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Plunging the Depths of the Seller's Resale Remedy under the Uniform Commercial Code

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I. INTRODUCTION

A. Scope

IN SITUATIONS in which "the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates," section 2-706 of the Uniform Commercial Code (the Code) allows the aggrieved seller to take back or withhold delivery of the goods, to resell the goods in good faith and in a commercially reasonable manner, and to recover the difference between the contract price and the resale price, plus incidental damages, less expenses saved as a result of the buyer's breach. By allowing the seller to "fix" his damages by a resale of the goods, section 2-706 represents a marked departure from pre-Code law under the Uniform Sales Act which did not recognize the resale formula as a generally available damage remedy. The dominant damage formula under the Uniform Sales Act was that based on market or current price, and the amount received by the seller on resale was merely evidence of that price. The primary advantages of the Code's resale formula are that it is generally available, it stands on its own as a damage measurement, and it allows the seller to avoid the well-documented difficulties of proving market price at a particular time and place.

Section 2-706 is the most precisely drafted of the

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3 Section 60 of the Uniform Sales Act allowed a seller's resale as the basis for a damage measurement only in the following circumstances:
   Where the goods are of perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transit may resell the goods.

Uniform Sales Act § 60, 1A U.L.A. 142 (1950).
Code's damage provisions, and it addresses most of the questions which have arisen concerning the mechanics of its application. This statement, however, is subject to two qualifications. First, the answers provided by section 2-706 are often couched in vague terms of "good faith" and "commercial reasonableness," which leave much to be fleshed out by the courts and triers of fact according to the circumstances of the individual case. Second, section 2-706 is silent at best, and misleading at worst, with respect to its applicability to individual cases in which the use of its formula would overcompensate the seller. Further, in cases in which the resale formula clearly applies, section 2-706 gives little guidance as to how the numerical calculations under its formula are to be made. These matters are left to the courts under the guidance of the overriding principle of section 1-106 that the remedy be "liberally administered" to the end of compensating the seller without windfall and of charging the buyer without penalty.

It must be remembered that the resale formula will compensate only full-capacity sellers, those whose supply of goods is met or exceeded by the demand for them. The resale formula will undercompensate a "lost-volume" seller, one who could have made both the sale under the breached contract and the sale under the resale contract, by the amount of profit which he would have made on the resale contract. Nothing, however, in the Code, in the common law or in common sense prohibits an injured party from bringing action for less damages than he has suffered. Because damages, as a practical matter, are easy to prove under the Code's resale formula, resale damages are often sought by aggrieved sellers who would fare better on the basis of lost profit, market price differential or even the full unpaid contract price. To proceed successfully under section 2-706, the seller need only introduce evidence of the price under the breached contract, the re-

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6 Id. § 2-106(1).
sale price and his compliance with the section's rather innocuous requirements. The burden of going forward with evidence that the requirements of section 2-706 have not been met then rests on the buyer. The cases demonstrate that unless the buyer can show that the seller has acted in some bizarre or unreasonably self-serving manner in conducting the resale, the seller will be successful. It is clear, however, that the requirements of good faith, commercial reasonableness and notice must be met or the seller will be denied damages based on the resale price. In the event that the seller is found not to have complied with the requirements of section 2-706, he is not denied recovery altogether but is relegated to recovery under section 2-708, for damages based on market price or, in a proper case, lost profit.

B. Mitigation of Damages

At common law, damages based on a resale by an aggrieved seller were allowed, if at all, only as evidence of market value at the time of breach. If market value had declined between the time of the buyer's breach and the

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7 See id. § 2-706.
8 Id. § 2-706 Comment 2. Comment 2 provides: "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." Id.
9 Id.
10 Section 2-706 provides:

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary the the
seller's resale, the resale could not be used to establish damages.\textsuperscript{11} Under the Code, a resale conducted in good faith and in a commercially reasonable manner continues to be recognized as fair evidence of market price in an action based on section 2-708.\textsuperscript{12} Under the Code, however, the justification for using resale price as a basis for measuring damages is not as a hypothetical approximation of market value of the goods at the time of breach, but rather as an incentive to the aggrieved seller to minimize his loss and mitigate the damages chargeable to the buyer. Market value is at best nothing more than a hypo-

\begin{itemize}
\item goods be in existence or that any or all of them have been identified to contract before the breach.
\item (3) Where the resale is a private sale the seller must give the buyer reasonable notification of his intention to resell.
\item (4) Where the resale is at public sale
\begin{itemize}
\item (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
\item (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
\item (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
\item (d) the seller may buy.
\end{itemize}
\item (5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.
\item (6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of this security interest, as hereinafter defined (subsection (3) of Section 2-711).
\end{itemize}

\textit{Id.}

\textsuperscript{11} See Royer v. Carter, 37 Cal. 2d 554, 233 P.2d 539, 542 (1951). See also Dehahn v. Innes, 356 A.2d 711, 723, 19 U.C.C. Rep. Serv. (Callaghan) 407 (Me. 1976) (seller has burden of proving that goods have not declined in value before resale price may be used as evidence of market price under Section 2-708).

thetical approximation of damages and is wholly inadequate as a basis for compensating sellers in the vast majority of real world sales cases. Accordingly, under section 2-706, the properly conducted resale stands on its own as a basis for damage measurement and prevails even against a showing by the buyer that the market value of the goods at the time of breach was greater than their subsequent resale price.

The theoretical thread running throughout section 2-706, tying together the section's general requirements of good faith and commercial reasonableness, is the minimization of losses and the mitigation of damages. Indeed, the courts have by and large addressed the requirements of good faith and commercial reasonableness in terms of whether the seller in a particular case could have, by adopting a different course of action, resold the goods at a higher price and thereby further mitigated the damages chargeable to the buyer. In conducting the resale, the seller must act within a commercially reasonable time to mitigate his damages and may not speculate about market conditions at the buyer's expense.

Accordingly, in judging a commercially reasonable time for a seller's resale, the courts have held that the resale should be made as soon as possible after the breach and that the seller

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should make every reasonable effort to minimize his loss.\footnote{16}

While fleshing out the requirements of good faith and commercial reasonableness under section 2-706, the attitude of the courts has closely paralleled that which they have traditionally demonstrated at common law in damage mitigation cases. In particular, doubts are resolved in favor of the injured party, and the reasonableness of his course of action is judged on the basis of the facts as they are known at the time of resale.\footnote{17} For these reasons, a buyer cannot defeat a seller’s recovery on the basis of resale merely by showing either that the market value at the time of breach was higher than the resale price or that the goods could actually have been resold at a higher price. In the former case, the buyer must further show that the seller delayed unreasonably; in the latter case, he must further show that the seller knew or should have known of the availability of a resale at a higher price. These matters are discussed more fully in Section III below.

C. The Requirements

Section 2-706 allows the seller to resell by either private or public sale.\footnote{18} The distinction between the two is based on whether or not bidding will occur.\footnote{19} Comment 4 to section 2-706 states that “public” sale means a sale by auction.\footnote{20} Accordingly, fixed price sales such as over-the-counter sales by merchants or garage or tag sales by non-merchants are not “public sales,” even though the sales are open to the public generally. The seller does not have


\footnote{17} U.C.C. § 2-704 comment 2 (1977) which, in discussing mitigation of damages in a different context, provides that the seller's "exercise of reasonable commercial judgment" is to be viewed in terms of "the facts as they appear at the time he learned of the breach."

\footnote{18} U.C.C. § 2-706(3) & (4) (1977).

\footnote{19} Id. § 2-706(3) & (4) (1977).

\footnote{20} Id.}
an unfettered option between public and private resale; the choice is governed by the general requirements of good faith and commercial reasonableness.\textsuperscript{21} Comment 4 to section 2-706 provides that "in choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed."\textsuperscript{22}

If a public resale is held, it must be at the usual place for such sales.\textsuperscript{23} Goods generally do not have a usual place for sale by auction, and the reference here is to goods such as antiques and collectables, grain, produce, livestock, and the like. If a usual place for public resale is not reasonably available, then "a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind."\textsuperscript{24} In some cases, for example resale of livestock, rare antiques, paintings or art objects, a public sale may be the only commercially reasonable method of resale in the important sense of eliciting the highest price for the goods.\textsuperscript{25}

Regardless of whether the resale is public or private, the resale must be reasonably identified with the broken contract and must be conducted in good faith and in a commercially reasonable manner.\textsuperscript{26}

If the resale is private, the seller must notify the buyer only of his intention to resell.\textsuperscript{27} However, in the case of a public resale, the seller must also notify the buyer of the time and place for resale.\textsuperscript{28} The purpose is to allow the buyer an opportunity to bid at the sale or to solicit the

\textsuperscript{21} Id.
\textsuperscript{24} Id. § 2-706(4)(b).
\textsuperscript{25} Id. § 2-706 comment 9.
\textsuperscript{26} See W. Hawkländ, Uniform Commercial Code Series § 2-706:04 (1982).
\textsuperscript{27} U.C.C. § 2-706(1)&(2) (1977).
\textsuperscript{28} Id. § 2-706(3).
attendance of other bidders. Notice is excused in cases in which the goods are perishable or threaten to rapidly decline in value. Even then, however, the general requirement of commercial reasonableness may require notice when it is possible prior to either a decline in the condition of the goods or in their value. Three additional requirements must be met in the case of public resale: (1) the goods must be identified to the breached contract except where there is an established market for sale of futures in the goods; (2) the resale must be at the usual place for public sale if one is reasonably available; and (3) the goods must be displayed at the auction, or alternatively, the notification of sale must have stated the location of the goods and have made provision for a reasonable inspection of the goods by prospective bidders. These three additional requirements are readily understandable, and a public resale which violated one or more of them would almost certainly be held to be commercially unreasonable.

The seller, as well as the buyer, may buy at the public sale. Comment 9 to section 2-706 states the rationale: "The provision of paragraph (d) of subsection (4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay." Failure to follow the requirements of section 2-706 will deny the seller a recovery thereunder and relegate him to damages under section 2-708. Such a

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29 Id. § 2-706(4).
30 Id. § 2-706 comment 8.
31 Id.
32 Id. § 2-706(4)(a).
33 Id. § 2-706(4)(c).
34 Id. § 2-706(4)(d).
35 Id. § 2-706(4)(d).
failure will not affect the rights of a good faith purchaser at the resale against the breaching buyer.37

1. Identified Goods

Section 2-706(2) provides that "it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."38 Of course, the goods must be identified to the breached contract prior to resale.39 "Identification" under the Code means that the goods can be objectively verified as those covered by the breached contract.40 To be identified to the breached contract the goods must be both existing and completed.41 Section 2-704 of the Code allows the seller to complete the goods following a breach by the buyer and to identify them to the breached contract.42 The only exception to the identification requirement is made by section 2-706(4)(a) for goods, such as commodities, which have a recognized market for public sale of futures in the goods.43

Only if the goods have been identified to the breached contract can the seller comply with the further requirement in section 2-706 that the resale "be reasonably iden-

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37 Id. § 2-706(5).
38 Id.
39 Id. § 2-706(2).
40 See Id. § 2-501(1). Section 2-501(1) provides that "identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs . . . (c) when the contract is made if it is for the sale of goods already existing and identified." Id.
41 Id.
42 Id. § 2-704(1). Section 2-704 provides:

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;
(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

Id. See Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co., 629 F.2d 1118, 1124 n.10, 30 U.C.C. Rep. Serv. (Callaghan) 996 (5th Cir. 1980) (not necessary under section 2-706 that the goods be in existence at the time of the breach).
tified as referring to the broken contract." No one knows precisely what this requirement means. It has no historical antecedent, and the courts to date have shed little light on its meaning. It is probably related to the provision in section 2-704(1)(b) which allows as the subject of resale only "goods which have demonstrably been intended for the particular contract" which has been breached. Logically, if the seller can demonstrate at trial that the resale contract was for goods which had been intended for the breached contract, he has met his burden of showing that the resale was "reasonably identified as referring to the broken contract." One of our most knowledgeable commentators has speculated that the purpose of the provision is to prevent the seller from speculating at the buyer's expense. Merchant sellers commonly have in stock and in manufacture a large number of goods identical to those required by the breached contract. Obviously such sellers could maximize their damages under section 2-706 by identifying as the resale contract the lowest priced contract involving such goods which was entered into within a commercially reasonable time of the breach. At trial, the breaching buyer would be hard pressed to counter the seller's testimony that the resale contract was the lowest priced contract involving identical goods. Accordingly, it has been suggested that the provision requiring a reasonable identification between the resale contract and the breached contract be read as requiring the seller to identify the resale contract by notice to the buyer prior to its consummation.

The suggestion, however, is not persuasive. It ignores the fact that the only notice requirement for a private re-

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46 Id. § 2-706(2).
47 W. HAWKLAND, supra note 26, § 2-706:03.
48 Id.
sale is that of "intention to resell" and not of the actual resale itself. Furthermore, subsection (2) of section 2-706 allows the seller to identify as the resale contract any one or more of his contracts existing at the time of breach. There is no prohibition against his selecting that existing contract with the lowest contract price as the resale contract. Finally, the typical real-world merchant seller is in a "lost volume" situation at breach and will be using as a resale contract one which he would have made regardless of the breach. As long as the resale contract is profitable, its use by such a seller in the damage formula of section 2-706 will not violate the compensation principle to the buyer's disadvantage. In fact, even if he uses as the resale contract the lowest profitable similar contract in which he has entered, he will be undercompensated (put in a worse position than he would have been had the breached contract been performed) by the amount of profit which he would have made on the resale contract.

