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A RADICAL RESTATEMENT OF THE LAW OF SELLER'S DAMAGES: MICHIGAN RESULTS COMPARED

*Robert J. Harris**

I. INTRODUCTION

THIS is the second in a series of articles concerned with the measurement of expectation damages¹ in contract cases where the plaintiff is a "seller."² In the first article³ my notions of how damages should be measured in such cases were set forth. This article restates those views⁴ and considers the results of relevant Michigan Supreme Court decisions. Subsequent articles will compare my notions with the case law of California and New York, and with the case law which has developed under the Uniform Sales Act.

Rules of law treating the measure of expectation damages must answer four questions: (1) what is to be valued; (2) what technique of valuation should be used; (3) which party has the burden of going forward to prove the value; (4) how should the value, once ascertained, be taken into account.

Conventional judge-made and statutory law on expectation damage measurement consists of three discrete bodies of authority: (1) statements of the abstract guiding policies; (2) what can be called "parochial damage formulae"; and (3) scattered rulings on the burden of proof. The statements of abstract guiding policies, recognized in Michigan as elsewhere, can be summarized thus: (1) unless one of the following five policies would be thwarted, plaintiff should recover a sum which, when added to the benefits

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¹ Expectation damages are damages whose prime function is to make plaintiff as well off as if the contract had been fully performed.

² "Seller" is used here to include anyone whose performance is more than or different from payment of money. It includes sellers of realty, services and personalty, as well as bailors and lessors. For the rationale of the definition, see text *infra* at 858.

³ Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577 (1962).

⁴ Some changes have been made in the theory presented in the prior article, chiefly regarding burden of proof and the lost volume problem. The present article, unlike the prior one, is not confined to total breach cases.

he already received under the contract, will give him an economic status⁵ identical to the one he would have enjoyed had the contract been performed precisely as agreed;⁶ (2) there is no recovery for items of loss unforeseeable to defendant at the time of contracting;⁷ (3) there is no recovery for those consequences of breach which plaintiff could have avoided by reasonable self-protective care;⁸ (4) all of plaintiff's gains causally related to the breach must be taken into account in measuring damages,⁹ whether or not plaintiff was obligated by the mitigation notion to incur the risks that were involved in achieving the particular gain;¹⁰ (5) all items not proved with sufficient certainty are to be ignored in damage measurement;¹¹ (6) all of plaintiff's expenditures in reasonable

⁵ The general rule denies recovery for mental anguish. See *Hall v. Encyclopaedia Britannica*, 325 Mich. 35, 37 N.W.2d 702 (1949); 5 CORBIN, CONTRACTS § 1076 (1951) [hereinafter cited as CORBIN]; RESTATEMENT, CONTRACTS § 341 (1932) [hereinafter cited as RESTATEMENT]. There are rare exceptions. See *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *McConnell v. United States Express Co.*, 179 Mich. 522, 146 N.W. 428 (1914); *Humphrey v. Michigan United Rys.*, 166 Mich. 645, 132 N.W. 447 (1911).

⁶ See *Balcom v. Tribbett*, 197 Mich. 620, 627, 164 N.W. 261, 262 (1917); *Fell v. Newberry*, 106 Mich. 542, 543, 64 N.W. 474 (1895); *Petrie v. Lane*, 67 Mich. 454, 458, 35 N.W. 70, 72 (1887). See also *Harris*, *supra* note 3, at 577 n.3.

⁷ This requirement is variously expressed as involving foreseeability, tacit assent to liability by defendant, that the item of loss be the natural and probable consequence of breach, that it arise directly from the breach. See, e.g., *Huler v. Nasser*, 322 Mich. 1, 8, 33 N.W.2d 637, 640 (1948) ("not damages within the contemplation of the parties"); *Wetmore & Wetmore v. Pattison*, 45 Mich. 439, 441, 8 N.W. 67, 68 (1881) ("damages . . . such as flow directly from his own default"); *Cuddy v. Major*, 12 Mich. 368, 370 (1864) ("an intention on the part of the vendor to assume an enlarged engagement"); *Clark v. Moore*, 3 Mich. 55, 60 (1853) ("not . . . the natural and proximate consequences of the breach"). See also the extensive citation of Michigan cases in *Frederick v. Hillebrand*, 199 Mich. 333, 342, 165 N.W. 810, 813 (1917). See generally 5 CORBIN § 1007; McCORMICK, DAMAGES §§ 137-41 (1935) [hereinafter cited as McCORMICK]; RESTATEMENT § 330.

⁸ This is known as the "duty to mitigate damages" or the "doctrine of avoidable consequences," and is recognized in Michigan. See *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252 (1924); *Beebe v. Cullinane*, 214 Mich. 37, 181 N.W. 1016 (1921); *Savage & Farnum v. Drs. K. & K.'s U.S. Medical & Surgical Ass'n*, 59 Mich. 400, 26 N.W. 652 (1886). See generally 5 CORBIN § 1039; McCORMICK §§ 33-42; RESTATEMENT § 336; Annot., 81 A.L.R. 282 (1932). *But see* *White & Carter, Ltd. v. McGregor*, [1962] 2 Weekly L.R. 17 (H.L.), discussed in *Goodhart, Measure of Damages When a Contract Is Repudiated*, 78 L.Q. REV. 263 (1962).

⁹ See *Harrington-Wiard v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911); *Milligan v. Sligh Furniture Co.*, 111 Mich. 629, 70 N.W. 133 (1897); *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887). See also 5 CORBIN § 1041; McCORMICK § 160.

¹⁰ There is no Michigan case on point. Apparently the only authority in the United States for this proposition is *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 (1931). The commentators cited in note 8 *supra* are in accord. See also *British Westinghouse Elec. & Mann Co. v. Underground Elec. Ry.*, [1912] A.C. 673 (dictum); *Cockburn v. Trusts & Guarantee Co.*, 55 Can. Sup. Ct. 264, 269-70, 37 D.L.R. 701, 704 (1917), *affirming* 38 Ont. L.R. 396, 33 D.L.R. 159 (App. Div. Sup. Ct. 1917).

¹¹ See *Stephany v. Hunt Bros. Co.*, 62 Cal. App. 638, 217 Pac. 797 (1923); *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912); *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473, 86 N.W. 954 (1901); *Stevens v. Yale*, 113 Mich. 680, 72 N.W. 5 (1897); *Schoenberg v. Forrest*, 253 S.W.2d 331 (Tex. Civ. App. 1952); 5 CORBIN § 1020;

efforts to avoid the consequences of breach can be recovered,¹² whether or not the effort ultimately proves successful.¹³

A typical "parochial damage formula" appears in section 64, subsection 3, of the Uniform Sales Act:¹⁴

"Section 64. Action for damages for non-acceptance of goods. . . .

"(3) where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Another typical one, used where plaintiff is a building contractor and defendant-owner committed a total breach, appears in *Restatement of Contracts*, section 346(2)(a):

"the entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less installments already paid and the cost of completion that the builder can reasonably save by not completing the work. . . ."¹⁵

Yet another, this quoted from *Corbin on Contracts*, governs cases in which plaintiff is an employee wrongfully discharged by defendant-employer before plaintiff substantially completed the service of a particular period for which a definite wage installment was the agreed equivalent. The measure is "the total amount of the unpaid wages that were promised to him for his service, less

McCORMICK §§ 25-32; RESTATEMENT § 331(1); Note, 64 HARV. L. REV. 317 (1950); Annot., 78 A.L.R. 858 (1932).

¹² See *Hartford City Paper Co. v. Enterprise Paper Co.*, 86 F. Supp. 549 (E.D. Pa. 1949); *National Commodity Corp. v. American Fruit Growers, Inc.*, 45 Del. 169, 70 A.2d 28 (1949); *Taylor v. Goldsmith*, 228 Mich. 259, 200 N.W. 254 (1924); *Federal Bond & Mortgage Co. v. Burstein*, 222 Mich. 88, 192 N.W. 549 (1923); *Piowaty v. Sheldon*, 167 Mich. 218, 132 N.W. 517 (1911); *Berquist v. N. J. Olsen Co.*, 165 Minn. 406, 206 N.W. 931 (1925); *Lake County Pine Lumber Co. v. Underwood Lumber Co.*, 140 Ore. 19, 12 P.2d 324 (1932); 5 CORBIN § 1044; McCORMICK § 42; RESTATEMENT § 336(2); Annot., 84 A.L.R. 171 (1933).

¹³ There is no Michigan authority for this point. See *Development Co. of America v. King*, 170 Fed. 923 (2d Cir. 1909); *Baker v. Mode Millinery Co.*, 193 Ill. App. 507 (1915); *Rench v. Hayes Equip. Mfg. Co.*, 134 Kan. 865, 8 P.2d 346 (1932); 5 CORBIN § 1044; RESTATEMENT § 336(2).

¹⁴ MICH. COMP. LAWS § 440.64 (1948).

¹⁵ This formula is used in Michigan. See *Nurmi v. Beardsley*, 284 Mich. 165, 278 N.W. 805 (1938); *Scheible v. Klein*, 89 Mich. 376, 50 N.W. 857 (1891); *Wells v. Board of Educ.*, 78 Mich. 260, 44 N.W. 267 (1889).

the amount that he can earn by making reasonable effort to obtain similar service under another employer."¹⁶

Each parochial damage formula is specifically tailored for a single kind of breach (such as non-performance, rather than tardy or defective performance), for a single kind of contract (such as sale of goods, rather than bailment or sale of realty or sale of services), for acts by a certain party (such as plaintiff-seller, rather than plaintiff-buyer). In theory, at least, there are as many of these parochial rules as there are fact situations to be litigated.

The last of the three conventional bodies of doctrine concerns burden of proof. The case law on this topic usually is too fragmentary to provide anything deserving the name "rules." Typically it consists of (1) scattered holdings devoid of generalization¹⁷ and (2) oscillating judicial endorsements of two overly broad and inconsistent positions. One of these shibboleths is to the effect that "plaintiff has the burden of proving his damages"¹⁸—suggesting that plaintiff *always* has the burden of proving all aspects of damage measurement, including the value of what he saved or should have saved because of the breach. The other purported command provides that "defendant, being the party at fault, has the burden of proving mitigation—what plaintiff saved or should have saved thanks to breach."¹⁹ Probably in all states, despite the presence of one or both of these supposed rules in the judicial literature, there are some situations in which defendant consistently has the burden of proving what he saved or should have saved,²⁰ and there are

¹⁶ 5 CORBIN § 1095, at 431. See also *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922); *Gerardo v. Brush*, 120 Mich. 405, 79 N.W. 646 (1899); *Stearns v. Lake Shore & Mich. So. Ry.*, 112 Mich. 651, 71 N.W. 148 (1897).

¹⁷ See, e.g., *Milligan v. Haggerty*, 296 Mich. 62, 295 N.W. 560 (1941); *McCull v. Wardowski*, 280 Mich. 374, 273 N.W. 736 (1937); *International Textbook Co. v. Schulte*, 151 Mich. 149, 114 N.W. 1031 (1908); *Brownlee v. Bolton*, 44 Mich. 218, 6 N.W. 657 (1880); Annots., 17 A.L.R.2d 963 (1951), 134 A.L.R. 242 (1941). The problem is barely mentioned in the *Restatement*, probably because it was not considered to be substantive. *But see* RESTATEMENT § 333 (d) (defendant has the burden of proving that the plaintiff made a losing contract in reliance damage cases).

¹⁸ See *Shapiro v. Fyrac Mfg. Co.*, 264 Mich. 280, 249 N.W. 851 (1933); *Mount Ida School for Girls v. Rood*, 253 Mich. 482, 235 N.W. 227 (1931); *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930). *Cf.* RESTATEMENT § 333(d).

¹⁹ See *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907); *Carver v. School Dist.*, 113 Mich. 524, 71 N.W. 859 (1897); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893). See also RESTATEMENT § 331, comment c ("Doubts are generally resolved against the party committing the breach of contract.").

²⁰ See cases where plaintiff is a full-time employee wrongfully discharged before the end of his term contract. *E.g.*, *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958); *Edgecomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Farrell v. School Dist.*, *supra* note 19. See also Annots., 41 A.L.R.2d 955 (1955); 134 A.L.R. 242 (1941).

other situations in which this burden is routinely placed upon plaintiff.²¹

Conventional doctrine does not address itself directly to the choice among valuation techniques, although the various parochial damage formulae give some clues. Underlying this series of articles is an assumption that the doctrine makes more sense when restated in valuation terms. These articles involve an effort to restate in such terms one sector of expectation damage law—the part that governs cases in which plaintiff is a “seller.”²²

A. *A Single General Rule*

A single general rule can answer two of the four basic questions in all expectation damage cases.²³ The rule is: “Plaintiff should recover (minuend minus subtrahend) plus incidental damages.”²⁴ The “minuend” is always the value to plaintiff²⁵ of the difference

²¹ See cases where plaintiff is a seller of staple goods. *E.g.*, *Peters v. Cooper*, 95 Mich. 191, 54 N.W. 694 (1893); *Brownlee v. Bolton*, 44 Mich. 218, 6 N.W. 657 (1880). See also Annot., 130 A.L.R. 1336 (1941).

²² By and large the question of the *date* on which value should be measured will not be treated. For discussion of this vexing question, see 5 CORBIN § 1005; McCORMICK § 48; RESTATEMENT § 338; Beale, *Damages Upon Repudiation of a Contract*, 17 YALE L.J. 443 (1908); *Editorial*, 66 CENT. L.J. 365, 383 (1908); Note, 37 MINN. L. REV. 215 (1953); Comment, 17 YALE L.J. 611 (1908); Annot., 34 A.L.R. 114 (1925).

²³ The rule is thought to be useful whether plaintiff is the “seller” or not; whether the subject matter of the contract is realty, personalty, services, or some combination; whether the transfer of property is permanent (sale or exchange), or temporary (bailment or lease); whether the promises were aleatory or not; whether the breach was “total” or “partial”; whether the defendant’s default was non-performance, defective performance, or tardy performance; whether the breach was anticipatory or not; whether the contract was unilateral, bilateral, or a non-bargain agreement supported by some substitute for consideration. (What did the medicine man say? “. . . will cure lumbago, falling arches, colic and warts; grow hair; purify the blood; steady the nerves; and bring the bloom of youth to your dear grandmother’s withered cheek.”)

²⁴ “Minuend plus subtrahend” appears in parentheses to show that it is the arithmetic, not algebraic, sum of the parenthetical matter and incidental damages which is recovered. If the minuend is \$50, the subtrahend \$75 and the incidental damages \$5, plaintiff recovers \$5, not zero. His \$5 recovery is really a reliance damage recovery; a zero recovery would be called for were the goal to give plaintiff the equivalent of full performance on both sides—the expectation remedy. This assumes that plaintiff’s reliance damage remedy can exceed what he could recover on an expectation damage theory. The Michigan law is in accord. See *Reynolds v. Levi*, 122 Mich. 115, 80 N.W. 999 (1899); *cf.* *Feldman v. Wear-U-Well Shoe Co.*, 191 Mich. 73, 157 N.W. 395 (1916).

There is scattered authority in other states for the proposition that reliance damages must be reduced by the sum plaintiff saved by not performing the balance of the contract. See *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949); RESTATEMENT § 333(a); Annot., 17 A.L.R.2d 1300 (1951). If “saved” means “expenses not incurred” as well as “resale losses not sustained,” in these other states the plaintiff can never recover, as reliance damages, more than he could have recovered as expectation damages. Thus, in such states plaintiff should recover the *algebraic* sum of the parenthetical matter and his incidental damages.

²⁵ Value to the promisee, not to the plaintiff, is relevant in cases where plaintiff is an assignee. No Michigan case raises this point or the related problem that arises if plaintiff is a third-party beneficiary.

between what defendant promised to do and what he in fact actually did in the way of performance. The "subtrahend" is always the value to plaintiff of being relieved by defendant's breach from all or part²⁶ of plaintiff's scheduled performance.²⁷ "Incidental damages" are always the value to plaintiff of the expenses and/or losses he reasonably incurred after notice of breach in his attempts to mitigate damages.²⁸

This single general rule answers the questions of what is to be valued and how shall the value, once computed, be taken into account. Its universality, of course, is possible only because it ignores questions of valuation technique and burden of proof. The answers it gives to the two other questions are identical to those of the parochial formulae. If the parochial formulae are stripped of their references to valuation technique, they all turn out to be elliptical statements of this single general rule.

²⁶ In a "total breach" case plaintiff is relieved of all his remaining scheduled or promised performance. Of course, if plaintiff has fully performed, he is relieved of nothing. Where the breach relieves plaintiff only of part of his remaining scheduled or promised performance, courts often speak of the breach as partial or of the contract as divisible.

²⁷ No adjustment need be made, of course, if plaintiff fully performed his side of the contract before defendant's breach. Or, if the contract did not contemplate any return performance by plaintiff, and was enforceable because of some substitute for present consideration, such as formalism, past consideration, or action in reliance. Or, if the contract contemplated an aleatory return performance by plaintiff, and the aleatory condition qualifying plaintiff's duty to perform was neither met nor excused. But if a return performance by plaintiff was contemplated, and it was neither rendered nor excused for non-fulfillment of an aleatory condition, in measuring expectation damages account must be taken of plaintiff's saved performance.

If plaintiff is the promisee in a "unilateral contract"—one in which plaintiff does not promise to perform, but his full performance is a condition qualifying defendant's promise to perform—and has not fully performed at the time of defendant's breach, plaintiff's saved performance should be taken into account in measuring expectation damages. This is true because, although plaintiff's remaining performance was never promised, he could not fulfill his expectations of receiving defendant's performance without rendering all of his own.

In this fact situation there is often a question of whether any contract has been formed. Compare RESTATEMENT § 45, comment *b* (merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for treating the offer as irrevocable), with *Pastras v. Oberlin*, 350 Mich. 183, 86 N.W.2d 264 (1957) (defendant-owner-offeror can revoke non-exclusive realty listing arrangement prior to the time that plaintiff-broker-offeree found a buyer even though plaintiff has incurred detriment in justifiable reliance upon it). Assuming a unilateral contract to have been formed in this fact situation, there may still be a question whether plaintiff should get reliance, rather than expectation damages. See *Savage & Farnum v. Drs. K. & K.'s U.S. Medical & Surgical Ass'n*, 59 Mich. 400, 26 N.W. 652 (1886) (court assumed that reliance damages are appropriate).

²⁸ The term is conventionally used in this sense, but not defined in this manner. E.g., UNIFORM COMMERCIAL CODE § 2-710: "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."

B. *Consistency With Conventional Parochial Rules*

Parochial measurement formulae are almost always expressed elliptically. For example, the Uniform Sales Act rule quoted earlier says the measure of damages in a certain situation is "the difference between the contract price and the market or current price." It does not state expressly that it really means "the unpaid balance of the contract price," and not "the contract price."²⁹ The omission has no significance in a case where none of the price has been paid at the time of breach, but the omission becomes important if defendant-buyer has prepaid all or part of the price. However, in cases where the latter problem is presented courts universally include in the formula an adjustment to reflect that part of the price that was paid.³⁰ The parochial formulae typically omit reference to items which, although deserving attention when they arise, occur only infrequently. Thus the builder's formula, quoted earlier,³¹ makes no reference to the value of materials which the builder has bought to perform the contract and which are still on hand when breach stops further performance. However, when such items are present in a builder case, they are taken into account, his recovery being reduced by the net resale value of such materials.³²

The elliptical nature of these rules tends to conceal the fact that they can all be framed into the same three-term formula—as minuend, subtrahend, and incidental damages. Demonstration with two familiar plaintiff-seller formulae will illustrate this.

In cases where plaintiff is a sawmill operator, or some other non-employee seller of services, and defendant-buyer of services repudiated the contract before plaintiff had finished his work, courts often express the parochial formula as "lost profit plus costs incurred." The notion of "lost profit" in this context really means "contract price minus total costs," so the fuller expression would

²⁹ The Uniform Commercial Code is more precise. See UNIFORM COMMERCIAL CODE § 2-708: ". . . the difference between the market price . . . and the unpaid contract price together with any incidental damages."

³⁰ See, e.g., *Bradford Novelty Co. v. Technomatic, Inc.*, 142 Conn. 166, 112 A.2d 214 (1955); *Kolton v. Nassar*, 358 Mich. 154, 99 N.W.2d 362 (1959); *Hamilton v. Stephens*, 240 Mich. 228, 215 N.W. 321 (1927); *Wells v. Board of Educ.*, 78 Mich. 260, 44 N.W. 267 (1889); *Sal's Furniture Co. v. Peterson*, 86 R.I. 203, 133 A.2d 770 (1957).

³¹ RESTATEMENT § 346(2)(a): ". . . the entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less installments already paid and the cost of completion that the builder can reasonably save by not completing the work."

³² See *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338 (1937); *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916); *Wells v. Board of Educ.*, 78 Mich. 260, 44 N.W. 267 (1889).

be "(contract price minus total costs) plus costs incurred." Since "total costs" are the sum of costs incurred and costs yet to be incurred at the time of breach, the item of "costs incurred" appears twice in the formula if it is further amplified: "contract price minus (*costs incurred* plus costs yet to be incurred) plus *costs incurred*." Algebraic cancellation permits a simpler statement: "contract price minus costs yet to be incurred."³³

But this version of "contract price minus costs yet to be incurred," while avoiding redundancy, is still elliptical. No court using the formula would hesitate to add to plaintiff's recovery an item unmentioned in the formula—plaintiff's "incidental expenses" incurred in post-breach efforts to mitigate damages.³⁴ Nor would such a court hesitate to reduce plaintiff's recovery to reflect still other phenomena as yet unmentioned in the formula. If at the time of notice of breach plaintiff has on hand either property or the right to command services, and he acquired such property or such right to services through expenditure which was included in "costs incurred," the value to plaintiff of such left-over services and property must be deducted from his recovery to avoid over-compensation.³⁵

One final adjustment must be made, and is made by all courts using this formula: plaintiff's recovery is reduced to the extent that defendant has paid part of the contract price before trial.³⁶

Thus, fully stated, this formula is "contract price plus incidental expenses minus (costs yet to be incurred plus property on hand plus services on hand) minus that part of the price that has been paid." More succinctly it is "unpaid balance of the contract price minus (costs yet to be incurred plus property on hand plus services on hand) plus incidental expenses."

