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## COMMENTS

### SELLER'S REMEDIES IN SALES CASES UNDER THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code<sup>1</sup> has been in effect in Wyoming since January 2, 1962.<sup>2</sup> At the date of this writing the Code had been adopted in forty-three of the fifty states and the District of Columbia.<sup>3</sup> Pennsylvania, the first state to enact the Code, did so in 1954,<sup>4</sup> and since that time law journals the country over have been reporting on, criticizing, and analyzing the various sections of the Code.<sup>5</sup> Legal writers have for the most part dealt with a comparison of the Code and prior law, in most cases the Uniform Sales Act. As the area of comparison has been more than adequately covered, this addition to the volumes already in print will take a slightly different approach.

This article will be concerned with but one area of the Code—sales remedies.<sup>6</sup> The purpose of this article is not to compare the Code with prior law but to attempt to provide a workable step-by-step guide to the use of the seller's remedies in sales cases under the Code. An attempt will be made to point out the interrelated Code sections which determine the availability of the Code remedies and the practical effect of the remedies themselves.

The proper starting point in an examination of statutory provisions is a determination of what the statute was intended to accomplish. The Code states that its purposes and policies are (a) "to simply, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (c) to make uniform the law among the various jurisdictions."<sup>7</sup> The achievement of the purposes

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1. Hereinafter designated the Code. Code sections are designated as they appear in the Uniform Commercial Code, *e.g.*, § 2-706. The sections referred to in this comment are identical in the Code and the Wyoming Statutes. The Code appears in the 1957 Wyoming Statutes under Article 34; therefore, § 2-706 in the Code appears as § 34-2-706 in the Wyoming Statutes.

2. § 10-105.

3. See UNIFORM COMMERCIAL CODE (U.L.A.) 5 (Supp. 1965) for a complete list of states and enacting statutes.

4. PA. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (1954).

5. See Carrington, *The Uniform Commercial Code—Sales, Bulk Sales, and Documents of Title*, 15 WYO. L.J. 1 (1960); Whiteside, *Uniform Commercial Code—Major Changes in Sales Law*, 49 KY. L.J. 165 (1960).

6. §§ 2-701 to -725.

7. § 1-102(2).

and policies of the Code is to be accomplished by a liberal construction of the Code sections to that end.<sup>8</sup> Remedies are to be liberally administered to the end that the aggrieved party is put in as good a position as he would have been had the contract been performed.<sup>9</sup> In examining specific provisions it should be noted first that section captions are part of the Code itself<sup>10</sup> and second that the Comments set forth the purposes intended to be accomplished by each section and are intended to facilitate construction of the Code.<sup>11</sup>

An aggrieved seller under the Code has three basic remedies: (1) an action for the price;<sup>12</sup> (2) damages based upon a substitute transaction;<sup>13</sup> and (3) damages based upon prevailing market prices.<sup>14</sup> The seller may also cancel the contract and reclaim goods in certain situations.<sup>15</sup> What follows is an attempt to illustrate the availability and practical effect of each of the seller's remedies.

### I. ACTION FOR THE PRICE

The seller may bring an action for the price (1) for goods accepted by the buyer; (2) for goods lost or damaged (within a commercially reasonable time) after risk of loss has passed to the buyer; or (3) for goods which the seller is unable to sell at a reasonable price after reasonable effort or where the circumstances indicate such effort would be unavailing.<sup>16</sup> A condition precedent to the seller's price action in any of the above situations is that the price be due and unpaid.<sup>17</sup>

#### A. Accepted Goods

Goods are "accepted" when the buyer signifies, by words, action, or silence when he should have spoken, that the goods are conforming or that he will accept them despite

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- 8. § 1-102(1).
  - 9. § 1-106(1).
  - 10. § 1-109.
  - 11. Comment to Title Section UNIFORM COMMERCIAL CODE.
  - 12. § 2-709.
  - 13. § 2-706.
  - 14. § 2-708. In a proper case the seller may be able to collect the profit lost on the contract under § 2-708. See *infra* p. 218.
  - 15. § 2-702.
  - 16. § 2-709(1).
  - 17. *Ibid.*

their non-conformity.<sup>18</sup> In the case of non-conforming goods the seller's price action will be subject to a set-off by the buyer of damages resulting from the non-conformity.<sup>19</sup>

The goods will also be deemed accepted if the buyer does not reject, by seasonably notifying<sup>20</sup> the seller, within a reasonable time.<sup>21</sup> What constitutes a reasonable time for rejection will depend upon the particular facts of each case.<sup>22</sup> In *Hudspeth Motors Inc. v. O. N. Wilkinson*<sup>23</sup> the court held that a buyer, who knew of defects the day he received a truck but made no claim of rejection for five months, had waived the right to reject because he did not reject within a reasonable time.<sup>24</sup>

Goods are deemed accepted if the buyer does any act inconsistent with the seller's ownership.<sup>25</sup> However, if the act is wrongful as against the seller the acceptance is good only if ratified by the seller.<sup>26</sup> Any exercise of ownership by the buyer after he has rejected the goods is wrongful,<sup>27</sup> and to make acceptance valid after rejection the seller must ratify the action. In *Park County Implement Co. v. Craig*<sup>28</sup> the Wyoming Supreme Court held that when the buyers began to install a hoist and dump bed on a truck received from the seller, they had accepted the goods under § 2-606 (1)(c) by doing an act inconsistent with the seller's ownership.<sup>29</sup> In *F. W. Lang Co. v. Fleet*<sup>30</sup> the buyer purchased an ice cream freezer and compressor unit on an installment contract. The buyer failed to make payments and two years after the buyer took possession the seller replevied the goods, resold them, and obtained judgment by confession, pursuant

18. § 2-606(1).

19. Under § 2-714 the buyer may recover damages arising out of non-conformity of accepted goods if he gives proper notice under §2-607 (3). He may collect the damages in an independent action or as a set-off against the price under § 2-717.

