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THE CODE'S ACTION FOR THE PRICE: A SURVEY*

Roy Ryden Anderson[†]

INTRODUCTION

Section 2-709 of the Uniform Commercial Code allows an aggrieved seller, in limited circumstances, an action to recover from the repudiating or breaching buyer the full unpaid contract price.¹ If the buyer has accepted the goods, and is unable justifiably to revoke his acceptance, the seller is entitled to the price action as a matter of course.² If, however, the buyer has not accepted the

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1. U.C.C. § 2-709 (1977) provides:

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

- (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
- (b) of goods identified to the contract if 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.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), 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.

2. U.C.C. § 2-709(1)(a).

goods, section 2-709 strictly limits the availability of the price action to two types of cases. First, the action lies if the goods have been lost or damaged within a commercially reasonable time after the risk of loss has passed to the buyer.³ Second, the action lies if the seller is unable to resell them with reasonable effort and at a reasonable price.⁴ Comment 6 to section 2-709 makes clear that only these three classes of cases—accepted goods, lost or damaged goods, and unresalable goods—give rise to the seller's right to an action for the price.⁵ The cases uniformly bear this out.

The theory is that unless the goods have been accepted, it would be "social waste" to allow a seller in the business of selling such goods to force them on a buyer who has indicated that he no longer wants them. "Social wisdom" dictates that it is more efficient and fair for the seller to use his own established marketing channels to dispose of the goods and to recover from the buyer in an action at law for whatever damages he has suffered.⁶ In the context of this theory, the three exceptions make sense. If the buyer has accepted the goods, he will usually have both possession of and title to them. Accordingly, he should pay the agreed price.⁷ If the goods have been lost or damaged and the risk of that loss is on the buyer, an obligation to pay the contract price is simply the legal monetary ramification of that risk. If the goods are not reasonably resalable, then the fundamental premise of the theory fails, and no reason remains for relieving the breaching buyer from doing precisely that which he has promised.

The price action remains the most attractive of damage remedies to sellers and their attorneys because it forces the buyer to honor his promise specifically. Seller clients without exception appreciatively follow the unconvoluted logic that the buyer should pay the full amount promised under the contract. Indeed, the price action under section 2-709 has been described as a specific performance remedy.⁸ This is an apt description as long as it is kept well in

3. *Id.*

4. U.C.C. § 2-709(1)(b).

5. Comment 6 to U.C.C. § 2-709 states: "This section is intended to be exhaustive in its enumeration of cases where an action for the price lies."

6. For an early statement of this theory by Professor Karl Llewellyn, the primary draftsman of Article 2, see Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 176-77 (1938). Professor Llewellyn termed this theory "social wisdom" and described any result to the contrary "social waste." *Id.*

7. U.C.C. § 2-607(1) provides: "The buyer must pay at the contract rate for any goods accepted."

8. See *Schumann v. Levi*, 728 F.2d 1141, 1143, 38 U.C.C. Rep. Serv. (Callaghan) 131,

mind that the price action is an action at law, whereas specific performance is a remedy in equity. Equitable remedies are, generally, discretionary with the court and are not a matter of right for the plaintiff. Remedies at law are a matter of right. If the aggrieved seller carries his burden of proof that his case falls within one of the three exceptions of section 2-709, he is entitled to the action for the price as a matter of right.

As an action at law for money damages, the action for the price seeks to honor the aggrieved seller's lost expectation under the contract. It seeks to compensate the seller by honoring the dictates of section 1-106 that the seller be placed in the position he would have occupied had the contract been performed. It is not an action in restitution, although one court has characterized certain restitution actions based on contracts implied in law as actions for the price governed by section 2-709.⁹

In most cases, of course, a seller will be absolutely enchanted to be allowed a recovery measured by the full unpaid contract price. On occasion, however, sellers have attempted to recover something more or something different. On the few occasions that the situation has been litigated at the appellate level, the courts have consistently held that if the action for the price lies, the seller is restricted to it.

In an early case, a department store seller brought an action against its customer for the price of clothing the buyer had purchased on a charge account.¹⁰ The action was brought more than four years after the last charge account purchase, and accordingly, an action for the price was barred by the Code's four-year statute of limitations.¹¹ The seller argued that its action was one to collect a debt and was governed by the local six-year statute of limitations. The court found for the buyer, holding that because the transaction was a sale of goods, the Code applied. The seller's sole remedy was an action for the price of accepted goods, and that action was barred by the Code's statute of limitations.¹²

In a more recent case, the seller sold steel to a third-party

133 (1984); *Central Ill. Pub. Serv. Co. v. Consolidated Coal Co.*, 527 F. Supp. 58, 65, 33 U.C.C. Rep. Serv. 278, 278 (C.D. Ill. 1981).

9. *See H. Russell Taylor's Fire Prevention Serv., Inc. v. Coca Cola Bottling Corp.*, 99 Cal. App. 3d 711, 724, 160 Cal. Rptr. 411, 420, 27 U.C.C. Rep. Serv. 1312, 1322 (1979).

10. *Gimbel Bros. v. Cohen*, 46 Pa. D. & C.2d 747, 6 U.C.C. Rep. Serv. 803 (Montgomery C.P. 1969).

11. *See* U.C.C. § 2-725.

12. *Gimbel Bros.*, 46 Pa. D. & C.2d at 748-51, 6 U.C.C. Rep. Serv. at 804-05.

buyer.¹³ The steel was delivered to the Air Force pursuant to the agreement. When the third party failed to pay for the steel, the seller sued the Air Force on an alleged promise by the government to pay for the steel which had been used subsequently in the construction of a power plant. The court dismissed the action against the Air Force for lack of consideration to support the alleged promise. The seller contended that it had a right to rescind the contract with the third party for nonpayment and that this right constituted an equitable interest in the steel sufficient to constitute consideration. The court rejected this argument, holding that no such equitable interest existed and that the seller's only remedy in the event of the third party's failure to pay was an action for the price under section 2-709.¹⁴

These two cases are undoubtedly not representative of commonly recurring fact situations. However, it is not uncommon for aggrieved sellers to be more interested in getting the goods back than in suing for the price. The buyer may be a generally unattractive defendant or, more specifically, teetering on the edge of bankruptcy. In other situations, the seller may simply wish to be vindictive or may have the self-righteous conviction that the buyer is not going to retain his property without paying for it. Further, litigation is rarely an attractive alternative, so the seller may be willing to cut his losses if he can get his property back. However, unless the seller has retained a security interest in the property, a course of action based upon an involuntary retaking of the property is fraught with danger. If the buyer has accepted the goods, title to those goods no doubt has long since passed to him. Such a retaking would be regarded as wrongful and would subject the seller to a common law tort action for wrongful conversion. In one case, for example, the buyer failed to pay for a tractor which had been delivered and accepted.¹⁵ The seller reclaimed the tractor without judicial process, resold it, and sued for his remaining loss. The court denied the seller any recovery. The court expressed emphatic disenchantment with the seller's cavalier self-help actions. Since the goods had been accepted, the seller's exclusive remedy was an action for the price under section 2-709.¹⁶ However, by fashioning his own remedy, one not recognized at law or in equity, the seller was

13. *Helash v. Ballard*, 638 F.2d 74, 30 U.C.C. Rep. Serv. 1563 (9th Cir. 1980).

14. *Id.* at 76, 30 U.C.C. Rep. Serv. at 1565-66.

15. *Kelly v. Miller*, 575 P.2d 1221, 23 U.C.C. Rep. Serv. 632 (Alaska 1978).

16. The seller, of course, would also have been entitled to incidental damages under U.C.C. § 2-710. *Id.* at 1223, 23 U.C.C. Rep. Serv. at 635.

precluded from recovering damages for the buyer's breach.¹⁷

I. GOODS ACCEPTED

A. *The Fact of Acceptance*

"Acceptance" is a term of art under the Code.¹⁸ Acceptance of any part of a commercial unit is acceptance of the entire unit.¹⁹ Section 2-606 provides three ways for the buyer to accept the goods.²⁰ First, after having had a reasonable opportunity to inspect the goods, the buyer may signify to the seller that he accepts them. Except in face-to-face transactions, this method of acceptance is understandably rare. Second, after having had a reasonable opportunity to inspect the goods, the buyer may fail to reject them. This is far and away the most common method of acceptance. Third, whether or not he has previously rejected the goods, the buyer may do an act inconsistent with the seller's ownership of the goods. This method of acceptance has given rise to a great deal of litigation beyond the pale of our present discussion. Sellers argue that buyers' actions constituted acceptance, and buyers argue that their actions were taken only for purposes of mitigating damages or responding to their obligations under the Code to preserve and care for the goods while in their possession. Comment 4 to section 2-606 provides the test for resolving such controversies. The test is whether the actions taken by the buyer can be said to be inconsis-

17. *Id.* at 1224, 23 U.C.C. Rep. Serv. at 636-37.

18. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-2, at 296 (2d ed. 1980).

19. U.C.C. § 2-606(2). See *Haken v. Scheffler*, 24 Mich. App. 196, 180 N.W.2d 206, 8 U.C.C. Rep. Serv. 349 (1970).

20. U.C.C. § 2-606 provides:

- (1) Acceptance of goods occurs when the buyer
 - (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
 - (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
 - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

tent with the buyer's claim that he has rejected the goods.²¹

Once the buyer has accepted the goods, section 2-607 provides that three important consequences immediately attach. First, the buyer can no longer reject the goods.²² Second, following acceptance the burden of proof is on the buyer to establish any breach of contract with respect to the goods accepted.²³ Third, the buyer must pay the contract price for the goods accepted.²⁴ Although this latter consequence is of the most obvious importance in the present context, all three consequences may become relevant at trial, as the discussion below will show.

It is important to keep in mind that we are talking here of acceptance by the buyer of the contract goods themselves and not of acceptance of an offer which provided the basis for the contract. Although it is true that the acceptance of the goods may in some cases serve both functions, the acceptance of the offer will commonly have occurred earlier in the transaction. Indeed, it may well have been the buyer who made the contract offer and the seller who accepted it.

Although generally title to the goods will have passed to the buyer by or at the time the goods are accepted,²⁵ it is not necessary for the title to have passed in order for the buyer to be deemed to have accepted them.²⁶ Section 2-401 of the Code provides in part: "Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title." For example, in one case the

21. Comment 4 to U.C.C. § 2-606 states in part: "Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance." Cf. *Haken*, 24 Mich. App. at 199-200, 180 N.W.2d at 208-09, 8 U.C.C. Rep. Serv. at 351-52 (buyer's use and sale of part of the goods indicated acceptance of all goods).

22. U.C.C. § 2-607(2) provides:

Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

23. U.C.C. § 2-607(4).

24. U.C.C. § 2-607(1).

25. See generally U.C.C. § 2-401. Under the Uniform Sales Act, the predecessor to Article 2 of the Code, a seller's action for the price often depended upon whether the property (title) in the goods had passed to the buyer. See *Hall v. Keller*, 9 Ariz. App. 584, 455 P.2d 266 (1969).

26. See U.C.C. § 2-606 comment 2.

contract provided that title to the goods would remain in the seller until payment was remitted by the buyer.²⁷ The court held that the failure of title to pass to the buyer because of failure to make payment did not preclude a finding that the buyer had accepted the goods by failure to reject them.²⁸

It is also unnecessary for the buyer ever to have had possession of the goods in order to be held to have accepted them and to be obligated for their price. It is not uncommon, for example, for a middleman to route the goods directly from his seller to his buyer. Unless the parties have agreed to the contrary,²⁹ such action would be inconsistent with the seller's ownership and would therefore constitute an acceptance. In equipment lease transactions, it is common for the middleman/lessor of the goods to be a bank or other financing agency. The middleman/lessor takes title, but not possession, of the goods for purposes of leasing them to a lessee, who receives the goods directly from the seller.³⁰

Further, it is possible for the buyer to accept the goods while they are in the seller's possession. In a straightforward situation, the buyer examines the goods at the seller's place of business, signifies that they are in accordance with the contract, and accepts them. He then becomes obligated to pay the price according to the terms of the contract. The courts have reached the same result in less clear-cut cases. Under section 2-308, unless otherwise agreed, the place of delivery is the seller's place of business. Further, under section 2-606 the buyer can be held to have accepted the goods if he fails to reject them after having had a reasonable *opportunity* to inspect. Only the opportunity, not the actual inspection, is a prerequisite of acceptance. Accordingly, sellers have successfully

27. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128, 14 U.C.C. Rep. Serv. 563 (1974).

28. *Id.* at 94-95, 310 N.E.2d at 130, 14 U.C.C. Rep. Serv. at 565-66. *See also* *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E.2d 188, 14 U.C.C. Rep. Serv. 949 (1974); *French v. Sotheby & Co.*, 470 P.2d 318, 7 U.C.C. Rep. Serv. 685 (Okla. 1970).

29. In *Can-Key Indus., Inc. v. Industrial Leasing Corp.*, 286 Or. 173, 593 P.2d 1125, 26 U.C.C. Rep. Serv. 675 (1979), the middleman was buying goods to lease them to a third party. The contract of sale provided:

This order is conditioned upon your assurance that lessee has selected the equipment described above and will accept same on delivery. If lessee does not accept the equipment for any reason, we shall have no obligation hereunder, and you shall refund to us all sums (including taxes, transportation charges and other charges) paid for or on account of the equipment.

