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## The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique

John M. Breen

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# The Lost Volume Seller and Lost Profits Under U.C.C. § 2-708(2): A Conceptual and Linguistic Critique

JOHN M. BREEN\*

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It is, as a matter of fact, clear that the things which the law of damages purports to "measure" and "determine"—the "injuries", "items of damage", "causal connections", etc.—are in considerable part its own creations, and that the process of "measuring" and "determining" them is really a part of the process of creating them . . . . In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a "loss" only by reference to an unstated *ought*.

L. L. Fuller and William R. Perdue, Jr.†

## I. INTRODUCTION

Suppose that a customer enters into a contract for the purchase of a boat from a seller in the business of selling such goods. Just before

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† L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest In Contract Damages*, 46 YALE L.J. 52, 52-53 (1936).

delivery is scheduled to take place, the would-be buyer repudiates the deal. The seller, being a resourceful businessperson, subsequently resells the boat to another buyer for the original contract price. Has the seller suffered any damages due to the breach by the original buyer, or has the seller made herself whole by effecting a prompt resale to a substitute purchaser?

Since 1972,<sup>1</sup> courts have consistently<sup>2</sup> held that such a seller has been damaged and is entitled to an award of lost profits under section 2-708(2) of the Uniform Commercial Code ("Code").<sup>3</sup> With the support of the vast majority of commentators,<sup>4</sup> courts have held that the total volume of sales that the seller would have made has been reduced by the buyer's breach. The seller's resale of the contract goods to a subsequent buyer does not replace this "lost volume," because if the original buyer had not breached, the seller would have made two sales, not just one, and thus would have earned an additional unit of profit. Only a damage

1. See *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972).

2. There appears to be only one reported case which has held otherwise. See *Northeastern Vending Co. v. P.D.O., Inc.*, 606 A.2d 936 (Pa. Super. Ct. 1992) discussed *infra* note 163.

3. U.C.C. § 2-708(2) (1994).

4. Professor Robert Harris was the first person to write extensively on U.C.C. § 2-708(2). In many ways he is responsible for judicial adoption of the lost volume seller theory. See Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66 (1965) [hereinafter Harris, *Seller's Damages*]; Robert J. Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577 (1962) [hereinafter Harris, *General Theory*]; Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: Michigan Results Compared*, 61 MICH. L. REV. 849 (1963); Robert J. Harris, *A Radical Restatement of the Law of Seller's Damages: New York Results Compared*, 34 FORDHAM L. REV. 23 (1965); Robert J. Harris & Kenneth Graham, *A Radical Restatement of the Law of Seller's Damages: California Results Compared*, 18 STAN. L. REV. 553 (1966). Since Harris' early writings on the subject, many others have contributed articles in favor of the lost volume seller. With some exception, these later pieces have largely repeated the arguments first put forth by Professor Harris justifying the award of lost profits to sellers who resell completed goods. See, e.g., 1 ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR LOST PROFITS* §§ 2.8-9 (4th ed. 1992); ROBERT J. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 177 (1970); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* §§ 7-8 to -14 (3d ed. 1988); Roy Ryden Anderson, *Damages for Sellers Under the Code's Profit Formula*, 40 SW. L.J. 1021 (1986); Robert Childres & Robert K. Burgess, *Seller's Remedies: The Primacy of UCC 2-708(2)*, 48 N.Y.U. L. REV. 833 (1973); William L. Schlosser, *Construing UCC Section 2-708(2) to Apply to the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 686 (1973) [hereinafter Schlosser, *Construing*]; William L. Schlosser, *Damages for the Lost-Volume Seller: Does an Efficient Formula Already Exist?*, 17 UCC L.J. 238 (1985); John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360 (1981); Note, *Seller's Recovery of Lost Profits for Breach of a Sales Contract: Uniform Commercial Code Section 2-708(2)*, 11 WM. MITCHELL L. REV. 227 (1985). Several authors have also written about the lost volume seller problem from a law and economics perspective. See Charles J. Goetz & Robert E. Scott, *Measuring Sellers' Damages: The Lost Profits Puzzle*, 31 STAN. L. REV. 323 (1979); Victor P. Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 S. CAL. L. REV. 283 (1984); Comment, *A Theoretical Postscript: Microeconomics and the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973); Paul S. Caselton, Note, *Lost-Profits Damage Awards Under Uniform Commercial Code Section 2-708(2)*, 37 STAN. L. REV. 1109 (1985).



award of lost profits for this lost volume can make the seller whole again and thus achieve the normative goal of Code remedies.<sup>5</sup>

Advocates for the so-called "lost volume seller" argue that the lost profits remedy available under U.C.C. § 2-708(2) was specifically designed to address this problem. Section 2-708(2) provides that where the contract price-market price differential available under U.C.C. § 2-708(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 this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.<sup>6</sup>

Courts and commentators have argued that the prerequisite for applying the lost profits remedy is satisfied with respect to the lost volume seller for two reasons. First, the contract price-market price differential is often inadequate to put the seller in as good a position as performance would have done because the goods are fixed priced hence, there will be no differential.<sup>7</sup> Second, even when the goods are not standard-priced, when there is some difference between the original contract price and the prevailing market price, this differential will almost invariably be less than the profit margin the seller would have obtained on the original sale.<sup>8</sup>

Even if it is conceded that the lost volume seller satisfies this precondition for the application of the lost profits remedy, the plain language of section 2-708(2) nevertheless appears to preclude such a remedy. A lost volume seller succeeds in reselling the completed goods identified in the contract where the buyer wrongfully rejected the

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5. See U.C.C. § 1-106 (1994); *Snyder v. Herbert Greenbaum and Assocs., Inc.*, 380 A.2d 618, 625 (Md. Ct. Spec. App. 1977) (liberally construing Code remedies to the end that the aggrieved party may be put in as good a position as if the other party had fully performed); see also *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982).

6. U.C.C. § 2-708(2) (1994).

7. See discussion *infra* part I.B.

8. See discussion *infra* part I.B.

goods,<sup>9</sup> wrongfully revoked his or her acceptance of the goods,<sup>10</sup> or repudiated the contract.<sup>11</sup> Section 2-708(2) provides, however, that the calculation of lost profit damages includes "due credit for payments or proceeds of resale."<sup>12</sup> Under the literal language of section 2-708(2), if the price obtained on resale is applied, as the statute provides, against the profit the seller expected to make on the original contract, the seller will recover nothing—a point conceded by both courts and commentators who favor the lost volume seller.<sup>13</sup>

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9. Under the Code, the seller's basic obligation is to transfer and deliver conforming goods, and the buyer's basic obligation is to accept and pay for goods in accordance with the contract. U.C.C. § 2-301 (1994). A buyer may reject the goods "if the goods or the tender of delivery fail in any respect to conform to the contract." U.C.C. § 2-601 (1994). If, however, the buyer rejects conforming goods, the seller may pursue any of the remedies for breach set forth under U.C.C. § 2-703. Courts have awarded lost profit damages under U.C.C. § 2-708(2) to sellers where the buyers wrongfully rejected conforming goods. *See* *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979) (awarding the seller lost profits after seller's buyer wrongfully rejected conforming goods).

10. The Code provides that the buyer must either accept or reject the tendered goods. There is no middle ground: "Acceptance of goods by the buyer precludes rejection of the goods accepted . . ." U.C.C. § 2-607(2) (1994). The buyer may, however, revoke his or her acceptance of the goods if the goods are nonconforming and the nonconformity "substantially impairs" the value of the goods to the buyer. The revocation is valid only if either (1) the buyer accepted the goods knowing of the nonconformity but reasonably assuming that the buyer would cure it, or (2) the buyer accepted the goods without discovering the nonconformity because of the difficulty of discovery or because of the seller's assurances. U.C.C. § 2-608(1) (1994). If the buyer revokes his or her acceptance of the goods without satisfying the conditions of § 2-608, such revocation is wrongful against the seller, who may then pursue any remedy for breach under U.C.C. § 2-703 (1994). For a case where the court awarded lost profits under U.C.C. § 2-708(2) to a seller whose buyer wrongfully revoked acceptance, *see* *Automated Medical Lab., Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (5th Cir. 1980).

11. Under the Code, a party to a contract for the sale of goods "repudiates" the agreement by "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." U.C.C. § 2-610 cmt. 1. As is the case with wrongful rejection and wrongful revocation of acceptance, a seller whose agreement is repudiated by the buyer may pursue any remedy for breach. Likewise, courts have found the lost profits remedy applicable in this context. *See, e.g.,* *R.E. Davis Chem. Corp. v. Diasionics, Inc.*, 924 F.2d 709, 711 (7th Cir. 1991) ("[A] broken contract costs a lost volume seller . . . its profit on one sale. To be made whole, a lost volume seller must thus recover damages equal to the profit it lost on the sale."); *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982).

12. U.C.C. § 2-708(2) (1994). The issue is, in fact, more complex than simply accounting for the "due credit" language. The final phrase of § 2-708(2) actually provides that the lost profit damage calculation shall include "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." Any legitimate interpretation of § 2-708(2) must take into account both the "due allowance" and the "due credit" language. *See* discussion *infra* part IV.A.

13. Although commentators admit that a literal application of § 2-708(2) will yield no profit for the lost volume seller, they insist that such a seller is entitled to recover lost profits and that a literal application of the statute is incorrect. Their rhetoric in this regard displays an unmistakable arrogance in the correctness of their position. *See, e.g.,* *WHITE & SUMMERS, supra* note 4, § 7-13, at 325 ("[I]f one gives [the breaching buyer] due credit for the resale, 2-708(2) will produce no damages, and it will misfire in every other lost volume case."); *id.* at 326 ("As the formula is now written, it simply will not yield the recovery which all right-minded people would agree the lost

Advocates of the lost volume seller employ two alternate strategies to avoid the untoward effects of this statutory language. First, they argue that the "due credit" language should simply be ignored, because that is the only way in which "correct" results can be obtained.<sup>14</sup> This approach has the advantage of being clear and resolute, but remains problematic because of its inventive means of statutory construction.<sup>15</sup>

The second approach taken to the "due credit" language is to rely upon the drafting history of section 2-708(2). Advocates of the lost volume seller argue that the section's drafting history shows that the problematic "due credit" language was not intended to apply to the lost volume seller. Instead, they argue, this language was designed to apply only to sellers who are either distributors who never acquire the contract goods, or manufacturers who never complete production of the goods and who resell the partially completed goods for scrap.<sup>16</sup>

As noted above, courts have largely followed one or both of these strategies when confronting the "due credit" language. Because this linguistic hurdle has been avoided, the path to the lost profits remedy is unimpeded. Moreover, because they believe that the lost profits remedy is the appropriate remedy for most sellers,<sup>17</sup> advocates of the lost volume seller have confidently proclaimed the primacy of U.C.C. § 2-708(2) among Code remedies for sellers.<sup>18</sup> Their view has become the

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volume seller should have."); Anderson, *supra* note 4, at 1025 ("Read literally, the provision cannot be applied correctly."); *id.* at 1052 ("Taken on its face, this provision would require that the buyer obtain credit for the amount received by the lost volume seller upon resale of the goods. An illogical result follows: the seller is denied a profit it would have otherwise earned."). Harris, *Seller's Damages*, *supra* note 4, at 98 ("A lost volume plaintiff would receive only nominal damages if he used the statutory formula . . ."); Sebert, *supra* note 4, at 393 ("[A] faithful application of section 2-708(2)'s formula to the lost volume seller produces an incorrect result" in that it awards no recovery) (footnote omitted); *id.* at 410 ("[T]he literal formula of section 2-708(2) is inappropriate when applied to lost volume sellers.").

14. See, e.g., WHITE & SUMMERS, *supra* note 4, § 7-13, at 326; see also discussion *infra* part II.C.1.

15. Harris suggests, however, that "[p]erhaps a court can ignore the terms of the subsection in this situation without running afoul of certain conventional notions of statutory construction, which preclude a judicial determination that legislative language is mere surplusage, on the ground that these terms would be surplusage in only one situation. . . ." Harris, *Seller's Damages*, *supra* note 4, at 106. The problem with this argument is that supporters of the lost volume seller believe that the lost volume scenario presents the most frequent occasion for application of § 2-708(2). See *infra* notes 100-01 and accompanying text. Indeed, they believe that § 2-708(2) was specifically designed and intended to apply to the lost volume seller.

16. See, e.g., Anderson, *supra* note 4, at 1052 ("The due credit provision, then, applies only to the situation in which a seller, left at breach with partially manufactured goods, sells the incomplete goods as components or scrap."); see also discussion *infra* part II.C.2.

17. See Childres & Burgess, *supra* note 4, at 835 ("Theoretically, the lost-profit formula can be applied to all sellers without regard to factual circumstances.").

18. *Id.* at 836 ("[I]t is in the interest of the administration of contract remedial policy that the lost-profit damages measure be applied as the primary rule of seller's general damages."); *id.* at 860 ("[I]f aggrieved sellers are to be made whole, 2-708(2) must be treated as the principal

prevailing orthodoxy. The lost profits remedy under section 2-708(2) is now seen as the "Pearly Gates" of sellers' remedies,<sup>19</sup> through which the vast majority of aggrieved sellers should be permitted to walk.<sup>20</sup>

In this Article I shall argue that this perception of the purpose and function of section 2-708(2), though plausible, is profoundly mistaken. My argument consists of three basic points. First, I shall argue that the award of lost profits under section 2-708(2) results in a windfall gain for the lost volume seller and that this both violates the normative principle governing remedies under the Code and is contrary to the normative order embodied elsewhere in the law of contracts and contract damages. The courts and commentators who favor the award of lost profits to the seller who resells finished goods following breach believe that as a matter of fact "[t]he breach and resale have reduced [the seller's] total volume of sales by the quantity rejected by [the original buyer],"<sup>21</sup> and that "no remedy other than an award of lost profits [will] be adequate to make [the seller] whole . . . ."<sup>22</sup> But damages are not, as Fuller and Perdue remind us, facts. Although damages are surely, in part, the product of empirical inquiry, they are not mere descriptions of "data of nature." They are also prescriptive in nature, the product of evaluation. Because the question of what constitutes a "loss," an "injury," or "damage" reflects a choice as to what is and is not to be valued in the law, the content of these terms is, as Fuller and Perdue say, "the reflection of a normative order."<sup>23</sup> I shall argue that the award of lost profits to so-called lost volume sellers systematically overcompensates such sellers

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damages measure in the UCC."); *id.* at 884 ("The primary rule for sellers with either finished or unfinished goods is the lost-profit rule in 2-708(2)."); Anderson, *supra* note 4, at 1022 (arguing that section 2-708(2) is the "most important" and the "dominant" damage remedy, and that courts ought to "regard the profit formula as the most important Code damage remedy for sellers."); *id.* at 1063 ("Under the Code's scheme the profit formula of section 2-708(2) is truly the dominant damage remedy for aggrieved sellers who suffer a breach prior to the time that the buyer accepts the goods."); Harris, *Seller's Damages*, *supra* note 4, at 93 (referring to § 2-708 as the Code's "basic damage remedy" for sellers).

19. See WHITE & SUMMERS, *supra* note 4, § 7-11, at 319.

20. See WHITE & SUMMERS, *supra* note 4, § 7-14, at 332 ("[W]e are persuaded that lost profits under 2-708(2) is the proper and best measure of damages in the large majority of cases . . . ."); Anderson, *supra* note 4, at 1025 (arguing that because § 2-708(2) will apply to "the vast majority of actual mercantile cases, the profit formula of § 2-708(2) is indeed the most important of sellers' damage remedies"); Childres & Burgess, *supra* note 4, at 834 ("[Section 2-708(2)] is potentially applicable in all situations, while the other [sellers' remedy] provisions are significantly restricted in applicability."); Sebert, *supra* note 4, at 366 ("[Section 2-708(2)] will be the appropriate measure of damages in a substantial majority of cases involving merchant sellers.").

21. Harris, *Seller's Damages*, *supra* note 4, at 81.

22. 1 DUNN, *supra* note 4, § 2.9, at 103.

23. Perhaps a concrete example would clarify this point. Whether or not your arm is broken is a factual issue which can be resolved independently of the normative order of the law. However, whether or not your broken arm constitutes an "injury" for which "damages" must be

for any losses they may have incurred. By awarding such a seller the profit that she would have earned on the original contract, courts place such a seller in a better economic position than performance would have done. This violates the guiding normative principle of remedies set forth in U.C.C. § 1-106. That section provides that the goal of Code remedies is to place the aggrieved party "in as good a position as if the other party had fully performed . . . ."<sup>24</sup> Furthermore, by providing the lost profits remedy to sellers who successfully resell completed goods, courts are valuing interests and protecting expectations that are neither recognized nor protected under the normative order of contract law and contract damages. This is because the seller is really claiming an expectation interest in a certain postcontractual market. Contrary to this, however, the law neither values nor protects such purported interests. Indeed, as will be discussed in more detail below, the original buyer may (and is in fact encouraged to) legally reduce the seller's volume by taking delivery of the goods and reselling them in the seller's market.<sup>25</sup>

Second, I shall argue that the drafting history behind U.C.C. § 2-708(2) does not support the claims made by advocates of the lost volume seller that would restrict the application of the "due credit" language. As noted above, courts and commentators have argued that the drafting history shows that the Code drafters intended the "due credit" language to apply only to sellers who never obtain completed goods through purchase or manufacture.<sup>26</sup> However, the statute on its face does not limit the application of the "due credit" language in any way. Moreover, it is preposterous to suggest that a significant portion of section 2-708(2) should simply be ignored to accommodate the results achieved by applying the statute with the results that one believes are the most normatively appealing. Although there are a variety of interpretive strategies and sources of authority through which lawyers can derive meaning from the Code text, the exercise of unfettered political choice is not one of them.<sup>27</sup>

Furthermore, although it is plausible to read the drafting history as the lost volume seller advocates suggest, this reading is neither the only possible interpretation of the historical record nor the best. The drafting

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paid in order to "compensate" you for your "loss" raises a host of legal questions which cannot be divorced from the normative order of law.

24. U.C.C. § 1-106 (1994). This goal of Code remedies is also specifically reiterated in U.C.C. § 2-708(2). That provision states that the lost profits remedy is available where the contract price—market price differential provided in § 2-708(1) is "inadequate to put the seller in as good a position as performance would have done . . . ." U.C.C. § 2-708(2) (1994).

25. See discussion *infra* part III.A.

26. See *supra* note 16 and accompanying text.

27. See discussion *infra* part IV.A. I use the term "political" here of course in a broad sense to refer to decisions which call for the exercise of normative judgment.

history should instead be read another way. The advocates of the lost volume seller read the drafting history of section 2-708(2) with an assumption that is critical to their analysis, yet fundamentally flawed. They assume that section 2-708(2) was drafted with the intention of awarding lost profits both to sellers who have finished goods to resell following breach (i.e., lost volume sellers) and to sellers who do not have finished goods to resell.<sup>28</sup> They find, somewhat to their surprise, that the entire damage formula set forth in section 2-708(2), including the "due credit" language, "works like a charm"<sup>29</sup> when applied to sellers who do not have finished goods to resell following breach. The "due credit" language only becomes problematic when the section is applied to sellers who resell completed goods. Rather than abandon the assumption that the statute applies to such sellers in the first place, the objective then becomes how to void the effect that the "due credit" language has on lost volume sellers. As noted above, one means the commentators have suggested for achieving this objective has been to ignore the statutory language.<sup>30</sup>

I propose that the statutory text be approached with a different background assumption. I shall argue that section 2-708(2) was not drafted with the lost volume seller in mind. Clearly, the drafting history does not support the claim that section 2-708(2) was specifically designed to address the lost volume phenomenon.<sup>31</sup> Instead, the history of section 2-708(2) suggests that, to the extent the drafters considered the lost volume seller at all, they decided that such a seller would be fully compensated by utilizing one of the other available Code remedies.<sup>32</sup> Section 2-708(2) and its drafting history should be read as presumably *not* applying to any seller who effected a resale of finished goods. Although the drafting history indicates that the "due credit" lan-

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28. This latter group of sellers is generally referred to as either "jobber" sellers or "components" sellers. Professor Harris coined both of these terms, as well as the term "lost volume" seller. See WHITE & SUMMERS, *supra* note 4, § 7-10; Anderson, *supra* note 4, at 1023 n.9; Harris, *Seller's Damages*, *supra* note 4, at 80-81, 97-98. A "jobber seller" is a distributor, one who purchases goods for the purpose of reselling them to someone else. With respect to § 2-708(2), a jobber seller is one who never actually acquires the contract goods, and never becomes legally obligated to acquire them. A "components seller" is one who agrees to manufacture or assemble the contract goods but who, following breach and in the exercise of reasonable commercial judgment, never completes production. WHITE & SUMMERS, *supra* note 4, § 7-10; see also discussion *infra* part II.C.2(c).

29. WHITE & SUMMERS, *supra* note 4, § 7-13, at 327.

30. See *supra* notes 14-15 and accompanying text.

31. The advocates of the lost volume seller generously season their writings with references to the intent of the Code drafters and their purported goal of making the lost volume seller whole. The commentators' citations to the drafting history (when given), however, do not support the boldness of their claims. See discussion *infra* part II.C.2.

32. See discussion *infra* part IV.B.

guage was intended to apply to sellers who resold incomplete goods for scrap, that does not mean that the language was to be "limited" to this specific class of seller. Rather, the drafters foresaw no other type of seller to which the section would apply other than the seller whose buyer breached but who had no completed goods to resell. I shall argue that the "due credit" language was added simply to ensure that such sellers would not be overcompensated.<sup>33</sup> Thus, by approaching the text with a different background assumption, the "due credit" language is rendered unproblematic and the drafting history is easily understood.

Furthermore, I shall argue that the drafting history relied upon by the courts and commentators in defense of the lost volume seller is sorely incomplete. This history has focused on prior drafts of section 2-708 and the accompanying, explanatory comments, with particular attention given to Supplement No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code. This was the first Code draft to contain the "due credit" language.<sup>34</sup> Some support for the lost volume seller position has also been gleaned from the New York Law Revision Commission's Report Relating to the Uniform Commercial Code.<sup>35</sup>

Although the Supplement No. 1 draft of section 2-708 is significant, it is not significant in the way suggested by courts and commentators to date because, as stated above, they have read the draft in the light of a mistaken assumption. Furthermore, prior drafts of Code sections other than section 2-708 show that the Code drafters did not intend for the lost profits remedy to be available when the aggrieved seller successfully resold completed goods. Specifically, I shall argue that the prior drafts of section 2-703 show that the drafters did not intend the lost

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33. See *infra* notes 104, 264-65, 444-64 and accompanying text.

34. SUPPLEMENT NO. I TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE (1955).

35. In 1953, the New York legislature referred the proposed Uniform Commercial Code to the New York Law Revision Commission for review and recommendations. Adoption of the UCC by the New York legislature was crucial for the Code project's success because of New York's importance in the national economy as a center for commerce, banking, and finance. In 1956, the Commission issued a report recommending that New York not adopt the Code without extensive revision. See NEW YORK LAW REVISION COMMISSION, REPORT RELATING TO THE UNIFORM COMMERCIAL CODE 68 (1956). Many of the Commission's recommendations were incorporated in 1957 into a revised official version of the Code text. A complete revised Official Text and Comments edition of the Code was published in 1958. New York enacted the Code in 1962. See generally E. ALLAN FARNSWORTH, CONTRACTS § 1.9 (1982); WHITE & SUMMERS, *supra* note 4, §§ 1-4, at 1-14; Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). Because of the Commission's thoroughness and the fact that many of its recommendations were incorporated into subsequent drafts, the New York Law Revision Commission Reports are widely regarded as a valuable resource in interpreting the Code.

profits remedy to be available to sellers of completed goods. Section 2-703 provided that section 2-708 was only available to sellers "so far as any goods have not been resold."<sup>36</sup> The language specifically limiting the remedy in this way was later deleted from the Official Draft of the Code because of the New York Law Revision Commission's exaggerated and unrealistic understanding of the Code's general policy against the doctrine of election of remedies.<sup>37</sup> The addition of the "due credit" language to section 2-708 was at best unrelated to the Commission's report and recommendations concerning that section and at worst a thorough rejection of the Commission's position.<sup>38</sup> The end result of my argument based on the drafting history will be a novel approach: the statutory language of section 2-708 should be applied on its face and the lost volume seller should receive only incidental damages.

My third and final argument concerning section 2-708(2) will be an argument in favor of the value of coherence in resolving interpretive disputes about the Code. Much has been written in recent years about coherence as a normative principle in interpretation and its usefulness in evaluating competing interpretations of the same text. Coherence, it is argued, is surely a part of our legal practice in that its use in legal interpretation is beneficial.<sup>39</sup> In the physical world, coherence is that quality among distinct items which causes them to stick together and resist separation. With respect to ideas, concepts, and beliefs, coherence denotes a systematic interrelatedness "stronger than mere consistency (freedom

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36. See discussion *infra* part IV.B.

37. See discussion *infra* part IV.B.5(b).

38. See discussion *infra* part IV.B.5.

39. Professor Ronald Dworkin has been the source of much of this discussion. See generally RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*]; RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in *THE POLITICS OF INTERPRETATION* 287 (W.J.T. Mitchell ed., 1983) [hereinafter Dworkin, *My Reply*]; Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) [hereinafter Dworkin, *Law as Interpretation*]. Other writings about the value of coherence include David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (reviewing Ronald Dworkin's book *A MATTER OF PRINCIPLE*). Of course, Dworkin and other legal coherence theorists have not been without their critics. See, e.g., J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993); Barbara B. Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & PHIL. 355 (1984); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992). Professor Stanley Fish in particular has had a lively, ongoing debate with Dworkin. See Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982) [hereinafter Fish, *Chain Gang*]; Stanley Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983) [hereinafter Fish, *Wrong Again*]; Stanley Fish, *Still Wrong After All These Years*, 6 L. & PHIL. 401 (1987) (reviewing Dworkin's book *LAW'S EMPIRE*).



from contradiction) yet weaker than entailment."<sup>40</sup> Thus, we can speak of the consistency of a legal principle or proposition within itself, as well as its coherence with or among other principles or propositions.

My argument about the role coherence should play in assessing the disparate interpretations of section 2-708(2) has three aspects. First, the interpretation of section 2-708(2) which favors awarding the lost profit remedy to so-called lost volume sellers is admittedly, internally coherent. However, the only interpretation that fits coherently with the other provisions of the UCC is one that restricts the lost profits remedy to sellers who do not have completed goods available for resale. If one reads the Code as an integrated whole, rather than as a collection of independent provisions which share a common theme (commercial law), then it is impossible to read section 2-708(2) as the seller's primary remedy. The only way to make sense of the statutory language and comments contained in Article 2 is to read section 2-708(2) as a default remedy that sellers would choose to exercise only if the superior remedies of an action for the price,<sup>41</sup> the contract price-resale price differential,<sup>42</sup> and the contract price-market price differential<sup>43</sup> were unavailable.

Second, coherence also provides a principled means of choosing between competing interpretations within a single category of interpretive argument. For example, as noted above, the limited drafting history relied upon by advocates of the lost volume seller can be interpreted in one of two mutually exclusive ways. I have suggested that the meaning one derives from this history depends upon the background assumption one holds when approaching the historical record. Coherence provides a means of choosing between these disparate background assumptions and the respective interpretations they entail, other than a simple bias in favor of or prejudice against the lost volume seller.

Finally, in a similar vein, I shall argue that coherence provides a non-arbitrary means of resolving interpretive questions when different categories of legal argument lead to disparate conclusions. For example, advocates of the lost volume seller can point to the substantial body of case law which supports the application of section 2-708(2) to lost volume sellers.<sup>44</sup> Those who oppose the application of the statute in this way have virtually no judicial authority for their position. As noted above, of all the reported decisions to date that have confronted lost volume seller claims, only one has found section 2-708(2) to be inappli-

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40. Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 897-98 (1989); see also Raz, *supra* note 39, at 315.

41. See U.C.C. § 2-709 (1994).

42. See *id.* § 2-706.

43. See *id.* § 2-708(1).

44. See cases cited *infra* notes 57, 89, 163.

cable.<sup>45</sup> On the other hand, those who would restrict the lost profits remedy to aggrieved sellers who do not have completed goods to resell have available a simple but powerful textual argument. The statute reduces the lost profits awards by any "payments or proceeds of resale."<sup>46</sup> Advocates of the lost volume seller cannot make any argument based solely on the text of the statute without appearing foolish.<sup>47</sup> Thus, arguments about the proper interpretation of section 2-708(2) based on judicial precedent are clearly at odds with those based on text. How can the dispute between two conflicting interpretations derived from two different categories of legal argument be resolved?

It cannot be resolved, as some have suggested, by reference to the "patent reason" or purpose behind a particular provision.<sup>48</sup> Indeed, Karl Llewellyn, the Chief Reporter for the UCC, believed that the provisions of the Code "should display on their face their organizing principle," and that this would decrease "the leeway open to the skillful advocate for persuasive distortion or misapplication of the language."<sup>49</sup> To suggest that interpretive disputes about the meaning of legal texts can be resolved by reference to the purposes behind the text at issue begs the question. The question is not whether or not interpretation should be "purposive" in nature. Every interpretation of every text must be purposive in order to be language, because all language must be purposive in order to be meaningful. Purpose and consciousness are what distinguish language from simple marks on a page or errant sounds.<sup>50</sup> The purpose or policy behind a Code provision cannot in itself be the arbiter of two or more disparate interpretations of the same text, because discerning that purpose is itself the goal of the interpretive process.

In this Article I shall argue that disparate interpretations of a single text, derived from distinct categories of argument, can best be resolved by recourse to still other categories of argument. When such interpretive

45. See *Northeastern Vending Co. v. P.D.O., Inc.*, 606 A.2d 936 (Pa. Super. Ct. 1992); see also *infra* note 163.

46. See U.C.C. § 2-708(2) (1994).

47. See Schlosser, *Construing*, *supra* note 4, at 692-94 (arguing that the term "profit" in § 2-708(2) really means two units of profit, but only in the case of the lost volume seller).

48. See WHITE & SUMMERS, *supra* note 4, § 4, at 18 ("In essence, judges and lawyers should interpret and construe Code words, phrases, and sections in light of their rationales. We will call this a 'rationale-oriented' approach. It has the merit of being the one that the Code drafters preferred.").

49. Collection of Karl Llewellyn Papers, J, VI, I, e, at 5 (1944) (unpublished manuscript, on file at the University of Chicago Law School), *quoted in* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 322 (1973).

50. See DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 50-51, 63-64. The debate currently raging in legal hermeneutics is not about whether or not legal language must be purposive in order to be meaningful, but about whose purposes (the author's, the reader's, society's, or some combination of these) should be controlling.

conflicts arise, the value of coherence becomes preeminent. That is, the interpretation which brings the greatest number of categorical arguments together, providing lawyers and judges with a synoptic meaning of the text, should prevail.

Before I begin my argument, I must first more fully explain the position of those who support the lost volume seller. This will be done in Part II of the Article. In Part III, I will set forth my conceptual critique of the lost volume seller phenomenon, that is, why the award of lost profits to such a seller will result in a windfall. Part IV will contain my argument with respect to the drafting history of section 2-708 and other relevant parts of the Code. The Article will conclude in Part V with my argument concerning the value of coherence as a principled means of resolving interpretive debate.

## II. THE LOST VOLUME SELLER THESIS IN DETAIL

It is essential to the success of the lost volume seller's claim that certain language in section 2-708(2) be ignored when the provision is applied. Whether the reason for ignoring the "due credit" language is that it is the only way to reach the normatively correct result or that the drafting history requires such an outcome is of no consequence. This is simply a difference in justification, not of interpretive technique. Accordingly, the courts and commentators clearly and emphatically urge that the "due credit" language contained in section 2-708(2) be ignored.<sup>51</sup>

The contention that certain statutory language must be ignored in order to properly apply a law is not a commonly suggested approach to statutory construction. What is clear from the literature concerning section 2-708(2) is that advocates of the lost volume seller do not make this claim lightly or without misgivings. They find the solution that they propose to be intellectually awkward and not fully satisfactory.<sup>52</sup>

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51. Harris, *Seller's Damages*, *supra* note 4, at 99 (asserting that § 2-708(2) "will only bring sound results if two terms—costs incurred and resale proceeds—are obliterated"); *id.* at 105 (asserting that "the terms 'costs reasonably incurred' and 'proceeds of resale' must be given meanings that almost read them out of the statute"); *id.* at 106 (arguing that the language "must in effect be read out of the statute in handling [the lost volume] situation"); WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (agreeing with Harris that "courts should simply ignore the 'due credit' language in lost volume cases"); *id.* at 327 (same); Anderson, *supra* note 4, at 1025 (arguing that the "due credit" language "must be read out of the statute in order for Section 2-708(2) to be correctly applied to lost volume sellers"); *id.* at 1052 (asserting that it is an "irony" that § 2-708(2) "cannot be read literally and still properly be applied to lost volume sellers, the group to which the section is most often applicable"); Sebert, *supra* note 4, at 393-94 ("Professor Harris showed the way out of this morass by arguing that when section 2-708(2) is applied to a lost volume vendor, the 'costs incurred' and 'proceeds of resale' parts of the formula should be ignored."); *see also* cases cited *infra* note 163.

52. *See* WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (conceding that "there is no

Indeed, it appears that they would prefer not to make the claim at all, but they believe they have no alternative. To see why this is so we must examine more closely the concept of the lost volume seller.

### A. *The Lost Volume Seller Defined*

The so-called lost volume seller is a seller of goods whose buyer breaches the contract through repudiation, wrongful rejection, or wrongful revocation of acceptance.<sup>53</sup> Regardless of the specific manner of breach, the seller has the contract goods available for resale and succeeds in effecting a resale to another purchaser. This resale, however, is not a replacement or substitute for the original broken contract. The seller contends that the substitute buyer is someone "who would have bought an additional unit from the seller had the original buyer not breached."<sup>54</sup> The seller has not been made whole by the resale because she has "lost volume." That is, she has had her total number of sales reduced by the quantity represented by the original contract.<sup>55</sup> Thus, even with the resale the seller has been denied the profit that she would

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explanation for it, and there is no polished solution," but arguing that "[g]ross errors of the kind here committed by the drafters call for extraordinary solutions"); *id.* at 329 (claiming that § 2-708(2) was "enacted in such a gnarled mutation that it now barely accommodates some of the cases for which it was originally designed"); Harris, *Seller's Damages*, *supra* note 4, at 101 (noting that "some strange things must be done with the language of section 2-708" if the lost volume seller is to recover lost profits); Sebert, *supra* note 4, at 394 ("In terms of normal methods of statutory interpretation . . . , it is not easy to justify such a creative reading of the statute."); *id.* at 410 n.214 (noting that the courts "have been forced to adopt strained constructions of the statutory language in order to achieve reasonable results"); Schlosser, *Construing*, *supra* note 4, at 691 (noting that under such an approach, "violence has been done to the express language of the statute"). Recognition of the fact that the solution is problematic has not caused the commentators to temper their frequently brash and arrogant rhetoric. See, e.g., WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (asserting that "all right-minded people would agree" that the lost volume seller is entitled to damages for lost profits); Harris, *Seller's Damages*, *supra* note 4, at 101, 102 (arguing that the "due credit" language must be ignored "if absurd results are to be avoided" and "if sane results are to be obtained"); *id.* at 105 (asserting that only a "naive reading of the statute" would acknowledge certain language in § 2-708(2)).

53. See *supra* notes 9-11 and accompanying text.

54. Sebert, *supra* note 4, at 384-85.

55. See WHITE & SUMMERS, *supra* note 4, § 7-7, at 309 n.10:

"Lost volume" occurs when the seller resells to a buyer who would have bought from the seller even if there had been no breach of the original contract. The result is the seller's total volume of sales by year's end is reduced by one, and his damages are the profit the seller would have made on that additional sale.

See also Harris, *Seller's Damages*, *supra* note 4, at 80-81 ("Had there been no breach, and consequently no resale, plaintiff would have sold two similar entities—one to defendant and one to the resale purchaser. The breach and resale have reduced plaintiff's total volume of sales by the quantity rejected by defendant."); Sebert, *supra* note 4, at 382 ("A lost volume seller is one who, even though he resells after the buyer's breach, resells to a customer who would have bought another unit from him even if the buyer had not breached. Thus, the lost volume seller has lost one sale because of the buyer's breach . . .").

have earned on the original contract.<sup>56</sup>

Professor Robert Harris, an early writer on the topic, captured the lost volume seller phenomenon in a definition which, with some modification, has been adopted by the majority of courts and commentators.<sup>57</sup> Harris proposed that a seller who resells finished goods could qualify as a "lost volume seller" only if three conditions were satisfied: "(1) the person who bought the resold entity would have been solicited by plaintiff had there been no breach and resale; (2) the solicitation would have been successful; and (3) the plaintiff could have performed that additional contract."<sup>58</sup> In essence, this definition requires the would-be lost volume seller to prove<sup>59</sup> that sufficient demand existed such that she would have sold the equivalent of the contract goods to the resale purchaser in any event, and that she had the physical capacity to satisfy both contracts, either by manufacturing more goods or acquiring them from a supplier.<sup>60</sup> The breach by the original buyer cannot have made performance of the resale contract possible. If this were the case—if the buyer's repudiation enabled the seller to satisfy the resale buyer—the seller did

56. 1 DUNN, *supra* note 4, § 2.9, at 103 ("If the reseller sold the goods to another buyer after the breach of contract, it nevertheless lost the profits from the first potential sale to the breaching buyer."); Harris, *Seller's Damages*, *supra* note 4, at 81 (noting that "the value of the lost volume is the profit [the seller] would have made on the additional sale").

57. For cases that have expressly adopted Harris' definition of the "lost volume seller," see *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865, 868 n.2 (1st Cir. 1982); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 254 n.5 (4th Cir. 1974); *Snyder v. Herbert Greenbaum and Assocs., Inc.*, 380 A.2d 618, 624 n.3 (Md. Ct. Spec. App. 1977). For commentators that have followed Harris, see WHITE & SUMMERS, *supra* note 4, § 7-13, at 326; Anderson, *supra* note 4, at 1058; Sebert, *supra* note 4, at 388 n.120, 411 n.219; Note, *supra* note 4, at 243-47.

58. Harris, *Seller's Damages*, *supra* note 4, at 82 (footnote omitted).

59. See Sebert, *supra* note 4, at 391 ("Whether one is a lost volume seller is ultimately a matter of proof.").

60. In this respect Harris' definition is more rigorous and discriminating than others that have been proposed. The fatal flaw of other proposed definitions of the lost volume seller is that they are overinclusive. Because these other formulations focus solely on the seller's capacity to supply potential buyers, they would overcompensate sellers who had the capacity to make additional sales but who lacked the demand. See, e.g., NORDSTROM, *supra* note 4, § 177, at 536 (describing volume sellers as those "who have a sufficient supply of goods available to them so that they could make as many sales as they are likely to obtain buyers"); Anderson, *supra* note 4, at 1023 ("A lost volume seller is one that has fewer customers than it can supply."); *id.* at 1024 ("The test is whether the seller has fewer customers than it can supply or, in other words, more goods than it has customers."); Childres & Burgess, *supra* note 4, at 873 (describing the lost volume seller as one whose "buyers are fewer than he could supply at the prevailing price"); Schlosser, *Construing*, *supra* note 4, at 687 (describing the lost volume seller as "one who can manufacture (or obtain) as many units as he has buyers"); Sebert, *supra* note 4, at 388 (stressing that sellers must be required to establish "that this particular buyer probably would have bought from the seller even if the original buyer had not breached."). But see Goldberg, *supra* note 4, at 293 (criticizing commentators who "have used awkward terminology, such as an ability to 'supply all probable customers' and the 'the seller has an unlimited supply of goods,' to describe this concept") (footnotes omitted) (quoting 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1100, at 541 (1964) and WILLIAM D. HAWKLAND, SALES AND BULK SALES 183 (3d ed. 1976)).

not really lose volume. The seller has simply substituted one sale for another, as the resale is a perfect replacement for the original contract.<sup>61</sup>

Some courts and commentators have adopted a fourth requirement for lost volume seller status, in addition to the three articulated by Harris. They argue that the seller must do more than simply show that the subsequent sale would have taken place even if the breach had not occurred. The seller must also demonstrate the profitability of the alleged volume of sales. That is, the seller must prove that her performance of both the original contract and the resale contract would have been profitable. This may not always be possible. Frequently, an increase in the number of units produced by a manufacturer or the number of goods sold by a retailer or wholesaler will result in increased marginal costs. The point at which the cost of producing or selling one additional unit of goods equals the amount of income generated by that one additional unit represents the ideal point at which the seller should seek to operate. Any sales made beyond this point will not be profitable.<sup>62</sup> Accordingly, if the additional sale claimed by the lost volume

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61. The point is often expressed in terms of whether or not the seller is a "full capacity seller." If the seller is operating at full capacity at the time of breach and she effects a resale, then she suffers no lost volume. See Anderson, *supra* note 4, at 1032 ("Regardless of a seller's general situation, it is not left at lost volume if a particular buyer's breach allows it to make a reasonable resale that it could not have made but for the breach."); Childres & Burgess, *supra* note 4, at 883 ("Only if the resale was made possible because of the breach is it a substitute sale . . ."); Harris, *Seller's Damages*, *supra* note 4, at 83 ("Where it is shown that plaintiff was unable to perform an additional contract with [the resale buyer]—that is, the third condition is not met—obviously no volume has been lost that would not have been lost even without breach and resale.").

62. Professor Morris Shanker, an early critic of the lost volume seller concept, is responsible for first suggesting this additional requirement. Morris G. Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 CASE. W. RES. L. REV. 697 (1973). He noted:

[T]he economic law of diminishing returns or increasing marginal costs states that as a seller's volume increases, then a point will inevitably be reached where the cost of selling each additional item diminishes the incremental return to the seller and eventually makes it entirely unprofitable to conclude the next sale.

*Id.* at 705. Professor Charles Goetz and Dean Robert Scott later explored this point and supported it with a more rigorous economic analysis. They used Shanker's basic insight as the foundation for one of two arguments they made against the lost volume seller concept. They argued that a buyer's breach would cause an increase in seller's demand in that the contract goods would not be in the hands of the original buyer, who, if he did have the goods, would likely try to resell them on the seller's market. See Goetz & Scott, *supra* note 4, at 340-42. They also argued (following Shanker) that the seller would not sell any units past the point where marginal costs equal marginal revenues. They attempted to show, however, that the original buyer's breach actually lowers seller's marginal costs where that seller's marginal costs are not constant. This results in lower costs and enhanced profitability for certain sales. See *id.* at 333-40; see also *id.* at 343-48 (combining both arguments into a single model). Goetz and Scott concluded that because of the effect a breach has on the seller's demand and marginal costs, courts should adopt a rebuttable presumption that the seller's resale constitutes a replacement sale. See *id.* at 348-54. This powerful economic analysis (first suggested by Professor Shanker) has caused even the supporters of the lost volume seller to concede that the profitability of the resale must be established. See WHITE &

seller is beyond this point, that sale would not be profitable. Thus, even accepting the lost volume seller concept as legitimate, an award of lost profits under section 2-708(2) would not be justified under these circumstances. Such an award would not be compensation for lost "profits," but a gratuitous windfall to the seller at the buyer's expense.<sup>63</sup>

### B. *The Unavailability or Inadequacy of Other Code Remedies*

If a seller has lost a sale and if this additional sale would have been profitable, then, the advocates of the lost volume seller contend, an award of lost profits under section 2-708(2) is the *only* Code remedy that will put her "in as good a position as performance would have done." They contend that the other damage remedies provided under Article 2 are either unavailable or inadequate.

#### 1. ACTION FOR THE PRICE

The greatest amount that any seller could hope to obtain from a repudiated deal is the full contract price of the goods.<sup>64</sup> Section 2-709

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SUMMERS, *supra* note 4, § 7-14 (arguing that although increasing marginal costs may lower profit margins, the breaching buyer should have the burden of proving this); Sebert, *supra* note 4, at 389-92 (conceding that increasing marginal costs may make the additional sale unprofitable but arguing that the burden of proof should be on the buyer to show this unprofitability).

