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MARKET PRICE DAMAGES UNDER UCC ARTICLE 2: SOME SUGGESTIONS FOR THE NEXT REVISION

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In 2003, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated a revised version of Article 2 of the Uniform Commercial Code (UCC), which governs the sale of goods.[1] This revision was greeted with much unfavorable commentary[2] and was withdrawn in 2011.[3] It now seems that another revision will have to be drafted. This Essay focuses on market price damages under UCC sections 2-708(1) and 2-713 and suggests a number of changes.

I. FOUR BASIC PRINCIPLES

In evaluating any proposed revision of the rules governing market price damages, we should consider four principles.

A. The Expectation Principle

The expectation principle suggests that a remedy for breach of contract should protect the plaintiff's contractual expectation by taking the plaintiff from its post-breach situation to where the plaintiff would be had the contract been performed.[4] This principle is expressed in UCC section 1-305(a).[5] Most of the important Article 2 remedies are expectation remedies.[6] Market price damages under section 2-708(1) (for seller plaintiffs) and section 2-713 (for buyer plaintiffs) are not intended to be expectation remedies.[7] This Essay will, however, consider the question of whether expectation damages should become a limitation on market price damages below.

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1. *See* Henry Deeb Gabriel, *The 2003 Amendments of Article Two of the Uniform Commercial Code: Eight Years or a Lifetime After Completion*, 52 S. TEX. L. REV. 487, 500 (2011) (describing the purpose of the 2003 amendments).

2. *See generally* Fred H. Miller, *What Can We Learn from the Failed 2003–2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471, 472–77 (2011) (citations omitted) (describing industry and consumer group opposition to the revisions).

3. The ALI approved the withdrawal at its 2011 annual meeting. *See Updates*, A.L.I., http://2011am.ali.org/updates.cfm (May 17, 2011).

4. *See* Robert Cooter & Melvin A. Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1438 (1985).

5. *See* U.C.C. § 1-305(a) (2012) ("The remedies provided . . . must 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 damages nor penal damages may be had . . . .").

6. *See* Michael T. Gibson, *Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. L.J. 909, 924–25 (1997) (citations omitted) (recognizing expectation remedies as "the keystone of Article 2's remedies").

7. *See* U.C.C. §§ 2-713, -708 (2012); *see also* Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV. 1181, 1197 (2011) (noting that market price remedies are "often explained as a sort of statutory liquidated damage clause that simply works to inhibit breach.").

B. The Mitigation Principle

The mitigation principle suggests that the plaintiff should not be compensated for loss that the plaintiff could have avoided through reasonable efforts.[8] The purpose of this principle is to give the aggrieved party an incentive to mitigate—or minimize—its losses.[9]

If we combine the expectation principle with the mitigation principle, we can say that the measure of damages should be equal to the plaintiff's expectation damages minus the plaintiff's avoidable loss—the loss plaintiff could have avoided through reasonable efforts.[10] This principle can be expressed in the following formula: *MD=ED-AL*.

C. The Evidentiary Principle

Litigation of a contract case should not be a protracted and expensive struggle to prove elusive facts. It should not be a war of attrition that favors the wealthier party. Therefore, the rules governing remedies under Article 2 should require evidence that proves necessary facts with reasonable accuracy but is not excessively difficult or expensive to obtain. We might call this the "evidentiary principle."

The best way to respect the mitigation principle without violating the evidentiary principle is to measure the plaintiff's avoidable loss using the market price—the average price in actual sales of goods similar to the goods the plaintiff contracted to sell or buy.[11] The approach taken in sections 2-708(1) and 2-713 of Article 2 simply assumes that a substitute transaction at the market price would have been reasonable mitigation.[12]

D. The Mimicking Principle

As of what date should the market price be measured? In what place or places should the market price be measured? It would seem that the 2-708(1) market price should be measured as of the date on which aggrieved sellers would be most likely to make reasonable resales and in the place or places where

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8. Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 176 (1996).

9. *See* U.C.C. § 1-305 cmt. 1 (2012) ("[T]he Uniform Commercial Code . . . makes it clear that damages must be minimized.").

10. *See* Kelly, *supra* note 8, at 178.

11. *See* U.C.C. § 2-713 cmt. 2 (2012) ("The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.").

12. *See id.* §§ 2-708(1), -713.

aggrieved sellers would be most likely to make such resales.[13] It would also seem that the market price under section 2-713 should be measured as of the date on which aggrieved buyers would be most likely to make a reasonable cover and in the place or places where aggrieved buyers would be most likely to make a reasonable cover.[14] Because the market prices under sections 2-708(1) and 2-713 are supposed to mimic the prices at which aggrieved sellers are most likely to make reasonable resales and the prices at which aggrieved buyers are most likely to make reasonable covers, we might call this the "mimicking principle."

If, for example, it appears that sellers would be most likely to resell at the average price then charged by sellers located in the plaintiff seller's city immediately after learning of the buyer's breach—thus making a reasonable resale—section 2-708(1) should require that the market price be measured as of the time when the plaintiff seller learned of the buyer's breach at the average price then charged by sellers located in the plaintiff seller's city.