Id. at 175-76, 593 P.2d at 1127, 26 U.C.C. Rep. Serv. at 677.

30. For an example, see *id.*, 286 Or. 173, 593 P.2d 1125, 26 U.C.C. Rep. Serv. 675.

maintained in actions for the price that acceptance has occurred, despite no delivery, once the buyer has been notified that the goods are available for inspection and delivery and a reasonable amount of time has passed without rejection of the goods by the buyer.³¹

B. Burden of Proof

The seller, of course, has the burden of proving that the buyer accepted the goods. On occasion, a seller may fail to carry this burden because the facts do not support the theory of recovery.³² More difficult to understand are those cases in which the facts are apparently in the seller's favor but have not been properly marshalled and presented into evidence at trial. Such a case occurred when the buyer, after effectively rejecting the goods, sold or gave away an unknown quantity of them.³³ The court agreed with the seller that such action by the buyer was inconsistent with the seller's ownership and constituted an acceptance of the goods of which the buyer had disposed. However, because the seller failed to carry the burden of proof as to the amount and sizes of the goods so accepted, the appellate court vacated a finding in favor of the seller and limited the seller's recovery to nominal (\$1.00) damages.³⁴

In another case, the seller was more successful.³⁵ The appellate court upheld the trial court's finding of acceptance by the buyer even though the evidence thereof was quite "scant." The test, said the court, was whether the evidence established "circumstances 'from which logical and reasonable inferences of other material facts [could] be fairly drawn.'"³⁶ The only documentary evidence presented by the seller was a set of ledger cards based on invoices

31. See *Unlaub Co. v. Sexton*, 568 F.2d 72, 23 U.C.C. Rep. Serv. 69 (8th Cir. 1977); *Industrial Molded Plastic Prods., Inc. v. J. Gross & Son*, 263 Pa. Super. 515, 398 A.2d 695, 26 U.C.C. Rep. Serv. 1154 (1979). See also *Montana Seeds, Inc. v. Holliday*, 178 Mont. 119, 582 P.2d 1223, 24 U.C.C. Rep. Serv. 884 (1978); *Armstrong v. Eberenz*, 9 U.C.C. Rep. Serv. 469 (Okla. Ct. App. 1971).

32. See, e.g., *Hayes v. Hettinga*, 228 N.W.2d 181, 16 U.C.C. Rep. Serv. 983 (Iowa 1975).

33. *Dubrofsky v. Messer*, 31 U.C.C. Rep. Serv. 907 (Mass. Dist. Ct. 1981).

34. *Id.* at 910.

35. *Swift & Co. v. Rexton, Inc.*, 187 Conn. 540, 447 A.2d 9, 34 U.C.C. Rep. Serv. 558 (1982).

36. *Id.* at 542, 447 A.2d at 11, 34 U.C.C. Rep. Serv. at 559 (quoting *Pierce v. Albanese*, 144 Conn. 241, 256, 129 A.2d 606, 615 (1957)).

showing charges against and payments by the buyer.³⁷

Under pleading rules in virtually all jurisdictions, general damages need not be pleaded with specificity, and a plaintiff is allowed to recover such damages under a general allegation of injury. Thus, where a seller alleged breach and pleaded only for "an amount necessary to compensate for his loss of bargain," the trial court's award of the full unpaid contract price was upheld on appeal.³⁸

C. *Effective But Wrongful Rejection*

How does a buyer reject the goods? Nothing could be simpler under the Code; and yet, when I pose this question to my law classes, I find that a correct response often takes the better part of a class hour, and in the interim, the hypothetical buyer has been required to go through contortions that would frustrate a skilled gymnast. Section 2-602(1) of the Code succinctly provides the answer: "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." All the buyer has to do is notify the seller within a reasonable time that he rejects the goods.

An occasional case requires more. For example, in an early case, a buyer rejected goods because of defects which the seller was properly entitled to cure.³⁹ The buyer contended that the seller was entitled only to damages for nonacceptance under section 2-708. Nevertheless, the court affirmed the trial court's award to the seller of the full contract price.⁴⁰ The case is wrongly decided. There is no requirement under the Code that the buyer have a justifiable reason for rejecting the goods. The buyer need only notify the seller within a reasonable time that he is rejecting the goods. This reasonable time does not run until the buyer has had an opportunity to inspect the goods.⁴¹ Accordingly, the rejection may occur after the goods have come into the buyer's possession. In such circumstances the situation may be a bit more complex, because the buyer in possession may have certain duties with respect to the rejected goods⁴² and must avoid doing any act which is

37. *Id.* at 543-44, 447 A.2d at 11, 34 U.C.C. Rep. Serv. at 560.

38. *Schumann v. Levi*, 728 F.2d 1141, 38 U.C.C. Rep. Serv. 131 (8th Cir. 1984).

39. *Beco, Inc. v. Minnechaug Golf Course, Inc.*, 5 Conn. Cir. Ct. 444, 256 A.2d 522, 6 U.C.C. Rep. Serv. 910 (1968). For the standards of a seller's right to cure, see U.C.C. § 2-508.

40. *Beco*, 5 Conn. Cir. Ct. at 450, 256 A.2d at 526, 6 U.C.C. Rep. Serv. at 915.

41. See *supra* notes 18-21 and accompanying text for discussion of section 2-606.

42. See U.C.C. §§ 2-602(2), 2-603 to 2-604.

inconsistent with the seller's ownership and with his own claim that he has rejected the goods. It may well be that if the buyer has wrongfully rejected the goods, he has an affirmative obligation to tender them back to the seller at his own expense,⁴³ but the Code requires no more. In particular, there is no requirement that the buyer have a justifiable reason for rejection, i.e., that he "rightfully" reject. It makes no difference whether the buyer has a good reason for rejection, has no such reason but in good faith believes he does, or has no reason and knows he does not. Accordingly, it is possible under the Code's scheme to have an effective but wrongful rejection. In such cases acceptance does not occur, and the seller is not entitled to an action for the price. The seller is simply entitled to damages for nonacceptance under section 2-708.⁴⁴ All commentators who have addressed this question agree on this concept of an effective but wrongful rejection.⁴⁵ Further, the concept is consistent with Professor Llewellyn's "social wisdom/social waste" theory that goods should not be forced on a buyer prior to acceptance of them.⁴⁶

I have found that the first time this concept is presented to a judge, a lawyer, or a law student, the initial reaction is to be dubious. However, the concept is sensible. Assume, for example, that the contract provides that the goods are to be picked up by the buyer at the seller's place of business. The seller contacts the buyer and tenders the goods, but the buyer refuses to take delivery or pick them up. Clearly, under established principles, there has been no acceptance, and the seller is not entitled to an action for the price. It should make no difference if the buyer's rejection occurs after he has taken possession of the goods by, for example, delivery by a common carrier.

Section 2-602, in text and comment, emphasizes the distinction between rightful rejections and effective but wrongful rejections.

43. The Code is not clear on this point. U.C.C. § 2-602(2)(b) states that the buyer "is under a duty after rejection to hold [the goods] with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them." Subsection (2)(c) states that "the buyer has no further obligations with regard to goods *rightfully* rejected." (Emphasis added.)

44. See U.C.C. § 2-709(3).

45. See J. WHITE & R. SUMMERS, *supra* note 18, § 7-3, at 258 & nn.17-18. *But see* Cochran v. Horner, 121 Ga. App. 297, 298, 7 U.C.C. Rep. Serv. 707, 709 (1970) (where the buyer wrongfully rejects goods, the seller may bring an action for the price); *Beco*, 5 Conn. Cir. Ct. at 450, 256 A.2d at 526, 6 U.C.C. Rep. Serv. at 915 (where the buyer wrongfully refuses the seller's right to cure, the buyer's rejection is ineffective and he is liable for the price).

46. See *supra* notes 6-7 and accompanying text.

The caption to section 2-602 reads: "Manner and Effect of Rightful Rejection."⁴⁷ Subsection (3) provides: "The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general" Comment 3 states:

The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.⁴⁸

In sum, the distinction between rightful and wrongful rejection is pertinent to establishing which party is in breach and to determining the available remedies, but it is irrelevant to the fact of rejection itself.

The facts of a well-known case can be used to illustrate the dynamics of an effective but wrongful rejection and a twist to the conclusion that the seller is not entitled to the contract price.⁴⁹ The buyer purchased a television set and paid the purchase price in cash. Two days later the set was delivered, uncrated, and plugged into an electrical outlet to "cook out." The television failed to function correctly from the beginning; the picture had a reddish tinge. The delivery man advised the buyer that a service representative would soon call to fix the set. The buyer unplugged the set and did not use it. A few days later the service representative arrived and spent approximately one hour attempting to eliminate the red tinge. The buyer was advised that the chassis would have to be removed and taken to the shop for repair. At that point the buyer refused to allow removal of the chassis and stated that

47. U.C.C. § 1-109 states: "Section captions are parts of this Act."

48. Of course, whether or not the rejection is rightful, it must be effectively done by seasonable notice to the seller. In *Connecticut Inv. Casting Corp. v. Made-Rite Tool Co.*, 382 Mass. 603, 416 N.E.2d 966, 31 U.C.C. Rep. Serv. 531 (1981), the court held that although the buyer had given seasonable notice of defects in the goods, there was no effective rejection because the buyer retained the goods and pressured the seller to deliver the remaining goods under the contract rather than giving proper notice of rejection. The court held that the failure to make an effective rejection constituted an acceptance which entitled the seller to recover in an action for the price. *Id.* at 608, 416 N.E.2d at 970, 31 U.C.C. Rep. Serv. at 535-36.

49. The facts are based on *Wilson v. Scampoli*, 228 A.2d 848, 4 U.C.C. Rep. Serv. 178 (D.C. 1967).

she wanted a "brand new" set rather than a "repaired" set. The buyer later demanded return of the purchase price although she retained the television. The seller refused to refund the price but maintained his offer to repair the set or to replace it if it could not be repaired. The sales ticket for the transaction guaranteed ninety days' free service and replacement of defective parts for a period of one year. On appeal, the court reversed the judgment in favor of the buyer. The court found that the buyer's refusal to allow the seller a reasonable opportunity to cure the defect defeated her claim of breach of warranty.⁵⁰

Assuming that the court's finding in favor of the seller was correct, how should the remedial rights of the parties be treated? If the buyer had not yet paid the purchase price and if the buyer had returned the set to the seller, the buyer would have effectively rejected the goods, albeit wrongfully, and the seller would not be entitled to maintain an action for the price. The seller's sole recourse would be an action for damages for nonacceptance under section 2-708. However, two critical facts—payment of the purchase price and retention of the goods—spell doom for the buyer. Any retention of the goods after a wrongful rejection is wrongful against the seller and will constitute an acceptance. The Code only allows a *rightfully* rejecting buyer to retain possession of the goods as security for refund of the purchase price or for other damages incurred.⁵¹ However, on our facts, even if the wrongfully rejecting buyer had returned the goods, the seller would have been entitled to retain the purchase price previously paid. The buyer is in breach, and the seller has the money. Is there any way that the buyer can get the money back? As long as the seller has refused the return of the goods or, alternatively, has carefully maintained that he is holding the returned goods for the buyer upon payment of storage charges and any other incidental damages incurred, the Code provides no remedy for the buyer. The Code does in some cases allow a defaulting buyer to recover a portion of any payments made on the purchase price, but this restitution remedy is limited

50. *See id.*

51. U.C.C. § 2-711(3) provides:

On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

to cases in which the seller has withheld delivery of the goods.⁵²

The lesson is clear for breaching buyers. To avoid a price action by the seller, they must effectively reject the goods by seasonably notifying the seller of rejection and tendering the goods back to the seller at their own expense. This course of action will be fruitful, however, only for buyers who have not paid the price in advance. In advance payment cases, the seller is entitled to retain the full price of any goods which have been delivered.

D. Wrongful Revocation of Acceptance

All acceptances are not necessarily final under the Code scheme. The buyer may be able to revoke an acceptance under section 2-608. Can the buyer make a procedurally effective, wrongful revocation of acceptance, throw the goods back on the seller, and thereby avoid an action for the price? The answer is no. In fact, an effective wrongful revocation is a misnomer; if it is wrongful, it is not effective.⁵³ Section 2-608 strictly limits the availability of revocation of acceptance.⁵⁴ First, the buyer may revoke his acceptance

52. U.C.C. § 2-718 provides in part:

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

- (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or
- (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

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

- (a) a right to recover damages under the provisions of this Article other than subsection (1), and
- (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

53. Although Professors White and Summers do raise with apparent sincerity the argument of the effective wrongful revocation, they soon find it made of straw and reject it. J. WHITE & R. SUMMERS, *supra* note 18, § 7-5, at 259-60.

