

OPPORTUNISTIC REALES AND THE UNIFORM COMMERCIAL CODE

*Jennifer S. Martin**

The Uniform Commercial Code seeks to compensate an aggrieved seller by taking into account actual or substituted transactions based on market considerations. More particularly, section 2-706 permits a seller to recover the value of a replacement transaction whereas section 2-708 attempts to protect the seller by allowing a market-based recovery. The question then arises: does the actual advantageous resale preclude reliance on the market-contract standard, or does the seller have the option to choose whichever measure turns out to be more favorable? It is unsettled whether a seller who resells advantageously can increase the damages award through recourse to market-based damages. This Article seeks to bring greater perspective to the interplay of opportunistic resales under the Uniform Commercial Code by examining the basic tenets of both the common law of contracts and the Code. This Article proposes a more careful and extensive look at the application of sections 2-706 and 2-708 in the specific context of advantageous resales, and attempts to guide those endeavoring to apply section 2-708(1) when a seller has made a resale, regardless of whether or not complying with section 2-706.

* Professor of Law, *St. Thomas University School of Law*. The Author wishes to thank research assistants Jessica Cutrone, Devin Locay, Janelle Vega, and Monika Woodard, St. Thomas University School of Law, for their valuable work on this project. The Author also thanks all those whose comments helped to shape this project, particularly Carol Chomsky (University of Minnesota), Victor Goldberg (Columbia), Gregory Klass (Georgetown), and Professor Lenore Ledwon (St. Thomas University). A working draft of this Article was presented at the 2015 International Contracts Conference at the University of Nevada, Las Vegas and a Faculty Forum at St. Thomas University School of Law. jmartin@stu.edu.

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I. INTRODUCTION

It is well understood that the Uniform Commercial Code (the “Code” or the “U.C.C.”), through its provisions on remedies, seeks to compensate an aggrieved seller through a construct that takes into account actual or substituted transactions based upon market-based considerations.¹ More particularly, the provisions of section 2-706² permit a seller to recover the value of a replacement transaction in certain circum-

1. See Henry Gabriel, *The Seller’s Election of Remedies Under the Uniform Commercial Code: An Expectation Theory*, 23 WAKE FOREST L. REV. 429, 437–38 (1988) (“[T]he Code does not specifically prohibit an aggrieved seller who has arranged a substitute sale pursuant to section 2-706 from freely electing to measure her damages under the market-contract price differential of section 2-708(1).”); Ellen Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 253 (1963) (describing the options of aggrieved parties and providing a roadmap of the interconnected remedies provisions).

2. U.C.C. § 2-706(1) (2011) (“Under the conditions stated in Section 2-703 on seller’s remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer’s breach.”).

stances, whereas section 2-708(1)³ attempts to protect the seller in terms of the substituted transaction by allowing a market-based recovery. In an observation more than fifty years ago, then Professor Ellen Peters—now Connecticut Supreme Court Chief Justice, retired—posited:

Does the existence of the substitute preclude reliance on the market-contract standard, or does the complainant have a free option to choose whichever measure turns out to be the more favorable? To permit the option is to allow speculation at the expense of the party in breach; forbidding it allows the party in breach to profit from a substitute transaction which he can neither compel nor control.⁴

Even with the passage of more than fifty years, no single, conclusive response to this question has emerged with respect to whether a seller who resells advantageously can increase the damages award through recourse to market-based damages. In their treatise, Professors James J. White and Robert S. Summers observe that the answer is “not clear,” but that “a seller should not be permitted to recover more under 2-708(1) than under 2-706.”⁵ Professor Henry Gabriel argues the “seller should be allowed to elect between the two remedies regardless of the seller’s good faith post-breach activities concerning the non-accepted goods.”⁶ Like the commentators, courts have been divided as to the answer of the recovery of market-based damages in advantageous resales.⁷ This Article seeks to bring greater perspective to the interplay of seller resales under section 2-706 and the recovery of market-based remedies under section 2-708(1), by examining the basic tenets of both the common law of contracts and the Code alike: that the expectation measure of damages allows the aggrieved seller only to be “put in as good a position as if the other party had fully performed.”⁸

3. *Id.* § 2-708(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.”).

4. Peters, *supra* note 1, at 259.

5. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 8–7, 359–60, 362–66 (6th ed. 2010). See Roy Ryden Anderson, *Damage Remedies Under the Emerging Article 2—An Essay Against Freedom*, 34 HOUS. L. REV. 1065, 1086 (1997) (“A full capacity seller who has resold at a price in excess of the applicable market has mitigated its damages and should recover no more than the amount set by the resale.”); Melvin A. Eisenberg, *Conflicting Formulas for Measuring Expectation Damages*, 45 ARIZ. ST. L.J. 369, 399 (2013) (“[T]he major normative arguments for awarding market-price damages, even when they exceed the promisee’s actual loss, are seriously flawed.”).

6. Gabriel, *supra* note 1, at 429.

7. See, e.g., *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1083 (9th Cir. 1979) (limiting seller damages to actual loss if reselling the goods); *Wendling v. Puls*, 610 P.2d 580, 584 (Kan. 1980) (allowing seller recourse to market-based damages, but without analysis); *Eades Commodities, Co. v. Hoeper*, 825 S.W.2d 34, 38 (Mo. Ct. App. 1992) (implying a limitation on the seller’s damages to no more than actual loss); *Tesoro Petrol. Corp. v. Holborn Oil Co.*, 547 N.Y.S.2d 1012, 1014–17 (N.Y. Sup. Ct. 1989) (limiting the seller’s damages to the actual loss if reselling the goods); *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 536 (Or. 2014) (permitting seller recourse to market-based damages).