II. THE AMBIGUITY OF "THE DIFFERENCE BETWEEN"

Section 2-708(1) provides that the measure of the plaintiff seller's damages is "the difference between the market price . . . and the unpaid contract price," plus incidental damages and less expenses saved.[15] The quoted language is ambiguous. Is the unpaid contract price to be subtracted from the market price? Or is the market price to be subtracted from the unpaid contract price? The plaintiff seller deserves compensatory damages for any excess of the unpaid contract price over the market price.[16] This excess measures the income the seller would have lost had the seller made a reasonable resale at the market price.[17] If the market price exceeds the unpaid contract price, the seller should have been able to resell at a price higher than the unpaid contract price and deserves no damages derived from the difference between the market price and the unpaid contract price. A revised section 2-708(1) should make it clear that the market price is to be subtracted from the unpaid contract price.

Section 2-713 provides that the measure of a buyer's damages is "the difference between the market price . . . and the contract price," plus incidental damages and consequential damages and less expenses saved.[18] Here too, "the difference between" language is ambiguous. Is the market price to be subtracted

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13. *Cf.* 1 WHITE ET AL., UNIFORM COMMERCIAL CODE § 8:13, at 688 (6th ed. 2012) ("[UCC] [s]ection 2-708(1) . . . directs the aggrieved seller to measure the market at the time and place for tender, and this is not the time and place where the seller is most likely to resell.").

14. *Cf. id.* § 7:16, at 566–67 ("It appears that the drafters intended 2-713's formula to yield approximately the same judgment in noncover cases against the seller as the 2-712 formula would have yielded had the buyer covered.").

15. U.C.C. § 2-708(1) (2012).

16. *See id.* § 1-305(a) (stating the code's remedial philosophy "that the aggrieved party may be put in as good a position as if the other party had full performed . . .").

17. *See* Kelly, *supra* note 8, at 189 (citing *id.* § 2-708).

18. U.C.C. § 2-713(1) (2012).

from the contract price? Or is the contract price to be subtracted from the market price? The plaintiff buyer deserves damages for any excess of the market price over the contract price.[19] This excess measures the increase in the cost of the goods had the buyer made a reasonable cover at the market price.[20] However, the buyer does not deserve damages derived from an excess of the contract price over the market price, as the buyer would have benefited by paying a cover price lower than the contract price. A revised section 2-713 should make it clear that the contract price is to be subtracted from the market price.

III. MARKET PRICE AT WHAT TIME?

The mimicking principle raises two questions concerning time. First, at what time are aggrieved sellers most likely to make reasonable resales? Second, at what time are aggrieved buyers most likely to make a reasonable cover?

A. The Case for Measuring Market Price as of an Early Time

Prudent aggrieved parties usually enter into substitute transactions soon after learning of the breach.

1. The Time for Delivery May Be an Essential Element in the Aggrieved Party's Bargain

For many buyers, timely receipt of the goods is essential. A buyer may have insisted on delivery by February 18 because the buyer needed the goods by February 25 in order to perform the buyer's preexisting contract with a third party. Another buyer may have insisted on delivery of a machine by May 5 because it was to replace an assembly line machine that had to be retired by May 10. If the sellers in such situations fail to deliver the goods when promised, the aggrieved buyers must cover quickly in order to avert serious loss.

Situations in which an aggrieved seller had an urgent need to ship the goods no later or not much later than the contractual date for shipment are infrequent. A seller may have contracted for a June 15 shipment date because the seller needed to get rid of the goods in order to make room in its warehouse for other inventory scheduled to arrive on June 30. If the seller's contractual buyer makes an anticipatory repudiation on June 10, the seller must quickly try to find a resale buyer to whom the seller can ship the goods no later than June 29.

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19. *See id.* § 1-305(a) (stating the code's remedial philosophy "that the aggrieved party may be put in as good a position as if the other party had full performed . . .").

20. *See id.* § 2-713 cmt. 1 ("The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief.").

2. The Time Value of Money and the Time Value of Goods

Even if the contractual time for delivery was not an essential element of the aggrieved party's bargain, it would still be advantageous to resell or cover as soon as possible. Because of the time value of money, an aggrieved seller would prefer receiving $10,000 in resale proceeds on September 1 to receiving the same amount of resale proceeds on December 1. Assuming that some of this money can be invested in securities or new equipment, the rate of return will increase the seller's wealth; therefore, it would be preferable for this return to begin on September 1, rather than December 1.

Because of the time value of productive goods, an aggrieved buyer who contracted to purchase a profit-producing machine would prefer covering for $10,000 on March 1 to covering at the same price on June 1. The return on the machine would begin to flow three months earlier (assuming, of course, that the rate of return on the machine exceeds the rate of return on money left in a bank account or securities).