54. U.C.C. § 2-608 provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

only if he proves that the defects substantially impair the value of the goods to him. Second, revocation is allowed only for latent defects or patent defects accompanied by either assurances of cure by the seller or the reasonable assumption by the buyer that such cure would be forthcoming. Third, the buyer must give notice of revocation to the seller within a reasonable time after discovery of the defect and before there has been a substantial change in the condition of the goods unrelated to their defects. Since the buyer has accepted the goods, he has the burden of proof to establish the defects which justify a revocation of acceptance.⁵⁵

It might be thought that section 2-608(3) supports an argument in favor of effective wrongful revocations. It provides: "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." However, this provision is a red herring, because the benefits and obligations of this provision are applicable only if the buyer has successfully revoked his acceptance.

It is also true that section 2-703 of the Code speaks of situations in which "the buyer wrongfully . . . revokes acceptance" and permits the seller to measure damages on the basis of a resale under section 2-706⁵⁶ or contract/market differential or lost profit under section 2-708,⁵⁷ as well as on the basis of a price action "in a proper case" under section 2-709.⁵⁸ The provision is permissive, however, rather than mandatory.⁵⁹ It merely allows the seller to retake goods following a wrongful revocation and to measure damages on the basis of section 2-706 or section 2-708 rather than on the basis of a section 2-709 price action. It does not obligate the

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

55. See U.C.C. § 2-607(4). The best judicial discussion of the burden of proof in a revocation of acceptance case remains *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 5 U.C.C. Rep. Serv. 673 (2d Cir. 1968).

56. U.C.C. § 2-703(d).

57. U.C.C. § 2-703(e).

58. *Id.*

59. See U.C.C. § 2-703 comment 1. "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." *Id.*

seller to do so.⁶⁰

Whether a buyer's attempted revocation is procedurally ineffective or substantively wrongful, the seller is entitled to the action for the price. The case law is in accord.⁶¹ Indeed, comment 5 to section 2-709 limits accepted goods to those of which there has been no justified revocation of acceptance.⁶²

A revocation of acceptance is procedurally ineffective if the buyer fails to give timely notice of it or if he unjustifiably continues to use the goods after having given such notice.⁶³ In either case, the seller is entitled to an action for the price. For example, in one case the buyer gave no notice of revocation of acceptance of an x-ray machine and discontinued making installment payments on the price, but he continued to use the machine in his business for some twenty-nine months.⁶⁴ The court found that the buyer's revocation was ineffective, his actions being inconsistent with the alleged revocation of acceptance. The seller was allowed the action for the price.⁶⁵

It is also possible for a buyer to suffer substantially from defects in the goods, give notice of those defects, yet be denied revocation of acceptance because of an inadequacy in the content of the notice. In one case, a buyer bought a quantity of aluminum from a metal distributor to use in manufacturing tubes for collecting solar energy.⁶⁶ The aluminum was defective, and the buyer seasonably so notified the seller. The court held that although the notice of

60. The prefatory phrase to U.C.C. § 2-703 provides that the seller "may" pursue some or all, as the case may be, of the listed courses of action.

61. *See* Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 479-81, 269 N.E.2d 664, 667-68, 9 U.C.C. Rep. Serv. 17, 22-24 (1971) (to revoke acceptance, buyer must carry burden of proof of substantial nonconformity of the goods). *See also* Dehahn v. Innes, 356 A.2d 711, 720, 19 U.C.C. Rep. Serv. 407, 417 (Me. 1976) ("An indispensable requirement of revocability under the Code for nonconformity is that the nonconformity of the goods *substantially* impairs their value to the accepting party."); Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp., 122 N.J. Super. 499, 502, 300 A.2d 878, 880, 12 U.C.C. Rep. Serv. 117, 119 (1973) (revocation of acceptance presupposes that the goods were nonconforming).

62. Comment 5 to U.C.C. § 2-709 states in part: "'Goods accepted' by the buyer under subsection (1)(a) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section."

63. *See* U.C.C. § 2-608(2).

64. *H.G. Fischer X-Ray Co. v. Meredith*, 121 N.H. 707, 433 A.2d 1306, 31 U.C.C. Rep. Serv. 1586 (1981).

65. *Id.* at 711-12, 433 A.2d at 1309, 31 U.C.C. Rep. Serv. at 1590.

66. *Solar Kinetics Corp. v. Joseph T. Ryerson & Son*, 488 F. Supp. 1237, 29 U.C.C. Rep. Serv. 85 (D. Conn. 1980).

defect was effective to preserve the buyer's claim for damages, it was not effective to revoke the acceptance of the goods. The seller was allowed its action for the price. The court concluded Connecticut law required that an effective notice of revocation specifically inform the seller that the buyer has revoked, identify the goods involved, and set forth the nature of the nonconformity in the goods.⁶⁷

It has already been said that the concept of a procedurally effective wrongful revocation is a misnomer.⁶⁸ Accordingly, it is a bit inelegant to distinguish between ineffective and wrongful revocations. However, there are cases in which the buyer did everything right (procedurally) to revoke, but he did not have a substantive basis for doing so. The buyer's revocation was thus wrongful and, accordingly, ineffective; the seller was entitled to the action for the price.

In one case, the buyer took possession of a Labrador retriever, treated it as his own, trained it, entered it into field trial competitions, and offered its services for breeding purposes.⁶⁹ Prior to purchase, the buyer's veterinarian had informed him that the dog had hip dysplasia and might develop arthritis. When the dog developed an arthritic condition, the buyer returned the animal to the seller, revoked his acceptance, and alleged that the seller had breached a warranty of future performance. The buyer then brought an action seeking rescission of the contract, and the seller counterclaimed for the balance of the purchase price. The court found that the seller had made no warranty of future performance and was not responsible for any defects in the dog. Accordingly, the buyer had wrongfully revoked his acceptance, and the seller was entitled to recover the remaining unpaid purchase price.⁷⁰

In an opinion worth careful reading, written by a noted commercial law scholar and justice of the Supreme Court of Connecticut, a similar result was reached.⁷¹ The buyer accepted goods under a contract to purchase specially constructed lead-covered tanks for

67. *Id.* at 1247, 29 U.C.C. Rep. Serv. at 95-96. The buyer in this case later gave notice expressing intent to revoke, but the attempted revocation was ineffective because the notice failed to specify the particular nonconformity in the goods. *Id.* at 1249, 29 U.C.C. Rep. Serv. at 98-99. See *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144, 20 U.C.C. Rep. Serv. 899 (1976).

68. See *supra* notes 53-60 and accompanying text.

69. *Connor v. Boggett*, 596 P.2d 683, 26 U.C.C. Rep. Serv. 902 (Wyo. 1979).

70. *Id.* at 687-88, 26 U.C.C. Rep. Serv. at 906-09.

71. *Plateq Corp. v. Machlett Laboratories, Inc.*, 189 Conn. 433, 456 A.2d 786, 35 U.C.C. Rep. Serv. 1162 (1983).

testing x-ray tubes. The tanks had minor nonconformities. The court held that upon acceptance the buyer was obligated by section 2-607 to pay for the goods and to bear the burden of establishing any nonconformity in the goods. The buyer had not carried its burden of proving that the defects in the goods were substantial. Accordingly, the attempted revocation of acceptance was wrongful and ineffective. The seller was entitled to recover the purchase price. The court also noted that, even if there had been no acceptance, the rejection by the buyer was wrongful because the buyer improperly refused the seller the opportunity to cure the defects in the goods. However, under the facts a wrongful rejection would not have barred the action for the price, because the specially manufactured goods could not have been resold with reasonable effort at a reasonable price.⁷²

If the attempted revocation of acceptance is wrongful and thus ineffective, mitigation of damages does not require that the seller attempt to resell the goods, even if the buyer has returned the goods to the seller.⁷³ Such an attempt is not requisite to an action for the price of goods accepted,⁷⁴ and the buyer may not unilaterally impose the burden of resale of accepted goods on the seller.⁷⁵ However, if the seller does voluntarily resell the returned goods at any time before collection of the judgment in an action for the price, he must credit the buyer with the proceeds of the resale.⁷⁶

E. The Buyer's Defenses and Counterclaims

Although it may be somewhat obvious, a point of procedure is of sufficient importance to deserve emphasis. Once the seller has proved that a contract exists, that the buyer has accepted the goods and has not revoked that acceptance, and that the buyer has not paid the price as required by the contract, the seller is entitled

72. *Id.* at 442-44, 456 A.2d at 790-91, 35 U.C.C. Rep. Serv. at 1169-70.

73. *See Equilease Corp. v. D'Annolfo*, 6 Mass. App. Ct. 919, 919, 379 N.E.2d 1130, 1131, 24 U.C.C. Rep. Serv. 1198, 1199 (1978).

74. *Industrial Molded Plastic Prods., Inc. v. J. Gross & Son*, 263 Pa. Super. 515, 522, 398 A.2d 695, 699, 26 U.C.C. Rep. Serv. 1154, 1157 (1979). *See Connor*, 596 P.2d at 687, 26 U.C.C. Rep. Serv. at 907.

75. *R.R. Waites Co. v. E.H. Thrift Air Conditioning, Inc.*, 510 S.W.2d 759, 762, 15 U.C.C. Rep. Serv. 43, 45 (Mo. Ct. App. 1974). Section 2-709(2) has no application to goods which have been finally accepted. *Connor*, 596 P.2d at 687, 26 U.C.C. Rep. Serv. at 907.

76. U.C.C. § 2-709(2). *See, e.g., Delaware Valley Equip. Co. v. Granahan*, 409 F. Supp. 1011, 1015, 19 U.C.C. Rep. Serv. 112, 117 (E.D. Pa. 1976).

to judgment on an action for the price as a matter of law.⁷⁷ It matters not that the goods are defective or the seller is otherwise in breach. The buyer may well have a counterclaim against the seller for breach of warranty or the like, but the burden of proof of that counterclaim and the buyer's damages is on the buyer.⁷⁸ Unless the buyer is successful in carrying that burden, the seller must prevail for the full unpaid contract price. The buyer is entitled to an offset against the seller's prevailing price action only to the extent that he is able to prove damages.⁷⁹ The buyer must prove the existence of the warranty, the seller's breach of it, and the fact that the breach was the proximate cause of the injury of which the buyer complains.⁸⁰ Of course, the buyer will also fail if the only damages that he can prove are consequential and the contract has properly excluded the seller's liability for consequential damages.⁸¹

It is for these reasons that the buyer's breach of warranty claim is more properly labeled a counterclaim than a defense to an action for the price. Some courts have held specifically that a breach of warranty is not a defense to a price action.⁸² Courts tend to regard a breach of warranty claim as defensive only in cases in which the buyer is able to prove the goods are totally worthless, the claim and counterclaim thus canceling each other. For example, in one case the seller was not allowed to recover the price of livestock sold by an auctioneer on behalf of the seller where the livestock died

77. See *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 455, 25 U.C.C. Rep. Serv. 1336, 1348-49 (8th Cir. 1979); *Amtel, Inc. v. Arnold Indus., Inc.*, 31 U.C.C. Rep. Serv. 48, 55 (D. Conn. Sept. 4, 1980); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 481, 269 N.E.2d 664, 668, 9 U.C.C. Rep. Serv. 17, 24 (1971); *Buff v. Giglio*, 124 N.J. Super. 94, 97, 304 A.2d 771, 773-74, 12 U.C.C. Rep. Serv. 868, 870 (1973).

78. U.C.C. § 2-607(4) provides: "The burden is on the buyer to establish any breach with respect to the goods accepted." See *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 450, 25 U.C.C. Rep. Serv. 1336, 1341 (8th Cir. 1979); *Amtel, Inc. v. Arnold Indus., Inc.*, 31 U.C.C. Rep. Serv. 48, 55 (D. Conn. Sept. 4, 1980); *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 481-84, 269 N.E.2d 664, 668-70, 9 U.C.C. Rep. Serv. 17, 24-26 (1971); *Columbia Novelty Co. v. Leslie Dawn, Inc.*, 6 U.C.C. Rep. Serv. 679, 680 (N.Y. App. Term. 1969).

79. See *Axion Corp. v. G.D.C. Leasing Corp.*, 359 Mass. 474, 481, 269 N.E.2d 664, 668, 9 U.C.C. Rep. Serv. 17, 24 (1971).

80. *Amtel, Inc. v. Arnold Indus., Inc.*, 31 U.C.C. Rep. Serv. 48, 55 (D. Conn. Sept. 4, 1980).

81. See *Singer Co. v. Alka Knitting Mills, Inc.*, 41 A.D.2d 856, 857, 343 N.Y.S.2d 146, 148, 12 U.C.C. Rep. Serv. 486, 487-88 (1973).

