Specific Performance under the Uniform Commercial Code - Will Liberalism Prevail?

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The extraordinary remedy of specific performance rarely was available to a buyer at common law. This Article illustrates how the Uniform Commercial Code intentionally broadened the possibility of specific performance as a buyer's remedy. This extension is accomplished by a general mandate for liberal interpretation and an expansion of the uniqueness requirement to include "other proper circumstances" when specific performance should be granted. The authors conclude with a recommendation that equitable principles govern the situations when a buyer's demand for specific performance conflicts with a seller's defense of commercial impracticability.

INTRODUCTION

Fundamental to any discussion of specific performance under the Uniform Commercial Code is a basic understanding of those concepts which form the essence of the law of contracts. The power to breach a contract historically has been almost as sacred as the freedom to form a contract. From the earliest days of mercantile dealings, judicial thinking has placed greatest emphasis on those principles that would best lubricate the comings and goings of the marketplace.¹

In the traditional case of a seller who breaches his promise to deliver certain goods, the aggrieved buyer usually must settle for whatever damages he sustains in procuring those goods elsewhere. But assuming that our first priority always is to facilitate commerce and promote commercial stability,² might not there be

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² Uniform Commercial Code §§1-102(2) [hereinafter cited as UCC] states that underlying purposes and policies of the UCC are:
certain instances when enforcing the contract will best serve that end? The answer, of course, must be in the affirmative; but the granting of specific performance is precisely the problem that has plagued judges, draftsmen, and legislators for what continues to be an inordinate period of time.

Section 2-716 of the Uniform Commercial Code offers a statutory scheme which "seeks to further a more liberal attitude than some courts have shown in connection with . . . specific performance . . . ." The effectiveness of this scheme, however, has come under serious attack. For example, Professor Nordstrom claims "the best way to summarize the Code's position as to specific performance . . . [is to say that] courts are free to go on doing what they did before the Code and the best prediction of the shape of the future law is that they probably will do just that." Nordstrom also argues that Code draftsmen may have made specific performance more difficult to obtain than it was under its predecessor, the Uniform Sales Act.3

Whatever the truth may be, the foregoing discussion serves to illustrate the state of confusion that currently reigns over the realm of specific performance. With this in mind, we hope to offer a clear analysis and discussion of this troublesome topic. Beginning with the general background of equity jurisdiction as it existed at common law, this Article will trace the development of specific performance through pre-Code and post-Code case law. In particular, it will explore the "other proper circumstances" test of Section 2-716 as the key to the liberalization of the specific performance doctrine in the Code.4 The inevitable conflict between a liberalized specific performance decree, forcing a seller to deliver the goods, and a liberalized commercial impracticability defense, permitting a seller not to deliver the goods at all,

[a] (a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.
3. UCC §2-716, Comment 1.
5. Id.
6. UCC §2-716(1) reads: "Specific performance may be decreed where the goods are unique or in other proper circumstances." (emphasis added).
then will be analyzed.\textsuperscript{7} From this analysis we hope to offer a more complete understanding of when and how Section 2-716 can be used to meet the commercial needs of the 1970's.

\textbf{THE EQUITABLE ORIGINS OF SPECIFIC PERFORMANCE}

At common law, courts of equity refused to grant an injunction or issue a decree for specific performance when it was possible for the wronged party to find an adequate remedy at law. The typical case was one in which monetary damages could be ascertained completely and justly by the court. The equity court's most potent weapon, it seems, was its ability to exercise discretion when determining whether to hear a case. To this end, such well-known judicial maxims as "the clean hands doctrine" and "he who seeks equity must also do equity" were often important factors in determining whether a plaintiff even penetrated the portals of the courtroom.\textsuperscript{8}

The remedy of specific performance traditionally has been limited to those situations in which monetary damages would not put the injured party in as good a position as would enforcement of contractual obligations. "Nothing less than the acquisition of the particular thing contracted for will satisfy the needs of the plaintiff or do him complete justice"\textsuperscript{9} was the rule used for determining when to grant specific performance.

The right to a decree for specific performance was neither universal nor absolute, and in this respect the term "right" is probably a misnomer. The only type of good that ever has been unique \textit{per se} is land. This is a traditional belief founded on the assumption that since no two parcels of land are exactly alike, an aggrieved buyer has no satisfactory alternative remedies available. Equity courts later modified their closed-door position regarding

\textsuperscript{7} UCC §2-615(a) reads:
\begin{quote}
Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
\end{quote}

\textsuperscript{8} J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS §12, at 32 (3d ed. 1926) [hereinafter cited as POMEROY].