20. "A person 'notifies' or 'gives' a notice or notification to another 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." § 1-201 (26).

21. § 2-606(1)(b); § 2-602(1).

22. § 1-204.

23. 238 Ark. 410, 382 S.W.2d 191 (1964).

24. *Id.* at 192.

25. § 2-606(1)(c), see § 2-327 as to approval sales.

26. *Ibid.*

27. § 2-602(2)(a) subject to § 2-603 and § 2-604.

28. 397 P. 2d 800 (Wyo. 1964).

29. *Id.* at 802.

30. 193 Pa. Super 365, 165 A.2d 258 (1960).

to the contract, for the unpaid balance, giving credit for the resale. The buyer then claimed the goods were unusable for the purpose intended. The buyer had disconnected the compressor unit from the freezer and attached it to an air conditioner about one year after he took possession. The Pennsylvania Supreme Court in this case held that the seller had to ratify the exercise of ownership by the buyer before the act was deemed acceptance:

In the instant case the defendants exercised dominion over the compressor unit by using it to operate an air conditioner. This is completely inconsistent with the seller's ownership. The seller in this case by entering judgment for the unpaid balance ratified the sale as represented by the installment sales contract.<sup>31</sup>

Why the Pennsylvania court required ratification in this case is not clear; they could have stopped where the Wyoming court did, *i.e.*, simply finding an act inconsistent with the seller's ownership. Ratification by the seller is only necessary where the act the buyer does is wrongful as against the seller. In this case the act, disconnecting the compressor unit and attaching it to an air conditioner, was done before the buyer had even made his belated attempt to reject.

*F. W. Lang Co. v. Fleet*<sup>32</sup> also illustrates the rule that acceptance of any part of a commercial unit is acceptance of the whole.<sup>33</sup>

Where the buyer has accepted non-conforming goods on the assumption that the non-conformity would be cured and it is not cured or has accepted non-conforming goods without discovering the non-conformity because of difficulty in discovering or the seller's assurances, and the non-conformity substantially impairs the value of the goods, he may revoke

31. *Id.* at 261.

32. See note 30 *supra*.

33. " 'Commercial unit' means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character of value on the market or in use." § 2-105(b). "Acceptance of a part of any commercial unit is acceptance of that entire unit." § 2-606(2). This case held that the buyer was liable for the price of the entire unit (compressor plus freezer) even though the act which constituted acceptance was directed only at the compressor. See note 30 *supra*.

acceptance if he notifies the buyer within a reasonable time.<sup>34</sup> Some ambiguity arises where the buyer attempts to revoke acceptance but is not entitled to do so. The question is whether the acceptance stands (in which case the price action is available) or the buyer is then termed a rejector (in which case the price action would lie only if the goods were not resalable).

A buyer who rightfully revokes acceptance has the same rights and duties as a buyer who rejects.<sup>35</sup> Under § 2-703 wrongful revocation of acceptance is listed as a breach which enables the seller to pursue his § 2-703 remedies.<sup>36</sup> The Code thus recognizes the possibility of wrongful revocation of acceptance. However, the inclusion of wrongful revocation of acceptance in that section plus wrongful rejection seems to distinguish between the two. The inclusion of wrongful revocation of acceptance as grounds for pursuing the remedies available under § 2-703 can be interpreted as allowing the use of § 2-703 remedies with respect to the undelivered balance of an installment contract. Thus, if the buyer makes an unjustified revocation of acceptance of a part of the contract which substantially impairs the value of the entire contract the seller will be able to pursue the price action as to the goods directly concerned and other remedies as to the undelivered balance.

The Code both in text and comment would seem to indicate that an unjustified revocation of acceptance leaves the goods accepted. "Acceptance . . . if made with knowledge of a non-conformity cannot be revoked because of it . . ." <sup>37</sup> "Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer."<sup>38</sup> " 'Goods accepted' . . . include only goods as to which there has been no justified revocation of accep-

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34. § 2-608.

35. § 2-608(3).

36. "Where the buyer wrongfully rejects or revokes acceptance of goods . . . the aggrieved seller may (a) withhold delivery of such goods; (b) stop delivery by any bailee as hereinafter provided (section 2-705); (c) proceed under the next section respecting goods still unidentified to the contract; (d) resell and recover damages as hereinafter provided (section 2-706); (e) recover damages for non-acceptance (section 2-708) or in a proper case the price (section 2-709); (f) cancel." § 2-703.

37. § 2-607(2).

38. § 2-608, comment 2.

tance . . . .'<sup>39</sup> This would certainly imply that an unjustified revocation of acceptance leaves the goods accepted for purposes of the price action. An unjustified *rejection* automatically reverts title to the goods in seller but only a justified *revocation* of acceptance reverts the title.<sup>40</sup> Thus, an unjustified revocation of acceptance leaves title to the goods in the buyer. It would certainly follow that the buyer should be liable for the purchase price of such goods.

The argument has been made that there is no reason to distinguish between a wrongful rejection (no price action) and a belated wrongful rejection in the form of a wrongful revocation of acceptance.<sup>41</sup> This argument is not entirely persuasive. When the buyer has accepted the goods, the seller is then freed from caring for and disposing of the goods. If this burden can be shifted back to the seller at the buyer's pleasure, acceptance has little legal significance.<sup>42</sup> A wrongful revocation should leave the goods accepted for purposes of the price action.<sup>43</sup>

### B. Goods Damaged or Lost

The seller can recover the contract price for conforming goods damaged or lost within a commercially reasonable time after the risk of loss has passed to the Buyer.<sup>44</sup>

In the absence of a breach or special contractual provisions, if the contract calls for the seller to ship the goods by carrier but does not require delivery to a particular destination, the risk of loss passes to the buyer upon the seller's due delivery of goods to the carrier.<sup>45</sup> If the contract requires the seller to ship the goods by carrier to a particular

39. § 2-709, comment 5.