82. See *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 455, 25 U.C.C. Rep. Serv. 1336, 1348-49 (8th Cir. 1979); *Columbia Novelty Co. v. Leslie Dawn, Inc.*, 6 U.C.C. Rep. Serv. 679, 680 (N.Y. App. Term. 1969).

shortly after acceptance.⁸³ However, just to show that in our beloved common law system of jurisprudence one can find precedent for any point no matter how bad, there is authority to the contrary. A buyer accepted silk which had been waterproofed by the seller.⁸⁴ The buyer argued that the silk was not processed in accordance with the sample furnished by the seller, that the silk was tacky, and that the buyer sustained damage. However, at trial the buyer was unable to prove any damages suffered. In an action for the contract price, the trial court awarded judgment to the buyer. On appeal, the court sustained the judgment of the trial court, holding that breach of warranty is a defense to an action for the price.⁸⁵

The buyer may have a claim for damages other than for a breach of warranty. The same rules apply. The buyer has the burden of proof in establishing his claim, and his damages only go to offset the seller's recovery of the price. In a straightforward case, the buyer may have accepted the goods and preserved his remedies,⁸⁶ yet suffered damages because the seller was late in tendering the goods.⁸⁷ In one case involving an installment contract, the seller shipped and the buyer accepted approximately 23,000 cases of photoflash lamps under a contract for the sale of 90,000 cases.⁸⁸ The seller repudiated the contract by refusing to deliver any further installments at the contract rate. The court held that the buyer's suspension of payment on the contract was proper, but the

83. *Bradford v. Northwest Ala. Livestock Ass'n*, 379 So. 2d 609, 28 U.C.C. Rep. Serv. 1009 (Ala. Civ. App. 1980).

84. *Vitomar Piece Dye Works v. Lawrence of London, Ltd.*, 119 Ill. App. 2d 301, 256 N.E.2d 135, 7 U.C.C. Rep. Serv. 487 (1969).

85. *Id.* at 306, 256 N.E.2d at 137, 7 U.C.C. Rep. Serv. at 490. Arguably, the court reached a fair result, albeit an incorrect one, if the court gleaned from the trial record that the processed cloth was worthless. However, the important point is that the buyer did not carry his burden of proof with respect to damages. Further, the case is of doubtful precedential value under the Code. The contract was essentially one for services in waterproofing silk furnished the seller by the buyer to which Article 2 does not apply. *Compare Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 4 U.C.C. Rep. Serv. 182 (3d Cir. 1967).

86. U.C.C. § 1-207 provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice', 'under protest' or the like are sufficient."

87. *Cf. Connecticut Inv. Casting Corp. v. Made-Rite Tool Co.*, 382 Mass. 603, 608, 416 N.E.2d 966, 970, 31 U.C.C. Rep. Serv. 531, 536 (1981) (buyer's remedy for late delivery of accepted goods is suit for resulting damages).

88. *Westinghouse Elec. Corp. v. CX Processing Laboratories, Inc.*, 523 F.2d 668, 18 U.C.C. Rep. Serv. 625 (9th Cir. 1975).

buyer was not excused from its obligation to pay for goods already delivered and accepted.⁸⁹ In another case, the buyer recovered for damage to his crop caused by the seller's herbicide. However, the seller was allowed to recover his fee for spraying the crop as a set-off against the buyer's damages.⁹⁰

It should be noted that in all cases in which the buyer does have a counterclaim for damages, the Code allows the buyer to deduct those damages from any payments due the seller. Section 2-717 of the Code provides: "The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

II. GOODS LOST OR DAMAGED AFTER PASSAGE OF THE RISK

If conforming goods are either lost or damaged within a commercially reasonable time after the risk of their loss has passed to the buyer, the seller is entitled to maintain an action for their price.⁹¹ This is logical. Regardless of where title might have rested at the time, the risk was on the buyer, and the payment of the price by the buyer is simply the remedial ramification of having that risk. The Code rules for risk of loss are reasonably straightforward but rather detailed, and this is not the place for a full discussion of them. They can, however, be briefly capsulated here. Section 2-509 of the Code provides special rules for two recurring commercial situations: when goods are to be delivered by common carrier, and when goods in the hands of a bailee are to be delivered without being moved.⁹² It also provides a residual rule for all other cases.

89. *Id.* at 680, 18 U.C.C. Rep. Serv. at 625.

90. *Eichenberger v. Wilhelm*, 244 N.W.2d 691, 20 U.C.C. Rep. Serv. 63 (N.D. 1976).

91. U.C.C. § 2-709(1)(a).

92. U.C.C. § 2-509 provides:

- (1) Where the contract requires or authorizes the seller to ship the goods by carrier
 - (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
 - (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.
- (2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

These rules can be varied by agreement of the parties including trade usage, course of dealing, or course of performance.

If the contract requires or authorizes the seller to ship the goods by common carrier, the passage of the risk of loss depends upon whether the contract requires the goods to be delivered at a particular destination. This in turn depends upon the shipment terms of the contract, the legal effects of which have been codified in sections 2-319 through 2-324 of the Code. The "F.O.B." term is the common one used in domestic carrier contracts. If the shipment term is F.O.B. place of shipment, then the contract is a "shipment" contract, and the risk of loss passes to the buyer at the place of shipment when the goods are duly delivered to the carrier under a proper contract for their transportation.⁹³ If the shipment term is F.O.B. place of destination, then the contract is a "destination" contract, and the risk of loss does not pass to the buyer until a tender of delivery has been made by the carrier at destination.⁹⁴ In cases of doubt as to the meaning of a shipment term, there is a presumption under the Code in favor of "shipment" contracts.⁹⁵ It should be noted that F.O.B. destination is the only destination term codified in the Code. All other shipment terms, including all water carriage terms (C.I.F., C. & F., F.O.B. vessel, F.A.S. vessel, etc.) are "shipment" contract terms.⁹⁶

If at the time of the contract the goods are in the hands of a bailee and are to be delivered to the buyer without removal from

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- (a) on his receipt of a negotiable document of title covering the goods; or
 - (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
 - (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

93. See U.C.C. §§ 2-319(1)(a), 2-504.

94. See U.C.C. §§ 2-319(1)(b), 2-503.

95. See U.C.C. § 2-503 comment 5.

96. An excellent short discussion of shipment terms as applicable in risk of loss situations can be found in G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 3-6 to 3-8 (2d ed. 1975).

the physical possession of the bailee, then the risk of loss passes either upon receipt by the buyer of a negotiable document of title (which in effect embodies the goods under the Code) or, in cases in which they are not covered by a negotiable document of title, upon acknowledgment by the bailee of the buyer's right to possession of the goods.⁹⁷ In all other cases, subject to contrary agreement, the risk of loss passes to the buyer upon receipt of the goods if the seller is a merchant or upon tender of the goods if the seller is a non-merchant.⁹⁸

When one party is in breach, section 2-510 provides for special, overriding rules.⁹⁹ The general concept seems to be that if one party is in breach, he bears the risk of loss even though the risk would have been allocated to the other party under section 2-509 had there been no breach. However, the nonbreaching party can recover only "to the extent of any deficiency in his effective insurance coverage."¹⁰⁰ This is an antisubrogation provision which allows the breaching party the benefit of the other's insurance coverage.

Section 2-510(3) says that if the buyer breaches or repudiates with respect to conforming goods identified to the contract, the seller may treat the risk of loss as resting on the buyer for a commercially reasonable time to the extent of any deficiency in the seller's effective insurance coverage. Note that under this subsection, as well as under section 2-709(1)(a), the buyer has the risk of loss and the seller can maintain an action for the price only if the goods are "conforming." Under section 2-106(2), goods are "conforming" only "when they are in accordance with the obligations under the contract." Accordingly, a breaching buyer might escape

97. See U.C.C. § 2-503(4). Cf. U.C.C. § 2-509 comment 4 (noting applicability of provisions on manner of tender of delivery).

98. U.C.C. § 2-509(3) to (4).

99. U.C.C. § 2-510 provides:

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

100. U.C.C. § 2-510(2) to (3).

a price action brought by virtue of section 2-510(3) by alleging and proving trivial deficiencies in the goods. Although I know of no good case on point, I suspect that the courts will be as artful in getting around such a position of the buyer as they have been historically in avoiding unjust rejections of goods by buyers under the perfect tender rule.¹⁰¹

Section 2-510(2) similarly allows a buyer who has rightfully revoked his acceptance to treat the risk of loss as being on the seller to the extent of any deficiency in the buyer's effective insurance coverage.

Section 2-510(1) is potentially the most troublesome of the provisions. It states that in cases in which the buyer has a right of rejection, the risk of loss remains on the seller until the defect is cured or the buyer has accepted the goods. Under section 2-601, the buyer has a right of rejection if the goods or the tender "fail in any respect" to conform to the contract. Assume that under a "shipment" contract (F.O.B. Sellerville) for the sale of 1,000 bushels of oranges, the goods are totally destroyed in a train accident. Under the normal rule in section 2-509(1)(a), the risk of loss would have passed to the buyer, and the seller would be entitled to maintain an action for the price. However, if the buyer can show that the oranges were delivered to the carrier one day late or, through the testimony of a former employee of the seller, that one or ten bushels out of a thousand were rotten, or that the shipment was one or ten bushels short, can the buyer use section 2-510(1) to force the risk of loss back on the seller? A literal reading of the Code would indicate yes. Note that in this case the seller gets no benefit from the buyer's effective insurance coverage. The use of the word "conforming" in sections 2-510 and 2-709(1)(a) and the phrase "right of rejection" in section 2-510(1), when coupled with the Code's definition of "conforming" and the perfect tender rule of section 2-601, gives rise to the potential for abuse by breaching buyers, and buyers generally, in risk of loss situations.¹⁰² The

101. *Cf. Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017, 1024, 23 U.C.C. Rep. Serv. 925, 928 (2d Cir. 1978) (rejection of goods wrongful where contract did not call for particular markings on cartons and delivered goods were known in trade as equivalent to ordered goods).

102. *See Jakowski v. Carole Chevrolet, Inc.*, 180 N.J. Super. 122, 433 A.2d 841, 31 U.C.C. Rep. Serv. 1615 (1981). The court held that the seller's notifying the buyer that the goods were nonconforming and the buyer's return of the goods upon request by the seller obviated the necessity for any formal rejection by the buyer. *Id.* at 126, 433 A.2d at 843, 31 U.C.C. Rep. Serv. at 1618. The court discussed the potential for abuse of the perfect tender rule, noting "scholarly criticism" of U.C.C. § 2-510. *Id.* at 127, 433 A.2d

courts to date have not addressed these problems, and the case law resolution in the future should be quite interesting.

Under sections 2-510(2) and 2-510(3), the nonbreaching seller or buyer may place the risk of loss on the breaching party only "to the extent of any deficiency in his effective insurance coverage." The question is against what do you measure the deficiency. I know of no case directly on point. If the seller is maintaining the action for the price and the buyer has breached, surely the deficiency is to be measured against the contract price. To allow the seller to recover the difference between his effective insurance coverage and the contract price will honor his expectation by placing him in the position he would have occupied had the contract been performed. However, if compensation is the goal, it does not necessarily follow that the contract price should be the basis against which the deficiency is measured when the buyer is the nonbreaching party and the risk of loss is placed on the seller. If the buyer made a particularly good deal, the lost or damaged goods may have been worth well in excess of the contract price, and that worth (market value?) should be the figure against which the deficiency is measured. Conversely, if the buyer made a poor deal and the goods were worth much less than the contract price, it would overcompensate the buyer to allow him to recover the difference between his insurance coverage and the contract price of the goods.

Although the risk of loss provisions under the Code generally provide predictable answers, there are a few questions of varying degrees of importance about which the Code provides very little guidance and which the courts have yet to address. Three in particular arise with frustrating frequency either in practice or in the classroom.

First, under section 2-509(3), precisely when does a tender occur? Assume your non-merchant client has advertised his valuable automobile for sale in the local newspaper. He has purchased another automobile and has discontinued insurance on the one for sale. Your client calls his buyer, notifies him that the car has been cleaned and waxed, and advises him that the car is ready to be picked up. The buyer leaves immediately to pick up the car, but while he is traveling across town or across state the car is stolen or destroyed by vandals. Who has the risk of loss? The answer depends upon tender.¹⁰³ You will argue for your client that tender

at 843, 31 U.C.C. Rep. Serv. at 1618.

103. See U.C.C. § 2-509(3).

has already occurred under section 2-503(1).¹⁰⁴ The buyer will argue to the contrary. Neither the Code nor the cases directly addresses the question of whether, in non-face-to-face transactions, tender entails allowing the buyer a reasonable opportunity to take possession of the goods.

This leads into a second question which is closely related. Could it be said in our hypothetical transaction that the parties had implicitly agreed under section 2-509(4) that tender would not take place until the buyer had a reasonable opportunity to get across town or across state to take delivery? What is a "contrary agreement" under section 2-509? What if the contract had provided that tender was to be made in one week, with seller to give buyer three days' notice? Here it would be clear that the parties agreed that tender was to occur at the buyer's option within a three-day period. Does not the same hold true by implication in non-face-to-face transactions such as our hypothetical? In one of the few cases dealing with contrary agreements as to the Code's risk of loss provisions, a non-merchant seller entered into a contract to sell used equipment to a buyer.¹⁰⁵ Vandals broke into the seller's warehouse and damaged the equipment, rendering it unworkable. The Second Circuit held that, even assuming the seller had complied fully with section 2-503(1) by putting and holding conforming goods at the disposition of the buyer and giving reasonable notification to enable the buyer to take delivery, the risk of loss remained on the seller. The contract provided for "f.o.b. purchaser's truck." The court held that this term represented a contrary agreement under section 2-509(4) and that, as provided in section 2-319(1)(c), the risk of loss would remain on the seller until the goods were loaded

104. U.C.C. § 2-503(1) provides:

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

- (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
- (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

The buyer might make much here of the phrase "for the period reasonably necessary to enable the buyer to take possession."