B. Seller's Market Price Remedy Under Section 2-708(1)—Nonacceptance Cases

In some cases, a breaching buyer wrongfully rejects the goods delivered by the seller or wrongfully attempts to revoke its acceptance of those goods.[21] Article 2 refers to these cases as "nonacceptance" cases.[22] Section 2-708(1) provides that, in nonacceptance cases, the market price must be measured as of the time for tender.[23]

1. The Time for Tender

In the usual "shipment contract" situation where the seller is not required to deliver the goods at a particular destination, the seller makes a tender when it has (1) put the goods in the possession of a carrier, (2) made a reasonable contract with the carrier, (3) delivered any document necessary to enable the buyer to obtain possession of the goods, and (4) promptly notified the buyer of the shipment.[24] The time for tender rule violates the mimicking principle because it does not mimic the time at which sellers are most likely to make reasonable resales.[25] In the usual shipment contract situation, the time for tender might be the day seller is to deliver the goods to the carrier, or it might be a day or two

21. *See id.* § 2-703.
22. *See id.* §§ 2-703, -708(1).
23. *Id.* § 2-708(1).
24. *See id.* §§ 2-503(1), -504, -504 cmt. 1.
25. *See* 1 WHITE ET AL., *supra* note 13, § 8:13, at 688 ("[UCC] [s]ection 2-708(1) . . . directs the aggrieved seller to measure the market at the time and place for tender, and this is not the time and place where the seller is most likely to resell.").

later, depending on the deadline for the seller's notification to the buyer. In most cases, the goods have just begun their journey to their destination at the time for tender. But in a nonacceptance case, the seller will not learn of the buyer's breach until the buyer receives the goods and wrongfully rejects them or wrongfully tries to revoke an acceptance. In that situation, the seller may not learn of the breach until many days or weeks have passed since the time for tender. We cannot expect a seller to begin resale efforts until the seller has learned of the breach. Thus, although the market price under section 2-708(1) should be measured as of an early time in the transaction, the time for tender is too early.

2. *The Time When the Seller Learned of the Breach*

A revised section 2-708(1) should require that, in nonacceptance cases, the market price be measured as of the time when the seller learned of the buyer's breach. This rule would comply rather well with the evidentiary principle.[26] Generally, it would be easy and inexpensive to determine the time when the seller learned of the buyer's wrongful rejection or revocation of acceptance.

With respect to the mimicking principle, the question is whether the time the seller learned of the breach is too early for measurement. The mimicking principle suggests that we use the market price at the time when sellers are most likely to make reasonable resales.[27] Few sellers can make a resale on the day they learn of the buyer's wrongful rejection or revocation of acceptance. Most sellers will need at least a few days to investigate resale opportunities and negotiate a resale contract. Therefore, we might want to use the market price at a time soon after the breach but not as early as the day when the seller learned of the breach.

The problem is that no later time seems to be a good alternative. After the the seller learns of the breach, there is no event that occurs in every case that could provide an appropriate time for measurement of the market price. Assuming that we do not want to violate the evidentiary principle by using a rule that measures the market price at the end of a "reasonable time" after the seller learned of the breach, the alternative rule would have to require that the market price be measured as of the end of a specified time period—for example, two months after the seller learned of the buyer's wrongful rejection or revocation of acceptance. But such a rule would be arbitrary. We have no reason to assume that aggrieved sellers would be most likely to make reasonable resales if they resell two months after learning of the buyer's breach. Why not one month? Why not three months?

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26. *See supra* Part I.C.
27. *See supra* Part I.D.

We can assume, however, that sellers would be most likely to make reasonable resales if they resell as soon as possible.[28] In most market conditions, the time when the seller learned of the breach is fairly close to being "as soon as possible." It is certainly closer than the time for tender.[29]

C. Buyer's Market Price Remedy Under Section 2-713—Nondelivery Cases

In some cases, the seller fails to deliver or delivers nonconforming goods, and the plaintiff buyer rightfully rejects the goods or justifiably revokes an acceptance.[30] Such cases are known as "nondelivery" cases.[31]

Section 2-713(1) now provides that, in nondelivery cases, the market price is measured as of the time when the buyer learned of the breach.[32] Under the 2003 version of Article 2, the market price would be measured as of the time for tender.[33] However, the change proposed in the 2003 version was ill-advised, and the present rule should be preserved.

1. The Time for Tender

In the usual shipment contract situation, buyers could not be expected to cover at the time for tender.[34] When the seller fails to deliver the goods to a carrier by the agreed upon day, the buyer might not learn of the failure to deliver until a few days later. If the seller delivered nonconforming goods, the lag between the time for tender and the time the buyer might begin efforts to cover could be long. It could take a few days for the carrier to reach the buyer and possibly even longer for the buyer to inspect the goods and discover the nonconformity. Buyers cannot be expected to begin cover efforts until they have learned of the seller's breach. A time for tender rule would, thus, be contrary to the mimicking principle, which suggests measuring the market price as of the time when aggrieved buyers are most likely to make reasonable covers.[35]

2. The Time When the Buyer Learned of the Breach

The best rule uses the market price at the time the buyer learned of the breach.[36] Admittedly, this is an imperfect way to comply with the mimicking principle. We cannot assume that buyers who have received nonconforming

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28. *See supra* Part III.A.
29. *See* 1 WHITE ET AL., *supra* note 13, § 8:13, at 688.
30. *See* U.C.C. § 2-711(1) (2012).
31. *See id.*
32. *Id.* § 2-713(1).
33. U.C.C. § 2-713 (2003) (withdrawn 2011).
34. *See supra* note 24 and accompanying text (describing when tender occurs in a shipment contract).
35. *See supra* Part I.D.
36. *See* U.C.C. § 2-713(1) (2012).

goods would cover as soon as they discover the nonconformity. A buyer might wait to cover after consulting with the seller about possible adjustments—for example, shipping conforming parts or reducing the price. But the rule setting the market price as of the time the buyer learned of the breach is better than the alternatives. We need a conventional rule that sets the market price at an early time—but not as early as the time for tender. A rule setting the market price at the expiration of a reasonable time after buyer learned of the breach would not be a conventional rule; it would require extensive evidence of the buyer's particular circumstances and, thus, would be contrary to the evidentiary principle.[37] A rule that sets the market price at sixty days—or twenty days or 120 days—after the buyer learned of the breach would be arbitrary.