50 See Alco Standard Corp. v. F. & B. Mfg. Co., 51 Ill. 2d 186, 187, 281 N.E.2d 652, 653, 10 U.C.C. Rep. Serv. (Callaghan) 639, 640 (1972) (holding that there is no requirement under section 2-706 of notice of the "proposed sale" but that the only notice required is of "intention to resell"). Of course, notice of resale can accomplish the purpose of identifying the resale contract to the breached contract. See Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1979).
51 See, Anderson, supra note 13 at 12:

"If the seller would have made the sale anyway, he is not really being compensated. The seller is worse off by the amount of profit that he would have made on the resale contract had the breached contract been performed. Test it yourself. Pick any number of transactions, figuring the contract price and profit on each one. Then pick one of the transactions as the breached contract and another (at a lower contract price, of course) as the resale contract. Then get out your calculator, home computer, or new-math textbook and figure the seller's profit both before and after the breach. It does not matter what figures are used. You should find that, whenever the resale would have been made anyway, the seller is going to be worse off by the amount of profit he would have made on the resale contract than he would have been had the breached contract been performed. The only exception occurs where the resale contract has a price below the cost of producing the goods. If the seller uses such a contract as the resale contract, he will always wind up overcompensated. In other words, he will be in a better position
It is only when the seller is not at "lost volume" and the buyer's breach allows him to make a resale which he otherwise could not have made, that there is a potential for abuse (overcompensation) in allowing the seller to identify as the resale contract one other than the "true" resale. Even here, section 2-706(2) can be read to allow identification of an "existing contract of the seller" as the resale contract. However, the overriding principle of compensation under section 1-106 should in such cases encourage the courts to hold that only the "true" resale contract can "be reasonably identified as referring to the broken contract."

In sum, there is no requirement in section 2-706 that the buyer be notified in advance of which contract constitutes the resale contract. The seller should be allowed to make that designation as late as at trial. The seller's designation should be accepted so long as the resale goods are conforming to those required by the breached contract. Only if the seller is not at "lost volume," and the seller can be shown to have made a resale which could not have been made except for the buyer's breach should the seller be limited under section 2-706 to the "true" resale contract.

2. Identified Resale

To date there is not sufficient case law to allow us to regard as resolved the question of how to satisfy the requirement of section 2-706(2) that the resale "be reasonably identified as referring to the broken contract." One persuasive decision, for example, can be read as holding that, in all cases in which the resold goods are conforming to the breached contract, the resale contract has been rea-

than he would have been had the contract not been breached by the amount of loss that he would have suffered on the disadvantageous resale contract. This has been labeled the phenomenon of lost volume.

Another case, however, has specifically held that section 2-706(2) "requires the seller to indicate, by some means, that the particular goods are being delivered to the new buyer as a result of the broken contract." The buyer had repudiated in February a contract to purchase cottonseed oil. By letter of March 17, the seller proposed four options for resolving the dispute, including resale of the goods. Prior to the letter, in late February, the seller had contracted to sell cottonseed oil to another buyer. When a resolution of the dispute with the breaching buyer did not occur, the seller decided to use the refused oil to fulfill the existing contract with the other buyer. The trial court denied the seller recovery on the basis of the resale and relegated the seller to recovery based on market price under section 2-708, because it found that the seller had neither given notice of intention to resell nor identified the cottonseed oil to the breached contract. On appeal, the holding of the trial court could have been upheld solely on the basis of the seller's failure to give notice of intention to resell. The court, however, expressly refused to resolve the case on this basis. The court held that even if it was clear that the oil delivered under the resale contract was that originally intended for the breached contract, the seller could not recover under section 2-706 because the seller had failed to take some action to identify the resale contract to the breached contract.

The court's decision was not well advised. There simply is no requirement in section 2-706(2) that the seller take affirmative action to identify the resale to the breached contract. The requirement is only that the re-

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sale "be reasonably identified" as referring to the breached contract. If the goods involved in a resale contract are clearly those intended for the breached contract, then surely a reasonable identification between the two contracts has been made. Unless a buyer is able to show some legitimate interest worthy of protection, such as being required to pay penal damages, the court's analysis represents an incorrect reading of the applicable Code provisions and is against the grain of judicial decisions which liberally allow the seller to use the resale formula upon a showing that the resale was conducted in good faith and in a commercially reasonable manner. Better reasoned decisions have found the identification requirement to be met if the goods involved in the resale contract are conforming to those required by the breached contract.54

Moreover, in at least one case, a seller was allowed to recover under section 2-706 even though the buyer was able to demonstrate that the goods involved in the resale contract were not those identified to the breached contract.55

In that case, the seller sold to the buyer 200,000 pounds of fifty percent lean navel trimmings which the seller held in cold storage. Under the agreement, delivery of the goods was to be by transmission of invoices and warehouse receipts, the goods remaining in cold storage with the seller. The seller delivered appropriate invoices and warehouse receipts for 200,000 pounds of navel trimmings from lot 19700. Market value of navel trimmings plummeted soon thereafter, and the buyer repudiated the contract. The seller sued alleging alternative methods of valuing its damages including, *inter alia*, the differentials between the contract price and both the resale price of the

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55 Servbest Foods, 403 N.E.2d at 7-10.
meat identified to the contract from lot 19700 and the resale price of the first 200,000 pounds of navel trimmings meeting the contract specifications which were sold following the buyer's repudiation. The seller testified that its standard practice was to ship meat on the basis of storage expiration date and argued that damages should be based on the resale of the first 200,000 pounds of navel trimmings sold subsequent to the repudiation, rather than of the meat from lot 19700 identified to the breached contract. The trial court agreed and so based the damages award.\(^{56}\)

The appellate court affirmed the trial court's award, saying that, although section 2-706 does refer to a resale of "the goods concerned," a "narrow reading" of the section was to be rejected "in light of the policy and intent underpinning the Code and the concept of 'resale'."\(^{57}\) The court suggested that the underlying purpose of section 2-706 is to honor the seller's lost expectation by insuring that the resale price accurately reflects the market value of the goods involved in the breached contract. This would be the normal purpose of restricting resales to identified goods. The court emphasized that the goods involved were fungible\(^{58}\) in nature and that the buyer had introduced no evidence to suggest that the goods which were the subject of the resale were not identical to those contained in lot 19700 which were identified to the contract.

The court further noted that its holding was consistent with the allowance by section 2-706 of a resale of goods which were not in existence or identified to the contract prior to the breach. Most importantly, the court rejected the buyer's argument that the resale was not reasonably identified as referring to the broken contract as required

\(^{56}\) Id. at 6. The seller did not plead for recovery of the full unpaid contract price. Id. On the facts, the goods had probably been accepted, and a price action would have been an appropriate remedy.

\(^{57}\) Id. at 7.

\(^{58}\) See U.C.C. § 1-201(17) (1977).
by section 2-706. The court said that this identification requirement is met when the resale consists of goods which are in conformity with the requirements of the breached contract. The court said that any concern that a seller will manipulate resale in order to obtain a particularly high damage award goes, not to whether the resale is identified to the contract, but rather to whether the resale was commercially reasonable. The court found no evidence of the seller's picking and choosing sales in order to increase damages and noted that the resale involved was conducted within a month of the buyer's repudiation, involved the first sales made following the repudiation and was conducted in accordance with the seller's standard practice of selling meats by the expiration dates on the storage contracts.

The court's holding is consistent with the underlying mitigation requirement of section 2-706 that the goods be resold as soon as reasonably possible after the breach. To require the seller to resell the specific goods identified to the breached contract would also have required the seller to violate its standard operating procedures and to keep meat in cold storage longer than necessary. It is important to note that the court's reasoning with respect to the identification requirements in Section 2-706 holds true for all cases in which the goods involved in the resale contract are identical to those required by the breached contract. So long as the resale goods are conforming and the seller has introduced evidence generally that the resale was made in good faith and in a commercially reasonable manner, the burden should rest with the buyer to show the unreasonableness of the resale or that another sale would more accurately reflect the damages incurred.

D. A Caveat

The provisions of section 2-706 have been applied not only to resales of goods by aggrieved sellers following breach by their respective buyers but also, by analogy, to resales of investment securities and the like which are not
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governed by Article 2. Section 2-706 has also been applied in cases involving resales by buyers following breach by their respective sellers. The construction and application by the courts of the provisions of section 2-706 should not vary in these kinds of cases from those involving resales of goods by aggrieved sellers, except that a buyer who resells must account to the seller for any excess over the amount of his security interest.

On the other hand, section 2-706 has been applied in numerous cases involving sales by secured creditors of property of their debtors following repossession of the collateral under Article 9 of the Code. Section 9-504 governs such sales and provides, with language identical to that in section 2-706, that such sales must be conducted in "a commercially reasonable manner." Section 9-504 further provides that "[a]ny sale of goods is subject to the Article on Sales (Article 2)." It has been persuasively argued that one should be wary of placing undue reliance on these Article 9 cases as defining the parameters of the requirements of section 2-706 with respect to questions such as notice of resale, good faith and commercial reasonableness. The potential for evil and abuse by secured creditors in deficiency judgment cases following repossession and sale of collateral at the proverbial dime-on-the-dollar is well known and has over time fostered a skeptical judicial attitude in such cases. Further, such cases often involve large institutionalized creditors against financially strapped consumers. However, similar

61 Id. § 2-706(6) (1977); see id. § 2-711(3) (1977). See also infra notes 293-307 and accompanying text.
situations are presented by the typical section 2-706 case in which the seller resells. The case may well involve a consumer, and, regardless, the potential for abusing the resale privilege is equally present. Thus, although the point of being careful in applying Article 9 cases to section 2-706 is well taken, the standard in both classes of cases is that of good faith and commercial reasonableness to be determined by the facts and circumstances of a given case. It is, after all, the buyer or the debtor, and not the seller or the creditor, who is in breach of his obligation, and a deadbeat is a deadbeat regardless of whether the one to whom he is indebted has the luxury of a security interest or other collateral.

In suggesting that the Article 9 provisions on commercial reasonableness in foreclosure sales, as well as the cases construing them, are relevant to resales under section 2-706, Professor Hawkland has cogently pointed out that the applicable provisions in both articles of the Code are predicated on the assumption that there will be a deficiency following the resale or foreclosure sale.\(^6\) Accordingly, the concept of commercial reasonableness in both kinds of cases is to be judged primarily in terms of keeping the deficiency to a reasonable minimum. As will be discussed more fully,\(^6\) regardless of whether the action arises under Article 9 or Article 2, the courts have generally assessed the standards of good faith and commercial reasonableness under the facts of a given case in terms of whether the particular seller used reasonable efforts to obtain the best price possible on resale.

II. THE NOTICE REQUIREMENT

A. In General

Section 2-706(3) provides that where the resale is private, the seller must give the buyer reasonable notice of his intention to resell. Section 2-706(4) provides that

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\(^6\) W. Hawkland, supra note 26, § 2-706:02, at 299-300.

\(^6\) See infra notes 116-237 and accompanying text.
where the resale is public, the seller must reasonably notify the buyer of time and place of the resale unless the goods are perishable or threaten to decline speedily in value. Even in such instances, however, the requirements of good faith and commercial reasonableness probably would require notification to the buyer if notice could be effectuated prior to the public sale.

The function of notice in the public resale situation is to afford the buyer the opportunity to bid at the sale or to encourage the attendance of other bidders.67 In the case of a private resale, although the requirement itself is clear,68 the purpose of the notification is not. The purpose may be no more than formally to advise the buyer that the seller considers him in breach or repudiation and is electing to substitute his remedies at law for the buyer's performance under the breached contract.69 Hopefully, the courts will not read compliance with the notice requirement as binding the seller to the resale remedy if, at trial, the seller is able to show damages in a greater amount. For example, the goods may not be resellable and the prospective resale may not occur. The seller should then be entitled to an action for the full remaining unpaid contract price. Or, the seller may unwittingly be in a "lost volume" position at the time he gives notice of intention to resell. If so, resale damages would not compensate him, and he should be entitled to recover his lost profit under section 2-708(2).70

68 Id. Comment 8 to section 2-706 provides:
    Where the resale is to be by private sale, subsection (3) requires that reasonable notification of the seller's intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Id.

69 See Coughlin v. Blair, 41 Cal. 2d 587, 262 P.2d 305, 311 (1953); RESTATEMENT OF CONTRACTS § 313, comment (c) (1932).
70 This proposition is discussed more fully at text accompanying infra notes 269-293.
B. The Seller Must Give

For both public and private resales, Section 2-706 provides that "the seller must give" the required notice. Although the contrary has been suggested,71 the provision should be read literally. Section 1-201(26) provides that a person "gives" notice "by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." Accordingly, although the seller must take reasonable steps to give notice, it is not necessary that the notice actually be received. Thus, in one case notice was sent by certified mail, return receipt requested but was signed for by the buyer's sister-in-law whose name was very similar to that of the buyer. The buyer denied receipt of the notice. The court held that notice had been properly given, there being no requirement in section 2-706 that the notice be received.72

On the other hand, the notice requirement may be satisfied if the buyer has actual notice of the resale, even though the notice has not been given by the seller. In a case involving a public resale of oil drilling equipment, notices which were sent by certified mail to the buyer were returned unclaimed. The resale had been well publicized with notices sent to several thousand potential purchasers, and the buyer acknowledged that he knew of the resale. The court held the notice sufficient.73 In this kind of case, common sense and fairness prevail over the precise wording of the statute.

