

SPECIFIC PERFORMANCE OF CONTRACTS FOR SALES OF GOODS: EXPANSION OR RETRENCHMENT IN THE 1980'S

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INTRODUCTION

Traditionally, in a case where the seller has breached a promise to deliver certain goods, an aggrieved buyer had to settle for whatever damages he sustained in securing the goods elsewhere. Important cases and commentary, however, indicate an expansive trend toward the granting of specific performance as a remedy in breach of contract actions regarding sales of goods. Simultaneously, a line of cases and commentaries has emerged indicating a counter-trend—one toward a retrenchment against granting this significant, equitable remedy. The conflict is not new and has historically caused much difficulty for courts, legislatures, and litigants.

This article will, after an examination of the history and common law in the area, explore the relevant cases and legal reasoning which produced these opposite trends. The goal will be to identify the current status of specific performance as a remedy in sales of goods contracts and predict its future in this decade. Qualitative and not merely quantitative analysis¹ will be employed to focus on key issues which may determine the trend for the 1980's.

I. DEFINITION

“Specific performance as a remedy for breach or threatened breach of contract means a decree issued by a court of equity or a court having equitable powers, ordering the defendant to render to the plaintiff the performance promised.”² Professor Corbin expressed the basic purpose and means for the implementation of specific performance as follows:

The purpose of a decree for specific performance is to attain, as fully and exactly as is reasonably possible, the realiza-

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1. A quantitative analysis cannot be entirely discounted when attempting to identify trends. It must, however, be appropriately weighed against key opinions and commentary which reflect opposing views on the same issue.

2. L. SIMPSON, *HANDBOOK OF THE LAW OF CONTRACTS* 405 (2d ed. 1965).

tion of the justifiable expectations of the promisee. In general, the means used to attain this realization is a court order that the promisor shall specifically perform as he promised in the contract. Disobedience to such an order is treated as contempt and punishable in accordance with the methods that the statutory or customary procedure in a particular jurisdiction may make available.³

The general purpose of all contract remedies is to place the aggrieved party in as good a position as he would have enjoyed had the other party performed according to the contract.⁴ This is tantamount to saying that all contract remedies seek to protect one's contract rights.⁵ Literally, specific performance demands the execution of a contract according to the precise terms agreed upon;⁶ it is, in contract law, the fundamental alternative to money damages.⁷

It is necessary throughout this study to keep in mind certain basic tenets regarding the remedy of specific performance:

a) "specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law;"⁸

3. 5A A. CORBIN, CORBIN ON CONTRACTS § 1138 (1964). In cases where the performance required pursuant to a contract was intended to create certain beneficial legal rights in the plaintiff, it may be within the court's power to create those rights by its own decree, without any action by the defendant. *Id.*

4. RESTATEMENT OF CONTRACTS § 329 comment a (1932); RESTATEMENT (SECOND) OF CONTRACTS § 358 comment a and § 371 comment a (Tentative Draft No. 14, 1979); *see also*, Schwartz, *The Case For Specific Performance*, 89 YALE L.J. 271, 271 (1979) [hereinafter referred to as Schwartz].

5. *See generally*, Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Protection of contract rights is distinguishable from property and liability rules. A right is protected by a property rule when it can be appropriated by a non-owner only if he first purchases permission from the owner of the right. *Id.* at 1092. One who misappropriates such a right will be subjected to sanctions. *Id.* at 1126. Where the right is protected by a liability rule, the misappropriator need only compensate the owner for any loss the owner suffers. *Id.* at 1092.

6. For further general definitional statements regarding specific performance, *see* *Guadalupe City Bd. of Educ. v. O'Bannon*, 26 N.M. 606, 609, 195 P. 801, 803 (1921) ("the actual accomplishment of a contract by a party bound to fulfill it. . . ."); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 689 (Tex. Civ. App. 1924); *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928); (Since the exact fulfillment of an agreement is not always practicable, specific performance, in a given case, can mean not literal but substantial performance.)

7. *See* Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 352 (1978). "A promise may be said to be specifically enforceable when the law gives its owner, the promisee, a right to require the actual (or "specific") performance of the promise." *Id.*

8. *Weathersby v. Gore*, 556 F.2d 1247, 1258 (5th Cir. 1977); *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39-40 (8th Cir. 1975); *Jamison Coal & Coke Co. v. Goltra*, 143 F.2d 889, 894 (8th Cir. 1943), *cert. denied*, 323 U.S. 769 (1944); *Columbia Gas Transmission Corp. v.*

b) specific performance is not a matter of right but is, rather, within the discretion of the court;⁹ and

c) there are many defenses against specific performance which are not available in actions at law such as inadequacy of consideration,¹⁰ lack of security for the promisee's performance,¹¹ the promisor's unilateral mistake,¹² and the difficulty of a court in supervising the decree.¹³

II. HISTORY

In early English society, the law courts insisted that a party file a writ specifically designed to encompass a particular cause of action.¹⁴ Questions regarding a particular action were often so unique that these inflexible writs were inadequate to provide the court with jurisdiction.¹⁵ Because of the adherence to such rigid principles, the English courts, in administering law, failed to achieve the broader concepts of justice envisioned by society. Equity, being founded on a sense of fairness, however, was very adept

Larry H. Wright, Inc., 443 F. Supp. 14, 24 (S.D. Ohio 1977); Kaiser Trading Co. v. Associated Metals & Minerals Corp., 321 F. Supp. 923, 933 (N.D. Cal. 1970); Duval & Co. v. Malcom, 233 Ga. 784, 788, 214 S.E.2d 356, 359 (1975); Rimes v. Rimes, 152 Ga. 721, 721-22, 111 S.E. 34, 34 (1922); Paloukos v. Inter-mountain Chevrolet Co., 99 Idaho 740, 746, 588 P.2d 939, 944 (1978); Ace Equip. Co. v. Aqua Chem., Inc., 73 Pa. D. & C. 2d 300 (1975). *See also* 71 AM. JUR. 2d *Specific Performance* § 152, at 197 (1973).

9. Public Water Supply Dist. v. Fowlkes, 407 S.W.2d 642, 647 (Mo. Ct. App. 1966); Green, Inc. v. Smith, 40 Ohio App. 2d 30, 37, 317 N.E.2d 227, 233 (1974). *See, e.g.*, Tipton v. Woodbury, 616 F.2d 170, 178 (5th Cir. 1980); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 725 (Mo. Ct. App. 1979); RESTATEMENT (SECOND) OF CONTRACTS § 371(1) (Tent. Draft No. 14, 1979). "[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty." *Id.*

10. Schlegel v. Moorhead, 170 Mont. 391, 394, 553 P.2d 1009, 1012 (1976); RESTATEMENT (SECOND) OF CONTRACTS, § 378(1)(c) (Tent. Draft No. 14, 1979). *But see* Gross v. J. & L. Camping & Sports Ctr. Inc., 270 Md. 539, 544, 312 A.2d 270, 273 (1973); Blankenship v. Porter, 479 S.W.2d 409, 414 (Mo. 1972). *See also* Schwartz, *supra* note 4, at 273, 299-300.

11. Handy v. Gordan, 65 Cal. 2d 578, 580, 422 P.2d 329, 331, 55 Cal. Rptr. 769, 771 (1967); RESTATEMENT (SECOND) OF CONTRACTS § 377 (Tent. Draft No. 14, 1979); Schwartz, *supra* note 4, at 273.

