Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference's Breach of Promise . . . Regarding Article 2 Damage Remedies

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OF HIDDEN AGENDAS, NAKED EMPERORS, AND A FEW GOOD SOLDIERS: THE CONFERENCE'S BREACH OF PROMISE . . . REGARDING ARTICLE 2 DAMAGE REMEDIES

Roy Ryden Anderson*

I dedicate this effort, with admiration, to Professor Richard E. Speidel, although lacking from it are his good judgment and unearthly tolerance. "His" Revised Article 2, the proposed final draft of July, 1999, stands as a remarkable and valuable contribution to commercial law literature and as an example of the quality of work the National Conference of Commissioners on Uniform State Laws was once capable.

PREFACE

In her recent, important article on the Article 2 revision process, Professor Linda J. Rusch gave an unique and surprisingly tempered insider's view of the process up to the time of its implosion in July of 1999 at the annual meeting of the National Conference of Commissioners on Uniform State Laws. At that time the revision process was thought to be virtually complete. A penultimate draft had been approved by the American Law Institute two months before at its May 1999 annual meeting. A proposed final draft, dated July 1999, was in the process of being approved by NCCUSL. After approximately half of this draft was read to the Conference, further consideration of it was terminated by Gene LeBrun, the Conference's president. The reason stated publicly by Mr. LeBrun at that time was an overly full remaining agenda for the Conference. The true reason, given privately to the Drafting Committee and later publicly, was a "fear of continued industry opposition to the draft and the perceived threat of nonuniform enactment of the revised

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2. Herein, "the Conference" or, occasionally, "NCCUSL".
3. Rusch, supra note 1, at 1684.
It is quite clear that the reason for pulling the draft was perceived political expediency and had nothing to do with its quality or fairness. Indeed, just two months previously, the Conference's leadership, including Mr. LeBrun, had extolled the quality and balance of the revision and had strongly urged the American Law Institute to approve it.5

It is also clear that the action of the Conference's leadership sounded the death knell for the July 1999 draft and also, as it turns out, for much semblance of it.6 Immediately following this action, the reporter for revised Article 2, Professor Richard E. Speidel, resigned, as did the associate reporter, Professor Linda J. Rusch. Neither Speidel nor Rusch were Conference members and may not have shared the overarching concern for political expediency that drove the Conference's leadership. The Conference's membership may not have either. It was not given a voice in the matter.

We may never know whether the call made by the Conference leadership was the correct one. Was the potential for successful "industry" opposition and nonuniform enactment realistic? Two months previously, when one industry representative after another, as guests at the annual meeting of the American Law Institute, traipsed to the microphone to voice objections to the revision, all objections were voted down by the

4. Id.
5. Id. at 1685-86. I have written elsewhere of the extraordinary openness and candid exchange of ideas that was characteristic of the process for the Original Revision. See Roy Ryden Anderson, Damage Remedies under the Emerging Article 2—An Essay against Freedom, 34 Hous. L. REV. 1065, 1079 (1997) [hereinafter Freedom]. The membership of the original drafting committee was a remarkable group of people, who unerringly worked over many years toward a single goal—to get things right. Every important issue was debated openly, sometimes heatedly, and a vote of the Committee was taken only after every view had been aired at least once, sometimes ad nauseum. Consolidation of this process into a coherent whole was made possible only by the talents of Professor Richard E. Speidel, later with the help of Professor Linda J. Rusch. The ultimate document that was the Original Revision was a brilliant one, of which the Conference was justifiably proud and which gained the strong approval of the American Law Institute.

An active, continuing participant in the process of the Original Revision was the American Bar Association's UCC Subcommittee on Sales of Goods, a voluntary committee of ABA members who participated actively throughout the revision process. The membership of the subcommittee was broad-based and included industry representatives, foremost of which was Thomas J. McCarthy of E.I. DuPont de Nemours & Company, who chaired the subcommittee, consumer advocates, practicing lawyers, and academics, whose viewpoints, needless to say, varied widely from issue to issue. Subcommittee members attended every meeting of the drafting committee for the Original Revision and contributed significantly in writing and in oral discussion at those meetings. I am proud that I was allowed to actively participate as a member of and commentator for the Subcommittee. Formal minutes or other record of discussion at meetings of the drafting committee were not kept. However, recollections expressed in this article regarding discussion at various meetings are affirmed in most cases by detailed, informal minutes kept by Tom McCarthy for the ABA Subcommittee. The opinions expressed herein are, of course, my own and not those of the Subcommittee.

6. For that reason, the July, 1999 draft is referred to as the "Original Revision." The particular remedy provisions of the Original Revision discussed herein are included as Appendix B to this article. The revision process subsequent to July, 1999 is referred to as the "Current Revision," and its damage remedy provisions are included as Appendix A.
voice vote of a significant majority. But the American Law Institute does not have the stake in the Uniform Commercial Code that the Conference does. The UCC is undoubtedly the starship of uniform laws promulgated by the Conference. Without a uniform commercial code, the importance of the Conference would be unquestionably diminished. The American Law Institute stands for many more important things than its partnership with the Conference in shepherding the Uniform Commercial Code. Given the extreme importance of a new, uniform revised Article 2 to the Conference, it might not have taken much of a threat by “industry” to persuade the leadership cadre to fold its cards. One of the most important and basic rules of sensible wagering is never to risk what you cannot afford to lose. The Conference could not afford the risk that the revised Article 2 would not be uniformly adopted by the states (with, of course, the customary smattering of local law variations). But to sacrifice without a fight the brilliant document that was the July 1999 draft, the work product of thousands of people-hours over most of a decade, was a tremendous loss indeed. Regardless, the high-standing and great history of the Conference as a respected and important member of the legal community perhaps demands that this sacrifice be taken at face value, as the lesser of two evils.

The action of the Conference leadership in July 1999 was, nevertheless, a watershed event in the organization’s proud history, and the process of the “Current Revision,” the label used herein for the revision of Article 2 since that date, will have much to say regarding the Conference’s continued viability as a reliable source of fair and reasonable uniform state laws. The process began with the appointment of a new drafting committee, which retained a few of the members from the original committee, including Professor William H. Henning as its chair and Professor Henry Deeb Gabriel, Jr. as the new reporter. Professor Gabriel was an interesting choice for the position on a project as important as the revision of Article 2, a position that would normally be reserved for a more seasoned scholar. Had Professor Gabriel stayed within the charge given him by the Conference, however, his extensive experience with the revision process would have made him well-suited for the task. The assigned task was the

7. See supra note 6.
8. This theme is explored in depth in Rusch, supra note 1.
9. Professor Gabriel was not only a member of the original Article 2 drafting committee, but he also served as a member of the ABA Task Force that critiqued the 1990 Study Group Report recommending revision of Article 2.

In 1987, the Permanent Editorial Board for the Uniform Commercial Code established an Article 2 Study Group to review Article 2 and to make recommendations regarding its revision. The Study Group issued its report in March, 1990, recommending that a drafting committee be established and making specific recommendations regarding revision of Article 2. The Study Group Report was reviewed by a Task Force of the American Bar Association, which in turn issued a reply report. Both reports are nicely juxtaposed and published in their entirety in An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group. This publication is herein referred to as Appraisal. An avowed purpose of the Original Revision was to consider, and adopt where appropriate, the recommendations of the Study Group. Regarding the Article 2 remedy
simple one of a scrivener, of putting down in more digestible form the
work previously done over more than a decade by the Article 2 Study
Group and the original drafting committee. The task was concisely stated
as follows: "The [Drafting] Committee has been asked to preserve the
substantive gains in the May [1999] version of Article 2 while restoring
some of the language of the current Article 2, with which many are more
comfortable." ¹⁰

The first draft of the Current Revision was issued in December, 1999.
It looked not at all like the Original Revision. Its format reflected a re-
turn to the numbering system and structure of current Article 2. A per-
usal of its contents also clearly demonstrated that many, perhaps most, of
the gains of the Original Revision had been discarded.¹¹ The charge for
the Current Revision had quite obviously been amended. At the two
open meetings of the new drafting committee in February and March
2000, the Conference leadership stated on numerous occasions that no
change in current Article 2 would be made without good reason being
demonstrated. It was the apparent opinion of the leadership that many
changes in the Original Revision were unjustified.

The policy of making no change in current Article 2 law without good
reason was emphasized by express assurances of Professors Gabriel and
Henning to the membership of the American Law Institute at its May
2000 annual meeting.¹² Presumably the reason for change would be
drawn from existing case law under current Article 2, from the 1990
Study Group and ABA Task Force reports, and from the Original Revi-
sion of Article 2, and not from a personal agenda of principles and theo-
ries held by the drafters of the Current Revision. This article will
demonstrate that, at least with respect to Article 2 remedies, the assur-
ances of Professors Gabriel and Henning, and thus those of the Confer-
ence itself, were wholly hollow ones. The Current Revision seeks to
restructure dramatically how Article 2 damage provisions work by per-
mitting an aggrieved party always to recover supracompensatory dam-
ages based on market price in derogation of the basic damages principle

¹⁰. Task Force of the A.B.A. Subcommittee on General Provisions Sales, Bulk Transfers,
and Documents of Title, Committee on the Uniform Commercial Code, An Appraisal of
the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study
¹¹. 22 ALI REP., No. 1, p. 4 (Fall 1999).
¹². Undoubtedly, this will be a central theme of many of the articles that appear with
this one in this symposium issue.
¹³. See 41 U.C.C. BULL. RELEASE 2, p. 7 (Nov. 2000), which describes these assur-
ances as follows:
Drafting Chair William H. Henning said his goals were to modernize Art. 2
with regard to emerging technologies . . . and changed business practices . . .
as well as fix some ambiguities. Just "some," he explained, because Art. 2,
unlike Art. 9, is a broad framework that should allow room for the courts to
resolve certain matters. Reporter Henry Deeb Gabriel Jr. echoed that there
is no desire to produce something like the Code of Federal Regulations.
of mitigation and of the Code’s current compensation principle. This attempt is in opposition to recommendations of the Study Group, the ABA Task Force, and the provisions of the Original Revision of Article 2. It even contravenes basic and clearly stated principles of the common law of contract and of international law as codified in the Convention on the International Sale of Goods. The attempt, however, is reflective of the published writings of Professors Gabriel and Henning and, presumably, of their own personal goals as drafters of the Current Revision.

I. INTRODUCTION

The Uniform Commercial Code presently makes emphatic a principle of compensation both as a goal for the courts to achieve in applying its damage remedies and as a limitation on the amount of recovery of damages in applying its remedies. Subject to this compensation principle, the Code also expresses an egalitarian philosophy of allowing an aggrieved party a free election of remedies. The injured party is free to choose to have damages measured by any formula provided by the Code but only to the extent that the measurement will not place her in a better position than she would have occupied had the contract been performed.

Two important damage remedy provisions in Article 2 provide for measuring damages based on actual, self-help, substitutionary relief engaged in by the injured party, resale by the seller and cover by the buyer. For cases in which the injured party has not engaged in resale or cover, Article 2 provides for the measurement of damages in Sections 2-708 and 2-713, for sellers and buyers respectively, based upon a rough approximation of the measure of damages that would have been demonstrated by substitutionary relief had that relief been sought.

This combination of remedies based on actual and hypothetical substitutionary relief has raised two recurring issues in the case law under current Article 2. The first issue is whether a seller who has resold or a buyer who has covered may, nevertheless, recover greater damages measured by the applicable market price formula. The second issue is whether the injured party may recover greater damages based on market price than would have been produced by a reasonably available resale or cover had the aggrieved party sought that relief. The cases under current Article 2 have clearly and uniformly answered both questions in the negative.

If the compensation principle in the Code’s Section 1-106 is to be followed, this case law is unarguably correct. With respect to the first issue, the results in the cases are justified both by the Code’s compensation principle and by the absurdity of the notion that an injured party should

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13. U.C.C. § 106(1) provides: “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.”

be able to resell or cover but also to ask that a court roughly estimate some price at which she might have engaged in that substitutionary relief. With respect to the second issue, the courts uniformly deny damages based on market price where those damages could have been reasonably avoided by a resale or cover. As will be discussed below, the Study Group and the ABA Task Force expressly recommended that the revision of Article 2 codify this case law by making explicit provision that neither a seller who resells nor a buyer who covers may recover damages based upon market price.\textsuperscript{15} The Original Revision of Article 2 so provided. However, the Current Revision deletes every provision from the Original Revision that so provides and seeks to achieve the exact opposite result.\textsuperscript{16}

This attempt is in violation of the publicly expressed assurances of the Conference that the sales law of Article 2 will not be changed without good reason. It contravenes the Original Revision, assurances by the Conference that gains from that revision would be preserved, and also the recommendations of the Study Group and the ABA Task Force. It is responsive to the recommendation of no industry or group that has actively participated over the past decade in the revision process. It is, however, reflective of highly questionable principles and theories espoused by Professors Gabriel and Henning in their writings.\textsuperscript{17}

Professor Gabriel, for example, has argued at length in favor of allowing a seller who properly resells under Article 2 to recover greater damages based upon market price.\textsuperscript{18} His analysis flows from Article 2's general philosophy of free election of remedies, and he attempts to justify his conclusion based upon Article 2's drafting history and upon his personal "expectation theory" of damage remedies. Regarding the statutory drafting history, we "scholars" always know that we are on presumptive and shaky ground in using so-called drafting history to assume the actual intent of a disparate group of people from some prior time, often decades or more in the past.\textsuperscript{19} Even those of us who have participated actively over the past several years in the Article 2 revision process, for example,

\textsuperscript{15} I have written elsewhere at length about these issues and the Article 2 case law addressing them in context with the Code's general philosophy of free election of remedies. \textit{See Freedom, supra} note 5. That analysis will be highlighted herein but not reprised in depth.

\textsuperscript{16} This attempt is demonstrated and critiqued throughout the discussion below, but particularly with respect to Current Revised Sections 2-703, 2-706, 2-708(1), 2-711, 2-712, and 2-713.

\textsuperscript{17} Professor Henning, for example, maintains the extraordinary position that Article 2 should be read to allow a buyer who covers to nevertheless recover damages based on market price despite the clear wording to the contrary of comment 5 to current Section 2-713 and the corresponding holding of every case that has addressed the issue. He finds all of this law ambiguous. His analysis of the law is discussed unfavorably below. \textit{See discussion infra} following note 190.


\textsuperscript{19} I am certainly no exception. For example, much of my article arguing, apparently unsuccessfully, that sellers should be allowed to recover consequential damages under current Article 2 was based on the drafting history of Section 1-106. \textit{See Roy Ryden Anderson, In Support of Consequential Damages for Sellers}, 11 J.L. & COM. 123 (1992).
would undoubtedly find either humorous or naive an attempt by any of us to argue an interpretation based on the “drafting history” of this Article 2 revision process. And most of us are still around to speak from firsthand knowledge.

Professor Gabriel is not alone in reaching a similar conclusion that drafting history supports a free election of remedies for sellers.\textsuperscript{20} However, in this corner at least, and taking at face value every historical “fact” suggested by Professor Gabriel, a fair reading of the drafting history suggests no more than that the drafters were unable to reach a firm conclusion on the issue of whether a seller who resells should be allowed to recover damages based on market price.\textsuperscript{21}

Given the absence of explicit provision in current Article 2, the more relevant question is what is the better result. As will be discussed below, all of the cases that have addressed the issue under current Article 2 hold that a seller who resells may not recover greater damages based upon market price. The cases justify their holdings on the basis of the Code’s compensation principle in Section 1-106 and on the basic mitigation principle of damage law. It is here that Professor Gabriel’s written ruminations are fatally flawed. His article manages to make his entire argument over many pages without ever once addressing either the compensation or mitigation principles. His analysis proceeds as if neither exists! Instead, he concocts as the “one possible explanation”\textsuperscript{22} for disallowing a seller who resells from a recovery of market damages the suggestion that “the seller acts as the buyer’s agent when the seller resells the goods.”\textsuperscript{23} He then quickly burns down this absurd, straw argument.

Professor Gabriel concludes by presenting what he calls his “expectation theory” of contract law to justify a supracompensatory recovery of damages based on market price even though the seller has resold. Under this theory, the breaching party is “held to her word”\textsuperscript{24} under a “‘reverse’ reliance theory” that “enforces reasonable expectations, but from the viewpoint of the promisor, not the promisee.”\textsuperscript{25} Included in these expectations is that a “seller has the reasonable expectation that she is entitled to the profit of the contract which the buyer breached, independent of any action she takes after the breach, such as reselling the goods.”\textsuperscript{26} He asserts that this “profit of the contract” is always to be measured “objec-


\textsuperscript{21} See Gabriel, supra note 18, at 433-37. The drafters had no similar reservations regarding a buyer who covers. See U.C.C. § 2-713, cmt. 5.

\textsuperscript{22} Id. at 445. The real possible explanations, of course, are compensation and mitigation.

\textsuperscript{23} Id.

\textsuperscript{24} Id. at 451.

\textsuperscript{25} Id. at 451 n.156.

\textsuperscript{26} Id. at 453 (emphasis added).
Professor Gabriel does concede that "many" would disagree with his view of contract law.28 I, for one, am uncertain that I understand his theory other than as an incoherent attempt to give primacy to market-based damages.29 I, thus, will count myself among the "many." Professor Gabriel does specifically identify Professors White and Summers as disbelievers when he cites their treatise for the proposition that a reselling seller should not recover greater damages based upon market price.30 He says that their conclusion "only makes sense if one assumes that a contract only entitles the non-breaching party to a specific end result."31 The conclusion of Professors Summers and White is not necessarily intended to reflect their own personal view. They simply state their conclusion that the Code itself limits the injured party "to a specific end result."32 They are right. The Code does not conform to Professor Gabriel's personal "expectation theory," but adopts an expectation theory that requires that remedies "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."33 It then specifically rejects any theory that would allow recovery of windfall, supracompensatory, or penal damages.34 The principle looks in its entirety, as Professors Summers and White conclude, "to a specific end result." Compensation and no more.

Professor Gabriel is certainly entitled to his theory, whether many may oppose it or whether few may understand it. What he is not entitled to do, as reporter for the Current Revision, is to exceed the charge given by the Conference by applying his personal theory so as to change fundamentally the current Article 2 remedy structure. How that illicit goal is sought to be accomplished is discussed fully below in context with a review in numerical order of the specific damage remedy provisions in the Current Revision.

27. *Id.* at 451-53.
28. *Id.* at 453.
29. His "theory" is but a series of postulates, sustained neither by logic or other syllogism. One conclusion jumps to the next without connecting synapses. For example, a predicate to understanding Professor Gabriel's "expectancy theory" is what he calls a "reverse reliance" theory, which goes unexplained but suggests an oxymoron. Under any "expectancy" theory of damages, the expectancy must exceed, and thus encompass, the reliance. Otherwise there is no compensable lost expectation. A reliance-based recovery is an alternative to an expectation-based recovery under basic principles of contract law, but the reliance recovery may not exceed the value of the expectation loss. See *Restatement (Second) of Contracts* § 349 (1981). What is the "reverse" of that? Further, an "expectancy" theory that focuses, as Professor Gabriel suggests, entirely on the expectation of the promisee, with no consideration of that of the promisor, ignores the basic requirement of foreseeability in the law of contract damages.
31. *Id.*
32. *Id.*
33. U.C.C. § 1-106(1) (emphasis added).
34. *Id.*
II. GENERAL REMEDIAL POLICIES

Section 2-701. Remedies for Breach of Collateral Contracts Not Impaired

Current Section 2-701 is an innocuous provision that merely restates the truism that the remedies provided in Article 2 do not affect those available for breach of collateral or ancillary obligations. The current revision continues the provision unchanged, thereby reflecting its disregard for all the work that preceded it, including that of the prior drafting committee, the Article 2 Study Group, and the ABA Task Force.

