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Remedying Anticipatory Repudiation—Past, Present, and Future?

Dena DeNooyer*

“Remember that time is money.”
—Benjamin Franklin

I. INTRODUCTION

The common law and commentators have grappled with the question of the time to measure damages under anticipatory repudiation. At the moment, a party who repudiates a contract is at the mercy of the courts. This Comment attempts to resolve the uncertainty and confusion by proposing a standard for determining the time a court should use in measuring damages.

Anticipatory repudiation is found in Article 2 of the Uniform Commercial Code (U.C.C. or Code), which is “probably the best-conceived and best-drafted part of the Code.” Nonetheless, Part 7 of Article 2 on damages is one of the most convoluted portions of the U.C.C. The delineation of remedies does not match the precision of the drafters’ conception, and the market-based damages under the U.C.C. are “curiously inconsistent and almost incoherent in places.” This inevitably in-


3. See id. at 363. This should not be surprising, however, since the remedies section substantially departs from prior law. See id.


5. Jackson, supra note 1, at 103; see Peters, supra note 4, at 204 (“Furthermore, the interrelationship between the various remedies is often left unnecessarily obscure in Article 2; a remedy which is permitted by one section appears to be interdicted by another;
interferes with the goal of Article 2 to provide objective, workable criteria for structuring the relationship between parties.6

Measuring damages for anticipatory repudiation in the U.C.C. merely mirrors the uncertainty in the common law.7 Determining the time to use to measure damages for an anticipatory repudiation involves one of the most confusing interpretive problems in the U.C.C.8 The entangled Code provisions relating to the time to measure damages include the buyers' and sellers' remedies and the interaction of sections 2-610, 2-708, 2-713, and 2-723.9 When untangling this confusion, a measure of damages should be adopted that will ensure the effective implementation of the underlying remedial policies of the U.C.C.10

This comment will trace the history of the U.C.C. provisions concerning anticipatory repudiation in legislative history, commentaries, and case law. It will then propose a resolution to the statutory confusion by suggesting that damages for anticipatory repudiation should be measured at the time an aggrieved party should cover, which is the equivalent of a commercially reasonable time after she learns of the repudiation.

II. WHAT IS ANTICIPATORY REPUDIATION?

Anticipatory repudiation11 originated in American and English common law in the mid-1800s with the watershed case of Hochster v. de la Tour.12 Lord Chief Justice Campbell, concerned that the nonbreaching party would be forced to perform under the repudiated contract,13 created the right to sue for anticipatory repudiation prior to the time of conduct apparently harmless when viewed from the vantage of one provision is fraught with danger when another section is considered."). But see Taylor, supra note 1, at 941 ("Even though not without weaknesses, the Code's approach to anticipatory repudiation should be considered a sound one.").

6. See Peters, supra note 4, at 205. The comments to the U.C.C. provide little or no relief for the textual confusion of the Code. See id. Many comments are ineffectively bound by prior law, and some are inappropriately tied to earlier versions of the Code. See id.

7. See Jackson, supra note 1, at 71. But see Taylor, supra note 1, at 940 ("The [U.C.C.] through its treatment of the doctrine of anticipatory repudiation should contribute greatly to overcoming some of the basic weaknesses in the application of the doctrine under the general contract law.").

8. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 6-7, at 318 (3d ed. 1988); 1 ANDERSON, supra note 1, § 9:17, at 42; see also George I. Wallach, Anticipatory Repudiation and the U.C.C., 13 U.C.C. L.J. 48, 64 (1980) (stating that courts face difficulties in choosing between possibilities).

9. See WHITE & SUMMERS, supra note 8, § 6-7, at 322, 324 n.19.

10. See Sebert, supra note 2, at 374.

11. Arthur Corbin uses the term "anticipatory breach" instead of "anticipatory repudiation." See 5 ARTHUR LITTON CORBIN, CORBIN ON CONTRACTS § 1053, at 309 (1964). Corbin notes that the parties never promised to abstain from repudiating. See id. Thus anticipatory breach in Corbin's terminology refers to the duty to render the performance that the parties bargained for, rather than the non-existent duty not to repudiate the contract. See id.


13. See id. at 926.
Early commentators of anticipatory repudiation criticized its logic. Under classic contract analysis, courts considered contracts to be a promise for performance. These promises could not be breached until the actual time of performance. Thus, there are no legal obligations until the time of performance. Despite the almost accidental creation of the doctrine of anticipatory repudiation, it has become firmly established in American and English law.

The doctrine of anticipatory repudiation rests on the notion that neither party will frustrate the other party’s bargained-for expectation interest. A repudiation does not automatically destroy the primary contract interest, so the contract may still be enforced. The pre-performance contract right frequently has its own market value, determined by the present value of the future performance, reduced by the probability that the performance will not occur. Despite this theoretical market value, in reality the anticipatory repudiation will most likely devalue all or part of the contract right. Courts implicitly acknowledge that the expectation interest outweighs the uncertainty inherent in measuring anticipatory repudiation damages.

To constitute anticipatory repudiation, the words or conduct creating anticipatory repudiation must be distinct, unequivocal, and absolute. Given these stringent requirements, anticipatory repudiations are atypical. Even when a party intends to repudiate a contract before time of performance, he generally refuses to be distinct, unequivocal, or absolute in order to anticipatorily repudiate. Thus, anticipatory repudiation cases require unique facts involving uncommon conduct by both buyer

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14. See id. at 927-28 ("[U]pon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action. . . .")

15. See Jackson, supra note 1, at 73; Janice C. Vyn, Comment, Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems, 30 Sw. L.J. 601, 602 (1976) ("Since the absolute duty to perform has not yet arisen according to the contract’s terms, in a strict sense no breach has occurred.").

16. See Taylor, supra note 1, at 917.

17. See id. at 918-19.

18. See id. at 919.

19. See 5 Corbin, supra note 11, at 313. According to Corbin, remedial rights are substituted for the primary right to full performance, so the power to earn full payment vanishes. See id. Completion of performance would cause economic waste; besides, the remedies are the pecuniary equivalent of full performance of the contract. See id. at 313-14.

20. See id. at 313.

21. See id.

22. See Taylor, supra note 1, at 920.

23. Wallach, supra note 8, at 50-51.

24. See 1 Anderson, supra note 1, § 9:17, at 45.

25. See id. at 45-46. "They may wheedle or whine or threaten or cajole, do all sorts of distasteful things, but rarely will they voluntarily put themselves in the posture of wrong-doer any earlier than is absolutely necessary." Id. at 46.
and seller. 26

Under the common law, the party who believes that the other party has
anticipatorily repudiated is in the difficult and uncomfortable situation of
predicting whether a court will find an anticipatory repudiation. 27 If that
party suspends performance and is wrong, the court will find that he was
the first to breach the contract. 28 Therefore, deciding whether there has
been an anticipatory repudiation is "[o]ne of the most difficult and poten-
tially risky decisions that an attorney may have to make." 29

Under the pre-Code law, anticipatory repudiation damages "were mea-
sured by the difference between the contract price and the market price
at the time and place for performance." 30 However, if the case went to
trial before the performance date, damages would be calculated at the
market price at the time of trial. 31 Courts considered this figure the best
evidence of the future market price. 32 The U.C.C. followed the former
rule but not the latter. 33

Section 2-610 of the U.C.C. also offers a remedy for breach of contract
before time of performance. 34 When an anticipatory repudiation occurs,
the buyer may cancel the contract, recover the price paid to the seller,
and seek either cover or the difference between the contract price and the
market price. 35 But if the aggrieved party does not cancel the contract,
make a material change his position, or inform the repudiator that he
considers the repudiation to be final, the repudiator may withdraw his
repudiation and reinstate the contract. 36 The Code addresses the risk as-
associated with accurately predicting an anticipatory repudiation by provid-
ing section 2-609, which allows a party to demand adequate assurance
when the party is insecure. 37

The common law made a distinction between repudiation of a contract
whose performance is entirely in the future and repudiation after partial
performance. 38 The U.C.C., however, never defines repudiation. 39 The

26. See id.
27. See Wallach, supra note 8, at 50.
28. See Gregory S. Crespi, The Adequate Assurances Doctrine After U.C.C. § 2-609: A
Test of the Efficiency of the Common Law, 38 VILL. L. REV. 179, 183 (1993); Wallach, supra
note 8, at 50.
29. John R. Trentacosta, Performance and Breach of Contracts Under U.C.C. Article 2,
30. Taylor, supra note 1, at 928.
31. See id.
32. See id. at 928 n.39.
33. See id. at 928.
34. See U.C.C. § 2-610; WHITE & SUMMERS, supra note 8, § 6-7, at 319.
35. See U.C.C. §§ 2-610, 2-711; WHITE & SUMMERS, supra note 8, § 6-7, at 319.
36. See U.C.C. § 2-611; WHITE & SUMMERS, supra note 8, § 6-7, at 326.
38. See Jackson, supra note 1, at 70. This distinction is "[f]or reasons that are not
entirely clear..." Id.; see also infra note 122 and accompanying text (regarding Professor
Edwin W. Patterson's concern that repudiation in the U.C.C. was not consistent with New
York law, wherein repudiation referred to a contract whose entire performance lay in the
future).
39. See Peters, supra note 4, at 264; Taylor, supra note 1, at 922.
term repudiation in the context of this comment will refer to an agreement whose performance is entirely in the future.