8. U.C.C. § 1-305(a) (2001).

An example of this problem is in order. Suppose a seller and buyer make a contract for the sale of grass seed at \$0.72 per pound.⁹ The buyer repudiates the contract due to a falling market for the seed at a time when the market price at tender is at \$0.64 per pound. The seller later resells the seed at \$0.75 per pound when the market recovers. The seller, having come ahead \$0.03 over the contract price on the resale, nevertheless brings suit against the buyer, and the seller claims market-priced damages under section 2-708(1), rather than damages under section 2-706.¹⁰

In examination of this problem, this Article does not question seller recourse to either the resale remedy or the market-based remedy under these provisions in a wide variety of cases, or suggest a rewriting of these provisions at a time when such efforts are not likely to be availing.¹¹ This Article also does not quibble with the application of section 2-708(2) in the cases of so called “lost-volume sellers.”¹² Rather, this Article proposes a more careful and extensive look at the application of sections 2-706 and 2-708 in this specific context of advantageous resales. Moreover, although other scholars might at times conclude that Code provisions would benefit from substantial revision, rewording, and perhaps even deletion of provisions, this Article does not take that path.¹³

First, section 2-708(1) itself has been described as “among the least novel and least remarkable of the Code’s damages provisions.”¹⁴ Ordinarily, the operation of this section’s market-based remedy simply places

9. This hypothetical is based on the facts of the case of *Peace River*, 322 P.3d at 531.

10. See *id.* at 534–35. In this case, there was not a lost-volume seller for purposes of section 2-708(2), so the seller claimed market price damages under section 2-708(1). *Id.* at 535.

11. See generally David Frisch, *Commercial Law’s Complexity*, 18 GEO. MASON L. REV. 245, 247 (2011) (providing an example of a failed revision to the U.C.C.); Gregory E. Maggs, *The Waning Importance of Revisions to U.C.C. Article 2*, 78 NOTRE DAME L. REV. 595, 604 (2003) (explaining that efforts to revise Article 2 have not succeeded throughout the years); Fred H. Miller, *What Can We Learn from the Failed 2003–2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471, 483 (2011) (stating that there have been no state enactments of the amended U.C.C. Article 2, and as such, it has been withdrawn as the official text); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1010 (2002) (discussing the end of the fifteen-year effort to revise Article 2); *Updates, 88th ALI Annual Meeting*, A.L.I., <http://2011am.ali.org/updates.cfm> (last visited Oct. 24, 2015) (discussing the withdrawal of the 2003 U.C.C. amendments officially in 2011 due to the fact that no state had enacted them in eight years).

12. U.C.C. § 2-708(2) (2011) (providing for an alternative measure of damages where § 2-708(1) is “inadequate to put the seller in as good a position as performance would have done”).

13. See, e.g., Henry Mather, *Market Price Damages Under UCC Article 2: Some Suggestions for the Next Revision*, 65 S.C. L. REV. 275 (2013); Mark R. Matthews, *A Doomed Proposal for Uniform Commercial Code § 2-207: That Official Comment Would Have Led to Confusion, Not Clarity*, 44 CUMB. L. REV. 223, 247 (2014) (stating that the official comment has caused a cloud of uncertainty, and the ALI should be re-examined and the language corrected); John A. Sebert, Jr., *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 380 (1981); James Nathan Spolar, *Much Ado Leads to Nothing: That “Basis of the Bargain” in Section 2-313 of the Uniform Commercial Code Should Be Eliminated is Still Lost on Drafters*, 24 J. CORP. L. 453, 474 (1999) (recommending that “the ALI should change 2-403(c)(1) to encourage an active understanding of warranties for unsophisticated parties by not prohibiting warranties when the buyer knows the representation is not true . . . [and in doing so,] the ALI should refuse to adopt the proposed explanatory comment”).

14. WHITE & SUMMERS, *supra* note 5, §§ 8–7, 359–60, 362–66.

an aggrieved seller in the same situation as performance would yield, at least hypothetically.¹⁵ Said another way, section 2-708(1) in most cases is consistent with the basic principles of the expectation theory, and we should not seek to disturb that function.¹⁶ It even operates consistently with expectation principles in most resales that fail under section 2-706, often because it is not “commercially reasonable” to provide the seller a measure of damages that affords the standard market-based recovery.¹⁷ It is sometimes said that section 2-708 operates as a sort of “statutory liquidated damages” clause and, as such, occupies a key role in the provision of seller remedies.¹⁸

Second, we are not likely to have a revision, or even a drafting project, to Article 2 in the near future. The unsuccessful, lengthy battle to amend Article 2 failed soundly with the withdrawal of the proposed amendments in 2011.¹⁹ As such, despite any perceived benefits of tinkering with the provisions of Article 2—many of which are arguably more in need of statutory revision than section 2-708(1)—such an undertaking is not the most likely successful strategy at this time for tackling troublesome provisions.²⁰ Rather, strategies for keeping the Code relevant to commercial parties and helpful to courts are more likely to focus on interpretive measures that reflect changing practices and examine more closely any unresolved applications.

This Article will attempt to guide those endeavoring to apply section 2-708(1) when a seller has made some resale, regardless of whether or not complying with section 2-706. Part II of this Article surveys the basic provisions of the Code relevant to seller resales and market-based recovery, including the relevant historical framework.²¹ Part III begins with a discussion of the generally accepted principle of both common law and the Code alike that an aggrieved party can recover a remedy that is ordinarily non-punitive and based on and limited to an expectation

15. *Id.* at 362.

