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UCC § 2-510: A Commercial Law Blunder?

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Introduction

Commercial law, as codified by the Uniform Commercial Code ("UCC"),[1] recognizes certain important policy goals and commercial realities as a basis to override property law.[2] Notably, to facilitate the sale of goods, the UCC gives buyers of goods in the ordinary course of business full unencumbered rights to those goods.[3] If commercial law did not override property law in

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[1] The UCC is a model law that is promulgated and continuously updated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission"). Enacted as law in every state of the United States, it has been described as the "most ambitious codification of commercial law ever attempted in any jurisdiction." Roy Goode, *The Codification of Commercial Law*, 14 MONASH U. L. REV. 135, 137 (1988).

[2] By observing that the UCC sometimes "overrides" property law in those circumstances, I am not making a general normative claim about the relationship between commercial law and property law. Rather, I am observing that state legislatures enacting the UCC agreed—to the extent provided therein—to override property law.

[3] *See* U.C.C. § 9-320 (AM. L. INST. & NAT'L CONF. COMM'RS ON UNIF. STATE LS. 2023) (providing that a buyer of goods in ordinary course of business takes free of a security interest created by seller of the goods, even if the buyer knows of the security interest's existence); U.C.C. § 2-403(2) (providing that the 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

this way, the transaction costs of selling goods would be prohibitively expensive.[4]

This Article focuses on a similar codification of commercial reality to override property law: the UCC's allocation of the risk of loss to goods in transit. The general rule, provided by UCC § 2-509, is that the risk of loss is borne by the party who "control[s] the goods and can be expected to insure his interest in them,"[5] whether or not that party owns the goods at the time of their loss.[6]

Promoting that reality over the "arbitrary shifting" of rights based on property[7] has been widely touted as providing "enormous" gains "in clarity, translatability and practicability."[8]

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course of business). *But cf.* U.C.C. § 2-403(1) (providing that a "person with voidable"—as opposed to void—"title has power to transfer a good title to a good-faith purchaser for value").

[4] Many nations' commercial law also recognizes policy goals and commercial realities as a basis to override outmoded limitations imposed by property law. In Germany, for example, a "bona fide acquirer may obtain the ownership of a chattel under certain circumstances although the transferor is neither the owner of the chattel nor authorized by the owner to dispose thereof." Karsten Thorn, *Germany*, *in* TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE 203, 211 (Alexander von Ziegler et al. eds., 2d. 2011); *see also* Bürgerliches Gesetzbuch [BGB] [Civil Code], § 932, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html (Ger.).; Handelsgesetzbuch [HGB] [Commercial Code], § 366, https://www.gesetze-im-internet.de/englisch_hgb/ (Ger.). Japan's commercial law is similar. Tomotaka Fujita, *Japan*, *in* TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE 264 (Alexander von Ziegler et al. eds., 2d ed. 2011) (recognizing that one who acquires the possession of movables peacefully and openly by a transactional act acquires rights in such movables if he is in good-faith and without fault) (citing MINPŌ [MINPŌ] [CIV. C.] art. 192 (Japan)).

[5] U.C.C. § 2-509 cmt. 3.

[6] U.C.C. § 2-509.

[7] *Cf.* U.C.C. § 2-509 cmt. 1 (observing that the "underlying theory" is to avoid "an arbitrary shifting of the risk with the 'property' in the goods").

[8] John Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW. 21, 27 (1984).

Among other things, it avoids the "bountiful sources of litigation and controversy" caused under prior law by having to decide "[w]ho had title and what caused title to pass from the seller to the buyer"[9]—decisions that "were often mysteries to both the lawyers and the courts."[10] That allocation of the risk of loss has also been adopted by the United Nations Convention on Contracts for the International Sale of Goods (CISG).[11]

So far, so good. Shortly after § 2-509 was enacted, however, it was modified by a new UCC provision, § 2-510,[12] which governs risk of loss where there has been a breach.[13] Since its enactment, § 2-510 has been the subject of criticism. One

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[9] JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE 203 (7th ed. 2022).

[10] *Id.*

[11] *See* Honnold, *supra* note 8, at 27 (discussing the CISG's rules in articles 66–70 for allocating risk of loss, and observing that those "rules on risk of loss are closely patterned on the modern rules of the UCC. The approach is the same: the elusive concept of property . . . is not employed. Instead, the Convention's rules are drafted in terms of concrete commercial events—handing over goods to the carrier and the buyer's 'taking over' [sic] physical possession from the seller.") (quoting U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3).

