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SELLER'S DAMAGES FOLLOWING RESALE UNDER ARTICLE TWO OF THE UNIFORM COMMERCIAL CODE

*Robert J. Nordstrom**

THE seller's right to resell contracted-for goods following a breach by the buyer[1] is set forth in section 2-706 of the Uniform Commercial Code (Code).[2] That section also contains a statement of the conditions placed upon the exercise of that right[3] and provides the measure of recovery if the resale is made "in good faith and in a commercially reasonable manner":[4]

> [T]he seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.[5]

In most of the cases in which the seller has resold, this section can be applied without difficulty. There are, however, some situations in which judicial interpretation will be needed in order to reach a desired result. The purpose of this article is to examine the measure of damages provided in section 2-706 as applied both to the usual and to the not-so-usual cases.

Legal principles have a deceptive quality of sounding extremely

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1. The phrase "breach by the buyer" may be too broad. The first sentence of § 2-706 of the UNIFORM COMMERCIAL CODE [hereinafter cited as U.C.C.] is: "Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance therof." Sction 2-703 lists four conditions under which the aggrieved seller may proceed under § 2-706: "Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole . . . ." Therefore, there may be breaches by a buyer which do not fall within the four conditions listed in § 2-703; if a particular case involves one of these non-covered breaches, § 2-706 should not be available to the seller.

2. All references to the Uniform Commercial Code are to the 1962 Official Text.

3. For example, the resale must be "in good faith and in a commercially reasonable manner"; "every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable"; the resale "must be reasonably identified as referring to the broken contract"; if resale is by private sale, the seller must give the buyer "reasonable notification of his intention to resell"; and if resale is by public sale, several conditions must be met including (in some cases) "reasonable notice of the time and place of the resale." U.C.C. §§ 2-706(1), (2), (3), & (4). In addition, the seller's right to identify goods to the contract is detailed in § 2-704.

4. Although the only stated conditions on the right of seller to resell and to recover resale damages are those listed in the text, the other conditions of § 2-706, see note 3 *supra*, will probably be read into the right through the "good faith and commercially reasonable manner" requirements.

5. U.C.C. § 2-706(1).

fair as long as they are discussed in the abstract. When considered in relation to specific cases, however, they sometimes become of much more doubtful wisdom. Therefore, this article will proceed from a basic fact pattern to which variations designed to emphasize some of the difficulties presented by the damage formula of section 2-706 will be added.

Basic Fact Pattern. Seller agreed to sell and Buyer to buy "goods"—as that term is defined in section 2-105. The agreed-upon price was $5,000. Buyer committed one of the acts listed in section 2-703 (wrongfully rejected or revoked acceptance of the goods, failed to make a payment due on or before delivery, or repudiated) and Seller elected to resell under the terms of section 2-706. Seller complied with the requirements of that section and is now requesting that damages be computed under the above-quoted formula.

Case One

Buyer had paid nothing on the purchase price. Seller obtained only $4,000 on resale and incurred $300 in incidental damages, but saved no expenses because of Buyer's breach.

This is a case quickly solved by section 2-706. The resale price was $1,000 less than the contract price; thus, Seller's recovery begins at $1,000. Had Seller incurred no incidental damages, that would have been the extent of his award. However, the language of section 2-706(1) makes it clear that Seller will recover his loss on resale ($1,000) "together with" the incidental damages ($300).[6] Seller's total recovery will therefore be $1,300, and he will have been placed in the same financial position in which he would have been had there been no breach; the goods have been sold and Seller has received a net price of $5,000.[7]

6. U.C.C. § 2-710. Seller's Incidental Damages.
Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

7. A pre-Code case is Wickman v. Opper, 188 Cal. App. 2d 129, 10 Cal. Rptr. 291 (1961). A seller who is in the business of selling the contracted-for goods and who can supply all reasonable demand for the product is generally not placed in the same financial position by § 2-706's formula as he would have been with buyer's performance. Such a seller could have made all sales (including the sale to the defaulting buyer), and the sale to the defaulting buyer would have provided additional revenue with which to pay his overhead and to return a net profit to the seller. Thus, one sale has been lost and is not compensated by the second sale which, by hypothesis, could have been made anyway. Such a seller should not ordinarily use § 2-706. His remedy is provided in § 2-708(2). See Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519

CASE TWO

Buyer had paid nothing on the purchase price. Seller was fortunate and obtained $6,000 on resale, incurring no incidental damages and saving no expenses in consequence of Buyer's breach.