\textsuperscript{9} W. DEFUNIAK, HANDBOOK OF MODERN EQUITY §67, at 156 (1950).
personalty and began to decree specific performance in the case of a contract where personalty was not obtainable on the open market, or obtainable only at great trouble or expense.\textsuperscript{10}

The general rule developed that specific performance could be granted when damages were an inadequate remedy and a grant of specific performance would be practical.\textsuperscript{11} Thus, such chattels as an original daVinci or the family jewels would be prime candidates for a decree of specific performance. The uniqueness, personal interest, or rarity of such items worked to transform them from common goods to what Pomeroy called \textit{pretium affectionis}.\textsuperscript{12}

There were, however, three important exceptions to the rule of \textit{pretium affectionis} when applied to personalty.\textsuperscript{13} The first involved the situation in which the pecuniary value of the goods in question had been fixed by the parties. In the typical situation, the owner of the goods and the party seeking to acquire them would include a market value as one of the dickered terms of their agreement. The setting of a market value gave the court of equity a hook upon which it readily could hang its “no jurisdiction” hat. A second area in which a decree for specific performance would be denied at common law was a contract that involved personal services. The denial was not based on how calculable monetary damages would be, but upon the fact that courts did not possess the enforcement capability necessary for such a compelling decree.\textsuperscript{14} The third situation involved those instances when the terms were unfair. In other words, the court wanted to make sure that one who was seeking equity also was doing equity.\textsuperscript{15} If a contract was not free of ambiguity, the task of insuring that its enforcement did not impose any difficult or unconscionable terms on a party to the contract became extremely difficult, if not impossible. As a result, the request for specific performance would be denied.

Early American case law adopted the rules promulgated by the common law courts of equity.\textsuperscript{16} However, the elusive nature of the

\begin{itemize}
  \item \textsuperscript{10} Id. \(\S\)71, at 162.
  \item \textsuperscript{11} S. Williston, \textit{A Treatise on the Law of Contracts} \(\S\)1418, at 651 (3d ed. 1968).
  \item \textsuperscript{12} Pomeroy, \textit{supra} note 8.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id. \(\S\)310, at 683.
  \item \textsuperscript{15} O'Brien v. Hamill, 147 Misc. 709, 264 N.Y.S. 557 (1933).
  \item \textsuperscript{16} Pomeroy, \textit{supra} note 8.
\end{itemize}
specific performance criteria and its discretionary character called for some kind of codification of this equitable remedy for the emerging commercial world.

EARLY CODIFICATION OF SPECIFIC PERFORMANCE: THE UNIFORM SALES ACT

The National Commissioners on Uniform State Laws approved the Uniform Sales Act in 1906, and the Act was adopted between 1907 and 1941 in 36 states and the District of Columbia. Section 68 of the U.S.A. codified the equitable remedy of specific performance. The language of Section 68 indicates a definite, if not explicit, desire on the drafters' part to liberalize the availability of specific performance decrees in commercial dealings.

At common law, courts of equity refused to grant specific performance when monetary damages were ascertainable. The courts felt that when damages could be calculated with some certainty, an adequate legal remedy was available which precluded equitable relief. Even when specific performance was extended from real property to personalty, it would be granted only when the goods were "unique" in the sense of not being readily available elsewhere.

The U.S.A. codification in Section 68, however, seemed to broaden the conditions under which a court could order specific performance. Courts were directed, at their discretion, to grant specific performance when they "thought fit." In addition, they could order the seller to deliver the goods even if he was willing

17. Uniform Sales Act §68 [hereinafter cited as USA] reads:
   Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as the court may deem just.


21. USA §68.
simply to pay the buyer damages for the breach.\textsuperscript{22} Of course, the circumstances had to be such that a specific performance decree would "seem just."\textsuperscript{23} Certainly implied in this codification was the notion that the common law requirement of an inadequate remedy at law was no longer a hard and fast rule. Indeed, even if monetary damages were ascertainable, a court could decree specific performance in cases it "thought fit."\textsuperscript{24}

Early cases making use of Section 68 did not stray immediately from the developed common law principles. Real estate remained the favored domain for invoking a decree of specific performance, but exceptions for personal property continued to be carved out. A liquor license was found to be a "unique" kind of personal property not readily available on the market. As such, a decree for specific performance was granted.\textsuperscript{25} Similarly, a license issued by the Interstate Commerce Commission was found to be a "unique" chattel, and specific performance was decreed.\textsuperscript{26} What is interesting about these cases, however, is that monetary damages probably could have been ascertained so as to provide an adequate legal remedy. The courts "thought fit" to grant specific performance in both cases, even though damages could be calculated. A liberalization of the common law principles began.

By 1950, courts began to recognize publicly both the impact of Section 68 of the Uniform Sales Act and the "growing tendency" to liberalize the requirements for specific performance.\textsuperscript{27} There

\textsuperscript{22} Id. Note especially the words, "without giving the seller the option of... payment of damages."

\textsuperscript{23} Id. Note especially the last phrase, "as the court may deem just."

\textsuperscript{24} Id. Note especially the words, "if it thinks fit."