III. INTERACTION OF ANTICIPATORY REPUDIATION PROVISIONS UNDER THE U.C.C.

There are six Code sections that are necessary to consider when analyzing the issue of when to measure damages for an anticipatory repudiation under the U.C.C.: sections 2-610, 2-708(1), 2-713, 2-706, 2-712, and 2-723.40

A. TEXT OF THE PROVISIONS

Anticipatory repudiation first appears in U.C.C. section 2-610.41 If a party repudiates a contract before the time for performance, thereby substantially impairing the value of the contract to the non-repudiating party, the aggrieved party has two choices: (1) await performance for a commercially reasonable time; or (2) utilize any remedy for breach in sections 2-703 (seller's remedies) or 2-711 (buyer's remedies). This second choice is available to the aggrieved party regardless of whether he has notified the repudiating party that he is awaiting performance or whether he has urged the repudiating party to retract.42 If the aggrieved party waits for performance beyond a reasonable time under the first choice in section 2-610, he cannot recover the damages that he could have avoided.43 Under the second choice, the aggrieved party can resort to any remedy he chooses if he fulfills the good faith requirement under section 1-203.44 The aggrieved party may suspend his performance whether he waits a commercially reasonable time for performance or whether he seeks remedies.45

If the aggrieved party is a seller and chooses to resort to remedies for breach, he has a number of options: (1) withhold delivery of the goods;46 (2) stop delivery by any bailee;47 (3) proceed under section 2-704 for goods unidentified to the contract;48 (4) resell the goods and recover

40. See Wallach, supra note 8, at 60.
41. U.C.C. § 2-610.
42. See id.
43. See U.C.C. § 2-610 cmt. 1. The text of section 2-610 gives no guidance of what remedies are available after a party awaits performance for a commercially reasonable time. See infra notes 125-27 and accompanying text (expressing Professor Patterson's concern that waiting the commercially reasonable time does not preclude the later seeking of remedies). The commentary, however, implies that the aggrieved party can seek remedies, but they are limited by the mitigation principle. See U.C.C. § 2-610 cmt. 1.
44. See U.C.C. § 2-610 cmt. 4. Section 1-203 states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” U.C.C. § 1-203.
45. See U.C.C. § 2-610(c).
46. See U.C.C. §§ 2-610(c), 2-703(a).
47. See U.C.C. §§ 2-610(c), 2-703(b).
48. See U.C.C. §§ 2-610(c), 2-703(c).
under section 2-706; 49 (5) recover damages under section 2-708 or recover price under section 2-709; 50 and (6) cancel. 51

If the aggrieved party is a buyer, he has the remedies available in section 2-711. 52 When the seller repudiates the contract, the buyer may cancel and recover the amount of the price he has already paid. 53 The buyer may also either cover under section 2-712 or recover damages under the market-contract differential in section 2-713. 54 If the buyer seeks the cover remedy under section 2-712, the buyer can recover the difference between the cost of cover of substitute goods and the contract price. 55 Cover is not a mandatory remedy, 56 but consequential damages are limited by what the buyer could have prevented by covering within a reasonable time. 57 In addition, the buyer may either recover the goods if they have been identified, as provided in section 2-502, or obtain specific performance or replevy as provided in section 2-716. 58

Section 2-713(1) causes much of the confusion and ambiguity of damages when the buyer is the aggrieved party of an anticipatory repudiation. The interpretive challenge is to determine when to measure a buyer’s damages after a seller repudiates a contract before performance is due. 59 Under section 2-713(1), the measure of damages for a seller’s repudiation is the market price at the time when the buyer “learned of the breach” less the contract price. 60 “Learned of the breach” can support a number of interpretations for when to measure the buyer’s damages. 61 The accompanying commentary is not helpful in interpreting the phrase, 62 so the pivotal question of when the buyer actually learns of the breach remains unanswered. 63 The comments explain that this remedy is only applicable to the extent the buyer fails to cover, providing a self-contained

49. See U.C.C. § 2-703(d). The Code is ambiguous as to whether it allows the seller to resell under section 2-706, then recover the difference between the market price at the time and place for tender and the unpaid contract price under section 2-708. See 67A AM. JUR. 2d § 1092 (1985); Henry Gabriel, The Seller’s Election of Remedies Under the Uniform Commercial Sales Code: An Expectation Theory, 23 WAKE FOREST L. REV. 429, 429 (1988). However, under 1-106, the U.C.C. expresses “[t]he remedies . . . shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .” U.C.C. § 1-106(1). The accompanying comment affirms that compensatory damages are limited to compensation. See U.C.C. § 1-106 cmt. 1. The seller would receive a windfall if the Code permitted both the resale formula, which fully compensates the aggrieved seller, and recovery under Section 2-708.

50. See U.C.C. § 2-703(e).
51. See U.C.C. § 2-703(f).
52. See U.C.C. §§ 2-610(b), 2-711.
53. See U.C.C. § 2-711(1).
54. See U.C.C. § 2-711(1)(a), (b).
55. See U.C.C. § 2-712.
56. See U.C.C. § 2-712(3) cmt. 3.
57. See U.C.C. § 2-712 cmt. 3.
58. See U.C.C. § 2-711(2).
59. See Sebert, supra note 2, at 372.
60. See U.C.C. § 2-713(1).
61. See Wallach, supra note 8, at 61.
62. See U.C.C. § 2-713 cmt. 1.
63. See Sebert, supra note 2, at 372.
alternative to cover.64

This market price formula has been harshly criticized as a hypothetical remedy.65 By providing the buyer the market-contract differential, which does not even use the market, the U.C.C. "leaves the remedial goals of section 2-713 quite unclear."66 If there is an available market, the buyer should cover.67 The market formula "is essentially ancillary to the cover formula."68 If there is no available market, "it makes little sense to assume an entry into the market."69

Section 2-723 governs the measurement of damages for the aggrieved party, either buyer or seller, when the anticipatory repudiation action comes to trial before time of performance.70 Under this circumstance, damages are measured at the price "when the aggrieved party learned of the repudiation."71 The accompanying comment explains that this section was included to alleviate the most obvious difficulties associated with determining market price.72 Section 2-723, however, yields to other methods of determining market price.73 The section should not be read to exclude other reasonable methods of measuring damages according to the necessity of particular facts.74

B. HISTORY OF THE U.C.C.

Article 2 is the oldest section of the U.C.C.; the basic draft dates from 1940.75 The predecessor of Article 2 was the Uniform Sales Act. The American Law Institute (ALI)76 and the National Conference of Commissioners on Uniform State Laws (NCCUSL)77 began a joint effort to create a comprehensive code of commercial law.78 Led by Karl Llewellyn, the two national organizations were involved in a massive mobilization of time and resources to create what eventually became the Uniform Commercial Code. As Chief Reporter, Karl Llewellyn was the primary,
Llewellyn had a strong sense of the relationship between law and commerce, and he imported this into the drafting of the U.C.C.\(^7\)

The first step in the creation of the U.C.C. was to overhaul the existing Uniform Sales Act. In 1938, the Merchants Association of New York City proposed a federal sales act to regulate interstate sales.\(^8\) This prompted NCCUSL to revise its Uniform Sales Act. The initial drafts of the revised Uniform Sales Act were finished in 1940. The project became a joint venture between the ALI and the NCCUSL in 1944 with Karl Llewellyn as the Reporter and Soia Mentschikoff as the Associate Reporter. The Uniform Revised Sales Act became the Sales Chapter of the U.C.C.\(^2\)

The ALI and NCCUSL published *The Code of Commercial Law* in 1946 as the most recent draft version of six of the articles of the uniform code scheduled to be completed in 1949.\(^3\) The two organizations asserted that preparation of the code had advanced enough to publish this portion.\(^4\) By 1949 the ALI and NCCUSL had published the first draft of the U.C.C. with comments as intended.\(^5\)

By spring 1950 after the publication of the Proposed Final Draft of the U.C.C., the codification effort more resembled a code.\(^6\) The statute was divided into the eleven articles, each segmented into parts.\(^7\) Despite its label of finality, this draft experienced further revisions.\(^8\) So many changes were made to the Proposed Final Draft No. 2 of the U.C.C. of 1951 that the changes from the 1950 version were symbolically indicated.\(^9\)

\(^7\) See Imad D. Abyad, Note, Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence, 83 VA. L. REV. 429, 429 (1997). Llewellyn recognized the feasibility of a commercial code: "The body of material is of itself both central, large, highly important, and a working unit." Karl Llewellyn's notes, Memorandum to Executive Committee, Committee on Scope and Program, Section on Uniform Commercial Acts.

