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Requirements Contracts Under Michigan UCC Law: Can a Buyer Significantly Reduce Its Orders in Response to Its Own Customer's Reduced Demands Without Liability?

By Thomas S. Bishoff and Andrew M. Gonyea

In a recent circuit court case, plaintiff, a Tier 2 automotive supplier, alleged that defendant, a Tier 1 supplier, breached the parties' requirements contract by substantially reducing its orders to the Tier 2 for the subject parts. The Tier 1 had estimated it would purchase 400,000 such parts per year from the Tier 2 for the life of the underlying vehicle program. However, when the vehicle did not sell as expected, demand for the Tier 1's assemblies plummeted and so too did the Tier 1's demands for the Tier 2's parts.

The Tier 1 moved for summary disposition on the pleadings, arguing that under Article 2 of the Uniform Commercial Code (UCC), it was permitted as a matter of law to reduce order volumes in "good faith" based on the reduced demands of its own customer, the original equipment manufacturer (OEM). The motion raised an issue of statutory construction and what turned out to be an issue of first impression under published Michigan caselaw: Whether UCC Article 2, Section 306(1) permits a requirements buyer to reduce order volumes so long as it does so in "good faith," or alternatively, whether it precludes a requirements buyer from reducing orders to the point they are "unreasonably disproportionate to any stated estimate," regardless of the buyer's good faith.[1]

While the circuit court acknowledged that the vast majority of jurisdictions have adopted the former "good faith" interpretation, it was compelled to follow the statute's "unreasonably disproportionate" language based on the oft-recited mandate of statutory construction that statutes must be interpreted and applied according to their plain language.[2] The court denied summary disposition and dismissal of the Tier 2's breach of requirements contract claim, and the parties later settled the action without an appeal.

To date, no Michigan published appellate opinion has addressed how MCL 440.2306(1) applies in this particular context, and the binding decision on this issue will have a significant impact on allocation of risk in the automotive supply chain. Under the majority, "good faith" reductions approach, it is the supplier who assumes the business risk of potentially significant fluctuations in demand for its parts, in exchange for a long-term and exclusive contract for the particular part or assembly. Under the minority, "unreasonably disproportionate to any stated estimate" approach, buyers are effectively placed in the position of being guarantors of minimum order volumes, even though such volumes are tied to consumer demand for the subject vehicle and are therefore outside of the buyer's control.

This article seeks to provide practitioners with an understanding of the different interpretations of UCC Article 2, Section 306(1) (Section 2-306) as to substantially reduced order volumes by a requirements buyer, and to equip practitioners with the arguments needed to litigate this open issue. In the first part of this article, we briefly examine the function and operation of requirements contracts in the automotive supply chain. In the second part, we examine and explain the majority and minority interpretations of Section 2-306 as it applies to substantially reduced order volumes by a requirements buyer. Finally, we examine the "good faith" reasons why a requirements buyer might substantially reduce its order volumes to its supplier without incurring liability.

Requirements Contracts in the Automotive Industry

The just-in-time delivery system implemented by the various OEMs has enabled significant efficiency gains in the automotive supply chain. In the span of a few days or weeks, raw material is manufactured into a part, integrated into a sub-assembly, and installed in a vehicle. Indeed, inventories have been reduced to the point that they are often measured in hours.

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The just-in-time delivery system requires flexibility to adjust to consumer demand, and accordingly, OEMs structure their contracts with Tier 1 suppliers as requirements contracts. Unlike a fixed-quantity contract,

> [A] Requirements contract allows production flexibility by enabling buyer to shift to seller the risk of demand fluctuations in the market for buyer's final product. Buyer may adjust its orders for the contract good to reflect variations in demand for the final product. When demand is high, buyer places large orders with seller; when demand is low, buyer places small orders with seller. … If the market for buyer's final product is uncertain … a requirements contract offers flexibility not found in a fixed quantity contract.[3]

OEMs frequently select the supplier of a part or assembly through a competitive bidding process. The chosen supplier commits to supplying the OEM's requirements for the subject part for the duration of the vehicle program, a period that can last four to eight years. The supplier is ordinarily required to make a significant capital investment in R&D and production assets. OEMs also typically secure in all supply contracts the right to unilaterally terminate orders, on short notice, with or without cause. Upon termination, an OEM may pay the supplier only for finished parts, work in progress, and raw materials.