\textsuperscript{27} See Bomberger v. McKelvey, 35 Cal.2d 607, 220 P.2d 729 (1950). Bomberger involved the demolition of an old building and the inclusion of certain salvageable materials from it in the construction of a new building. The materials in question, namely plate-glass and skylights, were scarce at the time, and could be obtained only after considerable delay. In addition, sheet metal for skylights was under priority by reason of governmental restriction. The plaintiffs had commenced construction of the new building when they were informed in a letter from the defendants that they were not to dismantle the old building. Defendants then sought a preliminary injunction to restrain plaintiffs from dismantling the old building, which was denied. Plaintiffs proceeded to dismantle the old building and ended up having to bring suit for payment of the price agreed upon for the demolition. The Supreme Court of California held that:
was little doubt that the "think fit" doctrine of Section 68 could be read to displace the common law requirement that the remedy at law be inadequate. And indeed, courts appeared to be a bit less tightfisted in granting specific performance with this new codification. Section 68 merely opened a door through which some courts passed.

A good example of how the door gradually opened is found in Poltorak v. Jackson Chevrolet Co. The defendant agreed to sell to the plaintiff a new black Chevrolet. Plaintiff traded in his car and received $714.22 as a credit. He called the car dealer weekly during the next six week period but the car was not sold to him. It was discovered that the company could have sold the plaintiff a car but simply decided it would not. The court, holding for the plaintiff, reasoned that a decree will lie where the buyer shows that he is unable by reason of the nature of the subject, the conditions of the market, or other circumstances, to procure an article substantially similar to the one which he contracted to buy, or that delay, expense and difficulties incidental to procuring such an article will entail serious inconvenience, loss or hardship, or that he stands in such a relation to the article that manifest justice will not be done unless performance is decreed.

Thus, the test was whether damages for the breach were the equivalent of the promised performance.

Some courts, however, continued to interpret restrictively the situations in which specific performance would be decreed.
Some legal scholars still maintain that Section 68 did little to liberalize the availability of specific performance in sales of goods cases. We are forced to take exception to such a harsh generalization. In light of the cases decided under Section 68, it is arguable that a liberalization of sorts did occur. Williston, in his works on Sales and Contracts, gave notice to the fact that Section 68 was intended to be a liberalization of the common law. The Poltorak case publicly recognized the trend toward liberalization, and the groundwork was laid for the new codification of specific performance under the Uniform Commercial Code. This historical account of the early codification of specific performance under the Uniform Sales Act is a necessary prerequisite for understanding the subtle yet powerful changes which developed.

Specific Performance Under The Uniform Commercial Code

Although the policies behind the Uniform Sales Act either were not followed or were ignored due to lack of specificity, the drafters of the Uniform Commercial Code detailed their intentions to modernize commercial law in the first article of the Code. As a general preamble, Section 1-102 of the UCC sets forth the underlying rationale and purposes of the Act. The command is explicit and the entire Code must be read with this rationale and purpose in mind. Even more supportive of a liberal interpretation of specific performance under the UCC is Section 2-716.

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36. The instances where the official Comments acknowledge that a particular section of the Code is designed to change prior case precedent are too numerous to mention. It is sufficient to say that §1-102 sets out the overall guideline from which the Code is to be interpreted.
37. See UCC §1-102.
38. See generally UCC §§1-102, 1-106.
39. UCC §2-716 reads:
§2-716. Buyer’s Right to Specific Performance or Replevin
(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
tion codifies the common law "uniqueness" test and the "other proper circumstances" test, which is the old "think fit" doctrine of Section 68 of the U.S.A. The comments to Section 2-716 emphasize the more liberal attitude the drafters meant to encourage.

Section 1-106 also contains a directive to liberalize the availability of remedies. However, the comments to Section 1-106 refer us elsewhere when specific performance is sought.

Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles.

The reader is then directed to Sections 1-103 and 2-716. Section 1-103 is the "supplementary principles" section which relates that the "principles of law and equity...shall supplement its provisions." And Section 2-716 proposes to make it clear that:

(1) the general prior policy as to specific performance and injunction against breach should be continued; (2) the courts' discretion should not be impaired; (3) a more liberal attitude is sought; (4) the test of uniqueness must be made in terms of the total situation which characterizes the contract; (5) uniqueness is not the sole basis of a remedy; (6) inability to cover is strong evidence of "other proper circumstances"; (7) specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting; (8) output and requirements contracts involve the typical commercial specific performance situation; and (9) 2-716 gives the buyer rights comparable to the seller's right to the price.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

40. Compare USA §68, with UCC §2-716.
41. UCC §2-716, Comment 1 reads:
The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.
42. UCC §1-106, Comment 2.
43. Id. §1-103.
44. Id. §2-716, Comments 1, 2 & 4.
One author analyzed these codified changes and concluded that they represent an intent to liberalize the availability of the remedy of specific performance over non-statutory law. He appropriately termed these changes and comments "a liberalization of a liberalization." With the benefit of sixteen years of case law under the UCC, it is possible to review the trends which have emerged in the application of Section 2-716 and analyze whether this predicted "liberalization of a liberalization" has occurred.