A rule requiring that the market price be measured as of the time the buyer learned of the breach, on the other hand, comports rather well with the evidentiary principle.[38] If the seller failed to deliver, it should be easy to prove the time when the buyer learned of the breach. If the buyer received nonconforming goods, the buyer could likely prove the time when the nonconformity was discovered. If the date of discovery is difficult to prove, the date on which the buyer notified the seller of its rejection or revocation of acceptance would be easy to prove and could be used as a close surrogate for the time the buyer learned of the breach.

D. Market Price Remedies Under Section 2-708(1) and Section 2-713—Anticipatory Repudiation Cases

This Essay now turns to cases in which the defendant has made an anticipatory repudiation. A party to a sales contract makes an anticipatory repudiation if the party repudiates the contract with respect to a performance not yet due, and such nonperformance would substantially impair the value of the contract to the other party.[39]

If the buyer has repudiated, section 2-708(1) allows the seller to recover market price damages based on the market price at the time for tender (which is the same as the rule for nonacceptance cases).[40] Under the 2003 version of section 2-708(1), the market price is measured as of the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time for tender.[41]

If the seller has repudiated, section 2-713(1) allows the buyer to recover market price damages based on the market price at the time the buyer learned of

37. *See supra* Part I.C.
38. *See* U.C.C. § 2-713(1) (2012); *supra* Part I.C.
39. U.C.C. § 2-610 (2012).
40. *Id.* § 2-708(1).
41. U.C.C. § 2-708(1)(b) (2003) (withdrawn 2011).

the breach (which is the same rule for nondelivery cases).[42] Under the 2003 version of section 2-713(1), the market price is measured as of the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time for tender.[43]

In evaluating any existing or proposed rule that deals with market price damages in repudiation cases, we should acknowledge two limitations on the time at which the market price should be measured. First, the market price should not be measured as of any time earlier than the time when the plaintiff learned of the defendant's repudiation.[44] Second, the market price should not be measured as of any time later than the time for tender. If a buyer plaintiff was not promptly notified that the seller made a shipment on the day for tender,[45] the buyer should assume that the seller's repudiation is final and make a substitute purchase as soon as possible. If a seller plaintiff has not received a retraction of the buyer's repudiation,[46] the seller would not ship the goods on the day for tender and should resell as soon as possible.

Unfortunately, between the time when the plaintiff learns of the defendant's repudiation and the time for tender, no event—no act or failure to act—occurs in every case that would signal the appropriate time to measure the market price. Therefore, the market price at the time when the plaintiff learned of the repudiation should not be used because section 2-610 provides that, for a commercially reasonable time, the aggrieved party may await performance by the repudiating party.[47] Nor should the market price at the end of a reasonable time after the aggrieved party learned of the repudiation be used because it would be difficult, expensive, and arbitrary—and therefore contrary to the evidentiary principle—to try to pinpoint the end of the reasonable time.[48]

This Essay suggests the following approach: if the aggrieved party made a substitute purchase or resale prior to the time for tender, we should use the market price at the time of that purchase or resale. If the aggrieved party did not enter into such a substitute transaction, the market price should be measured as of the time for tender. It should be easy to prove the time of a substitute purchase or resale, as well as the time for tender. Furthermore, this suggested approach—unlike the 2003 "expiration of a commercially reasonable time" approach[49]—would respect the aggrieved party's ability to choose when to give up on the repudiating party and enter into a substitute transaction. In a repudiation case, the plaintiff should get the benefit of the doubt.

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42. U.C.C. § 2-713(1) (2012) (assuming the buyer learns of the breach and the repudiation simultaneously).

43. U.C.C. § 2-713(1)(b) (2003) (withdrawn 2011).

44. We can assume that the aggrieved party would not make a substitute resale or purchase until it has learned of the repudiation.

45. U.C.C. § 2-504(c) (2012).

46. *See id.* § 2-611.

47. *See id.* § 2-610(a).

48. *See supra* Part I.C.

49. *See* U.C.C. §§ 2-713(1)(b), -708(1)(b) (2003) (withdrawn 2011).