40. § 2-401(4); "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . ." § 2-401(2).

41. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap to Article Two*, 73 YALE L.J. 199, 241 (1963).

42. The revocation would have to comply with requirements of an effective rejection in order to shift the burden, but if the buyer can revoke acceptance of conforming goods and force the seller to dispose of them acceptance does not have much legal significance.

43. *Contra*, Peters, *supra* note 41, at 241.

44. § 2-709(1)(b).

45. § 2-509(1)(a). See § 2-504 for requirements of delivery in shipment contracts. Risk of loss will pass upon delivery to carrier even though shipment is under reservation under § 2-505. *Ibid.*

destination and the goods are duly tendered while in the carrier's possession, the risk of loss will pass to the buyer when the goods are so tendered as to enable the buyer to take delivery.<sup>46</sup>

When a bailee holds the goods and they are to be delivered without being moved, the risk of loss passes to the buyer (1) when he receives a negotiable document of title covering the goods; (2) when the bailee acknowledges buyer's right to possession of the goods; or (3) when he receives a non-negotiable document of title or the written direction to deliver.<sup>47</sup>

If the contract does not call for shipment by the seller or the goods are not in the possession of a bailee the risk of loss does not pass to the buyer until receipt of the goods if the seller is a merchant.<sup>48</sup> If the seller is not a merchant the risk passes on tender of delivery.<sup>49</sup> Under a contract calling for a sale on approval the risk of loss does not pass until acceptance.<sup>50</sup>

If a tender or delivery is non-conforming so as to give the buyer a right of rejection, the risk of loss remains on the seller until cure or acceptance.<sup>51</sup> When the buyer rightfully revokes acceptance of the goods, he is liable only to the extent of his effective insurance coverage.<sup>52</sup> Thus where the goods are lost or damaged after a justified revocation of acceptance the seller can collect the proceeds of the buyer's insurance but no more. If the buyer repudiates the contract or breaches in some other manner the seller may, as to conforming goods already identified to the contract, treat the risk of loss as being on the buyer for a commercially reasonable time, to the

46. § 2-509(1)(b). See § 2-503(3) for requirements of tender and delivery.

47. § 2-509(2). Under § 2-509(3) the risk does not pass until the buyer has had reasonable time to present the document or direction and if the bailee refuses to honor the document or direction the tender is defeated. The buyer may object to the type of tender if he does so reasonably. § 2-503(4)(b).

48. § 2-509(3); "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." § 2-104(1); "Receipt" of goods means taking physical possession of them." § 2-103(1)(c).

49. § 2-509(3). See § 2-503(1) for requirements of tender and delivery.

50. § 2-327(1)(a).

51. § 2-510(1).

52. § 2-510(2).

extent his insurance coverage is deficient.<sup>53</sup> This section does not allow the seller to identify goods to the contract after breach but limits him to conforming goods already identified.<sup>54</sup>

If the buyer's breach occurs after the goods are damaged or lost and risk has passed, he will be liable for the entire contract price. The burden will of course be on the seller to prove conformity.<sup>55</sup> The only problem in this area is the meaning of a "commercially reasonable time."<sup>56</sup> If seller ships the goods by carrier, no specific destination required, the risk passes on delivery to the carrier.<sup>57</sup> However, supposing the goods are in transit two months, the buyer wrongfully rejects two days after receipt of the goods and the goods are then destroyed, does this section adequately cover the situation? Is two months a commercially reasonable time? The Code does not indicate, either in text or comment, what constitutes a commercially reasonable time in connection with risk of loss. The Code does indicate in another section that all circumstances must be taken into account in determining a commercially reasonable time, "its length cannot be measured by any legal yardstick or dividend into degrees."<sup>58</sup> Logically it would seem that a "commercially reasonable time" should include at least the time in shipment; however, to date no cases have been reported under this section and the prior law is not helpful inasmuch as under the Uniform Sales Act the risk of loss was dependent upon passage of title.

### C. Non-Resalable Goods

The third basis for the seller's price action is the inability of the seller, after reasonable effort, to resell the goods at a reasonable price. The seller must actually make a reasonable effort to resell the goods unless the circumstances reasonably

53. § 2-510(3).

54. *Ibid.* The goods would have to be identified under § 2-501 before the breach in order to qualify under this section. For discussion of goods identified to the contract see *infra* p. 214.

55. If the goods are destroyed before the buyer accepts them, the burden is on the seller to prove conformity, but if the buyer once accepts goods the burden then shifts under § 2-607(4).

56. "When the buyer fails to pay the price as it becomes due the seller may recover . . . the price (a) . . . of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer . . ." § 2-709(1). See also § 2-510(3).

57. § 2-509(1)(a).

58. § 2-706, comment 5.

indicate that such effort would be unavailing.<sup>59</sup> The "reasonable effort to resell" is intended to provide an objective test to determine the availability of the price action.<sup>60</sup> However, by including the phrase, "or the circumstances reasonably indicate that such effort will be unavailing,"<sup>61</sup> the Code may not have appreciably changed the test used under prior law.<sup>62</sup> There does not seem to be much difference between the two tests: (1) where "the circumstances reasonably indicate that such effort will be unavailing;"<sup>63</sup> or (2) "the goods cannot readily be resold for a reasonable price."<sup>64</sup>

Where the goods have been specially manufactured for the buyer's particular needs there will generally be no problem; the circumstances will permit an action for the price. However, the question which remains to be answered is whether the seller will be forced to enter a new market or re-enter one which he does not now use in order to make the reasonable effort to resell. Under the Sales Act the seller did not have to do this. For instance:

The finding that there was no available market for the goods after the breach, and that jobbers and wholesalers place no orders after April for such goods, and that these goods are not goods kept in stock, but are manufactured on special order, fully shows that the goods could not be sold for a reasonable price. There was no obligation upon the manufacturer to sell these cards at retail or to the retail trade—that would have involved the undertaking on its part of a new business.<sup>65</sup>

The facts stated in this opinion would certainly seem to be circumstances indicating that an effort to resell at a reasonable price would be unavailing. Just what action the courts will require the seller to make in order to satisfy the

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59. § 2-709(1) (b).