This formula is identical to the author's "(minuend minus subtrahend) plus incidental expenses." "Unpaid balance of the contract price" is the same as the author's "minuend"; "costs yet to be incurred plus property on hand plus services on hand" is iden-

³³ The use of the parochial formula often leads to the wasted motion of proof of total costs and proof of costs incurred, rather than direct proof of costs yet to be incurred. However, plaintiff often wants proof of costs incurred in the record in case his expectation damage fails, and he must fall back to another remedy based on these costs.

³⁴ E.g., *Shapiro v. Fyrac Mfg. Co.*, 264 Mich. 280, 249 N.W. 851 (1933); *Piowaty v. Sheldon*, 167 Mich. 218, 132 N.W. 517 (1911); *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888).

³⁵ See cases cited in note 32 *supra*. See also Annot., 50 A.L.R. 1397 (1927).

³⁶ See *Greenwood v. Davis*, 106 Mich. 230, 64 N.W. 26 (1895); *Atkinson v. Morse*, 63 Mich. 276, 29 N.W. 711 (1886); *Goodrich v. Hubbard*, 51 Mich. 62, 16 N.W. 232 (1883).

tical to the author's "subtrahend"; and both rules allow recovery of incidental expenses.³⁷

Another familiar parochial rule is the "difference money" formula used where plaintiff is a seller of goods or realty which defendant-buyer refuses to accept: plaintiff recovers the difference between the contract price and the market price at the time and place of promised delivery.³⁸ As indicated earlier, the term "contract price" in this formula really means "unpaid balance of the contract price."³⁹ And, although the rule is silent as to this, plaintiff can recover his incidental damages as well as the recovery expressly indicated.⁴⁰ Thus, with the gaps filled, the difference money formula reads: "unpaid balance of the contract price less market price at the time and place of promised delivery plus incidental damages." This formula, now expressed in three terms, is identical to the single general rule. "Unpaid balance of the contract price" is identical to "minuend"; "market price at the time and place of promised delivery" is identical to "subtrahend"; both formulae permit recovery of incidental damages.

These two parochial formulae, when amplified, differ in only one respect—the way they value the subtrahend. The "lost profit" rule values the subtrahend by reference to plaintiff's saved costs, whereas the "difference money" rule values it by reference to the price the saved property would command in the resale market⁴¹ at the time and place of breach. Both rules give identical answers to the questions of what is to be valued, and, once valued, how it should be taken into account.

The two illustrations may suffice to show that the single general rule is identical with *all* parochial measurement formulae which are concerned with expectation damages. There are some parochial formulae, however, which are concerned with measuring

³⁷ For a full treatment of the various ways in which the builder's parochial rule is stated, see Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 COLUM. L. REV. 1286 (1931). Cf. RESTATEMENT § 333, comments *a, c*.

³⁸ See *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252 (1924); *Pandaleon v. Brecker*, 227 Mich. 297, 198 N.W. 953 (1924); *Peters v. Cooper*, 95 Mich. 191, 54 N.W. 694 (1893); *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 864 (1889). See generally Annots., 108 A.L.R. 1482 (1937); 44 A.L.R. 215 (1926).

³⁹ See text at note 29 *supra*.

⁴⁰ See *Piowaty v. Sheldon*, 167 Mich. 218, 132 N.W. 517 (1911); *Peters v. Cooper*, 95 Mich. 191, 54 N.W. 694 (1893); *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 864 (1889); Annot., 29 A.L.R. 61 (1924).

⁴¹ Although the rule does not specify the "market" in question, it refers to the market in which plaintiff-seller would resell. See *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, 100 N.W. 127 (1904); *Peters v. Cooper*, *supra* note 40; *Simons v. Ypsilanti Paper Co.*, *supra* note 40. *But cf.* *Balcom v. Tribbett*, 197 Mich. 620, 164 N.W. 261 (1917).

plaintiff's recovery under some other remedy, and these rules, of course, cannot be stated in terms of minuend, subtrahend, and incidental damages. For example, in Michigan⁴² and many other states,⁴³ plaintiff cannot cover expectation damages where defendant, a vendor of land, is guilty of a "good faith" breach of his promise to deliver marketable title to the land. Instead, if plaintiff seeks damages, he gets a smaller recovery. Parochial formulae governing this situation are not equivalent to the single general rule. Loose judicial language, referring to all remedies which result in a judgment for a sum of money as "damages," sometimes blurs the distinctions among these various contract remedies: the price, expectation damages, reliance damages, money restitution, foreclosure and sale with deficiency judgment, statutory remedies, seller's specific performance remedy, and the peculiar measure, already described, used for vendor's "good faith" failure to produce marketable title. The single general rule is only the equivalent of those parochial rules which aim at giving expectation damages.

II. VALUING THE SUBTRAHEND: GENERAL

A. *Scope of This Article*

The single general rule leaves unanswered questions of valuation technique and burden of proof; other rules are needed to handle them. These valuation and burden of proof rules necessarily must be numerous, albeit not as numerous as the parochial formulae they are designed to replace. For convenience, attention in these articles is limited to the valuation and proof burden problems of only one of the three terms—the subtrahend. More accurately, this article should be entitled "Valuing the Subtrahend in Michigan."⁴⁴ The present title was adopted to delude some readers into thinking the article was going to prove comprehensible. Actually, cases in which the subtrahend proves hard to value are always cases in which plaintiff is a "seller"—one whose performance is not merely payment of a sum of money. Where plaintiff is merely to pay money, there is little difficulty with the subtrahend; in those (plaintiff-buyer) cases it is normally

⁴² *Hamburger v. Berman*, 203 Mich. 78, 83-84, 168 N.W. 925, 926-27 (1918); *Hammond v. Hannin*, 21 Mich. 374 (1870). *But cf.* *Way v. Root*, 174 Mich. 418, 428-29, 140 N.W. 577, 580-81 (1913) (court refused to say if *Hammond* is still good law in Michigan).

⁴³ 5 CORBIN §§ 1097, 1098; McCORMICK § 178; Annots., 68 A.L.R. 137 (1930); 48 A.L.R. 12 (1927).

⁴⁴ Or, "So You're Going To Value a Michigan Subtrahend."

the minuend that proves sticky.⁴⁵ To the extent that Michigan plaintiff-seller cases have presented problems of minuend valuation, the problems are discussed, but for the most part the plaintiff-seller cases prove troublesome only as regards the subtrahend.

B. *Policies Governing Valuation of the Subtrahend*

Earlier it was suggested that conventional doctrine does not approach damage measurement in terms of valuation, and that parochial rules give only fragmentary guidance when a choice of valuation methods must be made. But the abstract policies which guide damage measurement set the goals for choice of valuation technique, if the implications of these policies are pursued. One guiding principle of valuation is that, subject to one qualification, the value sought is the value to *plaintiff*. This accords with the idea that *plaintiff* should recover a sum which, when added to the benefits *he* already received under the contract, will give *him* an economic status identical to the one *he* would have enjoyed had the contract been performed precisely as agreed.

The major qualification of this approach flows from the mitigation notion—that there is no recovery for those consequences of breach which plaintiff could have avoided by reasonable self-protective care. Thus, the value of the subtrahend can never be lower than the value that would have been realized by a reasonable man in plaintiff's post-breach plight.

Since another of these abstract policies dictates that gains flowing from breach must be taken into account whether or not the mitigation requirement obligated plaintiff to incur the risk or hardship entailed in making such gains, the value of the subtrahend can sometimes *exceed* the value it would have had for a reasonable man in plaintiff's post-breach predicament—in those cases where plaintiff takes risks or incurs hardship not required by the mitigation rule and thus enhances the value of the subtrahend. Putting together these notions, the value of the subtrahend will always be the higher of these two figures: (1) value computed by reference to what plaintiff actually did after breach; and (2) value computed by reference to what a reasonable man would have done in plaintiff's post-breach plight to satisfy mitigation requirements.

For example, if breach releases the time of plaintiff, a full-time employee of defendant, that would have been devoted to defend-

⁴⁵ It is rare that incidental damages are hard to value.

ant's work, mitigation notions dictate that the value of the saved time be no less than the price it would have brought had plaintiff made reasonable efforts to find re-employment in the same general line of work in the same general locale.⁴⁶ However, if after breach plaintiff actually finds re-employment in some other line of work which is more hazardous, but more remunerative, his receipts from that work fix the value of his saved time.⁴⁷

C. *Policies Governing Burden of Proof*

The abstract policies governing all expectation damage measurement furnish no help in allocating the burden of proof. Nor is there any other well-established body of doctrine concerned with the burden of proving various aspects of the subtrahend. Since choice of valuation technique is closely bound to burden of proof, it seems necessary to set forth my own assumptions about the policies to be consulted in allotting the burden before treating specific problems. The Michigan case law contains nothing in the way of policy statements on this point except the familiar idea that the burden should fall on the party who normally has superior access to the evidence needed to carry it,⁴⁸ but there is no discussion of the impact on this idea of Michigan's later adoption of broad pre-trial discovery rules.⁴⁹ At least in cases where the sum at stake justifies the time and expense of extensive discovery, the new procedure tends to equalize the parties' access to evidence. Nor is there any discussion in the Michigan plaintiff-seller cases of competing goals that bear on the question of who should bear the risk of a directed verdict in a no-proof situation.

(1) It is better to give the burden to the party with superior access to the evidence needed to sustain it.

(2) Where the issue is susceptible to a yes-or-no answer,⁵⁰ and neither party can carry the burden, it is better to place the burden

⁴⁶ See *Wood v. Ravenscroft*, 135 Iowa 346, 112 N.W. 640 (1907); *Hussey v. Holloway*, 217 Mass. 100, 104 N.E. 471 (1914); *Edgecomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893); *Annots.*, 81 A.L.R. 282 (1932); 72 A.L.R. 1049 (1931); 28 A.L.R. 736 (1924).

⁴⁷ See *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930), and cases cited in note 10 *supra*.

⁴⁸ *E.g.*, *Mount Ida School for Girls v. Rood*, 253 Mich. 482, 235 N.W. 227 (1931); *International Textbook Co. v. Schulte*, 151 Mich. 149, 114 N.W. 1031 (1908).

⁴⁹ The Michigan cases stressing relative access to the evidence were decided in 1931 and 1908. Broad discovery rules were adopted in 1952 and 1958. See *MICH. CR. R.* 35. See also *Comment*, 8 *WAYNE L. REV.* 417 (1962).

⁵⁰ Such as the question: could plaintiff have handled another similar contract simultaneously? Questions of dollar value are not susceptible to a yes-or-no answer.

on the party who is maintaining the less likely state of facts, so that the court's assumption about the facts will coincide with the probable state of affairs.

(3) Where neither party can carry the burden, and the consequences of failing to carry it are less severe if it is placed on one of them, it is better to place it on that party.

(4) Where neither party can carry the burden, it is better to place it on plaintiff (with resulting undercompensation and splitting of the loss).

Some of these notions require amplification. Where the issue is the existence or value of an item which is *added* to the subtrahend, the consequences are more severe if plaintiff has the burden of proof, where plaintiff has no other remedy than damages to vindicate his expectation interest. If plaintiff fails to carry the burden on such an item, he is deprived of *all* expectation damages. It is necessary to visit him with so Draconian a penalty in order to get him to establish items which, once established, reduce his recovery. On the other hand, if defendant has the burden of proving such items, it suffices to value at zero such items as defendant fails to establish, leaving the rest of the expectation damage issues unaffected. This analysis supports giving defendant the burden of proving the existence and value of items which go to enhance the subtrahend.

But if plaintiff has an alternative way to vindicate his expectation interest, such as a suit for the price or specific performance, that interest is not as seriously harmed by plaintiff's being deprived of expectation damages. Moreover, if defendant has the burden of proof on some item of expectation damages which cannot be proved, plaintiff will be tempted to elect his damage remedy in the hope of being overcompensated when defendant fails to carry the burden. Thus, where plaintiff has an alternative remedy, the burden should be cast on him.

Where at issue is an item which, when established, *reduces* the subtrahend, defendant must be visited with a fairly severe penalty to force him to prove an item which augments plaintiff's recovery. This can be done only by valuing the subtrahend at zero if defendant fails to prove that item. If plaintiff has the burden on such an item, it suffices to value it at zero if the burden is not carried.

Where neither party can carry the burden if imposed, the court's choice involves either too much or too little recovery for plaintiff. "Too much" means that he recovers more than can be

justified in terms of all major relevant policy considerations; "too little" means that he recovers less than he should get to take into account all of these important policy factors. In the prior article I argued for giving defendant the burden of proof because in close cases this would enhance plaintiff's recovery, this being desirable because contract damage measurement always tends to give plaintiff too little.⁵¹ This allocation of the burden, I urged, would serve to reverse this tendency, whereas the opposite allocation would aggravate it.

I envisioned this tendency to give too little as flowing from three doctrines: the "certainty" requirement, the non-recovery of expenses of litigation, and the notion that recovery is limited to harm to plaintiff's *economic* interests.⁵² My (erroneous) tacit assumption was that these three doctrines were arbitrary limitations, reflecting no valid social policy. Upon reflection, however, I conclude that the doctrines do have a basis in social policy,⁵³ and that a recovery reduced in order to reflect them is not too small, but rather is of the correct size to reflect all related major social policies.

Thus, allocation of the burden of proof forces a choice between giving too much and giving too little; it is not relevant to argue, as I did earlier, that it is better to give the right amount than too little.⁵⁴ Stressing only the evils of undercompensation (it fails to deter breach adequately;⁵⁵ it fails to make promises sufficiently reliable;⁵⁶ it fails to satisfy the notion imbedded in the mores that the breaching party should fulfill, by damages, if not performance, the expectations of plaintiff⁵⁷) is misleading; overcompensation has its complementary evils.

⁵¹ Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577, 589-90 (1962).

⁵² *Ibid.*

⁵³ The "certainty" requirement is an aspect of burden of proof allocation and reflects all the policies that relate to that allocation. For a policy discussion of the non-recovery of litigation expenses, see 5 CORBIN § 1037; MCCORMICK § 71; Note, 21 VA. L. REV. 920 (1935); Comment, 49 YALE L.J. 699 (1940). For a policy discussion of non-recovery for non-economic harms, see 5 CORBIN § 1076; MCCORMICK § 145.

⁵⁴ Harris, *supra* note 51, at 589-90.

⁵⁵ See KESSLER & SHARP, *CASES ON CONTRACTS* 555 (1953); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936); Comment, 57 YALE L.J. 1360, 1366 (1948).

⁵⁶ See Fuller & Perdue, *supra* note 55, at 72; Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 725 n.47 (1931).

⁵⁷ I am somewhat puzzled to state the policy basis of the notion that plaintiff should recover enough to fulfill the expectations defendant created. Perhaps the mores dictate that fairness between plaintiff and defendant requires this measure, and the social policy is the familiar one of adjudicating quarrels in the light of norms hallowed by custom.

The imposition of overcompensatory liability is more likely to dislocate or ruin an existing enterprise than the imposition of compensatory liability. And the notion appears to be established in the mores that the breaching party should not be required to pay his victim a sum larger than that required to make the victim whole;⁵⁸ overcompensation does violence to this concept of man-to-man justice.

Sometimes fallacious arguments are put forward to show social utility in awarding plaintiff more money than is necessary to restore him to the status he would have enjoyed but for breach. The argument that plaintiff should be given enough money to punish the morally delinquent defendant (even if this is more than needed to compensate plaintiff)⁵⁹ suffers from two flaws: first, contract liability is by and large amoral, treating the innocent breacher in the same way as the malicious one;⁶⁰ second, under modern forms of business enterprise liability is usually vicarious, presenting the likelihood that innocent principals will pay the judgment flowing from a contract breach by their less innocent agent. The argument that overcompensation has a salutary effect in making promises more reliable in the future⁶¹ probably overestimates the impact on future commercial behavior of the isolated overcompensatory case, which (even if counsel knew of it and the client's decisions were all based on advice of counsel) could be nullified by the astute drafting of later contracts.

If, as I now suspect, allocation of the burden requires a judicial choice between giving plaintiff what, in the light of all major policy considerations, is too much or too little money, the choice

Perhaps the judges sincerely believe that there are mores which so dictate, albeit the "mores" are in fact nonexistent. Perhaps the judges, seeking a place to draw the line between competing social goals of give-enough-to-deter-breach and don't-give-so-much-you-deter-contracting, found this line handy. See Fuller & Perdue, *supra* note 55, at 57-66.

⁵⁸ It is surprisingly hard to document this statement by quotations or citations. American judges and text writers seem to assume a priori that overcompensatory awards for breach of contract are bad; they do not trouble themselves to identify the social evils that might flow from such awards. The practical corollaries of this assumption include the judicial refusal to honor agreements for the award of overcompensatory ("punitive") damages in the event of future breach; judicial refusal to permit recovery of punitive damages for breach of contract even in those instances where the breach was attended by patent moral culpability; and extreme judicial reluctance to permit back-door recovery of punitive damages in the guise of compensation to redress plaintiff's interest in being free from "mental anguish."

⁵⁹ See, e.g., *Hitchcock v. Knights of Maccabees*, 100 Mich. 40, 58 N.W. 640 (1894); RESTATEMENT § 331, comment c; *Editorial*, 66 CENT. L.J. 365, 366 (1908).

⁶⁰ Except insofar as doctrines of mistake and impossibility and judge or jury "fudging" in the interpretive and fact-finding process enter the picture, liability is imposed without regard to the moral nature of the breach.

⁶¹ Harris, *supra* note 51, at 589.

should be made by reference to a *minor* social policy—one which otherwise would not be consulted.

The “minor” policy in question is a social preference for preservation of existing enterprises from destruction or serious dislocation as the result of the imposition of civil liability. Undercompensation leaves part of the loss where it originally fell, on plaintiff’s enterprise, and shifts part of it to defendant’s enterprise. Thus, each enterprise need absorb and/or redistribute only part of the loss. Presumably, there is less likelihood of ruin or dislocation when two enterprises each bear part of a loss than when one enterprise bears all of it. Overcompensation not only shifts to defendant all of the loss plaintiff sustained, but sometimes results in additional liability, as well. In some cases, at least, overcompensation achieves ruin of defendant’s enterprise whereas undercompensation would not have visited ruin on either enterprise.⁶²

This social antipathy toward ruinous civil liability is probably consulted in this context (where major social goals are at a stand-off), even if it is not well enough established to be deemed determinative in other contexts where better-established policies are not in equipoise.⁶³

These various notions regarding allocation of the burden often pull in different directions in a given case. By and large, it would seem wise to subordinate the notion of placing the burden on the party with better access to the evidence to the other policies where: (a) the issue is one which often cannot be proved by either party, and (b) broad discovery rules tend to equalize accessibility to evidence. And it would seem wise to treat the undercompensation policy as paramount where there is a conflict among the policies to be applied on an issue which often is not susceptible of proof by either party, and the allocation of the burden on this issue will have a major impact on the size of the award. Thus, on many major issues the controlling consideration is the preference for undercompensation, leading to the burden of proof being placed on plaintiff.

However, to avoid unduly undercompensating plaintiff, courts should temper the rigors of the burden allocated in this fashion by fairly relaxed standards as to how “certain” evidence must be to carry the burden effectively.⁶⁴ Some requirement of “certainty” or

⁶² *Id.* at 589 n.54.

⁶³ *E.g., id.* at 590.

⁶⁴ *Cf.* RESTATEMENT § 329, comment *e*: “The uncertainties of valuation are frequently so great that all that can be hoped for is an honest and reasonably intelligent estimation.

"sufficiency" must be imposed, or the burden becomes meaningless. But the requirement should be no more onerous than necessary to reduce the risks of substantial overcompensation.

Since 1895 the Michigan Supreme Court has handled the overcompensation-burden of proof problem in plaintiff-seller contract cases as suggested here. It has generally given plaintiff the burden on major issues, but eased his path by a fairly tolerant view as regards the sufficiency of his evidence to carry the burden. Prior to 1895 the burden was imposed in the same way, but there were wide swings of opinion concerning the amount of "certainty" that plaintiff's evidence must demonstrate. Cases involving "lost profits" created the battleground.

Prior to 1895 the history of the court's treatment of lost profits divides into two epochs. The first, roughly from 1859 to 1882, was dominated by the views of Justice Christiancy. Although he had retired from the court prior to *Hopkins v. Sanford*⁶⁵ (1879), his attitudes were reflected in that decision. The second period, roughly from 1882 to 1895, was dominated by the attitudes of Justice Cooley. Although he had left the court prior to *Hutchinson Mfg. Co. v. Pinch*⁶⁶ (1892), his prior opinions left their mark on that case.

Justice Christiancy had favored the recovery of lost profits in tort suits⁶⁷ and in contract actions where the plaintiff-seller sought to use the formula "lost profits plus costs incurred."⁶⁸ He saw the recovery of lost profits as desirable to achieve full compensation of plaintiffs and to deter future breach.⁶⁹ Although he never espoused allocating the burden of proof to defendant, he did favor a vast relaxation of the notion of "certainty," preferring to run the risk that plaintiff be overcompensated rather than the opposite.⁷⁰

The measurement of an injury in money by a jury or by the trial court will not readily be set aside in cases where the subject-matter is complex and exchange values are doubtful or difficult." See also Annot., 78 A.L.R. 858 (1932).

⁶⁵ 41 Mich. 243, 2 N.W. 39 (1879).

⁶⁶ 91 Mich. 156, 51 N.W. 930 (1892).

⁶⁷ See *Gilbert v. Kennedy*, 22 Mich. 117 (1871); *Allison v. Chandler*, 11 Mich. 542 (1863) (trespass).

⁶⁸ See *Loud v. Campbell*, 26 Mich. 239 (1872); *Burrell v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865) (opinion of Cooley, J.; Christiancy, J., concurring); *Hosmer v. Wilson*, 7 Mich. 293 (1859). He conceded the validity of a relaxed "certainty" rule in cases where plaintiff-buyer sought lost collateral profits. *Edwards v. Sanborn*, 6 Mich. 347 (1859).

⁶⁹ See *Hosmer v. Wilson*, *supra* note 68, and the other cases cited in note 68 *supra*.

