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A Look Back at the Future of UCC Damages Remedies

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Strategic Behavior and Market Price Damages

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"What's past is prologue."
— William Shakespeare**

ABSTRACT

Article Two of the Uniform Commercial Code stands today as a living testament to Karl Llewellyn and the many other brilliant and dedicated lawyers from well over a half century ago who participated actively in its drafting. Of the Code's several articles, Article Two is particularly noteworthy because it alone has survived to the present day without significant substantive amendment. That longevity is most remarkable given the ensuing fifty plus years of expanded knowledge, technological advance, and innovative changes in fundamental business practice that have occurred in our ever-evolving economy. At its inception, much of Article Two represented novel departure from the archaic property-based concepts of its predecessor, the Uniform Sales Act. But nothing was more so than Article Two's promulgation of a broad array of remedy options for both sellers and buyers that were designed largely either to replace or subjugate the anachronistic but ubiquitous market price damages remedy, a primitive relic of the Langdellian-like formalism that had previously permeated sales law.

Within little more than a short decade and guided by the fundamental compensation policy articulated in § 1-305, the courts established a readily accessible set of rules for applying the various remedies by focusing largely on the position relative to contract performance in which the parties found themselves at the time of breach. From early on, the courts left little for ongoing debate, the major exception being arguments from a small group of scholars and a diminishing number of courts that a recovery of market price damages should always be allowed to either party plaintiff regardless

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** "The Tempest," Act II Scene 1.

of the actual loss suffered from the breach and regardless of whether the aggrieved party could reasonably have avoided the loss.

This article addresses the three categories of cases in which a claim has been made under § 2-708 or § 2-713 for market price damages that exceeds the actual damages that were reasonably unavoidable. The first category involves those in which the plaintiff, a middleman, has hedged a supply contract with a forward resale contract and either his supplier or the forward contract buyer has breached. The second category addresses those situations in which the plaintiff seeks market price damages but has not taken advantage of a reasonable opportunity to mitigate damages by a resale or cover. The third category addresses those situations in which the plaintiff seeks a recovery of market price damages that were actually avoided by a resale or cover. In rejecting the formalistic approach of market price advocates who favor recoveries of windfall damages, the author challenges both prongs of analysis that the advocates typically profer to justify their arguments: first, the notion that there was once a widely-accepted pre-Code principle that forced an election of damages upon sellers who resold goods post breach; and second, the extrapolation by the advocates of broad and artful interpretations of the Article Two drafting history.

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I. IN THE BEGINNING

THOUGH over a half-century has passed, other than for minor tinkering the 1962 version of Article 2 of the Uniform Commercial Code remains unchanged today. It has proved to be far more successful than its predecessor, the Uniform Sales Act, in its longevity, in the number of states adopting it, and, in its acceptance by the courts.[1] It is well known that the courts commonly ignored Sales Act provisions in writing their decisions, even in those states that had adopted the Act.[2] Nevertheless, it was most surprising that of the multitude of pre-UCC sales remedies cases consulted for this article so few courts even made reference to the old Act, a tribute no doubt to the minimalist, archaic, and stilted damage remedy structure that it had to offer.

Article 2 was relatively iconoclastic in its departures from prior sales law in three general respects. First, its provisions were written with comparatively broad strokes that left much discretion to the courts in applying them. Second, and closely related to the first, many of its provisions were imbued with obligations of good faith and commercial reasonableness that were designed to accommodate changes and fluctuations in how commercial parties interact in their contracting.[3] Third, and most important, Article 2 completely divorced itself from formalistic principles of property law that largely governed how the Sales Act provisions applied, particularly those that made rights and duties of parties to contracts dependent upon often mysterious notions of passing of title.[4] The Sales Act was as much property law as contract law. Article 2 is commercial law.

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1. The Uniform Sales Act was promulgated in 1906. By 1941, it had been enacted in only 34 states. Article 2 of the Uniform Commercial Code has been enacted in 49 states, passed over only by Louisiana. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958).

2. As Grant Gilmore, Reporter for the Code's Article 9, once observed: "Nothing is less common in the Sales Act case law than a careful analysis of the actual statutory text." GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY § 3.6, at 101 (2d ed. 1975).

3. In addition to the many specific provisions in Article 2 requiring the exercise of good faith and commercial reasonableness, § 1-103 states that a fundamental underlying purpose of the UCC is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." U.C.C. § 1-103 (AM. LAW INST. & UNIF. LAW COMM'N 2012). *See also* U.C.C § 1-304 (imposing the requirement of good faith on the performance and enforcement of "every contract or duty" governed by the UCC). Further, § 1-302 allows the parties wide latitude to contract around UCC provisions to accommodate their reasonable business practices.

4. Hence Llewellyn:

> I do not suggest the elimination of the Title-concept. It has its uses. But it should be made to serve merely as the general residuary clause. It should not give forth the norm for decision in each case when no cogent reason is shown to the contrary. Rather should it serve as a better-than-nothing, when inquiry has failed to reveal any other line of solution adapted to the problem at hand.

K. N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L. Q. REV. 159, 170 (1938). Replace the words "the Title-concept" with "market price damages," and Llewellyn would probably have said the same. *See infra* note 8 and accompanying text.

The new Article 2 included a panorama of damage remedies that was breathtaking when juxtaposed with the old sales law, both Sales Act and common law. Several of these new remedies had no pre-Code analogue, most certainly not a uniform one. The most important of these were § 2-706's resale remedy for sellers and § 2-712's cover remedy for buyers. These two remedies would now allow the aggrieved party to have damages measured by actual substitute transactions that he had found to replace the breached contract. It speaks volumes about the primitiveness of pre-Code law that courts largely ignored real market substitutes in favor of awards based on hypothetical transactions at a market price that almost always failed to emulate the actual transactions they were intended to foreshadow.[5]

This shift in focus was hardly surprising. Karl Llewellyn, the Chief Reporter for the Uniform Commercial Code and the author of Article 2, was among the leading exponents of the "Legal Realism" movement that reshaped American law through most of the first half of the twentieth century.[6] Llewellyn and Arthur Linton Corbin,[7] another prominent Realist, were the two legal scholars most responsible for reformulating contract and commercial law from the classical theory of Holmes and Williston to the law we know today. Since this article often refers to the drafting history of Article 2, the core legal philosophy that framed the outlook of its primary drafter deserves some emphasis.

Any precision in defining the Realist movement will always be elusive because of the varied and nuanced approaches of the multitude of proponents grouped loosely into the category dubbed "Realists." Its overarching characteristic, however, was a wholesale rejection of the formalism brought from English law in favor of law that would accommodate and work in context with an ever-changing American society.[8] To Llewellyn, therefore, commercial law as theory could make no sense unless either it

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5. The specific requirements for validating and applying these remedies will be referred to as their relevance arises in the discussion below. It suffices for most purposes to understand simply that the resale remedy measures damages by the breached contract price less the amount obtained by the seller from a proper resale of the goods. The cover remedy measures damages by deducting the breached contract price from the price paid by the buyer for goods purchased to substitute for those of the breached contract. The market price damages remedies for sellers and buyers are in §§ 2-708 and 2-713, and respectively they measure damages by the contract price/market price differential at the time set for performance.

6. It would be difficult to overstate Llewellyn's influence on the entire UCC project, but his particular concern was always with Article 2. For a brief description of his power and influence as Chief Reporter, see WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 282–85 (1973). Twining's book is perhaps the best study of Legal Realism, particularly as it pertained to and affected commercial law in this country. Twining says that the realists' approach to law is properly understood, not as "a school of jurisprudence but as an historical phenomenon." *Id.* at 375.

7. *Corbin on Contracts* is one of the great law books of the twentieth century. In his review of the voluminous literature produced by the Realists in books, articles, and legal decisions, Twining suggests that *Corbin* is the "outstanding example" of a "constructive" contribution to the growth of the law. *Id.* at 377.

8. In his autobiography, Samuel Williston, definitely not a "Realist," nor a fan, described the movement as a revolt:

reflected reasonable commercial practice, accommodated it, or in the less common case, channeled it in a socially normative way.

Both in conducting business and in their personal affairs, sellers enter into sales contracts to sell goods for profit and, correspondingly, to get rid of them. Buyers enter into sales contracts because, to the extent there is a difference, they want or need the goods. There is, of course, nothing in itself about a breach that quenches either set of desires. In response to breach, therefore, sellers tend to resell, and buyers tend to cover. Undoubtedly such has been true for time immemorial. Llewellyn, therefore, introduced in Article 2 the resale and cover remedies to account for the natural responses of aggrieved parties to a breach and to ensure that those responses would be protected by realistic damages remedies. In so doing he relegated market price damages to the backburner. It still seems extraordinary that this common sense approach to monetary compensation was not broadly recognized until well into the second half of the twentieth century.

However, a decade prior to taking pen in hand to begin his revision of the Sales Act, Llewellyn had capsulated his views on sales remedies. After noting, perhaps lamenting, that in this country, except for land contracts, we have chosen to severely limit "specific reparation" for breach, he wrote:

> The remedy for breach—which means its normal meaning in law—remains for us damages. Our trouble is chiefly that our rules have so over-rigidified (*especially on the amazingly naïve assumption of a frictionless market*) that the remedy is often inadequate, even when realized. The rules in Germany and the legal practice in England, allowing the plaintiff to go on the market and cover, and then to hold the defendant to compensation thus measured, offer a fairly adequate adjustment . . . .[9]

> The revolt against the method sponsored by Langdell as a means of prophetic determination of the law took a more emphatic form in recent years, in the writings of a group of legal thinkers, mostly young teachers, who with a zeal of new discoverers called themselves "realists" and called those "conceptualists" who seemed to them to lay too great stress on general principles. The new zealots were clear that the results achieved in litigation not only were not but should not always want deduction from rules discovered from earlier decisions would lead one to expect. The so-called realists did not all think alike, and in the use of names for themselves and for others they were sometimes guilty of the fault that they most objected to—a too inclusive generalization.

SAMUEL WILLISTON, LIFE AND LAW 209–10 (1941). Williston describes Karl Llewellyn as one of the most notable of the group. Twining suggested that, to glean a "common sense" understanding of the impact of Legal Realism on commercial law, much can be learned from comparing Article 2 of the UCC with Williston's Uniform Sales Act. TWINING, *supra* note 6, at 383–84. Chapter 15 of his book provides a helpful, nuanced, and balanced summary of the movement and the contributions of its key participants.

9. Karl N. Llewellyn, *What Price Contract—An Essay in Perspective*, 40 YALE L.J. 704, 737 (1931) (emphasis added). By "cover" here, Llewellyn was talking about actual marketplace substitution, including a seller's resale of the contracted goods. As a Realist, Llewellyn was philosophically opposed to using market price to measure damages where actual market substitutes were available. Indeed, his original intent was to make the new

Llewellyn, therefore, strongly favored the resale and cover remedies over traditional market price damages because they reflected actual marketplace behavior. Reality would now trump fiction and, in so doing, provide a far more accurate measure of the actual loss than market price damages had ever done.

Llewellyn also underscored the importance that he foresaw for the new resale and cover remedies by significantly restructuring the "specific reparation" remedies in Article 2—the price action for sellers and specific performance for buyers—so as to make them dependent on the availability to the aggrieved party of a true substitute transaction. Prior to Article 2, sellers were entitled as a matter of course to hold the goods for the breaching buyer's account and then sue for the remaining unpaid contract price. In stark contrast, buyers were normally denied specific performance except for unique goods, those not generally available on the market. Llewellyn reformulated the availability of these remedies by narrowing it for sellers and expanding it for buyers. Article 2's focus is now on the ability of the aggrieved party to access the market and find a sufficient substitute for the breached contract. The test is subjective; it matters not how other similarly situated sellers and buyers are doing in the marketplace. Article 2 denies the price action to sellers who can reasonably resell the goods,[10] and specific performance is granted to buyers who are not able to cover with a reasonable substitute whether or not the contracted goods are in any sense "unique."[11]

Section 2-712 requires that a buyer's cover be a true replacement contract, one that would not have been made except for the breach.[12] As such, the cover remedy in § 2-712 compensates for the buyer's lost expectancy as well as any damages calculation offered either party by Article 2.

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remedies of resale and cover mandatory. He was, however, ultimately unable to sell his view to the National Conference of Commissioners on Uniform State Laws. *See* Ellen A. 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, 257 n.161 (1963).

10. U.C.C. § 2-709(1)(b). Nothing is more fungible than money. The type of performance that is compelled by the price action is no different than an ordinary action for damages, and therefore it is less beneficial than is the buyer's right to force delivery of the goods. The price action is predicated more on allowing the seller to get rid of the goods than on the money to which he is entitled. Section 2-709(2) allows the seller to resell the goods at any time prior to collection of the judgment with the appropriate credit against the judgment then going to the buyer. To the extent they are able, therefore, most sellers will have disposed of the goods at most any available price well in advance of trial both to save the cost and inconvenience of storage and because receipt of part of the money in advance with the remainder to come is always a better alternative than is a future judgment for the full amount.

11. U.C.C. § 2-716(1) extends specific performance beyond unique goods to "other proper circumstances." Comment 2 to § 2-716 emphasizes that "uniqueness is not the sole basis of the remedy" and that the buyer's "inability to cover is strong evidence of 'other proper circumstances.'"

12. U.C.C. § 2-712 requires that a cover be a "purchase of . . . goods in substitution for those due from the seller." The courts uniformly have interpreted this language to exclude purchases that would have been made irrespective of the breach. The cases are collected in 1 ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 8:9 (2016–17 ed.).

The same often cannot be said for § 2-706's resale remedy. A resale by a commercial seller usually will not be a sale that was enabled by the breach but rather one that would have been made regardless of it. The resale, therefore, would not be a true substitution for the breached contract.[13] A seller finding himself in this situation has been aptly labeled a "lost volume" seller in that the breach has reduced by one the number of transactions he would have made and, correspondingly, has deprived him of a profit he would have made but for the breach.[14] A resale in the lost volume situation does not mitigate this loss and § 2-706's damages measure will leave the seller undercompensated by the amount of profit he would have made on the resale that is used to measure his damages.[15] It is unclear how well Llewellyn understood the magnitude of the lost volume phenomenon. But he certainly knew that resales of the goods would not mitigate damages for certain types of sellers and also that compensation for them should be measured by the profit lost from the breached contract. Section 2-708(2) provides for that recovery.[16]

All of the remedies mentioned above—the seller's price action, resale remedy, and lost profit recovery, and the buyer's specific performance and cover remedies—are available only where the breach occurred prior to the time the buyer had irrevocably assumed ownership of the goods.[17] Once acceptance has occurred, each party is limited to but one remedy. For sellers, § 2-709 allows recovery of the unpaid contract price. For buy-

13. Where the resale is a true substitution, of course, it is as functional as the cover remedy as a compensatory measure of actual damages. Almost all private resales are true substitutions for the breached contract. Although commercial sellers who are not left at lost volume by a breach are not uncommon, they comprise a slender minority of the marketplace. Typical examples would include output sellers, like farmers who sell their entire crop or oil and gas producers who sell production from a designated field, and manufacturers of seasonal goods, such as fashion clothing, who produce only to fill orders placed well advance of the particular season.

14. The "lost volume seller" has become so common a character in commercial law parlance that it is unlikely she will need introduction to anyone taking time to peruse this article. She was introduced to the literature by Professor Robert Harris' early articles on sellers' UCC remedies. *See, e.g.*, Robert Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 80–83 (1965). Two succinct judicial discussions of the lost volume phenomenon, one pertaining to a retail seller and the other to a manufacturer, are provided by Neri v. Retail Marine Corp., 285 N.E.2d 311, 314 (N.Y. 1972) (retailer) and Teradyne, Inc. v. Teledyne Indus., Inc., 676 F.2d 865, 868 (1st Cir. 1982) (manufacturer).

15. When resale damages are used to calculate a lost volume seller's damages, the remedy compensates for the profit lost on the breached contract. The compensation shortfall is the profit from the transaction used as the resale contract. *See* 1 ANDERSON, *supra* note 12, § 2:7.

16. U.C.C. § 2-708(2) is a prime candidate for the most poorly drafted commercial law statute extant. Thanks to the early work of Professor Harris and to cases like *Neri v. Retail Marine Corp.*, however, the courts have never shown much difficulty in working with it. *See supra* note 14. As this article will address contextually below, the lost profit remedy applies principally to three categories of cases: where the seller is left at lost volume by the breach; where because of the breach the seller reasonably decides not to acquire the contracted goods; and where the seller either does not begin manufacture of the goods or appropriately discontinues their manufacture as a result of the breach.

17. In Article 2 terms, the buyer has accepted the goods, as provided in § 2-606, and has not revoked acceptance, as provided in § 2-608.

ers, § 2-714 allows damages for any defect in the seller's tender of delivery or, where the goods themselves are defective, damages for breach of warranty. Other than with respect to a buyer's recovery of consequential damages,[18] these post-acceptance remedies have caused courts little difficulty and have for decades generated but a smidgen of appellate level litigation. They, therefore, are mostly beyond this article's consideration.[19]

The availability of the seller's price action and resale remedies is restricted as well. To recover under either remedy the seller must have had the goods on hand at the time of breach.[20] Otherwise, the seller would have had nothing to resell so as to invoke the resale remedy and no ability to tender the goods to the buyer upon payment of the price as is required by § 2-709. The pre-Code rule was much the same and typically measured damages in those situations by the profit lost on the breached contract. U.C.C. § 2-708(2) does the same for sellers without goods on hand, as well as where the seller was to manufacture the goods but has not completed their production. Indeed, § 2-708(2), which is so cumbersome in its application to the seller's lost volume cases, seems ideally suited to the case of partial manufacture.[21] Although cases to the con-

18. We need a mulligan for our misplaced concept that consequential damages may be recovered unless excluded by the contract of sale, which, incidentally, they *always* are. As commercial law continues to evolve, this default rule really should change so as to deny recovery to commercial parties for consequential loss unless the parties have agreed to the contrary. Exceptions should be made for consumers, who cannot bargain but rarely suffer consequential loss of significant magnitude, and against those who breach with some demonstrable degree of willfulness. Gaming for consequential damages has for a long, long time proved not worth the candle. Based upon almost three decades of reviewing Article 2 remedies cases, I think a conservative estimate is that for at least the past decade seventy-five percent of the Article 2 remedies litigation in the reported decisions has involved two related issues—whether consequential damages have been adequately proved and, if so, whether a contract provision that excludes them is enforceable. The answer varies as to the first issue, but is almost always "yes" as to the second. If the default rule were changed, most of this litigation would simply disappear, resulting in untold savings of time, money, and thought. Litigators might not be happy, but transaction lawyers would benefit, perhaps significantly. Commercial parties would then be encouraged to negotiate particularly with respect to the myriad of possible types of consequential loss that might occur, thereby allocating risk with specificity both as to liability and amount. In most cases, however, the sales contract would probably be silent on the subject, thereby leaving nothing to litigate.

19. The cases are collected and discussed in 1 JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE §§ 11:1–11:15 (6th ed. 2012) and 1 ANDERSON, *supra* note 12, §§ 10:1–10:16. *See also* John Sebert, *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 364–67 (1981).

20. Section 2-704 intends to state a mitigation principle for these situations. It, however, is no model of draftsmanship and is best read broadly. It says:

> Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and 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.

Comment 2 expands the text to include a seller's "procurement of the goods" unless doing so would "result in a material increase in damages."

21. The partially manufactured goods situation is the only case that might use all of the formula in § 2-708(2), and thus the provision seems to have been specifically tailored with it in mind. It says: "the measure of damages is the profit (including reasonable over-

trary can be found both under the Sales Act[22] and Article 2,[23] the significant weight of authority has always denied market price damages for sellers who could not have accessed the relevant market.[24] The rule here is more one of damages law than sales law and, as such, is a sensible corollary of a broader principle that damages should be measured in the market the seller likely would have participated.[25]

In sum, the market price remedy cannot be used for buyers after the goods have been accepted, nor where the buyer has covered for them. Where the buyer cannot cover, in most cases he may have specific performance rather than damages. For sellers, the price action trumps the market price remedy where the buyer has accepted the goods. The market price remedy is also not available unless the seller could have tendered the goods had the breach not happened.[26] Where the seller has

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head) which the seller would have made from full performance by the buyer, together with any incidental damages . . . , due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

22. Several of these cases are noted in Jagger Bros., Inc. v. Technical Textile Co., 198 A.2d 888, 889 (Pa. Super. Ct. 1964). *See also* Theodore Sedgwick, A Treatise on the Measure of Damages § 752, at 1568 (9th ed. 1920) ("Where the defendant repudiated the contract before the manufacture was completed, the [market price] rule just considered cannot apply, because the breach does not leave the manufactured product on the plaintiff's hands; hence we have to fall back on the general rule that the measure of damages is the net profits on the contract . . . ."). *See generally* Charles T. McCormick, Handbook on the Law of Damages 657–60 (1935).

23. Most of the contrary Article 2 cases were decided not long after Article 2 was adopted. Perhaps the most recent case is Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1129–32 (3d Cir. 1992). In *Tigg*, however, the federal district court felt constrained to follow Michigan law as reflected in an early Article 2 decision, Detroit Power Screwdriver Co. v. Ladney, 181 N.W.2d 828, 833–34 (Mich. Ct. App. 1970).

24. *See, e.g.*, Am. Metal Climax, Inc. v. Essex Int'l, Inc., 16 U.C.C. Rep. Serv. 101, 115 (S.D.N.Y. 1974) ("[C]ompensatory damages as provided in the contract-market formula of § 2-708(1) are realistic only where the seller continues to be in a position to sell the product to other customers in the market."). *See also* Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: New York Results Compared*, 34 Fordham L. Rev. 23, 31 (1965).