The Study Group observed that Section 2-701 deals with "a minor issue" and suggested that it "wastes an opportunity to state the basic remedial policies that should structure Part 7" of Article 2. The Study Group and the ABA Task Force recommended that the provision be retitled "Remedies in General" and that the provision be redrafted to reflect, either in text or commentary, the following fundamental principles:

1. The basic remedial objective of protecting the expectation interest of placing the injured party, no better and no worse, in the position that would have been occupied had the contract been performed;
2. That the courts, where appropriate, also have the power to protect the injured party's reliance and restitution interests;
3. The basic concept of mitigation of damages, that a party may not recover for a loss that was reasonably avoidable, whether or not the principle is reflected by a particular provision;
4. That damages must be caused in fact by the breach but need not be proved with mathematical precision but only with reasonable certainty; and, most importantly,
5. That, although the remedies provided by Article 2 are essentially cumulative, the injured party's right to choose freely among them should be limited both by the principle of compensation and where the remedy would be "fundamentally" inconsistent with the in-

35. U.C.C. § 2-701.
36. See infra Appendix A, § 2-701.
37. See Appraisal, supra note 9, at 1204.
38. The Original Revision, in commentary, stated that in appropriate cases an aggrieved party's recovery could be measured by her reliance or restitution interest subject to the principle that the recovery could not exceed compensatory damages. See Original Revised § 2-804 cmts. 2, 3. The Current Revision remains silent on the matter. For a thoughtful and informative article suggesting that recoveries based on reliance or restitution should not be expanded beyond those currently provided for by Article 2, see Michael T. Gibson, Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code, 29 Ariz. St. L.J. 909 (1997).
39. The most obvious case of a fundamental inconsistency in the Article 2 remedy chosen is where the injured seller has actually resold the goods or the injured buyer has actually covered for them but nevertheless seeks damages based on market price, which itself is an approximation of the amount at which the injured party would have resold or covered. A recurring criticism in this article is that the Current Revision seeks to change radically the law as we now have it by permitting this inconsistency. It is also fundamentally inconsistent to allow recovery for an alleged loss calculated on the basis of market
jured party's actual situation.\textsuperscript{40}

The Original Revision, in the fashion typical of it, followed the Study Group's recommendation by expressly reaffirming all of these basic principles in either statutory text or in commentary thereto.\textsuperscript{41} The Current Revision is, of course, silent as to them, thereby giving hint of the conundrum of its hidden agenda. To affirm basic principles, such as that of mitigation of damages and that recoveries should not exceed the actual loss incurred, would substantially undermine the objectives of allowing recovery for reasonably avoidable loss and for supracompensatory damages based on market price. To propose rejection of these principles expressly would virtually guarantee rejection of the proposal by the informed and unbiased. The Current Revision seeks to resolve this dilemma by making subtle changes to the text and commentary to various remedy provisions so as to disguise their effect on the availability of particular remedies in specific situations.

\section*{III. SELLER'S DAMAGE REMEDIES}

\textbf{Section 2-703. Seller's Remedies in General.}

The Current Revision proposes a substantial revision of Section 2-703. It begins with an inclusive listing of the ways in which a buyer may breach.\textsuperscript{42} Although the listing is a wholly unnecessary incantation, it is presumably harmless in that it says no more than that the buyer breaches if he fails to perform as required by the provisions in Article 2 or by the terms of the contract of sale.\textsuperscript{43} A complete listing of all the Article 2 remedies of the seller follows in subsections (2) and (3). This listing merely incorporates the index of remedies provided by the Original Revision,\textsuperscript{44} but adds a new subsection (b)(12), which states that "in other cases, recover damages in any manner that is reasonable under the circumstances."\textsuperscript{45} The syntax of subsection (b)(12) reflects poor drafting, because the listing to which the provision is appended refers to remedies and not to "cases." What are the "other cases" to which this new provision refers? The Reporter's Notes to Current Revised Section 2-703 promises that a comment will be provided that "will indicate that subsection (b)(12), which is open-ended, is designed to deal with remedies for contractually defined breaches." Perhaps, then, the intent of the provision is simply to recognize that a buyer might breach a term of the contract not contemplated by or provided for by Article 2 and to allow the court to fashion a remedy for that breach. If so, the provision is superflu-

\begin{thebibliography}{9}
\bibitem{40} See \textit{Appraisal}, supra note 9, at 1204-05.
\bibitem{41} See \textit{infra} Appendix B, §§ 2-803, 2-804.
\bibitem{42} See \textit{infra} Appendix A, § 2-703.
\bibitem{43} See \textit{id.} at § 2-703(a).
\bibitem{44} See \textit{infra} Appendix B, § 2-815(a).
\bibitem{45} See \textit{infra} Appendix A, § 2-703(b)(12).
\end{thebibliography}
ous because the contemplated situation is covered by Article 1’s provi-
sions for preserving the general common law of contract (Section 1-103) and
for the liberal administration of remedies (Section 1-106). Because
the provision is unnecessary and is drafted in such an open-ended man-
ner, it has the potential for causing confusion rather than clarity and
should be omitted from the final draft.

Once again, as with Section 2-701, Current Revised Section 2-703 says
more by silence than by expression. The Study Group and the ABA Task
Force recommended that the index of sellers’ remedies clearly state that
the remedies were subject to the basic damage principles alluded to
above, including the principle of compensation and no more and that of
mitigation of damages.\textsuperscript{46} The Original Revision devoted a separate sec-
tion to making this important point.\textsuperscript{47} The Current Revision is silent in
this regard, thereby setting the stage for deviating from those principles.

**Consequential Damages for Sellers.**

A major innovation in the Current Revision is a provision allowing for
consequential damages to be recovered by sellers. This is in accordance
with the recommendations of the Study Group and ABA Task Force re-
ports\textsuperscript{48} and is carried forward from the Original Revision.\textsuperscript{49} Although no
express provision for consequential damages is listed in the index to sell-
ers’ remedies in Section 2-703, as recommended by the Study Group and
the ABA Task Force\textsuperscript{50} and as provided for in the Original Revision,\textsuperscript{51} all
of the seller’s damage remedies in the Current Revision do make the pro-
vision. Consequential damages for sellers are defined in Current Revised
Section 2-710, and the limits on their recovery will be discussed below in
context with that section.

**Section 2-704. Seller’s Right to Identify Goods to the Contract
Notwithstanding Breach or to Salvage Unfinished Goods.**

The Study Group recommended no changes to current Section 2-704,
and neither the Original Revision\textsuperscript{52} nor the Current Revision has made
any. The seller’s right to identify to the contract conforming goods post-
breach thus remains unchanged, as do the seller’s responsibilities to miti-
gate damages when goods to be manufactured are incomplete at the time
of breach.\textsuperscript{53} The rule that any resale of the goods as a basis for measuring
damages must be reasonably identified as intended for the breached con-

\textsuperscript{46.} Appraisal, \textit{supra} note 9, at 1210-11.
\textsuperscript{47.} See \textit{infra} Appendix B, § 2-801: “The remedies of the seller, buyer, and other pro-
tected persons under this article are subject to the general limitations and principles stated
in Sections 2-802 through 2-814.”
\textsuperscript{48.} Appraisal, \textit{supra} note 9, at 1211.
\textsuperscript{49.} See \textit{infra} Appendix B, §§ 2-816(8), 2-806.
\textsuperscript{50.} Appraisal, \textit{supra} note 9, at 1211.
\textsuperscript{51.} \textit{See infra} Appendix B, § 2-815(8).
\textsuperscript{52.} \textit{Id.} at § 2-817.
\textsuperscript{53.} \textit{See infra} Appendix A, § 2-704.
tract, as provided in current Sections 2-704 and 2-706, is continued in the Current Revision. The relationship between this rule and the right of the seller in current Section 2-706, and thus in the Current Revision, to identify an existing contract as the resale contract remains unclear. However, this apparent contradiction has caused no court to date to limit a seller's right to use a previously existing contract as the identified resale contract in establishing damages under Section 2-706.

Section 2-706. Seller's Resale Including Contract for Resale.

The Current Revision continues Section 2-706 in much the same form but with one subtle and critical change. The Study Group had recommended no changes with respect to the provision's requirements of good faith, commercial reasonableness, and notice of resale; but the ABA Task Force did recommend that the term "public resale" be changed to read "auction sale" and that the requirement of notice of intention to resell by private resale be deleted. The Original Revision made both of these changes, except that the better term "public auction" was substituted for the recommendation of "auction sale." The comments to current Section 2-706 state explicitly that "public" sale is intended to mean a sale by auction. The context of the statement makes clear that a public auction is intended rather than one to which participation is restricted. The phrase "public auction" used in the Original Revision is thus precise, and the refusal to use it in the Current Revision is unjustified. The Current Revision instead uses the current language "public sale" but deletes the current explanatory commentary. It substitutes instead the following gibberish: "A 'public' sale is one to which members of the public are admitted. A public sale is usually a sale by auction, but all auctions are not public auctions." Presumably this is intended to mean simply that a "public sale" is a "public auction." If so, no change in the law should result. The approach of the Original Revision was, however, much clearer.

54. See U.C.C. § 2-706(2); Current Revised § 2-706(b) (see Appendix B).
55. So long as the resale was in good faith and commercially reasonable, the courts, in applying current Section 2-706, have consistently allowed the seller to use as the resale price the price obtained for goods resold even though those goods were not intended for the breached contract. See, e.g., Firewood Mfg. Co. v. Gen. Tire, Inc., 96 F.3d 163, 30 U.C.C. Rep. Serv. 2d 789 (6th Cir. 1996) (replacement parts used in machines prior to resale were fungible with those in goods at time of breach); Apex Oil Co. v. Belcher Co. of New York, Inc., 855 F.2d 997, 6 U.C.C. Rep. Serv. 2d 1025 (2d Cir. 1988) (with respect to resale of fungible goods, identification need not always be an irrevocable act); Servbest Foods, Inc. v. Emesee Indus., Inc., 403 N.E.2d 1, 29 U.C.C. Rep. Serv. 518 (1980) (with respect to identification of fungible goods for resale, a narrow reading of Section 2-706 would be rejected).
56. Appraisal, supra note 9, at 1213.
57. Id. at 1215.
58. See infra Appendix B, § 2-819.
59. U.C.C. § 2-706 cmt. 4.
Reinserting the notice requirement for a private resale retracts a gain in improving the law achieved by the Original Revision. The notice requirement for private resales was deleted by the original drafting committee several years ago after extensive public discussion. Since that time, no public objection to the deletion has been made. The notice requirement serves no practical purpose and has caused the courts in many cases to invalidate, as a basis for computing sellers' damages, resales that were in good faith and were commercially reasonable.\(^6\) No reason has been given by the current drafting committee for retaining the requirement.

There are three noteworthy changes in the text of Section 2-706. First, as noted above, sellers are allowed recovery for consequential loss. Second, the terms "resale price" and "contract price" are reversed so that the formula now reads: "The difference between the contract price and the resale price." This change is carried over from the Original Revision for reason of clarity. As the preliminary comment explains, "The contract price must be the larger number for there to be direct damages."\(^6\) The third change is the addition of a new subsection (g), which reads: "Failure of a seller to resell within this section does not bar the seller from any other remedy." This provision is carried over from the Original Revision,\(^6\) which explained that its purpose was to duplicate the similar provision in the buyer's cover remedy.\(^6\) However, the Original Revision made clear that the seller's failure to resell would be subject to the mitigation principle, so that the seller would not be allowed recovery for any damages that could have been avoided by resale.\(^6\) Read in this context, the provision not only achieves a symmetry with the buyer's cover remedy but also makes sense. It would apply to situations where the buyer's breach does not leave the seller in a lost volume situation. For example, assume that a non-merchant enters into a contract to sell her only automobile for $1000. After the buyer breaches, the best resale price that the seller can find is $800, which is the fair market value of the automobile. The seller does not wish to sell at that price and keeps the car. On these facts, although the seller did not resell, no issue of mitigation of damages is presented, and she should be allowed a recovery for her lost expectation based on the contract-market differential of $200. This reading of subsection (g) would reflect no change in the law and is one the courts

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\(^6\) See infra Appendix B, § 2-819(f).


\(^6\) Original Revised § 2-819, cmt. 9 (Proposed Draft Nov. 2000). Current U.C.C. § 2-712(3) provides: "Failure of the buyer to effect cover within this section does not bar him from any other remedy."

\(^6\) Comment 9 to Original Revised § 2-819 stated: "A seller's damages under § 2-821 [damages based on market price or lost profit] may be affected by the mitigation principle in Section 2-803." Id. Comment 4 to Original Revised section 2-803 stated, in turn: "Again, the mitigation principle of subsection (b) may prevent the seller from recovering the part of the loss that could have been prevented if the seller could have reasonably resold the goods."
would reach regardless of the provision.\(^66\)

However, the Current Revision would go much further. It would not subject the new provision to the mitigation principle but would allow the seller to recover damages based on market price even though those damages could have been, in whole or in part, reasonably avoided by resale. The case law under current Article 2 is entirely the other way.\(^67\) The wisdom and fairness in the case law, as we presently have it, is aptly demonstrated by the very simple fact situation presented in Schiavi Mobile Homes, Inc. v. Gironda.\(^68\) In Schiavi, the buyer breached a contract to purchase a mobile home on which he had placed a $1000 deposit. The buyer's father, in no need of the home himself, offered to purchase the home so that his son would not lose his deposit. Inexplicably, the seller refused the father's offer, resold the home at a lower price, and sued the son for damages measured by the profit it would have made on the breached contract. In a terse and trenchant opinion the court denied the seller any recovery, because any alleged loss could have been reasonably avoided by resale of the home to the father. Any knowledgeable court in this country today would reach this result whether applying the common law of contract or the Uniform Commercial Code.\(^69\) The Current Revision, however, would overrule this law by having new subsection (g) read

\(^{66}\) For a discussion of this point, see Anderson, supra note 61, at \S 6:07.

\(^{67}\) See Schiavi Mobile Homes, Inc. v. Gironda, 463 A.2d 722, 36 U.C.C. Rep. Serv. 1190 (Me. 1983) (seller denied any recovery where loss could have been reasonably avoided by resale); Desbien v. Penokee Farmers Union Coop. Ass'n, 552 P.2d 917, 20 U.C.C. Rep. Serv. 102 (Kan. 1976) (seller denied any recovery where immediately following buyer's breach market price was nearly double contract price and seller could have reasonably avoided loss by resale); see also Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 UCC Rep. Serv. 1037 (9th Cir. 1979) (on remand, seller should be limited to damages that would have been reflected by a commercially reasonable resale); James Mfg. Co. v. Stovner, 459 P.2d 51 (1969) (seller should not be allowed to "have his cake and eat it" by withdrawing goods from market and attempting to recover greater damages than those that would have resulted after a commercially reasonable resale); McCullough v. Bill Swad Chrysler-Plymouth, Inc., 449 N.E.2d 1289, 36 U.C.C. Rep. Serv. 513 (1983) (seller who wrongfully refuses to accept return of goods following proper revocation of acceptance by buyer must bear risk of subsequent decline in resale value of the goods).


\(^{69}\) The Restatement (Second) of Contracts states specifically that an injured party may not recover for any loss that either was or could reasonably have been avoided by engaging in a substitute transaction. See Restatement (Second) of Contracts § 347, cmt. e (1981), quoted infra note 197; see also Restatement (Second) of Contracts § 350, cmt. c (1981):

When a party's breach consists of a failure to deliver goods or furnish services, for example, it is often possible for the injured party to secure similar goods or services on the market . . . Similarly, when a party's breach consists of a failure to receive goods or services, for example, it is often possible for the aggrieved party to dispose of the goods or services on the market . . . In such cases as these, the injured party is expected to make appropriate efforts to avoid loss by arranging a substitute transaction. If he does not do so, the amount of loss that he could have avoided by doing so is subtracted in calculating his damages. In the case of the sale of goods, this principle has inspired the standard formulas under which a buyer's or seller's damages are based on the difference between the contract price and the market price on that market where the injured party could have arranged a substitute transaction for the purchase or sale of similar goods.
to allow the seller to recover damages based on market price whether or not those damages could have been mitigated by resale. With uncharacteristic candor, the Reporter's Note to the March, 2000 draft of the Current Revision read as follows regarding subsection (g): "Many courts have taken the position that when there is a commercially unreasonable resale, the seller cannot receive more under Section 2-708 than the seller would have received under Section 2-706. This provision would overrule those cases." Note, also that this provision eliminates any argument a buyer would have that the seller had an obligation to mitigate damages by reselling (although, unlike the problem discussed above, I have never seen this mitigation argument made in any cases).\footnote{70}

The Reporter's admitted ignorance\footnote{71} is understandable, but his failure to appreciate the core function of mitigation as a fairness principle in the law of remedies is disturbing. His willingness to overrule the "many cases" to which he refers, without discussion or reason given, overreaches his charge. The fact that the Current Drafting Committee would acquiesce in this endeavor is appalling, particularly given the firm assurances by the Conference that established law would not be disturbed in the current process without good reason. No reason at all is given in the present case because, quite simply, no persuasive reason could be. That we do not have more cases involving situations in which sellers seek to recover for a loss that could have been reasonably avoided by resale is simply because dispassionate, intelligent people will not act that way. To do so is clearly against their own best interest. What is inexplicable about the situation in the Schiavi case, discussed above, is why the seller refused to allow the father to pay for the boat when the son could not. Unless a seller is being vindictive, it makes no sense to resort to litigation rather than cutting one’s losses at the earliest reasonable opportunity. The law should be written to encourage sensible behavior, not to countenance self harm and vengeant conduct.

It is thus doubtful that subsection (g) would pass muster with any unbiased group of lawyers if it were proposed to them with the candid explanation of the March 2000 Reporter’s Note. Undoubtedly for this reason, the July 2000 draft that was presented for approval at the annual meeting of the National Conference of Commissioners on Uniform State Laws deleted the forthright Reporter’s Note and submitted instead the following veiled explanation: "Subsection (g) expresses the policy that resale is not a mandatory remedy for the seller. The seller is \textit{always} free to choose between resale and damages for repudiation or nonacceptance under Section 2-708."\footnote{72} This commentary is, however, only "preliminary." Addi-
tional, more direct, commentary has been promised for a later date.\textsuperscript{73}

The commentary we have in the present revision states that subsection (g) is intended to establish "that resale is not a mandatory remedy" and that the seller is "always" free to choose between resale damages and market damages. The provision is thus intended to cover situations, not only where the seller did not reasonably mitigate by resale, but also where he did. The absurdity of allowing a seller who has mitigated damages by resale to recover market-based damages can be simply illustrated.\textsuperscript{74} Assume the seller agrees to sell a boat for $1000. The market value at the time set for tender is only $800. For that reason, the buyer breaches. Fortuitously, the seller is able to find another buyer, who is particularly enamoured with the boat, and the seller is able to resell it to him for $1200. On these facts, the seller was not damaged by the breach but is $200 better off because of it. Under the current Article 2 remedial structure, there would be no occasion to allow a seller who has properly resold the goods a recovery based on market price. Unless the seller was left at lost volume by the breach, the resale remedy will always be compensatory in the sense of honoring the lost expectation. In the lost volume situation, the profit formula in Section 2-708(2) is the appropriate compensatory remedy. Thus, a seller who has properly resold the goods will seek to recover market based damages only for the purpose of producing a windfall recovery.\textsuperscript{75} For this reason, both the Study Group and the ABA Task Force recommended that a seller who has properly resold the goods not be allowed a recovery based on the market formula.\textsuperscript{76} This recommendation is consistent with the case law under current Article 2.\textsuperscript{77}

\textsuperscript{73} The March draft, for example, promised that: "A comment will clarify that subsection (g) applies when the seller's resale is inconsistent with the requirements of Section 2-706 and also applies when the seller chooses not to resell." Current Revised § 2-706, Reporter's Note, proposed draft March 2000. No explicit comment in the Current Revision has yet been forthcoming regarding a seller who chooses not to resell.