12. *See* CORBIN, *supra* note 3, at § 1166 and cases cited therein; 11 S. WILLISTON, WILLISTON ON CONTRACTS § 1427 (3d ed. 1968); Schwartz, *supra* note 4, at 273.

13. *See In re Staklinski & Pyramid Elec. Co.*, 6 N.Y.2d 159, 163, 160 N.E.2d 78, 82 (1959); Bessinger v. Nat'l Tea Co., 75 Ill. App. 2d 395, 398, 221 N.E.2d 156, 158 (1966); RESTATEMENT (SECOND) OF CONTRACTS § 380 (Tent. Draft No. 14, 1979); WILLISTON, *supra* note 12, at § 1422A; CORBIN, *supra* note 3, at § 1171; Schwartz, *supra* note 4, at 304-05.

14. *See generally* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1962).

15. F. MAITLAND, EQUITY 3 (2d ed. 1936).

at addressing the exigencies of a diverse society.¹⁶ The Court of Chancery,¹⁷ with its individualized approach, was capable of fashioning writs which were appropriate to particular circumstances and which provided the aggrieved party with an appropriate equitable remedy.¹⁸ It has been stated of equity in general that it is "a living, changing thing, forever adapting itself to new conditions; in its ultimate sense it is a supreme law, acting upon and modifying codes, statutes, and case law. The avoidance of the freezing of law into inflexible rules is one of its chief purposes."¹⁹

At common law, specific performance was only decreed when it was impossible for the aggrieved party to find a remedy at law.²⁰ Specific performance was granted where it provided the only means through which the aggrieved party could obtain complete justice, and have his needs satisfied.²¹ Such a case would arise where the goods were truly unique — one of a kind. Since no two parcels of land can be the same, land has traditionally been considered to be unique.²² It logically developed that where a unique chattel, such as an original oil painting, was the subject of a contract, an aggrieved buyer could obtain a decree for specific performance. Three exceptions to this concept developed rather quickly: specific performance would be denied where the pecuniary value of the goods was set by the contracting parties, where the subject matter of the contract was personal services, and where the terms of the contract were intrinsically unfair.²³ When the chattel in question was unique, there existed, over and above the market value, that which was called the "pretium affectionis"²⁴ and the

16. Oleck, *Historical Nature of Equity Jurisprudence*, 20 *FORDHAM L. REV.* 23 (1951); Newman, *The Place and Function of Pure Equity in the Structure of Law*, 16 *HASTINGS L.J.* 401 (1965).

17. The Court of Chancery was founded during the fourteenth century.

18. See *supra* note 16.

19. Oleck, *supra* note 16, at 25.

20. J. POMEROY, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS* § 12 (3d ed. 1926) [hereinafter cited as *POMEROY ON SPECIFIC PERFORMANCE*].

21. See Schmitt & Pasterczyk, *Specific Performance Under the Uniform Commercial Code—Will Liberalism Prevail?*, 26 *DE PAUL L. REV.* 54 (1976) [hereinafter cited as Schmitt & Pasterczyk]. The article states that "[t]he right to a decree of specific performance was neither universal nor absolute, and in this respect the term 'right' is probably a misnomer." *Id.* at 56.

22. See *Kitchen v. Herring*, 42 N.C. 190 (1851) (the uniqueness concept was applied to land simply because it was land — a favored subject in England and every country of Anglo Saxon origin).

23. Schmitt & Pasterczyk, *supra* note 21, at 57; *POMEROY ON SPECIFIC PERFORMANCE*, *supra* note 20, §§ 11-15.

24. This term has been defined as an imaginary value put upon a thing by the fancy of

Chancellor could thereby intervene and give the relief of specific performance. In the important case of *Pusey v. Pusey*,²⁵ specific performance was granted for the transfer of an ancient celebrated horn given to the Pusey family by the Danish King Canute. Other cases dealing with goods having "pretium affectiones" involved such items as masonic dresses and ornaments,²⁶ an unusual tobacco box,²⁷ a diamond ring,²⁸ and two china jars.²⁹

Historically, since the English Chancellors struggled to establish the jurisdiction of Chancery as a court separate from the existing law courts, it was imperative that the dignity of the then new courts be maintained. Any order issued by these courts which could not be certain of enforcement would clearly jeopardize this dignity. Accordingly, decrees for specific performance of anything beyond a single act were avoided.³⁰ Today, however, a court's reluctance to grant specific performance where extensive supervision would be involved is generally recognized to be a question of degree and not a question of valid jurisdiction.³¹ The early courts in this country, however, occasionally granted specific performance where extensive court supervision was involved or where there were great interests of public policy involved which outweighed the task of extensive supervision of the enforcement of the contract.³² The courts also avoided decrees of specific performance where the

the owner, and growing out of his attachment for the specific article, its associations, his sentiment for the donor, etc. BLACK'S LAW DICTIONARY 1069 (5th ed. 1979).

25. 23 Eng. Rep. 465 (1684).

26. *Lloyd v. Loring*, 31 Eng. Rep. 1302 (1802).

27. *Fells v. Read*, 30 Eng. Rep. 899 (1794). For American decisions, see 1 POMEROY, EQUITY JURISPRUDENCE § 185 (5th ed. 1941).

28. *Burr v. Bloomsburg*, 101 N.J. Eq. 615, 33 A. 962 (1927).

29. *Falcke v. Gray*, 62 Eng. Rep. 250 (1859). In this case, the court denied specific performance on other grounds, but said that the subject contract "is for the purchase of articles of unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-performance. . . ." *Id.* at 252-53.

30. See *Paxton v. Newton*, 65 Eng. Rep. 470 (1854); *Mosely v. Virgin*, 30 Eng. Rep. 959 (1794); *Errington v. Aynesley*, 29 Eng. Rep. 191 (1788). For a further discussion of this as related to the granting of specific performance of construction contracts, see Axelrod, *Judicial Attitudes Toward Specific Performance of Construction Contracts*, 7 U. DAYTON L. REV. 33 (1981); Note, *Specific Performance: A Liberalization of Equity Standards*, 49 IOWA L. REV. 1240 (1964) [hereinafter cited as Note, *Specific Performance*]. See also *supra* note 4 and accompanying text.

31. See *Strauss v. Estates of Long Beach*, 187 App. Div. 876, 176 N.Y. Supp. 447 (2d Dep't 1919); *McDonough v. Southern Or. Mining Co.*, 177 Or. 136, 159 P.2d 829 (1945).