60. § 2-709, comment 3.

61. § 2-709(1) (b).

62. Under § 63 of the UNIFORM SALES ACT the seller could maintain an action for the price where the goods could not "readily be resold for a reasonable price." WYO. STAT. § 34-228 (1957) repealed by Wyo. Sess. Laws 1961, ch. 219, § 10-101.

63. See note 61 *supra*.

64. See note 62 *supra*.

65. *Illustrated Postal Card & Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061, 1063 (1912).

reasonable effort to resell provision is not clear but the test does not seem to have been appreciably changed by the Code provision.

The seller may identify conforming goods to the contract after breach if the goods were in his possession or control at the time he learned of the breach.<sup>66</sup> The seller may also complete manufacture of unfinished goods and identify them to the contract if in his commercially reasonable judgment such action is necessary to avoid loss.<sup>67</sup> The seller's decision to complete manufacture need only be commercially reasonable in the light of the facts as they appear at the time he learns of the breach and the burden of proving that the decision was not commercially reasonable rests upon the buyer.<sup>68</sup> As the measure of damages is not clear under the Code where the seller sells the goods for salvage, the seller should, whenever commercially possible, finish the manufacture of goods. If the seller decides not to complete manufacture, he obviously cannot bring a price action, but whether the measure of damages is to be determined under the resale section<sup>69</sup> or the damages for repudiation section is not clear.<sup>70</sup> Under the Uniform Sales Act the seller in this situation was allowed to recover lost profits,<sup>71</sup> which might indicate that the seller should recover damages for non-acceptance under § 2-708(2).<sup>72</sup> However, § 2-708(2) is intended to operate where the goods involved are standard priced goods.<sup>73</sup> In any event the mea-

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66. § 2-704(1)(a).

67. § 2-704(1)(b), § 2-704(2).

68. § 2-704, comment 2.

69. § 2-706. Under § 2-704 the seller may "cease manufacture and resell for scrap or salvage value. . . ." This would seem to indicate that the measure of damages for unfinished goods would be the difference between the resale, salvage, price and the contract price less expenses saved as a consequence of the buyer's breach, which would be the seller's cost in finishing the goods. § 2-706. This would fairly accurately measure the seller's actual damage.

70. § 2-708; In the event the seller does not resell for scrap or salvage but uses the unfinished goods in some other manner as § 2-704 allows, "or proceed in any other reasonable manner," the measure of damages would be the profit on the contract.

71. UNIFORM SALES ACT, § 64(4), WYO. STAT. § 34-229 (4) (1957) repealed by Wyo. Sess. Laws 1961, ch. 219, § 10-101.

72. "If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in the article (section 3-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." § 2-708(2).

73. § 2-708, comment 2.

sure of 'damages provided by § 2-706<sup>74</sup> (difference between resale price and contract price) where the seller resells for salvage, or that provided by § 2-708(2)<sup>75</sup> (difference between market price at time and place for tender and contract price) gives the same effect as lost profits under prior law.

When the seller sues for the price he must hold the goods identified to the contract for the buyer and the buyer is entitled to the goods upon payment of the judgment.<sup>76</sup> However, if the seller gets an opportunity to resell the goods he may do so at any time before payment of the judgment but must then credit the buyer with the net proceeds of the sale.<sup>77</sup> Thus the seller with an unsatisfied judgment may resell the goods without forfeiting his right to the balance of the judgment. In *Carter, Moore & Co., Inc. v. Donahue*<sup>78</sup> the court refused to open a price judgment simply because the seller had resold the goods. After citing § 2-709(2) the court stated: "The judge may have determined that the goods had not been resold or, alternatively, that if the goods had been sold, there was no reason to believe that the defendant would not be credited with the net proceeds of the resale."<sup>79</sup>

In the event the seller is not successful in his price action but would otherwise be entitled to bring an action for damages under § 2-708 he may collect such damages in the same action.<sup>80</sup>

The seller may collect incidental damages in addition to the price in any price action.<sup>81</sup> Incidental damages will include any commercially reasonable expenditures made by the seller because of the buyer's breach.<sup>82</sup> This would normally include storage of goods, transport back to seller's place of business, etc.

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74. See note 69 *supra*.

75. See note 70 *supra*.

76. § 2-709(2). The seller may be in possession of the goods in any of the three situations discussed. Where the buyer revokes acceptance and it is not justified, the seller may take the goods pending litigation. When the goods are damaged the buyer may refuse to accept or where the goods are not resalable the seller may have possession of the goods.

77. § 2-709(2).

78. 345 Mass. 672, 189 N.E.2d 217 (1963).

79. *Id.* at 220.

80. § 2-709(3).

81. § 2-709(1).

82. § 2-710, comment.

## D. Remedy Modification by Contract

The Code limits the seller's price action to the three situations discussed above: (1) accepted goods, (2) goods damaged or lost for which the buyer bears the risk of loss or (3) non-resalable goods.<sup>83</sup> Within the framework of the Code the seller may bargain for a contract which provides for early passage of risk of loss or one which provides that the buyer has a specific time in which to inspect and reject the goods.<sup>84</sup>

The seller may also attempt to extend the availability of the price action by contracting for additional remedies outside the Code.<sup>85</sup> In providing for additional contractual remedies care must be taken to avoid the provisions of § 2-718.<sup>86</sup> In *Denkin v. Sterner*<sup>87</sup> the contract allowed the seller to (1) enter judgment in replevin and (2) confess judgment for the unpaid purchase price upon the buyer's default. The buyer repudiated the contract before any goods were delivered and the seller confessed judgment for the full purchase price. In a suit to open the judgment the court, after citing § 2-709, § 2-719, and § 2-718, stated:

While there seems little doubt from the depositions taken under the rule issued in this case that plaintiff is entitled to damages, for defendants admit that they canceled the agreement because they found out after checking that they could buy more equipment for less money elsewhere, yet it also seems evident under all the circumstances that to permit plaintiff to recover the full amount of the purchase price without showing what goods, if any, have been identified to the contract, what goods were standard items and readily salable and what goods had actually been

83. § 2-709, comment 2 and comment 6.