Importantly, the structure and terms of supply contracts between OEMs and Tier 1 suppliers are necessarily replicated downstream, as Tier 1 companies, when acting as buyers, cannot afford to give their Tier 2 suppliers better terms than they themselves can negotiate with the OEMs.[4] As a consequence, in the automotive supply chain, it is the downstream supplier—not the buyer—who bears the inherent risk that poor sales of a vehicle will reduce or even terminate demand for the vehicle's component parts.[5] Suppliers accept this risk, and, in exchange, they receive long-term and exclusive contracts for the particular part or assembly.[6]

Tier 1, 2, and other suppliers make business decisions to invest in the success of a vehicle program, and sometimes, those investments prove to be unprofitable. In the previously mentioned circuit court case, the OEM terminated production of the subject vehicles well in advance of projected termination dates due to low consumer demand, and as a direct consequence of the program's failure, the Tier 1 was forced to lay off hundreds of workers and close two of its plants. As for the Tier 2, by the end of the parties' supply agreement, it was selling a mere fraction of the anticipated order volumes, after having invested millions to develop the necessary program capacity. Thus, the policy issue underlying Section 2-306 is how to allocate risks and costs of dried-up end-user demand between requirements buyers and suppliers.

The Majority and Minority Interpretations of UCC 2-306(1) as to a Buyer's Substantially Reduced Order Volumes

The relevant UCC section provides as follows:

> Sec. 2306. (1) Output, requirements. A term which measures the quantity by the output of the seller or the requirements of the buyer *means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate* or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements *may be tendered or demanded.*[7]

On its face, it is the second, "unreasonably disproportionate" clause that defines the extent to which a requirements buyer may increase or reduce its order volumes under the contract, with the same standard applying to both substantial increases and substantial decreases. Essentially, reasonable deviations from estimated or reasonably anticipated order volumes are permitted, and unreasonably disproportionate deviations are not. Yet, despite this apparently clear language, the vast majority of courts have concluded that only substantially *increased* demands are subject to the "unreasonably disproportionate" standard of Section 2-306. Substantially *decreased* demands, by contrast, are subject to the more lenient "good faith" standard.

Judge Richard Posner's opinion in *Empire Gas Corp v American Bakeries Co*, 840 F2d 1333 (7th Cir 1988), serves as an intellectual foundation for the majority interpretation of Section 2-306. In that case, the seller, Empire Gas ("Empire"), agreed to supply the buyer, American Bakeries ("American"), with its requirements for propane and converters that would allow American's motor vehicle fleet to run on propane rather than gasoline. American estimated it would purchase 3000 converters over the four-year contract period. Within days of signing the contract, however, American reneged and decided against the fleet conversion plan, and it ordered no equipment or propane from Empire. Empire sued for breach of the parties' requirements contract and ultimately won a $3 million jury verdict for estimated lost profits.[8]

American appealed, arguing that the jury had been improperly instructed on the application of Section 2-306. Specifically, over American's objection, the trial court judge had read the statute to the jury verbatim, and without explaining the purportedly governing "good faith" standard. Judge Posner found that the trial court had erred by its instruction, but that the error was harmless because of American's obvious bad faith in essentially repudiating the parties' contract.[9]

As to the proper statutory interpretation, Judge Posner stated that the fundamental question before the court was whether Section 2-306's "proviso" dealing with "quantity unreasonably disproportionate to any stated estimate" "…*should be read literally* when the buyer is demanding less rather than more than the stated estimate."[10] The court found that "[t]he proviso *does not distinguish* between the buyer who demands more than the stated estimate and the buyer who demands less, and therefore *if read literally* it would forbid a buyer to take (much) less than the stated estimate."[11] The court found further support for the minority, "symmetrical" interpretation in Official Comment 3, which unambiguously provides that

> If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.[12]

Ultimately, however, Judge Posner found more compelling reasons for interpreting Section 2-306 as providing separate and distinct standards for substantially increased and substantially decreased demands, with "good faith" being the standard governing the later. As an initial matter, the court observed that this was the common law approach and the dominant approach among the admittedly "sparse" jurisdictions where the issue had been decided.[13] Per the cited common law rule, "the seller assumes the risk of all good faith variations in the buyer's requirements even to the extent of a determination to liquidate or discontinue the business."[14] Official Comment 2, in recognized conflict with Comment 3, also advocates the common law approach, stating

> Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith.[15]

Relevant to Michigan law, Judge Posner also found support for the majority "good faith" standard in the statutory language itself. First, the court noted the drafters' choice of the word "demanded" at the conclusion of the statute's second clause ("no quantity unreasonably disproportionate to any stated estimate ... may be ... demanded"), which it felt was "more naturally read as applying to the case where the buyer is demanding more than when he is reducing his demand below the usual or estimated level."[16]

Second, and more importantly, the court found a reasonable alternative construction of the statute's language, based on the redundancy between its main and second clauses. In the court's view, the second clause's proviso against demands for quantities that are "unreasonably disproportionate to any stated estimate" may be read as seeking to define or explain what constitutes "good faith" in a *particular context*, rather than as establishing an independent legal standard:

> More important than this verbal skirmishing is the fact that the entire proviso is in a sense redundant given the words "good faith" in the main clause of the statute. The proviso thus seems

Importantly, the structure and terms of supply contracts between OEMs and Tier 1 suppliers are necessarily replicated downstream, as Tier 1 companies, when acting as buyers, cannot afford to give their Tier 2 suppliers better terms than they themselves can negotiate with the OEMs.

> to have been designed to explicate the term "good faith" rather than to establish an independent legal standard.[17]

Based on this construction, Judge Posner concluded that the second clause was intended to serve a specific purpose: to prevent a requirements buyer from exploiting an increase in the market price for the subject good, by demanding substantially *increased* quantities at the lower contractual price and then reselling the goods at a profit. As the court explained:

> [T]he aspect of good faith that required explication had only to do with disproportionately *large* demands. If the buyer saw an opportunity to increase his profits by reselling the seller's goods because the market price had risen above the contract price, the exploitation of that opportunity might not *clearly* spell bad faith; the proviso was added to close off the opportunity. There is no indication that the draftsmen were equally, if at all, concerned about the case where the buyer takes less than his estimated requirements, provided, of course, that he does not buy from anyone else.[18]

Second, and more importantly, the court found a reasonable alternative construction of the statute, based on the apparent redundancy between its main and second clauses.

For these reasons, Judge Posner concluded that Illinois courts construe Section 2-306 as allowing a requirements buyer to reduce or even eliminate its requirements so long as the buyer does so in "good faith," regardless of the reduced volume's "proportionality" to contractually forecasted requirements.[19]

As to bad faith, the court found it sufficient that American had refused to provide any reason for not ordering parts or equipment from Empire, because a contrary ruling would effectively convert the parties' requirement contract to an option contract. As the court explained:

> If no reason at all need be given for scaling back one's requirements even to zero, then a requirements contract is from the buyer's standpoint just an option to purchase up to (or slightly beyond, i.e., within the limits of reasonable proportionality) the stated estimate on the terms specified in the contract, except that the buyer cannot refuse to exercise the option because someone offers him better terms. This is not an unreasonable position, but it is not the law.[20]

Regarding what constitutes good or bad faith, the court went on to state that

> *The essential ingredient of good faith in the case of the buyer's reducing his estimated requirements is that he not merely have had second thoughts about the terms of the contract and want to get out of it* … . Once it is decided (as we have) that a buyer cannot arbitrarily declare his requirements to be zero, this becomes an easy case, because American Bakeries has never given any reason for its change of heart.[21]

The court also noted that a buyer does not act in bad faith if it reduces its requirements for "a business reason … independent of the terms of the contract or any other aspect of its relationship with [the seller]."[22]

While no published Michigan opinions address the differing standards in Section 2-306, MCL 440.1103(1)(c) does direct Michigan courts to construe and apply Section 2-306 to promote uniformity of law among UCC jurisdictions,[23] and the federal courts of appeals uniformly agree that Section 2-306 permits a requirements buyer to reduce order volumes in response to its own customer's significantly reduced demands without regard to proportionality to forecasted requirements.[24]