This case represents one of the not-so-usual situations mentioned above. Seller was able to sell the goods at a price in excess of the Buyer-Seller contract price, which indicates that Buyer probably had a profitable contract. Buyers in such a situation do not generally breach; yet case law does not need to be searched long to discover fact patterns presenting precisely this type of circumstance.[8] On occasion buyers with profitable contracts have no alternative but to default; on other occasions there is a genuine dispute as to which party is in default and it is not until the court reaches its decision that the buyer knows that he was the breaching party.[9] In any event, legal rules must have sufficient flexibility to solve even the not-so-usual transaction.

The Code's answer to this case is found in section 2-706(6): "The seller is not accountable to the buyer for any profit made on any resale."[10] Since the resale price exceeded the contract price, Seller would not be entitled to any recovery under section 2-706(1), but as was just noted, Seller has no duty to account to Buyer for the $1,000 received above the contract price. Thus, under the Code, as under prior law, the buyer's default—however unintentional—bars him (the buyer) from any protection of his expected profit, although

(1929). Compare A. Lenobel, Inc. v. Senif, 252 App. Div. 533, 300 N.Y. Supp. 226 (1937). See generally Comment, *Lost Profits as Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L.J. 992 (1956). Pre-Code cases are collected in Annot., 24 A.L.R.2d 1008 (1952); *cf.* Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 275-77 (1963).

8. Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953), discussed in text accompanying notes 15-17 *infra*, is such a case. Other cases are discussed in 3 WILLISTON, SALES §§ 579c, 599m (rev. ed. 1948); Corman, *Restitution for Benefits Conferred by Party in Default Under Sales Contract*, 34 TEXAS L. REV. 582, 592 (1956); cases are collected in Annot., 11 A.L.R.2d 701 (1950).

9. Thach v. Durham, 120 Colo. 253, 208 P.2d 1159 (1949), may be such a case.

10. The Code provision quoted in the text continues the rule under § 60(1) of the Uniform Sales Act, which read:

> He [an unpaid seller] shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

Under the Code, "A person in the position of a seller . . . or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest . . . ." U.C.C. § 2-706(6); see U.C.C. §§ 2-707 & -711(3); *cf.* U.C.C. § 9-504.

the reasons that support the seller's right to retain the $1,000, beyond some feeling of what the answer ought to be,[11] are difficult to discover.

CASE THREE

Buyer had paid nothing on the purchase price. Seller was fortunate and received $6,000 on resale but incurred $300 in incidental damages, saving no expenses in consequence of Buyer's breach.

The problem presented by this case centers on whether Seller is entitled to the incidental damages which he incurred even though he received a net benefit of $700 following the breach. The Code does not provide a specific answer. Applying the formula incorporated in section 2-706(1), the following argument can be made that Seller is entitled to damages of $300 from Buyer: Section 2-706(1) provides that a seller recovers the loss on resale (in this case it would be zero) "together with" his incidental damages ($300);[12] by adding these two sums—as section 2-706(1) assumes—Seller's recovery would be the amount of his incidental damages. This argument might be strengthened by the statement in section 2-706(6) that the seller need not account to the buyer for any *profit* made on the resale. Allowing Buyer to reduce the incidental damages by the profit Seller made on resale would be an effective method of requiring Seller to account to Buyer for that profit, contrary to the mandate of the Code. Therefore, since Buyer is not entitled to any of the $1,000 profit Seller made on this resale, Buyer is liable—according to this argument—for the full amount of incidental damages.

There is, however, another way to read the Code. The statement in section 2-706(6) that a seller need not account to the buyer for any profit made on the resale may not refer to *gross* profits (as was assumed in the prior paragraph), but rather to the *net* profits of the sale (that is, the total amount received from the second buyer less the section 2-710 incidental expenses incurred by Seller). If the Code is referring to net profits, a seller has suffered no incidental damages until his expenses following breach exceed the amount by which the the resale price was greater than the contract price. Thus, Seller would have suffered no incidental damages in Case Three and would be entitled only to nominal damages.

The difficulty lies in the fact that the Code makes either of the above interpretations plausible. Nevertheless, the general philosophy

11. 3 WILLISTON, SALES § 553 (rev. ed. 1948).
12. The Code language is set out in the text accompanying note 5 *supra*.

of the Code tends toward the second. Article Two remedies seek to put the non-defaulting (the Code's word is "aggrieved") party in the same financial position he would have been in had there been no default;[13] they do not aim at placing him in a better position. The Code expresses this philosophy in these words:

> 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.[14]

Awarding Seller $300 incidental damages in Case Three puts him in a better financial position than he would have been in had Buyer performed. It is true that the express language of the Code which allows Seller to keep the excess of the resale price over the contract price also has this effect. There is, however, no need to accept a construction which further increases the total profit to Seller by giving him damages for the expenses which contributed at least in part to the receipt of that excess.

Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.[15] should be helpful to a court presented with a fact pattern similar to Case Three. In *Amtorg* the buyer had prepaid nearly $90,000 on a contract price of over $350,000. Partial deliveries reduced the balance due by twenty-five per cent and the prepayment to just under $60,000. The buyer defaulted and the seller was able to resell the goods (printing presses) for $18,765 more than the contract price. The buyer sued the seller for the down payment plus the $18,765 profit. The court found a national policy (arising out of the application of a federal statute to the facts of the case)[16] favoring restitution in spite of the fact that the plaintiff (buyer) was in default. The court concluded:

> Plaintiff [buyer] is therefore entitled to restitution of its payments beyond and above any injury suffered by defendant [seller]. This would not include the additional profit on resale obtained by defendant; no reason is apparent why defendant should not have the advantage it has been able to reap by this fortunate and frugal act. It appears further that defendant by counterclaim asserted certain offsets by way of expenses on its resale. If actually its expenses did eat up its apparent profits, it may deduct the amount of the excess from the prepayment before its refunding. . . . The case

13. Remedies expressing this philosophy are indexed in U.C.C. §§ 2-703 & -711.
14. U.C.C. § 1-106(1). See also U.C.C. §§ 2-703, comment 4; -711, comment 3.
15. 206 F.2d 103 (2d Cir. 1953).
16. See Note, 67 HARV. L. REV. 347 (1953).

> must be remanded for the determination of this issue and for entry of a judgment for plaintiff for refund of the prepayment, subject to deduction of any expenses proven by defendant *if and only so far as* they may exceed its profit of $18,765.[17]

Even though *Amtorg* involved a suit by a defaulting buyer for restitution, its holding on the question of the seller's expenses on resale should also apply to a suit instituted by the seller. Thus, the holding of *Amtorg* and the general philosophy of the Code against forfeitures compel a construction of section 2-706 which allows a seller to recover incidental damages only if they exceed any gross profit on resale. Hence, Seller in Case Three should be awarded no recovery against Buyer.

Case Four

> Prior to breach Buyer prepaid $500 on the $5,000 purchase price; thus, at the time of breach Buyer owed Seller only $4,500 for the goods. Following breach Seller resold the goods for $4,500—incurring no incidental damages and saving no expenses because of Buyer's breach.

Section 2-706's formula begins by allowing a seller to recover the difference between the resale price ($4,500) and the contract price ($5,000).[18] Therefore, under a literal application of section 2-706(1), Seller would be awarded a $500 recovery against Buyer which, when added to the $5,000 already received ($500 from Buyer's prepayment and $4,500 on resale), would net Seller a total of $5,500 on a $5,000 contract.

To the common-law lawyer, such a result is unthinkable. Seller has received the contract price through the down payment and the proceeds of the resale, and has incurred no expenses. He is, therefore, not "damaged" as that term is used in a system of law which seeks to compensate the non-defaulting party rather than penalize the defaulter. Thus both the common law and the stated philosophy of the Code (to put the aggrieved party in as good a position as if the defaulter had performed)[19] are contrary to such a literal application of section 2-706's formula to the facts of Case Four.

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17. 206 F.2d at 108. (Emphasis added.)

18. This portion of the Code is quoted in the text accompanying note 5 *supra*.

19. U.C.C. § 1-106(1). This section requires that Code remedies be "liberally administered" so that the aggrieved party will be put in "as good a position as if the other party had fully performed." To the extent that damages are the chosen remedy, the phrase "as good a position" undoubtedly refers to the *financial* position of the aggrieved party. Liberal administration of remedies will often require judicial construction which expands recovery from the language of the Code. There is, however, no reason why

The recovery in this case can be brought in line with the compensation principle by a judicial construction of section 2-706(1) which inserts the word "unpaid" immediately preceding the word "contract," so that the formula allows a seller to recover the difference between the resale price and the *unpaid* contract price. Inserting the word "unpaid" can be justified on the basis that the Uniform Commercial Code is a *code*, not a single statute. The Code expresses several ascertainable philosophies regarding commercial transactions; with respect to damages, it generally promotes compensation of the aggrieved party and this compensation philosophy ought to be applied to specific cases in the same manner as the theory of common-law decisions is used to decide the obligations of parties in situations not falling within the terms of the particular common-law rule drawn from those decisions. Moreover, the drafters of section 2-706 probably had in mind the case in which the entire contract price was still owed by the buyer—cases like Case One.[20] Surely the inadvertent omission of a word or a phrase in a specific rule that was designed to give direction in one type of case should not prevent a court from adding that word or phrase for an atypical case when such an addition promotes the philosophy of the Code.

