A. at 68.

18. *Id.*

Justice Walling, writing for a unanimous court, rejected defendant's counterclaim for loss of business caused by the alleged inferiority of plaintiff's tires:

> So far as appears, the tires in question were all used by defendant's customers and paid for, so he lost nothing. What he claims is that because the tires were less durable than recommended he lost customers, which otherwise he would have retained and whose business would have netted him a profit in the amount he sets up as a counter-claim. *This is entirely too speculative and not the proper measure of damages.* Had there been a warranty of quality, which, as we have seen, there was not, the true measure of damages, for breach thereof, would in general be the difference between the value of the goods as warranted and those delivered. . . .[19]

The court's criticism of the damages being "too speculative" was fully warranted under the facts of the case. As the court noted:

> Furthermore, the counterclaim is so indefinitely stated as to be fatally defective. It fails to state the name of plaintiff's agent who is alleged to have made the statements as to the durability of the tires, or the name of a single customer whose business defendant claims he lost or the amount of his, the customer's, business or the profits thereof which would have resulted. Mere columns of figures showing imaginary losses are insufficient.[20]

In essence the defendant failed to plead any evidence tending to substantiate his counterclaim.

Thirty years after *Michelin* the Pennsylvania Supreme Court was again confronted with the issue of whether loss of good will was a compensable element of damages. In *Harry Rubin & Sons v. Consolidated Pipe Co.*,[21] the plaintiffs sought $50,000 for the loss of good will and damage to their business reputation because of defendant's breach of contract.[22] The plaintiffs contended that under the Uniform Commercial Code an aggrieved party could recover for loss of good will.[23] The plaintiffs relied on Sections 2-713,

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19. *Id.* Judge Walling noted:
> No specific defect in the tires is averred, and the agreements by which they were purchased contained no warranty of quality. True, plaintiff's circulars stated that its tires had, under tests given, and would average, 35 per cent more mileage than other good tires . . . that the tires in question when used gave less, and not more, mileage than other good tires. . . . A mere statement as to quality, although extravagant or in the nature of puffing, is not a warranty.

Id.

20. *Id.* at 144, 145 A. at 68 (emphasis added).
21. 396 Pa. 506, 153 A.2d 472 (1959).
22. *Id.*
23. The plaintiff argued that:
> Both section 2-713 and 2-715(2) authorize the buyer's loss of good will, as an item of recoverable damage, contrary to the holding of the court below. Plaintiffs should be allowed to show that the defendants had reason to know that plaintiff's customers were relying upon plaintiffs to deliver to them the hoops ordered from defendants, and that another source of supply could not be obtained in time to satisfy that expectation. On such proof plain-

2-715(2) and 1-106(1) of the Uniform Commercial Code in support of their contentions.[24] The defendants argued that loss of good will was not a proper item of damages. The defendants grounded their contentions on the theory that loss of good will is too speculative. The defendants also contended that to permit recovery for loss of good will would be contrary to established custom and usage.[25]

The Supreme Court of Pennsylvania rejected the plaintiffs' contentions and held that a buyer could not recover for injury to good will and business reputation under Section 2-715(2) of the Uniform Commercial Code. The court noted there was not any existing judicial authority in Pennsylvania which would have supported recovery under the Uniform Sales Act, and elected to follow the "too speculative for recovery" position set forth in *Michelin*. Writing for a unanimous court, Justice Benjamin Jones stated:

> Our research fails to reveal any judicial authority in Pennsylvania which sustains under the Sales Act, a recovery for a loss of good will occasioned either by nondelivery or by the delivery of defective goods. As this court stated in Michelin Tire Co. v. Schulz, 295 Pa. 140, 144, 145 A. 67, 68, 'So far as appears the tires in question were all used by defendant's customers and paid for, so he lost nothing thereon. What he claims is that, because the tires were less durable than recommended he lost customers. . . . This is entirely too speculative and not the proper measure of damages.' *There is no indication that the Uniform Commercial Code was intended to enlarge the scope of a buyer's damages to include a loss of good will. In the absence of a specific declaration in this respect, we believe that damages of this nature would be too speculative. . . .*[26]

The court's narrow interpretation of the Uniform Commercial Code

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tiffs should be able to recover for damage to their business reputation in failing to serve their customers at a time when their customers desired prompt delivery to take advantage of a great, but short-term demand.