It is not clear, however, whether the notice requirement has been satisfied if the seller has not given notice but the buyer, under the facts, should reasonably have known of the resale. Section 1-201(25) provides that a person has notice of a fact when "from all the facts and circumstances

71 See supra note 26, § 2-706:04, at 304.
known to him at the time in question he has reason to know that it exists." It has been held that where the goods were purchased jointly by husband and wife, notice of resale to the husband only might not be sufficient under section 2-706.\textsuperscript{74}

C. Content of Notice

The content of the required notice varies depending upon whether the resale is public or private. If the resale is private, notice need be given only of "intention to resell." Thus, where the evidence was uncontradicted at trial that the seller advised the buyer following the buyer's breach that it had a potential buyer for the goods in another state, proof of notice of intention to resell was held sufficient. Notice of the actual resale was not required.\textsuperscript{75} In another case, section 2-706 notice was held sufficient when a buyer resold nonconforming goods, as permitted by section 2-711(3), after advising the seller that "if you do not give us instructions within a reasonable period of time, we will sell the said steel for your account."\textsuperscript{76}

If the resale is public, however, the notice must specifically advise the buyer of the time and place of the resale. Unless the goods are perishable or threaten to decline speedily in value so as to make it impractical to give advance notice to the buyer, the buyer is entitled to the opportunity to bid at the resale and to solicit the attendance of other bidders. Failure to allow these opportunities by appropriate advance notice is fatal to the seller's recovery under section 2-706.\textsuperscript{77} It has been held, however, that where the buyer was duly notified of the time and place of a public resale and did not appear at the auction to pro-


tect its interest, the buyer was not entitled to notice of a second public resale of the goods remaining unsold at the first resale. 78 Whether the resale is public or private, there is no requirement under the Code that the notice be in writing or that any other formalities be met.

D. Consequences of Failure to Give Notice

The courts have strictly construed the notice requirements of section 2-706 and have held that the failure of the seller to give the required notice bars recovery under the section. 79 Failure to give the required notice, however, does not bar the seller from any other remedy. 80 Accordingly, courts have held that the failure of the seller to give notice under section 2-706 does not bar a damage recovery under section 2-708, 81 the seller’s right of cancellation under section 2-703(6), 82 the right of the seller to stop delivery upon the buyer’s insolvency under section 2-702, 83 or a seller’s right to recover in an action for the price. 84 If, however, the seller does not give the required

notice, it matters not that the resale was otherwise commercially reasonable.\textsuperscript{85} And it has been held that a buyer is entitled to a directed verdict for lack of notice unless the seller has pleaded and proved an alternate measure of recovery.\textsuperscript{86}

At least one court has opined that where the goods were purchased jointly by husband and wife, notice of resale to the husband only might not be sufficient under section 2-706.\textsuperscript{87} On the other hand, where part of the goods were resold prior to notice of intention to resell and part resold thereafter, an award of damages based solely on the resales subsequent to notice has been upheld.\textsuperscript{88} Further, a failure to give the required notice may in itself, or in combination with other factors, render the resale commercially unreasonable.\textsuperscript{89} For example, in one case the buyer rightfully rejected nonconforming jackets, stored them, and awaited the seller's instructions as to their disposal.\textsuperscript{90} When such instructions were not forthcoming, the buyer resold them over a three-year period.\textsuperscript{91}


\textsuperscript{86} Twin Bridges Truck City, Inc. v. Halling, 205 N.W.2d 736, 12 U.C.C. Rep. Serv. (Callaghan) 381 (Iowa 1973). Even a seller who has failed to provide an alternate measure of recovery may be able to bootstrap success by convincing the trial court that the invalid resale price is sufficient evidence of market value upon which to base a recovery under section 2-708. The law normally does not require general damages to be pled with specificity. See B & R Textile Corp. v. Paul Rothman Indus., 101 Misc. 2d 98, 420 N.Y.S.2d 609, 27 U.C.C. Rep. Serv. (Callaghan) 996 (N.Y. Civ. Ct. 1979).


\textsuperscript{91} Id.
The buyer, however, did not notify the seller of the re-
sales and failed to render an accounting to the seller for
their proceeds. The court held that the buyer was liable
to the seller for the proceeds, with interest, after deduc-
tion of legitimate expenses incurred. Further, because
the buyer had failed to notify the seller and to maintain
accurate records of the resales, all uncertainties as to
amounts would be resolved against the buyer.

E. Notice Excused

The notice requirements of section 2-706 are strict and
rarely have been excused by the courts. The requirement
is that notice be given, not that it be received. Thus,
where the seller sent notice of resale properly addressed
to the buyer by certified mail, return receipt requested,
the buyer was held properly notified even though he de-
nied receipt of the notice. If the buyer has actual knowl-
dge of the proposed resale or indicates to the seller that
he wishes the goods resold, formal notice from the seller
may be dispensed with. Thus, in one case formal notice
was excused, even though the seller’s notices sent by cer-
tified mail were returned unclaimed, where the buyer ad-
mitted actual knowledge of the proposed public resale.
In another case, notice was excused where the evidence
reflected numerous conversations between the buyer and
the seller, in which the seller urged the buyer to take and
pay for the goods. The buyer consistently maintained
that he was not obligated to do so under the contract and
advised the seller to sell the goods elsewhere. Further,
it has been held that, where the buyer was properly noti-

92 Id.
93 Id.
94 Id.
95 Steelman v. Associates Discount Corp., 121 Ga. App. 649, 175 S.E.2d 62, 64,
7 U.C.C. Rep. Serv. (Callaghan) 697 (1970). Receipt had been signed for by the
buyer’s sister-in-law, whose name was very similar to that of the buyer. Id.
96 Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 575-76, 23
97 Gray v. West, 608 S.W.2d 771, 780, 31 U.C.C. Rep. Serv. (Callaghan) 568
(Tex. Civ. App.— Amarillo 1980, writ ref’d n.r.e.).
fied of a public resale and did not acknowledge the notice or attend the resale, the seller was not obligated to notify the buyer of a subsequent public resale of the goods remaining unsold at the first resale.\textsuperscript{98}

Every rule has its exception, and it has been consistently held that notice of resale is not necessary when section 2-706 is applied by analogy to a resale of securities on a national security exchange.\textsuperscript{99} In one such case, the court said:

Section 2-706(4)(b) . . . in particular requires that where there is a resale at a public sale, the seller must give the buyer reasonable notice of the time and place of resale. Official Comment 8 to § 2-706 explains that this was added to assure the buyer of a fair sale by giving him the “opportunity to bid or to secure the attendance of other bidders.” Here, the purpose of notification has been fulfilled. Unlike in situations contemplated by the Code, the resales in this case were made on the national securities exchange, a market clearly fair to the buyer. Prior notice to the defendant would not have given it any greater opportunity to attend or purchase the securities. Provisions necessary to protect the buyer of goods are not always necessary to protect the buyer of listed securities. The purpose underlying § 2-706(4)(b) was fulfilled and [the court] cannot rule that the notification provision was violated.\textsuperscript{100}

It remains to be seen whether the court’s reasoning with respect to securities is equally applicable to a resale of commodities or other futures which are governed directly by Article 2 and section 2-706.

At least one court has held that the failure of the seller


to give notice of resale is an affirmative defense of the buyer.\(^{101}\) Although this holding is of doubtful merit in most jurisdictions,\(^{102}\) its effect is that the failure of the seller to give notice of resale is excused in any case in which the buyer fails to plead and prove the failure to give notice of resale.

F. Burden of Proof; Burden of Pleading

It is a fundamental rule of the law of damages that the plaintiff has the burden of proof as to all aspects of his entitlement to damages. The defendant has the burden of proof with respect to matters in avoidance of damages or in mitigation thereof.\(^{103}\) Since the giving of notice of resale is a condition precedent to a seller's recovery under section 2-706, it would seem clear that the seller has the burden of proving that the required notice was given. There is nothing in the Code to the contrary.\(^{104}\) An early case, however, held that the failure to give notice under section 2-706 was an affirmative defense which, unless pleaded and proved by the buyer-defendant, was deemed waived.\(^{105}\) On appeal, the supreme court of the jurisdiction held that it was not necessary to review the lower court's determination regarding the burden of pleading and proof because the evidence was undisputed at trial that the buyer had received notice of resale.\(^{106}\) A later


case from the same jurisdiction has interpreted the supreme court's holding to mean that, where notice of intent to resell has been proved, it is not fatal that the seller has not pled notice in his complaint.\textsuperscript{107}

The general rule of law is that the burden of pleading and the burden of proof should rest on the same party. Notice of resale is a condition precedent to a seller's recovery under section 2-706, and the usual rule of practice is that a claimant must plead and prove that he has met all conditions precedent to his cause. Modern pleading practice, however, allows a plaintiff to allege generally that all conditions precedent have been met and does not require specific allegation of particular conditions.\textsuperscript{108} Accordingly, one court has held that, although it was not "insensible" to the fact that some courts have viewed lack of notice under section 2-706 as an affirmative defense which must be pleaded by the defendant or waived, the burden of pleading notice should rest on the seller.\textsuperscript{109} The court held, however, that the seller was required only to allege generally the performance of all conditions precedent to its recovery and was not required to plead the giving of


\textsuperscript{108} See generally Clark on Code Pleading \textsuperscript{§} 45 (2d ed. 1947); 9 Wigmore on Evidence \textsuperscript{§§} 2483-2489, 2537 (3d ed. 1940). Rule 9(c) of the Federal Rules of Civil Procedure provides:

\textbf{Conditions precedent.} In pleading the performance or occurrence of conditions precedent, it is sufficient to assert that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

\textbf{Fed. R. Civ. P. 9(c).} Rule 3015(a) of the New York Civil Practice Law and Rules provides:

The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying on the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified.

\textbf{N.Y. Civ. Prac. R. 3015(a) (McKinney 1974).} These rules would require the defendant to allege specifically that the notice of resale had not been given.

notice in detail.\textsuperscript{110} In another case, it was held that where notice of intent to resell had been given, the failure of the seller to plead notice in his complaint was not fatal.\textsuperscript{111} However, in a related context, other courts have held that the notice of breach requirement for buyers under section 2-607(3) is a condition precedent, and the failure to plead it bars the buyer's claim.\textsuperscript{112} Until the law in this area is more settled, the seller's attorney is best advised to plead that notice of resale has been given or, at least, that all requirements of section 2-706 have been satisfied.

**G. Waiver of Notice**

Following breach, sellers of goods wish to get the goods back in the market at the best possible price and with the least possible inconvenience. It is understandable that a seller might also want to accomplish all of this without suffering the alternative of either advising the buyer in advance of his intentions or limiting his remedial recourse if he does not do so. A possible way of avoiding the alternative is by provision in the agreement between the parties to the effect that, if the buyer breaches, the seller may resell the goods with or without notice to the buyer, and charge the buyer for the differential between the contract price and the resale price.\textsuperscript{113} Section 1-102(3) of the Code allows the parties a broad-based permission to vary provisions of the Code by agreement except when variance is expressly prohibited by the Code and "except that the obligations of good faith, diligence, reasonableness and care" may not be disclaimed. The Code does not expressly prohibit a waiver of notice of resale by agreement.

\textsuperscript{110} Id.


\textsuperscript{113} Such a provision would not limit the availability of remedies to the seller. U.C.C. § 2-719(1)(b) (1977) provides that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive. . . ."
However, at least one court has speculated that such waivers may be invalid because they disclaim obligations of "reasonableness and care."¹¹⁴ Nevertheless, a resale can be commercially reasonable and in good faith, even though the buyer does not have advance notice of it. This is particularly true with respect to private resales in which the notice requirement functions as little more than advice to the buyer that the seller considers him in breach and intends to pursue his remedies at law. Accordingly, waiver of notice of resale provisions should not be invalidated per se but instead their validity should be assessed both at the time of the making of the contract under the Code's general policing provisions on good faith and unconscionability,¹¹⁵ and after breach in terms of whether a resale without notice to the buyer would be commercially reasonable under all the facts and circumstances. Section 2-706 certainly invalidates as the basis for a measurement of damages any resale which is commercially unreasonable, regardless of whether notice has been given to the buyer.

III. GOOD FAITH AND COMMERCIAL REASONABLENESS

A. In General

The critical requisite to recovery under section 2-706 is that the resale be conducted "in good faith and in a commercially reasonable manner." In the words of one court, the provision "requires that every aspect of the resale including the method, manner, time, place, and terms must be commercially reasonable."¹¹⁶ Although section 2-706, particularly with respect to public resales, does provide some specifics as to reasonableness,¹¹⁷ "no clear-cut or

¹¹⁷ See infra notes 138-162 and accompanying text.
easily identifiable rule"\textsuperscript{118} can be stated and "what is a commercially reasonable manner depends on the nature of the goods,\textsuperscript{119} the condition of the market and other circumstances in the case and cannot be measured by any legal yardstick or divided into degrees."\textsuperscript{120} We are told that "[t]his standard of honesty and fair dealing is the foundation upon which the Code was drafted"\textsuperscript{121} and that "[w]hile it is a vague concept subject to a wide variety of interpretations from case to case, its flexibility is a feature which is needed by any Code to make it work in practice."\textsuperscript{122} Certainly local custom, usage, and trade practice should be followed,\textsuperscript{123} and it has been suggested by sound authority that the opinion of the breaching buyer be consulted as well as that of other sellers in the trade.\textsuperscript{124} Although commercial reasonableness is the "ultimate test," it is a "pragmatic test," a "practical test," and it is broader than the "reasonable care and judgment" standard under the old Uniform Sales Act and should not be treated as a "legalistic restriction."\textsuperscript{125}


\textsuperscript{119} See Broglie v. MacKay-Smith, 541 F.2d 453, 20 U.C.C. Rep. Serv. (Callaghan) 114 (4th Cir. 1976) (inquiring into the vexed question of what is a commercially reasonable manner in which to resell a lame horse).