Moreover, the majority interpretation of Section 2-306 finds support in decisions by the Sixth Circuit Court of Appeals and federal courts applying Michigan law. In *Wiseco, Inc v Johnson Controls, Inc*, 155 Fed Appx 815 (6th Cir 2005) (applying Kentucky law), the court recognized that *Empire Gas* "appears to be the most frequently consulted case in analyzing the good faith component of a requirements contract under the U.C.C.[,]" and that "the majority of authorities have construed [Section 2-306] as permitting good faith reductions in requirements, as opposed to increases, even though the reductions may be highly disproportionate to stated estimates."[25] The court found that the seller Wiseco had failed to rebut Johnson Controls' evidence of legitimate business reasons for significantly reducing its requirements for Wiseco's part, including evidence showing that the reduction was attributable to the reduced requirements of Johnson Controls' own OEM customer. Accordingly, Wiseco failed to establish that Johnson Controls had reduced its order volumes in bad faith.[26]

Additionally, in *Tigg Corp v Dow Corning Corp*, 962 F2d 1119 (3d Cir 1992) (applying MCL 440.2306), an opinion authored by then Judge (now Justice) Samuel Alito, the

court expressly acknowledged that "under the [Michigan] U.C.C., a requirements buyer may have a good faith reason for demanding no goods from the seller. In such a case, the buyer does not breach by ordering no goods."[27] This case primarily involved allocation of the burden of proof, and the court ultimately found that buyer Dow Corning *had* acted in bad faith and breached the parties' requirements contract by abandoning it on the false pretext that seller Tigg's device was defective, when in fact Dow's decision was based on other, non-excusing factors.[28]

With respect to the minority interpretation of Section 2-306, the Alabama Supreme Court's opinion in *Simcala, Inc v American Coal Trade, Inc*, 821 So 2d 197 (Ala 2001), is frequently cited in arguments advocating the plain reading interpretation of Section 2-306: that it contains a single standard for increased and decreased order volumes, and that such volumes may not unreasonably deviate from forecasted requirements, regardless of the buyer's good faith. *Simcala* provided the basis for the Michigan circuit court opinion in *Wellington Indus, Inc v Faurecia Interior Sys, Inc*, discussed above.[29]

In *Simcala*, American Coal Trade (ACT) agreed to supply Simcala's 1998 requirements for coal, with Simcala estimating it would purchase 17,500 tons from American Coal that year at a price of $78.50 per ton. By the end of 1998, however, Simcala had only purchased 7,200 tons from ACT, representing 41 percent of its anticipated requirement. Simcala's reduced orders were attributable to problems with its furnace. The trial court found no evidence that Simcala had reduced its order volumes in bad faith, but based on its plain reading of Section 2-306, the trial court determined that Simcala's substantially reduced order volumes were "unreasonably disproportionate" to Simcala's forecasted requirements and therefore breached the parties' requirements contract. ACT recovered over $100,000 from Simcala in lost profits damages.[30]

On appeal, the Alabama Supreme Court found that the application of Section 2-306 as to substantially reduced order volumes was an issue of first impression under Alabama law, and the court affirmed judgment for ACT under its plain reading interpretation of the statute.[31] In relevant part, the court found that Comments 2 and 3 to Section 2-306 are *not* in conflict, because unlike Comment 2, Comment 3 specifically addresses contracts that include an estimate of the buyer's requirements. Accordingly, the *Simcala* court found that the more specific Comment 3 reveals the drafters' intent as to how the statute should be applied in contracts containing an estimate of the buyer's requirements. Per Comment 3, "the agreed estimate is to be regarded as a center around which the parties intend the variation to occur[,]" and according to the court, "[t]he use of the word 'center' clearly indicates that the drafters intended to prohibit both unreasonably disproportionate increases *and* decreases from the estimates in a requirements contract."[32]

The *Simcala* court expressly acknowledged that the majority of UCC jurisdictions had adopted the "good faith" interpretation of Section 2-306 as to substantially reduced requirements—that "unreasonably disproportionate decreases are permissible so long as the buyer has acted in good faith[.]"[33] However, the court found that those decisions were admittedly based on "concerns over market impact that would flow from following the plain meaning of the statute[,]" rather than on the plain language of the statute itself.[34] Like the Michigan circuit court in the previously mentioned case, the Alabama Supreme Court found that its role in interpreting and applying Section 2-306 was to "say what the law is, not what it should be[,]" and that "[i]f adverse effects on market conditions warrant a different result, it is for the Legislature, not this Court, to amend the statute."[35] Because Simcala did not challenge the finding that its actual purchases from ACT were unreasonably disproportionate to its estimate, the court held that further discussion of Simcala's good or bad faith was unnecessary to its affirmance of the lower court judgment.[36]

"Good Faith" in the Context of Reduced Order Volumes

Because the vast majority of UCC jurisdictions have concluded that the "good faith" standard applies to a requirements buyer's reduced order volumes, we conclude by briefly examining what constitutes "good faith" in this context.