Brief for Appellant at 18, Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 396 Pa. 506, 153 A.2d 472 (1959).

24. *Id.* at 18-19.

25. Defendants stated that:

Loss of good will and business reputation is not a compensable item of damage even by the most liberal construction of "consequential damage." The many unknown factors which enter into the term "good will" render a determination of its value highly speculative, if not impossible. To hold a seller of goods, in the event of his failure to deliver, liable for possible impairment of the business reputation of the buyer or his loss of good will, would impose a burden upon business contrary to one of the underlying purpose expressed in Article 1-102(2)(b) [UNIFORM COMMERCIAL CODE] . . . .

Brief for Appellees at 12, Harry Rubin & Sons, Inc. v. Consolidated Pipe Co., 396 Pa. 506, 153 A.2d 472 (1959).

26. 396 Pa. at 512-13, 153 A.2d at 476 (emphasis added).

is regrettable, and not fully warranted. As the plaintiff contended, Section 2-715(2)(a) expressly provides for a buyer's recovery for "any loss resulting from the general or particular requirements and needs of which the seller at the time of contracting had reason to know. . . ." One of the general or particular requirements which a seller is held to know is the resale of the goods by the buyer.[27] The court appears to have ignored the rule of liberal construction[28] and also the liberal administration of remedies provision provided for by the Code.[29] The court also elected to adopt the view of the Second Circuit in *Armstrong Rubber Co. v. Griffith*,[30] that to allow recovery for loss of good will would open the floodgates to allow recovery for almost anything when defective goods are sold.[31] It is difficult to justify the court's reliance on *Armstrong*. The New York courts have indicated their willingness to allow recovery for loss of good will as an element of special damages in proper cases,[32] contrary to the predictions of Judge Augustus Hand in *Armstrong*.[33]

As recently as 1968 the Pennsylvania Supreme Court again announced that it was wedded to the "too speculative for recovery" dogma propagated by *Michelin*. In *Kassab v. Central Soya*,[34] after abrogating the privity of contract requirement in implied warranty cases, the court held that the owner of a cattle herd was entitled to recover damages for the diminution of value of the herd which occurred as a result of its ingesting defendant's harmful drug. The plaintiffs contended that community knowledge of the effects of the cattle feed on the herd resulted in his inability to sell his stock except at beef prices. The court held the plaintiffs could recover for the diminution in value of the herd if they could establish that the decreased value was the proximate result of defendants' breach of warranty.[35] The court expressly relied on Section 2-715(2)(b) of the Uniform Commercial Code as the basis for allowing recovery if the plaintiffs could establish causation.[36] Mr. Justice Roberts,

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27. UNIFORM COMMERCIAL CODE § 2-715, comment 6.
28. UNIFORM COMMERCIAL CODE § 1-102.
29. UNIFORM COMMERCIAL CODE § 1-106.
30. 43 F.2d 689 (2d Cir. 1930).
31. 396 Pa. at 512-13, 153 A.2d at 476.
32. *See, e.g.*, Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 13 Misc. 2d 129, 178 N.Y.S.2d 521 (Sup. Ct. 1958); Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 110 N.Y.S.2d 734 (Sup. Ct. 1951); Associated Spinners, Inc. v. Massachusetts Textile Co., 75 N.Y.S.2d 263 (Sup. Ct. 1958) (recovery denied for other reasons). *But see*, Tracton v. A & O Novelties Co., 32 Misc. 2d 991, 223 N.Y.S.2d 565 (Sup. Ct. 1961).
33. *See* notes 65-73 and accompanying text *infra*.
34. 432 Pa. 217, 246 A.2d 848 (1968).
35. *Id.* at 236, 246 A.2d at 857.
36. *Id.* Section 2-715(2)(b) of the Uniform Commercial Code provides that:

> (2) Consequential damages resulting from the seller's breach include . . .
> (b) the injury to person or property proximately resulting from any breach of warranty.

