

1-2011

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Recommended Citation

72 No. 4 U.C.C. Bulletin 1 (January 2011).

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UCC Bulletin
By Publisher's editorial staff. Particular Articles authored as noted.

January 2011

Late Delivery--Measure of Damages

By Sidney Kwestel [\[FNa1\]](#)

One would think that the measure of damages to be applied where the seller delivers goods late would be readily ascertainable from the Uniform Commercial Code (U.C.C.), but it apparently is not so simple. Take the facts in *Fertico Belgium S.A. vs. Phosphate Chemicals Exports Ass'n., Inc.* [\[FN1\]](#) There, Phosphate (S), an exporter of phosphate fertilizer, entered into a contract in October to sell Fertico (B), a fertilizer trader, two separate shipments of fertilizer--one for 15,000 tons to be delivered on or before November 20, and the other for 20,000 tons to be delivered by November 30. S knew that B's timely delivery was necessary in order for B to fulfill a contract that it had to resell the fertilizer to Alterweed (C). As required, B timely opened a \$1.7 million letter of credit in October in S's favor. When S projected a delay in delivery of the first shipment which would preclude B from timely performing on its resale contract with C, B properly cancelled the second shipment and purchased 35,000 tons of fertilizer from another source. B timely delivered these 35,000 tons to C under a renegotiated contract, thereby avoiding a breach of its contract with C but incurring a loss because the cover price was \$700,000 higher than the contract price. S's first shipment finally arrived on December 17. Because S had already obtained payment under B's letter of credit, B believed that it had no choice but to take delivery of the 15,000 tons, which it did. A few months later B sold these 15,000 tons to Janseen (D) at a \$454,000 profit. What is B entitled to recover and why?

On these facts, a majority of the New York Court of Appeals awarded B "cover" damages of \$700,000, representing the difference between the cost of cover and the contract price. Additionally, the majority held that the profit B made on the sale to D of the late-delivered 15,000 tons was not an expense saved as a result of S's breach, and thus S was not entitled to a \$454,000 credit under [U.C.C. § 2-712\(2\)](#). In explaining why B was entitled to the profits on the resale of the late delivered fertilizer, the majority said: [\[FN2\]](#)

At the same time, [\[U.C.C.\] § 1-106](#) directs that the remedies provided by the [U.C.C.] should be liberally administered so as to put the aggrieved party in as good a position as if the other party had fully performed. Had Phoschem fully performed, Fertico would have had the benefit of the Alterweed [C] transaction and, as a trade of fertilizer, the profits from the Janseen's [D's] sale as well. "Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable, unless such gains could

not have been made, had there been no breach.” (citations omitted). Fertico's profit made on the sale of a nonspecific article such as fertilizer, of which the supply in the market is not limited, should not therefore be deducted from the damages recoverable from Phoschem (citations omitted).

In reaching its conclusion that Fertico was entitled to both cover damages and the profits on the sale to D, the majority took the position that the facts were “exceptional” because Fertico had to cover to meet its resale obligation to C “and yet acquired title and control over the later-delivered fertilizer from Phoschem.” [FN3] Indeed, the majority said that Fertico was “compelled” to take the late delivery because Phoschem had been paid under Fertico's letter of credit. [FN4] However, Fertico was not “compelled” to take the late delivery. It had the same choices that every buyer has under the U.C.C. when goods are delivered late. It had two options. Option (a) was to reject Phoschem's nonconforming performance [FN5] --the late delivery of the 15,000 tons-- and (i) to recover damages pursuant to [U.C.C. §§ 2-711](#) and [2-712](#) as well as (ii) to hold the 15,000 tons as security and resell them pursuant to [U.C.C. § 2-712\(3\)](#) for the \$1.7 million prepayment [FN6] with S being entitled to a credit for any excess --here \$454,000-- on the resale. [FN7] Option (b) was to accept the late delivery, resell it for its own account, and sue for any damages under [U.C.C. § 2-714](#). [FN8] Thus Fertico had reasonable alternatives, and rather than being compelled, it freely chose to accept and not reject the late delivery.