105. *Consolidated Bottling Co. v. Jaco Equip. Corp.*, 442 F.2d 660, 8 U.C.C. Rep. Serv. 966 (2d Cir. 1971).

on the buyer's truck.¹⁰⁶ Accordingly, a contrary agreement with respect to the Code's risk of loss provisions need not refer specifically to risk of loss. The risk can be varied, for example, by a contrary agreement of the parties with respect to tender. How specific such an agreement must be and how much can be left to implication are questions yet to be addressed definitively by the courts.

A third perplexing question under section 2-509 is exactly who is a bailee. Professors Summers and White have argued cogently that under no circumstances should a seller be allowed to bootstrap himself into the position of a bailee so as to pass the risk of loss to the buyer by an argument that the seller has taken delivery of the goods for the buyer.¹⁰⁷ I agree. Further, section 2-509(2) only applies if the goods are to be delivered "without being moved." Accordingly, it would seem that any third party who holds the goods for the seller and acknowledges subsequently that he is holding the goods for the buyer would be a bailee for purposes of the subsection. Nevertheless, at least one court has held that a bailee under section 2-509 includes only common law commercial bailees, those who are in the business of storing goods for hire.¹⁰⁸ However, that case involved a consumer transaction and the sale of the proverbial consumer horror, a mobile home, and the court's holding was in response to an argument by the seller that it was a bailee itself, having taken possession of the goods for the buyer.¹⁰⁹

With respect to consignment sales, section 2-326 of the Code distinguishes between a "sale on approval" and a "sale or return," the latter being a true consignment for resale. Section 2-327(1) provides that under a sale on approval the risk of loss does not pass to the buyer until acceptance. However, under a sale or return, section 2-327(2) provides only that the return is at the buyer's risk and expense. Who then bears the risk after delivery but before a decision is made with respect to the return? The courts have placed the risk on the buyer. For example, in one case a diamond wholesaler delivered two diamonds to a retail jeweler under a sale or return arrangement.¹¹⁰ The diamonds were stolen from the retailer's store. In the ensuing action, the court allowed recovery by

106. *Id.* at 662-63, 8 U.C.C. Rep. Serv. at 968-69.

107. J. WHITE & R. SUMMERS, *supra* note 18, § 5-3, at 184-85.

108. *Caudle v. Sherrard Motor Co.*, 525 S.W.2d 238, 240, 17 U.C.C. Rep. Serv. 754, 757 (Tex. Civ. App. 1975).

109. *Id.* at 239-40, 17 U.C.C. Rep. Serv. at 757.

110. *Harold Klein & Co. v. Lopardo*, 113 N.H. 400, 308 A.2d 538, 13 U.C.C. Rep. Serv. 252 (1973).

the wholesaler in its action for the price. The court held that the risk of loss was on the buyer under section 2-327(2).¹¹¹ The court said that this result was consistent with the general rule reflected in section 2-509(3) and with the underlying intent of the Code draftsmen.¹¹²

A few cases will illustrate the application of risk of loss principles in actions for the price. In one case, goods were to be delivered to the buyer by carrier.¹¹³ The carrier delivered a portion of the goods to the wrong address and the goods were lost. The seller sued the buyer for the price of the lost goods. Since the contract did not specify delivery at a particular destination, the court held that section 2-709(1)(a) was applicable and that the risk of loss passed to the buyer upon delivery to the carrier. Accordingly, the seller was entitled to recover in the action for the price; and if the buyer had a cause of action for misdelivery, it was against the carrier.¹¹⁴ The court's conclusion is reflective of the presumption in favor of shipment contracts.

In another case involving a shipment contract, upon delivery of the goods the buyer wrongfully insisted that the carrier's truck driver deliver the goods inside the buyer's store.¹¹⁵ The driver refused and the carrier retained possession of the goods which eventually disappeared. The court properly held that the buyer's insistence on an in-store delivery constituted a wrongful rejection of

111. *Id.* at 401, 308 A.2d at 539, 13 U.C.C. Rep. Serv. at 253. *Cf.* *Lipshutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 388 (S.D. Tex. 1974) (customs and usages of diamond industry place risk of loss on buyer).

112. *Harold Klein*, 113 N.H. at 401, 308 A.2d at 539, 13 U.C.C. Rep. Serv. at 253. Comment 3 to U.C.C. § 2-509 provides:

Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

113. *Montana Seeds, Inc. v. Holliday*, 178 Mont. 119, 582 P.2d 1223, 24 U.C.C. Rep. Serv. 884 (1978).

114. *Id.* at 123-24, 582 P.2d at 1226, 24 U.C.C. Rep. Serv. at 887.

115. *Ninth St. East, Ltd. v. Harrison*, 5 Conn. Cir. Ct. 597, 259 A.2d 772, 7 U.C.C. Rep. Serv. 171 (1968).

the goods¹¹⁶ and, accordingly, the seller was entitled to recover the entire purchase price.¹¹⁷

In a third case, the goods were delivered by the seller under an agreement whereby the seller was to retain title until the purchase price was paid in full.¹¹⁸ The goods were subsequently destroyed by fire. The court held that regardless of the attempted reservation of title, the risk of loss had passed to the buyer upon delivery, and the seller was entitled to maintain an action for the price.¹¹⁹ Although the court did not cite the provision, the case represents a straightforward application of the general rule found in section 2-509(3).

III. IDENTIFIED GOODS NOT REASONABLY RESALABLE

A. *Section 2-709 and Mitigation of Damages*

Section 2-709(1)(b) provides that, upon failure of the buyer to pay the price as it becomes due, 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 or the circumstances reasonably indicate that such effort will be unavailing." Of a seller's three routes to an action for the price, this is certainly the most perplexing. Repeated use of the word "reasonable" does not necessarily make a provision reasonable itself nor reasonably understandable. A seller who has opted for this theory as the basis for an action for the price is well-advised to anticipate difficulty and to prove carefully an alternate theory for damage measurement. Remember that section 2-709 specifically provides that a seller held not entitled to an action for the price may nevertheless recover damages for nonacceptance based on market price under section 2-708.¹²⁰ The seller, of course, has the burden of proof that the goods are not reasonably resalable. To add to the horror of

116. Even under a "destination" contract, tender occurs and the risk of loss passes while the goods are "in the possession of the carrier." U.C.C. § 2-509(1)(b). *See also* U.C.C. § 2-319(1)(b).

117. *Ninth St. East*, 5 Conn. Cir. Ct. at 602, 259 A.2d at 774, 7 U.C.C. Rep. Serv. at 175.

118. *Conte v. Styli*, 26 Mass. App. Dec. 73, 4 U.C.C. Rep. Serv. 737 (1963). This, of course, resulted in only a reservation of a security interest in the seller. *See* U.C.C. § 1-201(37).

119. *Conte*, 26 Mass. App. Dec. at 75-76, 84, 4 U.C.C. Rep. Serv. at 738-39.

120. *See* U.C.C. § 2-709(3). Presumably, however, if the seller can show that he is at lost volume, he may recover lost profits under U.C.C. § 2-708(2) even though the goods are found to be reasonably resalable. *See Zippy Mart, Inc. v. A & B Coffee Serv., Inc.*, 380 So. 2d 833, 835, 28 U.C.C. Rep. Serv. 396, 399 (Ala. 1980).

that uncertainty, the issue is one for the jury,¹²¹ as is generally true with respect to questions of reasonableness. To carry his burden under section 2-709(1)(b), the seller must prove one of two things: (1) that he made reasonable efforts to resell the goods but that these efforts were unsuccessful because he could not find a buyer at a reasonable price; or (2) that although he made no such efforts, his failure to act was justified by circumstances which indicated that his efforts would be unsuccessful.

Both alternatives regarding proof of unresalability are conceptually consistent with the general common law duty of an injured party to mitigate damages, the former more obviously so. With respect to the latter alternative, if the circumstances reasonably indicate that resale efforts would be unavailing, attempting to resell would incur unreasonable incidental damages in contradiction of the mitigation responsibility.¹²² Avoiding an attempted resale in such circumstances should be encouraged. For example, in one case, after a repudiation by the buyer, the seller cancelled its order for the goods from the supplier and made no effort to seek other buyers for the goods.¹²³ At trial, the seller was able to prove that circumstances reasonably indicated that the goods were not resalable. The buyer nevertheless argued that the seller had failed to attempt to mitigate damages. The trial court found that the seller's course of action was "commercially reasonable."¹²⁴ With respect to this finding, the court on appeal stated:

This finding, too, is supported by substantial evidence in the record. Though the Uniform Commercial Code does not expressly require a seller to mitigate damages in the event of a buyer's unjustified repudiation, the code does not abrogate the common law requirement. Further, sections of the code require

121. See *Multi-Line Mfg., Inc. v. Greenwood Mills, Inc.*, 123 Ga. App. 372, 373, 180 S.E.2d 917, 918, 9 U.C.C. Rep. Serv. 80, 81 (1971) ("The language of [U.C.C. § 2-709(1)(b)] clearly evinces legislative intent that these matters ordinarily should be subject to determination by a jury and not by the court."). See also *Foxco Indus., Ltd. v. Fabric World, Inc.*, 595 F.2d 976, 983, 26 U.C.C. Rep. Serv. 694, 701 (5th Cir. 1979) ("Thus, we will reverse only if, as a matter of law, there was no way in which the jury could find that Foxco was unable, after reasonable effort, to resell the fabric at a reasonable price or that it was reasonably clear that an effort to resell would have been fruitless.").

122. U.C.C. § 2-710 provides in part: "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in . . . resale of the goods . . ."

123. *Copymate Mktg., Ltd. v. Modern Merchandising, Inc.*, 34 Wash. App. 300, 660 P.2d 332, 36 U.C.C. Rep. Serv. 161 (1983).

124. *Id.* at 303, 660 P.2d at 333, 36 U.C.C. Rep. Serv. at 163.

"reasonable commercial judgment" [section 2-704(2)], "good faith [exercised] in a commercially reasonable manner" [section 2-706(1)], and "reasonable effort to resell" [section 2-709(1)(b)]. We cannot and do not fault plaintiff, under all the circumstances present here, for any failure to pursue more aggressively a search for other purchasers at a price in excess of its original acquisition cost from [the supplier].¹²⁵

However, to speak of mitigation in the present context is a bit misleading. Mitigation of damages is an issue which goes to the amount of recovery, and the defendant historically has had the burden of proving that the plaintiff failed to mitigate damages. Under section 2-709, the seller has the burden of proving that the goods were not reasonably resalable or at least that the circumstances so indicated. Accordingly, if the buyer is arguing that an action for the price should be denied because the goods were reasonably resalable, the question is not really one of mitigation of damages but of the seller's entitlement to the action that he has brought.¹²⁶ Thus, the seller has the ultimate burden of proof, and the buyer should couch his argument not in terms of mitigation, but in terms of entitlement.

On the other hand, in a different kind of action by a seller (for example, one for lost profits or for the contract/market differential), the buyer might well argue that the seller could have mitigated damages by reselling the goods. In such cases, the buyer has the burden of proof that the goods were resalable and that such action would reasonably have mitigated damages.¹²⁷

An issue of mitigation of damages in an action for the price can be illustrated by an argument that has arisen with some frequency in the reported decisions. In several cases, buyers who had accepted the goods and wrongfully refused to pay for them argued in

125. *Id.* at 303-04, 660 P.2d at 333-34, 36 U.C.C. Rep. Serv. at 163-64.

126. In *Zippy Mart*, the Supreme Court of Alabama held that if the seller could have mitigated damages by reselling the goods, the seller was entitled to recover only lost profits under section 2-708(2) rather than the contract price of the goods. 380 So. 2d at 835, 28 U.C.C. Rep. Serv. at 399.

127. See *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 550-51, 32 U.C.C. Rep. Serv. 369, 379-80 (6th Cir. 1981), holding that the trial court had not erred in failing to give a requested jury instruction on the seller's duty to mitigate damages where the buyer had not properly objected and where there was a question as to whether the buyer had met its burden of showing that the seller had not used every reasonable effort to minimize damages. The court also found that, although there is no specific Code provision requiring a seller to mitigate damages, such a requirement has been incorporated into the Code pursuant to section 1-103. See also *Whewell v. Dobson*, 227 N.W.2d 115, 119, 16 U.C.C. Rep. Serv. 710, 716 (Iowa 1975).

the ensuing price actions that damages should be reduced by the amount the sellers could reasonably have received upon a resale of the goods. The cases have uniformly held that, regardless of whether the goods have been wrongfully returned to the seller¹²⁸ or are still in the buyer's possession,¹²⁹ the seller has no duty to mitigate damages by attempting to resell the goods. Accordingly, once acceptance of the goods has occurred, the resalability of them is irrelevant both to the entitlement of the seller to maintain an action for the price and to the issue of mitigation of damages.