\textsuperscript{74} A seller who is left at lost volume by the breach does not mitigate damages by resale. A lost volume seller, however, usually has no interest in recovering market-based damages, but will seek his lost expectancy based on the profit lost on the breached contract. Whether a lost volume seller can recover greater damages based on market price than the profit lost on the breached contract is a different issue. See Nobs Chem., U.S.A., Inc. v. Koppers, Inc., 616 F.2d 212, 28 U.C.C. Rep. Serv. 1039 (5th Cir. 1980).

\textsuperscript{75} Conceptually elegant arguments can be made for windfall recoveries. See Robert E. Scott, \textit{The Case for Market Damages: Revisiting the Lost Profits Puzzle}, 57 U. Chi. L. Rev. 1155 (1990). But acquiescence would require overturning the Code's compensation limitation in Section 1-106 and would effectively overrule the case law interpreting Article 2 over the past quarter century. This, of course, is precisely what the Current Revision seeks to do.

\textsuperscript{76} \textit{Appraisal}, supra note 9, at 1214 ("[Recommending] that, in the absence of lost volume, if the seller has notified the buyer and actually resold the goods in good faith and in a commercially reasonable manner, the seller is limited to damages as measured by § 2-706(1)").

with the view of most commentators,\textsuperscript{78} and with the rule of international sales law as codified in the Convention on the International Sale of Goods.\textsuperscript{79} The Original Revision appropriately made explicit provision disallowing the recovery of damages based on market price when the seller has properly resold the goods following the buyer's breach.\textsuperscript{80} Clearly the Original Revision reflected the type of positive gain in the law that the Conference firmly assured would be preserved by the Current Revision. Professor Fred H. Miller, Executive Director of the Conference, specifically designated the Original Revision's bar of market-based damages where a resale or cover has occurred, as an example of a gain that should be preserved by the Current Revision. In reference to the Current Revision, he said:

A new draft embodying many of the revisions previously proposed is being prepared, but which also will more closely follow present Articles 2 and 2A and only make changes that are of practical significance . . . . Hopefully, the new effort will be successful because there certainly were many non-controversial improvements in the earlier revision drafts that should be preserved. Among them were the following: . . . significant remedies issues were resolved or clarified, such as whether cover and market damages are options . . . . \textsuperscript{81}

The attempt in the Current Revision to undermine completely this gain, as well as to overturn established law, is both foolish and beyond the charge of the current drafting committee.\textsuperscript{82}

Schiavi Mobile Homes, Inc. v. Gironda, 463 A.2d 722, 36 U.C.C. Rep. Serv. 1190 (Me. 1983); see also Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 U.C.C. Rep. Serv. 1037 (9th Cir. 1979) (seller who had resold goods in a commercially unreasonable manner could not recover damages based on market price in an amount greater than would have been produced by a reasonable resale).

\textsuperscript{78} See JAMES J. WHITE \& ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 7-7 (4th ed. 1995); Freedom, supra note 5; see also Robert Childres, Buyer's Remedies: The Danger of Section 2-713, 72 NW. U. L. REV. 837 (1978).

\textsuperscript{79} C.I.S.G. art. 76 (if seller resells, damages based on market price may not be recovered).

\textsuperscript{80} Original Revised § 2-803, cmt. 5; U.C.C. § 2-819, cmts. 9, 10 (Proposed Draft Nov. 2000).


\textsuperscript{82} The Reporter's own prejudice on this issue has been previously discussed. See supra text following note 19. Perhaps further explanation for this radical departure from established law can be found in Professor Henning's treatise on the law of sales. Professor Henning chairs the drafting committee for the Current Revision, and the treatise makes the extraordinary assertion that, in the parallel situation where a buyer covers, it is unclear whether Article 2 would still allow a damage recovery based on market price. This assertion is made despite the emphatic statement to the contrary in comment 5 to Section 2-713 of current Article 2 and the holdings of every court that has addressed the issue since Article 2 was enacted. The only thing that is unclear is why the treatise asserts that it is. See WILLIAM H. HENNING \& GEORGE I. WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE § 10-4 (rev. ed. 1992) (asserting that it is "unclear if the buyer is free to pursue a § 2-713 remedy even though a cover transaction has been effected"). The analysis in the treatise on this point is critiqued below. See text following note 189, infra. However, given Professor Henning's position on the drafting committee (and the reporter's publicly stated prejudice), it is not surprising to find a similarly unique view expressed in the Current Revision regarding sellers who have resold the goods.
Section 2-708(a). Seller's Damages Based on Market Price.

As discussed in the prior section, the Current Revision seeks to expand dramatically the availability of the market formula for sellers to recover windfall damages, including damages that could have been reasonably avoided by mitigation. This approach directly contravenes the clearly stated position of the Study Group which, noting that the market formula will rarely produce a measurement that equates with the actual damages suffered by the seller, suggested that a "possible solution to this risk is to delete" provision for market-based damages entirely.\textsuperscript{83} However, because the market formula has "deep historical roots,"\textsuperscript{84} the Study Group and the ABA Task Force recommended instead that the comments to Section 2-708 severely restrict the availability of the market formula to situations in which a more precise damage measurement cannot be used.\textsuperscript{85}

The Study Group recommended no changes in the manner in which damages are measured under Section 2-708,\textsuperscript{86} and the Current Revision has made no changes regarding the time and place for measurement of market price in breach cases. This is consistent with the approach taken by the Original Revision.\textsuperscript{87} As with the resale remedy, the components of the formula have been reversed so that the provision reads "difference between the contract price and the market price" to emphasize that the contract price must be the greater amount for damages to be recoverable. As did the Original Revision,\textsuperscript{88} the Current Revision refers to the full contract price rather than the "unpaid" contract price stated in current Section 2-708(1).\textsuperscript{89} Finally, as with the other sellers' damage remedies,
provision is made for recovery of consequential damages.

The preliminary comments to Current Revised Section 2-708 address an issue that has arisen in some bankruptcy cases involving claims for breach of long-term contracts. The issue is whether, once the appropriate market price is established, the contract price minus market price formula is to be “frozen” at the time of the market price, or whether account should be taken of pricing provisions in the contract that would escalate or reduce the contract price over time. Proponents of freezing the contract price with the market price have labeled their theory the “Snapshot Approach.” Critics of this approach suggest that it violates the fundamental compensation principle regarding risks allocated by the parties' pricing provisions. They suggest that the “Snapshot Approach” makes sense only when the pricing provisions are themselves tied to market price. Their theory has been called the “Expectancy Approach.”

The issue was fully discussed in open meeting during the Original Revision process. The Original Revision specifically rejected the “Snapshot Approach” and left resolution of the matter to the courts on a case-by-case basis, on the theory that “the appropriate contract price should be determined in light of the general principle of full compensation for the aggrieved party.” This is the preferable rule, and the commentary to Current Revised Section 2-708 continues it.

The most important change in Current Revised Section 2-708(a) is with respect to the time for measuring market price in anticipatory repudiation cases. The courts and commentators have long divided on this issue in measuring a buyer's damages under Section 2-713. No reported decision has addressed this issue with respect to a seller's damages under Section 2-708, but the Current Revision appropriately makes the rule the same for both sellers and buyers. Current Section 2-708 measures dam-

that amount. This computation, of course, ignores the additional statutory offset of $500 allowed by U.C.C. Section 2-718(2)(b), an offset that has been deleted in Current Revised Section 2-718. See text following note 255, infra.


91. Original Revised § 2-708 cmt. 2.

92. Current Revised § 2-708, preliminary cmt. 2 states:

The price in a long-term contract may or may not have an escalation clause.

The time for determining the contract price in a long-term contract should not necessarily be tied to the time for measuring the market price in the repudiation situation. The appropriate contract price should be determined in light of the general principle of full compensation for the aggrieved party.

ages at the time set for tender with special exception made in Section 2-723 for cases in which the cause of action comes to trial prior to that time.94 The Current Revision states that market price in repudiation cases is to be measured “at the expiration of a commercially reasonable period after the seller learned of the repudiation,” but no later than the time for tender of delivery.95 This is the rule adopted by the better reasoned cases under Section 2-713 and is consistent with the recommendation of the ABA Task Force96 and with Original Revised Article 2.97 The Original Revision, however, was more specific and stated that “a commercially reasonable period” would include both Article 2’s time for awaiting performance in anticipatory repudiation cases98 and “any further commercially reasonable period for obtaining any substitute performance.”99 The commentary to the provision noted that including time for the seller to seek substitute performance by resale “is a particular application of the mitigation principle.”100 Although the Current Revision deletes the helpful language from the Original Revision regarding measuring a commercially reasonable time, it does affirm the mitigation principle in the commentary to the provision. Regarding the commercially reasonable time after the seller learned of the repudiation, the commentary states that:

This time is designed to approximate the market price at the time the seller would have resold the goods, even though the seller has not done so under Section 2-706. This subsection is designed to put the seller in the position the seller would have been in if the buyer had performed by approximating the harm the seller has suffered without allowing the seller an unreasonable time to speculate on the market at the buyer’s expense.101

In effect, the seller will not be allowed to recover damages based on market price in anticipatory repudiation cases in an amount greater than would be produced by a commercially reasonable resale. This approach is indeed ironic given the exact opposite rule that the Current Revision seeks to foster in breach cases as discussed above in context with Section 2-706. The position taken by the Current Revision regarding repudiation cases reflects both the wisdom of the mitigation principle and the absurdity of the position it takes regarding resales in breach cases. Regardless, in anticipatory repudiation cases, it is clear from the text of Current Revised Section 2-708 that if the seller is unable to find a substitute resale contract, damages may be measured at the time set for performance, but no later. In the event that the seller is unable to find a commercially reasonable resale, the seller should be entitled to recover the full unpaid

94. See U.C.C. § 2-723(1).
95. See infra Appendix A, § 2-708(a)(2).
96. See Appraisal, supra note 9, at 1223.
97. See infra Appendix B, § 2-821(a)(2).
98. See U.C.C. § 2-610.
99. See infra Appendix B, § 2-821(a)(2).
100. Original Revised § 2-821 cmt. 3 (Proposed Draft Nov. 2000).
101. Current Revised § 2-708, preliminary cmt. 3.
contract price under Section 2-709.\textsuperscript{102}

Section 2-708(b). Seller's Recovery for the Lost Profit.

The profit formula in current Section 2-708(2) applies only when damages based on the market formula are "inadequate to put the seller in as good a position as performance would have done."\textsuperscript{103} Section 2-708(2) as a whole is poorly drafted because it gives no indication of the specific type of situations in which market-based damages would be inadequate and because it states the damage measurement too broadly so that its literal application would produce absurd results in the lost volumes situations to which it was designed, in part, to apply. The overwhelming case law interpreting current Article 2 has established that the profit formula is the compensatory damage remedy and that the resale and market formulae do not correctly apply in two important situations: (1) where the breach leaves the seller with completed goods and at lost volume; and (2) where manufacture of the goods has not been completed at the time of the breach and the seller cannot reasonably mitigate damages by completing manufacture.\textsuperscript{104}

The damage measurement stated in Section 2-708(2), however, does not distinguish its application to these two situations and, if the measurement is applied literally, incorrect results will result in the lost volume situations. The provision states that the computation of damages must give the buyer "due credit for payments or proceeds of resale."\textsuperscript{105} This "due credit" provision fits nicely the incomplete goods problem but, if applied to completed goods situations, would always undercompensate the lost volume seller by giving the buyer full credit for the resale of the goods. For this reason, and relying on the drafting history of the provision, the courts have uniformly concluded that the due credit provision applies only to incomplete goods situations and not to completed goods situations involving lost volume.\textsuperscript{106}

The Study Group and the ABA Task Force recommended that the provision be redrafted so that, in text or commentary, it be made clear that the profit formula applies at least to the two situations of lost volume and incomplete goods, and that the provisions in the profit formula allowing

\textsuperscript{102} See infra Appendix A, §§ 2-709(1)(b), 2-709(a)(3).

\textsuperscript{103} U.C.C. § 2-708(2).


\textsuperscript{105} U.C.C. § 2-708(2).

the seller to recover for costs reasonably incurred and giving the buyer credit for resale be restricted to incomplete goods situations.\textsuperscript{107}

The Current Revision does attempt to accommodate these recommendations but, ironically, does so by drafting a provision even more abysmal than the one it proposes to replace. Current Revised Section 2-708(b) states:

If the measure of damages provided in subsection (a) or in Section 2-706 is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental and consequential damages provided under Section 2-710.\textsuperscript{108}

The solution to the Current Revision is simply to delete both elements of the damage calculation that apply exclusively to incomplete goods situations. The statutory text makes no provision for the buyer to recover, in addition to the profit, the expenses incurred in partially manufacturing the goods nor for crediting the buyer with any amount recoupable by selling the partially manufactured goods. The text thus gives no hint that the provision was intended to apply to the incomplete goods situation at all. However, the commentary to the Current Revision does state that subsection (b) applies "in the cases of uncompleted goods, jobbers or middlemen,\textsuperscript{109} or lost-volume sellers."\textsuperscript{110} The commentary also makes provision for the recoupment credit but for some reason makes no reference to allowing the seller to recover for expenses incurred.\textsuperscript{111}

This is extremely poor drafting. Unlike the text, the commentary will not be proposed as law by the state legislatures. Undoubtedly the courts have always and will always look to the Code's commentary for guidance, but they are not bound to follow it. The UCC comments should be reserved for tangential matters and for important matters that defy precise statutory formulation. Damage measurements lend themselves readily to precise statement and should be part of the statutory text. At its March 2000 meeting, the Drafting Committee heard objections to the proposed revision from several attendees. In response, there was much favorable discussion from the floor and among members of the Drafting Committee regarding the following proposed language, which had been submitted to the Committee earlier in writing:

(b) If the seller is left at lost volume by the breach then the measure of damages is the profit (including overhead) which the seller would have made from full performance by the buyer, less the amount of

\textsuperscript{107} See \textit{Appraisal}, supra note 9, at 1220-21.
\textsuperscript{108} \textit{Infra} Appendix A, § 2-708(b).
\textsuperscript{109} This is a redundancy. Jobbers or middlemen are merely particular examples of lost volume sellers.
\textsuperscript{110} Current Revised § 2-708, preliminary cmt. 5 (Proposed Draft Nov. 2000).
\textsuperscript{111} "When a seller ceases manufacture and resells component parts for scrap or salvage value under Section 2-704(b), a credit for the proceeds is due the buyer to offset the damages under this section." Current Revised § 2-708, preliminary cmt. 5 (Proposed Draft Nov. 2000).
any payment made by the buyer and, where the seller has not completed manufacture of the goods, costs reasonably incurred that could not be reasonably recouped.112

This proposal also suggested that the commentary explain that the provision was not intended to be restricted to lost volume and incomplete goods situations but could be applied by the courts to any situation where the formula would be compensatory. The proposed language, although perhaps improvable, is certainly far better than that proposed by the Current Revision. It received favorable commentary from Drafting Committee members and from others in attendance. However, a Conference officer in attendance instructed the Drafting Committee to ignore the proposal because it might in some way change the law.113 The opinion here is that this “instruction” says much about the “process” that has produced the Current Revision.

The rejected proposal had also deleted the word “reasonable” in reference to overhead as a component in the recovery of lost profit. The word is in the current statute and is continued in the Current Revision. Its deletion had been recommended by the ABA Task Force.114 The word “reasonable” in this context is without relevance and is calculated to cause confusion (although the courts have uniformly ignored it in applying current Section 2-708). The better word here would be “fixed,” to distinguish from “variable” overhead, which is an expense saved as a result of the breach and which should be deducted from the contract price in computing the seller’s lost profit.115 In certain situations, overhead costs that are normally fixed become variable because of circumstances unique to the breached contract.116 In such situations they should be treated as variable costs. For example, expenses for utilities, such as electricity and gas, are normally fixed, but if a previously closed plant is reopened solely for purposes of performing the breached contract, the expense of the utilities would be a variable cost, directly attributable to the breached contract.117 The Current Revision unfortunately continues use of the word “reasonable,” thereby erroneously indicating that a seller

112. This language had been proposed by me in my capacity as a commentator for the ABA U.C.C. Subcommittee in a memorandum to the Drafting Committee dated January 11, 2000.

113. Pride of authorship aside, the proposed language is consistent with all known cases to date and the proposed comment would have allowed courts to expand the availability of the profit formula to cover unique situations that might arise in the future. The unwarranted concern of the Conference leadership that the proposed language might change the law is ironic given the wholesale destruction of the Article 2 damage remedy scheme contemplated by the Current Revision.

114. See Appraisal, supra note 9, at 1224-25.


must somehow justify its fixed costs. At the least, commentary to the revision should address the matter.

The Study Group and the ABA Task Force also recommended that revised Article 2 address in commentary an important issue upon which the courts are currently divided. The question is whether a lost volume seller, who would be fully compensated by a recovery of the profit lost on the breached contract, should be allowed to recover windfall damages under the market formula. The better reasoned decisions answer this question in the negative and apply the compensation limitation in Section 1-106.118 The Second Circuit, however, has reached the contrary result, concluding that the market formula is, in effect, a statutory liquidated damage provision.119

Most commentators have been highly critical of the Second Circuit’s view,120 and the Study Group121 and the ABA Task Force122 recommended that the commentary to revised Section 2-708 contain language specifically rejecting the Second Circuit’s approach. Consistent with it veiled attempt to allow supracompensatory damages by giving primacy to the market formula, the Current Revision remains silent on the point.

The Current Revision, in commentary, specifically reserves for a case-by-case analysis, the question of how the seller’s lost profit should be calculated “because of the variety of situations in which this measurement may be appropriate and the variety of ways in which courts have measured lost profits.”123

Section 2-709. Action for the Price.

Other than making provision for the seller’s recovery of consequential damages, Current Revised Section 2-709 makes no substantive change to the seller’s action for the price. No changes were recommended by the Study Group124 or by the ABA Task Force.125 The Original Revision did specifically state that any resale of the goods by the seller after judgment for the price, but before collection thereof, must comply with the require-

121. See Appraisal, supra note 9, at 1223 (stating “We are thus in agreement with the Study Group in rejecting TransWorld Metals, Inc. v. Southwire. . . .”).
122. See id. at 1224.
123. Current Revised § 2-708, preliminary cmt. 5.
124. See Appraisal, supra note 9, at 1225.
125. See id. at 1226.
ments of notification, good faith, and commercial reasonableness of the resale remedy (current Section 2-706). If the seller fails to comply with these requirements, the buyer, who would be entitled upon payment of the judgment to any goods not resold or a credit against the judgment for the price of any goods properly resold, would presumably be entitled to a credit for the market value of the goods (if higher than the amount of the invalid resale) or to any higher amount that would have resulted from a valid resale. Although this probably would be the result reached by the courts under current law, a comment to that effect would be helpful in the Current Revision, which at present offers no commentary to Section 2-709.

Section 2-710(a). Seller's Incidental Damages.

The Current Revision makes no substantive changes in Section 2-710(a), which defines incidental damages for sellers. No changes were recommended by the Study Group nor by the ABA Task Force. The Original Revision included in its definition of incidental damages expenses incurred by the seller in attempting to mitigate damages. The addition was sensible and undoubtedly reflects current law. The failure to include it in the Current Revision is reflective of its continual deemphasis of the mitigation principle.

Section 2-710(b). Seller's Consequential Damages.