Further, the majority held that Fertico was entitled to make a cover purchase for the full 35,000 tons pursuant to [section 2-711](#). However, it does not explain why [section 2-711](#) applies to the late delivered 15,000 tons that Fertico accepted. [Section 2-711](#) seems clear: it gives a buyer the right to cover and collect cover damages under [section 2-712](#) where either the seller fails to make delivery or the buyer rejects the seller's tender, not where the seller makes a late delivery that is accepted. Indeed in *Aluminum Distributors, Inc. v. Gulf Aluminum Rolling Mill Co.* [FN9] the federal district court rejected the *Fertico* route and concluded that [sections 2-711](#) and [2-712](#) only apply to a buyer who has not accepted the goods. Therefore, a buyer who has accepted a late delivery is not entitled to the remedies of those sections. [FN10] Nevertheless, in dealing with similar facts as *Fertico* (except that the seller had not prepaid for the late delivered goods), [FN11] the federal court held that the buyer who had accepted a late delivery of aluminum was entitled to recover damages under [sections 2-714](#) [FN12] and [2-715](#) [FN13] for the loss that the buyer sustained in making the cover purchase. As in *Fertico*, the court held that the seller was not entitled to offset the profit that the buyer made on the resale of the late-delivered aluminum against the buyer's loss unless the buyer “fails to prove that it could otherwise have purchased similar aluminum for resale and hence would nevertheless have made these additional sales.” [FN14]

Both the *Fertico* majority and *Aluminum Distributors* appear to have proceeded on the assumption that the buyer accepted and owned the late delivery. [FN15] However, neither court explains why after making a “cover” purchase and seeking to recover cover damages from the seller, the buyer still had the right to accept the late delivery under its contract with the seller and then to sell the late-delivered goods for its own account. Further, the *Fertico* majority does not address the dissent's point that when Fertico made the cover purchase and sued for damages pursuant to [sections 2-711](#) and [2-712](#), Fertico lost its right to accept the late delivery of the 15,000 tons because, among other reasons, [section 2-712\(2\)](#) defines a cover purchase as a purchase of goods “in substitution for those due from the seller.” [FN16] In short, *Fertico* and *Aluminum Distributors* did not pose, and thus did not answer, the key question: did the seller's

duty to deliver under the seller's contract with the buyer survive the buyer's cover purchase and its claim for cover damages, and if so, why? If the seller's duty under the original contract was discharged because the buyer pursued cover damages, then the seller no longer had a duty to perform its promise to deliver, the buyer had no right to take the late delivery for its own account, and in turn, the buyer had no right to resell it and pocket the profit. [\[FN17\]](#)

Thus the first question that must be answered with an explanation is: did the buyer in *Fertico* and *Aluminum Distributors* own the late-delivered goods? If the buyer did not own the late-delivered goods, then it had no right to sell them for its own account, and the seller was entitled to offset the profit on the resale against the buyer's cover damages. Let us turn to a basic contract principle to determine whether a buyer such as Fertico is entitled to ownership of the late delivery. We know that a party's duty under a contract is discharged when that duty has been fully performed. [\[FN18\]](#) The same should be true when a party fails to perform its duty or promise and the injured party chooses to recover damages for the failure of that performance. Why? Because as Professor Corbin states, "The money damages are the legal substitute for the promised performance and in greater part measured by its value; the duty to pay them is a substituted or 'secondary duty', one that arises only after a breach of the 'primary duty' created by the contract." [\[FN19\]](#) Since no U.C.C. provision displaces this basic contract principle, it would be applicable to the situation where a buyer of goods has made a cover purchase to mitigate its damages. [\[FN20\]](#) So, for example, in *Fertico*, upon Phoschem's breach of its primary duty to timely deliver, Phoschem's secondary duty to pay Fertico money damages arose and was substituted for that primary duty. Since Fertico purchased substitute goods that it used to satisfy its resale contract with C in order to minimize or mitigate the loss that it otherwise would have occurred from its inability to perform that resale contract, Phoschem had a secondary duty to compensate Fertico for the \$700,000 loss incurred in making the cover purchase. [\[FN21\]](#) Fertico sought to recover those damages, and in so doing, Phoschem's duty to deliver under the Phoschem-Fertico contract was discharged. Accordingly, it would follow that Fertico no longer had the right to accept for its own account delivery of the delayed 15,000 tons unless it was willing to hold the contract open and forego its claim for cover damages. Stated otherwise, upon Phoschem's breach of its primary duty and Fertico's purchase of substitute goods to avoid the consequences of that breach, Fertico had a choice: Fertico could pursue its claim for cover damages and reject the late delivery *or* it could accept Phoschem's late performance under the Fertico-Phoschem contract and forego its right to cover damages--but it could not do both. In brief, Phoschem's duty to pay cover damages was a secondary or substitute duty for Phoschem's primary duty to timely deliver, and thus Fertico had a right to collect those damages, which it did, which is when Phoschem's duty to deliver under the original contract was discharged. Thus Fertico had no right, under [U.C.C. §§ 2-712, 2-713, 2-714, 2-715](#) or any other U.C.C. provision or contract principle, to collect cover damages and also to keep the 15,000 tons that arrived late. [\[FN22\]](#) To put it colloquially, Fertico was not entitled to have its cake --cover damages for the loss incurred because of the delayed delivery of the 15,000 tons---and eat it too-- ownership of the delayed 15,000 tons. [\[FN23\]](#)