16. *Id.* at 365–66.

17. U.C.C. § 2-703 (2011) (permitting the seller to proceed under either section 2-706 or section 2-708).

18. See WHITE & SUMMERS, *supra* note 5, § 8-7, 359–60, 362–66; Gabriel, *supra* note 1, at 439; Peters, *supra* note 1, at 259–60; see also Eisenberg, *supra* note 5, at 396.

19. See WHITE & SUMMERS, *supra* note 5. For conflicting positions about the failed revision, see Symposium, *Perspectives on the Uniform Law Revision Process*, 52 HASTINGS L.J. 603 (2001), containing articles by Richard Speidel, the original Reporter, and Fred Miller, the Executive Director of National Conference of Commissioners on Uniform State Laws (NCCUSL), as well as other participants. See Maggs, *supra* note 11, at 605–13 (providing an additional view); Scott, *supra* note 11, at 1009 (same); see also Jennifer Camero, *Level Up: Employing the Commerce Clause To Federalize the Sale of Goods*, 50 SAN DIEGO L. REV. 89 (2013); Miller, *supra* note 11; Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1687 (1999).

20. See David Frisch, *The Compensation Myth and U.C.C. Section 2-713*, 80 BROOK. L. REV. 173, 173 (2014) (noting that from an aggrieved buyer’s perspective, an Article 2 amendment is not likely); see also Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 564 (2000) (explaining Llewellyn’s approach of “purposive interpretation” such that judges apply the provisions—not literally as they are written—but with the goals and purposes of the law in mind).

21. See discussion *infra* Part II.

measure of damages.²² While not fully compensating an aggrieved party for all losses suffered, expectation damages are considered the most appropriate measure of damages in most cases. This Part then demonstrates why, in general, it should not be expected that contractual damages provide any type of windfall to an aggrieved party and that some of the theories that surround a seller's resale are based on the misplaced understanding that the law should not relieve a breaching buyer of market price damages due to the seller's advantageous resale. Part IV examines the decision of the Oregon Supreme Court in *Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc.*,²³ and other courts and commentators that have expressed a position on these resales.²⁴ This Part offers a critique of the decision and the commentators, while providing an analysis of section 2-708 that takes into account, to a greater degree, the broader considerations of remedies theory under the Code and contract law as a whole. Finally, in Part V, this Article argues that a seller who resells at a price higher than the contract price is limited to recovery of only incidental damages because it is consistent with other provisions of the Code and the expectation principle.²⁵ In doing so, Part V explains the consequences of this limitation on a seller's damages, whereby the seller cannot speculate at the expense of the buyer, and as such, there is no windfall to the buyer. Part VI concludes that a better balanced application of section 2-708(2) should preserve a seller's right to elect a remedy in most cases, but be subject to a limitation on the seller achieving the position equivalent to full contractual performance.

II. SELLER REMEDIES UNDER ARTICLE 2 OF THE U.C.C.

The provisions for remedies, both buyer and seller alike, are contained in Part 7 of Article 2. The ground rules for a seller's damages are stated in section 2-703,²⁶ which provides a general indexing of seller damages that takes into account the relative standards to which the Code

22. See discussion *infra* Part III.

23. 322 P.3d 531 (Or. 2014).

24. See discussion *infra* Part IV.

25. See discussion *infra* Part V.

26. U.C.C. § 2-703 reads:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (Section 2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (Section 2-706);
- (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
- (f) cancel.

U.C.C. § 2-703 (2011).

holds buyer conduct.²⁷ Section 2-703 gives the aggrieved seller expansive rights to stop goods in transit, resell goods, and ultimately cancel the contract.²⁸ Not only does section 2-703 make clear that election of remedies is rejected, but also, it adopts a policy that “remedies [are] to be liberally administered . . . unless a different effect is specifically prescribed.”²⁹ Accordingly, a seller should have access to a number of remedies under the Code and understand that all remedies are “available.” Importantly, these available remedies include access to remedies calculated as market-based damages by providing the option of reselling and claiming damages under section 2-706, or recovering damages under section 2-708.³⁰

Both sections 2-706 and 2-708(1) provide methodologies for calculating a seller’s remedy when invoked, the choice of which often turns upon whether the seller has retained the goods after breach. Under section 2-706, a seller who resells in accordance with the “commercially reasonable” strictures of its provisions can recover damages based upon the substituted transaction of sale, along with incidental damages.³¹ Sellers who engage in multiple transactions in a fluctuating market might be tempted to allocate a substituted resale contract with the largest amount of damages, but they are limited, to a degree, by the obligations of good faith under the Code.³²

While the Code provides for the substituted transaction in the form of a resale under section 2-706, the language of section 2-703 makes clear that such a resale is not mandated.³³ Sellers can also access the remedy of section 2-708(1) (typically invoked when the seller retains the goods rather than resells them) to recover damages based upon a hypothetical market-based “substitute” transaction, along with incidental damages. In cases where that remedy is insufficient to put the seller “in as good a position as performance,” then the seller can have access to section 2-708(2).³⁴ As a comparison, section 2-713 also provides a parallel market-based remedy to aggrieved buyers.³⁵

27. See Peters, *supra* note 1, at 216–17 (explaining that section 2-703 is analogous to the perfect tender rule for sellers under section 2-601). A similar indexing of remedies for buyers is set forth in section 2-711. U.C.C. § 2-711 (2011).

