

# **LITIGATING THE PURCHASE AND SALE OF INDUSTRIAL MACHINERY**

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## **Introduction:**

Sales of goods are governed by Article 2 of the Uniform Commercial Code (UCC). Many law school professors use the term “widget” to describe a generic object or item that is the subject of an Article 2 sale. The very use of the term suggests that the item or object itself is unimportant to understand the sales concepts being presented.

The underlying premise of this paper is that the sale of highly technical or complicated “non-widget” – and in particular, industrial or woodworking machinery -- gives rise to unique issues and risks. In other words, understanding Article 2 is necessary to avoid risk in the instance of industrial machinery, but it is not necessarily sufficient. Being familiar with certain important concepts under Article 2 – **and** with certain inevitable business considerations that arise in the sale of industrial machinery – is the best approach to manage risk. Understanding these concepts can provide a great advantage in both pre-lawsuit maneuvering and in actual litigation. This article will address the common practical and legal considerations that accompany the sale of industrial machinery.

## **A. Selling a Piece of Complicated Machinery**

### **1. Pitfalls of Commission Sales People**

The UCC permits a seller to manage its risk by limiting warranties and limiting remedies in the event there is a problem with the transaction or if the goods do not conform to the contract. See O.C.G.A. §11-2-719. These concepts will be discussed in further detail below. Unfortunately, these types of seller-friendly contract provisions are

not usually popular selling points. Indeed, to a commission based salesperson interested in closing the deal, seller-friendly “Terms and Conditions” of sale can be a downright nuisance. Even the most loyal salesperson can quickly lose sight of risk management when a lucrative deal is in the works.

The lawyer who represents a machine manufacturer should always be mindful of this risk. The best set of Terms and Conditions of Sale are of little use if the sales force does not take the necessary steps to make sure that the Terms and Conditions become part of the deal. Likewise, the seller should train its sales force on the importance of correctly documenting a sale and emphasize the risk that a misstep presents.

2. Representations Made During Sales Presentations and Demonstrations

In the instance of complicated machinery or equipment, a buyer will typically want to see a demonstration of the machine to determine how it runs, its productivity or output, the nature of maintenance issues, and the like. A seemingly very obvious point bears emphasizing: it is critical that the salesperson not “oversell” the item. Inaccurate or misleading representations about what a machine can or cannot accomplish can provide a basis for a fraud in the inducement claim regardless of what the seller’s Terms and Conditions may provide. And, if the salesperson oversells the machine and fails to properly document the deal, the consequences can be severe, as the UCC specifically entitles a buyer to incidental and consequential damages. See O.C.G.A. § 11-2-715.

In the case of highly technical or complicated machinery, this concern is especially pronounced because the information deficit from the customer’s perspective can be huge. An average consumer can probably distinguish straight talk from “puffing” when tires or lumber is at issue. In the case of a complicated, computerized machine,

however, a buyer is in many respects taking a giant leap of faith when considering whether to make a purchase. An expensive machine that does not perform as described can present enormous strain on a small business with limited resources.

### 3. Paperwork

If the parties agree to the terms of a deal, it is critical that the deal is documented properly. Assuming the seller has a limited warranty and a limitation of remedies provision, the buyer should sign off before the machine is delivered. Courts will cast a suspicious eye towards Terms and Conditions that appear for the first time only when the buyer is invoiced. A seller must also take care that it does not inadvertently create a contract or certain warranties through pamphlets, brochures, or other sales documents. It is not uncommon for parties to litigate these and other “battle of the forms” type issues. Although an exhaustive discussion of these issues is beyond the scope of this paper, a practitioner should pay regard to O.C.G.A. § 11-2-207 in any analysis of these issues.

Finally, as referenced above, a seller should always avail itself of the protections that the UCC provides in terms of limiting both warranties and remedies. For example, a seller can validly limit a buyer’s remedy to the repair or replacement of a defective machine. See O.C.G.A. § 11-2-719. In this event, so long as the warranty does not fail of its essential purpose (*i.e.*, so long as the seller can actually make the machine function correctly), a seller can effectively limit its exposure.