To sum up, a buyer that has properly covered before the arrival of the delayed merchandise, as was the case in *Fertico* and *Aluminum Distributors*, winds up in as good a position --but not in a better position-- as he would have been had his seller properly performed. By covering, the buyer acquires the necessary goods to meet any of its resale obligations. To the extent that the cover price exceeds the contract price, the buyer is entitled to cover damages. However, such a buyer, it seems, should be required to reject the late delivery if it wants to

recover cover damages. Further, as previously explained, such a buyer is not entitled to ownership of the late delivered goods and thus cannot resell them for its own account. [\[FN24\]](#) However, if the buyer does not cover but instead accepts the late delivery, it would be entitled to recover any damages caused by the late delivery and in addition to retain any profit on the resale of the late-delivered goods since it would own them.

[\[FN1\]. *Fertico Belgium S.A. v. Phosphate Chemicals Export Ass'n, Inc.*, 70 N.Y.2d 76, 517 N.Y.S.2d 465, 510 N.E.2d 334, 3 U.C.C. Rep. Serv. 2d 1812 \(1987\).](#)

[\[FN2\]. *Fertico*, 517 N.Y.S. 2d at 469-70.](#)

[\[FN3\]. *Fertico*, 517 N.Y.S. 2d at 469.](#) (Under these facts, the majority said that “our decision does not fit squarely within the available (UCC) remedies urged by the dissent.” Stated otherwise, the majority said that “Fertico's letter of credit had been presented by Phoschem and honored so, under the specific facts of this case, Fertico had no commercially reasonable alternative but to retain and sell the fertilizer.” [Fertico, 517 N.Y.S. 2d at 467.](#)

[\[FN4\]. *Fertico*, 517 N.Y.S. 2d at 467.](#)

[\[FN5\]. U.C.C. § 2-601.](#) Assuming that it was an installment contract under U.C.C. § 612(1), Fertico would have had the right to reject any non-conforming installment which substantially impaired the value of that installment and which could not be cured. [U.C.C. § 2-612\(2\).](#)

[\[FN6\].](#) As a secured party Fertico was certainly in a better position than a buyer who has prepaid and the seller fails to deliver the goods.

[\[FN7\]. U.C.C. §§ 2-711\(3\) and 2-706\(6\).](#)

[\[FN8\]. U.C.C. § 2-714](#) provides in pertinent part that:

(1) Where the buyer has accepted goods ... he may recover damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(3) In a proper case any incidental and consequential damages under the next section [[Section 2-715](#)] may also be recovered.