25. The principle applies in tort as well as in contract cases and can work for or against the plaintiff. *See* United Truck Rental Equip. Leasing v. Kleenco Corp., 929 P.2d 99, 107–08 (Haw. Ct. App. 1996) (conversion case holding that, although plaintiff had purchased the stolen truck in the wholesale market as part of a fleet purchase of 10 trucks, damages would nevertheless be measured by the retail market price in which plaintiff would have had to replace the truck). *Cf.* Alafoss v. Premium Corp. of Am., Inc., 599 F.2d 232, 237–38 (8th Cir. 1979) (bifurcating calculation of buyer's lost profits between retail market and bulk sale market based on percentage of defective goods buyer would likely have resold in each market; measuring damages solely in retail market would overcompensate buyer). The rule has its exceptions based primarily on the broader principle that it is better to roughly estimate the plaintiff's loss than to deny recovery altogether. The easiest example is in estimating a seller's future damages for breach of a long-term contract. *See, e.g.*, U.C.C. § 2-723(1), which designates market price at time plaintiff learned of an anticipatory repudiation for cases that are tried before performance is due. Another example is for cases where there is no market at the time or place specified for measuring damages. *See* U.C.C. § 2-723(2), allowing damages to be measured in a market that would "serve as a reasonable substitute."

26. The rule here is as much one of performance excuse than of damages. *See* Restatement (Second) of Contracts § 244 (Am. Law. Inst. 1981): "A party's duty to pay damages for total breach is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise."

resold the goods following the breach, compensatory damages are determined based on whether or not the breach left the seller in a lost volume situation. If it did, his damages are best calculated by his lost profit; if not, resale damages provide the correct measure. Article 2 is thus structured to leave little necessary work for the market price remedy to do.

As to the remaining situations, a plausible argument can be made that the seller who chooses not to resell or the buyer who chooses not to cover has received an intrinsic benefit that is evidenced by his choice not to engage in a substitute transaction and, therefore, this benefit should offset any damages otherwise provided by law. Article 2, however, is not set up that way. A seller who does not resell or who fails to meet § 2-706's requirements for a valid resale[27] or a buyer who does not make a proper cover[28] may nevertheless recover market price damages. The choice is in favor of allowing some measurement of damages even in cases of bad behavior rather than to deny damages altogether.[29]

If the buyer does cover, however, Comment 5 to § 2-713 provides that she may not recover market price damages. There is no similar provision for a seller who resells, but Article 2 specifically positions § 2-708(1) damages for sellers as a back-up for the other seller remedies. By its terms § 2-708(1) is subject to the profit formula in subsection (2), and it is explicitly made a default remedy for failed price actions by § 2-709 and for improper resales by § 2-706. There are many good reasons why market price damages should be of secondary importance. These will be addressed more fully in specific contexts as this article proceeds. In brief, however, as its most ardent advocates agree, it is purely by chance when market price damages accurately measure actual damages. Second, more often than not, the applicable market price does not even exist; it is purely a figment.[30] Third, the only way to explain the very purpose of the

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27. Although § 2-706 does not say that a seller is not required to resell, Comment 2 to the provision says that specifically. Courts and commentators are in agreement on the point. *See, e.g.*, Honeywell Int'l, Inc. v. RTF Int'l, Inc., 209 P.3d 764 (Kan. Ct. App. 2009). *See generally* 1 ANDERSON, *supra* note 12, §§ 4:32–33.

28. U.C.C. § 2-712(3) expressly says so.

29. For example, in Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 1080–81 (9th Cir. 1979) the seller attempted to enhance its damages by papering a fictitious sale with a related company. The court found the transaction commercially unreasonable for purposes of § 2-706 and opined that the seller's actions raised serious questions of bad faith. Nevertheless, the court remanded the case to allow the seller to prove market price damages. *See also* Kiser v. Lemco Indus., Inc., 536 S.W.2d 585, 589–90 (Tex. Civ. App.—Amarillo 1976, no writ) (bad faith for buyer, a grain elevator, to attempt to establish cover damages by purchase of company-owned grain; buyer relegated to market price damages).

30. In his influential treatise on damages, Professor Charles T. McCormick observed:

> While we are sometimes likely to lapse into the assumption that the "market value" of a thing is a quality of the object as definitely ascertainable as the qualities of shape, smell, or color, of course on reflection we realize that market value is a definite sounding term for a very imaginary inference. If we say that a certain secondhand automobile just before its destruction in a collision had a market value of $500, we mean that, if it had been offered for sale in the most available market—which it was not—someone would have bought it for $500; or, alternatively, that, if the owner had then sought—as he did not—to secure another like it, he could have done so for that price.

remedy is as a surrogate for approximating the amount at which the seller could have resold the contracted goods or the buyer could have covered for them.[31] Article 2 now provides for the real thing leaving no sense or reason for applying the remedy where a resale or cover has been implemented. Fourth, a proper resale or cover will usually be easier to prove at trial than will market price, which too often is nothing more than the product of conflicting testimony of paid experts filtered through the foggy deliberations of a confused jury.[32] Fifth, the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is the law in every state in this country, prohibits recovery of market price damages if the seller has resold or the buyer has covered.[33] The CISG governs commercial sales transactions between a U.S. company and any resident of nearly all of the world's major economies.[34] Unless Article 2 clearly provides to the contrary, which it does not, it makes no sense for courts to reach diametrically opposed results for identical contracts depending solely on the country of origin of the party with whom its resident has dealt.

McCormick, *supra* note 22, at 165. Market price, then, is no more than a mercurial designation for "value." It is most meaningful when referring to things, such as stocks and commodities, that are sold in regulated markets where close track is kept of transactions in a way that allows for a quick recording and broad publication of an average of the prices. But most commonly it refers to nothing more than an approximation along the lines described by Professor McCormick. And sometimes, as with heirlooms, collectibles, and other unique goods, it is nothing more than an approximation of a mythical isolated resale.

31. Article 2 emphasizes this truism and demonstrates a preference for the actual transaction over its surrogate. *See, e.g.*, U.C.C. § 2-713, cmt. 1 ("The general baseline [for market price] adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief."); *see also* U.C.C. § 2-706, cmt. 3 ("Evidence of market or current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.").

32. The courts commonly say that the alleged substitute transaction is presumed to be proper for purposes of measuring damages. At most, all that courts usually require is that the plaintiff introduce the resale or cover contract into evidence accompanied by his testimony that the transaction was in good faith and commercially reasonable. This was true for resale contracts even prior to the Code. Howse v. Crumb, 352 P.2d 285, 290 (Colo. 1960) (initial burden is on seller to show resale was made with reasonable care and judgment, after which burden shifts to buyer to show it was not fair and in good faith). The UCC cases reason similarly. *See, e.g.*, Wurlitzer Co. v. Oliver, 334 F. Supp. 1009, 1012 (W.D. Pa. 1971); Uganski v. Little Giant Crane & Shovel, Inc., 192 N.W.2d 580, 591–92 (Mich. Ct. App. 1971). Regarding a buyer's cover, *see* BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 82 U.C.C. Rep. Serv. 2d 697, 708–11 (N.D. Ind. 2014), *vacated and remanded*, 804 F.3d 1229 (7th Cir. 2015) (seller's burden to prove unreasonableness of buyer's cover is a heavy one because the cover is presumed to be proper); Meshinsky v. Nichols Yacht Sales, Inc., 541 A.2d 1063, 1069–70 (N.J. 1988) (buyer should not be denied cover damages unless seller comes forward with persuasive evidence that cover was improper).

33. C.I.S.G. Article 75 allows for recovery of resale and cover damages. Article 76 allows for recovery of "current," meaning market price, damages, but only if the claimant "has not made a [cover] purchase or resale under article 75."

34. The scope of the CISG. is provided for in Article 1: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State." Great Britain is the remaining major world economy that has not become a Contracting State.

But the most important reason is also the simplest. The Code does not allow it. Market price damages may not be awarded if another remedy will more accurately achieve compensation as provided in § 1-305.[35] To be sure, what is meant by "compensation" or "compensatory damages" could be articulated in different ways and have different meanings in different contexts. Section 1-305, however, relieves us from any puzzlement in ascertaining Article 2's meaning. It confirms that it is the meaning that contract law has always given it.[36] The Code's language is essentially a paraphrase of both Restatements of Contracts, which define compensatory expectation damages as those that will place the injured party in the post-performance position; i.e., in the position that would have been occupied had the contract been performed.[37] With its bar of "penal damages," § 1-305 also emphasizes that compensation is not just a goal, but a limitation as well. Although the term "penal" is not defined, surely any concept of penal damages would include an award of damages beyond the harm actually caused by the defendant.

As familiar as these basic principles are, they merit emphasis here because much of the remainder of this article examines various attempts by scholars and a diminishing number of courts to justify the use of Article 2's market price remedy to award damages that exceed the plaintiff's actual loss. These attempts represent what is probably the last contentious

35. The former designation was § 1-106. It was renumbered with no change in language as part of the revision of Article 1 almost two decades ago. For clarity it will be referred to as § 1-305 for the remainder of this article, including for cases that pre-date the revision where the court actually said "§ 1-106."

36. Current § 1-305(1) reads as follows:

> The remedies provided by this title *must* 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 damages nor penal damages may be had except as specifically provided in this title or by other rule of law.

(Emphasis added.) Section 1-305 is the most important remedy provision in the UCC, if for no reason other than that its stern requirements and prohibitions extend to all Code remedies, not just to those in Article 2. Although in early drafts of the Code the provision was a part of Article 2, it was given its current placement as the drafting of the other Articles came along. It is fair to say, therefore, that regardless of its present reach its roots are with the Article 2 remedies.

37. The original Restatement paid but sketchy attention to nuances in measuring contract damages. It instead painted with the broad strokes of general principles. Sense and understanding were to be found mostly in Williston's commentary to the various provisions and in the illustrations thereto. For example, in § 329, titled "Compensatory Damages for Substantial Injury," the text said merely that: "Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant's breach, in excess of savings made possible." But the key language is to be found in the first sentence of its Comment at which, as does U.C.C. § 1-305, defines compensation both as a goal and as a limitation. It said:

> In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, *at the least cost to the defendant* and without charging him with harms that he had no sufficient reason to foresee.

(emphasis added). The RESTATEMENT (SECOND) OF CONTRACTS § 344 echoes this understanding of compensation in defining the aggrieved party's "expectation interest" as "his interest of having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed."

Article 2 remedies issue that the courts have left us to talk about. Otherwise, it is impressive and remarkable that it took only little more than a decade for the courts to work through and reach a general consensus about the new, unfamiliar, and greatly expanded menu of remedies for breaches of sales contracts. Other than for fact disputes and for claims for consequential damages coupled with attacks on contract provisions that exclude liability for them,[38] Article 2 remedy issues have largely disappeared from the reported decisions.[39]

An examination of the development of Article 2 remedies cannot avoid some discussion of the long and ongoing academic debate about the viability of market price damages. The market price proponents fall roughly into two overlapping categories of lawyers. For brevity I will call them the "historians" and the "economists." The historians rely primarily on the truism that most of the lawyers of the day who were players in the complex drafting history of Article 2 regarded market price damages as the preferred remedy and wished that, going forward, the remedy would retain its primacy.

The economists unflinchingly offer various theories in support of an unassailable dogma that, not only is market price a real thing, it is always the proper remedy regardless of the aggrieved party's actual provable loss. Conversation about their theories has largely been confined to the academic literature and to law school classrooms. Even there this fascination with "economic analysis of law" that was so prevalent in the 1970s and 1980s has largely disappeared. Regardless, the economists' arguments never did have much noticeable impact on the case law. Some of this is because most lawyers not similarly schooled have difficulty following sophisticated economic analysis. Some of it is because most lawyers do not agree with their conclusions. A lot of it is because economists at times seemingly urge us to follow their market price muse from one implausible proposition to another along a road of "efficient" and "correct" behavior that defies our common experience and contradicts how we act in ways that leave us slack jawed with incredulity.[40] "Economic analysis of law" is largely Langdellian-like formalism that applies textbook rules

38. *See supra* note 18.

39. The direct damages cases we do get these days typically involve fact issues regarding good faith and commercial reasonableness.

40. During its ascendancy this school of "economic analysis of law" contributed greatly to our understanding by forcing a global thinking, rethinking and, on occasion, reformulation of legal precepts and notions that had long been considered settled and inviolate, including ways we looked at monetary remedies. As Professors Goetz and Scott, two of the school's leading advocates, better put it: "In recent years, a maturing theoretical scholarship has furthered understanding of the performance and remedial obligations of contracting parties." Charles Goetz & Robert Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 968 (1983). They support their observation with an inclusive list of law review articles by leading scholars. I doubt there are many who have labored extensively in commercial law over the years who have not read much of this work with some measure of understanding and benefit. But when it comes to protecting their sacred price point, the economists' scholarship would, as necessary, throw to the wind most any legal doctrine that undermines market price damages, most especially the principles of compensation, mitigation, and even causation.

from which it deduces syllogistic propositions that too often cannot withstand empirical examination.[41] The science would not likely have set well with Legal Realists like Llewellyn and, unsurprisingly, finds little support in Article 2.[42]

II. STRATEGIES

This article addresses three categories of cases in which a claim is made under § 2-708 or § 2-713 for market price damages that exceeds the actual damages that the plaintiff could not have reasonably avoided. The first category involves those in which the plaintiff, a middleman, has hedged a supply contract with a forward resale contract and either his supplier or the forward contract buyer has breached. The second category addresses those situations in which the plaintiff seeks market price damages but has not taken advantage of a reasonable opportunity to mitigate damages by a resale or cover. The third category addresses those situations in which the plaintiff seeks a recovery of market price damages that were actually avoided by a resale or cover. "Strategy" or "strategic behavior" here does not imply artful behavior but means no more than that the plaintiff has acted intentionally.[43] Turning first to the hedge contracts.

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41. Among the most implausible in this regard is the assertion that most commercial sellers are not left at lost volume when a customer breaches. *See, e.g.*, Charles Goetz & Robert Scott, *Measuring Sellers' Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV. 323, 329 (1979). *See also* Robert Cooter & Melvin Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1453–54 (1985). A thoughtful, common sense critique of the various theories offered in support of the assertion is provided by Professors White and Summers, who conclude that: "All of the above economic theories make sense in some settings and no sense in others." 1 WHITE ET AL., *supra* note 19, § 8.25, at 731. Their critique concludes with the practical observation that the burden here of factually separating the sense from the nonsense should be on the defendant.

42. As Professor Scott correctly lamented: "Following the adoption of the UCC, the attack on market damages has only intensified." Robert Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. CHI. L. REV. 1155, 1164 (1990). There is good reason. For the first time the law was available for the courts to base damages on actual substitute transactions and, correspondingly, the need for using the market price model diminished. An equally valid lamentation is that it took the law so long to move in this direction. Several of Professor Scott's theories in support of a primacy for market price damages would surely gnash the teeth of the Realists. For example in arguing for using market price damages as the primary remedy for sales contracts, he says, quite accurately, that we would need to "reconstruct" our understanding of compensatory damages. He says that we can do that by abandoning current law's "ex post perspective . . . based on what the parties actually did . . . [and] apply a measure of events extrinsic to the parties' behavior." *Id.* at 1158.

43. Occasionally strategic behavior is not reasonably possible. The seller wants to resell but cannot; the buyer wants to cover but cannot. The seller is then entitled by § 2-709 to recover the unpaid contract price, and the buyer is entitled to specific performance under § 2-716. Where specific performance is not possible, such as where the goods have been sold to a third party who bought in good faith, the buyer's only remedy is market price damages. This situation will be addressed below in Part II.B. It bears noting at this point, however, that the consensus of the courts in these cases is to limit market price damages to the time period during which the buyer could not have mitigated by a cover. *See* Trinidad Bean & Elevator Co. v. Frosh, 494 N.W.2d 347, 353–54 (Neb. Ct. App. 1992).

A. Where The Strategy Is To Hedge

1. And the Seller Breaches the Supply Contract

A stark example of a claim for market price damages that exceeds the plaintiff's actual loss is demonstrated by cases where the plaintiff has hedged his contract obligation so as to protect against adverse fluctuations in the market price. He has chosen to secure a profit rather than "wager" on the market. By his choice, the plaintiff incurs no market risk and foregoes market advantage. Included in this grouping are the cases where the plaintiff acts, in effect, merely as a broker between a supplier and a buyer, and the profit he receives is fixed by a commission or a discounted price he is given by the supplier. For our purposes both situations are the same in that the plaintiff is guaranteed a fixed profit and incurs no market risk.

Assume party A (defendant, supplier) contracts (K1) to sell to B (plaintiff, middleman) goods for a price of 8, and B then hedges with a forward contract (K2) to sell the goods to C (buyer) for a price of 10:

A----K1/8----B----K2/10----C.

B thereby secures a profit of 2 regardless of a subsequent adverse market fluctuation. Now assume A breaches K1 when the market has risen more than 2, say to 12. B sues A claiming damages under § 2-713 of 4 (market price of 12 less contract price of 8). A, of course, asserts that a recovery of 4 overcompensates for B's actual loss, which is 2. A's assertion should nevertheless be rejected in most cases because B will be obligated to C on its forward contract to sell the goods for 10. To honor that contract, B presumably must either cover for the goods at 12 or breach and incur consequential liability to C of 2 (C's cover cost or market price of 12 minus 10). Section 2-712 would govern the first alternative. Section 2-713 would govern the second. Both would award compensatory damages of 4.[44]

The cases that have caused controversy and disagreement among courts and commentators for well over a century are those where it is clear at the time of trial that B has no liability over to C. It may be that B is excused by the terms of the forward contract, or that C has released B, or that the statute of limitations has run on any claim C might have had against B. In this situation, an award in excess of 2 would unarguably exceed B's actual loss. The pre-UCC cases divided on the issue. The majority awarded windfall market price damages; a "persistent minority"

44. If § 2-713 applies, the market price of 12 would account for both B's general and consequential damages. An additional recovery of consequential damages would overcompensate B. *See* M.K. Metals, Inc. v. Container Recovery Corp., 645 F.2d 583, 590–91 (8th Cir. 1981). *Cf.* Eldesouky v. Aziz, 86 U.C.C. Rep. Serv.2d 356, 361–63 (S.D.N.Y. 2015) (general damages having been awarded based on buyer's cover cost, buyer's consequential damages should be calculated using the cover price rather than that of the breached contract).

awarded only actual damages.[45]

This division is understandable given that, prior to the UCC, "expectancy damages" was a loosely applied concept and market price damages was usually the only available remedy. With the UCC, however, the courts were given a broader array of remedies to work with, a clear articulation in § 1-305 of what was meant by compensatory damages, and the license to liberally adjust remedies to achieve compensation. It is, therefore, not surprising that the UCC cases analyze the issue much differently. The first Article 2 case to address the hedged contract situation was *Allied Canners & Packers, Inc. v. Victor Packing Co*.[46] The buyer had hedged its purchase of raisins with a forward resale contract. It thereby secured a profit of $4,462.50 in the form of a four percent trade discount or commission from the breaching supplier. A precipitous rise in the market price for raisins ensued from heavy rains, which caused a severe raisin shortage that rendered the seller unable to perform. The buyer sued seeking market price damages of approximately $150,000. In a carefully reasoned opinion that examined authorities on both sides of the issue, the court concluded that § 1-305 required that damages be limited to the buyer's lost resale commission.[47] The court further reasoned that, since Article 2 would impose liability on the breaching seller for losses a buyer incurs on advantageous resale contracts, it would be both consistent and fair to limit the buyer's damages when those contracts turn out to be less advantageous. The court emphasized that its conclusions might have been different if the evidence showed that the defendant seller had breached in bad faith.

The Eighth Circuit addressed the same issue a year later in *H-W-H Cattle Co. v. Schroeder*.[48] The contract was for the sale of cattle, and the middleman buyer had secured a profit in the form of a resale commission similar to that in *Allied Canners*. The court handled the issue in summary fashion by applying § 1-305 both to award actual damages based on the lost resale commission and to reject the buyer's claim for substantially higher market price damages.[49]

The next two cases to consider the issue, however, went the other way and allowed § 2-713 damages that greatly exceeded the buyer's actual

45. David Simon & Gerald Novack, *Limiting the Buyer's Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts*, 92 Harv. L. Rev. 1395, 1397 (1979). This article provides a detailed analysis of the pre-Article 2 cases.

46. 209 Cal. Rptr. 60, 61 (Dist. Ct. App. 1984).

47. The buyer had no liability on its two forward contracts to sell the raisins. One of the contracts had been rescinded, and the buyer's liability on the other was protected by an enforceable *force majeure* clause. Also, the statute of limitations had run on any claim by the resale buyer on the second contract.

48. 767 F.2d 437, 440 (8th Cir. 1985).

49. The court was comfortable with the assumption that the resale buyer would not pursue an action for breach against the plaintiff. The same family owned both the plaintiff and the resale buyer. The court also noted that the buyer might no longer have wanted the cattle because the market price had declined substantially shortly after the seller's breach. Regardless, if the market price had declined to below the breached contract price, the buyer could have covered at that price and mitigated any liability on the forward contracts.

loss. In both cases the buyers had secured resale profits, and in neither case did the buyer have ongoing liability to its resale purchaser. In the first, *Tongish v. Thomas,*[50] the Kansas Supreme Court sustained an award of market price damages that were approximately ten times the buyer's actual loss. In the second, *TexPar Energy, Inc. v. Murphy Oil USA, Inc.*,[51] the Seventh Circuit sustained an award of $386,370, although actual damages were only $45,000. The Seventh Circuit's opinion was perfunctory, saying little more than that it agreed with both the reasoning and the conclusion of the Kansas court in *Tongish*. Both courts saw the issue as simply one of resolving a conflict between § 1-305, which would limit recovery to actual damages, and § 2-713, which would allow recovery of market price damages regardless of the actual loss. Both applied the rule of statutory construction that, in the event of conflict, a specific provision (§ 2-713) would govern a general one (§ 1-305) "unless it appears the legislature intended to make the general statute controlling."[52] Section 2-713 was the more specific provision and, therefore, it controlled.