32. See *Standard Fashion v. Siegel-Cooper Co.*, 157 N.Y. 60, 51 N.E. 408 (1898). ("An exception to this rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts . . . which enjoy special privileges conferred by statute and promote the general welfare.")

contract would effectuate a compulsory personal relationship between the parties.³³

III. THE UNIFORM SALES ACT

The Uniform Sales Act, which was enacted in most American jurisdictions by the 1920's, contained the following provision for specific performance of sales of goods contracts:

Where the seller has broken a contract to deliver *specific or ascertained goods*,³⁴ a court having the powers of a court of equity may, *if it thinks fit*, on the application of the buyer, by its judgment of decree direct that the contract be performed specifically, without giving the seller the option of retaining the goods on payment of damages³⁵

This provision reflected the intent of the lawmakers to liberalize the rules regarding the granting of specific performance. In a 1951 case, *Hunt Foods Inc. v. O'Disho*,³⁶ the court stated with regard to section 68, that the legislature "unquestionably had in mind the liberalization of the law regarding specific performance of contracts for the sale of chattels."³⁷ While pre-section 68 case law shows the granting of specific performance in contracts for the sale of "unique" chattels,³⁸ the concept of "uniqueness" grew³⁹ to be more concerned with "economic uniqueness"⁴⁰ or scarcity. Al-

33. See *Johnson v. Shrewsbury & B. Ry.*, 42 Eng. Rep. 257 (1851); *Pickering v. Bishop of Ely*, 63 Eng. Rep. 109 (1843).

34. See *Holroyd v. Marshall*, 10 H.L.C. 191 (1862). The phrase "specific goods" probably originated in this case where the court stated that a "buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract." *Id.* at 210. But see FRY, *SPECIFIC PERFORMANCE*, 82 (6th ed. 1926) (This did not, however, represent the general English law of that period.).

35. UNIFORM SALES ACT § 68 (1906) (emphasis added).

36. 98 F. Supp. 267 (N.D. Cal. 1951).

37. *Id.* at 270; see also *Pallus v. Yarbrough*, 219 Or. 611, 347 P.2d 620 (1959); *Pittinger Equip. Co. v. Timber Structures, Inc.*, 189 Or. 1, 217 P.2d 770 (1950). See Note, *Specific Performance*, *supra* note 30, at 1293. "In utilizing [the Uniform Sales Act] to liberalize specific performance the courts have apparently exchanged the adequacy test which had been interpreted to mean *legally equivalent* money damages for a test where the remedy must be *equivalent in fact* to the performance promised by the contract." *Id.*

38. See WILLISTON, *supra* note 12, at § 602. "Specific performance has been granted for unique chattels listed as slaves, works of art, heirlooms, vessels, and valuable documents." *Id.* It will be granted where the "subject matter of [a] contract is unique in character and cannot be duplicated." CORBIN, *supra* note 3, at 1142.

39. *Id.*

40. Making reference to G. STIGLER, *THE THEORY OF PRICE* §§ 25-26 (3rd ed. 1966), Professor Kronman states:

In the framework of conventional economic analysis, however, the concept of

though American courts were very reluctant to grant specific performance of sales of goods contracts other than those for "unique chattels", the courts of the continent of Europe and of Scotland allowed specific performance without any limitations other than those which the circumstances of the case necessarily imposed.⁴¹

The case of *Cochrane v. Szpakowski*⁴² involved a contract for the sale of a restaurant and retail liquor business. Included in the sale of the business was the required license to operate the retail liquor business. Since the state limited the number of such licenses issued, the plaintiff could not have obtained the "same" business on the open market. The court granted specific performance, stating "where the thing contracted for cannot be purchased in the market, and, because of its nature or the circumstances, the delivery of the thing itself, and not mere pecuniary compensation, is the redress practically required."⁴³ Although pecuniary damages clearly could have been ascertained, the court, under section 68, "thought fit"⁴⁴ to grant specific performance.⁴⁵

uniqueness is troublesome. Although it might seem reasonable to define the economic uniqueness of a good in terms of its attributes or properties, this is not the definition economists employ. Economists recognize this sort of uniqueness — as they call it "technological" uniqueness — but they do not define the substitutability of goods in these terms. For the purpose of economic theory, the substitutability of a particular good is determined by observing consumer behavior, not by cataloguing the various properties of the good. If an alteration in the relative price of one good affects the demand for another, then these two goods are said to be economic substitutes. The degree of their substitutability is called the "cross-elasticity of demand. . . ." Economists are interested in determining how great a change in the price of one good is required to effect a change of given magnitude in the consumption of certain other goods. But these are really questions of degree, resting on the underlying assumption—fundamental to economic theory—that all goods are ultimately commensurable. If this assumption is accepted, the idea of a unique good loses meaning.

Kronman, *supra* note 7, at 359.

41. See WILLISTON, *supra* note 12, at § 601. See also Comment, *Specific Performance Under Section 2-716 of the Uniform Commercial Code—What Other Proper Circumstances*, 33 U. PITT. L. REV. 243, 245 (1971) [hereinafter cited as Comment, *Other Proper Circumstances*].

42. 355 Pa. 357, 49 A.2d 692 (1946). See, e.g., *Hogan v. Norfleet*, 113 So. 2d 437 (Fla. Dist. Ct. App. 1959); *Unatin 7-UP Co. v. Solomon*, 350 Pa. 632, 39 A.2d 835 (1944); *McCormick Dray Lines, Inc. v. Lovell*, 13 Pa. D. & C.2d 464, 2 Lyc. Rep. 55 (1957).

43. *Cochrane v. Szpakowski*, 355 Pa. 357, 361, 49 A.2d 692, 694 (1946) (citing *McGowin v. Remington*, 12 Pa. 56, 51 Am. Dec. 584 (1847)).

44. See UNIFORM SALES ACT § 68 (1906).

45. By 1950, "[t]here was little doubt that the 'think fit' doctrine of § 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

In *Heidner v. Hewitt Chevrolet Co.*,⁴⁶ the plaintiff, pursuant to a sales contract, was to purchase a new automobile from the defendant. Due to the severe shortage of new automobiles available to the public during the late 1940's, the plaintiff was given a priority number which entitled him to a new automobile from the defendant. Upon reaching the plaintiff's priority number, the defendant refused to sell the car to the plaintiff unless the plaintiff traded in another car; this was not required in their original contract. The lower court found for the defendant, but on appeal the decision was reversed and specific performance was granted. The court, after recognizing that the goods were not available on the open market, held that where "like chattels cannot be readily purchased on the market at the time specified in the contract for delivery of the chattel, specific performance will generally be granted if the other necessary elements are present."⁴⁷

Although it was generally accepted that section 68 was a liberalization of the common law,⁴⁸ some courts continued to be restrictive in granting decrees of specific performance. In *Lexington Loose Leaf Tobacco Warehouse Co. v. Coleman*,⁴⁹ the Court of Appeals of Kentucky affirmed a lower court decision denying specific performance of a contract to sell certain tobacco. The plaintiffs, tobacco auctioneers, had established that the subject tobacco was of such a nature that it could not be purchased on the open market.⁵⁰ The court said that "[A]s a general rule, equity will not decree specific performance of a contract for a sale of personal property because ordinarily there is an adequate remedy at law."⁵¹ The court held that damages could be computed to reflect the "unique" supply situation.

In *Gingerich v. Protein Blenders, Inc.*,⁵² the plaintiffs were denied specific performance of a contract for the sale of corporate

codification." Schmitt & Pasterczyk, *supra* note 21, at 59-60 (citing *Boeving v. Vandover*, 240 Mo. App. 117, 120, 218 S.W.2d 175, 178 (1949)).

46. 166 Kan. 11, 199 P.2d 481 (1948).

47. *Id.* at 13, 199 P.2d at 483 (emphasis added).