## **B. Acceptance**

### 1. When is a Piece of Complicated Machinery Accepted?

The legal definition of acceptance differs depending on the context. For example, acceptance has a different meaning in so-called installment contracts than in one time

sales contracts. In installment contracts the seller needs to only deliver goods which substantially conform to the sales contract. This article will focus on what constitutes “acceptance” in one time sale situations.

Acceptance legally occurs: (1) after the buyer has had reasonable opportunity to inspect the goods and alerts the seller that the goods are acceptable or that he will accept them despite their nonconformities; (2) a reasonable time after delivery when the buyer has inspected the goods and fails to reject them; or (3) the buyer rejects the goods and then acts in a manner inconsistent with the seller’s ownership of the goods. See O.C.G.A. § 11-2-606. It is important to emphasize that acceptance can occur without the buyer expressly affirming that it has accepted the goods in question.

In the sale of a machine, applying these concepts can be tricky. A buyer may require several weeks of training to even know whether the machine conforms to the parties’ contract. Further, it is common for complicated pieces of machinery to have “bugs” that need to be ironed out after installation. Because of these realities, a court will probably permit a buyer some flexibility in running its newly purchased machine before determining that acceptance has occurred as a matter of law.

On the other hand, if a buyer retains possession of a machine for too long – even if the machine is underperforming – the buyer could unwittingly accept the machine by failing to properly reject. See Economy Forms Corp. v. Kandy, Inc., 391 F. Supp. 944, 950 (N.D. Ga. 1974) (finding acceptance under the UCC where the buyer “did keep the goods and use them throughout the job and has continued to use them since that time”); Marbelite Co. v. Philadelphia, 40 Pa. D. & C.2d 347, 349 (C.P. Philadelphia Cty.), aff’d, 208 Pa. Super. 256, 222 A.2d 443 (1966)(“We believe the use of the equipment by

defendant is patently inconsistent with the seller's ownership and, therefore, constitutes acceptance under the Uniform Commercial Code”); Porter Bros. v. Smith, 325 S.E.2d 588, 589 (S.C. Ct. App. 1985) (buyer accepted goods by failing to reject them within two months of receipt); Computerized Radiological Services v. Syntex Corp., 786 F.2d 72, 75 (2d Cir. N.Y. 1986) (“The continued use of goods is inconsistent with the seller's ownership” and evidence of acceptance); Sobiech v. International Staple & Machine Co., 867 F.2d 778 (2d Cir. N.Y. 1989)(same); In Re Fran Char Press, 55 B.R. 55, 57 (Bankr. E.D.N.Y. 1985) (buyer “accepted” posters by taking possession of them and mounting them on cardboard).

A trap for the unwary is an acceptance form. A seller will likely request a buyer to sign a form after the machine is installed expressly stating that the machine has been accepted. It's obvious why this is desirable from the seller's perspective, because it eliminates any lingering doubt as to whether acceptance has occurred. See O.C.G.A. § 11-2-606 (acceptance can occur if buyer signifies that it has inspected the goods and agrees to inspect). Because of the way the UCC is crafted, the opposite is not true, however. In other words, a buyer who refuses to execute an acceptance form can still be deemed to have accepted the machine if he continues to use it or otherwise fails to properly reject.

## 2. Impact of Service Department on the Issue of Acceptance

The Service Department can play in an important role in the question of acceptance. If there are ongoing problems with the machine and the Service Department is engaged in trying to find a solution, a court is far more likely to forgive a buyer for a belated effort at rejection. This is especially so if the Service Department assures the

buyer that the problem can and will be fixed. At the same time, a seller is going to want to be paid before sending the Service Department out for multiple trips to the buyer's facility. Navigating these waters without tension surfacing can be tricky.