There is no wisdom in the courts' construction. Section 1-305 is a textbook example of a general provision that is included in an act or code for the very purpose of governing other provisions within its scope. Indeed, § 1-305 has no purpose other than to allow the Code's specific remedy provisions to be written broadly so as to leave the courts flexibility to meld them to the particular facts so that the remedy is applied in compliance with the policies set forth by the provision. In effect, the courts in *Tongish* and *TexPar* simply read the statute out of the Code by leaving nothing for which it to apply. Rather ironically, § 1-305 is actually the more specific provision in that it explicitly bars overly compensatory damages, whereas § 2-713 is silent on the subject.

Both courts also said that giving primacy to market price damages would offer "the advantage of promoting uniformity and predictability in commercial transactions, by fixing damages at the date of breach, rather than allowing the vicissitudes of the market in the future to determine damages."[53] This advantage, however, would actually be better achieved by applying § 1-305 as it is written. In these hedge cases, damages are determinable not only at the time of the breach but well before it (as soon as the second contract is secured) and are in no way affected by market price "vicissitudes." Hedge contracts by design render market fluctuations, before or after breach, irrelevant to the plaintiff's loss. In measuring damages, therefore, the court need do no more than look at the two contracts and subtract the price of one from that of the other. What has been happening in the market either before or after the hedging is of no consequence.

50. 829 P.2d 916, 920–21 (Kan. Ct. App. 1992), *aff'd*, 840 P.2d 471 (Kan. 1992).

51. 45 F.3d 1111, 1113, 1115 (7th Cir. 1995).

52. *Tongish*, 840 P.2d at 474.

53. *TexPar*, 45 F.3d at 1114 (citing *Tongish,* 840 P.2d at 476). Both decisions were rendered over 20 years ago. Over time, they have turned out to represent but two discordant outliers that undermine the significant weight of authority.

The theory that the threat of penal damages will compel performance is a bad one. It contravenes contract law's basic tenet that a promisor should always remain free to choose between the alternatives of performance and the payment of compensatory damages for breach. It is a tenet from which many of the principles in the Restatement of Contracts necessarily flow, including contract law's prohibition of punitive damages.[54] No empirical evidence has ever been offered to support a breach-inhibitor theory for penal damages.[55] To the contrary, leading commercial law scholars have long expressed doubt that the threat of liability for penal damages is a significant factor in framing a promisor's decision whether or not to breach.[56]

Nothing here is to suggest that a buyer does not make a prima facie case by introducing evidence in support of a claim for market price damages. Section 2-713 is written presumptively in their favor.[57] But where the seller is able to introduce evidence that the buyer has hedged with a forward contract, the burden should shift back to require the buyer to

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54. For a discussion of these principles in context with hedge contracts, see KGM Harvesting Co. v. Fresh Network, 42 Cal. Rptr.2d 286, 288–89, 293 (Cal. Ct. App. 1995):

> The basic premise of contract law is to effectuate the expectations of the parties to the agreement, to give them the "benefit of the bargain" they struck when they entered into the agreement . . . A compensation system that gives the aggrieved party the benefit of the bargain, and no more, furthers the goal of "predictability about the cost of contractual relationships . . . in our commercial system." . . . We believe that this focus on the good or bad faith of the breaching party is inappropriate in a commercial sales case. As our California Supreme Court recently explained, courts should not differentiate between good and bad motives for breaching a contract in assessing the measure of the non-breaching party's damages. Such a focus is inconsistent with the policy "to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise. Courts traditionally have awarded damages for breach of contract to compensate the aggrieved party rather than to punish the breaching party."

(Citations omitted). In *KGM*, the supplier/seller breached its contract to supply lettuce in response to a dramatic increase in the market price. Unlike in the § 2-713 market price cases, the buyer had immediately covered for the lettuce and was seeking damages under U.C.C. § 2-712. The court's opinion nevertheless includes an extensive analysis of authorities on both sides of the market price damages issue.

55. Courts in both lines of cases have expressed a concern that a rule that limits recovery to actual damages may encourage breach by the supplier who, knowing that its liability is limited, will engage in its own strategic behavior by willfully breaching to gain an undeserved windfall in the escalating market. For this reason, the court in *Allied Canners* specifically confined its holding to cases of innocent or good faith breach. This worry applies equally to hedged contract cases where it is the buyer on the forward contract who breaches. Since those cases are addressed next in subsection B, discussion of the willful breach situation is reserved to subsection C.

56. *See, e.g.*, 1 WHITE ET AL., *supra* note 19, § 8:19, at 715 ("[W]e suspect that damage formulas play a minimal part in the decisions of business people who are deciding whether to break a contract"). *See also*, *KGM Harvesting*, 42 Cal. Rptr.2d at 292–93, summarily rejecting the idea:

> The result in *Allied Canners* seems to have derived in large part from the court's finding that Victor had not acted in bad faith in breaching the contract. . . . We believe that this focus on the good or bad faith of the breaching party is inappropriate in a commercial sales case.

57. "[T]he measure of damages for non-delivery or repudiation by the seller *is*" the market price/contract differential. U.C.C. § 2-713(1) (emphasis added).

show that he still has liability on that contract.[58] The more recent cases dealing with hedge contracts support this view.[59] Market price damages have no place in these situations where actual damages are provable to the last penny and, most specifically, where the plaintiff has intentionally insulated himself from market fluctuations. In the mirrored situation where it is the forward contract buyer in breach, the courts unanimously deny market damages.

2. *And the Buyer Breaches the Forward Contract*

Assume the same hypothetical posed above, except the market price for the contracted goods has declined precipitously so that it is the forward contract buyer that breaches. In this situation, the middleman is suing as a seller who seeks market price damages under § 2-708 rather than as a buyer under § 2-713. So A (supplier) contracts [K1] to sell to B (plaintiff, seller) for 8, and B hedges with a contract [K2] to sell to C (defendant, buyer) for 10:

[A----K1/8----B----K2/10----C].

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58. This was an important part of the court's holding in the *Allied Canners* case. The court expressly conditioned its denial of market price damages to situations where "the buyer has not been able to show that it will be liable in damages to the buyer on its forward contract." Allied Canners & Packers, Inc. v. Victor Packing Co., 209 Cal. Rptr. 60, 66 (1984). At least for the cases discussed below in the next subsection where the forward buyer is the breacher, Professors White and Summers would go further by placing the full burden of proving actual damages on the defendant buyer. They suggest that it will be a heavy burden because it "will have to prove its case largely from the records of the plaintiff and out of the mouths of the plaintiff's employees." 1 WHITE ET AL., *supra* note 19, § 8:19, at 715. However, where it is the supplier in breach, since its buyer is a middleman who does not acquire and store the goods, it should not be difficult in most cases to ferret out in discovery the forward contract and tie it to the breached supply contract. This would seem particularly true where the plaintiff buyer is in effect merely a commissioned broker of the supplier, as was the case in *Allied Canners*. When it is the forward buyer in breach, tying its seller's supply contract to the breached forward contract may be more difficult but maybe not as much as White and Summers suggest. Regardless, in either case the appropriate proof will likely be more accessible to the plaintiff, and the better rule would leave the ultimate burden where it normally lies once the defendant has plausibly raised the issue.

59. *See* NHF Hog Mktg., Inc. v. Pork Martin, LLP, 811 N.W.2d 116, 119 (Minn. Ct. App. 2012):

> We are persuaded that the position adopted in H–W–H and Allied and favored by White and Summers is the better approach. The damages awarded by the district court put appellant in as good a position as if respondent had fully performed. We, therefore, hold that a buyer's damages under [U.C.C. § 2-713] are limited to the buyer's actual damages *when the breaching seller shows* that the buyer's expected resale profit was less than market-differential damages and the buyer fails to show a likelihood that the resale purchaser will enforce the resale contract.

(emphasis added). *NHF* involved the breach of a four-year master contract to supply the buyer with 750,000 hogs. The buyer had entered into a fixed price forward contract for a portion of the hogs that locked in a commission of precisely $43,197.50. The court affirmed the trial court judgment in that amount, rejecting the plaintiff's claim for market price damages of approximately $444,000. *See also* Unlimited Equip. Lines, Inc. v. Graphic Arts Ctr., Inc., 889 S.W.2d 926, 941 (Mo. Ct. App. 1994) ("We do not need to resolve the conflict over whether and when actual damages may substitute for § 2–713 damages because in this case *defendants did not prove actual damages* . . . Accordingly, the trial court did not err by awarding § 2–713 damages instead of actual damages."). (Emphasis added).

Market price has declined to 6 at the time C breaches the forward contract (K2). B claims market price damages of 4, although his actual loss is only for the profit of 2 that he would have made on the hedging contract. Also, if B does not honor the supply contract with A,[60] B is probably liable to A for damages of 2 (contract price of 8 less the market price of 6). On these facts B is a lost volume seller and, as such, his direct damages are the profit lost on the forward contract. However, unlike the situation where B is a buyer plaintiff, as a seller B cannot recover against C for his liability of 2 to A. That liability represents consequential damages, recovery of which is prohibited to sellers by § 1-305.[61] Since seller B cannot be compensated for any liability over to his supplier in these cases, one might guess that B would have a stronger case for market price damages than would B when he sues as a buyer. Interestingly, however, whereas the supply contract cases have divided 2-2, all five UCC cases addressing a breach of the forward contract have limited B to a recovery of his lost profit.

The leading case is the Fifth Circuit decision in *Nobs Chemical, U.S.A., Inc. v. Koppers Co, Inc.*[62] After contracting with several buyers, including Koppers, to sell cumene, Nobs Chemical entered into a contract with a Brazilian supplier to purchase the cumene at a quantity discount price. The market price for cumene plunged, Koppers breached, and Nobs Chemical chose to reduce its order with its supplier rather than to take the cumene intended for the Koppers contract. The supplier acquiesced, but it imposed on Nobs Chemicals a $25 per ton price increase for taking the smaller quantity. This, of course, reduced Nob's Chemical's profit margin on the other cumene contracts. The trial court limited damages to $95,000, the profit Nobs Chemical lost on the Koppers contract. On appeal, Nobs Chemical reasserted its claim for market price damages of approximately $300,000. After observing that no other court had yet ruled on the issue, the court made short work of affirming the trial court award. The court simply noted that, as a jobber,[63] Nobs Chemical's only direct loss was the profit on the Koppers contract. The court also rejected Nobs Chemical's argument that, since § 2-708(2) specifically provides that it ap-

60. B may refuse to take the goods from A because in the short term he cannot find willing buyers for the goods in the rapidly declining market and, as a middleman, may not have facilities to store the goods for the time necessary to find a substitute forward buyer.

61. Section 1-305 bars consequential damages "except as specifically provided." There is no provision for consequential damages in any of the seller's Article 2 remedies. Although it makes no sense to grant consequential damages to buyers but deny them to sellers, the courts have applied § 1-305 perfunctorily. Leading cases include Nobs Chemical, U.S.A., Inc. v. Koppers Co. Inc., 616 F.2d 212 (5th Cir. 1980); Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp., 372 F. Supp. 503 (E.D.N.Y. 1974); Sprague v. Sumitomo Forestry Co., Ltd., 709 P.2d 1200 (Wash. 1985).

62. 616 F.2d 212, 216–17 (5th Cir. 1980).

63. The term "jobber" designates a type of middleman who neither acquires nor manufactures the goods and could not have reasonably mitigated damages by doing either. A jobber is a typical lost volume seller. Professor Robert Harris used the term extensively in his watershed articles on sellers' damages, and the term has become familiar vernacular. *See, e.g.*, Harris, *supra* note 14, at 72–73; 1 White et al., *supra* note 19, § 8:16, at 703–05.

plies only when the market price damages are found to be "inadequate," it would not apply when those damages would be more than adequate. The court found this argument "intriguing," but concluded that § 1-305, as well as Texas case law, offered more persuasive reasons for limiting recovery to the seller's actual loss.

The issue was next addressed six years later in *Union Carbide Corp. v. Consumers Power Co.*[64] Union Carbide had a long-term supply contract with Petrostar, dating back several years, whereby Union Carbide agreed to purchase 27,000 barrels of residual fuel oil per day. Union Carbide was an archetypal middleman, one who had no use for the oil other than to resell. Consumers Power, one of its resale purchasers, had contracted in 1980 to buy 10,000 barrels of the oil per day for approximately six years at a cost-plus price based on the price Union Carbide was obligated to pay Petrostar. This guaranteed Union Carbide a fixed profit on all sales to Consumers Power. The market price for the oil dramatically declined in 1981, and Consumers Power repudiated the contract. As a result of "many factors," one of which was its loss of the Consumers Power contract, Union Carbide was forced to negotiate a settlement of its supply contract with Petrostar. As part of the settlement Union Carbide paid Petrostar $20 million (Canadian) and assigned to it one of its forward contracts with a third party. Union Carbide then sued Consumers Power alleging market price damages of approximately $120 million (U.S.).

Consumers Power argued that damages should be limited to Union Carbide's lost profit, which was alleged to be $30 million (U.S.). The court agreed, relying primarily on the Fifth Circuit's decision in *Nobs Chemical*.[65] The court also addressed the "inadequacy" of damages argument that the Fifth Circuit had found "intriguing." The court reasoned that § 2-708(2) was explicit in defining "inadequate," not as merely "insufficient," but as "inadequate to put the seller in as good a position as performance would have done." The court regarded this language as a clear affirmance of the compensation goal stated in § 1-305 and, accordingly, it expressed reluctance "to endorse any position that runs counter to this policy."[66] With that policy in mind, the court concluded that, because it had chosen to insulate itself from market price fluctuations so as to guarantee "riskless" and certain profits, an award of the profit lost from its contract with Consumer Power would give Union Carbide the full "benefit of [its] bargain." Conversely, market price damages would "fundamentally alter this allocation of contractual benefits" and allow "vastly greater returns than were provided for" by the contract.[67]

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64. 636 F. Supp. 1498, 1501 (E.D. Mich. 1986).

65. As had *Nobs Chemical*, the court also agreed with the analysis of Professors White & Summers, who had anticipated the issue years previously. JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 7-12, at 232–33 (1st ed. 1972). An extended analysis can be found in 1 WHITE ET AL., *supra* note 19, § 8:19, at 713–18.

66. *Union Carbide*, 636 F. Supp. at 1501.

67. *Id.* at 1503. The court also rejected Union Carbide's reliance on Trans World Metals, Inc. v. Southwire Company, 769 F.2d 902, 908 (2d Cir. 1985). *Trans World* was decided subsequent to *Nob Chemical*. The Second Circuit had allowed a recovery of market price

The next two hedged contract cases came some seventeen years later in 2003. The first, *Diversified Energy, Inc. v. Tennessee Valley Authority*,[68] involved a long-term contract whereby Diversified had agreed to supply TVA with coal that it was to obtain solely from a designated third party, Sigmon Coal Company, a supplier that Diversified then contracted with roughly simultaneously. Sigmon was to pay Diversified a fixed commission on coal it delivered to TVA. TVA breached, and Diversified sought market price damages of $8 million. The Sixth Circuit rejected the claim and affirmed the trial court's award of Diversified's lost commission of approximately $1.2 million. Citing *Nobs Chemical* and *Union Carbide*, the court merely noted that Diversified had assumed no market risk and, therefore, the fixed commission represented the benefit of its bargain. To award greater damages, said the court, would violate "standard principles of contract law" and be "unreasonable as a matter of law."[69]

A federal district court tested Iowa law again a few months later in *Purina Mills, L.L.C. v. Less*.[70] The facts of the case were similar to those in *Diversified Energy* in that Purina, a jobber, had contracted to supply weanling pigs to Less. To the extent possible, the pigs were to be acquired by Purina from supplier Perennial Pork. Purina thus entered into a corresponding contract with Perennial at a fixed price that would secure a profit on its forward contract with Less. Less later repudiated the contract because of financial difficulties. Unlike the seller in *Diversified Energy*, however, Purina remained liable to its current supplier, Concord Valley Pork.[71] On that basis, said the court, it would normally have had no reluctance to award market price damages even though they greatly exceed Purina's lost commission.[72] Purina, however, had just five days after Less' repudiation turned down an offer from Concord Valley to buy out of the supply contract for $100,000. The court regarded this as a voluntary relinquishment by Purina of its protection from market price fluctuation in exchange for the opportunity to profit from increases in the market for weanling pigs. As such, the court could find "no reason why it should protect the expectancy interest Purina perfunctorily cast aside."[73] To do so would grant Purina an unearned windfall because, in addition to market price damages on the pigs, it would also profit from any addi-

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damages under § 2-708(1) even though there was evidence that the amount may have exceeded the seller's actual loss. *Trans World*, however, did not involve a hedged contract situation. The court in *Union Carbide*, therefore, agreed with the court in *Trans World* that the fact situations were distinguishable. The *Trans World* case is discussed *infra* Part II.C.

68. 339 F.3d 437, 439–40 (6th Cir. 2003).

69. *Id.* at 445–46. The court also distinguished its facts from those in *Trans World* as had the court in *Union Carbide*.

70. 295 F. Supp.2d 1017, 1049 (N.D. Iowa 2003).

71. Concord Valley had been assigned the contract by Perennial Pork with Purina's permission.

72. *Purina Mills*, 295 F. Supp.2d at 1045.

73. *Id.* at 1046. Another plausible reason for Purina's decision to continue with the supply contract was that the supplier was obligated to raise the baby pigs on feed and nutritional products supplied by Purina. These products, not sales of weanling pigs, represented Purina's primary business.

tional amount it would later receive from selling them on the market. The court's analysis well demonstrates a proper application of the "liberal administration" principle in § 1-305 to accommodate the specific facts at issue.

The Fifth Circuit addressed the issue once again in *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*[74] The facts involved a slight variation from the hedged contract cases. UPC had given permission to a "bilateral broker" to find a seller for UPC's fixed price bid for a year's supply of ethylene. The broker contacted Westlake, which made a matching offer through the broker. The broker then "lift[ed] the veil" and revealed the identities of the two parties. Under industry custom, this action finalized a contract between UPC and Westlake. The market price for ethylene soon declined, and UPC repudiated. In the ensuing litigation, Westlake received a jury award of $6.3 million. UPC appealed, arguing that, since Westlake never acquired the ethylene to supply UPC, it could not recover market price damages under § 2-708(1).[75] The Fifth Circuit agreed, noting that Westlake was a "jobber" and, as it had held in *Nobs Chemical*, Article 2 "intends" damages for such sellers to be measured by their lost profit as provided in § 2-708(2).[76] The court said that to award greater damages based on market price would violate the basic policy expressed in § 1-305.

So Article Two has had its impact on the hedged contract cases. What was once the majority rule is represented in current law by only two of nine decisions, both of which date back more than twenty years. Both cases involved supplier breaches, not breaches by the forward contract buyer. The cases are unanimous in denying the jobber seller market price damages when they exceed the actual loss. However, given the fervor of the advocates for market price damages, it would be risky to predict future cases based on such a small sampling. It might also be inappropriate to combine the two groups of cases in a head count because, unlike the § 2-713 cases where the seller is in breach, the § 2-708 buyer breach cases are buttressed by the independent principle that denies market price damages to jobbers and other sellers who did not have goods on hand to perform the breached contract. But, as will be further developed below, it is clear that over time the courts have become increasingly comfortable with applying § 1-305 to structure damage awards to measure actual damages. In turn, across the board, including with the hedged contract cases, there has been a definite and appropriate decline in the influence of market price damages.

74. 688 F.3d 232, 243 (5th Cir. 2012).

75. The supplier for Westlake was not identified in the court's decision, perhaps because the repudiation happened so quickly that Westlake had not yet made arrangements to acquire the ethylene. There was, however, no dispute as to whether Westlake could have acquired the ethylene.

76. The courts deny market price damages where the seller was not able to access the market because either he did not acquire the goods or did not complete manufacture of them, assuming his decision was reasonable. *See* discussion *supra* note 25.

3. *Willful Breach, Intrinsic Loss, and Disgorgement of Gain*

Even the lost profit cases, however, have indicated that the court would award market price damages to frustrate a promisor (seller or buyer) who, knowing of the promisee's market hedge, has strategically breached to take advantage of an advantageous market swing. There is, of course, tension here with customary contract principles. Contract law, and § 1-305 most particularly, disregards a promisor's gains in excess of the damages caused by his breach. This is so regardless of the culpability of the breacher. Willful breaches are treated the same as innocent ones.[77] To the extent that so fundamental a principle needs justification, its intent is to promote predictability and uniformity and to avoid the chaos that would result from innumerable attempts to delineate fault in an infinite number of nuanced fact situations.[78] The line between "will not" and "cannot" is mercurial and, practically, indecipherable across a broad spectrum of breaches. Invariably, however, so myopic a view will lead to unpalatable results, particularly where the promisor's gain is significant and the promisee is left with a loss that is not adequately measured by expectancy damages.

It is not surprising, therefore, that leading contract law thinkers have long called for a contract remedy that would disgorge a breaching promisor's gains, particularly in cases of egregious wrong. And, as is well documented, courts here and there over time and jurisdiction have used various fictions to divert those gains to the promisee.[79] One widely adopted fiction is used where damages are not readily provable. The promisor's gains from breach are then treated as the presumptive equivalent of the promisee's loss and are awarded as compensatory damages.[80] Another tack is to punish the wrongdoer by awarding damages based on the higher of two available measures of damages, such as cost of

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77. Holmes, of course, is always blamed for the idea. To wit: Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.").