UNIFORM COMMERCIAL CODE § 2-715(2)(b).

writing the opinion of the court, noted that recovery was permissible regardless of whether the herd was actually harmed by defendants' feed or whether the buying community just refused to buy from the herd because they thought the cattle were subject to reproductive disorders.[37] In a footnote the court attempted to distinguish possible recovery by the plaintiffs in *Kassab* from the loss of good will situation found in *Rubin*. The court explained recovery in *Kassab* by stating:

> Recovery for the diminution in value of specific property caused by a refusal of the buying community to assign a market value to that property equal to what it was worth prior to its being affected by seller's defective product must not be confused with recovery for loss of good will to a business caused by community knowledge that the seller's defective products were once used or sold by that business. *Since the loss of good will cannot be measured by the diminution in value of any specific property belonging to the aggrieved buyer, unlike the present case, such good will loss is too speculative and hence not a compensable element of damages under section 2-715 of the code. Harry Rubin & Sons, Inc. v. Consolidated Pipe Company of America, Inc.*, 396 Pa. 506, 153 A.2d 472 (1959).[38]

The court's basic distinction was, therefore, in a loss of good will claim, the claimant cannot point to any specific piece of property which has been injured by the seller's breach. From this premise that the buyer cannot measure diminution of any specific property, the court therefore concludes that any loss of good will would be too speculative to permit recovery. It is submitted that under Section 2-715(2)(a) of the Code, it is unnecessary for an aggrieved buyer to establish injury to any specific property. The Code requires only that the buyer establish his extent of loss which is reasonable under the circumstances.[39] The Code expressly provides that consequential damages include "any loss resulting from the general or particular requirements" of the buyer which the

37. 432 Pa. at 236-37, 246 A.2d at 857. Justice Roberts stated:
> We believe that under section 2-715(2)(b) of the Uniform Commercial Code appellants should be allowed to recover for the diminution in value of their cattle provided they can establish that this diminution proximately resulted from appellees' breach of warranty. It does not matter whether the cattle lost value because they in fact could not reproduce, or because no one in the community would buy them out of a reasonable fear that the stilbestrol they ate might cause reproductive disorders. For, if either be true, it can be fairly said that appellant's property has been damaged due to the feed sold by appellees.

Id. at 236-37, 246 A.2d at 857.

38. *Id.* at 237 n.12, 246 A.2d at 857, n.12 (emphasis added).

39. UNIFORM COMMERCIAL CODE § 2-715, comment 3. *See also*, UNIFORM COMMERCIAL CODE § 1-106, comment 1.

seller had reason to know at the time of contracting.[40] It is submitted that the language of Section 2-715(2)(a) of the Code is sufficiently broad to encompass loss of good will as a recoverable element of damages *if* the aggrieved buyer can establish the extent of his loss in a reasonable manner.[41] A review of pre-Uniform Commercial Code cases indicates a willingness of several jurisdictions to permit recovery of damages for loss of good will under the consequential damage provisions of the Uniform Sales Act.

Loss of Good Will Under the Uniform Sales Act

As early as 1929 Pennsylvania announced that loss of good will was not a compensable element of damages under the applicable provisions of the Uniform Sales Act.[42] A 1928 decision of the First Circuit Court of Appeals, however, predated *Michelin*, and allowed recovery for loss of good will. In the landmark case of *Barrett Co. v. Panther Rubber Mfg. Co.*,[43] the court held that a $20,000 award for loss of good will was permissible under the Uniform Sales Act.[44] The court grounded its decision on the obvious fact that the defective materials supplied by the seller had been introduced into commerce under the buyer's trade mark, and the unmerchantability of the products would have a lasting effect on the image of the buyer's product. The court upheld the $20,000 award to the buyer for loss of good will, stating:

> The record shows that in 1920 the plaintiff had a large business, and that this business was acquired by years of a competent course of manufacture and sale. . . . This business was 98 per cent heels. The testimony of competent witnesses shows that the reputation of its product was high with jobbing trade and its heels were 'easy to sell.' It becomes evident that there was a substantial degree of good will. It appears that, as a result of defendant's action, the plaintiff put out into the trade about three-quarters of a million dollars worth of heels which proved unmerchantable. These heels were largely scattered in the trade, to the lasting detriment of the reputation of plaintiff's product.[45]

The court allowed recovery without insisting upon a showing of mathematical accuracy. The court recognized that loss of good

40. Uniform Commercial Code § 2-715(2)(a). *See also*, notes 5, 6, and 7 *supra* and accompanying text.

41. *But see*, W. Hawkland, Sales & Bulk Sales 141 (1958). Dean Hawkland suggests:

> But [2-715] does not seem to permit speculative damages, and, consequently, expected profits are not allowed by it, unless they clearly would have been earned. By the same token, the buyer should not be permitted to speculate as to the loss of profits resulting from the alienation of customers. This is all taken care of by imposing upon the buyer the burden of proving the extent of the loss by way of customer alienation.

Id. at 141.

42. *See, e.g.*, Michelin Tire Co. v. Schulz, 295 Pa. 140, 145 A. 67 (1929).

43. 24 F.2d 329 (1st Cir. 1928).

44. *Id.*

45. 24 F.2d at 337.

will is not susceptible to precise determination, but must be gauged by approximation.[46]

The courts of New York have also recognized that loss of good will should be a permissible element of special damages by an aggrieved buyer under the Uniform Sales Act.[47] *Cramerton Mills v. Nathan & Cohen Co.*,[48] sustained the sufficiency of a defendant-cloth merchant's counterclaims for loss of good will against a plaintiff-manufacturer who supplied defective cloth. It should be noted that the court in *Cramerton* was not faced with the issue of whether the defendant had established the extent of its loss of good will but rather whether the defendant had a right to recover damages for loss of good will.[49] The court held that the defendant "may recover, as special damages, the amount of injury which it has sustained to its business, reputation and good will."[50] The basis for the court's decision was section 69(6) of the Uniform Sales Act which provides:

> The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.[51]

The court expressly rejected the difference in value measure of damages provision of the Uniform Sales Act.[52] The court found that special circumstances of the defendant established proximate damage greater than the difference between the value of the goods

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46. *Id.*

47. *See* cases cited note 32 *supra.*

48. 231 App. Div. 28, 246 N.Y.S. 259 (Sup. Ct. 1930).

49. *Id.* at 34, 246 N.Y.S. at 267.

50. *Id.* It is interesting to note that the court considered good will to be a property right which was injured by plaintiff's breach of warranty. The court stated:

> In our opinion special damages alleged in the answer are recoverable by defendant-appellant from plaintiff or from its assignor . . . as the proximate result of the breach of warranty made upon the sale of goods in question to defendant-appellant. These special damages do not consist of loss of profits but flow from an alleged serious injury to the defendant's reputation and good will caused by the defective goods delivered to defendant-appellant and which it converted and sold and delivered to its customers. [T]he defendant . . . enjoyed a reputation for dealing in goods of the highest type and quality. Such good will and business reputation constituted a valuable property right, and the defendant-appellant may recover the damage which it sustained flowing directly from the delivery to it of goods of faulty manufacture resulting in the ultimate alienation of its customers.

Id. at 34, 246 N.Y.S. at 267. *Compare with* Kassab v. Central Soya, 432 Pa. 217, 237 n.12, 246 A.2d 848, 857 n.12 (1968).