IV. MARKET PRICE AT WHAT PLACE?

The mimicking principle suggests that section 2-708(1) market prices should be measured at places where empirical prices mimic the prices at which sellers are most likely to make reasonable resales.[50] The mimicking principle also suggests that market prices under section 2-713 should be measured at places where empirical prices mimic the prices at which buyers are most likely to make reasonable covers.[51]

The evidentiary principle intimates that the market price under section 2-708(1) or section 2-713 should be derived from a database of actual sales that is large enough to be meaningful but small enough to avoid excessive court time and excessive litigation expenses.[52]

A. Seller as Plaintiff—Section 2-708(1)

In both the present and 2003 versions of Article 2, section 2-708(1) provides that the market price is measured at the place for tender.[53] In a shipment contract situation, the "place for tender" seems to mean the place where the seller is to put the goods in the possession of a carrier.[54]

If the seller and buyer were engaged in a local city or county market, there may not be a place for tender. The seller may have agreed to deliver the goods in its own truck or wagon. Or the buyer may have agreed to pick up the goods in its own truck or wagon. Neither situation would involve a carrier. A revised section 2-708(1) should therefore provide that if the seller and buyer were engaged in a local market, the market price is the average price in sales made in that local market.

Things are not as simple, however, if the seller and buyer are involved in a national market. Assume that the plaintiff seller is a shoe manufacturer located in Boston, the defendant buyer is a retailer located in Chicago, and that the parties contracted for a sale of shoes to be delivered by a carrier. Section 2-708(1) requires that the market price be the market price in Boston (the place for

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50. *See supra* Part I.D.

51. *See supra* Part I.D.

52. *See supra* Part I.C.

53. U.C.C. § 2-708(1) (2012); § 2-708(1)(b) (2003) (withdrawn 2011).

54. *See* U.C.C. § 2-503(2) (2012) (providing that if the case is within section 2-504, tender requires that the seller comply with that section); *id.* § 2-504(a) (providing that when the seller is required or authorized to send the goods to the buyer and the contract does not require the seller to deliver them to a particular destination, the seller must put the goods in the possession of a carrier); *see also id.* § 2-504 cmt. 1 (noting that the section is limited to shipment contracts, as contrasted with destination contracts). The relevant provisions and commentary in the 2003 version of sections 2-503(2) and 2-504 in Article 2 are substantively the same as those in the current version of Article 2. *Compare* U.C.C. §§ 2-503(2), -504 (2003) (withdrawn 2011), *with* U.C.C. §§ 2-503(2), -504 (2012).

tender).[55] But what was the market price in Boston on the relevant date? Was it the average sales price Boston shoe manufacturers received from retailers located anywhere in the United States? Was it the average sales price Boston shoe manufacturers received from retailers located in Boston? Was it the average price Boston retailers paid to sellers located anywhere in the United States? Section 2-708(1) and its comments leave these questions unanswered.[56]

This Essay suggests that if the parties were doing business in a national market, the market price should not be derived from a database that focuses on one city. In a national market, an aggrieved seller should be trying to resell at the highest price acceptable to buyers located anywhere in the national market. In this situation, "the highest price" means the highest price for the goods themselves, exclusive of transportation charges. Assuming that a resale buyer would be paying for transportation of the goods, the seller would not care where its resale buyer was located. Another reason for not focusing on one city—be it the seller's city or the buyer's city—is that there may not be anyone in that city who desires to buy the kind of goods the seller is trying to resell. Thus, there are good reasons to conclude that the mimicking principle requires that the market price be the average price for the goods themselves paid by buyers located anywhere in the national market.[57] This would be a market price that mimics the price at which sellers are most likely to make reasonable resales.[58] Because aggrieved sellers should be trying to resell promptly, they cannot be expected to resell at the highest possible price.[59]

In an active national market, the above approach could result in a market price database that is excessively difficult and expensive to produce. To avoid violating the evidentiary principle, the database should be restricted. A revised section 2-708(1) should provide that if the parties were dealing in a national market, the court should set a limit on the number of transactions each party can submit as evidence of the market price. We can expect that the plaintiff seller would submit evidence of prices near the low end of the spectrum—thus maximizing the seller's contract price minus market price damages—and that the defendant buyer would submit evidence of prices near the high end of the spectrum—thus minimizing the contract price minus market price damages the buyer must pay. The result would be a market price somewhere in the middle of the spectrum—a market price close to the average price paid in other parties' transactions conducted at the relevant time. This average price is justified because we should not assume that, in making a resale, the plaintiff seller would have been unusually astute and energetic or unusually stupid and lazy. Some geographical markets are neither national markets—extending over many states—nor local city or county markets. An example would be a market in

55. *See* U.C.C. § 2-708(1) (2012).
56. *See id.*
57. See *supra* Part I.D for a discussion of the mimicking principle.
58. See *supra* Part I.D for a discussion of the mimicking principle.
59. *See supra* Part I.C.

which the buyers and sellers are located throughout five counties in State *A* and four counties in State *B*. If the plaintiff and defendant were dealing in such a market, the court should decide whether to treat the market like a local market and find the average price in all sales made on the relevant date, or to treat the market like a national market and restrict the market price database. The court's decision should depend on whether a database restriction would be necessary to avoid excessive difficulty and expense in proving the market price.

B. Buyer as Plaintiff—Section 2-713

In both the present and 2003 versions of Article 2, section 2-713(2) requires that the market price be measured at the place for tender or, if the buyer has rejected the goods or revoked acceptance, at the place of arrival.[60]

As noted above, if the seller and buyer were engaged in a local market, there may not be any place for tender.[61] A revised section 2-713 should provide that if the seller and buyer were engaged in a local market, the market price is the average price in that local market.