\(^8\) See William A. Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1, 4 ("He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial world rather than from the standpoint of what appeared in statutes and decisions.").

\(^9\) See N.Y. STATE L. REV. COMM'N, supra note 76, at 11.
The Official Draft was published in 1952 after final approval for Articles 4 and 5 at the Joint Meeting of the ALI and the NCCUSL in New York on Sept. 15, 1951. The newly created Editorial Board proposed additional changes that were promulgated in the 1953 official text of the U.C.C. The American Bar Association quickly endorsed Article 2.

Pennsylvania was the first state to enact the U.C.C. The Pennsylvania legislature enacted the 1953 Official Text in April 1953, effective July 1, 1954. Several states conducted in-depth studies of the U.C.C. in contemplation of adoption, including New York. Responding to the recommendation of the Association of the Bar of the City of New York, the New York Law Revision Commission held U.C.C. hearings in 1954. Their conclusions were reported in 1955, most of which were critical of the U.C.C. The Law Revision Commission did not recommend that New York enact the U.C.C.

This criticism by the commercially vital State of New York prompted the Editorial Board to review earlier recommendations for changing the 1953 text of Article 2 and then recommend further revisions in 1956. The New York Law Revision Commission undertook the last thorough review of Article 2, which prompted the changes by the Editorial Board in the 1958 Official Text with Comments. The Article 2 revisions between the 1959 draft of the U.C.C. and the 1962 Official text were relatively minor. Subsequently, every state but Louisiana enacted this revision in its entirety.

The U.C.C. was flexible enough to ensure its permanence. Open-ended standards such as reasonableness, course of dealing, and usage of trade left the courts with the maneuverability to rule according to the

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93. See id.
94. See id.
95. See N.Y. State L. Rev. Comm'n, supra note 76, at 6-7.
96. See N.Y. State L. Rev. Comm'n, supra note 76, at 6-7, 14. The record of the hearings consisted of over 1500 typewritten pages, expanding to 2000 pages with related documents. See id.
98. See N.Y. State L. Rev. Comm'n, supra note 76, at 5.
99. See id. at 8. A number of state legislatures notified the NY Revision Commission that action on the adoption of the U.C.C. would be deferred pending the report of the Revision Commission and knowledge of the course of action to be taken by New York. See id.
100. See id. at 8-9.
101. See id.
102. See Sebert, supra note 2, at 361 n.8.
103. See Abyad, supra note 79, at 441.
reality of commercial transactions. "While such standards produce uncertainty, that uncertainty merely mirrors reality."  

C. LEGISLATIVE HISTORY OF U.C.C. PROVISIONS RELATING TO ANTICIPATORY REPUDIATION

1. Section 2-610

The modern version of section 2-610 started with section 45 of the 1942 Revised Uniform Sales Act entitled "Anticipatory Breach; Defective Installment." Section 45 states that if the buyer or seller demonstrates the intention not to fulfill the duties or conditions imposed on him, the other party is free to treat this as a breach and seek any remedy or remedial right.  

The aggrieved party has several options: (1) to suspend his own performance; (2) to treat this as a breach of contract and seek a remedy under the Act or wait for the time of performance; and (3) to cancel the contract.  

The aggrieved party is presumed to be waiting for the other's performance unless notice is given to the contrary.  

Section 99 of the 1948 Code of Commercial Law gave the aggrieved party whose contract value was substantially impaired the right to (1) either sue for any remedy for breach, await performance, or negotiate for a retraction and (2) suspend his own performance. In this version, unlike previous versions, the section was entitled "Anticipatory Repudiation" instead of anticipatory breach. This change was probably due to the separation and removal of anticipatory repudiation from the provision covering installment contracts under which performance has begun but the remaining performance was being repudiated.

Section 2-610 of the Spring 1950 Proposed Final Draft of the U.C.C. was entitled "Anticipatory Repudiation" and had changed little from its previous version in the Code of Commercial Law. The commentary explains

[a]fter repudiation, the aggrieved party may immediately resort to any remedy he chooses. Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading.
the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.\textsuperscript{113}

The language of the provision did not change in the second Proposed Final Draft of the U.C.C. of Spring 1951\textsuperscript{114} nor the Official Draft of the U.C.C. of 1952.\textsuperscript{115}

In the New York Law Revision Commission’s endeavor to evaluate the U.C.C., Professor Edwin W. Patterson of Columbia Law School found section 2-610 generally in line with New York law, but contained “some material ambiguities, omissions and even contradictions.”\textsuperscript{116} The definition of “repudiation” concerned Patterson—he feared repudiation could be defined to include a party who materially breached a contract and repudiated it, thus capable of retracting both an anticipatory repudiation and a breach of contract under 2-611.\textsuperscript{117} He notes, “[i]t would seem, then, that section 2-610 does not clearly safeguard this result.”\textsuperscript{118}

Professor Patterson also expressed concern that the section did not match New York law, which held that anticipatory repudiation damages in certain situations are measured at the time of repudiation, not the time of performance.\textsuperscript{119} The U.C.C. allows the aggrieved party the resale or cover differential, which has three disadvantages according to Professor Patterson: (1) the aggrieved party would be discouraged from resale or cover transactions because the other party could attack the transaction on lack of good faith or because it was accomplished in an unreasonable manner; (2) since the aggrieved party is not required to resale or cover, he may speculate at the other party’s peril; and (3) the resale or cover transaction would be binding on the repudiating party to reimburse, but any profit from the transaction accrues to the aggrieved party without having to account for the profit.\textsuperscript{120}

In addition, the text of (a) and (b) gave Professor Patterson pause.\textsuperscript{121} A literal reading of the language section 2-610 with its “sharp alternative” of either (a) or (b) was the opposite of New York law.\textsuperscript{122} The professor argued that “the language should make it clear that merely choosing (b) [allowing the party to await performance or negotiate for retraction] does not preclude later choosing (a) [permitting the aggrieved party to resort to any remedy for breach].”\textsuperscript{123}

\begin{footnotesize}
\begin{enumerate}
\item[113.] See id. \S 2-610 cmt. 4.
\item[114.] See U.C.C. \S 2-610 (Proposed Final Draft No. 2 1951).
\item[115.] See U.C.C. \S 2-610 (Official Draft 1952).
\item[117.] See id. at 671.
\item[118.] Id.
\item[119.] See id. at 672.
\item[120.] See id. at 673.
\item[121.] See id. at 674; U.C.C. \S 2-610 (Official Draft 1952).
\item[122.] \textit{Id.}; \textit{see also} 1952 U.C.C. \S 2-610 (Official Draft 1952).
\item[123.] \textit{Id.}; \textit{see also} 1952 U.C.C. \S 2-610 (Official Draft 1952).
\end{enumerate}
\end{footnotesize}
Patterson noted that in section 2-610(c) "'may suspend' suggests that the repudiatee may resume his own performance, under some unspecified circumstances, and recover damages accordingly."124 This is contrary to American common law in which the aggrieved party cannot enhance his damages by continuing performance after the repudiation; thus the aggrieved party must stop performing following a repudiation.125