48. See WILLISTON, *supra* note 12, § 1418 at 652-53. See also, Kronman, *supra* note 7; Note, *Specific Performance*, *supra* note 30; Schmitt & Pasterczyk, *supra* note 21; Schwartz, *supra* note 4.

49. 289 Ky. 277, 158 S.W.2d 633 (1942).

50. *Id.* at 279, 158 S.W.2d at 634.

51. *Id.* at 279, 158 S.W.2d at 634 (citing *Steinway & Sons v. Massey*, 198 Ky. 268, 248 S.W. 884 (1937)).

52. 250 Iowa 654, 95 N.W.2d 522 (1959).

stock even though the appellate court agreed with the plaintiffs that the value of the stock in question was "of unknown and not easily ascertainable value."⁵³ It has therefore been maintained that section 68 did little to liberalize the availability of specific performance in sales of goods cases.⁵⁴

IV. THE UNIFORM COMMERCIAL CODE

Section 2-716(1) of the Uniform Commercial Code [hereinafter referred to as the "Code" or "UCC"] states: "Specific performance may be decreed where the goods are *unique or in other proper circumstances*."⁵⁵ Official comments 1 and 2 accompanying section 2-716 seem to support a liberal interpretation of that section:

1. 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.⁵⁶

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of *the total situation which characterizes the contract*. Output and requirements contracts involving a particular peculiarly available source of market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. *However, uniqueness is not*

53. *Id.* at 657, 95 N.W.2d at 524.

54. R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 158, at 480 (1970).

55. U.C.C. § 2-716(1) (1972) (emphasis added). The remainder of section 2-716 of the Uniform Commercial Code reads as follows:

(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.

(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.

U.C.C. §§ 2-716(2)-(3).

56. U.C.C. § 2-716 comment 1 (emphasis added).

*the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances."*⁵⁷

One commentator⁵⁸ believes that the intent of the Sales Act was to liberalize the availability of the remedy of specific performance over non-statutory law.⁵⁹ He further believes that the comments to section 2-716⁶⁰ show an intent at further liberalization. With this in mind, the commentator characterized section 2-716 as a "liberalization of a liberalization."⁶¹ Moreover, other sections of the Code, when read in conjunction with section 2-716 and the accompanying comments, also support this characterization.⁶²

The most significant aspects of UCC section 2-716 are the expanded bases for determining "uniqueness" and "other proper-circumstances."⁶³ These concepts, more than anything else, have been the common denominators of nearly all of the diverse interpretive cases regarding specific performance of sales of goods contracts.

V. EXPANSION

In Kaiser Trading Co. v. Associated Metals & Minerals

57. U.C.C. § 2-716 comment 2 (emphasis added).

58. See Comment, *Other Proper Circumstances*, *supra* note 41, at 243.

59. See *Hunt Foods, Inc. v. O'Disho*, 98 F. Supp. at 270 (citing *Bomberger v. McKelvey*, 35 Cal. 2d 607, 620 P.2d 729 (1950)); see also Comment, *Other Proper Circumstances*, *supra* note 41, at 243 (citing *Oreland Equip. Co. v. Copco Steel Corp.*, 310 Mich. 6, 16 N.W.2d 646 (1944)).

60. See *supra* note 56 and accompanying text.

61. Compare Comment, *Other Proper Circumstances*, *supra* note 41, at 243 ("Consistent with this, it is suggested that specific performance may now be granted in many instances which would not be commercially typical specific performance situations. Certainly, it may now be granted where it would not have been under the Sales Act and non-statutory law.") with UNIFORM SALES ACT § 68 (1906). See also *supra* note 35 and accompanying text.

62. U.C.C. § 1-106(1) (1972) deals with the liberal administration of remedies: *The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed* but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law (emphasis added).

U.C.C. § 1-102, also reads:

(1) This Act shall be *liberally construed and applied* to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are (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 . . . (emphasis added).

63. See U.C.C. § 2-716 comment 2. See *supra* note 57 and accompanying text.

Corp.,⁶⁴ Associated entered into a contract to sell Kaiser a large quantity of cryolite,⁶⁵ a scarce mineral substance used in the manufacture of primary aluminum. Upon Associated's repudiation of the contract,⁶⁶ Kaiser sought a preliminary injunction to restrain Associated from failing to perform under the contract. In determining whether or not to issue the requested injunction, the court noted that under California law, "an injunction, may not be issued to enforce contractual rights except under circumstances in which specific performance would be an available remedy."⁶⁷ The court granted the equitable relief sought by Kaiser and held that the remedy of specific performance should be available when goods cannot be covered and replaced.⁶⁸ Although the federal court deciding this case acknowledged the lack of California decisions interpreting the "other proper circumstances" phrase of section 2-716(1), the court relied heavily on the Code comments, decisions in other jurisdictions, and the California State Supreme Court case of *Bromberger v. McKelvey*.⁶⁹ The court in *Bromberger* noted the "'growing tendency' to allow specific performance where damages are not the equivalent of the performance."⁷⁰

The last sentence of comment 2 to section 2-716⁷¹ (referring to "other proper circumstances") can be construed to suggest that the draftsman contemplated a second, independent basis for awarding specific performance in particular cases. Professor Kronman states that it is unclear what this basis might be. He suggests that:

The problem of construing "other proper circumstances" may be avoided by reading it as nothing more than a restatement

64. 321 F. Supp. 923 (N.D. Cal. 1970).

65. The cryolite was actually a synthetically produced substitute which Associated had been purchasing from the producer for many years and had been selling annually to Kaiser for several years. *Id.* at 925 n.2.

66. Associated's alleged justification for repudiating the contract was that Kaiser had been surreptitiously negotiating with Associated's supplier and had concluded a contract with them thereby eliminating Associated's future role as a middleman. *Id.* at 927.

67. 321 F. Supp. at 931 (construing CAL. CIV. PROC. CODE § 526 (West 1979)). Availability of specific performance was deemed by the court to be the very essence of the action; the court held it could not be considered merely a procedural matter that would not "substantially" affect the outcome of the litigation. *Id.* See generally, 7 J. MOORE, FEDERAL PRACTICE § 65.18(1) (2d ed. 1970).

68. See, e.g., *Hogan v. Norfleet*, 113 So. 2d. 437, 439 (Fla. Dist. Ct. App. 1959); *Jaup v. Olmstead*, 334 Mich. 614, 615, 55 N.W.2d 119, 120 (1952); *Thompson v. Commonwealth*, 197 Va. 208, 212, 89 S.E.2d 64, 67 (1955).

69. 35 Cal. 2d 607, 220 P.2d 729 (1950).

70. *Id.* at 616-17, 220 P.2d at 735.