⁷⁰ *Ibid.*

After 1881⁷¹ Justice Cooley led a somewhat indiscriminate reaction against this tolerance of lost profit recovery. Perhaps his motive lay in a fear that, in cases where liability is imposed without fault, defendant might be saddled with ruinous liability to redress plaintiff's broken expectations.⁷² In two kinds of cases there was a real peril of this phenomenon: tort suits, and the contract suits in which *plaintiff-buyer* sought the "collateral" profits on some larger transaction which aborted upon defendant's breach. In the cases of present concern to us—where the *plaintiff-seller* sought lost "direct" profits—there was no peril of vast liability: the direct profits can never exceed the contract price. Justice Cooley apparently failed to appreciate the distinction, however, and he transformed the "foreseeability" and "certainty" requirements into insuperable obstacles to lost profit recovery in all three types of cases.⁷³

In *Allis v. McLean*,⁷⁴ in 1882, Justice Cooley's abhorrence of lost profit recovery first reached a plaintiff-seller case. The court held that the plaintiff sawmill operator could not recover lost profits, nor could he recover the rental value of his mill while it lay idle. Indeed, the court went on to say that, regardless of the evidence presented, no sawmill operator could ever recover lost profits, because profits were "proverbially uncertain" in that trade. This blanket proscription of lost profit recovery by an entire industry was later extended to flour millers,⁷⁵ the language in *Allis* having suggested that "millers," rather than "sawmillers," were covered.

But almost as soon as *Allis* was decided, the retreat from it began. Throughout the period from 1882 to 1895, when only one

⁷¹ Until then Justice Cooley had acquiesced in cases where lost profits were recovered. *E.g.*, *Hopkins v. Sanford*, 41 Mich. 243, 2 N.W. 39 (1879); *Loud v. Campbell*, 26 Mich. 239 (1872); *Sisson v. Cleveland & T.R.R.*, 14 Mich. 489 (1866); *Burrell v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865). Justice Christiancy had left the bench before Justice Cooley's new attitude was expressed.

⁷² That he was upset at large recoveries when defendant was without fault is suggested by his remarks in *Talcott v. Crippen*, 52 Mich. 633, 635-36, 18 N.W. 392, 393 (1884), denying recovery for lost profits in a tort suit because they were unforeseeable. See also *Hammond v. Hannin*, 21 Mich. 374 (1870) (no expectation damages recoverable for "good faith" breach of land contract by vendor). *Cf.* *Wetherbee v. Green*, 22 Mich. 311 (1871) (measure for conversion where lumber has been made into hoops).

⁷³ *Talcott v. Crippen*, *supra* note 72 (replevin for lost profits); *Allis v. McLean*, 48 Mich. 428, 12 N.W. 640 (1882) (plaintiff-seller seeking direct profits); *McKinnon v. McEwan*, 48 Mich. 106, 11 N.W. 828 (1882); *Friedland v. McNeil*, 33 Mich. 40 (1875) (plaintiff-buyer seeking lost collateral profits).

⁷⁴ 48 Mich. 428, 12 N.W. 640 (1882).

⁷⁵ *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N.W. 930 (1892) (flour millers cannot recover lost profits but can recover rental value of idle mill).

millers was permitted to use a "lost profit" formula,⁷⁶ plaintiff-sellers from all other trades were allowed to use such a measure without hindrance.⁷⁷ And during the thirteen years until *Allis* was repudiated in *Fell v. Newberry*⁷⁸ in 1895, the court conducted a step-by-step retreat in the cases involving millers.⁷⁹ By the time of the *Fell* decision Justice Cooley was gone from the bench, millers were out from under the cloud, and the "certainty" requirement in plaintiff-seller cases had taken its modern, relaxed form.⁸⁰ Apparently *Allis* was recognized as a mistake almost as soon as it was decided, although an express distinction between contract suits for "direct" profits (the plaintiff-seller cases), and contract suits for "collateral" profits (the plaintiff-buyer cases) was not uttered until in *Fell*.⁸¹ Henceforth such lingering hostility to lost profit recovery as survived Justice Cooley was confined to the tort and collateral profit suits.⁸² In time, the relaxed "certainty" requirement spread to all contract actions.⁸³

⁷⁶ *E.g.*, *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885) (sawmill's recovery of lost profits reversed for exclusion of evidence that no profits were lost); *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887) (directed verdict against sawmill seeking lost profits affirmed); *Maltby v. Plummer*, 71 Mich. 578, 40 N.W. 3 (1888) (sawmill failed to prove lost profits with certainty); *Hutchinson Mfg. Co. v. Pinch*, *supra* note 75 (flour millers cannot recover lost profits). In *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888), the trial judge directed verdict against the sawmill after plaintiff's opening statement, and was reversed. But the court held only that the case should not be decided at that stage; plaintiff had yet to submit his evidence to establish lost profits.

⁷⁷ *Goodrich v. Hubbard*, 51 Mich. 62, 16 N.W. 232 (1883) (hauler of timber); *Rayburn v. Comstock*, 80 Mich. 448, 45 N.W. 378 (1890) (logger); *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N.W. 319 (1891) (franchised distributor of bottled water); *Scheible v. Klein*, 89 Mich. 376, 50 N.W. 857 (1891) (building contractor); *Lee v. Briggs*, 99 Mich. 487, 58 N.W. 477 (1894) (logger); *Hitchcock v. Knights of Maccabees*, 100 Mich. 40, 58 N.W. 640 (1894) (organizer of fraternal lodges).

⁷⁸ 106 Mich. 542, 543-44, 64 N.W. 474, 474-75 (1895).

⁷⁹ *Allis v. McLean*, 48 Mich. 428, 12 N.W. 640 (1882) (no sawmill operator can recover anything as plaintiff-seller regardless of his evidence); *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885) (sawmill operator's recovery of lost profits reversed for uncertainty and exclusion of evidence); *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888) (trial judge erred in directing verdict against sawmill operator after his opening statement seeking lost profits); *Maltby v. Plummer*, 71 Mich. 578, 40 N.W. 3 (1888) (sawmill operator's lost profits are too speculative, but he can recover wages paid idle permanent employees); *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N.W. 930 (1892) (flour miller's lost profits too speculative, but he can recover rental value of idle mill, own lost time, and wages paid permanent employees); *Fell v. Newberry*, 106 Mich. 542, 64 N.W. 474 (1895) (sawmill operator's recovery of lost profits permitted; court overruled *Talcott* case, which quotes *Allis*, *sub silentio* overruling *Allis*).

⁸⁰ *E.g.*, *Herron v. Raupp*, 156 Mich. 162, 120 N.W. 584 (1909); *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N.W. 976 (1896).

⁸¹ *Fell v. Newberry*, 106 Mich. 542, 543, 64 N.W. 474 (1895) ("profits . . . made in the general conduct of the business"). (Emphasis added.)

⁸² *E.g.*, *Truman v. J. I. Case Threshing Mach. Co.*, 169 Mich. 153, 135 N.W. 89 (1912), and *Quay v. Duluth, So. Shore & Atl. Ry.*, 153 Mich. 567, 116 N.W. 1101 (1908) ("certainty" defeats tort suit for lost profits).

⁸³ *E.g.*, *Serbinoff v. Dukas*, 348 Mich. 69, 81 N.W.2d 236 (1957); *United States Gypsum*

Apart from the woes of millers during the period 1882-1895, the "certainty" requirement has proved troublesome to plaintiff-sellers in only one other situation: where the quantity term of the contract is not fixed numerically, but is defined in terms of the buyer's requirements. If breach occurs before the buyer establishes a pattern of annual or periodic requirements, and the contract is devoid of a fixed minimum requirement or liquidated damages clause, it may prove impossible to establish the quantity of goods the buyer would have taken, and *subtrahend* valuation fails for want of certainty (as does *minuend* valuation). In three cases the Michigan Supreme Court has found such uncertainty fatal,⁸⁴ and in three similar cases slightly better proof has satisfied the "certainty" requirement.⁸⁵ In none of these cases, however, does the "certainty" requirement appear to be a mask for judicial hostility to any recovery of large lost profits, as it was in the Cooley era. Nor has the "foreseeability" doctrine been used in that fashion in plaintiff-seller cases (although it, too, was put to that use in other kinds of cases in that era).

The laxity with which the court has viewed plaintiff's shaky evidence in some of these cases deserves emphasis. Evidence deemed sufficient to carry the burden of going forward has run the gamut from conclusory statements by the plaintiff,⁸⁶ through expert testimony,⁸⁷ to elaborate accounting exhibits conjured up from esoteric costing methods.⁸⁸ Many of the witnesses permitted to express opinions were of questionable expertise⁸⁹ and often the

Co. v. Zacks, 236 Mich. 698, 211 N.W. 22 (1926); Ludwigsen v. Larsen, 227 Mich. 528, 198 N.W. 900 (1924); Balcom v. Tribbett, 197 Mich. 620, 164 N.W. 261 (1917).

⁸⁴ Hall v. Encyclopaedia Britannica, 325 Mich. 35, 37 N.W.2d 702 (1949) (salesman suing supplier); Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N.W. 457 (1912) (franchised electric car dealer suing his supplier); Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473, 86 N.W. 954 (1901) (manufacturer of grain drills suing his exclusive distributor).

⁸⁵ Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N.W. 539 (1918); Hitchcock v. Knights of Maccabees, 100 Mich. 40, 58 N.W. 640 (1894); Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390, 50 N.W. 319 (1891). See generally Annots., 89 A.L.R. 252 (1934); 52 A.L.R. 546 (1928); 32 A.L.R. 209 (1924).

⁸⁶ See, e.g., Record, pp. 61, 75, 78, Detroit Independent Sprinkler Co. v. Plywood Prods. Corp., 311 Mich. 226, 18 N.W.2d 387 (1945); Record, p. 8, Loud v. Campbell, 26 Mich. 239 (1872). *But see* app. for Appellant, p. 4(a), Kolton v. Nassar, 358 Mich. 154, 99 N.W.2d 362 (1959).

⁸⁷ See, e.g., Record, pp. 4-6, Hester v. Harley, 230 Mich. 432, 202 N.W. 966 (1925); Record, pp. 90, 99, 103, Athol Mfg. Co. v. Briscoe Motor Corp., 222 Mich. 95, 192 N.W. 668 (1923); Record, pp. 59, 78-79, Herron v. Raupp, 156 Mich. 162, 120 N.W. 584 (1909).

⁸⁸ See Nurmi v. Beardsley, 284 Mich. 165, 278 N.W. 805 (1938); Record, p. 44, Moline Furniture Works v. Club Holding Co., 280 Mich. 587, 274 N.W. 338 (1937); Record, exhibit 45, Athol Mfg. Co. v. Briscoe Motor Corp., *supra* note 87; Record, pp. 46-48, Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276, 131 N.W. 559 (1911).

⁸⁹ See Record, p. 49, Milligan v. Haggerty, 296 Mich. 62, 295 N.W. 560 (1941) (elderly

alleged accounting figures turned out to be no more than pretentious guesses.⁹⁰

The extent of the imprecision which has been tolerated becomes even clearer upon examination of the way in which the trier of facts has been permitted to manipulate the figures produced. In one instance a trial judge was permitted to pull a 650 dollar "fudge factor" out of the air to offset what he felt to be an exaggeration in plaintiff's testimony.⁹¹ In another case the jury was advised that, while they had no discretionary power to assess damages, they were not bound by the cost figures introduced by plaintiff.⁹² In both cases there was no other evidence in the record on the issue.

In a number of cases the problem has been by-passed by a stipulation as to the amount of damages,⁹³ and in others plaintiff's success can be attributed in part to the lack of vigor on the part of defendant. In many instances defendant has offered no countervailing proof on the damage issue,⁹⁴ and the verbal attacks on plaintiff's evidence often eschew specific criticism in favor of a parade of tired epithets—"speculative," "uncertain," "conjectural."⁹⁵ No doubt some of this apathy of defendants reflects a fatalistic appreciation of the trial judge's reluctance to reach the conclusion that a wrong should go without substantial remedy because it has deprived the plaintiff of the opportunity to measure

lawyer who had once attended engineering school but never worked in the business); Record, pp. 59-60, *Gulf Vegetable & Fruit Co. v. Lane*, 258 Mich. 634, 242 N.W. 792 (1932) (employee of trade publication whose sole connection with the market was in connection with the sale of the disputed goods).

⁹⁰ See Record, pp. 75, 130-31, *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, 311 Mich. 226, 18 N.W.2d 387 (1945); *Petrie v. Lane*, 67 Mich. 454, 456-58, 35 N.W. 70, 71-72 (1887).

⁹¹ See Record, pp. 131-32, *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, *supra* note 90.

⁹² See Record, p. 131, *Federal Bond & Mortgage Co. v. Burstein*, 222 Mich. 88, 192 N.W. 549 (1923). See also Record, p. 166, *Taylor v. Goldsmith*, 228 Mich. 259, 200 N.W. 254 (1924).

⁹³ See, e.g., *United States Gypsum Co. v. Zacks*, 236 Mich. 698, 211 N.W. 22 (1926).

⁹⁴ See, e.g., *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, 311 Mich. 226, 18 N.W.2d 387 (1945); *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N.W. 539 (1918); *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911); *Atkinson v. Morse*, 63 Mich. 276, 29 N.W. 711 (1886); *Loud v. Campbell*, 26 Mich. 239 (1872). *But see* Record, p. 51, *Milligan v. Haggerty*, 296 Mich. 62, 295 N.W. 560 (1941); Record, pp. 94, 100, 113, *Taylor v. Goldsmith*, 228 Mich. 259, 200 N.W. 254 (1924); Record, pp. 159-60, 165, 185, *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich. 95, 192 N.W. 668 (1923); Record, pp. 100, 111, *Herron v. Raupp*, 156 Mich. 162, 120 N.W. 584 (1909).

⁹⁵ See, e.g., Record, pp. 11, 60, *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916); Record, p. 25, *Atkinson v. Morse*, *supra* note 94.

his loss with precision.⁹⁶ Thus there may be at work, in trial courts at least, not only a preference for undercompensation rather than overcompensation, but also a preference for overcompensation rather than nominal damages.

D. *Valuation Terminology*

When a court concludes that plaintiff was permitted or required to abandon further efforts to complete and resell the performance still unrendered when notified of defendant's breach, it should value the subtrahend by totalling the values of all the individual components that would have gone into plaintiff's post-breach performance. This is "components" valuation of the subtrahend, or a "components approach." When a court concludes that plaintiff was permitted or required to complete and resell the performance still unrendered when notified of defendant's breach, it should value the subtrahend by reference to the resale value of that performance, viewing it as an entity. This is "entity" valuation of the subtrahend, or an "entity approach." The judicial decision as to whether plaintiff was permitted or required to take one post-breach course rather than the other amounts to a choice between "entity" and "components" valuation of the subtrahend.

The nature of this choice can be illustrated by the plight of plaintiff in *Leonard v. Beaudry*,⁹⁷ a sawmill operator who contracted to cut defendant's lumber into boards. Performance of this contract would have kept plaintiff's mill fully occupied during that year's milling season. Defendant's repudiation came shortly before plaintiff's performance was to begin. At that juncture plaintiff had a choice: to try to find other loggers to whom the mill's services could be sold, or to close down the mill for the season. The decision actually taken, to seek other customers, was a decision to resell the entity. In this instance the "entity" was the milling services of this mill for one season.

The resale efforts were largely unsuccessful, plaintiff being unable to find any customers that late in the season except for some with inferior logs. Since the compensation of the mill operator was geared to the number of board feet of lumber produced, inferior logs meant reduced revenue per hour of mill operation.

⁹⁶ See language of trial judge in overruling objection to the introduction of estimates in Record, p. 64, *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338 (1937): "I would hate to say as a matter of law that because they cannot show the exact number of hours or days they are not entitled to recover at all."

⁹⁷ 68 Mich. 312, 36 N.W. 88 (1888).

The mill was operated part of the season with such timber, and was idle for the rest of the season.

If a "components" approach to valuation were taken, the plaintiff's subtrahend would be the total of the value of all the components that would have been saved had the mill been shut down upon notice of breach: saved overhead, saved wages for employees, etc. If an "entity" approach to valuation were taken, the plaintiff's subtrahend would be the resale value of the mill's capacity for the season. If plaintiff's efforts to resell this mill were as vigorous and astute as the mitigation rule requires, what plaintiff actually grossed by the resale efforts in fact made would fix entity value here. The rules that should govern the choice between "entity" and "components" valuation are discussed subsequently; the present purpose is merely to illustrate the two terms.

In valuing either the entity or some single component, a court sometimes faces a choice among valuation techniques. If it is valuing a component which plaintiff had yet to acquire at the time of being notified of breach, valuation by reference to plaintiff and a reasonable man in plaintiff's plight leads to this technique—the value of the component is the lower of these two figures: (1) the lowest price at which plaintiff could have acquired the component, using reasonable efforts to acquire it as cheaply as possible, or (2) the price which plaintiff actually paid to acquire it, in the event that by abnormal effort or risk he succeeded in acquiring it even more cheaply. This is "cost value," as that term is here used.

A second technique is applicable to valuing some entities and some components which are on hand at notice of breach. It fixes value at the higher of two figures: (1) the highest price at which plaintiff could sell the item, using reasonable efforts to obtain the highest gross receipts, or (2) the gross receipts plaintiff actually received for the item if, by abnormal effort or risk, he succeeded in selling it at an even higher price. In determining the highest price at which it could be sold under this technique, the court is interested in the behavior of actual potential buyers, as their behavior is manifested in bidding on this item or in bidding on or buying similar items at similar times and places. Under this technique no evidence of the behavior of a hypothetical willing buyer is admissible. The technique is "actual resale value," as that term is here used. It is the *buyer*, not the *sale*, which is actual. The actual resale value of an item can be determined although in fact plaintiff never resold the item prior to trial. Even if plaintiff resold

the item prior to trial, its actual resale value may be higher than the gross receipts plaintiff received from that sale.

The third technique can be called "hypothetical resale value." It differs from actual resale value only in this respect: in determining the highest price at which plaintiff could sell the item, using reasonable efforts to obtain the highest gross receipts, expert evidence as to the conduct of a hypothetical willing buyer is admissible. Indeed, behind the fiction of this hypothetical purchaser the court is getting expert valuation based on a composite of many valuation techniques.

Only one Michigan plaintiff-seller case, subsequently discussed,⁹⁸ uses any other valuation technique.

III. THE "COMPONENTS" APPROACH

A. *The Categories of Components Defined*

Plaintiff has the burden of proving the existence and value of some kinds of components; defendant has the burden of proving the existence and value of others. Some kinds of components are properly valued by one technique; others by different techniques. Some explanation of the various *categories* of components is required at the outset.

For purposes of this article, components are sorted into five categories. The first group, "saved overhead," includes all items which would have been only partially consumed in plaintiff's post-breach performance.⁹⁹ Such items are included whether they were "on hand" or "yet to be acquired" at the time plaintiff learned of the breach. If plaintiff's factory would have been used to perform the balance of his contract, but the factory would not, of course, have been wholly consumed in that process, some part of the value of that factory is an item of "saved overhead." Similarly, if plaintiff had a permanent labor force, and some, but not

⁹⁸ See text at note 142 *infra*. While the *minuend* is sometimes valued by the profits lost on a collateral transaction which aborted upon defendant's breach, the *subtrahend* is never valued in this manner. Doctrines designed to restrict that valuation technique are inappropriate in the process of subtrahend valuation. See text *supra* at 866.

⁹⁹ Since the line between "overhead" and "non-overhead" items is somewhat arbitrary, close questions can arise. Where plaintiff would have used six more screws to finish the job, and screws are sold by the gross, did he save the non-overhead item called "six screws" or the overhead item called "4% of a gross of screws"? Close questions have not troubled the Michigan Supreme Court. If they arise they should be resolved by reference to the policy underlying this category: it is a catchall for items so hard to value that unusual tolerance is shown to the party seeking to approximate the value of the category. For an argument that no overhead should be deducted, see Note, 12 RUTGERS L. REV. 634 (1958).

all, of its time would have gone into completing the contract, a portion of its time is "saved overhead."

It is not essential that plaintiff use an asset simultaneously on both defendant's contract and another contract to put the asset into this category. If the asset would retain some economic value for plaintiff at the end of plaintiff's scheduled performance for defendant, the asset is an overhead item, and that portion of its value which is allotted to the balance of plaintiff's contract is in the category of "saved overhead."

The category of "saved overhead" is isolated from the others because of the peculiar difficulties of valuation which all items in this category share. Not only is some cost accounting required to determine the percentage of each asset which should be allotted to the balance of plaintiff's contract with defendant, but there is grave difficulty in proving the cost value or actual resale value of that fraction of the asset. In theory the court should seek the actual resale value of each "on hand" saved overhead item, and the cost value of each "yet to be acquired" saved overhead item. In practice it is necessary to lump together all "on hand" and "yet to be acquired" items in this category and use rough approximations of the value of the entire category. From the remaining (non-overhead) items, a second category can then be isolated: "saved non-overhead items yet to be acquired."¹⁰⁰ Items are yet to be acquired if plaintiff, at the time of notice of breach, could not by feasible means escape the cost of acquiring them. All items which the plaintiff had neither acquired nor contracted to acquire fall into this category. Also included are items which plaintiff had contracted to acquire but which he could avoid acquiring without untoward consequence. Thus, if he could terminate his obligation to his supplier without loss of good will or substantial damages, the items he contracted to acquire should be classified in this category. Similarly, if the item was acquired under an arrangement which permitted plaintiff to return it to the supplier and recover back the price paid for it, the item should be placed in this category.

The unifying characteristic of all items in this category is that they are normally susceptible to item-by-item proof of value, and the appropriate valuation technique normally is cost value. In a single instance an item in this category should not be cost valued: if after notice of breach plaintiff nonetheless is shown to have ac-

¹⁰⁰ The atrocious label is my own and I am properly ashamed of it.

quired the item and to have put it to a use which (a) would have been impossible but for a breach, and (b) which gives it a value to plaintiff greater than cost value. This exception reflects the general policy of taking breach-caused gains into account in the measurement of expectation damages.

All remaining items are both non-overhead and "on hand." They should be valued by reference to the re-employment plaintiff does or should find for them. They are here divided into three remaining categories, depending on whether they consist of services, personalty, or realty. Services must be isolated because defendant has the burden of proving their value, whereas plaintiff has the burden of valuing realty and personalty, for reasons that will appear subsequently. Personalty and realty must be distinguished because, with certain exceptions, actual resale value is appropriate for the former, hypothetical resale value for the latter.