A late delivery of goods is a “non-conformity of tender” because it is a failure of the seller to perform its contractual obligation to timely deliver the goods. [Franklin Grain & Supply Co. v. Ingram](#), 44 Ill. App. 3d 740, 3 Ill. Dec. 379, 358 N.E.2d 922, 925, 21 U.C.C. Rep. Serv. 53 (5th Dist. 1976). See [1 New York State Law Revision Commission Report, Study of Uniform Commercial Code 572-73 \(1955\)](#) (analyzing 1952 Official Text) (Professor Honnold of the University of Pennsylvania Law School says: “By this language [“any non conformity of tender”] [Section 2-714](#), is not limited to breach of warranty but applies to any deviation from the contractual obligation, such as lateness of delivery or insufficiency of quantity.”) Thus, under [U.C.C. § 2-714](#), an aggrieved buyer may accept the late delivery and recover for any loss in the ordinary course of events resulting from the delay together with any consequential damages.

However, if such a buyer covers before the late delivery arrives it would not be entitled to recover cover damages under [section 2-714](#) for the reasons explained in the text accompanying notes 18-22 *infra*, and for similar reasons, it would not be entitled to the market price contract price differential as damages if it did not cover. See notes 22 and 23 *infra*.

[\[FN9\]. Aluminum Distributors, Inc. v. Gulf Aluminum Rolling Mill Co., 1989 WL 157515 \(N.D. Ill. 1989\).](#)

[\[FN10\]. Aluminum Distributors, 1989 WL 157515 at *4.](#)

[\[FN11\]. Aluminum Distributors, 1989 WL 157515 at *4-5.](#)

[\[FN12\].](#) See note 11 *supra*.

[\[FN13\]. Section 2-715](#) (2) provides in pertinent part that “[c]onsequential 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.” See [Franklin Grain, 358 N.E.2d at 925](#) (consequential damages properly awarded for loss of yield resulting from delayed delivery and therefore delayed application of fertilizer). In *Fertico*, Phoschem would have been liable to Fertico for any consequential damages to the extent that they were not prevented by cover since, at the time that it contracted with Fertico, Phoschem knew of Fertico’s resale contract with C and that Fertico required timely delivery in order to satisfy the Fertico-C contract. See [U.C.C. § 2-715\(2\)\(a\)](#) and cmt. 6.

[\[FN14\]. Aluminum Distributors, 1989 WL 157515 at *5.](#) The court went on to note that if the evidence showed that the price the buyer would otherwise have been required to pay in order to acquire the aluminum to make the post-breach additional sales was higher than the contract price, this price differential could be offset against the buyer’s damages. [Aluminum Distributors, 1989 WL 157515 at *5.](#)

[\[FN15\].](#) If not, it seems clear that the buyer would not be entitled to retain the profit made on the resale of the late delivered goods.

[\[FN16\]. Fertico, 517 N.Y.S. 2d at 471.](#) “The language in [UCC § 2-712](#)-- ‘in substitution for those due from the seller’ --on which the dissent relies--does not appear to address the issue in *Fertico*.” [Section 2-712](#) does not apply unless the buyer first comes within [section 2-711](#), which provides for the cover remedy where the buyer has rightfully rejected or justifiably revoked acceptance. See [Horizons, Inc. v. Avco Corp., 714 F.2d 862, 867, 36 U.C.C. Rep. Serv. 1207 \(8th Cir. 1983\)](#). Put differently, rightful rejection is a condition precedent under [section 2-711](#) to pursuing cover damages under [section 2-712](#). Thus if the buyer has first rightfully rejected, then pursuant to [section 2-711](#), it can seek cover damages under [section 2-712](#). The reverse--if a buyer seeks cover damages that it impliedly rejected--which is the dissent’s premise, has no support in [section 2-711](#) or any other U.C.C. provision. To properly reject, a buyer must follow the procedure prescribed by the U.C.C., including giving notice of rejection to the seller. See [U.C.C. § 2-602](#). Further, the language “in substitution for those due from the seller” appears to be informing us of the type of purchase that complies with [section 2-712](#), that is, the type of

purchase that would be considered a cover purchase. It informs us that a buyer is entitled to cover damages if its purchase--namely the type of goods and the contract terms--are "in substitution for those due from the seller." See [section 2-712](#), cmt. 2; James J. White & Robert S. Sommers, Uniform Commercial Code 7-3 (6th ed. 2010).

