

get good title to the goods they buy from merchants in the ordinary course of business. However, a merchant-seller cannot pass good title to stolen goods even if the buyer is a buyer in the ordinary course of business. This is because the original owner did nothing to facilitate the transfer.

LO5

Apply the Code's rules concerning risk of loss to determine who had the risk of loss in a given transaction where the goods that were the subject of a contract were lost or destroyed before the buyer took possession.

Risk of Loss

The transportation of goods from sellers to buyers can be a risky business. The carrier of the goods may lose, damage, or destroy them; floods, hurricanes, and other natural catastrophes may take their toll; thieves may steal all or part of the goods. If neither party is at fault for the loss, who should bear the risk? If the buyer has the risk when the goods are damaged or lost, the buyer is liable for the contract price. If the seller has the risk, he is liable for damages unless substitute performance can be tendered.

The common law placed the risk on the party who had technical title at the time of the loss. The Code rejects this approach and provides specific rules governing risk of loss that are designed to provide certainty and to place the risk on the party best able to protect against loss and most likely to be insured against it. Risk of loss under the Code depends on the terms of the parties' agreement, on the moment the loss occurs, and on whether one of the parties was in breach of contract when the loss occurred.

Terms of the Agreement The contracting parties, subject to the rule of good faith, may specify who has the risk of loss in their agreement [2-509(4)]. This they may do directly or by using certain commonly accepted shipping terms in their contract. In addition, the Code has certain general rules on risk of loss that amplify specific

shipping terms and control risk of loss in cases where specific terms are not used [2-509].

Shipment Contracts If the contract requires the seller to ship the goods by carrier but does not require their delivery to a specific destination, the risk passes to the buyer when the seller delivers the goods to the carrier [2-509(1)(a)]. Shipment contracts are considered to be the normal contract where the seller is required to send goods to the buyer but is not required to guarantee delivery at a particular location.

The following are commonly used shipping terms that create shipment contracts:

1. *FOB (free on board) point of origin.* This term calls for the seller to deliver the goods free of expense and at the seller's risk at the place designated. For example, a contract between a seller located in Chicago and a buyer in New York calls for delivery FOB Chicago. The seller must deliver the goods at his expense and at his risk to a carrier in the place designated in the contract, namely Chicago, and arrange for their carriage. Because the shipment term in this example is FOB Chicago, the seller bears the risk and expense of delivering the goods to the carrier, but the seller is not responsible for delivering the goods to a specific destination. If the term is "FOB vessel, car, or other vehicle," the seller must load the goods on board at his own risk and expense [2-319(1)].
2. *FAS (free alongside ship).* This term is commonly used in maritime contracts and is normally accompanied by the name of a specific vessel and port—for example, "FAS Calgary [the ship], Chicago Port Authority." The seller must deliver the goods alongside the vessel *Calgary* at the Chicago Port Authority at his own risk and expense [2-319(2)].
3. *CIF (cost, insurance, and freight).* This term means that the price of the goods includes the cost of shipping and insuring them. The seller bears this expense and the risk of loading the goods [2-320].
4. *C & F.* This term is the same as CIF, except that the seller is not obligated to insure the goods [2-320].



Ethics in Action

Perils of Entrusting Goods

Suppose you are the owner of a small jewelry store that sells new and antique jewelry. A customer leaves a family heirloom—an elaborate diamond ring—with you for cleaning

and resetting. By mistake, a clerk in your store sells it to another customer. What would you do? If you were the buyer of the ring and had given it to your fiancée as a gift and then were informed of the circumstances, what would you do?