\textsuperscript{120} Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 12, 9 U.C.C. Rep. Serv. (Callaghan) 977, 989 (4th Cir. 1971).


\textsuperscript{122} Id.

\textsuperscript{123} See United States v. Terrey, 554 F.2d 685, 21 U.C.C. Rep. Serv. (Callaghan) 1488 (5th Cir. 1977); Symonds v. Adler Restaurant Equip. Co., 10 U.C.C. Rep. Serv. (Callaghan) 1179 (Okla. Ct. App. 1971) (the Oklahoma Supreme Court has directed that this opinion not be considered as precedent or authority and that it not be published in the Pacific Reporter).

\textsuperscript{124} W. Hawkland, supra note 26, § 2-706:02 (1982).

1. **Question of Fact**

Given the extremely nebulous nature of the issue, it is not surprising to find the courts in near unanimous accord that the issue is one for the jury.\(^1\) In fact, it has been held reversible error for the question of commercial reasonableness under section 2-706 to be decided by the trial court as a matter of law.\(^2\) Nevertheless, all so-called fact questions involve both questions of law and fact, and a seller’s conduct in a given case may be so bizarre, outrageous or questionable that the trial court can properly decide the issue against him as a matter of law.\(^3\) Thus, in a case involving a merchant seller of bulldozers who was well aware that the bulldozer market was in decline due to a recession in the construction business and high fuel prices, the court held that the seller’s failure to make any

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effort to resell the bulldozer for over one year was commercially unreasonable as a matter of law.\textsuperscript{129} On the other hand, the conduct of the seller may be so clearly in good faith and shining with reasonableness that the trial court may find it commercially reasonable as a matter of law.\textsuperscript{130}

2. \textit{Good Faith}

Read literally, section 2-706 requires not only that the resale be conducted in a commercially reasonable manner, but that it be entered into in good faith as well. This requirement is akin to the Code's general requirement of good faith in the performance and enforcement of contracts.\textsuperscript{131} Good faith is defined to mean "honesty in fact in the conduct or transaction concerned."\textsuperscript{132} With respect to merchants, Article 2 of the Code provides that good faith "means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."\textsuperscript{133} In light of these definitions, it is obvious that the Code's concept of commercial reasonableness is at least as broad as its concept of good faith. Although good faith is perhaps a more subjective concept than commercial reasonableness, the latter certainly includes the former. Accordingly, in any case in which the seller has not acted in good faith in the conduct of the resale, the resale should be held to be commercially unreasonable. And, in such cases, the broader concept furnishes the more certain basis for decision.

The courts have not dealt definitively with the concept of good faith in the conduct of resales under section 2-


\textsuperscript{131} U.C.C. § 1-203 (1977). Section 1-203 provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." \textit{Id.}

\textsuperscript{132} \textit{Id.} § 1-201(19).

\textsuperscript{133} \textit{Id.} § 2-103(1)(b).
706. They have instead tied good faith to their discussions of commercial reasonableness. A case in point involved an attempt by the plaintiff to establish as a commercially reasonable resale a fictitious "wash sale" involving a paper transaction in which the seller sold goods to, and subsequently purchased them from, a buyer whom he controlled. In refusing to allow the resale as a basis for computing damages, the court said that resale was a "striking example of commercial unreasonableness that suggests bad faith" and that the "commercial unreasonableness is obvious."

The discussion below will follow the lead of the courts by focusing primarily on commercial reasonableness rather than on good faith. Any party litigant, after all, would no doubt prefer his conduct labeled unreasonable rather than without "honesty in fact."

B. Specific Requirements

As has been previously discussed, section 2-706 requires that notice of resale be given whether the resale is public or private. Since the only requirement in private resales is notification of intention to resell, there is only a tenuous relationship at best between the required notice and the commercial reasonableness of the resale. Certainly a private resale could be in good faith and commercially reasonable even though the seller overlooked the notice requirement. With respect to public resales, however, the relationship between notice and commercial reasonableness is more direct. Unless the goods are perishable or threaten to decline rapidly in value, the seller must notify the buyer reasonably of the time and place of the resale. The purpose is to allow the buyer an oppor-
tunity to bid at the resale or to persuade other bidders to attend.\textsuperscript{140} If the required notice is not given, the resale will probably be rendered commercially unreasonable.\textsuperscript{141}

The Code's resale provision also requires that the resale be reasonably identified as referring to the breached contract. This requirement has been discussed previously.\textsuperscript{142} In the case of a public resale, three additional requirements for commercial reasonableness are specified by section 2-706.\textsuperscript{143} The failure of any of these requirements should render the public resale commercially unreasonable.\textsuperscript{144} First, except where there is an established market for the public sale of futures in the particular goods, only identified goods can be resold.\textsuperscript{145} This requirement is related both to the general requirement that the resale be reasonably identified as referring to the broken contract and to the Code's theory of compensation. To be identified, the goods must be in existence, that is, complete.\textsuperscript{146} If the goods have not been completed and identified to the broken contract, the resale contract logically cannot be identified to the broken contract. Further, if the goods have not been completed, the only correct compensatory formula under the Code's scheme is that of lost profit plus reasonable overhead under section 2-708(2).\textsuperscript{147} Goods which are not both existing and identified are termed "future" goods.\textsuperscript{148} If the goods are "future" they generally cannot be resold at a public sale. However, in the words of one commentator: "Where there is a recognized market for public sale of such future

\textsuperscript{140} See id. § 2-706 comment 8. Even in cases in which the goods are perishable or their value is rapidly declining, the notice would no doubt be required if it could be reasonably effectuated prior to the resale.

\textsuperscript{141} See supra notes 95-102 and accompanying text for a discussion of exceptions to the general rule.

\textsuperscript{142} See supra notes 18-56 and accompanying text.

\textsuperscript{143} U.C.C. § 2-706(4) (1977).

\textsuperscript{144} See id. § 2-706 comment 2.

\textsuperscript{145} Id. § 2-704(4)(a).

\textsuperscript{146} See id. § 2-401. See also id. § 2-704(2) allowing the aggrieved seller, following breach, to complete the goods and identify them to the breached contract.

\textsuperscript{147} Id. § 2-708(2). See generally, Anderson, supra note 13 at 13-14.

\textsuperscript{148} Id. § 2-105(2).
goods, as in the common case of most commodities, there is no good reason to deny the seller his resale remedy, simply because the goods underlying the commodity resale are not yet in existence.\textsuperscript{149} Section 2-706(4)(a) of the Code provides for the appropriate exception.\textsuperscript{150}

Second, if one is reasonably available, the usual place or market for public sale must be used.\textsuperscript{151} The Code envisions that the seller may be required to transport the goods a considerable distance to reach such a market.\textsuperscript{152} In such cases, of course, the transportation costs would be recoverable by the seller as incidental damages under section 2-710.\textsuperscript{153} Comment 9 to section 2-706 explains the matter:

Since there would be no reasonable prospect of competitive bidding elsewhere, subsection (4) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available;" i.e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be "reasonably available" under this subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under subsection (1). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.\textsuperscript{154}

Third, the goods must either be "within the view" of the bidders at the public resale or the notification of the

\textsuperscript{149} W. Hawkland, \textit{supra} note 26, § 2-706:05.
\textsuperscript{150} U.C.C. § 2-706(4)(a) (1977).
\textsuperscript{151} Id. § 2-706(4)(b).
\textsuperscript{152} Id. § 2-706 comment 9.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
resale must have stated the place where the goods are located and have provided for their reasonable inspection in advance of the auction. This requirement is obviously consistent with the underlying purpose of section 2-706 of generating the best possible resale price. Implicit in this requirement is the necessity of adequately publicizing the public resale so as to attract the largest number of potential purchasers reasonably possible. The notification must be commercially reasonable and should contain the time and place of the auction, a suitably enticing description of the goods for sale, and any special rules under which the auction is to be conducted, such as whether or not a minimum bid is required or whether the goods are put up without reserve.

Local custom and practice should be followed as to whether the notification of auction is to be posted at the courthouse or in other public places or simply sent to

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155 Id. § 2-706(4)(c).
156 See id. § 2-328(3). Because a public resale under section 2-706 means a sale by auction, the Code's rules with respect to auctions must be followed. These rules are found in section 2-328 which provides:

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

Id.

potential purchasers by mail.\textsuperscript{158} Adequate publicity of a
public resale is necessary for the resale to be held com-
cmercially reasonable. For example, in one case the court
held a public resale to be commercially unreasonable as a
matter of law where the advertisement of the resale con-
tained neither the correct date nor the location of the auc-
tion and failed to state that a minimum bid would be
required.\textsuperscript{159}

In another case, it was held that a public resale would
not be in good faith if it was shown at trial that, although
the seller had advertised the resale at a particular time, a
prospective bidder was advised prior to that time that the
sale had already taken place, when in fact the goods were
subsequently auctioned to the seller at a lower price than
the prospective purchaser had been willing to pay.\textsuperscript{160} On
the other hand, a simple advertisement in the New York
Times has been held under the circumstances to be suffi-
cient public notification of the proposed resale.\textsuperscript{161}

In another case, involving the public resale of a mobile
home, the notice of sale was posted on the mobile home
in Tuscon, as well as in three places in Phoenix, and other
mobile home dealers were invited to bid. The testimony
at trial was to the effect that this procedure was consistent
with general practices of mobile home dealers in the lo-
cale in repossession sales. The notice of sale specified the
location of the goods for viewing, because they were not
to be available for such purpose at auction. The resale

\textsuperscript{158} See Miller & Miller Auctioneers, Inc. v. Mersch, 442 F. Supp. 570, 23 U.C.C.

\textsuperscript{159} California Airmotive Corp. v. Jones, 415 F.2d 554, 6 U.C.C. Rep. Serv. (Callaghan) 1007 (6th Cir. 1969).

\textsuperscript{160} Meadowbrook Nat'l Bank v. Markos, 3 U.C.C. Rep. Serv. (Callaghan) 854

(Callaghan) 372 (1972).
was held to be commercially reasonable.\textsuperscript{162}

C. \textit{Specific Allowances}

Section 2-706 anticipates and specifically allows several courses of action which the seller may pursue in conducting the resale. Subsection (2) provides that: (1) the resale may be public or private; (2) an existing contract or contract to sell may be identified as the resale contract; and (3) the goods may be resold as a unit or in parcels. Further, at a public sale the seller may bid for and buy the goods.\textsuperscript{163} The provision for using as a resale contract a contract to sell is consistent with the provision in section 2-704 that the aggrieved seller may "treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished."\textsuperscript{164} If the seller identifies an existing contract, one into which he has already entered, as the resale contract, he is by definition in a "lost volume" situation, and the resale formula for damages will leave him less than whole by the amount of profit he could have made on the resale contract.\textsuperscript{165} The matters of a seller's right to complete goods after breach and of identification of the resale contract have been discussed previously.\textsuperscript{166}

Regardless of the specific permission given a seller's course of action, section 2-706 qualifies the permit with the provision "every aspect of the sale including the method, manner, time, place and terms must be commer-


\textsuperscript{164} Id. § 2-105(2). Section 2-105 provides that: "[g]oods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or any interest therein operates as a contract to sell," \textit{See also}, Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co., 629 F.2d 1118, 30 U.C.C. Rep. Serv. (Callaghan) 996 (5th Cir. 1980) (no need for goods to be in existence at the time of breach for section 2-706 to be applicable).

\textsuperscript{165} \textit{See supra} note 13.

cially reasonable.’” Accordingly, in choosing between a public or private resale, or whether to resell the goods as a unit or in parcels, or whether to complete the goods and identify them to the breached contract, the seller must chart his course of action in good faith and with commercial reasonableness.168

1. Public vs. Private Resale

It has been held that section 9-504 and, by analogy, section 2-706 do not allow the seller an absolute option in choosing between a public or private sale. The choice must be made on the basis of which of the two is the more commercially reasonable.169 Comment 4 to section 2-706 indicates that the choice is allowed “so as to realize as high a price as possible in the circumstances” and provides that “in choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.”170

In one case, the trial court’s decision upholding a public auction sale as commercially reasonable was reversed, the court on appeal stating that a private sale was probably preferable under the circumstances.171 The seller admitted that it usually handled such matters by private sale, and the evidence was that the decision to hold a public auction was made only two days after it had taken possession of the property. Further, contrary to the seller’s usual practice, no appraisal was made as to the value of the property and potential private purchasers were not contacted. Relevant trade practices and usages usually included a search for potential private purchasers. There was evidence that at least two items could have been sold

168 U.C.C. § 2-706.
separately at a higher price. Further, there was evidence in the record that the seller bargained unreasonably with a potential purchaser who was considering making an offer substantially higher than the amount realized at auction. It was also alleged that the value received at the public sale was substantially less than market value. The case was remanded for a new trial. It is possible that if the seller chooses a public resale, but fails to comply with one of the technical requirements of section 2-706(4) with respect to such a sale, the resale may nevertheless be upheld as a private resale if it is commercially reasonable on the whole.