[FN17]. Further, whether or not Fertico would have made the sale to D (Janseen) if Phoschem had duly performed would be completely irrelevant.

[FN18]. [Restatement \(Second\) of Contracts § 235 \(1981\)](#).

[FN19]. 5 Arthur L. Corbin, Corbin on Contracts § 995 (1964). See also 5 Arthur L. Corbin, Corbin on Contracts § 990 (1964) ("In the law of Contract the term 'damages' is used to mean compensation in money as a substitute for and the equivalent of the promised performance").

[FN20]. [U.C.C. § 1-103\(b\)\[Rev\]](#).

[FN21]. Fertico was entitled to the cost of cover because Fertico reasonably purchased substitute goods in an effort to avoid the consequential damages which it otherwise would have incurred if it failed to perform its resale contract with C. [U.C.C. § 1-305\[Rev\]](#); [U.C.C. § 2-715\(2\)\(a\)](#), cmt. 6. [West Haven Sound Development Corp. v. West Haven](#), 201 Conn. 305, 514 A.2d 734, 748 (1986) (citing to Restatement Second §§ 350 (2) and cmt. h and 347, cmt. c); [Spang Indus., Inc., Ft. Pitt Bridge Div. v. Aetna Casualty & Surety Co.](#), 512 F.2d 365 (2d Cir. 1975); [Restatement of Contracts § 336 \(2\)\(1932\)](#).

[FN22]. Further, the same basic analysis would follow where the buyer-- whether or not it had prepaid--does not cover and the seller makes a late delivery of the goods. The buyer cannot accept the late delivery and also seek damages measured by the market price-contract price differential. Such a measure of damages would be a substitute for or the equivalent of the seller's promise to deliver, and in the case under discussion, the seller has delivered the goods, albeit late. If the buyer wanted to recover damages measured by the market price-contract price differential it would have to reject the late delivery. See also note 23 infra.

[FN23]. It should be noted that at one point the *Fertico* majority cited and relied on [section 2-714](#) (1), stating that "the loss resulting to Fertico by having to acquire cover, even in the face of its acceptance of a late delivered portion of fertilizer, is properly recovered under [Section 2-714\(1\)](#) (3 Hawkland, Uniform Commercial Code Series, § 2-714:05, at 384-385.)" [Fertico](#), 517 N.Y.S. 2d at 469. However, as explained in the text accompanying notes 18-22 supra, a buyer cannot pursue cover damages where it has covered because the seller failed to deliver on time and at the same time accept the late delivery. There appears to be nothing in [section 2-714](#) that, fairly construed, would displace the contract principle that supports this conclusion.

the Hawkland commentary cited by the *Fertico* majority is at best confusing. It notes that a buyer who has accepted goods may be entitled to recover damages measured by the difference between the market price and the contract price. However, it does not explain why such a measure is appropriate under [U.C.C. § 2-714](#). It cites no case or other authority, and it overlooks the contract principle mentioned in the text accompanying notes 18-21 supra. Indeed, a buyer who has not covered and who accepts a late delivery should not be entitled to damages measured by

the contract price-market price differential since such damages would not be for a loss resulting in the ordinary course of events from the delay in receiving the goods. To be sure, under 2-714 (1), the buyer who accepts the late delivery may recover any loss suffered because of the delay in receiving the goods. However, the measure of those damages cannot be the same as the measure of damages (contract price-market price differential) that is applicable where the seller has completely failed to deliver.

[\[FN24\]](#). Of course, a seller is always free to consent that a buyer such as Fertico keep the late-delivered goods and pay either the contract price originally agreed upon or some other agreed-upon price.

[\[FN1\]](#). *Professor of Law, Touro College Jacob D. Fuchsberg Law Center. B.A. 1958, Yeshiva University, J.D., 1961, New York University; former partner Kaye Scholer.*

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