That the omission of "unpaid" was inadvertent may be surmised by comparing section 2-706 with two other sections of the Code. First, consider section 2-712, which gives an aggrieved buyer the right to cover and awards the buyer "the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach."[21] Admittedly, once again the reference is only to the contract price; however, under the section which inventories a buyer's general remedies, a buyer may be given cover damages "in addition to recovering so much of

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those words should not also be given the construction suggested in the text when an application of the Code language would overcompensate the aggrieved party. The comments to the seller's remedies make specific reference to § 1-106. U.C.C. § 2-703, comment 4.

20. Any argument that the seller's right of resale should be limited to cases in which the buyer has paid nothing on the price should be rejected. The purpose of the right of resale is to afford an aggrieved seller a commercially reasonable remedy which eliminates the requirement that market price be shown. In this sense the Code expands the resale remedies of the Uniform Sales Act § 60. See Continental Copper & Steel Indus., Inc. v. Bloom, 139 Conn. 700, 96 A.2d 758 (1953), with its emphasis on the seller obtaining "the best prices available," and cases collected in Annot., 44 A.L.R. 296 (1926), supplemented in Annot., 119 A.L.R. 1141 (1939). The Code's purpose of providing a commercially reasonable remedy is just as applicable when the buyer has paid a part of the price as when all of the purchase price is still due.

21. U.C.C. § 2-712(2).

the price as has been paid."[22] Thus, the buyer's cover remedy takes specific account of any prepayments on the contract price. Although there is no similar provision in the sections governing seller's remedies, it may be that the general damage formula for the seller who has resold under section 2-706 was patterned after the buyer's cover remedy provided in section 2-712 without recalling that, with respect to the buyer's remedy, amounts prepaid on the contract price had been dealt with in another section of the Code.[23]

Second, compare section 2-706 with section 2-708 which states the measure of recovery for a seller who has not elected to pursue the resale remedy. The measure of damages provided in section 2-708 is "the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach."[24] This formula parallels that found in section 2-706, although market price is substituted for resale price because the safeguards of cover have not been met.[25] Outside of this understandable change, the only difference between the measures of recovery found in sections 2-706 and 2-708 is the addition of the word "unpaid" in the latter section. Does this addition indicate an intention that the two sections should produce different results when the seller resold the goods for their market price under section 2-706 and when he did not resell but rather sought recovery under the general damage formula of section 2-708? The primary purpose for including the right to "cover" (both a buyer's right to cover and a seller's right to resell) was to give the aggrieved party a remedy more consistent with commercial practice and to simplify recoveries by not requiring detailed proof of market prices.[26] Thus,

22. Section 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract . . . .

23. Comment 1 to § 2-712 (the section giving the buyer the right to cover) states: "This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer's equivalent of the seller's right to resell."

24. U.C.C. § 2-708(1).

25. As to whether a seller who has resold has the option of pursuing damages under § 2-708, see Peters, *supra* note 7, at 257-61; *cf.* Sloss-Sheffield Steel & Iron Co. v. Stover Mfg. & Engine Co., 37 F.2d 876 (7th Cir. 1929). The privilege of using § 2-708(2) following a resale is expressly recognized by that subsection.

26. 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 273-83 (1964).

except for the omission of the word "unpaid" in section 2-706, there is no reason to believe that the Code envisions different measures of recovery under sections 2-706 and 2-708 when the seller has resold the goods for their market price. The word "unpaid" should therefore be read into section 2-706(1) so that, in a suit by Seller in Case Four, the damage formula would consider only the *unpaid* contract price.[27]

Should courts conclude that the proper formula to be applied under section 2-706(1) ought always to begin with the resale price minus the unpaid contract price? Certainly such a conclusion would not affect the results in those cases in which the buyer has made no prepayments (Cases One through Three); it would make section 2-706 parallel to section 2-708 and equivalent to the buyer's cover remedy; and, most important, the Code philosophy of compensation would be promoted by this conclusion. However, generalizations cause difficulties when facts get in their way. Consider the following variation on the Basic Fact Pattern.

CASE FIVE

> Prior to breach Buyer prepaid $2,000 on the $5,000 purchase price. Thus, at the time of Buyer's breach, Buyer owed Seller only $3,000 for the goods. Seller resold the goods for $4,500—incurring no incidental damages and saving no expenses because of the breach by Buyer.