2. As a Unit or in Parcels

It is generally true that goods can be resold at a higher total price individually rather than in quantity parcels or lots. Further, the fact that the seller has made numerous individual sales to various customers at a variety of prices is strong indication that the sales were at arms-length and commercially reasonable transactions. Nevertheless, section 2-706 contemplates and permits quantity resales where the situation warrants. The intent is to enable the seller to obtain the best price possible as soon as possible.

Individual sales usually take time and entail storage and handling costs which are chargeable to the breaching buyer as incidental damages under section 2-710. Quantity sales mitigate such damages, and the Code, accordingly, allows the seller to deviate from the terms of the breached contract to effectuate such sales. Comment 6 to section 2-706 provides that "[t]he purpose of subsection (2) being to enable the seller to dispose of the goods to the best advantage, he is permitted in making the resale to

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172 Id.


depart from the terms and conditions of the original contract for sale to any extent 'commercially reasonable' in the circumstances.'\textsuperscript{175} Thus, a resale by lot in a public auction has been upheld in the teeth of allegations by the buyer that higher prices would have been obtained by individual sales. The court said that, although the seller was obligated to obtain the highest price reasonably available, the buyer had not presented sufficient evidence that the resale was not in "good faith." In the absence of evidence to the contrary, the amount received at the resale would be presumed to be the best obtainable.\textsuperscript{176} In a related context, however, it has been termed "questionable" whether a private resale at a wholesale price would constitute a commercially reasonable disposal of goods which had been sold to the buyer at a retail contract price.\textsuperscript{177}

3. Seller May Buy

Section 2-706(4)(d) provides that the seller may buy the goods resold at public sale. Comment 9 explains that ""[t]he provision of paragraph (d) of subsection (4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay."\textsuperscript{178} The presumption is, of course, that the auction itself is held in good faith and conducted in a commercially reasonable manner. When this is apparently the case, the price paid by the seller at the auction has been allowed to form the basis for measuring his damages.\textsuperscript{179} On the other hand, where the resale itself is

\textsuperscript{175} U.C.C. § 2-706 comment 6 (1977).


\textsuperscript{178} U.C.C. § 2-706 comment 9 (1977).

\textsuperscript{179} Symonds v. Adler Restaurant Equip. Co., 10 U.C.C. Rep. Serv. 1179 (Okla. Ct. App. 1971) (seller purchased for $800 specially built goods which were originally contracted to be sold for $3600) (the Oklahoma Supreme Court has directed that this case not be considered as precedent or authority and that it not be published in the Pacific Reporter).
commercially unreasonable, either because it was delayed too long\textsuperscript{180} or because the attendance of a prospective purchaser was discouraged in bad faith,\textsuperscript{181} the price paid by the purchasing seller may not be used to compute damages under section 2-706. Indeed, the defects in the reasonableness of the public resale may have been calculated for the purpose of allowing the seller to purchase the goods at a particularly attractive price without competitive pressure from other bidders or inflating the seller’s subsequent damage claim.

There is no express authorization in section 2-706 for the seller to purchase the goods at a private resale. Such a resale would involve nothing more than a paper transaction and would almost certainly be held to be commercially unreasonable. In the \textit{Coast Trading} case mentioned above, involving a fictitious “wash sale,”\textsuperscript{182} the court emphasized that it was dealing with a private resale and that the resale raised the question of a bad faith attempt to inflate the seller’s damage claim. However, if the resale is made by the buyer to the seller, or by the seller to himself with the buyer’s acquiescence, as a partial settlement of the seller’s damage claim, the resale should be upheld as commercially reasonable. In this kind of situation, the seller must be quite careful to avoid an accord and satisfaction by properly reserving his rights to pursue later his damage claim.\textsuperscript{183}

\textbf{D. The Best Possible Price; Mitigation}

Other than the specific restrictions and allowances discussed above, section 2-706 gives no help as to the meaning of “commercial reasonableness” in the resale context. The Code nowhere defines the phrase. It has been sug-

\textsuperscript{182} Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1978).
\textsuperscript{183} See U.C.C. § 1-207 (1977).
gested that commercial reasonableness should be judged in terms of whether the resale price approximates the market price at the time of the buyer's breach or repudiation:

The object of the resale is simply to determine exactly the seller's damages. These damages are the difference between the contract price and the market price at the time and place when performance should have been made by the buyer. The object of the resale in such a case is to determine what the market price in fact was. Unless the resale is made at about the time when performance was due it will be of slight probative value, especially if the goods are of a kind which fluctuate rapidly in value, to show what the market price actually was at the only time which is legally important.\(^\text{184}\)

This analysis is a reflection of pre-Code law, under which resale price was not generally available as a basis for computing damages but was restricted in its use to evidence of market value.

Section 2-706, however, changes all of that by establishing damages based on resale as a generally available independent remedy.\(^\text{185}\) If the seller has conducted a proper resale, it matters not that the unassailable or uncontroverted evidence establishes that the market price at the time of the buyer's breach differs from the resale price.\(^\text{186}\) Any disparity between market price and resale price is but one factor to be considered in determining the commercial reasonableness of the resale.\(^\text{187}\) The breaching buyer in a fixed price contract assumes the risk that the market value will decline between the time of his breach and a reasonable time thereafter for the seller to effectuate a resale. Section 2-706 appropriately leaves


\(^{185}\) See supra notes 11-17 and accompanying text.


this risk on the buyer by allowing the seller to base his damages on the resale. Conversely, if the seller is at full capacity and engages in a commercially reasonable resale with a buyer to whom he could not have sold except for the breach, the seller will be restricted to his compensatory recovery under section 2-706 and should not be allowed to recover damages based on market price.\textsuperscript{188} In such cases, it has even been held that a seller who conducts an improper resale will not be allowed to recover a greater amount in damages based on market price than he would have recovered as a result of a proper resale.\textsuperscript{189}

The true “bright line” test for good faith and commercial reasonableness under section 2-706 is whether under the circumstances, the seller obtained on resale the best price reasonably possible. Virtually all of the cases which analyze the concepts of good faith and commercial reasonableness in the context of resales under section 2-706 do so from the standpoint of whether the seller reasonably acted under the circumstances to obtain the best possible price. This focus is logically consistent with the common law maxim requiring an aggrieved party to act reasonably to minimize his loss and mitigate the damages payable by the breaching party,\textsuperscript{190} with the interest of sellers in moving their goods as quickly as possible and at the best possible price, and with the general economic efficiency of keeping goods moving in the marketplace as smoothly as possible.\textsuperscript{191}

The courts have strongly emphasized the mitigation of damages function of section 2-706,\textsuperscript{192} and have, in assessing commercial reasonableness thereunder, spoken in

\begin{footnotesize}
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\item Coast Trading Co. v. Cudahy Co. 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1978).
\item See \textit{Restatement of Contracts} § 336 comment d (1932).
\item See \textit{generally U.C.C.} § 2-706 comments 4, 5, 6 & 9 (1977).
\end{enumerate}
\end{footnotesize}
terms of the seller reselling at the "best possible price,"\textsuperscript{193} at the "highest price obtainable,"\textsuperscript{194} at "as high a price as possible"\textsuperscript{195} and at the "highest offer."\textsuperscript{196} In the words of one court, "[t]he objective of § 2-706(2) in encouraging the seller to obtain the best possible price by selling within a reasonable time after the breach without undue risk or expense is in accord with the basic principles of the law of damages that a plaintiff must minimize his losses."\textsuperscript{197} Indeed, the courts, as well as the Official Comments to section 2-706, contemplate that a seller in mitigating damages may have to expend reasonable amounts of money or other resources to locate a private purchaser\textsuperscript{198} or to transport goods for public or private resale at a more lucrative market.\textsuperscript{199} In such cases, of course, the money or resources expended are recoverable as incidental damages reasonably incurred under section 2-710.

It is true that section 9-507, the companion to section 2-706, provides in part in subsection (2) that:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefore or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a

\textsuperscript{193} Bache, 339 F. Supp. at 351.
\textsuperscript{194} Wurlitzer, 334 F. Supp. at 1010.
\textsuperscript{198} United States v. Terrey, 554 F.2d 685, 695, 21 U.C.C. Rep. Serv. (Callaghan) 1488 (5th Cir. 1977).
\textsuperscript{199} See U.C.C. § 2-706 comment 9 (1978), which states that the seller may be required to transport the goods "a considerable distance" to locate a commercially reasonable market for resale.
This provision is consistent with the general concept of mitigation of damages, and says little more than that an otherwise commercially reasonable resale will not be overturned simply because it can be shown that a better price was obtainable elsewhere. If, for example, the seller conducts the resale according to his customary marketing practices, the resale will be upheld despite the fact that, unknown to the seller, a better price could have been obtained by deviating therefrom. In conducting a resale, as in mitigating damages generally, the seller is only required to act reasonably. To follow one's established internal operating procedures is to act reasonably. To deviate therefrom, with no firm prospect of increased success, would be an unwarranted fishing expedition which would, on the average, exacerbate rather than mitigate damages. If, on the other hand, the seller is well aware of the availability of premium prices in a market other than his normal one, good faith and commercial reasonableness would dictate that he explore the availability of a lucrative resale in that market. The good faith and reasonableness of the seller's conduct must be judged on the whole, under the facts and circumstances as they appear to him at the time he makes the resale decision.

Certainly the price obtained on resale is an important indicia of the degree of reasonableness of the resale. Although the courts may be guided in determining a reasonable price by considerations similar to those used in assessing the availability of a reasonable price of resale in a price action under section 2-709, the determination under section 2-706 must always be made in the context of the available alternatives. On occasion, one such alternative may be the breaching buyer himself, and a seller

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200 U.C.C. § 9-507(2) (1977). See California Airmotive Corp. v. Jones, 415 F.2d 554, 556 U.C.C. Rep. Serv. (Callaghan) 1007, 1010 (6th Cir. 1969). The court stated that "[w]hile we recognize that Uniform Commercial Code § 9-507(1) relieves the Appellee from selling the aircraft at the highest possible price, the sale must be conducted in a commercially reasonable manner." Jones, 415 F.2d at 556.
who has some doubt as to the reasonableness of an available resale price is well advised to consult with, or keep the buyer abreast of, the developing alternatives. Thus, in one case the seller, following the buyer's breach with respect to specially built goods, held the goods for the buyer and attempted to assist the buyer in finding a purchaser for them.\textsuperscript{201} A purchaser was thereby found who was willing to pay the full contract price of $3,609.27.\textsuperscript{202} The buyer, however, refused to approve the purchaser and insisted upon making a profit of at least $1,000 on the resale. The seller then decided to conduct a public resale, so notified the buyer and advertised the auction. At the auction, the seller was the highest bidder and purchased the goods for $800. The jury found the public resale to be commercially reasonable, and the court on appeal so affirmed.\textsuperscript{203}

1. Reasonable Time; Unreasonable Delay

Quite obviously, reasonably mitigating damages by obtaining the best available price on resale depends largely on the timeliness of the seller's action. Good faith and commercial reasonableness demand that the seller act within a reasonable time and without unreasonable delay. Comment 5 to section 2-706 allows the seller flexibility in selecting the time and place of the resale. It provides:

Subsection (2) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer's breach, by using the language "commercially reasonable." What is such a reasonable time depends upon the nature of the goods, the condition of the market and other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees.\textsuperscript{204}

\textsuperscript{201} Symonds v. Adler Restaurant Equip. Co., 10 U.C.C. Rep. Serv. (Callaghan) 1179 (Okla. App. Ct. 1971) (the Oklahoma Supreme Court has directed that this case not be considered as precedent or authority and that it not be published in the Pacific Reporter).
\textsuperscript{202} Id. at 1180.
\textsuperscript{203} Id. at 1182.
\textsuperscript{204} U.C.C. § 2-706 comment 5 (1977).
Comment 3 further provides that: "[e]vidence 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."\textsuperscript{205} The courts with regularity have overturned as commercially unreasonable resales too far removed in time from the buyer's breach.\textsuperscript{206} What is a reasonable time depends upon all the facts and circumstances. Although the seller, as the injured party, should perhaps be given the benefit of the doubt, his time for action may be quite short if the market is declining\textsuperscript{207} or if the goods are perishable.\textsuperscript{208} In fluctuating markets, where value is not necessarily declining, it has nevertheless been held that the seller should not be allowed to speculate on market value at the buyer's expense.\textsuperscript{209} Time periods as long as 14 months\textsuperscript{210} or two years,\textsuperscript{211} and as short as 30 days,\textsuperscript{212} have been held commercially unreasonable. The entire resale may be thereby

\textsuperscript{205} Id. comment 3.


invalidated\textsuperscript{213} or only those resales conducted after the passing of a reasonable time.\textsuperscript{214}