Another kind of case in which the resalability of the goods is irrelevant to the issue of mitigation of damages is one in which, although there is an available market, the seller's supply of the goods exceeds the demand for them. Because the goods are resalable, however, an action for the price might not lie. For example, in one case the buyer ordered twelve loads of chipping potatoes, accepted the first three loads, and then wrongfully rejected the remainder when the potato market plummeted drastically.¹³⁰ At the time of the breach, the sellers had seventeen to twenty-one loads of potatoes unharvested in the fields. Although the sellers made diligent efforts to sell as many loads as possible, only four loads were sold. The buyer argued that damages should be measured under section 2-708(1) and that the extent of his liability was the contract/market differential of approximately \$2.25 per hundred-weight. The court disagreed, correctly holding that "the measure of damages provided in [section 2-708(1)] . . . [was] inadequate."¹³¹

128. See *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 95, 310 N.E.2d 128, 130, 14 U.C.C. Rep. Serv. 563, 566 (1974); *R.R. Waites Co. v. E.H. Thrift Air Conditioning, Inc.*, 510 S.W.2d 759, 761-62, 15 U.C.C. Rep. Serv. 43, 44-45 (Mo. Ct. App. 1974); *Connor v. Bogrett*, 596 P.2d 683, 687, 26 U.C.C. Rep. Serv. 902, 907 (Wyo. 1979).

129. In *Equilease Corp. v. D'Annolfo*, the buyer went so far as to argue that the seller had an obligation to repossess the goods and resell them to mitigate damages. The court rejected the argument out of hand. 6 Mass. App. Ct. 919, 919, 379 N.E.2d 1130, 1131, 24 U.C.C. Rep. Serv. 1198, 1199 (1978).

130. *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272, 26 U.C.C. Rep. Serv. 61 (Ala. 1979).

131. *Id.* at 276, 26 U.C.C. Rep. Serv. at 66. U.C.C. § 2-708(2) provides:

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

Accordingly, damages were to be measured on the basis of the profit lost on the breached contract, plus costs reasonably incurred thereunder, but less expenses saved. The sellers were not required to resell in the glutted market the particular goods involved in the breached contract. The court said:

To expect Sellers to give priority to selling those potatoes allocated to Buyer's contract, rather than selling the unallocated portion of their inventory, would be to require them to forego an advantageous opportunity and sacrifice a substantive right. Such is not the law. Had Sellers' inventory consisted solely of the potatoes allocated to Buyer's contract or had Sellers failed to act reasonably to sell their entire inventory, they would have failed to meet the obligation imposed by the avoidable consequences rule. However, under the circumstances here presented, Sellers had no obligation to enter the market with those potatoes allocated to Buyer's contract.¹³²

The sellers did not ask for a recovery of the full unpaid contract price. Arguably, on these facts, the goods were unresalable and the price action would be appropriate. On the other hand, where the seller has a surplus of goods which were obtained or produced without specific order for them, the courts may regard the seller's plight to be more the result of his own internal operating procedures and decision-making methods than the result of the buyer's breach. In such a case, the courts may deny the seller the price action when his excess supply cannot be resold.¹³³ Nevertheless, nothing in the text of section 2-709 places this limitation on the seller's right to maintain an action for the price of unresalable goods. The courts have not yet directly addressed this question, and it remains unclear in cases like the potato case whether the price action will be allowed if appropriately pleaded. It should be noted, however, that where the goods have been manufactured or acquired by the seller, a measure of damages based on his lost profit plus expenses incurred will come close to the full contract price. This will be reduced only by the variable costs of packaging, shipping, or the like required of the seller by the contract.

If acceptance has not occurred and the seller is holding the goods for the buyer, section 2-709(2) provides that the seller may resell the goods at any time prior to collection of the judgment for

132. *Neumiller Farms*, 368 So. 2d at 276, 26 U.C.C. Rep. Serv. at 66.

133. See R. CHILDRES & W. JOHNSON, *EQUITY, RESTITUTION AND DAMAGES* 112 (2d ed. 1974).

the price. The buyer is, of course, entitled to a credit for the net proceeds of any such resale.¹³⁴ In this context, the action for the price has the same practical effect as the resale remedy of section 2-706. The seller recovers a sum equal to the difference between the contract price and the resale price. The question has arisen as to whether the requirements of section 2-706 must be strictly followed in a resale under section 2-709(2). The cases to date have concluded that the seller need not so comply.¹³⁵ Although this result has been criticized,¹³⁶ there is not much here to get excited about. The requirements of section 2-706 generally focus on good faith, reasonableness, and advance notice of the resale to the buyer. In the price action situation, the requirements of good faith and reasonableness no doubt still obtain. Little would be accomplished, however, by requiring the seller to give advance notice of the resale after the action for the price has been filed.

B. *Goods Not Reasonably Resalable*

To maintain an action for the price of goods identified to the contract, the seller must carry the burden of proving that the goods identified to the contract were not reasonably resalable.¹³⁷ Precisely what constitutes reasonable efforts to resell and what is a reasonable price in a declining market depend largely on the facts of the individual case and thus are questions for the jury. Few helpful generalizations can be gleaned from the reported decisions. Much here depends upon good common sense and prayer. Much is complicated by the fact that the seller is required in essence to prove a negative—that the goods are *not* resalable.

One would suppose that generally a seller would not reasonably be required to go beyond his general marketing procedures or outside his general marketing area in order to resell the goods. On the other hand, if the breaching buyer procures another buyer for the goods, or one just walks in off the street, surely reasonable efforts require the seller to resell the goods to such a buyer even

134. U.C.C. § 2-709(2). *See supra* note 1.

135. *See* *Foxco Indus., Ltd. v. Fabric World, Inc.*, 595 F.2d 976, 984 n.6, 26 U.C.C. Rep. Serv. 694, 701 n.6 (5th Cir. 1979); *Wolpert v. Foster*, 312 Minn. 526, 530, 254 N.W.2d 348, 351, 21 U.C.C. Rep. Serv. 516, 520 (1977).

136. *See* G. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* ¶ 8.03[3], at 8-10 to 8-11 (1981).

137. *See* *French v. Sotheby & Co.*, 470 P.2d 318, 323, 7 U.C.C. Rep. Serv. 685, 691 (Okla. 1970) (summary judgment for seller in action for the price reversed where there was no evidence in the record that the goods were not reasonably resalable).

though that buyer might not have been available to the seller in the ordinary course of business.

Surely there is some price so low that it can be generally considered unreasonable. Virtually all goods have some value as scrap, but it is not uncommon for the cost of carting the goods off or of otherwise disposing of them to exceed the scrap value.¹³⁸ In one case, for example, the court upheld a jury's finding that the goods were not reasonably resalable even though there was an available market for the goods.¹³⁹ Access to that market would have required the seller to go beyond its general marketing procedures. The contract involved a sale of specially manufactured fabric. The seller generally sold its fabric only during the spring buying season and was able to show that it would be difficult for it to sell the fabric at any other time, despite the availability of some market. By the next spring buying season following the buyer's breach, the market value for the fabric had declined by some fifty percent. The seller was allowed to recover the contract price under section 2-709(1)(b).¹⁴⁰

The cases indicate that a mere statement of opinion by the seller that the goods are not resalable will not carry the burden of proof.¹⁴¹ At trial, the seller should specify with particularity either why no efforts were taken to resell the goods or what efforts were taken and the reasons, in the seller's opinion, such efforts were unsuccessful. With respect to such particularization, the most commonly recurring situation in which goods generally have been held to be unresalable is that of goods manufactured specially to the buyer's order. In some cases, the fact that the goods were specially manufactured, coupled with a statement of the seller's opinion that the goods were not reasonably resalable, has been held sufficient to uphold a jury finding in support of an action for the price.¹⁴²

138. For an example, see *Askco Eng'g Corp. v. Mobil Chem. Corp.*, 535 S.W.2d 893, 19 U.C.C. Rep. Serv. 1119 (Tex. Civ. App. 1976).

139. *Foxco*, 595 F.2d 976, 26 U.C.C. Rep. Serv. 694.

140. *Id.* at 984, 26 U.C.C. Rep. Serv. at 701.

141. See, e.g., *Multi-Line Mfg., Inc. v. Greenwood Mills, Inc.*, 123 Ga. App. 372, 180 S.E.2d 917, 9 U.C.C. Rep. Serv. 80 (1971).

142. See *Plateg Corp. v. Machlett Laboratories, Inc.*, 189 Conn. 433, 444, 456 A.2d 786, 791, 35 U.C.C. Rep. Serv. 1162, 1170 (1983) ("Since the contract goods in this case were concededly specially manufactured for the defendant, the defendant cannot and does not contest the trial court's finding that any effort to resell them on the open market would have been unavailing."). See also *City of Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159, 12 U.C.C. Rep. Serv. 840 (6th Cir. 1973) (parking meters); *Unlaub Co. v. Sexton*, 427 F. Supp. 1360, 21 U.C.C. Rep. Serv. 1303 (W.D. Ark. 1977) (specially manufactured coal screens); *Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d

In other cases, the record has been more specific as to the reasons why the specially manufactured goods were not reasonably resalable. One case involved the sale of steel rolling doors fabricated with specific dimensions to fit designated openings.¹⁴³ The seller introduced evidence satisfactory to the court that the doors were "tailor-made," that it was impractical to cut or adjust the doors for use at another site, that the doors only had a scrap value, and that delivery of the doors to a scrap dealer would be at substantial cost to the seller.¹⁴⁴

Another case involved the sale of a natural alabaster mink coat, specially made to the buyer's order in an extra-large size with an unusually wide flare.¹⁴⁵ The trial court instructed the jury as to the circumstances it should consider in determining whether the coat was reasonably resalable. The court said: "The circumstances include the coat's size, its color, its s[t]yle, its price, the fact that it was made to order for a particular person, and whatever else the events may indicate to you, reasonable inferences from the testimony."¹⁴⁶ Although the seller had made no effort to resell the coat, the jury returned a verdict for the seller. However, the trial court granted the defendant a new trial. Noting the paucity of authoritative decisions interpreting section 2-709(1)(b), the court stated: "[I]n the interests of justice additional evidence, e.g., the cost of taking the coat apart and the value of the resulting skins, should be produced."¹⁴⁷

In another case involving a fur coat, the buyer agreed to buy an off-the-rack coat of petite size, and the seller altered it at the buyer's request.¹⁴⁸ The alterations made it smaller in the neck and shoulders and, according to the court, no longer suitable for sale. The seller had preserved and maintained the coat in its vaults and remained "ready and willing to sell [it] anytime it receive[d] a good offer."¹⁴⁹ The coat itself was presented at trial for inspection. The seller was granted judgment for the price.¹⁵⁰

446, 11 U.C.C. Rep. Serv. 75 (Tex. Civ. App. 1972) (sheetrock specially cut to the buyer's order).

143. *Walter Balfour & Co. v. Lizza & Sons*, 6 U.C.C. Rep. Serv. 649 (N.Y. Sup. Ct. 1969).

144. *Id.* at 650-51.

145. *S. Pollack, Inc. v. Bechtel*, 63 Berks 27, 8 U.C.C. Rep. Serv. 701 (Pa. C.P. 1970).

146. *Id.* at 28, 8 U.C.C. Rep. Serv. at 702-03.

147. *Id.* at 29, 8 U.C.C. Rep. Serv. at 703.

148. *Ludwig, Inc. v. Tobey*, 28 Mass. App. Dec. 6, 5 U.C.C. Rep. Serv. 832 (1964).

149. *Id.* at 13, 5 U.C.C. Rep. Serv. at 836.

150. *Id.*

Of course, it is not necessary that the goods be specially manufactured or ordered for them to be unresalable. In one case, for example, the seller successfully maintained an action for the price upon a showing of numerous unsuccessful attempts to sell used carbon ring manufacturing equipment.¹⁵¹

Further, the fact that the goods are used or have been specially manufactured or specially ordered is not conclusive proof that the goods are not reasonably resalable. The issue is one of uniqueness and marketability. At least one court has indicated that specially manufactured goods may be marketable even though substantial reworking or alteration would first be required.¹⁵² Such a result is sensible and consistent with the damage mitigation concept of section 2-709(1)(b) if the cost of reworking the goods is small when compared with the price the reworked goods are likely to bring. In one case the seller took this course of action voluntarily.¹⁵³ The buyer had breached the contract by wrongfully returning skateboard truck and wheel assemblies which the buyer had accepted. The court noted that the seller could have held the goods for the buyer and brought an action for the price. Instead, the seller rebuilt the assemblies for use on roller skates, credited the buyer with the reasonable value of the rebuilt materials, and brought suit for the balance of the purchase price. The court allowed the seller's recovery, noting, however, that the appropriate damage formula on the facts was the profit formula of section 2-708(2).¹⁵⁴ The court expressed approval of the seller's course of action, stating that "plaintiff was evidencing good faith and conforming to the general rule requiring one damaged by another's breach of contract to reduce or mitigate damages."¹⁵⁵

In another case, the seller specially ordered goods specified by the buyer.¹⁵⁶ The goods, however, were standard stock items, including bathroom soap dishes, paper holders, and towel bars. Following a wrongful rejection of the goods by the buyer, the seller made no effort to resell them. In denying the seller's action for the

151. *Continental-Wirt Elecs. Corp. v. Sprague Elec. Co.*, 329 F. Supp. 959, 9 U.C.C. Rep. Serv. 1049 (E.D. Pa. 1971).