The Expanded Uniqueness Test of the UCC

Under the U.S.A., stocks were excluded from the definition of goods, and a contract for their sale would not be specifically enforced under Section 68. However, a California court in Capaldi v. Levy granted specific performance for a stock sale, acknowledging that the trend under the UCC is in the direction of sanctioning specific performance of contracts to sell or transfer property. In Capaldi, the broadened definition of "goods" under the UCC became a vehicle for applying Section 2-716 to a wider variety of factual situations.

Additionally, Section 2-716 codified the "uniqueness" test developed under common law for personalty. However, the application of the uniqueness test under the UCC has not always meant specific performance will be granted. In one instance, an enterprising plaintiff argued that cosmetics offered at an unusually low price due to a close-out were "unique." Accordingly, he sought specific performance. The court denied the requested relief, holding that the goods were not unique and that adequate compensation could be had by an award of damages.

46. Id.
47. USA §76.
49. UCC §2-716.
51. Id.
The New “Other Proper Circumstances” Test of the UCC

However, under the UCC the traditional notion that goods had to be unique to qualify for specific enforcement has been watered down by the development of the “other proper circumstances” test of Section 2-716. Obviously, one element which would make goods unique, for all practical purposes, would be the unavailability of the goods on the open market. Unavailability prevents the buyer from “covering” under UCC Section 2-712. In Kaiser Trading Co. v. Associated Metals & Minerals Corp., the court awarded specific performance on the ground that inability to cover sufficiently justified a decree of specific performance. Section 2-716(1), the comments thereto, prior case law, decisions of other jurisdictions, and the general trend toward a more liberalized availability of specific performance persuaded the court that the remedy should be available when goods cannot be covered or replaced.

Another court, at approximately the same time, extended the “inability to cover” concept to the situation in which the plaintiff was financially unable to cover, even though the goods could be purchased on the open market. Thus, the “other proper circumstances” test began to be used in cases in which courts formerly would not have granted specific performance because the goods were not unique. In a sense, courts were determining whether the plaintiff was situated so uniquely that he was financially unable to cover. If so, his “uniqueness” would give rise to the “other proper circumstances” called for in Section 2-716. This can be seen further in the area of automobiles, goods which consistently were found not to be unique under the U.S.A. In

52. UCC §2-716.
53. UCC §2-712 and Comment 2 thereto define cover as reasonable purchase of goods not identical with those involved but commercially usable as reasonable substitutes for those goods due from the seller.
55. Id. at 932-33.
58. UCC §2-716.
Schweber v. Rallye Motors, Inc., a court granted specific performance for a Rolls Royce under the “other proper circumstances” test, although not specifically identifying those circumstances. The court acknowledged that prior to the adoption of the Uniform Commercial Code automobiles were not considered unique but held that the development of the “other proper circumstances” test now permitted this result.

Needless to say, there have been exceptions to the trend toward liberalization. Not always have courts felt that the facts of the case warranted a Section 2-716 decree. In Northern Delaware Industrial Development Corp. v. E. W. Bliss Co., a court denied specific performance because personal services were involved and such an order would have committed the court to supervising a massive, complex, and unfinished construction project. Basic common law principles were followed to the letter. A court of equity never became involved in a case in which the nature of the remedy required enforcing an agreement in which personal services had to be rendered. This was not because there was an adequate remedy at law, but because equity courts do not possess the means nor the ability to enforce their decrees. However, dicta in a case involving a long-term lease indicates that personal services in the form of continuing business relationships are within the scope of a specific performance decree.

For the majority of cases, though, the liberal trend continued to erode common law principles. Under common law, goods had to be ascertainable for specific performance to be granted. In R. N. Kelly Cotton Merchant, Inc. v. York, the defendant alleged that the non-existence of cotton at the time the contract was formed prohibited a specific performance decree. The court, considering the fact that the plaintiff was obligated to third parties,
used the "other proper circumstances" test of Section 2-716 to order specific performance.\textsuperscript{68}

The judicial trend toward liberal construction of Section 2-716 is apparent from the cases reviewed. This trend is consistent with the drafters' mandate as expressed in the more flexible two-fold test of unique goods or other proper circumstances. It is clearly stated in Comment 1 of Section 2-716 that, "[t]his Article seeks to further a more liberal attitude . . . in connection with the specific performance of contracts of sale."\textsuperscript{69} This liberal trend in the granting of specific performance certainly will encourage buyers. If they can show the "other proper circumstances" when difficulties arise under the contract, the seller will be ordered to perform. The increased buying activity naturally expands commercial transactions, which is one of the underlying purposes of the Code.\textsuperscript{70}

\textit{The Specific Performance—Commercial Impracticability Conflict}

A problem arises when Section 2-716 comes into conflict with Section 2-615, which provides for excused performance due to commercial impracticability.\textsuperscript{71} When the buyer seeks performance of the contract under the liberal command of the drafters of the Code to grant specific performance, a seller may seek a liberal interpretation of Section 2-615 to excuse him from performing.