78. As with many contracts scholars, Alan Farnsworth was a consistent critic of using willfulness as a determination of awardable damages. He was concerned not only by the difficulties in defining its borders, but with the confusion he anticipated would invariably result from self-serving attempts by promisors to fabricate moral and legal justifications for the breach. *See, e.g.*, E. Allan Farnsworth, *Your Loss or My Gain?—The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1383–84 (1985).

79. *See*, *e.g.*, John Dawson, *Restitution for Damages?,* 20 OHIO ST. L.J. 175 (1959); Melvin Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559 (2006); Farnsworth, *supra* note 78, at 1343–50; Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980); Joseph Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208, 1217–18 (1973).

80. Long ago, Professor Dawson identified these surrogate damages cases as forerunners for what he hoped presaged the development of a remedy that would disgorge illicit gains from breach. *See* Dawson, *supra* note 79*,* at 188–89. Common examples of surrogate damages were for patent infringement and for breach of negative covenants, such exclusive territory agreements.

repair or restoration, rather than a lesser award of diminution in value of the property.[81] Neither model, however, well fits these hedged contract cases. The first is inapplicable because the lost profit on the hedging contract establishes readily provable actual damages. The second model is inappropriate because an award of higher market price damages runs afoul of the penal damages prohibition in § 1-305.

The recently promulgated Restatement Third of Restitution and Unjust Enrichment, however, proposes an attractive third alternative. Its § 39 formulates a restitution remedy that would disgorge profits gained from a deliberate breach of contract.[82] The essential elements are but three: (1) a deliberate breach, from which (2) the breaching party profits, but (3) leaves the promisee with an inadequate contract remedy.[83] For courts to supplement Article 2 with a restitution remedy for willful breach cases is preferable to a market price damages award because the same result can be achieved without fiction and without contravention of § 1-305's prohibition of penal damages.[84]

A breach to access an advantageous market by a promisor on either end of the hedged contract situation should easily meet the first two re-

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81. *See generally* Timothy Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 571 (1981); Patricia Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 741–56 (1982).

82. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. LAW INST. 2011) provides:

> § 39 Profit From Opportunistic Breach
>
> (1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.
>
> (2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.
>
> (3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).

83. The historical development of the remedy is examined and § 39's formulation of it is critiqued in Roy Ryden Anderson, *The Compensatory Disgorgement Alternative to Restatement Third's New Remedy for Breach of Contract*, 68 SMU L. REV. 953 (2015).

84. U.C.C. § 1-103(2) preserves extra-Code law "[u]nless displaced by the particular provisions" of the Code. There is, of course, no remedy in Article 2 that would specifically displace a remedy in restitution such as that in § 39. It is arguable, however, whether a disgorgement of benefits for willful breach would run afoul of § 1-305's prohibition against penal damages. It would seem not since a restitution award is not an award of damages. *See, e.g.*, Pyskaty v. Wide World Cars, LLC, 856 F.3d 216, 229 (2d Cir. 2017) (valid § 2-719 exclusive remedy provision applies only to limit Article 2 remedies and would not bar restitution remedy of rescission; it would be "odd at best" for equitable remedy to be barred by very contract that plaintiff sought to rescind). *See also*, AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 (8th Cir. 1998) (as provided in U.C.C. § 2-721, claims for fraud and misrepresentation that arise out of a sale of goods are not preempted by Article 2).

quirements of the disgorgement remedy. Where, however, the claimant, whether it is the seller or the buyer, has no liability on the other contract with its supplier or customer, satisfaction of the third element is less certain.[85] Fertile ground, however, will often be provided by the symbiotic relationship that commonly exists between and among the parties in these situations. The hedged contract decisions often mention that the middleman had previously done business with either the supplier or the forward contract buyer, and sometimes with both. These middlemen, jobbers, brokers, commission merchants, and their ilk typically do not handle goods but trade in putting together deals. They rely on their knowledge, wits, and salesmanship to generate repeat customers and to develop a certain goodwill with them. Contract law has always had difficulty in quantifying this sort of inchoate interest monetarily.[86] But business goodwill is, of course, very real and can have substantial value.[87] So where the breach has rendered the middleman unable to perform on the other contract, and even though that supplier or buyer has chosen not to pursue a claim against the middleman, surely that decision often will have come with an express or implicit understanding that the third party's largess will be reciprocated if in the future the situation is reversed. Or worse, the previous goodwill that may have been generated with the third party has been undermined. Either way there is an intangible cost to the middleman in terms of future obligation or lost goodwill that may not be accounted for by expectancy damages but would, in appropriate circumstances, be sufficient to support a disgorgement award.[88]

B. WHERE THE STRATEGY IS TO STAND PAT

It is axiomatic that an agreed contract price allocates marketplace risk—to the seller that market price will rise after the contract is made; to the buyer that it will fall. It is also axiomatic that contract law regards market fluctuations in themselves, regardless of magnitude, to constitute

85. Where, however, the seller is the claimant and has liability over to its supplier, UCC damages are clearly inadequate because that liability is in the nature of consequential damages, recovery of which is denied to sellers by § 1-305.

86. Courts most everywhere abstractly recognize the value of goodwill, but in most cases find it too uncertain and speculative in amount to support an award of damages. For an extensive judicial discussion of the difficulties in recovering compensatory damages for loss of goodwill, see AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915, 925–26 (Pa. 1990). *See generally* 1 ANDERSON, *supra* note 12, §§ 11–31.

87. The hedged contract situation typically involves specific types of goods, such as livestock, farm products, and other commodities, including oil and gas. As such, it is as common a component of the commercial landscape as are output and requirements contracts. This symbiotic relationship that the middleman has with parties at both ends of the contracting string may well explain why, as common as these contract are, litigation of them is rather rare.

88. Purina Mills, L.L.C v. Less, 295 F. Supp.2d 1017 (N.D. Iowa 2003), offers a good example of how the relationships of the parties can intertwine in these cases. Purina, primarily a seller of pig and other animal feed, entered into a contract to sell weanling pigs to Less for purposes of growing the pigs for slaughter. In turn, Less agreed to buy the feed to grow the pigs from Purina but, in turn, Less required that Purina acquire the little pigs from a particular supplier, Perennial Pork.

no basis for excuse from contract performance. Balanced against these principles are two of the most fundamental rules of the law of damages. First is the causation principle, which bars a recovery of damages that were not caused by the wrongdoer. Second is the mitigation principle, one closely related to causation, which bars a recovery of damages that were readily avoidable by the injured party and, therefore, need not have been caused by the wrongdoer.[89] The mitigation principle permeates Article 2 remedies as common law that is preserved for UCC cases by § 1-103. As previously discussed, the principle also is explicitly provided for in § 2-704 for situations where the goods have not been acquired or their manufacture has not been completed. Indirectly, the principle also arises by implication from the principles of good faith and commercial reasonableness that govern the validity of a resale or cover. The courts uniformly assess those standards in terms of whether the aggrieved party acted reasonably in the resale or cover to mitigate its loss and, in turn, lessen the damages for which the breaching party is responsible.[90]

Nevertheless, the UCC does not require the seller to resell or the buyer to cover.[91] It is a sensible rule. There is no danger that the aggrieved party will speculate unfairly on market changes because damages are fixed in § 2-708 and § 2-713 by the market price at the time of breach.[92] But to allow a recovery of damages that could have been reasonably avoided by a resale or cover is another matter entirely. As to those damages, the courts have consistently applied the mitigation principle to deny

89. The mitigation of damages principle stands with the oldest concepts of the common law. Professor Farnsworth told of a seventeenth century case that shows the conceptual overlap between the principles of causation and mitigation.

In Vertue v. Bird, 86 Eng. Rep. 200 (1677), the plaintiff had contracted to deliver lumber to the defendant at a specified time and place. The defendant was six hours late in taking delivery. The court denied plaintiff damages for his horses that had died from standing in harness in the sun for all that time. The court said that the loss was due to "the plaintiff's folly," because he might have easily avoided the loss by unloading the lumber and moving the horses to the shade. *Id*. (as described in E.A. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1184 (1970)).

90. For both sellers and buyers, however, the substitute transactions are generally presumed to be in good faith and commercially reasonable, and the mere fact that hindsight might show that prudence could have produced a better price is irrelevant. The cover cases are collected and discussed in §§ 8:11–8:15, and the resale cases in §§ 4:22–4:33 of 1 ANDERSON, *supra* note 12.

91. Comment 1 to § 2-703 states a "fundamental policy" that "rejects any doctrine of election of remedy" and says that a seller's remedies are "essentially cumulative." The courts have consistently read this provision to allow the seller to forego resale and keep the goods. This confirms the permissive language in § 2-706 that says that a seller "may" resell. Section 2-712(3) is even more emphatic for buyers: "Failure of the buyer to effect cover . . . does not bar him from any remedy." Comment 3 to the section affirms a "policy that cover is not a mandatory remedy" and says that a "buyer is always free to choose between cover and [market price] damages."

92. *See*, *e.g.*, Desbien v. Penokee Farmers Union Coop Ass'n, 552 P.2d 917, 926–27 (Kan. 1976) (seller who retained possession of wheat denied damages where market price of wheat at time of breach was nearly double the breached contract price; seller could have avoided any loss by simply reselling); Cole v. Melvin, 441 F. Supp. 193 (D. Ct. S.D. 1977) (seller who unreasonably delayed resale of cattle in falling market relegated to damages measured by market price for cattle at date of breach); James Mfg. Co. v. Stovner, 459 P.2d 51, 54 (Wash. Ct. App. 1969) (accord).

their recovery.[93] The § 2-713 anticipatory repudiation cases provide an excellent example of courts melding the mitigation principle with an Article 2 remedy provision that otherwise would allow for greater damages. In the typical scenario, the seller repudiates in a rapidly escalating market well in advance of the time for performance. The market continues to rise, so that at the time set for performance the market price for the goods is much greater than it was at the time the seller repudiated.[94] The common law rule was uniform; damages were to be measured by the market price at the date for performance. It mattered not that the buyer could have easily avoided most or even all of the loss by an earlier cover. In all but the occasional case, it did not even matter that the buyer actually did mitigate by a cover. The cases treated cover as a foreign concept and stood proudly as unparalleled exemplars of nonsensical awards of market price damages.

Article 2 introduced the cover remedy to sales law both as a viable substitute for the market price remedy and as a concept for mitigating damages. It is well settled, however, that the drafters did not write § 2-713 with intent to change these pre-Code rules for anticipatory repudiation cases. Market price damages would continue to be measured no earlier than the time set for performance.[95] Nevertheless, armed with the cover concept, the cases have artfully interpreted § 2-713 so that damages are set no later than the time the buyer could have reasonably minimized his loss by a cover purchase.[96] These cases also stand as excellent examples of how the liberal administration principle in § 1-305 can be used to limit damages to the actual loss, notwithstanding express language or even a drafting history that would otherwise require a different result.

Apex Oil Co. v. Vanguard Oil & Service Co. Inc.[97] is perhaps the leading case confirming a buyer's right to not cover, stand pat, and recover market price damages. *Apex* Oil (a § 2-713 case) and *Trans World Metals*[98] (a § 2-708 case) are often cited as illustrations that the Second Circuit will award market price damages regardless of the plaintiff's actual

93. *See also*, U.C.C. § 2-715, which denies recovery for consequential loss that could "reasonably be prevented by cover." On the other hand, where a resale does not mitigate damages, as with lost volume sellers, the courts do not restrict recovery to resale damages.

94. To illustrate: assume a contract price of 10 and that the seller repudiates when the market price is 12. The buyer does not cover although it could have at that time or at other times prior to performance. The market price continues to rise steadily to 15 at the time set for tender. The buyer seeks damages measured by the market price of 15.

95. For a detailed discussion of measuring § 2-713 damages in anticipatory repudiation cases, *see* 1 White et al., *supra* note 19, § 7:38, at 624–32. *See also* 1 Anderson, *supra* note 12, § 9:17, at 618–25.

96. The leading case is the instructive and well-reasoned opinion of the Tenth Circuit in Cargill, Inc. v. Stafford, 553 F. 2d 1222, 1277 (10th Cir. 1977). Other helpful analyses can be found in Cosden Oil & Chem. Co. v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064, 1071–76 (5th Cir. 1984) and in Trinidad Bean and Elevator Co. v. Frosh, 494 N.W.2d 347, 350–54 (Neb. Ct. App. 1992).

97. 760 F.2d 417, 424 (2d Cir. 1985).

98. Trans World Metals, Inc. v. Southwire Co., 769 F.2d 902, 908 (2d Cir. 1985).

loss.[99] If there is truth in the indictment it is largely because of the court's rhetoric, particularly in *Trans World*, rather than the damages awards that the court affirmed. The court probably got both cases right.[100]

In *Apex,* both parties were dealers in petroleum products and had also previously engaged in a contract similar to the one at issue. Neither was an end user, a fact of some importance in the court's decision. Apex agreed to purchase fuel oil from Vanguard for purposes of resale. After arranging financing for its purchase, Vanguard contracted with CEI, a supplier, for oil to fulfill several contracts, including its deal with Apex. After several delays in performance, which Vanguard attributed to problems with CEI, Apex cancelled the contract and brought suit against Vanguard. The trial awarded market price damages to Apex of a little over $1 million.

On appeal, Vanguard argued that, since Apex was not an end user, it could not recover damages under § 2-713. Apparently Vanguard was saying that, because Apex was purchasing the oil solely for resale but did not cover for any oil to supply customers, it must have had no customers for the contracted oil and, therefore, it had suffered no damages. Non-sequitur arguments can be the hardest to respond to, which may explain why Judge Newman did not better describe Vanguard's position. Regardless, Apex was seeking only direct damages, not lost resale profits, and § 2-712(3) specifically provides that a failure to cover does not bar a buyer from remedy. The court could have simply dismissed Vanguard on that basis.

Judge Newman, however, chose a kinder stance.[101] He agreed with Vanguard that § 2-713 certainly makes more sense for end users than for mere brokers because, even if they don't cover, end users, unlike brokers, still have lost the value of the contracted goods. Thus, it "seems fictional" to say that the broker who chooses not to cover suffers any loss. But, said Newman, Vanguard could itself have covered to honor its obligation to Apex and thereby have avoided Apex's claim for market price damages. He reasoned that, by not obligating the buyer to cover, § 2-713 reflects a "policy judgment" that any savings that could result from a cover should go to the buyer rather than "permit the non-performing and non-covering

99. *See, e.g.*, KGM Harvesting Co. v. Fresh Network, 42 Cal. Rptr.2d 286, 293 (Cal. App. 1995) (extending the observation to all New York courts). *But see* Tesoro Petroleum Corp. v. Holborn Oil Co., 547 N.Y.S.2d 1012, 1015–17 (Sup. Ct. 1989) (denying recovery of market price damages and limiting seller to resale damages).

100. For a discussion of *Trans World*, see *infra* notes 122–26 and accompanying text. The two cases taken together represent extraordinary coincidence. Both cases were decided the same year by the same court. The same judge (Jon Newman) wrote both opinions. Both opinions addressed the same contentious issue, one from the buyer's perspective, and the other from the seller's. Together they covered the waterfront of UCC provisions for market price damages, §§ 2-708 and 2-713. Whether one case influenced the other is conjectural. *Apex* was issued first, on April 18, 1995. *Trans World* was not rendered until August, but oral argument had been on April 2, almost three weeks before *Apex* was published. The court has not spoken directly to the issue since.

101. The court also denied Apex's not entirely unwarranted request for sanctions against Vanguard for a frivolous appeal. *Apex Oil*, 760 F.2d at 424.

seller to retain it." He concluded that whether this policy "should be legislatively limited to buyers who demonstrate some prospect of forgone opportunity for profitable resale is not for us to say."[102]

Apex Oil is a solid decision in response to an abnormal fact situation. If Vanguard was arguing that Apex could have mitigated damages by covering and reselling, it did so poorly. Even so, it had the burden of proof that Apex could have avoided loss by a cover. Had it carried that burden and had the court still affirmed the damage award, *Apex Oil* would have been a bad decision, and the case could then be reliably cited as an example of the court's predilection to award windfall market price damages.

Unlike the seller resale cases discussed immediately below, the cases do not directly address the issue of whether the buyer can recover market price damages that could have been reasonably avoided by cover. This is likely attributable to the fact buyers typically take advantage of reasonable cover opportunities. A buyer who still wants the goods is going to purchase substitutes if she can. If she no longer wants them, she probably has good reason and feels no quarrel worth pursuing with the seller. The following hypothetical illustrates the puzzling type of situation that would raise the issue. Assume Alice breaches a contract to sell Brenda goods for $10. Whether or not at Alice's behest, Charley offers to sell Brenda the identical goods for the identical $10. Brenda declines the offer. Charley then offers Brenda the same goods for $9. Brenda again declines and instead sues Alice for $2, which is supported at trial by the testimony of expert Donald, who swears that the true market value of the goods at the time of Alice's breach was $12.

Among several choices, what seems most implausible about this scenario is not the testimony of Donald as to market price or even that a jury might award damages to Brenda. What makes least sense is that Brenda decided to sue Alice rather than accept either of Charley's offers, particularly if Donald is right that Alice could have flipped them at a profit. Unless, of course, Brenda had suffered some buyer's remorse and was happily relieved by Alice's breach. Regardless, Brenda has suffered no unavoidable loss and should be denied any recovery. Comment 1 to § 2-713 emphasizes that market price damages are intended to emulate "the market in which the buyer would have obtained cover had he sought that relief." On these facts neither court nor jury would have difficulty picking the price at which Brenda would have covered.

When the courts have addressed the issue indirectly, they have consistently implied that a buyer may not recover market price damages that could have been avoided by cover.[103] The anticipatory repudiation cases discussed above are particularly instructive in this regard because they

102. *Id.*

103. The leading treatise even asks: "If the Code's goal is to put the buyer in the same position as though there had been no breach, and if 2-712 will accomplish that goal but 2-713 will do so only by coincidence, why not force the covering buyer to use 2-712?" 1 WHITE ET AL., *supra* note 19, § 7:19, at 579.

demonstrate a strong consensus of carefully reasoned opinions that disallow reasonably avoidable damages notwithstanding a literal reading of § 2-713 and a contrary intent of its drafters.[104]

Where it is the buyer in breach, the courts overwhelmingly have held that a seller may not recover market price damages under § 2-708 that could have been reasonably avoided by resale. In *Schiavi Mobile Homes, Inc. v. Gironda*,[105] for example, the Maine Supreme Court was introduced to a real world seller who acted as absurdly as had fictitious Brenda in the cover hypothetical above. Gironda had contracted to buy a mobile home from Schiavi, sealing the deal with a $1,000 down payment. Medical and financial difficulties ensued, and Gironda moved from Maine to California. Schiavi contacted Gironda's father to inquire whether his son was going to honor the contract. The father was uncertain but, so that his son would not lose his deposit, he offered to buy the home himself if his son did not. Schiavi ignored the offer and sued the son, claiming lost profit damages as a lost volume seller. The court made understandably short work in denying the seller's claim. Although Schiavi may have been a lost volume seller in the general sense, it did not lose this particular sale because the uncontroverted evidence was both that the father would have honored the contract in his son's stead and that he would not have bought a mobile home from Schiavi had it not been for his son's breach.[106]

The court's holding in *Schiavi* has been followed consistently by numerous comparable cases.[107] It has also been extended to situations in

104. *See* discussion *supra* following note 93. One can find dictum in the occasional case to the effect that, since § 2-712(3) does not mandate cover, a buyer does not have to cover to mitigate damages. *See* Jon-T Farms, Inc. v. Goodpasture, Inc., 554 S.W.2d 743, 750 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); TXU Portfolio Mgmt. Co., L.P. v. FPL Energy, LLC, No. 05-08-01584-CV, 2016 WL 4410252, at *9 (Tex. App.—Dallas Aug. 18, 2016, no pet.). The courts' observations were purely dictum, the latter case relying entirely on the former. In neither case did the evidence show that the buyer had covered. Nor was there evidence that damages could have been mitigated by cover. The courts' dictum overreads § 2-703. Article 2 treats as distinct the issues of whether a buyer must cover and whether a buyer may recover damages that could have been avoided by cover. For example, although § 2-712(3) says that a failure to cover does not bar the buyer from *any* [applicable] remedy, § 2-715(2)(a) explicitly provides that consequential damages may not include those that could have been reasonably avoided by cover.

105. 463 A.2d 722, 723–26 (Me. 1983).

106. *Cf.* New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., No. CIV.A.3:97CV894(CFD), 2002 WL 229900, at *15 (D. Conn. Feb. 4, 2002) (general rule that lost volume seller has duty to mitigate damages by selling goods to substitute buyer who was introduced by breaching buyer did not apply because substitute buyer would have required material change in terms of breached contract).

107. *See*, *e.g.*, Zippy Mart of Ala., Inc. v. A & B Coffee Serv., Inc., 380 So.2d 833, 835 (Ala. 1980) (before awarding damages, court must first determine whether supplier could have mitigated damages by reselling goods; if so, supplier could only recover damages for lost profits); Neumiller Farms, Inc. v. Cornett, 368 So.2d 272, 275–76 (Ala. 1979) (UCC imposes no obligation on seller to reenter market unless resale would have mitigated damages); Desbien v. Penokee Farmers Union Coop. Ass'n, 552 P.2d 917, 927 (Kan. 1976) (seller who retained possession of wheat denied damages where market price of wheat at time of breach was nearly double the breached contract price; seller could have avoided any loss by simply reselling); Sharp Electronics Corp. v. Lodgistix, Inc., 802 F. Supp. 370 (D. Kan. 1992) (damages should be measured by resale price rather than market price);

which the seller engaged in an invalid resale. In *Coast Trading Co. v. Cudahy Co.*,[108] the Ninth Circuit found a fictitious paperwork resale to a company related to the seller to be commercially unreasonable and in bad faith. The court then remanded for a determination of market price damages, but with the instruction that the seller's recovery could not exceed those that would have been produced by a commercially reasonable resale.[109]

C. Where The Strategy Is To Mitigate

When a buyer makes a proper Article 2 cover, it is by definition a true replacement contract because § 2-712 requires that it be "in substitution" for the contracted goods. It is hard to think of a better example of the mitigation principle at work. The cases, therefore, have uniformly embraced the restriction in Comment 5 to § 2-713 that bars market price damages "to the extent the buyer has . . . covered."[110] Comment 1 to § 2-713 also affirms the surrogacy of market price damages by emphasizing that the "baseline" and "yardstick" against which its damages are to be measured is "the market in which the buyer would have obtained cover had he sought that relief."