63. The Seventh Circuit was the first court to adopt the proof of profitability standard as a requirement for lost volume seller status. *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987). The *R.E. Davis* court reasoned, citing the Goetz & Scott and Shanker articles, that in determining lost volume seller status, "the relevant questions include, not only whether the seller could have produced the breached units in addition to its actual volume, but also whether it would have been profitable for the seller to produce both units." *Id.* at 684. Accordingly, the court held that on remand the plaintiff seller "must establish, not only that it had the capacity to produce the breached unit in addition to the unit resold, but also that it would have been profitable for it to have produced and sold both." *Id.* In following the Seventh Circuit's *R.E. Davis* decision, the court in *Monetti, S.p.A. v. Anchor Hocking Corp.*, No. 87-C9594, 1992 U.S. Dist. LEXIS 15945 (N.D. Ill. Oct. 15, 1992) held: "In order to qualify as a lost volume seller, a plaintiff must establish the following three factors: (1) that it possessed the capacity to make an additional sale, (2) that it would have been profitable for it to make an additional sale, and (3) that it probably would have made an additional sale absent the buyer's breach." *Id.* at \*3-\*4 (quoting *R.E. Davis*). See also *Jetz Serv. Co. v. Salina Properties*, 865 P.2d 1051, 1056 (Kan. Ct. App. 1993) (noting that the question of whether the second sale would have been profitable is one of fact to be resolved accordingly).

64. The Code only allows buyers to seek consequential damages for breach of contract. *Cf.* U.C.C. § 2-703 (1994); *id.* § 2-711; see also U.C.C. § 1-106 (1994) ("neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law"). Presumably this is because sellers are, by definition, not the ultimate users of goods. Hence, they cannot suffer any consequences other than not being fully paid. See WHITE & SUMMERS, *supra* note 4, § 7-16, at 338-39; see also Daniel S. Schechter, *Consequential Damage Limitations and Cross-Subsidization: An Independent Approach to Uniform Commercial Code Section 2-719*, 66 S. CAL. L. REV. 1273 (1993). Sellers can recover "incidental damages," which are damages incurred as a result of the breach and which relate to the care, custody or shipment of the goods. U.C.C. § 2-710 (1994).

provides that a seller may bring an action for the price in only three limited circumstances. First, the seller can sue for the price if the buyer has accepted the goods and simply has not paid for them.<sup>65</sup> Second, the seller can obtain the price if the goods supplied were conforming but were "lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer."<sup>66</sup> In either case, the goods are not in the possession or control of the seller. Consequently, resale of the goods by the seller is not an option.

The third situation in which the seller can maintain an action for the price is where the goods have already been "identified" to the contract<sup>67</sup> and the seller is "unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing."<sup>68</sup> In this instance the goods are still in the possession or control of the seller and a resale of them is contemplated. Such a resale proves to be impossible, however, because no market for the goods exists.<sup>69</sup>

The price remedy under section 2-709 is plainly not available to the lost volume seller. Such a seller has possession of the goods, and an available market for those goods clearly exists. Indeed, it is only through the seller's resale to a subsequent purchaser who would have purchased goods from the seller even absent the breach that the seller can demonstrate his loss of volume.<sup>70</sup> Because the three situations articulated in section 2-709 exhaustively enumerate the instances in which the price remedy may be sought,<sup>71</sup> the lost volume seller cannot be awarded the contract price.<sup>72</sup>

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65. U.C.C. § 2-709(1)(a) (1994).

66. *Id.*

67. Although the Code does not define the term, goods are "identified" to a contract when they are marked or otherwise designated as the goods that will be used by the seller in performance of the agreement. *See id.* § 2-501; *Hold-Trade Int'l, Inc. v. Adams Bank and Trust (In re Quality Processing, Inc.)*, 9 F.3d 1360, 1364 (8th Cir. 1993) ("[I]dentification occurs 'when the goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers.'"); *Apex Oil Co. v. Belcher Co.*, 855 F.2d 997, 1002 (2d Cir. 1988); *Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc.*, 839 F.2d 1104, 1111 (5th Cir. 1988).

68. U.C.C. § 2-709(1)(b) (1994).

69. Section 2-709(1)(b) captures the "no available market" condition found in § 2-708's statutory predecessor, section 64 of the Uniform Sales Act. *See UNIF. SALES ACT* § 64, 1 U.L.A. 188 (1950); U.C.C. § 2-709(1)(b) (1994); *see also* discussion *infra* part IV.B.1-2.

70. *Cf. Sebert, supra* note 4, at 399 (arguing that a seller may qualify as a lost volume seller even though he does not effect a resale of completed goods).

71. *See* U.C.C. § 2-709 cmt. 6 (1994) ("This section is intended to be exhaustive in its enumeration of cases where an action for the price lies."); *French v. Sotheby & Co.*, 470 P.2d 318, 323 (Okla. 1970) ("[Section 2-709] is intended to be exhaustive in its enumeration of cases where an action for the price lies.").

72. Furthermore, an award of the price would undeniably overcompensate the lost volume seller. Through resale of the contract goods, such a seller recoups the cost of the goods and



## 2. DIFFERENCE MONEY DAMAGES

The other damage remedies provided for sellers under the Code are the contract price-resale price differential under section 2-706 and the contract price-market price differential under section 2-708(1). The lost volume seller contends that neither of these damage awards will fully compensate her for the original breached contract.

Unlike section 2-709, nothing in either section 2-706 or section 2-708(1) precludes the lost volume seller from seeking the relief these provisions offer. Under section 2-706, the seller can recover from the buyer "the difference between the resale price and the contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach."<sup>73</sup> To qualify for this remedy, the seller must comply with certain procedural requirements provided under section 2-706. For example, if the resale is conducted by auction,<sup>74</sup> it must be conducted at "a usual place or market" for such a sale and the buyer must be given reasonable notice of when and where the sale will take place.<sup>75</sup> Similarly, if the seller resells the goods through a private sale, the seller must give the buyer "reasonable notification of his intention to resell."<sup>76</sup> In either case, the resale "must be reasonably identified as referring to the broken contract"<sup>77</sup> and must comply with the Code's basic principles of good faith and commercial reasonableness.<sup>78</sup> Indeed, the rules concerning notice to the buyer of the planned resale can be seen in part as a way of ensuring that these conditions are satisfied.<sup>79</sup>

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receives some margin of profit. An award of the price to such a seller would mean that the seller would recoup the cost of the goods a second time, even though she had incurred the cost of those goods (through purchase or manufacture) only once.

73. U.C.C. § 2-706(1) (1994).

74. The term used in § 2-706 is "public sale." *Id.*; *see id.* § 2-706, cmt. 4 ("By 'public' sale is meant a sale by auction."). Conversely, a "private sale" is a sale conducted otherwise than by auction, through the normal channels of solicitation and negotiation. *See id.*

75. *Id.* § 2-706(4).

76. *See id.* § 2-706(3).

77. *See id.* § 2-706(2).

78. *Id.* §§ 2-706(1) & 2-706, cmts. 5-6 (1994); *see also id.* § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); U.C.C. § 2-103(1)(b) (1994) (defining "good faith" in the case of merchants as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"). For cases interpreting these requirements, *see Johnson & Johnson Prods. v. Dal Int'l Trading Co.*, 798 F.2d 100, 104-07 (3d Cir. 1986); *Foy v. First Nat'l Bank of Elkhart*, 693 F. Supp. 747, 757-58 (N.D. Ind. 1988); *Loos & Dilworth v. Quaker State Oil Ref. Corp.*, 500 A.2d 1155, 1159-60 (Pa. Super. Ct. 1985).

79. *See* U.C.C. § 2-706, cmt. 9 (1994) (referring to the desire for "competitive bidding"). The fear is that absent such notice the seller could enter into a "sweetheart" deal with a friendly purchaser far below the original contract price, leaving the breaching buyer to make up the difference. In such a case, the breaching buyer would in effect be purchasing part of the goods for the benefit of the seller's friend. *See Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1081 (9th

Under section 2-708(1), the aggrieved seller can recover "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach."<sup>80</sup> Although section 2-708(1) does not refer to a resale of the contract goods, it necessarily assumes that such a resale takes place.<sup>81</sup> The seller cannot hope to be made whole absent such a resale, because the difference between the contract price and the market price alone will only compensate the seller with a portion of her profit margin. Absent such a resale, the seller will not recoup the cost of goods and will not be in as good a position as she would have been in had the original buyer performed.<sup>82</sup>

Even with such a resale, however, the contract price-market price differential is not as desirable as the contract price-resale price differential. First, the contract-market differential may not put the seller in as good a position as would performance,<sup>83</sup> whereas the contract-resale dif-

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Cir. 1979) (characterizing the resale at issue as "a fictitious 'wash' sale designed to inflate plaintiff's damage claim").

80. U.C.C. § 2-708(1) (1994).

81. See PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 210 (1990) ("Viewed realistically, § 2-708(1) is a surrogate for the resale remedy."); see also Anderson, *supra* note 4, at 1026 (noting that under § 2-708(1), "an actual resale . . . is presumed"); *id.* at 1032 ("[T]he formula contemplates an actual resale of completed goods."); Childres & Burgess, *supra* note 4, at 872 ("[T]he only difference between the 2-706 resale price formula and the 2-708(1) market price formula is the fact of resale, which thereby converts the theoretical market price into a specific resale price."); Goetz & Scott, *supra* note 4, at 324 ("Such a price differential formula assumes a market in which the seller has a realistic opportunity to replace the buyer's contract.").

82. As White and Summers remark, "[o]nly if the seller resells the [goods] at the market price prevailing on the date of tender and the collection of his damages is cost free, will 2-708(1) put him in the same economic position as performance would have." WHITE & SUMMERS, *supra* note 4, § 7-7, at 307; see also Childres & Burgess, *supra* note 4, at 878 ("In order fully to understand the 2-708(1) contract price-market price formula, it is important to remember the basic principle behind it—that the damages recovery plus the price received at the proven hypothetical market price equals the contract price . . .").

83. For example, suppose that the boat in the hypothetical above was to be sold for \$10,000. Suppose also that the prevailing market price at the time and place of tender was \$9000, but that, due to a change in the market, seller was able to resell for only \$8500. Under this scenario, the seller will not be put in as good a position as he would have had the original buyer performed. Under the original contract, the seller would have received the contract price (\$10,000). By utilizing § 2-708(1), the seller will receive the contract price-market price differential (\$1000) which, combined with the resale price (\$8500), will still be less (by \$500) than the contract price.

It is also possible, however, that the contract-market formula overcompensates the seller. For example, suppose that the market price for the boat at the time and place of tender was \$9000 but that the seller resold the boat for \$9500. If the seller were allowed to utilize the remedy under § 2-708(1), he would be put in a better position (having received a total of \$10,500) than he would have been in had the original buyer performed. If the seller were limited to the contract-resale formula in § 2-706, he would be in exactly the same position as if the original buyer had fully performed, having received a total of \$10,000. The commentators have engaged in a vigorous debate as to whether or not the seller in this situation may elect between the remedies under §§ 2-706 and 2-708(1). See WHITE & SUMMERS, *supra* note 4, § 7-7, at 309-13 (arguing that the seller

ferential will invariably achieve this result.<sup>84</sup> Indeed, some commentators have suggested that section 2-708(1) will fully compensate an aggrieved seller only by happenstance.<sup>85</sup> Second, even if the contract-market formula does fully compensate the seller, it will be more costly to enforce than the contract-resale formula, because under section 2-708(1) the seller must prove the prevailing market price. Although the Code attempts to ease this burden by liberally allowing proof of market price,<sup>86</sup> the factual inquiry necessary to prove this figure will always be more expensive (because of litigation discovery costs and time at trial) than proof of the actual resale price of the goods.<sup>87</sup> Thus, a seller who resells completed goods will voluntarily pursue the section 2-708(1) damage remedy only in those instances where that remedy exceeds damages under section 2-706 and where the law of the jurisdiction allows the seller to choose between the two. Typically, a seller will utilize the section 2-708(1) remedy because she failed to comply with one or more of the procedural requirements under section 2-706, making the contract-resale differential unavailable.<sup>88</sup>

### 3. LOST PROFIT DAMAGES

Although a seller will generally prefer section 2-706 over section 2-708(1), the lost volume seller contends that neither remedy will put her in the same economic position as would performance. The lost volume seller claims that an award under section 2-708(2) for the profit she would have earned on the original deal is the only Code remedy that can

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who resells should not be allowed to recover more under § 2-708(1) than under § 2-706, as this would violate § 1-106 by putting the seller in a better position than performance would have done); Goetz & Scott, *supra* note 4, at 355-56 (seller should be permitted to recover greater damages under § 2-708(1) even though he resells under § 2-706, because the seller could have performed the contract by purchasing substitute goods in the declining market); Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 260-61 (1963). Sebert, *supra* note 4, at 402-03 (arguing that the seller frequently does not learn of the lower market price until after time for performance has begun and that in any case the seller could purchase satisfactory substitute goods only in the case of standardized fungible goods).

84. As we shall see below, the lost volume seller contends that even the contract-resale formula is inadequate to put him in the same position as performance would have done. See WHITE & SUMMERS, *supra* note 4, § 7-7, at 309 ("In circumstances in which he is not a 'lost volume' seller, his 2-706 remedy will put him in precisely the same position as performance would have.") (footnote omitted); see also discussion *infra* notes 89-101 and accompanying text.

85. See Peters, *supra* note 83, at 259, 275-76; see also WHITE & SUMMERS, *supra* note 4, § 7-7, at 307 (noting that "the contract-market differential will seldom be the same as the seller's actual economic loss from breach"); *id.* § 7-11, at 318.

86. See U.C.C. § 2-708(1) cmt. 1 (1994); *id.* § 2-723.

87. See David W. Carroll, *A Little Essay in Partial Defense of the Contract-Market Differential as a Remedy for Buyers*, 57 S. CAL. L. REV. 667, 673 n.24 (1984).

88. See WHITE & SUMMERS, *supra* note 4, § 7-6, at 305-06.

achieve this goal. In order to understand this contention, let us reconsider the boat seller hypothetical. Suppose that the contract price for the boat ordered by the buyer is \$10,000 and the seller acquired the boat at a cost of \$8500.<sup>89</sup> Suppose further that the boat seller has calculated her overhead expenses to be \$500 per boat sold.<sup>90</sup> Under these facts, the seller expects to make \$1500 profit less overhead on this sale.

Some sellers do not or, for reasons of profitability, cannot alter the price of their goods.<sup>91</sup> Suppose that the boat seller in our hypothetical is such a seller. Because the price of the boat is fixed, the contract price, the resale price, and the market price will be identical. Consequently, there will be no contract price-market price differential, and there will be no contract price-resale price differential. Accordingly, even though the seller succeeds in reselling the goods, the remedies provided under sections 2-706 and 2-708(1) offer no relief.<sup>92</sup> The seller of standard-priced

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89. Although the seller in this hypothetical is a retailer, this need not be the case. In awarding lost profits under section 2-708(2), courts have recognized that manufacturers and distributors, as well as retailers, can qualify as lost volume sellers. See *National Controls, Inc. v. Commodore Business Machs.*, 209 Cal. Rptr. 636, 642 (Cal. Ct. App. 1985). ("While the seller in *Neri* was a retailer, the lost volume seller rule is also applicable to manufacturers."); see also *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972); *Comeq, Inc. v. Mitternacht Boiler Works, Inc.*, 456 So. 2d 264 (Ala. 1984) (applying the lost volume seller theory to a distributor/importer).

90. Recall that the damage remedy under section 2-708(2) is "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer." U.C.C. § 2-708(2) (1994). Many courts have struggled with the concept of "overhead" in calculating sellers' damages under section 2-708(2). See *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982); *Automated Medical Lab., Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (5th Cir. 1980); *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); *Distribu-Dor., Inc. v. Karadanis*, 90 Cal. Rptr. 231 (Cal. Ct. App. 1970). This issue, predictably, has not escaped the attention of commentators. See WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (noting that "[o]ne can expect no unanimity among accountants about what is overhead and what is not or about how the overhead is to be allocated to the seller's various contracts"); Anderson, *supra* note 4, at 1044-49; Childres & Burgess, *supra* note 4, at 837-60; Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. CHI. L. REV. 1155 (1990); Seibert, *supra* note 4, at 403-07; Richard E. Speidel & Kendall O. Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy*, 57 CORNELL L. REV. 681 (1972); Shanker, *supra* note 62, at 708-10 (claiming that proof of profit and overhead will always be speculative and contestable). Although the "profit (including reasonable overhead)" phrase admittedly presents problems in application, those problems are not germane to the issue before us, namely, the availability of lost profits under § 2-708(2) to the "lost volume seller."

91. Indeed this appears to be a growing trend in the American retail automobile market. See Mary Connelly, *GM Fuels Pricing Revolution: Dealers Fear Volume Won't Offset Lower Grosses*, AUTOMOTIVE NEWS, Oct. 18, 1993, at 1; Ed Henry, *How to Get the Best Deal*, KIPLINGER'S PERS. FIN. MAG., Dec. 1994, at 60; *How to Buy a Car*, CONSUMER REP., Apr. 1, 1994; Liz Pinto, *One Price Only*, AUTOMOTIVE NEWS, Jan. 14, 1991, at 3.

92. Harris, *Seller's Damages*, *supra* note 4, at 95 (noting that "a rule limiting a fixed price plaintiff to the difference between unpaid contract price and resale market price often will produce only nominal damages"); 3 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-708:04, at 482 (1994). Hawkland noted that in such a case:

the seller would not want to use the resale rule of section 2-706 to measure his damages, because there is no difference between the resale price and the contract

goods will recover zero damages in either case.

At first glance, section 2-708(2) appears to address this situation. Comment 2 to this provision refers to "fixed price articles" and states that the section "permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods."<sup>93</sup> It is exceedingly doubtful, however, that the resale of goods at the original contract price by a one-time seller is such an "appropriate case." Suppose, for example, that the boat seller in the hypothetical had only one boat available for sale and could not acquire another from the manufacturer. The seller in that case is made completely whole by resale of the goods at the original contract price. The fact that the contract-resale formula and the contract-market formula yield no damages for such a seller does not show that he has a right to compensation but no remedy. Instead, it demonstrates that the seller has suffered no damage because he has been fully compensated.<sup>94</sup>

This is purportedly not the case, however, where the seller is a "volume seller" of goods. Suppose, for example, that at the time of breach our hypothetical boat seller has several other boats of the same model on hand or that can be quickly obtained from her supplier. Following the original buyer's breach she resells the boat to another purchaser. The seller claims, however, that the resale has not made her whole. It has not put her in the same economic position as performance would have done. Had the original buyer not breached, she would have sold two boats instead of one and thus would have collected two units of profit.

Because the seller has "lost volume," she cannot be made whole by any price differential damage formula. She has lost the sale of some quantum of goods and the corresponding profit that this sale would have brought. Thus, the argument goes, the "relevant characteristic" is not the "standard pricedness" of the goods, "but the fact that [she] will lose one sale."<sup>95</sup> Moreover, because section 2-708(1) does not compensate the volume seller for this lost sale, the prerequisite for application of

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price. Nor would he want to use the rule for damages stated in subsection 2-708(1), for there is no difference between the market and contract prices.

*Id.*

93. U.C.C. § 2-708, cmt. 2 (1994).

94. Advocates of the lost volume seller agree that the award of lost profits under § 2-708(2) is inappropriate where a seller of fixed-price goods resells his only available lot of goods at the original, fixed contract price. See Harris, *Seller's Damages*, *supra* note 4, at 95; Goetz & Scott, *supra* note 4, at 331 n.21.

95. WHITE & SUMMERS, *supra* note 4, § 7-9, at 315; see also *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846, 849 (E.D.N.Y.) *aff'd mem.*, 614 F.2d 1289 (2d. Cir. 1979) (resale of steel strand at prices below original contract); *infra* notes 454-64 and accompanying text.

section 2-708(2) is satisfied in all lost volume cases. Recall that, by its own terms, section 2-708(2) only applies "[i]f the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done."<sup>96</sup> The fact that section 2-708(1) cannot award the profit on the original broken contract demonstrates its inadequacy in remedying the lost volume problem.<sup>97</sup> An award of lost profits under section 2-708(2) is the *only* Code remedy that can fully compensate the lost volume seller, regardless of whether or not the goods are standard-priced.<sup>98</sup> It is, say the advocates of the lost volume seller, the only remedy that can achieve the goal of all Code remedies—putting the aggrieved party "in as good a position as if the other party had fully performed."<sup>99</sup>

More than this, they believe that the other Code remedies for sellers are now largely irrelevant. Because, they say, most sellers of goods are volume sellers who resell the contract goods following breach, the lost profits remedy will apply in the vast majority of cases.<sup>100</sup> Because of

96. U.C.C. § 2-708(2) (1994).

97. See Anderson, *supra* note 4, at 1026 ("[T]he market formula of section 2-708(1) will not work to compensate a lost volume seller . . ."); Sebert, *supra* note 4, at 385 ("Because such a [lost volume] seller has lost a sale due to the buyer's breach, the seller will not be made whole if he must credit the buyer with the full resale price or market price under sections 2-706 or 2-708(1)."); Childres & Burgess, *supra* note 4, at 875 (arguing that it is "plain" that in the case of the lost volume seller "the 2-708(1) formula is not merely inadequate, it must be held irrelevant").

98. See WHITE & SUMMERS, *supra* note 4, at 316:

By the same token, when [the seller's] goods are not standard priced but he loses one sale as a result of one buyer's breach, he needs more than the contract-market differential on the resale to put him in the same economic position as performance would have; he needs the profit on the sale he lost that year.

*Id.* See also Harris, *Seller's Damages*, *supra* note 4, at 96 (arguing that § 2-708(2) applies to all lost volume cases and that "fixed priced goods often present the lost volume phenomenon"); Sebert, *supra* note 4, at 387 ("[E]ven if the goods are not standard priced goods, the seller may still be a lost volume seller if the facts show that the sale to buyer 2 would have been made even if buyer 1 had not breached.").

99. U.C.C. § 1-106 (1994); see also Anderson, *supra* note 4, at 1042 ("A lost volume seller who receives the profit lost on the breached contract, plus incidentals, is fully compensated for the loss caused by the buyer's breach."); Sebert, *supra* note 4, at 414 (arguing that the "ultimate objective" of his recommendation to redraft § 2-708(2) and clarify its application to the lost volume seller is to "fulfill the traditional 'just compensation' principle" of § 1-106).

100. See Anderson, *supra* note 4, at 1063 (concluding that § 2-708(2) "applies to most commercial sellers because such sellers are usually left in a lost volume situation by a buyer's breach"); *id.* at 1059-60 (noting that the case law demonstrates that proof of lost volume status is not difficult); Childres & Burgess, *supra* note 4, at 834 ("[Section 2-708(2)] is potentially applicable in all situations, while the other provisions are significantly restricted in applicability."); *id.* at 882 ("[I]n the American economy of today and the foreseeable future, the overwhelming proportion of sales contracts should produce the 2-708(2) situation if repudiated by the buyer."); Sebert, *supra* note 4, at 389 (agreeing with Childres & Burgess that § 2-708(2) should be regarded as the primary Code remedy for sellers because "most merchant sellers will be lost volume sellers in that they probably will have excess capacity and probably will resell to a buyer who otherwise would have bought from them"). Cf. Shanker, *supra* note 62, at 701

the prevalence of the lost volume seller phenomenon and the inability of other Code remedies to redress the lost volume injury, the commentators believe that section 2-708(2) should be recognized as the primary Code remedy for sellers.<sup>101</sup>

C. *Avoiding the "Due Allowance" and "Due Credit" Language*

Once the idea of "lost volume" is accepted, it cannot be disputed that section 2-708(2) is the only existing Code remedy that can provide relief for the volume seller who resells completed goods. The troublesome language contained in the last phrase of the section, however, appears to preclude exactly this result. It provides that, in addition to the award of lost profit and incidental damages, the court in calculating damages must also factor in two other items. It must give "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."<sup>102</sup>

If this language is given its apparent meaning and applied to the lost volume seller, such a seller will receive either no recovery or, at most, incidental damages. For example, suppose that the hypothetical boat seller is a volume seller who effects a resale of the boat at the original contract price of \$10,000. Suppose also that the cost of the boat to the seller, either as a manufacturing cost or as a wholesale price, is \$9000, so that the seller's expected profit on the original contract is \$1000. "[D]ue allowance for costs reasonably incurred" awards the seller the costs which she incurred in performing the contract. Because the volume seller, by definition, always resells completed goods, the "costs reasonably incurred" will be the seller's manufacturing cost or wholesale price for the finished goods. Furthermore, "due credit for payment or proceeds of resale" credits the original breaching buyer with the money the seller obtains for the goods from the resale purchaser. Consequently, a straightforward application of section 2-708(2) yields no damages for the lost volume seller. The section 2-708(2) formula requires the court to award the "profit (including reasonable overhead) which the seller would have made from full performance by the buyer" (\$1000) "together with any incidental damages" (\$0), "due allowance for costs reasonably incurred" (\$9000), "and due credit for payments or proceeds of resale" (\$10,000).<sup>103</sup> Under this calculation, the seller will not receive any damages for "lost profits" or otherwise.

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(bemoaning the fact that "almost every seller will apparently qualify as the very lost-volume seller who the commentators insist is entitled to a profit under section 2-708(2)").

101. See *supra* notes 17-20.

102. U.C.C. § 2-708(2) (1994).

103. See *id.*

In order for the lost volume seller to receive the profit that she purportedly would have obtained under the original contract, both the "due credit" language and the "due allowance" language must be rendered meaningless. As the boat seller example demonstrates, if the seller is awarded the cost of the finished goods and the original breaching buyer is credited with the proceeds from the resale of the finished goods, the seller will recover zero damages for lost profits. If both the "due allowance" and the "due credit" language are given meaning, the resale completely *replaces* the original contract under the section 2-708(2) formula.<sup>104</sup> Thus, the commentators agree that both the "due allowance" and the "due credit" language must be treated as dead letter

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104. If the "due credit" language is given meaning but the "due allowance" language is not, then application of § 2-708(2) will result in negative damages for the seller. Using the boat seller hypothetical above, the damage calculation under § 2-708(2) will be as follows:

\$1000—profit plus overhead  
 + 0—incidental damages  
 + 0—costs reasonably incurred  
 – \$10,000—payments or proceeds from resale  


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 – \$9000—total damages

Under this reading of § 2-708(2), the volume seller is actually placed in a better position following breach and resale. For obvious reasons, the advocates of the lost volume seller do not support this interpretation of the statute.

If, on the other hand, the "due allowance" language is given meaning and the "due credit" language is not, the lost volume seller will clearly be overcompensated under § 2-708(2). In addition to the profit the seller expected on the contract, the seller will also receive the cost of the goods. Using the boat seller hypothetical, the calculation under this reading of § 2-708(2) will be as follows:

\$1000—profit plus overhead  
 + 0—incidental damages  
 + \$9000—costs reasonably incurred  
 – 0—payments or proceeds from resale  


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 \$10,000—total damages

The volume seller, however, is fully compensated for the cost of the goods by effecting a resale following breach. Thus, if the "due allowance" language is given meaning but the "due credit" language is not, the volume seller will recoup the cost of goods twice: once under the § 2-708(2) formula and once on resale.

Professors White and Summers argue that the statute's "due credit" language should always be ignored when applied to the lost volume seller, but that the "due allowance" language can sometimes be meaningful in this context. They argue that the "due allowance" language should be applied to the lost volume seller when she has taken steps "for performance of the contract that will now be valueless." WHITE & SUMMERS, *supra* note 4, § 7-13, at 327. As an example of a volume seller who should receive "due allowance for costs reasonably incurred," White and Summers suggest an aircraft manufacturer whose resale purchaser does not want certain equipment which the original buyer ordered. *Id.* If, however, the seller could resell this equipment to someone else, then the seller should not be given "due allowance" for the cost of these "extras." Apart from the issue of recovery of "lost profit," under this interpretation, the most the seller can hope to recover from the breaching buyer is the incidental damages she has incurred in transporting or caring for the goods following breach. See *infra* notes 233-39 and accompanying text.



with respect to the lost volume seller.<sup>105</sup>

### 1. IGNORING THE STATUTORY TEXT

The commentators have adopted two independent strategies for rendering the "due allowance" and "due credit" language meaningless. The first such strategy is simply to ignore the statutory language.<sup>106</sup> The rationale given for this admittedly "creative" form of statutory construction<sup>107</sup> is a supreme confidence in the rectitude of the lost volume seller's claim. "[E]ither some strange things must be done with the language of section 2-708," Professor Harris declares, "or the whole section must be treated very casually by the judges if *absurd* results are to be avoided."<sup>108</sup> Similarly, Professors White and Summers "agree with Professor Harris: courts should simply ignore the 'due credit' language in lost volume cases."<sup>109</sup> Although they concede that this is an "extraordinary solution," White and Summers believe that the drafters' "gross errors" and the truth of the lost volume seller thesis justify this action. "Only by ignoring [the "due credit"] language can [courts] apply 2-708(2) to put the [lost volume sellers] of this world in the same position as performance would have."<sup>110</sup>

### 2. USING CODE-DRAFTING HISTORY TO LIMIT APPLICATION OF THE STATUTORY TEXT

Because it endorses a strategy that is both wholly normative and plainly noninterpretive,<sup>111</sup> the claim that the "due allowance" and "due

105. See Anderson, *supra* note 4, at 1035 ("[N]o recovery should be allowed under the formula for 'costs reasonably incurred' if the seller could reasonably have recouped these costs by completing and reselling the goods.") (footnote omitted); Harris, *Seller's Damages*, *supra* note 4, at 105 (arguing that in the case of the lost volume seller both "the terms 'costs reasonably incurred' and 'proceeds of resale' must be given meanings that almost read them out of the statute"); Sebert, *supra* note 4, at 393-94 (agreeing with Harris that as "applied to a lost volume vendor, the 'costs incurred' and 'proceeds of resale' parts of the formula should be ignored").

106. See *supra* notes 14-15 and accompanying text.

107. See Sebert, *supra* note 4, at 396.

108. Harris, *Seller's Damages*, *supra* note 4, at 101 (emphasis added); see also WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 ("As the formula is now written, it simply will not yield the recovery which all right-minded people would agree the lost volume seller should have.").

109. WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (footnote omitted).

110. *Id.*

111. The purely normative nature of this approach should be evident from the commentators' own rhetoric. See, e.g., WHITE & SUMMERS, *supra* note 4, § 7-13, at 327 (arguing that the "due credit" language "must be ignored if we are to reach the right outcome in lost volume cases."). I describe this approach as "noninterpretive," because it makes no attempt to account for certain language within section 2-708(2). It does not interpret the language as meaningful or meaningless because it does not interpret the language at all. Thus, I am using the term much more narrowly and precisely than does John Hart Ely. See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980). Professor Ely describes "interpretivism" as that branch of constitutional theory that says that courts "should confine themselves to enforcing norms that are

credit" language should be ignored to accommodate the lost volume seller is likely to have limited appeal.<sup>112</sup> This approach, however, is not the only option. Advocates of the lost volume seller present a more compelling account of the "due allowance" and "due credit" language based on the drafting history of section 2-708(2). Before turning to the specific historical evidence upon which they rely, it would be useful to review briefly the Uniform Commercial Code's history.

#### a. An Overview of the Code-Drafting Process

The Code project began in 1940 when William Schnader, president of the National Conference of Commissioners on Uniform State Laws ("the Conference"), addressed the Conference at its annual meeting.<sup>113</sup> Prior to this, the Conference had promulgated a number of proposed uniform statutes dealing with a variety of commercial subjects including the Uniform Sales Act, the Uniform Warehouse Receipts Act, and the Uniform Negotiable Instruments Law. The Conference successfully sponsored these and other laws for enactment by the several states.<sup>114</sup>

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stated or clearly implicit in the written Constitution." *Id.* He contrasts this with "noninterpretivism" which says "that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." *Id.* This distinction is not very helpful because under both accounts courts are still trying to give meaning to the constitutional text. According to Dworkin, Ely's distinction "is a poor one," because:

[a]ny recognizable theory of judicial review is interpretative in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole. . . . The theories that are generally classed as 'noninterpretive' . . . are plainly interpretivist in any plausible sense. They disregard neither the text of the Constitution nor the motives of those who made it; rather they seek to place these in the proper context.

DWORKIN, A MATTER OF PRINCIPLE, *supra* note 39, at 35; see also Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) ("Virtually all modes of constitutional decisionmaking, including those endorsed by Professor Ely, require interpretation. The differences lie in what is being interpreted. . . .").

112. No court that has squarely confronted the problem created by the "due allowance" and "due credit" language has adopted this approach. Even the commentators recognize that this strategy is at best a secondary approach. See *supra* note 52 and accompanying text.

113. See Address of the President of the Fiftieth Annual Meeting of the National Conference of Commissioners on Uniform State Laws First Session (Sept. 2, 1940), in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTIETH ANNUAL CONFERENCE 35-58 (1940) [hereinafter 1940 HANDBOOK]; Braucher, *supra* note 35, at 799; Schnader, *supra* note 35, at 1; see also TWINING, *supra* note 49, at 270-301 (discussing the origins, creation, and initial drafting of the Code). For a more anecdotal account of the drafting process, see Symposium, *Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code*, 43 OHIO ST. L.J. 535-84 (1982) (includes recollections from Soia Mentschikoff, Peter Coogan, Fairfax Leary, Allison Dunham, and Homer Kripke).

114. See UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS, cmt. 2 (1959) [hereinafter 1958 OFFICIAL TEXT], reprinted in 20 UCC DRAFTS, *infra* note 117, at 298; WHITE & SUMMERS, *supra* note 4, § 1, at 2-3; Braucher, *supra* note 35, at 799; Schnader, *supra* note 35, at 2.

Different individuals within the Conference prepared these statutes at different times. For example, the Conference promulgated the Negotiable Instruments Law in 1896 and the Uniform Trust Receipts Act in 1933.<sup>115</sup> These differences combined with the passage of time resulted in "inconsistencies between the several acts" and the presence of provisions that were no longer "suitable to govern the business practices of the day."<sup>116</sup> By 1940 the Conference had already taken steps to revise the Negotiable Instruments Law. More importantly, in early 1940 the United States Congress began to consider a Federal Sales Act.<sup>117</sup> "To avoid conflict between that act and the Uniform Sales Act, the executive committee of the Conference appointed a special committee to consider amendments to the Uniform Sales Act, and the proponents of the Federal Sales Act were induced to postpone action."<sup>118</sup> At this juncture, Schnader proposed that "instead of attempting to patch up the various uniform commercial acts, the Conference undertake preparation of one comprehensive commercial code."<sup>119</sup> The Conference embraced this proposal.<sup>120</sup>

Because of the size, scope, and expected cost of this ambitious proposal, the Conference sought the cooperation and involvement of the American Law Institute ("the Institute") in the Code project.<sup>121</sup> In 1942, the Institute agreed to participate in a revision of the Uniform Sales Act.<sup>122</sup> After further negotiations between the two organizations, on December 1, 1944 the Institute and the Conference formally agreed to co-sponsor the entire Code project.<sup>123</sup> Under the auspices of both bodies, work on the Code officially began in January 1945.<sup>124</sup>

Work on the Code, in fact, began much earlier. Shortly after

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115. 1958 OFFICIAL TEXT, *supra* note 114, at 2; Braucher, *supra* note 35, at 799.

116. Schnader, *supra* note 35, at 2.

117. See H.R. 8176, 76th Cong., 3d Sess. (1940), reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS 113-69 (Elizabeth S. Kelly ed., 1984) [hereinafter UCC DRAFTS]. A copy of an earlier Federal Sales Bill considered by the 75th Congress is also included in the same volume of Kelly's work. This collection of drafts will undoubtedly prove to be an invaluable resource for those researching the history of particular Code provisions and the UCC as a whole.

118. Braucher, *supra* note 35, at 799.

119. Schnader, *supra* note 35, at 2. For thoughts on why the Code should not be seen as a truly "comprehensive" codification of commercial law, see WHITE & SUMMERS, *supra* note 4, § 2, at 6-7. Cf. William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291.

120. 1940 HANDBOOK, *supra* note 113, at 114-15.

121. Schnader, *supra* note 35, at 3; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-FIRST ANNUAL CONFERENCE 63 (1941).

122. Braucher, *supra* note 35, at 800.

123. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL CONFERENCE 98 (1944); Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2201 (1991); Schnader, *supra* note 35, at 3, 5.

124. Schnader, *supra* note 35, at 5.

Schnader's address to the Conference, Karl Llewellyn, then a professor at Columbia University Law School and chairman of the Commercial Acts Section of the Conference, began revising the Uniform Sales Act.<sup>125</sup> A complete Uniform Revised Sales Act was approved by the Conference in 1943<sup>126</sup> and by the Institute in 1944.<sup>127</sup> After undergoing numerous permutations and revisions, this document eventually formed the core of Article 2, the sales portion of the Uniform Commercial Code.<sup>128</sup>

The two sponsoring bodies established an elaborate drafting organization responsible for preparing and editing the Code prior to submitting it to their memberships for consideration and approval. At the top of this organizational structure was the five-member Editorial Board. The Conference appointed Llewellyn and Schnader to the Editorial Board, and the Institute appointed two others, Harrison Tweed and John Pryor. Judge Herbert Goodrich of the United States Court of Appeals for the Third Circuit chaired the Board.<sup>129</sup> The Board appointed Llewellyn Chief Reporter for the Code and Soia Mentschikoff, a former student of Llewellyn's and a practicing Wall Street lawyer, Associate Chief Reporter.<sup>130</sup> Llewellyn, in turn, appointed reporters, that is, primary draftsmen for each of the articles within the Code. Llewellyn appointed himself reporter for Article 2.<sup>131</sup> Before a draft was submitted for consideration to the general membership of the Institute or the Conference,

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125. Braucher, *supra* note 35, at 799-800; see also DRAFT OF A UNIFORM SALES ACT: REVISED COPY OF EARLIER PORTION (1940), reprinted in 1 UCC DRAFTS, *supra* note 117, at 261; REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941), reprinted in 1 UCC DRAFTS, *supra* note 117, at 269.

126. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-THIRD ANNUAL CONFERENCE 54-55 (1943).

127. *Discussions: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 63-263 (1943-44).

128. See UNIFORM REVISED SALES ACT (Proposed Final Draft No. 1, 1944), reprinted in 2 UCC DRAFTS, *supra* note 117.

129. See 1958 OFFICIAL TEXT, *supra* note 114, at 4; Schnader, *supra* note 35, at 4. In 1950 the Editorial Board was replaced by the Enlarged Editorial Board, which consisted of the five original members plus ten new members, all of whom were practicing lawyers. See *id.* at 6 & n.8. The Permanent Editorial Board was created in 1961 to oversee the enactment and implementation of the Code in the various jurisdictions and to consider any proposed amendments and revisions. See *infra* notes 534-37 and accompanying text.

130. 1958 OFFICIAL TEXT, *supra* note 114, at 4. Llewellyn is, of course, one of the giants in the history of American law. William Twining's book provides a readable and lucid account of the man, his life, and work. See TWINING, *supra* note 49. Because of the long and substantial shadow cast by a figure like Llewellyn, it is a common but nonetheless regrettable mistake to overlook the accomplishments of his wife, Soia Mentschikoff, and the significant contributions she made to the Code project and to legal education. See also Charles A. Bane, *From Holt to Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351 (1983).

131. TWINING, *supra* note 49, at 284; WHITE & SUMMERS, *supra* note 4, § 1, at 3-4.

it was first submitted to three groups of experts for review and approval. A select number of judges, practicing lawyers, and law professors made up the first group.<sup>132</sup> The second group was the Council of the American Law Institute,<sup>133</sup> and the third group was either the Commercial Acts or the Property Acts Section of the Conference, depending on the subject matter of the draft at issue.<sup>134</sup> The Code drafters also received advice on various drafts from numerous informal consultants and from the American Bar Association's Section of Corporation, Banking and Business Law.<sup>135</sup>

After several years of intensive preparation, a definitive text was approved in 1951 at joint meetings of the two sponsoring bodies.<sup>136</sup> However, a full text with comments edition was not published until 1952. Additional editorial work and the preparation of the extensive Official Comments accompanying each section delayed publication.<sup>137</sup> The Enlarged Editorial Board approved a few minor amendments in 1952 and 1953.<sup>138</sup> The two sponsoring bodies approved these amendments and the revised comments in 1953.<sup>139</sup>

After its completion, legislative action on the Uniform Commercial Code was slower than expected. In April 1953, Pennsylvania became the first state to enact the Code.<sup>140</sup> Although the Code was introduced into the legislatures of seven other states that same year, Pennsylvania

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132. 1958 OFFICIAL TEXT, *supra* note 114, at 4.

133. *Id.* at 5.

134. *Id.*

135. *Id.* at 9; *see also* Braucher, *supra* note 35, at 800; Schnader, *supra* note 35, at 6-7.

136. *See* Herbert F. Goodrich, *Foreword* to UNIFORM COMMERCIAL CODE: FINAL TEXT EDITION at v (1951); *see also* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTIETH YEAR 164-67 (1951) [hereinafter 1951 HANDBOOK].

137. *See* Braucher, *supra* note 35, at 800; Herbert F. Goodrich, *Foreword* to UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT, TEXT AND COMMENTS EDITION at v (1952) [hereinafter 1952 OFFICIAL DRAFT], *reprinted* in 14 UCC DRAFTS, *supra* note 117, at 5. Clearly the Code drafters believed that the Official Comments were significant enough to warrant delay in the promulgation of the Code. What is less clear is the role the comments ought to play in Code interpretation. *See generally* Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597 (1966); Sean M. Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962 (1990). For an exposition of Llewellyn's purpose behind the comments, *see* TWINING, *supra* note 49, at 326-30.

138. *See* UNIFORM COMMERCIAL CODE: OFFICIAL DRAFT TEXT AND COMMENTS EDITION 1952, WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953 AND DECEMBER 11, 1953, *reprinted* in 16-17 UCC DRAFTS, *supra* note 117; Braucher, *supra* note 35, at 801.

139. Schnader, *supra* note 35, at 7-8.

140. The Code did not take effect in Pennsylvania until July 1954. PA. STAT. ANN. tit. 12A (1954) (amended 1959) (current version at PA. STAT. ANN. tit. 13 (1984)).

remained the sole Code jurisdiction.<sup>141</sup> Significantly, the New York legislature decided not to enact the Code but instead referred it to the New York State Law Revision Commission for study and recommendation. This decision initially slowed the progress of Code enactment<sup>142</sup> but, ultimately, paved the way for its widespread acceptance. New York was, after all, deemed by many "the most important commercial state in the country"<sup>143</sup> because of its place as a center for banking and trade. Indeed, the success of the Code project as a whole hinged upon its enactment in New York. With New York on board, the Code would most likely be adopted by a majority of states.<sup>144</sup> Without it, the goal of a widely enacted uniform law governing commercial transactions would be virtually impossible to attain.

The Law Revision Commission set up an elaborate organization to study the Code and report its findings. Like the Editorial Board of the Code itself, the Law Revision Commission enlisted respected practitioners, law professors, and judges to review the proposed statute. The Commission worked on the Code from 1953 to 1956, held public hearings on the matter, and published six substantial volumes of comments, criticisms, and suggestions.<sup>145</sup> These materials included almost five hundred pages devoted entirely to Article 2, including some dealing specifically with U.C.C. § 2-708(2).<sup>146</sup> In its final report, the Law Revision Commission applauded the efforts of the Conference and the Institute in preparing the Code, but recommended extensive revision before enactment by the New York legislature.<sup>147</sup>

Because of the importance of New York to the success of the Code project, the drafters were receptive to many of the criticisms and suggestions made by the Law Revision Commission.<sup>148</sup> The Editorial Board reactivated in 1954 to consider the Law Revision Commission's

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141. Schnader, *supra* note 35, at 8.

142. *Id.* at 8-9.

143. *Id.*

144. See Braucher, *supra* note 35, at 806 (stating the drafters' belief that "[l]egislative action in New York could obviously add tremendous force to the drive for enactment in other states."); FARNSWORTH, *supra* note 35, at 27 (noting that when New York adopted the Code in 1962 "the complete success of the Code was assured.").

145. NEW YORK LAW REVISION COMM'N, REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE, LEGISLATIVE DOC. NO. 65 (1954) (2 vols.) [hereinafter N.Y. REPORT 1954]; NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMM'N FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE, LEGISLATIVE DOC. NO. 65 (1955) (3 vols.) [hereinafter N.Y. REPORT 1955]; NEW YORK LAW REVISION COMM'N, REPORT OF THE LAW REVISION COMMISSION FOR 1956: REPORT RELATING TO THE UNIFORM COMMERCIAL CODE, LEGISLATIVE DOC. NO. 65 (1956) (1 vol.) [hereinafter N.Y. REPORT 1956].