152. *See S. Pollack*, 63 Berks at 29, 8 U.C.C. Rep. Serv. at 703.

153. *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.*, 185 Neb. 515, 177 N.W.2d 25, 7 U.C.C. Rep. Serv. 804 (1970).

154. *Id.* at 517-18, 177 N.W.2d at 27, 7 U.C.C. Rep. Serv. at 806.

155. *Id.* at 517, 177 N.W.2d at 26, 7 U.C.C. Rep. Serv. at 806.

156. *Carnes Constr. Co. v. Richards & Conover Steel & Supply Co.*, 10 U.C.C. Rep. Serv. 797 (Okla. Ct. App. Feb. 2, 1972) (not to be considered as precedent or authority, by directive of the Supreme Court of Oklahoma).

price, the court stated:

We cannot believe that these stock or standard bathroom fixtures, such as soap dishes or towel racks, would not have a ready resale for use on other construction projects. At least we are not willing to assume inability to resell such items under the circumstances, absent proof of serious attempts to dispose of them.¹⁵⁷

Although the court's finding with respect to the stock nature of the goods is certainly sensible, the tone of the opinion is further reflective of the dubious attitude courts take towards sellers who have made no attempt to resell the goods but who are arguing circumstantially that the goods are not reasonably resalable.

In another case, a buyer, who apparently had rather bad taste in choosing fabrics and colors, specially ordered various household furniture and rugs, the latter cut to odd-sized lengths.¹⁵⁸ The buyer died and his estate wrongfully rejected the goods. In denying the seller's action for the price, the court found that the seller had not proved reasonable efforts to resell. The evidence was found inconclusive because the seller proved only that the goods had been displayed in an undisclosed place and manner, for an unspecified period of time, at only a twenty-five percent markdown. The court also found that other circumstances did not reasonably indicate that the goods were not resalable. The following language by the court is instructive:

In short, while it may be that there would be some amount of difficulty in disposing of much of this merchandise at the prices which decedent had agreed to pay, largely because of the apparently extreme choices of colored fabrics in which some thereof were made up, the auditing judge is not persuaded that all of it, or even a substantial part thereof, was of such a character as would "reasonably indicate that (reasonable efforts to resell at reasonably marked-down prices) will be unavailing." In particular, the auditing judge finds completely incredible the opinion of [the seller's] sales manager that the probability was "very nil" for "recovering any money by future sales of these goods." The patently exaggerated nature of this overstatement, and the self-serving generality and lack of specificity similarly running through a large part of his entire testimony, certainly created no inferences in [the seller's] favor in

157. *Id.* at 803.

158. *Bacon Estate*, 18 Bucks 39, 45 Pa. D. & C.2d 733, 5 U.C.C. Rep. Serv. 486 (Orphans' Ct. 1968).

this respect.¹⁵⁹

The truly difficult cases under section 2-709(1)(b) are those involving goods that are resalable, but only at a price substantially below the contract price. After all, virtually all goods are resalable at some price. It is only when the goods are worth less than the cost of disposing of them that goods are truly not resalable. As one might suspect, the cases to date vary. However, there is a definite flavor running through the opinions that since the buyer does not want the goods and his liability for their entire price is at risk, any price that will save the buyer money on that potential liability is a reasonable price if the seller has acted in good faith in attempting to resell. As we have seen, however, one court indicated that fifty percent of the contract price might not be reasonable,¹⁶⁰ while another indicated that less than seventy-five percent of the purchase price would be.¹⁶¹ This is an area in which the seller runs a significant risk of jeopardizing his action for the price and, accordingly, should always plead and prove a backup measure of damages under section 2-708.

It is best to use common sense and to attempt to place as much of this risk as possible on the buyer. This often can be accomplished by notifying the buyer of the resale opportunity and allowing the buyer first option to purchase at that price. As long as the seller's actions are all aboveboard, a buyer who refuses to purchase at even that low price, or who ignores the seller's offer, will be hard-pressed at trial to argue persuasively that the goods were reasonably resalable at a higher price. If the buyer accepts the seller's offer, the seller loses nothing by reselling the goods to the buyer at the lower price, provided that the seller reserves his right to recover the differential between the contract price and the resale price as allowed by section 1-207 of the Code.

The seller, of course, wants to unload the goods quickly and to receive as much money as possible as soon as possible. Although any firm recommendation in this area is tenuous at best, if the

159. *Id.* at 44, 45 Pa. D. & C.2d at 739, 5 U.C.C. Rep. Serv. at 490. Professors White and Summers opine that the result in this case may be attributable to the "court's unwillingness to allow a seller to reap the benefits of a decedent's profligacy out of the heirs' legacies." J. WHITE & R. SUMMERS, *supra* note 18, § 7-5, at 262. The tone of the court's opinion supports this conclusion.

160. See *Foxco*, 595 F.2d at 984, 26 U.C.C. Rep. Serv. at 701; *supra* text accompanying notes 139-40.

161. See *Bacon*, 18 Bucks at 44, 45 Pa. D. & C.2d at 739-40, 5 U.C.C. Rep. Serv. at 490-91; *supra* text accompanying note 159.

buyer will not take the goods at the resale price the seller has offered and the seller's business experience tells him that his efforts to resell the goods have been reasonable, the seller should probably be advised to sell the goods at the depressed price. By this course of conduct, he will have undermined future arguments by the buyer. Further, he will have mitigated damages by reducing the contract price owed, by reducing the amount of prejudgment interest that the buyer will have to pay, and by avoiding further incidental damages under section 2-710 in terms of storage and upkeep charges on the goods. If the resale of the goods is conducted subsequent to the filing of the action for the price, section 2-709(2) supports such conduct. However, if the resale occurs prior to the filing of the cause of action, section 2-709(2) does not appear to be applicable. Where the seller resells the goods in the context of the present discussion and then subsequently brings an action, the Code is not clear as to whether the action is an action for the price or an action for the contract/resale price differential under section 2-706. Since we are discussing a resale which has occurred long after the buyer's breach or repudiation and at a substantially depressed price, the seller is probably on firmer ground in maintaining his action under section 2-709. Regardless of the section under which the seller is regarded as proceeding, the result should be the same, although cases to date have held that a seller making a resale in connection with a price action does not need to comply with the more onerous resale requirements of section 2-706.¹⁶²

Further argument for reselling the goods even at substantially depressed prices is to be found from the fact that the courts have not dealt kindly with sellers who have eschewed an opportunity to resell the goods at such prices and are nevertheless seeking to maintain an action for the price under section 2-709(1)(b). For example, in a case involving a buyer's unjustified failure to purchase 40,000 cracked Liberty Bell whiskey bottles at a contract price of \$2.50 each, the seller received and refused an offer to sell the bottles at forty cents each.¹⁶³ The court remanded the case for further fact findings to determine whether or not the forty cents repre-

162. See *Foxco*, 595 F.2d at 984 & n.6, 26 U.C.C. Rep. Serv. at 701 & n.6; *Wolpert v. Foster*, 312 Minn. 526, 530, 254 N.W.2d 348, 351, 21 U.C.C. Rep. Serv. 516, 520 (1977). This result has been criticized. See G. WALLACH, *supra* note 136, ¶ 8.03[3], at 8-10 to 8-11.

163. *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 27 U.C.C. Rep. Serv. 133 (3d Cir. 1979).

sented a reasonable price.¹⁶⁴ In another case involving the sale of exotic heifers, the court stated that an action for the price would not be appropriate because "there *was* a market for exotic cattle . . . even though that market was plummeting."¹⁶⁵

On more happy occasions, however, a buyer's actions, inactions, and testimony can make a seller's case for him. For example, in one case that will appeal to the hearts of plaintiff's attorneys everywhere, a seller recovered the price less certain expenses saved when the defendant's office equipment buyer and vice president testified that they would only buy the goods at a "closeout price," that they might take the goods "off [seller's] hands at half" as distressed merchandise, and that in the alternative, they would only take the goods on a "completely guaranteed sale basis" where they had no obligation to keep any of the goods that did not sell.¹⁶⁶

C. *Identified (Existing) Goods*

It has been implicit in this discussion that in order to maintain an action for the price, the goods must be completed and the seller must be in a position to tender them to the buyer upon payment.¹⁶⁷ One court has theorized that completed goods are a predicate of the action for the price for the reasons that section 2-709 makes no provision in the damage recovery for expenses saved as a result of the breach and that the action lies only if the buyer fails to pay the price "as it becomes due."¹⁶⁸ This reasoning is not entirely dispositive; several courts have read a credit-for-expenses-saved provision into section 2-709,¹⁶⁹ and the agreement between the parties may provide for payment of the price prior to completion of the goods.

Nevertheless, the conclusion is correct. If the action for the price is based on the buyer's having finally accepted the goods, the goods are obviously complete or the buyer has waived any claim as to their incompleteness and is relegated to an action for damages

164. *Id.* at 1072, 27 U.C.C. Rep. Serv. at 137.

165. *Cole v. Melvin*, 441 F. Supp. 193, 205 n.7, 22 U.C.C. Rep. Serv. 1154, 1165 n.7 (D.S.D. 1977).

166. *Copymate Mktg., Ltd. v. Modern Merchandising, Inc.*, 34 Wash. App. 300, 302-03, 660 P.2d 332, 333, 36 U.C.C. Rep. Serv. 161, 163 (1983).

167. If the seller is not in a position to tender the goods because he has resold them, then he must either bring his action under the resale formula of U.C.C. § 2-706 or credit the buyer with the proceeds of resale under U.C.C. § 2-709(2).

168. *Detroit Power Screwdriver Co. v. Ladney*, 25 Mich. App. 478, 484-85, 181 N.W.2d 828, 831-32, 8 U.C.C. Rep. Serv. 504, 508 (1970).

169. *See infra* notes 182-88 and accompanying text.

for breach of warranty. If the price action is based on the goods having been lost or destroyed after the risk of loss has passed to the buyer, Code principles require that the goods at least be completed before the risk of loss can pass to the buyer. In an unusual case, the parties can presumably agree under section 2-509(4) that the risk of loss will be on the buyer prior to completion of the goods. However, if the goods are destroyed prior to completion, it is doubtful that any court would allow the seller the full contract price as the measure of damages.

With respect to an action for the price of goods which cannot be resold, section 2-709(1)(b) requires that the goods be "identified." "Identification" is a term of art governed by section 2-501 of the Code.¹⁷⁰ Essentially, it means that the goods can be verified objectively as those covered by the contract in question. It can be accomplished by agreement of the parties or by the seller unilaterally, either before breach by the buyer or after.¹⁷¹ It is essential to

170. U.C.C. § 2-501 provides:

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

- (a) when the contract is made if it is for the sale of goods already existing and identified;
- (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
- (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

171. U.C.C. § 2-704 provides in part:

- (1) An aggrieved seller under the preceding section may
 - (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are

identification, however, that the goods be completed; incomplete goods cannot be identified to the contract.¹⁷² In short, the cases uniformly hold that an action for the price can be maintained only for completed goods.¹⁷³

This is not to say that the goods necessarily must be completed at the point in time when the buyer breaches or repudiates the contract. Section 2-704(2) provides:

Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

This subsection, of course, embodies a damage mitigation concept. In most cases, it encourages the seller to complete manufacture of the goods and resell them. In any case in which he reasonably believes that the goods, once completed, can be resold at a price which exceeds the cost of inputs (labor, materials, shipping costs, etc.), including transaction costs, the seller should complete the goods and resell them. Only if the seller reasonably doubts that the completed goods can be resold at such a price should he discontinue manufacture. The reason is that by completing the goods and reselling them at that price, the seller will save the buyer damages for the expenses incurred in partially manufacturing the goods. If the seller appropriately discontinues manufacturing the goods, his measure of recovery is under section 2-708(2) for his profit plus expenses incurred. If the seller completes manufacture of the goods and resells them, his damages would be measured under section 2-

in his possession or control;

- (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

172. U.C.C. § 2-501 speaks of "identification of *existing* goods as goods to which the contract refers." (Emphasis added.) Under U.C.C. § 2-704(1)(a), the aggrieved seller may identify only "conforming" goods to the contract.

173. See *Detroit Power Screwdriver*, 25 Mich. App. at 485, 181 N.W.2d at 832, 8 U.C.C. Rep. Serv. at 508; *Rowland Meledandi, Inc. v. Kohn*, 7 U.C.C. Rep. Serv. 34, 35 (N.Y. Civ. Ct. 1969); *E-Z Roll Hardware Mfg. Co. v. H & H Products & Finishing Corp.*, 4 U.C.C. Rep. Serv. 1045, 1047-48 (N.Y. Sup. Ct. 1968). See also *Foxco*, 595 F.2d at 983, 26 U.C.C. Rep. Serv. at 700. But cf. *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.*, 185 Neb. 515, 517, 177 N.W.2d 25, 26-27, 7 U.C.C. Rep. Serv. 804, 806 (1970) (price action unavailable where completed goods were substantially reworked by the seller for the purpose of mitigation following wrongful return of the goods by the buyer).