Case Five differs from Case Four only in the amount of the down payment—the $500 of Case Four has been increased to $2,000. Once again this fact pattern falls into the not-so-usual category, since buyers who owe less than the goods are worth do not often breach. Nevertheless, as mentioned above, it is not a satisfactory answer to Case Five Buyer that his situation does not occur very often and that therefore it must be treated like the more common situation, even

27. Section 64 of the Uniform Sales Act contained the following formula for damages when the buyer wrongfully neglected or refused to accept and pay for the goods: "the difference between the contract price and the market or current price . . . ." In commenting on this section, Williston stated:

> But the essential element of damages is conveniently expressed by the formula—the difference between the contract price, that is, the amount of the obligation which the buyer failed to fulfil, and the market price, that is, the value of the goods which the seller has left upon his hands.

3 WILLISTON, SALES § 582 (rev. ed. 1948). Notice how Williston suggests that the contract price should be read as the amount of the obligation "which the buyer failed to fulfil." Is this another way of saying *unpaid* contract price?

U.C.C. § 2-718, discussed in the text accompanying notes 33-42 *infra*, does not support Case Four Seller's claim for $500 in damages. Section 2-718 deals with a buyer's right to restitution; it does not express a policy of awarding sellers up to $500 more than their damages.

though the result may be unjust. Yet this is what the seemingly inflexible formula of section 2-706 does: If the resale conditions of that section are met, subsection (1) would allow Seller to recover from Buyer the difference between the resale and contract prices—or an additional $500. Thus, Seller would have received $4,500 on resale, $2,000 from Buyer's down payment, and $500 damages—a total of $7,000 on a $5,000 contract. An attempt to use section 2-706 in this manner ought to be rejected for the reasons suggested above in the discussion of Case Four.

If this were the only Code problem presented by Case Five, there would have been little reason to include it, for it would have been only a more glaring example of the possibility of using section 2-706 to penalize a defaulting buyer. Case Five was included because its larger down payment brings into consideration another section of the Code (section 2-718)—a section whose philosophy is other than that of only compensating the aggrieved party.[28] In Case Five, Buyer paid a substantial sum of money and received nothing in return, except perhaps the pleasure of having entered into a contractual relation. Since Buyer has paid more than the amount by which the goods have declined in value, Buyer may desire a return of as much of the $2,000 down payment as he can secure. Such a claim is foreign to a fault-minded legal system because it presents a party in substantial default attempting to recover from one who has committed no breach of contract. Seller is not at "fault" and therefore, if Buyer is to recover, such recovery must rest on the idea of preventing even a non-breacher from gaining an unjust enrichment at the expense of the breaching party.[29]

The majority of common-law cases refused to grant the defaulting buyer any relief,[30] and the courts often supported their decisions

28. U.C.C. §§ 2-718(2) and (3) are quoted in the text following note 32 *infra*.

29. Disgorging unjust enrichments is the goal of a series of ideas loosely grouped under the heading of restitution. The policy underlying the statement in the text is summarized in RESTATEMENT, RESTITUTION § 1 (1937): "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." The same principle can be traced back to DIGEST OF JUSTINIAN Book 12, tit. 6, para. 14: "For this by nature is equitable, that no one be made richer through another's loss." See DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 3 (1951).

30. Atalah v. Wilson Lewith Mach. Corp., 200 F.2d 297 (4th Cir. 1952); Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 197 Pac. 94 (1921) ("No rule is more firmly settled"); Noel v. Dumont Builders, Inc., 178 Cal. App. 2d 691, 3 Cal. Rptr. 220 (1960); Thach v. Durham, 120 Colo. 253, 208 P.2d 1159 (1949) (*But cf.* Perino v. Jarvis, 135 Colo. 393, 312 P.2d 108 (1957).); Foss-Hughes Co. v. Norman, 32 Del. 108, 119 Atl. 854 (1923); Reitano v. Fote, 50 So. 2d 873 (Fla. 1951); Cobb v. Library Bureau, 268 Mass. 311, 167 N.E. 765 (1929); Notti v. Clark, 133 Mont. 263, 322 P.2d 112 (1958); Ellinghouse v. Hansen Packing Co., 66 Mont. 444, 213 Pac. 1087 (1923); Babbitt v. Wides Motor Sales Corp., 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. T. 1959); Dluge v. Whiteson, 292 Pa. 334, 141 Atl. 230 (1928); Neis v. O'Brien, 12 Wash. 358, 41 Pac. 59 (1895).

Not all cases denied recovery to the defaulting buyer. Indeed, there was substantial

with colorful phrases about the impact which an allowance of restitution would have on the commercial world.[31] In these jurisdictions, neither Seller nor Buyer in Case Five would have been allowed any recovery and Seller would have "netted" $6,500 on the $5,000 contract.[32] The Code, however, has taken a partial step in favor of the defaulting buyer. Section 2-718 of the Code approves agreements which provide for liquidated damages and then provides:

> (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.