146. See 1 N.Y. REPORT 1955, *supra* note 145, at 335-761.

147. See N.Y. REPORT 1956, *supra* note 145, at 58.

148. See TWINING, *supra* note 49, at 295; WHITE & SUMMERS, *supra* note 4, § 4, at 11.

work.<sup>149</sup> The Board appointed subcommittees for each article in the Code. The subcommittee's members reviewed all available comments and criticisms and recommended changes in the text and comments, where appropriate.<sup>150</sup> The 1954 Further Recommendations of the Enlarged Editorial Board,<sup>151</sup> Supplement No. 1 to the 1952 Official Draft,<sup>152</sup> and the 1956 Recommendations of the Editorial Board were produced during this review process.<sup>153</sup> These documents are significant because they are the first official Code documents to contain the "due allowance" and "due credit" language in section 2-708(2).<sup>154</sup> The sponsoring bodies approved the recommendations of the Editorial Board in 1956 and published a new Official Edition of the entire Code incorporating these changes in 1957.<sup>155</sup> The same statutory text was published with a set of revised Official Comments in 1958.<sup>156</sup> Although the sponsoring bodies have approved numerous revised Official Text editions of the Code in subsequent years, no changes in the text or comments of section 2-708 have been made since 1958.<sup>157</sup>

b. Supplement No. 1 and the Limited Application of the "Due Allowance" and "Due Credit" Language

As this brief historical account illustrates, the Uniform Commercial Code was the product of a long and deliberate drafting process that took place over a number of years and involved some of the finest legal minds in the country. Although the specific history behind the drafting of section 2-708 is lengthy and complex, advocates of the lost volume seller have only selected a narrow portion of this history to bolster their position. The drafting history utilized to explain away the "due allowance" and "due credit" language consists largely of comments accompa-

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149. Schnader, *supra* note 35, at 9; Braucher, *supra* note 35, at 803.

150. See Braucher, *supra* note 35, at 803. For a list of the memberships of each of these subcommittees, see 1958 OFFICIAL TEXT, *supra* note 114, at 8-9.

151. FURTHER RECOMMENDATIONS OF THE ENLARGED EDITORIAL BOARD FOR AMENDMENTS OF TEXT AND ANSWERS TO CERTAIN CRITICISMS (1954) [hereinafter 1954 RECOMMENDATIONS]. Unfortunately this document is not reprinted in UCC DRAFTS, *supra* note 117.

152. SUPPLEMENT NO. 1 TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE (1955) [hereinafter SUPPLEMENT NO. 1], reprinted in 17 UCC DRAFTS, *supra* note 117, at 307.

153. 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE [hereinafter 1956 RECOMMENDATIONS], reprinted in 18 UCC DRAFTS, *supra* note 117, at 1.

154. See *infra* notes 420-42 and accompanying text.

155. UNIFORM COMMERCIAL CODE: 1957 OFFICIAL EDITION, reprinted in 18 UCC DRAFTS, *supra* note 117, at 341.

156. UNIFORM COMMERCIAL CODE: 1957 OFFICIAL TEXT WITH COMMENTS, reprinted in 19-20 UCC DRAFTS, *supra* note 117.

157. Major changes were made in the 1972, 1978, 1987, 1988, 1989, and 1990 Official Text editions of the Code. Because Article 2 was not changed in any of these editions, they are not germane to our inquiry.

nying the addition of this language in a revised draft of section 2-708, first proposed in 1954. The advocates of the lost volume seller contend that these comments definitively prove that the "due allowance" and "due credit" language only applies where the aggrieved seller resells unfinished goods in a scrap sale. Because the lost volume seller resells completed goods, they believe that the "due allowance" and "due credit" language is inapposite and that the availability of the lost profits remedy is preserved for volume sellers.

In December 1954, the Enlarged Editorial Board recommended several amendments to the UCC text for approval by the two sponsoring bodies.<sup>158</sup> These recommendations were also published in January 1955 as Supplement No. 1 to the 1952 Official Draft.<sup>159</sup> They included a proposed revision of section 2-708, followed by a comment explaining the reason for the change:

*Unless a lesser measure is agreed, the measure of damages for non-acceptance or repudiation is the difference between the price current at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less any expense saved in consequence of the buyer's breach, except that if the foregoing measure of damages 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 with due allowance for costs reasonably incurred and due credit for any resale.*

**REASON:** The main purpose of the change is to extend the rule clearly to the right of repudiation and to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture.<sup>160</sup>

Although the revised version of section 2-708 contained three textual changes, only one is germane to the present inquiry.<sup>161</sup> The addition of the phrase "with due allowance for costs reasonably incurred and due credit for any resale" marked the first appearance of this language in the

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158. See 1954 RECOMMENDATIONS, *supra* note 151.

159. See SUPPLEMENT NO. 1, *supra* note 152.

160. 1954 RECOMMENDATIONS, *supra* note 151, § 2-708 (in original); SUPPLEMENT NO. 1, *supra* note 152, § 2-708 (in original).

161. The first change, language allowing parties to agree to "a lesser measure," is consistent with the principle of freedom of contract present in the Code. See 1952 OFFICIAL DRAFT, *supra* note 137, § 1-102(d)-(e); U.C.C. § 1-102(3)-(4) (1994). The freedom to liquidate damages remains a part of the Code today but is no longer included in § 2-708. See U.C.C. § 2-718 (1994). The second change, the explicit extension of the contract-market and lost profits remedies to cases involving repudiation, is clear and uncontroversial. Repudiation of the deal is a form of breach recognized under the 1952 Official Draft. See 1952 OFFICIAL DRAFT, *supra* note 137, §§ 2-610, 2-703.



drafting history. Standing alone this new language would surely preclude lost volume sellers from obtaining the lost profits remedy. Advocates of the lost volume seller contend, however, that the "saving grace" of the drafting history is that the accompanying comment manifested the drafters' intent to apply the "due credit" clause "only to the situation in which a seller, left at breach with partially manufactured goods, sells the incomplete goods as components or scrap."<sup>162</sup> The new language does not preclude recovery for volume sellers. Rather, it merely clarifies the privilege of sellers to realize junk value in a scrap sale when it is "manifestly useless" to complete production. Every court that has encountered a lost volume claim and confronted the obvious problem created by the "due allowance" and "due credit" language has relied upon this drafting history either directly or by way of precedent in awarding the profit remedy to the aggrieved seller.<sup>163</sup>

### c. Components Sellers and Jobber Sellers

According to this reading, the "due allowance" and "due credit" language applies only to those sellers who are manufacturers who do not do complete production and, instead, resell the unfinished goods for scrap.<sup>164</sup> Although neither the text nor the comments of the present Code limit the "due credit" language in this way, the advocates of the lost volume seller doggedly rely on this one small piece of drafting history to support their position.<sup>165</sup> Professor Harris coined the term "components seller" to refer to this special type of seller, which he

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162. Anderson, *supra* note 4, at 1052; see also WHITE & SUMMERS, *supra* note 4, § 7-10, at 317 (quoting 1954 RECOMMENDATIONS, *supra* note 151, at 14); Sebert, *supra* note 4, at 394 n.146 (citing Supplement No. 1 as "some support in the drafting history of § 2-708(2) for ignoring the costs and proceeds language in the context of a lost volume seller."); Note, *supra* note 4, at 239, 245-47 (asserting that the "[l]egislative history indicates that 2-708(2) was intended to apply in cases where a components seller reasonably ceases manufacture after learning of the breach" and arguing that the "due credit" language should not be applied to lost volume sellers).

163. See, e.g., *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 254 (4th Cir. 1974); *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846, 853-54 (E.D.N.Y.), *aff'd mem.* 614 F.2d 1289 (2d Cir. 1979); *Snyder v. Herbert Greenbaum & Assocs. Inc.*, 380 A.2d 618, 624-25 (Md. Ct. Spec. App. 1977); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 314 n.2 (N.Y. 1972); *R.E. Davis Chem. Corp. v. Disonics*, 826 F.2d 678, 684-85 (7th Cir. 1987); *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865, 868 (1st Cir. 1982); *Nat. Controls, Inc. v. Commodore Bus. Mach., Inc.*, 209 Cal. Rptr. 636, 641-43 (Cal. App. 1 Dist. 1985). The one reported decision that denied the lost profits remedy to a volume seller did so without recognizing the linguistic hurdle confronting the seller's claim. Instead, the court in that case denied the profit remedy because it found that "[t]he theory of 'lost volume' erodes the duty to mitigate." *Northeastern Vending Co. v. P.D.O., Inc.*, 606 A.2d 936, 938 (Pa. Super. Ct. 1992).

164. See WHITE & SUMMERS, *supra* note 4, § 7-9, at 315 & n.3 (referring to "a seller who had ceased manufacture and sold the goods for salvage") (citing 1954 RECOMMENDATIONS, *supra* note 151, at 14).

165. See sources cited *supra* notes 162-64.

distinguished from "jobber sellers" and "lost volume sellers."<sup>166</sup> Other commentators soon adopted this vocabulary. A components seller is "one who agrees to manufacture or assemble the contract goods," which may or may not be part of some larger product.<sup>167</sup> Such a seller "reasonably stops production before completing the goods and thus has available for resale only raw materials or partially fabricated components."<sup>168</sup> A jobber seller, by contrast, is a distributor, "a middleman whose only role is to procure finished goods and sell them."<sup>169</sup> The jobber seller does not acquire the goods, and his decision to do so "after learning of the breach [must be] commercially reasonable."<sup>170</sup> Thus, neither the components seller nor the jobber seller has any finished goods available for resale,<sup>171</sup> even though he may have incurred costs toward their procurement. If he did, his claim would be identical to that of the lost volume seller who has finished goods and resells them after breach.<sup>172</sup>

Therefore, the crucial question for components and jobber sellers is whether the decision not to complete or acquire the goods was commercially reasonable. Section 2-704 gives the seller "express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach make it clear that such action

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166. See Harris, *Seller's Damages*, *supra* note 4, at 68-72, 97-98.

167. WHITE & SUMMERS, *supra* note 4, § 7-10, at 316; see also Note, *supra* note 4, at 238 ("A components seller is a seller who agrees to assemble or manufacture contract goods for a buyer.").

168. Sebert, *supra* note 4, at 385 (footnote omitted); see also Anderson, *supra* note 4, at 1032 (noting that such a seller "reasonably decides not to complete manufacture of the goods"); Harris, *Seller's Damages*, *supra* note 4, at 97 (describing such a seller as one who "stops further fabrication efforts upon notice of breach").

169. Sebert, *supra* note 4, at 385; see also Anderson, *supra* note 4, at 1024 (describing a jobber seller as one that "does not sell over the counter or out of stock, but rather purchases goods from a source of supply to accommodate orders of buyers"); Note, *supra* note 4, at 247 ("A jobber [seller] buys goods from a manufacturer or from another wholesaler and sells them at a higher price to a dealer."). Professors Goetz and Scott collapse components sellers and jobber sellers into one category. See Goetz & Scott, *supra* note 4, at 325-26 (describing a components seller as one that "has not fully manufactured or procured the contract goods at the time of breach").

170. WHITE & SUMMERS, *supra* note 4, § 7-10, at 317-18; see also Harris, *Seller's Damages*, *supra* note 4, at 97 (noting that for such a seller "breach occurs before the goods are on hand"); Sebert, *supra* note 4, at 396 (arguing that the lost profits remedy is available to "the components seller who reasonably stops production or the jobber who reasonably decides not to acquire goods intended for the buyer after learning of the buyer's breach or repudiation").

171. Sebert, *supra* note 4, at 385.

172. See Note, *supra* note 4, at 248 ("A jobber in possession of contract goods is in the same position as any seller in possession of finished goods after the buyer's breach."). Cf. Anderson, *supra* note 4, at 1028 (arguing that it "makes no difference" whether or not the jobber seller has acquired the goods); *id.* at 1033 (arguing that the claims of the volume seller and the components seller are analogous in that both have "lost the volume of one sale"). Despite the ostensible similarity between the lost volume seller's and the jobber and component sellers' claims to lost profits, I shall argue that the former are in fact radically different from the latter. See *infra* notes 241-65 and accompanying text.

will result in a material increase in damages."<sup>173</sup> Historically, the most important factor in evaluating the commercial reasonableness of the seller's decision has been the availability of a resale market for the goods. Many of the cases establishing this law have involved specially manufactured goods that, because of their unique character, can normally be resold only as scrap.<sup>174</sup> The mere decision not to acquire the goods or complete their manufacture is not, in itself, sufficient to warrant the award of lost profits. Indeed, the decision not to acquire or finish the goods where a readily available resale market exists should be construed as per se commercially unreasonable where the expected market price exceeds the total cost of production.<sup>175</sup> Courts, however, have been highly deferential to components and jobber sellers in assessing the reasonableness of their judgment not to acquire the contract goods.<sup>176</sup> It is rare for the seller to decide not to acquire the contract goods following breach where the goods are not specially manufactured or ordered. Typically, the seller will complete production or acquisition and resell on the available market, thereby converting his or her components or jobber seller claim into a lost volume seller claim.

#### i. Applying the Entire Damage Formula

The complete damage formula in section 2-708(2) easily applies to components or jobber sellers without ignoring statutory language or rendering it moot with the aid of legislative history. For example, suppose that the boat seller in our original hypothetical is also the boat

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173. U.C.C. § 2-704, cmt. 2 (1994).

174. See, e.g., *Cyil Bath Co. v. Winters Indus.*, 892 F.2d 465 (6th Cir. 1989); *Blair Int'l, Ltd. v. Labarge, Inc.*, 675 F.2d 954 (8th Cir. 1982); *Unique Systems, Inc. v. Zotos Int'l Inc.* 622 F.2d 373 (8th Cir. 1980); *Nobs Chem., U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212 (5th Cir. 1980); *Anchorage Centennial Dev. Co. v. Van Wormer & Rodrigues, Inc.* 443 P.2d 596 (Alaska 1968); *Royal Jones & Assocs. v. First Thermal Sys., Inc.*, 566 So. 2d 853 (Fla. 1st Dist. Ct. App 1990); *Kvassy v. Murray*, 808 P.2d 896 (Kan. Ct. App. 1991); *Jericho Sash & Door Co. v. Building Erectors, Inc.*, 286 N.E.2d 343 (Mass. 1972); *Detroit Power Screwdriver Co. v. Ladney*, 181 N.W.2d 828 (Mich. Ct. App. 1970); *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.*, 177 N.W.2d 25 (Neb. 1970); *Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc.*, 503 P.2d 482 (Or. 1972); *Lakewood Pipe of Texas, Inc. v. Conveying Techniques, Inc.*, 814 S.W.2d 553 (Tex. Ct. App. 1991). Some common law courts reached this same result prior to the UCC's enactment. These decisions limited sellers to damages equal to the contract-market differential. See *W.R. Grace & Co. v. Nagle*, 275 F. 343 (2d Cir. 1921); *Kincaid v. Price*, 70 P. 153 (Colo. Ct. App. 1902); *Garfield & Proctor Coal Co. v. New York, N.H. & H. R.R.*, 143 N.E. 312 (Mass. 1924).

175. See Goetz & Scott, *supra* note 4, at 356-58 (arguing that such a rule is necessary in order to ensure mitigation of damages). Professor Sebert believes that U.C.C. § 2-704 does not clearly establish such a per se rule but asserts that this is the interpretation that ought to be given to the provision. See Sebert, *supra* note 4, at 398 ("Thus, when there is an available market in which the completed goods can be resold, the Code should encourage the seller to mitigate damages by completing and reselling the goods.").

176. See cases cited *supra* note 174.

maker and that she has contracted with a nostalgic purchaser to build a small paddle-wheeler for \$25,000. Suppose also that the boat maker has built the specially designed hull and frame, incurring \$10,000 in expenses. Before she has acquired the separately manufactured steam engine, the eccentric buyer repudiates the deal. The steam engine will cost \$5000 to acquire and an additional \$5000 to install and complete production. There is no available market for steam-powered paddle-wheelers. Accordingly, the seller ceases production and resells the unfinished vessel for \$1000 in a scrap sale after spending \$50 on advertising. The seller then sues the contract buyer under section 2-708(2). Applied to this case, section 2-708(2) would award the boat seller "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer" (\$5000) plus "incidental damages" (\$50) with "due allowance for costs reasonably incurred" (\$10,000) and "due credit for payment or proceeds of resale" (\$1000). This would put the boat seller in exactly the same economic position that receipt of the full purchase price from the buyer in exchange for the completed boat would have done.

Courts unanimously agree that section 2-708(2) perfectly compensates both components sellers and jobbers who, exercising reasonable commercial judgment, decide not to complete production or acquire the contract goods.<sup>177</sup> Advocates of the lost volume seller, however, appear somewhat surprised at how well the lost profits damage formula works in these cases. Professors White and Summers remark that "[t]he jobber has no particular problems in using the formula set out in 2-708(2)"<sup>178</sup> and that the formula "works like a charm for components sellers."<sup>179</sup> Sebert observes that, with respect to components and jobber sellers, "there is no difficulty with the formula of section 2-708(2): the entire formula is used including 'costs incurred' and 'proceeds of resale'. . . ."<sup>180</sup> Finally, Professor Anderson notes, with unintended irony, that section 2-708(2) "reads as though it were specifically designed for the incomplete goods case."<sup>181</sup>

The statement is ironic because that is exactly the case: the formula was designed to address components and jobber sellers, that is, sellers who do not have finished goods to resell. The necessary corollary to this proposition is that the formula excludes and was designed to exclude lost volume sellers from enjoying the profit remedy. Two factors prevent the advocates of the lost volume seller from seeing this point:

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177. See cases cited *supra* note 174.

178. WHITE & SUMMERS, *supra* note 4, § 7-13, at 328.

179. *Id.* § 7-13, at 327.

180. Sebert, *supra* note 4, at 396.

181. Anderson, *supra* note 4, at 1033.

the interpretive assumption with which they approach the current statutory text and their reliance on a truncated portion of the drafting history. This interpretive assumption is the normative belief that the lost volume seller *ought* to receive the lost profit remedy. It colors their reading of both the statutory text and the drafting history behind that text. It may even be the reason why the advocates of the lost volume seller have not looked beyond the limited drafting history upon which they rely. In other words, this belief legitimizes the act of reading *in* the "due allowance" and "due credit" language in the case of components and jobber sellers, and reading this same language *out* of the statute in the case of the lost volume seller.

In what follows I will first critique this normative belief. Then I will offer what I believe is a more complete account of the drafting history behind section 2-708. Finally, I shall present a partial theory of how those who interpret the Uniform Commercial Code can resolve interpretive disputes that involve conflicting interpretive assumptions.

### III. CONCEPTUAL CRITIQUE OF THE LOST VOLUME SELLER

The theory that enables the volume seller to recover lost profits under section 2-708(2) does not rest upon a sound normative footing. When applied to the lost volume seller, the profit remedy protects unprotected and unprotectable expectation interests in the market-place. In doing so, it overcompensates the volume seller by treating the seller's desired position in the post-contractual market as a guaranteed, tangible right rather than only an unprotected hope for the future. This overcompensation violates section 1-106, the fundamental norm of all Code remedies, by placing the aggrieved party in a better position than he would have enjoyed had the original buyer fully performed. To see why this is so, we must once again return to the boat seller hypothetical.

#### A. *The Counter-Hypothetical*

In the original hypothetical the buyer who contracted to purchase the boat from the merchant seller repudiated the deal or rejected the boat upon delivery without any basis for doing so. The seller then resold the boat to another purchaser and sued the original contract buyer for lost profits, claiming that he would have made this subsequent sale in any case. The buyer's breach did not make the second sale possible. The seller could have supplied goods to both buyers and could have reaped two units of profit. Instead, because of the buyer's breach, the seller lost volume for which the recovery of lost profits under section 2-708(2) is the only adequate remedy.

Let us now alter this hypothetical in a small, but critical, way. Sup-

pose that the original buyer, instead of repudiating the deal, takes possession of the boat. Nevertheless, let us suppose that she still has no use for the boat or that she is unable to pay for it. Consequently, she does not lay anchor and begin enjoying life on board. Instead, she immediately resells the boat to someone else who is shopping for a boat of the same model and style. Alternatively, the original buyer could, under U.C.C. § 2-210(2), assign her right to delivery of the boat to this newly discovered purchaser for the contract price.<sup>182</sup> By reselling the boat or assigning delivery under the original contract to this subsequent purchaser, the original buyer has caused the boat seller to lose volume in a wholly legal and proper fashion. Because the purchaser wanted to buy the very type of boat that the boat seller sold to the original buyer, the original buyer's actions have taken away a customer he otherwise would have had. The seller has been denied the profit he would have enjoyed on this additional sale.

#### 1. THE DUTY TO MITIGATE AND THE IMPOSSIBILITY OF MITIGATION

Professor Morris Shanker first offered this counter-hypothetical in 1973 to demonstrate that the award of lost profits to lost volume sellers was improper.<sup>183</sup> Although the counter-hypothetical succeeds in doing this, it does so for reasons other than those suggested by its author. Shanker argued that by reselling the goods to a subsequent purchaser, the original buyer was merely exercising his right to mitigate damages. Because the original buyer no longer wanted or could no longer afford the boat, retaining the contract goods would be economically irrational. Rather than suffer the full brunt of this loss, the original buyer is well-advised to mitigate her damages as best she can. Indeed, if the original buyer were a corporation rather than an individual, the officers and directors might well owe a fiduciary duty to the corporate shareholders to resell the boat to another buyer rather than incur the loss unabated.<sup>184</sup>

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182. Section 2-210(2) provides in pertinent part:

Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

U.C.C. § 2-210(2) (1994).

183. See Shanker, *supra* note 62, at 701-03. Professor Shanker based his counter-hypothetical on White and Summers' hypothetical involving Boeing, TWA, United Airlines, and the sale of a Boeing 747. See WHITE & SUMMERS, *supra* note 4, § 7-13, at 325-27. Although I have substituted boats (based on the *Neri* case) for airplanes, the two hypotheticals are essentially the same.

184. For a discussion of the fiduciary obligation of corporate directors and officers, see generally ROBERT C. CLARK, CORPORATE LAW 93-140 (1986).

Shanker reasoned that the theory of lost volume taken to its logical conclusion precluded the possibility of mitigation.<sup>185</sup> Under this theory, even where the original buyer resold the boat in good faith in order to mitigate its damages, the original buyer still "caused [the seller] to 'lose' the further sale and the additional profit which it might have made from [the subsequent purchaser]."<sup>186</sup> The original buyer's efforts at mitigation would thus be "futile" and it would have to pay the seller's "lost" profit anyway.<sup>187</sup> Shanker predicted that a court faced with the facts presented in the counter-hypothetical would not reach this result. He believed that a court "might well rule that [the original buyer] having assigned its rights to [the subsequent purchaser] . . . has no further damage responsibility to [the seller]."<sup>188</sup> If this is the case, he reasoned, then reluctant buyers remain free to mitigate their damages. If, however, the buyer can mitigate its liability for damages by assigning or reselling the contract goods, "then why should not the result be the same when [the seller] resells? Indeed, why should not [the seller] be under a duty to do likewise; that is to use reasonable efforts to find a buyer . . . and sell it the [boat] originally intended for [the original buyer]?"<sup>189</sup>

There are at least two reasons why this argument for the equitable application of the mitigation principle fails. First, the duty to mitigate owed by the original buyer and that owed by the seller are not equivalent. In general, the duty to mitigate is a duty to minimize the loss that has occurred or that may occur because of someone else's misconduct.<sup>190</sup> On the one hand, the Code imposes a duty on the aggrieved seller to mitigate damages caused by the buyer's breach.<sup>191</sup> The seller owes this duty to the buyer because a failure to mitigate will absolve the buyer from liability for the loss that could have been avoided.<sup>192</sup> On the other hand, the buyer who accepts the contract goods does not owe a duty of mitigation, because the buyer's full performance of his contractual obligations does not give rise to any legally cognizable loss. The buyer is not injured, in a legal sense, by accepting the goods. Granted, the buyer may have injured himself in an economic sense by accepting goods he either can no longer afford or does not need, but such loss does

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185. See Shanker, *supra* note 62, at 701.

186. *Id.* at 702.

187. *Id.*

188. *Id.*

189. *Id.*

190. See *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981); *Masters Mach. Co. v. Brookfield Athletic Shoe Co.*, 663 F. Supp. 439, 441 (D. Me. 1987).

191. U.C.C. § 1-106, cmt. 1 (1994) states that various Code sections make "it clear that damages must be minimized."

192. See *Carnation Co. v. Olivet Egg Ranch*, 229 Cal. Rptr. 261 (Cal. Ct. App. 1986); *Lorenz Supply Co. v. American Standard, Inc.*, 300 N.W.2d 335, 340 (Mich. Ct. App. 1980).

not result from anyone else's misconduct. Rather, it has been caused by the buyer's poor judgment, lack of foresight, or bad luck in entering into the contract. As noted above,<sup>193</sup> if the buyer is a corporation or other type of business organization, certain individuals within the organization may owe a fiduciary duty to its investors. This duty may require these individuals to mitigate the loss by reselling the contract goods. But such a duty, if it exists, is purely internal in nature, in that it is owed by certain constituents within the buyer to other constituents also within the buyer. By contrast, the aggrieved seller's duty to mitigate the losses occasioned by the buyer's breach is owed to someone outside the seller itself, namely, the buyer. Accordingly, the duty to mitigate is not being imposed on buyers and not on sellers unfairly, because the buyer who performs by accepting the contract goods is not subject to any such duty.

Second, Shanker's argument that the volume seller should be required to mitigate his losses by using "reasonable efforts to find a [substitute] buyer"<sup>194</sup> overlooks the claim that such a seller *cannot* mitigate his losses by reselling the contract goods. Commentators supporting the lost volume seller acknowledge that the Code preserves the common-law duty to mitigate losses.<sup>195</sup> Nevertheless, they assert that "[n]o subsequent resale of the goods by a lost volume seller should be applied to mitigate the damages owed by the breaching buyer unless the resale was one that the seller could not have made except for the buyer's breach."<sup>196</sup> This is because "the volume seller does not mitigate his lost profit when he makes a second sale—even of the same goods—that he would have made anyway."<sup>197</sup> Because the subsequent resale of the goods is always a sale that the lost volume seller would have made regardless of the original breaching buyer's actions, the advocates of the lost volume seller conclude that "[b]y definition, the lost-volume seller cannot mitigate its damages."<sup>198</sup>

If the lost volume seller concept is accepted, the impossibility of mitigation through resale necessarily follows. Thus, Shanker's argument that the duty to mitigate should be imposed equally on buyers and sellers is not wrong but irrelevant. Yet, Shanker's counter-hypothetical still succeeds in undermining the lost volume seller thesis not by urging equal application of the duty to mitigate, but by disclosing the essence of lost volume claims.

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193. See *supra* note 184 and accompanying text.

194. Shanker, *supra* note 62, at 702.

195. See, e.g., Anderson, *supra* note 4, at 1055.

196. *Id.* at 1023.

197. NORDSTROM, *supra* note 4, § 177, at 536.

198. 1 DUNN, *supra* note 4, § 2.9 (pocket part 1993), at 10.



## 2. THE ESSENCE OF THE LOST VOLUME SELLER'S CLAIM

The freedom of the original buyer to resell the contract goods reveals the true nature of the lost volume seller's claim to lost profits. The theory supporting award of the profit remedy to the lost volume seller provides that even though the seller succeeds in reselling the contract goods to another customer "[h]e has lost one sale and one profit which he would have made if the [original] buyer had performed."<sup>199</sup> The original buyer's breach took away part of the lost volume seller's expected market by making the seller realize one less sale and, hence, one less profit. But the original buyer in Shanker's counter-hypothetical does exactly the same thing— she takes away part of the seller's market by reselling the contract goods to another buyer. If the seller has expectations about his market, the buyer who resells the goods disrupts those expectations by eliminating a potential buyer from the market-place.

### a. Neither Restitution nor Reliance Damages

The similarity between the two cases compels a closer examination of the lost volume seller's claim and the nature of the interest he seeks to protect. In seeking to obtain lost profits, the seller is not seeking reliance damages, that is, payment for expenses he incurred in reliance on the buyer's promised performance.<sup>200</sup> Although the seller may have incurred expenses in manufacturing or acquiring the contract goods from a supplier, the seller recovers these costs in the resale price. There may be some slight unrecovered cost, namely, the cost of finding a substitute buyer,<sup>201</sup> but this amount will likely be far less than the profit figure. Moreover, the seller may recover such a cost as incidental damages.

The award of lost profits is also not an award of damages in restitution. In suing for lost profits, the volume seller is not seeking compensation for the value of some benefit bestowed upon the buyer.<sup>202</sup> The buyer enjoys no such benefit because the buyer does not have the contract goods.

Instead, the claim for lost profits is a claim for expectancy dam-

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199. NORDSTROM, *supra* note 4, § 177, at 536; *see also* WHITE & SUMMERS, *supra* note 4, § 7-9, at 315 (arguing that even if the lost volume seller "resells Buyer No. 1's goods to Buyer No. 2, he still will not be made whole by difference money because he will have lost one sale, one profit, over the course of the year").

200. Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720, 729 (2d Cir. 1992).

201. For a fuller discussion of this expense, *see infra* notes 233-39 and accompanying text.

202. *See generally* R.E. Davis Chem. Corp. v. Diasonics, Inc., 826 F.2d 678, 683-84 (7th Cir. 1987); George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1227 n.5 (1994) (arguing that the goal of restitution is to put the non-breaching party in the position she would have been in had the contract not been made by restoring to her any benefit she had conferred upon the breaching party).

ages. The volume seller is asserting his right to receive the benefit he expected to receive from the buyer's full performance and which he does not receive from any other source. The seller receives the benefit of payment for the cost of goods from the resale buyer plus some margin of profit. The benefit the seller purportedly does not receive from this resale is the expected profit the seller would have earned on the original sale. Thus, the seller's interest in this unit of profit is an expectation interest and the damages sought are expectancy damages. The commentators,<sup>203</sup> the courts,<sup>204</sup> and the drafters of section 2-708 all agree that the lost profit formula recognizes and protects sellers' expectation interests.<sup>205</sup>

b. The Lost Volume Seller's Unprotected and Unprotectable  
"Expectation" Interest

Because the profit remedy protects expectation interests we must identify what the volume seller's expectation was when he entered into the contract with the original buyer. The seller's expectation was that he would sell the contract goods and receive the contract price, including his margin over cost. In other words, he expected to receive one unit of profit for the sale of one unit of goods. This expectation cannot be the interest that the seller hopes to protect in seeking the profit remedy, because this is precisely what takes place. The seller sells one unit of goods (to a resale purchaser) and receives one unit of profit. Because the seller obtains the same price for the goods on resale as the price in the original contract, the seller's profit margin also remains the same.<sup>206</sup> In seeking the profit remedy, the volume seller is attempting to protect his expectation of what he hopes the market will be after his sale to the original buyer.

Clearly, the seller is claiming that he expected to sell the contract goods plus an additional lot of the same size. But, this is an expectation that the seller does not have until he succeeds in reselling the contract goods. It is not an expectation that he had at the time he entered into the original contract with the breaching buyer. Indeed, arguably it is not an expectation at all. An expectation is a belief one has about the future; it

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203. See, e.g., Harris, *Seller's Damages*, *supra* note 4, at 66, 95. See generally David H. Vernon, *Expectancy Damages for Breach of Contract: A Primer and Critique*, 1976 WASH. U. L.Q. 179.

204. See, e.g., *Snyder v. Herbert Greenbaum & Assocs.*, 380 A.2d 618, 624 (Md. Ct. Spec. App. 1977).

205. The comment to section 2-708 makes clear that the section permits the "recovery of expected profit." See U.C.C. § 2-708, cmt. 2 (1994).

206. Of course the seller may have incurred certain additional cost in finding a resale purchaser. The seller can recover such incidental expenses under U.C.C. § 2-710. See *infra* notes 233-39 and accompanying text.

is a belief that some state of affairs will occur before it in fact takes place. The volume seller surely has an expectation that the buyer will pay for conforming goods. Moreover, the seller has this expectation at the time of contract formation. By contrast, the seller's expectation that he will resell the goods does not arise until after the original buyer has repudiated the deal. The seller does not have this expectation until after he has entered into the contract with the second buyer. In awarding the profit remedy to volume sellers, courts retroactively apply this expectation to the time of formation of the original contract, the only time at which expectations are relevant with respect to contract goods. In other words, the seller's expectation of an additional sale is actually a *post hoc* expectation, which is an oxymoron.

Although the seller does not have an expectation at the time of the original contract that he will resell the contract goods, he, nevertheless, contemplates achieving a certain volume of sales. Even at the time of the original contract, the seller contemplates a further sale—he expects to sell an additional volume of goods within some given period of time.<sup>207</sup> Seen in this way, the lost volume seller theory does not protect “after the fact” expectations. Instead, it protects the volume seller's expectation that he will succeed in selling a certain volume of goods beyond the original contract. Indeed, this is the heart of any lost volume claim: “If the buyer had not breached, the seller would have sold two [units of goods] instead of one, for it may be safely assumed that the

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207. In analyzing this problem, both critics and supporters have largely ignored the issue of whether or not the lost volume seller phenomenon contains a temporal component. Professors White and Summers describe the lost volume seller as one who “will have lost one sale, one profit, over the course of the year.” WHITE & SUMMERS, *supra* note 4, § 7-9, at 315; *see also id.* § 7-7, at 309 n.10 (“The result is the seller's total volume of sales by year's end is reduced by one, and his damages are the profit the seller would have made on that additional sale.”). Despite this rhetoric, it is unlikely that the lost volume seller concept contains a temporal element. Suppose, for example, that the boat seller from our original hypothetical expected to sell five boats of a certain style during the selling year and that his fifth such sale was to a buyer who repudiated the deal. If the seller succeeded in reselling this fifth boat to a subsequent purchaser during the same year, have that seller's expectations been satisfied? Suppose, in the alternative, that the boat seller expected to sell only five of the boats during the sales year and instead sold six. Suppose also that the last of these sales was actually the resale of a boat that the original buyer repudiated. The seller could have supplied up to ten boats in this style during the year. Does the fact that the seller only expected to sell five boats during the selling year mean that he has no protectable interest in selling a total of seven boats? Similarly, suppose that the seller expected to sell five boats during the year and that he succeeded in reselling the fifth boat that was the subject of a repudiated contract on either the day before or the day after the end of the “selling year.” Does the happenstance of when the resale occurred mean that the seller's expectation either was or was not satisfied? I believe that the answer to each of these questions must be “no.” The relevant expectations of the seller are not the sales he expected during a given period of time but the volume of sales he expected up to and including his resale of the repudiated goods. Thus, notwithstanding White and Summers' rhetoric, the lost volume seller phenomenon does not contain a temporal component, a point which even their own argument appears to bear out.

second purchaser would have bought another [unit]."<sup>208</sup>

Accordingly, even if it is granted that the expectation interest that the lost volume seller seeks to protect is not *post hoc*, it is nonetheless illicit. That is, the expectation interest that the lost volume seller seeks to protect by recovery of "lost" profits is neither protected nor protectable under the law of damages. In essence, the volume seller asserts that he has an expectation of what his market *will* be like—or rather, what he believes it *ought* to be like—following the original sale, and that the law must protect this expectation. The seller who resells the contract goods following breach and then sues the original buyer for lost profits is claiming an *entitlement*, a legally cognizable *right* to a certain level of demand for his goods. In short, the lost volume seller who sues for lost profits asserts that he has a protectable expectation interest in a certain post-contractual market.

Not all expectations, however, are created equal. People harbor expectations about everything from weather reports and horoscopes to the success of sports teams and the performance of the stock market. Society does not accord all of them the same honor or respect. Indeed, most are simply individuals' private hopes and desires to which society is largely indifferent. Consequently, the law does not assign equal value to all expectations. That is, the law attempts to protect our expectations about public safety, bodily integrity, and individual autonomy through the workings of tort law and the criminal justice system. The law does not, however, protect expectations that are unwarranted or should not be encouraged. For example, whereas the law protects my expectation that products that I purchase and use correctly will not physically harm me,<sup>209</sup> it does not protect my expectation that I will win the lottery.

In general, expectations about one's hoped for performance in the market-place are not protected by the law *unless* one has a valid contract in place that governs those expectations. For example, independent of any contract, a person may have an expectation that she will be able to purchase oranges, diamonds, crude oil, or wheat at a certain time and for a certain price. Absent a contract that provides for the purchase of these items at that time and at that price, however, such an expectation is worthless because, as a legal matter, it is nonexistent. That is to say, such an expectation is not juridically cognizable—the law does not rec-

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208. 3 HAWKLAND, *supra* note 92, § 2-708:04, at 482. See also Snyder v. Herbert Greenbaum & Assocs., Inc., 380 A.2d 618, 624 (Md. Ct. Spec. App. 1977) (arguing that seller's "original expectation" was "to make a profit from the sale of carpet to appellants, and, even if appellants did not breach, to make a profit on the sale of additional carpet to the buyers who . . . became the resale purchasers.") As the text that follows makes clear, it is difficult to see this as either the seller's "original" expectation at the time of contracting or as a legally cognizable expectation.

209. See, e.g., Corfab, Inc. v. Madine Mfg. Co., 641 F. Supp. 448 (N.D. Ill. 1986).

ognize it as one of those beliefs about the future entitled to such respect sufficient to command the coercive power of the state for its protection. Likewise, a person may have an expectation that she will be able to sell her oranges, diamonds, crude oil, or wheat at a certain time and for a certain price. Again, unless she possesses a legally valid contract for the sale of these goods at the price and time she has in mind, her expectation is legally irrelevant and unenforceable. The relation between two parties created by a contract for the sale and purchase of goods is a way of capturing a market, that is, of guaranteeing the existence of a market and ensuring the inviolability of each party's expectations in that respect. A contract removes the parties from the dynamic machinations of market-place competition. Because society generally values the benefits of efficient distribution and pricing created by this competition, the law requires contract formation before expectations about the market-place will be given legal protection. Therefore, in order to protect a legally cognizable expectation interest in the market, one must be party to a valid contract.<sup>210</sup>

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210. The relatively new business torts, tortious interference with contract and tortious interference with prospective economic advantage, are not to the contrary. In most major jurisdictions, the elements of a cause of action for tortious interference with contractual relations include the existence of a valid and enforceable contract between the plaintiff and some third party. See, e.g., *Laser Indus., Ltd. v. Eder Instrument Co.*, 573 F. Supp. 987, 993 (N.D. Ill. 1983); *Ecolab, Inc. v. Paolo*, 753 F. Supp. 1100, 1113 (E.D.N.Y. 1991); *Richardson v. La Rancherida La Jolla, Inc.*, 159 Cal. Rptr. 285, 288 (Ct. App. 1980); *Freed v. Manchester Serv., Inc.*, 331 P.2d 689, 691 (Cal. Dist. Ct. App. 1958); *Belden Corp. v. Internorth, Inc.*, 413 N.E.2d 98, 101 (Ill. App. Ct. 1980); *S & S Hotel Ventures, Ltd. v. 777 S.H. Corp.*, 489 N.Y.S.2d 478, 480 (N.Y. App. Div. 1985); *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991). Clearly, this tort cannot be used to protect a plaintiff's expectations unless those expectations have been rendered legally recognizable in the form of a contract.

At first blush the tort of interference with prospective economic advantage appears to be different. The elements of this tort do not include a valid and enforceable contract, merely the existence of a valid business relationship or expectancy. See, e.g., *H & M Assocs. v. City of El Centro*, 167 Cal. Rptr. 392, 396 (Ct. App. 1982); *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 878 (Ill. 1991); see also *Belden Corp.*, 413 N.E.2d at 101. In practice, however, courts have been reluctant to impose tort liability where the business relationship or expectancy is not reflected in an existing contract. "The right to engage in a business relationship is accorded less protection than the right to receive the benefits of a contract. Consequently, interference in the business affairs of another by an outsider is even more likely to be privileged where no contract is involved." *Schott v. Glover*, 440 N.E.2d 376, 380 (Ill. App. Ct. 1982); see also *Belden Corp.*, 413 N.E.2d at 102 (noting that "as the degree of enforceability of a business relationship decreases, the extent of permissible interference by an outsider increases"). As the California Supreme Court aptly stated:

When the defendant's action does not interfere with the performance of existing contracts, the range of acceptable justification is broader; for example, a competitor's stake in advancing his own economic interest will not justify the intentional inducement of a contract breach, whereas such interests will suffice where contractual relations are merely contemplated or potential.

*Env'tl. Planning & Info. Council v. Superior Court*, 680 P.2d 1086, 1090 (Cal. 1984) (citation omitted). *Accord Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 590 (Cal. 1990).

Although the law protects the seller's expected benefit under a valid contract for the sale of goods, it does not protect the seller's expectation as to what his market will be like following the contract. Indeed, this, as I see it, is the real point of Professor Shanker's counter-hypothetical. It demonstrates that the seller has no protectable interest in his future market. He has no legal right to make the sale to the second, subsequent purchaser. On the contrary, the counter-hypothetical shows that the original buyer could have taken this sale away from the seller in a wholly legal and proper fashion by reselling the contract goods herself to a purchaser who otherwise would have bought from the seller. The seller has no right to the post-contractual market he desires. He has no right to enjoy a certain hoped-for level of demand for his goods. Instead, the seller has only the opportunity to exploit the market-place as he finds it. His success is not guaranteed by the law. Rather, it is contingent on his performance in the market, a system of relations that is by design highly dynamic and malleable, and, at times, even volatile.

### 3. THE PROFIT REMEDY OVERCOMPENSATES VOLUME SELLERS

The volume seller is a party to a valid contract and, as such, has a legitimate and protectable interest in occupying a certain economic position. The seller has a protectable expectation interest in being "in as good a position as performance would have done."<sup>211</sup> Both sections 1-106 and 2-708(2) expressly sanction this result as the normative goal of Code remedies. The seller does not, however, have a legitimate interest in exceeding this goal. He does not have a protectable expectation interest in occupying a *better* position than he would have been in had the original buyer fully performed. The volume seller has no right to be overcompensated for the buyer's breach.

The award of "lost" profits to the volume seller does exactly that—overcompensates the seller. It does not put the seller in the same economic position as performance would have done, but in a better one. The volume seller who succeeds in reselling the contract goods following breach and who is not awarded the profit remedy has his original expectations fulfilled. The seller expected to sell one unit of goods and receive one unit of profit. This in fact takes place. That is, the profit made on the resale of the contract goods *replaces* the expected profit on the original contract because the seller's expectation interest in that profit is the only contractually protected expectation interest at the time of breach. Put another way, the volume seller succeeds in mitigating his

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211. U.C.C. § 2-708(2) (1994); *see also id.* § 1-106 (stating that the "end" of Code remedies is "that the aggrieved party may be put in as good a position as if the other party had fully performed").

damages by effecting a resale. The resale, in fact, constitutes a mitigation because the seller did not already have a contract in place protecting his expectation in the second sale.<sup>212</sup> Because the original buyer could have taken possession of the goods and resold them, thereby both performing the contract and reducing the seller's market, the seller has no expectation interest in further sales protected under the original contract. The seller has no legitimate interest in the resale qua additional contract or qua additional volume that is now "lost." This volume is not lost because, as a matter of law, it was never his to begin with. Only by assuming that the seller had an expectation interest in this additional sale prior to it taking place and by assuming that the seller had a legal right to this additional volume can the seller be awarded "lost" profits following a successful resale. The counter-hypothetical demonstrates that these assumptions are without foundation.

Under the counter-hypothetical, the reluctant buyer accepts the goods and quickly resells them to another purchaser who otherwise would have bought from the seller. The seller is left "in as good a position as performance would have done" because the buyer fully performed. Moreover, the seller's legitimate, protectable expectation interests have been recognized and enforced. The seller has sold one unit of goods and obtained one unit of profit. The seller probably hoped or wanted to make additional sales. He may have even believed such sales were likely in the future. Nevertheless, such hopes, desires, and expectations were neither reflected in nor protected under the original contract. Therefore, even the most fervent expectations of future sales were not legally cognizable at the time the original contract was created.

By contrast, the volume seller who succeeds in reselling the contract goods following breach and who is awarded the profit remedy is overcompensated. The award of the profit remedy to a seller who successfully resells does not protect the seller's expectation that he would

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212. The failure of the advocates of the lost volume seller to see this point has led to confusion in their account of the lost volume seller problem. For example, in their lost volume hypothetical, Professors White and Summers suppose that the seller can resell the contract goods to a buyer who is already contractually committed to purchasing goods from the seller and still maintain a claim for lost volume. See WHITE & SUMMERS, *supra* note 4, § 7-13, at 325. Even if one accepts the lost volume seller theory, however, the seller making a lost volume claim should still be required to attract and retain a replacement buyer, not someone already under contract with the seller. That is, if the resale buyer was already under contract to purchase goods from the seller, that buyer should count as volume the seller already has, not additional volume he could have had. See Harris, *General Theory*, *supra* note 4, at 599-601; Shanker, *supra* note 62, at 701 n.21. The replacement sale to a buyer already under contract does not prove lost volume because the seller's expectation interest in that additional sale was already protected. The same cannot be said of a resale to a substitute buyer not already under contract. Of course, that does not mean that the seller can convert his unprotected expectation interest in an additional sale into a protected one by simply selling the goods to a buyer already under contract.

sell the contract goods and receive one unit of profit. Instead it honors the expectation that the seller would have made an additional sale to an additional buyer. This puts the seller in a better position than performance would have done, because he no longer has to contend with the risk of the reluctant buyer reselling the goods and taking away his market. The seller is guaranteed his desired position in the market-place, a position he otherwise would have had to earn without any assurance of success. Thus, the seller reaps a windfall profit in violation of the Code's compensation principle set forth in section 1-106.