51. UNIFORM SALES ACT § 69(6).

52. 231 App. Div. at 34, 246 N.Y.S. at 267. For discussion of the difference in value provision of the UNIFORM SALES ACT § 69(7) see note 5 *supra.*

at the time of delivery to the buyer and the value the goods would have had if they answered to the warranty.[53] The court also placed substantial reliance on the pre-Uniform Sales Act decision of *Swain v. Schieffelin*[54] and also *Barrett Co. v. Panther Rubber Mfg. Co.*[55]

In *Swain*, the manufacturer of ice cream was permitted to recover the loss of good will caused by two druggists who supplied the manufacturer with a dangerous poison instead of a harmless food coloring ordered by the ice cream maker. The court discussed the general contract principle which would limit damages for breach of warranty of quality to the difference in value test, and rejected its application to the ice cream maker. Instead, the court suggested:

> In case a manufacturer of goods sells them to a purchaser to be used for a particular purpose, which is known by the vendor at the time of the sale, a more liberal rule prevails than in cases where like articles are sold as merchandise, for general purposes.[56]

The basis for the rule is simply that a seller, with knowledge of the buyer's particular purpose, should be liable for

> [s]uch damages as naturally flow from the breach of his contract and which he, or any reasonable man, might apprehend would follow from the breach.[57]

Two New York cases have cast doubt upon the recovery of damages for loss of good will in a breach of warranty action. In *Moran v. Standard Oil Co.*,[58] Judge Cardozo refused to permit recovery of damages for alienation of customers because of defects in the defendant's paint. The court held that the plaintiff failed to prove his loss with reasonable certainty.[59] The court did recognize, however,

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53. The special circumstances found to exist by the court included: a warranty of fitness for a particular purpose; knowledge by the seller of the proposed use of the goods intended by the buyer, presence of a latent defect undiscoverable by the buyer, and knowledge that the goods would be converted and resold by the buyer. 231 App. Div. at 34, 246 N.Y.S. at 267-68.

54. 131 N.Y. 474, 31 N.E. 1025 (1892).

55. 24 F.2d 329 (1st Cir. 1928).

56. 131 N.Y. at 476, 31 N.E. at 1026.

57. *Id.*

58. 211 N.Y. 187, 105 N.E. 217 (1914).

59. *Id.* at 192, 105 N.E. at 219. The plaintiff attempted to establish his loss of trade through the introduction of a schedule which purported to represent his loss of profits because of alienation of customers. The schedule consisted of a compilation of customer's names, date of last transaction with the customer, and the amount of profit which plaintiff estimated he would have received if the customer continued to do business with him. Judge Cardozo rejected the plaintiff's method of proof stating:

> There was no proof of the extent or number of the sales which the plaintiff had made to any of the customers on the list. There was nothing beyond the fact that he had dealt with them, that the dealings had ceased, and that they told him that his unsatisfactory paint was the cause of their defection. . . . The plaintiff did not place before the jury the volume of his business with each customer, and the circumstances tending to show the reasons for the breaking off of their dealings. If that had been done, it may be

that plaintiff did have a right to recover for his losses because the defendant had promised to remedy any losses of the plaintiff caused by the defective paint.[60] Judge Cardozo made one sweeping statement which has been adopted by a number of courts to deny recovery for loss of good will.[61] Judge Cardozo formulated a general rule that

> [w]hen defective goods are sold, the measure of damages does not include the profits lost from the vendee's failure to resell them, unless such a loss is proved to have been within the contemplation of the parties. . . . Still less does it include the loss of profits resulting from the alienation of the customers. We may assume that such losses would be recoverable if the vendor undertook to indemnify against them; but they ought to be proved with reasonable certainty. . . . The plaintiff failed to satisfy that requirement and his verdict may not stand.[62]

In *Armstrong Rubber Co. v. Griffith*,[63] the Court of Appeals of the Second Circuit held that a district court had properly excluded evidence of defendant's injury to his businesss reputation. The defendant contended that he was entitled to special damages for injury to his business reputation in a counterclaim alleging breach of warranty against the plaintiff. The court found that the defendant could not avail himself of the special damages provision of the Uniform Sales Act,[64] because there were not any special circumstances to warrant its application. The court rejected the contention that a seller's knowledge that the goods were to be resold, and if defective, would cause the buyer a loss of profits, was sufficient to constitute special circumstances.[65]

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that the jury from such premises might have reached a conclusion as to the resulting loss of profits.

Id. at 192, 105 N.E. at 219.

60. *Id.* at 191, 105 N.E. at 218.