From the seller's perspective, the ideal scenario is to be paid all (or at least most) of the purchase price up front. That way, there should be no reservations about providing whatever warranty service is called for under the seller's Terms and Conditions. If a balance is outstanding, the seller may very well take the position that its warranty obligations have not been triggered.

It bears repeating again that a buyer who fails to affirmatively reject a non-conforming machine will be deemed to have accepted it. Thus, if a Seller refuses to send its Service Department to troubleshoot or service a machine, while this may give rise to a claim for breach of warranty, it will not relieve the buyer of its payment obligations if the buyer does not properly reject. Imex Int'l, Inc. v. Wires Eng'g, 261 Ga. App. 329, 583 S.E.2d 117 (under the UCC, wrongful or delayed rejection by buyer entitles seller to recover full purchase price of goods).

A final word of caution from the Seller's perspective: the Service Department should be mindful to not create a new "contract" with the buyer that will serve to moot the otherwise applicable Terms and Conditions. In a relationship where there are signs of trouble on the horizon, a seller is most often well served by communicating to the buyer, in writing, that any concessions or service calls it makes while payment is in dispute shall not serve as a modification to the parties' agreement.

### 3. Partial Acceptance

As stated above, the focus of this paper is on the sale of a single “non-widget” item; namely, a complicated piece of industrial machinery. In sales where the contract calls for the delivery of more than one good, the buyer has the option of partial acceptance. Partial acceptance allows the buyer to accept those of the delivered goods which were conforming and reject those which were not. The buyer must accept and reject by “commercial unit.” This prevents a buyer from accepting usable parts from a machine while rejecting non-usable parts. If a buyer accepts part of a single commercial unit, he has accepted the entire commercial unit.

### 4. Cure

In a one time sales, a seller is technically required to deliver goods which perfectly comply with the terms of the contract, though courts have taken the position that minor defects are legally irrelevant. The seller always has a right to fix the nonconformity if the time period for performance in the contract has not expired. The seller, however, must simply give the buyer reasonable notice of his intention to fix the machine.

Once the seller has properly communicated to the buyer that he intends to rectify the nonconformity, the buyer cannot rescind the contract on the basis of that nonconformity. See Stevenson v. Frazier, 339 N.E.2c 794 (Ind. Ct. App. 1980). The seller also has the right to cure the nonconformity where he had reasonable grounds to believe the machine would be acceptable (with or without a reduction in the contract price). In this situation, the seller must once again seasonably notify the buyer that he intends to cure. However, the seller’s time to deliver conforming goods may extend past

the contract period. Whether the nonconforming goods are delivered before the contract period runs out or the seller reasonably believed the buyer would accept the goods despite the nonconformity, courts have consistently held that “repair should be permitted whenever the seller can do so without subjecting the buyer to any great inconvenience, risk or loss.” See Wilson V. Scampoli, 228 A2d 848 (D.C. 1967).

In a situation where the goods delivered have a substantial defect, the seller has no right to cure. This is known as the “Shaken Faith Doctrine.” Douglas J. Whaley, *Tender, Acceptance, Rejection and Revocation – The UCC’s “TARR Baby”*, 24 Drake L. Rev. 52 1974-5. The policy behind this doctrine is based upon the belief that in some situations the buyer will lose faith in the good to such an extent that it no longer has any practical value to him. The difference between a minor defect and a major defect can be summed up by stating “only a minor defect can be cured without any great inconvenience to the buyer.” See Zabriski Chevrolet v. Smith, 240 A.2d 195 (N.J. Super. 1968).

The UCC also allows parties to limit the buyer’s remedy for delivery of nonconforming goods to repair or replacement of the goods. See UCC §2-719. If the sales contract has a limiting provision of this nature, the buyer must allow the seller an opportunity to fix the defect. If the seller cannot correct serious product malfunctions within a reasonable time, the buyer may pursue other legal remedies.