Because the seller's expectations, his hopes and desires for future sales, are not protected by contract, they may be disregarded and thwarted by others who participate in the same market. Indeed, because the seller's competitors operate under the same principle of self-interest, they have every incentive to do so. The reluctant buyer who accepts contract goods that she does not want or can no longer afford becomes the seller's competitor when she resells them to a subsequent purchaser. That is, the buyer may reduce the demand for the seller's goods because of "the risk that the buyer will dispose of the goods by reselling in the same market."<sup>213</sup> "By refusing the goods, the defaulting buyer no longer can resell them and thus diminish the seller's pool of potential buyers."<sup>214</sup> By reselling the contract goods himself, the seller "eliminat[es] the breaching buyer's ability to 'spoil' the market through resale."<sup>215</sup> Moreover, the seller is in a much better position to resell the contract goods quickly and cheaply than is the reluctant buyer.<sup>216</sup> The seller, after all, is in the business of selling these goods and presumably has an efficient selling apparatus already in place for this very purpose. The buyer's entry into the seller's market, on the other hand, might entail more than a perfunctory newspaper advertisement or "for sale" sign. Depending on the type of goods involved and the nature of the market, the buyer "could find disposing of the [goods] a very expensive proposition."<sup>217</sup> Suppose, for example, that the simple boat in our hypothetical

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213. Goetz & Scott, *supra* note 4, at 341.

214. *Id.* at 347.

215. *Id.* at 342. Professors Goetz and Scott offer an elaborate argument against the award of profit damages to volume sellers based on the economic effect of the buyer's breach on the seller's market. Paradoxically, Goetz and Scott conclude that most often the seller will be better off if the original buyer is allowed to breach and the seller resells the goods herself. They base their analysis on two independent factors: the effect that breach has on the seller's marginal costs and the effect it has on the demand for the seller's goods. See *supra* note 62 and accompanying text.

216. See WHITE & SUMMERS, *supra* note 4, § 7-2, at 291-92 (noting that the Code as a general policy puts the burden of resale on the seller, "because he is usually in the business of selling goods of the kind in question, is likely to have better market contacts and is therefore in a better position to salvage by redispensing of the goods through normal channels"); Goldberg, *supra* note 4, at 288-90.

217. Goldberg, *supra* note 4, at 289.



was instead a nuclear reactor or anti-aircraft missile. The cost of obtaining the necessary licenses and government approval for the sale in addition to the expense of identifying and convincing potential customers could be prohibitive.<sup>218</sup> Unless the breaching buyer is a reseller with easy access to the seller's market, the seller will almost invariably enjoy a comparative advantage in reselling the contract goods.<sup>219</sup>

#### 4. THE INTERPRETIVE IMPLICATIONS OF THE CONCEPTUAL CRITIQUE

The implications of this critique for the interpretation of section 2-708(2) are simple, but profound. Because the award of profit damages to sellers who successfully resell the contract goods consistently overcompensates such sellers, the lost profit damage remedy contained in section 2-708(2) should be applied as it is written. That is, the seller should be given "due allowance for costs reasonably incurred" in performance of the contract, and the breaching buyer should be given "due credit for payments or proceeds of resale." Suppose, once again, that the sale price for the boat in our hypothetical was \$10,000 and that this amount included an expected profit plus overhead figure of \$1000. Suppose also that following breach, the seller resells the boat for the original contract price. Under the section 2-708(2) damage formula, the seller should also receive \$9000 as "due allowance for costs reasonably incurred," that is, the amount the seller spent in acquiring the boat in order to perform the contract. Section 2-708(2) also requires that the original breaching buyer be given "due credit for payments or proceeds of resale," namely, the \$10,000 obtained by the seller in reselling the boat to the subsequent purchaser. The effect of this addition, the result of attaching meaning to each of the damage formula terms, is that the "profit (including reasonable overhead)" figure (\$1000) and the "due allowance for costs reasonably incurred" amount (\$9000) cancel out the "due credit for payments or proceeds of resale" (\$10,000). The subsequent resale replaces the original sale. The seller occupies the same economic position she would have, had the original buyer fully performed. The normative perspective of the counter-hypothetical demands a straightforward application of the statutory terms. The seller's expectation interest in receiving one unit of profit for one unit of goods is honored. The seller's unprotected expectation interest in enjoying a guaranteed level of demand in the post-contractual market is not. The seller is not awarded substantial damages because, as the counter-hypothetical shows, the seller was not substantially injured. At most, she can

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218. See Goetz & Scott, *supra* note 4, at 344 n.51 (noting that "[h]igher resale costs for the buyer could be expected in a wide range of circumstances").

219. See *id.* at 343-45.

recover "incidental damages," as provided in section 2-708(2), for the costs of caring for the goods and making the second sale.<sup>220</sup>

*B. Three Criticisms of the Counter-Hypothetical and Three Replies*

Advocates of the lost volume seller agree that the buyer who does not accept the contract goods cannot resell them in competition with the seller for the obvious reason that she has no goods to resell. They also agree that this enhances the demand for the seller's goods.<sup>221</sup> Still, they disagree with the conclusion that the possibility of resale within the seller's market should deprive the volume seller of the profit remedy.

First, even acknowledging that the seller "is better situated than others to resell [the contract goods],"<sup>222</sup> the act of finding a substitute buyer and closing the deal is not without cost.<sup>223</sup> Even though the seller already has a sales apparatus in place, the seller will still incur some expense in reselling the contract goods. Professor Victor Goldberg argues that this resale of goods is a service for which the seller ought to be compensated.<sup>224</sup> That is, Goldberg agrees that the counter-hypothetical shows that the buyer could have reduced the seller's volume by reselling the goods herself. If, however, the burden of resale remains on the seller because of his greater efficiencies, the buyer must still pay a competitive rate for use of the seller's selling services. Goldberg estimates that "[t]he competitive price of the reselling service is, roughly, the gross margin (retail minus wholesale price) of the dealer" and that this measure of damages "is precisely what the drafters of the U.C.C. had in mind under 2-708(2)."<sup>225</sup> Thus, Goldberg justifies the award of the profit remedy not in terms of lost volume but in terms of payment for services rendered.

Second, advocates of the lost volume seller also argue that the counter-hypothetical proves too little. They argue that it only shows that if the buyer had accepted the goods, she may have resold them to one of the seller's potential customers. "[E]ven if the buyer would have resold

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220. For a fuller discussion of the successful reseller's right to recover incidental damages and what these damages entail, see *infra* notes 233-39 and accompanying text.

221. See WHITE & SUMMERS, *supra* note 4, § 7-14, at 330-32 (arguing that Goetz and Scott's argument "carries more weight" in markets where there are "a limited number of players"); Goldberg, *supra* note 4, at 288 (acknowledging that Goetz and Scott "raise a valid issue"); Seibert, *supra* note 4, at 392 (asserting that his disagreement with Goetz and Scott "is not with the possibility that a breach might increase the demand for the seller's goods, but rather with the proposition that this is the most likely result of a breach").

222. Goldberg, *supra* note 4, at 289.

223. Cf. Goetz & Scott, *supra* note 4, at 341 n.45 (assuming for purposes of analysis a "frictionless," i.e. costless, resale).

224. See Goldberg, *supra* note 4, at 288-90.

225. *Id.* at 289-90 (footnote omitted).

had she not breached, it is not at all certain that she would have resold to someone who otherwise would have bought from the seller.”<sup>226</sup> Thus, the buyer’s resale of the contract goods may not directly correspond to a drop in the seller’s demand or volume of sales. There may, for example, be several sellers who sell competing goods within the same market. “In this case all sellers share the risk of resale by any buyer.”<sup>227</sup> Accordingly, the advocates of the lost volume seller argue that the claim that the buyer’s resale would have reduced the seller’s total volume of sales is a fact issue for which the buyer should have the burden of proof.<sup>228</sup> If the issue is a matter of proof, then the seller will likely be awarded profit damages because identifying and quantifying the effect of a buyer’s breach on a seller’s market will present intractable problems of proof.<sup>229</sup>

The third argument advanced by advocates of the lost volume seller in response to the counter-hypothetical is an interpretive argument. It focuses on the logic behind the statutory text itself rather than on the normative merit of the lost volume seller concept. The argument is that if the “due allowance” and “due credit” language is given meaning in the case of the lost volume seller, “[t]he seller’s damage recovery would be roughly that provided by section 2-706 or section 2-708(1). . . .”<sup>230</sup> This has the effect of thwarting what they describe as section 2-708(2)’s “main purpose of compensating the volume seller.”<sup>231</sup> Thus, according to the advocates of the lost volume seller, section 2-708(2) has a special function, distinct from that of sections 2-706 and 2-708(1). To give the breaching buyer credit for the proceeds from resale, as suggested by the

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226. Sebert, *supra* note 4, at 392.

227. Goetz & Scott, *supra* note 4, at 345.

228. See 3 HAWKLAND, *supra* note 92, § 2-708:04, at 482 (arguing that the possibility of buyer’s resale to one of seller’s customers “involves assumptions that should not be made lightly in favor of a breaching party, and a heavy burden should be placed upon him should this speculation be offered to defeat the seller’s claim to his lost profit”); WHITE & SUMMERS, *supra* note 4, § 7-14, at 332 (“If the defendant is then able to prove that the lost profits are overstated because the breaching buyer would have sold the goods in competition with the seller . . . then the damages should be reduced accordingly.”). In contrast, Professor Shanker argues that plaintiff sellers will be unable to satisfy Harris’ criteria for lost volume seller status. They will be unable to prove that they would have solicited the resale purchaser in any case and that the solicitation would have been successful. Because these matters will “require proof in court not of what actually happened, but rather, of what might have happened,” they demand “inquiries into the unknown and into the speculative.” Shanker, *supra* note 62, at 708. In other words, both advocates and critics of the lost volume seller argue that either the buyer or the seller should be required to meet a certain burden of proof, but that this burden will likely be insurmountable.

229. See Goetz & Scott, *supra* note 4, at 348 & n.59.

230. Anderson, *supra* note 4, at 1052 (footnote omitted).

231. NORDSTROM, *supra* note 4, § 177, at 541; see also Sebert, *supra* note 4, at 393 (arguing that the result obtained when the “due allowance” and “due credit” language is applied to the lost volume seller “is precisely the same as would obtain if the seller were forced to measure damages under the contract price less resale price formula of section 2-706, and it obviously does not award the lost volume seller his lost profit”).

counter-hypothetical and the "due credit" language, would deny section 2-708(2) this special role. The relief afforded to the lost volume seller by section 2-708(2) would in that case be virtually indistinguishable from the other Code remedy provisions. Courts, reaching this same conclusion, have reasoned that giving the entire statutory text meaning renders section 2-708(2) simply "nugatory."<sup>232</sup>

# 1. RECOVERING THE COST OF RESELLING AS INCIDENTAL DAMAGES

None of the three arguments described above succeeds in undermining the counter-hypothetical's conclusion. Although each contains a few grains of truth, these arguments consist of more chaff than meal. For example, Professor Goldberg is quite right to characterize the act of reselling the contract goods as a service performed by the seller on behalf of the breaching buyer and to point out that this resale is not without cost.<sup>233</sup> But Goldberg's assertion that the cost of reselling the wrongfully rejected goods equals the seller's gross margin is an empirical claim. Goldberg does not provide the data necessary to support this assertion, and his rhetoric suggests his own uncertainty.<sup>234</sup> Moreover, Dean Scott offers several reasons for doubting the possibility of an empirical basis for the claim. Scott argues that the cost of selling one unit of goods to one customer does "not equal the entire margin between wholesale price and contract price" because the margin includes certain costs that "are incurred only for buyers who actually go through with the deal."<sup>235</sup> For example, the costs of final product preparation and actual delivery are not general selling costs but are incurred only in the case of completed transactions, whereas the costs of marketing and display are general costs of selling. Because both are included in the margin, the award of the total margin to the seller as recovery for the cost of selling

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232. *Snyder v. Herbert Greenbaum & Assocs.*, 380 A.2d 618, 625 (Md. Ct. Spec. App. 1977). The *Snyder* court also remarked: "Practically, if the 'due credit' clause is applied to the lost volume seller, his measure of damages is no different from his recovery under § 2-708(1)." *Id.*; see also *Nat'l Controls, Inc. v. Commodore Business Machs., Inc.*, 209 Cal. Rptr. 636, 642-43 (Ct. App. 1985) (following *Snyder*); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 254 (4th Cir. 1974) (arguing that if the "due credit" language were not read out of the statute "then the measure of damages would be substantially the same as the contract-market differential of 2-708(1)").

233. Moreover, although he does not make this point, Goldberg's argument that the breaching buyer should compensate the seller for the cost of reselling the contract goods fits nicely with U.C.C. § 2-603 and § 2-604. Under these provisions a buyer who has properly rejected the contract goods may, under certain circumstances, resell the goods for the seller's account. U.C.C. §§ 2-603(1), 2-604 (1994). These sections further provide that such a buyer may recoup her costs in handling and reselling the goods from the resale price plus a reasonable commission not to exceed ten percent. U.C.C. §§ 2-603(2), 2-604 (1994).

234. Hence, Goldberg's choice of the term "reasonable approximation" and the qualification "roughly". See Goldberg, *supra* note 4, at 289.

235. Scott, *supra* note 90, at 1182.

would overcompensate the seller.<sup>236</sup> Furthermore, Scott argues that fixed overhead costs (such as the cost of the boat seller's showroom) "are not properly attributed to the breaching buyer because he does not consume or exhaust that resource."<sup>237</sup>

The counter-hypothetical shows that at the time of breach the seller does not have a protectable expectation interest in the resale as an additional volume of sales. Although it does not protect this expectancy interest, the contract established between the seller and the original buyer is not worthless. The breaching buyer is not equivalent to the seller's other potential customers. The buyer who enters into a contract with the seller is not the same as all the would-be buyers who considered purchasing seller's goods, perhaps even negotiated with the seller, but who for whatever reason did not take the next step of entering into a binding agreement. The contractual relation between the parties still protects the seller's reliance interest in performance. This interest includes recovery of the pro rata share of selling costs. Although the seller's contract with the original buyer does not and cannot guarantee a second additional sale, it does guarantee recovery of the seller's expenses in arranging a transaction that resulted in no revenue.

Instead of receiving the overcompensatory profit remedy, the volume seller should be awarded incidental damages arising from the actual costs of selling the contract goods. Section 2-710 defines the aggrieved seller's incidental damages as: "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."<sup>238</sup> The cost to the seller of making the sale to the original buyer could surely fit within the broad language of this provision. Furthermore, although section 2-710 does not award incidental damages to sellers (it merely defines them), the seller could obtain these damages under sections 2-706, 2-708(1), or 2-708(2). Where the seller resells the contract goods for the original contract price, there would be no contract-resale differential, contract-market differential, or lost profits figure for the seller to recover. These provisions do, however, allow the seller to recoup the cost of the original sale.<sup>239</sup> The argument that the cost of

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236. *See id.*

237. *Id.* at 1182-83.

238. U.C.C. § 2-710 (1994).

239. It is easier conceptually, perhaps, to think of this recaptured selling cost as the cost of effecting the resale rather than the cost of the original sale. *See* 1 DUNN, *supra* note 4, § 2.8, at 98 (describing incidental damages as "expenses of resale and the like"); Shanker, *supra* note 62, at 698 n.3 ("The aggrieved seller may always collect incidental damages from the breaching buyer, which, among other things, would include any costs incurred in connection with resale of the

selling equals the seller's gross margin, however, goes too far.

## 2. MATTER OF RIGHT VS. MATTER OF PROOF

The second argument, that the breaching buyer must prove that her resale would have directly reduced the seller's volume, may appear measured and reasonable, but it is in fact specious. Although the advocates of the lost volume seller say that the payment of lost profits should be a matter of proof, the unstated premise behind the entire theory of lost volume is that such an award is a matter of right. If the award of lost profits is a matter of proof, then it is unlikely that the buyer will be able to avoid paying such damages. First, to the extent that the buyer can prove her hypothetical resale to one of the seller's regular customers, such proof will be highly speculative in nature. It will be proof "not of what actually happened, but rather, of what might have happened."<sup>240</sup> Further, the buyer's contention will seem all the more implausible when juxtaposed with evidence from the seller concerning the buyer's unfamiliarity with the market, market entry impediments and other costs, and the loyalty of the seller's customers and their unwillingness to purchase goods from someone like the buyer. All told, it is highly unlikely that the buyer will be able to satisfy her burden.

But this view is based on a faulty premise, the same flaw that underlies the entire lost volume seller thesis. That is, the argument that the buyer must prove that she would have reduced the seller's expected market through resale wrongly presumes that the seller had a protectable expectation interest in achieving a certain volume of sales. Following breach, the seller clearly has a legal right to resell the contract goods to a substitute buyer. It is equally clear that following acceptance, the buyer has the same legal right to resell the goods to the same substitute buyer. Framing the issue as a matter of proof does not protect the right to sell or resell goods or the right to attempt to achieve a certain volume of sales. These rights are not in question, because they only guarantee the freedom to engage in certain activities. Rather, framing the issue as a matter of proof protects the unprotected interest the seller has in the successful exercise of the right to sell. It does not protect the seller's right to sell, rather it recognizes his interest in receiving the profit from a completed

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goods.")). *Contra* Anderson, *supra* note 4, at 1054 (arguing that the "typical lost volume seller situation rarely will incur incidental damages" because many of these damages "such as expenses of reselling or handling the goods, are incurred by the seller regardless of the buyer's breach"). Whether the damage is perceived as being the cost of the original sale or the cost of the resale will likely be of no consequence because the seller will in any case receive the cost of reselling the goods in the resale price.

240. *Cf.* Shanker, *supra* note 62, at 708 (referring to the nature of the lost volume seller's claim).

sale. Thus, it does not protect the right to pursue an opportunity, but the right to enjoy a certain outcome. It presumes that the seller has a protectable expectation interest in completing the sale to the replacement buyer even before there is a contract in place achieving this result. To say that the seller's recovery of lost profits is a matter of proof is to assume implicitly that the seller has a *right* to the profit on the second sale *ab initio*. But a right, a legally recognized and protected interest, is a matter of principle not a matter of proof. No amount of proof as to the likelihood or probability that the reluctant buyer would or would not have resold the contract goods to one of the seller's expected customers can transform an unprotected interest into a protected one.

### 3. SECTION 2-708(2) IS NOT RENDERED NUGATORY

The third argument, that the counter-hypothetical deprives section 2-708(2) of its special place among Article 2 remedies, also fails. Although it is true that the interpretive implication of the counter-hypothetical is that the lost volume seller does not receive the profit remedy, section 2-708(2) is not thereby rendered "nugatory." Although it does not apply to the seller who successfully resells the contract goods, section 2-708(2) does enjoy a special place among Code remedies, albeit not the place envisioned by advocates of the lost volume seller. Section 2-708(2) awards lost profits to components sellers and jobber sellers who, through the exercise of reasonable commercial judgment, have no finished goods available for resale. The decision by the components or jobber seller not to complete production or acquisition of the goods must be made to avoid additional damages. Generally, the seller will do this only in the absence of an available resale market. Because these sellers cannot and do not resell finished goods, their respective claims to the profit remedy are different from that of the lost volume seller. Moreover, section 2-708(2)'s entire damage formula readily applies to both components and jobber sellers without treating the statutory text as "mere surplusage"<sup>241</sup> or resorting to other forms of "creative" interpretation.<sup>242</sup>

Again, the problem with the lost volume seller is one of overreaching. The hidden premise in the volume seller's claim for lost profits is that such a seller is entitled to two sales at the time she enters into a contract for only one. Such a seller claims that she has a protected expectation interest in what her market will be like following performance of the contract. She claims to have an expectation interest both in

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241. See Harris, *Seller's Damages*, *supra* note 4, at 106.

242. See *supra* note 47 and accompanying text (discussing Schlosser's theory that "profit" in section 2-708(2) should be read to mean two units of profit).

completion of the original sale and in the next sale that takes place. Such a purported expectation interest is illicit. As demonstrated by the counter-hypothetical, the volume seller has no protected expectation interest in the post-contractual market because the buyer could legally take this additional sale away from the seller by accepting the contract goods and reselling them to the seller's potential customer. The volume seller can, however, protect the actual expectation interests that are reflected in the original contract by finding a replacement buyer for the contract goods. Such a subsequent purchaser replaces the original buyer and puts the volume seller in the same economic position she would have been in had the original buyer fully performed. If the volume seller is unable to find a replacement buyer for the goods, the seller may obtain the price from the original breaching buyer under section 2-709.<sup>243</sup> In the absence of an available resale market, this remedy also places the volume seller in the same economic position she would have been in had the original buyer fully performed.

a. Application of Section 2-708(2) to Jobber Sellers

The jobber seller, properly understood, neither claims an unprotected expectation interest nor hopes to replace the breached contract through resale. As noted above, a jobber seller is a distributor, a middleman who purchases the goods from a manufacturer or other supplier and then resells them, either to another seller in the chain of distribution or to an end-user.<sup>244</sup> At the time of breach, the jobber seller has not yet acquired the contract goods.<sup>245</sup> Such a seller may be one of three types: (1) one who is already bound by contract to take possession of the goods; (2) one who is not already bound by contract with his supplier to

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243. See U.C.C. § 2-709(1)(b) (1994) (stating that the seller may recover the price "of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price").

244. See *supra* notes 169-72 and accompanying text.

245. This statement is in need of some qualification. The majority of commentators describe the jobber seller as one who has not acquired the contract goods at the time of breach. See WHITE & SUMMERS, *supra* note 4, § 7-10, at 317-18; Harris, *Seller's Damages*, *supra* note 4, at 97; Sebert, *supra* note 4, at 396. Professor Anderson, however, believes that "whether the jobber or middleman has acquired the goods makes no difference." Anderson, *supra* note 4, at 1028. Anderson believes that the jobber seller is in fact a "well-recognized example of the lost volume seller." *Id.* What matters for purposes of the jobber's lost volume claim is not whether the seller had possession of the contract goods at the time of breach but "whether the jobber or middleman has available to it through its resources of supply more goods than it can sell." *Id.* Anderson is correct in asserting that a jobber seller who has already acquired the contract goods and who makes a claim for lost profits following resale of the goods is identical in all respects to the lost volume seller. Such a seller should be denied the profit remedy for the same reasons as the lost volume seller. See text accompanying *supra* notes 199-220. A jobber seller who has not yet acquired the goods at the time of breach may or may not be identical to the volume seller for purposes of the lost profits remedy. See *infra* note 253.



acquire the goods but who chooses to do so anyway; or (3) one who is not bound by a contract to acquire the goods and who chooses not to do so. Depending upon the available resale market following breach, these three types of jobbers may be entitled to the profit remedy, the price remedy, or no remedy at all.

If the jobber is already bound by contract to take possession of the goods or if he chooses to take possession of them, then he may be able to replace the contract through resale. The jobber who succeeds in reselling the goods now occupies the same economic position he would have had the original buyer fully performed. Nevertheless, if he sues the original buyer for profit damages his claim will be indistinguishable from that of the lost volume seller.<sup>246</sup> Like the volume seller, the jobber seller will contend that if the original buyer had not breached, he would have made two sales and received two units of profits instead of only one. Thus, the jobber seller who resells the contract goods and then sues for lost profits is claiming a protectable expectation interest in the post-contractual market. The award of profit damages to the jobber seller who resells the contract goods will overcompensate such a seller just as it will overcompensate the so-called lost volume seller. Such a damage award will put the jobber seller in a better economic position than he would have enjoyed following full performance by the original buyer.

By contrast, the jobber seller who is contractually bound to take the goods from his supplier, but is unable to resell them, need not settle for the profit remedy. Such a jobber may recover the full price from the original breaching buyer under section 2-709.<sup>247</sup> Likewise, the jobber who takes possession of the contract goods (though not contractually obligated to do so) and is unable to resell them, may also recover the contract price from the breaching buyer if his decision to acquire the contract goods was commercially reasonable at the time of breach.<sup>248</sup> Accordingly, if the jobber acquired the goods because he reasonably believed that he would be able to find a resale buyer and thereby mitigate his damages, the jobber will be awarded the price remedy under section 2-709 if he is in fact unable to resell the goods after a reasonable effort to do so.<sup>249</sup>

The jobber seller who is not contractually bound to take the contract goods at the time of breach and who chooses not to acquire the goods cannot recover the price remedy because he never incurs the full

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246. See *supra* note 172 and accompanying text.

247. See *supra* notes 64-72 and accompanying text.

248. See U.C.C. § 2-704, cmt. 2 (1994) for the proposition that the seller must use "reasonable commercial judgment."

249. See *id.* § 2-709(1)(b).

cost of acquisition. The availability of the profit remedy to this third type of jobber turns on the same standard under section 2-704. That is, the jobber seller who chooses not to acquire the contract goods following breach may recover the lost profit remedy only if the seller, in the exercise of reasonable commercial judgment, decided that he would be unable to resell the goods to another buyer. The jobber must reasonably believe that mitigation is impossible—that there is no available market for resale and that acquisition of the contract goods would only increase the damage amount to be paid by the breaching buyer. The majority of courts<sup>250</sup> and commentators<sup>251</sup> agree that a jobber seller may obtain the profit remedy under section 2-708(2) if he did not acquire the contract goods and his decision not to do so was based on reasonable commercial judgment.<sup>252</sup> The only generally recurring case in which there will be no available resale market is where the contract goods are special order goods.

The claim for profit damages made by a jobber seller who properly has no goods to resell is quite different from the lost volume seller's claim. The jobber cannot hope to replace the original contract through resale because there is no resale market in which a replacement buyer can be found. Consequently, the jobber seller who properly has no goods to resell and who sues the breaching buyer for profit damages does not claim an expectation interest in his future market. Instead, he simply seeks to recover the one unit of profit for the one unit of goods he expected to sell. Moreover, if the jobber has already incurred expenses toward performance of the contract, such as the hiring of warehouse space to store the goods, section 2-708(2)'s "due allowance" language will permit him to recover this amount. This phrase is not, however, a loophole for overcompensation. If the jobber can allocate these expenses to another customer, the "due credit" language ensures that the breaching buyer will not have to pay for them. Because section

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250. See, e.g., *Blair Int'l. Ltd. v. La Barge, Inc.*, 675 F.2d 954, 960 (8th Cir. 1982); *Nobs Chem. U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212, 215 (5th Cir. 1980); *Timber Access Indus. Co. v. United States Plywood-Champion Papers, Inc.*, 503 P.2d 482, 489-90 (Or. 1972).

251. See, e.g., *WHITE & SUMMERS*, *supra* note 4, § 7-10, at 317-18; *Sebert*, *supra* note 4, at 396; Note, *supra* note 4, at 247.

252. If an available market for resale is readily accessible then the jobber seller's decision not to complete acquisition of the goods will, in all likelihood, not satisfy § 2-704's "reasonable commercial judgment" standard. Thus, Professor Anderson is plainly wrong in asserting that it "makes no difference" whether or not the jobber seller decides to acquire the goods. Anderson, *supra* note 4, at 1028. According to Anderson, jobber sellers are simply a "well-recognized example" of the lost volume seller phenomenon. *Id.* If, however, it was commercially reasonable for a jobber not to acquire the contract goods following breach because there was no available market for the goods, then the jobber did not lose volume. Even if one wholeheartedly endorses the concept of "lost volume," one must concede that a seller can lose a volume of sales only where a market exists for the contract goods.

2-708(2) properly applies to such a seller, the provision plays a special role among Code remedies for sellers.<sup>253</sup>

b. Application of Section 2-708(2) to Components Sellers

The application of section 2-708(2) to the components seller who has no finished goods to resell closely parallels its application to the jobber seller who likewise has no goods. A components seller is, of course, the unfortunate seller "who agrees to manufacture the contract goods," but whose buyer breaches before production is complete.<sup>254</sup> Thus, at the time of breach the components seller has no finished goods available for resale. Whether or not the goods remain unfinished depends upon the cost of completion and the seller's prospects for finding a resale purchaser. As noted above, U.C.C. § 2-704 allows the seller

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253. As should be clear from the preceding argument, the award of the profit remedy to the so-called lost volume seller is both overcompensatory and inefficient. First, such an award overcompensates the volume seller by protecting the seller's unprotected desire for a certain volume of sales in the post-contractual market. The counter-hypothetical shows that the original buyer could have taken away demand for the seller's hoped-for market by reselling the goods to the seller's customers. The award of the profit remedy also overcompensates the seller because it treats the seller's resale as an additional volume rather than as a replacement sale. Second, the award of the profit remedy is inefficient because the volume seller is clearly the party who is best equipped to effect a resale of the contract goods. The award of the profit remedy incorrectly assumes that the original breaching buyer must resell the goods herself. The counter-hypothetical shows that the seller resells the contract goods on behalf of the original buyer quickly and efficiently.

Because a jobber seller who acquires and successfully resells the contract goods is indistinguishable from the lost volume seller, refusing to award the profit remedy to such a seller advances both the compensation and efficiency principles. If the jobber seller elects not to acquire the contract goods despite the presence of an available resale market, the denial of the profit remedy may serve one or both principles. A jobber seller who is the exclusive distributor of the contract goods within a defined market does not risk having his market reduced when he refuses to acquire the goods following breach. Because the goods cannot be sold in competition with the seller, they pose no threat to his market demand. Thus, according to the counter-hypothetical, the award of profit damages would overcompensate such a jobber and be inefficient.

On the other hand, a jobber who is not the exclusive distributor for the contract goods risks having his competitor sell the goods he does not acquire, thereby reducing his market. The award of the profit remedy to such a jobber overcompensates him if the jobber typically deals in the contract goods. Because an available resale market exists, most such jobbers will generally complete acquisition of the goods and resell them to a substitute purchaser. The decision not to acquire the contract goods is merely a decision to postpone acquiring them to avoid the appearance of making a lost volume claim. In reality, however, the claim is exactly that. Accordingly, the profit remedy would overcompensate such a seller.

A jobber who typically does not deal in the contract goods and who decides not to acquire the goods following breach will not be overcompensated by the award of lost profits. Such a seller expected to receive one unit of profit for one unit of goods sold. Denial of the profit remedy to such a jobber is appropriate, however, based on efficiency grounds. Presumably, the seller can make herself whole more efficiently through a quick resale on the available market, rather than by refusing to take the goods and then suing the original buyer for lost profits.

254. WHITE & SUMMERS, *supra* note 4, § 7-10, at 316; see also *supra* notes 167-68 and accompanying text.

"in the exercise of reasonable commercial judgment [and] for the purpose of avoiding loss . . . [to] either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value."<sup>255</sup> If the components seller completes production she may or may not succeed in her attempt to find a substitute buyer. Likewise, if the components seller chooses not to complete production, she may or may not succeed in selling the unfinished goods for scrap. In any case, the components seller's decision regarding production and her subsequent experience in the market-place will determine the availability of profit damages under section 2-708(2).

By allowing the seller to identify finished goods to the contract, section 2-704 enables the seller to pursue the contract-resale differential under U.C.C. § 2-706 and, where resale is not possible, the price remedy under U.C.C. § 2-709.<sup>256</sup> A components seller who completes production following breach and who succeeds in reselling the contract goods fully replaces the original contract. If, however, such a components seller sued the original buyer for the profit remedy, her claim would be identical to that of the lost volume seller. Moreover, the award of profit damages to the components seller who completes manufacture and resells the finished goods would overcompensate such a seller for the same reasons that the profit award would overcompensate the jobber seller who successfully resold.<sup>257</sup> Specifically, the award of profit damages to such a seller would protect her unprotected desire to achieve a certain volume of sales. Such a seller would claim that but for the buyer's breach, she would have manufactured and sold two units of product and received two units of profit instead of only one. However, because there are no guarantees in the post-contractual market-place, the award of profit damages to the components seller who resells finished goods would put such a seller in a better position than performance would have done.

On the other hand, a components seller who is unable to resell the finished goods will not be made whole by the profit remedy. Because such a seller has incurred the full costs of production, she needs more than an award of the profit margin she expected to make on the sale. Only an award of the original contract price can put such a seller in the economic position she would have enjoyed had the original buyer fully performed. However, because resale of finished goods is almost always

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255. U.C.C. § 2-704(2) (1994).

256. See U.C.C. § 2-704, cmt. 1 (1994). Although the comment does not expressly say so, presumably the contract-market differential under section 2-708(1) would also be available if the seller identified the contract goods but then failed to meet the requirements of § 2-706 in reselling them.

257. See *supra* notes 172, 244-53 and accompanying text.

possible, the award of the price remedy rarely occurs. The only generally recurring case in which there will be no available resale market for the contract goods is where the goods are specially manufactured to meet the buyer's requirements.<sup>258</sup> Because a seller exercising reasonable commercial judgment will usually discern the unmarketability of such goods, the components seller will generally choose not to complete production. If the seller decides to complete manufacture, even though there is no available resale market for the goods, she will not be entitled to recover the additional costs of manufacture incurred following breach. The exercise of reasonable commercial judgment would have avoided these costs. The breaching buyer should not be required to pay for the seller's failure to satisfy this rudimentary standard.

The components seller who does not complete manufacture of the goods cannot replace the original contract with a resale because there are no finished goods to resell. As noted above, if an available market exists, in general it will be commercially reasonable for the manufacturer to finish and resell the goods.<sup>259</sup> Where no available market exists, (for example, where the goods are special order) commercial judgment may recommend the cessation of production. If the components seller exercises reasonable commercial judgment in deciding not to finish the goods, then she will not incur the full cost of production.<sup>260</sup> Clearly, the price remedy would overcompensate such a seller by awarding her "damages" for expenses she did not incur.<sup>261</sup> The seller, however, may have already incurred certain costs at the time of breach. Even though the components seller has no finished goods to resell, she may still be able to recover some of these costs by other means. She may, for instance, be able to allocate the raw materials she purchased to the manufacture of other goods. Likewise, she may be able to recoup part of the

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258. See Goetz & Scott, *supra* note 4, at 358-61; Sebert, *supra* note 4, at 398; see also cases cited *supra* note 174.

259. I say "in general" because it is possible that an available market could exist but completion of the goods would still be commercially unreasonable. For example, if the original contract price were above the market price and the production costs made a sale of the finished goods at or near the prevailing market price unprofitable, completing the goods would unnecessarily increase the seller's damages. See WHITE & SUMMERS, *supra* note 4, § 7-15, at 332-36.

260. Under the Code, the seller's decision to complete production is presumptively correct. "The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture." U.C.C. § 2-704, cmt. 2 (1994). Conversely, courts have found that the buyer also has the burden of showing that the seller's decision not to complete manufacture was unreasonable. See *Northern Helix Co. v. United States*, 445 F.2d 546, 553 (Ct. Cl. 1972); *Modern Mach. v. Flathead County*, 656 P.2d 206, 211 (Mont. 1982).

261. The express terms of U.C.C. § 2-709 prohibit award of the price remedy where the seller does not have finished goods available for tender. U.C.C. § 2-709 (1994); see also *Rowland Meledandi, Inc. v. Kohn*, 7 U.C.C. Rep. Serv. (Callaghan) 34, 35 (N.Y. Civ. Ct. 1969).

cost of her investment in the sale of the partially completed goods. Such a sale is commonly called a "scrap sale" or "junk sale".<sup>262</sup> Typically, however, some costs will not be recovered through such remedial efforts.<sup>263</sup> Furthermore, even if the components seller recovered the cost of production, she still would not be made whole. She still would not have the profit she expected to receive on the original contract for the finished goods.

The damage formula under section 2-708(2) is uniquely well-suited to address this situation.<sup>264</sup> The phrase "due allowance for costs reasonable incurred" permits the components seller to recover the costs she has incurred in the course of production, and the phrase "due credit for payment or proceeds of resale" makes certain that the seller will not be overcompensated for these costs. That is, the "due credit" language ensures that the costs recovered by the seller from a scrap sale will be taken into account. Last, and most important, section 2-708(2) awards the components seller the profit that she "would have made from full performance by the buyer."<sup>265</sup>

In pursuing the profit remedy, the components seller who properly has no finished goods to resell does not claim an expectation interest in the market she hoped to enjoy following the original contract. The components seller who does not complete production because there is no available market for the contract goods does not claim to have lost volume. Instead, such a seller simply seeks to recover the one unit of profit for the one unit of goods she contracted to sell. The profit remedy, together with any costs not recovered in the scrap sale of the unfinished goods, places the components seller in the economic position she expected to enjoy following the original contract. Section 2-708(2) is the only remedy provision capable of achieving this result. Although section 2-708(2) does not apply to the so-called lost volume seller, the provision is not thereby rendered nugatory. Indeed, it clearly holds a special place among Article 2 remedies.

#### IV. LINGUISTIC CRITIQUE OF THE LOST VOLUME SELLER

The advocates of the lost volume seller are able to interpret the text

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262. See, e.g., *Intervale Steel Corp. v. Borg & Beck Div., Borg-Warner Co.*, 578 F. Supp. 1081, 1089 (E.D. Mich. 1984) (referring to a "scrap sale").

263. For example, a boatmaker will not recover the labor costs of designing a special order vessel by selling the partially completed hull for firewood. See *supra* text accompanying notes 176-81.

264. Indeed, one court has asserted that "a seller of uncompleted components whose market is composed solely of the buyer in breach cannot adequately measure his damages in any other way." *Bead Chain Mfg. Co. v. Saxton Prods., Inc.*, 439 A.2d 314, 320 (Conn. 1981).

265. See U.C.C. § 2-708(2) (1994).

of section 2-708 and the limited drafting history upon which they rely only by *assuming* that the drafters intended to award volume sellers the lost profit remedy from the very start. This assumption is based on their belief that the lost volume seller *ought* to receive lost profit damages. That is, their normative belief that the volume seller who resells the contract goods is not made whole by either the contract-resale differential or the contract-market differential gives them the capacity to see the "genuine" purpose behind section 2-708(2), namely compensation of the seller for "lost volume." For example, Professor Anderson writes that if the "due credit" language is applied to the lost volume seller "[a]n illogical result follows," namely, the volume seller receives only nominal damages.<sup>266</sup> But this result is only "illogical" if one first assumes that the seller was entitled to anything more than nominal damages.<sup>267</sup> Likewise, Professor Sebert's remark that "a faithful application of section 2-708(2)'s formula to the lost volume seller produces an incorrect result" makes sense only if "correctness" is understood as fidelity to some normative order rather than fidelity to the text itself.<sup>268</sup> Although conceptually distinct from the language of the provision, this normative order imbues the language with meaning. It makes the purposeful reading of the statutory text possible and allows the reader to see this plan, purpose, or goal as coexistent with the text. Thus, it is quite "natural" and "ordinary" for an advocate of the lost volume seller like Schlosser to claim that his reading of section 2-708 "achieves the drafters' goal of providing the lost-volume seller with a full-damages recovery."<sup>269</sup>

This interpretation of the drafters' purpose and view of the drafting

266. See Anderson, *supra* note 4, at 1052.

267. Cf. Harris, *Seller's Damages*, *supra* note 4, at 85 ("Of course, the fact that a formula leads to recovery of only nominal damages does not prove the formula is erroneous; it may indicate only that the plaintiff sustained no actual harm.").

268. See Sebert, *supra* note 4, at 393. The same can also be said of Sebert's reference to "appropriate results," *id.* at 394, and to Anderson's remark that "[r]ead literally, the provision cannot be applied correctly." Anderson, *supra* note 4, at 1025.

269. Schlosser, *Construing*, *supra* note 4, at 686; see also *id.* at 691-93 (arguing that interpreting "profit" in section 2-708(2) to mean two profits is needed for "the attainment of the drafters' goal of ensuring a full recovery to the lost volume seller."). Professor Stanley Fish explains that our normative views enable us to see some interpretations of texts as natural and ordinary and others as bizarre or ludicrous. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 271 (1980).

[The ordinary] does not require comment . . . because it is obvious, right there on the surface; anyone can see it. But what anyone sees is not independent of his verbal and mental categories but is in fact a product of them; and it is because these categories, rather than being added to perception, are its content that the entities they bring into being seem to be a part of the world in the sense that they were there before there was anyone to perceive them.

*Id.*; see also STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY AND LEGAL STUDIES* 87-90 (1989).

process is not implausible. The normative theory behind the lost volume seller clearly has some intuitive appeal, and the historical account of the drafting history plainly makes sense in light of this theory and given the materials relied upon. Indeed, the plausibility of this account of the drafting history and the lost volume seller theory in general can be seen in its widespread acceptance among courts. Professors White and Summers' endorsement of this normative approach in their popular treatise has been especially influential in establishing the lost volume seller thesis as the prevailing orthodoxy.<sup>270</sup>

This view is not, however, the *only* plausible, or even the most plausible, interpretation available. The alternative normative account of the lost volume seller "phenomenon" presented above<sup>271</sup> provides us with another way of interpreting the historical materials that supposedly prove the drafters intended to award the profit remedy to successful resellers. Rather than assume that the drafters wanted to address the lost volume seller phenomenon, we shall approach the text with a different interpretive assumption in mind. We shall take the drafters at their word. The drafters did not hope to compensate the lost volume seller with the lost profits remedy. Where the aggrieved seller succeeded in reselling finished goods following breach, the drafters believed that any difference between the original contract price and the resale price could be recovered either under section 2-706 or section 2-708(1). They intended section 2-708(2) to remedy the situation where there was no resale of finished goods (hence no recovery under section 2-706) and the goods were fixed price (hence no recovery under section 2-708(1)). The drafters added the "due allowance" and "due credit" language to clarify that a manufacturer who did not complete production could resell the unfinished goods for scrap and still receive the profit she expected on the contract. This clarification did not *preserve* the lost profits remedy for sellers who successfully resold completed goods because application of the profit remedy to this type of seller was not contemplated in the first place.<sup>272</sup> Moreover, additional sources from the drafting history support the plausibility of this "unorthodox" view.

In what follows, I will critique the claim made by the courts and commentators that the "due allowance" and "due credit" language

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270. For cases citing WHITE & SUMMERS, *supra* note 4 in support of lost volume sellers, see e.g. Teradyne, Inc. v. Teledyne Indus., Inc., 676 F.2d 865, 868 nn.2-4 (1st Cir. 1982); Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251, 254 nn.5-7 (4th Cir. 1974); Autonumerics, Inc. v. Bayer Indus. Inc., 696 P.2d 1330, 1339 (Ariz. Ct. App. 1984); Snyder v. Herbert Greenbaum & Assocs., Inc., 380 A.2d 618, 624, 625 n.4, 626 n.6 (Md. Ct. Spec. App. 1977).

271. See discussion *supra* part III.

272. Additional sources from the drafting history support the plausibility of this "unorthodox" view. See discussion *infra* part IV.B. and accompanying notes.



should be ignored. In the first part of this critique, I will argue that it is illegitimate to ignore the statutory text simply because it cannot accommodate one's normative beliefs. The "due allowance" and "due credit" language cannot be discarded simply because it precludes recovery of profit damages by volume sellers. In the second part of the critique, I will offer a more complete account of section 2-708(2)'s drafting history as seen from the alternative normative perspective provided above.

### A. *The Illegitimacy of Ignoring the Statutory Text*

Although the advocates of the lost volume seller assert that the "due allowance" and "due credit" language must be ignored to avoid "absurd" results, what is truly absurd is that this type of statutory "construction" is actually taken seriously. Granted, words sometimes do not in fact mean what they appear to say.<sup>273</sup> Nevertheless, interpreting a text to mean something different or unusual, perhaps heretofore unorthodox, is quite a different thing from pretending the text is not there. To ignore a text is different from interpreting it as meaningless or inapposite. To

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273. Professor Richard Kay provides a wonderful example in his discussion of *Cernauskas v. Fletcher*, 201 S.W.2d 999 (Ark. 1947). In that case the Supreme Court of Arkansas interpreted a statute concerning the authority of municipalities to vacate streets and alleys. The focus of the court's attention was whether the statute eliminated the discretion to vacate these areas that the predecessor statute had granted to municipalities. The last section of the statute provided that "[a]ll laws and parts of laws and particularly Act 311 of the Acts of 1941, are hereby repealed." *Id.* at 1000. The court, however, found the new statute did not repeal "all laws," only those "in conflict with that act." *Id.* Kay uses the *Cernauskas* case to demonstrate his point that law "does not emanate from the mere words of the provision," but from the "exercise of human will" by the recognized lawmaking authority. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 232 (1988). Kay believes that we must construe legal rules according to the intent of the drafters, that is, "in the sense in which those rules were understood by the people who enacted them." *Id.* at 230 (italics omitted).