[12] U.C.C. § 2-510 (AM. L. INST. & NAT'L CONF. COMM'RS ON UNIF. STATE LS. 2023) ("(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 he may to the extent of any deficiency in his effective insurance 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 him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.").

[13] *See* A.B.A. SUBCOMM. ON GEN. PROVISIONS, SALES, BULK TRANSFERS, & DOCUMENTS OF TITLE, COMM. ON U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1153–55 [hereinafter "Study Group Appraisal"].

commentator observes that "given the dubious origin of Section 2-510, some form of empirical inquiry is needed to determine" its appropriateness.[14] That commentator further suggests that "it might be found that Section 2-510 . . . serves no practical purpose save the harassment of the legal mind."[15] Other critics argue that the link between the breach and the loss can become too tenuous, and additionally that the section is "complex, incomplete and difficult to apply."[16] Still others find that "2-510 is considerably out of step with the policies of 2-509."[17]

The one scholar who nominally appears to support § 2-510's risk-of-loss provisions offers no express support. Professor Sebert writes that Article 2's "risk of loss provisions"—which seemingly would include § 2-510—appear "to have succeeded in clarifying that previously murky area of the law."[18] He supports his proposition by observing that "at least there now is little litigation or critical commentary concerning the risk of loss provisions."[19] That observation, however, relates only to § 2-509, being based on a "study [which] shows that, in California, New York, and Ohio between 1973 and 1975, there were only four reported cases in which the *Code's basic risk of loss provision, § 2-509*, was cited."[20]

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[14] F. Carlton King, Jr., *UCC Section 2-510—A Rule Without Reason*, 77 COM. L.J. 272, 279 (1972). The "dubious origin" of UCC § 2-510 may well refer to the section's relative anonymity throughout the drafting process. *See id.* at 274–77 (detailing the legislative history of U.C.C. § 2-510). King notes that "[t]he hearings before the New York Law Revision Commission (1954) contain no reference to Section 2-510." *Id.* at 274.

[15] *Id.* at 279.

[16] *See* Study Group Appraisal, *supra* note 13, at 1153–54.

[17] WHITE, *supra* note 9, at 217.

[18] John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 362 (1981).

[19] *Id.*

[20] *Id.* at 362 n.13 (emphasis added).

This Article examines § 2-510, including its fatally flawed rationale that breaching a contract is morally wrong. That flaw helps to explain some of these criticisms. Furthermore, the Article shows that § 2-510's convoluted risk reallocation undermines commercial realities and can produce unreasonable, if not absurd, results. For these reasons, this Article concludes that UCC § 2-510—or at least, subsections (1) and (2) therefore—should be repealed.

This Article proceeds as follows. Part I traces the legislative history of § 2-510, including other recommendations that it be repealed. Part II examines the few cases decided under § 2-510, showing they do not make a compelling case for that section's retention. Part III adds a theoretical analysis, showing that § 2-510 is inconsistent with efficient-breach theory,[21] is inconsistent with the UCC's general theory of risk allocation,[22] and can produce commercially unreasonable, and sometimes absurd, results.[23]

I. Legislative History

Shortly after UCC § 2-509 was enacted, § 2-510 was enacted to govern the "Effect of Breach on Risk of Loss."[24] Beginning in 1988, the Permanent Editorial Board for the Uniform Commercial Code ("PEB"), with the approval of the Uniform Law Commission and the American Law Institute, began a formal study of UCC Article 2 to decide if the Article should be updated.[25] The PEB published a preliminary report in 1990, and a final report in

[21] *See infra* Part III.A.

[22] *See infra* Part III.B.

[23] *See infra* Part III.C.

[24] *See supra* notes 12–13 and accompanying text.

[25] Study Group Appraisal, *supra* note 13, at 984.