##### 5. UCC Acceptance vs. Business Intuition

Taking a step back, it is not difficult to imagine how the UCC’s rules regarding acceptance are counterintuitive to a common businessperson. A businessperson may quite reasonably believe that if the machine he or she purchased is not performing in perfect conformity with the contract’s specifications, the duty to pay does not arise.

Under this logic, the buyer can continue to possess, and even use, the machine until the seller “gets it right.”

As we have shown, the UCC compels the exact opposite result. A buyer cannot keep and continue to use a machine without paying, even if the machine is non-conforming. See O.C.G.A. § 11-2-607.

## **C. Rejection**

### 1. How to Reject

A buyer may reject goods which do not conform to the sales contract. The rejection must occur within a reasonable time after delivery or tender. This rejection is only a valid, legal rejection if the buyer clearly informs the seller of his intention to reject the goods. See O.C.G.A. § 11-2-602. That communication should explicitly state the nonconformities upon which the rejection is based. The buyer’s only duty, with regard to the rejected goods, is to store them in a reasonable manner. If the buyer is a merchant he would be required to follow the seller’s reasonable instructions regarding disposition of the goods. See UCC §2-603. This simply means the buyer must store the goods in the same way as he would store them if he owned them.

The definition of a “reasonable” amount of time is situation specific. In Miron v. Yonkers Raceway, 400 F.2d 112 (2d Cir. 1968), the Second Circuit concluded that rejection the day after delivery was unreasonable. In that case, the Second Circuit emphasized the fact that the buyer had the opportunity to inspect the goods (in this case, a horse) but failed to do so. In another case, a different court found that rejection ten months after delivery was reasonable. See Commonwealth Bank and Trust co. v. Keech, 192 A.2d 133 (Pa. Super. Ct. 1963). To lend some predictability to the process, the

parties may specify in the contract the amount of time allowed for inspection. As long as that specified period is not unreasonable, it will be binding. Any assurances by the seller that the nonconformities will be fixed extend the time frame for rejection. Thus, “reasonable” is situational and is often a question for the “fact finder” to decide in court.

Once a buyer effectively rejects nonconforming goods, he may not exercise any type of ownership over those goods. In practical terms, this means that buyer may not reject the machine while continuing to use it.

An individual buyer must only protect the rejected goods as he would protect his own property, but a merchant buyer is required to follow the seller’s reasonable instructions concerning the machine’s return. If the merchant buyer resells the rejected goods at the seller’s instruction, he is entitled to a statutorily defined commission. However, any act by the buyer inconsistent with the seller’s ownership of the rejected goods will result in the buyer’s technical re-acceptance of them. See W.M. Hobbs, Ltd. V. Accusystems of Georgia, Inc., 339 S.E.2d 646 (Ga. Ct. App. 1986).

## 2. Seller’s Option Upon Rejection

If the Seller of the machine is a merchant, upon rejection, the seller has three basic options. First, the seller could have the buyer ship the machine back to the seller’s warehouse, so long as the seller does not have an office in the city where buyer’s factory is located. O.C.G.A. § 11-2-603. Of course, the seller would have to reimburse the buyer for the shipping charges. Second, the seller could request that the buyer store the goods for a reasonable period of time while the seller arranges for the machine to be picked up. O.C.G.A. § 11-2-602(b).

Finally, the seller could also refuse to recognize the buyer's rejection. This option can be dangerous, unless the seller is absolutely sure that the buyer did not have grounds to reject the machine (for example, if the buyer waited six months to reject the machine and used it the entire time). If the seller, however, was aware of the problems that the buyer was having with the machine and assured buyer that the defects would be fixed, a court will likely find a valid rejection or revocation of acceptance.