As set forth in more detail below, I believe that drafters' intent and legislative history are relevant, if not always dispositive, aids to interpretation. What I believe the *Cernauskas* case really illustrates, however, is the folly of "textualism" or "literalism." Textualism is an approach to interpretation which posits the language of the text alone as the source of the meaning of the text. According to the literalist, one need not look anywhere other than the words themselves in order to discover their meaning. Brest, *supra* note 111, at 205 ("Textualism takes the language of a legal provision as the primary or exclusive source of law. . ."). Meaning, as Gerald Graff reminds us, does not reside "in" language the way furniture resides "in" a room. See Gerald Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 405 (1982); see also Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 743 (1982) (calling the belief that the meaning of words resides in the words "textual determinism"). At their root textualism and literalism fail because meaning is distinct from language itself. Indeed, language (marks on a page, sounds that are spoken) by itself is meaningless. See generally E. D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* 4 (1967) (asserting that ultimately "meaning is an affair of consciousness not of words" because "a word sequence means nothing in particular until somebody either means something by it or understands something from it").

ignore a text is not to interpret it at all.<sup>274</sup>

# 1. THE RULE OF RECOGNITION

It is illegitimate to ignore the "due allowance" and "due credit" language of section 2-708(2) in order to aid the cause of the lost volume seller. First, no matter what one's interpretive predilections, no matter what values one hopes to support through interpretation, those who interpret legal texts must have some "rule of recognition." That is, they must have some means of identifying those texts that constitute "the law." They must have some rule that "tells them which statements, of all the statements there are in any natural language such as English, are authoritative and should be taken as part of the law."<sup>275</sup> We can never begin the process of interpretation unless and until we agree what constitutes the "canonical" legal text to be interpreted. Such agreement is necessary "in order to be able to tell the difference between interpreting and changing a work."<sup>276</sup> In other words, before we can begin to interpret

274. Similarly, in the context of constitutional law, Richard Fallon notes that "[a]n 'interpretation' that is unsupportable by the text, as measured by conventional norms, is not constitutional interpretation as our tradition knows it." Fallon, *supra* note 39, at 1244 (footnote omitted).

275. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 282 (1985). Professor H.L.A. Hart coined the term "rule of recognition" to name the criteria for identifying the rules of social obligation. H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961). Hans Kelsen, the great German legal philosopher whose theory of legal positivism preceded Hart's, introduced a similar concept. Kelsen argued that legal statements are fundamentally normative in nature. Furthermore, Kelsen maintained that norms cannot be derived from descriptive propositions—non-normative statements—and that there are no self-evidently true normative propositions. Thus, according to Kelsen, in order for a norm to be "valid" it must be derived from some pre-existing norm, which has already been accepted. To avoid an infinite regress, Kelsen theorized that normative systems, including all legal systems, must be founded on a "basic norm," that is, a norm which is presupposed and from which all other norms derive their validity. See HANS KELSEN, *THE PURE THEORY OF LAW* (Max Knight trans., 1967). For example, we might say that the Securities Act of 1933 is a norm. It is validated by Congress' authority to make laws. Congress' lawmaking power is in turn validated by the Constitution, which is the basic norm. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383-84 (1981) ("The authoritative status of the written constitution is . . . an incontestable first principle for theorizing about American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration. It is our master rule of recognition . . .") (emphasis in original). The "basic norm" functions in Kelsen's theory much as the "rule of recognition" operates in Hart's, namely, as the way of identifying those texts that have the authority of law, those texts which are "legal" texts.

276. Dworkin, *Law as Interpretation*, *supra* note 39, at 531. Dworkin notes that "[c]ontemporary theories of interpretation all seem to use, as part of their response to that requirement, the idea of a canonical text (or score in the case of music, or unique physical object in the case of most art)." *Id.* In a similar vein, Professor Scott Brewer uses the term "inscriptional text" to refer to a text "that can be identified solely by the shape and order of its letters and spaces; its identity criteria are solely orthographic." Scott Brewer, Note, *Figuring the Law: Holism and Tropological Inference in Legal Interpretation*, 97 YALE L.J. 823, 824 (1988).

the Uniform Commercial Code or any part of it, we must be able to recognize what language, what words and phrases, constitutes the Uniform Commercial Code and we must be able to distinguish this language from the language that makes up the Internal Revenue Code, the Federal Rules of Civil Procedure, and all other legal and non-legal texts.

Typically, the act of identifying or recognizing the plain language of the text is clear and unproblematic. It is simply "taken for granted."<sup>277</sup> Indeed, with respect to U.C.C. § 2-708(2), it cannot be disputed that the "due allowance" and "due credit" phrases make up part of the language of the statute. These phrases are universally recognized as part of the canonical text of the UCC. Ignoring this language in order to favor certain plaintiffs is wrong because it disregards our beliefs about what language constitutes the text of section 2-708(2). It violates the rule of recognition by applying it on a purely *ad hoc* basis. The rule of recognition does not permit an interpreter to pick and choose among the components of a single, integrated text, recognizing some as constituting "the law" and disregarding others as mere "surplusage."<sup>278</sup> To read the "due allowance" and "due credit" language out of section 2-708(2) to accommodate the lost volume seller is equivalent to disregarding the third act of *Hamlet* simply because it does not fit well with one's proposed interpretation of the play.<sup>279</sup> It would be absurd to suggest that literary critics and English professors can alter Shakespeare's text to suit their interpretive ideas of what the play *ought* to say. What the interpreter values in the world may very well influence the meaning and significance that he or she attributes to the text.<sup>280</sup> The interpreter's normative viewpoint may not, however, displace the canonical text itself. In the same fashion, no matter how strong their desire to see the lost volume seller vindicated, neither judges, lawyers, nor law professors may redact portions of the statutory text.

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277. Fallon, *supra* note 39, at 1195. See also DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 91 (noting that "we have no difficulty identifying collectively the practices that count as legal practices in our own culture.").

278. See Harris, *Seller's Damages*, *supra* note 4, at 106 (arguing that the "due credit" language may be ignored by courts as "mere surplusage.").

279. See Dworkin, *Law as Interpretation*, *supra* note 39, at 531-32 ("An interpretation cannot make a work of art more distinguished if it makes a large part of the text irrelevant, or much of the incident accidental, or a great part of the trope or style unintegrated and answering only to independent standards of fine writing."); DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 219-28. Dworkin also provides the *Hamlet* example. See Dworkin, *Law as Interpretation*, *supra* note 39, at 531; Dworkin, *My Reply*, *supra* note 39, at 301.

280. See discussion *infra* notes 293-94, 304.

## 2. DEMOCRATIC VALUES AND THE PRINCIPLE OF SEPARATION OF POWERS

Second and relatedly, it is wrong to ignore the statutory language of section 2-708(2) because it is anti-democratic and violates the principle of separation of powers. As Professor Cass Sunstein rightly observes, it is an important but often overlooked truth that "[s]tatutory terms are the enactment of the democratically elected legislature and [as such] represent the relevant 'law'."<sup>281</sup> It is these words, these pieces of language, that "have gone through the constitutionally specified procedures for the enactment of law."<sup>282</sup> The same cannot be said of statutory history, legislative intent, or, for that matter, any other source of textual meaning.<sup>283</sup> When a legislature enacts a particular statute, it intends to imbue the particular language of the statute with the force of law.<sup>284</sup> The legislators who enact a given statute exercise their lawmaking powers by selecting its vocabulary and syntax. For judges, this language and its form are a given. They cannot be altered or revised. That is, judges "cannot treat the statute as a stab at formulating a concept which they are free to rewrite in their own words."<sup>285</sup>

The principle of separation of powers, the idea that the legislative, executive, and judicial branches of government have separate powers to carry out distinct functions is a simple concept that has proven to be enormously complex in practice.<sup>286</sup> Nevertheless, although admittedly an oversimplification, the power to revise the text of statutes is not a judicial power, but a legislative one. The role and function of courts is to interpret statutes, not to edit them. For courts to simply ignore the "due allowance" and "due credit" language in section 2-708(2) violates

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281. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989).

282. *Id.*

283. See Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 459 (1984) ("Once text and intent are seen as separable, the former comfortably assumes authoritativeness in a way that the latter cannot. Only the text is adopted.").

284. Indeed, in his discussion of the role of intention in legal interpretation, Professor Michael Moore suggests that this is the most basic intention of any legislator or legislative body. See Moore, *supra* note 275, at 339.

285. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1986-87) (citing EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-7, 28-30 (1949)); see also *id.* at 192-93 (discussing the opposing view that statutes, like common law decisions, express tentative principles which judges are free to revise).

286. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 18-400 (2d ed. 1988); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (arguing that the Supreme Court has adopted both a formalist and a functionalist approach to the question, neither of which is satisfactory).

the principle of separation of powers by allowing courts to assume the legislative function.

The effect of this assumption of power is anti-democratic. As noted above, the words of the statute are what the legislature enacts.<sup>287</sup> They are the product of the democratic lawmaking process. Judges who are not elected but who rewrite legislative enactments act in a way that undermines the principle of majority rule that democratic government is designed to preserve.<sup>288</sup> Of course, many state judges are elected officials.<sup>289</sup> Their elected status does not, however, legitimize the act of ignoring statutory language. Even if a judge is popularly elected, the judicial abrogation of statutory language is still anti-democratic, because the judge was not elected to act in this capacity. Popular majorities that elect candidates to judicial posts elect these individuals to function in a judicial, not a legislative, role.<sup>290</sup> The heart of that role is the interpretation of legal texts that already exist, not creating new texts.

Let me be clear that by "text" I mean the marks on the page, the words that the legislature selected and arranged in a particular order. By "text" I do not mean the meaning that one derives from those words and their arrangement. In recent years much has been made of the distinc-

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287. See Sunstein, *supra* note 281, at 416, 431; see also *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1451 (D.C. Cir. 1988).

288. What is at issue here is different from Professor Bickel's view that judicial review presents a "counter-majoritarian difficulty." See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 1986) (1962). For Bickel, legislative actions are legitimate, are morally supportable, only because they are democratic. Thus, he argued that judicial review of popular legislation by Article III judges was quintessentially anti-democratic. "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." *Id.* at 16-17. Moreover, the voiding of contemporary legislative actions is essentially permanent because judges do not function in a representative capacity and because the process of constitutional amendment is too cumbersome to be efficacious. See *id.* at 17. Bickel termed this the "counter-majoritarian difficulty." This problem is quite different from the problem of a court ignoring statutory language to achieve what it believes is the "correct" result. Bickel's problem involves a court using one text, the Constitution, to void the effect of another text, a particular legislative enactment. The court that ignores statutory language does so for purely consequentialist reasons and without any textual basis. For an interesting theory suggesting that Bickel's idea led to the current debate over the nature of legal interpretation, see Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 Wis. L. Rev. 679, 701-14.

289. See Mark A. Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987).

290. But see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1529-33 (1987) ("[G]iven the biases of the political process, the fact that judges are not elected may enable them to be better 'representatives' of the people than their elected legislators are (in some instances)."); Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725 (1992) (arguing that judges function as policymakers and representatives).

tion between "faithfully interpreting" a text and "making" or "changing" it. When the text involved is the law, this latter act has sometimes been referred to in a more pejorative fashion as "legislating from the bench," a phrase that was popularized during Robert Bork's confirmation hearings.<sup>291</sup> Judge Bork has, of course, been a long-time defender of the distinction between interpreting the law and making new law. Courts, he argues, fall into the "heresy" of legislating from the bench when they depart from the original understanding of the constitutional text and read into the document their own morality or policy preferences.<sup>292</sup> With respect to the meaning of a legal text there is, I believe, a real difference between faithfully interpreting the law and changing the law. Moreover, courts are charged with the duty of performing the former and are forbidden from doing the latter. This distinction, however, cannot be applied in any pre-interpretive fashion. In other words, one cannot determine whether one is faithfully following the meaning of the text or wrongfully departing from it simply by appealing to the text itself.<sup>293</sup>

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291. Although it surely pre-dates this event, the phrase made its way into colloquial American political discourse during the Senate confirmation hearings on the nomination of Robert H. Bork to the United States Supreme Court. See *Bork Confirmation as Justice: The Witnesses For and Against Nomination*, N.Y. TIMES, Sept. 22, 1987, at B6.

292. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). For thorough critiques of Bork's book, see Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (book review). For an argument that wholly rejects the distinction between "interpreting" and "changing" the law, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

293. Ronald Dworkin argues that there is a difference between following and departing from the meaning of a text. He argues that a judge is like one novelist in a great chain of novelists who are creating a book together. The first novelist writes the first chapter then passes it on to the next. All the subsequent writers in the chain have "the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is." Dworkin, *Law as Interpretation*, *supra* note 39, at 541. Each judge, says Dworkin, is like a novelist in the chain because "[h]e or she must read through what other judges in the past have written not simply to discover what these judges have said . . . but to reach an opinion about what these judges have collectively *done* . . ." *Id.* at 542; see also DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 228-38; Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 166-68 (1982). The judge, says Dworkin, "must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own." Dworkin, *Law as Interpretation*, *supra* note 39, at 543. Dworkin asserts that the belief that "interpreting a text is different from changing it into a new text" is a necessary corollary to the belief that some interpretations are better than others, what Dworkin calls the "'right-wrong picture' of interpretation." Dworkin, *My Reply*, *supra* note 39, at 289. He clearly believes that a judge may decide cases based upon the principles of the prior law "or he might ignore the past record of statutes and decisions to decide cases 'on a clean slate' instead." *Id.* at 305.

Stanley Fish incorrectly argues that Dworkin believes the distinction between following the text and changing it is pre-interpretive, a distinction that can be applied by appealing to the text itself. See Fish, *Chain Gang*, *supra* note 39, at 554. Fish argues that "the question of whether the

The distinction between following textual meaning and departing from it does not apply in this context. Those who simply urge others to ignore the "due allowance" and "due credit" language found in section 2-708(2) are not concerned with textual meaning at all but with ensuring the availability of the lost profits remedy for volume sellers. They urge that the language be ignored not because they have interpreted it and found it to be meaningless or inapplicable, but because they have found it inconvenient. Because this language threatens what the commentators believe to be the normatively correct result, they candidly urge that the "due allowance" and "due credit" language be jettisoned. Unless the meaning of the text warrants such a move, the commentators who urge this approach cannot seriously contend that they are faithfully following the text.

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legal history is being ignored or consulted depends upon a prior decision as to what the legal history is, and that decision will be an interpretive one." Fish, *Wrong Again*, *supra* note 39, at 306. But because the question is interpretive "there is no *independent* way of determining whether or not a particular judge is acting in one way as opposed to the other." *Id.* Because the distinction is interpretive in nature "it is always possible . . . that someone characterized as 'inventing' will reply that his accuser is mistaken as to the nature of that which is to be continued." *Id.* at 305.

The distinctions which appear throughout Dworkin's writing—between explaining a text and inventing a new one, between finding and creating meaning, between continuing a chain and striking out in a new direction—do not, as Fish suggests, depend upon the assumption that the meaning of a text "announces itself," Fish, *Wrong Again*, *supra* note 39, at 310, that it "has, at some level, the status of a brute fact." Fish, *Chain Gang*, *supra* note 39, at 559. Instead, Dworkin agrees with Fish that the distinction between continuing and striking out in a new direction is interpretive and "because it is interpretive, one cannot determine whether a particular piece of behavior is one or the other by checking it against the text." Fish, *Wrong Again*, *supra* note 39, at 305. He also agrees with Fish that the different interpretive meanings of the same canonical text that give rise to these distinctions appear only "in the light of different assumptions." Fish, *Chain Gang*, *supra* note 39, at 554 and "within interpretive conditions." Fish, *Wrong Again*, *supra* note 39, at 303. Dworkin, however, attempts to explain what these "assumptions" and "interpretive conditions" are in terms of beliefs about identity, integrity, coherence, and value. See DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 50-68, 219-38, 254-58; Dworkin, *Law as Interpretation*, *supra* note 39, at 530-35, 543; Dworkin, *My Reply*, *supra* note 39, at 92-97. Thus, contrary to the contentious rhetoric of their exchange, Fish and Dworkin appear to agree about the general nature of interpretation. This point has not escaped the observation of some of the more careful readers of the debate. See Gerald L. Bruns, *Law As Hermeneutics: A Response to Ronald Dworkin*, in *THE POLITICS OF INTERPRETATION* 315, 316-17 (W. J. Mitchell ed., 1983) (arguing that Dworkin and Fish represent the "grammarian" and "pragmatist" branches of conventionalism within contemporary literary theory and assuring the reader that "[t]here's not much room for disagreement between Dworkin and Fish."); Moore, *supra* note 40, at 908 (describing Dworkin as "a fellow interpretivist [of Fish's] whom Fish very much resembles"). The difference between the two is really only a matter of emphasis. Fish stresses the social dimension of "interpretive conditions" and their constraining effect, the fact that they are shared and enforced through the channels of authority and power in an interpretive community, see, e.g., Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1339-47 (1984), while Dworkin emphasizes the personal quality of these beliefs, the fact that they are one's own individual beliefs "nothing more interpersonal." Dworkin, *My Reply*, *supra* note 39, at 288. In this way it is possible to see Fish and Dworkin as articulating communitarian and libertarian versions of essentially the same theory of interpretation.

## 3. THE "RULE OF LAW" VALUES

Third, ignoring statutory language undermines the "rule of law" values of certainty, predictability, and fairness.<sup>294</sup> Although there is no one settled definition of "the rule of law,"<sup>295</sup> the basic concept is that disputes between individuals and the state must be resolved by the "law." Here, the law consists of norms which are publicly available and which have been properly enacted by the people's representatives, not by the fiat, prejudice, or self-interest of a lone decisionmaker.<sup>296</sup> This concept was captured in the American founders' aspiration that we have "a government of laws, and not of men."<sup>297</sup> Clearly, if laws are to be

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294. The following argument is largely based on Professor Lon Fuller's classic discussion of the rule of law. See LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969); see also Moore, *supra* note 275, at 313-18. For a more substantive, less procedural conception of the rule of law, see DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 39, at 9-32. Of course some critical legal scholars doubt the existence and worth of the rule of law. Professor Morton Horwitz, for example, explains:

I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good'! It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrewd, the calculating and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimizes an adversarial, competitive, and atomistic conception of human relations.

Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review); see also Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 772 (1982) (suggesting that the legal profession's commitment to the rule of law is really a commitment to rules that protect "our relatively fortunate status within this society."); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10-19 (1984) (arguing that linguistic determinacy is an essential component of the rule of law because it restrains "arbitrary judicial power," but because law is so ambiguous, incomplete, and internally contradictory, "[i]f traditional legal theorists are correct about the importance of determinacy to the rule of law, then—by their own criteria—the rule of law has never existed anywhere"). But cf. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989) (arguing that law is largely determinate and that the indeterminacy that does exist in the law does not undermine its legitimacy); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993) (arguing that the rule of law can be reformulated based on Gadamer's philosophical hermeneutics); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) (arguing that the rule of law concept should not be abandoned but reinterpreted in a pragmatic way that emphasizes the interpretive community in which it subsists).

295. Radin, *supra* note 294, at 783 ("The complex of ideas thought to comprise the Rule of Law is not completely canonical."); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 995 (1994) (noting that "there is no single definition of the rule of law").

296. See Radin, *supra* note 294, at 785 (arguing that the traditional view of the rule of law "can be boiled down to two principles: first there must be rules; second, those rules must be capable of being followed."); Segall, *supra* note 295, at 995-97 (arguing that the rule of law is the settled norms that guide conduct and can be applied in a fair and neutral way so as to enhance personal autonomy and restrain state power).

297. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 283-99



followed, they must be known, or at least available, to those who are subject to them.<sup>298</sup> Furthermore, notice of the law allows citizens to plan for the future by predicting the legal consequences of their actions. Indeed, absent such notice "they may simply be unable to carry out complex social arrangements that are dependent on legal sanctions being predictable in their application."<sup>299</sup> The promulgation of laws enhances the overall liberty of citizens, because it gives them the freedom to plan for the future. Courts that disregard statutory language for purely normative, noninterpretive reasons undermine the predictability of law and the greater freedom that it brings. The commentators who urge courts to ignore the "due allowance" and "due credit" language found in section 2-708(2) likewise undermine the freedom of those who engage in commerce under the Code.<sup>300</sup> Moreover, judicial discretion to ignore Code language would defeat the Code's underlying purposes of simplification, clarification, and uniformity.<sup>301</sup>

Furthermore, the rule of law requires that legal decisions bear a certain rational connection to the relevant law. A judge's opinion, whether in favor of the plaintiff or the defendant should be made "with reference to standards to which the parties themselves have access."<sup>302</sup> Such an identifiable "congruence between official action and the law"<sup>303</sup> protects society from arbitrary decisionmaking. It requires the decisionmaker to act in good faith and interpret the law before her. The demand that adjudicative decisions be justified in terms of the law does not make arbitrary decisions impossible. It does, however, make it more difficult for the judge to justify a decision that departs from the applicable law.<sup>304</sup> The advocates of the lost volume seller who suggest that the

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(1977) (discussing the necessity of a constitutional basis to legitimize enforcement of liberty and justice principles); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985).

298. Cf. FULLER, *supra* note 294, at 51 (noting that it is "plain that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.").

299. Moore, *supra* note 275, at 316.

300. Admittedly, the uncertainty created by such an approach to the text could be diminished by the uniform adoption of such an approach throughout a particular jurisdiction and between jurisdictions. If it is widely known that courts will act in this fashion, then buyers and sellers of goods can predict the legal consequences of their actions and adjust their conduct accordingly. As noted above, nearly all of the Code jurisdictions have accepted the lost volume seller theory and have awarded such sellers lost profits under section 2-708(2). See cases cited *supra* notes 89-90, 163.

301. See U.C.C. § 1-102(2) (1994).

302. Moore, *supra* note 275, at 317.

303. FULLER, *supra* note 294, at 81.

304. As noted above, where the identity of the relevant canonical text is not in dispute, the determination of whether one is following the meaning of the text or departing from it is an interpretive determination that calls for the exercise of interpretive judgment. See *supra* note 293.

"due allowance" and "due credit" language be ignored obviate the need for congruence between the language of section 2-708(2) and the decision that lost profit damages be awarded to lost volume sellers. If the troublesome language is simply disregarded, it need not be interpreted.

Some critical scholars argue that the requirement that judicial decisions be justified in terms of the language of the applicable law in no way constrains judicial interpretation. According to Professor Tushnet, "in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants." Tushnet, *supra* note 292, at 819. That is, congruence always can be achieved between the law and the decision because the meaning of each is infinitely malleable. What causes the judge to discover one legal principle rather than another within a statute or line of cases has nothing to do with the text itself and everything to do with the social norms about correctness and continuity within the practice of judging. "[O]nly a vision of the contours of the judicial role constrains judges' understanding of what counts as applying the rule." *Id.* at 822.

Stanley Fish likewise argues that because the meaning of a text is never self-declaring, no text can by itself ever constrain the meaning derived by an interpreter. *See supra* note 293. Even though Fish does not believe the text itself constrains the interpreter, he does not believe that the text is a "blank check" or that the interpreter is wholly unconstrained. Rather, for Fish the constraints on interpretation "inhere not in the language of the text (statute or poem) or in the context . . . in which it is embedded, but in the cultural assumptions within which both texts and contexts take shape for situated agents." Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 783 (1988); *see also supra* note 293.

Fish acknowledges the possibility that in practice an individual may not act in good faith. He gives as an example the baseball "pitcher who deliberately put[s] men on base and the judge who issue[s] willfully bizarre opinions." Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1793 (1987). Practitioners such as these have operated in bad faith and thus have not "played their respective games." *Id.* That these bad-faith practitioners are not playing the game that constitutes the practice may not be apparent to all the participants. For example, what if such an action or decision made in bad faith were combined with a persuasive strategy for presenting it? Fish might say that the two are mutually exclusive. He might say, for example, that for a legal opinion to be persuasive, it "would have to be made in recognizably judicial terms," Fish, *Chain Gang*, *supra* note 39, at 556, and "organized by judicial concerns," *id.* at 557, so that the "reasons for [the judge's] decision[s] . . . would be seen as reasons by competent members of the legal community." *Id.*

However, if Fish's example of baseball is at all similar to other practices, then the exercise of bad faith and persuasive presentation are clearly not mutually exclusive. For instance, it is easy to imagine a baseball pitcher who deliberately puts men on base but who also appears to be doing his best to keep them off. Although such a pitcher is not "playing the game," this may not be apparent to the participants. Indeed, an artfully executed ruse may deceive even the most discriminating participant. If such a convincing charade can be performed in the practice of baseball, it can likewise be performed in the practice of legal interpretation. Dworkin captures this point well when he observes:

The judge who ignores statutes and precedent to establish the rule he believes will serve society best is certainly not acting in a way "unrelated to any generally acknowledged legal concern." But if he reports his conclusions as the best interpretation of past decisions, in spite of the fact that he has made no effort to interpret them, then he will be inventing a judicial history in the only sense in which that epithet is or can be used within professional practice.

Dworkin, *My Reply*, *supra* note 39, at 306. Dworkin also notes that normally "when lawyers accuse a judge of inventing judicial history . . . they mean that he has only *pretended* to interpret past judicial decisions, that he has actually taken up the different assignment [of establishing a rule he believes will best benefit society], rather than simply making a mistake." *Id.* at 306 n.6 (emphasis added) (citation omitted).

Although this simplifies a judge's task, it undermines the rule of law by pretending that no law exists.

Finally, fundamental fairness is served when courts refrain from ignoring statutory language to aid a desired outcome. It is unfair to those who have already acted upon a law to simply disregard that law. An individual's expectation that a law will be enforced as written is legitimate and should be honored.<sup>305</sup> A buyer who breaches her contract with a volume seller who successfully resells may legitimately expect that the "due allowance" and "due credit" language of the statute will be applied. To ignore this language simply because it does not fit within one's normative perspective subverts the stability and fairness which the rule of law is intended to preserve.

### B. *The Drafting History Behind Section 2-708*

#### 1. RECOVERY OF LOST PROFITS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT

The idea of awarding lost profits as damages for breach of contract did not originate with the Uniform Commercial Code. Lost profits were awarded as damages both at common law and under the UCC's predecessor, the Uniform Sales Act.<sup>306</sup> What is novel about the lost profits remedy under the UCC is the primacy that the advocates of the lost volume seller wish to attach to it.<sup>307</sup> Prior to widespread acceptance of the lost volume seller theory among Code jurisdictions, the lost profits formula enjoyed a dubious stature among remedies for breach of contract. Supporters of the lost volume seller are prone to exaggerate the extent to which the common law awarded lost profit damages to sellers who successfully resold their contract goods.<sup>308</sup> The frequency with which common law courts awarded lost profits is not very compelling. By no means was it the predominant damage formula utilized by com-

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305. See FULLER, *supra* note 294, at 80 ("The evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect."). This, of course, also raises the intellectually thorny issue of retroactive application of laws. See *id.* at 51-62; Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

306. For cases awarding lost profits for breach of contract at common law, see *Smith v. Onyx Oil & Chem. Co.*, 218 F.2d 104 (3d. Cir. 1955); *Hugo V. Loewi, Inc. v. Geschwill*, 186 F.2d 849 (9th Cir.), *cert. denied*, 342 U.S. 817 (1951); *Ross v. Frank W. Dunne Co.*, 260 P.2d 104 (Cal. Dist. Ct. App. 1953); *Masterton v. Mayor of Brooklyn*, 7 Hill 61 (N.Y. Sup. Ct. 1845); *Betterman v. American Stores Co.*, 80 A.2d 66, (Pa.), *cert. denied*, 342 U.S. 827 (1951). For cases awarding lost profits under the Uniform Sales Act, see *infra* notes 320-321 and accompanying text.

307. For discussion of this position, see *supra* notes 17-20 and accompanying text.

308. See, e.g., 1 DUNN, *supra* note 4, § 2.9, at 102 ("Even cases under the Uniform Sales Act and prior common law consistently permitted recovery of lost profits damages when a buyer from a reseller breached the contract of sale.").

mon law courts. Rather, the traditional and most widespread measure of damages for breach of contract was the difference between the contract price and the market price of the goods in question.<sup>309</sup> Although there were written opinions awarding lost profits "on the books,"<sup>310</sup> such decisions were so unusual<sup>311</sup> that they could hardly be regarded as the paradigmatic approach to sales contract damages.

The Uniform Sales Act continued the primacy of the traditional contract price-market price differential damage formula. Section 64 of the Uniform Sales Act provided:

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.
- (4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.<sup>312</sup>

The contract-market differential found in subsection 3 of section 64 is the predecessor of U.C.C. § 2-708(1)<sup>313</sup> but differs from it in at least two significant respects. First, this measure of damages applies "[w]here

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309. See 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1039, at 246-47, § 1110, at 541-42 (1964); FARNSWORTH, *supra* note 35, § 12.12, at 863-65; Goetz & Scott, *supra* note 4, at 323 & n.2 (citing cases). See generally Scott, *supra* note 90. This formula is, of course, now found in U.C.C. § 2-708(1).

310. See cases cited *supra* note 306.

311. See Anderson, *supra* note 4, at 1025 (asserting that "the profit formula in goods cases was rarely used under pre-Code law").

312. UNIF. SALES ACT § 64, 1 U.L.A. 188 (1950).

313. The Official Comment to U.C.C. § 2-708 lists section 64 of the Uniform Sales Act under the heading "Prior Uniform Statutory Provision." See U.C.C. § 2-708, Official Comment (1994). The Code drafters were aware that they had departed from this prior statute in several important ways. Accordingly, under the heading "Changes" they wrote "Rewritten." See *id.*

there is an available market for the goods in question.”<sup>314</sup> Thus, it expressly contemplates a resale of the goods “[w]here the buyer wrongfully neglects or refuses to accept and pay for the goods.”<sup>315</sup> As noted above, the occurrence of such a resale is only implied in U.C.C. § 2-708(1).<sup>316</sup> The second significant difference is that if an available market for the goods exists and there are no “special circumstances showing proximate damage of a greater amount,” the contract-market differential is a mandatory remedy.<sup>317</sup> Unlike the UCC with its “fundamental policy” against “any doctrine of election of remedy,”<sup>318</sup> the Uniform Sales Act requires sellers who have finished goods suitable for resale and a market in which to sell them to pursue the contract-market differential damage remedy unless they can show some other significant loss caused by the original buyer’s breach.<sup>319</sup>

The mandatory language of section 64(3) presents an obvious problem to sellers seeking profit damages for “lost volume.” The lost volume seller’s complaint regarding section 64(3) is exactly the same as her complaint with respect to sections 2-706 and 2-708(1) of the UCC. Even if she is awarded the contract-market differential available under section 64(3), the lost volume seller contends she will not be made whole. From this perspective, section 64(3) will invariably undercompensate the lost volume seller, as would any difference money damage formula, because under it she will receive at best only one unit of profit for one unit of goods sold when she expected to receive two units of profit for two units of goods sold.

Despite the mandatory language contained in section 64(3), some courts did award lost profits to sellers of finished goods under the Uniform Sales Act. In these cases, courts found either that there was no “available market” for the goods at issue<sup>320</sup> or that there were “special

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314. UNIF. SALES ACT § 64(3), 1 U.L.A. 188-89 (1950).

315. *Id.* § 64(1).

316. See *supra* notes 80-82 and accompanying text.

317. UNIF. SALES ACT § 64(3), 1 U.L.A. 188-89 (1950); Harris, *Seller's Damages*, *supra* note 4, at 90.

318. U.C.C. § 2-703, cmt. 1 (1994).

319. By “significant” loss I mean something more substantial than incidental damages. Under the Uniform Sales Act, a seller could recover such damages in addition to the contract-market differential. Section 70 of the Uniform Sales Act provided: “Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.” UNIF. SALES ACT § 70, 1 U.L.A. 406 (1950); see also Rosenthal v. Green, 141 N.E. 863 (Mass. 1923).

320. For cases finding that there was no “available market” for the contract goods, see Feldman v. Jacob Branfman & Son, 166 A. 126 (N.J. 1933); Jessup & Moore Paper Co. v. Bryant Paper Co., 147 A. 519 (Pa. 1929); Smead v. Sutherland, 111 A.2d 335 (Vt. 1955); Breeding v. Champlain Marine & Realty Co., 172 A. 625 (Vt. 1934); Harris, *Seller's Damages*, *supra* note 4, at 90 n.122.

circumstances showing proximate damages in a greater amount."<sup>321</sup> Sometimes courts found that there was no available market where the goods were fixed price because application of the contract-market formula would yield either nominal damages or none at all.<sup>322</sup> Although the goods could be resold at the standard price, some courts reasoned that such a resale was not the "available market" contemplated by the statute.<sup>323</sup> Other courts found that the same phenomenon constituted "special circumstances" under the statute that entitled the seller to a greater amount of damages.<sup>324</sup> Once an escape from section 64(3) was secured through one of these clauses, the court derived a lost profit formula out of either section 64(2) or section 64(4).<sup>325</sup>

By all accounts, the reasoning of these courts is fallacious. First, the fact that application of the contract-market formula awards zero damages to sellers of fixed-price goods and otherwise gives sellers only nominal damages does not mean that the damage award is inadequate. It may mean that the seller has not suffered any substantial harm.<sup>326</sup> Second, a market in which the seller can resell the contract goods at the original contract price clearly constitutes an "available market" under the statute. To suggest otherwise is simple casuistry. To see this point, suppose that the seller in our boat hypothetical is not a volume seller and that he does not possess the capacity "to supply all probable customers."<sup>327</sup> Suppose instead that he is a casual or one-time seller or that he

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321. For cases finding "special circumstances," see *Renner Co. v. McNeff Bros.*, 102 F.2d 664 (6th Cir.), *cert. denied*, 308 U.S. 576 (1939); *Dolly Parker Motors, Inc. v. Stinson*, 245 S.W.2d 820 (Ark. 1952); *Torkomian v. Russell*, 97 A. 760 (Conn. 1916); *Poppenberg v. R.M. Owen & Co.*, 146 N.Y.S. 478 (Sup. Ct. 1914); *Nelson Equip. Co. v. Harner*, 230 P.2d 188 (Or. 1951); *Stewart v. Hansen*, 218 P. 959 (Utah 1923); *Popp v. Yuenger*, 282 N.W. 55 (Wis. 1938); and *William M. Roylance Co. v. Jewett & Sherman & Co.*, 210 N.W. 376 (Wis. 1926).

322. See *Harris, Seller's Damages*, *supra* note 4, at 84; see also *Electrical Prods. Corp. v. Mosko*, 297 P. 991 (Colo. 1931); *Torkomian v. Russell*, 97 A. 760 (Conn. 1916); *Stewart v. Hansen*, 218 P. 959 (Utah 1923).

323. See 1 N.Y. REPORT 1955, *supra* note 145, at 694 (arguing that contrary to New York precedent, other courts deciding cases under § 64(3) have found that "a price-fixed market is not the 'available market' contemplated by the statute or by the common law."). Professor Edwin Patterson, the author of this portion of the Commission's report, also cites the following cases in support of this proposition: *Torkomian v. Russell*, 97 A. 760 (Conn. 1916); *Stewart v. Hansen*, 218 P. 959 (Utah 1923); *Breeding v. Champlain Marine & Realty Co.*, 172 A. 625 (Vt. 1934); *Popp v. Yuenger*, 282 N.W. 55 (Wis. 1938).

324. See *Edwards Mfg. Co. v. Bradford Co.*, 294 F. 176 (2d Cir. 1923); *Myers v. Stephens*, 43 Cal. Rptr. 420 (Dist. Ct. App. 1965).

325. See *Harris, Seller's Damages*, *supra* note 4, at 84 n.91 (citing *Poppenberg v. R.M. Owen & Co.*, 146 N.Y.S. 478 (Sup. Ct. 1914), *aff'd*, 116 N.E. 1070 (N.Y. 1917); *Smead v. Sutherland*, 111 A.2d 335 (Vt. 1955); *Breeding v. Champlain Marine & Realty Co.*, 172 A. 625 (Vt. 1934); *Popp v. Yuenger*, 282 N.W. 55 (Wis. 1938)).

326. *Id.* at 85; *Goetz & Scott*, *supra* note 4, at 331 n.21; see also *supra* note 267 and accompanying text.

327. 5 CORBIN, *supra* note 309, § 1100, at 541.

is a retail boat dealer who is unable to acquire boats from his supplier in quantities sufficient to meet his customer demand. Thus, the original buyer's breach of the sales contract makes resale of the boat to a subsequent purchaser physically possible.<sup>328</sup> Suppose also that the seller will not accept anything less than the original contract price. Resale of the boat demonstrates that a market for the boat in fact exists and that the seller could utilize this market. Clearly, under these circumstances, such a seller would be limited under the Uniform Sales Act to recovery of the contract-market differential, if any.<sup>329</sup> But the market in which the non-volume seller resells is precisely the same market in which the volume seller resells. Indeed, minus the original breaching buyer, the market in which resale by either the volume or the non-volume seller takes place is the same market in which the original contract was formed. Clearly, the claim that there is no "available market" for a volume seller of fixed priced goods is a pretense for avoiding the consequence of nominal damages under section 64(3). Third, if the seller is unable to resell the goods because of the absence of an available market, then the proper remedy is an action for the price. This remedy was available to sellers under section 63(3) of the Uniform Sales Act.<sup>330</sup> Fourth, proof of an available market is essential to any volume seller's claim for lost profits. This is because the heart of such a claim is *not* that the seller could not resell the goods on an available market, but that she could and did in fact make such a resale *and* that if the original buyer had not breached, she would have made both sales.<sup>331</sup> In other words, the "lost volume" about which the lost volume seller complains is a volume of sales lost on the available market. Thus, to contend that no "available market" for the goods exists thoroughly undermines the lost volume seller's claim for

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328. By definition, the original buyer's breach does not "enable" the lost volume seller to make a subsequent sale to a resale purchaser. He could have made this second sale in any case. *See supra* notes 57-61 and accompanying text.

329. For cases applying § 64(3) where the plaintiff did not assert a lost volume claim, see *Compania Engraw Commercial E. Indus. S.A. v. Schenley Distillers Corp.*, 181 F.2d 876 (9th Cir. 1950); *Crane Iron Works v. Cox & Sons Co.*, 28 F.2d 328 (3rd Cir. 1928); *Franklin Sugar Ref. Co. v. Hanscom Bros.*, 116 A. 140 (Pa. 1922).

330. Section 63(3) provided:

Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

UNIF. SALES ACT § 63(3), 1 U.L.A. 188-89 (1950); *see also* Harris, *Seller's Damages*, *supra* note 4, at 85.

331. "By definition, a lost volume seller is one that resells the goods to a party to whom it could have sold regardless of the breach." Anderson, *supra* note 4, at 1023; *see also supra* notes 53-56 and accompanying text.

lost profits. Fifth, and finally, although section 64(4) of the Uniform Sales Act does contain a remedy for lost profits, the remedy is plainly not available to lost volume sellers. The lost profits formula found in section 64(4) is suggestive rather than mandatory. It states that "[t]he profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating" the seller's damages.<sup>332</sup> This rule, or rather this suggestion, can only be applied to sellers who do not have finished goods enabling them to complete their performance under the contract. Section 64(4) only applies where breach occurs "while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract" and "the buyer repudiates" the deal.<sup>333</sup> It further limits the buyer's liability to "no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation."<sup>334</sup> This amount is "estimated" to be the profit that the seller would have made from the contract. But a lost volume seller is a seller who, by definition, succeeds in reselling finished goods.<sup>335</sup> Such a seller has already accomplished all that is "necessary on the part of the seller to enable him to fulfill his obligations under the contract."<sup>336</sup> Thus, by its own terms, the lost profits remedy available under the Uniform Sales Act is clearly inapplicable to sellers presenting claims for lost profits due to lost volume.<sup>337</sup> The majority of cases that awarded lost profits under section 64(4) involved sellers of "special order" goods whose buyers breached before the completion of manufacture.<sup>338</sup> Because the goods at issue in these cases were specially manufactured to meet the specific needs of the particular buyer involved, the seller could reasonably conclude that there would be no "available market" for resale of the goods if she completed production. Because no available market existed, section 64(3) became inapposite, the seller could cease production and the court could properly apply the lost profits remedy under section 64(4). Most of the few cases that awarded lost profits but did not involve "special order" goods involved

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332. UNIF. SALES ACT § 64(4), 1 U.L.A. 189 (1950).

333. *Id.* This portion of section 64(4) is the predecessor to U.C.C. § 2-704(2), which permits a seller whose buyer breaches when the goods are unfinished to exercise "reasonable commercial judgment" in deciding either to "complete the manufacture" or to "resell for scrap or salvage value." U.C.C. § 2-704(2) (1994).

334. UNIF. SALES ACT § 64(4), 1 U.L.A. 189 (1950).

335. *See supra* part II.A. *Cf. supra* note 172.

336. UNIF. SALES ACT § 64(4), 1 U.L.A. 189 (1950).

337. *See Harris, Seller's Damages, supra* note 4, at 84-85.

338. *See, e.g., New York Oversea Co. v. China, Japan and S. Am. Trading Co.*, 200 N.Y.S. 449 (1923); *Nelson Equip. Co. v. Harner*, 230 P.2d 188 (Or. 1951).



the retail sale of automobiles.<sup>339</sup>

Admittedly, lost profits were awarded to some sellers of finished goods that were not specially manufactured, however, such awards were not commonplace. "Common law courts were generally skeptical about the validity of these lost-volume claims. If the contract goods were on hand at the time for performance, the majority of courts limited the seller to market damages, reasoning that any resale adequately replaced the breached contract."<sup>340</sup> Prior to the Code, courts that denied lost profits to lost volume sellers identified the presence of an available resale market as a reason for doing so.<sup>341</sup> Moreover, even when they did award the lost profits remedy to sellers of finished goods, courts did not expressly identify the lost volume theory as their rationale.<sup>342</sup> Indeed, even Professor Harris concedes that only one pre-UCC case squarely confronted the lost volume seller theory and that the court in that case plainly rejected it as a basis for recovery.<sup>343</sup> In short, the belief implicit in the Uniform Sales Act is that resale of finished contract goods made the seller whole. Thus, the only widely accepted application of the lost profits remedy under the Uniform Sales Act involved sellers who did not finish the contract goods for resale to a substitute buyer.

## 2. EARLY REVISIONS OF THE UNIFORM SALES ACT

In September 1940, the Commercial Acts Section of the National Conference of Commissioners on Uniform State Laws presented a first draft and report on a revised Uniform Sales Act to the full Confer-

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339. See *Dolly Parker Motors, Inc. v. Stinson*, 245 S.W.2d 820 (Ark. 1952); *Torkomian v. Russell*, 97 A. 760 (Conn. 1916); *Poppenberg v. R.M. Owen & Co.*, 146 N.Y.S. 478 (Sup. Ct. 1914); *Stewart v. Hansen*, 218 P. 959 (Utah 1923); *Popp v. Yuenger*, 282 N.W. 55 (Wis. 1938). In preparing Article 2 Llewellyn was surely aware of the existence of at least some cases that awarded the profit remedy for breach. See KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 28, 109-49 (1930).

340. Goetz & Scott, *supra* note 4, at 330; see also *id.* at 330 n.20 (citing cases in support).

341. See *W.R. Grace & Co. v. Nagle*, 275 F. 343, 345 (2d Cir. 1921); *Kincaid v. Price*, 70 P. 153, 155 (Colo. Ct. App. 1902); *Charles St. Garage Co. v. Kaplan*, 45 N.E. 928, 929 (Mass. 1942); *Garfield & Proctor Coal Co. v. New York, N.H. & H.R. Co.*, 143 N.E. 312, 313-14 (Mass. 1924); *Centennial Elec. Co. v. Morse*, 116 N.E. 901, 902 (Mass. 1917); *Frederick v. Willoughby*, 116 S.W.2d 1109, 1111 (Mo. Ct. App. 1909); *Babbitt v. Wides Motor Sales Corp.*, 192 N.Y.S.2d 21, 22 (App. Term. 1959); *Lowas Garage Co. v. Scheer*, 199 N.Y.S. 748, 748-49 (App. Term. 1923); *Varley v. Belford*, 156 N.Y.S. 597 (App. Term. 1916); see also Goetz & Scott, *supra* note 4, at 330 n.20; Harris, *Seller's Damages*, *supra* note 4, at 84.