The major change in the Current Revision in the damage remedies available to sellers is that they all allow for a recovery of consequential damages. This is consistent with the recommendations of the Study Group and the ABA Task Force and with the Original Revision. The courts have uniformly interpreted current Article 2 to deny sellers recovery for consequential loss. Allowing consequential damages for sellers is unlikely to open the proverbial litigation floodgates. Unlike commercial buyers, sellers rarely suffer consequential loss when their sales contracts are breached. And even when they do, the foreseeability requirement will operate to bar sellers from recovery for consequen-

126. See infra Appendix B, § 2-819(b).
127. See Appraisal, supra note 9, at 1226.
128. See id. at 1227.
129. See infra Appendix B, § 2-805(4).
130. See Appraisal, supra note 9, at 1226.
131. See id. at 1227.
132. See infra Appendix B, § 2-806.
134. The Reporter's Note to Current Revised § 2-710 says that a future comment "will make it clear (with examples) that cases in which sellers will recover consequential damages are rare."
ial loss much more often than it does to prevent buyers from recovery. In commercial contracts, sellers have reason to know at the time of contracting, almost as a matter of course, that the buyer is purchasing the goods for the purpose of producing income and that the seller's breach may cause the buyer to suffer consequential damages in the form of lost profits.\textsuperscript{135} However, because a commercial seller's potential for consequential loss is ordinarily remote, a unique fact situation must exist both for the seller to incur the loss and for the buyer to have sufficient knowledge of the seller's operation to have reason to know of the potential for that loss. Regardless, allowing sellers recovery for consequential damages on appropriate facts is well justified by the basic compensation principle in Article 2 and by the obvious injustice reflected by the current case law that categorically denies sellers that recovery.\textsuperscript{136}

The Current Revision defines consequential damages for sellers in a manner substantially similar to the definition for buyers in current Article 2 Section 2-715. However, the provision specifically bars a seller's recovery of consequential damages in a consumer contract.\textsuperscript{137}

The Current Revision presently includes no commentary. The Original Revision did provide extensive commentary, some of which will probably be used for future drafts of the Current Revision. The commentary in the Original Revision emphasized the four important common law limitations on a recovery for consequential loss: (1) cause-in-fact (the loss must be caused by the breach); (2) foreseeability (the "reason to know" standard of current Article 2 was continued); (3) mitigation (the aggrieved party may not recover for any consequential loss that could have been reasonably avoided); and (4) certainty (the amount of the loss need only be proved with reasonable certainty and not with mathematical precision).\textsuperscript{138}

The commentary in the Original Revision also addressed two important concepts that were not implied by the text of the new provision. First, the commentary suggested that the injured party should have no obligation to attempt to avoid any loss that the breaching party could have avoided as readily as the injured party.\textsuperscript{139} Although this principle is

\textsuperscript{135} See, e.g., Lewis v. Mobil Oil Co., 438 F. 2d 500, 8 U.C.C. Rep. Serv. 625, 641 (8th Cir. 1971) (where a seller provides goods to manufacturing buyer with knowledge they will be used in manufacturing process, seller has reason to know that defect in goods could disrupt the process and cause buyer consequential damages in the form of lost profits). See generally, Roy Ryden Anderson, Incidental and Consequential Damages, 7 J.L. & COM. 327, 354-60 (1987).

\textsuperscript{136} For the argument that denying consequential damages to sellers is not required by Article 2, see Anderson, supra note 133.

\textsuperscript{137} See infra Appendix A, Current Revised § 2-710(c). The Original Revision had a similar provision but would have allowed the prohibition to be subject to contrary agreement. See infra Appendix B, Original Revised § 2-806(b). The Current Revision, although silent on the point, reflects the better rule. The issue should be left to the courts, which will hopefully prohibit sellers from an wholesale amendment of their forms in consumer contracts so as to provide for their recovery of consequential damages.

\textsuperscript{138} Original Revised § 2-806 cmt. 6.

\textsuperscript{139} Original Revised § 2-806 cmt. 3.
followed in a smattering of contract cases, it operates as a poor rule. It could perjoratively be labeled "the petulance principle" because its theory allows the injured party to act unreasonably simply because the breaching party has acted unreasonably. It thus conjures images of resolving disputes between adolescents. Also, it potentially threatens to undermine substantially the mitigation principle, because in a significant percentage of breach cases the argument can be fairly made that the breacher could more reasonably have avoided the loss by simply not breaching. The better rule would make the breacher's ability to mitigate damages simply a factor for the fact-finder to consider in determining whether the injured party's failure to mitigate was reasonable.

Second, the commentary also suggested a "disproportionate compensation" principle to limit recovery for consequential damages in some cases. This principle is taken from the Restatement Second of Contracts. It allows a court to deny or limit a consequential damage recovery if "justice so requires in order to avoid disproportionate compensation." The principle, which was at one time included in the text of the Original Revision, generated a great deal of heated discussion during the original drafting process. It was ultimately deleted from the text with the understanding that it would be included in the commentary. That commentary suggested that: "The essence of the principle is that in some cases the consequential damages sought may be significantly greater than the risk the party in breach assumed under the contract." It further suggested that the principle may be appropriate to apply in some sales cases. To date, few cases have applied the principle as part of the common law of contract. The merit in the principle is that it would allow courts to reach just results directly without having to stretch artificially the requirements of foreseeability, mitigation, and causation to achieve those results.

141. Original Revised § 2-806, cmt. 4.
142. RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1981) states: "A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation."
143. Original Revised § 2-806 cmt. 4.
144. Id.
IV. BUYER’S DAMAGE REMEDIES

Section 2-711. Buyer’s Remedies in General; Buyer’s Security Interest.

Current Revised Section 2-711 provides a catalog of the buyer’s remedies for breach and a statement of the ways a seller may be found to be in breach. The new provision is a substantial revision of current Section 2-711, similar to that discussed above for sellers in section 2-703. The new provision attempts to provide an exhaustive listing of the buyer’s remedies, including a new catch-all provision that the buyer may “in other cases, recover damages in any manner that is reasonable under the circumstances.” The new provision also continues without substantive change the buyer’s right to a security interest upon breach by the seller.

The Study Group and the ABA Task Force recommended that the text of the revised provision state specifically that the buyer’s remedies were subject to basic remedial principles, including mitigation of damages and that recovery should be limited to compensation. The Original Revision complied with this recommendation. The Current Revision does not. The refusal is intentional and reflective of the purpose of the current Drafting Committee, as with sellers’ remedies, to change dramatically the Article 2 remedial scheme by deemphasizing the mitigation principle and allowing use of the market formula to recover windfall damages. This purpose will be discussed more fully below.

Section 2-712. Cover; Buyer’s Procurement of Substitute Goods.

Current Revised Section 2-712 contains no apparent substantive change to current section 2-712 regarding the buyer’s cover remedy. The requirements that the cover be in good faith, be made without unreasonable delay, and be itself reasonable in all respects are continued. Most importantly, the cover purchase must be “in substitution” for the goods due from the seller; i.e., the cover purchase must be to replace the goods of the breached contract and may not be a purchase that the buyer would have made regardless of the breach.

The commentary to Current Revised Section 2-825 continues the following important rules, all of which are reflective of current law. First, a

146. Current Revised § 2-703(12). As discussed previously regarding the similar provision for sellers in Section 2-703, the buyer’s provision is poorly drafted, is an unnecessary addition, and, because of its broad formulation, should be deleted from the draft. No reason is given for its inclusion other than to cover “contractually defined breaches.” However, no call for such a provision has been made in the Article 2 literature and no cases decided under current Article 2 have demonstrated its need. Indeed, the commentary to the Current Revision points to no specific cases, even hypothetically, that the provision is designed to cover.

147. See infra Appendix A, § 2-711(c).

148. See Appraisal, supra note 9, at 1227-28.

149. Original Revised § 2-823 cmt. 3.

150. See infra Appendix A, § 2-712(a).

151. Id.
cover may be made by a single or a series of contracts.\textsuperscript{152} Second, the cover goods need not be identical with those due from the seller if the cover was otherwise reasonable.\textsuperscript{153} Third, the reasonableness of the cover decision is to be determined at the time the decision was made.\textsuperscript{154}

The Current Revision omits commentary provided by the Original Revision that a cover could include conduct by the buyer other than the purchase of comparable goods.\textsuperscript{155} This was a nice addition to the commentary and was reflective of well-reasoned cases under current Article 2.\textsuperscript{156} It should be included in the Current Revision.

The most important aspect of the Current Revision is that it once again chooses to ignore an important recommendation of the Study Group and the ABA Task Force that would give primacy to the cover remedy over damages based on market price and would emphasize the importance of the principle of mitigation of damages. Although, as discussed below regarding the buyer’s market damage formula, compliance with the recommendation would merely codify the universal case law under current Article 2, the recommendation is a critical element of the Article 2 remedial scheme for buyers. The recommendation was as follows:

The Study Group recommends that § 2-712(3) be revised to state that a buyer who effects a proper cover under § 2-712 should be barred from a remedy under § 2-713. This result is now implicit in Section 2-711(1), and the explicit revision would be consistent with that proposed for § 2-706(1). Furthermore, some of the Study Group believe that the damages of a buyer who attempts to cover but fails in bad faith to comply with § 2-712(1), should be limited to those that should have been awarded under § 2-712.\textsuperscript{157}

Current Section 2-712(3) states simply that the failure of the buyer to

\textsuperscript{152} Current Revised § 2-712, preliminary cmt. 3.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} See Original Revised § 2-825, cmt. 2.
\textsuperscript{157} Appraisal, supra note 9, at 1228. The ABA Task Force supported the recommendation of the Study Group regarding the bar for covering buyers and that of some of its members regarding bad faith cover situations. Appraisal, supra note 9, at 1228-29. The bad faith cover situation has occurred in no reported case decided under current Article 2, but the recommendation is consistent with the cases, discussed above, regarding a seller’s bad faith resale. See Coast Trading Co. v. Cudahy, 592 F.2d 1074, 25 U.C.C. Rep. Serv. 1037 (9th Cir. 1978). In making its recommendation, the Study Group quoted with approval from Professor Sebert’s conclusion that any revision “should make it clear that a buyer who covers cannot obtain market damages based on a market price higher than the actual cover price, and that a seller who resells cannot obtain market damages based on a market price lower than the actual resale price.” John A. Sebert, Remedies under Article Two of the Uniform Commercial Code: An Agenda for Review, 130 U. Pa. L. Rev. 360, 382 (1981).
cover “does not bar him from any other remedy.”\textsuperscript{158} This provision, however, is substantially limited by Section 2-715, which defines consequential damages in terms of those that could not have been reasonably avoided by cover, and by the commentary to Section 2-713, which states that a buyer who properly covers may not recover damages based on market price.\textsuperscript{159} Read together, these provisions simply mean that, if the buyer chooses not to cover, damages may be based on market price. It does not directly address the issue, however, of whether those damages could be greater than those that would have been fixed by a reasonable cover. No reported decision has addressed this issue with respect to buyers, but there is little doubt that the courts under current Article 2 would use the mitigation principle to limit damages to those that would have been produced by a reasonable cover. The result reached by the cases, discussed above,\textsuperscript{160} where the seller unreasonably fails to mitigate damages by resale. The Current Revision seeks surreptitiously to overrule those cases.\textsuperscript{161} It seeks a similar result for buyers, as will be demonstrated in the next section, by giving primacy to damages based on market price at the expense of both the compensation and mitigation principles.

Section 2-713. Buyer's Damages for Nondelivery or Repudiation.

Section 2-713 provides for a buyer's damages based on market price. The Current Revision makes three important changes to current Section 2-713. Two of the changes are acknowledged by the preliminary commentary to the revised provision. The third, and most important one, is accomplished surreptitiously by omission.

First, the time for measuring market price in breach cases is changed from “the time when the buyer learned of the breach” in the current statute to “the time for tender” in the revision. No such change was recommended by the Study Group or by the ABA Task Force. Nor was it proposed by the Original Revision. Almost always, a buyer will learn of the seller's breach at the time set for tender when the seller fails or refuses to perform or performs in a way that does not conform with the contract. In such cases, damages are measured at the time for tender. However, occasionally the buyer does not receive reasonable notice of the seller's breach until later on. If in the interim between the seller's breach and the buyer's learning of it the market price has risen, the courts at common law adopted the rule that the buyer's damages would be measured by the higher, later market price. The rule has been followed by an unbroken line of cases dating back well over one hundred years.\textsuperscript{162} It is

\textsuperscript{158} U.C.C. § 2-712(3).
\textsuperscript{159} U.C.C. § 2-713 cmt. 5 states: “The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.”
\textsuperscript{160} See text following note 68, supra.
\textsuperscript{161} Id.
\textsuperscript{162} See Perkins v. Minford, 139 N.E. 276, 277 (1923); Boyd v. L. H. Quinn Co., 41 N.Y.S. 391, 392 (1896); see also Wilson v. Gifford-Hill & Co., Inc., 570 P.2d 624, 21 U.C.C.
REGARDING ARTICLE 2 DAMAGE REMEDIES

codified by current Section 2-713. To the best of my knowledge, no court or commentator has argued for its repeal. The rule is based on a principle of fundamental fairness that a buyer should not be charged with damages based on a price in a market in which the buyer could not have been reasonably expected to replace the goods.\textsuperscript{163}

The change in the Current Revision was made upon a motion by Professor James J. White at the March 2000 meeting of the Drafting Committee. The motion drew strong objection from the floor. Professor White's reasoning in favor of changing the rule was apparently based on achieving parity with market damages for sellers under Section 2-708 and on providing greater certainty as to the time of measuring damages. Although I am familiar with no case applying the "learned of the breach" rule to sellers in goods cases, the fairness principle upon which the rule is based suggests that parity would be better achieved by changing the rule for sellers in Section 2-708 so as to measure damages at the time the seller learned of the breach. Any problem of certainty as to the time for measuring damages should be resolved by placing on the buyer (or seller in situations where the buyer has breached) the burden of proof to show specifically the time she learned of the breach and why that knowledge was not reasonably forthcoming at an earlier time. The change proposed by Mr. White and by the Current Revision is both unwise and in violation of the Conference's assurances that substantive changes in the law would not be made by the Current Revision without good reason. Good reason here is to stay with the present rule.

The second change in the Current Revision involves important and innovative concepts for measuring market-based damages in anticipatory repudiation cases. These concepts affect both market price and contract price. Regarding market price, the courts and commentators have long divided on the issue of the appropriate time to determine market price for aggrieved buyers in anticipatory repudiation cases.\textsuperscript{164} The language in current Section 2-713, "the time when the buyer learned of the breach,"\textsuperscript{165} is at best ambiguous. Over time, most cases have opted to give the language a broad reading so as to apply the market price at a reasonable time after the buyer learned of the repudiation.\textsuperscript{166} This result is preferable to measuring damages at the future time set for performance.

\textsuperscript{163} See U.C.C. § 2-713 cmt. 1 (stating that the purpose of the provision is to have market damages measured in the market in which the buyer would have covered). No case as yet has addressed the situation under Article 2 where the buyer has alleged that it did not reasonably learn of the breach until after the time set for tender. This is no doubt attributable in part to the great increase in communication technology over time and to the general stability of markets. For a more recent contract case applying the common law rule, see Swink & Co. v. Carroll McEntee & McGinley, 594 S.W.2d 393, 462 (Ark. 1979).

\textsuperscript{164} See supra note 93.

\textsuperscript{165} U.C.C. § 2-713(1).

if the “reasonable time” takes into account the buyer’s ability or inability to mitigate damages by cover.\textsuperscript{167} The rule adopted by the Current Revision does so.\textsuperscript{168} The Current Revision provides that, in repudiation cases, market price is to be determined “at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than” the time for tender.\textsuperscript{169} The commentary to the provision states that this designation “is designed to approximate the market price at the time the buyer would have covered even though the buyer has not done so. . . .”\textsuperscript{170} The proposed new rule would thus measure damages at the time for tender in cases where the buyer could not cover, but would restrict the buyer to the price at which he should have covered in cases in which he should reasonably have done so.\textsuperscript{171} It is, however, unclear who has the burden of proof regarding the buyer’s ability or inability to cover. The one case that addressed the issue under current Article 2 placed the bur-

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\bibitem{167} See Cargill, Inc. v. Stafford, 533 F.2d 1222, 21 UCC Rep. Serv. 707 (10th Cir. 1977) (court would allow a buyer to recover greater damages based on the time set in the contract for performance only if the buyer could show he could not previously have reasonably covered).
\bibitem{168} In this respect, as discussed below, the provision is wholly inconsistent with the heretical rule proposed for breach cases which would allow recovery of market price at the time of tender regardless of the buyer’s ability to cover or whether the buyer actually did cover. See \textit{infra} text following note 163.
\bibitem{169} See \textit{infra} Appendix A, § 2-713(a)(2).
\bibitem{170} Current Revised § 2-713 preliminary cmt. 3.
\bibitem{171} This is precisely the rule advocated by the Tenth Circuit in Cargill, Inc. v. Stafford, 553 F.2d 1222, 21 U.C.C. Rep. Serv. 707 (10th Cir. 1977). This is also the rule proposed by the ABA Task Force (see \textit{Appraisal, supra} note 9, at 1231-32), by the Original Revision (see \textit{infra} Appendix B, § 2-826(a)(2)) and is the position taken by most commentators. See generally Thomas H. Jackson, \textit{Anticipatory Repudiation and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance}, 31 \textit{STAN. L. REV.} 69 (1978); George Wallach, \textit{Anticipatory Repudiation and the UCC}, 13 U.C.C. L.J. 48 (1980); Roy Ryden Anderson, \textit{Market Based Damages for Buyers Under the Uniform Commercial Code}, 6 \textit{REV. LITIG.} 1 (1987).

The Study Group took a different position and, in a divided vote, recommended that market price in repudiation cases “should be determined at the time when and the place where the seller agreed to tender delivery. . . .” See \textit{Appraisal, supra} note 9, at 1229-30. The Study Group justified its position as follows:

\textit{This position is supported, in part, by the aggrieved party’s difficulty in learning when the other party has repudiated. Rarely will words or conduct of alleged repudiation be clear and unequivocal. A final answer may not be given until the trial. If so, it is unreasonable to tie the aggrieved party’s damages to an uncertain time in the past, particularly where the breaching party created the uncertainty. This argument is less persuasive when the repudiation time is clear or the aggrieved party has smoked out a repudiation under § 2-609(4).}

\textit{Id. See also,} \textit{WHITE \& SUMMERS, supra} note 78, § 6.7 (4th ed. 1995). The position taken by the Study Group, and by Professors Summers and White, is not persuasive. Under the common law of contract and the U.C.C., an anticipatory repudiation must be definite and unequivocal to justify the aggrieved party’s cancelling the contract and bringing suit based on the repudiation. See U.C.C. § 2-610 cmts. 1, 2. The reservations expressed by the Study Group and Professors Summers and White go to this substantive element of the rule for anticipatory repudiation and not to the measurement of damages. Once the aggrieved party has carried the heavy burden of demonstrating a definite and unequivocal repudiation, there should be no doubt as to the point in time at which to measure damages.

\end{thebibliography}
Regarding contract price in repudiation cases, as previously discussed with respect to the seller's market formula,\textsuperscript{173} the Current Revision rejects the "Snapshot Approach" in favor of the "Expectancy Approach" in applying contract price adjustment clauses in long-term forward contracts. The commentary to the provision suggests that the contract price "should not necessarily be tied to the time for measuring the market price" but "should be determined in light of the general principle of full compensation for the aggrieved party."\textsuperscript{174}

The third important change proposed by the Current Revision goes unspoken but is calculated to change fundamentally the remedial structure of current Article 2 for buyers in pre-acceptance and revocation cases. By deleting critical commentary found in current Article 2, the Current Revision proposes to allow buyers who have covered nevertheless to recover higher damages based on market price and to allow buyers who fail to cover to recover damages that could have been reasonably avoided by cover. However, rather than presenting this radical and unjustifiable change in the law directly and with candor, the Current Revision seeks to accomplish its objective by misdirection (leaving the applicable statutory text unchanged) and surreptitiously (by deleting key commentary to the provision).