3. Buyer's Option if Seller Refuses to Recognize Buyer's Rejection

If the seller refuses to recognize a buyer's rejection of nonconforming goods, the buyer has three options: (1) the buyer can store the goods; (2) the buyer can sell the goods and credit the seller's account; or (3) the buyer can ship the goods back to the seller. Because the goods legally become the property of the seller after rejection, the seller must bear the loss if the goods are damaged or destroyed while in the buyers hands as long as the buyer exercised reasonable care while holding the goods. If the buyer chooses to ship the goods back to the seller, the seller must reimburse the buyer's shipping costs unless the seller has an office in the same city as the buyer. In this situation, the buyer does not have the option of shipping the goods back to the seller; however, if the buyer wrongfully rejects conforming goods, the seller may recover damages. See O.C.G.A. § 11-2-703.

The UCC allows parties to limit the buyer's remedy for delivery of nonconforming goods to repair or replacement of the goods. See UCC §2-719. If the sales contract has a limiting provision of this nature, the buyer must allow the seller an opportunity to fix the defect. If the seller cannot correct serious product malfunctions within a reasonable time, the buyer may pursue other legal remedies.

4. Buyer's Use of Equipment After Rejection

Once goods have been rejected, any exercise of ownership by the buyer will result in a legal re-acceptance of the goods. See Griffith v. Stovall Tire & Marine, Inc., 174 Ga. App. 137, 329 S.E.2d 234 (1985).

**D. Revocation of Acceptance**

1. How To

A buyer may revoke his acceptance of nonconforming goods if: (1) he did not know of the nonconformity due to the difficulty of discovery; (2) he relied on the seller's assurances that the goods were conforming; or (3) the buyer was under the reasonable assumption that the nonconformity would be fixed by the seller. See O.C.G.A. § 11-2-608. For a revocation of acceptance to be effective, the nonconformity must substantially impair the value of the goods to the buyer. Like rejection, revocation of acceptance must be clearly communicated to the seller within a reasonable time frame. Revocation of acceptance is not possible once the goods have substantially changed for any reason other than their original defects. See O.C.G.A. § 11-2-608 (2). Revocation is an available remedy even where the seller has limited his warranties by use of "as is" language. See Esquire Mobile Homes, Inc. v. Arrendale, 182 Ga. App. 528 (Ga. Ct. App. 1987).

In this analysis, the key issue again is whether the buyer engages in conduct that is inconsistent with the seller's rights. For example, in J.L. Clark Mfg. Co. v. Gold Bond Pharmaceutical Corp., 669 F.Supp. 40, 43 (D.R.I. 1987), the district court for the District of Rhode Island, applying Pennsylvania law, held that the buyer's continued use of goods following purported revocation "is unreasonable and inconsistent with [the seller's ownership] and [buyer's] purported rejection." Similarly, in Mockabee v. Wakefield

Buick, Inc., 298 S.C. 386, 380 S.E.2d 848, 849 (S.C. Ct. App. 1989), the South Carolina Court of Appeals held that a customer who kept and used a car, despite its claimed mechanical problems, failed to revoke his acceptance because he continued to use the car for 22 months after he purchased it. While there was evidence that the buyer had returned to the dealer three or four times to complain about problems with the car, the Court of Appeals determined that the significant time lapse and continued use of the car barred his efforts to revoke acceptance. See id.; see also Computerized Radiological Services v. Syntex Corp., 786 F.2d 72 (2d Cir. N.Y. 1986) (holding that extended use of equipment “invalidates the purported revocation of acceptance”); Delhomme Industries, Inc. v. Houston Beechcraft, Inc., 735 F.2d 177 (5th Cir. 1984) (holding that “a buyer’s act of dominion over the goods...is inconsistent with a claim by the buyer that acceptance has been revoked”); Jenkins v. GMC, 240 Ga. App. 636, 524 S.E.2d 324 (1999) (holding that “[c]ontinued use is inconsistent with revocation of acceptance”).