342. Goetz & Scott, *supra* note 4, at 330 n.21.

343. See Harris, *Seller's Damages*, *supra* note 4, at 83 (citing *A. Lenobel, Inc. v. Senif*, 300 N.Y.S. 226 (App. Div. 1937), *modified*, 1 N.Y.S.2d 1022 (1938)). The *A. Lenobel* case is also significant in the development of U.C.C. § 2-708 because the New York Law Revision Commission focused on the case in its report on Article 2. See 1 N.Y. REPORT 1955, *supra* note 145, at 692-95 and discussion *infra* notes 472-501 and accompanying text.

ence.<sup>344</sup> "This was principally the work of Llewellyn, who had worked intensively for five weeks on the draft during the summer."<sup>345</sup> In preparing this draft, Llewellyn had made use of the Federal Sales Bill and "literature, and suggestions from all available quarters."<sup>346</sup> Although Llewellyn changed the Uniform Sales Act in a great many respects,<sup>347</sup> section 64 remained largely the same. It appeared in section 82 of the 1940 Draft as follows:

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damage is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when *and the place where* the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept. *If there is no available market for the goods at the place where the goods ought to have been accepted, the market or current price at the nearest available market may be taken as the basis of computing the damages, with proper allowance for cost of transportation.*

(4) If, while labor or expense of material amount is necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates [sic] the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.<sup>348</sup>

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344. See 1940 HANDBOOK, *supra* note 113, at 89-90; see also DRAFT FOR A "UNIFORM SALES ACT, 1940" APPENDED TO AND PART OF A REPORT ON THE UNIFORM SALES ACT TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS [hereinafter 1940 DRAFT], reprinted in 1 UCC DRAFTS, *supra* note 117, at 174.

345. TWINING, *supra* note 49, at 279-80.

346. 1940 DRAFT, *supra* note 344, at 8; see also TWINING, *supra* note 49, at 280.

347. The introduction to the 1940 Draft states that it was prepared "within the essential frame of the Uniform Sales Act of 1906 and the case-law thereunder" and that it had "only carr[ied] forward lines of drafting which the first Act began." 1940 DRAFT, *supra* note 344, at 8. Twining accurately asserts, however, that "Llewellyn's draft constituted a complete re-working and contained a number of new proposals." TWINING, *supra* note 49, at 280.

348. 1940 DRAFT, *supra* note 344, at 81-82 (italicized text underlined in original).

The *emphasized* text (as in the original) indicates how this section differs from section 64 of the Uniform Sales Act. Clearly these differences are very slight. The significance of this draft for our purposes is that it maintains and clarifies the "available market" criterion. Like section 64 of the Uniform Sales Act, section 82 of the 1940 Draft provides that the contract-market differential will be the seller's mandatory damage remedy where an "available market" for resale exists. Furthermore, it provides that where there is no available market "at the place where the goods ought to have been accepted, the market or current price at the nearest available market may be taken as the basis of computing the damages."<sup>349</sup> Moreover, like its predecessor, section 82 of the 1940 Draft limits the recovery of lost profits to sellers who do not complete production of the contract goods. The presumption implicit in this statute is that resale of finished goods coupled with recovery of the contract-market differential makes the aggrieved seller whole.

In response to comments and suggestions he received concerning the 1940 Draft, Llewellyn produced a report and second draft by September of the following year. The Conference reviewed the 1941 Draft and, following some additional revision by the Conference's Section on Uniform Commercial Acts, published it as a book in December 1941.<sup>350</sup> With respect to remedies, the 1941 Draft represented a more serious departure from the Uniform Sales Act than did the 1940 Draft.<sup>351</sup> Arguably the changes made in the 1941 Draft could be used to support lost volume claims. The advocates of the lost volume seller have, however, wholly ignored this draft in their commentary.

Although the contract-market differential was retained in the 1941 Draft, it lost its position of dominance among remedies for sellers. Market damages were still mandatory but only where "the seller has not effected cover under sections 58 through 58-H, and has not resold the goods under sections 62 through 62-B."<sup>352</sup> The term "cover" referred to the substitute performance obtained by the aggrieved party—either the buyer or the seller as the case may be—as a replacement for the performance of the breaching party.<sup>353</sup> The concepts of "cover" and actual

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349. *Id.* at 81.

350. See REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT 45 (1941) [hereinafter 1941 DRAFT], reprinted in 1 UCC DRAFTS, *supra* note 117, at 269; see also TWINING, *supra* note 49, at 280.

351. See 1941 DRAFT, *supra* note 350, at 259 (noting that with respect to remedies under the Uniform Sales Act the 1941 Draft has undertaken "a complete recast." ).

352. 1941 DRAFT, *supra* note 350, § 63(1).

353. Section 58 of the 1941 Draft defined "cover" as follows:

"Cover" presupposes a breach of the contract to sell or the sale, and consists in the justified claimant making, by way of contract, purchase, or sale, any arrangements which are by mercantile usage reasonable in the circumstances, to dispose of the

resale in the 1941 Draft thus replaced the concept of "available market" in the 1940 Draft and the Uniform Sales Act. These older versions of the statute did not have a provision specially dealing with actual resale, only the possibility of resale within an available market. Moreover, whereas the existence of a possible resale in an available market made the application of market damages unassailable under the Uniform Sales Act and the 1940 Draft, the existence of an actual resale prohibited the application of this remedy under the 1941 Draft.

The express lost profits remedy remained much as it was under the Uniform Sales Act and Llewellyn's 1940 revision. The provision setting forth the lost profits remedy appeared in section 63-A of the 1941 Draft and provided as follows:

Section 63-A. (Sales Act, Section 64(4), Fed. Sec. 53(4) redrafted.)  
*Unfinished Goods.*

(1) This section applies where labor or expense of material amount is, at the time the seller receives notice of the buyer's breach, still necessary to enable the seller to fulfill his obligations under the contract or sale; and where cover has not been had.

(2) Except in cases falling within subsection 3, the seller's damage is then to be measured as if he had done nothing, after such notice, to complete the work. The profit the seller would have made by completion and performance shall be considered as an element of damage in such a case.

(3) If, however, in the judgment of a reasonable merchant as of the time of notice of breach, completion of the work might be expected to lessen the damage, the seller may in good faith complete the work, appropriate the goods to the contract, and have his remedies accordingly.<sup>354</sup>

The damage formula here is clearly more emphatic than its statutory predecessors. Section 82 of the 1940 Draft and section 64 of the Uniform Sales Act cautiously suggested that the seller's expected profit would be "considered in estimating" the seller's damages.<sup>355</sup> Section 63-A of the 1941 Draft, by contrast, explicitly stated that the profit the seller would have earned on the deal "shall be considered as an element of damage in such a case."<sup>356</sup> It appears, however, that the profit remedy was still only available to sellers who did not complete production of the contract goods. Section 82 of the 1940 Draft and section 64 of the Uniform Sales Act plainly stated that lost profits were only available

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goods or of such goods as are called for by the contract; or if the claimant is the buyer, then to procure such goods.

*Id.* § 58(1).

354. *Id.* § 63-A.

355. See *supra* notes 332-37, 345-49 and accompanying text.

356. 1941 DRAFT, *supra* note 350, § 63-A(2).

where the buyer breached when the seller was still in the process of producing or obtaining the goods.<sup>357</sup> Section 63-A(1) of the 1941 Draft retained that condition, specifying that "[t]his section applies where labor or expense of material amount is, at the time the seller receives notice of the buyer's breach, still necessary to enable the seller to fulfill his obligations under the contract . . . ."<sup>358</sup> The new statute was, however, more flexible than its predecessors in that it allowed the seller to "in good faith complete the work" if "in the judgment of a reasonable merchant" doing so "might be expected to lessen the damage."<sup>359</sup> If the seller did complete the work necessary to fulfill the contract, obviously she would then have finished goods to resell. Upon completion of the goods, section 63-A(3) provided that the seller would still "have his remedies accordingly."<sup>360</sup> These remedies would not, however, include the lost profits remedy under section 63-A(2) if the seller succeeded in reselling the finished goods. Section 63-A(1) clearly stated that the section only applied "where cover has not been had."<sup>361</sup> Under the 1941 Draft, if the seller was the aggrieved party, resale of the finished goods constituted "cover."<sup>362</sup>

Although the contract-market differential formula under section 63 and the express lost profits remedy under section 63-A did not reflect either a recognition of or concern for so-called lost volume claims, other portions of the 1941 Draft arguably did. In the Introductory Comment to the remedies sections of the 1941 Draft, the drafters set forth what they believed were the differences between their revision and the Uniform Sales Act. Listed among these differences was the following: "The consumer-buyer is protected against summary resale; but the retailer who has sold such an article as an automobile is allowed to fix his 'price less proceeds' by a reasonable turn-back resale to his supplier."<sup>363</sup> Although they did not cite them by name, the drafters likely had in mind the automobile resale cases in which automobile dealers were awarded lost profits under the Uniform Sales Act despite the fact that they resold the vehicles at issue to another consumer or back to the manufacturer.<sup>364</sup> As noted above, these automobile dealer cases clearly

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357. The precise phrase used in both the Uniform Sales Act and the 1941 Draft is "while labor or expense of material amount is [\"are\" in the Uniform Sales Act] necessary on the part of the seller to enable him to fulfill his obligations under the contract." See UNIF. SALES ACT § 64, 1 U.L.A. 188-89 (1950); 1940 DRAFT, *supra* note 344, § 82.

358. 1941 DRAFT, *supra* note 350, § 63-A(1).

359. *Id.* § 63-A(3).

360. *Id.*

361. *Id.* § 63-A(1).

362. See *supra* note 353 and accompanying text.

363. 1941 DRAFT, *supra* note 350, at 260.

364. See *supra* note 339.

presented the lost volume phenomenon, although they did not refer to it as such.<sup>365</sup> Accordingly, the Introductory Comment indicates that by 1941 Llewellyn likely found these cases more agreeable than he did when he published his casebook in 1930.<sup>366</sup>

In addition to the comment, support for this view can also be found in sections 62, 62-A, and 62-B of the 1941 Draft. Section 62 provided that when the buyer is in breach,<sup>367</sup> "[t]he seller may resell, immediately upon sending notice to the buyer of his intent to do so."<sup>368</sup> Section 62-B in turn provided that following the resale "the seller may recover from the buyer the difference between the contract price and the net proceeds of the resale."<sup>369</sup> The resale must, however, comply with the requirements contained in section 62-A. This section provided that the resale may be either public or private so long as it is made in a fair manner and in good faith.<sup>370</sup> More importantly, section 62-A specifically provided that: "Resale by a retailer, under a reasonable adjustment, to the wholesaler or manufacturer from whom the goods were bought, is a proper method for resale."<sup>371</sup> This provision is important because, when combined with the contract-resale damage formula found in section 62-B, it approximates the award of lost profits in lost volume cases. That is, where the resale price equals the wholesale cost of the goods to the seller, the difference between the contract price and the resale price will be the profit that the seller expected to earn on the deal. Thus, these provisions reflect for the first time in a statutory text a willingness to award the profit remedy to sellers of finished goods who succeed in reselling their wares.<sup>372</sup>

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365. See *supra* notes 339-43 and accompanying text.

366. See *supra* note 339 and accompanying text.

367. Section 62 refers to the necessary condition of buyer's breach in a roundabout fashion by directing the reader to other sections in the statute which in turn refer to other sections. Section 62 actually says that the resale remedies provided in sections 62 through 62-D "apply to any goods which have been effectively appropriated by the seller to the contract, and in regard to which the seller has justifiably withheld performance under Sections 61 through 61-B." 1941 DRAFT, *supra* note 350, § 62(1). Section 61, in pertinent part, provides that the seller may withhold performance under the contract "[w]hen the seller is justified in resorting to cover under Sections 58 through 58-H." *Id.* § 61(1)(c). Section 58-B in turn provides that the seller is justified in seeking cover in the event of breach by non-acceptance, repudiation, notification of failure to perform, or failure to provide prompt assurances against future material default. *Id.* § 58-B.

368. *Id.* § 62.

369. *Id.* § 62-B. Because the formula allows the seller to recover the contract price less *net* proceeds of resale, the seller can recoup the actual cost of the resale plus reasonable expenses for care, custody, and insurance of the goods following the buyer's breach. See *id.* In subsequent drafts of the Code, these expenses became known as "incidental damages." See U.C.C. § 2-710 (1994).

370. 1941 DRAFT, *supra* note 350, § 62-A(1).

371. *Id.* § 62-A(3).

372. The claim to lost profits under sections 62 through 62-B of the 1941 Draft only "approximates" the lost volume seller's claim to lost profits because the retail seller discussed in

There are, however, two immediate reasons for doubting the apparent significance of the expansion of the lost profit remedy in the 1941 Draft. First, the scenario under which the award of lost profits would be proper under sections 62 through 62-B of the 1941 Draft is clearly not a lost volume case. A seller who resells the contract goods back to his supplier rather than to another retail customer has not lost volume. Recall again that a volume seller is defined as one who can "supply all probable customers"<sup>373</sup> and that such a seller loses the volume and accompanying profit represented by a contract when the buyer breaches and the seller resells the contract goods to a subsequent buyer. When the seller resells the goods back to his supplier, he is conceding that there was no subsequent buyer available because of lack of sufficient demand. Whereas the lost volume seller claims that but for the original buyer's breach he would have sold two units of goods and collected two units of profit, the seller who returns the contract goods to his supplier can make no such claim. He would in any case have made only the one sale. Thus, the advocates of the lost volume seller cannot properly contend that the 1941 Draft recognized the lost volume phenomenon or that it protected volume sellers by awarding them lost profits. The scenario addressed in sections 62 through 62-B was quite different.

Second, and more importantly, the innovations with respect to the award of lost profits introduced by the 1941 Draft were quickly abandoned by the drafters. The next draft of the Uniform Revised Sales Act, published in 1944, did not contain any provision indicating that the seller's resale of goods back to the manufacturer or supplier at or about the wholesale price constituted a proper resale entitling the seller to the contract-resale differential (*i.e.* lost profits).<sup>374</sup> Nor did the 1944 Draft contain any references to the automobile dealer cases mentioned earlier.<sup>375</sup> Whatever enthusiasm the drafters may have had for expanding the lost profits remedy seems to have been short-lived.

The 1944 Draft did, however, contain a complete reorganization of the sections concerning remedies. Moreover, this draft included extensive comments on most of the sections that both explained the contents of those sections and justified the policy choices implicit within them.<sup>376</sup>

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those provisions may be open to the risk of having his market taken away by resale of the contract goods by the supplier to another distributor or to an end-user. See the discussion of the jobber seller's claim to lost profits, *supra* notes 244-53 and accompanying text.

373. 5 CORBIN, *supra* note 309, § 1100 at 541.

374. See UNIFORM REVISED SALES ACT (SALES CHAPTER OF PROPOSED COMMERCIAL CODE) PROPOSED FINAL DRAFT NO. 1 (1944) [hereinafter 1944 DRAFT], reprinted in 2 UCC DRAFTS, *supra* note 117, at 1.

375. See *supra* notes 363-65 and accompanying text.

376. See 1944 DRAFT, *supra* note 374.

Like the original Uniform Sales Act, the 1944 Draft grouped the lost profits remedy together with the contract-market differential damage formula in the same provision. That provision, section 110, provided as follows:

The measure of damages for non-acceptance is the difference between the unpaid contract price and the price current at the time and place for tender together with any incidental damages under Section 112 but less any expense saved in consequence of the buyer's breach, except that if the foregoing measure of damages is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit the seller would have made from full performance by the buyer.<sup>377</sup>

The two-page comment on section 110 which appeared in the 1944 Draft is decidedly unhelpful in determining the application of this provision to the so-called lost volume phenomenon. It focused on the issue of repudiation and the effective retraction of repudiation.<sup>378</sup> Moreover, it was not entirely devoted to section 110; it also concerned section 111, the provision granting the seller a cause of action for the unpaid price of the goods.<sup>379</sup> The comment makes clear, however, that the drafters believed that the contract-market differential, the lost profits remedy, and the price remedy were all potentially applicable where the buyer repudiated the deal, a point reinforced by the statutory text of section 105.<sup>380</sup>

These three remedies are not, however, equally applicable to cases of repudiation. The statutory text of section 110 established an explicit hierarchy between two of them. Section 110 stated that "[t]he measure of damages for non-acceptance is the difference between the unpaid contract price and the price current at the time and place for tender."<sup>381</sup> The lost profit remedy was available only "if the foregoing measure of damages is inadequate to put the seller in as good a position as performance would have done."<sup>382</sup> As we shall see, the hierarchy between these two remedies remained in the Code throughout the remainder of the drafting process and is present in the Code today.<sup>383</sup> Thus, the lost profits remedy does not apply to those cases of repudiation where the contract-market damage formula places the seller in the position she would have enjoyed had the buyer fully performed.

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377. 1944 DRAFT, *supra* note 374, § 110.

378. *Id.* at 255-56.

379. *See id.*; *id.* § 111. Section 111 is, of course, the precursor to U.C.C. § 2-709.

380. *See infra* notes 384-86 and accompanying text.

381. 1944 DRAFT, *supra* note 374, § 110.

382. *Id.*

383. *See infra* notes 590-600 and accompanying text.



Section 105 of the 1944 Draft made clear that the contract-market differential and the lost profits remedy could apply in cases involving some form of buyer breach other than repudiation. More importantly, the statutory text of section 105 also indicated that the drafters did not intend for the lost profit remedy to apply to volume sellers who successfully resold the contract goods. Section 105 of the 1944 Draft provided:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract under Section 102, then also with respect to the whole undelivered balance, the aggrieved seller may (a) withhold delivery of such goods; (b) stop delivery by any bailee under Section 107; (c) proceed under Section 106 respecting goods still unappropriated; (d) resell and recover damages under Section 108; (e) if any goods have not been resold recover damages for their non-acceptance as measured under Section 110 or in a proper case their price under Section 111; (f) cancel.<sup>384</sup>

Section 105 is obviously the precursor to U.C.C. § 2-703. It cataloged all of the seller's remedies and listed them in one convenient place. It is apparent from section 105 that the contract-market differential and the lost profits remedy were available not only following repudiation, but also when the buyer "wrongfully rejects or revokes acceptance of goods."<sup>385</sup> The text of Section 105 also made clear that the absence of a resale was a *precondition* to the contract-market differential, the price remedy, and, most importantly, the lost profits remedy. Subsection (e) provided that "if any goods have not been resold [the buyer may] recover damages for their non-acceptance as measured under section 110 or in a proper case their price under Section 111."<sup>386</sup> Because section 105(e) of the 1944 Draft expressly conditioned recovery of lost profits on the absence of any resale, the lost profits remedy was obviously not available to any seller who successfully resold the contract goods. Therefore, the drafters did more than simply delete from the 1941 Draft the references to automobile dealer cases and to sellers who quickly resold their goods back to their suppliers. Such a deletion could be attributed to a change of style, a desire for less detail and greater simplicity. Instead, the drafters made recovery of the lost profits remedy and resale of the contract goods mutually exclusive. Clearly, they did not contemplate any substantial damage remedy for lost volume sellers.

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384. 1944 DRAFT, *supra* note 374, § 105.

385. *Id.*

386. *Id.*

### 3. EARLY DRAFTS OF THE UCC AND THE 1952 OFFICIAL DRAFT

In May 1949, the Institute and the Conference published the first complete draft of the Uniform Commercial Code.<sup>387</sup> Prior to this event the sponsoring bodies had been content merely to publish drafts of individual articles within the Code. Publication of the entire statute as it stood at that time gave the Code drafters an opportunity, as Judge Herbert Goodrich said, to “see what we have done and what we still have left to do.”<sup>388</sup> The text of the lost profits remedy did not change from the 1944 Draft except that the syntax of the elements of the contract-market formula, the “unpaid contract price” and the “price current at the time and place for tender,” were reversed. The numeration of all the sections changed, however, and the provision containing the contract-market formula and the lost profits remedy became section 2-708, a designation which has remained since that time.<sup>389</sup> The May 1949 Draft is significant because it contained a comment specifically addressing the lost profits remedy. Comment 2 to section 2-708 in the 1949 Draft provided as follows:

The provision of this section permitting recovery of expected profit where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods.<sup>390</sup>

Although this “explanatory” comment stated that the section “permits the recovery of lost profits in all appropriate cases,” it failed to explain what exactly those cases were. This phrase remains in the comment to section 2-708 in the current version of the Code. The absence of any genuine explanation in the comment concerning the circumstances under which section 2-708 is to apply has not been lost on the commentators.<sup>391</sup> Most of the literature, however, has focused on the references in the comment to “fixed price articles” and “standard priced goods.”<sup>392</sup>

Other than the new enumeration of the sections and the addition of

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387. UNIFORM COMMERCIAL CODE: MAY 1949 DRAFT [hereinafter MAY 1949 DRAFT], reprinted in 7-8 UCC DRAFTS, *supra* note 117.

388. *Id.* at v.

389. *See id.* § 2-708.

390. *Id.* § 2-708, cmt. 2.

391. *See* Goetz & Scott, *supra* note 4, at 327-28 n.13 (“[t]he Code draftsmen failed to indicate in the statutory language the circumstances in which lost-profits awards were appropriate.”).

392. Because subsequent drafts of section 2-708 also contain language relevant to this point, I will postpone my discussion of the comment until later. *See* part IV.B.4(b)(ii).

new explanatory comments, much of Article 2 remained as it was in the 1944 Draft. For our purposes, the most significant similarity between the two is the section cataloging sellers' remedies. Like its predecessor, section 2-703 of the May 1949 Draft provided in pertinent part that: "the aggrieved seller may . . . (e) if any goods have not been resold recover damages for their non-acceptance (Section 2-708) or in a proper case their price (Section 2-709)."<sup>393</sup> Again, because the drafters made the absence of resale a necessary condition for use of the lost profits remedy, they did not contemplate the application of this remedy to volume sellers who, by definition, succeed in reselling their goods to subsequent purchasers.

A number of explanatory comments also followed section 2-703 of the May 1949 Draft. Of these, the most important for our purposes is Comment 1. This comment set forth for the first time the Code's fundamental policy against the doctrine of election of remedies. It provided in pertinent part as follows: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."<sup>394</sup> The present Code retains this language.<sup>395</sup> The significance of this language with respect to the lost volume seller lies not in its longevity, however, but in the fact that it prompted a change in the language of section 2-703 in a later draft. The reason for this change and the meaning of the comment will be discussed later in the Article.<sup>396</sup>

A "text only" edition of the Code was published<sup>397</sup> in the spring of 1950. It was followed by a text and comments edition in May of that year.<sup>398</sup> By this time the drafters felt confident enough to refer to their work as a "Proposed Final Draft" and to submit it for approval to the two sponsoring organizations sitting in joint session.<sup>399</sup> The text of section 2-708 in the May 1950 Draft remained very much as it was in the May 1949 Draft, except there was new language allowing sellers to recover overhead expenses as part of their lost profits remedy. It provided as follows:

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393. MAY 1949 DRAFT, *supra* note 387, § 2-703.

394. *Id.* § 2-703, cmt. 1.

395. *See* U.C.C. § 2-703, cmt. 2 (1994).

396. *See infra* notes 502-23 and accompanying text.

397. *See* UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT. TEXT EDITION (Spring 1950), *reprinted in* 9 UCC DRAFTS, *supra* note 117, at 185.

398. *See* UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT. TEXT AND COMMENTS EDITION (May 1950) [hereinafter MAY 1950 DRAFT], *reprinted in* 10-11 UCC DRAFTS, *supra* note 117.

399. *See id.* at 1; Schnader, *supra* note 35, at 6.

The measure of damages for non-acceptance is the difference between the price current at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less any expense saved in consequence of the buyer's breach, except that if the foregoing measure of damages 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>400</sup>

Under this draft, the contract-market formula remained an obvious first option for aggrieved sellers. Such sellers may only have availed themselves of the lost profits remedy if the contract-market remedy was "inadequate."

Comment 2 to section 2-708 of the May 1950 Draft and the May 1949 Draft contained the same language.<sup>401</sup> In the May 1950 Draft, however, the drafters added the following language: "The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of 'profit' to show a history of earnings especially if a new venture is involved."<sup>402</sup> With this addition, the comment concerning the lost profits remedy reached its final form.<sup>403</sup> The actual text of section 2-708, however, underwent further change.

The authors of the May 1950 Draft changed the wording of section 2-703 slightly from the previous draft. Section 2-703 of the May 1950 Draft provided that: "the aggrieved seller may. . . (e) so far as any goods have not been resold recover damages for their non-acceptance (Section 2-708) or in a proper case their price (Section 2-709)."<sup>404</sup> This change clarified the point that although some of the contract goods may be resold, the seller may recover the contract-market differential, the price remedy, or the lost profits remedy only with respect to those goods that have not been resold. The drafters probably made the change because the phrase in the prior draft "if any goods have not been resold" could have been misconstrued to mean that the entire remedy with respect to all the goods was available so long as one portion of the goods had not been resold. In any case, the language of section 2-703 in the May 1950 Draft clearly precluded recovery of lost profits for volume sellers.

The plan to present the May 1950 Draft to the Conference and the Institute for adoption at their May 1950, joint meeting in Washington,

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400. MAY 1950 DRAFT, *supra* note 398, § 2-708.

401. See *supra* note 390 and accompanying text.

402. MAY 1950 DRAFT, *supra* note 398, § 2-708, cmt. 2.

403. Compare *id.* with U.C.C. § 2-708, cmt. 2 (1994).

404. MAY 1950 DRAFT, *supra* note 398, § 2-703.

D.C. proved to be untenable "as a number of demands were made by various organizations to have the Editorial Board hold hearings on certain provisions of the Code."<sup>405</sup> To accommodate such hearings, the sponsoring bodies organized an Enlarged Editorial Board in the summer of 1950.<sup>406</sup> In January 1951, the sixteen-member Enlarged Editorial Board listened to criticisms from the American Bar Association Section of Corporation, Banking and Business Law, and other interested groups.<sup>407</sup> The Board adopted many of the suggested changes and published a second proposed final draft in the spring of 1951.<sup>408</sup> Additional changes were incorporated over the summer, particularly with respect to Article 4.<sup>409</sup> A final definitive text was published in November 1951,<sup>410</sup> following approval by the two sponsoring bodies during two joint meetings in May and September 1951.<sup>411</sup> Because preparation and revision of the accompanying comments took additional time, a final text and comments edition was not published until the fall of 1952.<sup>412</sup> Throughout this period of final preparation, sections 2-703 and 2-708 remained unchanged from the May 1950 Draft. Section 2-708 still provided that sellers could obtain the lost profits remedy only if the contract-market formula was "inadequate,"<sup>413</sup> and section 2-703 continued to restrict

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405. Schnader, *supra* note 35, at 6; see also Walter D. Malcolm, *The Proposed Commercial Code: A Report on Developments During the Period from May 1950 through February 1951*, 6 BUS. LAW. 113 (1951).

406. Braucher, *supra* note 35, at 800; Schnader, *supra* note 35, at 6.

407. See *Meeting of Council January 13-14, 1951; Hearing Before Enlarged Editorial Board January 27-29, 1951*, 6 BUS. LAW. 164 (1951); see also Braucher, *supra* note 35, at 800.

408. See UNIFORM COMMERCIAL CODE: PROPOSED FINAL DRAFT NO. 2. TEXT EDITION (Spring 1951) [hereinafter SPRING 1951 DRAFT], reprinted in 12 UCC DRAFTS, *supra* note 117, at 1.

409. Schnader writes that Walter Malcolm, a Boston lawyer and chairman of the Committee on Proposed Commercial Code in the American Bar Association's Section on Corporation, Banking and Business Law, was largely responsible for saving Article 4 from elimination from the Code. Malcolm "voluntarily redrafted the article of the Code on bank collections and held numerous conferences with those who insisted in May [1951] that the entire article be dropped." Schnader, *supra* note 35, at 7; see also Walter D. Malcolm, *The Proposed Commercial Code: Report on Developments During the Period from September 1951 through May 1952, Particularly With Reference to Activities of the Section of Corporation, Banking and Business Law of the American Bar Association*, 7 BUS. LAW. 6 (1952).

410. See UNIFORM COMMERCIAL CODE: FINAL TEXT EDITION (November 1951) [hereinafter NOVEMBER 1951 DRAFT], reprinted in 12-13 UCC DRAFTS, *supra* note 117, at 375.

411. NOVEMBER 1951 DRAFT, *supra* note 410, at v; see also 1951 HANDBOOK, *supra* note 136, at 161.

412. 1952 OFFICIAL DRAFT, *supra* note 137. Professor Charles Bunn of the University of Wisconsin was primarily responsible for editing the final text and revising the comments. See *id.* at 5; Braucher, *supra* note 35, at 800.

413. SPRING 1951 DRAFT, *supra* note 408, § 2-708; NOVEMBER 1951 DRAFT, *supra* note 410, § 2-708; 1952 OFFICIAL DRAFT, *supra* note 137, § 2-708.

both remedies to cases "so far as any goods have not been resold."<sup>414</sup> Likewise, the comments to both sections in the 1952 Official Draft remained unchanged from the May 1950 Draft.<sup>415</sup>

Aside from the absence of change in sections 2-703 and 2-708, the 1952 Official Draft is significant for two additional reasons. First, this draft of the UCC became the first version of the Code to become law when Pennsylvania enacted the statute without amendment in April 1953.<sup>416</sup> Second, because it was the first complete official draft approved by both sponsoring bodies, the 1952 Official Draft was the basis for all subsequent official drafts of the Code.<sup>417</sup>

In 1952 and 1953 the Editorial Board made a series of recommendations concerning a number of minor amendments and changes to the text and comments.<sup>418</sup> The Institute and the Conference approved these modest changes in 1953.<sup>419</sup> The language of sections 2-703 and 2-708, however, remained unchanged from the 1952 Official Draft throughout this period of fine-tuning and adjustment.

#### 4. THE NEW YORK LAW REVISION COMMISSION AND SUPPLEMENT NO. 1

The next significant change to the sellers' remedies provisions in the Code did not occur until after the New York Law Revision Commission began to examine the statute in detail. The Code had been intro-

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414. SPRING 1951 DRAFT, *supra* note 408, § 2-703; NOVEMBER 1951 DRAFT, *supra* note 410, § 2-703; 1952 OFFICIAL DRAFT, *supra* note 137, § 2-703.

415. See 1952 OFFICIAL DRAFT, *supra* note 137, § 2-703, cmt. 1, § 2-708, cmt. 2.

416. Schnader, *supra* note 35, at 8; see also PA. STAT. ANN. tit. 12A (1954).

417. See, e.g., 1958 OFFICIAL TEXT, *supra* note 114, Comment at 1-2 ("This Act is a revision of the original Uniform Commercial Code promulgated in 1952 and enacted in Pennsylvania in 1953, effective July 1, 1954; and these Comments are a revision of the original comments, which were before the Pennsylvania legislature at the time of its adoption of the Code.").

418. RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT OF THE UNIFORM COMMERCIAL CODE (December 29, 1952), *reprinted in* 15 UCC DRAFTS, *supra* note 117, at 351; RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (April 20, 1952), *reprinted in* 15 UCC DRAFTS, *supra* note 117, at 367; RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (April 30, 1953), *reprinted in* 15 UCC DRAFTS, *supra* note 117, at 391; RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (June 1, 1953), *reprinted in* 15 UCC DRAFTS, *supra* note 117, at 419; UNIFORM COMMERCIAL CODE OFFICIAL DRAFT: TEXT AND COMMENTS EDITION 1952, WITH CHANGES AND MODIFICATIONS APPROVED BY THE ENLARGED EDITORIAL BOARD AT MEETINGS HELD ON DECEMBER 29, 1952, FEBRUARY 16, 1953, MAY 21, 1953 AND DECEMBER 11, 1953, *reprinted in* 16-17 UCC DRAFTS, *supra* note 117.

419. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-SECOND YEAR 77-78 (1953); Schnader, *supra* note 35, at 7-8.

duced in New York at the close of the 1952 legislative session<sup>420</sup> and enjoyed the support of Governor Thomas E. Dewey.<sup>421</sup> In January 1953, however, the Committee on Uniform State Laws of the Association of the Bar of the City of New York and the Special Committee on the Uniform Commercial Code of the New York State Bar Association jointly issued a report on the Code.<sup>422</sup> Because of the scope and complexity of the subject matter, and the legal innovations introduced by the Code, the report recommended that the legislature not enact the Code. Instead, it urged New York to begin "a publicly sponsored and financed study of the Code, looking to an informed decision as to whether it is satisfactory in its present form; or should be revised; or merely used in part as a basis for revision of and additions to existing statutes."<sup>423</sup> On February 8, 1953, Dewey directed the New York Law Revision Commission to undertake such a study, specifying that it "include a series of public hearings on various parts of the proposed Code, as well as thorough legal analysis of its provisions."<sup>424</sup>

The Law Revision Commission followed the governor's direction in earnest. It laid aside all other work<sup>425</sup> and employed eighteen special consultants, in addition to its regular staff, to research and analyze the Code as a whole and its constituent articles.<sup>426</sup> The Commission received letters and memoranda from banks, manufacturers, carriers, and trade associations criticizing the Code. It also held a series of public hearings on the Code at which lawyers and representatives of interested parties were invited to voice their concerns. Llewellyn, Mentschikoff, and others involved in the Code project attended some of these hearings and defended their work.<sup>427</sup> The Commission also compiled a number of rigorous and highly detailed studies dealing with each of the Code articles, as well as a final report and recommendation.<sup>428</sup> In all, the Commission's work on the Code filled six substantial volumes. In its final report, published February 29, 1956, the Law Revision Commission endorsed the goal of enacting a single code bringing together major

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420. See Malcolm, *supra* note 409, at 8.

421. See TWINING, *supra* note 49, at 293.

422. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON UNIFORM STATE LAWS. REPORT ON PROPOSED UNIFORM COMMERCIAL CODE (January 20, 1953) [hereinafter BAR REPORT], reprinted in 15 UCC DRAFTS, *supra* note 117, at 307-50; see also TWINING, *supra* note 49, at 293.

423. BAR REPORT, *supra* note 422, at 10.

424. 1 N.Y. REPORT 1954, *supra* note 145, at 7; TWINING, *supra* note 49, at 293.

425. 1 N.Y. REPORT 1954, *supra* note 145, at 7.

426. *Id.* at 8-9.

427. For a collection of letters and memoranda received by the Commission and stenographic reports of the public hearings, see 1-2 N.Y. REPORT 1954, *supra* note 145.

428. See *supra* note 145.

parts of commercial law, but concluded that the UCC was "not satisfactory in its present form and [could not] be made satisfactory without comprehensive re-examination and revision in the light of all critical comment obtainable."<sup>429</sup>

The sponsoring bodies did not wait for the Law Revision Commission to issue its final report before responding to these criticisms. The sponsors recognized that without the cooperation of New York, the Code project could not succeed. Of all the major commercial states in which the Code drafters sought adoption, "New York was the most important."<sup>430</sup> Accordingly, when the Commission began its work, the Editorial Board for the Code was reactivated.<sup>431</sup> Moreover, the Board appointed a separate subcommittee for each article. Each subcommittee included at least one member from Pennsylvania to reflect the experience of the sole Code jurisdiction and one member from New York to "reflect the thinking" of that state, "particularly as a result of the extensive study being given to the Code by the New York Law Revision Commission."<sup>432</sup> The Law Revision Commission took the position that, as a public agency, it could only report to the New York legislature.<sup>433</sup> Nevertheless, the Commission and the Code drafters maintained a healthy dialogue throughout the Commission's period of study. The Commission furnished the Editorial Board and the subcommittees with materials setting forth its concerns, the Commission's consultants' legal analysis, suggested redrafts, and existing statutory and relevant New York case law.<sup>434</sup> These materials were carefully studied and a number of proposed amendments were approved by the Editorial Board in 1954<sup>435</sup> and published in January 1955 as Supplement No. 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code.<sup>436</sup> By sharing information, the Code drafters anticipated and

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429. N.Y. REPORT 1956, *supra* note 145, at 68.

430. TWINING, *supra* note 49, at 293; *see also* Schnader, *supra* note 35, at 9.

431. Braucher, *supra* note 35, at 803; Schnader, *supra* note 35, at 9.

432. SUPPLEMENT NO. 1, *supra* note 152, at VI.

433. 1 N.Y. REPORT 1955, *supra* note 145, at 8; Braucher, *supra* note 35, at 803.

434. 1 N.Y. REPORT 1955, *supra* note 145, at 9; *see also* TWINING, *supra* note 49, at 294; Braucher, *supra* note 35, at 803.

435. 1954 RECOMMENDATIONS, *supra* note 151.

436. SUPPLEMENT NO. 1, *supra* note 152. The New York Law Revision Commission's work clearly gave rise to Supplement No. 1. In the foreword to this document Judge Goodrich wrote in quite understated terms:

The study by the New York Law Revision Commission is still continuing. Public hearings were held during the early part of 1954 at which certain vigorous criticisms were voiced by representatives of some New York banks. All of these criticisms have been studied. To the extent that they have merit, the Editorial Board believes that it is recommending amendments to eliminate the objections.

*Id.* at V.



avoided a great deal of criticism that would have appeared in the Commission's final report.<sup>437</sup> Unfortunately, because the contact between the Commission and the Code drafters was informal, or at least unofficial, it is difficult to correlate changes in text with the work of the Commission.<sup>438</sup>

Supplement No. 1 modified section 2-708 to include the "due allowance" and "due credit" language for the first time in the history of the Code project. The modified section permitted an aggrieved seller to recover the profit "which the seller would have made from full performance by the buyer *with due allowance for costs reasonably incurred and due credit for any resale*."<sup>439</sup> The comment which followed this revised text explained that "[t]he main purpose of the change is . . . to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture."<sup>440</sup> This, of course, is the specific drafting history upon which the advocates of the lost volume seller rely. Despite the fact that the "due allowance" and "due credit" language appears to preclude the profit remedy where the seller succeeds in reselling the contract goods, the advocates of the lost volume seller argue that this language "applies only to the situation in which a seller, left at breach with partially manufactured goods, sells the incomplete goods as components or scrap."<sup>441</sup> Those courts that have confronted the linguistic problem presented by this language have awarded volume sellers the profit remedy based upon this same account of the drafting history.<sup>442</sup>

a. Interpretive Assumptions and the Meaning of Supplement No. 1

Although this is a plausible interpretation of the revised text of section 2-708 and the drafting history behind it, it is still important to recognize that this interpretation's plausibility is derived from an interpretive approach that assumes, as a normative matter, that there is such a thing as the "lost volume seller" and that he is entitled to the profit remedy. That is, the advocates of the lost volume seller believe

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437. TWINING, *supra* note 49, at 294; *see also* 1 N.Y. REPORT 1955, *supra* note 145, at 9-10 (noting that some of the Editorial Board's changes "respond to criticism stated at the Commission's hearings; others proceed from critical reconsideration of the Code by members of the Editorial Board and its committees, independently of comment at the hearings and in some instances anticipating questions raised in the Commission's study.").

438. *See* TWINING, *supra* note 49, at 296.

439. SUPPLEMENT NO. 1, *supra* note 152, § 2-708 (italicized text underlined in original). The entire text of this revision of section 2-708 is reprinted above. *See supra* text accompanying note 160.

440. The full text of this is likewise reprinted above. *See supra* text accompanying note 160.

441. Anderson, *supra* note 4, at 1052; *see also* additional authorities cited *supra* note 162.

442. *See* cases cited *supra* note 163.

that an aggrieved seller who successfully resells the contract goods *ought* to receive profit damages and that the Code drafters tried to achieve this normative goal by creating section 2-708. Seen from this perspective, the addition of the “due allowance” and “due credit” language and the explanatory comment in Supplement No. 1 are a natural and necessary progression in thought. According to this view, the drafters always intended to award the profit remedy to lost volume sellers. Later, they identified “a second situation as appropriate for the profit remedy of 2-708, namely the situation where a seller-manufacturer who learns of the buyer’s breach while in the process of manufacturing the contract goods.”<sup>443</sup> The addition of this language makes perfect sense to the advocates of the lost volume seller because without it the seller who does not complete production would be either undercompensated or overcompensated under the profit formula.<sup>444</sup> In their eyes, the comment following the revised draft of section 2-708 in Supplement No. 1 explains why the entire formula “works like a charm” when applied to the seller of unfinished goods.<sup>445</sup> Viewed from this normative perspective, the “due allowance” and “due credit” language was added to address this situation and this situation *only*.<sup>446</sup> Accordingly, the advocates of the lost volume seller can concede that “it is not easy to justify” the award of lost profits to volume sellers under the language of section 2-708(2)<sup>447</sup> and that the section “reads as though it were specifically designed for the incomplete goods case.”<sup>448</sup> These admissions are wholly insignificant to the advocates of the lost volume seller because their normative preconception of the statute informs them that section 2-708(2) was principally and “originally designed” to award the profit remedy to volume sellers who successfully resell finished goods.<sup>449</sup>

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443. WHITE & SUMMERS, *supra* note 4, § 7-10, at 317.

444. A seller who does not complete production would be undercompensated if she did not fully recover the costs that she incurred towards performance. Such a seller would be overcompensated if she resold the unfinished goods for scrap and the proceeds of this resale were not credited against the cost of the goods. Furthermore, in the unlikely event that such a seller receives more than the cost of goods in the scrap sale, the seller would be overcompensated if this excess amount were not deducted from the seller’s expected gross profit on the finished goods.

445. WHITE & SUMMERS, *supra* note 4, § 7-13, at 327; *see also* Harris, *Seller’s Damages*, *supra* note 4, at 99 (noting that the entire formula “works well in such cases”); Sebert, *supra* note 4, at 396 (“In this context, there is no difficulty with the formula of section 2-708(2): the entire formula is used, including ‘costs incurred’ and ‘proceeds of resale’ . . .”).

446. *See* Anderson, *supra* note 4, at 1052.

447. Sebert, *supra* note 4, at 394; *see also* WHITE & SUMMERS, *supra* note 4, § 7-13, at 326 (noting with almost comic understatement that the award of lost profits to volume sellers under the statutory language is correct but not a “polished solution”).

448. Anderson, *supra* note 4, at 1033.

449. WHITE & SUMMERS, *supra* note 4, § 7-13, at 329; *see also id.* at 325 (asserting that “the statutory history of the Code and in particular Comment 2 to 2-708 indicate that the current 2-708(2) was intended to provide an adequate remedy for the lost volume seller”); Schlosser,

Although the advocates of the lost volume seller presume that the drafters wanted to achieve the normative goal of awarding the profit remedy to volume sellers, the “due allowance” and “due credit” language and the limited drafting history on which they rely can and should be read in an entirely different fashion. Indeed, the drafting history behind section 2-708 should be viewed from the opposite perspective. That is, the drafters did not prepare section 2-708 with the so-called lost volume seller in mind. They did not believe that a seller who successfully resold finished goods was entitled to the profit remedy. Instead, they believed that the profit remedy should be reserved for those sellers who had no finished goods available for resale, namely manufacturers or jobbers who did not complete production or acquisition. Where the seller did resell finished goods, they believed that the price obtained on resale, combined with the contract-market differential or the contract-resale differential, together with any incidental damages, perfectly replaced the economic benefit that the seller expected from the original repudiated contract. Because the volume seller invariably, indeed by definition, resells finished goods, the volume seller is made whole by operation of the other Code remedies. Because the volume seller always resells the goods, these other Code remedies will never be “inadequate to put the seller in as good a position as performance would have done.”<sup>450</sup> Seen from this alternate perspective, the drafters could not have intended for such a seller to receive the profit remedy.

b. Supplement No. 1 as the Clarification of a Pre-existing Right

This alternative interpretive approach can better explain the textual changes introduced in Supplement No. 1. Moreover, it can thoroughly account for all of the drafting history here surveyed—both the sources upon which the advocates of the lost volume rely and the additional sources which they ignore. First, the revision of section 2-708 that appeared in Supplement No. 1 and upon which the advocates of the lost volume seller rely can instead be interpreted to reflect the drafters’ intention not to award the profit remedy to sellers who succeed in reselling finished goods. Supplement No. 1 marked the first appearance of the “due allowance” and “due credit” language in section 2-708. The comments that accompanied this change stated that the language was added “to *clarify* the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture.”<sup>451</sup> Of

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*Construing, supra* note 4, at 691 (referring to “the drafters’ goal of ensuring a full recovery to the lost-volume seller”).