Thus, the Code rejects the rule that a defaulting buyer has no right to any restitution of his down payments,[33] and to this extent

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authority which allowed recovery for the amount of the benefits the buyer had conferred on the seller. Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953); Michigan Yacht & Power Co. v. Busch, 143 Fed. 929, 934 (6th Cir. 1906) ("In justice the defendants have no right to more of this money than will compensate them against loss by reason of plaintiff's conduct"); Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569 (6th Cir. 1894); McCrea v. Ford, 24 Colo. App. 506, 135 Pac. 465 (1913); Sabas v. Gregory, 91 Conn. 26, 98 Atl. 293 (1916); Hickock v. Hoyt, 33 Conn. 553 (1866); Wonder Prods., Inc. v. Blake, 330 Mich. 159, 47 N.W.2d 61, *cert. denied*, 342 U.S. 850 (1951); Humphrey v. Sagouspe, 50 Nev. 157, 254 Pac. 1074 (1927); Bryant v. Pennington, 346 S.W.2d 367 (Tex. Civ. App. 1961); Breding v. Champlain Marine & Realty Co., 106 Vt. 288, 172 Atl. 625 (1934); Stewart v. Moss, 30 Wash. 2d 535, 192 P.2d 362 (1948).

Nonetheless, cases stating that recovery would be denied to a defaulting buyer were probably in the majority. 3 WILLISTON, SALES § 599m (rev. ed. 1948); WOODWARD, LAW OF QUASI CONTRACTS § 177 (1913); Corman, *supra* note 8; Talbot, *Restitution for the Defaulting Buyer*, 9 W. RES. L. REV. 445 (1958); cases collected in Annot., 11 A.L.R.2d 701 (1950).

31. See, *e.g.*, Dluge v. Whiteson, 292 Pa. 334, 141 Atl. 230 (1928).

32. U.C.C. § 2-706(6), which allows a seller to retain any "profit" made on the resale, does not express a policy of allowing the seller to retain the down payment when the down payment plus the proceeds of the resale exceed the contract price. See U.C.C. § 2-718.

33. *Cf.* Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965). U.C.C. § 2-718 parallels N.Y. PERS. PROP. LAW § 145(a) (McKinney 1962). New York was one of the states which had denied restitution recovery to the defaulting buyer. NEW YORK LAW REV. COMM'N REPORT 234 (1942). New York law drew a distinction between payments on the price

section 2-718 strengthens the philosophy that an aggrieved seller is entitled only to compensation. However, the compensation principle is partially lost in the limitation which is placed on a buyer's right: A defaulting buyer is not entitled to recover all of his prepayments (less seller's damages); nor does he recover the amount of his seller's benefit.[34] A buyer's basic right to restitution is a right to recover the amount by which his payments exceed a stated minimum—a minimum which varies depending upon the value of the buyer's total contract obligations, but which never exceeds $500. Therefore, in situations like Case Five, there is a Code philosophy to allow Seller (in Buyer's suit for restitution) to retain $500 without a showing of damages.[35] This philosophy is contrary to the compensation principle and, as will be demonstrated, makes a solution to Case Five difficult.

Suppose Case Five Buyer seeks restitution under section 2-718. His basic right is detailed in section 2-718(2), which is quoted above. Since the contract price is $5,000 and since twenty per cent of $5,000 exceeds the $500 maximum, Buyer is entitled to restitution of $1,500 —that is, the $2,000 down payment less the statutory maximum of $500. However, section 2-718(3) adds that the "buyer's right to restitution under subsection (2)" is subject to offset by the amount of Seller's *damages*. It is at this point that the restitution remedy of section 2-718 does not easily mesh with the two principal sections on seller's damages. The problems thus created may be illustrated by the following three situations.

Situation A

Assume that Seller in Case Five had not complied with the requirements of section 2-706 when he resold, that he therefore was not entitled to recover the difference between the resale and con-

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and deposits given as security. The latter could be recovered. Annot., 11 A.L.R.2d 701, 713-17 (1950). U.C.C. § 2-718, comment 2, rejects this distinction.

34. He would have recovered the amount of the seller's benefit in those states which, prior to the Code, allowed recovery to the defaulting buyer. Foster v. Warner, 42 Idaho 729, 249 Pac. 771 (1926).