Due to the criticism and concerns of the New York Law Revision Commission, the Editorial Board made substantial changes in section 2-610, where the text had remained consistent for a number of previous years. The 1957 Official Edition of the U.C.C. adopted most of the suggested changes. In deference to the concern of the breadth of "repudiation," section 2-610 restricts anticipatory repudiation to a "contract with respect to a performance not yet due."126 Also, subsection (b) allows the aggrieved party "for a commercially reasonable time [to] await performance."127 This provision prevents the aggrieved party from awaiting performance indefinitely, then recovering full damages.128 Changing former subsection (b) in the 1952 Official Code to allow the aggrieved party to wait for performance for a commercially reasonable time in the 1957 Official Code implicitly suggests that if the commercially reasonable time is expended, an aggrieved party may resort to any remedy for breach.129 The commentary notes that waiting for performance beyond a reasonable time will not increase the aggrieved party's recoverable damages by the amount he could have avoided.130 This comment also suggests that all remedies are available following the commercially reasonable waiting period. By adding the alternative choice "to identify the goods to the contract notwithstanding breach or to salvage unfinished goods"131 to section 2-610(c) in the 1957 U.C.C., the drafters circumvented Professor Patterson's criticism that the aggrieved party may resume his own performance notwithstanding repudiation by giving the aggrieved party concrete options without suggestive abuse of the word "may" in the 1952 U.C.C.132

The only change unrelated to the New York Law Revision Commission concerned the aggrieved party's ability to resort to any remedy for breach despite urging retraction and informing the repudiating party that he

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124. 2 N.Y. L. REV. COMM'N, supra note 116, at 674-75.
125. See id. at 675.
126. See U.C.C. § 2-610 (1957) (emphasis added to demonstrate the change in text).
127. Id. § 2-610(b) (emphasis added to demonstrate the change in text).
129. See U.C.C. § 2-610 (official Draft 1952); U.C.C. § 2-610 (1957) . At the minimum, New York courts would likely interpret the change in this manner given Professor Patterson's criticism that the literal interpretation of section 2-610 of the 1952 Uniform Commercial Code was contrary to New York law. See supra notes 126-30 and accompanying text. Other courts may not be influenced by this reasoning, however, if they read a "sharp alternative" into section 2-610(a) and (b) as Professor Patterson first suggested, despite the change in the section's language. See 2 N.Y. STATE L. REV. COMM'N, supra note 116, at 674.
131. Id. § 2-610(c).
132. See id.; U.C.C. § 2-610(c) (Official Draft 1952).
would await the repudiating party's performance.\textsuperscript{133}

2. \textit{Section 2-708}

The precursor of U.C.C. section 2-708, which describes the seller's damages for non-acceptance or repudiation, was section 63 of the Revised Uniform Sales Act entitled “Primary Damages to Seller, Apart from Resale or Cover.” Section 63 explains a seller's remedy when the buyer breached and the seller failed to “cover” or resell the goods.\textsuperscript{134} The section lists the situations in which damages for the price of the goods is appropriate; in all other situations, the seller's damages are “the estimated loss resulting in the ordinary course of events from the buyer's breach, as determined in any manner which is reasonable.”\textsuperscript{135} Section 63 also describes the typical reasonable manner to measure damages: “the difference between the contract price and the market price at the time when the seller learns of the breach” and three locations depending on the shipping status of the goods.\textsuperscript{136}

The most dramatic and telling change in later versions of this section that result in modern ambiguity among the U.C.C. provisions of when to measure damages concerns the phrase “learns of the breach,” first seen here in the U.C.C. for sellers not buyers.\textsuperscript{137} Subsequently, the provision for sellers morphs this phrase into “time and place of tender.”\textsuperscript{138} The provision for buyers later becomes “learns of the breach,” which is the source of much academic hand-wringing.\textsuperscript{139} In this version of the Revised Uniform Sales Act, buyers and sellers remedies diverge.\textsuperscript{140}

In a 1943 version of the Revised Uniform Sales Act, the seller's measure of damages for non-acceptance was the price differential between the unpaid contract price and the market price “at the time of breach.”\textsuperscript{141} The parallel buyer's damages are measured “at the time the buyer learned of the breach.”\textsuperscript{142} This precursor of the U.C.C. is the closest the timing of buyers and sellers remedies are to being identical. Nonetheless, it is unlikely that the phrases are a distinction without a difference despite being in the drafting stage. This suggests there is a meaningful difference between “time learned of the breach” and “time of the breach.”

\textsuperscript{133}. See U.C.C. § 2-610(b) (1957).
\textsuperscript{134}. See Karl Llewellyn's notes, IV2f, Consideration in Committee of the Whole of the Revised Uniform Sales Act (transcript of consideration of sections 37-71) § 63 at 177-78 (1941).
\textsuperscript{135}. Id. § 63(2), (3) at 178.
\textsuperscript{136}. Id. § 63(4) at 178.
\textsuperscript{137}. See id.
\textsuperscript{138}. See U.C.C. § 2-708.
\textsuperscript{139}. See U.C.C. § 2-713; see also infra notes 150-70 and accompanying text (describing the legislative history of the buyer's remedy).
\textsuperscript{140}. See Karl Llewellyn's notes, supra note 134, §§ 63, 70 (stating that the buyer's damages are measured “at the time when . . . the goods should have been received by the buyer”).
\textsuperscript{141}. Karl Llewellyn's notes, V2e, Introductory Comment to Remedies § 102 (1943).
\textsuperscript{142}. Id. at § 107.
Part VI of the Code of Commercial Law deals with remedies. Section 109 under the heading "Seller's Remedies" describes the "Damages for Non-Acceptance." The seller's damages were measured by the "difference between the price current at the time and place for tender and the unpaid contract price." There was no substantive change in the renumbered section 2-708 of the 1950 Proposed Final Draft. The commentary reminds that "[t]he prior uniform statutory provision is followed generally in setting the current market price at the time and place for tender as the standard by which damages for non-acceptance are to be determined." Neither the 1951 Proposed Final Draft nor the 1952 Official Draft of the Uniform Commercial Code changed the text of this provision.

Professor Patterson did not criticize the timing aspect of section 2-708; he recognized the consistency with New York case law, in which the seller's damages are "the value of his bargain, which is the difference between the contract price and the market price at the time and place specified for delivery of the goods by the terms of the contract." He did question the ambiguity of some of the terminology defining the market-contract differential, most of which was ultimately changed.

Section 2-708 of the 1957 Official Draft of the Uniform Commercial Code did not change with respect to the timing of when to measure a seller's damages. It did, however, broaden the seller's damages to "the measure of damages for non-acceptance or repudiation." This addition suggests the provision applies to anticipatory repudiation notwithstanding section 2-723.

3. Section 2-713

Section 70 of the Revised Uniform Sales Act was a precursor of U.C.C. section 2-713 and described a buyer's damages for non-delivery. It allowed a buyer who failed to cover to sue for damages for the non-delivery. Damages consisted of the estimated loss ordinarily resulting from the seller's breach, determined in any reasonable manner. In the ordinary case this meant "the difference between the contract price and the market price at the time when and the place where the goods should have been delivered," but in some cases it might include "other losses as the result of the seller's breach of contract and the contract price is a reasonable estimate of the loss." It also allowed a buyer to bring an action for the amount of the contract price, multiplied by the number of the remaining parts of the contract, if the seller refused to perform or to tender the goods.

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143. See THE CODE OF COMMERCIAL LAW § 109 at 58 (1948).
144. Id.
146. Id. § 2-708 cmt. 1.
148. 2 N.Y. STATE L. REV. COMM'N, supra note 116, at 692.
149. See id. at 695; U.C.C. § 2-708 (1957).
151. See Karl Llewellyn's notes, supra note 134, § 70, at 185-86.
152. See id. § 70(1).
153. See id. § 70(2).
been received by the buyer.’

In 1943, the language of section 70 dealing with when to measure the buyer’s damages changed significantly. Instead of being the difference between the contract price and the market price at the time when the breaching party should have delivered the goods under the contract, the buyer’s measure of damages for non-delivery changed to “the difference between the unpaid contract price and the comparable market price at the time the buyer learned of the breach.”

Section 114 of the Code of Commercial Law measured the buyer’s damages as “the difference between the price current at the time the buyer learned of the breach and the contract price.” Apart from re-numbering, there was no substantive change in section 2-708 of the 1950 Proposed Final Draft. The commentary explains that this rule approximates “the market in which the buyer would have obtained cover had he sought that relief.” Thus, “the crucial time is the time at which the buyer learns of the breach.” The provision did not change in either the 1951 Proposed Final Draft or the 1952 Official Draft of the U.C.C.