450. SUPPLEMENT NO. 1, *supra* note 152, § 2-708.

451. *Id.* § 2-708, Reason (emphasis added).

course, the advocates of the lost volume seller believe that this comment limits the “due allowance” and “due credit” language to sellers who do not complete production and who resell the unfinished goods or raw materials for scrap. It is significant, however, that the statutory text of section 2-708 did not restrict the application of these terms to salvage sellers. Moreover, the comments did not limit the effect of the “due allowance” and “due credit” language to manufacturers who cease production and resell the unfinished goods for scrap. Rather, this was the only instance in which the drafters foresaw both the possibility of some sort of resale *and* the appropriate application of the profit remedy under section 2-708.

Plainly, the additional text was intended to clarify a privilege which was already there. That is, before the “due allowance” and “due credit” language was added, a seller already had the right to resell unfinished goods and still obtain the profit remedy. The advocates of the lost-volume seller would surely argue that this also implies that volume sellers in the possession of finished goods likewise had the right to resell their goods and obtain the profit remedy *before* the clarifying language was added. But if the operative paradigm, if the background assumption was that resale was generally available to those who sought the profit remedy, then why would the drafters have to “clarify” the right of manufacturers to resell? That is, if a resale was presumed, why was this presumption in need of clarification? Furthermore, if it was assumed before the “due allowance” and “due credit” language was added that a seller could resell completed goods and still obtain the profit remedy, then why was this not explained in the accompanying comments? Surely the drafters would have seen that the newly added language applied to resellers of finished and unfinished goods alike.

The lost volume seller’s presumption that a seller could resell finished goods and still obtain the profit remedy cannot render this conundrum intelligible. The added language makes sense as a “clarification” only if the right of resale was not generally available to aggrieved sellers who sought the profit remedy. The resale of completed goods and the pursuit of the profit remedy, however, are not compatible. Indeed, they are mutually exclusive. The Code drafters believed and intended the act of resale of finished goods to preclude the recovery of profit damages. The drafters’ suggestion that the added text “clarified” the meaning and application of section 2-708 by “clarifying” the right of manufacturers to resell unfinished goods for junk value makes sense only if no resale was presumed in the first place. The only resale that the drafters contemplated that they believed was consistent with the profit remedy was the resale of raw materials or partially completed goods for scrap.

i. Accounting for Section 2-703(e)

Second, the interpretive belief that resale of finished goods precludes recovery of the profit remedy also explains the drafting history behind section 2-703. That is, this view can account for the additional historical sources overlooked by those who favor the award of profit damages to volume sellers. The preparation of section 2-703 is an important aspect of the drafting process which the advocates of the lost volume seller have uniformly ignored.<sup>452</sup> This omission is highly significant because the drafting history of section 2-703 indicates that originally the absence of resale was a precondition to relief under section 2-708. Beginning with section 105(e) of the 1944 Draft and continuing through section 2-703(e) of the May 1949 Draft, the Spring 1950 Draft, the May 1950 Draft, the Spring 1951 Draft, the November 1951 Draft, the 1952 Official Draft, and the 1953 Official Draft, the Code permitted sellers to recover lost profits only "so far as any goods have not been resold."<sup>453</sup> Furthermore, because Supplement No. 1 did not recommend any changes to section 2-703, this restriction on access to the profit remedy remained in place. Thus, even before the "due allowance" and "due credit" language was added, an aggrieved seller who resold completed goods could not obtain the profit remedy. The drafters clearly made the recovery of lost profits and the resale of the contract goods mutually exclusive.

The drafting history and statutory text of section 2-703 at the time of Supplement No.1 also help explain the addition of the "due allowance" and "due credit" language to section 2-708. Section 2-703(e) demonstrates that the resale of goods precludes an aggrieved seller from recovering lost profits under section 2-708. Seen from this perspective, the "due allowance" and "due credit" language added to section 2-708 in Supplement No. 1 does indeed clarify the right of an aggrieved manufacturing seller to resell unfinished goods for scrap just as the accompanying comment suggests. It does *not* indicate, however, that a manufacturer may—like any other seller—resell the goods (whether finished or unfinished) and still recover lost profits under section 2-708. Indeed, given the clear import of section 2-703(e), it is preposterous to suggest that a seller could resell the contract goods and still obtain the profit remedy. Instead, the added language clarifies an

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452. Professors White and Summers do discuss the history of section 2-703 with respect to the question of whether a seller who has properly resold goods under section 2-706 may opt for the contract-market differential under section 2-708(1) if that amount would exceed the contract-resale differential. They fail, however, to see the significance of this history with respect to the question of what the drafters hoped to remedy under section 2-708(2). See WHITE & SUMMERS, *supra* note 4, § 7-7, at 310-11.

453. See *supra* notes 384-419 and accompanying text.

exception to the general rule that the resale of goods precludes recovery of the profit remedy. In short, section 2-703(e) enables one to see the added language in section 2-708 as a "clarification" and not simply a confusing afterthought.

ii. Explaining the References to "Fixed Price" Goods in the Comment to Section 2-708

Third and finally, the interpretive belief that the drafters did not intend to award the profit remedy to successful resellers can better explain the comment to section 2-708 than can the advocates of the lost volume seller. What is now Official Comment 2 to section 2-708 began to take shape in the May 1949 Draft of the Code.<sup>454</sup> In that earlier draft, the Comment stated that the profit remedy under section 2-708 was designed "to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved" and that the profit remedy would be available "in all appropriate cases, which would include all standard priced goods." This language survived the numerous revisions that followed the May 1949 Draft and it appears in the Official Comment today.<sup>455</sup> The advocates of the lost volume seller believe that the references to "fixed price articles" and "standard priced goods" provide clear evidence of the Code drafters' intent to award lost profits to volume sellers.<sup>456</sup>

The advocates of the lost volume seller are able to discern the drafters' intent to protect "lost volume sellers" (a term not present in the Code) in the references to "standard priced goods" and "fixed price articles" only by assuming that the drafters intended to award profit damages to successful resellers from the start. This normative assumption enables them to reconceptualize the stated purpose of the remedy found in the Comment and then view the drafting history as manifesting that purpose. According to the advocates of the lost volume seller, the "Code drafters perceived that a contract-market formula would not even grossly approximate the proper damage recovery for

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454. Compare MAY 1949 DRAFT, *supra* note 387, § 2-708, cmt. 2 with U.C.C. § 2-708, cmt. 2 (1994).

455. U.C.C. § 2-708, cmt. 2 (1994).

456. See Harris, *Seller's Damages*, *supra* note 4, at 99 (arguing that even though the "due credit" language "made it clear that subsection 2 was to govern the manufacturer cases" that "Comment 2 made it fairly clear . . . that subsection 2 was also to govern the lost volume cases"); *id.* at 101 ("The one formula that is difficult to find in the language of 2-708(2) is one that the official comment indicates is present there!"); Schlosser, *Construing*, *supra* note 4, at 688 ("Although the comment does not explicitly mention the lost-volume seller, the comment's reference to the 'unfair . . . results . . . when fixed price articles [are] involved' indicates that in creating subsection 2-708(2) the draftsmen were probably concerned with the lost-volume seller's problem.").

certain sellers," namely, the sellers of "'standard priced' goods."<sup>457</sup> Because the contract-resale and contract-market formulas yield only nominal damages where the goods are fixed price, the drafters "necessarily" concluded "that some other measure of recovery was needed."<sup>458</sup> Incredibly, however, the advocates of the lost volume seller contend that the drafters "did not identify the relevant characteristic of the 'standard priced' class."<sup>459</sup> They believe that the references in the Comment to "standard priced goods" and "fixed price articles" represent an awkward attempt on the part of the drafters to define the lost volume problem. The reason why the contract-resale and contract-market formulas will not adequately compensate certain sellers "is not the 'standard pricedness' of the goods the seller is selling but the fact that he will lose one sale."<sup>460</sup>

Thus, according to the advocates of the lost volume seller, the drafters did not identify the lost volume problem, they *misidentified* it, which is to say they identified something else. Their subsequent approach to the text of section 2-708(2) is not to analyze the drafters' theory but to supplant it with their own. Rather than try to see some other meaning in the Comment to section 2-708, these commentators assume that the drafters stumbled upon a problem that they "did not formulate well and presumably did not understand well."<sup>461</sup> The commentators have not considered the possibility that they have identified a "problem" that is separate and distinct from the one the drafters sought to remedy. Instead, their theory of the purpose behind the lost profits remedy provides the normative vision, the corrective lenses if you will, through which they look back upon the drafting history of section 2-708. Because they believe that it "was intended to provide an adequate remedy for the lost volume seller,"<sup>462</sup> the advocates of the lost volume seller view the drafting history behind section 2-708 in "stages" that demonstrate this intention.<sup>463</sup>

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457. WHITE & SUMMERS, *supra* note 4, § 7-9, at 314-15.

458. *Id.* at 315.

459. *Id.*

460. *Id.*; see also Sebert, *supra* note 4, at 386-87 (asserting that "[t]he comment's focus on standard priced goods is misleading" and concluding that "despite the language of the comment, whether the goods are standard priced is entirely irrelevant to the determination of whether the seller is a lost volume seller.").

461. WHITE & SUMMERS, *supra* note 4, § 7-9, at 314.

462. *Id.* § 7-13, at 325.

463. In the first stage, Professors White and Summers assert that the drafters articulated a lost profit remedy specifically with the lost volume seller in mind. *Id.* § 7-9, at 314-15. Of course, White and Summers concede, as they must, that the drafters did not identify the problem as such. "In the later stages of the drafting process," they write, "the drafters identified a second class of sellers," namely components sellers who "resell uncompleted goods for scrap" and jobber sellers "who never purchase the contract goods at all." *Id.* § 7-10, at 316. Under this view, the "due

The advocates of the lost volume seller are able to transform the references to "standard priced goods" into the problem of "lost volume" only by assuming from the start that the drafters intended to award profit damages to successful resellers. However, when we approach the Comment to section 2-708 from a different interpretive perspective, we are able to understand the drafters as they expressed themselves. Contrary to the commentators' suggestion, the drafters did not misidentify the lost volume problem as the problem of fixed price goods. Professors White and Summers assert that in preparing section 2-708 the drafters addressed a problem they "did not formulate well and presumably did not understand well"<sup>464</sup> because they have a different problem in mind than the drafters. The drafters did not formulate, or even conceive of, the lost volume seller problem because they did not believe that a seller who resold finished goods was denied the profit she expected to make. They believed that such a seller could be made whole through market damages. The drafters did not poorly formulate the lost volume seller problem, because they did not conceive of this "problem" at all. Instead, the problem the drafters identified was the lack of *any* remedy in cases involving standard priced goods that were not available for resale.

##### 5. THE 1956 RECOMMENDATIONS TO THE 1952 OFFICIAL DRAFT

Although the advocates of the lost volume seller do not rely upon the drafting history that followed the publication of Supplement No. 1 in explaining away the "due allowance" and "due credit" language, this subsequent history is relevant and in need of exposition.<sup>465</sup> In the fall of 1956, the reactivated Editorial Board completed its work on the 1956 Recommendations of the Editorial Board for the Uniform Commercial Code.<sup>466</sup> This document contained a complete version of the revised UCC but did not include a set of Official Comments. Many Code sections were unchanged from the 1952 Official Draft. In those sections that were revised, however, the language deleted from the 1952 Official Draft appeared in brackets, and the newly added text appeared in italics. An explanatory Reason or Reason for Recommendation followed each section that contained a change. The changes made by the Editorial Board in the 1956 Recommendations included those previously pub-

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allowance" and "due credit" language was added when the drafters identified this "second situation as appropriate for the profit remedy of 2-708." *Id.* at 317.

464. *Id.* § 7-8, at 314.

465. In his defense, Professor Harris does refer to the subsequent drafting history in his discussion of the lost volume seller problem. He does not, however, rely upon this history in reading the "due allowance" and "due credit" language out of the statute. *But see infra* note 530.

466. 1956 RECOMMENDATIONS, *supra* note 153.



lished in the 1954 Recommendations and Supplement No. 1, as well as some changes suggested by the Board's subcommittees and adopted following the publication of the New York Law Revision Commission's final report in February of that year. The 1956 Recommendations is a significant draft because it was the first draft in which section 2-708 was divided into two subsections. The first subsection contained the contract-market differential, while the second stated the remedy for lost profits. More importantly, in this draft the Code drafters settled upon a final and definitive articulation of section 2-708. The approved statutory language found in this version is exactly the same as that found in the current Code. Section 2-708 and the accompanying Reason in the 1956 Recommendations provided:

(1) *Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price [current] at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less [any expense] expenses saved in consequence of the buyer's breach [, except that if].*

(2) *If the [foregoing] 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 this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.*

**REASON:** The section was revised in Supp. No. 1 to extend the rule clearly to cases of repudiation and to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture. Further changes, made for clarification to meet criticisms of the New York Commission, divided the section into two subsections, inserted cross-references to Sections 2-710 and 2-723, substituted "market" for "current" price, and inserted the provision for credit for payments in new subsection (2). As to "expenses", see Section 2-706.<sup>467</sup>

Most of the changes in this draft are purely stylistic and are not relevant to the question of the lost volume seller. It appears that the drafters wanted to better integrate section 2-708 with other Code remedy sections. This explains the added references to sections 2-710 and 2-723. It also appears from the Reason that follows section 2-708 that some of

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467. *Id.* § 2-708 (emphasis in original).

these changes were made in response to the work of the New York Law Revision Commission.

The "due allowance" and "due credit" language that first appeared in the 1954 Recommendations and in Supplement No. 1 was also present in the 1956 Recommendations in slightly altered form. The preposition "with" that proceeded the phrase "due allowance" was dropped. Furthermore, the phrase "due credit for any resale" was changed to "due credit for payments or proceeds of resale."<sup>468</sup> The drafters clearly believed that these were only minor adjustments to what had been accomplished in Supplement No. 1. Indeed, in the Reason that accompanied section 2-708, the drafters simply repeated the explanation they gave for the addition of the "due allowance" and "due credit" language in Supplement No. 1, namely, "to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture."<sup>469</sup> Again, the addition of this language makes sense as a "clarification" only if resale of the contract goods is not available to sellers who seek the profit remedy—a point reinforced by section 2-703(e). There the drafters made clear that the absence of resale was a precondition for obtaining the profit remedy, that resale precluded the recovery of lost profits. Significantly, the Reason did not state that the profit remedy was available to aggrieved sellers who successfully resold finished goods.

This omission is significant because the 1956 Recommendations deleted the no-resale precondition from section 2-703(e). It provided:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may . . . (e) [so far as any goods have not been resold] recover damages for [their] non-acceptance (Section 2-708) or in a proper case [their] *the* price (Section 2-709) . . . .<sup>470</sup>

The Reason that accompanied this revision explained: "At the suggestion of the New York Commission, subsection (e) was changed to make it clear that the aggrieved seller is not required to elect between damages under Section 2-706 and damages under Section 2-708. See Comment 1 to this section and Comment 2 to Section 2-706."<sup>471</sup> These remarks indicate that the phrase "so far as any goods have not been resold" was

468. Compare *id.* § 2-708(2) with SUPPLEMENT NO. 1, *supra* note 152, § 2-708.

469. Compare 1956 RECOMMENDATIONS, *supra* note 153, § 2-708, Reason with SUPPLEMENT NO. 1, *supra* note 152, § 2-708, Reason.

470. 1956 RECOMMENDATIONS, *supra* note 153, § 2-703(e) (emphasis in original).

471. *Id.* § 2-703, Reason.

deleted to reinforce the Code policy against the doctrine of election of remedies and that this change was suggested by the New York Law Revision Commission. They also indicate that support for this position may be found in Comment 1 to section 2-703 and Comment 2 to section 2-706 of the 1952 Official Draft.

As noted above, the advocates of the lost volume seller have ignored the drafting history behind section 2-703. Consequently, they have not attempted to reconcile their belief that the drafters intended to award the profit remedy to volume sellers who successfully resell with the fact that section 2-703(e) restricts the remedies under section 2-708 to sellers who have not resold. The advocates of the lost volume seller could argue, however, that the deletion of the phrase "so far as any goods have not been resold" from section 2-708(e) erases whatever doubt it may have caused with respect to the lost volume seller. Indeed, they would surely contend that this change shows that volume sellers are free to seek the profit remedy following resale. To see why this is not the case we must examine the New York Law Revision Commission's review of sections 2-703 and 2-708 and the Comments cited by the drafters in the Reason following section 2-703 of the 1956 Recommendations.

a. The New York Law Revision Commission's Analysis of  
Section 2-708

Beginning in 1953 the New York Law Revision Commission suspended all other work and devoted all of its resources to an in depth review of the 1952 Official Draft of the UCC. The Law Revision Commission retained a number of consultants to assist with the review. Professor Edwin Patterson of Columbia University was the consultant responsible for the Law Revision Commission's analysis of section 2-708.<sup>472</sup> In his review, Professor Patterson first compared the damage remedies for sellers under the Code with the four damage formulas then available to sellers under New York case law. The first formula, which Patterson identified as the "general rule," was the "market-value test," in which the seller's measure of damages "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."<sup>473</sup> The second formula Patterson described was the "'profit' test," under which the seller receives the "contract price less cost of manufacture, [but] only in cases where the seller is a manufacturer or an agent for a manufac-

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472. See 1 N.Y. REPORT 1955, *supra* note 145, at 337.

473. *Id.* at 692.

turer.”<sup>474</sup> The third formula Patterson identified was “[t]he difference between the contract price and the amount obtained by the seller at a public sale of the goods, held after due notice at a reasonable time and place.”<sup>475</sup> The fourth and final seller’s damage formula Patterson identified was an “action for the price.”<sup>476</sup> He correctly noted that the UCC limits recovery of the price where conforming goods have been identified to the contract but not accepted “to a situation where it is probable that the seller will not be able ‘to resell them at a reasonable price.’ ”<sup>477</sup> Patterson asserted that the Code, like New York case law, “would give the seller the option to choose” among the contract-market differential, the contract-resale differential, and the price remedy.<sup>478</sup>

As a description of an aggrieved seller’s freedom to choose among Code remedies, this assertion was not quite correct. As Patterson himself observed, section 2-709 severely restricted access to the price remedy. For example, section 2-709 required that the seller first attempt in good faith to resell for a reasonable price goods that were identified but not accepted by the seller. That is, it presumed that the seller would first seek the contract-resale price damage formula. Thus, Patterson exaggerated the seller’s “option to choose” among Code remedies. The seller’s freedom to choose was not absolute but conditional.

Nevertheless, Professor Patterson complained that “[t]he only alternative as to which the seller does not have a discretionary choice of remedies is that between the market-price formula and the profit formula.”<sup>479</sup> It is unclear, however, whether Professor Patterson was referring to the UCC, the Uniform Sales Act, or New York case law. He did go on to discuss section 64 of the Uniform Sales Act and its interpretation by New York courts. He noted that under section 64 the contract-market differential was the mandatory measure of damages where there was an “ ‘available market’ ” and where there were no “ ‘special circumstances, showing proximate damage of a greater amount.’ ”<sup>480</sup> He believed, however, that New York courts incorrectly applied this standard where the goods at issue were fixed price. Patterson criticized *A. Lenobel, Inc. v. Senif*,<sup>481</sup> a New York case in which the court held

that the buyer’s refusal to take and pay for a standard model of automobile, the retail price of which was fixed by the manufacturer, gave

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474. *Id.* at 693.

475. *Id.*

476. *Id.*

477. *Id.* (quoting 1952 OFFICIAL DRAFT, *supra* note 137, § 2-709(1)(b)).

478. *Id.* at 693-94 (citing *Ackerman v. Rubens*, 60 N.E. 750 (N.Y. 1901)).

479. *Id.* at 694.

480. *Id.* (quoting UNIF. SALES ACT § 64).

481. 300 N.Y.S. 226 (App. Div. 1937).

the seller the right to recover only nominal damages, on the grounds that there was an available market, the market price was the same as the contract price, and there were no "special circumstances" sufficient to invoke a different measure of damages.<sup>482</sup>

Professor Patterson believed that *A. Lenobel* was wrongly decided. As evidence, he cited several cases from other jurisdictions that found "that a price-fixed market [was] not the 'available market' contemplated by [Uniform Sales Act § 64] or by the common law."<sup>483</sup> Patterson clearly approved of these cases,<sup>484</sup> which "allowed a *dealer* to recover under a profit formula."<sup>485</sup> That is, they allowed volume sellers to obtain the profit remedy following resale of the contract goods.

Although Professor Patterson believed that the profit remedy ought to be awarded even where the seller resells the contract goods at the fixed contract price, he was ambivalent over whether section 2-708 achieved this result. He concluded:

[I]t would seem that the application of Section 2-708 would *not* be confined to situations in which the seller is the manufacturer, or has a contract for the manufacture, of these goods; that the market-value damages might well be "inadequate" . . . in the case of a dealer in price-fixed articles, and that the enactment of Section 2-708 would, or at least might, overturn the rule of *A. Lenobel v. Senif*, and bring New York law into accord with the majority view.<sup>486</sup>

These remarks are significant for several reasons. First, despite Professor Patterson's reference to the few cases that awarded the profit remedy to sellers who successfully resold as the "majority view," the majority of cases appear to have gone the other way. The only instance in which courts consistently found no "available market" under Uniform Sales Act § 64 was where the case involved special order goods.<sup>487</sup> Thus, Patterson's characterization of New York as a jurisdiction out of step with the rest of the country with respect to sellers' damages is a clever but hollow piece of advocacy. Second and relatedly, Patterson clearly saw that if the profit remedy was to be an option for all sellers, it must "not be confined to situations in which the seller is the manufacturer."<sup>488</sup> Although he did not say so, Patterson probably had in mind the true majority of cases which, because they involved special order goods, typically involved manufacturers.<sup>489</sup> Third, Patterson ignored the precondi-

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482. 1 N.Y. REPORT 1955, *supra* note 145, at 694 (footnote omitted).

483. *Id.*

484. For a list of the cases cited by Professor Patterson, see *supra* note 323.

485. 1 N.Y. REPORT 1955, *supra* note 145, at 694.

486. *Id.* at 695 (footnote omitted).

487. See *supra* notes 306-43 and accompanying text.

488. 1 N.Y. REPORT 1955, *supra* note 145, at 695.

489. See *supra* notes 306-43 and accompanying text.

tion to section 2-708 stated in section 2-703(e). One could view this omission in a number of different ways. It may have been that Professor Patterson deliberately chose to ignore the clear meaning of section 2-703(e) for volume sellers seeking the profit remedy. On the other hand, it may have been that in his desire to expand the profit remedy he simply overlooked section 2-703(e). This latter reading seems more probable given the fact that Professor John Honnold, another consultant retained by the Law Revision Commission, was responsible for review of section 2-703.<sup>490</sup> In either case, however, Professor Patterson's analysis of section 2-708 was made without reference to section 2-703. Fourth and finally, Patterson was anything but certain that section 2-708 would actually achieve the result of awarding the profit remedy to aggrieved sellers who successfully resold fixed price goods. He said that "it would *seem*" that section 2-708 would not be confined to manufacturers; that the contract-market differential "*might*, well be 'inadequate' " in the case of fixed price goods; and that section 2-708 "*might* overturn" the rule established in the *A. Lenobel* case.<sup>491</sup> The reason for this lack of confidence is unclear.<sup>492</sup> It is, however, surprising to see someone who endorses the lost volume seller theory express uncertainty as to whether or not section 2-708 extends the profit remedy to volume sellers *before* the "due allowance" and "due credit" language was added.<sup>493</sup>

Professor Patterson did not comment on the language added to sec-

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490. See 1 N.Y. REPORT 1955, *supra* note 145, at 355, 550-52.

491. *Id.* at 695 (emphasis added).

492. Patterson's uncertainty concerning the expansion of the profit remedy under section 2-708 may be explained in a number of ways. It may be due to someone calling Patterson's attention to section 2-703(e), or indicating that an expansion of the profit remedy was not the intended result. It may be that Professor Patterson simply lacked confidence in the New York courts' willingness to carry through this new approach to sellers' damages. Without additional information this inquiry is doomed to speculation. Indeed, this inquiry points out an inherent limitation on the use of drafting history in the search for textual meaning. That is, one can never "discover" the "author's intent" in a written text with absolute certainty. This is because the historical sources of this intent are themselves texts which are sometimes incomplete and which are always open to interpretation. See Graff, *supra* note 273, at 408 (noting that "the degree to which we can be confident about our inferences [concerning an author's intent] depends on the amount of evidence available, evidence which itself is open to criticism and may well be fallible."); Fallon, *supra* note 39, at 1212-13 (noting that intent is not "a simple fact awaiting discovery" but is instead "an intellectual construct, developed through a process of interpretation"). Discerning the author's intent is even more inferential, conventional, and problematic where the author is a collective body like a legislature. The classic discussion of this issue can be found in Brest, *supra* note 111. To recognize that this sort of inquiry has its limitations is not to say that it is without value or that it should be abandoned as some have suggested. See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); FRANK H. EASTERBROOK, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983).

493. This uncertainty is even more surprising given the bold assertions made by later commentators that the extension of lost profits to volume sellers was the Code drafters' intended goal. See *supra* notes 52, 266-70 443-49 and accompanying text.

tion 2-708 in Supplement No. 1. Indeed, the Law Revision Commission's 1955 report clearly indicated that Patterson's review was limited to the 1952 Official Draft.<sup>494</sup> Although Supplement No. 1 was published in January 1955, one month before the Law Revision Commission's 1955 report came out, it appears that Professor Patterson completed his work before this time. The Law Revision Commission report for 1955 did, however, contain a short entry by Professor Robert Pasley of Cornell reviewing the changes made in Supplement No. 1.<sup>495</sup> Pasley's analysis of the revision of section 2-708 in Supplement No. 1 is quite brief. Of the two short paragraphs contained in Pasley's commentary, only the second is relevant to our inquiry. In it he wrote that two of the changes in the text, "inserting a reference to 'repudiation' and to 'due allowance for costs reasonably incurred and due credit for any resale', relate to matters discussed in Professor Patterson's analysis of the 1952 Text."<sup>496</sup>

The accuracy of this assertion is doubtful. Nowhere in his analysis did Professor Patterson criticize section 2-708 for failing to identify "repudiation" as a ground upon which sellers may seek the remedies provided in that section. Moreover, Patterson did not specifically recommend that "repudiation" be mentioned in the statutory text. Patterson did, however, discuss cases and examples in which the buyer was guilty of repudiating the contract at hand. Consequently, although the addition of the term "repudiation" to section 2-708 cannot be directly attributed to Patterson's analysis, Pasley's attribution of this change to Patterson is not wholly unwarranted.<sup>497</sup>

Pasley's claim that the "due allowance" and "due credit" language may be attributed to Professor Patterson's analysis is, however, less plausible. Again, nowhere in his analysis did Patterson suggest that such language be added to the text of section 2-708. Moreover, unlike the Reason following section 2-708 in Supplement No. 1, Patterson did not discuss manufacturing sellers who do not complete production and who resell the unfinished goods for junk value. On the contrary, in his commentary Patterson was almost exclusively interested in extending

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494. See 1 N.Y. REPORT 1955, *supra* note 145, at 337.

495. See *id.* at 723-61.

496. *Id.* at 761.

497. Patterson may have recommended that reference to "repudiation" be added to section 2-708 to members of the Editorial Board subcommittee responsible for Article 2 or to others involved in the drafting process. In the alternative, it is possible that Pasley was privy to other communications between the Code drafters and the Law Revision Commission and that he recalled such a recommendation. Indeed, the close, informal liaison between the Law Revision Commission and the Code drafters suggests the existence of numerous unpublished documents reflecting their thoughts concerning the Code and negotiation over changes in Code language. See generally TWining, *supra* note 49, at 293-96.

the profit remedy under section 2-708 to sellers of finished goods who are not manufacturers.

Indeed, the stark contrast between Patterson's analysis of section 2-708 and the revision of that text in Supplement No. 1 suggests that the New York Law Revision Commission's comments were at best irrelevant to the change in Supplement No. 1 and at worst thoroughly rejected by the drafters. The 1956 Recommendations indicate that Patterson's remarks were *not* the reason for the addition of the "due allowance" and "due credit" language. The Reason that follows section 2-708 in the 1956 Recommendations stated that the language was added in Supplement No. 1 "to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture."<sup>498</sup> The Reason also stated that "[f]urther changes [were] made for clarification to meet criticisms of the New York Commission."<sup>499</sup> Some of these changes—the inclusion of incidental damages, the clarification of the contract-market measure of damages—can be traced directly to Patterson's comments.<sup>500</sup> The final change, however, namely, the insertion of "the provision for credit for payments in new subsection (2),"<sup>501</sup> cannot be traced to the Law Revision Commission's report. That is, Patterson did *not* suggest that breaching buyers be given "due credit for payments or proceeds of resale."

It may, however, be the case, as Professor Pasley suggested, that this change in the 1956 Recommendations "relate[d] to matters discussed in Professor Patterson's analysis." If the Code drafters added the phrase "payments or proceeds" following the "due credit" language in response to Professor Patterson's analysis of section 2-708, an analysis which expressly advocates expansion of the profit remedy to sellers who successfully resell finished goods, then their response ought to be seen as a *rejection* of Professor Patterson's views.<sup>502</sup> It is incongruous to

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498. 1956 RECOMMENDATIONS, *supra* note 153, § 2-708, Reason.

499. *Id.*

500. Compare *id.* and 1 N.Y. REPORT 1955, *supra* note 145, at 695, Terminology.

501. 1956 RECOMMENDATIONS, *supra* note 153, § 2-708, Reason.

502. Indeed, there are further reasons for believing that the Code drafters rejected the New York Law Revision Commission's view of the profit remedy. In an appendix attached to the Commission's final report on the Code, the Commission collected a number of excerpts from its proceedings on the U.C.C. With respect to the version of section 2-708 found in Supplement No. 1 the Commission observed that where the aggrieved seller resells the goods pursuant to section 2-706 "subsection (1) of that section provides that seller may recover the difference between resale price and contract price, together with incidental damages but less expenses saved." N.Y. REPORT 1956, *supra* note 145, at 397-98. The Commission then remarked: "It was suggested that the reference to credit for any resale [in section 2-708] may refer to a sale not conducted as provided in Section 2-706." *Id.* at 398. The drafters, however, clearly rejected this suggestion. The "due credit" language remained in section 2-708. Indeed, since the 1956 Recommendations, the text of section 2-708 has gone unchanged. More importantly, the phrase "due credit for payments or



read the added language as clarifying the right of resellers to seek the profit remedy. If one believes that this was truly the drafters' intention, then one must also believe that the drafters did an exceedingly poor and careless job of articulating their goal. The alternative reading is far more reasonable, because it makes far more sense to conclude that the drafters rejected Patterson's views. Instead of making it clear that a successful reseller (like the automobile dealer in *A. Lenobel*) could resell the contract goods and still obtain the profit remedy, the added language makes it clear that the proceeds of the seller's resale will be credited against her profit claim. The added language does not clarify the "right" of volume sellers to seek profit damages, rather it precludes this result.

b. The New York Law Revision Commission's Analysis of  
Section 2-703

Section 2-703 of the 1952 Official Text provided that sellers could obtain the contract-market damage remedy and the lost profit remedy only if "any goods have not been resold."<sup>503</sup> This language was deleted in the 1956 Recommendations "[a]t the suggestion of the New York Commission . . . [in order] to make it clear that the aggrieved seller is not required to elect between damages under Section 2-706 and damages under Section 2-708."<sup>504</sup> That is, the Law Revision Commission did not recommend the deletion of this language in order to make the profit remedy freely available to volume sellers. A review of the Law Revision Commission's analysis of section 2-703 reveals that the change was

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proceeds of resale" remains generally applicable to *any* resale of goods, including the resale of finished goods under section 2-706.

In the appendix attached to its final report, the Law Revision Commission also provided a proposed draft of section 2-708 as the Commission thought it should appear. *Id.* In it the Commission divided section 2-708 into two subsections, the first of which contained the contract price-market price damage remedy, while the second contained the profit remedy. *Id.* In its version of the profit remedy the Commission deleted the "due credit" language. *Id.* In the 1956 Recommendations the Code drafters divided section 2-708 into two subsections just as the Commission had suggested. *See* 1956 RECOMMENDATIONS, *supra* note 153, § 2-708. Furthermore, the drafters acknowledged that the division of the section into two subsections was in response to the Law Revision Commission's work. *Id.* § 2-708, Reason. Significantly, however, the drafters did not delete the "due credit" language from section 2-708 as the Commission suggested. Instead the drafters explained that they "inserted the provision for credit for payment in new subsection (2)" in order "to meet criticisms of the New York Commission." *Id.* The historical accuracy of this statement is somewhat dubious given that the "due credit" language had already been added to section 2-708 in Supplement No. 1. *See* SUPPLEMENT NO. 1, *supra* note 152, § 2-708. Nevertheless, the drafters' decision to retain the "due credit" language in the 1956 Recommendations, contrary to the recommendation of the New York Law Revision Commission, represents a rejection of the Commission's views.

503. 1952 OFFICIAL DRAFT, *supra* note 137, § 2-703(e).

504. 1956 RECOMMENDATIONS, *supra* note 153, § 2-703, Reason.

made for the sole purpose of promoting the Code policy against the doctrine of election of remedies.

John Honnold, a law professor at the University of Pennsylvania, prepared the analysis of section 2-703 that appears in the Law Revision Commission's 1955 report. Honnold did not criticize the Code drafters for providing an index of the sellers' remedies, the primary purpose behind section 2-703. Rather, his sole complaint with respect to section 2-703 was the language in subsection (e), which precluded a seller from obtaining the relief provided under section 2-708 where she had already resold the contract goods. Honnold's only concern in critiquing section 2-703 was to ensure that the seller had "a free choice" between the "measurement of seller's damages by resale of the goods under Section 2-706, and measurement by reference to market price under Section 2-708."<sup>505</sup>

According to Honnold, the opening language of section 2-703(e) "plainly says that the seller is denied the market-price standard for measuring damages whenever he has resold the goods."<sup>506</sup> This language, Honnold argued, is "inconsistent with the statement in Comment 1 [to section 2-703]" rejecting the doctrine of election of remedies.<sup>507</sup> Comment 1 to section 2-703 of the 1952 Official Draft provided in pertinent part: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."<sup>508</sup> The no-resale precondition in section 2-703(e) thwarts this policy. Honnold further argued that under this language a seller may be barred from obtaining any damage remedy. That is, even though a "seller may have resold the goods he may not be able to use the proceeds of the sale as a basis for recovery since he may have failed to comply with one of the requirements of Section 2-706."<sup>509</sup> For example, an aggrieved seller who resells may fail to notify the buyer in breach or may fail to identify the goods to the contract.<sup>510</sup> Combined with the no-resale precondition to section 2-708 stated in section 2-703(e), such a seller would be barred from all the damage remedies available to sellers under Article 2. Professor Honnold concluded that "[t]he draftsmen probably did not intend so to bar the seller."<sup>511</sup> In support of his conten-

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505. 1 N.Y. REPORT 1955, *supra* note 145, at 550.

506. *Id.* at 551.

507. *Id.*

508. 1952 OFFICIAL DRAFT, *supra* note 137, § 2-703, cmt. 1.

509. 1 N.Y. REPORT 1955, *supra* note 145, at 551.

510. *See id.*

511. *Id.*

tion, Honnold referred to Comment 2 of section 2-706 of the 1952 Official Draft. It provided in part that "[f]ailure to act properly under [section 2-706] deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708."<sup>512</sup> Thus, the comments indicated that if the reselling seller failed to meet any of the requirements of section 2-706, he could nonetheless resort to the secondary, less desirable damage remedy found in section 2-708.<sup>513</sup> A seller who improperly resold under section 2-706 could not be "relegated" to damages under 2-708, however, if the no-resale language remained an effective part of section 2-703(e). Accordingly, Professor Honnold recommended that the opening language, "so far as any goods have not been resold," be stricken from section 2-703(e) "with the result that seller will have a free choice between the amount received on resale (§ 2-706) and damages based on market price (§ 2-708)."<sup>514</sup>

Honnold recognized that this nearly complete freedom to choose between contract-resale damages and contract-market damages might overcompensate some sellers.<sup>515</sup> A seller may be able to resell the contract goods at a price above the market level and still recover the contract-market differential. In such a scenario, the ability to pursue market damages under section 2-708 would place the seller in a better position than full performance by the original buyer would have done. Professor Honnold believed that "[t]his result . . . hardly seems subject to serious abuse" because "[r]esale above the market will be rare, and perhaps should be rewarded."<sup>516</sup> Other commentators have argued that sellers "should not be permitted to recover more under 2-708(1) than under 2-706" because such an award of damages would constitute a windfall, putting the seller in a better economic position than the position she would have enjoyed following full performance under the original contract in violation of the normative principle of section 1-106.<sup>517</sup>

The Code drafters plainly agreed with Professor Honnold's analysis of section 2-703 and properly deleted the phrase "so far as any goods have not been resold" from section 2-703(e) in the 1956 Recommendations.<sup>518</sup> The Reason that followed section 2-703 in the 1956 Recom-

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512. 1952 OFFICIAL DRAFT, *supra* note 137, § 2-706, cmt. 2.

513. Indeed, as numerous commentators have noted, the contract-market differential cannot possibly make the seller whole unless the seller supplements this amount with the proceeds from a resale. *See supra* notes 81-83.

514. 1 N.Y. REPORT 1955, *supra* note 145, at 551.

515. *Id.*

516. *Id.* at 551-52; *see also* Harris, *Seller's Damages*, *supra* note 4, at 101 n.174.

517. WHITE & SUMMERS, *supra* note 4, § 7-7, at 309-10; *see also* Sebert, *supra* note 4, at 380-83 (arguing that "the Code should be amended in order to eliminate the possibility of overcompensation.").

518. *See* 1956 RECOMMENDATIONS, *supra* note 153, § 2-703(e).

mendations attributed this change to the New York Law Revision Commission. Moreover, the Reason also referred to the two comments from the 1952 Official Draft upon which Honnold based his analysis and critique.<sup>519</sup> The Code drafters agreed that the no-resale precondition was contrary to the policy against election of remedies and that it thwarted the hierarchy of remedies envisioned by the drafters. The no-resale precondition was too broad in that it had the untoward consequence of preventing some aggrieved sellers from receiving any damage remedy whatsoever.

The drafters' reliance on Professor Honnold's analysis of section 2-703 is also significant for what it does not say. In advocating the deletion of the no-resale precondition from section 2-703(e), Honnold was not concerned with making the profit remedy freely available to aggrieved sellers who resell finished goods. Indeed, Honnold was not concerned with the profit remedy *at all*. Honnold's discussion of section 2-708 was completely devoid of any mention of lost profits or the like. His only concern was the elimination of the phrase "so far as any goods have not been resold" from section 2-703(e) so that sellers might have the option of seeking contract-resale damages under section 2-706 or contract-market damages under section 2-708. Because Honnold's analysis is oblivious to the profit remedy, the advocates of the lost volume seller cannot seriously contend that the Law Revision Commission here sought to extend the profit remedy to volume sellers. Moreover, because the Code drafters simply followed Professor Honnold's reasoning in deleting the no-resale language in the 1956 Recommendations and did not go beyond it, the advocates of the lost volume seller cannot reasonably argue that the drafters were in fact attempting to remove the last "linguistic impediment" to lost volume claims. Indeed, such an argument would be nothing short of bizarre because, at the same time, the drafters added another such impediment to lost volume claims by adding the "due allowance" and "due credit" language to section 2-708.

It seems far more reasonable to conclude, especially in light of Comment 1 to section 2-703 and Comment 2 to section 2-706, that in this instance the Code drafters simply adopted the change suggested by the Law Revision Commission because it appeared to be reasonable and to have merit.<sup>520</sup> The Editorial Board accepted the vast majority of recommendations from the Law Revision Commission<sup>521</sup> because, as noted

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519. *Id.* § 2-703, Reason.

520. Cf. SUPPLEMENT NO. 1, *supra* note 152, at v (wherein Judge Goodrich explains: "To the extent that [the New York Law Revision Commission's criticisms] have merit, the Editorial Board believes that it is recommending amendments to eliminate the objections.").

521. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-SIXTH YEAR 100-

above, New York's acceptance of the Code was of critical importance.<sup>522</sup>

The Code drafters were not beyond sacrificing certain preferences in style or drafting in order to further ensure the success of the Code project.<sup>523</sup> Surely some of these recommendations were adopted without anticipating all of the possible ramifications. With respect to section 2-703(e), it appears that neither the drafters nor the Law Revision Commission contemplated that the deletion of the no-resale precondition would affect the profit remedy under section 2-708. This does *not* mean that the drafters believed that resale of finished goods was irrelevant to the application of the profit remedy. Indeed, the history behind sections 2-703 and 2-708 set forth above, beginning with section 64 of the Uniform Sales Act and continuing through the first Official Draft of the Code in 1952 and Supplement No. 1 in 1955, shows that the drafters believed that resale of finished goods made the seller eligible for difference money damages, but precluded recovery of the profit remedy. Instead, the deletion of the no-resale precondition from section 2-703(e) indicates either that the drafters did not comprehend the change or that they believed in the courts' ability to discern the adequacy of damages under either section 2-706 or section 2-708 where the seller resold finished goods.<sup>524</sup>

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01 (1957) [hereinafter 1957 HANDBOOK] (wherein William Schnader estimates that the drafters "adopted fully ninety per cent of the recommendations of the New York Law Revision Commission in one form or another").

522. See *supra* notes 141-48 and accompanying text.

523. See TWINING, *supra* note 49, at 295 ("The commission's [final] report represented a partial victory for the sponsors of the Code, but a victory for which a price had to be paid."); see also Walter D. Malcolm, *Panel Discussion on the Uniform Commercial Code*, 12 BUS. LAW. 49 (1956) (comments from Code drafters concerning the influence of the Law Revision Commission's work). See generally *id.* at 293-98.

524. Finally it should be noted that Professor Honnold not only failed to address the effect that the deletion of the no-resale pre-condition would have on the profit remedy, he also fundamentally misunderstood the doctrine of election of remedy. More importantly, the policy against the doctrine of election of remedy (the stated reason for the deletion of the phrase "so far as any goods have not been resold" from section 2-703(e)) does not support an extension of the profit remedy to aggrieved sellers who resell finished goods.

Comment 2 to section 2-703 of the 1952 Official Draft provided: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." 1952 OFFICIAL DRAFT, *supra* note 137, § 2-703, cmt. 2. This language survived the New York Law Revision Commission's critique and is still present in the current Code. See U.C.C. § 2-703, cmt. 2 (1994). This comment makes clear several points obscured by Honnold's analysis. First, the comment indicates that the Code's rejection of the doctrine of election of remedy is not absolute. Instead, the remedies available to a seller "depends entirely on the facts of the individual case." *Id.* Consequently, a seller's conduct following breach *can* affect what remedies are available to that seller under the Code. Thus, contrary to Honnold's assertion, if the seller fails to resell the goods in good faith and in a commercially reasonable manner she will be denied the contract-resale

## 6. SUBSEQUENT DRAFTS OF THE CODE AND THE WORK OF THE PERMANENT EDITORIAL BOARD

Those sections of Article 2 relevant to the lost volume seller problem have not changed since the 1956 Recommendations. The revised statutory text that appears in this document was approved by both sponsoring bodies<sup>525</sup> and published in 1957 as the Uniform Commercial Code: 1957 Official Edition.<sup>526</sup> The same statutory text was published with a set of revised comments in 1958 as the Uniform Commercial Code: 1957 Official Text with Comments.<sup>527</sup> The Comments accompanying section 2-703 were unchanged from the 1952 Official Draft, while

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differential under section 2-706. Cf. 1 N.Y. REPORT 1955, *supra* note 145, at 551 ("The draftsmen probably did not intend so to bar the seller."). Likewise, resale of finished goods can affect the availability of the profit remedy to an aggrieved seller. Second, the existence of a remedy precondition does not violate the "fundamental policy" against the doctrine of election of remedy. The Code remedy sections for sellers are full of various pre-conditions that must be satisfied before a seller may pursue such remedy. For example section 2-709 provides that in order to recover the contract price where the goods have been lost or damaged, the risk of loss must have already passed to the buyer. U.C.C. § 2-709(1)(a) (1994). Likewise, and more importantly, section 2-708(2) provides that in order to be able to obtain the profit remedy for a broken contract, the contract-market differential must be inadequate to make the seller whole. U.C.C. § 2-708(2) (1994). These pre-conditions remain in the Code despite Honnold's suggestion that injured parties should have a completely "free choice" among them. Third, the statement in Comment 2 to section 2-704 that Code remedies are "essentially cumulative" may be true as a matter of pleading, but not as a matter of result. That is, an injured seller may seek all the remedies provided under Article 2, but she will not be entitled to receive all of them. The seller cannot receive the price remedy under section 2-709 in addition to the contract-resale remedy under section 2-706, in addition to the contract-market remedy under section 2-708(1), and the profit remedy under 2-708(2). If Code remedies were truly "cumulative" in this sense then the aggrieved seller could recover the value of the contract many times over. This would plainly violate the compensation principle under section 1-106. Accordingly, even though the Code rejects the doctrine of election of remedy, this policy does not itself support the extension of the profit remedy to sellers who resell finished goods.