35. Perhaps the philosophy of allowing the non-defaulting seller to retain up to $500 of down payments reflects a belief that, upon a buyer's breach of contract, a seller has damages which are difficult to measure—especially when the contract is small and the down payment minimal. Thus, the seller can retain the Code minimum without proving damages. However, on seller's breach of contract, the buyer does not receive similar favorable treatment. If he has accepted non-conforming goods, the buyer must pay the price, U.C.C. § 2-607, and can reduce recovery by proving his damages, U.C.C. § 2-714, but he cannot retain up to $500 worth of the goods without paying for them. The difference between the Code treatment given sellers and buyers may be explained in part by the pre-Code law. Corman, *supra* note 7.

tract prices, and that a court would find that the market price of the goods was at least $5,000, even though Seller resold for $4,500. Buyer's failure to pay the remaining $3,000 on the contract price has caused Seller no damage (since there is no difference between the contract and market prices)[36] and, therefore, under section 2-718(2), Buyer ought to recover $1,500—the $2,000 down payment less the $500 deduction. Thus, Seller's net financial position would have been at least $5,500, since he could have kept the goods (worth at least $5,000) and, under section 2-718, $500 of Buyer's down payment. Such a case is not difficult to solve under the Code, even though there may be disagreement with the policy underlying the legislative decision which allows a seller to retain up to $500 without a showing of injury.

Situation B

Assume again that Seller in Case Five had not complied with the resale requirements of section 2-706, but that a court would find that the market price of those goods was $4,500. Seller's damages would be measured by section 2-708(1): unpaid contract price less market price. Thus, if Buyer had made no down payment in Case Five, Seller would have been entitled to $500 in damages ($5,000—the unpaid contract price—less $4,500—the market price). However, Case Five assumes that Buyer made a substantial down payment prior to his default and therefore it is necessary to consider the effect which such a down payment has on a determination of Seller's damages.

First, having made a down payment, Buyer is placed in the position of having to initiate court action since Seller undoubtedly would be most willing to leave matters just where they are: he has $2,000 from Buyer and $4,500 on the resale—a total of $6,500 from a $5,000 contract. The defaulting Buyer must therefore bear the uncertainties involved in attempting to change this status quo by means of an action for restitution under section 2-718 which allows the non-defaulting Seller to retain $500 of the down payment without any showing of injury. Second, the $2,000 down payment and the resulting restitution action require Seller to establish his damages *as an offset* to Buyer's right of recovery. Since it has been assumed in Situation B that the "cover" formula of section 2-706 is not available, those damages must be measured under section 2-708(1)

36. This article assumes that § 2-708(1) is applied to determine the seller's damages. See text at note 24 *supra*. If subsection (2) is applicable, see note 7 *supra*, the measure and amount of seller's damages may change; however, the approach to buyer's restitution recovery would be the same. Section 2-708(1) was used in the text because of its similarity to the damage formula when the seller has elected resale under § 2-706.

and would be zero because the unpaid contract price ($3,000) is less than the market price ($4,500) of the goods.[37] Therefore, a literal application of the language of sections 2-718(3) and 2-708(1) would allow Buyer to recover $1,500—the same amount he recovered in Situation A. Such a result compensates Seller for his loss since, after default, Seller has goods worth $4,500 and a right to retain $500 of the down payment, but it ignores the philosophy of section 3-718(2) which allows a non-defaulting seller to retain up to $500 of a down payment without a showing of damages.[38]

That there is an inconsistency between these two parts of the Code is not surprising; a philosophy of compensation and a philosophy of penalizing the defaulting party are difficult to assimilate. Courts can, if they desire, use section 2-708 as it was used in the preceding paragraph to limit substantially the scope of the statutory deduction from the defaulting buyer's restitution recovery. Urging such a Code construction is tempting, but it too patently ignores the express purpose of section 2-718. There are several possible methods of giving effect to this purpose under facts like those in Case Five when Seller is relying on section 2-708 to measure his damages.[39] One method would be to hold that a buyer's "right to restitution" which is subject to offset under section 2-718(3) means the buyer's right to his down payment and not to his down payment less the statutory deduction, as has been assumed up to this point. Thus, from the down payment ($2,000)—which it is assumed is being returned—would be subtracted the section 2-708 damages of $500 [since the restitution payment ($2,000) increases the unpaid contract price from $3,000 to $5,000, the damages (unpaid contract price less market price) are $500]; from this difference would then be deducted

37. This result follows even though the money returned to Buyer is considered as increasing the "unpaid contract price" for the purpose of § 2-708(1)'s damage formula. If $1,500 must be returned pursuant to § 2-718, the unpaid contract price would still be $4,500. Since the goods are worth $4,500, the UCC § 2-708(1) formula produces no damages to be offset against Buyer's restitution recovery.