71. See text accompanying *supra* note 56.

of the proposition which (according to the Comment) is implicit in the Code's notion of uniqueness—that uniqueness can only be determined by looking at “the total situation which characterizes the contract.” . . . Read in this way, § 2-716(1) states only one test, not two.⁷²

At approximately the same time that *Kaiser Trading Co. v. Associated Metals and Minerals Corp.*⁷³ was decided, the “inability to cover or replace” concept was expanded to include a situation where a plaintiff is *financially* unable to cover, even though the goods could be purchased on the open market.⁷⁴

While it is axiomatic that specific performance of a sale of goods contract will not be decreed when the party claiming breach of contract has an adequate remedy at law,⁷⁵ the difficult question to answer is whether or not damages are adequate or inadequate. In the 1975 case of *Laclede Gas Co. v. Amoco Oil Co.*⁷⁶ the court stated that a remedy at law which was adequate to defeat the grant of specific performance, “must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.”⁷⁷ When no adequate remedy at law is present and all equitable rules are met, the court held that “specific performance goes as a matter of right.”⁷⁸ Professor Schwartz, in his article, argues very persuasively that the remedy of specific performance should be as routinely available as the damages remedy.⁷⁹ He stresses that the damages remedy is undercompensatory more often than is generally supposed.⁸⁰ According to Professor

72. Kronman, *supra* note 7, at 357 n.28. See *Jamison Coal & Coke Co. v. Goltra*, 143 F.2d 889 (8th Cir. 1944), *cert. denied*, 323 U.S. 769 (1944); see also cases cited *supra* note 8.

73. 321 F. Supp. 923; see *supra* note 62 and accompanying text.

74. *Gerwin v. Southeastern Cal. Ass'n. of Seventh Day Adventists*, 14 Cal. App. 3d 209, 217, 92 Cal. Rptr. 111, 117-18 (Ct. App. 1971).

75. *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); see also cases cited *supra* note 8.

76. 522 F.2d 33 (8th Cir. 1975).

77. *Id.* at 40 (quoting *National Marking Mach. Co. v. Triumph Mfg. Co.*, 13 F.2d 6 (8th Cir. 1926)).

78. 522 F.2d 33, 39 (citing *Miller v. Coffeen*, 365 Mo. 204, 207, 280 S.W.2d 100, 102 (1955)) (emphasis added).

79. Schwartz, *supra* note 4.

80. *Id.* at 271. Certain defenses can be raised against specific performance that are not available against a damages award. See *supra* notes 10-13 and accompanying text. “The class of cases in which damage awards fail to compensate promisees adequately is . . . broader than the class of cases in which specific performance is now granted. . . . The compensation goal supports removing rather than retaining present restrictions on the availability of specific performance.” Schwartz, *supra* note 4, at 275.

Schwartz, there are two additional basic reasons why specific performance should be routinely available: a) promisees have economic incentives to sue for damages when damages are likely to be fully compensatory⁸¹ and b) promisees possess better information than courts as to both the adequacy of damages and the difficulties of coercing performance.⁸²

An interesting application and further expansion of the granting of specific performance in circumstances other than "uniqueness" — "other proper circumstances," for example — can be seen in the case of *Ace Equipment Co. v. Aqua Chem., Inc.*⁸³ The defendant breached an agreement to sell a huge used electric transformer to the plaintiff at a relatively low price, knowing that the plaintiff had contracted in advance to resell it to a third party at a substantial profit. The defendant retained the transformer. In granting a decree for specific performance, the court held that, although as between the parties there would be an adequate remedy at law and the measure of damages would be fixed by the terms of the agreement, the defendant's breach rendered the plaintiff unable to perform its contract with the third party. The court said:

This failure of performance for an item of service equipment may render plaintiff liable to damages, in addition to those for breach of contract, of a consequential nature for failing to perform The nature of these damages is speculative and conceivably could be extensive. It is this state of affairs which, in our judgment, is the ". . . other proper circumstances" contemplated by the Uniform Commercial Code.⁸⁴

This decision is questionable because nowhere in the statute or the official comments is there any references to third party ramifications as bearing on "other proper circumstances". Where there is an adequate remedy at law, as was the case here, there should be no need for the granting of specific performance.

Under the Code, the test of uniqueness must be made in terms of the "total situation which characterizes the contract."⁸⁵ Applying this test, courts have granted specific performance where the plaintiff contracted to purchase a fiberglass boat manufactured

81. *Id.* at 277.

82. *Id.*

83. 73 Pa. D. & C. 2d 300, 20 U.C.C. REP. SERV. 392 (CALLAGHAN 1975).

84. *Id.* (citation omitted).

85. U.C.C. § 2-716 comment 2.

only by the defendant⁸⁶ and also where the contracting parties had stipulated that certain cotton, the subject of their contract, was unique.⁸⁷ The total situation which characterizes the contract would also seem to include the nature of the contract and even the parties' relationship, if any, to the public.⁸⁸ In *Laclede Gas Co. v. Amoco Oil Co.*,⁸⁹ Amoco was to provide propane gas distribution systems through Laclede to various residential developments on a continuing basis.⁹⁰ As a result of a shortage of propane, Amoco voluntarily placed all of its customers, including the plaintiff, on an 80% allocation basis. Laclede objected and insisted on 100%. After notifying the plaintiff of a price increase to which the plaintiff objected, Amoco terminated the parties' agreement.⁹¹ Although Laclede had propane gas immediately available to it from other suppliers and although there was evidence indicating that propane gas was readily available on the open market, the court said there was no assurance that the plaintiff could find another supplier willing to enter into a long-term contract. Specific performance was granted because the public would ultimately suffer as a result of the termination of the agreement.⁹² The court held: "[h]ere the public interest in providing propane to the retail customers is manifest"⁹³ The decree was granted even though it required a degree of long term supervision by the court. Concerning supervi-

86. *Gay v. Seafarer Fiberglass Yachts, Inc.*, 14 U.C.C. REP. SERV. 1335 (N.Y. Sup. Ct. 1974).

87. *R.L. Kimsey Cotton Co., Inc., v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975).

88. *See Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39 (8th Cir. 1975).

89. 522 F.2d 33.

90. *Id.* at 35.

91. *Id.* at 36. Amoco claimed the right to terminate the parties' agreement on the ground that the agreement lacked mutuality. *Id.*

92. *Id.* at 40.

93. *Id.* at 39; *see also Orange Rockland Utils., Inc. v. Ameruda Hess Corp.*, 67 Misc. 2d 560, 324 N.Y.S.2d 494 (N.Y. Sup. Ct. 1971). The court stated that "general 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 involved." *Id.* at 563-64, 324 N.Y.S.2d at 498-99.

Early courts also gave special consideration when the interests of the public were involved:

An exception . . . [to the rule that courts will not grant a decree of specific performance which will require constant court supervision] . . . , founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute and promote the general welfare. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N.Y. 60, 61-62, 51 N.E. 408, 409 (1898).

sion, the court said, "[w]hile a court may refuse to grant specific performance where such a decree would require constant and long-continued supervision, this is merely a discretionary rule of decision which is frequently ignored *when the public interest is involved.*"⁹⁴

Generally, the relief for the breach of a requirements or output contract⁹⁵ is money damages.⁹⁶ The official comment to the Code, however, specifically discusses requirements and output contracts as follows: "Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation . . ." ⁹⁷ In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*,⁹⁸ Eastern brought an action for specific performance of its requirements contract with Gulf, pursuant to which Gulf was to supply aviation fuel to Eastern at certain airports.⁹⁹ The court, in granting specific performance, held that this case was "a particularly appropriate one for specific performance."¹⁰⁰ After citing the more liberal test under the Code for determining entitlement to specific performance, the court added that "[i]n the circumstances, a decree of specific performance becomes the *ordinary and natural relief rather than the extraordinary one.*"¹⁰¹ This appears to be one of the most expansive holdings regarding the liberalization of the granting of specific performance in recent years. One commentator offers the following cogent explanation for the inclusion of requirements and output contracts in comment 2 to the Code:

94. *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39 (8th Cir. 1975) (emphasis added). See, e.g., *Joy v. St. Louis*, 138 U.S. 1 (1891); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684, 691 (Tex. Civ. App. 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928). For a discussion regarding the uniqueness, not of the goods, but of the buyer, as an element in the determination of the granting of specific performance, especially in connection with a conflict between U.C.C. § 2-615 and § 2-716 (commercial impracticability), see Schmitt & Paszerczyk, *supra* note 21, at 69-70.