A straightforward case is illustrative. The buyer properly rejected for breach of warranty goods in which he had a security interest and was thus entitled to resell under section 2-711(3).\textsuperscript{215} Some four months later, the seller offered to repurchase the goods from the buyer for approximately $22,000, without prejudice to any further claim by the buyer. The buyer refused the seller's offer, stating that it would not settle for anything less than its full damages. The buyer held the goods for nearly two years following rejection, made no attempt to find prospective purchasers for them, gave no notice to the seller of its intention to resell, and ultimately resold the goods to an apparently unsolicited purchaser for the amount of $9,200. During the interim two-year period the condition of the goods had deteriorated.\textsuperscript{216} The court found that the buyer's resale did not comply with the requirements of section 2-706.\textsuperscript{217}

When the buyer commits an anticipatory repudiation, as opposed to a breach by a wrongful rejection, revocation, or failure to pay the price when due, section 2-610(a) allows the seller to "for a commercially reasonable time await performance by the repudiating party." While the seller is awaiting such performance, he need not resell. Accordingly, it has been held that the seller's right to await the buyer's performance following an anticipatory

\begin{footnotes}
\item[216] Deaton, 657 P.2d at 109.
\item[217] Id. at 109.
\end{footnotes}
repudiation extends the time for conducting a reasonable resale.\textsuperscript{218} In this case, the buyer argued that the resale should have been conducted in November or December shortly following the buyer's repudiation.\textsuperscript{219} The court upheld as timely a resale made by the seller the following April, the final date set by the contract for performance by the buyer.\textsuperscript{220} In the same vein, conduct by the buyer following breach, such as entering into settlement negotiations regarding the dispute with the seller or demanding a right to inspect the goods, can extend the time for conducting a reasonable resale. Comment 5 to section 2-706 provides that "[w]here a seller contemplating resale receives a demand from the buyer for inspection under the section of [sic] preserving evidence of goods in dispute, the time for resale may be appropriately lengthened."\textsuperscript{221}

Finally, it has been emphasized that the failure of the seller to conduct a commercially reasonable resale, or to


\textsuperscript{219} Aura, 27 Agric. Dec. at 1553, 6 U.C.C. Rep. Serv. (Callaghan) at 152.

\textsuperscript{220} Id.

\textsuperscript{221} U.C.C § 2-515 (1978). Section 2-215 provides:

In furtherance of the adjustment of any claim or dispute
(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and
(b) the parties may agree to third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

\textit{Id.}

For a case discussing the relationship between sections 2-706 and 2-515, see Koppers Co. v. Brunswick Corp., 244 Pa. Super. 250, 308 A.2d 32, 13 U.C.C. Rep. Serv. (Callaghan) 68 (1973). But, in the case of goods incomplete at the time of breach, it has been suggested that commercial reasonableness may require the seller to resell them before completion as "future" goods rather than waiting until their production is complete. G. Wallach, The Law of Sales Under the Commercial Code 8-6 (1981).
otherwise comply with the requirements of section 2-706, does not bar the seller from a damage recovery but relegates him to damages computed under section 2-708. This will generally mean damages based on market price, evidence of which may sometimes be shown by the amount received on resale. However, where the resale has been delayed unreasonably, the price thereby obtained is of only "slight probative value" of the market price at the time of breach, and the courts have disallowed its use in such circumstances in providing damages under section 2-708.

The fact that the dilatory reseller may nevertheless base his recovery on the market price at the time and place for tender under section 2-708(1) will be of small solace if the market price has declined between the times of the breach and the tardy resale. For example, in one case involving the breach of a promise to repurchase cattle at a price of $44,000, the seller delayed unreasonably and received only approximately $7,000 when the cattle were ultimately resold some five months after the breach. The court properly denied recovery to the seller on the basis of the resale formula and relegated him to damages under section 2-708(1). The market price at the time and place for tender (the time of the breach) was found to be $27,000, and damages under the market formula were thus only $16,000. When this amount was added to the $7,000 which the seller had received from the delayed resale, the seller pocketed only $23,500, an amount far short of the $44,000 he would have accumulated had he

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resold the cattle promptly after the breach.\textsuperscript{226}

E. Burden of Proof

As a rule, the seller, as movant of a claim under section 2-706, has the burden of proof as to all aspects of his damage claim, including that the resale was conducted in good faith and in a commercially reasonable manner. However, the burden here is slight. About all a seller must do is introduce evidence of the resale price, allege that he acted reasonably and in good faith, and perhaps sketch a brief scenario of the resale. The burden of going forward with the evidence that the resale was commercially unreasonable then rests on the buyer. The situation was the same prior to the Code under the Uniform Sales Act, and the flavor of the matter is captured by the following language:

Initially, therefore, the burden is on the seller to prove that the resale was made with reasonable care and judgment . . . Once, however, the seller has introduced evidence establishing that fairness and good faith was observed the buyer has the burden of showing that it was not fair and in good faith . . . .\textsuperscript{227}

The cases decided under section 2-706 are in accord.\textsuperscript{228}

F. Consequences of Failure to Prove

If the seller fails to secure a finding from the trier of fact or, in a rare case, as a matter of law,\textsuperscript{229} that the resale was conducted in good faith and in a commercially reasonable manner, the seller may not recover under section 2-706 but is relegated to a recovery under section 2-708. Com-

\textsuperscript{226} Id.
\textsuperscript{227} Howse v. Crumb, 143 Colo. 90, 352 P.2d 285, 289 (1960).
\textsuperscript{229} See supra notes 126-130 and accompanying text.
ment 2 to section 2-706 provides that "[f]ailure 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."\(^2\) In the usual case, this will mean damages based on market price at the time and place for tender.\(^3\) However, if the seller can show that the buyer’s breach left him in a “lost volume” situation so that the invalid resale was one which the seller would have made regardless of the breach, there is no reason why the seller should not be allowed to recover his lost profit under section 2-708(2).

In order to recover on the basis of the market formula, however, the seller must prove, at trial, a back-up measure of damages to guide the court in the event that the resale is held not to be commercially reasonable. Of course, local procedural rules may allow a remand of the case to determine an alternate measure of damages. However, the seller may be able to avoid remand, or the horror of a decision rendered against him on the damages point, or a decision in his favor for only nominal damages (which is about the same thing), by convincing the trial court that the price brought by the invalid resale was fair evidence of the market price at the time and place for tender. This tactic has appeal when the reason for the invalidity of the resale is a technical one, such as the failure to give notice of intention to resell in a private sale.

If the resale, however, is invalidated as commercially unreasonable for reasons related to the failure of the seller to act reasonably to obtain the best possible price, the resale price will have little, if any, probative value as evidence of the market price. In the words of one court:

In order for a seller to use a resale price as the measure of its damages, it must be shown that all proper measures to secure as fair and favorable a sale as possible were taken, and that the sale was made fairly and to the best advantage of the buyer. “Without a determination that the sale price

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\(^2\) See supra notes 79-94 and accompanying text.

represents either the market price in the case of an available market for the goods, or that the resale was a fair test of the actual value in the absence of an available market, that sale price cannot be determined as the market value."\(^\text{252}\)

That the invalid resale price should not be received as fair evidence of market price is most readily evident in cases in which the seller has been unreasonably dilatory in conducting the resale. In such cases, the courts have uniformly refused to receive the evidence.\(^\text{253}\)

In not all cases, however, should the seller who has conducted an invalid resale be allowed to recover damages based on market price under section 2-708. The *Coast Trading* case, discussed above,\(^\text{254}\) held that a seller could not recover on the basis of the invalid resale, nor on the basis of market price, but was limited to a recovery based on the amount which would have been brought by a reasonably conducted resale. Since the seller was not at "lost volume" and, accordingly, could not have honored both the breached contract and the resale contract, section 2-706 represented the proper compensatory measure of damages. However, because the resale conducted by the seller was held to be a commercially unreasonable "wash sale," the court remanded the case for further proceedings to determine the amount which should have been brought by a commercially reasonable resale.\(^\text{255}\)

If a resale has been held to be commercially unreasonable and the seller is attempting to recover on the basis of


\(^{254}\) Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1978).

\(^{255}\) Id.
market price under section 2-708, it is arguable that the incidental damages allowed by that section and section 2-710 are unreasonable as well and that their recovery should be denied. Section 2-710 specifically allows recovery of expenses of resale as incidental damages, if they were reasonably incurred. If the resale itself was found to be in bad faith and conducted in a commercially unreasonable manner, the expenses incurred incident to that resale should be held unreasonable and denied. It has been so held.\footnote{Id.}

If, however, the resale has been invalidated for a technical reason, such as the failure of the seller to give notice of intention to resell, and the resale was otherwise commercially reasonable and conducted in good faith, it has been held with the following statement that the expenses of resale may be recovered as incidental damages:

Those incidental damages are allowable to an aggrieved seller under § 2-710, whether he gets there through § 2-706 or through § 2-708. It is only § 2-706 which imposes the condition of a commercially reasonable resale. The remedies under § 2-708 are not related to a resale. Under § 2-710, it is only the incidental damages, not an antecedent resale, which must be commercially reasonable. There is no contention here that the items of damage allowed were not commercially reasonable.\footnote{Lee Oldsmobile, Inc. v. Kaiden, 32 Md. App. 556, 363 A.2d 270, 276, 20 U.C.C. Rep. Serv. (Callaghan) 117, 125 (1976).}

IV. MEASURING DAMAGES

A. In General

If the seller has made a commercially reasonable resale and has fulfilled the various other requirements under section 2-706, subsection (1) provides that the seller may recover as damages the difference between the price of the breached contract and the resale price, plus incidental damages, but less expenses saved by the buyer’s breach.
Thus, if the buyer has breached a contract to pay $10,000 for goods, and the seller is able to resell the goods for $8,000, his recovery under section 2-706 is $2,000. This recovery will compensate him if the resale was a "pure" resale — i.e., a resale to a buyer to whom the seller could not have sold but for the breach. If the resale is one which the seller would have made regardless of the breach, the seller is in a "lost volume" position and the $2,000 damage recovery will undercompensate him by the amount of profit he would have made on the resale contract.

To take our hypothetical a step further, assume that the breached contract required the seller to ship the goods to the buyer at his own expense and that shipment costs would have been $500. Since the seller has saved this expense, section 2-706 requires that it be deducted from his recovery, and damages would then total $1500. However, if the seller incurred additional expenses of $100 in advertising the goods for resale and another $300 in shipping the goods to the resale buyer, this total of $400 for expenses of resale, if reasonably incurred, would be recoverable as incidental damages under sections 2-706(1) and 2-710. The seller’s recovery would thus total $1900.

This simple hypothetical covers the vast majority of real-world resale transactions. Section 2-706 addresses this range of cases directly, and the computation of damages under its provisions is a matter of simply plugging the appropriate numbers into the formula. However, the provision does not address several important questions which are presented by cases slightly aberrant from the basic scenario. How, for example, are the computations affected when either the breached contract or the resale

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238 U.C.C. §§ 2-706(1), 2-710 (1977). Section 2-710 provides:

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

Id.
contract, or both, are credit contracts? How does the fact that the buyer has pre-paid part of the purchase price affect the computations? When, if ever, is resale the mandatory damage remedy, the failure of which to utilize will bar the seller from a recovery of damages? If the seller gives notice under section 2-706 and conducts a resale, is he obligated to use the resale as the basis for computing his damages, or can he proceed instead under another damage formula? These questions will be addressed in the succeeding sections.

I. Incidental Damages

Incidental damages can be roughly defined as extra expenses reasonably incurred by the seller as a direct result of the buyer's breach. Their recovery is authorized by section 2-706, as qualified by section 2-710.\(^{239}\) They have been held to include servicing and maintenance charges,\(^ {240}\) storage and handling costs,\(^ {241}\) and any and all monies otherwise expended in the care and custody of the goods affected by the breach.\(^ {242}\)

In the present context, expenses incurred in reselling the goods are a clear example of incidental damages. They are specifically allowed by section 2-710\(^ {243}\) and have

\(^{239}\) Id. § 2-710.


been held to include expenses ranging from the commission fee to an auctioneer at a public sale\textsuperscript{244} to the expense of a classified advertisement in a local newspaper in a private sale.\textsuperscript{245} Indeed, in an action under section 2-706, where the resale price equals the price of the breached contract, incidental damages form the sole basis for a damage recovery.\textsuperscript{246} It can be plausibly argued, however, that if the seller is left by the breach in a "lost volume" situation, so that the resale is one which would have been made regardless of the breach, the expenses of resale are not extra expenses "resulting from the breach," as required by section 2-710, and, thus, should not be recoverable as incidental damages. To date no reported decision has addressed this argument.

The Code makes no provision for a seller's recovery of consequential damages. The distinction between consequential and incidental damages is often a difficult one to make.\textsuperscript{247} Suffice it to say at this point, whereas incidental damages usually entail extra expense incurred by the seller as a result of the breach, consequential damages involve remote losses which arise as a result of the special circumstances of the seller's situation, including contractual relationships with third parties. The distinction is important, because the courts have generally held that a seller is not entitled to recover consequential damages.\textsuperscript{248}

\textsuperscript{246} \textit{Id}.
Further, although it is necessary to any recovery of consequential damages that the loss be shown to be within the contemplation of the parties, there is no such requirement under the Code for incidental damages.\textsuperscript{249} The primary requirement is simply that they be reasonably incurred.