61. *See, e.g.*, Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363 (5th Cir. 1964); Allied Chemical Corp. v. Eubanks Industries, Inc., 155 So. 2d 740 (Fla. App. 1963).

62. 211 N.Y. at 192, 105 N.E. at 220.

63. 43 F.2d 689 (2d Cir. 1930).

64. UNIFORM SALES ACT § 69(7).

65. 43 F.2d at 690. The court stated:

> The question is whether there were any "special circumstances" in the present case which entitled the defendant to recover damages for loss of his good will. Knowledge that the goods are to be resold, and, if defective, will be the occasion of a loss of profits is not enough to justify an award of special damages.

Id. at 690.

The view that knowledge that the goods are to be resold is not a special circumstance appears to be rejected under the Code. *See, e.g.*, UNIFORM COMMERCIAL CODE § 2-715, comment 6 which states:

> In the case of sale of wares to one in the business of reselling them, *resale is one of the requirements of which the seller has reason to*

It is suggested that *Armstrong Rubber* was decided on the ground of public policy. Although the court cast its rationale in terms of damages not within the contemplation of the parties,[66] it is apparent that the court feared that recovery of good will damages would open the floodgate for recovery of all types of damages without limitation. Judge Hand expressed the fear of the court when he stated:

> If the plaintiff here can recover for loss of good will, it is difficult to see what limits are to be set to the recovery of such damages in any case where defective goods are sold and the vendee loses customers. Indeed, if such were the holding, damages which the parties never contemplated would seem to be involved in every contract of sale.[67]

In arriving at its decision the court discounted *Swain v. Schiefflin*[68] as not being the law of New York,[69] and distinguished *Barrett Co. v. Panther Rubber Mfg. Co.*,[70] as involving an implied warranty for a particular purpose.[71] The court concluded that existing case law,[72] "as well as what we regard as the most sound dictates of public policy, would seem to preclude a recovery here for loss of good will."[73]

Later New York cases appear to have spurned *Armstrong Rubber* and *Moran* and have recognized the right of a buyer to recover damages for injury to business reputation and good will.[74] Although the recovery of damages for injury to good will has been limited to instances where there has been a warranty of fitness for a particular purpose,[75] there is some indication that the New

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know within the meaning of subsection (2) (a) [of § 2-715].
UNIFORM COMMERCIAL CODE § 2-715, comment 6 (emphasis added).

66. 43 F.2d at 690-91. Judge Augustus N. Hand, writing the opinion of the court stated:

> We can hardly doubt that such an uncertain and perilous risk as indemnification against loss through alienation of customers was never contemplated by the plaintiff in this case. Nothing was said about it in the negotiations between the parties, and it seems quite unlikely that it should have been intended.

Id. at 690-91.

67. *Id.* at 691.

68. 134 N.Y. 471, 31 N.E. 1025 (1892).

69. 43 F.2d at 691.

70. 24 F.2d 329 (1st Cir. 1928).

71. 43 F.2d at 691. The court correctly pointed out that *Barrett* involved an implied warranty for a particular purpose. In *Barrett*, the buyer specifically relied on the seller's skill and judgment. In *Armstrong Rubber*, the buyer purchased tires for resale in the general trade, and not for a particular purpose as the oil in *Barrett*.

72. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); Moran v. Standard Oil Co., 211 N.Y. 187, 105 N.E. 217 (1914).

73. 43 F.2d at 691.

74. *See, e.g.*, Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 13 Misc. 2d 129, 178 N.Y.S.2d 521 (Sup. Ct. 1958); Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 110 N.Y.S.2d 734 (Sup. Ct. 1951); Associated Spinners, Inc. v. Massachusetts Textile Co., 75 N.Y.S.2d 263 (Sup. Ct. 1948) (damages not allowed because of contract provisions, and failure to allege goods sold for a specific purpose).