Current Article 2 very clearly bars a buyer who has covered from recovering damages based on market price. Those who would attempt to argue against this proposition point to the text and commentary to the buyer's cover remedy, Section 2-712. Section 2-712(3) states that: "Failure of the buyer to effect cover within this section does not bar him from any other remedy."\textsuperscript{175} This provision, of course, deals only with situations in which the buyer does not cover and is irrelevant to situations in which she does. However, the commentary to the provision expresses as its policy that cover is not a "mandatory remedy"\textsuperscript{176} and that the "buyer is always free to choose between cover" and damages based on market price.\textsuperscript{177} This provision says only that the buyer may choose to cover (and base damages thereon) and that, if she so chooses, she cannot be restricted to damages based on market price. The provision does not say that the buyer may choose to cover and then choose between damages based on cover and damages based on market price. And, as does the statutory text, this commentary indicates that a buyer who chooses not to cover may "always" recover damages based on market price.\textsuperscript{178}

\textsuperscript{173} See supra text following note 89.
\textsuperscript{174} Current Revised § 2-713 preliminary cmt. 4.
\textsuperscript{175} U.C.C. § 2-712(3).
\textsuperscript{176} Id. cmt. 3.
\textsuperscript{177} Id.
\textsuperscript{178} The unfortunate literal wording of subsection (3) and the related commentary would allow a buyer who could have mitigated damages by cover, but did not, to recover for the avoidable loss under section 2-713. The Original Revision, as discussed above,
Current Section 2-713 emphatically limits the availability of its provision for damages based on market price to situations in which the buyer has not covered. Comment 5 to the provision, after first stating that the market formula “is completely alternative to cover,” thereby reaffirming the relevant text and commentary to Section 2-712 discussed above, then makes clear that the market formula “applies only when and to the extent that the buyer has not covered.” Thus, not only is the provision unarguably clear, it is completely consistent with the text and commentary to Section 2-712. The reason for the restriction of covering buyers is apparent. The market price chosen as the standard for measuring damages under Section 2-713 is a rough estimate or hypothesis of the price at which the buyer would have covered if he were able and had chosen to do so. Comment 1 to Section 2-713 says that: “The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief.” In a situation in which the buyer has covered, it would be ludicrous for the buyer to ask a court to ignore the fact that she has covered and to, instead, estimate the price at which she might have covered. This, however, the Current Revision seeks to do. Unless the purpose is to ignore the mitigation principle and to allow windfall damages, to permit such a recovery is clearly absurd.

Unsurprisingly, the Study Group, the ABA Task Force, and the Original Revision would continue the rule barring market damages to a buyer who has covered. In fact, all three, the Study Group, the Task Force, and the Original Revision recommended that the Article 2 revision also specifically provide that a seller who resells may also not recover damages based on market price. The Current Revision arrogantly takes the opposite position, both with respect to a seller who resells and a buyer who covers. As noted above, the change is fostered by omission. The Current Revision simply deletes comment 1 to Section 2-713 (which establishes that the market formula is a surrogate for the cover remedy) and comment 5 (which expressly prohibits use of the market formula when the buyer has covered). It retains, however, the now misleading text and commentary that the buyer is not required to cover and that the buyer may “always” choose between cover and damages based on market price.

corrected this problem by restricting the availability of the market formula to sellers and buyers to situations in which damages could not be avoided by resale or cover. See supra note 80. Consistent with its agenda of undermining the mitigation principle, the Current Revision leaves the problem uncorrected.

179. U.C.C. § 2-713 cmt. 5.
180. Appraisal, supra note 9, at 1229-30 (no change recommended).
181. Id. at 1231-32 (no change recommended).
182. Original Revised § 2-803 cmt. 5.
183. Appraisal, supra note 9, at 1214.
184. Id. at 1215-16.
185. Original Revised § 2-803 cmt. 5.
186. See supra note 65.
This kind of obfuscation with respect to such an important rule of law is unforgivable and demeans the drafting committee. But the reason for the tack is quite practical. Were the Current Revision candidly to state its purpose to any group of unbiased observers, the proposal would undoubtedly fail.

The Drafting Committee's reason for changing so fundamental and fair a rule of law is baffling. It has been unwilling to discuss the issue in its open meetings.187 There is no persuasive argument in favor of allowing market damages to a buyer who has covered unless the premise is that an injured party should be allowed to recover damages in excess of those actually caused and regardless of whether those damages could have reasonably avoided.188 Perhaps some explanation for the dilemma can be found in Professor Henning's treatise, which strains mightily, and unsuccessfully, to demonstrate that under current Article 2 "it is unclear if the buyer is free to pursue a Section 2-713 remedy even though a cover transaction has been effected."189 Because Professor Henning chairs the Drafting Committee and has acknowledged that he works closely with the Reporter in drafting the Current Revision, it is sensible to look to his treatise to ascertain both why, in his opinion, the law is unclear and why the ambiguity should be resolved in favor of allowing a buyer who has covered to recover damages based on market price. The treatise presents no argument in favor of market damages other than an obviously disparaging assertion that "some" would regard as a "windfall" allowing a buyer who has covered to recover greater damages under the market formula.190 In point of fact, every knowledgeable commentator who has addressed the issue in print, except perhaps Professors Gabriel and Henning, acknowledges that such a recovery would be a windfall and would conflict with the compensation limitation in Section 1-106.191

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187. I have attempted, to no avail, to raise the issue by memoranda to the Drafting Committee prior to both of its open meetings in the year 2000 and in private discussion with both Professor Henning, as chair of the Committee, and with Professor Gabriel, as Reporter.

188. Judge Ellen Ash Peters suggested long ago that, since sellers were apparently subject to no similar restriction when they resell, parity of remedy should allow buyers the same freedom. Ellen Ash Peters, Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two, 73 YALE L.J. 199, 258-60 (1963). However, in ensuing years the courts have properly restricted sellers who have resold from recovering damages based on market price. Parity of remedy has thus been achieved, although in the opposite and more appropriate way.

189. HENNING & WALLACH, supra note 82, ¶ 10.02, 10-4 (Revised Edition 1992). The treatise, originally written by Professor Wallach, has been revised and updated in recent years by Professor Henning.

190. Id. at ¶ 10.02, p. 10-4.

The treatise does present a three-pronged analysis based on a contextual analysis of the applicable Article 2 provisions, their drafting history, and the case law interpreting them in an attempt to justify its conclusion that the law on point is unclear. The applicable provisions are Section 2-712(3), comment 3 thereto, and comment 5 to Section 2-713. However, as discussed above, read literally all of these provisions are perfectly consistent with the emphatic statement in comment 5 to Section 2-713 that a buyer may recover damages based on the market formula only to the extent that a cover has not occurred. The treatise concludes its analysis with the following extraordinary assertion regarding comment 5 to Section 2-713: “At a minimum this comment suggests that the market formula recovery can only be pursued by a buyer who has either failed to enter the market in an attempt to cover or has covered in a transaction that will not qualify under Section 2-712.” Perhaps “at minimum” that is true. But the provision specifically says much more. It says that Section 2-713 applies only “when” the buyer has not covered and only “to the extent” the buyer has not covered in cases of partial cover. The provision could not be more clear. Professor Henning’s incorrect analysis and attempt to give the provision a minimal reading simply suggest disagreement with it.

The treatise also asserts that the drafting history of the applicable remedy provisions “indicates that the buyer was not intended to be forced to elect between cover and market damages.” This point is made without accompanying discussion. But even if this statement is accurate, it does not address the issue of whether the free election should include situations in which the buyer has mitigated market-based damages by a cover transaction. What is clear is that the current Article 2 provisions do favor a free election of remedies by the buyer, but the freedom is subject to the basic principles of mitigation and compensation. To allow a buyer who has covered to recover damages based on the market formula would violate both principles.

The treatise concludes its analysis by acknowledging that the scholarly literature, as well as basic principles of the common law of contract as promulgated in the Restatement of Contracts, decidedly favor the de-

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192. See supra note 175.
194. Id.
195. As authority for this reading of the Code’s drafting history the treatise refers to Professor Peters’ law review article, supra note 189, at 260-61. Ironically, Professor Peters, unlike Professor Henning, finds comment 5 to Section 2-713 to be “clear enough.” Id. at 260.
196. See supra note 191.
197. See Restatement (Second) of Contracts, § 347 cmt. e: The injured party is limited to damages based on his actual loss caused by the breach. If he makes an especially favorable substitute transaction, so that he
Regarding Article 2 Damage Remedies

nial of market-based damages in situations in which the buyer has covered. It then asserts, however, that:

The case law interpreting the Code has not taken a clear position on this question. The decided cases have not involved this precise question, and the courts have not had to choose between the freedom of choice approach suggested by the Code’s history and the lack of choice approach taken by the Restatement.\textsuperscript{198}

This statement is more artful obfuscation than detached scholarly commentary. It is true that the courts do not question that a buyer should be free to choose between cover and having damages measured based on market price, but they consistently subject that freedom to the principles of mitigation and compensation. It is also true that no court has questioned the wisdom of the Restatement of Contracts or of comment 5 to Section 2-713 in providing that a buyer who has covered is restricted to damages based upon that remedy.

Regarding the applicable case law, the treatise then asserts that: “The most that can be said is that the courts have not insisted that a buyer cover, and have allowed the buyer to use Section 2-713 where there is no evidence that the buyer actually did cover.”\textsuperscript{199} The first half of this statement is true. However, no reported decision has involved a situation in which a buyer sought to recover damages based on market price when the buyer has unreasonably failed to purchase substitute goods at a price lower than the applicable price. The absence of such a case should not be surprising. It would be both extraordinary and weird for a buyer to refuse to enter into a substitute transaction that would minimize his loss. An injured party who fails unreasonably to avoid loss always acts against his own best interest.\textsuperscript{200}

A buyer has strong incentive to cover when a substitute transaction is reasonably available. The cover action by the buyer fixes the amount of his loss, and Section 2-712 allows for its full recovery. It is both a tribute to the fairness of the cover remedy and a testimony to the clear prohibition in current Article 2 that no reported decision has involved a buyer who has admittedly covered seeking higher damages based on market price. Professor Henning would turn this fact on its head and assert that such a recovery should be allowed by suggesting that “the most that can be said” is that the courts have allowed the buyer a recovery under the market formula where there is no evidence of cover.\textsuperscript{201} However, much

\textsuperscript{198} See also Restatement (Second) of Contracts § 350 cmt. c, supra note 69.
\textsuperscript{199} Henning & Wallach, § 10.02, p. 10-5.
\textsuperscript{200} Id.
\textsuperscript{201} See discussion of the Schiavi Mobile Homes case following note 67, supra.
more can be said of the cases. The courts have without exception allowed the buyer to recover damages based on market price only where the evidence has demonstrated that the buyer had not covered.202

In sum, the text and commentary to current Article 2 clearly prohibit a buyer who has covered from a recovery of higher damages based on market price. The case law interpreting the Code's provisions is uniform and emphatic. The prohibition is consistent with basic principles of the common law of contract as reflected by the Restatement of Contracts and with basic principles of international law as codified in the Convention on the International Sale of Goods. The CISG expressly, and unambiguously, provides that a seller who resells203 and a buyer who covers204 may not recover damages based on market price. The veiled attempt in the Current Revision, by retaining current Code provisions emphasizing freedom of choice of remedies while deleting limitations such as comment 5 to Section 2-713, is both without logic and without necessity. It goes directly against the recommendations of the Study Group, the ABA Task Force, and the rule provided by the Original Revision. It also dramatically contravenes the firm assurance of the Conference of Commissioners that no fundamental changes in Article 2 law would be made in the Current Revision and that this specific rule from the Original Revision would be retained.205 The proposed change is so fundamentally unsound and

202. It is typical of the analysis of the courts that, before allowing a buyer recovery under the market formula, they will cite with approval comment 5 to section 2-713 and then will emphasize pointedly that the record before them demonstrates that the buyer did not cover. See Bigelow-Sanford, Inc. v. Gunny Corp., 649 F.2d 1060, 31 U.C.C. Rep. Serv. 968 (5th Cir. 1981); Ralston Purina Co. v. McFarland, 550 F.2d 967, 21 U.C.C. Rep. Serv. 136 (4th Cir. 1977); McGinnis v. Wentworth Chevrolet Co., 668 P.2d 365, 37 U.C.C. Rep. Serv. 130 (1983); Jon-T Farms, Inc. v. Goodpasture, Inc., 554 S.W.2d 743, 21 U.C.C. Rep. Serv. 1309 (Tex. Civ. App. 1977); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 8 U.C.C. Rep. Serv. 643 (1971). Other courts in allowing recovery under section 2-713 simply cite comment 5 thereto with approval and state that the remedy is available only where the buyer has not covered. See Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064, 38 U.C.C. Rep. Serv. 1645 (5th Cir. 1984); Tennell v. Steve Cotton Co., 546 S.W.2d 346 (Tex. Civ. App. 1976). See also 579 N.E.2d 389, 16 U.C.C. Rep. Serv. 2d 681 (1991) (where buyer covered, proper measure of damages was difference between cost of cover and price to be paid under contract; damages based on market price under § 2-713 are available only when and to extent buyer has not covered). How careful the courts are in applying the rule that Section 2-713 is not available to a buyer who has covered is demonstrated by the one reported case that makes an exception to the rule. In Interior Elevator Co. v. Limmeroth, the buyer was able to cover for only part of the goods it was due under the breached contract. Interior Elevator, 565 P.2d 1074, 1080, 22 U.C.C. Rep. Serv. 69 (1977). However, it sought damages for all the goods under the market formula of Section 2-713. Citing comment 5 to Section 2-713, the court said that the recovery would not normally be allowed. See id. at 1080. However, since the cover price paid by the buyer was greater than the market price at which the buyer sought to recover damages, the buyer would actually receive a lesser recovery than if it had bifurcated its claim by seeking recovery under Section 2-712 for that portion for which it had covered. The court thus allowed the lower recovery based on market price. In reaching its decision, the court emphasized that it would not allow the recovery had the cover price been lower than the market price.

203. C.I.S.G. art. 76.

204. See id.

205. See Miller, supra note 81.
unprincipled that the scheme of the Current Revision should not pass muster with the American Law Institute, nor with any state legislature.206

206. One final failure of the Current Revision regarding Section 2-713 deserves mention. A recurring situation under current Article 2 has involved a buyer acting as a middleman, who purchases from the seller at one price and then immediately resells to its customer at a higher price, thereby guaranteeing itself a profit on the differential and hedging its buy contract against market fluctuation. Subsequently, the market price of the goods rises dramatically, and the seller breaches. Unable to find substitute goods, the buyer secures from its customer a release or settles its contract with the customer for a nominal amount. The buyer then sues the seller, seeking damages under Section 2-713. The issue posed is whether the buyer can recover windfall damages based on the market formula or whether the buyer is limited to compensatory damages measured by the profit the buyer would have made on its contract with its customer. The pre-Code cases divided almost evenly on the issue. See David Simon & Gerald A. Novack, Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts, 92 HARV. L. REV. 1395 (1979). To date, four reported decisions have addressed the issue in applying Article 2. The first two cases to do so denied the buyer recovery of damages based on market price and, citing the Code's compensation principle in Section 1-106, held that recovery would be limited to the buyer's actual loss measured by the lost profit on its resale contract. See H-W-H-Co. v. Schroeder, 767 F.2d 437, 41 U.C.C. Rep. Serv. 832 (8th Cir. 1985); Allied Canners & Packers, Inc. v. Victor Packing Co., 162 Cal. App. 3d 905, 914, 39 U.C.C. Rep. Serv. 1567 (1984). However, two more recent cases reached the opposite result by allowing the buyer to recover damages based on market price, even though both courts candidly acknowledged that the recovery was in excess of the buyer's actual loss. See TexPar Energy, Inc. v. Murphy Oil USA, Inc., 45 F.3d 1111, 25 U.C.C. Rep. Serv. 2d 1759 (7th Cir. 1995); Tongish v. Thomas, 840 P.2d 471, 20 U.C.C. Rep. Serv. 2d 936 (1992). Both cases justified ignoring the Code's compensation principle by misapplying the basic principle of statutory construction that a specific provision should govern a general one. The courts reasoned that the compensation principle in Section 1-106 should yield to the specific provision of Section 2-713 that allows the buyer a recovery of market damages without limitation. The reasoning of these courts borders on the absurd. The "specific over general" principle of statutory construction does not apply to situations where it is clear that the intent of the statute is to the contrary. The Code provision in Section 1-106, mandating that the courts liberally administer remedies by limiting recovery to actual loss, is clearly intended to govern each and every Code remedy provision including the market formula in Section 2-713. Otherwise, the provision has no meaning. These two decisions would simply read Section 1-106 out of the Code because, under their analysis, there could never be a situation to which Section 1-106 would apply. For a detailed analysis of the problem, see Roy Ryden Anderson, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 9:08 (1988 & Supp. 2000). The Study Group recommended that the Article 2 revision address the issue, and the ABA Task Force recommended that the revision reject the reasoning of the cases that refused to apply the compensation principle. See Appraisal, supra note 9, at 1250-32. The Original Revision complied with the Study Group request and followed the recommendation of the Task Force. It accomplished the task simply and elegantly. In Original revised Section 2-801, it stated that Article 2 remedies "are subject to the general limitations and principles" stated in subsequent sections including Section 2-803. See infra Appendix B, §§ 2-801, 2-803. In Original Revised Section 2-803, it then both codified the principle of mitigation of damages and restated the compensation principle from Section 1-106. Once again, as is its wont, the Current Revision ignores positive gains made by the Original Revision despite firm assurances to the contrary by the Conference on Commissioners. The Current Revision also ignores the recommendations of the Study Group and the ABA Task Force. Once again, the reason is apparent and consistent with the unspoken agenda in the Current Revision of restructuring Article 2 remedies so as to give primacy to supracompensatory damages based on market price in contravention of both the compensation and the mitigation principles.
Section 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

The text to Section 2-714 in the Current Revision is continued virtually without change and it should foster no change in the law. As yet, no commentary has been provided for the provision. When commentary is provided, it should address points suggested by the Study Group and adopt commentary that was included in the Original Revision.

In measuring damages for breach of warranty, a few courts under current Article 2 have erroneously concluded that the price in the breached contract, rather than the appropriate market value, conclusively establishes the value of the goods as warranted. The Original Revision provided a comment to the effect that, although the contract price may be evidence of the value of the goods as warranted, it is not conclusive. This important point should be included in the comments to the Current Revision.

The Study Group suggested that the revision include in its comments confirmation that a buyer’s reasonable cost of repair is often an appropriate way to determine the value differential measurement for breach of warranty under Section 2-714. The suggestion reflects current case law interpreting Section 2-714. Finally, regarding the “special circumstances” exception in measuring damages for breach of warranty, the Study Group suggested that the comments in the revision “identify prototypic cases” for applying the exception and that the comments should clarify that “special circumstances” are not a condition to the buyer’s recovery of consequential damages. Such commentary in the Current

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207. The Reporter’s Note to the provision states that the “section reflects current law.”
209. See Original Revised § 2-827 cmt. 4.
210. See Appraisal, supra note 9, at 1232.
212. Appraisal, supra note 9, at 1232-33. The Study Group, by way of example, pointed to the Chatlos Sys. case as follows:

In Chatlos Systems, Inc. v. National Cash Register Corp., 670 F.2d 1304 (3d Cir. 1982), the seller breached a warranty that a particular computer system would meet the buyer’s particular purposes. There was evidence that another more expensive system would meet those needs. The court upheld a judgment under § 2-714(2) that the value of the goods as warranted could be measured by the value of the different system. The court rejected the defense’s argument that § 2-714(2) was limited to the value of “the” goods, i.e., the particular system delivered, “if they had been as warranted,” but did not rely on the ‘special circumstances’ exception. Arguably, that exception should apply, since the buyer’s particular needs, which the seller agreed to meet, would not be met unless the value of the different system were calculated. At least one member of the Study Group thinks that this case is “dead wrong.”