Resolution of this specific performance-commercial impracticability conflict is especially difficult in light of the essential liberality of the Uniform Commercial Code. Section 1-102 defines the purpose of the Code, in part, as permitting "the continued expansion of commercial practices."\textsuperscript{72} Economic considerations demand that this liberal interpretation be given to Section 2-615 as well as to Section 2-716. The economic justification for this position lies in the fact that if Section 2-615 is construed nar-
rowly, it would equate with common law impossibility. Sellers would be inclined to avoid long-term contracts since, over a long period of time, they would be faced with the possibility of greater fluctuations in the market value of the goods and other unforeseen circumstances.\textsuperscript{74} If, on the other hand, sellers knew that their performance would be excused in those instances in which it would be economically disastrous for them to comply with the terms of the contract, they would be more willing to enter into long-term contracts. The significance of this point, of course, is that long-term contracts help promote economic stability. A second justification for liberally construing Section 2-615 is the fact that the drafters did not intend commercial impracticability to be synonymous with common law impossibility. This is made apparent in Comment 3 of Section 2-615 which contrasts commercial impracticability with impossibility.\textsuperscript{75}

The inevitable conflict between a liberal granting of specific performance and a liberal interpretation of commercial impracticability is more than a theoretical proposition. Several courts have been forced to deal with the problem head on when unforeseen market changes have resulted in increased cost to the seller. More often than not, courts have made use of the "other proper circumstances" test of Section 2-716 to resolve the dispute.

In \textit{G.W.S. Service Stations, Inc. v. Amoco Oil Co.},\textsuperscript{76} service station operators sought a mandatory injunction directing Amoco to fill all their orders for gasoline. The oil company defended on the ground of commercial impracticability. Both parties stipulated that an oil shortage existed, but the court found for the plaintiff-gas station dealers. The court found that federal regulations required a percentage allocation and that the defendant did not comply with them. Here the court determined its own percentage allocation\textsuperscript{77} instead of considering Section 2-615(b) and forming its decree under Code principles of resource allocation.

\textsuperscript{74} \textit{Id.} at 15.
\textsuperscript{75} UCC §2-615, Comment 3 reads in part:
   The additional test of commercial impracticability (as contrasted with "impossibility," . . .) has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.
\textsuperscript{76} 75 Misc.2d 40, 346 N.Y.S.2d 132 (Sup.Ct. 1973).
\textsuperscript{77} \textit{Id.} at 44, 346 N.Y.S.2d at 137.
G.W.S. Service Stations goes to our problem concerning the effect of commercial impracticability on specific performance. Comments to Section 2-615 seem to suggest that the defense of commercial impracticability would prevail as a “severe shortage of raw materials or of supplies due to a contingency such as . . . unforeseen shutdown of major sources of supply . . . is within the contemplation of this section.”78 In G.W.S. Service Station basic equity and the requirements under Section 2-716 led to the injunction which plaintiff sought.

The interrelation between commercial impracticability and specific performance again was at issue in Tennessee Valley Authority v. Mason Coal, Inc.79 The TVA accepted a bid of $8.48 for coal in October of 1973. A month later, the price rose to $13.93, allegedly due to the energy crisis. TVA sought an injunction restraining the defendant from selling or disposing of any coal until its obligations under the existing contract were fulfilled.

In granting the injunction, the court said that “in determining the unique character of this contract, the court must look beyond the property of the subject matter itself to the surrounding circumstances at the present time. Accordingly, the scarcity of raw fuel materials can make an otherwise common product assume a unique character.”80 The uniqueness of the situation and the type of contract therein, basic output and requirement, combined to give the coal a unique status due to its scarcity.

This relationship between specific performance and commercial impracticability was reversed somewhat in Gay v. Seafarer Fiberglass Yachts, Inc.81 The court was willing to decree specific performance of a contract to build a customized boat, which admittedly would be unique, until the defendant pleaded “impossibility of performance” under common law and “excuse by failure of presupposed conditions” under UCC 2-615. The court held that:

Were it not for defendant's assertions concerning the oil shortage and energy crisis (and the precepts governing motions for summary judgment), it would have granted judgment to the

78. UCC §2-615, Comment 4.
80. Id. at 1111.
extent of mandating specific performance of the contract. Accordingly, plaintiff is granted leave to renew the motion at the trial of the action, should defendant fail to prove that the rise in costs was caused by the oil shortage.82

In the past five years at least four significant cases have arisen which face the conflict directly. In Orange & Rockland Util., Inc. v. Amerda Hess Corp.,83 the court decided in favor of the plaintiff, using an expanded “other proper circumstances” test. The plaintiff utilities company was required by the New York State Air Pollution Control Board to use crude oil #6. The defendant had agreed to supply the oil at $2.14 per barrel through September 1974. The defendant allegedly was forced by unforeseen market changes to increase its prices, and the plaintiff refused to pay. The defendant, therefore, threatened to cut off its supply. The plaintiff was granted a temporary restraining order and on the motion for a preliminary injunction, the defendant raised the defense of commercial impracticability under Section 2-615. Defendant also alleged that plaintiff had an adequate remedy at law. In Orange & Rockland, the court held:

In an ordinary commercial transaction, the ability to compute specific dollar damages would preclude the granting of injunctive relief. (citations omitted) Here, however, plaintiff has a specialized and unique status as a public utility. . . . [G]eneral public users and consumers are the persons who would be dramatically and adversely affected . . . . In balancing the equities, the Court must consider the public interest. . . .