75. *See, e.g.*, Swain v. Schiefflin, 134 N.Y. 471, 31 N.E. 1025 (1892);

York courts may be willing to allow recovery where there is not a warranty of fitness for a particular purpose.[76]

Other courts have also recognized the loss of good will or loss of reputation as a recoverable element of damages.[77] Courts which recognize the recovery of such loss reject contentions that loss of good will is too speculative to permit recovery.[78]

In *Stott v. Johnston*,[79] the Supreme Court of California upheld a judgment of $10,000 in damages in favor of a house painter who used defendant's defective paint.[80] The court unequivocally rejected defendant's arguments that, as a matter of law, the plaintiff could not recover damages for loss of good will because injury to good will is too speculative to permit recovery of damages. The court held that such damages were properly allowed under the authority of *Cramerton Mills, Royal Paper Box Co. v. Munro & Church Co.*,[81] and sections 69(6) and (7) of the Uniform Sales Act, if there was evidentiary support to establish such damages. An underlying reason, which was not fully articulated by the court, is that a plaintiff should not be denied recovery when it is certain that injury has resulted but there is uncertainty as to the amount.[82] As the court noted:

> [U]pon submitting the damage issue to the jury, the court defined 'good will of a business . . . as the expectation of continued public patronage.' . . . It is not open to argument that the sale of defective paint to a successful painting contractor—which results in his painting 50 or more houses and buildings with the paint and it then begins to 'peel, crack, discolor, powder and come off' within six months or less—can do serious harm to his reputation as a painting contractor in that particular community.[83]

The court found that loss of good will must have been within the contemplation of the parties at the time of contracting because of

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Cramerton Mills, Inc. v. Nathan & Cohen Co., 231 App. Div. 28, 246 N.Y.S. 259 (Sup. Ct. 1930). *See also* Associated Spinners Inc. v. Massachusetts Textile Co., 75 N.Y.S.2d 263 (Sup. Ct. 1948).

76. *See, e.g.*, Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 13 Misc. 2d 129, 178 N.Y.S.2d 521 (Sup. Ct. 1958); Log Cabin Rest, Inc. v. Alpine Wine & Liquor Corp., 110 N.Y.S.2d 734 (Sup. Ct. 1951).

77. *See, e.g.*, Isenberg v. Lemon, 84 Ariz. 340, 327 P.2d 1016 (1958); Stott v. Johnston, 36 Cal. 2d 864, 229 P.2d 348 (1951); Sol-O-Lite Laminating Corp. v. Allen, 223 Ore. 80, 353 P.2d 843 (1960). *See also*, Superwood Corporation v. Larson-Stang, Inc., 311 F.2d 735 (8th Cir. 1963).

78. See cases cited note 76 *supra*.

79. 36 Cal. 2d 864, 229 P.2d 348 (1951).

80. *Id.* at 868, 229 P.2d at 352.

81. 284 Mass. 446, 188 N.E. 223 (1933).

82. 36 Cal. 2d at 868, 229 P.2d at 352.

83. *Id.*

the factors surrounding the transaction.[84]

In *Sol-O-Lite Laminating Corp. v. Allen*,[85] the Supreme Court of Oregon affirmed a $1,000 verdict for breach of warranty and damages to defendant Allen's business good will. The court found plaintiff's objections that damage to good will was too remote and speculative to be without merit. Although the court acknowledged that damage to good will is not capable of exact determination, it declined to adhere to the principle of denying recovery for injury to good will:

> We believe it is a proper basis for the recovery of damages in an otherwise adequate case of breach of warranty where, . . ., there is evidence that the seller knew the goods were being purchased for resale for a use which required a certain standard of clarity and that they were being resold with similar goods which were sold under the purchaser's trade name. Such damages then can hardly be said not to be within the contemplation of the parties.[86]

Similarly, the Supreme Court of Arizona, in *Isenberg v. Lemon*,[87] recognized the right of a purchaser to recover damages for loss of good will for a breach of warranty by the vendor. The court, without extensive discussion, found that the vendor knew the purchaser was procuring paint for resale to painting contractors. Although the court rejected Lemon's evidence of his amount of loss, it did note that Lemon did lose the business of large paint contractors because of Isenberg's inferior product.[88]

It is submitted that under the foregoing decisions the right to recover damages for injury to business good will was recognized under the Uniform Sales Act by the Courts of Arizona, California, New York, and Oregon. Generally, recovery must be predicated on a showing of actual injury to business good will. While such injury is not capable of precise determination, it is not too remote or speculative to permit recovery. An aggrieved purchaser may establish injury to his good will by establishing loss of customers and business following the resale of the vendor's product. An aggrieved buyer must be careful, however, to establish a casual connection between the vendor's defective merchandise and the resulting loss of patronage.