Although Comment 1 to § 2-712 goes on to say that cover is intended to be "the buyer's equivalent of a seller's right to resell," there are no comparable provisions limiting market price damages for sellers. A similar provision for sellers would have had to be tailored differently, however. Unlike covers, not all resales are replacements for the breached contract. Resales by "lost volume" sellers are not enabled by the breach but would have been made regardless of it. For this reason, they do not fully mitigate damages in the way the buyer's cover does.[111] Unarguably, however, when a seller makes a resale that is enabled by the breach, one

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Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa Ct. App. 1989) (upholding trial court's damage award that had reduced damages by 70% for seller's failure to mitigate loss by reselling goods); Tesoro Petroleum Corp. v. Holborn Oil Co., Ltd., 547 N.Y.S.2d 1012, 1016–17 (Sup. Ct. 1989) (contract price less resale price was proper measure of damages rather than greater amount based on market price). *See also* Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc., 503 P.2d 482, 490–91 (Or. 1972) (difference between contract price and market price is correct measure of damages when there is no "market which, if availed of, would have substantially mitigated [seller's] damages").

108. 592 F.2d 1074 (9th Cir. 1979).

109. *See* U.C.C. § 2-706 cmt. 2 ("Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.").

110. *See, e.g.*, Bayer Corp. v. DX Terminals, Ltd., 214 S.W.3d 586 (Tex. App. 2006) (once buyer obtains proper cover, damages are to be based on cover price); *In re* S.N.A. Nut Co., 247 B.R. 7, 18 (Bankr. N.D. Ill. 2000), *aff'd as modified*, 302 F.3d 725 (7th Cir. 2002) (buyer could not seek market price damages since it was able to buy substitute goods at price lower than breached contract price); B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651, 661–62 (M.D. N.C. 1979) (§ 2-713 damages denied where seller had covered for all its requirements). *See also* Interior Elevator Co. v. Limmeroth, 565 P.2d 1074, 1080 (Or. 1977) (awarding both § 2-712 and § 2-713 damages, but the latter only to extent buyer had not covered).

111. As is discussed more fully below following note 117, resales by lost volume sellers do partially mitigate damages by covering the seller's performance expenses.

that he could not have made otherwise, the resale is a true substitute and mitigates damages just as a cover does. For brevity, in the discussion below these sellers are called "full capacity" sellers.

It is interesting that the Article 2 cases do not queue up with holdings that full capacity sellers cannot recover market price damages if they have resold.[112] There are certainly a plethora of cases that apply the resale remedy perfunctorily, so it may well be that most full capacity sellers are happy with the easily provable compensatory damages provided by § 2-706. In any event, as will be discussed more fully below, there were plenty of pre-Code cases that rejected recoveries of market price damages where the resale price was less than the applicable market price.[113] It is a dubious argument that asks a court to ignore an actual resale because the seller could have sold for much less earlier on.[114] There is also ample indirect authority from the many cases discussed immediately above that have denied market price damages that could have been avoided by resale, by observational dictum in cases where the seller has resold,[115] and, most importantly, in the countless cases that allow lost volume resellers to recover the profit lost on the breached contract.

Neri v. Retail Marine Corp.[116] is a leading lost volume seller case. The relevant facts were simple. Four months after the buyer's breach, the seller had resold for the same price the same boat the breaching buyer had agreed to purchase. The seller sued for § 2-708(2) damages. The buyer defended that damages should be offset by the resale price. The court rejected the argument, thereby introducing the "lost volume" seller

112. There are a few. *See, e.g.*, Sharp Elec. Corp. v. Lodgistix, Inc., 802 F. Supp. 370, 378–79, 381 (D. Kan. 1992) (where seller properly resold goods, market price damages not recoverable); Lake Erie Boat Sales, Inc. v. Johnson, 463 N.E.2d 70, 72–73 (Ohio Ct. App. 1983) (where goods were sold for same amount as breached contract price, no market price damages could be recovered). This is the position taken in the 1999 revision of Article 2 as approved by the American Law Institute. U.C.C. § 2-803 cmt. 4. (AM. LAW INST. & UNIF. LAW COMM'N 1999). In this regard, the revision followed the recommendations of the Article 2 Revision Study Group Report and the A.B.A Task Force Report that evaluated the Study Group Report. The two reports are juxtaposed in *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991) [hereinafter *Appraisal*]. The recommendations for § 2-706 are at pages 1213–16. The Study Group Report's recommendation reads as follows: "We recommend that, in the absence of lost volume, if the seller has . . . actually resold the goods . . . the seller is limited to damages as measured by § 2-706(1)." *Id.* at 1214. This is also the view taken in 1 WHITE ET AL., *supra* note 19, § 8:6.

113. The cases are discussed *infra* Part II.C.3.

114. But for Comment 5 to § 2-713, the aggrieved buyer's argument would be even more fun: "Your honor, forgive please, but I messed up and paid too little for these goods."

115. *See, e.g.*, Sprague v. Sumitomo Forestry Co., Ltd., 709 P.2d 1200, 1202–05 (Wash. 1985) (emphasizing that full capacity timber seller mitigated its damages by reselling).

116. 285 N.E.2d 311 (N.Y. 1972). The case is leading in the true sense that the New York Court of Appeal's decision was the first to instruct on lost volume sellers and on how the profit formula in § 2-708 should be applied. The decision may seem quaint by today's standards, but oldsters will recall that not so long ago courts were often skeptical that a second sale of the same goods did not mitigate the first sale. Professor Harris says that his research revealed only one Sales Act case where the court demonstrated that it even understood the lost volume concept. And there, alas, the court rejected it. Harris, *supra* note 14, at 83 n.86 (citing A. Lenobel, Inc. v. Senif, 300 N.Y.S. 226 (App. Div. 1937)).

to the case law. But for the proof of lost volume, however, it was clear that the court would have ruled that the resale had fully mitigated the seller's damages.[117]

The mitigation issue is different for lost volume sellers. Their resales do mitigate but to the lesser extent of the costs the seller saves in not having to perform the breached contract. Those costs are deducted from the breached contract price, and the seller is thereby fully compensated by limiting recovery to the profit (including reasonable overhead) it lost from the breached contract.[118] Some courts, however, have struggled with the issue of whether the lost volume seller can recover a greater amount based on market price damages. Although the five hedged contract cases discussed above all denied windfall market price damages to lost volume sellers, the case law for other situations is sketchy unless one considers the multitude of cases that have perfunctorily awarded lost profit damages once the seller has proved lost volume. Those cases also suggest that lost volume sellers rarely seek market price damages.

Courts and commentators have agreed on three categories of lost volume sellers. Two have been addressed previously in this paper: component sellers and jobbers.[119] Sellers in these categories do not have completed goods on hand to fulfill the breached contract—component sellers because they did not complete manufacture, jobbers because they did not acquire the goods from a supplier.[120] As we have seen, with near unanimity courts deny market price damages to these sellers because they could not have accessed the market in which they seek to measure damages. A specific mitigation component also applies to each of these types of sellers. To recover the lost profit, component sellers must pass muster with § 2-704 by having acted reasonably in their decisions to discontinue manufacture. And, by definition, a seller qualifies as a "jobber" only if its

117. It is also clear that a seller who has resold has the burden of proof that the breach left it at lost volume. *See* Kenco Homes, Inc. v. Williams, 972 P.2d 125, 128 (Wash. Ct. App. 1999) (seller who bought goods from factory supplier had access to virtually unlimited supply of goods and would have sold additional unit but for buyer's breach; seller thus proved lost volume and was entitled to recover its lost profit; market price damages under § 2-708 would be inadequate). The cases are collected and discussed in 1 ANDERSON, *supra* note 12, § 5:17. *Cf.* New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc., 2002 WL 229900, at *13 (D. Conn. Feb. 4, 2002) (under § 2-708, seller is allowed to recover lost profits only for period it was in state of lost volume, after which it is restricted to market price damages).

118. *See, e.g.*, Zippy Mart of Alabama, Inc. v. A & B Coffee Serv., Inc., 380 So.2d 833, 835 (Ala. 1980) (seller may not have price action if on remand jury determined seller could have mitigated damages by resale, in which case seller only entitled to lost profit under § 2-708). *Cf.* Am. Seating Co. v. Archer Plastics Inc., 2014 WL 4798522, *12 (D. N.J. Sept. 26, 2014) (even if damages for contract price under § 2-709 were improper because goods could have been reasonably resold, damages for lost profit under § 2-708 would be the same because no performance costs were saved as a result of the breach).

119. *See* discussion *supra* following note 19. *See also* 1 WHITE ET AL., *supra* note 19, § 8:13 (discussion of applicability of § 2-708(2) to component sellers and jobbers). Use of the term "jobber" to describe sellers in this context has been part of sales law terminology for a long time. *See, e.g.*, A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 245 (1925).

120. For an analysis of the jobber's damages situation, *see* Westlake Petrochemicals, L.L.C. v. United Polychem, Inc., 688 F.3d 232, 242–44 (5th Cir. 2012).

decision not to acquire the goods was reasonable.[121]

The third category of lost volume sellers is the largest. It may also be a residual one into which all the others can be grouped. It is comprised of manufacturers with unused manufacturing capacity or sellers that have a sales inventory that has not been depleted. These are the proverbial "middlemen." Although as with the other two categories of lost volume sellers, they are fully compensated by lost profit damages, this is the category of sellers who occasionally have sought to recover windfall market price damages, thereby causing consternation and controversy, but mostly in the scholarly literature. But only two reported cases have actually allowed market price damages to a lost volume seller.

The leading case is the Second Circuit's 1985 decision in *Trans World Metals, Inc. v. Southwire Co.*[122] In April 1981, Trans World entered into a master contract with Southwire to sell 12,000 metric tons of aluminum for $20.4 million. Deliveries were to be made in response to release orders from Southwire for each month during 1982. The market price for aluminum fell dramatically, and Southwire repudiated the contract in March of that year. Trans World sued, and the trial court affirmed the jury award of $7.1 million in market price damages. On appeal, Southwire argued that damages should have been limited to Trans World's lost profits. In raising the issue at trial, however, Southwire apparently had not put Trans World to proof of its damages for each monthly delivery. Instead, Southwire merely took Trans World's profit on the first delivery and projected it over the twelve-month term of the contract.[123] This failure gave the court no hard facts in support of Southwire's position and perhaps was reason enough for the court to affirm the trial court award.[124]

Instead, however, Judge Newman wrote an opinion lauding market price damages. He first turned to the Article 2 drafting history and found "nothing in the language or history" to suggest that § 2-708(2) was intended to apply where market price damages overcompensated the seller. Although he readily conceded that market price rarely measures damages accurately, he reasoned that no other measure would actually give Trans World the "benefit of its bargain." To the court, apparently, actual damages and benefit of bargain damages were two different things. So, the reasoning continued, since fixed price contracts impose on each party the risk of adverse market price fluctuations, Trans World and Southwire surely knew "that they were betting on which way aluminum prices would

121. *See supra* note 63.
122. 769 F.2d 902 (2d Cir. 1985).
123. Trans World had been equally cavalier. Its market price expert merely took the "actual" market price for the month following breach (April) and projected it forward. The court found this harmless error because this calculation produced a lesser sum than would have a proper calculation based on market price for the month of each delivery.
124. Southwire, however, was not making a mitigation of damages argument but alleging that Trans World would be overcompensated by market price damages. It would seem, therefore, that once Southwire showed plausible evidence to support its allegation, the trial court should have required Trans World to controvert that evidence as part of its ultimate burden of proving damages.

move."[125] And Trans World won the bet and was entitled to the market price payoff![126]

But surely the wager analogy here is inapt. Fixed price contracts are not wagers on breach; they are protectors against it. They, of course, do not offer the additional protection that would hedging with a supply or forward contract.[127] The court found its facts distinguishable on that basis from the hedged contract situation in *Nobs Chemical.*[128] The court also cited its decision in *Apex Oil* with a parenthetical merely noting that the seller in that case was also entitled to market price damages.[129] As emphasized above, however, *Apex* O*il* was a sound decision with facts as readily distinguishable from those in *Trans World* as were those in *Nobs Chemical.* Nevertheless, given the evidentiary record, the quarrel here is not so much with the court's judgment as with Judge Newman's reasoning in support of it.[130]

After *Trans World* the field lay fallow for almost twenty years. The Second Circuit has not addressed the issue again and, although several courts have noted the case, none have adopted the court's reasoning. As noted above, however, the Fifth Circuit did implicitly reject *Trans World*'s holding in *Westlake Petrochemical.*[131] The recent decision of the Oregon Supreme Court in *Peace River Seed Co-Operative, Ltd. v. Proceeds Marketing, Inc.*[132] was therefore surprising, especially since several other Article 2 cases had previously interpreted Oregon law to deny recoveries of market price damages in excess of the plaintiff's actual loss.[133]

Peace River had agreed to sell Proseeds, a Canadian corporation, the total production of grass seed from a specified number of acres. The price

125. *Trans World*, 769 F.2d at 908. Although it says here that *Trans World* was not one of his better opinions, Judge Newman enjoyed a remarkable and illustrious career as a jurist. He provides an entertaining account in his autobiography, JON O. NEWMAN, BENCHED (2017).

126. It bears emphasis once again that in these overcompensation cases, § 1-305 must be compromised either by artful construction or, as the court did here, by ignoring it altogether.

127. If Trans World were a manufacturer, of course, it would not have been in a position to hedge.

128. *Trans World,* 769 F.2d at 908.

129. *Id.*

130. Both the Study Group Report for the Article 2 Revision and the A.B.A. Task Force Report in response to it also rejected the court's reasoning, most particularly Judge Newman's "betting on the market" analogy. *See Appraisal*, *supra* note 112, at 1218 n.25, 1224 n.456.

131. 688 F.3d 232, 244 (5th Cir. 2012). *See supra* notes 74–76 and accompanying text for discussion of *Westlake*.

132. 322 P.3d 531 (Or. 2014).

133. *See* Coast Trading Co. v. Cudahy Co., 592 F.2d 1074 (9th Cir. 1979) (seller could not recover market price damages greater than those that would have been resulted from a proper resale); Diversified Energy, Inc. v. Tennessee Valley Auth., 339 F.3d 437, 445–47 (6th Cir. 2003) (market price damages could not be recovered where seller's actual damages were its lost profit); Purina Mills, L.L.C. v. Less, 295 F. Supp. 2d 1017, 1047 (N.D. Iowa 2003) (accord); H-H-H Cattle Co. v. Schroeder, 767 F.2d 437 (8th Cir. 1985) (accord). *See also* Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc., 503 P.2d 482, 525 (Or. 1972) ("By market, we mean a market which, if availed of, would have substantially mitigated [the seller's] damages.").

was fixed for both years of the contract. The market price declined, Proceeds repudiated, and Peace River brought suit. The trial court issued a preliminary ruling that, because the fixed price had put the risk of market decline on Proceeds, Peace River was entitled to market price damages. The court also ruled, however, that it was Peace River's obligation to mitigate its loss by reselling as much seed as it reasonably could. Damages for the seed that could reasonably have been resold, therefore, would be limited to the lesser of contract price minus either market price or resale price.

At a later hearing, the court instructed both parties to submit calculations to account for the seed that had been resold. Proceeds complied with the court's order, but Peace River ignored it. Without offering supporting evidence, it merely objected generally to Proceeds' calculations and insisted on the right to the market price damages shown in the trial record. In response, the trial court ruled that, since Peace River had not complied with its order, it had no alternative but to render judgment based on the resale damages shown by Proceeds' calculations.

The trial court judgment was reversed on appeal, the court concluding that Article 2 allowed a seller to recover market price damages regardless of any resale of the goods. The case then went to the Oregon Supreme Court, which affirmed the reversal. The court's opinion relied heavily on a 1988 article by Professor Gabriel interpreting the Article 2 drafting history.[134] The May 1949 draft of the Uniform Sales Act had included a major revision of § 2-706 that eliminated the title-based constraints on a seller's right to resell the goods that had been imposed by § 60 of the Sales Act.[135] In so doing, the draft was the first to promulgate resale damages as an alternative to market price damages. Comment 3 to the revision had also provided that the new remedy was "the exclusive measure of the seller's damages" if the seller resold in compliance with § 2-706. This restriction, however, was deleted in the 1952 draft and replaced with the permissive language in the text that said a seller "may" recover resale damages.

Relying on Gabriel's analysis, the court saw the deletion as a significant "retreat" from the position taken in the 1949 draft.[136] But in truth this was no retreat at all, and the event merits no mention here except for the Oregon court's misplaced emphasis on it. Beginning with the 1948 draft, § 2-703's listing of seller remedies had explicitly prohibited recovery of market price damages for goods that had been properly resold. The deleted comment, therefore, was merely a redundancy, and removing it had no substantive effect on the 1952 draft. The market price prohibition re-

134. Henry Gabriel, *The Seller's Election of Remedies Under the Uniform Commercial Code: An Expectation Theory*, 23 Wake Forest L. Rev. 429 (1988).

135. *See* U.C.C. § 2-706 cmt. 3 (Am. Law Inst. & Unif. Law Comm'n 1949): "The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller had resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected."

136. *Peace River*, 322 P.3d at 538–39; *see* Gabriel, *supra* note 134, at 436–37.

mained in § 2-703 until the 1957 draft, and its deletion that year is the only drafting event that has any relevance to whether a seller who has resold may recover market price damages.[137] By that time, however, the process had passed from the neutrality of an academic enterprise to the give-and-take of the political arena.[138]

Notwithstanding its flawed analysis, however, the opinion in *Peace River* does provide a general summary of the arguments made over the years, mostly by academics, in favor of awards of market price damages irrespective of actual loss. The historians hang their hats primarily on two editorial pegs in the long and bumpy road to Article 2's enactment in its present form. First is the 1957 amendment of § 2-703. The second is the inclusion of language in its comments that "rejects any doctrine of election of remedy."

1. *The Article Two Drafting History*

The drafting history argument stems largely from the seminal "Roadmap" article by Justice Ellen Peters, writing then as a member of the Yale law faculty.[139] She expressed puzzlement that, although Article 2 strives for parity of remedies for sellers and buyers, it treats their resale and cover remedies differently by giving binding effect to a cover but not to a resale. She suggested that the explanation could be found in the development of the two remedies "over the various drafts." Most important in this regard was the 1957 draft's deletion from § 2-703(e) of the restrictive phrase that allowed market price damages only "so far as any goods have not been resold." This deletion was in response to a 1956 recommendation of the New York Law Revision Commission. The purpose was said "to make it clear that the aggrieved seller [was] not required to elect between" resale and market price damages.[140]

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137. The relevant 1957 amendment is discussed in the next section.

138. For a helpful short history of the drafting process, *see* Braucher, *supra* note 1. The political era began in earnest once the New York Law Revision Commission got involved with the 1952 draft. That draft had been given final approval by both the National Conference of Commissioners and the American Law Institute. Allen Kamp has given us a helpful description of this period, beginning with the 1949 draft. He describes "a critical era in the history of the [UCC] in which the proposed Code of 1949, a product of the academic drafters, entered into the political world and changed to meet political realities." Allen Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFF. L. REV. 359, 360 (2001). He quotes with approval Professor Rubin's observation that this era renders false any notion that the Code's drafting history was "a neutral, balanced, expertise-based process." *Id.* at 362 (quoting Edward Rubin, *The Code, The Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L. Q. 11, 13 (1997)). *See also* Soia Mentschikoff, *Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code*, 43 OHIO ST. L.J. 535, 537 (1982); Peter Winship, *Jurisprudence and the Uniform Commercial Code: A Commote*, 31 SW. L.J. 843, 844 (1977).

139. Peters, *supra* note 9. "Seminal" is not lightly used here. Surely the White & Summers treatise is one of the most influential law books of the second half of the twentieth century. But hard as it is to recall, there was a time when it was not there. The crib so often used in those dark ages by judges, lawyers, and law professors to work through Article 2's murky new law was the roadmap provided by Professor Peters.

140. AMERICAN LAW INSTITUTE AND NAT'L CONFERENCE OF COMMISSIONERS ON UNIF, STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNI-

Professor Peters emphasized that the Commission's purpose was expressed as a clarification, "to make it clear," rather than, as with other amendments, as a "change." She took this fine distinction to mean that § 2-703 must never have been intended literally to bar market price damages to a seller who had resold, but only to a seller who had resold *and* also chose to recover resale damages. She then suggested that Comment 5 to § 2-713 could be read similarly so as to reject its literal prohibition for buyers who had covered.[141]

Peters' reasoning is simply unpersuasive. It concludes that the drafters intended nothing more than to state truisms: if sellers and buyers ask for proper resale or cover damages, they do not get market price damages; if they do not ask for market price damages, they do not get them. Her willingness to parse language so finely, however, does suggest a strong preference, one held by many lawyers of the time, for unrestricted market price damages and, also perhaps, a dubiousness about the new, untried resale and cover remedies.