28. U.C.C. § 2-703(b)-(c), (f) (2011).

29. *Id.* § 2-703 cmt. 4.

30. *Id.* § 2-703(b), (d); see Peters, *supra* note 1, at 216–17 (providing an analogous analysis of section 2-703 in comparison to the perfect tender rule for sellers under section 2-601).

31. U.C.C. § 2-706(1) (2011) (stating that in order for the seller to claim damages under this section, all aspects of the resale must be “commercially reasonable”).

32. See *e.g., id.* (allowing damages “[w]here the resale is made in good faith”); see also U.C.C. § 1-201(b)(20) (2001) (requiring “honesty in fact and the observance of reasonable commercial standards of fair dealing”); Peters, *supra* note 1, at 256 (“The general obligation of good faith seems as adequate as any statutory standard could be to limit the possibility of manipulations.”).

33. See U.C.C. § 2-703 (2011) (offering resell as one of six remedies available to an aggrieved seller).

34. *Id.* § 2-708(2).

35. *Id.* § 2-713 (explaining that “the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages”).

In order to appreciate the interplay between section 2-706 and 2-708, some legislative history is helpful, particularly with respect to the intent expressed by the comments to the Code. Karl Llewellyn, the chief reporter of the Code and draftsman for much of Article 2, crafted section 2-706 as a response to the Uniform Sales Act's ("USA") section 60.³⁶ Notably, USA section 60 permitted seller resales and provided for a recovery "for any loss occasioned by the breach of the contract for sale," without more specific direction on how to calculate the damages.³⁷ Llewellyn explained that the inclusion of statutory provisions preserving the ability to "cover"³⁸ through substituted transactions:

make[s] it possible, in transactions between professionals in the market, for the justified claimant, be he buyer or seller, to fix [h]is rig[h]ts with speed, after a breach, and then to *move*, with safety, in such manner as to get in fact the agreed benefit under the contract, or so much of it as is still available. . . . It not only steps up the certainties which the law can provide to help contractors, fitting into mercantile need and mercantile practice; but it also lays a foundation for cheaper and more adequate administration, at law, of the other remedies. . . . These sections incorporate the long standing practice of the English courts to give the aggrieved party reasonable time, on discovering breach, to cover himself in any reasonable way. Any litigation *after cover has been actually sought and had* is thus made to turn first on a fact easy to prove: to wit, what loss was actually suffered.³⁹

36. REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941), reprinted in Elizabeth Slusser Kelly, 1 UNIFORM COMMERCIAL CODE DRAFTS 523 (Elizabeth Slusser Kelly ed., 1984) [hereinafter REPORT AND SECOND DRAFT]; see generally Maggs, *supra* note 20 (explaining Llewellyn's approach to drafting the Code).

37. U.S.A. § 60 reads:

(1) Where the goods are of perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default of the payment of the price any unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transit may sell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell of the sale or for any profit made by such resale, but may recover from the buyer any damages for any loss occasioned by the breach of contract or the sale.

(2) Where a resale is made, as authorized by this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract of the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale the notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Id.

38. REPORT AND SECOND DRAFT, *supra* note 36, at 522. In the drafts of the Revised Uniform Sales Act, which later became U.C.C. Article 2, Llewellyn used the term "cover" to refer to either the seller's resale after a breach by the buyer or the buyer's purchase of substitute goods after the seller's breach. *Id.*

39. *Id.* at 522–23.

While the legislative history is far from unclouded, at one time, section 2-703(e) was to contain the language “so far as any goods have not been resold.”⁴⁰ This language was deleted to “make it clear that the aggrieved seller was not required to elect between damages under 2-706 and damages under 2-708.”⁴¹ The history clearly reflects that preservation of the election of remedies also preserves a remedy for a reselling seller who may need access to section 2-708 remedies because it has failed to comply with its strictures for recovery under section 2-706, and might otherwise be left without a remedy.⁴² The cloud on this commentary is that the chosen correction to this problem did not expressly limit a seller’s recovery under 2-708 to the proceeds of resale or the market price, whichever is lower, and it, in fact, indicates in a footnote that in fairness suggests that a seller should be able to take the benefit of an advantageous resale to collect more than the “expected return.”⁴³ A correction that expressly took into account the resale problem was criticized for complexity, finding the problem rare and not “subject to serious abuse.”⁴⁴

Ultimately, the comments to section 2-703 reflect little of this commentary and take no explicit final position on this point.⁴⁵ Instead, comment one to section 2-703 directs “[w]hether the pursuit of one remedy bars another depends entirely on the facts of the individual case.”⁴⁶ Added to this, though, the language of section 1-305 seems opposite to an outcome permitting more than the “expected return” by expressly directing that a party be put in the position as had the contract been fully performed.⁴⁷ The seller remedies of Article 2 itself, as indexed by section 2-703, appears to favor a set of specific rules without stating one overarching theory of recovery in the way often expressed in the common law of contracts.⁴⁸ Such general guidance, however, is now expressed in the lan-

40. 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMM’N FOR 1955: STUDY OF THE UNIFORM COMMERCIAL CODE 550–52 (1955) [hereinafter LAW REVISION COMM’N].

41. *Id.* at 550–51; see Frisch, *supra* note 20, at 203 n.125.

42. See LAW REVISION COMM’N, *supra* note 40, at 551.

43. See *id.* at 551–52 n.380 (“If seller had waited too long and the market had dropped, he would have suffered the loss; it seems fair that in this situation a market rise should be to his advantage.”). The fairness of such an outcome is one of the misconceptions with expectation theory discussed in Part II.B of this Article.