If the parties were dealing in a national market, the present rule in section 2-713(2) raises a number of serious problems. Assume that the place for tender was in the defendant seller's city, and the seller never shipped the goods. Presumably, the market price would be the average price charged by sellers located in that city. In a national market, however, it is not likely that the plaintiff buyer would have made a hypothetical reasonable cover with a substitute seller located in the defendant's city. An aggrieved buyer would probably shop around, searching throughout the national market for the lowest total cover price (the price for the goods plus transportation charges). If there are many sellers in the market, the chances of finding that price in the defendant's city would be slim.

If the seller delivered nonconforming goods and the buyer rejected them or revoked acceptance, the rule under section 2-713(2) requires that the market price be measured at the place of arrival (the plaintiff buyer's city).[62] However, there is no reason to assume that the buyer would have made a reasonable cover with a seller located in the buyer's own city. In a national market with many sellers, the odds are that the buyer had better cover opportunities in other cities. Although the buyer would minimize transportation charges by covering with a seller located in the buyer's own city, the lowest total cover cost might be offered by a seller located in some other city. If the defendant seller was located in a distant city, we might even suspect that the buyer would not have contracted with the seller had there been a suitable source of the goods in the buyer's own city.

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60. U.C.C. § 2-713(2) (2012); U.C.C. § 2-713(2) (2003) (withdrawn 2011).
61. *See supra* Part IV.A.
62. U.C.C. § 2-713(2) (2012).

Therefore, we need a new rule. A revised section 2-713 should provide that if the parties were engaged in a local market, the market price is the average price in that local market. A revised section should also require that if the parties were engaged in a national market, the market price should be the average total cost (including transportation charges) paid by buyers located anywhere in that national market. This market price should be derived from a database, and the court should restrict the number of transactions each party can submit into evidence. A revised section 2-713 should also provide that if the buyer and seller were dealing in a market that was neither a local city or county market nor a national market, the court should decide whether to apply the rule for local markets or apply the rule for national markets, depending on whether a database restriction would be necessary to avoid excessive difficulty and expense in proving the market price.

V. SHOULD A SELLER WHO IS QUALIFIED FOR DAMAGES UNDER SECTION 2-706 BE ALLOWED TO RECOVER MARKET PRICE DAMAGES?

Assume that a plaintiff seller contracted to sell goods to the defendant buyer for a price of $10,000. After the buyer breached, the seller made a resale—complying with the requirements of section 2-706—and the resale price was $9,000.[63] At the relevant time, however, the market price was $8,000. The seller's damages under section 2-706 would be $1,000—the $10,000 contract price minus the $9,000 resale price.[64] The seller's market price damages under 2-708(1) would be $2,000—the $10,000 contract price minus the $8,000 market price.[65]

We can learn much from the *MD=ED-AL* formula, which provides that the measure of damages is equal to the plaintiff's expectation damages minus the plaintiff's avoidable loss. In the above hypothetical, damages of $1,000 would put the seller in an expectation position; because the seller complied with the requirements of section 2-706, we can assume that there was no avoidable loss. The *MD=ED-AL* formula thus suggests that the plaintiff seller should be awarded damages of $1,000, rather than market price damages of $2,000.

In the present version of Article 2, a comment to section 2-713 states that market price damages are not available if the plaintiff buyer has made a cover in compliance with section 2-712.[66]

Unfortunately, no similar rule or comment is included in the present version of section 2-708(1), which deals with a plaintiff seller's market price remedy.[67] The rule for seller plaintiffs should be explicit and similar to the rule

63. *See id.* § 2-706(1).
64. *See id.*
65. *Id.* § 2-708(1).
66. *Id.* § 2-713 cmt. 5.
67. *See id.* § 2-708(1).

for buyer plaintiffs;[68] moreover, the issue is too important to be addressed only in comments. The statutory text of section 2-708(1) should provide that if the seller has resold the goods in compliance with section 2-706, the seller cannot recover damages under this subsection. The statutory text of section 2-713 should provide that if the buyer has covered in compliance with section 2-712, the buyer cannot recover damages under this section.

A. Should There Be an Expectation Cap on Damages Awarded Under Section 2-708(1) or Section 2-713?

If we decide that a plaintiff who is qualified for damages under sections 2-706 or 2-712 should not receive market price damages under sections 2-708(1) or 2-713, must we also decide that any recovery of market price damages under sections 2-708(1) or 2-713 should be subject to an expectation cap limiting the recovery to the amount that would put the plaintiff in the position the plaintiff would occupy had the contract been performed?[69] Neither the present version nor the 2003 version of sections 2-708(1) and 2-713 provides for such a cap.[70]

One advantage of an expectation cap is that it avoids overcompensation, which can occur when a plaintiff has made a resale or substitute purchase but is not qualified for damages under sections 2-706 or 2-712.[71] Assume that the plaintiff is a seller who made a resale for $9,000 but does not qualify for damages under 2-706 because the plaintiff failed to give the buyer a required notification.[72] The unpaid contract price was $10,000. The market price at the relevant time was $8,000. The seller had no incidental damages or expenses saved. Under the present version of section 2-708(1), the seller would recover damages of $2,000—the $10,000 contract price minus the $8,000 market price.[73] Such damages would overcompensate the seller. All that the seller needs to be

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68. *See, e.g.*, Roy Ryden Anderson, *Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference's Breach of Promise . . . Regarding Article 2 Damage Remedies*, 54 SMU L. REV. 795, 810 (2001) (citing Task Force of the Am. Bar Ass'n Subcomm. on Gen. Provisions, Sales, Bulk Transfers, and Documents of Title, Comm. on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1214 (1991)) (supporting a statutory denial of section 2-708(1) market price damages when plaintiff seller has resold the goods in compliance with section 2-706).