. . . [W]elfare of the general public is the major factor in the decisional process.84

Uniqueness, not of the goods, but of the buyer was an aspect which had never been considered prior to this case. This appears to be a major step toward liberalization of the uniqueness test for specific performance. Yet, nowhere in Section 2-716 does the term uniqueness refer to the purchaser of the goods. More specifically, uniqueness is to be considered when the goods are analyzed, not the purchaser. Therefore, it seems more appropriate to classify

82. Id. at 1336-38.
83. 67 Misc.2d 560, 324 N.Y.S.2d 494 (Sup.Ct. 1971).
84. Id. at 563-64, 324 N.Y.S.2d at 498-99.
this case under the "other proper circumstances" test rather than the uniqueness test.

The Section 2-615/2-716 conflict arose again in Eastern Air Lines, Inc. v. Gulf Oil Corp.\(^8\) Gulf had a long-term contract with Eastern to supply aviation fuel. Gulf sent a written demand to Eastern stating that it would shut off Eastern's supply of jet fuel if Eastern did not meet its price increase within 15 days. Eastern brought an action for specific performance which was granted since the "events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed."\(^6\)

As in Orange & Rockland,\(^7\) the conflict was resolved by negating the Section 2-615 commercial impracticability defense and upholding its decree for specific performance because of the "other proper circumstances."

In Laclede Gas Co. v. Amoco Oil Co.,\(^8\) the court again awarded a decree for specific performance. The defendant, Amoco, had agreed to supply propane gas to the plaintiff on a long-term basis.\(^9\) During the winter of 1972-73, Amoco experienced a shortage of propane and voluntarily placed all of its customers, including Laclede, on an 80% allocation basis. After Laclede objected, Amoco notified Laclede that the price of propane had increased by three cents per gallon. Later, Amoco informed the plaintiff that the contract was terminated because of "lack of mutuality" in the contract.\(^10\)

The appellate court made use of the "other proper circumstances" test of 2-716 to order specific performance. The court acknowledged that Laclede presently could "cover" by purchasing propane on the open market, but felt that the "long-term supply of propane" was not assured. Indeed, relying on expert testimony, the court found "that Laclede probably could not find another supplier of propane willing to enter into a long-term contract such as the Amoco agreement, given the uncertain future of worldwide supplies."\(^11\)

\(^8\) 19 UCC REP. SERV. 721 (1975).
\(^6\) Id. at 737.
\(^7\) 67 Misc.2d 560, 324 N.Y.S.2d 494 (Sup.Ct. 1971).
\(^8\) 17 UCC REP. SERV. 447 (1975).
\(^9\) Id. at 448.
\(^10\) Id. at 450.
\(^11\) Id. at 452.
Perhaps the most interesting, and certainly the most financially important case to present the conflict between specific performance and commercial impracticability is *Tennessee Valley Authority v. Westinghouse Elec. Corp.*92 Westinghouse informed T.V.A., and other utilities operations around the country,93 that it considered continuation of its long-term nuclear fuel supply contracts to be "commercially impracticable."94 Realizing that they would have to renegotiate their long-term contracts at much higher prices or go without nuclear fuel,95 T.V.A. sought specific performance under Section 2-716.

This case raises many of the factual and interpretive considerations courts will have to weigh. Both seller and buyer will demand a liberal interpretation of their respective Code sections. And both seller and buyer will be justified in their demand.96 From our discussion above, it is clear that the trend toward the liberalization of Section 2-716 provides a very potent weapon for the buyer. Once a Section 2-716 high, hard fastball is thrown at the seller, he has only one mighty swing in defense.97 And if he misses, his strike-out could cost him billions of dollars.98 From the cases which have resolved the Section 2-716/2-615 conflict, it appears that the buyers have the advantage.99 This is supported further

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92. 18 UCC REP. SERV. 945, 69 FRD 5 (1975). The financial aspects have been mentioned in The Wall Street Journal, Sept. 30, 1976, at 1, col. 6, wherein one Westinghouse spokesman is quoted as saying that an adverse legal decision could cost Westinghouse two billion dollars over two decades.

93. These cases have been consolidated for discovery purposes, and the litigation is currently in process. No officially recorded decisions on these matters are available at the time of this printing.


95. Westinghouse is the principal supplier of this nuclear fuel to most utilities in the East and Southeast. No other company has the capacity to produce this particular type of fuel at the needed quantity. See The Wall Street Journal, Sept. 15, 1975, at 8, col. 1.

96. For seller’s justification, see Schmitt & Wollschlager, supra note 73. For buyer’s justification see UCC §2-716, Comment 1.