The 1957 amendment to § 2-703 was made in response to the Law Revision Commission's 1956 recommendations. Those recommendations were in turn based on the analysis and recommendations that the Commission had made in its 1955 Report.[142] Although the 1956 Report's recommendation for § 2-703 is trenchant and direct, the 1955 Report's three-page analysis in support of the recommendation is rambling and bewildering. The Report began by expressing concern over a perceived ambiguity between the restrictive language in subsection (e) and the statement in Comment 1 that rejected an election of remedies. It speculated that the restrictive provision was probably based on the view that resale damages "will provide a more accurate measure of [seller's] loss . . . than a reference to a generalized market price" and that the drafters, therefore, probably intended for any ambiguity to be resolved in favor of subsection (e)'s prohibition of market price damages.[143]

The Report affirmed this view, saying said that the drafters' "conclusion is easily supported if seller may [in fact] recover damages based on his resale of the goods."[144] Concern was expressed, however, that the restrictive language might also be read to deny both resale and market price damages to a seller who had failed to comply with all of the many

FORM COMMERCIAL CODE 73 (1957). *See also* STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1956 at 396 (1956) [hereinafter 1956 REPORT]. But, as will be discussed in the next section, this need not be read to mean that he can resell the goods and recover the greater of the two measures, but only that the seller is free to elect to keep the goods and sue for market price damages.

141. Peters, *supra* note 9, at 260–61.

142. 1956 REPORT, *supra* note 140, at 396. The 1956 Report merely said that the restrictive phrase should be removed because otherwise § 2-703(e) "creates an ambiguity as to whether seller must elect between" damages under § 2-706 and § 2-708.

143. STATE OF NEW YORK LAW REVISION COMM'N, REPORT OF THE LAW REVIEW COMMISSION FOR 1955, at 550–51 [hereinafter 1955 REPORT].

144. *Id.*

requirements in § 2-706.[145] The Report concluded that this surely was not the drafters' meaning because Comment 2 to § 2-706 explicitly stated that a seller who failed to make a proper resale was merely relegated to a recovery of market price damages.[146]

So, given Comment 2, why the concern? It may well be that the Commission was not reassured because at this point in the drafting process the comments were no longer keeping up with changes to the Code's text, and the intent was to update them only after the text had been finalized.[147] Whatever the reason, the Report said that the "difficulty" here still needed to be "corrected." Although the Report's analysis to this point was rather opaque, a fair reading of it shows a clear intent to resolve any ambiguity between text and comment in § 2-703 in favor of the restrictive language in subsection (e) and that, subject to the concern that an invalid resale would leave the seller with no remedy, the Commission supported the intent of the drafters that resale damages would trump those based on market price.

The short remainder of the Report, however, lapsed into near incoherence. It proposed three alternative solutions to the Commission's very simple concern about the effect of an invalid resale, but only two of the three directly addressed that concern. Those two were then summarily rejected for imaginary and nonsensical reasons, leaving by default the recommended alternative of deleting the restrictive language entirely from § 2-703(e). This solution, of course, not only went far beyond the concern at issue, it created virtually from whole cloth the ambiguity that some perceive to exist today as to whether a seller may recover market price damages that exceed the seller's actual loss.

If this was artifice, it was nicely done with a seductively constructed misdirection that is reminiscent of the three-shell game that was so prevalent for so long on the avenues of Manhattan. With sleight of logic the author moved the pea from one shell alternative to another, showing two to be void of substance, and then deftly slipped the hidden pea that had been tucked in hand under the third, revealing the alternative that he had the side bet on. It went as follows. The first of the rejected alternatives was simply to amend § 2-703 to provide that a seller who had made a *proper* resale could not recover market price damages. The Commission's concern would then have been directly resolved with the insertion of but one word or short phrase, and the original intent of the drafters, which the Report had found worthy of support, would have been unambiguously preserved. This surely was the resolution that would first occur to most anyone. The Report said, however, that the problem with this reso-

145. The 1955 Report opined that: "A seller may fail to comply with one of these requirements without having engaged in conduct so reprehensible as to deserve complete loss of recovery for buyer's breach." *Id.*

146. Comment 2 to § 2-706 read then as it does now: "Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708."

147. *See* Braucher, *supra* note 1, at 808–09.

lution was that "in some situations" sellers who sought greater market price damages than those produced by a resale would be put in the "ironic position" of having to prove the invalidity of that resale. No explanation was given as to why this would be a bad thing, particularly since the irony would stem entirely from the seller's attempt to recover damages that he should be denied. Regardless, the so-called "problem" was a pure fabrication. A seller would never be in the position, ironic or otherwise, of proving that his own resale was invalid. The courts would address the situation as they have always done by presuming that the seller was entitled to market price damages and then placing the burden on the buyer to show that the resale had mitigated damages.[148]

The other alternative rejected by the Report was to limit the seller's recovery to the lesser of resale or market price damages. As with the previous choice, this one also embodied a mitigation of damages rule that would actually affirm the overwhelming weight of existing case law, both then and now.[149] And it too would have preserved the original intent of the drafters. The Report, however, rejected this suggestion, professing fear that a seller who was guilty of "an undue delay in a rising market" would have his damages unfairly reduced. If that were so, said the Report, "it seems fair that in this situation a market rise should be to his advantage."[150] This, of course, is pure gobbledygook. An aggrieved seller, whether under prior sales law or current Article 2, has always been allowed to keep the goods and speculate on the post-breach market—but at his own risk. What he has never been allowed to do, either then or now, is to speculate on the market at the buyer's risk and impose on the buyer damages that could have been reasonably avoided by an earlier resale.

With the two most plausible alternatives so rejected, that left the alternative of simply deleting the restrictive phrase, which was then recommended by the Report and ultimately adopted by the Conference of Commissioners two years later. In support of the alternative, the Report gratuitously opined that removal of the restrictive language of § 2-703 would give the seller a "free choice" of the *amount* of damages shown by either the resale or market price[151] and would also allow "the seller to take advantage of an advantageous resale above the market level."[152] Both of these observations, of course, were blatant non-sequiturs that

148. That is the way the pre-Code cases handled the matter, and that is the way the courts handle it today. The pre-Code cases are discussed *infra* Part II.C.3. Today, of course, the buyer will fail to carry the burden of proving mitigation in cases of lost volume sellers, but will prevail where the resale was a true substitute for the breached contract. *Compare* Neri v. Retail Marine Corp., 285 N.E.2d 311, 314–15 (N.Y. 1972) (buyer fails), *with* Schiavi Mobile Homes, Inc. v. Gironda., 463 A.2d 722, 725–26 (Me. 1983) (buyer prevails).

149. It is noteworthy that this alternative was not limited to "proper" resales. By this point in the report the author had abandoned any pretense that his alternatives were intended solely to resolve the concern expressed by the Commission.

150. 1955 Report, *supra* note 143, at 552.

151. *Id.* at 551.

152. *Id.*

had nothing to do with the Commission's limited concern that an improper resale might deny a seller any damages recovery.[153] The Report offered no reasoning in support of either observation. Nor did it argue in their favor, but merely provided a brief footnote containing an illustration of a situation in which a seller would be allowed to recover the *greater* of resale or market price damages.[154] This was, of course, the complete opposite of the alternative the Report had just rejected of holding the seller to the lesser of the two measures, a rule that reflected the overwhelming weight of authority. It was also completely at odds with the original intent of the drafters, which the Report had said it could "easily support." Without explanation for the reversal, the Report merely offered assurance that permitting windfall damages "hardly seems subject to serious abuse." It also speculated that excess recoveries "will be rare" and opined that sellers "*perhaps* should be rewarded."[155] Certainly these non-sequiturs do not resound with a ringing endorsement. There is, however, unarguably enough in this dizzying analysis to support the views of the historians that at least some participants in the drafting process favored unrestricted recoveries of market price damages, even at the cost of overruling the overwhelming weight of authority.

The 1955 Report's primary author, and the writer of this portion, was Professor John Honnold, who needs no introduction as one of the leading commercial law scholars of his day.[156] For his analysis to be so flawed by false assumptions and leaps in logic suggests either artifice or confusion. The former might imply a general antagonism for Llewellyn's broad new panorama of seller remedies. Just as likely, however, it demonstrates misunderstanding as to how the new remedies would interrelate. Regardless, allowing for unrestricted recoveries of market price damages would address either worry. At the time, a seller's remedy choices were primitively sparse. In most cases, subject to the mitigation principle, it was essentially market price damages or bust. Misunderstanding, therefore, is easy to presume, particularly given the 1955 Report's meandering path that takes us in a few short paragraphs through a baffling analytical maze that begins with an entirely unwarranted concern about the effect of technically invalid resales and ends with an equally misplaced concern for depriving

153. Nor was either observation affirmed in the 1956 Report upon which the change in the Conference's 1957 draft was based. In fact, the 1956 Report said nothing to imply that its recommendation was that the seller should have a free choice of the "amount" of damages. The Commission's recommendation said merely that the seller should be allowed to elect between damages based on resale or market price. This can and should be read solely to confirm that the seller was not obligated to resell, but was free to retain the goods and sue for market price damages.

154. The illustration posed a situation where, with a contract price of 100, a seller would be allowed to "elect" damages based on a market price of 80 even though he had resold the goods for 85. 1955 REPORT, *supra* note 143, at 551 n.380.

155. *Id.* at 552 (emphasis added).

156. The 1955 Report credits Honnold as author of pages 347–592; Edwin W. Patterson with pages 593–708; Samuel Hesson with pages 709–21; and Robert S. Pasley with pages 723–61.

a seller of a particularly advantageous resale.[157] These days we are much farther up the learning curve and have come to recognize that Llewellyn's Article 2 remedies fully protect sellers in both these respects up to the point that they could have mitigated their damages.

Today, a lost volume seller's damages recovery is not affected at all by a resale, whether it was a particularly advantageous one or not. The seller retains the profit from that resale and also is given damages for the profit that would have been earned from the breached contract. Even where the seller chooses to sacrifice full compensation in return for the simplicity of proving resale damages, he still does not lose the advantage of a particularly advantageous resale. He is then allowed to pick *any* good faith resale as his choice to measure damages, including even one that he had made prior to the breach.[158] Conversely, of course, where the seller is not left at lost volume and the advantageous resale is actually enabled by the breach, the resale mitigates his damages, and he will be denied excess market price damages.

It bears noting in this regard that in none of its reports did the Commission ever evidence difficulty with a buyer's similar but much simpler situation. For buyers, the choice is between just two remedies, cover and market price. The 1956 Commission Report unstintingly approved § 2-712's cover remedy with no concern for the denial of market price damages.[159] This was true even though the cover remedy itself was new law with no Sales Act or common law ancestor.

This type of inconsistency and conflict between and within various reports, drafts, comments, and texts to the emerging Code are easily understood if viewed as products of a chaotic political process through the mid-1950s as the New York Commission exerted its considerable influence,[160] the Conference of Commissioners scrambled to keep up, and primary drafter Llewellyn struggled to keep alive as much of his grand vision as he

157. Surely Professor Honnold had broad discretion as the 1955 Report's primary author. If one compares his discussion of remedies with the other portions devoted to Article 2, it is not unfair to attribute to Honnold some confusion and, perhaps, a private agenda with respect to remedies. Most of the other portions provide far less analysis and editorial comment and, where present, the analysis generally is articulate and easy to follow.

158. U.C.C. § 2-706(2) provides that "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."

159. There was, however, language in the 1955 Report that suggests further confusion by Honnold. In his discussion of § 2-711, he noted that buyers were given the choice between cover and market damages. He then said that this would change "some decisions" that gave "controlling effect" to cover damages where the buyer purchased at less than market price. This, of course, is absolutely incorrect. Comment 5 to § 2-713 said the exact opposite, as it does today. 1955 REPORT, *supra* note 143, at 570. Professor Honnold may have once again been pursuing his own agenda. Curiously, the historians do not make use of this portion of the 1955 Report in their advocacy for market price damages. More importantly, there is no mention of it in either the 1956 or 1957 Reports.

160. It was especially important to the Code's success that the National Conference obtain New York's approval after the New York Commission had effectively stopped state adoptions of the 1952 version of the UCC by pronouncing it unacceptable. For an extraordinary example of New York's ability to exert this type of influence, *see* GILMORE & BLACK, *supra* note 2, § 3-12, at 117–20.

could. In 1958, Professor Robert Braucher, an active participant, offered a trenchant description of the process that concluded with sage advice:

> It is the belief of the sponsors that for most purposes examination of prior drafts and analysis of controversies now laid to rest will add little light to that shed by the official comments. The author's own view is that resort to legislative history is helpful only in unusual cases. The reader may decide for himself, however, whether . . . to enjoin judges from reading such an article as this.[161]

Regardless, other than in the 1955 Report's footnoted "rare" scenario that was offered to satisfy Honnold's oblique concern for preserving advantageous resales, there is no direct statement anywhere in the Commission's Report that simply says that market price damages should be allowed to put the seller in a better position than performance would have done. The Commission's 1956 Report does not say that. The Conference's 1957 adoption of the Commission's recommendation for amending §2-703 does not say that. No preliminary draft of Article 2, before or after, has ever said that, either in text or commentary. And, most certainly, Article 2 today does not say that. Given that § 1-305's compensation mandate and prohibition of penal damages had been in the drafts from early in the process, had any Commission Report directly proposed that market price damages be allowed no matter what, a lively and illuminating discussion may well have ensued. Perhaps then one of Honnold's more practical alternative amendments might have been adopted.

2. *Free Election of Remedies*

Having no Code provision to aid their mission, market price advocates rely heavily on the second sentence in Comment 1 to § 2-703. It says: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach." From this the advocates extrapolate that a seller who mitigates her damages by a resale below the statutory market price is not bound by an "election" to resell, is not bound by damages shown by the resale, and can instead recover the greater market price damages. That is a heavy load for one little sentence to bear, particularly when it's merely a comment. Most particularly, it is asked, at a minimum, to overrule then prevailing case law on that issue,[162] to override the compensation principle in § 1-305, a statutory provision, as well as its penal damages prohibition, and to subjugate the fundamental doctrine of mitigation of damages, a doctrine that permeates

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161. Braucher, *supra* note 1, at 814. Professor Braucher preceded Allan Farnsworth as the Reporter for Restatement (Second) of Contracts. He resigned that position to become Chief Justice of the Supreme Judicial Court of Massachusetts.

162. The court in *Peace River* did use the little comment to overrule pre-UCC Oregon law and to put itself with the small minority of UCC cases. Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531, 536 (Or. 2014), *overruling* Krebs Hop Co. v. Livesley, 118 P. 165 (Or. 1911). *Krebs* and other pre-Code cases are discussed in the next section.

Article 2 and has been affirmed without argument by hundreds of contracts and torts cases. One would think that some explication of these phenomenal feats by the little comment would be articulated more fully somewhere in Article 2.

A comment, of course, is not enacted law. It cannot override a statute, but is relevant only to explain or to resolve some ambiguity or to fill some gap in the text to which it applies. In *Peace River*, the court found consistency between text and comment by, as Grant Gilmore once said euphemistically, "brood[ing] anxiously over commas."[163] In concluding that the seller may recover market price damages irrespective of the actual loss, the court first noted that the permissive language "may resell" in the text and comments to § 2-703 makes clear that the seller is not obligated to resell but instead may choose to sue for market price damages. The court then emphasized that, whereas § 2-711(1) uses the disjunctive "or" to limit the buyer to cover "or" market price damages, § 2-703 does not use a disjunctive for seller remedies.[164] Neither of the court's points is pertinent. The fact that a resale is optional merely begs the question of whether the seller can recover greater market price damages or damages that could have been avoided by a resale. The absence in § 2-703 of § 2-711's disjunctive language is explained by the two statutes' different purposes. Section 2-711(1) is a damages formula, whereas § 2-703 is merely a menu of seller remedies. Under § 2-711, in addition to a refund of any monies paid on the purchase price, the buyer gets to elect either cover damages "or" market price damages. He cannot, of course, have both. In contrast, as the introductory sentence to Comment 1 says, § 2-703 is merely an "index section [that] gathers together in one convenient place all the various remedies open to the seller." Four of the six subsections list non-damage remedies like cancellation, identifying goods to the breached contract, and stopping or withholding delivery.[165] To place a similar "or" between the remedies in § 2-703 would legislate chaos because a seller may, and at times must, exercise some of the stated remedies simultaneously. So an aggrieved seller might freely choose to withhold delivery under subsection (a) without being said to have cancelled the contract under subsection (f). Or she might both withhold and cancel. Or she might elect to identify the goods to the breached contract under subsection (c) without binding herself to either resell under subsection (d) or keep the goods and recover market price damages under sub-

163. GILMORE & BLACK, *supra* note 2, §§ 3–6, at 101: "Now-a-days courts, weaned on the Internal Revenue Code, treat statutes like Holy Writ and brood anxiously over commas."

164. *Peace River*, 322 P.3d at 537–38.

165. The options in § 2-703 are as follows:

> [T]he aggrieved seller may (a) withhold delivery of such goods; (b) stop delivery by any bailee as hereafter provided (Section 2-705); (c) proceed under the next section respecting goods still unidentified to the contract; (d) resell and recover damages as hereafter provided (Section 2-706); (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709); (f) cancel.

section (e). And so on. Market price damage proponents would add to the list that she may resell at less than market price and still recover a windfall. That might be a fair assumption if § 1-305 did not explicitly say she may not do that.

Comment 1 is meant for all the remedies in § 2-703, but it makes particular sense with respect to the remedies other than damages, such as withholding the goods and cancelling the contract. Those had been previously driven by property-based rules that artificially denied remedies where some action by one of the parties had triggered a retention or passing of title either before or after breach. As Professor Peters pointed out in discussing Comment 1 and pre-Code law's "premature" election of remedies:

> A number of sections are designed to mitigate the effect of prior law insofar as it forced a choice of remedy on the party aggrieved without regard to the adequacy of compensation so recovered. Buyers may now return defective goods and reclaim moneys paid, without losing their right to affirmative damages . . . . Sellers who have mistakenly sought to recover a remedy in price may, without new pleadings, recover what is appropriate by way of damages. And neither buyers nor sellers will be deemed by the use of language like "cancellation" or "rescission" to have waived existing claims for antecedent injuries.[166]

At the time at least, Professor Peters favored recoveries of market price damages irrespective of resale or cover. She did not, however, use Comment 1 to support her analysis other than to observe in passing that her position would be consistent with it.[167]

The only other election doctrine that pertained even indirectly to damages applied to bar one who had sued for one remedy from later choosing to pursue an inconsistent one. Thus, one who had brought action for specific performance could not later choose to pursue a claim for damages. Or one who elected to sue for damages for a partial breach could not, absent new facts, decide to cancel the contract and sue for damages for total breach.[168] By the 1950s the doctrine was no longer being followed by many courts unless the defendant had in some manner suffered detri-

166. Peters, *supra* note 9, at 204 n.16 (citation omitted).

167. *Id.* at 260–61.

168. *See generally*, E. Allan Farnsworth, Changing Your Mind: The Law of Regretted Decisions 187–188 (Yale U. Press 1998). The rule was more one of procedure than of substantive law and has been supplanted by modern rules. As Farnsworth observed:

> What conduct will amount to an election? This question has plagued litigants under a doctrine of "election of remedies." If a plaintiff has two inconsistent remedies for a single wrong, should the commencement of a lawsuit to obtain one of the remedies amount to an election? Since the plaintiff cannot have both remedies, a time must come when an election must be made. But when is that time?

Id. (footnotes omitted).

ment in reliance on the plaintiff's election.[169] From early on courts often resorted to strained reasoning and puzzling fact interpretations to avoid patently unfair results that could result from application of the doctrine. Justice Cardozo's opinion in *D'Aprile v. Turner-Looker Co.*[170] is a good example. It shows both how uncertain pertinent title considerations could be under the Uniform Sales Act and how they might force an election of remedy on an aggrieved seller, often to his disadvantage. In previous litigation the seller had brought a price action against the buyer for ten barrels of whiskey held under bonded warehouse receipts. While the suit was still ongoing, the seller sold the receipts for $418.81, a fraction of the $1,799.45 breached contract price. The seller then offered to amend its pleadings to credit the buyer with the resale proceeds. The buyer successfully opposed the amendment, perhaps because it felt that it would prejudice its right to contest the bona fides of the resale. The trial court rendered judgment for the seller for the full contract price.

Without having paid the judgment, the buyer then sued the seller for the market value of the whiskey at the time of the sale, which was found to be $1,846.36. The buyer alleged that, since the seller had elected by his price action to treat title as having passed to the buyer, the sale of the whiskey during the prior litigation was a conversion of the buyer's property. Although the trial court found for the seller, the court on appeal reversed and rendered judgment for the buyer. The seller appealed. In a 4-2 decision over a vigorous dissenting opinion, the majority reinstated the trial court judgment for the seller because, as Cardozo opined, it would be wrong to allow a buyer to "pay his debt so easily."[171] Although there was apparently nothing in the facts that suggested such, the court reasoned that in this particular case the seller had not acted contrary to his election to treat the contract as executed and title as having passed but had, in effect, sold the whiskey in partial satisfaction of its possessory lien that secured payment of the contract price. On the facts as stated, however, the odds are that the appellate division and Judge Lehman's dissenting opinion had the old law right and that, but for a single vote and another mystical Cardozo opinion, the election of remedy doctrine would have produced a truly absurd result.

It was this type of election of remedy that Comment 1 was intended to reject as part of Article 2's wholesale abandonment of title considerations. Comment 1, therefore, says only that it rejects any doctrine of election of remedy and does not mean to imply that it supports a free election of damages recoveries. Advocates nevertheless choose to read the phrase out of context so as to give it an interpretive gloss that would allow a free

169. *See* Pac. Coast Cheese v. Sec. First Nat'l Bank, 286 P.2d 353, 356 (Cal. 1955) (election of remedies doctrine "is based on estoppel and, when applicable, operates only if the party asserting it has been injured.").