69. *See generally* 1 WHITE ET AL., *supra* note 13, § 7:20, at 581–86 (citations omitted) (discussing the expectation cap question).

70. *See* U.C.C. §§ 2-708(1), -713 (2012); U.C.C. §§ 2-708, -713 (2003) (withdrawn 2011).

71. *See generally* 1 WHITE ET AL., *supra* note 13, § 7:20, at 581–86 (citations omitted) (discussing the expectation cap question).

72. *See* U.C.C. §§ 2-706(3), (4)(b) (2012).

73. *See id.* § 2-708(1).

made whole is $1,000—the $10,000 contract price minus the $9,000 resale price.[74]

An expectation cap would be appropriate in some instances to prevent a plaintiff buyer from recovering more than the buyer lost.[75] Suppose that the plaintiff is a buyer who contracted to purchase goods from the defendant at a contract price of $10,000. Assume the plaintiff also had a contract with *T* to sell these same goods to *T* for $12,000, and that the defendant was aware of this. Further, assume that the defendant failed to deliver the goods to the plaintiff, and the plaintiff failed to make a substitute purchase because the market price charged by all sellers had increased to $14,000.[76] Assume that the plaintiff has no liability because the contract with *T* was contingent on the plaintiff's acquisition of the goods for no more than $10,000. Under the present version of section 2-713, the plaintiff buyer would be entitled to consequential damages of $2,000—the lost profit the plaintiff would have made by buying the goods for $10,000 and then selling them for $12,000—because under section 2-715(2)(a), the plaintiff could not reasonably have prevented the loss, and the defendant knew of plaintiff's contract with *T*.[77] An award of $2,000 would satisfy the *MD=ED-AL* formula because the plaintiff's expectation damages would be $2,000, and the plaintiff had no avoidable loss. Under the present version of section 2-713, the plaintiff would also recover damages equal to the $14,000 market price minus the $10,000 contract price, resulting in overcompensation.[78] An expectation cap on the plaintiff's total damages would prevent such overcompensation.

We should consider a legitimate question: would measuring the expectation cap be so difficult and expensive that the evidentiary principle would be violated? To answer this question, one must distinguish between cases in which the plaintiff was a seller and cases in which the plaintiff was a buyer.

B. Would Measuring the Expectation Cap Be Excessively Difficult and Expensive? Seller as Plaintiff—Section 2-708(1)

If the seller is the plaintiff, the seller may have made a resale preventing qualification for the measurement of damages provided in 2-706, in which case the seller would be relegated to the measurement provided in 2-708(1).[79] The

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74. If we apply the *MD=ED-AL* formula, there was probably no avoidable loss because the resale price was higher than the market price; therefore, the seller should receive expectation damages.

75. *See* 1 WHITE ET AL., *supra* note 13, § 7:20, at 581–86 (citations omitted) (discussing whether a buyer's remedy should be subject to an expectation cap).

76. It would not be reasonable for the plaintiff to purchase the goods for $14,000 knowing that she could sell them to *T* for only $12,000.

77. *See* U.C.C. § 2-715(2)(a) (2012).

78. *See id.* § 2-713.

79. *See id.* § 2-706 cmt. 2 ("Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.").

expectation cap should be easy to calculate. One component of the seller's lost expectation would be the seller's reduction in income—the contract price minus the resale price. Proving the contract price and resale price is seldom difficult or expensive. Other components of the seller's expectation loss might include incidental damages with an offset for expenses saved,[80] which could be very difficult to prove. But under section 2-708(1), these items would have to be proven even if there were no expectation cap.[81] If the plaintiff seller has not made a resale, the expectation cap might be established by ascertaining the profit that the seller would have made had the contract with the buyer been performed —the approach used in section 2-708(2).[82] This would be very difficult and expensive to prove, however, if the seller had not actually incurred all of its necessary costs. But situations in which the seller had not made a resale—falling within section 2-708(1) but not section 2-708(2)—are probably infrequent. Section 2-708(2) applies if market price damages under section 2-708(1) do not adequately give the seller its expectation.[83] Indeed, in many cases where the seller has not made a resale, market price damages do not adequately give the seller its expectation.[84] They give the seller the excess of the contract price over the market price, but this excess might be less than the seller's lost profit.[85] If so, section 2-708(2) would apply and section 2-708(1) would not apply,[86] which explains why cases in which the seller had not made a resale—and section 2-708(1) applies—are infrequent. If such cases are infrequent, the difficulty and expense of establishing an expectation cap under section 2-708(1) equal to the seller's lost profit should be tolerated in cases where the seller never made a resale.