95. In a requirements contract, a buyer binds himself for a stated period of time to purchase all of his requirements for particular goods or services from a seller, in many cases at a fixed price, in exchange for a promise by the seller to furnish the buyer's requirements during such period. See U.C.C. § 2-306.

96. See *Loy v. Madison & Hancock Gas Co.*, 156 Ind. 332, 58 N.E. 844 (1900).

97. U.C.C. § 2-716 comment 2.

98. 415 F. Supp. 429 (S.D. Fla. 1975).

99. Gulf contended commercial impracticability under U.C.C. § 2-615 and that the contract was not a binding requirements contract because it lacked mutuality of obligations. The court rejected the impracticability contention, *id.* at 440, as well as the mutuality of obligations argument. *Id.* at 435.

100. *Id.* at 442.

101. *Id.* at 443 (emphasis added).

[A] buyer would normally enter into an output or requirements contract under circumstances which normally present adequate grounds for specific performance. A buyer may enter into such a contract in order to guard against a possible shortage of the product. On entering into the contract the buyer must realize the possibility that at some time during the duration of the contract the market price of the product might drop below that called for by the contract. He is willing to accept that risk in return for assurance of a steady supply of the product. Generally, then, the buyer would be likely to enter into an output or requirements contract where the goods involved are presently or prospectively difficult to obtain in a short time on the open market. In addition, it is likely that if the seller in such a contract breaches, the buyer could not easily find another seller able to supply like output or requirements. *Output and requirements contracts, then fall into the traditional inability to cover situation.*¹⁰²

VI. EVIDENCE REQUIRED

It has been stated that a plaintiff seeking the "extraordinary" equitable remedy of specific performance "assume[s] the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that [the plaintiff has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in [the plaintiff's] favor."¹⁰³ In the case of *Copylease Corp. of America v. Memorex Corp.*,¹⁰⁴ the plaintiff sought specific performance on a contract requiring the defendant to sell certain products to the plaintiff at prices lower than those being currently charged. The court appropriately denied equitable relief holding that this situation was completely remediable in damages.¹⁰⁵ In the 1980 case of *Tipton v. Woodbury*,¹⁰⁶ the court addressed the evidentiary issue in granting specific performance on a contract involving a defendant who agreed to sell to the plaintiff all of the defendant's stock in a state bank. The defendant argued

102. Comment, *Other Proper Circumstances*, *supra* note 41, at 253-54 (emphasis added). For a discussion of one of the few recorded earlier cases dealing with specific performance of requirements and output contracts, see *Hunt Foods, Inc. v. O'Disho*, 98 F. Supp. 267 (N.D. Cal. 1951) (decided under the UNIFORM SALES ACT). *Hunt* is also discussed in Comment, *Other Proper Circumstances*, *supra* note 41, at 253 n.43.

103. *Copylease Corp. of America v. Memorex Corp.*, 397 F. Supp. 853, 855 (S.D.N.Y. 1975) (quoting *Stark v. N.Y. Stock Exchange*, 466 F.2d 743 (2d Cir. 1972)).

104. 397 F. Supp. 853 (S.D.N.Y. 1975).

105. *Id.* at 855.

106. 616 F.2d 170 (5th Cir. 1980).

that a greater degree of proof was required for the granting of specific performance than was necessary under the preponderance of the evidence rule.¹⁰⁷ The court held that "the granting of a final decree in a specific performance suit requires that the proof be clear, competent and satisfactory."¹⁰⁸ With respect to specific performance under the Code, the court stressed that the Code is "an integrated comprehensive statement of a single body of law . . . [and] must be considered as a whole, and each section . . . read in conjunction with others. . . ."¹⁰⁹ With this interpretive method in mind, the court cited sections 2-711 and 2-716 and comment 2 to section 2-716¹¹⁰ and concluded that when read together, "the proof required . . . to establish . . . specific performance as an appropriate remedy, is only that shown by the preponderance of evidence."¹¹¹

VII. RETRENCHMENT

Many cases have evidenced a trend toward expansion of the number of situations where specific performance will be granted;¹¹² a number of commentators and legal scholars have argued for further expansion and liberalization of the granting of specific performance.¹¹³ There have, however, been notable exceptions to this trend, evidencing a pattern of retrenchment from granting this extraordinary remedy. The case of *Duval & Co. v. Malcom*¹¹⁴ involved a purported contract for the sale of cotton,¹¹⁵ pursuant to which, the buyer sought specific performance. Although there was

107. *Id.* at 177.

108. *Id.*

109. *Id.*

110. That part of U.C.C. § 2-716 comment 1 which was cited was "this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." *Id.* at 178. See text accompanying *supra* note 57.

111. *Tipton v. Woodbury*, 616 F.2d 170, 178 (5th Cir. 1980) (emphasis added).

112. See *Tipton*, 616 F.2d 170; *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923 (N.D. Cal. 1970), *appeal dismissed*, 433 F.2d 1364 (9th Cir. 1971); *Bomberger v. McKelvey*, 35 Cal. 2d 607, 220 P.2d 729 (1950); *Capaldi v. Levy*, 1 Cal. App. 3d 274, 81 Cal. Rptr. 629 (1969); *Ace Equipment Co. v. Aqua Chem., Inc.*, 73 Pa. D. & C.2d 300, 20 U.C.C. REP. 392 (1975).

113. See *Schwartz*, *supra* note 4, at 280; *Kronman*, *supra* note 7, at 29; *Schmitt & Pasterczyk*, *supra* note 21, at 33; Comment, *Other Proper Circumstances*, *supra* note 41, at 245; Note, *Specific Performance*, *supra* note 30, at 34.

114. 233 Ga. 784, 214 S.E.2d 356 (1975).

115. The contract was, in fact, an output contract to sell the defendant-grower's "entire crop of 1973 cotton of 729.6 acres plus any addition that may be leased prior to planting." *Id.* at 784, 214 S.E.2d at 357.

a question of fact as to the existence of a binding contract,¹¹⁶ the court addressed itself specifically to the question of whether the buyer, assuming a valid contract, would be entitled to specific performance or merely damages.¹¹⁷ The court said:

The general rule is that specific performance of contracts in relation to personal property will not be enforced, for the reason that ordinarily compensation for breach of contract may be had by way of an action at law for damages. . . . The rule is simply a corollary of the principle upon which equity acts in decreeing specific performance, namely, the inadequacy of the remedy at law for damages.¹¹⁸

In response to the buyer's contention that these principles of equity have been substantially modified and liberalized by the Code, the court, commented on the Code language — "specific performance may be decreed where the goods are *unique or in other proper circumstances*"¹¹⁹ — and held that, "[u]niqueness has always been an equitable test; the '*other proper circumstances*' test is at best a vague and general rule which liberally construed without proper guidelines would seem to afford specific performance for all commercial goods and turn the courts into referees in commerce. *This is plainly unworkable.*"¹²⁰

Professor Nordstrom has criticized the language of section 2-716. He says that if it was the drafters' intention to liberalize the granting of specific performance, they "used strange statutory language to promote that attempt."¹²¹ Professor Nordstrom says that goods are unique "when there are no other like them — when they are without equal."¹²² However, he suggests that perhaps due to misuse of the word "unique," uniqueness has taken on a second

116. The case came to appeal on certificates from the denial of cross motions for summary judgment.

117. *Duval & Co. v. Malcom*, 233 Ga. 784, 788, 214 S.E.2d 356, 359 (1975).