Perhaps unsurprisingly, "good faith" under Section 2-306 has not been consistently defined (and for that reason, could be the subject of its own article). That said, one commentator aptly summarized the concept as follows:

Perhaps unsurprisingly, "good faith" under Section 2-306 has not been consistently defined[.]

(1) the buyer's actual requirements

> must be based upon a good faith operation of its business, and (2) the buyer must, in good faith, make an accurate communication of such actual requirements to the contractual seller. Accordingly, under the language of the Code, it would seem that a buyer may not represent fewer requirements to its seller than it actually has, nor may a buyer manipulate its actual operations in order to avoid making purchases from its contractual seller.[37]

In other words, a buyer "may not simply 'choose' the requirements it wishes to demand[,]" but a buyer "may respond to its business needs and the business environment."[38]

This explanation is consistent with the limited statutory guidance on what constitutes "good faith" versus "bad faith" that appears in Official Comment 2 to Section 2-306: "A shut-down by a requirements buyer *for lack of orders* might be permissible[,]" whereas "a shut-down *merely to curtail losses* would not."[39] It is also consistent with *Empire Gas*'s holding that "[t]he essential ingredient of good faith [is] that [the buyer] not merely have had second thoughts about the terms of the contract and want to get out of it[,]" and that a buyer does not act in bad faith if it reduced its requirements for "a business reason … independent of the terms of the contract or any other aspect of its relationship with [the seller]."[40]

Thus, as a general rule, when a buyer's reduction in requirements is attributable to a legitimate business reason or decision *not* involving the seller or the price terms of the contract—*e.g.*, reduced demands of the buyer's own customer, or the buyer's insolvency—the court will find the requisite "good faith."[41] The burden of establishing bad faith is on the seller, and the seller is usually unsuccessful.[42]

Conclusion

The issues analyzed herein will at some point be decided by the Michigan Supreme Court, and as we have summarized, there are valid text-based arguments that support the majority and minority interpretations of Section 2-306 as to a requirements buyer's ability to substantially reduce order volumes. For counsel representing a defendant buyer in an order volume dispute, emphasis should be placed on the UCC's mandate to promote uniformity of law among the UCC jurisdictions, and on the fact that the minority rule or standard would risk jeopardizing the tremendous efficiency gains made possible by the automotive supply chain's just-in-time delivery system. For counsel representing a plaintiff seller, the apparently unambiguous text of MCL 440.2306(1) provides the strongest argument for adoption of the minority approach in Michigan.

NOTES

1. *See* MCL 440.2306(1) (A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.).
2. *See* Opinion at 7, *Wellington Indus Inc v Faurecia Interior Sys, Inc*, No 16-006497-CB (Mich 3d Cir Ct, Nov 28, 2016) ("It is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent.") (quoting *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 159, 615 NW2d 702, 711 (2000)).
3. Cheryl R. Guttenberg, *And Then There Were None: Requirements Contracts and the Buyer Who Does Not Buy*, 64 Wash L Rev 871, 873 (1989).
4. James J. White and Omri Ben-Shahar, *Boilerplate and Economic Power in Auto-Manufacturing Contracts*, 104 Mich L Rev 953, 973 (2006).
5. Guttenberg, 64 Wash L Rev at 873.
6. *Id.* at 874.
7. MCL 440.2306(1) (emphasis added).
8. *Empire Gas Corp v American Bakeries Co,* 840 F2d 1333, 1134-35 (7th Cir 1988) (applying 810 Ill Comp Stat 5/2-306).
9. *Id.* at 1336-39.
10. *Id.* at 1337 (emphasis added).
11. *Id.* (emphasis added).
12. UCC Art 2, Sec 306, Cmt 3.
13. *Empire Gas*, 840 F2d at 1137-38 (citations omitted).
14. *Id.* (quoting *HML Corp v General Foods Corp*, 365 F2d 77, 81 (3d Cir 1966)).
15. UCC Art 2, Sec 306, Cmt 2.
16. *Empire Gas*, 840 F2d at 1338.
17. *Id.*
18. *Id.* (emphasis in original).
19. *Id.*
20. *Id.* at 1339.
21. *Id.* at 1340-41 (emphasis added).
22. *Id.* at 1339.
23. MCL 440.1103(1)(c) ("This act must be liberally construed and applied to promote the following underlying purposes and policies: … (c) To make uniform the law among the various jurisdictions.").
24. *See, e.g.: Atlantic Track & Turnout Co v Perini Corp*, 989 F2d 541 (1st Cir 1993) (applying Mass Gen Laws ch 106, sec 2-306); *Tigg Corp v Dow Corning Corp*, 962 F2d 1119 (3d Cir 1992) (applying MCL 440.2306) (discussed herein); *Brewster of Lynchburg, Inc v Dial Corp*, 33 F3d