97. The swing is commercial impracticability, UCC §2-615.

98. See note 92 supra.

by the authors' historical study of commercial impracticability. However, this is not necessarily the wisest resolution, nor the one most in accord with the overall interpretive mandates of the Code.

Resolution of the Section 2-716/2-615 conflict must come from the liberal interpretation of both sections. In addition to the mandate of Section 1-102, the courts must consider fairness to both parties when specific performance is sought. Initially, a court must determine whether the use of either commercial impracticability or a decree of specific performance is valid in the case as presented. If a buyer could cover reasonably under Section 2-712, he should be prevented from seeking a specific performance decree. We have seen, however, that a drastic rise in price makes cover an extremely difficult buyer's remedy. This, in turn, gives rise to the "other proper circumstances" test of Section 2-716. Indeed, the typical Section 2-716/2-615 conflict occurs when the price of the contracted good unforeseeably rises. In these situations, it is natural for the court to consider a specific performance decree.

However, courts also must consider the validity of the Section 2-615 defense. Rise in market price alone is surely not enough to permit a seller to abrogate his contract. But the situations which have presented the Section 2-716/2-615 conflict are usually situations which involve a rise in price coupled with an alleged "unforeseen circumstance" such as a crop failure, a war embargo, an oil embargo, or a labor dispute. The court is man-

100. Schmitt & Wollschlager, supra note 73.
101. UCC §1-102.
102. Id. See also Comment 1 to §1-102 which reads, in part:
   The text of each section should be read in the light of the purpose and policy of
   the rule or principle in question, . . . and the application of the language should
   be construed narrowly or broadly, as the case may be, in conformity with the
   purposes and policies involved. (emphasis added)
103. It should be noted that UCC §2-716 is a codified "equitable" remedy. The word
   "proper" in §2-716(1) recognizes this fact. As such, courts must consider the granting of
   specific performance in light of the needs of both parties and the fairness of the decree.
104. UCC §2-712.
105. Id. §2-615, Comment 4, "Increased cost alone does not excuse performance. . . ."
duted to consider the "commercial character" or commercial setting in which the problem arose.\(^{110}\) If a seller has diminished supplies of a contracted good, and future supplies are impracticable to procure, the Code itself mandates an allocation of the remaining supplies to all customers in a fair and reasonable manner. In the past, however, courts have been reluctant to immerse themselves in the waters of commercial impracticability, often incorrectly using the elements of common law impossibility to negate the commercial impracticability defense.\(^{111}\) Instead, courts have preferred the liberal notions of specific performance, resulting in a balance in favor of the buyer.\(^{112}\)

The difficult case is the one presenting the factual elements of *T. V. A. v. Westinghouse.*\(^{113}\) It is not impossible for the seller to perform, for the seller is capable of producing the good required. However, he often must do this at considerable, if not prohibitive expense.\(^{114}\) The buyer, on the other hand, wants the seller to perform, as the seller is the only person capable of filling the order in the quantities demanded or at the quality needed.\(^{115}\) It appears likely that this particular kind of Section 2-716/2-615 conflict is one that increasingly will raise its head in the shortage economy of the 1970's and 80's. Fortunately, the Code provides a mechanism based on sound economic theory and equitable considerations which can resolve this dispute.

**Resolution of the Specific Performance—Commercial Impracticability Conflict**

All sections of the Code are to be interpreted liberally to promote its underlying purposes and policies.\(^{116}\) The purposes and policies are expressly codified as simplifying, clarifying, modernizing, and making uniform commercial transactions so that com-

\(^{110}\) UCC §2-615, Comment 3.
\(^{112}\) See note 99 *supra*.
\(^{114}\) See note 92 *supra*.
\(^{115}\) Id.
\(^{116}\) UCC §1-102.
mercial practices can continue to expand. The waste and high "transaction costs" of litigation fees and inadequate remedies were the very reasons businessmen demanded a uniform commercial code. In a very real sense, they were seeking a uniform statute which would "maximize resources" while minimizing social costs. The economic impact of the UCC is both expressly mandated, and supported by scholarly legal commentary.

Presently, the Section 2-716/2-615 conflict forces courts to use a double-edged sword. If a court saves the buyer by ordering specific performance, the seller can be mortally wounded. If the seller is saved by commercial impracticability, the buyer receives no fair or just compensation. Furthermore, the tendency of past courts to favor specific performance over commercial impracticability can result only in sellers refusing to engage in long-term contracts. This, in turn, affects the buyers' ability to secure goods on a long-term basis. The direct consequence is an unstable market situation for both the buyer and the seller.