44. LAW REVISION COMM’N, *supra* note 40, at 552.

45. See U.C.C. § 2-703 cmt. 1 (2011) (“The Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the fact of the individual case.”).

46. *Id.* § 2-703 cmt. 1.

47. U.C.C. § 1-305(a) reads:

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

Id.

48. Frisch, *supra* note 20, at 179 (describing Article 2 as “exceptional among statutory regimes by not prescribing a general standard of recovery for the aggrieved party, but instead employing specific formulas for computing damages”). *But see* Sebert, *supra* note 13, at 363 (arguing that the provisions are not sufficiently detailed).

guage of section 1-305.⁴⁹ Even where an aggrieved seller might assert the lack of clarity in Article 2 as to recovery of market-based damages after an advantageous resale as an indication of permissibility, the broad policy constraints of Article 1 are also binding.⁵⁰ Section 1-305 clearly anticipates that, despite the more specific provisions on remedies contained in the Code, the policy on damages is one, as indicated elsewhere in the Code, favoring compensating aggrieved parties only to the extent of full recovery reflecting full performance of the transaction.⁵¹ Importantly, this provision also rejects any remedy that might be viewed as a penalty unless expressly provided for in the Code.⁵² In fact, the comments go so far as to say that the Code “makes it clear that damages must be minimized.”⁵³

The operative provisions of Articles 1 and 2, along with some historical background, appear to favor a seller recovery aimed toward a limited recovery by sellers of the loss actually suffered as reflected by a measure approximating full contractual performance. The next Part of this Article will explore the role of the common law of contracts and the Code in shaping party expectations regarding available remedies in the event of a breach.

III. THE EXPECTATION PRINCIPLE, THE U.C.C., AND COMMON MISCONCEPTIONS

A. *Common Law Contract Principles of Compensation*

The Code is intended to work in tandem with the common law of contracts unless displaced by its provisions, including principles of law and equity.⁵⁴ Accordingly, the common law principles of remedies, particularly the theories underlying them, play a role in the award of inappropriate amounts of damages to aggrieved sellers.⁵⁵ As a whole, contract law presumes that parties might perform their contractual obligations but might also breach and pay damages, thereby walking away from the

49. U.C.C. § 1-305 (2011).

50. *Id.* § 1-102 (“This article applies to a transaction to the extent . . . it is governed by another article of the . . . Code.”).

51. *Id.* § 1-305 cmt. 1 (stating that this provision is to “make it clear that compensatory damages are limited to compensation”).

52. *Id.* § 1-305(a).

53. *Id.* § 1-305 cmt. 1. See Anderson, *supra* note 5, at 1086 (“The courts, in applying [the] current article 2, have uniformly used the mitigation principle to limit the recovery of the full capacity seller.”).

54. U.C.C. § 1-103(b) (2011) (“Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.”). See Robyn Meadows, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code*, 54 SMU L. REV. 537–35, 537–38 (2001) (“[M]any commercial disputes cannot be decided without resort to common law and equity.”).

55. See generally JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 118(D)(6), at 756 (5th ed. 2011) (discussing that the remedies under the Code are a “combination of traditional contract remedies and the creativity of . . . Karl Llewellyn”).

transaction.⁵⁶ Like section 1-305, the mechanism used in the common law to award damages in most cases is that which is sufficient to give the aggrieved party “the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,” commonly referred to as an “expectation interest.”⁵⁷ In some cases, a party can have recourse to the remedy of compulsion in order to compel the performance of the other party, but these cases are less ordinary outside of the Code.⁵⁸

An expectation recovery typically takes into account “gains prevented” by the breach and losses of a positive character due to expenditures by the non-breaching party.⁵⁹ Notably, the expectation recovery does not provide any sort of punishment to breaching parties except in rare circumstances.⁶⁰ From the proposition that an aggrieved party is entitled to collect its expectation interest, though, it does not follow that an aggrieved party has unfettered reign with respect to establishing the responsibility of the breaching party.⁶¹ There are limitations firmly embedded in the common law of contracts on the ability of an aggrieved party to collect an expectation interest, including foreseeability,⁶² certainty,⁶³ and mitigation.⁶⁴ These basic principles seek to strike a balance in terms

56. See generally Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004) (arguing that parties enjoy a type of “option” to breach and pay expectation damages).

57. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981); see MURRAY, *supra* note 55, § 118, at 750 (“The purpose of contract law is often stated as the fulfillment of those expectations that have been induced by the making of a promise.”); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 989 (2005); L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936) (discussing that the expectation interest requires the defendant to “pay the money value of this performance”).

58. RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981). See U.C.C. § 2-709 (2011) (allowing an aggrieved seller an action for the price which amounts to specific performance in most cases); *id.* § 2-716 (reflecting a buyer’s right to specific performance).

59. Fuller & Perdue, *supra* note 57, at 55.

60. MURRAY, *supra* note 55, § 118[B], at 751–52. See U.C.C. § 1-305(a) (2001) (disallowing “penal” damages unless specifically provided in the Code); *NHF Hog Mktg., Inc. v. Pork-Martin, LLP*, 811 N.W.2d 116, 119 (Minn. Ct. App. 2012) (prohibiting penal damages and holding that limiting the plaintiff to expectation damages preserves the possibility of an “efficient breach”); Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 405 (1990) (stating how courts refused to permit disappointed promisees the recovery of penal damages).