1991.[26] The final report recommended that Article 2 be revised and that § 2-510, in particular, should be repealed or revised.[27]

The PEB's criticism was that § 2-510's reallocation of the risk of loss for breach does not require that the breach have caused the loss, nor is the fact of breach tied to which party is the least-cost insurer of the goods.[28] Its effect, therefore, is to reallocate the risk from the party in the better position to insure to the contract breacher who, presumably, is not.[29] This result makes little sense in a commercial statute.[30]

The PEB favored repeal over revision because it concluded that "the effort required to redraft [§ 2-510] for clarity in application is not justified."[31] If repeal is rejected, however, it recommended that § 2-510 be "revised to insure a link between the breach and [loss] to the goods."[32] The PEB feared, however, that even if it were plausible to establish such a link, § 2-510 would still be "complex, incomplete, and difficult to apply."[33]

Following the PEB's recommendation, the ALI voted to approve the 1999 draft of Article 2, deleting § 2-510.[34] It then submitted the draft to the Uniform Law Commission for final approval. The Uniform Law Commission, however, quickly withdrew the 1999 draft from consideration "in response to concerns that the proposed changes were too controversial, and that the

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[26] Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971, 982 (2001).

[27] *Id.*

[28] *Id.* at 983.

[29] *Id.*

[30] Study Group Appraisal, *supra* note 13, at 1153.

[31] *Id.*

[32] *Id.* The PEB apparently further recommended that if the breach is not the substantial cause of the loss, there should be no reallocation of the usual risk of loss outcome. Tauchert, *supra* note 26, at 982–83.

[33] Study Group Appraisal, *supra* note 13, at 1153.

[34] Tauchert, *supra* note 26, at 983.

Draft was probably not enactable on a reasonably uniform basis."[35] Section 2-510 was reinstated in the July 2000 draft of Article 2, which espoused a more conservative attitude toward "addressing the need for evolutionary rather than revolutionary change."[36] Section 2-510 thus continues to be the law.[37]

II. Court Decisions

The few cases decided under UCC § 2-510 do not make a compelling case for its retention—except perhaps for the retention of subsection (3) thereof. In *Moses v. Newman*,[38] for example, a buyer had responded to an advertisement that said mobile home "trailer, complete set-up."[39] The seller "delivered the mobile home to plaintiff's rented lot, blocked up, leveled the mobile home, removed the tires and axles and connected the sewer and water pipes."[40] The seller's salesman said that the "'set-up' of the mobile home [also] included . . . *anchoring the mobile home*."[41] The very next day, a windstorm destroyed the mobile home.[42] The court ruled that because the seller did not anchor

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[35] *Id.* at 971.

[36] *Id.* at 972.

[37] *Cf.* sources cited *supra* note 1 (describing the UCC, and thus § 2-510 thereof, as a model law that is promulgated and continuously updated by the American Law Institute and the Uniform Law Commission and intended for state legislative enactment); Tauchert, *supra* note 26, at 972 (discussing how the Uniform Law Commission presents "states with commercial law that reflects commercial practices and facilitates the flow of business, while maintaining neutrality between the parties").

[38] 658 S.W.2d 119 (Tenn Ct. App. 1983).

[39] *Id.* at 120.

[40] *Id.*

[41] *Id.* at 121 (emphasis added).

[42] *Id.* at 120.

the mobile home, it was in breach.[43] Therefore, under § 2-510(1), the risk of loss remained with the seller.[44]

The existence of UCC § 2-510(1) was not essential, however, to that outcome. The *Moses* court actually stated a more fundamental reason that the risk of loss remained with the seller: that under UCC § 2-606, the buyer had not yet accepted the mobile home.[45] Therefore, under UCC § 2-509(3), the risk of loss had not yet shifted to the buyer.[46]

Subsection (3) of UCC § 2-510, however, might arguably make commercial sense.[47] In *Multiplastics, Inc. v. Arch Industries, Inc.*,[48] for example, the plaintiff agreed to manufacture and deliver 40,000 pounds of plastic pellets for the defendant,

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[43] *Id.* at 122.

[44] *Id.*; *see also* William F. Wilke, Inc. v. Cummins Diesel Engines, Inc., 252 Md. 611, 250 A.2d 886 (1969) (holding that despite delivery of goods to buyer, the risk of loss remained with the seller because the seller had not conducted an inspection); Southland Mobile Home Corp. v. Chyrchel, 500 S.W.2d 778, 782 (1973) (holding that risk of loss remained with the seller when a mobile home was destroyed by fire because the seller had not completed installation before the home was destroyed). *Cf.* Danner v. Fraley, 1980 WL 351092 (Ohio Ct. App. Oct. 15, 1980) (holding that § 2-510 does not apply when seller delivers but does not completely install kitchen equipment and then apartment building burns down).