Professor Patterson noted the primary differences between Section 2-713 of the 1952 U.C.C. and the comparable section of the Uniform Sales Act related to the time when and the place where market value is to be evaluated. When the buyer “learned of the breach” was “apparently a change in New York law; but actually it probably is not a change in the law as applied by New York courts.” At least two New York cases determined damages when the buyer learned of the default. The cases purported to apply the special circumstances exception of the Uniform Sales Act and not change the general law. The cases delayed the time to measure market beyond the performance date. Since Professor Patterson accepted the timing underlying the phrase “learned of the breach,” there was no impetus for its change.

Professor Patterson criticized the word “learned”: “[t]he word ‘learned’ seems likely to give trouble.” He suggests “received information of” for its replacement. Professor Patterson argued that this would avoid two

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154. Id. § 70(3). This phrase describing the timing of damages was later co-opted in the modern seller’s market formula. See U.C.C. § 2-708(1). The Official U.C.C. seller’s remedy of “time and place of tender” is remarkably similar to “time when . . . the goods should have been received by the buyer.” Karl Llewellyn’s notes, supra note 134, § 70(3).
155. Karl Llewellyn’s notes, supra note 134, §107 (emphasis added).
156. See THE CODE OF COMMERCIAL LAW § 114 at 61 (1948).
159. Id.
161. See 2 N.Y. STATE L. REV. COMM’N, supra note 116, at 698 (analysis by Professor Edwin W. Patterson).
162. Id.
163. See id.
164. See WHITE AND SUMMERS § 6-7, supra note 8, at 322.
165. 2 N.Y. STATE L. REV. COMM’N, supra note 116, at 700.
things: (1) the buyer's investigation of all rumors of the seller's breach; and (2) the buyer's fraud by arguing that he did not "learn" of the breach through his own inaction (i.e. fail to open his mail). He also suggested improving "price current" by replacing it with "market price." Section 2-713 of the 1957 Official Draft of the Uniform Commercial Code did not change with respect to the time to measure damages, despite Professor Patterson's suggestion. The provision did absorb Professor Patterson's improvement by replacing "price current" with "market price."

Like section 2-708, this provision was newly extended to repudiation in addition to breach. This addition contributed confusion to an already ambiguous tangle of damages for anticipatory repudiation.

4. Section 2-723

Section 2-723, which describes the time and place used to determine market price, had no comparable analog in the Uniform Sales Act. In the 1943 Revised Uniform Sales Act, section 121 measured damages for anticipatory repudiation if the suit came to trial before the time for performance "by the comparable market price of such goods at the time when the aggrieved party learned of the repudiation." No substantive changes were made in the 1948 Code of Commercial Law or the 1950, 1951, or 1952 Uniform Commercial Code. The 1957 version of section 2-723, compiled after the extensive review by New York, clarified that the measurement of damages was for damages based on market price in sections 2-708 and 2-713.

5. Implications of the Legislative History

Section 2-610 gives the aggrieved party a choice: to wait a commercially reasonable time for performance or to resort to any remedy for breach. One of the first iterations of this U.C.C. section allowed the aggrieved party to wait until performance. The New York Revision Commission rejected this time of measurement; the importance of approval by the state of New York resulted in the addition of "for a commercially reasonable time." By the legislative history of section 2-610, it is clear that damages were not measured at time of performance.

Section 2-723 was written to address the problem of the unavailability

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166. See id.
167. See id.
171. Karl Llewellyn's notes, supra note 141, § 121 (emphasis added).
173. See U.C.C. § 2-723 (1957). This implies that other remedies for anticipatory repudiation are not measured at time of repudiation if this section does not apply.
174. See supra notes 115-20 and accompanying text.
of evidence.\textsuperscript{175} One of Llewellyn’s goals was to obliteratethe litigation of hypothetical damage measurements.\textsuperscript{176} By measuring damages at time of repudiation when the case goes to trial before the time of performance, the Code provides a definite time to measure damages. This removes the uncertainty of predicting future damages. But in easing evidence, Llewellyn created a provision that is impossible to construe consistently with other U.C.C. damage provisions.

D. POLICIES OF THE U.C.C.

1. \textit{Compensating the Aggrieved Party}

One of the underlying philosophies of the U.C.C. is to compensate the aggrieved party.\textsuperscript{177} Section 1-106 explains “[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.”\textsuperscript{178} Damages are limited to compensation, though they need not be calculable by mathematical accuracy.\textsuperscript{179}

2. \textit{Mitigation and Cover}

\begin{enumerate}
\item \textbf{a. Mitigation}

Mitigation or the doctrine of avoidable consequences is “[o]ne of the most important rules with respect to the measure of damages.”\textsuperscript{180} It is a “universally accepted principle of contract law.”\textsuperscript{181} The doctrine of avoidable consequences minimizes costs by requiring a mitigating party to bear the risk of failing to minimize his losses.\textsuperscript{182} A mitigator is denied recovery for losses he unreasonable failed to avoid, but is given full recovery for costs due to any reasonable attempt to minimize losses.\textsuperscript{183} The primary purpose of the duty to mitigate is to avoid economic waste when the injured party suffered damages that could have been circumvented with reasonable efforts.\textsuperscript{184} Nonetheless, an aggrieved party’s duty to mitigate is limited; a plaintiff must do what is reasonable to mitigate but is not bound by what is possible.\textsuperscript{185}
\end{enumerate}

\begin{itemize}
\item \textsuperscript{175} See 2 N.Y. STATE L. REV. COMM’N, supra note 116, at 590; Peters, supra note 4, at 265.
\item \textsuperscript{176} See Karl Llewellyn’s notes, supra note 134, at 35.
\item \textsuperscript{177} See Devience, supra note 1, at 371.
\item \textsuperscript{178} U.C.C. § 1-106.
\item \textsuperscript{179} See \textit{id.} cmt. 1.
\item \textsuperscript{180} See \textit{id.} at 973.
\item \textsuperscript{181} See \textit{id.}
\item \textsuperscript{182} See \textit{id.}
\item \textsuperscript{184} See Clive M. Schmitthoff, \textit{The Duty to Mitigate}, 1961 J. BUS. L. 361, 364 (1961). For instance, the injured party has a duty to make substitute agreements with third parties if reasonable, but the duty to mitigate with the breaching party is less clear. See Hillman, supra note 183, at 559. The injured party need not “make extraordinary or impracticable
To build on Llewellyn's concept of mitigation in the U.C.C. is a difficult task. The duty to mitigate is not explicitly in the text of the U.C.C., but is implicitly suggested in a number of Code provisions. Cover and resale are two mitigation concepts invented by the redoubtable Karl Llewellyn.

b. Cover

The concept of cover was one of Karl Llewellyn's useful U.C.C. innovations. Cover is a conclusive statement of the market price and reflects the U.C.C. philosophy of full compensation. If the remedial goal is to compensate for actual loss, then cover is superior to the hypothetical market formula for calculating loss.

Karl Llewellyn considered cover to have two essential purposes: (1) "to make it possible in the event of an anticipatory breach or any other kind of breach, for the party who has been disappointed in performance, to move at once, if he is a merchant, either to buy goods or as the case may be, to get rid of the goods which the other party is not accepting" and (2) "to get rid of the litigation of a hypothetical measure of damages." Cover and resale are parallel remedies for buyers and sellers.

The commentary to section 2-712 on cover indicates that the remedy is "aimed at enabling him to obtain the goods he needs, thus meeting his essential need." This demonstrates the remedy's practicality in commercial transactions. "A cover transaction ensures that an aggrieved party is compensated in full without being overcompensated."