118. *Id.* at 788, 214 S.E.2d at 359. See 71 AM. JUR. 2d *Specific Performance* § 152 (1973). See also *supra* note 8.

119. U.C.C. § 2-716(1).

120. *Duval & Co. v. Malcom*, 233 Ga. 784 at 789, 214 S.E.2d 356, 359-60 (1975) (emphasis added). See *Northern Del. Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431 (1968) (court denied specific performance because personal services were involved and such a decree would have committed the court to extensive supervision duties).

121. NORDSTROM, *supra* note 54, at § 158.

122. *Id.* "Goods are not unique just because they were purchased at an exceptionally low price." *Id.* at 479 n.10 (citing *Hilmer Saks Co. v. Helen Neushaefer Div. of Supronics Corp.*, 6 U.C.C. REP. SERV. 325 (N.Y. Sup. Ct. 1969)).

meaning: goods which are very unusual or rare.¹²³ Nevertheless, he maintains that based upon the statutory language, "a court which looks at specific performance as an uncommon remedy for contracts involving the sale of goods will have no difficulty in *severely limiting* the number of cases in which the remedy will be granted."¹²⁴

In *Tower City Grain Co. v. Richman*,¹²⁵ the trial court granted a decree of specific performance of a contract involving the sale of wheat by Richman to Tower City. In reversing the judgment, the appellate court stated that while it "cannot [be] presume[d] that an award of damages acts to put an aggrieved party in as good a position as if the other party had fully performed,"¹²⁶ there was no finding by the trial court which indicated what it believed to be other "proper circumstances" for the granting of specific performance. That specific performance was requested and that the defendant had in its possession the goods called for in the contract, were not adequate to support such a finding.¹²⁷ The court almost vitiated the "either or" test of section 2-716(1) by stating that "ordinarily, circumstances which are proper will impart uniqueness to the goods,"¹²⁸ thereby setting up "uniqueness" as the only 'significant point.'¹²⁹

The "other proper circumstances" test of section 2-716 (1) has been characterized as being "vague."¹³⁰ In light of the language of comment 2 which indicates that inability to cover is strong evidence of "other proper circumstances," it has been argued that if the drafters of the Code meant this language to be the courts' guide, "it is disappointing that they did not at least create a statutory presumption in favor of specific performance whenever a buyer could not cover."¹³¹ Without such a statutory presumption, not only is "the buyer left where he was before the Code was

123. *Id.* at § 158.

124. *Id.* at 480.

125. 232 N.W.2d 61 (1975).

126. *Id.* at 66.

127. *Id.*

128. *Id.* at 66-67 (citing 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-716:15 (2d ed. 1971)).

129. *Id.* at 67.

130. NORDSTROM, *supra* note 54, at 480 (1970).

131. *Id.* Professor Nordstrom adds that "[t]his would have had the merit of assuring a buyer that he would get the contracted for goods at the contract price, either from an outside source or from the seller." *Id.*

adopted, but it may be harder for him to obtain specific performance than it was under the Uniform Sales Act."¹³² Professor Nordstrom summarizes the Code's position concerning specific performance: "[C]ourts 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."¹³³

Although the Code may have liberalized some of the old common law rules, "specific performance . . . remains an extraordinary remedy available only where the other remedies are in some way inadequate."¹³⁴ Also, it is an established principal that "the courts will not order the impossible, such as ordering the seller under a sales contract to sell to the buyer something the seller does not have."¹³⁵ It has been similarly stated that the proper reading of UCC 2-716(1) is a "restrictive" one.¹³⁶ With respect to the expansion of the granting of specific performance in sales of goods contracts, the Federal Court of Appeals for the Fifth Circuit has recently stated that "the comments accompanying UCC section 2-716 are of little guidance."¹³⁷ The court further stated that an interpretation of the Code language regarding output and requirements contracts¹³⁸ can range "from suggesting [that] all output contracts should be specifically enforceable to a mere observation that output contracts form a suitable factual background in most cases in which specific performance may be sought."¹³⁹ This recent case involved a cotton buyer suing a cotton farmer who had entered into an output contract for the sale of cotton; two months after the contract was signed, the farmer notified the buyer that he was cancelling the contract. On appeal, the court denied specific performance by applying a restrictive reading of section 2-716(1). The vague language did not authorize the wholesale granting of

132. *Id.*

133. *Id.*

134. *Paloukos v. Inter-mountain Chevrolet Co.*, 99 Idaho 740, 747, 588 P.2d 939, 944 (1978); see J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 6-6 (1972); see also *Sims v. Purcell*, 74 Idaho 109, 257 P.2d 242 (1953); *Bowman v. Adams*, 45 Idaho 217, 261 P. 679 (1927).

135. *Paloukos v. Inter-mountain Chevrolet Co.*, 99 Idaho at 747, 588 P.2d at 944. See *Moody v. Crane*, 34 Idaho 103, 199 P. 652 (1921); *CORBIN*, *supra* note 3 at § 1170.

136. *Weathersby v. Gore*, 556 F.2d 1247, 1258 (5th Cir. 1977).

137. *Id.*

138. The Code states: "[o]utput and requirements contracts involving a particular or peculiarly available source of market present today the typical commercial specific performance situation" U.C.C. § 2-716 comment 2 (1978).

139. *Weathersby*, 556 F.2d at 1258.

such a remedy when output contracts are involved. The remedy of damages was held to adequately compensate the buyer.¹⁴⁰

Although Professor Schwartz argues for the routine availability of the remedy of specific performance,¹⁴¹ he also points out that there are two ways in which efficiency might suffer as the result of such expansion:

First, many parties might prefer to have the specific performance remedy available only in those cases in which the law currently grants it. If the remedy's availability was greatly expanded, these parties would negotiate contract provisions restricting its use. Legal limitations on the availability of specific performance save these transaction costs Second, if specific performance were routinely available, promisors who wanted to breach would often be compelled to "bribe" promisees to release them from their obligations. The negotiations required might be more complex and costly than the post-breach negotiations that occur when breaching promisors have merely to pay promisees their damages.¹⁴²

In *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*,¹⁴³ the plaintiff was in the business of procuring and distributing natural gas for profit. When his agreements for the purchase of natural gas from the defendants had been cancelled by the defendants, he brought an action for specific performance and sought injunctive relief during the pendency of its action. The court cited *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*¹⁴⁴ as

140. *Id.* The court cited an early pre-Code case and quoted the following language therefrom:

It is altogether immaterial whether there was a sale of certain specific bales of cotton, or an agreement to sell and deliver a certain number of bales out of a particular lot, or a general agreement to sell and deliver a certain number of bales, without any designation of the specific bales, or of the particular lot out of which they are to come. All such cases depend upon the same general principle. The rule is, not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a personal nature, unless, under the particular circumstances of the case, there can be no adequate compensation in damages at law.