170. 147 N.E. 15 (N.Y. 1925).

171. *Id.* at 16. Cardozo's analysis also rejects the idea that a resale amounts to some sort of "election" of remedies. He spoke of the seller's remedy choices as "alternatives," not "elections": "The remedies are not one. They are several and alternative." *Id.*

election of damages measurement irrespective of the actual loss. The remainder of the sentence that follows the "election" clause further undermines such a reading. It cautions that any license here is not unfettered but that a seller's remedies are just "*essentially* cumulative" and include "all of the *available* remedies for breach."[172] Whether or not a remedy is "available" is explained by the next sentence, which says that "[w]hether the pursuit of one remedy bars another depends entirely on the facts of the individual case." The two sentences when read fully and together orchestrate an essential harmony that allows § 2-703 and § 1-305 to be juxtaposed without contradiction. Where market price advocates find discordance, this reading finds symmetry, albeit one that would not allow sellers a "free election" to pursue windfall damages.

As to damages, Comment 1 implies only that a seller may elect a remedy that he can qualify for and that, if he is found unqualified, his election will not be held against him so as to deny an appropriate measure of damages. So, as all agree, he can notify the buyer of his election to resell but still recover market price damages if he later decides not to resell or if his resale is found to be unreasonable.[173] In this regard, Comment 1 states principles that are then explicitly confirmed by each of the specific damages remedies provisions that follow § 2-703.[174] But that is all. As with all damage remedies, each must still pass muster with the fundamental principles of causation and mitigation of damages and, most importantly, with the goals and limitations specified in § 1-305.

3. *Election of Remedy, Mitigation of Damages and the Pre-Code Case Law*

In *Peace River*, the Oregon court correctly summarized pre-Code law. The courts had long allowed a seller who was left with goods on hand at the time of breach to choose one of three remedies. He could: (1) hold the goods for the buyer's account and sue for the unpaid contract price; (2) keep the goods and sue for market price damages; or (3) resell the goods and recover damages measured by the difference between the contract and resale prices.[175] However, said the court, if a seller chose to

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172. U.C.C. § 2-703, cmt. 1. (Emphasis added).

173. As discussed in the previous section, this was the concern that the New York Law Review Commission expressed in recommending deletion of the phrase denying market price damages to a seller who had resold the goods.

174. For example, § 2-709(3) says that a seller who is not entitled to his price action may nevertheless recover market price damages. And comment 2 to § 2-706 says the same for a seller who has failed to prove a proper resale.

175. 322 P.3d 531, 536–37 (Or. 2014). The courts also interpreted the Uniform Sales Act to allow the seller the same three remedy choices. *See, e.g.*, *D'Aprile*, 147 N.E. at 17 (Lehman, J., dissenting). Both the majority and dissenting opinions in *D'Aprile* were in agreement that these choices were alternatives and that the choice of one did not amount to an election of remedy. *See supra* note 170 and accompanying text. Hence, said Justice Lehman in his dissent:

> Whatever may have been the rule in this state prior to the Sales Act, I agree with the views expressed in the prevailing opinion that under the Sales Act the bringing of the action for the price did not constitute a choice of one

resell the goods "it had *elected* its remedy and could recover only resale price damages, but not market price damages."[176] This then is the election the court believed that Comment 1 to § 2-703 was intended to reject. Having so concluded, the court overruled its previous holding in *Krebs Hop Co. v. Livesley*.[177]

The reversal compounded the court's error because *Krebs* was not an election of remedies case at all, but rather a sound decision, then and now, that actually upheld a trial court award of market price damages. On appeal, the buyer had alleged that the seller should have mitigated its damages by accepting the buyer's offer to purchase the goods at above market price, albeit at less than the breached contract price. The court agreed with the buyer that, generally, an aggrieved party "must make reasonable exertion to render his injury as light as possible" and said further that this mitigation rule was one for which "no exception can be taken." The court, however, found that the seller had not acted unreasonably in declining the mitigating offer because acceptance would have required the seller to relinquish his rights under the breached contract.[178] *Krebs* was simply a textbook example of the mitigation principle at work, and it's holding has been confirmed in countless cases.[179]

The mitigation principle is a fundamental component of all damages measurements both in contract and in tort. It does not force an election or any other conduct, nor does it bar any remedy. It applies only to limit the extent to which the remedy will be enforced.[180] If some sort of election of damages was involved, as the court in *Peace River* surmised, all

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> remedy, which would bar the seller from the subsequent adoption of the other remedy afforded by the statute, through enforcement of his lien by resale, for both remedies are based upon the theory that title to the property had become vested in the buyer.

D'Aprile, 147 N.E. at 17 (citation omitted). There is some irony here in that these choices allowed greater freedom than the seller has today under Article 2, which allows the seller to sue for the price of goods on hand only if they are not reasonably resalable. Before the Sales Act there was some confusion on this point. In 1858 Theodore Sedgwick said that "it has been doubted whether the rule of damages is the price itself" where the seller remained in possession of the goods. Otherwise, the rule "seems to be well settled" in cases where the title to the goods has passed before delivery and the purchaser refuses to accept "that the vendor can re-sell [the goods] if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale." THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 295–96 (3d. ed. 1858). Curiously, Sedgwick's observations in this regard remained unchanged through the 1920 edition of the treatise. SEDGWICK, *supra* note 22, at 1564.

176. *Peace River*, 322 P.3d at 536.

177. *Id.*

178. 118 P. 165, 166 (Or. 1911).

179. *See* MCCORMICK, *supra* note 22, § 175, at 668 n.34 (listing *Krebs* among several cases correctly applying the doctrine of avoidable consequences).

180. Granted, where the seller resells below the market price specified in § 2-708 and the resale is one that is enabled by the breach, market price damages are completely avoided. But it would be wrong to say that the seller had "elected" the wrong remedy. The remedy merely produced no damages. By comparison, in the more common lost volume situation, the resale mitigates only the seller's performance expenses that have been saved by the breach. This arguably may leave open the question of whether the seller should be allowed market price damages greater than his actual lost profit damages. The answer, however, would not turn on any theory of election of remedy.

the court in *Krebs* need have done was to confirm that the seller had not elected resale damages and let it go at that. Instead, as courts always have, it allowed a full recovery of market price damages after the buyer had failed to prove that those damages could have been reasonably mitigated.

It is a shame that the Oregon court felt compelled to take so sound a case as *Krebs* off the board. The court's error was in conflating the mitigation principle with the right of the seller to choose its damages remedy. The court was led astray by its heavy reliance on a 1988 article by Professor Gabriel that had incorrectly interpreted the pre-Code law.[181] According to Gabriel, Comment 1 "specifically rejected" prior law that a seller who opted to resell had elected his remedy and "was barred from proceeding under an inconsistent remedy."[182]

Professor Gabriel's assertion was incorrect. There was the occasional case that loosely said that a seller who had "elected" to resell could not recover market price damages. But there was no doctrine of election of *damages* for Comment 1 to reject, not one at common law, nor one under the Uniform Sales Act.[183] Professor McCormick mentions no such doc-

181. Gabriel, *supra* note 134, at 429–30. The court also shared Professor Gabriel's conclusion that Article 2 has abandoned the mitigation principle for the market price remedy. They reason that, since § 2-706 does not require a seller to resell, the seller cannot be required to resell to mitigate damages. *Peace River*, 322 P.3d at 540–41 (citing Gabriel, *supra* note 134, at 445). Their conclusion results from a misunderstanding of how the mitigation principle operates. The principle does not "require" anything. It does limit the recoverable damages, including market price damages. Nor is there any case law to support their conclusion, pre- or post-Code. The pre-Code cases, several of which are discussed in this section, lined up solidly to deny seller's market price damages that could have been avoided by resale. As a UCC. case, *Peace River* also stands alone. The Code cases have held uniformly that a seller may not recover any damages, market price or otherwise, that could have been reasonably avoided by a resale. *See* cases cited *supra* note 107. The issue is discussed *supra* Part II.B.

Professor Gabriel went further to fabricate what he called a "common sense" statutory right to market price damages that would transcend a duty to mitigate:

> The seller has no obligation to resell, and the failure to resell the goods does not affect the right to proceed under section 2-708(1). If non-action by the seller does not impact on the statutory right under section 2-708(1), common sense dictates that an affirmative act by the seller to resell should not have any impact on that right.

Gabriel, *supra* note 134, at 445. Gabriel was wrong that "non-action" would not affect the seller's damages recovery. *See* the discussion *supra* in subsection B, particularly following note 101. Gabriel's reasoning here merely proceeds from a false assumption of a statutory right to market price damages. Gabriel's conclusion, of course, is persuasive only if such a statutory right were to exist. Presently it does not.

182. Gabriel, *supra* note 134, at 446. Courts and lawyers have long had difficulty defining boundaries for the overlapping concepts of "waiver," "estoppel," and "election." *See, e.g.*, Ireland v. Waymire, 191 P. 304, 304–06 (Kan. 1920) (applying theory of election of remedy and theory of waiver of tort to the same facts, after noting the defendant's argument that plaintiff was estopped to bring the action). There was once an entire book devoted to the subject. *See generally* LON FULLER & MELVIN EISENBERG, BASIC CONTRACT LAW 240–42 (3d ed.1972) (providing a synopsis of JOHN SKIRVING EWART, WAIVER DISTRIBUTED AMONG THE DEPARTMENTS: ELECTION, ESTOPPEL, CONTRACT, RELEASE (1917)).

183. The common law election of remedy doctrine for contracts in general applied so that one who brought an action for one type of remedy was said to have made an election and was barred from another inconsistent remedy. *See* the discussion following note 168

trine in his great treatise; nor did Sedgwick before him through the many editions of his book.[184] Rather, these so-called "election" cases were, as was *Krebs*, ones in which the court applied the mitigation principle to limit the seller's recovery. Professor Harris in his multitude of exhaustive watershed articles comparing Article 2 with pre-Code cases does not refer at all to an election doctrine, or even use the word "election" in discussing any case that awarded resale damages. Harris did acknowledge both that pre-Code law used market price damages as the default remedy and also that, similarly, Article 2 does not compel the seller to seek resale damages.[185] He suggested, therefore, that "Sales Act notions" for measuring damages might be good precedent for Article 2 cases, but cautioned that the "compensation principle must be subordinated *to the overriding principles of certainty or mitigation.*"[186] He concluded with the particularly prescient observation that "while it is easy to reach bad results under section 2-708, it is not absolutely necessary."[187]

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supra. Thus, if one brought an action for specific performance, he had elected his remedy and could not later choose to sue for damages. And vice versa. Or if one brought a claim for restitution, he could not later choose to sue for damages. And vice versa. This was also the way it worked for tort. *See infra* note 191. As does Comment 1 to § 2-703, RESTATEMENT (SECOND) OF CONTRACTS § 378 (1981) rejects the doctrine:

> If a party has more than one remedy . . . his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation.

RESTATEMENT (SECOND) OF CONTRACTS § 378 (AM. LAW. INST. 1981); *see* U.C.C. § 2-703 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2017). Comment a to § 378 notes that this is a rejection of former law and is consistent with Comment 1 to § 2-703. Examples of the old contracts cases are collected in the Reporter's Note to § 378. None of the cases involve an election of measures of damages. Modern rules, of course, permit a plaintiff to obtain judgment on multiple causes of action in the same suit and "elect" to recover on the one that produces the greater damages. But a plaintiff cannot recover under multiple claims for the same injury. *See, e.g.*, Bruce v. Cauthen, 515 S.W.3d 495, 502, 516–17 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (where jury found for plaintiff on both tort and breach of contract claims and plaintiff elected to recover under tort claim, which included award of punitive damages, plaintiff could not recover attorney fees allowable under state law for contract, but not tort, claims).

184. The first American treatise on the law of damages was THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES (1st ed. 1847). Successive editions were published well into the twentieth century.

185. *See* Harris, *supra* note 14, at 101 n.174. Curiously, the only illustration he gives of this situation is one where resale damages exceed market price damages. *See also* Robert Harris, *A Radical Restatement of the Law of Seller's Damages: Michigan Results Compared*, 61 MICH. L. REV. 849 (1963); Harris, *supra* note 24. One wonders whether market price advocates would go so far as to allow windfall resale damages that exceed market price damages. For example, if a lost volume seller is allowed to choose a losing (non-profitable) contract as the resale contract, he will be over-compensated for his loss by the amount he would have lost on the resale. The courts, therefore, uniformly agree that to prove lost volume status he must prove not only that he would have made the alleged resale regardless of the breach but also that both sales would have been profitable. *See* R.E. Davis Chem. Corp. v. Diasonics, Inc., 826 F.2d 678, 683–84 (7th Cir. 1987); Teradyne, Inc. v. Teledyne Indus., Inc., 676 F.2d 865, 868 n.4 (1st Cir. 1982); Sci. Components Corp. v. Isis Surface Mounting, Inc., 539 F. Supp. 2d 653, 660 (E.D.N.Y. 2008).

186. Harris, *supra* note 14, at 100–01 (emphasis added).

187. *Id.* at 101.

The mitigation principle is not an element of the damages remedy a plaintiff chooses to pursue but instead works separately in tandem with it. A simple scenario demonstrates the ease with which one could arrive at one of Harris's bad results by permitting an election of market price damages irrespective of avoidable loss. Assume the breached contract price is $10 and the § 2-708(1) market price is $7. The seller notifies the buyer of his election to resell and then gets an offer from a third party to buy the goods for $9. Seller declines the offer and sells instead to his brother-in-law for $8. The resale is found to be in bad faith and cannot be used for measuring damages. Nevertheless, Article 2 does not bind the seller by his "election" to resell but "relegates" him to market price damages.[188] That recovery, however, should not be for the full market price damages of $3 ($10-$7) but for that $3 less the $2 that could have been mitigated by a proper resale to the third party. To rule otherwise is for the court to say in effect, "bad seller, you wrongly failed to reduce your damages to $2, so we will just give you $3."[189]

For his pre-Code election doctrine, Gabriel relied upon one case, *Sloss-Sheffield Steel & Iron Co. v. Stover Manufacturing & Engine Co.*,[190] and on five of the nine cases that the court in *Sloss-Sheffield* cited in support of its decision. Inexplicably, two of the five were tort cases,[191] and none of the three sales cases even mentioned an election or had anything to do with the concept.[192] Even *Sloss-Sheffield* ultimately was just a run-of-the-

188. U.C.C. § 2-706 cmt. 2 (Am. Law Inst. & Unif. Law Comm'n 2017).

189. The Ninth Circuit addressed a similar situation in Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 1083 (9th Cir. 1979) (holding that a seller who was denied damages based on an invalid resale could not recover greater market price damages than would have been produced by a proper resale. Strangely enough, the court was applying Oregon law).

190. 37 F.2d 876 (7th Cir. 1929). McCormick does cite the case twice, but only for the court's determination of the proper time for measuring market price damages. McCormick, *supra* note 22, § 173, at 659–60 nn. 7 & 9.

191. The two torts cases are instructive as to how early election of remedy law worked for non-damages remedies. The plaintiffs in both cases were victims of archaic title concepts and of outmoded procedural rules that barred plaintiffs from pursuing inconsistent causes of action. In one, the court dismissed a suit for negligence by a bailee in the death of a team of horses because the plaintiff had previously lost a suit against the defendants for breach of contract to purchase the horses. Having elected to sue in assumpsit alleging that he had sold the horses to the defendants, the plaintiff was barred from bringing an inconsistent action on the theory that he still held title and that the defendants were bailees. Turner v. Grimes, 106 N.W. 465 (Neb. 1906). Similarly, in the second case, the court dismissed an action in replevin for conversion of an automobile because the plaintiff had previously brought an action in assumpsit to recover in restitution for the value of the car. It made no difference that the plaintiff had voluntarily dismissed the first action. Ireland v. Waymire, 191 P. 304 (Kan. 1920).

192. Of the three sales contract cases, one simply held that a buyer could not both keep the goods and recover back the price he had paid the seller. Fox v. Wilkinson, 113 N.W. 669, 671 (Wis. 1907). In another, the court held that resale damages were proper where the evidence showed that the goods could not have been disposed of at a better price in a declining market. Peck v. Southwestern Lumber & Exp. Co., 59 So. 113, 115–16 (La. 1912). In the third, the court denied a recovery of resale damages because the seller did not give proper notice of intention to resell. It then denied market price damages because the seller had failed to prove that the applicable market price was less than the breached contract price. Southern States Co. v. Long, 73 So. 148 (Ala. Ct. App. 1916).

mill mitigation of damages case. The court simply held that, since the seller had resold at above the market price, the seller had incurred no damages. The case involved a 1918 contract for the sale of pig iron at a price fixed by wartime governmental regulations. Subsequently, the Department of Commerce issued a "purely advisory" recommendation that the 1919 price for pig iron be reduced by $6 a ton for purposes of stabilizing the post-war market. The seller refused the buyer's request for a price reduction, and the buyer in turn refused to take further deliveries. The seller then resold the pig iron for its own account at a price greater than the breached contract price. The court, therefore, refused the seller's demand for market price damages, finding that the seller had "no loss or damage to compensate" and that having "made the election [to resell] it cannot now recover the excess of the contract price over the market price at the time of the alleged breach."[193]

In context, the court's use of the term "election" suggests no more than that the seller was not obligated to resell but could have chosen instead to keep the goods and sue for market price damages. Those damages would presumably still be subject to the mitigation principle.[194] Three of the other four cases cited by the court, but passed over by both Gabriel and the court in *Peace River*, would confirm that this was indeed the court's meaning. None of the three said anything about an election but, as did *Sloss-Sheffield*, merely affirmed that resale damages were the proper measure of recovery where the resale price exceeded market price.[195]

Of the three, the court's opinion in *Hughes v. Eastern Railway & Lumber Company*,[196] is particularly instructive. The seller had resold logs that the buyer had contracted to purchase. The seller sought to recover, not market price damages, but the profit lost on the breached contract as shown by the contract price less what it had cost to produce the logs. It was the buyer that argued for market price damages. The court rejected both theories and chose instead to limit damages to those shown by the resale. Were there an applicable election doctrine available, this would have been the perfect occasion for the court to use it. The court instead began its analysis by agreeing with the buyer that the general rule called for a recovery of market price damages. But, said the court, the "fundamental principle" was that, where a market exists, the seller must "practice diligence, to the end that the loss may be 'as 'small as possible.'"[197] An award of damages, therefore, would be limited to compensation for the actual loss and would be subject to the "usual" defense that would bar

193. *Sloss-Sheffield*, 37 F.2d at 877.

194. The court's analysis might be read to imply that, had the seller chosen not to resell, the court would have allowed market price damages to include even those that could have been avoided by resale. The court's reliance on Hughes v. Eastern Railway & Lumber Co., 161 P. 343 (Wash. 1916), however, makes this implication unlikely. *Hughes* is discussed immediately below.

195. Hughes v. Eastern Railway & Lumber Co., 161 P. 343 (Wash. 1916); Herd v. Thompson, 24 A. 282, 282–83 (Pa. 1892); Saladin v. Mitchell, 45 Ill. 79, 85–86 (Ill. 1867).

196. 161 P. 343 (Wash. 1916).

197. *Id.* at 344.

any recovery where the goods were sold for an amount higher than market price. There are countless cases similar to *Hughes* at both the state and federal levels where the courts have applied the mitigation principle to deny a seller more than the actual damages shown by a resale. *Hughes* was simply one of those. And *Sloss-Sheffield* was as well.

Consider, for example, the Supreme Court's decision in *A.B. Small Co. v. American Sugar Refining Co.* affirming a trial court's award of resale damages.[198] The action was by a seller, a refiner, on two contracts to sell sugar to a wholesale buyer. The buyer had challenged the reasonableness of the resale with the testimony of "jobbers and dealers," who maintained that at the time of resale the market price for sugar was higher than the resale price obtained by the buyer. The court nevertheless rejected the argument, finding that the seller had acted reasonably, albeit unsuccessfully, to mitigate it loss. The sugar market was "greatly demoralized," and sellers were unloading sugar for whatever price they could get, even with sales below production costs. The issue was not, said Justice Van Devanter, whether the seller obtained the "best possible price," but rather whether the seller made a "reasonably diligent effort to obtain a good price."[199] Nothing was said about the seller having made an "election," although the seller's actions post breach gave the court plenty of opportunity. After the breach, the seller had made arrangements to warehouse the goods and had later notified the buyer of its intention to resell.

Slaughter v. Marlow[200] was the final case cited by the court in *Sloss-Sheffield*. It came closest to matching the court's reasoning in that it talked about both election and mitigation. But again, as in *Sloss-Sheffield*, the court's three-pronged analysis simply confirmed that the seller's election depended upon whether he chose to have title pass, that the remedy the seller elected could not exceed actual damages, and that those damages could not include any that could have been reasonably avoided. The seller had prevailed at trial on a counterclaim alleging that it was the buyer who had breached the contract to purchase beef steers and was awarded market price damages. The buyer appealed. The Arizona Supreme Court reversed and remanded.

The court prefaced its analysis with the observation that "the circumstances of each case must determine what measure of damages should apply, *having in view always the giving actual compensation for actual loss*."[201] It then held that, since the seller had "elected" to treat the sale as executory, retain title, and resell the goods for its own account, it could not recover market price damages in an amount greater than those shown by the mitigating resale. Since the record did not show the resale price,

198. 267 U.S. 233, 245–46, 248 (1925).

199. *Id.* at 245–46.

200. 31 P. 547 (Ariz. 1892).