[45] *Newman,* 658 S.W.2d at 121–22.

[46] *Id.* at 122.

[47] The *Multiplastics* case, discussed *infra*, has been referenced as an example of UCC § 2-510(3)'s application. *See* Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of UCC Sections 2-509 and 2-510*, 87 NW. U. L. REV. 1415, 1437 (1993); Tauchert, supra note 26, at 989.

[48] Multiplastics, Inc. v. Arch Industries, Inc., 348 A.2d 618 (Conn. Sup. Ct. 1974).

and the defendant agreed to accept delivery.[49] The plaintiff contacted the defendant after producing the pellets, requesting payment and delivery instructions.[50] The defendant responded that it would send instructions, but in fact never did.[51] Over a month later, the plaintiff's warehouse, including the pellets, burned down, and the cost of the pellets was not covered by plaintiff's insurance.[52] The court held that defendant breached the contract by not accepting and paying for the pellets and therefore, under UCC § 2-510(3),[53] the breach shifted the risk of loss to the defendant.[54]

Subsection (3) might make sense in situations, like *Multiplastics*, in which a buyer's breach makes it awkward for a seller to insure the risk of loss, thereby creating a "link between the breach and casualty to the goods."[55] Nonetheless, it is unclear if the plaintiff in that case acted reasonably. It certainly needed to

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[49] *Id.* at 620.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Recall that § 2-510(3) provides that "[w]here 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 him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time." U.C.C. § 2-510(3).

[54] *Multiplastics, Inc.*, 348 A.2d at 621.

[55] *Cf. supra* note 31 and accompanying text (suggesting that as an appropriate standard for shifting the risk of loss). Accordingly, even the PEB might agree with the application of subsection (3) in the *Multiplastics* case. Justin Reed, a research assistant on this Article, confirms that link based on his personal experience working in manufacturing, transportation, and logistics. He observes that with proper shipping instructions, third-party carriers can be contracted, and goods shipped, within hours or even more quickly. That can explain the seller's failure to procure insurance.

maintain insurance to cover the pellets pending their contractually expected delivery to the defendant.[56] If that insurance were to expire after a specified period (corresponding to the expected delivery date), plaintiff could have monitored that and, if the delivery were not made by that date, extended the insurance as needed.[57] Plaintiff then could sue the defendant for breach, including the cost of the extended insurance as incidental damages.[58] Given that breaching a contract and accepting contract-breach damages is itself commercially reasonable,[59] and that a party normally is expected to insure its own property—especially where that property is on its premises[60]—the *Multiplastics* decision is debatable.

III. Analysis

The legislative history and judicial decisions suggest that UCC § 2-510, perhaps other than subpart (3) thereof, should be

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[56] *See* Sebert, Jr., *supra* note 18, at 362 & 362 n.13 (detailing the commercial realities regarding the insurance of goods before their shipment).

[57] *But cf. Multiplastics*, 348 A.2d at 622 (stating that "it was reasonable for the plaintiff to believe that the goods would soon be taken off its hands and so to forego procuring the needed insurance").

[58] *See* Conn. Gen. Stat. Ann. § 42a-2-710 (West) ("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.").

[59] *See, e.g.*, BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 981 F.3d 618, 632 (7th Cir. 2020) ("The law no longer treats commercial contracts as moral obligations, the breach of which must be punished. Commercial contract law encourages or at least tolerates breaches that are economically efficient so long as the non-breaching party is made whole (net of transaction costs).").

[60] *See* Sebert Jr., *supra* note 18, at 362 & n.13 (detailing the commercial realities regarding the insurance of goods before their shipment). *Cf.* U.C.C. § 2-509 (generally shifting the risk of loss upon delivery of goods to a carrier or receipt by the buyer); U.C.C. § 2-509 cmts. 1, 3 (recognizing that a party that controls the goods is much more likely to insure them).

repealed. This Part III provides theoretical justification for that repeal. Subpart A explains why § 2-510 is inconsistent with efficient-breach theory. Subparts B and C then explain, respectively, why that section not only is inconsistent with the UCC's general theory of risk allocation but also can produce commercially unreasonable results.