Logically, the Section 2-716/2-615 conflict can best be resolved by equitably balancing the economic considerations presented. In the area of nuisance and pollution, for instance, courts are beginning to recognize the value of using economic considerations in deciding property rights. The use of economic considerations is expressly suggested in Comment 6 to Section 2-615. The "ex-

117. Id.
118. The term "transaction costs" can be found in recent literature dealing with the relation between law and economics. See, e.g., R. Posner, Economic Analysis of Law 13 (1972). See also Calabresi & Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1096 (1972).
120. UCC §1-102(2).
122. See note 92 supra.
123. If seller is excused under §2-615, he is excused from all damages. UCC §2-615(a).
124. See note 99 supra.
126. Id. at 13-14.
128. UCC §2-615, Comment 6 reads:
In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment under the
cuse” or “no excuse” dilemma presented by the commercial impracticability defense must be resolved by a sense of justice coming from a reading of “all provisions in light of their purpose.” The court is mandated to use *equitable principles* in furtherance of commercial standards and good faith. What this means in real life is that courts, faced with the kind of controversy presented in *T.V.A. v. Westinghouse*, must fashion an equitable decree which does justice to both parties. Merely choosing between Section 2-615 and Section 2-716 will not suffice.

When Westinghouse engaged in the long-term contract to supply nuclear fuel to T.V.A., it anticipated that the price agreed upon would reflect its cost plus a reasonable profit. T.V.A., in turn, could calculate its purchaser’s cost on a long-term basis, and make other long-term decisions in light of its cost. The tremendous rise in the basic cost of producing the nuclear fuel, allegedly due to the dramatic increase in the cost of petroleum necessary to manufacture the nuclear fuel, was estimated to range in the billions of dollars. This fact situation illustrates how, if the court favors buyers with a specific performance decree, or excuses sellers under Section 2-615, the other contracting party bears an inordinate burden. Equitable and economic considerations mandate a decree which will not shift such a burden so arbitrarily. Indeed, courts have resolved such a conflict in pre-Code law in an equitable and economically feasible manner.

The most economically feasible resolution to the conflict would be to grant the buyer a decree for specific performance in those cases in which the seller actually can produce the goods in accordance with the long-term contract. But, in fairness to the seller,
the decree necessarily must include a rewriting of the price term to reflect the increased cost to seller. A decree could be fashioned which permits the seller to charge the buyer the actual cost of producing the fuel, plus the percentage of profit the seller would have made on the contract, had the unforeseen circumstances not occurred. This would permit the seller to continue the contract without going out of business and also prevent him from obtaining the windfall profits which could occur when goods become scarce and he is free to sell the goods on the open market. The buyer, in turn, gets what he wants, the goods. However, justice demands that he pay the minimal increased production costs, plus the percentage profit to the seller he originally agreed to pay. The usual result will be that the buyer will get the goods at something more than the agreed contract price, but certainly far less than the current scarce commodity market price.

This approach seems to be in total accord with the purposes set out in Section 1-102, and reflects the liberal construction called for in interpreting both Section 2-615 and Section 2-716. As such, the Section 2-615/2-716 conflict can be resolved through the inherent flexibility of the Code itself. In addition, its resolution secures the availability of long-term contracts, so needed in a rapidly changing economic world.

136. For a simplified understanding of this principle, consider the following: Seller agrees to sell to buyer coffee at $50.00 per ton on a ten-year long-term contract. At the time of formation of the contract, seller's cost for procuring the beans was $40.00. He received a $10.00 profit per ton, or a 25% overall profit on his cost. If a crop shortage results and the cost of procuring the coffee rises to $80.00 per ton due to this unforeseen circumstance, the court will order specific performance, but re-write the price term. Buyer will now pay $80.00 plus 25% or $100.00 per ton.

137. For a discussion of the need to consider the adverse effect of a company going out of business, see Schmitt & Wollschlager, supra note 73, at 14.

138. Scarce commodities naturally draw a higher price on the open market, and the percentage of profit similarly will increase. See A. Alchian & W. Allen, University Economics 296-97 (3d ed. 1972).

139. See note 136 supra. In this hypothetical, the retail market price due to the unforeseen crop failure may well have risen to $120.00 per ton. Under our formula, buyer could purchase from seller at $150.00 per ton ($120.00 plus the percentage profit of $30.00).

140. UCC §1-102, Comment 1.

141. Schmitt & Wollschlager, supra note 73, at 14.
Conclusion

Hopefully, this Article has provided the historical basis to understand and accept the increasingly liberal granting of specific performance. The rigid common law shackles on the courts of equity have given way to the flexibility needed in today's commercial world. Specific performance, along with commercial impracticability, are two of the more obscure and long neglected aspects of the Uniform Commercial Code which will become more and more prominent. There is no doubt that the courts will be called on to clarify, and perhaps even to expand further, the "other proper circumstances" in which specific performance may be invoked. They also will be called on to resolve the Section 2-716/2-615 conflict in a wider variety of circumstances as our economy changes, shortages develop, and scarce commodities increase. This Article suggests an economic perspective from which the Section 2-716/2-615 conflict can be analyzed. It is certainly not the only approach, but one which appears to be viable and in accord with the Code's expressed purposes. It represents one of the characteristics of the UCC for which the drafters can be justly proud, the Code's inherent flexibility in the ever-changing commercial world.