It may be well to stress here the fact that the last three categories consist of *non-overhead* "on hand" services, personalty, and realty. If plaintiff's own time would not be consumed entirely in the performance of the post-breach phase of his contract with defendant, but would be distributed among the many contracts which plaintiff is performing simultaneously, his saved time goes into the first category, as saved overhead.¹⁰¹

Although no Michigan Supreme Court case has involved such facts, it is possible to have saved non-overhead "on hand" services which are not those of plaintiff himself, but of an employee or contractor whom he engaged to work exclusively on defendant's contract. If the mitigation notion requires or permits plaintiff to put the employee or contractor to work on some other of plaintiff's projects rather than to repudiate the arrangement for services, the "on hand" saved non-overhead time of the employee or contractor must be valued. If the mitigation notion requires or permits plaintiff to repudiate his contract with this employee or contractor, the price plaintiff would have paid him had he worked constitutes a non-overhead item "yet to be acquired," and the amount in damages plaintiff pays the employee or contractor are items of plaintiff's incidental damages.

All saved components of plaintiff's post-breach performance should fit into one of these five categories: overhead items "yet to be acquired"; (non-overhead) items "yet to be acquired"; (non-overhead) "on hand" services; (non-overhead) "on hand" personalty; (non-overhead) "on hand" realty.

¹⁰¹ See discussion of the *Callender* case at note 121 *infra*. See also Note, *supra* note 99.

B. *Problems of Categorization in Michigan*

Often there is no need to decide whether a particular component falls into one category or another because, for the particular purpose at hand, both categories are treated identically. For example, it is unnecessary to determine whether property "on hand" is realty or personalty for purposes of burden of proof; as will appear, plaintiff has the burden of proving the value of items in both categories. But the line between the two categories becomes important when a dispute arises over valuation technique: realty "on hand" normally is valued at hypothetical resale value, whereas personalty "on hand" normally is valued at actual resale value.

The results reached in Michigan cases suggest that the court has had an intuitive appreciation of the categories just described, although it has rarely articulated the notions fully. The court has called the "overhead" category by that name,¹⁰² although it has never attempted to define the concept. However, the results reached suggest (with one possible exception) that the court's working concept of "overhead" is identical to that described in this article. The single instance in which the court may have used a different concept of "overhead" occurred in circumstances where such categorization was of no significance.

In that case¹⁰³ plaintiff trade journal sought damages from defendant advertiser when the latter repudiated its advertising contract in the middle of the one-year term during which defendant's ad was to appear weekly in plaintiff's journal. Both at the trial and on appeal the courts used an "entity" approach, not a "components" approach, to value the subtrahend, treating the space which defendant's ad would have occupied as the saved "entity."¹⁰⁴ But there was some cross-examination during the trial directed to the components of plaintiff's performance that were saved. Plaintiff's editor testified that plaintiff saved nothing because of the breach inasmuch as all of plaintiff's costs of publication were met by the revenue from the first sixty columns of ads printed in the journal, and all revenue after that was sheer profit. Apparently plaintiff had sixty columns of ads without including defendant's. The witness concluded that the plaintiff's profit on defendant's contract equalled the contract price.¹⁰⁵ The trial judge

¹⁰² *E.g.*, *Nurmi v. Beardsley*, 284 Mich. 165, 278 N.W. 805 (1938); *Federal Bond & Mortgage Co. v. Burstein*, 222 Mich. 88, 192 N.W. 549 (1923); *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916).

¹⁰³ *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907).

¹⁰⁴ *Record*, p. 59, *Tradesman Co. v. Superior Mfg. Co.*, *supra* note 103.

¹⁰⁵ *Id.* p. 26.

made a finding to this effect, which the Michigan Supreme Court quoted with apparent approval,¹⁰⁶ although the finding apparently had no effect on the ultimate decision of either court.

The finding that plaintiff saved no overhead in this situation rests either on a tacit definition of overhead which differs from that presented here or on a factual assumption not wholly articulate. Either the courts tacitly defined "overhead" to embrace only items which plaintiff *would not have acquired but for his contract with defendant*,¹⁰⁷ or they assumed that plaintiff actually had some items of saved overhead, but that these saved overhead items had a zero value to plaintiff. The latter would be a proper finding if plaintiff neither found nor should have found any feasible way to re-employ his breach-released overhead items, all of which were on hand at the time of breach. This may have been true in that case and may have been the thought the witness was trying to express. If so, the case is consistent with the treatment of overhead in this article. The other reading of the case—that "overhead" only includes items that plaintiff would not have acquired but for the plaintiff-defendant contracts—is inconsistent with the court's treatment of the concept in later cases,¹⁰⁸ and ignores some of what plaintiff saved because of the breach.

The court's recognition of the distinction between non-overhead items "on hand" and non-overhead items "yet to be acquired" was explicit in *Roycraft v. Northville-Six Mile Co.*,¹⁰⁹ and tacitly indicated in the court's consistent use of cost valuation as to the latter items,¹¹⁰ and resale valuation of the former.¹¹¹ Recognition of the distinction between realty and personalty "on hand" is similarly apparent from the court's consistent use of hypothetical resale value for the former,¹¹² and actual resale value for the latter.¹¹³

¹⁰⁶ See Finding VIII, *id.* p. 49.

¹⁰⁷ The witness's reference to the sixty columns of other ads suggests that he meant that publishing defendant's ad would not require plaintiff to acquire *additional* overhead items. The ultimate question, however, seems to be whether the breach either released some of the time of "on hand" overhead items, or enabled plaintiff to avoid acquiring "yet to be acquired" overhead items. The witness ignored the first of these possibilities.

¹⁰⁸ See *Federal Bond & Mortgage Co. v. Burstein*, 222 Mich. 88, 192 N.W. 549 (1923); *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916).

¹⁰⁹ 358 Mich. 466, 100 N.W.2d 223 (1960).

¹¹⁰ See *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich. 95, 192 N.W. 668 (1923); *Brucker v. Manistee & G.R.R.R.*, 166 Mich. 330, 130 N.W. 822 (1911); *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390, 50 N.W. 319 (1891).

¹¹¹ See *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338 (1937); *U.S. Gypsum Co. v. Zacks*, 236 Mich. 698, 211 N.W. 22 (1926); *Wells v. Board of Educ.*, 78 Mich. 260, 44 N.W. 267 (1889).

¹¹² See *Hamburger v. Berman*, 203 Mich. 78, 168 N.W. 925 (1918); *Frederick v. Hillebrand*, 199 Mich. 333, 165 N.W. 810 (1917); *Allen v. Mohn*, 86 Mich. 238, 49 N.W. 626 (1891).

¹¹³ See *Gulf Vegetable & Fruit Co. v. Lane*, 258 Mich. 634, 242 N.W. 792 (1932);

And the recognition of a distinction between services "on hand" and all other types of components is clear from the consistent judicial approach of giving defendant the burden of proving the former's value¹¹⁴ while giving plaintiff the burden of proving the value of the latter.¹¹⁵

That these notions are not only inarticulate, but hazy, is suggested by the court's rare efforts to explain its choice between valuation techniques or its choice as to which party should have the burden of proof. Usually the outcome is announced without supporting rationale or citations,¹¹⁶ but when citations are furnished or a rationale is offered, the rationale¹¹⁷ or citations¹¹⁸ are often unconvincing. The superiority of the results reached to the rationale offered for them—familiar in all common-law experience, but striking in this context—seems to suggest that the court relies most frequently on a mixture of intuitive insight and the abstract policies governing all expectation damage measurement, with little resort to such intermediate generalizations as parochial formulae or the type of rules presented here.

In only three cases has the court been required to categorize borderline items that did not clearly fit only one category. In the *Roycraft* case,¹¹⁹ involving a choice between saved non-overhead "realty on hand" and saved non-overhead items "yet to be acquired," the court properly chose the latter category. The case is discussed later in this article.¹²⁰

In *Callender v. Myers Regulator Co.*,¹²¹ plaintiff had agreed to

Goldsmith v. Stiglitz, 228 Mich. 255, 200 N.W. 252 (1924); *Taylor v. Goldsmith*, 228 Mich. 259, 200 N.W. 254 (1924); *Pandaleon v. Brecker*, 227 Mich. 297, 198 N.W. 953 (1924).

¹¹⁴ See *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958); *Edgecomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893). Cf. *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907).

¹¹⁵ See *Kolton v. Nassar*, 358 Mich. 154, 99 N.W.2d 362 (1959); *Mount Ida School for Girls v. Rood*, 253 Mich. 482, 235 N.W. 227 (1931); *International Textbook Co. v. Schulte*, 151 Mich. 149, 114 N.W. 1031 (1908); *Brownlee v. Bolton*, 44 Mich. 218, 6 N.W. 657 (1880).

¹¹⁶ See, e.g., *Brucker v. Manistee & G.R.R.R.*, 166 Mich. 330, 130 N.W. 822 (1911); *Brighton v. Lake Shore & Mich. So. Ry.*, 103 Mich. 420, 61 N.W. 550 (1894); *Allen v. Mohn*, 86 Mich. 328, 49 N.W. 626 (1891); *Goodrich v. Hubbard*, 51 Mich. 62, 16 N.W. 232 (1883); *Loud v. Campbell*, 26 Mich. 239 (1872).

¹¹⁷ E.g., *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich. 95, 192 N.W. 668 (1923); *Frederick v. Hillebrand*, 199 Mich. 333, 165 N.W. 810 (1917); *Burrell v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865).

¹¹⁸ E.g., *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907); *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473, 86 N.W. 954 (1901); *Burrell v. New York & Saginaw Solar Salt Co.*, *supra* note 117.

¹¹⁹ *Roycraft v. Northville-Six Mile Co.*, 358 Mich. 466, 100 N.W.2d 223 (1960).

¹²⁰ See text at note 137 *infra*.

¹²¹ 250 Mich. 298, 230 N.W. 154 (1930). See also Annot., 41 A.L.R. 1175 (1926). Cf. RESTATEMENT § 329, illustration 3.

sell defendant-manufacturer's product and to maintain a Detroit sales office for that purpose. Upon defendant's repudiation plaintiff took a new job paying 16,000 dollars per year. Neither party offered evidence to show whether or not plaintiff could have handled the new job and his contract with defendant simultaneously. Defendant claimed, with success at trial and on appeal, that on such a record the court should assume the two jobs were incompatible, that plaintiff saved 16,000 dollars per year by being discharged of his obligation to use his time for defendant's purposes, and thus plaintiff should recover nothing (the minuend being less than 16,000 dollars). Plaintiff claimed that defendant had the burden of proving the incompatibility of the two jobs, and absent such proof plaintiff's saved "time" should be valued at zero. In Michigan "saved overhead" must be proved by plaintiff, non-overhead services "on hand" by defendant. Thus, it would appear that the outcome should turn on whether the time plaintiff would put on defendant's work was "overhead" or non-overhead services "on hand." However, this categorization was easy: inasmuch as plaintiff claimed that he could perform both contracts at once, he was taking the position that his time was an overhead item—one not wholly consumed in performing the contract with defendant. The court did not elaborate the reasons for its conclusion that defendant should prevail, but the result is wholly consistent with the notions expressed here.

In another case¹²² plaintiff was a partnership selling masonry services. The partners did some of the work themselves and hired employees to do other parts of the work. Defendant having repudiated the contract before the work was completed, it became important to know what part of the remaining work would have been done by plaintiffs themselves, and what part by employees. The employee portion would be valued at the saved cost of hiring such employees—1.50 dollars per hour. But, thought the trial court in charging the jury, the part that would have been done by plaintiffs themselves should not be valued at cost to plaintiff, but at the actual resale value of their saved "on hand" services. Having charged the jury to measure damages thus (although the jury had no way of knowing what proportion of the work would be done by plaintiffs themselves or what the actual resale value of their time was per hour), and having seen the jury render a substantial verdict for plaintiff, the court then ordered remittitur.

¹²² *Hamilton v. Stephens*, 240 Mich. 228, 215 N.W. 321 (1927).

It entered judgment for the reduced sum, the sum being derived on the assumption that all the saved time should be valued at 1.50 dollars per hour. This judgment was affirmed.

The result was correct. Although the trial court never explained its rationale and the appellate court gave none, the result can be defended in this manner: the actual resale value of plaintiff's own saved time was at least 1.50 dollars per hour; there was at least one potential employer willing to pay plaintiff this much for their services—the partnership itself; this appeared from the fact that after breach the partnership continued to hire employees at that rate, thus demonstrating that it considered the partners' time at least that valuable.

Thus, the necessity to decide if the saved services were those of the plaintiffs or those of yet to be hired employees vanished, and the 1.50 dollars per hour figure was correct on either assumption.

C. *Valuing Saved Overhead*

Were there neither problems of proof nor of accounting, the process of valuing plaintiff's saved overhead might exhibit the following sequence: (1) listing of all non-overhead items that would go into completion of plaintiff's performance, directly or indirectly; (2) elimination by the court of those items on the list that contribute only indirectly, that is, breach does not "release" them for other profitable re-employment by plaintiff;¹²³ (3) elimination of those direct non-overhead items remaining which plaintiff after breach neither re-employed nor was obligated by the mitigation notion to re-employ; (4) determination of the percentage of each of the remaining items on the list that should be allocated to the performance of the balance of plaintiff's contract with defendant; (5) valuation of each of these remaining items at cost of acquisition (if they were yet to be acquired at notice of breach and never acquired afterward), or by reference to the use to which they were or should have been put (if they were on hand at notice of breach or acquired after breach); (6) totalling the values thus determined of the various saved overhead items to give the value to plaintiff of total saved overhead.

The second and sixth of these steps present no insuperable problems of marshalling proof, but the other four steps do. The third and fifth steps in particular will usually prove impossible for either party to establish with any certainty.

¹²³ Examples are plaintiff's good will and his immunity from prosecution "purchased" by paying various taxes and license fees. Arguably these are not "costs."

The Michigan Supreme Court in effect has permitted the party with the burden of proving saved overhead to carry that burden by a simplified process of proof. In this simplified process "expert" testimony is used to establish: (1) the share of plaintiff's enterprise-wide overhead costs that should be allocated to this contract, and (2) the percentage of this contract unperformed at the time of notice of breach. By multiplying these figures together an estimate of saved overhead is established.¹²⁴

To arrive at the first figure witnesses have been permitted to testify regarding the "average" ratio that obtains in contracts of this sort between contract price and overhead costs.¹²⁵ Thus, one witness testified that on the average his overhead costs ran to twelve percent of the contract price, and from this the inference was drawn that the total overhead costs of performing this contract would have been twelve percent of the contract price.¹²⁶

The percentage of the contract unperformed by plaintiff when notified of defendant's breach has been established by proof of the ratio of variable costs incurred to total variable costs.¹²⁷

Thus, in one case where the contract price was 14,315 dollars, the percentage of work unperformed was 43.8 percent, and "we usually figure 12 percent [of the contract price for total overhead costs of the contract]," the court in effect multiplied together (14,315 dollars) (12 percent) (43.8 percent) and arrived at saved overhead.¹²⁸ The same technique has met with apparent approval in other cases also.¹²⁹ Indeed, there appears to be no case in which defendant insisted on proof of saved overhead¹³⁰ in which plaintiff succeeded in carrying the burden¹³¹ in any other fashion.

¹²⁴ See *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, 311 Mich. 226, 18 N.W.2d 387 (1945); *Nurmi v. Beardsley*, 284 Mich. 165, 278 N.W. 805 (1938); *Federal Bond & Mortgage Co. v. Burstein*, 222 Mich. 88, 192 N.W. 549 (1923); other cases cited in notes 86-94 *supra*.

¹²⁵ *Ibid.*

¹²⁶ *Nurmi v. Beardsley*, 284 Mich. 165, 174-76, 278 N.W. 805, 808-09 (1938).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ See *H. O. Brackney & Son v. Ryniewicz*, 346 Mich. 404, 78 N.W.2d 127 (1956); *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, 311 Mich. 226, 18 N.W.2d 387 (1945). Only in the *Nurmi* case, *supra* note 126, did plaintiff attempt to prove the percentage of performance incomplete at the time of breach. In the cases here cited breach preceded performance.

¹³⁰ In *Demirjian v. Kurtis*, 353 Mich. 619, 91 N.W.2d 841 (1958), defendant acquiesced in treating saved overhead at zero after cross-examination revealed it was at most a trifling figure. In *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911), defendant abandoned on appeal his earlier objection to plaintiff's technique of asking an expert what profit plaintiff would have made on the contract. In other cases defendant never objected to the fact that plaintiff wholly ignored saved overhead. *E.g.*, *Loud v. Campbell*, 26 Mich. 239 (1872).

¹³¹ Plaintiff failed to carry the burden in three cases, but in all of them he offered

This simplified method of proof helps the party with the burden to carry it, but he carries it in a fashion which is very likely to overestimate the value of saved overhead to plaintiff. Of the six steps listed previously, the first is avoided completely. The second is avoided, but in the process of avoiding it the court overestimates the value of saved overhead since "indirect" overhead items are treated identically with "direct" items.¹³² The third step is avoided, but only by the (arbitrary) assumption that plaintiff had no overhead items on hand at the time of notice of breach and never acquired any of them subsequently. The fourth step is simplified by using the ratio of variable costs yet to be incurred to total variable costs as the percentage in question for every overhead item—an arbitrary assumption that may either overstate or understate the value of saved overhead. The fifth step is simplified by the assumption already noted: that all overhead items are yet to be acquired and are never acquired post-breach. If plaintiff remains in business after the breach, this assumption is obviously false. Even if he does not remain in business, it is unlikely that he had no overhead items "on hand" at notice of breach if defendant's contract was not the first contract ever performed by plaintiff. The simplification of this fifth step goes the farthest toward overstatement of saved overhead, ignoring as it does the very likely possibility that plaintiff cannot re-employ all breach-released overhead, or that its re-employment is less valuable than its acquisition cost value.¹³³ The sixth step, of course, is avoided.

The writer has no basic quarrel with the simplified approach to valuing saved overhead used in the Michigan cases. While perfect accuracy requires that overhead items on hand should be valued according to the use to which they were or should have been put after breach, the practical difficulties of mustering such proof are so great that it is wise to settle for proof which is less

no proof of saved overhead, simplified or otherwise. See Mount Ida School for Girls v. Rood, 253 Mich. 482, 235 N.W. 227 (1931); Detroit Fireproofing Tile Co. v. Vinton Co., 190 Mich. 275, 157 N.W. 8 (1916); International Textbook Co. v. Schulte, 151 Mich. 149, 114 N.W. 1031 (1908).

¹³² The term "indirect overhead item," as used here, refers to one of plaintiff's commodities which is no more available for other use by plaintiff, after plaintiff has been relieved of his obligation to complete performance for defendant, than it would have been had plaintiff not been so relieved. The concept is not the same as any of the of the various accountant's concepts that are labelled "indirect costs." I have found no Michigan case in which a plaintiff attempted to exclude from his proof of saved overhead "indirect overhead items," on the ground that such items are not capable of being "saved." The court should accept such an argument, were it made.

¹³³ See Note, 12 RUTGERS L. REV. 634, 637 n.13 (1958).

accurate, but more feasible to gather. Insisting on more theoretical accuracy would only result in inability to prove saved overhead at all; in that event the court would be compelled either to assume that saved overhead had a zero value to plaintiff (if defendant was given the burden of proving it), or to deprive plaintiff of expectation damages (if plaintiff had the burden). Either assumption would result in a judgment further distorted from reality than the judgment rendered when saved overhead is proved in the fashion now tolerated by the court.

The problems of cost accounting and proof are so great in regard to this item that little in the way of hard-and-fast valuation rules seems desirable. Courts should, as the Michigan court does, relax the "certainty" rule to make admissible such proof as is both feasible to muster and reasonably geared to approximate reality. Of course, where the sums at stake are larger, and it is feasible for counsel to use more expert testimony based on more extensive trial preparation, the standards should be higher.

D. *Burden of Proving Saved Overhead*

The Michigan Supreme Court gives the plaintiff the burden of proving saved overhead.¹³⁴ As indicated, it permits him some leeway in carrying this burden, but the simplified method of proof which it tolerates still resolves some important questions against him. The plaintiff who succeeds in avoiding a directed verdict against him by use of the simplified proof nonetheless is probably undercompensated. The amount of undercompensation varies directly with the ratio of his overhead items to all items. If he is in a trade in which overhead items figure prominently, he is grossly undercompensated.

The only solution to this problem would be to permit plaintiff to establish prima facie his saved overhead by the simplified method, and then to try to reduce that figure by showing specific overhead items (either on hand at breach or reasonably acquired after breach) that would have gone into his post-breach performance and which plaintiff neither did re-employ nor should have fully re-employed. Apparently no plaintiff has attempted such a showing, perhaps because of its difficulty. But should the attempt be made, the court would be well-advised to allow it.

Only two major alternatives to the current Michigan solution suggest themselves, and both seem inferior to it. One would give

¹³⁴ See cases cited in note 115 *supra*. See also *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930) (*semble*), discussed in the text at note 121 *supra*.

defendant the burden of proving saved overhead, but permit him to use the simplified method of proof. In cases where the simplified method could not be used (for example, where plaintiff lacked sufficient experience to form an estimate of his average ratio of overhead costs to gross receipts in contracts of this sort), the result would err toward overcompensation, which is undesirable. Moreover, this solution would in all cases give the burden to the party with inferior access to the evidence.

In the prior article¹³⁵ I suggested the other alternative—giving defendant the burden of proof without resort to the simplified method of proof. I was led to this by a preference for overcompensation, rather than its converse, and by fears lest a plaintiff lose his entire expectation damage remedy for lack of proof of some trifling item of overhead. Now in the ranks of the friends of undercompensation, I see little value in this alternative. Moreover, since counsel almost always prove saved overhead by this simplified route, in which there is little peril of some small item being omitted (since the whole matter is handled much more crudely), fears of plaintiff losing his whole case for uncertain proof of a trifling item seem unrealistic. The existing Michigan solution seems the best of the (admittedly poor) alternatives open to courts.