A. Section 2-510 is Inconsistent with Efficient-Breach Theory

Breaching a contract is not morally wrong, at least in a commercial context, because efficient-breach theory offers an economic remedy. That counters the sometimes-expressed view supporting § 2-510 that "[t]here is something appealing about the notion that a contract breacher—the party at fault—cannot pass the risk of loss to the innocent party."[61] King articulates the tension between these views:

> The [§ 2-510] idea of penalizing a defaulting party may seem equitable, but it does not seem to reflect modern feeling in the commercial world. Commercial realities occasionally dictate breach, and to term such behavior as "wrongdoing" seems to ascribe to merchants a moral culpability that is not justified.[62]

Outside of a commercial context, some might feel that breaching a contract may be immoral.[63] The Restatement of Contracts refers, for example, to the "sanctity of contract and the resulting moral obligation to honor one's promises."[64] That view, however, ignores efficient-breach theory, in which the non-

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[61] A Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and

Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1999 Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1153 n.27 (1991).

[62] King, Jr., *supra* note 14, at 277.

[63] *See generally, e.g.*, Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439 (2006).

[64] Restatement (Second) of Contracts ch. 16, intro. note (Am. L. Inst. 1981).

breaching party receives money damages in place of performance.

At least in a commercial context, allowing a party to breach in exchange for paying money damages can reduce overall transaction costs and produce "greater expected gains of trade for the parties to divide."[65] Such breaches should not carry the moral culpability of breaking promises.

B. Section 2-510 is Inconsistent with the UCC's General Theory of Risk Allocation

Another reason to repeal § 2-510 is that it is inconsistent with the UCC's general theory of risk allocation: to allocate risk of loss based on who would be expected to insure the goods at the time of their loss.[66] Parties that control goods are most likely to insure them,[67] and placing the risk of loss on those parties helps to promote adequate insurance coverage.[68] Thus, in the interest of efficient insurance coverage, the controlling party (and not the breaching party) should still be expected to insure those goods even if their loss is the result of the other party's breach.[69]

There may well be situations in which a buyer receiving nonconforming goods is forced to purchase insurance thereon while awaiting their cure or replacement by the seller. Such a buyer, however, could still demand payment of the insurance cost as

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[65] Gregory Klass, *The Rules of the Game and the Morality of Efficient Breach*, 29 YALE J.L. & HUMAN RTS. 71, 89 (2017).

[66] U.C.C. § 2-509 cmts. 1, 3 (recognizing that theory of risk allocation).

[67] *See id.*

[68] *Cf.* Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc., 774 F.2d 214, 218 (7th Cir. 1985) (stating that the UCC has "sought to create a set of standard contract terms that would reflect . . . the preferences of contracting parties," and that "[o]ne such preference is for [loss spreading through insurance] to minimize the adverse consequences of untoward events").

[69] *Cf. supra* note 58 and accompanying text (discussing the availability of incidental damages to remedy a controlling party's wrongful insurance costs resulting from the other party's breach).

part of its claim for breach of contract.[70] The buyer also could contractually allocate risk of loss for returning the goods.

As discussed, the PEB similarly found that § 2-510 is inconsistent with commercial risk allocation theory.[71] That section reallocates the risk of loss to the breaching party even if the breach does not cause the loss.[72] Moreover, that risk reallocation ignores whether the breaching party is the least-cost insurer of the goods.[73] Accordingly, the PEB itself advocated for § 2-510's repeal.[74]

C. Section 2-510 can Produce Commercially Unreasonable Results

UCC § 2-510 also has the potential to produce commercially unreasonable, and sometimes absurd, results. For example, assume that a manufacturer ships goods to its buyer pursuant to a standard contract, which requires or authorizes the goods to be shipped by a common carrier. Under § 2-509(a)(1), the risk of loss would pass to the buyer when the manufacturer delivers the goods to the carrier. As next described, however, the buyer could sometimes use § 2-510 to unexpectedly shift the risk of loss back to the manufacturer.

Say, for example, an accident to the carrier causes the goods to sink in a river. If the buyer hires a diver that finds just one nonconforming widget, the "tender or delivery of goods" would, under § 2-510(1), "so fail[] to conform to the contract as to give a right of rejection"[75] because UCC § 2-601 (the "perfect tender

[70] U.C.C. § 2-715(1) (buyer's right to incidental damages resulting from the seller's breach). *Cf. supra* note 58 and accompanying text (discussing a seller suing for a buyer's contract breach, including the cost of insurance as incidental damages).

[71] *See supra* note 30 and accompanying text.

[72] *See id.*

[73] *Id.*

[74] *See supra* note 31 and accompanying text.