In *Sol-O-Lite*, the buyer not only established his loss of business through decreased profits, he also had his salesmen recount "in detail their trials or tribulations with customers who had received the defective material."[89] The salesmen testified that former customers would refuse to continue to do business with them.[90]

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84. *Id.*
85. 223 Ore. 80, 353 P.2d 843 (1960).
86. *Id.* at 88, 353 P.2d at 850.
87. 84 Ariz. 340, 327 P.2d 1016 (1958).
88. *Id.*
89. 223 Ore. 87, 353 P.2d at 849.
90. *Id.*, 353 P.2d at 849-50.

The buyer also had four former customers called as witnesses. The former customers testified that after receipt of the defective paint they had reduced or terminated their dealings with the buyer.

Implicit in *Stott*, and its progeny,[91] is that a buyer may recover damages for loss of good will because of seller's breach of warranty, where goods are sold for a particular purpose which the seller knows at the time of contracting and where the buyer relies on the seller's skill and judgment. Although the requirements of sale of goods for a particular purpose and reliance on the seller's skill and judgment do not appear to be prerequisites under the Code, it is submitted that the existence of such facts would constitute special circumstances justifying recovery of consequential damages under the Code.[92] The decisions of other jurisdictions fully support the recovery of damages for loss of good will or business reputation under the Code, if such damages can be established by a reasonable method.[93] Although the cases which allow recovery have been generally within the area of breach of warranty actions, it is submitted that under the Code recovery of damages for loss of good will would be proper in an action for non-delivery or repudiation.[94]

CONCLUSION

The existing Pennsylvania view would prohibit an aggrieved buyer from attempting to establish damages for loss of good will at the pleading stages. The Pennsylvania view does not distinguish between recovery of damages for loss of good will in breach of warranty actions and recovery of damages for loss of good will in a breach of contract for non-delivery action. In either instance recovery for injury to good will is denied.

The Pennsylvania view is inconsistent with the broad provisions of the Uniform Commercial Code which allow recovery for "any loss"[95] resulting from the seller's breach. It is submitted that the pre-Code cases which permit recovery of damages for loss of good will are consistent with the consequential damage provision of the Uniform Commercial Code. Such cases recognize the right of an aggrieved buyer to recover damages for loss of good will *if he can establish such damages by a reasonable method.* A basic dis-

91. See cases cited at note 77 *supra.*
92. *See, e.g.,* UNIFORM COMMERCIAL CODE §§ 2-714(2), (3); 2-715(2)(a), and comments thereto.
93. *See* cases cited at note 77 *supra.*
94. UNIFORM COMMERCIAL CODE § 2-715(2). *See also,* Walpole v. Prefab Mfg. Co., 103 Cal. App. 472, 230 P.2d 36 (1951).
95. UNIFORM COMMERCIAL CODE § 2-715.

tinction between the Pennsylvania cases and those cases which recognize a right to damages for injury to good will is that the latter allow the aggrieved buyer to attempt to show his damages while the Pennsylvania cases prohibit the aggrieved buyer from attempting to establish his injury. The Pennsylvania courts dispose of the matter by holding that such damages are too speculative for recovery. Courts which recognize the right of the aggrieved buyer to recover damages for loss of good will insist that such damages be established by reasonable proof. If the aggrieved buyer fails to establish his damages, he is precluded from recovery. The distinction is that the buyer has the opportunity of proving his injury. Pennsylvania precludes such proof.

In light of the liberal provisions of the Code, it is submitted that a buyer should be allowed to prove his injury to good will in either a non-delivery or breach of warranty action. Although the buyer's burden of proof will be a difficult one to carry, it is submitted that such damages can be established in instances of actual damage to good will and business reputation.

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