The U.C.C. suggests the market formula in section 2-713 is "completely alternative to cover . . . and applies only when and to the extent that the buyer has not covered." The Code does not require an aggrieved party to cover. Nonetheless, if the buyer has reasonably covered, courts
have never enforced a higher recovery of damages under the section 2-713 market formula instead of the cover formula.\textsuperscript{199}

IV. OPINION OF COMMENTATORS

Commentators do not agonize over the aggrieved seller's market formula remedy for anticipatory repudiation; the text of section 2-708(1) clearly asserts that damages are to be measured at time and place of tender.\textsuperscript{200} The aggrieved buyer's remedies for anticipatory repudiation, however, are fraught with ambiguity and uncertainty.\textsuperscript{201}

A. MEANING OF THE TEXT

According to commentators, the language of section 2-713, "learned of the breach," may be endowed with at least three interpretations: (1) the time at repudiation;\textsuperscript{202} (2) a commercially reasonable time after the buyer learns of the repudiation;\textsuperscript{203} and (3) the time of performance.\textsuperscript{204} Each interpretation has its defenders.\textsuperscript{205}

1. Time of Repudiation

Early judicial interpretation of the buyer's remedies for anticipatory repudiation easily found time of repudiation was the proper moment to measure damages, usually without scrutiny.\textsuperscript{206} The plain meaning of section 2-713 supports the time of repudiation—it seems the obvious choice that the buyer "learns of the breach" when he learns of the repudiation.\textsuperscript{207} Measuring damages early does have the advantage of limiting damages in a rising market, the usual circumstance for a seller's repudiation.\textsuperscript{208} This prevents the aggrieved party from speculating at the expense of the repudiating party. Nonetheless, most commentators criticize this time for measuring damages.\textsuperscript{209}

White and Summers list six reasons why time of repudiation is the

\textsuperscript{199} See id. § 9:06, at 14.

\textsuperscript{200} See Jackson, supra note 1, at 103-04; U.C.C. § 2-708(1). Though the text is unambiguous, the buyer's and seller's remedies are curiously inconsistent. A seller's remedy is always measured at the time of performance; a buyer's remedy can be measured at a number of different times depending on how the text is interpreted. See U.C.C. §§ 2-708, 2-713.

\textsuperscript{201} See Wallach, supra note 8, at 63.

\textsuperscript{202} See White & Summers, supra note 8, § 6-7, at 320; . Time of repudiation is generally defined when the breaching party indicates verbally or by conduct the intention not to fulfill the contract. See Wallach, supra note 8, at 60.

\textsuperscript{203} See White & Summers, supra note 8, § 6-7, at 320; Wallach, supra note 8, at 60.

\textsuperscript{204} See White & Summers, supra note 8, § 6-7, at 320; Wallach, supra note 8, at 60.

\textsuperscript{205} This was the common law period for measuring damages. See Wallach, supra note 8, at 60.

\textsuperscript{206} See Wallach, supra note 8, at 63.

\textsuperscript{207} See White & Summers, supra note 8, § 6-7, at 320-21.

\textsuperscript{208} See id. at 321. "The most powerful argument of course is the language itself." Id. at 325.

\textsuperscript{209} See White & Summers, supra note 8, § 6-7, at 320-21; Sebert, supra note 2, at 376; Wallach, supra note 8, at 62.
wrong interpretation of the U.C.C. provisions. 210 First, if the drafters had meant time of repudiation in section 2-713, they would have used “repudiation” instead of “breach.” 211 Second, if the damages are measured at time of repudiation, the buyer cannot utilize the waiting for a commercially reasonable time for performance as permitted in section 2-610(a) without suffering loss from following a U.C.C. sanctioned remedy. 212 It is also inconsistent with the U.C.C.’s policy of encouraging cover. 213 Third, the drafters intended the language “learned of the breach” to include time of performance or later when the buyer actually acquired the knowledge that the contract was breached in an older time when speed of communication lagged. 214 Fourth, time of repudiation conflicts with section 2-723. 215 If “learned of the breach” always meant “learned of the repudiation,” section 2-723 would be unnecessary. 216 In order to give meaning to the special rule for the suit before time of performance in section 2-723, the time learned of the breach in section 2-723 cannot be time of repudiation. 217 Fifth, if section 2-713’s “learned of the breach” is interpreted to be time of the repudiation, the section 2-713 buyer’s remedy would be inconsistent with the parallel section 2-708(1) seller’s remedy. 218 Finally, since the pre-Code time for measuring anticipatory repudiation damages was time for performance, if the drafters intended to change the common law rule, they would have at least mentioned it in a comment. 219 Another commentator noted that by using the date of repudiation, the parties are given a completely unbargained-for performance date. 220

211. See id.
212. See U.C.C. § 2-610(a); White & Summers, supra note 8, § 6-7, at 322; Sebert, supra note 2, at 376; Wallach, supra note 8, at 62, 63. However, the U.C.C. is silent as to what follows the commercially reasonable wait. See U.C.C. § 2-610. The provision gives the aggrieved party the choice of either waiting a commercially reasonable time for performance or resorting to any remedy for breach. See U.C.C. § 2-610(a), (b). The comments merely state that if the party waits longer than a commercially reasonable time, he cannot recover the resulting damages which he could have avoided. See U.C.C. § 2-610 cmt. 1. This suggests that an aggrieved party seeking to await performance will still have access to remedies for damages, but there is a change in the election of available remedies (otherwise the “or” between sections 2-610(a) and (b) is superfluous).
213. See Sebert, supra note 2, at 376.
214. See White & Summers, supra note 8, § 6-7, at 322.
215. See id. at 323-24;
217. See White & Summers, supra note 8, § 6-7, at 323-24; Anderson, supra note 215, at 319.
218. See White & Summers, supra note 8, § 6-7, at 324. But see supra Part III.C (indicating that the legislative history suggests that buyer’s and seller’s remedies were not meant to be analogous).
219. See White & Summers, supra note 8, § 6-7, at 324. White and Summers are the leading authorities for the conceptions that section 2-713 was not intended to change the pre-Code rule and that it should not be interpreted to change it. See 1 Anderson, supra note 1, § 9:17, at 43-44.
220. See Taylor, supra note 1, at 931.
Using the time of repudiation as the time the buyer learned of the breach is internally inconsistent. In interpreting the Code, it must be assumed that “breach” and “repudiation” are two different concepts. Section 2-713(1) uses the time when the buyer learned of the breach to determine damages for repudiation. Internal consistency in this subsection demands that anticipatory repudiation is not measured at the time learned of the repudiation, but rather at whatever time the buyer learned of the breach.

Though most commentators also dismiss time of repudiation as the proper moment for measuring an aggrieved buyer’s damages under anticipatory repudiation, there is not a clear commentator consensus between time for performance and a commercially reasonable time after the repudiation.221

2. Commercially Reasonable Time after the Repudiation

The U.C.C.'s language also supports a commercially reasonable time after repudiation as the time to measure a buyer's anticipatory repudiation damages.222 A commercially reasonable time after the repudiation does not interfere with section 2-610, which allows the aggrieved party to wait a reasonable time before resorting to a remedy.223

The language of section 2-713 and its explanatory comments can support the view that damages are measured at a commercially reasonable time following the repudiation.224 This is consistent with the comment of section 2-713 that states market damages are to be measured in the market in which the buyer would have covered.225 Also, the buyer does not actually “learn” of the breach until the reasonable waiting period has expired.226 The resale and cover provisions also support a commercially reasonable time following repudiation.227 Both sections allow the aggrieved party a reasonable time in which to resell or cover.228 Thus damages are fixed at some time after the aggrieved party learned of the breach, suggesting a commercially reasonable time is a viable

221. See White & Summers, supra note 8, § 6-7, at 321.
222. See Sebert, supra note 2, at 376; Wallach, supra note 8, at 63; Note, U.C.C. § 2-713: Anticipatory Repudiation and the Measurement of an Aggrieved Buyer's Damages, 19 WM. & MARY L. REV. 253, 255 (1977). Measuring damages at a reasonable time after repudiation “provides the most flexible and most equitable method for ascertaining a buyer's damages after a seller's anticipatory repudiation.” Id.
223. See U.C.C. § 2-610(a); Wallach, supra note 8, at 63. Unfortunately there is less case law for § 2-610(a)'s awaiting a commercially reasonable time than for § 2-610(b)'s immediately resorting to remedies for breach. See White & Summers, supra note 8, § 6-7, at 325.
224. See Sebert, supra note 2, at 376.
225. See U.C.C. § 2-713 cmt. 1 (“The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief.”); Sebert, supra note 2, at 376.
226. See Sebert, supra note 2, at 376-77. This rationale should not be given full credence, however, since commentators generally have ignored this argument.
227. See Wallach, supra note 8, at 63.
228. See U.C.C. §§ 2-706(1), 2-713(1) cmt. 2; see also Wallach, supra note 8, at 63.
alternative.229

One might expect that an aggrieved party, while waiting for performance and trying to convince the seller to retract his repudiation, would evaluate the resale or cover market.230 This allows him to make a cover or resale following a reasonable time after the waiting period expires.231

Using a commercially reasonable time after repudiation to measure damages inserts the concept of commercial reasonableness into the remedies sections of the U.C.C. without textual support. Though section 2-610 allows a buyer to await performance for a commercially reasonable time, there is no mention of this concept in sections 2-712, 2-713, 2-723, or their comments. Nevertheless, commercial reasonableness is an acceptable compromise in the search for a resolution to this Code tangle.