708(2) only by the profit he would have made or under section 2-706 on the basis of the resale price/contract price differential.

It is unlikely, albeit not inconceivable, that the seller will make a reasonable decision to complete manufacture of the goods and later find that the goods are not resalable. The reasonableness of his decision is to be judged at the time that he made it, and the Code does not penalize him for an erroneous decision reasonably reached or because circumstances subsequently and unforeseeably have changed.¹⁷⁴ Accordingly, if the seller acted reasonably in his decision to complete manufacture, and the goods subsequently turn out not to be resalable, the seller should be entitled to maintain an action for the price. The one case on point supports this analysis. In that case the buyer repudiated a contract for the purchase of fabric shortly before the seller had completed manufacture.¹⁷⁵ The seller decided to complete the production process and brought an action for the price of the fabric less proceeds from the resale of part of the goods. The court allowed the seller to recover under section 2-709, basing its analysis in part on comment 1 to section 2-704:

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.*¹⁷⁶

IV. ADDITIONAL PARAMETERS OF RECOVERY

A. Credit to Buyer of Resale and Expenses Saved

It is clear that if the seller resells the goods subsequent to bringing an action for the price, the buyer is entitled to credit for the

174. Comment 2 to U.C.C. § 2-704 provides:

Under this Article the seller is given 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* makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture. (Emphasis added.)

175. *Foxco*, 595 F.2d 976, 26 U.C.C. Rep. Serv. 694.

176. *Id.* at 983, 26 U.C.C. Rep. Serv. at 700 (emphasis by the court).

proceeds of the resale.¹⁷⁷ Indeed, section 2-709(2) expressly so provides. The subsection allows the seller to resell the goods at any time prior to payment of the judgment for the price and affirmatively obligates the seller to credit the buyer with the net proceeds of any such resale.¹⁷⁸ Otherwise, the seller must hold the goods for the buyer and tender them to him upon payment of the judgment.¹⁷⁹ It has been said that upon payment of the judgment, title to the goods passes automatically to the buyer.¹⁸⁰ Regardless, the buyer's attorney should make certain that the court specifically orders that the buyer is entitled to the goods upon payment of the judgment.¹⁸¹

Although section 2-709 specifically provides for a resale credit to the buyer, no provision is made for crediting the buyer with any expenses saved by the seller which he would have been obligated to incur had the contract been fully performed. This is no doubt a conceptual oversight by the Code drafters, misled by the presumption that since the goods must be completed for the action to be maintained, no expenses will be saved. However, the reported decisions bear out that an aggrieved seller may save various expenses even after the goods are completed. Nevertheless, at least one early case denied the buyer a credit for expenses saved because of the lack of a specific provision therefor in section 2-709.¹⁸² Other courts have allowed such credit for a wide variety of expenses saved including installation costs,¹⁸³ shipping costs,¹⁸⁴ the value of

177. See *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 95, 310 N.E.2d 128, 130, 14 U.C.C. Rep. Serv. 563, 566 (1974); *Walter Balfour & Co. v. Lizza & Sons*, 6 U.C.C. Rep. Serv. 649, 651 (N.Y. Sup. Ct. 1969).

178. See, e.g., *Symbol Technologies, Inc. v. Sonco, Inc.*, 36 U.C.C. Rep. Serv. 402, 407 (E.D. Pa. 1983).

179. See *Akron Brick & Block Co.*, 365 Mass. at 95, 310 N.E.2d at 130-31, 14 U.C.C. Rep. Serv. at 566; *Walter Balfour*, 6 U.C.C. Rep. Serv. at 651.

180. See *Unlaub Co. v. Sexton*, 568 F.2d 72, 77 n.5, 23 U.C.C. Rep. Serv. 69, 75 n.5 (8th Cir. 1977); cf. *Murray v. Americare-Medical Designs, Inc.*, 123 Ga. App. 557, 560-61, 181 S.E.2d 871, 873-74, 9 U.C.C. Rep. Serv. 459, 461 (1971) (upon payment of the judgment buyer would thereby become owner of the goods).

181. Cf. *Wolpert v. Foster*, 312 Minn. 526, 532 & n.5, 254 N.W.2d 348, 352 & n.5, 21 U.C.C. Rep. Serv. 516, 521 & n.5 (1977) (amending judgment of lower court to provide that buyer is entitled to goods upon payment of contract price).

182. *Beco, Inc. v. Minnechaug Golf Course, Inc.*, 5 Conn. Cir. Ct. 444, 450-51, 256 A.2d 522, 526, 6 U.C.C. Rep. Serv. 910, 915 (1968).

183. See *Walter Balfour*, 6 U.C.C. Rep. Serv. at 651; *James Mfg. Co. v. Stovner*, 1 Wash. App. 27, 29, 459 P.2d 51, 53 (1969) (decided under Uniform Sales Act). But see *Beco*, 5 Conn. Cir. Ct. at 450-51, 256 A.2d at 526, 6 U.C.C. Rep. Serv. at 915.

184. *Continental-Wirt Elecs. Corp. v. Sprague Elec. Co.*, 329 F. Supp. 959, 965, 9 U.C.C. Rep. Serv. 1049, 1057 (E.D. Pa. 1971).

a portion of the goods used for scrap,¹⁸⁵ the cost of dyeing the contract goods,¹⁸⁶ and warranty adjustment expenses that would have been incurred by the seller.¹⁸⁷ These results are correct and are consistent with the courts' mandate under section 1-106 that remedies be "liberally administered" to the end of achieving compensation without penalty.¹⁸⁸ To allow the seller to save expenses without crediting the buyer would clearly represent a windfall to the seller and a penalty to the buyer.

B. *When The Price Becomes Due*

Under section 2-709, the seller is entitled to maintain an action for the price only if the buyer fails to pay the price "as it becomes due." In most cases this restriction poses no problem, because the particular contract provides for a lump sum payment for the goods at a specified time. Further, even in a contract providing for installment payments by the buyer, there is almost always an acceleration clause which entitles the seller to the entire unpaid purchase price upon failure to make any installment payment. But what if a contract providing for installment payments contains no acceleration clause, and the buyer wrongfully refuses to pay an installment as it becomes due? At common law and under the present law outside of the Code, the vast majority rule in this country is that the aggrieved creditor cannot accelerate the obligation and can recover only for those payments due at the date of trial.¹⁸⁹ Al-

185. *Walter Balfour*, 6 U.C.C. Rep. Serv. at 651.

186. *Jacobson v. Donnkenney, Inc.*, 4 U.C.C. Rep. Serv. 850, 852 (N.Y. Sup. Ct. 1967). This case might better have been decided under U.C.C. § 2-708(2) for damages for incomplete goods.

187. *In re Pennsylvania Tire Co.*, 26 Bankr. 663, 37 U.C.C. Rep. Serv. 410 (N.D. Ohio 1982) (warranty adjustment expenses were "saved" when the seller went bankrupt).

188. U.C.C. § 1-106(1) provides:

The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

In addition, comment 1 thereto states that one purpose of the subsection is "to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Act elsewhere makes it clear that damages must be minimized."

189. See RESTATEMENT (SECOND) OF CONTRACTS §§ 243, 253 (1979); RESTATEMENT (FIRST) OF CONTRACTS §§ 316, 318 (1932). See generally 4 A. CORBIN, CORBIN ON CONTRACTS §§ 959, 962-963 (1951).

though this is an abjectly silly and unfair rule of law¹⁹⁰ which requires the creditor to incur the expense of successive actions even after unequivocal repudiation by the debtor, or to wait, sometimes interminably, for the entire debt obligation to become due before filing suit, it remains a rule of remarkable tenacity in our law.

Although there would appear to be nothing in the Code, either in text or comment, that indicates a change in the rule, a California court has held that if a buyer fails to make an installment payment for accepted goods, section 2-709(1)(a) allows the seller to sue for the price of all goods which have been delivered and accepted even though the contract contains no acceleration clause.¹⁹¹ The court's reasoning is of dubious merit. It ignores the fact that under section 2-709 an action lies only for "the price as it becomes due." Further, under section 2-607(1) the buyer is obligated to pay for accepted goods only "at the contract rate." If the Code had been intended to change so entrenched a rule of the common law as that denying action for a repudiation of a unilateral obligation to pay money installments in the future, surely express and unequivocal language to that effect would have been provided therein. The California decision is probably more reflective of a justified judicial reaction to the absurdity of the rule than it is an example of sound judicial construction of the Code's provisions. Until the rule falls from its own dead weight, in all probability the courts in other jurisdictions will continue to follow their respective rules applicable prior to and outside the Code.

C. Variation by Agreement

As we have seen in the above discussion, the seller's three routes to an action for the price are sensible and are consistent with the basic Code damage theory of compensation. Section 2-709 strictly limits the seller's access to an action for the price, and comment 6 thereto provides that the "section is intended to be exhaustive in its enumeration of cases where an action for the price lies."

Nevertheless, section 1-102(3) of the Code allows the parties a

190. The rule has been roundly criticized by Professor Corbin. *See* 4 A. CORBIN, *supra* note 189, §§ 962-966. For an example of the absurdity of the rule, see *Minor v. Minor*, 184 Cal. App. 2d 118, 7 Cal. Rptr. 455 (1960). Compare Justice Cardozo's opinion in *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936). A minority of jurisdictions sensibly discarded the rule long ago. *See, e.g., Pollack v. Pollack*, 46 S.W.2d 292 (Tex. Comm'n App. 1932).

191. *Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49 Cal. App. 3d 186, 192, 122 Cal. Rptr. 834, 837, 17 U.C.C. Rep. Serv. 1218, 1221 (1975).

broad-based permission to vary Code provisions by private agreement.¹⁹² Some provisions of Article 2 expressly state that they are variable by agreement; others expressly state that they are not. Most, like section 2-709, are silent on the question. Is the availability of the price action variable by agreement of the parties so as to accelerate or expand the availability of an action for the price? Certainly much can be accomplished in this regard by a reasonable agreement accelerating the time for inspection and acceptance of the goods or for the passing of the risk of loss to the buyer. Such an agreement would not be inconsistent with the express wording of section 2-709 or incompatible with its underlying theory. However, assuming for the moment that the goods are resalable and have not been lost or destroyed, any agreement between the parties which entitles the seller to the full contract price upon breach, but prior to acceptance of the goods, is purely and simply an attempt by the parties to liquidate damages. Such an agreement in essence states that upon breach by the buyer it is agreed that the seller's damages constitute the full remaining unpaid contract price. As such, the agreement should be judged under the Code principles applicable to liquidated damages provisions.¹⁹³

The Code provides that, to be valid, liquidated damages provisions must represent an approximation of the "anticipated or actual harm" caused by the buyer's breach.¹⁹⁴ If the goods have been neither accepted by the buyer nor lost or damaged, and the seller has access to them and the ability to resell them, an agreement of the parties fixing damages at the full contract price obviously overstates the actual damages suffered by the seller. Such an agree-

192. Section 1-102(3) provides:

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

193. U.C.C. § 2-718(1) provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

194. *Id.*

ment would contravene the damage mitigation principles underlying the Code and would penalize the buyer by having him pay more in damages than the injury actually caused by his breach.¹⁹⁵ Section 2-718(1) concludes, "A term fixing unreasonably large liquidated damages is void as a penalty." This was the result reached by an early case, the only case I have found which has directly addressed the problem.¹⁹⁶ The case arose in Pennsylvania, one of the few remaining jurisdictions still recognizing the validity of cognovit clauses. The buyers agreed to purchase refrigerated cases and equipment for a total price of \$35,500. The buyers repudiated the contract before any of the goods had been delivered. The seller then confessed judgment for the full contract price under the terms of the cognovit clause of the contract. The court held that the confessed judgment would be reopened so as to allow the buyers to defend as to the amount of damages due the seller. The court stated that to permit the seller to recover the full contract price without showing what goods, if any, had been identified to the contract, what goods had actually been specially manufactured prior to repudiation, and what goods had been or could be readily resold, would effectively result in unreasonably large liquidated damages, void under section 2-718 of the Code.¹⁹⁷

Accordingly, it is probably accurate to say that section 2-709 is not directly variable by agreement in the sense of providing the seller an additional avenue to an action for the price beyond the three provided by the Code provision. On the other hand, a reasonable agreement between parties providing guideposts for the section 2-709 avenues, such as a provision pertaining to the passing of the risk of loss or pertaining to when, where, and how acceptance of the goods will occur, is generally valid and does not contravene the philosophical underpinnings of the Code's action for the price.¹⁹⁸

195. See U.C.C. § 1-106(1) & comment 1; *supra* note 188.

196. *Denkin v. Sterner*, 70 York 105, 10 Pa. D. & C.2d 203, 1 U.C.C. Rep. Serv. 173 (C.P. 1956).

197. *Id.* at 107-08, 10 Pa. D. & C.2d at 208, 1 U.C.C. Rep. Serv. at 176.

198. Of course, there is nothing generally wrong with contractual provisions which, by way of warranty or the like, would restrict a seller's entitlement to the contract price.