[75] U.C.C. § 2-510.

rule") gives such a right of rejection for failure "in any respect to conform to the contract."[76] In that case, "the risk of . . . loss remains on the seller."[77] That reversal of the risk of loss could be devastating to the manufacturer, especially if (as would be the commercial norm[78]) its insurance of the goods terminates once they are loaded onto the carrier.

One might, of course, look to certain legal doctrines to try to mitigate that absurdity. For example, a well-established canon of statutory interpretation holds that "if a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."[79] While there is no formally established judicial definition of "absurd," "standard interpretive doctrine (perhaps tautologically) defines an 'absurd result' as an outcome so contrary to perceived social values that [a legislature] could not have 'intended' it."[80] Having to apply that broad canon of interpretation to a technical commercial scenario seems ill-advised.

Similarly, a court might apply good-faith doctrine to try to avoid commercially unreasonable results. For example, in *Fanok v. Carver Boat Corp.*,[81] a court rejected the argument of a buyer of a yacht that the defendant-seller's failure to complete a "punch list" of relatively minor fixes constituted a violation of

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[76] U.C.C. § 2-601.

[77] U.C.C. § 2-510(1).

[78] UCC § 2-509(1)(a) establishes that risk of loss passes to the buyer upon delivery of goods to a carrier. A seller is thus incentivized to carry insurance coverage up until, but not after, goods are delivered to the carrier. *Cf.* Daniel E. Murray, *Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from Other Voices*, 23 U. MIAMI INTER-AM. L. REV. 93, 96 (1991) (discussing the commercial reality of insurance coverage for the delivery of goods).

[79] Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892).

[80] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

[81] 576 F. Supp. 2d 404 (E.D.N.Y. 2008).

the perfect tender rule. That violation would have enabled the buyer to use UCC § 2-510(2) to shift the risk of the yacht's loss to the seller. The court ruled, instead, that "the majority of items on the punch list were sufficiently minor that even under the perfect tender rule, they may not have supported rejection as opposed to an adjustment of the purchase price, as such an attempted rejection might be indicative of bad faith."[82]

The need to rely on good-faith doctrine is problematic, however. Even though the UCC has adopted that doctrine[83] and courts sometimes apply it "to meet the realities of the more impersonal business world of our day [and] to avoid sharp dealing,"[84] reliance on that doctrine to avoid commercial unreasonableness under UCC § 2-510 would undermine predictability and certainty. Those policies are essential to commercial law:

> [E]fforts by courts to fashion equitable solutions for mitigation of hardships experienced by creditors in the literal application of [commercial law] requirements may have the undesirable effect of reducing the degree of reliance the market place should be able to place on [commercial law] provisions. The inevitable harm doubtless would be more serious to commerce than the occasional harshness from strict obedience.[85]

Conclusion

Subsections (1) and (2) of UCC § 2-510 should be repealed. They are inconsistent with both efficient-breach theory and the UCC's general theory of risk allocation, and they also can produce commercially unreasonable results. Furthermore, the few

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[82] *See id.* at 418.

[83] *See* U.C.C. § 1-304.

[84] T.W. Oil, Inc. v. Consol. Edison Co. of New York, 57 N.Y.2d 574, 582 (1982).

[85] Sec. Nat. Bank and Tr. Co. v. Dentsply Pro. Plan, 617 P.2d 1340, 1343 (Sup. Ct. Okla. 1980).

cases citing those subsections could have been decided reasonably absent those subsections' existence.[86]

The case for the repeal of subsection (3) of UCC § 2-510 is less obvious. If subsections (1) and (2) of UCC § 2-510 were repealed, parties should consider whether to retain subsection (3), perhaps by making it a new subsection (5) of UCC § 2-509. UCC § 2-509 then should be re-titled, simply, "Risk of Loss." Its current title, "Risk of Loss in the Absence of Breach," would be inapplicable because the proposed new subsection (5) to § 2-509 contemplates a breach.[87]

[86] In *Moses*, for example, the risk of loss would have remained with the seller because the buyers had not legally accepted the mobile homes. *See supra* notes 38–47 and accompanying text. In the *Fanok* case, the result should have been the same because UCC § 2-509 shifted the risk of loss to the buyer upon delivery of the yacht. 576 F. Supp. 2d at 420-21; *see also supra* notes 75–78 and accompanying text.

[87] *See supra* note 54 and accompanying text.