Perhaps it should be tempered in one small way: in the event plaintiff does attempt to establish saved overhead item by item, and he fails to include some fairly trifling items, at least if he had no expectation remedy except for damages, his omissions should be ignored, or adjusted by an arbitrary deduction of some sum from his recovery, rather than necessitate the denial of all expectation damages.¹³⁶

E. *Valuing Saved Non-Overhead Items "Yet To Be Acquired"*

Normally such items should be valued by reference to their cost value, *i.e.*, the lower of two figures: what plaintiff actually paid to acquire them, or the lowest price he would have paid had he used reasonable efforts to acquire them as cheaply as possible. The rare situation in which an item in this category is valued

¹³⁵ Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577 (1962).

¹³⁶ By treating the contract as "divisible" and confining plaintiff to failure to carry the burden as to that particular segment of the contract, a court can minimize the impact of failing to carry the burden in some instances. For example, plaintiff can recover for his pre-breach performance, although he fails to recover for the post-breach phase. *E.g.*, *Davey v. Sanders*, 253 Mich. 137, 234 N.W. 128 (1931); *Reynolds v. Levi*, 122 Mich. 115, 80 N.W. 999 (1899).

above its cost to plaintiff has two characteristics: (a) after breach plaintiff nonetheless acquires the item, and (b) plaintiff then puts it to a use which (i) would have been impossible had plaintiff performed his contract with defendant, and (ii) gives the item a value to plaintiff greater than the cost of acquisition. This exception reflects the abstract guiding policy that breach-caused gains must be taken into account in measuring expectation damages.

For example, assume plaintiff agreed to sell Blackacre to defendant for 30,000 dollars at a date one year after the date of contract formation. At the time of contract formation plaintiff did not own Blackacre, but had an option to buy it from its owner for 25,000 dollars. On the date for closing with defendant the hypothetical resale value of Blackacre is 32,000 dollars and defendant defaults. If plaintiff then fails to exercise his option, the land should be valued at the cost of it which plaintiff avoided incurring—25,000 dollars. But if plaintiff upon defendant's breach nonetheless exercises the option, the land should be valued at 32,000 dollars. In the latter event plaintiff's post-breach behavior has enabled him to make a gain caused by breach, and this gain must be taken into account.

A Michigan case presented the former situation, with plaintiff failing to exercise the option upon defendant's breach. The court properly valued the land by cost value.¹³⁷ The case is significant because the court rejected defendant's argument to the effect that saved realty should always be valued at hypothetical resale value whether "yet to be acquired" or "on hand" at the time of notice of breach.¹³⁸

F. *Burden of Proving the Value of Saved Non-Overhead Items
"Yet To be Acquired"*

Although no Michigan case clearly raises the question of burden of proof on items in this category, it is clear that courts and counsel have universally assumed that plaintiff has the burden of proof.¹³⁹ The one dictum in point is in agreement.¹⁴⁰ This appears wise, inasmuch as plaintiff has superior access to the evidence and undercompensation is preferable to its converse. The sole disadvantage is the peril that in some case plaintiff will fail

¹³⁷ *Roycraft v. Northville-Six Mile Co.*, 358 Mich. 466, 100 N.W.2d 223 (1960).

¹³⁸ Brief for Defendant-Appellant, p. 21, *Roycraft v. Northville-Six Mile Co.*, *supra* note 137.

¹³⁹ See *Kolton v. Nassar*, 358 Mich. 154, 99 N.W.2d 362 (1959).

¹⁴⁰ *Ibid.*

to prove a single item, or some trifling few items, and be visited with the Draconian sanction of denial of all expectation damages recovery. If this occurs in a case where plaintiff had no price remedy or specific performance remedy available as an alternative route to vindicate his expectation interest, the burden will have worked injustice.

But the reported Michigan Supreme Court opinions fail to reveal such an instance, perhaps because the trial judges have turned a deaf ear to defendant's criticism of trifling omissions in plaintiff's proof of this category of components.

If plaintiff attempts to establish the value of an item in this category at cost value, and defendant wants it valued higher (on the theory that plaintiff nonetheless acquired it after breach and put it to a use impossible, but for breach, and more valuable to plaintiff than its cost), defendant should have the burden of proving this state of facts. Since he is attempting to *raise* the value of the subtrahend, less Draconian consequences attend defendant's failure to carry the burden than would accompany plaintiff's. Moreover, in cases where the "components" approach is proper, the probabilities are against this state of affairs ever arising. No Michigan case presents this question.

G. *Valuing Saved Non-Overhead Realty "on Hand"*

As indicated earlier, "on hand" items are not properly valued by their cost. Moreover, actual resale value is inappropriate in most cases involving realty. Actual resale value turns on the highest price an actual buyer was willing to pay for the land on the date of valuation. Since on any given day there are usually few buyers, if any, interested in a given tract except those who are in the market for a sacrifice sale, actual resale value of land tends to reflect the sacrifice sale market. Inasmuch as most tracts would bring substantially more if kept on the market longer, actual resale value understates the land's resale value in many instances.

Hypothetical resale valuation of land avoids this difficulty, since the expert describes a willing buyer, not a sacrifice sale buyer. The Michigan cases permit hypothetical resale valuation of the saved realty.¹⁴¹

¹⁴¹ See cases cited in note 112 *supra*. See also Annots., 7 A.L.R.2d 781 (1949); 52 A.L.R. 1511 (1928). I have suggested that hypothetical resale value should be confined to realty and actual resale value should be applied to personalty. There is administrative convenience in this, but it erroneously values a few items. Short-term leases, for reasons elaborated later, should not be valued at hypothetical resale value unless an adjustment is made. See text *infra* at 888, relating to a discussion of valuing saved services "on hand." Where the personalty being valued is valuable, but slow-moving, and no alter-

If plaintiff has not resold the saved realty before trial and the probabilities are high that he never had and never will have an opportunity to resell it, neither actual nor hypothetical resale value should be used. Some other valuation technique must be attempted to measure what economic benefit, if any, plaintiff gained by not transferring this realty to defendant. In one Michigan case¹⁴² plaintiff saved clay which defendant had contracted to extract from plaintiff's land and make into bricks. There was evidence that the clay had no value to anyone except an adjacent brick manufacturer, and defendant, the only person that fit that category, was not interested in the clay. The court, quite properly, suggested that rather than valuing the clay at zero, as the trial judge had done, the parties should be permitted to show "whether plaintiff's land is worth more, and if so how much more, without the clay having been excavated than it would have been if it had been excavated 12 to 15 feet below the natural level of the land."¹⁴³ In the circumstances, it was a sensible approach to valuation, since it was most unlikely that plaintiff would realize any economic gain by resale of the saved clay, but not unlikely that he would some day realize gain by selling the entire tract for purposes other than clay excavation.

H. *Burden of Proving the Value of Saved Realty*

The Michigan court very properly gives plaintiff the burden of proving the value of saved realty.¹⁴⁴ This gives the burden to the party who more often has superior access to the evidence, prefers undercompensation to its converse, and places the burden on the party who usually suffers least if he fails to carry it. Where plaintiff cannot establish the hypothetical resale value of the land (a rare situation), he normally can vindicate his expectations by resort to a price or specific performance remedy.¹⁴⁵

I. *Valuing Personalty "on Hand"*

As with all "on hand" items, cost value is irrelevant, and valuation should be done by reference to the best use to which plain-

native remedy, such as price or specific performance, is available to the seller, hypothetical resale value should be used for the same reasons as in the realty cases. A ship, for example, should be valued in this manner. No Michigan case raises the problem.

¹⁴² *Milligan v. Haggerty*, 296 Mich. 62, 295 N.W. 560 (1941).

¹⁴³ *Id.* at 72, 295 N.W. at 564.

¹⁴⁴ See *McCull v. Wardowski*, 280 Mich. 374, 273 N.W. 736 (1937).

¹⁴⁵ Price remedy: *Wesorick v. Winans*, 277 Mich. 589, 269 N.W. 609 (1936); *Allen v. Mohn*, 86 Mich. 328, 49 N.W. 626 (1891); *Curran v. Rogers*, 35 Mich. 221 (1876). Specific performance: *Lutz v. Dutmer*, 286 Mich. 467, 282 N.W. 431 (1938); *Pearson v. Gardner*, 202 Mich. 360, 168 N.W. 485 (1918).

tiff either does, or should have, put the saved personalty. Normally the best use is "resale" on terms substantially the same as the attempted "sale" to defendant. ("Sale" is used here to include bailment, if the original contract with defendant was one of bailment—a "sale" of the temporary use of the goods.)

Actual, not hypothetical, resale value normally should be used because of its superior accuracy. Where prior to trial plaintiff made a resale that accords with mitigation notions,¹⁴⁶ it should fix actual resale value. Absent any resale, or absent proof that the resale met mitigation tests, the court has a variety of devices available for approximating actual resale value: (1) evidence of bids solicited by plaintiff from potential purchasers of the personalty at or about the time of breach notice;¹⁴⁷ (2) prices prevailing in commodity exchanges at the time of breach notice, the exchanges in question being feasibly accessible to plaintiff;¹⁴⁸ (3) prices prevailing in commodity exchanges either at a different time than when notice of the breach was received or at an exchange not feasibly accessible to plaintiff, but with an allowance for transportation expenses to that exchange.¹⁴⁹

No Michigan case has faced the situation in which plaintiff's only evidence of the resale value of personalty is expert testimony of what a willing buyer would have paid.¹⁵⁰ The Michigan court's

¹⁴⁶ To establish that the actual sale was in accord with mitigation notions, plaintiff should be permitted to show his efforts to obtain the highest possible price. Statutes often prescribe the procedures for such a sale, providing in that event for a statutory remedy which is identical to expectation damages in all respects but one—the value of the subtrahend is fixed at the gross receipts of such a sale even if the sale did not occur on the date when the subtrahend would otherwise be valued. *E.g.*, MICH. COMP. LAWS § 440.60 (1948); UNIFORM SALES ACT § 60. See generally Annots., 119 A.L.R. 1141 (1939); 44 A.L.R. 296 (1926).

¹⁴⁷ See Record, pp. 59-60, *Gulf Vegetable & Fruit Co. v. Lane*, 258 Mich. 634, 242 N.W. 792 (1932); Record, pp. 94-96, *Taylor v. Goldsmith*, 228 Mich. 259, 200 N.W. 254 (1924).

¹⁴⁸ See Record, pp. 22, 37-39, *Taylor v. Goldsmith*, *supra* note 147; Record, pp. 90, 106, *Athol Mfg. Co. v. Briscoe Motor Co.*, 222 Mich. 95, 192 N.W. 668 (1923). See also Annot., 44 A.L.R. 358 (1926).

¹⁴⁹ See *Pandaleon v. Brecker*, 227 Mich. 297, 198 N.W. 953 (1924); *Aulls v. Young*, 98 Mich. 231, 57 N.W. 119 (1893); *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 86½ (1889).

¹⁵⁰ Where defendant objects to such evidence as uncertain and plaintiff still has available a price or specific performance remedy, he should be forced to use those remedies rather than to expose defendant to the risk of overcompensation. Where neither of those expectation-vindicating remedies are available, the decision cannot be made intelligently by hard and fast rules, but must turn on such things as: (1) whether plaintiff's failure to establish actual resale value reflected the difficulties inherent in the situation or slipshod trial preparation; (2) the amount of overcompensation to which defendant would be exposed by hypothetical resale value testimony; (3) whether plaintiff earlier had an opportunity to avoid his present dilemma by a proper resale according

valuation of saved personalty differs in no way from the views here expressed.¹⁵¹

J. *Valuing Non-Overhead Services "on Hand"*

The Michigan Supreme Court has encountered only one kind of non-overhead services "on hand"—the full-time services of the individual plaintiff himself (or partners themselves) which, but for breach, would have been devoted to the performance of the balance of his contract with defendant. The court has valued such items consistently at actual resale value, the appropriate valuation technique.¹⁵² Cost valuation of all "on hand" items is inappropriate, as indicated previously. Indeed, it is impossible in this situation. As between actual resale value and hypothetical resale value the former is to be preferred. Use of hypothetical resale value, with its arbitrary assumption that a willing buyer exists, distorts reality if in fact no such buyer exists. In its application to property to be transferred permanently this distortion deprives plaintiff only of compensation for the interest on the resale value of the land between the date of breach and the date when he actually could have resold the land. Compared to the total value of the land, this sum is trifling. Applied to "on hand" services, however, hypothetical resale value distorts reality much more.¹⁵³ It deprives plaintiff of compensation for the saved time itself during the interval between breach and the date when actual resale would occur.

to mitigation standards, or by suing for price or specific performance; (4) whether the commodity is valuable, but slow-moving. See note 141 *supra*.

A comparable situation involving a plaintiff-buyer arose in *Sauer v. McClintic-Marshall Constr. Co.*, 189 Mich. 577, 155 N.W. 586 (1915). Plaintiff carried the burden of proving "market value" (the highest price a reasonable man in plaintiff's plight would have paid for cover goods upon defendant's failure to deliver as agreed) by expert testimony as to the market value of such goods on the critical day. Plaintiff could not establish market value in any other way since there was no organized exchange anywhere for the goods in question (structural steel designed for this one project), and plaintiff never sampled the market by soliciting bids after breach. Plaintiff had no specific performance or price remedy available, and the jury verdict affirmed was for \$651—some \$400 less than the spread between the contract price and the price plaintiff in fact paid to the seller with whom he covered.

¹⁵¹ See, e.g., *Peters v. Cooper*, 95 Mich. 191, 54 N.W. 694 (1893); *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 864 (1889); *Brownlee v. Bolton*, 44 Mich. 218, 6 N.W. 657 (1880). See also Annot., 130 A.L.R. 1336 (1941).

¹⁵² See, e.g., *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958); *Edgecomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930); *Hamilton v. Stephens*, 240 Mich. 228, 215 N.W. 321 (1927); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893).

¹⁵³ It has similar distorting effects whenever the saved commodity is the "time" of someone or something. That is, whenever the contract called for a temporary transfer of the benefit of something. The shorter the "time" saved, the more significant the distortion.

Since the defendant-employer has the greatest incentive to breach in times of recession or depression, which are the times when plaintiff has the greatest difficulty in finding re-employment, the result is undercompensation (and reduced deterrence of breach) at the precise time when there is the greatest social need for full compensation and such deterrence as accompanies it. *

Actual resale value, while better than hypothetical resale value, still has a major disadvantage: in some situations the party with the burden of proving what plaintiff should have earned by reasonable efforts to resell his released time cannot carry the burden despite diligent trial preparation. Thus, allocation of the burden frequently results in a judicial choice between over and undercompensation. The situations that cause trouble are those in which plaintiff, for all or part of the term of his contract remaining after breach, fails to secure other employment which pays him as much as he would have earned under the contract. If plaintiff has the burden of showing that he could not have earned more by reasonable efforts to mitigate, he usually cannot demonstrate the fact. If defendant must prove he could have earned more (and how much more), he usually cannot prove the fact.¹⁵⁴ The methods of proving actual resale value conventionally used in cases involving personalty¹⁵⁵ are ill-adapted to the cases where saved "on hand" services are involved. And, unlike plaintiff-lessor, plaintiff-employee has no alternative expectation remedy¹⁵⁶ to vindicate his expectation interest.

K. *Burden of Proving Saved Non-Overhead Services "on Hand"*

The Michigan courts properly give defendant the burden of proving the value of this component.¹⁵⁷ This casts the burden on the party with inferior access to the evidence, and raises some

¹⁵⁴ In no Michigan case has defendant carried this burden successfully.

¹⁵⁵ See text at note 146 *supra*.

¹⁵⁶ The plaintiff-employee has an alternative remedy of money restitution (*quantum meruit*), but this only vindicates his restitution interest. To the extent that his expectation interest exceeds his restitution interest *quantum meruit* recovery is undercompensatory. The problem is acute where plaintiff has yet to perform the bulk of a contract which would be very profitable, or where he has rendered much of his performance but as yet has delivered nothing to defendant. *E.g.*, *Hosmer v. Wilson*, 7 Mich. 293 (1859) (plaintiff-seller was to manufacture and deliver an engine; repudiation by defendant preceded completion of the engine; no recovery permitted for "work and labor done"). At one time plaintiff had a price recovery on the now discredited doctrine of "constructive service." See Annots., 17 A.L.R. 629 (1922); 8 A.L.R. 338 (1920).

¹⁵⁷ See *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958); *Edgcomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893).

risk of overcompensation.¹⁵⁸ However, the risk of overcompensation is not too great. While defendant normally cannot prove with requisite certainty what plaintiff should have earned,¹⁵⁹ he usually can prove what plaintiff in fact earned with his breach-released time.¹⁶⁰ Thus, the maximum overcompensation which is likely to occur is the difference between what plaintiff earned and what he should have earned.

For those parts of the term during which plaintiff found full-time re-employment the probabilities are that he found work as remunerative as the mitigation notion would require him to find. For those parts of the term during which plaintiff failed to take full-time re-employment, there is some likelihood that more effort would have produced a job, especially if plaintiff is not the head of the household, and is tempted to retire from the labor force upon defendant's breach.¹⁶¹ If plaintiff is the head of the household, the probabilities are that the idleness was forced, rather than voluntary. It would be unusual for a full-time employee to watch his income stop altogether in the hope that successful litigation will recoup it without labor.

Such risks of overcompensation as exist in this handling of the burden should be run.¹⁶² In this situation, overcompensation, not its converse, facilitates loss distribution and loss absorption. Normally the full-time employee is much less able to perform these functions than defendant, his employer. Splitting the loss among them puts part of it on the plaintiff-employee, who normally cannot distribute it in the cost of his product nor absorb it without serious dislocation of his family's economy.

L. *Minor Adjustments to the Value of Components and Incidental Damages*

Where breach enabled plaintiff to avoid acquiring a particular item, what he saved by not acquiring it may exceed the price he

¹⁵⁸ See *Ogden v. George F. Alger Co.*, *supra* note 157, where defendant failed to show what plaintiff earned or should have earned during a ten-year term. Plaintiff-employee recovered over \$40,000 when the subtrahend was valued at zero, although the record suggests that plaintiff's actual earnings from two new enterprises were substantial.

¹⁵⁹ See note 154 *supra*.

¹⁶⁰ *E.g.*, *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922); *Milligan v. Sligh Furniture Co.*, 111 Mich. 629, 70 N.W. 133 (1897). *But see* *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958).

¹⁶¹ The possibility was present in several cases in which plaintiff-schoolteachers failed to obtain re-employment. *E.g.*, *Edgecomb v. School Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893). But it is also possible that no other teaching job could be found at the time when defendant breached.

¹⁶² If the saved non-overhead services on hand are those of plaintiff's employee or contractor, this is not true, and the burden should be plaintiff's. No Michigan case involves such facts.

would have paid for the item. If, but for breach, he would have incurred miscellaneous additional charges in the process of locating a supplier, transporting the item to his storage point or job site, or maintaining and protecting the item until the time it is used in performing defendant's contract, these additional saved charges should be reflected in the subtrahend. They should be valued at cost and defendant should have the burden of proving their existence and value. Since they represent additions to the subtrahend, the consequences for defendant for failing to carry the burden as to any one of them are less dire than plaintiff's consequences would be. No Michigan case appears to raise an issue as to such items.

Where plaintiff did or should have resold "on hand" components, the actual resale value of the components does not necessarily accurately reflect their value to plaintiff. In the process of actually reselling them he may have been obliged to incur charges in finding a new purchaser, delivering the items to him, or maintaining and protecting the items during the interval between notice of breach and resale. These charges should be subtracted from the subtrahend to reflect more accurately what plaintiff saved because of defendant's breach. His true savings are not the gross receipts the resale purchaser paid, but the gross receipts less those charges.

Often plaintiff incurred, or would have incurred, charges of a similar kind had he completed performance with defendant. Without breach his performance might entail expense in locating defendant as a buyer, storing or maintaining property slated for delivery to defendant, freight to defendant, etc. If these have already been incurred they have no proper place in the subtrahend; they were not saved.¹⁶³ If they have not been incurred, they have been taken into account already as non-overhead items "yet to be incurred." For example, if plaintiff incurred liability to a broker who found defendant as a prospective purchaser, and defendant's breach does not enable plaintiff to escape such liability, the broker's commission is not relevant to subtrahend valuation. If plaintiff incurs another broker's charge for finding the resale purchaser, that second broker's commission should be taken into account as an adjustment of the subtrahend or in some other fashion. Otherwise the subtrahend is overvalued. If defendant's

¹⁶³ They are relevant to a reliance damage remedy, however. See *Biddle v. Biddle*, 202 Mich. 160, 168 N.W. 92 (1918). *But see* *Hubbard v. Epworth*, 69 Mich. 92, 36 N.W. 801 (1888).

breach lets plaintiff escape liability to the first broker, the service for which such broker would have collected but for breach is a non-overhead item "yet to be acquired."

In one Michigan case¹⁶⁴ a Detroit plaintiff saved goods which he had contracted to deliver to defendant in Ypsilanti. After breach he resold them to a buyer in Milwaukee. The court held that plaintiff should recover the difference between (the contract price less the freight from Detroit to Ypsilanti) and (the gross receipts paid by the Milwaukee purchaser less the freight from Detroit to Milwaukee). This achieved the same effect as the treatment suggested here.

Some courts on occasion treat these extra charges attending resale as items of incidental damages. This treatment does not alter the result (if double-counting is avoided),¹⁶⁵ except in the rare case where the subtrahend, even when adjusted so as to reflect these charges, exceeds the minuend. In that situation these charges are recovered if treated as incidental damages and not recovered if treated as adjustments to the subtrahend.¹⁶⁶

Where the saved component is realty, and it has been resold before trial, these additional charges should be recovered in similar fashion.

If the component is being valued by actual or hypothetical resale value, *although there has been no resale prior to trial*, these charges have not in fact been incurred, and it is impossible to treat the charges as items of incidental damages. Nonetheless, if their existence and value are shown with requisite certainty, they should be recovered as adjustments to the subtrahend. For example, if it is clear that plaintiff would have had to pay a broker at least 1,000 dollars to effect a resale, the 1,000 dollars should be taken into account although plaintiff has not and never will resell. *If he had resold*, the assumption under which the item was valued, he would have incurred this charge.

Plaintiff should have the burden of proving the existence and value of all such charges. Since they enhance the value of the subtrahend, the consequences are less dire when he fails to carry the burden of proof: the particular charge is deemed non-existent, leaving the rest of the subtrahend intact. If defendant had the

¹⁶⁴ *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 864 (1889).