## 2. Seller’s Options

When a buyer attempts to revoke its acceptance of a machine, the seller has a couple of options. First, the seller can allege that defect in the machine does not substantially impair the machine’s value so as to justify the buyer’s revocation of acceptance. Whether an effective revocation of acceptance was made is ordinarily a matter for determination by the trier of fact, unless the facts are otherwise uncontroverted. Griffith v. Stovall Tire & Marine, Inc., 174 Ga. App. 137, 329 S.E.2d 234 (1985). Second, the seller can also object that the revocation did not occur within a reasonable time. O.C.G.A. § 11-2-608(2). This lack of proper notice argument is usually made because the attempted revocation came too long: (1) after the buyer discovered or

should have discovered the defect; or (2) after a substantial change in the condition of the machine occurred which was not caused by the machine's own defects. Id.

On the other hand, if the buyer successfully revokes acceptance, the seller can insist that the buyer treat the machine as though it had been rejected. O.C.G.A. § 11-2-608(3). For instance, a buyer who successfully revokes acceptance is required to hold the goods with reasonable care for a period sufficient to permit the seller to remove them. O.C.G.A. § 11-2-602(2)(b).

### 3. Impact of Machine that Works Sporadically

When the machine only works sporadically, the buyer is entitled to revoke acceptance if the seller's attempts to repair or replace are not effective. O.C.G.A. § 11-2-608(1). For example, the Georgia Court of Appeals has held that a refusal to repair or an unsuccessful repair, where the warranty provided for repair, was such a breach as to render the revocation of acceptance an available remedy. Jacobs v. Metro Chrysler-Plymouth, 125 Ga. App. 462, 467, 188 S.E.2d 250 (1972).

### 4. What Happens if Buyer Attempts to Repair

Generally speaking, a buyer who attempts to repair his machine does so at his peril. First, such actions may serve to void the seller's warranty. Second, it weakens a buyer's claim to revoke acceptance for two reasons: (1) it is inconsistent with the seller's rights; and (2) if the buyer damages the machine, O.C.G.A. § 11-2-608 cannot apply by its express terms.

## **E. Damages**

### **1. Did the Seller Properly Limit Remedies**

A seller of machines in Georgia should contract to limit its damages to repair or replacement of the machine. When a buyer of a machine seeks consequential damages for the sale of a machine and the seller claims it contractually limited its liability, a court must determine whether liability was properly limited.

Georgia law expressly allows parties to limit or exclude consequential damages. See O.C.G.A. § 11-2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not"); see also NEC Technologies, Inc. v. Nelson, 267 Ga. 390, 478 S.E.2d 769 (1996)(Georgia law allows manufacturers to limit or exclude consequential damages). In Georgia, competent parties are free to agree to whatever provisions in lawful contracts they may choose. White Farm Equipment Company v. Jarrell & Clifton Equipment Company, Inc., 139 Ga. App. 632, 229 S.E.2d 113 (1976). "If the parties agree what the damages for breach shall be, the damages are liquidated, and unless the agreement violates some principle of law, the parties are bound thereby." Id. at 634. Thus, a seller of a machine may limit its liability by including language in its sales contract that incidental, special, consequential and all other types of damages caused by defects in materials and workmanship in the machine are not covered by or recoverable under this limited warranty and are specifically excluded. Such a limited warranty may also provide that replacement or repair of defective machine is the first ultimate purchaser/user's exclusive remedy. If the provisions of the contract limiting

liability are explicit and unambiguous, Georgia courts are likely to find that the parties expressly agreed that consequential damages would not be recoverable and that buyer's exclusive remedy would be the replacement or repair of the machine. See White Farm v. Clifton, 139 Ga. App. 632; NEC Technologies v. Nelson, 267 Ga. 390. Thus, sellers of machines should contract to limit their damages to repair or replacement of the machine.