61. See *supra* note 60.

62. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981). The foreseeability doctrine does not have the same impact on seller’s damages under Article 2 because aggrieved sellers generally do not have a right to consequential damages, as that measure of remedies is only had by aggrieved buyers. *Id.* § 351 cmt. b; see, e.g., U.C.C. § 2-713 (2011) (stating that consequential damages are recoverable in the event of non-delivery or repudiation by the seller); *id.* § 2-715(2) (following the common law rule of foreseeability with respect to consequential damages, but requiring a buyer to prevent the loss by cover or otherwise).

63. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981); see U.C.C. § 2-723 (2011) (explaining proof of market price).

64. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.”); see U.C.C. § 2-715 (2011) (requiring a buyer who seeks consequential damages to mitigate). *But see id.* § 2-703 (allowing an election of remedies that does not require the seller to mitigate its loss by resell-

of fairness of the allocation of responsibility for breach. Thus, the intent is neither to over or under compensate in the event of breach.⁶⁵ Despite these parameters, the expectation remedy does not necessarily employ a “full” measure of damages.⁶⁶

The expectation principle is firmly rooted in the common law of contracts and the Code.⁶⁷ One need look no further than section 1-305’s mandate toward placing the aggrieved party in the position of its expectation to conclude the Code’s adherence to an expectation perspective.⁶⁸ Moreover, even section 2-708, in its subsection (2), reserves a holding place for protection of “as good a position as performance would have done” in the event that the specific measurement of damages under subsection (1) proves inadequate to achieving this tenet of compensation.⁶⁹ Even the Code’s provisions on liquidated damages in section 2-718 only allow such liquidation “in the light of the anticipated or actual harm caused by the breach” and, like section 1-305, disallow penalties in favor of a basic measure of compensation.⁷⁰

The compensation parameters of the expectation principle are also consistent with the “efficient breach” theory, which attempts to balance the cost of a breach and performance,⁷¹ because it is aimed at providing

ing the goods in all circumstances). While the U.C.C. does not expressly impose a responsibility for mitigation, courts and commentators often find it applies pursuant to the general provisions of section 1-305 and the good faith obligation under section 1-201(20). *See* ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE, 1 DAMAGES UNDER UCC § 1:6 (2015); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 909 (7th ed. 2012); *see also* Am. Nat’l Bank and Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 468 (7th Cir. 1982) (“[B]y imposing the requirements of good faith and commercial reasonableness, the law does in fact require reasonable attempts to mitigate damages.”); N.J. Collins, Inc. v. Pacific Leasing, Inc., No. Civ.A. 97-2379, 1999 WL 681393, at *4 (E.D. La. 1999) (same); Copymate Mktg., Ltd. v. Modern Merch., Inc., 660 P.2d 332, 333-34 (Wash. Ct. App. 1983) (stating that though the Uniform Commercial Code does not expressly require a seller to mitigate damages in the event of a buyer’s unjustified repudiation, the Code does not abrogate the common law requirement).

65. Frisch, *supra* note 20, at 179 (describing Article 2 as “exceptional among statutory regimes by not prescribing a general standard of recovery for the aggrieved party, but instead employing specific formulas for computing damages”). *But see* Sebert, *supra* note 13, at 413 (arguing that the provisions are not sufficiently detailed).

66. Eisenberg, *supra* note 57, at 989, 995-96; Frisch, *supra* note 20, at 185.

67. *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 936-37 (1974) (“The moment at which courts focus on expectation damages . . . is precisely the time at which contract law becomes an instrument for protecting against changes in supply and price in a market economy.”). *But see* Fuller & Perdue, *supra* note 57, at 57 (“It is as a matter of fact no easy thing to explain why the normal rule of contract recovery should be that which measures damages by the value of the promised performance.”). *See generally* Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687 (W.D. Wis. 1974) (awarding expectation damages); *Devecmon v. Shaw*, 14 A. 464 (Md. 1888) (same); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (same); *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) (same); *Spiegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923) (same); *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917) (same); *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891) (same); *East Providence Credit Union v. Geremia*, 239 A.2d 725 (R.I. 1968) (same).

68. U.C.C. § 1-305 (2001).

69. *Id.* § 2-708.

70. *Id.* § 2-718.

71. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 89-90 (2d ed. 1977); *see also* Barry Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679, 1680 (2008) (“At the heart of efficient breach theory is the common law remedy of expectation damages.”); Eisen-

adequate, but not over, compensation to an aggrieved party that is not penal. A breach is said to be efficient when a promisor values the breach more than performance because the gains of the breach exceed the damages the party will owe to the promisee.⁷² In these cases, the breach may be seen as “pareto superior.”⁷³ So long as the breaching party is held accountable for the loss, blameworthiness is not part of the inquiry or the focus of the compensation calculation.⁷⁴ The efficiency of the remedy on resale is considered further in this section.

In sum, both the common law and the Code accept the expectation principle as the underlying theory informing damage calculations. It attempts to achieve a sense of fairness, and efficiency, by compensating the aggrieved party’s actual harm through a system that respects either hypothetical or actual substitute transactions as a measure of compensation balanced against basic limitations on calculations to regulate over and under compensation. Furthermore, the expectation principle tempers the risk to the breaching party not only by disallowing penalties, but also by employing a measure of mitigation in many contexts.