84. "Whenever this act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement." § 1-204(1).

85. "[T]he agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article . . ." § 2-719(1)(a).

86. "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty." § 2-718(1). The difficulty is that a term allowing confession of judgment for the purchase price may be considered as liquidated damages under § 2-718 rather than an additional remedy under § 2-719.

87. 10 Pa. D & C. 2d 203 (1956).

specially manufactured prior to the cancellation by defendants, as well as what goods have been or can be readily resold, would be in effect "unreasonably large liquidated damages" and, therefore, unconscionable and void.<sup>88</sup>

This case would seem to indicate that one of the seller's favorite remedies, that of confessing judgment upon default, is no longer available. However, the result in this case might have been different had the contract provided that the buyer was to receive the goods upon payment of the judgment.<sup>89</sup> The problem in this case was that the contract was not clear as to the buyer's right to the goods and the applicability of the provision to an anticipatory repudiation. The seller must exercise caution in the drafting of provisions allowing confession of judgment and replevin but they will be available if the contract is well written. Apart from possible restrictions under § 2-718 of the Code the seller should check the availability of confession of judgment under the statutes of his jurisdiction.<sup>90</sup>

## II. CANCELLATION

Where the buyer has (1) wrongfully rejected; (2) wrongfully revoked acceptance; (3) failed to make a payment due on or before delivery; or (4) repudiated, the seller has an immediate right to cancel the contract.<sup>91</sup> The effect of the seller's cancellation is to put an end to his obligation to perform but to allow him to pursue his remedies to any damages caused before or after the breach.<sup>92</sup> In the absence of contractual modification the practical value of the right to cancel is somewhat limited. If the seller still has the goods in his control at the time of the breach the right to cancel adds little to his other rights.

This right to cancel may, however, be of greater value if it is extended to goods in the possession of the buyer. If the seller can replevy goods from the buyer upon failure to make a payment due on or before delivery he will be able

88. *Id.* at 208.

89. 105 U. PA. L. REV. 764, 769 (1957).

90. See WYO. STAT. §§ 1-71 to -75 and §§ 1-610 to -616 (1957).

91. § 2-703(f).

92. § 2-106(3), (4).

to use the goods under a more favorable contract in some situations. When the buyer fails to make a payment due on or before delivery, *i.e.*, in a cash sale, the buyer's right to retain or dispose of the goods is conditioned upon his making the payment due.<sup>93</sup> However the seller's right to reclaim the goods may be waived if he does not demand payment and, if payment is not forthcoming, reclaim the goods within ten days after the buyer receives the goods.<sup>94</sup> Thus the seller may immediately cancel and reclaim the goods if the buyer fails to make a payment due on or before delivery. As long as the only parties involved are the buyer and the seller, the seller will be able to reclaim the goods. However, where third party lien creditors or purchasers are involved the right may be severely limited. The seller who attempts to reclaim goods may find himself designated as one pursuing a security interest and subject to the rights of innocent lien creditors of the buyer.<sup>95</sup> The seller's right to replevy goods in the absence of special contractual provisions is limited by the ten-day reclaiming requirement and the fact that his rights may be subject to lien creditors.<sup>96</sup>

If the buyer has sold the goods, the third party purchaser gains good title to the goods in most cases.<sup>97</sup> The seller's right to cancel and replevy goods in the absence of contractual provisions is not of real value because it is so severely limited and the informed seller should protect his interest in the goods by complying with Article 9 on security agreements if he wishes to protect his right to reclaim the goods.<sup>98</sup>

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93. § 2-507(2).

94. § 2-507, comment 3.

95. "The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2-401) is limited in effect to a reservation of a 'security interest.'" § 1-201(37); "[A]n unperfected security interest is subordinate to the rights of . . .

(b) a person who becomes a lien creditor without knowledge of the interest and before it is perfected." § 9-301(2).

96. The same limitations apply where the seller discovers the buyer to be insolvent. § 2-702.

97. If the buyer is a merchant and the sale is made in the ordinary course of business the purchaser obtains good title under § 2-403(2). If the purchaser does not buy in the ordinary course of business or the buyer is not a merchant, the purchaser may still obtain good title under § 2-403(1).

98. For discussion of secured transactions under Article 9, see Rudolph, *Secured Transactions under the Commercial Code*, 14 Wyo. L.J. 220 (1960).

## III. RESALE

Where the buyer (1) wrongfully rejects; (2) wrongfully revokes acceptance; (3) fails to make a payment due on or before delivery; or (4) repudiates, the seller may resell the goods and collect damages under § 2-706 or collect damages for non-acceptance under § 2-708.<sup>99</sup> If the goods are non-resalable the seller may, of course, recover the contract price as discussed above. If the contract calls for more than one delivery and the breach only concerns one delivery the seller may pursue his remedies as to the goods directly affected; if the breach of the one delivery substantially impairs the value of the entire contract<sup>100</sup> the seller may pursue his remedies as to the undelivered balance of the contract as well as the goods directly affected.<sup>101</sup>

If the seller complies with the requirements of resale he may collect the difference between the contract price and the resale price plus incidental damages less expenses saved as a result of the buyer's breach.<sup>102</sup> "Expenses saved" are nowhere defined in the Code but these expenses can reasonably be interpreted as out-of-pocket expenses the seller would have had to make had the contract been performed. This would include transportation costs for which the seller would have had to pay had the contract been performed. Incidental damages would include storage of goods, transportation to place of resale, and expenses of resale.<sup>103</sup>

"The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."<sup>104</sup> This statement does not clearly determine what goods are available for resale. However, the Comments to § 2-706 seem to indicate that in order to be available for resale the goods must have been identified to the contract either under § 2-704 or § 2-501 or

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99. § 2-703.