## 2. Lost Profits

Even if the contract for the sale of a machine does not expressly bar the recovery of lost profits, summary judgment may still be an available means to avoid liability for lost profits. "As a general rule, expected profits of commercial business are too uncertain, speculative, and remote, to permit recovery for their loss." SMD, LLP v. City of Roswell, 252 Ga. App. 438, 441, 555 S.E.2d 813 (2001) (citing Molly Pitcher Canning Co. v. Central of Georgia R. Co., 149 Ga. App. 5, 253 S.E.2d 392 (1979)); Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953). "The profits of a commercial business are dependent on so many hazards and chances, that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages." Molly Pitcher Canning Co. v. Central of Georgia R. Co., 149 Ga. App. at 10-11.

A jury is not permitted to speculate as to the amounts of allegedly lost profits. "When [an] owner of a business seeks to recover lost profits, that recovery can be had only if the business has a proven 'track record' of profitability." SMD, LLP, 252 Ga. App. at 441. Anticipated profits may be recovered only "where the business has been long established, has uniformly made profits, and there are definite, certain, and

reasonable data for their ascertainment." Id. (citing B.H. Levy Bro. & Co. v. Allen, 53 Ga. App. 246, 185 S.E. 369 (1936)). Conversely, "[w]here . . . the evidence shows the claimant was a new business with no history of profits and, in fact, was operating at a loss, the loss of prospective profits . . . is too remote and speculative to support a recovery [of] damages." Interstate Development Services of Lake Park, Georgia v. Patel, 218 Ga. App. 898, 463 S.E.2d 516 (1995). In Georgia, the anticipated profits claimed by the buyer must be either capable of reasonable ascertainment or directly traceable to the alleged failures of the machine. See Palm Restaurant of Georgia, Inc. v. Prakas, 186 Ga. App. 223, 366 S.E.2d 826 (1988).

Georgia courts generally find future lost profits are too speculative to be recovered. SMD, LLP, 252 Ga. App. at 441. However, where the business is established and profitable and such profits are "definite, certain and reasonable data for their ascertainment" and were "in the contemplation of the parties" when the parties contracted, these future lost profits may be recovered, "even though they can not be computed with exact mathematical certainty." Authentic Architectural Millworks, Inc. v. SCM Group USA, Inc., 262 Ga. App. 826, 831-32, 586 S.E.2d 726 (2003); Mizell v. Spires, 146 Ga. App. 330, 332(2), 246 S.E.2d 385 (1978). "[T]o recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery." Kitchens v. Lowe, 139 Ga. App. 526, 531, 228 S.E.2d 923 (1976). Thus, gross profits cannot be used as basis for recovery of damages for lost profits. Authentic Architectural Millworks, Inc., 262 Ga. App. at 832; Shaw v. Ruiz, 207 Ga. App. 299, 304(11), 428 S.E.2d 98 (1993); Empire Shoe Co. v. NICO Indus., 197 Ga.App. 411,

414(2), 398 S.E.2d 440 (1990). Additionally, lost profits must be directly traceable to the acts of the other party. Tri-State Systems v. Village Outlet Stores, 135 Ga. App. 81, 84(2), 217 S.E.2d 399 (1975).

3. Buyer's Attempts to Avoid Limitation

Buyers – and especially those represented by counsel – will often come up with creative ways to avoid a damages limitation provision. While such efforts are typically unsuccessful, a seller should at least be aware of the potential challenges such a provision may face.

The argument that such a provision is unconscionable is usually a loser, at least in a commercial setting. See O.C.G.A. § 11-2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not"); see also NEC Technologies, Inc. v. Nelson et al., 267 Ga. 390, 478 S.E.2d 769 (1996)(Georgia law allows manufacturers to limit or exclude consequential damages).

The better argument is that the provision never became part of the deal. In cases where multiple offers, pamphlets, or forms are exchanged relating to the sale of a machine, a buyer may be able to argue that there was never a “meeting of the minds” with respect to a damages limitation provision. This again underscores the importance from the seller’s perspective of properly documenting the sale.