It has been held that the reasonable expense of insuring the goods following breach is an incidental damage properly recoverable by the aggrieved seller under section 2-710.\textsuperscript{250} But what about finance charges incurred by the seller on loans covering the goods between the time of the breach and the time the goods are resold? These charges are incidental damages in the sense that they are extra expenses incurred by the seller as a result of the breach. On the other hand, the charges are arguably consequential damages in that they represent remote losses incurred by the seller under contractual arrangements with third parties. The question is a recurring one, because it is quite common for commercial sellers to have their inventories highly leveraged by loans thereon at least to the point in time when the goods are sold. To date, the courts have held such finance charges to be incidental damages and have allowed their recovery.\textsuperscript{251} These cases are fairly decided if the finance charges are actually extra expenses caused by the breach. This would be true if the seller can show that the loan would have been repaid at the time the breaching buyer paid for the goods. If, on the other hand, the loan was not to be re-


paid at that time but was for a fixed term, with the inven-
tory (and thus the goods involved in the breached
contract) merely serving as the collateral for the loan,
then the buyer's breach caused the seller no extra ex-
pense and should not be recoverable. The seller will
be compensated for his loss by a simple recovery of pre-
judgment interest, allowed in virtually all jurisdictions.

In one case, the seller argued for an interesting and
lawyer-like extension of analysis for insurance and finance
charges as incidental damages. The seller argued that he
should be entitled not only to a recovery for insurance
and finance charges on the goods involved in the
breached contract, but also for insurance expenses on ad-
ditional collateral required by his creditor to be put up by
the seller when the value of the goods identified to the
breached contract declined following the buyer's breach.
Although the court allowed recovery for the finance
charges and initial insurance expense, it refused to allow
recovery for the insurance expenses incurred on the addi-
tional collateral. The court said that such expenses were
too remote to be regarded as incidental damages.

The courts have split on whether the expenses of an in-
valid resale are properly recoverable as incidental dam-
ages. A case disallowing such recovery involved a
fictitious resale in which the seller immediately bought
back the goods in a paper transaction. On such facts, the
disallowance of any expenses involved was reasonable.
On the other hand, if the resale has been invalidated on
the basis of a technical failure to give notice of resale,
there would appear to be no reason to disallow the resale
expenses themselves. The seller is still allowed to recover

Rep. Serv. (Callaghan) 1190, 1196 (Me. 1983).
253 Gray v. West, 608 S.W.2d 771, 781, 31 U.C.C. Rep. Serv. (Callaghan) 568,
Serv. (Callaghan) 1037 (9th Cir. 1978) (expenses not allowed) with Lee Oldsmo-
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damages based on market price under section 2-708, and that section also allows recovery of incidental damages. If the resale expenses were reasonably incurred, their recovery should be allowed even if the resale contract itself was in some sense commercially unreasonable.

2. Expenses Saved

Section 2-706 requires that the seller account to the buyer for any expenses saved as a result of the buyer's breach. If the seller is proceeding on the basis of the resale formula, the goods will have been completed and any expenses saved will probably take the form of the cost of getting the goods to the buyer, if the contract so requires, or the cost of installation of the goods as required by the contract. Expenses saved will usually be netted out against the incidental damages of costs of resale. For example, if the breached contract required the seller to transport the goods to the buyer at a cost of $500, and the buyer's breach prevents this performance, the seller will have saved $500 in expenses. If in reselling the goods, the seller incurs costs of $600, the buyer's damage liability is a net $100 (resale expenses less expenses saved) plus the differential between the contract price and the resale price.\(^{255}\) Of course, if the expenses saved exceed the damages suffered by the seller, so that the buyer's breach actually benefited the seller rather than causing him injury, the seller is not accountable to the buyer for the expenses saved. Such expenses go only to reduce the seller's damage recovery so that he is put in no better position than he would have occupied had the contract been performed.

B. Seller Not Accountable for Profit

If the resale price exceeds the price of the breached contract, so that the seller profits by the breach, he may retain that profit and is not accountable to the buyer for

This is clear enough. Section 2-706, however, does not define profit. Assume that the seller resells goods for $10,000, that the price of the breached contract is $8,000, that no expenses are saved, but that incidental damages are incurred in the form of resale expenses of $500. On these facts, the seller should be denied any recovery under section 2-706. The seller might argue that he is entitled to retain the $2,000 profit and to recover the $500 incidental damages against the buyer. A fair reading of subsection (1) of section 2-706, however, would interpret profit to mean the net of excess made on the resale contract less any incidental damages suffered. To allow the seller to recover the incidental damages, while retaining the $2,000 profit, would both place him in a better position than he would have occupied had the contract been performed and subject the buyer to penal damages, both results which are prohibited by section 1-106.257

Further, such results would violate the basic principle of mitigation of damages by encouraging a seller to incur extraordinary resale expenses to inflate the price of the resale contract. For example, in our hypothetical if the resale expenses represent $500 in transportation costs, the true value of the resale contract is $9,500. Stated differently, the resale buyer would be willing to pay either $10,000, with the seller incurring the transportation costs, or $9,500, with the resale buyer incurring those costs himself. This demonstrates that the true resale price is the lower figure and that, accordingly, incidental damages should be deducted from the seller's "profit," as that term is used in section 2-706(6).258 This method of computation would provide no encouragement to sellers to inflate

the resale contract price by absorbing ordinary or extraordinary resale expenses.

A related problem arises if the seller resells the goods in installments, some of which bring a price in excess of, and others a price less than, the price of the breached contract. Does section 2-706(6) allow the seller to retain the profit made on some of the installments and recover damages based on the others? Assume that the breached contract called for the sale of 1,000 units at one dollar each. Following the breach, the seller is able reasonably to resell the goods in two resales. The first resale is of 500 units at $1.25, and the seller thereby incurs a "profit" on those units of $125. The second resale of the other 500 units brings only $.90 per unit, and thus the seller receives $50 less for those goods than his expectation under the breached contract. However, considering both resales, the seller is better off by $75 than he would have been had the contract been performed. Certainly he is entitled by subsection (6) to retain that amount. But he should not be allowed to add insult to non-injury by maintaining an action against the buyer based on the losing resale of half the goods.

Several reasons, besides logic and fairness, support this conclusion. First, section 1-106 of the Code dictates that the seller be put only in "as good a position as if the other party had fully performed." Only by calculating damages on the basis of both resales can the failure of the full performance by the buyer be assessed accurately. Second, in a related context, section 2-612 demonstrates a strong Code policy in favor of treating related installments as part of the same contract. It provides that "[a]n 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent." Similar treatment should be accorded installment resales. Finally, if the seller was seeking remedy under section 2-708(1) and attempting to prove market price thereunder by evidence
of the resale value of the goods, the seller would certainly be required to show all of the resales to establish accurately the value of the goods. Similarly, under section 2-706 he must show all of the resales to establish accurately the amount of his loss.

1. When the Buyer Prepays

The extent of the right of the seller to retain the profit made on the resale contract is called into question when the buyer has made payments on the contract price prior to breach. The discussion which follows will assume that the prepayments were not intended by the parties to be retained by the seller as liquidated damages in the event of the buyer's breach. Further, the discussion will ignore incidental damages suffered by and expenses saved by the aggrieved seller, matters which have been discussed previously. The results here are consistent with that discussion.259

To take an easy case, assume the price of the breached contract is $10,000, that the goods are resold for $8,000, and that the buyer has paid the seller $1,000 on the breached contract. Clearly here the seller's damages are $1,000 (the $2,000 resale differential less the $1,000 payment by the buyer). Although there is no provision in section 2-706 for crediting the buyer with his prepayment, to not do so would allow the seller a windfall and penalize the buyer. Such a result would ignore the dictate of section 1-106 that remedies be "liberally administered" to the end of achieving compensation. Section 2-706 should be read to allow the seller only a recovery of the difference between the resale price and the unpaid contract price. I have found no argument to the contrary by either case or commentary.

The situation becomes more complex when the resale contract price exceeds that of the breached contract. Assume that the price of the breached contract is $8,000,

259 See supra notes 238-254, 256-258 and accompanying text.
that the goods are resold for $10,000, and that the buyer has paid $1,000 on the breached contract. On these facts, the seller has suffered no damages and is not likely to be a plaintiff in a cause of action against the breaching buyer. Is the breaching buyer, however, entitled to recover the $1,000 payment made to the seller? The action would be in restitution, governed by section 2-718. Subsection (2) thereof allows the buyer to recover his down payment reduced by the lesser of twenty per cent of the value of the total performance or $500. Accordingly, the buyer is entitled to a return of $500 ($1,000 - $500). This amount is subject to further reduction under subsection (3) "to the extent that the seller establishes . . . a right to recover damages." On our facts, the seller could show no such right. The seller might argue such a right by

260 Section 2-718 provides in part:

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

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

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


261 Id. § 2-718(3). A literal reading of section 2-718 allows the seller to offset against the buyer's restitution recovery both the $500 (or the twenty per cent of the value of the total performance if it is less) and the damages actually suffered. This allows the seller a statutory windfall of the $500 or twenty percent figure. See Feinberg v. J. Bongiovi Contracting, 110 Misc. 2d 379, 442 N.Y.S.2d 399, 32 U.C.C. Rep. Serv. (Callaghan) 139 (1981). Cf. Neri v. Retail Marine Corp., 30 N.Y.2d 393, 285 N.E.2d 311, 334 N.Y.S.2d 165, 10 U.C.C. Rep. Serv. (Callaghan) 950 (1972) (allowing the seller to offset against the buyer's right to restitution under section 2-718 only the actual damages suffered).

262 See Anheuser v. Oswald Refractories Co., 541 S.W.2d 706, 20 U.C.C. Rep. Serv. (Callaghan) 672 (Mo. Ct. App. 1976), in which the buyer was held entitled under section 2-718 to recover a $5,000 down payment less $500 and the amount of damages the seller could prove at trial on remand.
virtue of section 2-706(6), which holds the seller "not accountable to the buyer for any profit made on any resale." The down payment, however, is not a profit made on resale, and further, the provision does not establish any damages actually suffered by the seller.  

The situation is similar, and the result consistent, when the resale price plus the breaching buyer’s prepayment exceed the price of the breached contract, even though the resale contract price standing alone does not. Assume that the price of the breached contract is $10,000, that the resale contract price is $8,000, and that the buyer has paid in advance $3,000. On these facts, the seller has suffered $2,000 in actual damages. Under section 2-718, the buyer is entitled to restitution of $500 (the $3,000 payment less the statutory $500 less the $2,000 actual damages suffered by the seller under section 2-706).

C. Credit Contracts: Discount to Present Value

When either the resale contract or the breached contract, or both, is for the payment of the contract price on credit, either by lump sum or in installments, the computation of damages under section 2-706 becomes more complex. For example, assume that the price of the breached contract is $10,000, cash on delivery, and the

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264 It should be noted that it is a bit illogical for the buyer to breach in this situation, because under the contract he is entitled to receive $8,000 worth of goods for an additional payment of $7,000. However, buyers do breach in such cases. See, e.g., Anheuser v. Oswald Refractories Co., 541 S.W.2d 706, 20 U.C.C. Rep. Serv. (Callaghan) 672 (Mo. Ct. App. 1976); Bush v. Canfield, 2 Conn. 485 (1818)(seller).
seller resells the goods following breach for $10,000 to be paid in equal installments over 10 months. Obviously, the present cash value of the resale contract is less than $10,000 and to compare the two contracts without some present valuation of the resale contract is to compare apples and oranges, leaving the seller undercompensated with no recovery under the formula of section 2-706. Accordingly, prior to applying the formula, it will be necessary to adjust the resale contract downward to reflect its present value.

A similar adjustment must be made if it is the breached contract which is on credit, and the resale is a cash transaction. The value of the breached contract would be adjusted downward, thereby reducing the seller’s damages and, of course, if both contracts are for payment of the price in the future, both must be discounted to their present value before one can be fairly set off against the other. Presumably, a breached contract should be valued at the time of breach and the resale contract at the time of resale.

Although no reported decision to date has addressed these situations, the courts should have little problem with them when they do arise. The courts frequently reduce awards of future damages to present value. And in this age of mega-buck personal injury damage awards, court settlements and professional athlete contracts, the service of calculating the present worth of such awards, settlements and contracts has become institutionalized in most large cities and is readily available to aid the beleaguered, but soon-to-be-quite-happy, plaintiff’s attorney in making the appropriate calculations.

D. When Resale Fixes Damages

An important question, not addressed directly by sec-

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265 See generally, J. White & R. Summers, supra note 63 at 266-67.
tion 2-706, is whether or not a resale conducted by the seller in accordance with its provisions obligates the seller to use that resale as the basis for computing damages at trial to the exclusion of other damage remedies under the Code. As we have seen, in order for a seller to have the benefit of its provisions, section 2-706 will often require the resale to be conducted shortly following breach. Further, notice to the buyer is generally required. For these reasons, it can quite easily happen that a seller who wishes to preserve his options under section 2-706 will give resale notice to the buyer and conduct an identified resale at a time when he is not yet in a position to assess accurately his damage situation.

If the resale turns out to be a “true” resale to a party to whom the seller could not have sold but for the buyer’s breach, the resale formula will compensate him and should be used. But what if, as it turns out, the seller is in a “lost volume” situation, in that the resale was one which the seller would have made regardless of the buyer’s breach? In this situation, the resale formula will not compensate the seller and will fail to honor his lost expectation by the amount of profit he would have made on the resale contract. Nevertheless, is the seller obligated to use section 2-706 or can he proceed at trial to recover under the compensatory lost profit formula of section 2-708(2)? At least three strong arguments favor allowing the seller to preserve his options in this situation.