Id.

Revision would be helpful.

The ABA Task Force made the additional suggestion that the comments to Section 2-714 be revised to give examples of cases under current Section 2-714(1) where damages may be “determined in any manner which is reasonable.” The cases applying this provision under current Article 2 have generally involved situations in which the tender by the seller, rather than the goods themselves, was defective.

The Original Revision of current Section 2-719 on limitation of remedies contained a new provision stating that an agreed remedy “may create a remedial promise.” The typical limited remedy granted by sellers to buyers is repair or replacement. Depending on how the provision is worded in the contract, some courts have had difficulty with whether this limited remedy constituted a separate warranty, a remedial promise, neither, or both. The new provision in the Original Revision was designed to allow a court to construe the limited remedy of repair or replacement to constitute a promise, the breach of which would be actionable and which would start the running of a statute of limitations independent of that applicable to any warranties provided by the seller in the contract of sale. The Original Revision then provided in its revision of Section 2-714 that the damages for breach of the remedial promise “may be measured by the value of the promised remedial performance, less the value of any remedial performance made.” Because the limited remedy will normally be repair or replacement, the damage measurement under this proposed formula in most cases would be the cost of repairing the goods to conform to the contract. The alternative measurement would be the difference in the value of the goods at the time of the breach of the remedial promise and the value of the goods as warranted by the contract. The Current Revision does not make provision

213. See Appraisal, supra note 9, at 1233.
215. See infra Appendix B, § 2-810(a)(3).
216. See U.S. Marine Corp. v. Kline, 882 S.W.2d 597, 27 U.C.C. Rep. Serv. 2d 158 (Tex. App. 1994) (promise to repair or replace any defective parts without charge merely provided a remedy and was not a warranty that explicitly extended to future performance); Ranker v. Skyline Corp., 493 A.2d 706, 41 U.C.C. Rep. Serv. 476 (1985) (manufacturer's warranty to correct defects did not explicitly extend to future performance but merely defined buyer's remedy); Allis-Chalmers Credit Corp. v. Herbolt, 479 N.E.2d 293, 41 U.C.C. Rep. Serv. 485 (1984) (clause in contract for sale of goods promising to repair or replace was a remedial promise and not a warranty; the promise was that seller's conduct would conform to the promise and not that the goods' performance would conform to the promise).
217. Infra Appendix B, § 2-827(c).
218. The parallel is the many cases that have used cost of repair as evidence of the difference between value of the goods as warranted and their value as accepted in measuring damages under U.C.C. Section 2-714(2). The cases are collected and discussed in Roy Ryden Anderson, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 10:06 (1988 & Supp. 2000).
219. Similarly, the courts allow recovery, in addition to the cost of repair, for the difference between the value as warranted and the value after repair in cases where the repair leaves the goods with a value less than that as warranted. See Hartzell v. Justus Co., Inc.,
in Section 2-719 for the breach of a remedial promise nor for the damage measurement for such a breach in Section 2-714. Perhaps, however, when the commentary is added to these provisions the matter will be addressed.

Section 2-715. Buyer’s Incidental and Consequential Damages.

The Current Revision continues Section 2-715 unchanged. The provision, however, at present includes no commentary. As discussed above regarding Section 2-710’s provision for consequential damages for sellers, the commentary to the buyer’s provision undoubtedly will cover at least some of the points addressed in the commentary to the Original Revision.220

V. GENERAL PROVISIONS

Section 2-716. Right to Specific Performance or Replevin or the Like.

Although specific performance is the preferred remedy under the CISG and the law of most civil law countries, substitutionary relief in the form of damages continues to be the remedy of choice under the Current Revision. This is consistent with the Study Group221 and ABA Task Force222 recommendations and with the Original Revision.223

The Current Revision essentially tracks Section 2-716 of Current Article 2, the specific performance remedy for buyers, except the new revision makes the remedy available to sellers as well as buyers.224 In most cases, the buyer’s breach or repudiation will be of an obligation to pay money. Specific performance is not available to sellers in those situations. The new revision states that “specific performance may not be decreed if the breaching party’s sole remaining contractual obligation is the payment of money.”225 The typical example of a breach or repudiation by a buyer of an obligation other than payment of money is a buyer’s failure or refusal to perform a “take or pay” obligation in oil and gas supply contracts.226 The new revision was crafted with these “take or


220. See supra note 137.
221. Appraisal, supra note 9, at 1235.
222. Id. at 1236.
223. See infra Appendix B, § 2-807.
224. See infra Appendix A, § 2-716(a).
225. In such situations, the seller’s remedy is for the unpaid contract price under Section 2-709 or, in the case of repudiation, damages under sections 2-706 or 2-708. See Current Revised § 2-716, preliminary cmt. 2.

pay” obligations in mind.\footnote{227} No hint is given as to other types of buyer breach as to which the revision might apply.

The Current Revision continues the standard that the specific performance remedy “may be decreed where the goods are unique or in other proper circumstances.”\footnote{228} The Original Revision had extended the standard to situations where “the goods or the agreed performance of the party in breach” was unique.\footnote{229} This extension was intended to codify the case law under current Article 2 that holds that the uniqueness either of the performance or of the contract itself is also an example of “other proper circumstances” that will justify specific performance.\footnote{230} The Current Revision takes into account this case law by commentary rather than amendment of the text to Section 2-716.\footnote{231}

The Current Revision does, however, amend the text to Section 2-716 to state that: “In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy.”\footnote{232} By specific statement, the new provision does not apply to consumer contracts nor where the breaching party's sole remaining obligation is to pay money.\footnote{233} The new provision permitting a court to allow specific performance if the parties have so agreed is not stated in mandatory language. Thus it is unlikely to cause significant change in the current case law, where the courts have considered the agreement of the parties as but a factor to be weighed in exercising the court's discretion as to whether to allow an equitable remedy.\footnote{234} However, the Current Revision does seek to affect the court's exercise of that discretion with the suggestion that “the parties' agreement to specific performance can be enforced even if legal remedies are entirely adequate.”\footnote{235} Nevertheless, the commentary to the new provision does concede that: “Nothing in this section con-

\footnote{227} See Current Revised § 2-716 preliminary cmt. 2.  
\footnote{228} \textit{Infra} Appendix A, § 2-716(a).  
\footnote{229} \textit{Infra} Appendix B, § 2-807(a) (emphasis added).  
\footnote{231} See Current Revised § 2-716, preliminary cmt. 1, which states: Uniqueness should be determined in light of the total circumstances surrounding the contract and is not limited to goods identified when the contract is formed. The typical specific performance situation today involves an output or requirements contract rather than a contract for the sale of an heirloom or priceless work of art. A buyer's inability to cover is strong evidence of a circumstance in which a decree of specific performance is appropriate.  
\footnote{232} \textit{Infra} Appendix A, § 2-716(a).  
\footnote{233} See \textit{id.} The revision to approve the parties' ability to agree to specific performance is consistent with the recommendations of the Study Group and the ABA Task Force. See \textit{Appraisal, supra} note 9, at 1235-36. The Original Revision contained a similar provision. See \textit{infra} Appendix B, § 2-807(a).  
\footnote{234} For example, where the parties attempt to limit the remedy for breach exclusively to liquidated damages, the courts, nevertheless, will exercise discretion and allow an equitable remedy, such as specific performance, under appropriate circumstances. See generally William S. Harwood, Comment, \textit{Liquidated Damages: A Comparison of the Common Law and the Uniform Commercial Code}, 45 \textit{FORDHAM L. REV.} 1349, 1367-80 (1977).  
\footnote{235} Current Revised § 2-716 preliminary cmt. 2.
strains the court’s exercise of its equitable discretion in deciding whether to enter a decree for specific performance or in determining the conditions or terms of such a decree.\textsuperscript{236}

Concluding that the specific performance remedy is “a more complete goods oriented remedy” and that the buyer’s right to replevin in Section 2-716 would in most cases be covered by the “special circumstances” requirement for specific performance, the Study Group and the ABA Task Force recommended that replevin be deleted from Section 2-716.\textsuperscript{237} The Original Revision made the deletion.\textsuperscript{238} The Current Revision, however, continues to provide for a buyer’s right to replevin in circumstances identical to those currently provided for by current Article 2.\textsuperscript{239} The new provision extends to replevin-like remedies “to reflect the fact that under the governing state law the right may be called ‘detinue,’ ‘sequestration,’ ‘claim and delivery,’ or something else.”\textsuperscript{240} The Current Revision also proposes a new provision that the buyer’s right to replevin “vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.”\textsuperscript{241} The commentary to the new provision states that this rule for vesting assumes a “first in time” priority rule so that “if the buyer’s rights vest under this rule before a creditor acquires an in rem right to the goods, including an Article 9 security interest and a lien created by levy, the buyer should prevail.”\textsuperscript{242}

Section 2-717. Deduction of Damages from the Price.

The Current Revision makes no changes in Section 2-717, which allows a buyer to deduct damages from payment of any part of the contract price due on the same contract the seller has breached. No changes were recommended by the Study Group,\textsuperscript{243} nor by the ABA Task Force,\textsuperscript{244} and none were made in the Original Revision.\textsuperscript{245}

Section 2-718. Liquidation or Limitation of Damages; Deposits.

Under the common law of contract\textsuperscript{246} and current Article 2, the en-

\textsuperscript{236} Id.
\textsuperscript{237} See Appraisal, supra note 9, at 1236.
\textsuperscript{238} See infra Appendix B, § 2-807.
\textsuperscript{239} See infra Appendix A, § 2-716(c).
\textsuperscript{240} Current Revised § 2-716 preliminary cmt., Changes (3).
\textsuperscript{241} See infra Appendix A, § 2-716(d).
\textsuperscript{242} Current Revised § 2-716 preliminary cmt. 4.
\textsuperscript{243} See Appraisal, supra note 9, at 1237.
\textsuperscript{244} See id.
\textsuperscript{245} See infra Appendix B, § 2-828.
\textsuperscript{246} See RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (“Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.”); see also RESTATEMENT OF CONTRACTS § 339(1)(b) (1932) (“An agreement, made in advance of breach, fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless . . . (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.”).
forceability of liquidated damage provisions has always been carefully limited to situations in which both the damages likely to be caused by the breach are uncertain in amount or difficult to calculate and where the amount liquidated by the contract is a reasonable approximation of those damages. The courts have divided sharply on the issue of whether the amount liquidated must be a reasonable approximation of the damages actually caused by the breach or only of the damages anticipated by the parties at the time of contracting.\textsuperscript{247} The majority of courts have favored judging the reasonableness only in terms of the loss anticipated to be caused by the breach.\textsuperscript{248} Current Article 2 Section 2-718, read literally, codifies the majority rule by providing that the amount liquidated may be judged "reasonable in the light of the anticipated or actual harm caused by the breach."\textsuperscript{249} However, it is unclear under current Article 2 whether courts that have followed the "actual loss" rule outside the U.C.C. will read the provision literally or will continue to follow their customary rule. Certainly Section 2-718 permits courts to consider the actual loss suffered. No case from a jurisdiction following the "actual loss" rule has addressed this issue in applying current Article 2. The Current Revision continues the "anticipated or actual harm" standard.\textsuperscript{250}

The Current Revision, however, seeks to make a major change by deleting from commercial contracts consideration of "the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy" found in current Section 2-718. This factor is continued for consumer contracts. The change was not recommended by the Study Group,\textsuperscript{251} nor by the ABA Task Force.\textsuperscript{252} Further, the Original Revision continued the difficulty of proof of loss test for all contracts, commercial and consumer.\textsuperscript{253} Thus, once again, the Current Revision proposes a dramatic change in the law of damage remedies based on no external recommendation and without public discussion. The change is, of course, consistent with the agenda of


The ABA Task Force objected to the Study Group recommendation and suggested that either reference to anticipated loss be deleted from the revision or that the provision expressly state the objective of the Study Group of allowing parties to contract for reasonable penalties in excess of actual damages. \textit{See Appraisal, supra} note 9, at 1239-40. \textit{See generally} Cal. & Hawaiian Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433, 1 U.C.C. Rep. Serv. 2d 1211 (9th Cir. 1986) (taking into account equitable considerations relating to the actual harm resulting from the breach as well as the difficulty of proving actual damages).

\textsuperscript{248} \textit{See California & Hawaiian Sugar Co.}, 794 F.2d at 1433.

\textsuperscript{249} U.C.C. § 2-718(1).

\textsuperscript{250} \textit{See infra} Appendix A, § 2-718(a).

\textsuperscript{251} \textit{See Appraisal, supra} note 9, at 1237-38.

\textsuperscript{252} \textit{See Appraisal, supra} note 9, at 1239-40.

\textsuperscript{253} \textit{See infra} Appendix B, § 2-809(a).
allowing recovery of damages in excess of compensation at every available opportunity.

The proposed revision is ill-advised. It will undoubtedly promote uncertainty as to the validity of liquidated damage provisions in Article 2 cases and, correspondingly, will promote litigation on the issue. Under pre-Code contract law and under current Article 2, liquidated damage provisions are relatively unimportant in sale of goods cases. There is very little reported litigation involving them under current Article 2, because the courts have always restricted the enforceability of such provisions to situations in which the damages likely to be caused by the breach will be uncertain in amount and difficult to calculate. Because goods typically can be valued by reference to market price or other external indicia, and damages can be reasonably calculated based thereon, contracts for the sale of goods rarely produce uncertain damages either for sellers or buyers.254 By removing this uncertainty factor as a predicate, the Current Revision throws open the door to allowing recoveries based on liquidated damage provisions in all kinds of commercial sales contracts. The only limitation is that the amount liquidated be reasonable in terms of "the anticipated or actual harm." Without the accompanying standard of uncertainty, it will usually be unclear, except in the most historically stable of markets, when the amount liquidated is unreasonable in terms of the anticipated loss. In effect, the Current Revision seeks to give a broad-based permission to provide for penal damages upon breach. The courts will be left to determining on a case-by-case basis when and why the amount forecast may or may not have been a reasonable forecast of the anticipated loss. If the goal is to allow commercial parties to agree to penalties for breach, as it appears to be, it would be far better for the Current Revision to say so explicitly and to subject the license to some high standard that would discourage litigation, such as "patently unreasonable" or "unconscionable."255 But the Current Revision, as is its wont, seeks once again to make a major, uncalled for change in the law by subtle misdirection and unstated intent.

The Current Revision does make two minor, sensible changes in Section 2-718. It deletes from current Section 2-718(1) the statement that "[a] term fixing unreasonably large liquidated damages is void as a penalty." This statement has always been confusing because the same could be said for a term fixing unreasonably small liquidated damages. To affirm this point, the Current Revision inserts in place of the deleted language the statement that: "Section 2-719 [on remedy limitation


255. The commentary to the new revision seemingly celebrates the litigation that is likely to ensue. "This section thus respects the parties' ability to contract for damages while providing some control by requiring reasonableness based upon the circumstances of the particular case." Current Revised § 2-718, preliminary cmt. 1.
provisions] determines the enforceability of a term that limits but does not liquidate damages."\textsuperscript{256} Both of these changes, the deletion and the insertion, are carried forward from the Original Revision.\textsuperscript{257} Finally, the commentary notes that, in the event that a liquidated damages provision is found to be unenforceable,\textsuperscript{258} the normal Article 2 remedies become available to the aggrieved party. As the commentary to the Original Revision noted, this result follows by necessary, logical implication.\textsuperscript{259}

As does current Section 2-718, the Current Revision allows a breaching buyer restitution of any payments made under the contract in excess of the seller’s actual or liquidated damages. New language continued from the Original Revision\textsuperscript{260} would expand the availability of restitution to the breaching buyer to include any situation where the seller stops performance (not just delivery) because of the buyer’s breach or insolvency.\textsuperscript{261} Under current Article 2, restitution is available to the breaching buyer only: “Where the seller justifiably withholds delivery of goods because of the buyer’s breach . . . . “\textsuperscript{262} The new language, however, represents no change of apparent practical importance.

As did the Original Revision,\textsuperscript{263} the Current Revision eliminates the statutory penalty in current Section 2-718 that allows the seller to offset against the buyer’s restitution “twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.”\textsuperscript{264} Obviously, deleting this tiny statutory “cookie” for sellers is relatively unimportant. Indeed, under current Article 2, some courts have ignored this offset, which the Current Revision refers to as a “statutory liquidated damages provision.”\textsuperscript{265}

**Section 2-719. Contractual Modification or Limitation of Remedy.**

Current Section 2-719 has probably fostered more litigation than any other remedy-related provision in Article 2. The Study Group\textsuperscript{266} and the ABA Task Force\textsuperscript{267} made little recommendation for change but did make various suggestions for clarification of questions that have been raised by the Article 2 case law. The text of Current Revised 2-719 contains no substantive change from the original text. However, the Current Revision provides no commentary at present. Given the propensity of the Current Revision to make subtle, sometimes dramatic, changes in the law through its commentary, it is fruitless to evaluate the current provision

\textsuperscript{256} Infra Appendix A § 2-718(a).
\textsuperscript{257} Original Revised § 2-809(a), cmt. 2.
\textsuperscript{258} An unlikely event in commercial contracts under the Current Revision.
\textsuperscript{259} Original Revised § 2-809 cmt. 2.
\textsuperscript{260} See infra Appendix B, § 2-809(b).
\textsuperscript{261} See infra Appendix A, § 2-718(b).
\textsuperscript{262} U.C.C. § 2-718(2).
\textsuperscript{263} See infra Appendix B, § 2-809(b).
\textsuperscript{264} U.C.C. § 2-718(2)(b).
\textsuperscript{265} Current Revised § 2-718 preliminary cmt., Changes (5).
\textsuperscript{266} See Appraisal, supra note 9, at 1240-43.
\textsuperscript{267} See Appraisal, supra note 9, at 1243-44.
until such commentary is forthcoming. This discussion will focus instead on the Original Revision with the thought that the forthcoming commentary for the Current Revision might seek guidance from it.268

The Original Revision contained little substantive change in current Section 2-719. The requirements that a remedy limitation provision leave the affected party with a "minimum adequate remedy" and a "fair quantum of remedy" so as to provide the affected party with the "substantial value of its bargain" were retained in the commentary.269 These requirements will presumably be continued in the Current Revision.

The "failure of the essential purpose" standard was also retained in the text of the Original Revision to cover situations in which circumstances caused a remedy limitation not to work as anticipated by the parties.270 The standard is continued in the Current Revision.271 However, both the Original Revision and the Current Revision are silent as to whether a remedy limitation must be conspicuous in the written contract. The courts have split on the issue under current Section 2-719.272

Two changes from the Original Revision deserve mention. First, the revision provided that an agreed remedy "may create a remedial promise."273 This provision was discussed above.274 Second, the Original Revision contained an important new provision that, in consumer contracts, when an exclusive or limited remedy fails of its essential purpose, the injured party may pursue all remedies "including the right to recover consequential damages, despite any term purporting to exclude or limit that remedy."275 This provision was reflective of the better reasoned and significant majority of cases under current Section 2-719.276 In non-consumer contracts, the Original Revision provided that a term excluding

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269. Original Revised § 2-810 cmt. 3.

