

## FOCUS ON COMMERCIAL LITIGATIONS

# Risk of Loss for Shipments Governed by the UCC

By Leo K. Barnes Jr.

The Uniform Commercial Code's section regarding Risk of Loss is a great example of why counsel's periodic review of a client's day-to-day operations may prove to be an excellent investment in light of the serious ramifications which can bind clients in seemingly benign transactions. Assume the rudimentary shipment of goods for a transaction which is governed by the Uniform Commercial Code. The pre-printed order form which the seller has utilized for years to document price and quantity fails to note whether the agreement between seller and buyer mandates that the goods must be delivered to a particular destination. Assume the seller duly delivers the goods to a common carrier for shipment to the buyer and that the goods are thereafter lost or damaged while in transit. Who bears the risk of that loss?

### The Applicable Code Provision

UCC 2-509, entitled "Risk of Loss in the Absence of Breach" provides, in pertinent part:

**"A determination whether the contract is a shipment or a destination contract must be made."**

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

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

The Official Commentary confirms that the scope of this section is expressly limited to scenarios where there has been no breach by the seller. In the alternative, if the delivery fails to comply with the contract specifications, UCC 2-509 does not apply and the situation is governed by the provisions on effect of breach on risk of loss. Accordingly, the analysis offered herein is limited to those situations where no breach has occurred.

A cursory reading of the provision confirms that if the seller is required to ship the goods by carrier, but not required to deliver the goods at a particular destination, the risk of loss passes to the buyer when the



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seller duly tenders them to the carrier. § 2-509(1)(a). To the contrary, when the seller is required to deliver the goods to a particular destination, the seller bears the risk of loss until tender of delivery at the destination. § 2-509(1)(b).

Notwithstanding these bright-line rules, a determination of the parties' rights and obligations must be made when ambiguity exists in the contract between them. The resolution of that ambiguity begins with a determination of whether the contract is a shipment or a destination contract. If the contract does not require the seller to deliver the goods at a particular destination, a shipment contract is presumed. On the other hand, a destination contract is characterized by a seller's obligation to deliver at a particular destination.

### Shipment contracts are presumed

In *Windows, Inc. v. Jordan Panel Systems Corp.*, 177 F.3d 114 (2<sup>nd</sup> Cir. 1999), the Second Circuit Court of Appeals ruled that:

Where the terms of an agreement are ambiguous, there is a strong presumption under the U.C.C. favoring shipment contracts. Unless the parties "expressly specify" that the contract requires the seller to deliver to a particular destination, the contract is generally construed as one for shipment. 3A Ronald A. Anderson *Uniform Commercial Code* §§ 2-503:24, 2-503:26; see also *Dana Debs, Inc. v. Lady Rose Stores, Inc.*, 65 Misc.2d 697, 319 N.Y.S.2d 111, 112 (N.Y. City Civ. Ct. 1970) (no destination contract absent "explicit written understanding" that goods will be delivered to buyer at a "particular destination").

Indeed, *New York Jurisprudence*, at § 113, confirms that:

Under the Code, the "shipment" contract is regarded as the normal one, while the "destination" contract is regarded as the variant type, and the seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed to so deliver, or the commercial understanding of the terms used by the parties contemplates such delivery.

In as much as New York Jurisprudence confirms that the "commercial understanding of the terms used by the parties" may serve as a foundation to impose destination contract obligations upon a seller, it bears noting that the contention that the seller's payment of freight expenses imputes a destination contract is expressly rejected in § 2-503. In regard to the term "F.O.B." (which means "free on board"), an oft-used denotation on delivery of goods, the Uniform Commercial Code expressly provides that unless otherwise

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agreed, the term F.O.B. at a named place, even though used only in connection with the stated price, is a delivery term, not simply a price term. More specifically, § 2-319 provides that:

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and

bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503).

Of course, the burdens with respect to risk of loss may be varied by the contrary agreement of the parties.

The First Department's *Jordan v. Kentshire Galleries, Ltd.* 282 A.D.2d 319, 723 N.Y.S.2d 456 (1<sup>st</sup> Dep't 2001) provides a fairly typical example of the many parties which interact with a shipment. In *Jordan*, the Appellate Division described the scene where the buyer's agent interacted with the carrier and the distinct cargo packer, yet unreasonably expected that the seller would bear the risk of loss until tender at the ultimate destination. The First Department disagreed:

The record is devoid of evidence that the seller agreed to ship the item to a particular destination (*see*, UCC 2-503, Official Comment 5). Indeed, since it is undisputed that the buyer's decorator asked the seller to recommend a carrier, that the seller recommended the art pack-

er, and that the buyer paid the shipping costs by check made out to the art packer, it is clear that the buyer expected the seller only to put the item in the possession of the art packer and make such contract for its transportation as was reasonable (UCC 2-504[a]). This being the parties' understanding, i.e., a shipping, not a destination, contract, the seller did not bear the risk of loss once the item was picked up from its premises by the art packer (UCC 2-509 [1][a]).

Because a contract which contains no express mandate that the goods be delivered at a specifically delineated destination is not a destination contract, the buyer assumes the risk of loss, pursuant to the code provisions, upon the delivery of the goods to the carrier. *Caveat Emptor!*

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