100. § 2-612.

101. § 2-703.

102. § 2-706(1).

103. § 2-710; see also § 2-706, comment 9.

104. § 2-706(2).

the goods must be future goods.<sup>105</sup> Under § 2-501, in the absence of explicit agreement, goods are identified to the contract when the contract is made if the goods are already existing and identified.<sup>106</sup> If the goods are not in existence or not identified at the time of the making of the contract, they will become identified to the contract when they are "shipped, marked or otherwise designated by the seller as goods to which the contract refers."<sup>107</sup> However, where the seller alone identifies the goods to the contract he may substitute other goods for those identified if he does so before default, insolvency, or notice to the buyer that the identification is final.<sup>108</sup>

Under § 2-704 the seller may identify conforming goods to the contract after the breach if they are in his possession or control at the time he learned of the breach.<sup>109</sup> The seller may also complete manufacture of unfinished goods and identify them to the contract if, in his reasonable commercial judgment, such action is necessary to avoid loss or effectively realize under the contract.<sup>110</sup> The seller should be able to resell all goods involved in the contract through the use of these sections or as future goods.<sup>111</sup> The only requirements that the seller must prove in order to make use of the resale remedy are (1) the buyer's breach;<sup>112</sup> and (2) conformity of the goods to the contract.<sup>113</sup>

The resale may be effected by a private sale, a public sale, or by identifying the goods to an existing contract of the seller.<sup>114</sup> The seller is not completely free to determine

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105. "The provision . . . that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. . . . The companion provision . . . that resale may be made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence." § 2-706, comment 7.

106. § 2-501(1)(a).

107. § 2-501(1)(b).

108. § 2-501(2).

109. § 2-704(1)(a).

110. § 2-704(1)(b); § 2-704(2).

111. "Goods which are not both existing and identified are 'future goods.'" § 2-105(2). Any conforming goods not identified under either § 2-501 or § 2-704 can be resold as future goods, even though in existence at the time of the breach.

112. See § 2-703(1).

113. § 2-706, comment 7.

114. § 2-706(2).

the method of resale.<sup>115</sup> The basic requirement of an effective resale is that it be made in good faith and in a commercially reasonable manner as to every aspect of the sale.<sup>116</sup> Where the resale is to be a public sale<sup>117</sup> only identified goods can be resold unless there is a recognized market for the sale of future goods of the kind, and the buyer must be notified as to the time and place for the sale.<sup>118</sup> Where the sale is to be private, however, the buyer need only be notified that the seller intends to resell.<sup>119</sup>

If the seller fails to comply with the requirements of § 2-706, he may not recover the difference between contract price and resale price, but must look to § 2-708 (market price difference) for his damages.<sup>120</sup> However, even though the seller fails to comply with § 2-706 a good faith purchaser at the resale takes the goods free of any right the original buyer may have had.<sup>121</sup> The seller in making the resale is selling the goods in his own right and is not accountable to the buyer for any profit he may make on the resale.<sup>122</sup>

The seller may make use of the resale remedy where he buyer has (1) wrongfully rejected; (2) wrongfully revoked acceptance; (3) failed to make a payment due on or before delivery; or (4) repudiated.<sup>123</sup> Some examination should be made of the practical effect of such breaches by the buyer.

Rejection by the buyer must be made within a reasonable time after the tender or delivery of the goods and the seller must be notified of the rejection in a reasonable time or the

115. "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." § 2-706, comment 4.

116. § 2-706(1) and § 2-706(2). See comment 5 which states, "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 the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees."

117. "By 'public' sale is meant a sale by auction." § 2-706, comment 4.

118. § 2-706(4). If the goods are perishable or threaten to decline speedily in value the notice to the buyer is not essential. § 2-706(4)(b).

119. § 2-706(3). See § 2-706, comment 8 which states: "Notification of the time and place of this type of [private] sale is not required."

120. § 2-706, comment 2.

121. § 2-706(5).

122. § 2-706(6).

123. § 2-706, § 2-703.

goods will be deemed accepted.<sup>124</sup> The rejection which allows the use of the resale is thus one which is made within a reasonable time but is wrongful because the goods do conform to the contract. If the buyer rejects goods he must hold them for the seller for a reasonable time to enable the seller to take the goods back.<sup>125</sup> Thus, even though the buyer has wrongfully rejected, the seller will have to retake the goods within a reasonable time and arrange a resale. If the rejection is not made within a reasonable time, the seller will not have the obligation of caring for the goods until the matter is resolved. However, as a practical matter, the seller may be well advised to take the responsibility of caring for the goods. If the seller is successful in his contention that rejection was not made within a reasonable time, the goods will be deemed accepted and the seller will have no responsibility for caring for the goods. However, if he is not successful in this contention, he will be forced to determine his damages under § 2-708.<sup>126</sup> Therefore, although the time for rejection may be considered unreasonable, if there is doubt, the seller should retake the goods and make use of the resale remedy. The buyer may, by rejecting within a reasonable time, force the seller to 'dispose of the goods and make a price action for the goods unavailable as a remedy.

The Code is not entirely clear as to whether the buyer may defeat the price action by revoking acceptance of conforming goods.<sup>127</sup> As has been discussed previously, a wrongful revocation of acceptance should leave the goods accepted and make the price action available.<sup>128</sup> However, the inclusion of wrongful revocation of acceptance in § 2-703 as a breach leaves the matter somewhat ambiguous. A revocation which is not made within a reasonable time would not be effective.<sup>129</sup> When the buyer revokes acceptance of conforming goods,

124. § 2-602, § 2-606. An action for the price under § 2-709 will be available for accepted goods.