270. Original Revised § 2-810(b).

271. See infra Appendix A, § 2-719(b).


273. See infra Appendix B, § 2-810(a)(3).

274. See supra note 218.

275. See infra Appendix B, § 2-810(b)(2).

liability for consequential damages would continue to be judged by an unconscionability standard even though an exclusive or limited remedy had failed of its essential purpose.277

The provision in the Original Revision protecting consumers for consequential loss when an agreed remedy fails is sensible and fair. Unlike for commercial buyers, whose consequential loss in the form of lost profits often may greatly exceed the value of the contract to the seller, when consumer buyers suffer economic consequential loss it almost always is simply in the form of loss of use of the goods. That loss, which usually is not out of proportion to the value of the contract to the seller, can be compensated by the rental value of the goods and can often be avoided by the breaching seller's providing substitute goods to the buyer for use during the period defects in the goods are being corrected.278 The provision from the Original Revision protecting consumers in remedy failure cases was made part of the December, 1999 Draft of the Current Revision.279 However, at its March meeting, upon motion of Professor James J. White, the Drafting Committee deleted the provision from the Current Revision. In support of his motion, Professor White incorrectly asserted that the provision was not supported by the case law under current Article 2 and would represent a change in the law. Professor White's assertion was vigorously challenged by several observers at the meeting.280

An unfortunate omission in the Original Revision was of any commentary designed to aid the courts in determining the unconscionability issue for provisions excluding consequential damages when the agreed remedy has failed. The Study Group requested that this issue, which has troubled the courts in applying current Section 2-719, be addressed in revising Section 2-719.281 The ABA Task Force agreed with this suggestion and asked specifically that the revision make clear that the unconscionability issue in this context includes facts and circumstances arising subsequent to the...
making of the contract. In applying Section 2-719, some courts incorrectly assume that the unconscionability standard refers exclusively to the standard as expressed in Section 2-302, which by its terms restricts consideration to the time of the making of the contract. The commentary in the Original Revision, as does that of current Section 2-719, stated that clauses limiting or excluding consequential damages "may not operate in an unconscionable manner." Clearly a determination of how the clause operates must be dictated by events as they occurred subsequent to the making of the contract. Hopefully the commentary to the Current Revision will go further in clarifying the matter.

Section 2-720. Effect of "Cancellation" or "Rescission" on Claims for Antecedent Breach.

The Current Revision makes no changes in the text to current Section 2-720, but no commentary has as yet been provided.

Section 2-721. Remedies for Fraud.

The Current Revision makes no changes to the text of current Section 2-721, but no commentary has as yet been provided.

Section 2-722. Who Can Sue Third Parties for Injury to Goods.

The Current Revision makes no changes to the text of current Section 2-722, but no commentary has as yet been provided.

Section 2-723. Proof of Market Price: Time and Place.

The Current Revision makes no changes to the text of current Section 2-723 except that the special rule regarding measuring damages based on market price in anticipatory repudiation cases has been deleted. That rule has been changed and made a part of Current Revised Sections 2-708 and 2-713 as discussed above.

Section 2-724. Admissibility of Market Quotations.

The only change in the text to current Section 2-724 is additional language providing for "other means of communication" as a source, in addition to printed media, in determining the prevailing price or value of goods. This addition is intended to reflect current common usage of electronic, non-printed media.

282. See Appraisal, supra note 9, at 1243-44.
284. Original Revised § 2-810 cmt. 5 (emphasis added).
285. See supra text accompanying notes 93 and 164.
286. See Current Revised § 2-724, Reporter's Note.
VI. CONCLUSION: REMEDIAL RECOMMENDATIONS

Article 2 currently provides a rich panorama of damage remedies to the party injured by a breach of contract for the sale of goods. However, the freedom of the aggrieved party to make use of a particular remedy currently is strictly limited by the basic common law damage principles of compensation and mitigation. A delicate balance is thereby achieved between honoring the injured party's lost expectation and allowing a free election of remedies. As the Current Revision demonstrates, it takes little to upset the balance. No addition to or deletion from the menu of remedies is necessary, and the Current Revision makes none. Havoc is accomplished simply by expanding the availability of the remedies already in place by undermining the applicability of the compensation and mitigation principles.

Current Article 2 clearly gives primacy over market-based damages to the substitutionary, self-help remedies of cover for buyers and resale for sellers. That primacy has been uniformly honored, even celebrated, by our courts over the past thirty years. A seller who has engaged in a true resale, one that would not have been made but for the breach, or a buyer who has similarly covered, will not be allowed to have damages measured by market price but will be restricted to a recovery based upon the resale or cover. This rule follows logically from the principle that the market price provided in Sections 2-708 and 2-713, for sellers and buyers respectively, is intended as a surrogate for the price at which the seller would have resold or the buyer would have covered had that relief been sought. The rule limiting the availability of market-based damages to situations in which a resale or cover has not occurred is a fair one because a proper resale or cover will always compensate the injured party, as that principle is defined in Section 1-106, by placing her in the monetary position she would have occupied had the contract been performed (once proper allowance is made for performance expenses saved or recouped and for additional incidental and consequential damages suffered).

Although current Article 2 is silent as to mitigation of damages in this context, the courts have further extended this primacy principle for resale and cover by disallowing any recovery for damages based on market price that could have been reasonably avoided by a proper resale or cover. A party who allows a loss to occur that he could have reasonably avoided acts not only illogically against his own self-interest but also unfairly against the breacher if he seeks recovery for that loss. For this reason, the principle that one may not recover damages for a loss that could have been reasonably avoided is firmly entrenched in our common law jurisprudence for actions based on both contract and tort.

The Article 2 Study Group and the ABA Task Force emphatically affirmed the primacy principle for the substitutionary remedies of resale and cover by specifically recommending both that the Article 2 revision provide that a seller who resells and a buyer who covers may not recover damages based on market price and that damages based on market price
be unavailable to the extent that they could have been reasonably avoided by a proper resale or cover. These recommendations are not only consistent with the law under current Article 2 but are affirmed by basic principles of the common law of contract and by those of international law as reflected by the Convention on the International Sale of Goods. The Original Revision of Article 2 complied with these recommendations both by explicit provision and by adding to Article 2 statutory language that would subject the availability of all Article 2 damage remedies to the compensation and mitigation principles.

It is thus both extraordinary and appalling that the Drafting Committee for the Current Revision has, without open discussion and without call from any recognized constituency, proposed a revised Article 2 that takes the completely different tack of allowing the aggrieved party freedom to elect his damage remedy, regardless of whether the recovery based thereon exceeds his actual loss and regardless of whether that recovery could have been, in whole or in part, reasonably avoided by a proper resale or cover. Unquestionably, this tack violates firm assurances by the Conference on Commissioners that positive gains from the Original Revision would be preserved and that no change in current law would be forthcoming without compelling reason being shown. Indeed, provisions in the Original Revision for primacy of the remedies of resale and cover over damages based on market price were designated by the Executive Director of the Conference as specific examples of positive and noncontroversial gains that would be preserved.

Conceivably, this dramatic departure is the inadvertant result of the Drafting Committee's inattention rather than a reflection of its actual intention. The process of the Current Revision from inception until the July, 2000 draft has been less than one year, during which time the Committee as a whole has concerned itself primarily with major controversial issues that have been perceived by the Conference to threaten the uniform enactability of Article 2. Article 2 remedies issues, at least until now, have been largely uncontroversial. This lack of attention, however, has provided fertile ground for the primary drafters of the Current Revision, Professors Gabriel and Henning, to make subtle, albeit iconoclastic, changes in the Article 2 remedy structure. These changes are pervasive and intended by the drafters. They are consistent with the published writings of both Gabriel and Hennings. They have been continued in successive drafts of the Current Revision over strenuous oral and written objection from representatives of the ABA Subcommittee. Indeed, at one time the commentary to the Current Revision candidly trumpeted both the intent to overrule all case law holding that a seller who resells may not recover damages based on market price and the intent to permit a seller who could have avoided loss by resale to, nevertheless, recover for that loss by basing damages on market price.

Whether the drafters' attempt is perceived as unseemly arrogance or unconventional wisdom, it is doomed to fail and perhaps to cause failure.
with it of the Conference's goal of achieving uniform enactment of Revised Article 2. It is a certainty that the state legislatures will not be receptive to adopting a radical statutory scheme that undermines the basic damage principles of compensation and mitigation. They will not be willing to put their own local law at variance with accepted rules of international commercial law as well as with their own contract damage rules in non-Article 2 cases. State legislatures will undoubtedly view askance recommendations for radical change produced by the rushed process of the Current Revision over the recommendations of the Original Revision that resulted from a decade-long deliberate and careful review.

Although the changes in the Article 2 remedies structure sought to be accomplished by the current revision are irresponsible and ill advised, their flaws can be easily corrected. The following simple steps should be taken. The commentary to Section 2-713 should be reinserted so as to provide that damages based on market price are unavailable to the extent the buyer has covered. A similar comment should be included in Section 2-708 regarding a seller who has properly resold so as to properly limit new comment 10 to Section 2-706 of the Current Revision which "expresses the policy that resale is not a mandatory remedy for the seller" and would allow the seller freedom "always ... to choose between resale and damages" based on market price. Finally, and most importantly, the new revision should follow the recommendations of the Article 2 Study Group and the ABA Task Force by revising Section 2-701 so as to state clearly the basic remedial principles that should govern Article 2. The Original Revision complied with these recommendations in its Sections 2-801 and 2-803. Those provisions should be made part of Section 2-701 of the Current Revision, which might then read as follows:

SECTION 2-701. REMEDIES IN GENERAL.

The remedies of a seller, buyer, or other protected person under this article are subject to the following general limitations and principles.

(a) In accordance with Section 1-106, the remedies provided in this article must be liberally administered with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed.

(b) Unless the contract provides for liquidated damages enforceable under Section 2-718 or a limited remedy enforceable under Section 2-719, an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances. The burden of establishing that reasonable measures under the circumstances were not taken is on the party in breach.

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury, nor may a party recover damages in excess of those
allowed by subsection (a) or damages that could have been reason-
ably avoided as provided by subsection (b).

(d) This article does not impair a remedy for breach of an obligation or
promise collateral or ancillary to a contract for sale.287

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287. The commentary for Revised Section 2-701 should be taken directly from that of
Section 2-803 of the Original Revision, which reads in pertinent part as follows.

**COMMENT**

1. **SOURCE:** Section 1-106, Former Section 2-701.

2. **COMPARISON WITH FORMER ARTICLE 2.** This section, except for subsec-
tion (d), is new. Subsection (d) makes no substantive changes from former
Section 2-701.

3. **COMPENSATION OF EXPECTATION INTEREST.** Subsection (a) is derived
from the statement of remedial policy in Section 1-106. This remedial policy
is designed to allow an aggrieved party to recover the value of its expectation
interest or the benefit of the bargain. See Restatement (Second) of Con-
tracts § 344. The specific remedies in [this article] are designed to compen-
sate the aggrieved party based upon its expectation interest.

4. **MUTIGATION PRINCIPLE.** Subsection (b) contains a statement of the miti-
gation principle derived from the Restatement (Second) of Contracts,
section 350 (1932). An aggrieved buyer who has not accepted the goods has
two alternative measures of damages, the cover price minus the contract
price (Section [2-712]) or the market price minus the contract price (Section
[2-713]). The aggrieved buyer is not required to cover although the state-
ment of the mitigation principle in subsection (b) may preclude the recovery
of loss that could have been prevented if the aggrieved buyer could have
reasonably avoided that loss by making a cover transaction. If the buyer
covers under Section [2-712] by reasonably and in good faith making a
purchase in substitution for the goods from the seller without undue delay,
the buyer has appropriately mitigated under the principle of this section and
may recover its damages based upon the cover price even if the market price
based measurement would result in a smaller damage award.

An aggrieved seller has three alternative damage measurements, the con-
tract price minus the resale price (Section [2-706]), the contract price minus
the market price (Section [2-708(a)]) or lost profit and reliance expenditures
(Section [2-708(b)]). The seller is not required to resell goods. Again, the
mitigation principle of subsection (b) may prevent the seller from recovering
the part of the loss that could have been prevented if the seller could have
reasonably sold the goods. If the seller does resell and complies with the
requirements of Section [2-706], the seller has appropriately mitigated the
loss and may recover its damages based upon the resale price even if the
market price based measurement would result in a smaller damage award.

5. **CUMULATIVE REMEDIES.** Subsection (c) declares that the rights and reme-
dies are cumulative. This statement accords with the former Article 2’s rejec-
tion of a policy of an election of remedies subject to a preclusion of double
recovery for the same harm. . . . Whether the exercise of one remedy may
preclude use of another remedy depends upon whether the use of both reme-
dies violates the principles stated in . . . this section. Any choice among re-
medial options must be made in good faith.

Under former Article 2, if the buyer had covered by buying goods in sub-
stitution of the ones due the seller in good faith, reasonably and without
unreasonable delay, the buyer must use the cover section to measure its dam-
ages and may not use the section on market price to measure damages. See Com-
monwealth Edison C. v. Allied Chemical Nuclear Products Inc., 684 F.
Supp. 1434, 1435 (N.D. Ill. 1984) (“Official comment 5 to Section 2-713 indi-
cates that when a party covers, his damages are measured by Section 2-712,
not Section 2-713.”); Dickson v. Dehli Seed Co., 760 S.W.2d 382, 389 (Ct.
App. Ark. 1988) (“Because appellee chose to purchase substitute goods its
remedy was limited to that of Section 2-712 unless the purchase did not con-
stitute ‘cover.’”); Neibert v. Schwenn Agri-Production Corp., 579 N.E.2d 389,
These basic remedial principles deserve specific statement in Article 2. Provision for them was a positive gain of the Original Revision. The principles reflect the better reasoned cases under current Article 2. Expressly subjecting the various damage remedies to them, ensures that the case law under Article 2 will continue to be consistent with the basic damage principles of the common law of contract and with the preferred rules of international sales law.²⁸⁸

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²⁸⁸ JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 6.4, subsection c (4th ed. 1995) (advocating that a cover that qualifies under Section 2-712 should preclude the buyer from recovering a greater amount by using the market price formula of Section 2-713). Similarly, if the seller resold the goods in compliance with the section on recovering damages based upon the resale, some courts have precluded the seller from obtaining damages based upon the market price measurement. See Sharp Electronics Corp. v. Lodgistix, Inc., 802 F. Supp. 370, 380-81 (D. Kan. 1992) (holding that seller could not use market price damages when it had resold the goods); WHITE & SUMMERS, UNIFORM COMMERCIAL CODE, § 7-7 (4th ed. 1995) (advocating that a resale complying with the requirements of Section 2-706 should preclude seller from recovering a larger amount by using the market price formula of Section 2-708(1)). This section does not change the results of these cases under former Article 2.

6. COLLATERAL OR ANCILLARY PROMISES OR OBLIGATIONS. Subsection (d) is the same as former Section 2-701.

7. INTERNATIONAL SALES. CIGS Articles 74 through 77 contain statements applicable to damage recoveries of a seller and a buyer. Of note is the endorsement of the expectancy interest, Article 74, the preference for using the substitute transaction as the measure for damages, Article 75, and a statement of a mitigation principle, Article 77.

Surely, none of this proposed text and commentary for Revised Section 2-701 is in any sense controversial if indeed the goals are to continue current law unless good reason is shown for change and to preserve positive gains from the Original Revision.

²⁸⁸ A final major change proposed by the Current Revision that should be rejected out of hand is the deletion of the uncertainty requirement for liquidated damages in Section 2-718. See supra the discussion in the text following note 251.
APPENDIX A
CURRENT REVISED ARTICLE 2
NOVEMBER 2000 DRAFT

SECTION 2-701. REMEDIES FOR BREACH OF COLLATERAL
CONTRACTS NOT IMPAIRED. Remedies for breach of any obliga-
tion or promise collateral or ancillary to a contract for sale are not im-
paired by the provisions of this article.

SECTION 2-703. SELLER'S REMEDIES IN GENERAL.

(a) A breach of contract by the buyer includes the buyer’s wrongful
rejection or wrongful attempt to revoke acceptance of goods, wrongful
failure to perform a contractual obligation, failure to make a payment
when due, or repudiation.

(b) If the buyer is in breach of contract the seller may to the extent
provided for by [the Uniform Commercial Code]:

(1) withhold delivery of the goods;
(2) stop delivery of the goods under Section 2-705;
(3) proceed under Section 2-704 with respect to goods unidentified to
the contract or unfinished;
(4) reclaim the goods under Section 2-507(b) or 2-702(b);
(5) cancel;
(6) resell and recover damages under Section 2-706;
(7) recover damages for nonacceptance or repudiation under Section
2-708(a);
(8) recover lost profits under Section 2-708(b);
(9) recover the price under Section 2-709;
(10) obtain specific performance under Section 2-716;
(11) recover liquidated damages under Section 2-718;
(12) in other cases, recover damages in any manner that is reasonable
under the

circumstances.

(c) If a buyer becomes insolvent, the seller may:

(1) withhold delivery under Section 2-702(a);
(2) stop delivery of the goods under Section 2-705; (and/or)
(3) reclaim the goods under Section 2-702(b).

SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO
THE CONTRACT NOTWITHSTANDING BREACH OR TO SAL-
VAGE UNFINISHED GOODS.

(a) An aggrieved seller under Section 2-703 may:

(1) identify to the contract conforming goods not already identified if
at the time the

seller learned of the breach they are in the seller’s possession or con-
trol; (and/or)
(2) treat as the subject of resale goods that have demonstrably been intended for the particular contract even though those goods are unfinished.

(b) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

SECTION 2-706. SELLER’S RESALE INCLUDING CONTRACT FOR RESALE.

(a) In an appropriate case involving breach by the buyer, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the contract price and the resale price together with any incidental and consequential damages provided under Section 2-710, but less expenses saved in consequence of the buyer’s breach.

(b) Except as otherwise agreed a resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(c) Where the resale is at private sale the seller must give reasonable notification of an intention to resell.

(d) Where the resale is at public sale:

(1) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind;

(2) the sale must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods that are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale;

(3) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(4) the seller may buy.

(e) A purchaser that buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(f) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller or a buyer that has right-
fully rejected or justifiably revoked acceptance must account for any excess over the amount of any security interest under Section 2-711(c).

(g) Failure of a seller to resell within this section does not bar the seller from any other remedy.

SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR REPUDIATION.

(a) Subject to subsection (b) and to Section 2-723:

(1) the measure of damages for nonacceptance by the buyer is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided under Section 2-710, but less expenses saved in consequence of the buyer's breach; and

(2) the measure of damages for repudiation by the buyer is the difference between the contract price and the market price at the place for tender at the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time stated in paragraph (1), together with any incidental or consequential damages provided under Section 2-710, but less expenses saved in consequence of the buyer's breach.

(b) If the measure of damages provided in subsection (a) or in Section 2-706 is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental and consequential damages provided under Section 2-710.

SECTION 2-709. ACTION FOR THE PRICE.

(a) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental or consequential damages provided under Section 2-710, the price of:

(1) goods accepted;

(2) conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(3) goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(b) A seller that sues for the price must hold for the buyer any goods that have been identified to the contract and are still in the seller's control except that if resale becomes possible the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold.

(c) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated, a seller that is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under Section 2-708.
SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(a) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

(b) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting has reason to know and which could not reasonably be prevented by resale or otherwise.

(c) In a consumer contract, a seller may not recover consequential damages from a consumer.

SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST.

(a) A breach of contract by the seller includes the seller's wrongful failure to deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or performance, or repudiation.