3. Time of Performance or Later

A number of commentators support time of performance as the proper time to measure damages.232 The pre-U.C.C. rule, under common law and the Uniform Sales Act, measured anticipatory repudiation damages for buyers and sellers like any other breach case—at the time set for performance.233 Thus adoption of this measurement would be consistent with the pre-Code law.234

Interpreting section 2-713 to mean time of performance would make sections 2-708 and 2-713 symmetrical.235 It would also give meaning to section 2-723 by creating a distinction between measuring damages for a lawsuit brought before or after time of performance.236 If 2-713 refers to time of performance, then 2-723 is “a sensible and helpful rule.”237 Measuring damages at time of performance is consistent with the policy of not penalizing the aggrieved party for his immediate choice.238 Also, if the buyer’s expectation interest is being compensated, time of performance would make the damages as nearly equal as the “expectation-date.”239

By citing sections 2-708 and 2-713, section 2-723 implies that time of performance is the measuring point for both buyers and sellers.240 There
are no fundamental differences between the injury to a seller when a buyer commits an anticipatory repudiation or the injury to a buyer when the seller commits an anticipatory repudiation. Thus, unless 2-713 is measured at the time for performance like section 2-708(1), the difference between the remedies for buyers and sellers "represents a difference without a distinction." 

The language "learned of the breach" can be explained as the codification of an exception to the time for performance under New York law. If the drafters had intended damages to be measured at time of performance, they had no need to attach "learned" to "of the breach"; the section could have merely stated that damages are to be measured at "the time of the breach." In the two New York cases, however, the buyer had no knowledge of the breach—did not "learn of the breach"—until after the time for performance had passed. The need for this exception was a result of a less technological society wherein important information was not as easily communicated. By this definition, a party cannot "learn of the breach" until there has been a breach.

Measuring market damages when performance is due, however, is inconsistent with section 2-610(a), which allows the aggrieved party to await performance for only a commercially reasonable time. If the repudiating party has not retracted the repudiation by the end of the commercially reasonable time, the aggrieved buyer should cancel the contract and cover. If section 2-713 damages are measured at the time of performance, there is a reduced incentive to cover; the buyer could wait to cover until performance without penalty. The time of performance measurement would also discourage efficient breaches because of the repudiating party's difficulty in predicting the amount of liability at the time of a potential repudiation.

If damages are assessed at the time of performance, the aggrieved buyer receives a windfall, since the seller most likely breached in a rising market. The aggrieved party is to be put in as good a position as if the other party had fully performed under the contract, not in a better position. Though time of performance is apparently the best resolution for giving meaning to section 2-723, the comment to section 2-723 permits flexibility in measuring damages. Accordingly, section 2-723 does not need to be strictly followed.

241. See Anderson, supra note 1.
242. Id.
243. See id. at 319.
244. See id.
245. See id. at 319-20.
246. See id. at 320.
247. See Anderson, supra note 215, at 320.
248. See U.C.C. § 610(a); Sebert, supra note 2, at 375.
249. See Sebert, supra note 2, at 375.
250. See id.
251. See id. at 375 n.77.
B. Economic Efficiency Analysis

Compensating an aggrieved party for its loss of expectation without overcompensating moves goods and services to their highest value user.252 "From the standpoint of economic efficiency, contract law should not discourage ‘efficient’ breaches of contract."253 Accordingly, the legal system should be governed by a legal rule that facilitates efficient breaches at minimum transaction cost.254

Professor Jackson has identified three approaches to cover after an anticipatory repudiation: (1) cover on the performance date at the spot price on that date; (2) cover at the date of repudiation at the forward price for the date of performance; and (3) cover at the date of repudiation at the spot price on that date.255 The question of when to cover involves both the moment to enter the cover transaction and whether the cover transaction is on a spot or forward basis.256 A spot price is the contemporary value of the contract duty according to the market on the date the spot price is measured; a forward price is the current market price of a future contract duty.257

If the forward price is greater than the contract price at repudiation, the nonbreaching party will favor delaying cover since it has nothing to lose and may gain by delay.258 The preference of the repudiating and nonrepudiating parties will diverge; the repudiating party will want the nonrepudiating party to cover immediately and the nonrepudiating party will want to delay for potential gain.259 "To assist the efficient movement of goods to their highest value user at minimum dead-weight loss from transaction costs, contract law presumptively should adopt a general rule that an aggrieved buyer should cover at the forward price as of the date of the repudiation."260

"For most situations, an economic perspective on contract law would have little to say about which party should get the benefits flowing from [the repudiator’s] breach, since that is a question of allocation and not of efficiency."261 Nevertheless, when a repudiating party’s benefit from a breach is greater than its liability when the nonrepudiating party covers immediately, but its benefit is less than its probable liability when the nonrepudiating party delays cover, the law should adopt the first option, which produces efficient breaches unavailable in the second option.262 The adoption of the forward price at repudiation applies to both buyers’

252. See Jackson, supra note 1, at 69.
253. See id. at 375 n.77.
254. See id. at 82.
255. See id. at 89 n.59.
256. See id. at 82.
257. See id. at 82-84.
258. The repudiating party must compensate for any detriment. See id. at 90.
259. See id.
260. See Jackson, supra note 1, at 92-93.
261. See id. at 94.
262. See id. at 93.
263. See id.
and sellers' remedies.264

V. CASE LAW

The cases that consider both the performance date and the repudiation date as the time for measuring anticipatory repudiation damages "indicate a rather free wheeling attitude toward interpreting [section 2-713] in light of the facts of the particular case."265 The overriding judicial intent is to accomplish a fair result by approximating the injury actually suffered by the buyer.266 The following cases are unique among the case law for the depth of analysis of each court's conclusion.

A. CARGILL, INC. V. STAFFORD267

The plaintiff, Cargill, Inc., bought and sold agricultural commodities; the seller, Van Stafford, owned and operated a grain elevator. The parties entered into two transactions to sell wheat. The trial court found and the appellate court agreed that the first transaction did not afford Cargill recovery and the second transaction was a valid and enforceable contract that was breached by the defendant.268

The Tenth Circuit emphatically concluded that the proper time to measure damages under section 2-713's "learned of the breach" language is time of performance, concurring with Professors White and Summers.269 The court gave two reasons: (1) the old common law rule measured damages from the performance date and the ambiguous U.C.C. text does not indicate a clear departure from common law and (2) the drafters would have used "repudiation" if they meant time of repudiation, as they did in section 2-723.270

Despite their preference for time of performance, the court recognized the importance of cover in the U.C.C.271 The aggrieved buyer can urge continued performance of the contract as provided in Section 2-610(a), but "at the end of a reasonable period he should cover if substitute goods are readily available."272 If the goods are available and the buyer fails to cover, damages should be measured when the buyer should have covered.273 If the buyer had a valid reason for failure to cover, damages should be measured at time of performance.274 Thus the Cargill court found the cover remedy to be compelling in anticipatory repudiation cases.

264. See id. at 96.
265. 1 ANDERSON, supra note 1, § 9:17, at 46.
266. See id.
267. 553 F.2d 1222 (10th Cir. 1977).
268. See id. at 1225.
269. See id. at 1226.
270. See id.
271. Cargill, 553 F.2d at 1227.
272. Id.
273. See id.
274. See id.
B. C Osden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft275

The plaintiff, Cosden Oil, was a manufacturer of chemical products; the defendant, Karl O. Helm, was an international trading company that anticipated a contracted world petrochemical supply. Seven purchase orders were exchanged between the two parties. Cosden brought suit for failure to pay for delivered polystyrene; Helm counterclaimed for Cosden's failure to deliver polystyrene as agreed. The jury found that Cosden anticipatorily repudiated the fifth through seventh orders.