125. § 2-602(2)(b).

126. § 2-709(3). If the goods are not resold before litigation the resale remedy will not be available.

127. See text accompanying note 43 *supra*.

128. *Ibid*.

129. § 2-608(2). Under § 2-608(3) the buyer who revokes has the same rights and duties as if he had rejected the goods. As a rejection which is not made within a reasonable time leaves the goods accepted, so should a revocation.

the seller gains nothing by retaking the goods and making use of the resale remedy. If the goods prove conforming, the price action will be available and if the goods are not conforming he gains nothing by resale as that action would not be available. However, where the question of conformity is in dispute the seller may be well advised to retake the goods and resell them, since if he is unsuccessful in the litigation he will at least have disposed of the goods.

When the buyer fails to make a payment due on or before delivery, the seller's use of the resale remedy will depend upon whether he has withheld delivery.<sup>130</sup> If the buyer accepts the goods, of course, the proper action will be one for the price. If the seller does not withhold delivery but allows the buyer to take the goods he will have little opportunity to use the resale remedy because of the difficulty of reclaiming the goods.<sup>131</sup> Thus the seller should not complete delivery of goods when the price is not paid if he wishes to preserve his resale remedy.

#### IV. DAMAGES FOR NON-ACCEPTANCE OR REPUDIATION

Where the buyer has (1) refused to accept the goods; or (2) repudiated the contract, the seller may recover as damages the difference between the market price at the time and place for tender and the unpaid contract price plus incidental damages but less expenses saved as a result of the buyer's breach.<sup>132</sup>

Incidental damages under this section would cover the same expenses as those under the resale section as would expenses saved.<sup>133</sup> The time and place for tender will be determined by terms of the sales contract and the effect given to trade terms by provisions of the Code.<sup>134</sup> In the event evidence of a price at the time and place for tender is not available, a price prevailing at a reasonable time before or after

130. § 2-703 (a).

131. See text accompanying note 96 *supra*.

132. § 2-708.

133. See text accompanying note 103 *supra*.

134. See § 2-319 for significance of F.O.B.; § 2-320 for significance of C.I.F. and C. & F.; § 2-321 for significance of C.I.F. or C. & F.; Net Landed Weight; Payment on Arrival; Warranty of Condition on Arrival; § 2-322 for significance of Delivery Ex-Ship; and § 2-324 for significance of No Arrival, No Sale Term.

the time provided by the contract may be used. Any place which by usage of trade and reasonable commercial judgment would serve as an adequate substitute may be used.<sup>135</sup>

If the measure of damages provided in subsection (1) [difference between contract price and market price at time and place for tender] is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. . . .<sup>136</sup>

The availability of this section to an aggrieved seller is not clear. It seems clear that it is available where standard priced goods are involved.<sup>137</sup> A dealer who deals in standard priced goods obviously does not gain anything by suing for the difference between the market price and the contract price, because the two prices are identical. What he has lost is his profit on the sale under the contract. In most cases dealers in standard-priced goods can obtain all the goods they can sell; therefore, by reselling the goods involved, he gains nothing, as he would have made that sale anyway.

While the Code states that the section is intended to alleviate the situation in the standard-priced goods case,<sup>138</sup> it does not limit the section in text or in the Comment to that case. Comment 2 states: "This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods." The text of § 2-708(2) boldly states that the lost profits remedy is available whenever "the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done. . . ." The availability of this section in cases other than standard-priced goods is not readily apparent. However, with some exceptions, this section will in most cases be limited in use to contracts involving standard-priced goods.<sup>139</sup>

135. § 2-723(2). In the event a substitute place is used, adequate allowance for transportation expenses is to be made. *Ibid.* Market reports are admissible in evidence under § 2-724.

136. § 2-708(2).

137. "This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods." § 2-708, comment 2.

138. *Ibid.*

139. See Peters, *supra* note 41, at 274.

One other situation where this section might apply is the situation in which goods are unfinished and the seller sells for salvage. In that case the market-contract price difference obviously is not adequate. The allowance of lost profits would adequately cover damages in that situation as § 2-708(2) provides for "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

Damages under § 2-708 may be recovered by the seller for non-acceptance of goods or for repudiation.<sup>140</sup> Non-accepted goods would obviously cover all rejected goods so that either resale under § 2-706 or damages under § 2-708 would be available when the buyer rejects the goods.

This section would not provide an adequate measure of damages where the buyer wrongfully revokes acceptance as the time for determining market price under this section is the time for tender.<sup>141</sup> Revocation of acceptance would necessarily come after such time and on a declining market, the measure of damages would not accurately measure the seller's damage. This would seem to support the interpretation that a wrongful revocation of acceptance leaves the goods accepted.

When the buyer fails to make a payment due on or before delivery this section will only be available if the seller stops delivery. Failure to pay the price when due would constitute a repudiation under § 2-610 but if the buyer accepts the goods the seller will have a proper price action.

#### V. ANTICIPATORY REPUDIATION

The seller may also make use of the resale remedy when the buyer has repudiated the contract. Repudiation of the contract may be shown by a variety of actions. If the seller has reasonable grounds he may demand adequate assurance of performance from the buyer and if such assurance is not forthcoming within thirty days, the contract will be considered

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140. § 2-708(1). Profits under § 2-708(2) can be recovered only if § 2-708(1) is not adequate so that section would only be available where § 2-708(1) was available but not adequate.

