Destination Contracts If the contract requires the seller to deliver the goods to a specific destination, the seller bears the risk and expense of delivery to that destination [2–509(1)(b)]. The following are commonly used shipping terms that create destination contracts:

1. *FOB destination.* An FOB term coupled with the place of destination of the goods puts the expense and risk of delivering the goods to that destination on the seller [2–319(1)(b)]. For example, a contract between a seller in Chicago and a buyer in Phoenix might call for shipment FOB Phoenix. The seller must ship the goods to Phoenix at her own expense, and she also retains the risk of delivery of the goods to Phoenix.
2. *Ex-ship.* This term does not specify a particular ship, but it places the expense and risk on the seller until the goods are unloaded from whatever ship is used [2–322].
3. *No arrival, no sale.* This term places the expense and risk during shipment on the seller. If the goods fail to arrive through no fault of the seller, the seller has no further liability to the buyer [2–324].

For example, a Chicago-based seller contracts to sell a quantity of Weber grills to a buyer FOB Phoenix, the buyer's place of business. The grills are destroyed en route when the truck carrying the grills is involved in an accident. The risk of the loss of the grills is on the seller, and the buyer is not obligated to pay for them. The seller may have the right to recover from the trucking company, but between the seller and the buyer, the seller has the risk of loss. If the contract had called for delivery FOB the seller's manufacturing plant, then the risk of loss would have been on the buyer. The buyer would have had to pay for the grills and then pursue any claims that he had against the trucking company.

Goods in the Possession of Third Parties If the goods are in the possession of a third-party bailee (like a warehouseman) and are to be delivered without being moved, the risk of loss passes to the buyer upon delivery to him of a negotiable document of title for the goods; if no negotiable document of title has been used, the risk of loss passes when the bailee indicates to the buyer that the buyer has the right to the possession of the goods [2–509(2)]. For example, if Farmer sells Miller a quantity of grain currently stored at Grain Elevator, the risk of loss of the grain will shift from Farmer to Miller (1) when a negotiable warehouse receipt for the grain is delivered to Miller or (2) when Grain Elevator notifies Miller that it is holding the grain for Miller.

Risk Generally If none of the special rules that have just been discussed applies, the risk passes to the buyer on receipt of the goods if the seller is a merchant. If the seller is not a merchant, the risk passes to the buyer when the seller tenders (offers) delivery of the goods [2–509(3)]. For example, Frank offers to sell Susan a car, and Susan sends an e-mail accepting Frank's offer. When he receives the e-mail, Frank calls Susan and tells her she can "pick up the car anytime." That night, the car is destroyed when a tree falls on it during a storm. If Frank is a used-car salesman, he must bear the loss. If Frank is an accountant, Susan must bear the loss.

The case that follows, *Capshaw v. Hickman*, illustrates another critical issue, that is, whether the seller in fact tendered delivery to the buyer.

Capshaw v. Hickman

64 UCC Rep.2d 543 (Ct. App. Ohio 2007)

Charles Capshaw entered into a written contract with Rachel Hickman to purchase Hickman's 1996 Honda Civic EX for $5,025. The contract provided, among other things, that "the title will be surrendered upon the new owner's check clearing." Capshaw made a down payment of $80 in cash and gave Hickman a personal check for the balance. She provided Capshaw with the keys to the vehicle and also complied with his request to sign the certificate of tile over to his father and placed the certificate in the vehicle's glovebox. They agreed the vehicle was to remain parked in Hickman's driveway until the check cleared.

Unfortunately, before Hickman was notified by her bank that the check had cleared, a hailstorm heavily damaged the vehicle. Due to the damage, Capshaw decided that he no longer wanted the vehicle and asked Hickman to return his money. Hickman refused, believing that the transaction was complete and that the vehicle belonged to Capshaw. She also requested that it be removed from her driveway. Capshaw brought suit against Hickman, alleging, among other things, conversion, breach of contract and "quasi-contract and unjust enrichment—promissory estoppel." Capshaw contended that the risk of loss remained with Hickman until the check cleared; because it had not cleared at the time the hail damaged the car, Hickman sustained the loss. Hickman maintained that the risk of loss for a nonmerchant seller like her passes to the buyer after the seller tenders delivery to the buyer.