38. These same problems arise whenever the goods are worth less than the contract price, but more than the amount still due on the contract price. For example, if the goods in Case Five had a market price of $3,800 (assume no resale for $4,500), the analysis in the text would give Buyer a right to restitution of $1,500 ($2,000 down payment less the $500 maximum). Under § 2-718(3), Seller could offset damages of $700 since the "unpaid contract price" under U.C.C. § 2-708(1) would be increased to $4,500. See note 37 *supra*. Buyer's net recovery would be $800 and Seller would have goods worth $3,800 and a right to retain $1,200 of the down payment. Seller has thus "lost" the statutory $500 deduction allowed by § 2-718(2).

39. In cases where the purchase price and the down payment substantially exceed the $500 limit in § 2-718, it is possible that neither the court nor the parties will consider carefully how the $500 ought to be handled. See Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965).

the statutory twenty per cent or $500, whichever is smaller. Such a construction would permit Buyer to recover $1,000 and would leave Seller with goods worth $4,500, $500 as damages, and $500 as the statutory penalty awarded when a buyer breaches after having made a substantial down payment. Another method of reaching the same result would be to ignore the word "unpaid" in section 2-708(1) in those cases in which a defaulting buyer is seeking restitution. This construction would give Seller $500 in damages (contract price minus market price) to be deducted from Buyer's right to restitution of $1,500. Although such a construction makes no sense if the purpose of Code damages is to award compensation and only compensation, nevertheless this approach is consistent with the philosophy of section 2-718 and, since Buyer must rely on that section for his recovery, its philosophy ought to control.[40]

Situation C

Finally, assume Case Five Seller had complied with the resale requirements of section 2-706. Buyer's right to $1,500 in restitution would then be subject to Seller's damages—presumably measured by section 2-706(1). A literal application of that section's formula would give Seller $500 in damages (contract price minus resale price), even though he resold for more than the unpaid balance. Buyer's restitution award would thus be $1,000 and Seller would have a net recovery of $5,500. The apparent policy of section 2-718(2) has been satisfied and it has been satisfied without the difficulties experienced in working with section 2-708, which does include the word "unpaid" in setting forth the damage formula. In short, the restitution philosophy of the Code is more easily served by the contract minus resale price formula of section 2-706 than by the awkward handling of the word "unpaid" when it appears in section 2-708.

Thus, any confident suggestion that the formula in section 2-706(1) should be judicially rewritten for all cases so as to consider the amounts a buyer has paid toward the contract price must be

40. This result is reached with reluctance. A defaulting buyer ought to be able to recover the net benefits which his partial performance has given the seller. Unless ideas supporting punitive damages have intervened and except for those cases where the defaulting party has received a benefit from the non-defaulter's performance, the law should require compensation—but no more than compensation. Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 OHIO ST. L.J. 264 (1959). Those courts which agree with this philosophy, see cases cited in note 30 *supra*, can read § 2-718 so that the $500 is a part of the unpaid contract price; thus, the offset by the seller will be correspondingly reduced. However, the Code purpose to award a seller up to $500 *in addition to* his damages—when sued by a defaulting buyer—seems clear. See generally 5A CORBIN, CONTRACTS §§ 1122-35 (1964).

tempered by the supposed policy of section 2-718. Perhaps this much can be said: as long as a seller is using section 2-706 to recover what he claims are his damages after resale, the formula should begin with the *unpaid* contract price. On the other hand, when the breaching buyer is the moving party seeking restitution of his prepayments, the historical reluctance of courts to come to the aid of the defaulter may cause those courts to apply section 2-706's formula literally and to remake section 2-708(1) so as to eliminate the word "unpaid." Indeed, the Code itself promotes such a policy in this situation. This construction will diminish the buyer's section 2-718 recovery and perhaps "teach him a lesson" for breaching his contract[41]—a lesson which is entirely unneeded because, by hypothesis, these are contracts where the buyer owes less than the goods are worth.

Conclusion

The Code has given both the buyer and the seller—on the default of the other—a privilege to cover, by either buying or selling on the market. When certain safeguards are followed, damages are computed from the cover price. The seller's measure of damages is detailed in section 2-706(1), but that section ignores payments made by the buyer prior to his breach. This omission will cause difficulties until the statute is judicially construed in enough cases to present a pattern for predicting future results.

This article does not argue that the buyer should not be made to compensate the seller for the buyer's breach. On the contrary, compensation should be the foundation of contract damages. However, no more than compensation should be required of the buyer. The Code's rules of damages, and especially the measure included in section 2-706(1), must be applied with the same judicial understanding as is required in applying any sweeping rule of law. The purposes underlying the rule must be sought out and the results in the particular case measured against those purposes.

41. Neis v. O'Brien, 12 Wash. 358, 41 Pac. 59 (1895).