The plaintiff advocated measuring damages at the time of repudiation. The defendant advocated measuring damages at the time of performance. The court identified three potential times to measure damages for anticipatory repudiation under the U.C.C.: (1) at repudiation; (2) at repudiation plus a reasonable time; and (3) at performance.276 The court cites to section 2-610 for authority for measuring damages at a commercially reasonable time after the repudiation, reading section 2-610 in conjunction with Section 2-713.277 The court analyzed U.C.C. section 2-713 in-depth, concluding that the correct measure of damage for anticipatory repudiation was a commercially reasonable time after the repudiation.278 Interpreting the language in this manner: (1) will not undercut the time section 2-610 gives the aggrieved buyer to await performance; (2) permits the seller to retract his repudiation as permitted in section 2-611; and (3) allows the buyer to evaluate cover before he elects his remedy.279

The commercially reasonable time allows the aggrieved buyer an opportunity to investigate his cover possibilities in a rising market without fear of damages being measured at time of repudiation.280 "While cover is the preferred remedy, the Code clearly provides the option to seek damages."281 Thus, "[w]hen a buyer chooses not to cover, but to seek damages, the market is measured at the time he could have covered—a reasonable time after repudiation."282

The court recognized there were persuasive arguments for measuring anticipatory repudiation at the time of performance, but ultimately rejected such a measurement.283 The court noted, however, "[t]he interplay among the relevant Code sections does not permit, in this context, an interpretation that harmonizes all and leaves no loose ends."284 Given the U.C.C.'s theme of commercial reasonableness, the prominence of cover, and the time an aggrieved party is permitted to await performance

275. 736 F.2d 1064 (5th Cir. 1984).
276. See id.
277. See id. at 1071.
278. See id. at 1069.
279. See id. at 1072.
280. See id.
281. Cosden, 736 F.2d at 1072.
282. Id.
283. See id.
284. Id.
and investigate his cover possibilities, the Fifth Circuit concluded that “learned of the breach” adopted the “commercially reasonable time” from section 2-610.285

C. Trinidad Bean and Elevator Co. v. Frosh286

In April 1988, Trinidad Bean and Elevator Company (Trinidad) contracted with Elmo Frosh, an individual farmer, to buy Frosh's navy bean crop for $16 per hundredweight at the end of the 1988 harvest. In May, when the price of navy beans was equal to the contract price, Frosh repudiated the contract.

Due to drought conditions, the price of beans rose from $16 per hundredweight in May 1988 to $37 at the time of harvest in mid-October and $36 per hundredweight in late September when Trinidad finally bought beans from other suppliers. The trial court rendered a verdict for Frosh because at the time of repudiation, the contract price was equal to the market price of $16 per hundredweight. Trinidad appealed on the ground that the proper time to measure damages was the time of the promised delivery in mid-October.

The court analyzed whether section 2-713's “learned of the breach” refers to time of repudiation or time of performance.287 It concluded that time of repudiation was the best interpretation288 for the following reasons: (1) time for performance gives no meaning to an aggrieved party’s option of waiting a commercially reasonable time for the other party to perform; (2) the pre-U.C.C. law allowing the aggrieved party to wait until performance for the repudiating party to fulfill its obligations is irrelevant; (3) measurement of damages at time of performance discourages the aggrieved party from covering, which would overcompensate the buyer and penalize the seller; and (4) the language of the cover remedy requires the buyer to cover without unreasonable delay.289 The court did concede the importance of cover by holding the measure of damages to be “the difference between the contract price and the price of the goods on the date of repudiation, so long as it would be commercially reasonable for the buyer to cover on the date of repudiation.”290 The aggrieved buyer, however, has the burden of proving that cover was commercially unreasonable on the repudiation date.291 If there is an available, established market, cover would be commercially reasonable as soon as possible after the repudiation.292

285. See id. at 1073.
287. See id. at 351. The court did not consider the third option of a commercially reasonable time or another time between time of repudiation and time of performance. See id.
288. See id. at 352.
289. See id. at 353.
290. Id.
291. See Trinidad Bean, 494 N.W.2d at 353.
292. See id. at 354.
D. IMPLICATIONS OF THE CASE LAW

In each of the cases addressing the time to measure damages after an anticipatory repudiation, the court recognized the primacy of the cover remedy. The *Trinidad* court used the time of repudiation to measure damages *as long as* it would be commercially reasonable to cover at the time of repudiation. The *Cosden* court used a commercially reasonable time after the repudiation to measure damages, partly out of deference to the cover remedy. The *Cargill* court used cover as the time to assess damages.

The courts have implemented a solution to the confusion of the Code sections that the commentators have not considered.

VI. THE SOLUTION

The best solution is to consider the primacy of cover under the U.C.C. Since one of the U.C.C. policies is to compensate the aggrieved party, cover should be used to resolve this quandary. As the Fifth Circuit notes, no solution can resolve all questions relating to damages under anticipatory repudiation. The ambiguous and conflicting language of the Code guarantees this. But most of the issues can be resolved.

The *Cosden* court was disingenuous in applying section 2-610 to section 2-713. There is no indication in the Code that section 2-610 modifies section 2-713. It would be inconsistent to apply an unrelated section just to resolve statutory complications. The better result is for a court to use the time the aggrieved party ought to cover, which *should still be a commercially reasonable time*. Cover is the commercially reasonable action when a buyer faces an anticipatory repudiation. And the cover remedy satisfies the policy in section 1-106 of fully compensating the aggrieved party. Using the time the buyer should cover to measure damages acknowledges the mitigation concept, which is an implicit policy in the U.C.C.

Using the time the buyer can and should cover penalizes neither the aggrieved buyer nor the repudiating seller. The buyer obtains the goods he needs and the seller will not pay an excessively exorbitant judgment. In addition, neither party receives a windfall. The seller will most likely anticipatorily repudiate a contract in a rising market. If repudiation were the time to measure damages, the seller would receive a windfall by not paying the difference of the cost of the goods between time of repudiation and the time the buyer covers. By measuring damages at the time the buyer should cover, the seller is giving the buyer his bargained-for expectation interest. If performance were the time to measure damages, the buyer would have no economic incentive to cover and could use the time between repudiation and performance to wait for the price to increase. This would be an inefficient breach because the seller would pay more than he should have if the buyer had covered at a commercially reasonable time.
If the buyer is unable to cover if the goods are scarce or because it is impossible for him to gather the resources to purchase the goods, cover is not a viable remedy, and the buyer's damages should be measured at time of performance. The aggrieved buyer should not be penalized for not being able to cover. Using the time of performance when the buyer cannot cover is still commercially reasonable.

This proposal of using cover as the time to measure damages resolves some of the complications among the Code provisions. Cover does not conflict with "learned of the breach" in section 2-713(1). The buyer will "learn" of the breach sometime after repudiation when he realizes that the seller will not perform. When he realizes that the seller will not perform, he should cover.

Using cover also allows the buyer to wait a commercially reasonable time for performance. Since the cover remedy itself is a commercially reasonable action for a buyer, the waiting period in section 2-610 is satisfied. This is consistent with the comment of section 2-610, which states that if the aggrieved party "awaits performance beyond a commercially reasonable time he cannot recover the resulting damages which he should have avoided." This implicates the policy of mitigation that runs throughout the Code. Cover is the ultimate mitigation remedy.

Measuring damages for anticipatory repudiation at the time the buyer should cover does not nullify the purpose of section 2-723 as using the time of repudiation does. If "learned of the breach" in section 2-713(1) meant "learned of the repudiation," section 2-723 would be superfluous. When the question of damages for anticipatory repudiation is litigated before time of performance, section 2-723 becomes operative and damages are measured at time of repudiation. If the buyer should have covered, regardless of whether time of performance has arrived, damages should still be measured at the time the buyer should have covered, even under section 2-723. The comment to section 2-723 allows the court leeway to develop different methods of calculating damages and using a different moment to determine damages qualifies.

By using the time that the buyer should cover as the time to measure the buyer's damages, a court compensates the buyer and fulfills the Code's expectation of mitigation of damages. If the buyer cannot cover, he is compensated at time of performance.

VII. CONCLUSION

For a court to entertain the question of when to measure damages for anticipatory repudiation requires a rare situation. To create this question requires two things: "(1) an anticipatory repudiation; and (2) a buyer who cannot use the goods under the time of performance or who is unable to

293. U.C.C. § 2-610, cmt. 1.
294. U.C.C. § 2-723, cmt.
cover." 295 When this question does arise, the best solution is to use the Code's innovative cover remedy. Using the time in which the buyer should cover resolves most of the confusion of the entangled Code provisions.