C. Would Measuring the Expectation Cap Be Excessively Difficult and Expensive? Buyer as Plaintiff—Section 2-713

Assume that the plaintiff is a buyer who made a substitute purchase that did not qualify the buyer for the measurement of damages provided in section 2-712, thus relegating the buyer to the measurement of damages provided in section 2-713.[87] To determine the recovery that the buyer would need to obtain the buyer's expectation, the contract price would be subtracted from the substitute purchase price. These two prices should be easy to prove. On the other hand, any incidental damages, consequential damages, or expenses saved would also

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80. *See id.* § 2-708(2).
81. *See id.* § 2-708(1).
82. *See id.* § 2-708(2).
83. *See id.* § 2-708(2).
84. *See* 1 WHITE ET AL., *supra* note 13, § 8:13, at 685 ("[T]he contract-market differential will seldom be the same as the seller's actual economic loss from breach.").
85. *See id.* (providing a hypothetical situation where the buyer's contract-market differential is less than his lost profit).
86. *See* U.C.C. § 2-708 (2012).
87. *See id.* §§ 2-712, -713.

have to be proven, which could be difficult and expensive. But these items would have to be proven under sections 2-713(1) and 2-715 even if there was no expectation cap.[88] Assume that the buyer had not made a substitute purchase. If the buyer was a business firm, a large component of the expectation cap would consist of profits lost as a result of the seller's breach. Such lost profits could be very difficult and expensive to prove. But if the buyer was seeking consequential damages for lost profits, the buyer would have to prove them under section 2-715(2)(a) even if there was no expectation cap.[89]

If the plaintiff buyer was a consumer who made a substitute purchase, the expectation cap could easily be measured by subtracting the contract price from the substitute purchase price.

If, however, the consumer did not make a substitute purchase, the expectation cap on the consumer's market price damages should not apply. It would probably be impossible to compute the consumer's expectation—the net benefit the consumer would have enjoyed after receiving the goods and paying the contract price. A large portion of the consumer's benefit would have been pride, pleasure, convenience, or enhanced safety, none of which would have been susceptible to measurement.[90]

VI. CONCLUSIONS

1. A revised section 2-708(1) should state that the market price is subtracted from the unpaid contract price.
2. A revised section 2-713 should state that the contract price is subtracted from the market price.
3. A revised section 2-708(1) should require that, in nonacceptance cases, the market price is measured as of the time when the seller learned of the buyer's breach.
4. A revised section 2-713 should preserve the present rule, which states that in nondelivery cases, the market price is measured as of the time when the buyer learned of the seller's breach.
5. A revised section 2-708(1) should provide that in cases where the buyer repudiated and the seller made a resale prior to the time for tender, the market price is measured as of the time of the resale; if the seller did not make such a resale, the market price is to be measured as of the time for tender.
6. A revised section 2-713 should provide that in cases where the seller repudiated and the buyer made a substitute purchase prior to the time for tender, the market price is measured as of the time of that substitute

88. *See id.* §§ 2-713(1), -715.

89. *See id.* § 2-715(2)(a).

90. Consumer goods are bought for personal, family, or household purposes. *See id.* §§ 2-103(3), 9-102(23). They are not purchased for the purpose of making business profits, which can be measured in dollars.

purchase; if the buyer did not make such a substitute purchase, the market price is measured as of the time for tender.

7. A revised section 2-708(1) should provide that if the seller and buyer were dealing in a local city or county market, the market price is the average price in that local market; if the seller and buyer were dealing in a national market, the market price is the average price in that market, which is derived from a database restricted by the court as to the number of transactions each party can submit as evidence.

   If the seller and buyer were dealing in a geographical market that was neither a local city or county market nor a national market, the court should treat that market as a local market or as a national market, depending on whether a database restriction would be necessary to avoid excessive difficulty and expense in proving the market price.
8. A revised section 2-713 should provide that if the seller and buyer were dealing in a local city or county market, the market price is the average price in that local market; if the seller and buyer were dealing in a national market, the market price is the average total cost (including transportation charges) paid by buyers located anywhere in that national market, and this market price is derived from a database restricted by the court as to the number of transactions each party can submit as evidence.

   If the buyer and seller were dealing in a geographical market that was neither a local city or county market nor a national market, the court should treat that market as a local market or as a national market, depending on whether a database restriction would be necessary to avoid excessive difficulty and expense in proving the market price.
9. The statutory text of a revised section 2-708(1) should provide that if the seller has resold the goods in compliance with section 2-706, the seller cannot recover damages under this subsection.
10. The statutory text in a revised section 2-713 should provide that if the buyer has covered in compliance with section 2-712, the buyer cannot recover damages under this section.
11. A revised section 2-708(1) should provide that damages under this subsection must not exceed an amount that would put the seller in the position the seller would occupy had the contract been performed.
12. A revised section 2-713 should provide that damages under this section must not exceed an amount that would put the buyer in the position the buyer would occupy had the contract been performed, but this "expectation cap" should not apply if the buyer contracted to purchase consumer goods and did not make a substitute purchase.

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