(b) If the seller is in breach of contract under subsection (a) the buyer may to the extent provided for by [the Uniform Commercial Code]:

(1) in the case of rightful cancellation, rightful rejection or justifiable revocation of acceptance recover so much of the price as has been paid;

(2) deduct damages from any part of the price still due under Section 2-717;

(3) cancel;

(4) cover and have damages under Section 2-712 as to all goods affected whether or not they have been identified to the contract;

(5) recover damages for nondelivery or repudiation under Section 2-713;

(6) recover damages for breach with regard to accepted goods or breach with regard to a remedial promise under Section 2-714;

(7) recover identified goods under Section 2-502;

(8) obtain specific performance or obtain the goods by replevin or the like under Section 2-716;

(9) recover liquidated damages under Section 2-718;

(10) in other cases, recover damages in any manner that is reasonable under the circumstances.

(c) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller under Section 2-706.
SECTION 2-712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS.

(a) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(b) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages provided under Section 2-715 but less expenses saved in consequence of the seller's breach.

(c) Failure of the buyer to effect cover within this section does not bar the buyer from any other remedy.

SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION.

(a) Subject to Section 2-723, if the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance the following rules apply:

(1) The measure of damages in the case of wrongful failure to deliver by the seller or rightful rejection or justifiable revocation of acceptance by the buyer is the difference between the market price at the time for tender under the agreement and the contract price together with any incidental and consequential damages provided under Section 2-715, but less expenses saved in consequence of the seller's breach.

(2) The measure of damages for repudiation by the seller is the difference between the market price at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time stated in paragraph (1), and the contract price together with any incidental or consequential damages provided under Section 2-710, but less expenses saved in consequence of the seller's breach.

(b) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO ACCEPTED GOODS.

(a) Where the buyer has accepted goods and given notification under Section 2-607(c) the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(b) The measure of damages for breach of a warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
(c) In a proper case any incidental and consequential damages provided under Section 2-715 may also be recovered.

SECTION 2-715. BUYER’S INCIDENTAL AND CONSEQUENTIAL DAMAGES.
(a) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
(b) Consequential damages resulting from the seller’s breach include:
(1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(2) injury to person or property proximately resulting from any breach of warranty.

SECTION 2-716. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR THE LIKE.
(a) Specific performance may be decreed where the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party’s sole remaining contractual obligation is the payment of money.
(b) 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.
(c) The buyer has a right of replevin or the like for goods identified to the contract if after reasonable effort the buyer 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.
(d) The buyer’s right under subsection (c) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

SECTION 2-717. DEDUCTION OF DAMAGES FROM THE PRICE.
The buyer on notifying the seller of an intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

SECTION 2-718. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS.
(a) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual harm caused by the breach and, in a consumer contract, in
addition the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the enforceability of a term that limits but does not liquidate damages.

(b) Where the seller justifiably withholds delivery of goods or stops performance because of the buyer’s breach or insolvency, the buyer is entitled to restitution of any amount by which the sum of the buyer’s payments exceeds the amount to which the seller is entitled by virtue of terms liquidating the seller’s damages in accordance with subsection (a).

(c) The buyer’s right to restitution under subsection (b) is subject to offset to the extent that the seller establishes:

(1) a right to recover damages under the provisions of this article other than subsection (a); and

(2) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(d) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (b); but if the seller has notice of the buyer’s breach before reselling goods received in part performance, the resale is subject to Section 2-706.

SECTION 2-719. CONTRACTUAL MODIFICATION OR LIMITATION OF REMEDY.

(a) Subject to subsections (b), (c), and (d) and Section 2-718:

(1) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(2) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in [the Uniform Commercial Code].

(c) 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.

SECTION 2-720. EFFECT OF “CANCELLATION” OR “RESCISSION” ON CLAIMS FOR ANTECEDENT BREACH.

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.
SECTION 2-721. REMEDIES FOR FRAUD.
Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

SECTION 2-722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS. Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

(1) a right of action against the third party is in either party to the contract for sale that has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party that either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(2) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, the party plaintiff’s suit or settlement is, subject to its own interest, as a fiduciary for the other party to the contract; and

(3) either party may with the consent of the other sue for the benefit of a person that it may concern.

SECTION 2-723. PROOF OF MARKET PRICE; TIME AND PLACE.
(a) If evidence of a price prevailing at a time or place described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place that in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(b) Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until that party has given the other party such notice as the court finds sufficient to prevent unfair surprise.

SECTION 2-724. ADMISSIBILITY OF MARKET QUOTATIONS.
Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers, periodicals or other means of communication in general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.
SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS.

The remedies of the seller, buyer, and other protected persons under this article are subject to the general limitations and principles stated in Sections 2-802 through 2-814.

SECTION 2-802. BREACH OF CONTRACT; PROCEDURES.

If a party is in breach of a contract, the party seeking enforcement:

(1) has the rights and remedies under this article and, except as limited by this part, under the agreement;

(2) may reduce its claim to judgment or otherwise enforce the contract by any available administrative or judicial procedure, or the like, including arbitration or other dispute-resolution procedure if agreed to by the parties; and

(3) may enforce the rights granted by and remedies available under other law.

SECTION 2-803. REMEDIES IN GENERAL.

(a) In accordance with Section 1-106, the remedies provided in this article must be liberally administered with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed.

(b) Unless the contract provides for liquidated damages enforceable under Section 2-809 or a limited remedy enforceable under Section 2-810, an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances. The burden of establishing a failure to take reasonable measures under the circumstances is on the party in breach.

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury.

(d) This article does not impair a remedy for breach of any obligation or promise collateral or ancillary to a contract for sale.

SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL.

Subject to Section 2-803, if there is a breach of contract the aggrieved party may recover compensation for the loss resulting in the ordinary course from the breach as determined under Sections 2-815 through 2-829 or as determined in any other reasonable manner, together with incidental damages and consequential damages, less expenses saved as a result of the breach.

SECTION 2-805. INCIDENTAL DAMAGES.

Incidental damages resulting from breach of contract include compensation for any commercially reasonable charges, expenses, or commissions incurred with respect to:
(1) inspection, receipt, transportation, care, and custody of identified goods that are the subject of the breach;
(2) stopping delivery or shipment;
(3) effecting cover, return, or resale of the goods;
(4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and
(5) otherwise dealing with the goods or effectuating other remedies after the breach.

SECTION 2-806. CONSEQUENTIAL DAMAGES.
Consequential damages resulting from a breach of contract include compensation for:
(1) any loss resulting from the aggrieved party's general or particular requirements and needs of which at the time of contracting the party in breach had reason to know and which could not reasonably be prevented; and
(2) injury to person or property proximately resulting from any breach of warranty.

SECTION 2-807. SPECIFIC PERFORMANCE.
(a) A court may enter a decree for specific performance if the goods or the agreed performance of the party in breach of contract are unique or in other proper circumstances. In a contract other than a consumer contract, a court may enter a decree for specific performance if the parties have agreed to that remedy. However, even if the parties agree to specific performance, a court shall not enter a decree for specific performance if the breaching party's sole remaining contractual obligation is the payment of money.
(b) The decree for specific performance under this section may include terms and conditions as to payment of the price, damages, or other relief the court considers just.

SECTION 2-808. CANCELLATION; EFFECT.
(a) An aggrieved party may cancel a contract if there is a breach of contract under Section 2-701, or in the case of an installment contract, a breach of the whole contract under Section 2-710(c), unless there is a waiver of the breach or of the right to cancel under Section 2-702 or there is a right to cure the breach under Section 2-709.
(b) Cancellation is not effective until the canceling party notifies the party in breach of contract of the cancellation. Upon cancellation of a contract, all obligations that are still executory on both sides are discharged, but any right based on prior breach or performance survives and the canceling party retains any remedy for breach of the whole contract or any unperformed balance.
(c) Unless a contrary intention clearly appears, language of cancellation, rescission, or avoidance of the contract or similar language is not a renunciation or discharge of any claim in damages for an antecedent breach of contract.
SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.

(a) Damages for breach of contract by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the difficulties of proof of loss in the event of breach and either the actual loss or the then anticipated loss caused by the breach. If a term liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the remedies provided in this article. Section 2-810 determines the enforceability of a term that limits but does not liquidate damages.

(b) If the seller justifiably withholds delivery of goods or stops performance because of the buyer’s breach of contract or insolvency, the buyer is entitled to restitution of any amount by which the sum of payments exceeds the amount to which the seller is entitled under a term liquidating damages in accordance with subsection (a).

(c) The buyer’s right to restitution under subsection (b) is subject to set off to the extent that the seller establishes a right to recover damages under the provisions of this article other than subsection (a) and the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(d) If the seller has received payment in goods, their reasonable value or the proceeds of their resale are payments for the purposes of subsection (b). However, if the seller has notice of the buyer’s breach before reselling goods received in part performance, the resale is subject to the requirements of Section 2-819.

SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.

(a) Subject to subsections (b) and (c) and Section 2-809, the following rules apply:

(1) An agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, such as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.

(2) Resort to an agreed remedy under paragraph (1) is optional. However, if the parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

(3) An agreed remedy under this section may create a remedial promise.

(b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose, the following rules apply:

(1) In a contract other than a consumer contract, the aggrieved party may pursue all remedies available under this article. However, an agreement expressly providing that consequential damages are excluded, including those resulting from the failure to provide the exclusive or limited remedy, is enforceable to the extent permitted under subsection (c).
(2) In a consumer contract, an aggrieved party may reject the goods or revoke acceptance and may pursue all remedies available under this article including the right to recover consequential damages, despite any term purporting to exclude or limit that remedy.

(c) Subject to subsection (b), consequential damages may be limited or excluded by agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is presumed to be unconscionable but limitation of damages where the loss is commercial is not.

SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach of contract. Rescission or a claim for rescission of a contract for sale or rejection or return of the goods does not bar and is not inconsistent with a claim for damages or other remedy.

SECTION 2-812. PROOF OF MARKET PRICE.

(a) If evidence of a price prevailing at a time or place described in this article is not readily available, the following rules apply:

(1) The price prevailing within any reasonable time before or after the time described may be used.

(2) The price prevailing at any other place that in commercial judgment or usage of trade is a reasonable substitute for the one described may be used, making proper allowance for any cost of transporting the goods to or from the other place.

(3) Evidence offered by one party of a relevant price prevailing at a time or place other than one described in this article is not admissible unless the party has given the other party sufficient notice to prevent unfair surprise.

(b) If the prevailing price or value of any goods regularly bought and sold in any established commodity market is in dispute, reports in official publications or trade journals or in newspapers, periodicals, or other means of communication in general circulation and published as the reports of that market are admissible in evidence. The circumstances of the preparation of such a report may affect the weight of the evidence but not its admissibility.

SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS.

If a third person deals with goods identified to a contract for sale and causes actionable injury to the goods, the parties to the contract have the following rights and remedies:

(1) A party with title to, or a security interest, special property interest, or insurable interest in, the goods has a right of action against the third person.
(2) If the goods have been destroyed or converted by a third person, the party that had the risk of loss under the contract for sale, or since the injury has assumed that risk as against the other party, also has a right of action against the third person.

(3) If at the time of the injury the plaintiff does not have the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, the plaintiff's right of action or settlement is, subject to the plaintiff's interest, as a fiduciary for the other party to the contract.

(4) Either party, with the consent of the other, may maintain an action for the benefit of a concerned party.

SECTION 2-815. INDEX TO SELLER'S REMEDIES.

(a) If a buyer is in breach of the contract under Section 2-701, or in breach of the whole contract under Section 2-710(c), the seller, as provided in the following sections, may:

(1) withhold delivery of the goods under Section 2-816(a);
(2) stop delivery of the goods under Section 2-818(b);
(3) proceed with respect to goods still unidentified to the contract or unfinished under Section 2-817;
(4) reclaim the goods under Section 2-816(b)(2);
(5) obtain specific performance under Section 2-807 or recover the price under Section 2-822;
(6) resell the goods and recover damages under Section 2-819;
(7) recover damages for repudiation or nonacceptance under Section 2-821;
(8) recover incidental and consequential damages under Sections 2-805 and 2-806;
(9) cancel the contract under Section 2-808;
(10) recover liquidated damages under Section 2-809;
(11) enforce limited remedies under Section 2-810; or
(12) recover damages under Section 2-804;

(b) If a buyer becomes insolvent but is not in breach, the seller may:

(1) withhold or stop delivery of the goods under Section 2-818; or
(2) reclaim the goods under Section 2-816(b)(1).

SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS.

(a) If the buyer has breached the contract, an aggrieved seller may:

(1) identify to the contract conforming goods not already identified if they are in the seller's possession or control at the time the seller learned of the breach of contract; and
(2) resell goods that are shown to have been intended for the particular contract, even if those goods are unfinished.
(b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, may complete the manufacture and wholly identify the goods to the contract, cease manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner.

SECTION 2-819. SELLER'S RESALE.

(a) If the buyer has breached a contract, the seller may resell the goods concerned that are in the seller's possession or control. If the resale is made in good faith, within a commercially reasonable time, and in a commercially reasonable manner, the seller may recover the contract price less the resale price together with any consequential and incidental damages, less expenses saved as a result of the breach.

(b) A resale:

(1) may be at a public auction or at a private sale which includes a private auction, a sale by one or more contracts to sell, or an identification to an existing contract of the seller;

(2) may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner, time, place, and terms, must be commercially reasonable; and

(3) must be reasonably identified as referring to the breached contract, but the goods need not be in existence or have been identified to the contract before the breach.

(c) If the resale is at a public auction, the following rules apply:

(1) Only identified goods may be sold unless there is a recognized market for the public sale of futures in goods of the kind.

(2) The resale must be made at a usual place or market for public sale if one is reasonably available. Except in the case of goods that are perishable or that threaten to decline in value speedily, the seller shall give the buyer reasonable notice of the time and place of the resale.

(3) If the goods are not to be within the view of persons attending the sale, the notice of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders.

(4) The seller may buy the goods.

(d) A good-faith purchaser at a resale takes the goods free of any rights of the original buyer, even if the seller fails to comply with this section.

(e) The seller is not accountable to the buyer for any profit made on a resale. However, a person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked acceptance shall account for any excess over the amount of the claim secured by the security interest provided in Section 2-829(b).

(f) A seller that fails to resell in the manner required under this section is not barred from any other available remedy.
SECTION 2-821. SELLER'S DAMAGES FOR BREACH BASED ON MARKET PRICE, LOST PROFIT, OR RELIANCE.

(a) If the buyer breaches a contract, the seller may recover damages based upon market price, together with any incidental and consequential damages, less expenses saved as a result of the breach, as follows:

(1) Except as otherwise provided in paragraph (2), the measure of damages is the contract price less the market price of comparable goods at the time and place for tender of delivery.

(2) In the case of a repudiation governed by Section 2-712, the market price of comparable goods is to be determined at the place for tender of delivery and at the expiration of a commercially reasonable period after the seller learned of the repudiation, but no later than the time stated in paragraph (1). The time period includes a commercially reasonable time for awaiting performance under Section 2-712 and for obtaining any substitute performance.

(b) If the measure of damages under Section 2-819 or 2-821(a) are inadequate to put the seller in as good a position as if the other party had fully performed, the seller may, together with incidental and consequential damages, recover:

(1) lost profits, including reasonable overhead, resulting from the breach of contract determined in any reasonable manner; and

(2) reasonable expenditures made in preparing for or performing the contract.

SECTION 8-222. ACTION FOR PRICE.

(a) If the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental and consequential damages, the price of:

(1) goods accepted;

(2) conforming goods lost or damaged after risk of their loss has passed to the buyer but, if the seller has retained or regained control of the goods, the seller may recover the price only if the loss or damage has occurred within a commercially reasonable time after the risk of loss has passed to the buyer; and

(3) goods identified to the contract, if the seller is unable after a reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that this effort would be unavailing.

(b) A seller that remains in control of the goods and sues for the price shall hold for the buyer any goods identified to the contract. If the seller is entitled to the price and resale becomes possible, the seller may resell the goods under Section 2-819 at any time before the collection of the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the judgment entitles the buyer to any goods not resold.

(c) If the buyer has breached a contract, a seller that has sued for but is held not to be entitled to the price under this section may still obtain damages under Section 2-821.
SECTION 2-823. INDEX TO BUYER'S REMEDIES.

If the seller is in breach of the contract under Section 2-701, or in breach of the whole contract under Section 2-710(c), the buyer, as provided in the following sections, may:

1. recover the price paid under Section 2-829(a) or deduct damages from price unpaid under Section 2-828;
2. cancel the contract under Section 2-808;
3. cover and obtain damages under Section 2-825;
4. recover damages based on market price under Section 2-826;
5. recover damages for breach with regard to accepted goods under Section 2-827;
6. recover identified goods under Section 2-824;
7. obtain specific performance under Section 2-807;
8. enforce a security interest under Section 2-829(b);
9. recover incidental and consequential damages under Sections 2-805 and 2-806;
10. recover liquidated damages under Section 2-809;
11. enforce limited remedies under Section 2-810; or
12. recover damages under Section 2-804.

SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.

(a) If the seller breaches a contract, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to procure comparable goods to substitute for those due from the seller.

(b) A buyer that covers in the manner required by subsection (a) may recover damages measured by the cost of covering less the contract price, together with any incidental or consequential damages, less expenses saved as a result of the seller's breach of contract.

(c) A buyer that fails to cover in a manner required under subsection (a) is not barred from any other available remedy.

SECTION 2-826. BUYER'S DAMAGES FOR BREACH BASED ON MARKET PRICE.

(a) If the seller breaches a contract, the buyer may recover damages based upon the market price less the contract price, together with any incidental and consequential damages, less expenses saved as a result of the breach, as follows:

1. Except as otherwise provided in paragraph (2), the market price for comparable goods is determined at the time for tender of delivery or when the buyer learned that the tender of delivery did not occur, whichever is later.

2. In the case of a repudiation governed by Section 2-712, the market price of comparable goods is determined at the expiration of a commercially reasonable period after the buyer learned of the repudiation, but no
later than the time stated in paragraph (1), less the contract price. The
time period includes the commercially reasonable time for awaiting per-
formance under Section 2-712 and any further commercially reasonable
time for obtaining substitute performance.

(b) Market price is determined at the place for tender of delivery. However, in cases of rejection after arrival or revocation of acceptance, market price is determined at the place of arrival.

SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING ACCEPTED GOODS.

(a) A buyer that has accepted goods and not justifiably revoked ac-
ceptance and that has given any notice required pursuant to Section 2-
707(c)(1) may recover as damages for any nonconforming tender the loss
resulting in the ordinary course of events from the seller's breach of con-
tract as determined in any reasonable manner.

(b) Damages for breach of a warranty of quality may be measured by
the value of the goods as warranted, less the value of the goods accepted
at the time and place of acceptance, unless special circumstances show
proximate damages of a different amount.

(c) Damages for breach of a remedial promise may be measured by
the value of the promised remedial performance, less the value of any
remedial performance made.

(d) A buyer may also recover incidental and consequential damages.

SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE.

The buyer, after notifying a seller of an intent to do so, may deduct all
or any part of the damages resulting from any breach of contract from
any part of the contract price still due under the same contract.

SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST.

(a) If the seller has breached the contract, the buyer may recover any
payments made on the price of goods that are not accepted.

(b) On rightful rejection or justifiable revocation of acceptance, the
buyer has a security interest in goods in the buyer's possession or control
for any payments made on their price and any expenses reasonably in-
curred in their inspection, receipt, transportation, care, and custody. The
buyer may hold the goods and resell them in the manner provided for an
aggrieved seller under Section 2-819, but the buyer shall give the seller
reasonable notice of the intended resale and must account to the seller
for any excess of the proceeds of resale over the amount of the security
interest created by this subsection.