My explanation of the deletion of the "no-resale" language from section 2-703 and the addition of the "due credit" language to section 2-708 will undoubtedly strike some readers as untidy and incomplete. Despite its limitations, reading the drafting history in this way is, I believe, still more satisfying than pretending certain statutory language does not exist. Moreover, the absence of any statement in the text or comments expressly making no-resale a condition for obtaining the profit remedy may in part be explained by the fact that every text *by itself* is incomplete. In order for communication to take place, in order for language to be recognized as language, the author and interpreter "must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these *as* claims rather than just noises." DWORKIN, *LAW'S EMPIRE*, *supra* note 39, at 63; see also *supra* note 273 (discussing the folly of textualism). The drafters themselves recognized that they "frequently . . . omitted [matters] as being implicit without statement." 1958 OFFICIAL TEXT, *supra* note 114, at 2.

525. See 1957 HANDBOOK, *supra* note 521, at 101.

526. See UNIFORM COMMERCIAL CODE: 1957 OFFICIAL EDITION, *reprinted in* 18 UCC DRAFTS, *supra* note 117, at 341.

527. See UNIFORM COMMERCIAL CODE: 1957 OFFICIAL TEXT WITH COMMENTS [hereinafter 1957 OFFICIAL TEXT], *reprinted in* 19-20 UCC DRAFTS, *supra* note 117. The various subcommittees prepared these revised comments "during the spring of 1957, but publication was

the comments to section 2-708 were changed in only one trivial way unrelated to the lost volume seller problem.<sup>528</sup> Professor Harris believes that the absence of meaningful change in the comments to section 2-708 makes "it fairly clear . . . that subsection 2 [is designed] to govern the lost volume cases."<sup>529</sup> Of course, Harris is able to see this "clear" result only by ignoring the drafting history of section 2-703 and by viewing the text and comments to section 2-708 from the normative perspective of the lost volume seller.<sup>530</sup>

The Code sponsors adopted certain amendments to Articles 8 and 9 in 1958 and subsequently published a revised text and comments edition.<sup>531</sup> With the publication of the 1958 Official Text the Code project began to gather considerable momentum in the legislative arena. "Successively, Connecticut, New Hampshire, Rhode Island, Wyoming, Arkansas, New Mexico, Ohio, Oregon, Oklahoma, Illinois, New Jersey, Georgia, Alaska, New York, and Michigan enacted the 1958 version of the Code."<sup>532</sup> The greatest triumph in this series of legislative successes was New York's adoption of the Code in September 1962. "Thereafter the compliance of the remaining jurisdictions was virtually assured."<sup>533</sup>

Meanwhile it became apparent that virtually every state that

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withheld to await developments in the 1957 legislative sessions in Massachusetts and Pennsylvania." Braucher, *supra* note 35, at 804.

528. The last delivery term listed in the second sentence of Comment 1 was changed from "To Arrive" to "No Arrival, No Sale." Compare 1957 OFFICIAL TEXT, *supra* note 526, § 2-708, cmt. 1 with 1952 OFFICIAL DRAFT, *supra* note 137, § 2-708, cmt. 1.

529. Harris, *Seller's Damages*, *supra* note 4, at 99.

530. In support of his position that section 2-708(2) affords the profit remedy to volume sellers, Harris refers to correspondence between himself and Robert Braucher, the chairman of the Editorial Board subcommittee responsible for Article 2. This correspondence was written in July and September 1963 and is available at the University of Michigan Law Library. See *id.* at 105 n.178. In it, Braucher states that he believes section 2-708(2) was "designed for the 'lost volume' case." It is entirely possible that some individuals involved in the drafting process thought that section 2-708(2) ought to apply to volume sellers. This would certainly help explain the comments found in the 1941 Draft. See *supra* notes 350-73 and accompanying text. It would not, however, account for the subsequent textual changes which appear to preclude this result. Moreover, Braucher was not directly involved in the drafting process prior to the reactivation of the Editorial Board in 1953 and the formation of the individual subcommittees. Finally, Braucher's thoughts about how section 2-708(2) ought to be applied, spoken six years after the language of that section was finalized, do not constitute drafting "history." See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 757-58 (1988) (arguing that such after-acquired intentions are not intentions at all); HIRSCH, *supra* note 273, at 6-10 (arguing that textual meaning does not change over time, but that one's response to the text, even the author's response, may indeed change).

531. See 1958 OFFICIAL TEXT, *supra* note 114.

532. REPORT NO. 1 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE VIII (1962) [hereinafter PEB REPORT NO. 1], reprinted in UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT WITH COMMENTS (1963), reprinted in 22 UCC DRAFTS, *supra* note 117, at 291-99.

533. TWINING, *supra* note 49, at 298.

enacted the Code was amending the statutory text. This practice threatened to undermine one of the principal goals of the Code project, namely, the uniformity of commercial law among the several states.<sup>534</sup> To stop this trend and promote uniformity among the enacting jurisdictions, the Institute obtained additional funds for the purpose of establishing a Permanent Editorial Board.<sup>535</sup> On August 5, 1961, the Institute and the Conference entered into an agreement creating an eleven-member Permanent Editorial Board ("PEB") composed of five representatives from each body with the director of the Institute serving as chairman.<sup>536</sup> To further uniformity, the agreement stated that the PEB's policy would be "to approve a minimum number of amendments to the Code."<sup>537</sup> Nevertheless, the creation of the Permanent Editorial Board established a process that enabled representatives of both sponsoring bodies to review the work of the drafters and to consider possible improvements.

On October 31, 1964, the PEB published its second report, which reviewed various state amendments to the Code, including West Virginia's version of section 2-708(2).<sup>538</sup> In enacting the UCC, West Virginia deleted the closing phrase "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale" from section 2-708(2).<sup>539</sup> In rejecting this amendment, the PEB commented: "No reason appears for the deletion. The deleted words clarify by providing for items which may cause controversy."<sup>540</sup> By steadfastly insisting that the language *clarifies* "items which may cause controversy," the PEB simply repeated the explanation the drafters gave when they added the "due allowance" and "due credit" language in Supplement No. 1.<sup>541</sup> Unlike the drafters' comments in Supplement No. 1, however, the PEB's comments did not contain any reference to manufacturing sellers who do not complete production. Assuming sellers who resell will be fully compensated by difference money damages, this omission is significant. It indicates that the "due allowance" and "due credit" language was

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534. See U.C.C. § 1-102(2)(c) (1994); see also PEB REPORT NO. 1, *supra* note 532, at viii; TWING, *supra* note 49, at 299.

535. See PEB REPORT NO. 1, *supra* note 532, at viii.

536. See *id.* at xi, app.

537. *Id.* at xiv, app.; see also William A. Schnader, *The Permanent Editorial Board for the Uniform Commercial Code: Can it Accomplish its Object?*, 3 AM. BUS. L.J. 137, 138-39 (1965).

538. See REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, AMENDMENTS TO THE UNIFORM COMMERCIAL CODE MADE BY ONE OR MORE OF THE THIRTY CODE JURISDICTIONS NOT RECOMMENDED FOR UNIFORM ADOPTION AND THE BOARD'S REASONS FOR REJECTION (1965).

539. *Id.* at 49.

540. *Id.*

541. Compare *id.* with SUPPLEMENT NO. 1, *supra* note 152, § 2-708, Reason.



intended to apply to all cases in which the profit remedy is sought. The application of this language is not to be restricted to cases involving manufacturers who resell unfinished goods for scrap. Furthermore, the PEB's remarks indicate that there might be some "controversy" surrounding the deduction of resale proceeds from the seller's expected profit and overhead together with the costs incurred by the seller in performing the contract. The PEB's comments indicate that the additional language answers this controversy. They clarify the point that resale proceeds should be deducted, even where the proceeds are obtained from the resale of finished goods. Thus, PEB Report No. 2 reaffirms the inability of volume sellers to recover lost profits under section 2-708(2).

The current members of the PEB apparently do not share their predecessors' belief that the "due allowance" and "due credit" language clarifies the application of section 2-708(2). In March 1988, the Permanent Editorial Board appointed a Study Group to review Article 2 for the purpose of identifying major problems and recommending possible revisions.<sup>542</sup> On March 1, 1990, the Article 2 Study Group issued its Preliminary Report, recommending that, with respect to section 2-708(2), "a different measure of damages be devised for both the 'lost volume' case and the 'salvaged' performance case."<sup>543</sup> The Study Group clearly recognizes that "[i]n the 'lost volume' case, the seller has completed goods on hand that were or could have been resold."<sup>544</sup> The Study Group, however, appears to have accepted the theory of lost volume without much critical reflection, probably because of the theory's general acceptance among courts.<sup>545</sup> Because the volume seller's variable cost for producing finished goods "are tied up in goods which have a market value,"<sup>546</sup> the Study Group recommended that the "due allowance" and "due credit" language be deleted. "This measure of damages, because it focuses only on lost profits, should not contain the language, now in § 2-708(2), 'due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.'"<sup>547</sup> This assertion does not justify the deletion of the language. Rather, it merely assumes, without attempting to defend, the basic premise behind the theory of lost volume—that but for the buyer's breach the seller would have made two sales and thus two units of profit. The Article 2 Study Group obviously does not agree

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542. See PEB STUDY GROUP UNIFORM COMMERCIAL CODE, ARTICLE 2 - PRELIMINARY REPORT (1990) [hereinafter PRELIMINARY REPORT]. For a brief overview of this document, see Alex Devience, Jr., *The Recommendations to Revise Article 2*, 24 UCC L.J. 349 (1992).

543. PRELIMINARY REPORT, *supra* note 542, at 216.

544. *Id.* at 217.

545. See *id.* at 215 & n.29 ("Many courts have found lost volume where the seller had capacity and in fact resold the goods after the breach.").

546. *Id.* at 217.

547. *Id.* at 218.

with the drafters of section 2-708 and PEB Report No. 2 that the “due allowance” and “due credit” language “clarifies” the situation. No doubt this is because the Study Group has a different “situation” in mind. The drafters did not intend to award profit damages to volume sellers who successfully resell, although the prevailing view among courts and commentators is that such an award is appropriate. The Study Group is not interested in understanding what the drafters intended by section 2-708(2) but is instead only concerned with clarifying and solidifying the current law. The drafting history behind Article 2 demonstrates that this current interpretation is in error.

#### V. THE ROLE OF COHERENCE IN RESOLVING INTERPRETIVE DISPUTES UNDER THE UCC

The argument advanced thus far has been two-fold. First, the normative argument urged by most commentators and accepted without question by the majority of courts is seriously flawed. The award of “lost” profits under U.C.C. § 2-708(2) to volume sellers who successfully resell finished goods systematically overcompensates such sellers by paying them damages for an unprotected expectation interest which they claim to have in the post-contractual market. Generally, the law does not guarantee those who compete in the market-place a protected outcome, only a protected opportunity to achieve that outcome. The counter-hypothetical demonstrates the unprotected and protectable nature of the volume seller’s claim to profits that she supposedly would have earned but for the original buyer’s breach. As a normative matter, volume sellers are fully compensated when they resell the contract goods and obtain damages for the difference between the contract price and the resale price, together with damages for any incidental expenses incurred. Where the goods are standard-priced, typically the seller will recover only a nominal amount. Second, the arguments put forth by the commentators and courts as a way of avoiding the untoward effects of the “due allowance” and “due credit” language in section 2-708(2) are illegitimate and unwarranted by the drafting history. It is plainly illegitimate to ignore statutory language simply because it conflicts with the outcome that one believes is most desirable as a normative matter. To do so violates principles like separation of powers and undermines the rule of law. Furthermore, the drafting history behind Article 2 shows that the Code drafters did not intend for the profit remedy to be awarded to successful resellers. The prior drafts of section 2-703 show that the drafters believed that resale of the contract goods would preclude recovery of the profit remedy. The drafters later added the “due allowance” and “due credit” language to section 2-708 to clarify the right of sellers

to resell the unfinished goods for scrap and still obtain the profit remedy. This point was in need of clarification only because the drafters believed as a general matter that reselling sellers could not seek lost profits.

Most readers, hopefully, will have found these arguments to be persuasive and the evidence offered in support of them substantial and convincing. Undoubtedly, however, there will be some who will not be convinced. Some readers will still believe that the successful reseller should recover profit damages and that the drafting history supports the lost volume seller theory. Still others will remain on the fence, unconvinced by either account.

Although I have ridiculed the view which favors the award of profit damages to volume sellers, that view is not without its appeal. The claim that a seller who is the victim of breach ought to be awarded damages sounds commonsensical. Indeed, it almost has the status of a truism, especially in an age in which bearing the mantle of victimhood paradoxically makes one's claims invulnerable to attack or criticism.<sup>548</sup> From this perspective, the claim that an aggrieved seller may recover only nominal damages for breach sounds not only counterintuitive but morally wrong. More importantly, the view which favors profit damages for volume sellers has gained the support many of the most respected legal scholars in the areas of sales, contracts, and commercial law.<sup>549</sup> Furthermore, most of the nation's courts have embraced the lost volume seller thesis.<sup>550</sup> Both the academic commentary and the case law precedent that support the lost volume seller thesis depend upon the same account of the drafting history behind section 2-708 in eliminating the "due allowance" and "due credit" language. Moreover, the inclination to read the historical record as evidencing the drafters' deliberate effort to craft a remedy specifically designed to compensate the lost volume seller is derived from an acceptance of the normative theory that such a seller has indeed suffered a loss for which no other remedy can make amends. Although I believe that both the normative and the drafting history arguments are fatally flawed and that there are persuasive reasons for rejecting them, it would be wrong to suggest that these views are wholly baseless. The flaws in these arguments are not so obvious on

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548. See generally ROBERT HUGHES, *CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* (1993); Brent Staples, *The Rhetoric of Victimhood*, N.Y. TIMES, Feb. 13, 1994, § 4, at 14.

549. Professors White and Summers' popular hornbook on the UCC is widely used by practicing lawyers, academics, and judges. For cases citing this work in support of the lost volume seller thesis, see *supra* note 270. Likewise, Professor Sebert's analysis of Article 2 remedies clearly influenced the members of the PEB in their review of section 2-708 and in their suggestions for its revision. PRELIMINARY REPORT, *supra* note 542, at 214 n.28. Professor Robert Harris is perhaps more responsible than anyone for the success of the lost volume seller thesis. See *supra* notes 57-61 and accompanying text.

550. See cases cited *supra* notes 89-90, 163.

their face so as to render acceptance of the lost volume seller theory irrational. Both the normative argument and the drafting history argument that support the lost volume seller are free of self-contradiction. Moreover, the wide acceptance of the lost volume seller theory among courts and commentators does not show that it is correct but that it is at least plausible. Viewed judiciously from some critical distance, it is, I think, fair to say that both the view that favors the award of profit damages to volume sellers and the view that opposes such an award have some merit and that neither view is wholly incontestable.

### A. *Interpretive Strategies for Reading the Code*

There are a number of well-settled modes of argumentation or interpretative strategies that lawyers, judges, and academics utilize when arguing about the meaning of the Code in general and how specific provisions of the statute ought to be applied.<sup>551</sup> These include arguments based on the plain meaning of the UCC text,<sup>552</sup> arguments based on the Official Comments to the Code,<sup>553</sup> arguments based on the historical intent of the Code drafters,<sup>554</sup> arguments based on the structure of the statute,<sup>555</sup> arguments based on precedent,<sup>556</sup> and normative arguments

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551. The typology of legal argumentation that follows is derived from the recent work of several constitutional law scholars who have attempted to describe the various interpretive strategies employed to determine what the Constitution means. Professor Richard Fallon, for example, argues that there are at least five types of constitutional argument:

arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy.

Fallon, *supra* note 39, at 1189-90; *see also* PHILLIP BOBBITT, *CONSTITUTIONAL FATE* 7 (1982) (arguing that there are five types of constitutional argument: historical, textual, structural, prudential, and doctrinal); Moore, *supra* note 275, at 286 (arguing that there are "four plausible ingredients of any theory of interpretation: ordinary meanings, intentions, precedent, and values"). Although derived from scholarship involving constitutional law, these typologies may, with some variation, be used to describe legal interpretation in other areas.

552. *See* Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 617-18 (3d Cir. 1995); Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 152 (6th Cir. 1983).

553. *See* Amwest Sur. Ins. Co. v. Republic Nat'l Bank, 977 F.2d 122, 128 (4th Cir. 1992); Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1578 (10th Cir. 1984); Weathersby v. Gore, 556 F.2d 1247, 1256 (5th Cir. 1977).

554. *See* Broadcast Capital Corp v. Summa Medical Corp., 972 F.2d 1183, 1189 (10th Cir. 1992); MBank Alamo Nat'l Ass'n v. Raytheon Co., 886 F.2d 1449, 1452 (5th Cir. 1989); *In re Bialac*, 712 F.2d 426, 430 (9th Cir. 1983).

555. *See* Michael v. Shiley, Inc., 46 F.3d 1316, 1322 (3d Cir. 1995); Shackett v. Philko Aviation, Inc., 841 F.2d 166, 171 (7th Cir. 1988); Shearson Lehman Bros. v. Wasatch Bank, 788 F. Supp. 1184, 1197 (D. Utah 1992).

556. *See* Alaska Airlines, Inc. v. Lockheed Aircraft Corp., 430 F. Supp. 134, 138 (D. Alaska 1977); Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 326 (Tex. 1978).

based on the values and policies reflected in the Code.<sup>557</sup> Each of these categories "has a familiar and accepted place" in the practice of interpreting the UCC.<sup>558</sup> Moreover, although each of these categories is conceptually distinct from the others, none is conceptually independent.<sup>559</sup> Indeed, each category of argument is interconnected with and influenced by each of the others. For example, as we have already seen, arguments about the Code drafters' intent behind section 2-708 draw upon various historical sources, such as prior drafts of the Code text and comments, as well as the New York Law Revision Commission reports. Clearly, however, one's reading of these materials will be influenced by normative arguments about the compensation principle and the adequacy of other Code remedies.<sup>560</sup> Likewise, an argument based on precedent in favor of the lost volume seller cannot be rigidly divorced from arguments based on the drafting history of section 2-708.<sup>561</sup> Thus, although these several modes of argument can be described separately, they are still substantially interrelated.

### B. *Disputes Within and Between Categories of Argument*

Each of these interpretive strategies has figured to some extent in arguments about the lost volume seller. Some of these categories of argument clearly favor the lost volume seller thesis, while others are just as clearly at odds with this theory. For example, the advocates of the lost volume seller have a strong argument based on precedent. They can point to a substantial body of case law decided under U.C.C. § 2-708(2) which supports the award of profit damages to volume sellers who successfully resell finished goods. On the other hand, the plain meaning of the statutory text of section 2-708(2) precludes this result on its face. The "due allowance" language demands that courts factor in the costs of the goods, and the "due credit" language requires that they subtract the proceeds obtained on resale. When these amounts are combined with the sellers's expected profit figure, the seller yields either no damages or only nominal damages. Clearly, a straightforward textual approach does not favor the lost volume seller.

The interpretive dispute over the application of section 2-708(2) to volume sellers is not limited to conflicts between categories of argument. Rather, this dispute also involves conflicts within the same category of argument. For example, the advocates of the lost volume seller

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557. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 418 (Cal. 1988) (Mosk, J., dissenting).

558. Fallon, *supra* note 39, at 1194.

559. See *id.* at 1238-39.

560. See *supra* notes 64-101, 266-72, 443-64 and accompanying text.

561. See discussion *supra* part II.C.2.

argue that the compensation principle, the normative goal of all Code remedies, requires the award of profit damages to volume sellers who resell. In response, I have offered a contrary normative argument, that the award of "lost" profits to volume sellers would grossly overcompensate them by placing them in a better economic position than performance would have done. Similarly, the advocates of the lost volume seller argue that the drafting history behind section 2-708 evidences a desire to award lost profits to volume sellers and that, therefore, the "due allowance" and "due credit" language may be casually discarded. I have offered a contrary argument demonstrating that the drafters never intended to award profit damages to aggrieved sellers who successfully resold. Rather, the drafters' intent, reflected in the drafting history was to limit the profit remedy to aggrieved sellers who had no finished goods available for resale. Furthermore, the advocates of the lost volume seller and I have made opposing arguments concerning the meaning of the Official Comment which follows section 2-708.

Accordingly, the lost volume seller problem has presented us with numerous interpretive disputes within the context of a larger interpretive problem. That is, it has presented us with interpretive disputes *between* several categories of argument as well as competing claims *within* a single category of argument. Because these are the accepted modes of Code interpretation, resolving these interpretive disputes will enable us to resolve the larger interpretive question—does section 2-708(2) award profit damages to volume sellers. How then can these interpretive disputes be resolved?

### C. *Reading the UCC as an Integrated Whole*

Following Professor Richard Fallon's constructivist coherence argument with respect to constitutional law, I propose that when interpretive disputes concerning the Code arise within a single category of argument and between categories of argument, such disputes should be resolved "by reference to other categories of argument."<sup>562</sup> Unlike the practice of literary interpretation, which encourages reading texts in multiple ways with widely divergent meanings, the implicit norms within legal practice encourage lawyers and judges to strive for a single meaning when the text is applied to a single set of facts.<sup>563</sup> Neither the

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562. Fallon, *supra* note 39, at 1239.

563. The idea of multiple interpretations of legal rules is plainly at war with this widely held view of the function of law because it creates uncertainty as to what the law requires and allows. Thus lawyers and judges have traditionally been much more concerned with arriving at a single valid interpretation than their literary counterparts.

Kay, *supra* note 273, at 239 (footnotes omitted); see also Brest, *supra* note 294, at 770 ("Interpre-

rule of law nor the goal of ordered liberty will be served by the frequent and continued radical reinterpretation of legal texts.<sup>564</sup>

Furthermore, because each mode of argumentation is an accepted and established means of interpreting the UCC, it may not be ignored simply because it does not suit one's immediate interpretive ends. No one may re-invent the practice of Code interpretation as if writing on a "clean slate."<sup>565</sup> It would, for example, be mistaken to suggest that lawyers and judges may not consult the historical record or attempt to discern the intent of the Code drafters by reviewing earlier drafts of a particular provision.<sup>566</sup> Perhaps in some imaginary perfect world those charged with the responsibility of interpreting the UCC would not refer

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tation in the humanities is essentially concerned with exposing and illuminating ambiguity; it exalts indeterminacy. Legal interpretation seeks to resolve ambiguity."); Fish, *supra* note 293, at 1344 (arguing that judges strive for continuity and stability and the avoidance of interpretive crisis but that "[t]he situation is exactly the reverse in literary studies, at least in the context of a modernist aesthetic where the rule is that a critic must learn to read in a way that multiplies crisis").

564. This is in part the policy behind the doctrine of *stare decisis*. See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

565. Dworkin makes a similar point with respect to constitutional interpretation. See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 39, at 35. He argues that any plausible theory must

aim[ ] to integrate the Constitution into our constitutional and legal practice as a whole. No one proposes judicial review as if on a clean slate. Each theory claims to provide the most illuminating account of what our actual constitutional tradition, taken as a whole, really 'comes to'—of the 'point' or 'best justification' of the constitutional system that has been developed in our own legal history.

*Id.*

566. In fact, Llewellyn's clear preference was to prohibit judges, lawyers, and other interpreters from relying on earlier drafts in a search for textual meaning. Section 1-102(3)(g) of the 1952 Official Draft provided: "Prior drafts of text and comments may not be used to ascertain legislative intent." 1952 OFFICIAL DRAFT, *supra* note 137, § 1-102(3)(g). Comment 2 following section 1-102 explained this prohibition as follows: "Frequently matters have been omitted as being implicit without statement and language has been changed or added solely for clarity. The only safe guide to intent lies in the final text and comments." *Id.* § 1-102 cmt. 2. The New York Law Revision Commission did not view this restriction favorably. In its final report to the New York legislature, the Commission stated that "it [did] not believe that courts and lawyers should be prevented or discouraged from using the many rules of interpretation ordinarily employed to determine meaning of text." N.Y. REPORT 1956, *supra* note 145, at 26. Because these rules authorized reference to the "immediate background and legislative history" of statutes, the Law Revision Commission believed that the prohibition should be deleted. *Id.* The Code drafters, ever sensitive to the concerns of the Commission, deleted section 1-102(3)(g) in the 1956 Recommendations. The drafters acknowledged the Law Revision Commission's suggestion in this regard but added that "paragraph (3)(g) was deleted because the changes from the text enacted in Pennsylvania in 1953 are clearly legitimate legislative history." 1956 RECOMMENDATIONS, *supra* note 153, § 1-102, Reason for Recommendation. Today, reference to prior drafts of the Code or comments is a common method of resolving textual ambiguities. See cases cited *supra* note 554; see also Dworkin, *Law as Interpretation*, *supra* note 39, at 537 ("Of course no plausible theory of interpretation holds that the intention of the author is always irrelevant. Sometimes it is plainly the heart of the matter . . .").

to such historical sources.<sup>567</sup> In the real world of Code interpretation which we inhabit, judges, lawyers, and others can and do look to the drafters' intent, as well as the text, comments, structure of the statute, case precedent, and values, to discern the meaning of Code provisions. Moreover, the implicit norms of our legal practice "prescribe an effort" to understand all of these categories of argument as pointing to the same textual meaning.<sup>568</sup> That is, we must try to understand these several interpretive strategies as coherent, as synoptic, as leading to the same interpretive result.<sup>569</sup>

The theory which supports the award of profit damages to volume sellers who resell finished goods cannot bring all of the categories of argument together in a coherent fashion, whereas the theory which opposes such an award can. The advocates of the lost volume seller cannot treat the Code as a single coherent whole. They cannot account for the structure of Article 2's remedy provisions. Instead, the theory that favors the award of profit damages to volume sellers demands that these various remedy provisions be read independently and in isolation from one another rather than as a coherent and integrated set of rules. No doubt some statutes may not be susceptible to this sort of reading since they may be inherently inconsistent or plainly incoherent.<sup>570</sup> The Code is not, however, like most acts of legislation. Its subject matter is relatively discrete. More importantly, the Code was not drafted in piecemeal fashion by politicians but by a select group of academics and practitioners working within the parameters of Llewellyn's vision of how law ought to respond to commercial practices.<sup>571</sup> Clearly some of its

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567. I say "perhaps" because some believe that reference to the intentions of the democratically elected legislators who enacted the statute in question will enhance the values of democracy and predictability. See Kay, *supra* note 273, at 284-92.

568. Fallon, *supra* note 39, at 1240.

569. See Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 816 (1978) (setting forth a theory of "purposive construction" of the Code in which the final step is: "After considering statutory language, Official Comments and historic context, in seriatim, examine these factors in combination for a coherent interpretation.") (emphasis omitted).

570. Professor Sunstein has argued that interpretive strategies that focus on the structure of statutes are "entirely unobjectionable" and generally "provide significant interpretive guidance." Sunstein, *supra* note 281, at 425. He notes, however, that such approaches are weak in that they assume "that statutes are in fact internally consistent and coherent—an assumption that recent theories of legislation have questioned in light of the influence of interest groups, compromise, and irrationality." *Id.* He also notes that sometimes such approaches may undermine coherence in that they "reveal ambiguities, silences, or delegations." *Id.* at 426.

571. See Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962) ("Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it."); TWining, *supra* note 49, at 291 ("Despite extensive consultation and public discussion, the project was inevitably under the control of a tightly knit group."); see also Zipporah B. Wiseman,



provisions were the subject of compromise, especially after 1952, as the review of the drafting history above indicates. Overall, however, the Code plainly represents a desire to articulate a coherent legal approach to commercial transactions.<sup>572</sup> Accordingly, it ought to be read as an integrated whole embodying a limited number of coherent normative principles.

# 1. THE COMPENSATION PRINCIPLE OF SECTION 1-106

The normative principle at issue with respect to the lost volume seller is the compensation principle found in U.C.C. § 1-106. Section 1-106(1) provides that Code 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."<sup>573</sup> The policy that favors the "liberal administration" of Code remedies does not mean that those remedies should be given away. Indeed, as noted above, the Comment to section 1-106 makes clear that the aggrieved party must work to minimize her damages.<sup>574</sup> The Code does not favor injured parties who respond to their misfortune with inaction. Instead, the various Article 2 remedy provisions designed to implement section 1-106 assume that both aggrieved buyers and sellers can help to make themselves whole. That is, the aggrieved party should work to substitute someone else's performance for the performance of the party in breach. If the buyer's supplier repudiates the deal, the buyer should obtain substitute goods or "cover" under section 2-712. If the seller's customer wrongfully refuses delivery, the seller should resell the goods to an alternate purchaser under section 2-706.<sup>575</sup> The aggrieved party may recover any shortfall in this substitute performance from the party in breach and so be put "in as good a position as if the other party had fully performed." With

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*The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987) (discussing Llewellyn's original vision for transactions under Article 2).

572. This desire for coherence is captured in one of the Code's stated purposes: "to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2)(c) (1994). It is important to note that the type of coherence I have in mind here is not the grand notion of "global" coherence, which insists that the entire legal system be understood as "speaking with one voice" and that legislators enact laws and judges adjudicate cases so that the law expresses the strong coherence of a normative system derived from a single or very few normative principles. See Raz, *supra* note 39, at 297-309. Instead the coherence I have in mind is more akin to what Professor Raz calls "local" coherence, that is, the coherence of doctrine in specific fields. See *id.* at 309-14. Here I am suggesting that the Code, a statute which addresses a discrete and limited area of social life, be construed as articulating a coherent approach to remedies.

573. U.C.C. § 1-106(1) (1994).

574. See *id.* § 1-106, cmt. 1; see also *supra* notes 183-98 and accompanying text.

575. See U.C.C. § 2-712, cmt. 1 ("This remedy is the buyer's equivalent of the seller's right to resell."); see also WHITE & SUMMERS, *supra* note 4, § 7-6, at 301 ("The analogue to the buyer's right to cover under 2-712 is the seller's right to resell under 2-706."); Sebert, *supra* note 4, at 365.

respect to sellers, the Article 2 remedies reflect the belief that the resale of finished goods combined with some award of difference money damages will make an aggrieved seller whole. The lost volume seller thesis cannot be squared with this belief. It cannot account for either the content or structure of Article 2 remedies in any coherent fashion. Accordingly, it must be rejected in favor of the interpretation which contends that the resale of finished goods precludes recovery of the profit remedy. Moreover, this interpretation not only explains the other Article 2 remedy provisions, it also brings together in a coherent fashion the normative, textual, and historical arguments advanced above.

## 2. THE HIERARCHY AMONG SELLERS' REMEDIES

The statutory text and accompanying comments clearly set forth a hierarchy of remedies for aggrieved sellers. The greatest award of money damages that a seller can hope to obtain through a cause of action for breach is recovery of the full contract price under section 2-709.<sup>576</sup> As noted above, however, the Code severely restricts sellers' access to the price remedy. Resale of finished goods by the seller is not one of the limited circumstances under which the contract price may be obtained.<sup>577</sup>

If the aggrieved seller does not qualify for the price remedy, then she may obtain one of three money damage awards: the contract price-resale price differential under section 2-706, the contract price-market price differential under section 2-708(1), or the profit remedy under section 2-708(2). A hierarchy exists among these remedies, at the top of which sits section 2-706 and at the bottom of which lies section 2-708(2). The drafters intended section 2-706 to be the primary remedy for aggrieved sellers who fail to qualify for the price remedy. They also intended for section 2-708(2) to act as a default or residuary remedy, a last resort for injured sellers unable to recover under the other damage provisions.

The drafters indicated this hierarchy and the primacy of section 2-706 at several places in the Code. For example, section 2-704 allows the seller to identify finished goods to the contract if they are "in his possession or control" at the time of breach.<sup>578</sup> If the goods are unfinished at the time of breach, section 2-704 allows the seller to treat the goods "as

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576. Here I leave to one side the non-monetary remedies available to sellers under sections 2-702 and 2-705. In short, these provisions allow the seller to stop delivery of the contract goods in transit to an insolvent buyer and reclaim them from the carrier. See generally WHITE & SUMMERS, *supra* note 4, § 23-10.

577. See *supra* notes 64-72 and accompanying text (discussing the limited circumstances under which the aggrieved seller may obtain the price).

578. U.C.C. § 2-704(1)(a) (1994).

the subject of resale" if the goods "have demonstrably been intended for the particular contract."<sup>579</sup> Furthermore, section 2-704 permits the seller to complete production of unfinished goods "in the exercise of reasonable commercial judgment."<sup>580</sup> Official Comment 1 to section 2-704 explains this provision as follows:

This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of their resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under *the resale section, the seller's primary remedy*, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of his contract.<sup>581</sup>

Clearly, the point of section 2-704 is to permit the seller to utilize the resale remedy under section 2-706 and, where resale is not available, the price remedy under section 2-709. The comment plainly and unequivocally refers to the resale remedy as "the seller's primary remedy" and states that the price may be had "in the special case in which resale is not practicable." This description of section 2-706 as the seller's "primary remedy" first appeared in the comments to section 2-704 in the May 1949 Draft and has remained there ever since.<sup>582</sup> The Code drafters apparently believed at an early point in the drafting process that sellers could and ought to make themselves whole by reselling the contract goods and recovering any difference between the contract price and the resale price from the breaching buyer.

The hierarchy among sellers' remedies and the primacy of the contract-resale damage formula is also reflected in Official Comment 2 to section 2-706. Recall that under section 2-706 the seller may recover the difference between the contract price and the resale price if the seller satisfies certain conditions in conducting the resale. For example, the resale must be "made in good faith and in a commercially reasonable manner."<sup>583</sup> If the resale is a "private sale," then the seller "must give the buyer reasonable notification of his intention to resell."<sup>584</sup> If the resale is a "public sale," that is, a sale by auction, then the seller must not only "give the buyer reasonable notice of the time and place of the resale" but must also conduct the resale "at a usual place or market for

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579. *Id.* § 2-704(1)(b).

580. *Id.* § 2-704(2).

581. *Id.* § 2-704, cmt. 1 (emphasis added).

582. See MAY 1949 DRAFT, *supra* note 387, § 2-704, cmt. 1.

583. U.C.C. § 2-706(1) (1994).

584. *Id.* § 2-706(3).

public sale.”<sup>585</sup> Furthermore, if the goods are not within view of those attending the sale then “the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders.”<sup>586</sup> Not all resales conducted by aggrieved sellers will satisfy all of the conditions provided under section 2-706. For example, the seller may fail to notify the breaching buyer of the intended resale, or the seller may enter into a “sweetheart” deal with a friendly customer, thereby violating the obligation of good faith and commercial reasonableness. Consequently, not every seller who resells the contract goods will be able to obtain the contract-resale differential.

Official Comment 2 to section 2-706 recognizes this fact and so provides in part: “Failure to act properly under this section deprives the seller of the measure of damages here provided and *relegates* him to that provided in Section 2-708.”<sup>587</sup> The comment does not distinguish between the two distinct damage remedies provided under section 2-708. It does, however, imply that the relief provided under section 2-708 is secondary and less desirable than the relief provided under section 2-706. Moreover, as Professor Shanker reminds us, “there is no suggestion within [section 2-706] that the profit formula of section 2-708(2) is in any way intended to qualify or be superior to it.”<sup>588</sup> If section 2-708(2) was really designed to be the “principal,” “primary,” or “most important” remedy or the “Pearly Gates” of sellers’ remedies, as the advocates of the lost volume seller contend,<sup>589</sup> then one must wonder about the drafters’ chosen rhetoric. Typically, to be “relegated” to a new position is to be assigned to a lower station, to have to settle for something less. The seller who resells finished goods to a substitute buyer for less than the original contract price is placed in the same economic position by recovering the difference between the contract price and the resale price from the original buyer under section 2-706. The volume seller who resells finished goods for the original contract price is not “relegated” to a lower station if he is then awarded the profit remedy under section 2-708(2). Such a seller receives an additional unit of profit on top of the full contract price and so is put in a better position than section 2-706 could ever hope to do. One may conclude that either the drafters did not know what the word “relegate” meant or they did not contemplate the award of profit damages to resellers of finished goods.

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585. *Id.* § 2-706(4).

586. *Id.*

587. *Id.* § 2-706, cmt. 2 (emphasis added).

588. Shanker, *supra* note 62, at 699.

589. See WHITE & SUMMERS, *supra* note 4, § 7-11, at 319, § 7-14, at 332; Anderson, *supra* note 4, at 1022, 1025, 1063; Childres & Burgess, *supra* note 4, at 834, 836, 860, 880, 884; Seibert, *supra* note 4, at 366, 389.

It is far more reasonable to view the drafters' choice of words as reflecting a hierarchy among sellers' remedies, at the bottom of which sits the remedy for lost profits. Because section 2-708(2) was designed to be a remedy of last resort, it cannot reasonably be construed as awarding damages which are superior to the primary remedy of section 2-706.

The hierarchy among sellers' remedies is further reflected within the Code text itself. For example, section 2-709(3) expressly provides that "a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section."<sup>590</sup> The "preceding" section is of course section 2-708. Thus, section 2-709 clearly indicates that section 2-708 is a default remedy where the price remedy is not available.

More importantly, section 2-708(2) expressly states that it only applies where "the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done."<sup>591</sup> The advocates of the lost volume seller, however, argue that this hierarchy merely reflects the drafters' concern with fixed price goods and the absence of either a contract-resale differential or a contract-market differential where such goods are involved.<sup>592</sup> Admittedly, the drafters expressed their interest in standard-priced goods in Official Comment 2 to section 2-708.<sup>593</sup> These remarks take on new significance, however, when viewed in light of Official Comment 2 to section 2-704 and the Official Comment to section 2-706. These comments indicate that a seller who has goods available for resale should attempt to resell them pursuant to section 2-706.<sup>594</sup> If the goods are in the seller's possession or control but "resale is not practicable," the seller may obtain the price remedy under section 2-709.<sup>595</sup> If the goods are resellable and the seller succeeds in reselling them but "fail[s] to act properly" under section 2-706, the seller is "relegate[d]" to the lesser remedy of section 2-708.<sup>596</sup> According to the advocates of the lost volume seller, however, section 2-708(2) grants the reselling seller a better remedy than the primary remedy of section 2-706. From this perspective, the seller would actually hope to be "relegated" to section 2-708(2) because it gives him an additional unit of profit. According to this reading, the seller stands to gain from his mistake. He will help himself by failing to resell properly under section 2-706. This view makes no

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590. U.C.C. § 2-709(3) (1994).

591. *Id.* § 2-708(2).

592. *See supra* notes 454-64 and accompanying text.

593. *See supra* notes 89-101, 454-64 and accompanying text.

594. *See* U.C.C. § 2-704, cmt. 1 (1994) (referring to resale as the "primary remedy").

595. *Id.* (calling the unavailability of resale a "special case").

596. *Id.* § 2-706, cmt. 2.

sense, because it cannot fit in any intelligible fashion with the drafters' view of sellers' remedies set forth in the statutory text and comments. Just as they must ignore the "due allowance" and "due credit" language in section 2-708(2), the advocates of the lost volume seller must ignore the Official Comments to sections 2-704 and 2-706 to accommodate the result they desire.

Indeed, in order to accomplish their normative objective, the advocates of the lost volume seller turn the hierarchy of Code remedies on its head. What first appeared to be a "residuary formula" awarding lost profits<sup>597</sup> suddenly becomes "the primary rule of seller's general damages"<sup>598</sup> and "the proper and best measure of damages in the large majority of cases."<sup>599</sup> Although some advocates of the lost volume seller acknowledge that this role reversal among sellers' remedies is neither what the drafters intended nor what they articulated,<sup>600</sup> most are oblivious to the Code hierarchy. Moreover, those who do acknowledge the departure from the drafters' plan justify this move on purely normative grounds.<sup>601</sup> Accordingly, by their own admission, an acceptance of the lost volume seller thesis cannot be reconciled in any coherent fashion with the text, structure, or comments of other Code remedy provisions.

The decision to ignore those comments which reflect the intended hierarchy among sellers' remedies is very similar to the interpretive approach endorsed by some advocates of the lost volume seller that the "due allowance" and "due credit" language should simply be ignored.<sup>602</sup> This approach does not attempt to read the Code text and comments in a coherent fashion leading toward the same result.<sup>603</sup> Indeed, it foregoes even the pretense of textual interpretation and disdains any principled approach to the Code comments. Instead, it treats the comments as mere

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597. Schlosser, *Construing*, *supra* note 4, at 688.

598. Childres & Burgess, *supra* note 4, at 836.

599. WHITE & SUMMERS, *supra* note 4, § 7-14, at 332. For other authorities advocating the primacy of lost profit damages and the widespread application of section 2-708(2), see *supra* notes 17-20, 100-01.

600. See Childres & Burgess, *supra* note 4, at 836 (acknowledging that "[t]he UCC draftsmen did not articulate things this way"); *id.* at 864 (noting that the Code text, comments, and structure indicate a "pecking order" in which sections 2-706 and 2-709 come before section 2-708); *id.* at 873 (arguing that section 2-708(2) ought to be construed as primary to section 2-706 in some situations but neither the Code text or comments offer "any help" on this point); *id.* at 874 (arguing that the resale remedy "which the draftsmen thought primary is largely irrelevant to seller's damages law"); *id.* at 880 (acknowledging that the theory which supposes the primacy of section 2-708(2) "is very different from the draftsmen's apparent view"); *id.* at 882 (acknowledging that section 2-708(2) is "the last resort in the draftsmen's scheme").

601. See *id.*

602. See *supra* notes 106-10 and accompanying text.

603. See Fallon, *supra* note 39, at 1240.

playthings that may be ignored when they are inconvenient and selectively invoked when they appear to support one's position. As it did with respect to the "due allowance" and "due credit" language, this interpretive approach threatens to undermine the rule of law.<sup>604</sup>

## VI. CONCLUSION

In this article I have argued that contrary to the opinions of the vast majority of courts and commentators, the profit remedy should not be awarded to so-called lost volume sellers under U.C.C. § 2-708(2). I have attempted to show how the award of "lost" profits to sellers who successfully resell finished goods overcompensates such sellers by placing them in a better position than performance would have done. The award of lost profits to volume sellers grants them an expectation interest in the post-contractual market. The seller, however, does not have an expectation interest in this market, she only has hopes and desires that the law neither recognizes nor protects. Furthermore, the advocates of the lost volume seller can only accomplish the award of lost profits to volume sellers by ignoring the statutory language of section 2-708(2). The statutory text requires that the breaching buyer be given "due credit" for the proceeds obtained by the seller on resale. The drafting history behind section 2-708(2) does not indicate that the "due credit" language may be ignored or that the Code drafters intended to award lost profits to volume sellers. Instead, the limited drafting history relied upon by the advocates of the lost volume seller may be read as manifesting the very opposite intention. Moreover, the additional drafting history which the advocates of the lost volume seller ignore, including the prior drafts of section 2-703, shows that the drafters did not contemplate the award of profit damages to volume sellers. Instead, it shows that the drafters believed that the resale of finished goods precluded the award of lost profits. Finally, I have argued that the interpretation that favors the award of profit damages to volume sellers cannot be read in a coherent fashion with the other Code remedy provisions and the accompanying comments. The text and comments set forth a hierarchy of remedies for sellers. Section 2-708(2) is a final default remedy that sits at the bottom of this hierarchy. The advocates of the lost volume seller necessarily stand this hierarchy on its head, making section 2-708(2) the primary remedy for sellers.

The advocates of the lost volume seller are not concerned with a coherent interpretation of the Code but with one that ensures the award of profit damages to volume sellers. I have not suggested that coherence

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604. See *supra* notes 266-305 and accompanying text.

ensures the correctness of interpretations. Coherence does not justify the adoption of a particular interpretation any more than logical validity justifies the acceptance of a syllogism's conclusion. Nor have I suggested that one's normative perspective should play no part in the interpretive process. This is plainly not possible. All language must be seen as purposive if it is to be perceived as language at all. Moreover, because law is a normative system the purposes behind legal language are undeniably normative and value-laden. Coherence may, however, provide a principled means of resolving interpretive disputes without resorting to unfettered political choice. This is especially true where the legal text at issue is an integrated statute like the Uniform Commercial Code.