¹⁶⁵ See RESTATEMENT § 333, comment *f*.

¹⁶⁶ See text at note 24 *supra*. Courts that permit plaintiff recovery of reliance damages without reduction to reflect what he would have lost had he completed performance should, to be consistent, permit plaintiff at his option to treat the item as one of incidental damages.

burden, his failure to establish the non-existence of any item would have to be visited with valuing the entire subtrahend at zero.¹⁶⁷ No Michigan case raises these problems.

IV. "ENTITY" VALUATION

A. "Entity" or "Components" Valuation?

In the bulk of cases the court can avoid making this choice.¹⁶⁸ Where plaintiff saved a single component, of course the component is the entity, and the two approaches are identical.¹⁶⁹ Even when more than one component has been saved, the two approaches sometimes are the same. To explain this something must be said of the minor adjustments that must be made to the subtrahend when an "entity" approach is used.

The "entity" approach assumes that plaintiff did or should have delivered to a resale purchaser some performance once scheduled for defendant. In the process of reselling plaintiff may incur charges in locating the resale purchaser, delivering the entity to him, storing or maintaining it or parts of it during the interval between breach notice and resale of the entity, etc. Breach may also permit the plaintiff to avoid incurring similar charges which he would have incurred had he completed his scheduled performance with defendant. Under a "components" approach, the adjustments to the subtrahend (or the incidental damages) are the additional charges involved in resale. However, under an "entity" approach, the adjustments (or incidental damages) are this sum *minus similar charges saved by not completing performance with defendant*.

The "entity" and "components" approaches differ in their

¹⁶⁷ See text *supra* at 884-85.

¹⁶⁸ In only five cases did the Supreme Court face this choice: *Demirjian v. Kurtis*, 353 Mich. 619, 91 N.W.2d 841 (1958); *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911); *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885); *Hopkins v. Sanford*, 41 Mich. 243, 2 N.W. 39 (1879); *Loud v. Campbell*, 26 Mich. 239 (1872). In *Loud* the argument for "entity" valuation was "faintly pressed." In *Demirjian* plaintiff contended that he should prevail in either event. In *Hopkins* the only question was one of burden of proof. In the other two cases the trial judge excluded evidence bearing on the propriety of "entity" valuation, so that in reversing the court did not have to make this choice but had to decide only that the choice should be explored more thoroughly below. In several other cases the facts presented this choice, but counsel failed to see it. *E.g.*, *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich. 95, 192 N.W. 668 (1923); *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, 100 N.W. 127 (1904); *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888).

¹⁶⁹ *E.g.*, *St. John v. Richard*, 272 Mich. 670, 262 N.W. 437 (1935); *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252 (1924); *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922); *Burrell v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865).

adjustments (or incidental damages) because only the latter approach takes into account, as non-overhead items "yet to be incurred," the saved charges that would have been incurred had plaintiff completed performance with defendant. Since under an "entity" approach these saved charges cannot be taken into account in that fashion, they must be taken into account in the process of adjusting the subtrahend or in the process of computing incidental damages. Under an "entity" approach, for example, the incidental damages or subtrahend adjustments are not the freight charges from Detroit to Milwaukee in our earlier fact situation. They are the difference between Detroit-Milwaukee and Detroit-Ypsilanti freight costs.

Now it is possible to explain how "entity" and "components" approaches can be identical although more than one component was saved. This occurs where all the saved components are either (a) non-overhead "on hand" items, or (b) non-overhead "yet to be acquired" items which would be taken into account in adjusting the subtrahend (or computing incidental damages) under an "entity" approach.¹⁷⁰ Returning to the Ypsilanti-Detroit-Milwaukee situation, it can be seen that "entity" and "components" approaches are identical there. Under a "components" approach the saved components are the "on hand" finished goods and the saved freight to Ypsilanti. The adjustment or the incidental damages is the freight to Milwaukee. Under an "entity" approach the entity is the "on hand" finished goods, and the adjustment or incidental damages is the difference between freight to Milwaukee and freight to Ypsilanti.

Even in those situations where the facts present an opportunity for a significant choice between approaches, the judges may avoid the necessity for choice if counsel are in agreement as to the approach to be taken. In one Michigan case¹⁷¹ where the choice between "entity" and "components" valuation might have been most difficult for the court to resolve, counsel were in agreement that a "components" approach should be used. Counsel did not see the formula which plaintiff proposed and as to which defendant acquiesced in all major respects¹⁷² as involving "components" valuation of the subtrahend, but upon analysis it turns out

¹⁷⁰ See note 164 *supra*.

¹⁷¹ Athol Mfg. Co. v. Briscoe Motor Corp., 222 Mich. 95, 192 N.W. 668 (1923).

¹⁷² Defendant's only quarrel with plaintiff's proposed measure of damages concerned the *timing* of measuring the value of certain raw materials; defendant never urged an "entity" approach, which would have resulted in much larger recovery by plaintiff. See text *infra* at 897.

to be an algebraic equivalent of the approach sketched previously in this article.

Plaintiff corporation, a manufacturer of artificial leather, sought expectation damages from buyer corporation, which had repudiated the contract before the goods were delivered. At the time of breach, plaintiff had completed the manufacture of, but had not delivered, 6,848 yards of goods, and another 46,464 yards remained to be manufactured. In order to manufacture these remaining 46,464 yards, plaintiff needed 46,464 yards of unfinished cloth, and the other raw materials used in transforming such cloth into artificial leather. At about the same time as the plaintiff-defendant contract was formed, plaintiff contracted with a cloth supplier for the cloth that was to be used in performing the defendant's order. The agreed price was 1.10 dollars per yard. At the time when defendant breached, the cloth supplier had delivered to plaintiff some, but not all, of the cloth needed to complete manufacture of an additional 46,464 yards of finished product. The plaintiff had the power then to refuse further deliveries from this supplier, and such termination would not have exposed plaintiff to liability to the supplier inasmuch as the supplier was at that time seriously in default in his performance.

After defendant's repudiation plaintiff did not complete manufacture of the 46,464 yards, nor did plaintiff resell the finished 6,848 yards then on hand. Between the time when the plaintiff-defendant contract was formed and the time when it was repudiated prices fell sharply in both the market in which plaintiff sold his finished product and the market in which plaintiff bought his raw materials. Cloth was selling for .32625 dollars per yard at the time of defendant's repudiation.

Under a "components" approach, the minuend would be the unpaid balance of the price—104,846 dollars. The subtrahend would be the total of the value of all saved components. The saved 6,848 yards of finished goods (valued at actual resale value) were worth 2,602 dollars. The saved costs of transforming 46,464 yards of unfinished cloth into artificial leather (dyeing, coating, labor, overhead, inspection) totalled 29,565 dollars. The saved cloth that would have been consumed in manufacturing another 46,464 yards of artificial leather must be separated into two categories—"on hand" and "yet to be acquired" cloth. The "on hand" cloth should be valued at its actual resale value on the date of notice of breach—.32625 dollars per yard. The "yet to be acquired" cloth should be valued at its cost of acquisition. If this

is determined as of the date when plaintiff first contracted with his supplier for it, this cloth should be valued at 1.10 dollars per yard; if the proper time for determination is the time of notice of breach, it should be valued at .32625 dollars per yard.

Thus, if we assume that the "yet to be acquired" cloth should be valued by what it would have cost to acquire it at the time of notice of breach, it has the same value as the "on hand" cloth—.32625 dollars per yard. (While the "on hand" cloth is valued at resale value and the "yet to be acquired" cloth is valued at acquisition cost, these figures are in effect the same because plaintiff would acquire or resell this cloth in the same market.¹⁷³) Assuming that all the saved cloth is properly valued at .32625 dollars per yard, its value to plaintiff is 15,170 dollars. Still using this assumption, the total value of the components is 47,337 dollars and plaintiff's recovery would be 57,509 dollars.

In the trial court plaintiff persuaded the judge to submit the case to the jury on a measurement formula which was actually an algebraic equivalent of the "components" approach, and which permitted a recovery of 57,512 dollars¹⁷⁴ as sketched above. Plaintiff's theory gave him the sum of three items: 10,864 dollars for "loss on finished goods"; 7,309 dollars for "loss of profits on 46,464 yards not made"; and 39,339 dollars for "loss on material for 46,464 yards." Plaintiff's rationale for the three items was roughly this: the contract can be divided into two parts, one embracing the finished goods, and one embracing the unfinished goods. Plaintiff's first item of damages (10,864 dollars) reflected the first (finished goods) part of the contract. His other two items of damages reflected the unfinished goods part of the contract. As to these unfinished goods he argued that he should recover "the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price . . ."¹⁷⁵—his second item of 7,309 dollars. And, "if materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach [plaintiff argued, plaintiff should further recover] the difference between the cost

¹⁷³ If plaintiff would incur expense in accomplishing acquisition and/or resale of the cloth, the resale and costs values are *not* identical even though they are accomplished in the same market, because such expenses are *added* to the market price to give the adjusted cost of acquisition, but are *subtracted from* the market price to give the adjusted resale price.

¹⁷⁴ The \$3 discrepancy between this figure and that in the prior paragraph is due to my rounding off fractions for simplicity.

¹⁷⁵ Brief for Plaintiff, p. 92, quoting *Kingman v. Western Mfg. Co.*, 92 Fed. 486, 490 (8th Cir. 1899).

and the market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost"¹⁷⁶—the third item of 39,339 dollars.

Plaintiff did not attempt to justify the formula except by stating that it was first uttered in Judge Sanborn's "great leading case on the subject" (*Kingman v. Western Mfg. Co.*), and was approved in Sedgwick's treatise on damages.¹⁷⁷

The weakness of plaintiff's formula lay in the third item of 39,339 dollars, which, according to Judge Sanborn's language, is recoverable only if "materials have been purchased with which to fulfill the contract." As defendant pointed out, in the trial court plaintiff had recovered in the third item for the cost/market difference of *all* materials that would have gone into an additional 46,464 yards of artificial leather, although not all of these materials were on hand at the time of notice of breach. If the rationale underlying the allowance of this third item is to permit plaintiff to recover for the loss he sustained when the resale value of raw materials that he purchased in reliance on the contract and had on hand at the time of breach declined, no recovery should be permitted for the decline in value of materials which plaintiff never purchased nor obligated himself irrevocably to purchase.

On appeal the Michigan Supreme Court followed plaintiff's analysis of the situation, treating the three items separately. Plaintiff's recovery of the first two items was approved routinely, since they were uncontested on appeal.¹⁷⁸ Turning then to the third item, the court sided with defendant: there was reversible error in permitting plaintiff to recover the cost/market spread of those raw materials which at the time of breach he neither had in his possession nor was obligated to accept and pay for. Since he could terminate his contract to accept further cloth with impunity, the mitigation notion required that he do so upon learning of defendant's breach.¹⁷⁹

Had the case been presented in both courts as a straightforward suit for expectation damages with the subtrahend valued one component at a time, the issue on appeal would have appeared differently. Then the issue would have been: in fixing the saved cost of acquiring the raw materials as yet undelivered at the time of breach, should they be valued as of the time when plaintiff orig-

¹⁷⁶ *Ibid.*

¹⁷⁷ SEDGWICK, DAMAGES § 752 (9th ed. 1912).

¹⁷⁸ 222 Mich. at 100-01, 192 N.W. at 670.

¹⁷⁹ *Id.* at 101-02, 192 N.W. at 670-71.

inally contracted with his supplier to pay 1.10 dollars per yard for them, or as the date of breach, when plaintiff could have repudiated his contract with his cloth supplier and purchased the cloth on the open market for .32625 dollars per yard? The supreme court's refusal to allow recovery of the part of the plaintiff's third item which represented the cost/market spread on raw materials that would have gone into plaintiff's performance but for breach, but which were yet to be acquired at the time of breach, had the identical economic effect as a decision to use the "components approach" would have had, valuing such materials at the earlier date, rather than at the later date, as was done by the trial court.

The present object is not to get involved in a discussion of the appropriate time for valuing such components; the *timing* of valuation is a topic beyond the scope of this article. Rather, it is suggested that in this case the trial and appellate courts were using a "components" approach without knowing it, and counsel were similarly in agreement that "components" valuation should be attempted.

Plaintiff's acquiescence in a "components" approach in this case, although an "entity" approach would give him greater recovery, may have been due to failure to appreciate the possible alternative, to doubts that he could persuade judge and jury to use an "entity" approach, or to the belief that section 64 of the Uniform Sales Act, which plaintiff quoted in his brief,¹⁸⁰ forbade greater recovery than that computed under a "components" approach.

Section 64(4) of the Uniform Sales Act,¹⁸¹ in effect in Michigan at the time the plaintiff-defendant contract was formed,¹⁸² addresses itself to the choice which plaintiff-manufacturer faces when his buyer repudiates before fabrication of the goods is completed. It is very clear that in no event can plaintiff recover

¹⁸⁰ Brief for Plaintiff, pp. 90-91.

¹⁸¹ MICH. COMP. LAWS § 440.64(4) (1948): "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed, shall be considered in estimating such damages."

Michigan's adoption of the Uniform Commercial Code, MICH. STAT. ANN. §§ 19.1101-.9994 (Supp. 1962), will repeal the above provision, effective Jan. 1, 1964.

¹⁸² The Uniform Sales Act was adopted in Michigan in 1913.

greater damages than those he would have sustained had he stopped work toward completion and resale of the goods upon notice of breach.¹⁸³ But the draftsmen of the statute were much less clear as to just what damages plaintiff would have sustained had he stopped work upon notice of breach. The draftsmen's certainty returned in prescribing that the court should "consider" the plaintiff's lost profits (however they might be computed). But no direction was given as to how to proceed after this period of contemplation was concluded.

Michigan has recently adopted the Uniform Commercial Code,¹⁸⁴ but its provisions on this point, according to which the trial court is enjoined to depart from "entity" valuation of the subtrahend if that "measure of damages . . . is inadequate to put the seller in as good a position as performance would have done," are almost equally as mysterious,¹⁸⁵ as the text of the statute contains no clue as to when that measure is "inadequate." The comment to section 2-708 mutters darkly about "fixed price articles," "standard priced goods," and "list price,"¹⁸⁶ suggesting that the pricing practices of the plaintiff are determinative in some situa-

¹⁸³ This seems to flout the general mitigation notions (1) that plaintiff need not take a certain post-breach course that would reduce damages if it would expose him to unreasonable risk or loss or hardship, and (2) plaintiff's damages will not be reduced because in his efforts to choose a course of mitigation he selected one which, although apparently reasonable when selected, ultimately proved less frugal than some alternative course.

¹⁸⁴ MICH. STAT. ANN. §§ 19.1101-.9994 (Supp. 1962).

¹⁸⁵ UNIFORM COMMERCIAL CODE § 2-708, which reads: "Seller's Damages for Non-acceptance or Repudiation.

"(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price 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.

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

¹⁸⁶ UNIFORM COMMERCIAL CODE § 2-708, comment 2, which states: "The provision of this section permitting recovery of expected profit including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of 'profit' to show a history of earnings, especially if a new venture is involved."

tions.¹⁸⁷ In any event, when "entity" valuation of the subtrahend would give inadequate recovery, the proper measure under the UCC is "the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with incidental damages . . . , due allowance for costs reasonably incurred and due credit for payments or proceeds from resale." How "reasonable overhead" gets included in "profit" is not explained. Nor is there any explanation of the meaning of the term "proceeds of resale" in a case, like that just discussed, where at the time of trial plaintiff resold neither the entity nor the saved "on hand" components. When a court is forced to a choice between "entity" and "components" valuation of the subtrahend, the ultimate question is this: in the light of the notions of mitigation and breach-caused gains, was plaintiff reasonable in his post-breach choice between (1) stopping all further work on the contract, and (2) completing work on the contract with an eye to resale of the entity to another buyer?

If counsel frame the issue as a choice between "entity" and "components" valuation of the subtrahend,¹⁸⁸ four basic fact situations can arise: (1) plaintiff completes work on the entity and at trial wants an "entity" approach to be adopted; (2) plaintiff stops further work and at trial wants a "components" approach to be taken; (3) plaintiff completes work and at trial wants a "components" approach; (4) plaintiff abandons work and at trial wants an "entity" approach.

In the first two situations, where plaintiff's choice of valuation technique corresponds with his post-breach course of action, the court should accept plaintiff's approach to valuation unless (a)

¹⁸⁷ The language savors of English decisions involving car dealers. See *Thompson v. Robinson*, [1955] 2 Weekly L.R. 185. These have been criticized by Professor Marshall on the grounds that parties should not be able to bootstrap themselves out of the normal measure of damages by arguing their own restrictive marketing practices. Comment, 34 CAN. B. REV. 969, 971 (1956).

¹⁸⁸ Usually the issue is not framed by counsel in this manner. Plaintiff will typically argue for a "components" approach by saying he is entitled to "lost profits." *E.g.*, *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930); *Atkinson v. Morse*, 63 Mich. 276, 29 N.W. 711 (1886); *Goodrich v. Hubbard*, 51 Mich. 62, 16 N.W. 232 (1883). Defendant may not counter by arguing for an "entity" approach, but by arguing that plaintiff is not among the class entitled to "lost profits." *E.g.*, *Hamilton v. Stephens*, 240 Mich. 228, 215 N.W. 321 (1927); *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, 100 N.W. 127 (1904); *Goodrich v. Hubbard*, *supra*. Or that the "lost profits" are "speculative." *E.g.*, *Detroit Independent Sprinkler Co. v. Plywood Prods. Corp.*, 311 Mich. 226, 18 N.W.2d 387 (1945); *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N.W. 976 (1896); *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888). Or that some items are not proved with certainty. *E.g.*, *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338 (1937); *Callender v. Myers Regulator Co.*, *supra*; *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916).

plaintiff should have known at the time he made the choice that it would enhance damages and (b) it would not require undue risk or self-sacrifice for plaintiff to take the opposite course. Defendant should have the burden of showing that plaintiff's choice violated mitigation notions because in the frequently-encountered "no proof" situation the probability is that plaintiff's choice accords with mitigation notions. This is true because plaintiff's self-interest normally leads him to mitigate damages; it is the rare plaintiff who is so sure of a future victory in court that he is willing to incur unnecessary expense after breach in order to increase the size of his future judgment.

In the last two of the four situations, where plaintiff's choice of valuation technique runs counter to his post-breach course of conduct, the court should side with defendant. Defendant's preference for a technique that coincides with what plaintiff actually did rests on defendant's belief that that valuation technique will result in lower damage recovery. The mitigation notion and the notion of breach-caused gains favor such a valuation technique. Plaintiff's only possible counter-argument is the fallacious assertion that since mitigation notions did not *require* him to take the post-breach course he took, in valuation, that course should be disregarded. The fallacy lies in overlooking the notion that breach-caused gains, even though resulting from gambles not required by the mitigation notion, must be taken into account.¹⁸⁹

The first of these four situations (plaintiff completed work and wanted to use an "entity" approach, but defendant wanted a "components" approach) has not arisen in Michigan. The closest case involved a plaintiff who published a trade journal in which an ad was to be run weekly for a year, plaintiff seeking damages when defendant repudiated before the end of the year.¹⁹⁰ Defendant made a feeble effort at trial to establish that plaintiff would sustain no damages if the subtrahend was valued by components saved,¹⁹¹ but the effort was abandoned by the time the case reached the supreme court. There both parties were agreed upon the use of an "entity" approach.

The second situation (plaintiff abandons work and wants a "components" approach at trial, but defendant wants an "entity" approach) arose in *Loud v. Campbell*.¹⁹² Plaintiff, owner of a ship,

¹⁸⁹ See text *supra* at 850, 859.

¹⁹⁰ *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907).

¹⁹¹ Record, p. 26, *Tradesman Co. v. Superior Mfg. Co.*, *supra* note 190.

¹⁹² 26 Mich. 239 (1872).

contracted to load the vessel with defendant's lumber at Au Sable and carry the cargo to Buffalo. Defendant's breach occurred when the ship was lying off Au Sable, before the lumber was loaded. Plaintiff, unable to berth at Au Sable because of weather conditions, thereupon abandoned all plans for a voyage from Au Sable to Buffalo, ordering the vessel to return to its home port, Detroit. Plaintiff sought to value the subtrahend by including the various saved components—the costs yet to be incurred in the voyage from Au Sable to Buffalo. Defendant sought to value the entity—carriage of a shipload of lumber from Au Sable to Buffalo. The court rejected defendant's argument (which was only "faintly pressed"),¹⁹³ apparently because the weather conditions made it unreasonable to demand that plaintiff seek to resell the entity by finding another lumber dealer at Au Sable interested in carriage of a shipload of lumber to Buffalo.

It arose again in *Hopkins v. Sanford*¹⁹⁴ where plaintiff sawmill owner, who had failed to resell the entity (part of his mill's services for the season), sought a "components" approach and defendant argued for an "entity" approach. Neither party offered evidence that plaintiff could have found a new purchaser for the entity had he sought one late in the season, the time of the breach. The trial judge charged that defendant had the burden of showing that plaintiff could have resold the entity, and this was held proper on appeal. This accords with the notion that where plaintiff picks one course of action and defendant seeks to use a valuation approach predicated on another course, defendant has the burden of proving the feasibility of that other course.

The third situation (plaintiff abandoned further work toward completing the entity and wanted "entity" valuation, defendant wanting "components" valuation) has not reached the Michigan Supreme Court. *Demirjian v. Kurtis*,¹⁹⁵ involving a complex variant on the situation, is discussed subsequently.¹⁹⁶

The fourth situation (plaintiff completes performance but wants "components" approach at trial, defendant wanting "entity" approach) has arisen twice in Michigan. In *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*,¹⁹⁷ plaintiff was a manufacturer of engines who contracted to furnish a specified number of them to defendant,

¹⁹³ *Id.* at 244.

¹⁹⁴ 41 Mich. 243, 2 N.W. 39 (1879).

¹⁹⁵ 353 Mich. 619, 91 N.W.2d 841 (1958).

¹⁹⁶ See text at note 230 *infra*.