First, section 1-106 mandates that the courts “liberally” administer the Code’s remedies to the end of achieving compensation to the aggrieved party without penalty to

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267 See supra notes 204-226 and accompanying text.
268 See supra notes 67-114 and accompanying text and, in particular, text accompanying notes 79-94.
269 For a discussion of whether or not the use of a “true” resale by the seller is mandated by the Code, see infra text accompanying notes 276-291.
the breaching party. On our facts, the profit formula, and not the resale formula, achieves compensation. Further, the breaching buyer is not likely to have been prejudiced, by detrimental reliance or the like, by the fact that the seller has given notice of resale. In a public resale situation, the buyer might have a detrimental reliance argument based on his efforts in attending the resale or in persuading other prospective purchasers to attend. However, a public resale by auction is almost certainly a “true” resale in that it is not one which the seller would have made in the ordinary course of business except for the buyer’s breach. Thus, in the public resale case, the seller should be obligated to use the resale formula.\(^{271}\)

Second, comment 1 to section 2-703 expresses a strong policy against election of remedies and in favor of allowing the aggrieved seller to preserve his options. It states that “[t]his 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. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.” In our case, the facts strongly call for allowing the seller to pursue the profit formula under section 2-708(2).

Third, the drafting history of the Code reveals that language formerly allowing other damage remedies to be used only “so far as any goods have not been resold” was deleted to make it clear that the aggrieved seller was not required to elect between damages under section 2-706 and damages under section 2-708.\(^{272}\) On the other hand, if the seller is at full capacity, so that the resale is a “true” resale, the cases indicate that the resale formula will set the upper limit of the seller’s damages.\(^{273}\) This, of course,

\(^{271}\) For a discussion of the seller’s obligation to use the resale formula in a “true” resale situation, see Schiavi Mobile Homes, Inc. v. Gironda, 463 A.2d 722, 36 U.C.C. Rep. Serv. (Callaghan) 1190 (Me. 1983).


\(^{273}\) See Publicker Indus. v. Roman Ceramics Corp., 652 F.2d 340, 32 U.C.C.
is as it should be. The possibility is left open, however, that a full capacity seller might intentionally violate the requirements of section 2-706 in conducting the resale by either failing to give notice to the buyer or by conducting the resale in a manner that is in some way commercially unreasonable. Such a course of conduct would be beneficial to the seller if the market price at the time and place for tender is less than the resale price. The seller would be tempted to resell the goods at a particularly attractive price, having failed to give notice thereof to the buyer, and bring his action against the buyer under the market formula of section 2-708(1). Since the seller was at full capacity, and the resale was a “true” resale, any recovery against the buyer in excess of that allowed by the resale formula would represent a windfall to the seller and a penalty to the buyer. The cases to date that have addressed the problem have appropriately held that the seller should be restricted in such circumstances to the amount which would be allowed by the resale formula for a commercially reasonable resale.274 The commentators and the Restatement (Second) of Contracts are in agreement with this result.275

E. When Resale is Mandatory

What if the seller is in a full capacity situation, has more customers than he can supply, and the buyer breaches? Clearly the seller should immediately resell the goods to one of his waiting customers. In this situation, he is likely


274 See _Coast Trading_, 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1979). See also _Lake Erie Boat Sales, Inc. v. Johnson_, 11 Ohio App. 3d 55, 463 N.E.2d 70, 38 U.C.C. Rep. Serv. (Callaghan) 845 (1983) (where seller was not at “lost volume” and resold the goods for the same price as that of the breached contract, no damages were recoverable).

to have suffered no damages beyond, perhaps, incidentals, because the law of supply and demand will usually dictate that the resale price equal or exceed the price of the breached contract. But what if, for whatever reason, the seller withdraws the goods from the market, brings action against the buyer on the basis of the market formula of section 2-708(1) and refuses to resell the goods until at least after trial? There is potential for abuse here by the seller because theoretically he could recover damages against the buyer and then subsequently incur a windfall when he does resell the goods. Further, this course of action by the seller represents an unwarranted failure to mitigate damages by resale. Nevertheless, nothing in the text of section 2-706 obligates the seller to use its provisions, and there is Code commentary against forcing the seller to choose a particular remedy.276 The courts, however, have persuasively determined that the overriding principles of compensation and mitigation of damages require that the seller either resell when such action would mitigate his loss or be barred from recovery of any damages that could have been thereby avoided.277

In an interesting case on point involving a contract to purchase a mobile home, when circumstances indicated that the buyer might breach the contract, the buyer’s father inquired as to whether he could purchase the home at the contract price of $23,028.69 so that his son would not lose his $1,000 deposit.278 The father expressed a willingness to mortgage his own home to finance the sale. The seller ignored the father’s offer, resold the home to a third party for $22,000 and brought an action against the son under section 2-708(2) for $4,800 in lost profit and

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276 See U.C.C. § 2-703 comment 1 (1977) and supra notes 208-216 and accompanying text.

277 For a discussion of the mitigation of damages policy underlying section 2-706 of the Uniform Commercial Code, see supra notes 11-17, 184-226 and accompanying text.

interest expense.\textsuperscript{279} The trial court found for the seller, but only in the amount of $759.45, as reflected by the difference between the contract price and the resale price plus incidental damages. Both parties appealed. The court on appeal found for the buyer and denied recovery to the seller based either on lost profit or the resale.\textsuperscript{280} The court said that the determinative issue in the case was the seller’s failure to mitigate damages and that the seller should have taken “reasonable affirmative measures to keep its losses to a minimum” by pursuing the resale offered by the buyer’s father. This resale would have fully mitigated the seller’s loss.\textsuperscript{281} The court further held that the seller was not entitled to lost profits under section 2-708(2) because the proposed resale to the buyer’s father would not have left the seller in a “lost volume” situation.\textsuperscript{282} Since the father conditioned his offer on his son’s failure to complete the purchase, the resale to the father would not have been to a party who would have purchased notwithstanding the buyer’s breach. The seller simply could not have made both sales and, had it proceeded properly by mitigating its damages, it would not have lost the one sale.\textsuperscript{283}

In another case, the buyer breached contracts to purchase wheat because of a shortage of railroad cars to ship the wheat to market.\textsuperscript{284} The sellers retained possession of the wheat and brought an action against the buyer. The court denied recovery to the sellers, stating that they should have immediately resold the wheat following the buyer’s breach.\textsuperscript{285} The court said that the sellers were not damaged because the market price at the time of the breach was nearly double the contract price. The court

\textsuperscript{279} Shiavi, 463 A.2d at 723-24.
\textsuperscript{280} Id. at 726.
\textsuperscript{281} Id. at 725.
\textsuperscript{282} Id. at 725-26.
\textsuperscript{283} Id. at 726.
\textsuperscript{285} Desbien, 552 P.2d at 927.
noted that the sellers still had possession of the wheat and were free to resell the wheat in the future at the best available price.\textsuperscript{286} The result in the case was further supported by the fact that the sellers were apparently in a full capacity situation. They were farmers, and the sale was evidently of their entire crop. To allow any damage recovery would have allowed them to withdraw their goods from the market, recover damages, and then receive a windfall on a subsequent profitable resale of the goods. The sellers had improperly failed to mitigate damages and presented the danger to the court of overcompensating them by the amount of profit they could make on a subsequent sale of the goods.\textsuperscript{287}

In another case, a full capacity seller effectively withdrew the goods from the market by engaging in a fictitious resale with a third party from whom the seller immediately repurchased the goods in a paper transaction.\textsuperscript{288} When the seller subsequently attempted to recover damages based on the fictitious resale, the court found the resale commercially unreasonable and denied recovery based thereon. Further, the court held that since the seller was at full capacity he, should have mitigated damages by a valid resale, thus, damages would be and limited to those based on the price that would have been brought by a commercially reasonable resale.\textsuperscript{289}

However, if a mitigation of damages will not result, the

\textsuperscript{286} Id.

\textsuperscript{287} See James Mfg. Co. v. Stovner, 1 Wash. App. 27, 459 P.2d 51 (1969) (seller should not be allowed to "have his cake and eat it." 459 P.2d at 55). However, there would appear to be no reason a seller in this position could not recover damages based on the market formula if he meets the requirements of section 2-708(1). In effect, by crediting the buyer in the 2-708(1) action for the market price at the time and place for tender, the seller himself would have made a hypothetical purchase of the goods at that price and should be entitled to speculate at his own risk and the market fluctuation subsequent to the breach. In Desbien the market price excluded that of the breached contract, and thus the sellers suffered no damages.


\textsuperscript{289} Cudahy, 592 F.2d at 1083.
seller is not obligated to resell the goods. Thus, in one case, where there was, apparently, no market for the goods, the seller acted properly in not purchasing the goods from its supplier for resale.\textsuperscript{290} Similarly, if the seller is in a "lost volume" situation, his resale of the goods should not obligate him to measure damages under section 2-706.\textsuperscript{291} Any such resale would not mitigate his damages because he would still be left less than whole by the amount of profit that he could have made by making both sales.

1. \textit{To Mitigate Incidental Damages}

The courts have also held, under the general principle of mitigation of damages, that the seller will be denied recovery of any incidental damages that could have been avoided by a timely and commercially reasonable resale.\textsuperscript{292} Such damages would not be reasonably incurred as required by section 2-710. Further, a denial of recovery is consistent with the parallel provision in section 2-715(2)(a) which denies the buyer a recovery as consequential damages of any loss that could have been reasonably avoided.

V. MISCELLANY

A. Resale by Buyer

A buyer who rightfully rejects or justifiably revokes acceptance is given a security interest by section 2-711(3) in goods in his possession or control for any payments made on their price and for any expenses reasonably incurred with respect to them.\textsuperscript{293} The buyer is allowed to foreclose

\textsuperscript{291} See supra notes 267-275 and accompanying text.
\textsuperscript{293} Section 2-711(3) provides:

On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any
on the security interest by reselling the goods. If the buyer resells, he must comply with the provisions of section 2-706. His situation thereunder is the same as that of the seller, and the above discussion has not differentiated cases involving resales by sellers from resales by buyers. The only distinction is made by subsection (6) which provides that, although the seller is not accountable to the buyer for any profit made on the resale, a buyer must account for any excess over the amount of his security interest produced by the resale.

The importance of this distinction is well illustrated by a case in which the buyer rightfully rejected non-conforming goods, stored them, and awaited instructions from the seller as to disposal of the goods. When no instructions were given, the buyer, with no notice to the seller, resold the goods over a three-year period. The buyer did not render an accounting to the seller with respect to the proceeds of the resales. In an action by the

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payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).


295 Section 2-706(6) provides:

The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).


seller, the court emphasized that the goods remained the property of the seller following the rejection, subject only to the security interest of the buyer. Further, section 2-706(6) required the buyer to maintain careful records of the resales and their proceeds and to account to the seller for those proceeds, plus interest thereon, after deducting the amount of the allowable security interest. The buyer was held liable to the seller for this amount, and, most importantly, the court held that the failure of the buyer to follow its duty to maintain accurate records would cause all uncertainties as to amounts to be rendered against it.

1. Resale by a Person in the Position of a Seller

Section 2-706(6) also provides that a person in the position of a seller must account to the seller for any excess over the amount of his security interest. A person in the position of a seller is defined in Section 2-707 and includes any factor or other agent who has advanced his personal credit or funds for the purchase of goods on behalf of his principal. Classic recurring commercial examples are banks or other financing agencies which have honored letters of credit or drafts on behalf of their customers. Another typical example would be an art dealer who acts as an agent for his customer in purchasing

297 Kleiderfabrik, 483 F.Supp. at 1234.
298 Id. at 1234-35.
299 Id. at 1235.
300 Section § 2-707 provides:
   (1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.
   (2) A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2-705) and resell (Section 2-706) and recover incidental damages (Section 2-710).
301 For a more complete discussion of Section 2-707, see W. HAWKLAND, supra note 26, § 2-707, at 314-21.
a painting. If the art dealer purchases the painting per its principal’s instructions, takes title in the principal’s behalf, but commits its own funds therefore, it has a security interest in the painting for that amount. In the event that the art dealer is not reimbursed for its expenses, it may resell the painting but must account to its customer-principal for any amount produced by the resale in excess of its security interest.

B. Variation by Agreement

Within reasonable parameters, the resale provisions of section 2-706 may be varied by agreement of the parties. The right of the parties to provide for waiver or other variation of the resale notice requirements has been discussed previously. The standard for contractual variations of Code provisions is provided by section 1-102(3), which provides:

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

The essential thrust of section 2-706 is good faith and commercial reasonableness. Clearly the parties cannot agree to the contrary. On the other hand, it is quite common in security agreements for the parties to agree that any foreclosure sale on collateral following breach by the debtor will be conducted in a specified manner, rather


304 U.C.C. § 2-706(b) (1978).
than strictly in compliance with applicable law. With respect to personal property security agreements, the applicable law includes section 2-706. Such provisions will be upheld except that "[o]bligations of 'reasonable-ness and care . . . may not be disclaimed by agreement,' but the parties may agree to the standards to be applied if they 'are not manifestly unreasonable.' "