141. § 2-708(1).

repudiated.<sup>142</sup> Repudiation is not, however, limited to that situation. "Anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."<sup>143</sup> Where the buyer has repudiated the contract,<sup>144</sup> the seller may immediately resort to any remedy provided by § 2-703 or he may await performance for a commercially reasonable time.<sup>145</sup>

The seller may put an end to his obligations immediately by canceling if he so desires.<sup>146</sup> Whether the seller awaits performance or immediately resorts to his remedies he may identify goods to the contract under § 2-704.<sup>147</sup> If the seller wishes to continue the contract he should await performance by the buyer, who may retract his repudiation.<sup>148</sup> The seller must, however, be cautious for if he awaits performance beyond a commercially reasonable time he "cannot recover resulting damages which he should have avoided."<sup>149</sup> If the seller wishes to get out of an unsatisfactory contract and the buyer breaches in any way, he may do so by immediately canceling the contract and pursuing the right of resale.<sup>150</sup>

When the buyer repudiates the contract the seller may immediately sue for damages under § 2-708.<sup>151</sup> If the case comes to trial before the time for tender, his damages will be measured by the market price at the time he learned of the repudiation.<sup>152</sup> Presumably the language "at the time when

142. "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance . . ." § 2-609(1). "After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

143. § 2-710, comment 1.

144. As installment contracts are covered by § 2-612 and § 2-609 covers assurance of performance, repudiation as used in the Code seems to be defined by § 2-610 exclusively.

145. § 2-610. See Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DE PAUL L. REV. 1 (1964), for discussion of § 2-609 and § 2-610.

146. § 2-703. See text accompanying note 91 *supra*.

147. § 2-610(c).

149. § 2-610, comment 1.

149. § 2-610, Comment 1.

150. Cancellation is not essential; as long as the seller has materially changed his position the buyer cannot retract. § 2-611. However, by cancelling the seller immediately serves notice that he considers the contract repudiated and will no longer accept a retraction.

151. § 2-610.

152. § 2-723.

the aggrieved party learned of the repudiation,"<sup>153</sup> means exactly what it says so the seller who awaits performance may be penalized by waiting. If the seller awaits performance and it is not forthcoming, and the case comes to trial before the time for tender, he will not be able to recover any drop in the price between the time he learned of the repudiation and the time he pursues this remedy.

On the other hand, the seller must pursue some remedy within a commercially reasonable time or he will not be able to recover losses he could have avoided.<sup>154</sup> The measure of damages under this section may then vary depending upon the docket of the court the seller selects. If he immediately sues under § 2-708 and the case comes to trial before time for tender, the measure is the market price at the time he learned of the breach. However, if the case does not come to trial before time of tender then the market price at that time will depend upon the court's docket and the variance in the market. The seller can, of course, avoid this speculation by pursuing the resale remedy under § 2-706.

## VI. USE OF DAMAGE REMEDIES

The availability and practical value of the remedies provided by the Code will depend upon the type of goods involved and the type of breach. Where the goods cannot be resold the only adequate remedy is the price action, for although the seller may recover damages under § 2-708, he will still have the goods which he cannot dispose of without taking a loss. As previously discussed, the seller's right to reclaim goods, in the absence of contractual modification, is seriously hampered by the rights of third party lien creditors or purchasers. Here the price action is again the best remedy available.

When the seller is still in possession of goods which have a market, he seems to have a choice between two different methods of measuring his damages; (1) a substitute transaction or (2) the market price. The Code does not require

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153. *Ibid.*

154. § 2-610, comment 1.

resale, the primary remedy;<sup>155</sup> but in many cases, as will be shown below, the circumstances force the seller to use this remedy to avoid loss. The Code, however, is not clear as to whether the seller may actually resell and then rely upon § 2-708 if it turns out that this would be a more favorable remedy.<sup>156</sup> Prior to the 1957 draft of the Code the seller's right to recover damages for non-acceptance contained in the limitation "so far as any goods have not been resold."<sup>157</sup> However, the 1957 Code and subsequent drafts have deleted that language. This would seem to indicate that the choice is up to the seller.<sup>158</sup>

The seller's choice of remedies may be limited somewhat by the general rule that the aggrieved party must mitigate damages whenever possible.<sup>159</sup> Where there has been an anticipatory repudiation the seller may resort to any of his remedies under § 2-703 or he may await performance by the buyer for a commercially reasonable time.<sup>160</sup> If the seller waits beyond a reasonable time "he cannot recover resulting damages which he should have avoided."<sup>161</sup> This seems to require the seller to mitigate damages. However, what will be the result if the seller pursues his remedies under § 2-703? If the seller resells the goods within a reasonable time under § 2-706, he will have an absolute measure of damages and there is no problem with mitigation. If the seller resorts to his remedy under § 2-708 and the case does not come to trial before the time for performance, the measure will be the market price at the time for performance.<sup>162</sup> Under prior law the seller would have a duty to mitigate damages.<sup>163</sup> If the action for non-acceptance came to trial before the time for performance the measure of damages would be the market price at the time

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155. § 2-704, comment 1.

156. "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." § 2-703, comment 1.

157. All drafts of the Uniform Commercial Code prior to 1957 contained this language.

158. See Peters, *supra* note 41, at 260.

159. See *Sturgeon v. Phifer*, 390 P.2d 727 (Wyo. 1964).

160. § 2-610.

161. See note 153 *supra*.

162. § 2-708(1).

163. *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252 (1924) (Buyer repudiated and seller knew market was falling, seller had duty to mitigate damages).

the seller learned of the breach and there would be no problem of mitigation.<sup>164</sup> If the seller has in fact resold he will gain no advantage by using § 2-708 as a measure of damages unless the case comes to trial before the time for performance.<sup>165</sup>

If the breach is at the time for performance there will be no problem of mitigation as the time for determining market price will have passed.

Practical considerations must also be taken into account in determining the best available remedy. Damages under § 2-708 are determined by the time for performance. On the other hand the measure of damages determined by resale is determined at the actual time of resale. Thus, in a falling market the seller is best protected by using the resale remedy. It will take the seller some time to dispose of the goods and any drop in price between the time for performance and actual resale will not be reflected in the measure of damages under § 2-708 while it will be under § 2-706.

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164. § 2-723.

165. If the case comes to trial before the performance date the seller may be able to resell at a favorable price and still collect damages under § 2-708 but otherwise the resale will be a mitigation of damages.