¹⁹⁷ 166 Mich. 276, 131 N.W. 559 (1911).

a manufacturer of automobiles. Performance of the contract would have utilized almost the entire productive capacity of plaintiff's plant for a substantial length of time, so the "entity" could be regarded as that capacity for that time. At trial plaintiff sought to use a "components" approach, proving the value of the various items that would have gone into his promised performance. The trial judge prevented defense counsel from introducing evidence to the effect that after breach plaintiff had resold almost the entire productive capacity of his plant to another car manufacturer, promising to make similar engines for him. The exclusion of this evidence was deemed reversible error by the supreme court, its underlying logic undoubtedly being that a "components" approach would be inappropriate if plaintiff had in fact resold the entity after breach and defendant wanted "entity" valuation. The court did not elaborate on its reasons, however.

A comparable situation arose in the first *Petrie v. Lane*,¹⁹⁸ involving a plaintiff selling the services of his lumber mill to defendant, owner of a large number of logs. Cutting defendant's logs would have fully occupied plaintiff's productive capacity during that year's milling season. Plaintiff sought to use a "components" approach, and was successful in the trial court. The trial judge excluded defendant's evidence that plaintiff had resold the entity—his mill's capacity for the season. The court reversed, on this ground as well as others.

In all four cases—*Loud*, *Hopkins*, *Harrington-Wiard*, and *Petrie*, the court reached results that accord with the views expressed here.

B. *Valuing the Entity in the Absence of Lost Volume Problems*

If the entity consists of real property other than a short-term lease,¹⁹⁹ the entity should be valued at hypothetical resale value. Otherwise, it should be valued at actual resale value.²⁰⁰

If the entity consists of plaintiff's own non-overhead services, the burden of proving its value should be cast on defendant. Otherwise, the burden should be on plaintiff.²⁰¹

Adjustments to reduce the subtrahend²⁰² should be proved by

¹⁹⁸ 58 Mich. 527, 25 N.W. 504 (1885).

¹⁹⁹ Regarding short-term leases, see note 141 *supra*, and text *supra* at 888.

²⁰⁰ The valuation rules here suggested parallel the valuation rules earlier suggested for various categories of components. The rationale, which would be repetitious, is omitted.

²⁰¹ The burden of proof rules here parallel those for "components" valuation. See text at note 157 *supra*.

²⁰² See text *supra* at 861.

plaintiff; adjustments to increase it²⁰³ by defendant,²⁰⁴ whether or not plaintiff in fact resells the entity before trial.

The Michigan case law concerning the valuation techniques and burden of proving the value of the entity accords with the views presented here,²⁰⁵ with a single possibly discrepant case.²⁰⁶

Plaintiff there was a trade journal which had contracted to run defendant's ad weekly for a year on the journal's inside cover. Defendant agreed to pay at the rate of fifty-five cents per inch. Before the middle of the year defendant repudiated. Plaintiff attempted with no success to find another purchaser on the same terms: the same part of the cover, one year, fifty-five cents per inch. He refused to cut the rate in order to attract another customer. Throughout this period plaintiff was selling less desirable space on the inside pages of his journal at the rate of forty cents per inch, and after defendant's breach plaintiff published some of the ads of his "inside page" customers on the cover, receiving no additional compensation from them for this improved position. Had plaintiff filled the entire inside cover with ads at forty cents per inch, his gross receipts from such advertisers would have been 336 dollars. His gross receipts from the advertisers whose ads he actually moved to the inside cover were 326.26 dollars.

Plaintiff succeeded in the trial court in having the subtrahend valued at the gross receipts from "inside page" advertisers whose ads were moved to the cover—326.26 dollars. At trial and on appeal defendant argued that plaintiff could have received more than that sum for the breach-released cover space, had he been willing to cut the price for cover space from fifty-five cents, or had he been willing to sell the cover space in small bits, instead of as a single ad, or had he been willing to sell the space to one purchaser for less than a year. The supreme court affirmed the findings and the conclusions of the trial judge who had sat without a jury. The court remarked, "The burden of proof is on the party

²⁰³ If plaintiff saved larger incidental charges for freight, storage, etc., than the incidental charges for finding the repurchaser, freight to him, storage, etc., defendant should be permitted to increase the subtrahend by the amount of such difference.

²⁰⁴ Compare text *supra* at 861.

²⁰⁵ In none of the cases where "entity" and "components" approaches differ did the court reach a question of choice of technique for valuing the entity. In cases where "entity" and "components" approaches are identical there is harmony between these views of valuation techniques and the Michigan results. See, e.g., *Roycraft v. Northville-Six Mile Co.*, 358 Mich. 466, 100 N.W.2d 223 (1960); *St. John v. Richard*, 272 Mich. 670, 262 N.W. 437 (1935); *Goldsmith v. Stiglitz*, 228 Mich. 225, 200 N.W. 252 (1924); *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922); *Burrell v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865).

²⁰⁶ *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907).

wrongfully repudiating the contract to show to what extent the damages were lessened or might have been lessened [citing four cases]."²⁰⁷

As I analyze the case, "entity" valuation of the subtrahend was adopted by both counsel and both courts, the entity being the space on the cover which defendant's ad would have occupied. Since the entity was not realty, its actual resale value should fix the subtrahend. Since the entity did not consist solely of plaintiff's own non-overhead services "on hand," plaintiff should have had the burden of showing the actual resale value of the space. A mere showing of his gross receipts would not carry the burden, since they might be less than a reasonable man would have garnered. But plaintiff established at least a prima facie case that his gross receipts were as high as a reasonable man's would have been, since he introduced testimony as to his unsuccessful efforts to resell the space on the same terms as those on which it had been sold to defendant and further testimony that those were his customary terms.

Defendant's efforts to break down this prima facie case rested on two arguments: (1) that plaintiff should have departed from his customary terms for cover space, and (2) that plaintiff should have filled *all* the space, not merely the bulk of it, with transferred "inside page" ads. The court apparently rejected the latter argument because the adjustment in recovery which it would effect (less than 10 dollars) was *de minimis*. Its opinion on motion for rehearing indicates that it rejected the former argument because "the plaintiff was under no legal obligation to split up the time or space covered by the contract. . . ."²⁰⁸ In other words, mitigation notions did not compel him to depart from his customary terms of sale.²⁰⁹

So viewed, the case is consistent with the notions of burden of proof expressed here. By its remark that defendant had the burden of proof, the court, according to this view, meant only that defendant had the onus of rebutting plaintiff's prima facie case as to the value of the entity. It did not mean that the result would have been the same had plaintiff failed to introduce any evidence of the value of the saved entity.

But the four cases cited by the court in support of its position

²⁰⁷ 147 Mich. at 706, 111 N.W. at 344.

²⁰⁸ *Tradesman Co. v. Superior Mfg. Co.*, *supra* note 206, *rehearing denied*, 147 Mich. 706, 708, 112 N.W. 708, 709 (1907).

²⁰⁹ *Cf. Annot.*, 35 A.L.R. 1536 (1925). See generally *Annot.*, 46 A.L.R. 1192, 1194 (1927); 1 A.L.R. 436 (1919).

led to a different reading of the case. One was too far from the point to shed much light.²¹⁰ But two others²¹¹ involved the burden of proving the value of plaintiff's own non-overhead services "on hand." In such cases defendant has the "burden" of proving the value of the subtrahend in the fullest sense: if neither party offers any evidence of its value, the court gives it a zero value and allows plaintiff the equivalent of a price recovery. The citation of these cases suggests that the court recognized no distinction in the allocation of the burden between such cases and others, or, at least, that it regarded the trade journal plaintiff in this plight as somehow akin to the plaintiff-employee. The fourth case cited stresses this kinship, although in a different context.²¹²

The court's result accords with the views urged here; its dictum, however, is inconsistent when read in the light of the cases cited.

C. *The Problem of Lost Volume*

Sometimes, when plaintiff resells the entity once destined for defendant to a new buyer, X, plaintiff thereby deprives himself of something of value—sale of another similar entity to X. Had there been no breach and consequently no resale, plaintiff would have sold two similar entities—one to defendant and one to X. The breach and resale have reduced plaintiff's total volume of sales by the quantity that was resold to X.²¹³

²¹⁰ *Hopkins v. Sanford*, 41 Mich. 243, 2 N.W. 39 (1879). See text at note 194 *supra*. In *Hopkins* and the case at bar the issue was the burden of proving what a reasonable man would have garnered by resale of the entity. But in *Hopkins* the question arose as a choice between "entity" and "components" approaches where the two would give different results and plaintiff had taken a post-breach course consistent with "components" valuation. In the trade journal case the question arose in the course of deciding whether the actual resale value of the entity was higher than the gross receipts that plaintiff garnered by resale, plaintiff having conceded that "entity" valuation was appropriate. Had plaintiff failed to make this concession and had there been no evidence of a resale of the space released by breach, the cases would have presented the same problem.

²¹¹ See *Carver v. School Dist.*, 113 Mich. 524, 71 N.W. 859 (1897); *Farrell v. School Dist.*, 98 Mich. 43, 56 N.W. 1053 (1893).

²¹² *Peck & Co. v. Kansas City Metal Roofing & Corrugating Co.*, 96 Mo. App. 212 (1902). There the trade journal plaintiff, upon defendant advertiser's breach, continued to run his ad for the balance of the term and collected the whole price in the trial court. The appellate court reversed on the ground that plaintiff was required to mitigate by ceasing to run the ad after defendant's repudiation, and went on to decide whether "entity" or "components" valuation of the subtrahend was proper. Contrasting its plaintiff-employee cases ("entity"), with its plaintiff-builder cases ("components"), it concluded that the instant case "more nearly resembles the former than it does the latter kind of contracts." 96 Mo. App. at 218. No issue of burden of proof was involved.

²¹³ See 1 BONBRIGHT, *VALUATION OF PROPERTY* 304 (1937); 5 CORBIN § 1100, at 449; MCCORMICK § 41; Beale, *Damages Upon Repudiation of a Contract*, 17 YALE L.J. 443, 455 (1908); Waters, *The Concept of Market in the Sale of Goods*, 36 CAN. B. REV. 360 (1958); Comment, 34 CAN. B. REV. 969 (1956); Note, 22 CORNELL L.Q. 581 (1937); Com-

Where there in fact has been a resale of the entity prior to the trial,²¹⁴ with attendant lost volume, the value of the lost volume can be taken into account in either of two ways: (1) by adjusting the value of the subtrahend to reflect it, or (2) by treating the lost volume as an item of incidental damages. Where there has been no such resale before trial, but damages are being computed as if plaintiff had made such a resale, the value of the lost volume should be taken into account as an adjustment of the subtrahend. The subtrahend (actual resale value of the entity) should be reduced by the value to plaintiff of the lost volume. As will be shown shortly, its value is the profit he would have made on such an additional sale.

To take a simplified example, if plaintiff is a car retailer who sells all his cars of a certain model at 3,000 dollars, and defendant-customer repudiates his contract to purchase one, and resale would be attended by lost volume, the minuend is the unpaid balance of the price—3,000 dollars if defendant has paid nothing. The subtrahend is the resale value of the entity (3,000 dollars), reduced by the profit plaintiff would have made on the lost sale—hypothetically 500 dollars. Deducting the adjusted subtrahend, 2,500 dollars, from the minuend, 3,000 dollars, plaintiff should recover 500 dollars plus any incidental expenses. In this particular instance his recovery is identical with the profit he would have enjoyed on the contract with defendant had there been no breach, but, as will be shown, this is not always the case.

D. *When Does Resale of the Entity "Cost" Plaintiff the Sale of Another Similar Entity?*

If the plaintiff resold or should have resold the entity once promised to defendant and four conditions are met, the resale²¹⁵ of that entity to that buyer has an invisible cost to plaintiff: loss of the sale of *other* wares to that buyer.²¹⁶ This will be true only if: (1) the person who bought the resold entity²¹⁷ would have been

ment, 65 YALE L.J. 992, 993 (1956); Annots., 24 A.L.R.2d 1008 (1952); 120 A.L.R. 1192 (1939); 44 A.L.R. 349 (1926).

²¹⁴ In the prior article, I discussed the lost volume problem in the context of valuing "on hand" personalty, and made passing reference to its impact on "entity" valuation. It arises only when the "entity" valuation is used, although in many such cases "entity" and "components" approaches give identical results. It seems more easily handled by an "entity" analysis.

²¹⁵ "Resale" is used hereafter to include both a factual resale and the putative resale used as a reference point when the entity's resale value fixes the subtrahend, although in fact plaintiff failed to resell.

²¹⁶ Cf. RESTATEMENT § 336, illustrations 6, 7.

²¹⁷ If plaintiff in fact resold before trial a specified entity scheduled for defendant,

solicited by plaintiff to buy other wares had there been no breach and resale; (2) the solicitation would have been successful; (3) the plaintiff could have performed that additional contract; and (4) solely because he purchased the resold entity, that buyer now is unwilling to buy other wares from plaintiff. Some amplification is in order.

The notion that "the person who bought the resold entity would have been solicited by plaintiff to buy other wares had there been no breach and resale" can be broken down into two aspects. One pertains to the likelihood that plaintiff would have solicited someone to buy other wares at all. If plaintiff is not a commercial seller, absent other evidence, he probably would not have solicited anyone.²¹⁸ If he is a commercial seller, absent other facts, he probably would have attempted other sales. However, even if plaintiff is a commercial seller, if he had decided to go out of business prior to the time of receiving notice of defendant's breach,²¹⁹ he would not have solicited anyone to buy other wares. Even if plaintiff is a commercial seller who had no plans to go out of business, if prior to notice of breach he had reached the limits of the volume he planned to sell,²²⁰ he would not have solicited further orders.

Plaintiff may have reached his limit of volume because he could not handle more business without expansion of his plant or drastic revision of his mode of doing business, neither of which he intended to undertake. If at notice of breach plaintiff was handling as great a volume as he could accommodate without plant expansion or drastic revision of his operations,²²¹ the court should

this resale purchaser can be identified at the trial. Otherwise he is a putative person, used as a reference point in valuation. In the latter event his "behavior" had he not "bought" the "resold" entity can be known only through inferences drawn from the original contract with defendant and the general nature of plaintiff's business. In the former event evidence about his particular plans and wants should be admitted.

²¹⁸ Unless there is affirmative evidence that plaintiff would have attempted other sales, the plaintiff-seller who is not in the business of selling such wares as he contracted to sell defendant should not get a lost volume adjustment.

²¹⁹ See discussion of the *Demirjian* case in the text *infra* at 911-13.

²²⁰ Plaintiff's substantial expenditures on non-institutional advertising and promotion at the time of receiving notice of breach is strong evidence that he had not reached the limits of the volume that he planned to sell.

²²¹ In several cases court and counsel appeared to ignore possible adjustment for lost volume for this reason. *E.g.*, *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911) (plant filled to capacity by substitute contract); *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N.W. 343 (1907) (limited supply of cover space apparently already exhausted); *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885) (sawmill of limited capacity); *Loud v. Campbell*, 26 Mich. 239 (1872) (boat fully loaded). In some cases, however, it was ignored although plaintiff's capacity was still expansible. *E.g.*, *Hopkins v. Sanford*, 41 Mich. 243, 2 N.W. 39 (1879).

presume that he did not intend to solicit another order. Of course, the presumption should be rebuttable upon the introduction of evidence that plaintiff in fact planned such expansion or revision.²²²

The other aspect of this first condition concerns the identity of the person whose business plaintiff intended to solicit. If he would not have solicited the person who purchased the resold entity, the first condition is not met. For example, if plaintiff resold the entity once headed for defendant in a market in which plaintiff did not ordinarily operate,²²³ the probabilities are that the resale purchaser, found in that market, was not someone whom plaintiff otherwise would have solicited.²²⁴

The second condition is that the resale purchaser, had he been solicited by plaintiff absent breach and resale, would have agreed to purchase other wares from him. Normally,²²⁵ this is evidentially supported by the fact that the purchaser took the resale entity from plaintiff, suggesting that if he had not taken this entity from plaintiff he would have taken another like one from him. The evidence has probative value where the resold entity is in no significant way different from the other wares plaintiff claims he would have sold to the resale purchaser but for defendant's breach. If the purchaser took one entity of fungibles, the odds are high that he would have taken another entity of fungibles instead.

Once we depart from fungibles, however, the problem gets harder. If the wares plaintiff claims he otherwise would have sold this purchaser differ in some respect from the resold entity, the question arises: had the resale purchaser been offered not the entity rejected by defendant, but those other wares of plaintiff most similar to that entity, would he have bought these other wares from

²²² See discussion of the *Petrie* case in the text *infra* at 911.

²²³ "Proof" problems become most difficult where defendant claims that the reduction in price which plaintiff gave the resale purchaser amounted to resale in such a market, all other aspects of the sale being indistinguishable from plaintiff's ordinary sales. Probably it is just a question of degree; a big reduction below the prices plaintiff customarily gives arguably represents entry into another market.

²²⁴ If it appears that plaintiff resold the entity in an unusual market to avoid losing volume by a resale in his usual market, the court should presume that this decision accords with mitigation notions. However, defendant should be permitted to rebut the presumption by showing that plaintiff (a) should have known resale in his regular market would reduce damages further, even with adjustment for lost volume, and (b) resale in his regular market would not have entailed more risk or self-sacrifice than the mitigation notions require. Absent such rebuttal, the actual resale value of the entity in the unusual market should fix the subtrahend, with no adjustment for lost volume.

²²⁵ Where the resale purchaser is identified at trial, this condition can be established by other lines of proof. But the fact that the other wares of plaintiff all differ substantially from the resold entity should still be evidence that the condition was not met.

plaintiff, refrained from any purchase of such wares, or purchased from another seller wares which were more like the entity rejected by defendant?

The car retailer situation furnishes an illustration. If defendant refused to accept a 1963 Chevrolet of a certain color and model, and it was resold to X, and plaintiff is the only Chevrolet dealer accessible to X, it is probable that plaintiff could have sold X another 1963 Chevrolet of that model and color had X not bought the car rejected by defendant. But if plaintiff could not have obtained another Chevrolet of that color and model, and another Chevrolet dealer accessible to X could have done so, it is less likely that X would have bought a different car from plaintiff had he not bought the car rejected by defendant. Assuming for the moment that price and other terms would be identical, and servicing would be the same, it is more likely that X would have purchased his car from the other Chevrolet dealer. Of course, if X is identified, there may be other evidence offered to show that he would have preferred to deal with plaintiff rather than another dealer even if this meant buying a different model or color. But absent such other evidence, there is no probability that this second condition is met.

The third condition concerns plaintiff's ability to have performed such a contract with X, had it been made. If it is shown that plaintiff lacked the physical ability to perform such a contract, no volume has been lost because of breach and resale that would not have been lost even without breach and resale.²²⁶

The last condition pertains to the limits on the resale purchaser's wants and financial means. If his purchase of the wares that defendant rejected does not reduce X's desire or ability to purchase other wares plaintiff wants to sell, plaintiff's volume has not been impaired by the resale. For example, if defendant has a standing offer to purchase all of a certain type of commodity which plaintiff can acquire, resale of some of that commodity to the resale purchaser does not prevent plaintiff from selling more of it later to X. The purchaser's demands for more of it later are undiminished by the resale of the entity defendant rejected.²²⁷

In only two cases which have reached the Michigan Supreme

²²⁶ Often the non-fulfillment of this condition is the easiest way to defeat a lost volume adjustment. *E.g.*, *Charter v. Sullivan*, [1957] 2 Q.B. 117. See discussion of the *Petrie* case *infra* at 911.

²²⁷ Similarly if X is a wealthy collector of items such as the resold entity, his resale purchase may not reduce his interest in later purchases from plaintiff.

Court have plaintiffs apparently argued for valuation of the subtrahend by an "entity" approach with adjustment to reflect the lost volume attendant upon resale. In the second *Petrie* case²²⁸ plaintiff was a sawmill operator who contracted to cut defendant's timber into boards. Defendant repudiated before performance began. Plaintiff found other customers and kept the mill going during the entire milling season doing their work. Plaintiff sought to recover "lost profits," so his theory was either (a) that he should be allowed a "components" approach, or (b) that he should be allowed an "entity" approach with adjustment for lost volume. The trial judge directed a verdict for defendant after plaintiff's opening statement, and this was affirmed on appeal. On petition for rehearing by the Michigan Supreme Court plaintiff argued, in effect, that an "entity" approach with adjustment for lost volume was appropriate, since resale of the entity (the mill's normal productive capacity for the season) deprived him of what otherwise would have been his larger volume of his sales. He tried to counter the argument that he could not handle defendant's contract as well as another by asserting that he could have operated his mill day and night. The petition for rehearing was denied on the ground that plaintiff failed to allege his ability to operate day and night.²²⁹ This would suggest that the court would not be adverse to allowing an adjustment for lost volume in appropriate cases, but that in this case plaintiff lacked the intent to sell any other wares—the first condition. There may have been a feeling, too, that he lacked the physical ability to operate the mill day and night—the third condition.

In the *Demirjian* case²³⁰ plaintiff apparently oscillated between a "components" approach and an "entity" approach with adjustment for lost volume, and it is most difficult to tell on which theory the court affirmed plaintiff's trial court judgment. There plaintiff was a commercial lessor of juke boxes who had agreed to furnish defendant with a box for three years, to change the records in it from time to time, and to keep it in repair. When defendant repudiated the contract shortly after its commencement, plaintiff repossessed the machine and sued for expectation damages. Shortly thereafter plaintiff went out of business, liquidating this machine along with the rest of his enterprise. Apparently, in

²²⁸ *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887).

²²⁹ The court later properly retreated from this apparent endorsement of the resolution of such problems on the pleadings. See *Leonard v. Beaudry*, 68 Mich. 312, 322, 36 N.W. 88, 93 (1888).

²³⁰ *Demirjian v. Kurtis*, 353 Mich. 619, 91 N.W.2d 841 (1958).

the brief time between repossession and liquidation, he did not arrange for another long-term lease of this machine, but put it at some other location where his weekly receipts from it were less than his costs of doing business.²³¹

In the trial court plaintiff computed damages as if the mitigation notion required him to re-let the machine on identical terms to those given defendant, and as if such re-letting deprived him of still another lease of another machine.²³² By the time plaintiff filed his brief with the circuit court, however, he had modified his theory. Now he was claiming, as well, that upon breach the mitigation notion permitted him to liquidate his business rather than re-letting the machine for another three years.²³³ His damage measurement figures, with a single exception,²³⁴ were equally applicable to the new theory as well as to the old.²³⁵ The single exception worked in defendant's favor.²³⁶ The circuit court affirmed plaintiff's judgment without shedding much light on its rationale.²³⁷ On further appeal to the supreme court plaintiff

²³¹ Record, pp. 40(a)-41(a).