201. *Id.* (emphasis added). *Cf.* U.C.C. § 2-703 cmt. 1 (Am. Law Inst. & Unif. Law Comm'n 2017): "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."

the court reversed the award of market price damages and remanded for a new trial to determine the seller's actual loss.

In sum, the so-called election of remedy doctrine was not an election of "damages" one. Nor was it a prohibition of damages one. It was an election that allowed the seller unilaterally to decide whether he would treat title as having passed to the buyer and then to tailor his remedy accordingly.[202] It was permissive, not restrictive, but as with all damages remedies, it was subject to the customary principles of certainty, causation, and mitigation. No, a seller who resold could not recover greater market price damages. But it was not because of his election to resell, but because his actual damages were shown by the resale. So said the courts in *Slaughter v. Morrow*, in *Saladin v. Mitchell*, and in *Hughes v. Eastern Railway*. Yes, it is true that a seller who resold at less than market price could on occasion recover resale damages, but only because the resale, at the time it was made, represented a reasonable attempt to mitigate damages, and the courts, as always, will not use hindsight to judge the reasonableness of an aggrieved party's mitigation decision. So said the court in *Fox v. Wilkinson* and the Supreme Court in *A.B. Small*. *Sloss-Sheffield* is the only case relied upon in *Peace River* that could be read to stand for an election of damages doctrine, but then only if the decision is read very narrowly and out of context with the nine decisions that it cites in support of its holding.

4. Election of Remedy and Compensatory Damages

Read literally, § 1-305's mandate for compensatory damages makes shambles of the arguments of market price advocates. Coupled with their cheerful reading of Comment 1 to § 2-703, they have tried three tacks to get around it. Two were addressed previously. One is simply to ignore it, as the court did in *Trans World*.[203] The second is to subjugate it by misapplying statute construction rules, as the courts did in *Tongish* and *TexPar*.[204]

The third is a purely metaphysical theory, one with absolutely no empirical validation, that § 1-305 actually supports recoveries of unlimited market price damages. The theory centers on the phrase "expectancy damages," a common phrase for compensatory damages, although one that § 1-305 does not actually use. As the theory proceeds, everything turns on what is actually meant by expectancy and expectation. In *Peace River*, the court adopted what Professor Gabriel called a "modified will theory."[205] The theory is that market price damages should always be

202. U.C.C. § 2-401, of course, does away with title as a determinative factor, saying that the parties' rights and obligations apply "irrespective of title." Also, as noted previously, § 2-709 takes away a seller's right to treat the contract as complete and sue for the contract price.

203. 769 F.2d 902, 907 (2d Cir. 1985). *See* discussion of *Trans World supra* Part II.C.

204. *See* discussion of *Tongish* and *TexPar supra* Part II.A.1.

205. Its roots are said to be found somewhere in CHARLES FRIED, CONTRACT AS PROMISE 19 (1981). Gabriel, *supra* note 134, at 450 n.146.

recoverable as a matter of right because the recovery is "the 'logical and expected measure of damages'"[206] and, therefore, "resale price damages does not account fully for either party's expectations upon entering into the contract."[207] The theory goes even farther to maintain that, not only does a seller expect upon contracting to recover market price damages, but "a breaching buyer expects to pay them" as well, because market price damages are "no more than the right the buyer originally conferred on the seller."[208] In short, sellers and buyers get market price damages because they expect to get them and to pay them, and hence market price damages *always* represent proper expectancy damages regardless of the actual loss.[209] The theory is no more than tautology based on circular reasoning that presumes the truth of its every conclusion.

Professor Robert Scott reasons along the same lines. He begins by saying that compensation should be for what he labels "*ex ante expectancy*" damages, which he says are preferable to an award of actual damages.[210] Less elegantly, but more commonly, this view is explained by analogy to wagering contracts.[211] Parties enter into fixed price contracts as bets on which way the market will swing. When the market has swung downward, the seller has won his bet, and the buyer needs to pay up. Indeed, Professor Gabriel observed that: "In this respect, contracts resemble gambling more than moral philosophy."[212] Contracts then would also resemble gambling more than common sense bargaining.

"Expectancy damages" could be defined in all sorts of ways. But if we are to use the phrase to identify the goal of compensatory damages, the Code defines them just the way contract law always has.[213] It specifically adopts, to borrow a phrase, an *ex post* perspective, one of placing the aggrieved party in the "position as if the other party had fully performed."[214] Professor Scott, therefore, shifts attention away from § 1-305 to § 2-708, and makes the extraordinary assertion that to view compensa-

206. 322 P.3d 531, 539–40 (Or. 2014) (quoting Gabriel, *supra* note 134, at 449).

207. *Id.* (quoting Gabriel, *supra* note 134, at 449–50, 453).

208. *Id.* (quoting Gabriel, *supra* note 134, at 449).

209. Professor Peters famously reached the same conclusion without convolution by simply suggesting that § 2-708(1) could be viewed as a "statutory liquidated damages clause." Peters, *supra* note 9, at 259.

210. Scott, *supra* note 42, at 1190 (emphasis added). Scott says that this "argument" was first made in Thomas H. Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Non-Performance*, 31 STAN. L. REV. 69, 110, 115–16 (1978). Scott, *supra* note 42, at 1190 n.105. It is an entertaining "argument," but its adoption for UCC purposes would require that a legislature amend § 1-305.

211. *See, e.g.*, Trans World Metals, Inc. v. Southwire Co., 769 F.2d 902, 908 (2d Cir. 1985): "It simply could not have escaped these parties that they were betting on which way aluminum prices would move." *See also* Simon & Novack, *supra* note 45, at 1436 ("Payment of market damages amounts to specific performance of the bet.").

212. Gabriel, *supra* note 134, at 449 n.145.

213. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344, which defines "expectation interest" as the injured party's "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed."

214. U.C.C. § 1-305(a) (AM. LAW INST. & UNIF. LAW COMM'N 2017). Professor Scott would say that § 1-305 is ambiguous in that it fails to resolve explicitly the issue of whether

tory damages from an *ex post* perspective "is not only misguided in theory, but contravenes the statute and the policy underlying the UCC's treatment of damages."[215] He is wrong on both counts. There is no "letter of the statute" in § 2-708 to support his theory, but only the implication he finds from its unqualified phrasing that market price damages "is" the proper "measure of damages for non-acceptance or repudiation by the buyer." From this he then extrapolates that sellers have the right to market damages irrespective of actual loss.[216]

So it bears emphasis once again that no one disputes that § 2-708(1) damages "is" the default measurement. But, contrary to Scott's assertion, the actual *letter* and the actual *policy* are as expressed in § 1-305, not § 2-708. He, however, tells us instead that Article 2 "emphasizes the primacy of market damages for market contracts and the correlative right to choose among alternative methods of measuring that loss."[217] In support he loosely interprets two now familiar Article 2 comments[218] and concludes that they must prevail over § 1-305, an unambiguously worded *statute* that says just the opposite.[219] The result of his analysis is a blurred thaumatropic vision of truth as concocted from two quickly spun half-truths, one on each side of a whirling board.

A fixed price contract does, of course, allocate risks of market price fluctuation. But to analogize that contracts are, therefore, essentially wagers on the market is singularly unpersuasive. Most particularly, parties rarely intend their dealings to be aleatory, and when they do so intend, they say so. But even so, the correct aleatory contract analogy is not to wagers that can be won only by virtue of the other party's breach, but to insurance contracts that protect the expectation that, upon breach, the law will afford them an adequate market substitute for the promised performance. Like with insurance contracts, the payout is with an indemnification for the actual loss up to a policy limit of market price at the time of breach. It is a woefully misplaced assumption that people typically enter into contracts thinking about breach, much less that they choose to do business with others who they hope will breach.

People contract because they want and expect something. That something is the performance they will receive in return for their own. Sellers expect their profit. Article 2 gives them substitutes for that expectation,

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UCC damages should be measured based on the parties expectations at the time of contracting. Scott, *supra* note 42, at 1188.

215. Scott, *supra* note 42, at 1190.

216. Professor Scott also says as follows: "The seller enjoys an advantage in selecting the remedy that will minimize breach costs. In turn, the injured party's obligation to mitigate damages helps ensure efficient salvage responses." *Id.* at 1188 n.97. This is indeed confusing. The injured seller's primary "salvage response" is to mitigate his loss by resale. If his point were simply that the UCC presumes that a seller has a right to market price damages subject to the buyer's right to carry the burden of proving mitigation, it is doubtful Scott would find argument from anyone.

217. *Id.* at 1190.

218. *Id.* at 1190 n.106 (citing U.C.C. § 2-703, cmt. 1 (election of remedy) and § 2-706 (resale not mandatory)).

219. *Id.*

either directly under § 2-708(2) or, occasionally, under § 2-709, or indirectly as resale damages under § 2-706 or, occasionally, as market price damages under § 2-708. Buyers expect to receive the goods they were promised. Article 2 only rarely gives them specific performance but allows substitutes for that expectation, either as cover damages under §2-712 or, occasionally, as market price damages under § 2-713.

III. THE ROAD AHEAD

We all love fairies and their tales. A favorite is the one about wise old geniuses, lawyers no less, who had such wisdom that they could write immutable rules that would last through the centuries immune from any new found wisdom and emerging technologies. We love the illusionists, whoever they may be, who make us think we see at every turn businesses striving for customers in every which way when actually they are deviously humming along at peak efficiency with, apparently, the hidden goal not to make any more money but to launder it through costly advertising on radio, television, wireless devices, and (for the present) in every sort of written instrument as well. And maybe the very most, we love advisors who can make us rich by, for example, correcting our persistent bad behavior by, for example, teaching us to do deals, not for what we want, but with the hope that the market goes our way so we can sue the sucker we contracted with and take his money. But some advice can bankrupt you. Some illusions are not. And some fairy tales have Grimm endings.

Peace River gives us gives us another unhappy ending, and in so doing the Oregon court went against the great weight of authority to become the first reported decision in the twenty-first century to interpret the Uniform Commercial Code to support an award of windfall market price damages. Indeed, *Peace River* joins but three other decisions that have ever so-interpreted the Code. Two of those decisions were early hedged contract cases that chose to follow the majority of pre-Code decisions on an issue that had troubled the courts for more than a century. As such they might be considered *sui generis* to hedged contracts. And, now that those cases represent a distinct minority on even that issue, it is sensible to ask whether those courts would reach the same conclusions today.

Even so, those cases did not address the issue before the Oregon court of whether a seller who had mitigated damages by a resale could recover greater market price damages. No Code case had ever held affirmatively on that issue, and the Oregon court now stands alone on the point. Indeed, the court could have found but one decision that had reasoning that might tangentially support its conclusion. But the Second Circuit in *Trans World* addressed a quite different issue. In that case, the choice that was presented the court on a weak trial record was either to affirm an award of market price damages or remand and require a seller who was apparently left at lost volume to prove its profit lost from the breached contract. Even so, both the holding and the reasoning of the Second Circuit in *Trans World* was later rejected by the 1990 Study Group Report for the Revision of Article 2, by the ABA Task Force that critiqued that report, and by the 1999 Revision itself, which although never formally approved by the National Conference of Commissioners, had been sanctioned by the American Law Institute. *Trans World* is a bad decision from decades ago. *Peace River* becomes a sad recent decision when one juxtaposes its analysis against that of so many other courts that have in the interim joined the mainstream in modernizing Article 2 remedy law.

It is curious then that the court said that its decision would promote uniformity in the law and allow Oregon to "obtain the same advantages that other states had gained from the adoption of a uniform and comprehensive set of commercial statutes."[220] It is doubtful that the Oregon buyer felt particularly advantaged by the court's decision. And, most ironically, the next foreign seller in a different line of work who darkens the court's doors with a request for a windfall will necessarily be tossed on its ear. The Canadian seller in *Peace River* had the benefit of a seed industry trade rule that specified the UCC as the governing law. Otherwise the CISG and its prohibition of market price damages to sellers who have resold would have required the Oregon Supreme Court to affirm the trial court's award of resale damages. Unless the Oregon court regroups, of course, the Oregon business community now faces one set of remedy rules for domestic transactions and another for foreign ones. As the world grows smaller, our states really should consider carefully before providing unnecessarily different sets of rules for commerce that depend on whether one or both parties are residents of this country.

Market price advocates are a fervent bunch. Their muse is a hypothetical abstraction that misses its mark with varying degrees of inaccuracy. Most of the time this is harmless fantasy, coming close enough, as we say, for government work and horseshoes, and as just another fantastical indulgence common to economics analytics, such as, for example, horizontal demand "curves" and transactions without costs. But when the little invention exceeds its practical boundaries as a serviceable surrogate and comes to the law by asserting primacy over the real transactions it is only supposed to emulate, it can become an ugly little monster indeed. Sellers and buyers will not litigate when the price guesstimate is close and there is but a few bucks of difference between what they sold or bought and its hypothetical or "ex ante" value. As the cases attest, they litigate when the difference is ten times reality and the lottery payout, to wager a mixed gambling metaphor, is worth a roll of the dice. It takes an almost religious fervor to let the ugly little monster have its way when that happens.

But that's enough about policy and common sense. *Peace River* and the market price advocates are wrong on the law as well. There is nothing within the four corners of the UCC text and comments that supports windfall market price damages. Advocates thus falsely find a "free election of damages" to be implicit in Comment 1 to § 2-703 and use that to

220. Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531, 536 (2014) (quoting Sec. Bank v. Chiapuzio, 747 P.2d 335, 339 n.6 (Or. 1987)).

fabricate an ambiguity with § 1-305. They then turn to Article 2's drafting history to resolve the conflict. As this article shows, there was no such pre-Code damages doctrine for Comment 1 to reject. Regardless, even if we extend Comment 1 so that damages measurements fall within its ambit, there is still no conflict. Section 1-305, by its terms, anticipates this kind of tension and, together with the mitigation principle, ensures that damages do not exceed actual loss.

Without question many prominent lawyers, judges, and academics who had participated one way or another in the Code's drafting had a strong preference for the tried and familiar market price damages remedy. So, as § 2-708 and § 2-713 say, market price damages "is" the default remedy. I doubt seriously, however, that more than a small percentage favored awards of market damages that exceeded those that had been mitigated by a proper resale. That had never been the law prior to the Code, either at common law or under the Sales Act. More importantly, those who do turn for guidance to the Code's extraordinarily cumbersome drafting process should recall that the 1952 version that was approved for adoption by both the Conference of Commissioners and the American Law Institute had specifically prohibited sellers who resold the goods from recovering market price damages. That version had been impartially reviewed and analyzed by untold numbers of informed minds. And that prohibition stands today as law for the vast majority of major economies of the world, including the United States, for commercial dealings across borders. The explicit prohibition was removed from the Code only later, after the New York Commission had asserted its extraordinary political influence.

One who wishes to treat the 1957 amendment of § 2-703 as wisdom truly should read the reasoning proffered for it by Professor Honnold. It is a sobering experience indeed.[221] Honnold certainly exceeded his charge, and it would seem apparent that he had a limited understanding of how the new Article 2 remedies would work together. Nevertheless, it says here that Llewellyn and his drafting committee still won the day. Even with the removal of the prescription in § 2-703, they retained the safeguard in § 1-305 that continues to protect against windfall recoveries of market price damages.

To be sure, many participants in the process read Comment 1 as a choice of damages measurement provision. Honnold certainly did. Undoubtedly, many others also favored the choice. Still others were uncertain or dispassionate on the point.[222] But many, like Llewellyn and members of his drafting committee, intended that the comment be read literally and in compliance with § 1-305. The drafting process for legislation is often messy, most certainly for a project like the Code that took

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221. A short appendix is provided at the end of this article that quotes the relevant portions of Honnold's analysis.

222. *See, e.g.*, GILMORE & BLACK, *supra* note 2, at 103 n.43 ("Article 2 (which does not make the availability of remedies depend on the location of title) apparently allows the seller a free choice in all cases between the contract less market and the contract less resale measures of damages; see §§ 2-703, 2-706 and 2-708.").

decades to conclude, and most particularly when the inevitable time arrives for politics to inject itself into the proceedings. We talk often about the "intent" of the drafters but never ever actually know who all they were, nor what was in the minds of all those who voted a certain way on a certain point at a certain time. To treat amendments, changes, and clarifications through the drafts as reflecting acclamation or even consensus is often foolhardy, and therefore, rules of statutory construction look to history as a last resort.

Through the years our courts have used the Code's drafting history in positive ways. Regarding remedies, the most prominent of these was to reject the nonsensical result that would obtain from a literal application to lost volume sellers of § 2-708(2)'s "due credit" clause and to instead carry forth the clear contrary intent of the provision's drafters as to the scope of the provision.[223] Yet our courts with unanimity have also disregarded the drafters' intent when it has produced inequitable results. Restricting the applicable market price for damages in anticipatory repudiation cases to no later than the time necessary to allow buyers to mitigate by cover is an excellent example of that.[224]

So let's assume for argument that the multitude of "drafters" in the mid-1950s both from the National Conference and from the New York Commission intended to allow sellers to choose freely to recover the greater of resale or market price damages. If we assume that they knew then what we know now about how Llewellyn's grand menu of Article 2 remedies would be tailored by our courts along the lines contemplated by § 1-305, should we then think that their minds would remain unchanged? And even if we thought that, is that the intent that should matter? Foremost among so many ambitious goals of those great lawyers from over a half century ago was to create a living code of law, a flexible one that would be liberally interpreted to accommodate developing knowledge, technological innovation, and changes in business practices. They said so specifically and asked that we liberally construe Code provisions to accomplish those purposes.[225] They accomplished their lofty goals to a remarkable degree, and it is that history which deserves our homage.

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223. *See, e.g.*, cases cited *supra* note 14.

224. *See* the discussion of anticipatory repudiation cases in Part II.B.

225. After a half century of formative case law, Comment 1 to § 1-103, written so long ago, seems almost trite:

> The Uniform Commercial Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent and infrequently-amended piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in the Uniform Commercial Code to be applied by the courts in light of unforeseen and new circumstances and practices. The proper construction of the Uniform Commercial Code requires, of course, that its interpretation and application be limited to its reason.

U.C.C. § 1-103 cmt. 1 (Am. Law Inst. & Unif. Law Comm'n 2017).

APPENDIX
STATE OF NEW YORK
REPORT OF THE LAW REVIEW COMMISSION OF 1955
STUDY OF THE UNIFORM COMMERCIAL CODE
Excerpts from pages 550–552

The language of paragraph (e) of 2-703 raises difficult problems of relationship between measurement of seller's damages by resale of the goods under Section 2-706, and measurement by reference to market price under Section 2708. . . .

The problem which language of paragraph (e) of 2-703 beclouds is whether seller is to be afforded a free choice between those remedies. . . . This language rather plainly says that the seller is denied the market-price standard for measuring damages whenever he had resold the goods. This reading is, however, inconsistent with the statement in Comment 1 that Article 2 "rejects any doctrine of election of remedies as a fundamental policy and thus remedies are essentially cumulative in nature . . ."[226]

The statutory language, which the Comment contradicts, may have been prompted by the view that seller's resale of the very goods described by the contract will provide a more accurate measure of his loss from buyer's non-performance than a reference to a generalized market price, and seller should therefore be tied to the amount received on resale. This conclusion is easily supported if seller may recover damages based on his resale of the goods. Difficulty, however, arises from the fact that although seller may have resold the goods he may not be able to use the proceeds of the sale as a basis for recovery since he may have failed to comply with one of the requirements of Section 2-706. There are several such requirements. . . . A seller may fail to comply with one of these requirements without having engaged in conduct so reprehensible as to deserve complete loss of recovery for buyer's breach.

The draftsmen probably did not intend so to bar the seller [quoting Comment 2 to § 2-706]. . . . The text of the Code does not reflect this policy, since the market-value measure of 2-708 is made available "so far as any good *have not been resold*."

If this language in Section 2-703(e) is to be corrected, the following alternatives are open: (1) Strike the opening language "so far as any goods have not been resold," with the result that seller will have a free choice between the amount received on resale (§ 2-706) and damages based on market price (§ 2-708); (2) Provide that seller may use the market-price test (§ 2-708) if the goods have not been resold *pursuant to Section 2-706*; (3) Provide that if seller has resold, but not in conformity with Section 2-706, seller may recover damages based on (a) the proceeds of resale or (b) market price (§ 2-708), whichever produces the lower recovery.

Alternative No. 1 allows the seller to take advantage of an advanta-

226. *See also* Comment 2 to Section 2-706, quoted *infra*. [Footnote 379 in original.]

geous resale above the market level.[227] This result, however, hardly seems subject to serious abuse. Resale above the market will be rare, and perhaps should be rewarded. . . .

The other alternatives involve serious complexities of administration. Under Alternative No. 2, the availability of the market-price test would in some situations depend on controverted issues concerning the propriety of seller's resale; and a seller who sought recourse to the market-price standard of Section 2-708 would be in the ironic position of achieving his goal by proving the impropriety of his own resale as measured by the standards of Section 2-706. The third alternative seems equally undesirable since a high price on resale, which would reduce seller's damage, may result from an undue delay in a rising market beyond the time for tender stated in the contract. If seller had waited too long and the market had dropped, he would have suffered the loss; it seems fair that in this situation a market rise should be to his advantage.

If Alternative No. 1, above, is selected, Section 2-703(e) should be redrafted to read:

(e) [so far as any goods have not been resold] recover damages for [their] non-acceptance (Section 2-708) or in a proper case [their] *the* price (Section 2-709);

227. *E.g.*, Assume a contract price of 100, market value of 80, and re-sale for 85; under Alternative No. 1 seller could elect to use the market-price test and could obtain damages of 20, although use of the resale test would limit him to 15. Thus seller would finally gross 105 rather than his expected return of 100. [Footnote 380 in original.]