Id. at 1258 (quoting *Scott v. Billgerry*, 40 Miss. 119 (1866)). In *Scott*, the court said that "the adoption of The Uniform Commercial Code by Mississippi does not suggest that the considerations . . . [were] to be rejected." *Id.*

141. Schwartz, *supra* note 4, at 279.

142. *Id.* at 279.

143. 443 F. Supp. 14 (S.D. Ohio 1977).

144. 321 F. Supp. 923 (N.D. Cal. 1970), *appeal dismissed*, 443 F.2d 1364 (9th Cir. 1971). See also *supra* notes 63-69 and accompanying text.

evidence of a trend toward a more liberal availability of specific performance, especially when goods cannot be covered or replaced. The court, however, went on to say that it "did not agree with [Kaiser's] application of the more liberal specific performance standards to a motion for preliminary injunctive relief. Such extraordinary relief should be granted only if the movant has established each of the well-settled standards applicable to such motions. . . ." ¹⁴⁵ While the court found it necessary to distinguish standards for granting the equitable remedies of both specific performance and injunction, ¹⁴⁶ the implication of a retrenchment in liberalized standards was clear. ¹⁴⁷

CONCLUSION

Many judicial decisions interpreting statutes ¹⁴⁸ indicate a trend towards the expansion of specific performance as a remedy in breach of contract actions regarding sales of goods. ¹⁴⁹ The Uniform Sales Act clearly liberalized the law and the Uniform Commercial Code has been fairly labeled a "liberalization of a liberalization." ¹⁵⁰ From a paucity of situations under early common law, the granting of specific performance has expanded to include unique chattels and to situations under section 68 of the Uniform Sales Act where "the court thinks fit . . ." ¹⁵¹ and subsequently under section 2-716(1) of the Code where the goods are "unique or

145. *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 443 F. Supp. 14, 36 (S.D. Ohio 1977). See, e.g., *Winkleman v. N.Y. Stock Exchange*, 445 F.2d 786, 789 (3rd Cir. 1971).

146. Perhaps so as not to be too bold in going against what it perceived to be the "tide."

147. Professor Corbin points out that "[a]n injunction may command an affirmative performance . . . and a decree for specific performance may require the performance of a promise to forbear." CORBIN, *supra* note 1, at 1138. Additionally, Professor Corbin states that:

The working rules and standards governing the issuance of an enforcement decree do not vary with respect to the name by which that decree is described, whether injunction or specific performance. Statements contrary to this are not infrequently to be found; but they are based upon a failure to observe the extent of the overlapping and the variance in usage.

Id.

148. UNIFORM SALES ACT § 68 (1906); U.C.C. § 2-716 (1972).

149. See *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Ace Equip. Co. v. Aqua Chem., Inc.*, 73 Pa. D. & C. 2d 300, 20 U.C.C. REP. 392 (1975); *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923 (N.D. Cal. 1970), *appeal dismissed*, 443 F.2d 1364 (9th Cir. 1971).

150. See Comment, *Other Proper Circumstances*, *supra* note 41, at 245-48.

151. *Weathersby v. Gore*, 556 F.2d 1247, 1258 (5th Cir. 1977).

in other proper circumstances.”¹⁵² The concept of “uniqueness” has generally developed to mean “economic uniqueness”¹⁵³ and together with the “other proper circumstances” test of the Code, courts have continued to expand the granting of specific performance to new situations. Several examples include: 1) where like goods could not be *readily* purchased on the market at the *contract time*,¹⁵⁴ 2) where a plaintiff was financially unable to cover goods,¹⁵⁵ 3) where a plaintiff would, by reason of the defendant’s breach, be unable to fulfill his contract with a third party,¹⁵⁶ and 4) where the public interest was involved.¹⁵⁷

Even under the Uniform Sales Act, however, a sort of “mini-trend” emerged with holdings that denied specific performance on traditional grounds.¹⁵⁸ Recent notable cases scrutinizing section 2-716(1) of the Code have demonstrated a retrenchment in the granting of specific performance holding that the statutory language and guidelines relating thereto are “vague and general,”¹⁵⁹ “of little guidance,”¹⁶⁰ and “unworkable.”¹⁶¹ Furthermore, the statutory language has been criticized as being redundant,¹⁶² and because there is no statutory presumption in favor of specific performance,¹⁶³ no real liberalization has been statutorily advanced.¹⁶⁴

The further expansive trend toward the granting of specific performance of contracts for sales of goods could ultimately approach a point where specific performance is as routinely available as the remedy at law. Continued expansion along these lines could seriously undermine the basic time-tested principle upon which eq-

152. *Id.*

153. See *supra* notes 39-40 and accompanying text.

154. See *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923 (N.D. Cal. 1970), *appeal dismissed*, 443 F.2d 1364 (9th Cir. 1971); *Heidner v. Hewitt Chevrolet Co.*, 166 Kan. 11, 199 P.2d 481 (1948).

155. *Gerwin v. Southeastern Cal. Ass’n of Seventh Day Adventists*, 14 Cal. App. 3d 209, 92 Cal. Rptr. 111 (1971).

156. *Ace Equip. Co. v. Aqua Chem., Inc.*, 73 Pa. D.&C.2d 300, 20 U.C.C. REP. 392 (1975).

157. See *supra* notes 88-94 and accompanying text.

158. See *supra* notes 49-54 and accompanying text.

159. See, e.g., *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975).

160. See *Weathersby v. Gore*, 556 F.2d 1247 (5th Cir. 1977).

161. *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975). See also *supra* notes 122-24 and accompanying text.

162. See *Tower City Grain Co. v. Richman*, 232 N.W.2d 61 (N.D. 1976). See also *supra* notes 125-29 and accompanying text.

163. There is no such statutory presumption as part of U.C.C. § 2-716.

164. See *supra* notes 131-33 and accompanying text.

uity operates — the inadequacy of the remedy at law. An expanded choice of remedies might actually encourage parties to litigate issues, when a major goal of contract law is to discourage the same.¹⁶⁵

Despite the cases which have followed the expansive approach, the 1980's will yield a greater number of significant holdings and commentaries favoring a restrictive reading of section 2-716. The cases which already indicate this, although perhaps less in number than those indicating the opposite, represent key commercial situations. The uniqueness of these cases and the effectiveness of their reasoning should serve to influence courts in the future. The 1980's will show an important return to a more traditional application of specific performance in sales of goods cases, as a truly *extraordinary remedy* available only when other remedies are unequivocally inadequate.¹⁶⁶

165. See generally F. KESSLER & G. GILMORE, *CONTRACTS*, 1-5 (2d ed. 1970).

166. See, e.g., *Michiana Mack v. Allendale Rural Fire Protection*, ___ Ind. ___, ___, 428 N.E.2d 1367, 1369 (1982) (no proof of exhaustion of legal remedies); *Pierce-Odom, Inc. v. Evenson*, 632 S.W.2d 247, 248 (Tex. 1982) (no proof that chattel was unique).