B. Confronting Misconceptions of an Expectation Approach

Let us now turn to two misconceptions that underlie the discourse of the right of an aggrieved party to receive compensation for a breach. This Article suggests that some of the discussion concerning contract damages, as well as seller remedies upon resale, is often laced with faulty assumptions about responsibility, windfalls, and speculation. One such faulty assumption is that a breaching party should not be relieved of damages due to the efforts of the non-breaching party.⁷⁵ A second faulty assumption is that the right of an aggrieved party to recover a market price is bargained for, such that the breaching party becomes the guaran-

berg, *supra* note 57, at 997 (discussing efficient breach); Frisch, *supra* note 20, at 180–81 (discussing efficient breach).

72. See, e.g., POSNER, *supra* note 71.

73. Robin Paul Malloy, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 39 (West, 1990) (defining “pareto superior” as the type of breach in which one party benefits and the other is not worse off).

74. See, e.g., Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988) (“Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”). See also United Consumers Club, Inc. v. Bledsoe, 441 F. Supp. 2d 967, 982 (N.D. Ind. 2006) (“Even if the breach is deliberate, it is not necessarily blameworthy.”) (quoting Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988)); Ortiz v. Lyon Mgmt. Group, Inc., 69 Cal. Rptr. 3d 66, 75 (Ct. App. 2007) (“The law ordinarily assigns no moral blameworthiness to breaching a contract.”); Giampapa v. Am. Family Mut. Ins. Co., 64 P.3d 230, 251 (Colo. 2003) (“The theory of ‘efficient breach’ posits that the purpose of contract law is not to discourage all breaches. To the contrary, certain breaches, such as those where the breaching party’s gains exceed the injured party’s losses, are thought to be desirable.”); Paiz v. State Farm Fire & Cas. Co., 880 P.2d 300, 309 (N.M. 1994) (“Contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault.” (quoting E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 90 (1990))).

75. See discussion *infra* Part III.B.1.

tor for market price fluctuations, such that the non-breaching party can speculate at the expense of the breaching party.⁷⁶

1. *The Misconception that Deduction of Losses Avoided Leads to a Windfall to the Breaching Party*

Any response to questions regarding the application of the expectation theory to seller resale must necessarily include an evaluation of how certain post-breach transactions might affect damage calculations. Unless these transactions are examined and carefully analyzed, it is difficult to distinguish the outcome of a true expectation measure of damages from arguments involving perceived fairness,⁷⁷ bargained risk allocation,⁷⁸ common sense,⁷⁹ and the like. For example, one might believe that fairness dictates that the law penalize a breaching party or withhold relief from increased damages, yet that would not be consistent with compensating an expectation interest.⁸⁰ Similarly, common sense might indicate that the absence of commentary in section 2-703 suggests no limitations on a market-based recovery, but statutory provisions must also be read in conjunction with other broad principles and the statutory scheme as a whole.⁸¹ Accordingly, a hastily considered application of an expectation remedy can be over or under compensatory or penal in nature. A closer look at two scenarios of post-breach transactions based upon the example set forth in the introduction to this Article is illustrative here.

76. See discussion *infra* Part III.B.2.

77. See LAW REVISION COMM'N, *supra* note 40, at 551–52.

78. Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531, 540 (Or. 2014) (“[L]imiting an aggrieved seller to its resale price damages ignores the risk for which the parties bargained.”).

79. *Id.* (“[C]ommon sense dictates that an affirmative act by the seller to resell should not have any impact on that right.”) (quoting Gabriel, *supra* note 1, at 445).

80. MURRAY, *supra* note 55, § 118[B], at 751–52; see U.C.C. § 1-305 (2001) (disallowing “penal” damages unless specifically provided in the Code).

81. See U.C.C. § 1-305 cmt. 1 (2001) (explaining that the provisions are “liberally administered” to compensate an expectation where “compensatory damages are limited to compensation”).

a. The Non-Breaching Party Cannot Recover for a Loss It Increased



In Figure 1, representing a “loss-increased” case, the price at the time of contracting presents the highest market price for the goods, where a lower price is evident at the time the tender of goods was contracted and a still lower price is present at the time of the resale by the aggrieved seller. That is, over time, the potential damages owed to the aggrieved seller have increased. Presuming a delay in resale by the seller makes it not “commercially reasonable,”⁸² Article 2 would not permit the seller to pass on the increased loss to the breaching buyer. But is this consistent with the expectation policy of section 1-305 and the common law? The answer is in the affirmative.

The “doctrine of unavoidable circumstances,” sometimes called mitigation,⁸³ has both “negative and positive dimensions.”⁸⁴ That is, a failure to mitigate may have a positive result for a breaching party who gets the benefit of reasonable limitations on damages, whereas the non-breaching party experiences a negative outcome if they are unable to receive com-

82. *Id.* § 2-706.

83. CORBIN ON CONTRACTS §57.11; ANDERSON, *supra* note 64, § 1:6 (emphasizing that while the U.C.C. does not expressly recognize a doctrine of mitigation, many courts find that it impliedly does through section 1-305); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 973–74 (1983) (discussing doctrine of avoidable consequences); Richard C. Tinney, *Reduction or Mitigation of Damages—Sales Contract*, 11 AM. JUR. PROOF OF FACTS 2D 131 § 3 (2015) (explaining that despite ambiguity in the Code, its policy toward mitigation is typically found through common sense exploration of its provisions); Lisa A. Fortin, Note, *Why There Should Be a Duty to Mitigate Liquidated Damage Clauses*, 38 HOFSTRA L. REV. 285, 310 (2009) (citing the requirement of section 2-706 that a seller must resell goods “in good faith and in a commercially reasonable manner” as proof that the code emphasizes the “inseparability of mitigation and good faith”); see *F. Enters., Inc. v. Kentucky Fried Chicken Corp.*, 351 N.E.2d 121, 125-27 (Ohio 1976) (discussing the doctrine of avoidable circumstances).