355 (4th Cir 1994) (applying Ariz Rev Stat sec 47-2306); *Wiseco, Inc v Johnson Controls, Inc,* 155 Fed Appx 815 (6th Cir 2005) (applying Ky Rev Stat sec 355.2-306) (discussed herein); *Empire Gas, supra* (applying 810 Ill Comp Stat 5/2-306); *Angelica Unif Grp, Inc v Ponderosa Sys, Inc*, 636 F2d 232 (8th Cir 1980) (applying Mo Stat sec 400.2-306); *Bright Harvest Sweet Potato Co, Inc v HJ Heinz Co, LP,* 760 F App'x 537 (9th Cir 2019) (applying Idaho Code sec 28-2-306); *Boyd v Kmart Corp*, 110 F3d 73 (10th Cir 1997) (applying Okla Stat tit 12A, sec 2-306); *R A Weaver & Assoc, Inc v Asphalt Constr, Inc,* 587 F2d 1315 (DC Cir 1978) (applying DC Code Ann sec 28:2-306); *Tech Assistance Int'l, Inc v United States*, 150 F3d 1369 (Fed Cir 1998) (adopting majority "good faith" interpretation as law of circuit).

25. *Wiseco, Inc v Johnson Controls, Inc*, 155 Fed Appx 815, 817-18 (6th Cir 2005) (applying Ky Rev Stat sec 355.2-306).

26. *Id.* at 818-20.

27. *Tigg Corp v Dow Corning Corp*, 962 F2d 1119, 1126 (3d Cir 1992) (applying MCL 440.2306).

28. *See id.* at 1122-23, 1126-27.

29. *See* Opinion at 7-8, *Wellington Indus Inc v Faurecia Interior Sys, Inc*, No 16-006497-CB (Mich 3d Cir Ct, Nov 28, 2016) (citation omitted).

30. *Simcala, Inc v American Coal Trade, Inc*, 821 So 2d 197, 199-200 (Ala 2001) (applying Ala Code sec 7-2-306).

31. *Id.* at 200-203.

32. *Id.* at 201 (citations omitted) (emphasis in original).

33. *Id.* at 202 (citations omitted).

34. *Id.* at 202 (citing *Brewster,* 33 F3d at 364; *Empire Gas*, 840 F2d at 1337; and *R A Weaver,* 587 F2d 1322).

35. *Id.* (citations omitted).

36. *Id.*

37. Travis W. McCallon, Old Habits Die Hard: The Trouble with Ignoring Section 2-306 of the UCC, 39 Tulsa L Rev 711, 719 (2004).

38. *Id.* at n 69, 70.

39. UCC Art 2, Sec 306, Cmt 2 (emphasis added).

40. *Empire Gas*, 840 F2d at 1339-41.

41. *See, e.g., Wiseco*, 1115 Fed Appx at 818-20 (Buyer's reduced orders attributable to the reduced demands of its own customer); *Hitachi Auto Sys Americas, Inc v TI Auto Ligonier Corp,* 2018 WL 3615993, at *1 (ED Ky July 27, 2018) (same); *Goaltex Corp v Association for Blind & Visually Impair*ed, 979 NYS2d 481, 488–89 (Sup Ct 2014) (same); *Global Minerals Corp v Nucor Steel Tuscaloosa Inc*, 2012 WL 12951435, at *4–6 (ND Ala Mar 21, 2012) (same); *Schawk, Inc v Donruss Trading Cards, Inc*, 319 Ill App 3d 640, 651, 746 NE2d 18, 27 (2001) (Buyer was in economic duress and made legitimate decision to discontinue its business.).

42. Guttenberg, 64 Wash L Rev at 875.

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