

Bradley: August 31, 2017

**Neri v Retail Marine: Interaction of UCC §2-718 and §2-708:** a textual application

Neri paid a deposit of \$4250

**UCC §2-718 (2):**

**If [Retail Marine] justifiably withholds delivery of goods... because of the [Neri's] breach... [Neri] is entitled to restitution of any amount by which the sum of the [Neri's] payments exceeds .....(b).. twenty per cent of the value of the total performance for which [Neri] is obligated under the contract or \$500, whichever is smaller**

Restitution means restoration or return. The provision tells us how much of the deposit Neri should get back.

Neri's payments (the deposit) amounted to \$4250

The total performance for which the buyer is obligated was \$12,587.40 and 20% of this is around \$2500. \$500 is smaller than \$2500 so Neri gets back all but \$500 of the deposit.

**UCC §2-718 (3) [Neri's] right to restitution under subsection (2) is subject to offset to the extent that [Retail Marine] establishes:**

**(a) a right to recover damages under the provisions of this Article other than subsection (1)...**

Neri's right to restitution under subsection (2) is \$3750

The \$3750 is subject to offset to the extent Retail Marine establishes a right to damages under another provision of Art. 2 (Merriam-Webster online has as one meaning for offset: "something that serves to counterbalance or to compensate for something else")

So Neri should get as much of the \$3750 as is left after Retail Marine's right to damages is taken care of

The Court says Retail Marine is entitled to \$3253 under UCC §2-708(2) (lost profits of \$2579 and incidental damages of \$674)

Neri should get \$3750 - \$3253 or \$497 according to the text of UCC §2-718 and §2-708.

**What would explain why Neri in fact gets \$500 more than this, or \$997 ?**

If the 20% or \$500 should be conceived of as an amount allowed for incidental damages and is therefore already essentially included in the \$674 figure for incidental damages the Court has allowed (Retail Marine gets the larger amount of incidental damages it has proved instead of the \$500 it would have got under UCC §2-718(2)).

The Court does not say this is what it is doing and just seems to assume the full amount of the deposit is the starting point for the UCC §2-708 calculation.

Perhaps a way for the court to apply the statute consistently with its terms would be to say Neri gets \$3750 less Retail Marine's damages under UCC §2-708(2) which are (lost profits of \$2579 and incidental damages of \$174 being the amount of incidental damages not covered by the \$500 allowed to be retained out of the deposit). I think this produces the same bottom line number as the court's decision in a way that would be more consistent with the statutory text.