²³² Plaintiff's theory was that he should recover the contract price, \$3,120, less the following: depreciation over three years, cost of new records, cost of repair parts and service, and interest on the purchase price of \$165. He explained the last item thus: "I estimated, that if the machine was taken out and could be placed somewhere else that would save . . . the lessor from buying a new machine to put someplace else. The new machine [would] cost eleven hundred dollars. Therefore, he would save the interest on that Therefore, I knocked off an additional one-hundred-seventy-five dollars for five per cent interest at three years." Record, pp. 38(a)-39(a). (The \$175 figure was later corrected to \$165.)

His computation was correct if "entity" valuation was being used with adjustment to reflect lost volume, and if the unadjusted actual resale value of the entity was \$3,120, as he assumed. The minuend would be \$3,120. The unadjusted subtrahend would be the same. The adjustment would be the profit plaintiff would have made had he let another juke box to X—the person to whom plaintiff should have re-let the box that was repossessed. The lost profit on that "lost lease" of another machine would have been \$3,120 less the cost of items proved by plaintiff. The \$165 item was properly included as a variable cost that would have been incurred to perform that lost lease. Neither counsel pressed the question of saved overhead after cross-examination of plaintiff showed it to be of negligible size.

²³³ Record, p. 90(a).

²³⁴ The \$165 item was inappropriate when plaintiff switched his theory. Under a "components" approach the costs of another lease are irrelevant. And the interest charges incurred before breach in order to perform for defendant are irrelevant, since not saved because of the breach.

²³⁵ Under a "components" approach plaintiff saved (1) three years' use of the machine, which is reflected in the earlier "depreciation" item; (2) the "yet to be acquired" non-overhead items involving record replacement and repairs—all reflected in the figures in the record.

²³⁶ Plaintiff magnanimously waived the \$165 item when he switched theories. He did not mention the fact that he was switching, in either his circuit court or supreme court brief.

²³⁷ "Plaintiff . . . is suing for his expectation interest, the profit he would have enjoyed had not defendant breached the contract. To determine this amount it is

again straddled both theories—"components" valuation and "entity" valuation with adjustment for lost volume.²³⁸ His victory produced no further judicial illumination; the supreme court affirmed on the opinion below without additional comments.

While the case can be read as a judicial endorsement of the "entity" approach with adjustment for lost volume, it seems better to read it as but another example of the "components" approach. Mitigation notions permitted plaintiff to stop further work toward resale (re-letting) of the entity, and he never did resell the entity; thus a "components" approach is in order. An "entity" approach with adjustment for lost volume would seem inappropriate inasmuch as plaintiff went out of business shortly after breach, suggesting that even without the breach he would not have been trying to arrange for additional leases. (There was nothing in the record to indicate that plaintiff's decision to go out of business could be attributed to defendant's breach.)

In *Mohr Hardware Co. v. Dubey*²³⁹ plaintiff did not argue that entity resale would impair his total volume, but did seek to measure damages in a fashion that would be justifiable only according to such a theory. The rationale he presented for his measure, however, was clearly fallacious.²⁴⁰ The court reversed the plaintiff's judgment, in effect valuing the subtrahend by the actual resale value of the entity without adjustment for the value of the lost volume. Since neither counsel nor the court considered the possibilities of volume being impaired,²⁴¹ the case would not seem

necessary to subtract plaintiff's expenses from the consideration he would have received from defendant." 353 Mich. at 622, 91 N.W.2d at 843.

²³⁸ Brief for Plaintiff-Appellee, pp. 10, 15. Plaintiff did not view his second theory as "entity valuation with adjustment for lost volume." Rather, he saw it as involving a rule of this sort: where plaintiff has sufficient space and personnel to handle, at once, his contract with defendant and another similar contract made by plaintiff with X after defendant's breach, plaintiff's recovery against defendant should not be reduced by the profits plaintiff made on his contract with X, because these profits were not caused by defendant's breach. Brief for Plaintiff, p. 11.

²³⁹ 136 Mich. 677, 100 N.W. 127 (1904).

²⁴⁰ Plaintiff argued: (1) the measure is the difference between contract price and market price; (2) the only evidence of market price was his testimony about the wholesale market in which he had purchased the goods; and (3) therefore, the subtrahend should be the wholesale price of the goods. The fallacy lies in the facts that (a) the formula means resale market (actual resale value), not the market in which plaintiff purchased (cost value), and (b) since plaintiff has the burden of proving actual resale value, his failure to prove the right market results in his defeat, not the substitution of the value he proved in the wrong market. The court so held.

Since he was a list-price seller it was possible to infer the actual resale value of the goods: it would be identical to the contract price. Plaintiff did not want to stress this because, unless an adjustment for lost volume was possible, it would lead to identical minuend and subtrahend and no recovery. The court so held.

²⁴¹ Defendant and the court distinguished cases in which the plaintiff-seller recov-

to indicate that the court would reject such an argument were it put forward.²⁴²

E. *"Components" Approach Compared With "Entity" Approach With Adjustment for Lost Volume*

Counsel and the court often refer to the "components" approach by describing it as a formula which permits plaintiff-seller to recover his "lost profits." This is dangerous terminology. In some situations, however, "components" valuation of the subtrahend gives plaintiff his "mark-up profit," and this fact apparently gave rise to the terminology. If breach occurs before plaintiff has received any payment from defendant, and before plaintiff has delivered any performance to defendant, and before plaintiff has "on hand" any non-overhead components of performance, all the components saved are valued at cost. Indeed, the subtrahend is identical to a list of the total costs of contract performance, and the minuend is identical to the contract price. The recovery is contract price less total costs, plus incidental damages, if any. It is only natural to regard such a formula as giving plaintiff his "lost profit"—the difference between the contract price and what it would have cost him to perform that contract with defendant.²⁴³

When breach occurs after plaintiff has accomplished part of his performance, if he still has no non-overhead components on hand and has received nothing from defendants, it is possible to view the formula as one involving recovery of two items: "lost profit" plus "costs incurred."²⁴⁴ Even if plaintiff has both delivered

ered "lost profits" under a "components" approach. Such an approach was deemed inapplicable here both because plaintiff had in fact resold the entity and because the mitigation notion required him to do so. Neither defendant nor the court considered the possibility of lost volume adjustment, and there is no suggestion of it in plaintiff's brief.

²⁴² In several Michigan cases plaintiff has been a correspondence school and defendant the disheartened self-educator who broke his contract. The plaintiff invariably sought, and failed to get, a price recovery. *E.g.*, *Walton School of Commerce v. Stroud*, 248 Mich. 85, 226 N.W. 883 (1929); *International Text-Book Co. v. Marvin*, 166 Mich. 660, 132 N.W. 437 (1911); *International Text-Book Co. v. Jones*, 166 Mich. 86, 131 N.W. 98 (1911); *International Textbook Co. v. Schulte*, 151 Mich. 149, 114 N.W. 1031 (1908). The court, while unwilling to allow a price recovery (which would value the subtrahend at zero), nevertheless indicated that the proper measure of damages would be "the difference between the contract price of the course and what it would cost plaintiff to give it." *Walton School of Commerce v. Stroud*, *supra* at 89, 226 N.W. at 885. This apparently would be an example of valuing the subtrahend as an entity and then adjusting for lost volume, although the rationale is not elaborated by the court. Perhaps the court really had in mind the "components" approach. See also *Annot.*, 78 A.L.R. 334 (1932).

²⁴³ See *Walton School of Commerce v. Stroud*, *supra* note 242; *Fell v. Newberry*, 106 Mich. 542, 64 N.W. 474 (1895); *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888).

²⁴⁴ See *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338

some performance and received some payment, the "lost profit" formulation can be retained by viewing the recovery as consisting now of three items: ("lost profit" plus "costs incurred") minus such part of the price as has been paid.²⁴⁵ And even if plaintiff has delivered some performance, received some of defendant's performance and has some finished goods on hand but undelivered, the flavor can be retained by seeing in the formula four elements: ("lost profit" plus "costs incurred") minus ("such part of the price as has been paid" plus "the market [actual resale] value of the finished goods on hand").²⁴⁶

But this effort to retain the "lost profit" notion at all intellectual costs involves unnecessary steps in computation,²⁴⁷ and obscures the justification for this measure of damages.²⁴⁸ Moreover, it invites the judges to treat the "lost profit" involved in such suits as they treat "lost profits" in other types of cases—requiring that the "lost profits" be proved with certainty and be foreseeable to defendant at the time of contract as potential items of loss in the event of his breach.²⁴⁹ The fact that the "lost profit" involved in this components-valued plaintiff-seller suit is markedly different from the "lost profits" involved in those other suits is thereby obscured.²⁵⁰

This familiar habit of viewing the components-valued plaintiff-seller recovery as one involving recapture of lost profits breeds further confusion in regard to suits in which the plaintiff-seller seeks to use "entity" valuation with adjustment for lost volume. In the latter kind of case plaintiff's recovery can also be regarded as one involving "lost profits."²⁵¹

(1937); *Davey v. Sanders*, 253 Mich. 137, 234 N.W. 128 (1931); *Loud v. Campbell*, 26 Mich. 239 (1872).

²⁴⁵ See *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N.W. 976 (1896); *Atkinson v. Morse*, 63 Mich. 276, 29 N.W. 711 (1886); *Goodrich v. Hubbard*, 51 Mich. 62, 16 N.W. 232 (1883).

²⁴⁶ *Ibid.*

²⁴⁷ See text at note 33 *supra*.

²⁴⁸ The "components" approach is not justified merely because plaintiffs in certain trades have a peculiar view of their enterprise [See Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 COLUM. L. REV. 1286, 1293-94 (1931), attempting to explain why the builder gets lost profits.], nor because for reasons mysterious the spirit of the common law treats certain occupations as peculiar [see note 212 *supra*], but because mitigation notions required or permitted plaintiff to refrain from attempting to complete and resell the entity still undelivered to defendant.

²⁴⁹ See text *supra* at 866.

²⁵⁰ The distinction was first recognized in the *Fell* case in 1895. See text at note 81 *supra*. But this did not forestall the habit of calling the "components" approach a "lost profit" recovery. See, e.g., *Davey v. Sanders*, 253 Mich. 137, 234 N.W. 128 (1931); *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N.W. 976 (1896); *Hitchcock v. Knights of Maccabees*, 100 Mich. 40, 58 N.W. 640 (1894).

²⁵¹ In such a suit the term is appropriate. But it should be kept clear that the

The notion that there can be two different rationales for plaintiff-seller's "lost profit" recovery, each applicable to different, but overlapping, sets of fact situations,²⁵² has not reached the court. In *Mohr Hardware*,²⁵³ the court seems to have assumed that "lost profits" can be recovered by a plaintiff-seller only when the "components" approach is justified. The same assumption, with less disastrous consequences, was manifest in the two cases in which the court reversed "lost profit" recoveries because defendant had not been permitted to show a post-breach resale of the entity.²⁵⁴ While in neither case does the record suggest that volume was lost by the resale, the possibility should not have been foreclosed.

Another aspect of the confusion seems to be a somewhat fatalistic acceptance of the inscrutable ways of the plaintiff-seller's "lost profit" recovery. At times court and counsel seem to regard it as a peculiarity not susceptible to rational analysis.²⁵⁵ *Athol Mfg. Co. v. Briscoe Motor Corp.*,²⁵⁶ discussed earlier,²⁵⁷ may well have blundered along its bizarre route because no one felt sure he could tell just when "lost profits" should be recovered. The *Leonard* case,²⁵⁸ involving the single sawmill operator who succeeded in getting lost profits during Justice Cooley's sawmill reign of terror, seems to have thrived on similar confusion. There plaintiff was once again faced with repudiation before he started to perform, and once again the saved entity was the productive capacity of the mill for the season. But this plaintiff had attempted to resell the entity and had met with moderate success. Part of the productive capacity of the mill was resold (at low rates) although the remainder could not be sold.

"lost profit" is not the one plaintiff would have made on his contract with defendant, but on the lost contract he would otherwise have made with the resale purchaser but for resale to him.

²⁵² In some situations plaintiff is entitled to "lost profits" on *both* rationales; because mitigation notions permit him to stop work toward completion of the entity, and because resale of the entity would entail lost volume. The court has on occasion reached the correct result in such cases, but saw only the single reason—that mitigation notions permitted plaintiff to refuse to finish and resell the entity ("components" approach). *E.g.*, *Nurmi v. Beardsley*, 284 Mich. 165, 278 N.W. 805 (1938); *Davey v. Sanders*, 253 Mich. 137, 234 N.W. 128 (1931); *Scheible v. Klein*, 89 Mich. 376, 50 N.W. 857 (1891).

²⁵³ *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, 100 N.W. 127 (1904).

²⁵⁴ See *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911); *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885).

²⁵⁵ The court's reluctance to explain the distinction between entity-valued and components-valued cases is striking. See also the discussion of *Tradesman* in the text *supra* at 904-905, and the judicial opinions in *Demirjian* at note 230 *supra*.

²⁵⁶ 222 Mich. 95, 192 N.W. 668 (1923).

²⁵⁷ See text *supra* at 894-98.

²⁵⁸ *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888).

Plaintiff pleaded these facts and repeated them in his opening statement, concluding with a prayer for recovery of lost profits. The prayer appears strange since neither a "components" approach²⁵⁰ nor an "entity" approach with lost volume adjustment²⁶⁰ would seem appropriate. Conceivably plaintiff could justify the prayer on the ground that a "components" approach should be used although he attempted to resell the entity because "entity" valuation of the subtrahend would give him even larger recovery.

In any event, the trial judge directed a verdict for defendant at that point, influenced by the prior sawmill operator case²⁶¹ to the effect that these mill operators as a class can never recover lost profits. When the instant case reached the supreme court on appeal, the retreat from the no-sawmiller-lost-profits-nohow position was beginning,²⁶² and the court reversed the verdict directed on that theory. Had it stopped there, things would have been well.

But the court remanded to permit plaintiff to prove his lost profits with certainty, if he could, thereby endorsing plaintiff's version of the measure of damages. In the later struggle over sawmiller's recovery of lost profits the case became the plaintiff's standby,²⁶³ illustrating just when such lost profits can be recovered. The probable explanation of the case is that the court spent its attention on the decision to repudiate the flat ban on sawmill operator's lost profits and spent little or no thought on whether the facts of this case justified this sawmill operator in such a measure even if the ban were repealed. Defendant never argued for an "entity" valuation, being preoccupied in the effort to maintain his directed verdict.

The pattern that seems to emerge from these cases neither supports nor vitiates my views. In no case where counsel has made appropriate arguments has the court nonetheless ignored them to reach an erroneous result. On the other hand, in several cases where counsel have failed to make appropriate arguments, the court has failed to find them.²⁶⁴ This is true even in those cases

²⁵⁰ Having attempted to resell the entity he should be permitted to use "entity" valuation unless defendant shows he should not have made the attempt. See text *supra* at 900-01. Indeed, if defendant preferred "entity" valuation it should be used. *Ibid.* The trial judge ended the case before defendant took a position on this.

²⁶⁰ Plaintiff could not handle more contracts without plant expansion and apparently planned none.

²⁶¹ *Allis v. McLean*, 48 Mich. 428, 12 N.W. 640 (1882).

²⁶² See text at note 79 *supra*.

²⁶³ *Barrett v. Grand Rapids Veneer Works*, 110 Mich. 6, 67 N.W. 976 (1896); *Fell v. Newberry*, 106 Mich. 542, 64 N.W. 474 (1895).

²⁶⁴ From the writer's point of view, *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich.

where the court was remanding for trial, and where its remarks might have prevented confusion on remand.²⁶⁵

The Michigan legal development, judicial and statutory,²⁶⁶ never comes to grips²⁶⁷ with two major distinctions: (1) the choice between "entity" and "components" approaches; and (2) the choice between ordinary entity valuation and entity valuation with an adjustment for lost volume. And neither court nor counsel work sure-footedly in this area when guided by instinct alone.

F. *Valuing the Lost Volume*

The value of the lost volume is the difference between the gross receipts lost and the costs saved when plaintiff was deprived of the additional sale.

Normally the quantity of volume lost is identical to the quantity of the entity resold. But if plaintiff lacked the intent or ability to make another sale of that much additional volume, and still had such intent and ability as to some lesser volume, that lesser volume fixes the quantity term. For example, if plaintiff's factory can handle contracts for 40,000 units simultaneously, and defendant's contract was for 15,000 units, and repudiation came while the factory had total orders (including defendant's) for 30,000 units, the lost volume is 10,000 units.

In proving the lost gross receipts it is necessary to show the price of the lost sale. This demonstration is simple if plaintiff always sells on identical terms to those defendant accepted. It was in such a list price context that many courts first recognized the lost volume phenomenon.²⁶⁸ But even if plaintiff's price term is not fixed, it should be possible to meet the "certainty" test as to the lost gross receipts if plaintiff can show the past range of his prices

95, 192 N.W. 668 (1923), and *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, 100 N.W. 127 (1904), were wrongly decided. And *Leonard v. Beaudry*, 68 Mich. 312, 36 N.W. 88 (1888), *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, 131 N.W. 559 (1911), and *Petrie v. Lane*, 58 Mich. 527, 25 N.W. 504 (1885), may have been erroneous, although the facts are scanty. In none of them was the proper argument made by counsel.

²⁶⁵ *E.g.*, *Athol Mfg. Co. v. Briscoe Motor Corp.*, *supra* note 264; *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, *supra* note 264; *Leonard v. Beaudry*, *supra* note 264; *Petrie v. Lane*, *supra* note 264.

²⁶⁶ See discussion of UNIFORM SALES ACT § 64(4) [MICH. COMP. LAWS § 440.64(4) (1948)] at note 181 *supra*.

²⁶⁷ See note 168 *supra*.

²⁶⁸ *E.g.*, *Torkomian v. Russell*, 90 Conn. 481, 97 Atl. 760 (1916); *Stewart v. Hansen*, 62 Utah 281, 218 Pac. 959 (1923); *Thompson v. Robinson*, [1955] 1 Ch. 177. See Comment, 65 YALE L.J. 992 (1956); Annot., 24 A.L.R.2d 1008 (1952). Comment 2 to UNIFORM COMMERCIAL CODE § 2-708 stresses "fixed price articles" and "standard priced goods" as appropriate for "lost profit" treatment under § 2-708(2).

and is willing to fix the gross receipts at the bottom of that range.²⁶⁹

Proof of saved variable costs varies somewhat from the treatment of non-overhead items under a "components" approach. There a distinction was drawn between "on hand" and "yet to be acquired" items. This was feasible because the particular contract, wholly or partially unperformed by plaintiff, could be identified with precision: it was the contract with defendant. In computing the value of saved volume the unperformed contract normally cannot be identified with precision, so it is not possible to show whether it would have been performed with "on hand" or "yet to be acquired" non-overhead components.

The court should presume that it would have been performed with "yet to be acquired" non-overhead items, and should value all such items at cost. This will value them accurately if, as is usually the case, the reduction in plaintiff's volume of sales causes him to reduce proportionately the volume of non-overhead items he acquires from his suppliers. In the one case in which the Michigan Supreme Court may have approved a lost volume adjustment, its value was established in this fashion.²⁷⁰

Valuing the saved overhead costs of the lost volume presents the same problems seen earlier when saved overhead was discussed as one category of a "components" approach. No Michigan case has raised this problem. The only Michigan case dealing with the burden of proving various aspects of the lost volume held that plaintiff has the burden of showing that he could have had another contract in addition to those he had at the time of breach.²⁷¹ This accords with the views presented in my prior article concerning burden of proving lost volume.²⁷² In view of the dearth of Michigan decisions, further discussion of the burden of proof problems seems needless.

V. CONCLUSION

No Michigan case in which counsel presented appropriate arguments to the court reached a result inconsistent with the

²⁶⁹ Cf. *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928); *Franklin Sugar Ref. Co. v. Egerton*, 288 Fed. 698 (4th Cir. 1923); *Dolly Parker Motors, Inc. v. Stinson*, 220 Ark. 28, 245 S.W.2d 820 (1952). See also *Waters, The Concept of Market in the Sale of Goods*, 36 CAN. B. REV. 360 (1958).

²⁷⁰ *Demirjian v. Kurtis*, 353 Mich. 619, 91 N.W.2d 841 (1958). See text *supra* at 911-13.

²⁷¹ *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887).

²⁷² See *Harris, A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577, 601 (1962).

views set forth here. In *Athol*²⁷³ and *Mohr Hardware* results different from those which the writer would endorse were reached, but in both instances counsel failed to make proper arguments. In *Leonard* and the second *Petrie* case²⁷⁴ the results may have been discrepant (it being hard to tell since both cases were decided on the pleadings and opening statements), but again counsel failed to present their views properly. In *Tradesman* the result was proper, but the dictum was either discrepant or deceiving.

The court's treatment of the various categories of components in cases where that approach is used, and its treatment of the entity in cases where the "entity" approach is identical to the "components" approach, correlates perfectly with my views, and suggests that the court's analysis is quite similar. But when a choice arises between "entity" and "components" approaches, or when the court must handle an "entity" approach in a case where the "entity" and "components" approaches differ, the court does not seem to be travelling the same route as that indicated here. And when the problem of lost volume arises, the court seems quite unaware of the concepts here described. Perhaps the court is struggling for some such concepts, but it would not be fair to say that my views are merely an articulation of the court's tacit notions in such cases.

While this article was designed to test my hypothesis against the Michigan experience, I cannot resist adding a suggestion for the future. Michigan has recently made pre-trial mandatory in all civil actions.²⁷⁵ It would appear from the cases where counsel has failed to carry the burden on some subtrahend item because he was unaware until too late that he had the burden, that pre-trial discussion of the contract damage issues would be time well spent even if it did no more than apprise counsel of the perils ahead. And if on occasion stipulations were forthcoming about such matters as whether "components" or "entity" valuation was to be used, the time spent at pre-trial would save much more time at the actual trial. Where complex issues of contract damages are tried to a jury the possibilities of confusion are grave enough in the best of circumstances; if pre-trial can simplify some of these issues it would pay dividends in improved justice.

²⁷³ See text *supra* at 894-98.

²⁷⁴ *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887).

²⁷⁵ MICH. CT. R. 35.