84. See MURRAY, *supra* note 55, § 123[C], at 779.

pensation for some losses.⁸⁵ This turns, of course, on the avoidability of the loss at hand.⁸⁶ For instance, section 2-706 indicates that a resale made outside of a “reasonable time after the buyer’s breach”⁸⁷ in a declining market, would be avoidable, and thus, not recoverable.⁸⁸ Consistent with the common law, the result of seller’s failure to promptly engage in resale “simply precludes his recovery of such avoidable losses.”⁸⁹ Any losses incurred by the seller after the time of tender has passed, whether due to speculation, neglect, or otherwise, would be at the risk of the seller, consistent with common law principles concerning collection of an expectation interest.⁹⁰

Moreover, a result that does not pass on the additional loss to the breaching buyer does not provide a true windfall to the buyer. While windfalls are disfavored, the term is often over-used.⁹¹ Consider, for example, what Professor Christine Hurt observed regarding windfalls:

Though windfalls have always been disfavored in contract law, the law defines windfall very narrowly. When courts classify economic gains as windfalls and fashion rulings accordingly, these gains are generally amounts received for no corresponding work or harm incurred, double payments for the same corresponding obligation or

85. *See id.*

86. CORBIN, *supra* note 83, § 57.11; ANDERSON, *supra* note 64, § 1:6; Goetz & Scott, *supra* note 83, at 973; *see* Exim Brickell LLC v. PDVSA Servs., Inc., 516 Fed. App’x. 742, 759 (11th Cir. 2013) (holding that the buyer could not recover storage fees for the milk as incidental damages after the milk had already spoiled); Knitcraft Corp. v. Raleigh Ltd., No. 49A04-1007-CC-397, 2011 WL 676166 (Ind. Ct. App. Feb. 25, 2011) (finding a seller’s failure to mitigate in an action for the price under section 2-709 precluded its recovery of damages).

87. U.C.C. § 2-706 cmt. 5 (2003).

88. *See id.*

89. MURRAY, *supra* note 55, § 123[C], at 779; *see* TCP Indus., Inc. v. Uniroyal, Inc., 661 F.2d 542, 550 (6th Cir. 1981) (holding that a common law duty to mitigate applies in cases subject to the Michigan U.C.C.); Schiavi Mobile Homes, Inc. v. Girona, 463 A.2d 722, 724–25 (Me. 1983) (finding that the Maine U.C.C. includes a duty to mitigate, and disallowing recovery to seller who made resale at lower price when another buyer willing to pay a higher resale price was available); Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 392 S.E.2d 128, 135 (N.C. Ct. App. 1990) (finding that the trial court erred by not instructing jury with regard to reduction of buyer’s damages due to failure to mitigate); Robert A. Hillman, *The Future of Fault in Contract Law*, 52 DUQ. L. REV. 275, 293–94 (2014) (“[T]he promisee must take affirmative steps, such as agreeing to reasonable substitute opportunities that diminish the loss from breach, and must refrain from conduct that increases damages.”); Sarah Howard Jenkins, *Contracting out of Article 2: Minimizing the Obligation of Performance & Liability for Breach*, 40 LOY. L.A. L. REV. 401, 403 n.10 (2006) (stating that the duty to mitigate damages under 2-715(2)(a) should be construed as mandatory). *But see* Bob Kenagy, *Using a Liquidated Damages Clause in Major Agreements for the Sale of Goods*, 89 MICH. B.J. 26, 28 (2010) (“[C]ourts have held that there is no duty to mitigate damages when a contract contains a valid liquidated damages clause.”); Fortin, *supra* note 83, at 307 n.139 (“[I]t should be noted that the UCC appears to contradict itself as to whether such damages that could have been avoided are recoverable. Despite the language in section 2-712(2), section 2-712(3) explicitly states any additional remedies are not barred to those buyers that do not cover.”).

90. Goetz & Scott, *supra* note 83, at 973 (stating that the “cost-minimizing conception of the mitigation principle[] require[s] a mitigator to bear the risk of his failure to minimize losses”).

91. Christine Hurt, *The Windfall Myth*, 8 GEO. J.L. & PUB. POL’Y 339, 345, 369 (2010) (explaining that a windfall is “an unanticipated benefit usually in the form of a profit and not caused by the recipient” (quoting BLACK’S LAW DICTIONARY 1631 (8th ed. 2004))); *see* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1491 (1999) (defining windfall as “economic gains independent of work, planning, or other productive activities that society wishes to reward”).

harm, or relief from making a payment that is legally owed. Courts generally do not classify as a windfall a legally received payment merely because of its excessive nature, if the premise for the payment is just. Therefore, the law applies a fairly mechanical classification rule and does not label economic gains as windfalls merely out of distaste for the underlying activity, sympathy to the payor, or the unpopularity of the recipient.⁹²

Indeed, it is hard to suggest that there is a wrongful, illegal, or classic windfall to the breaching buyer in a loss-increased case where damages only provide compensation to the seller and allow the buyer to escape payment for amounts in excess of actual reasonable compensation.⁹³ The “benefit” to the buyer here is in no way accidental but arises due to the application of the proper expectation remedy under contract law.⁹⁴ That is, even an aggrieved seller would not be entitled to this type of “windfall,” which arguably does not exist at all, which would result from its own actions that increased damages by delaying the making of a timely, reasonable resale.⁹⁵ Moreover, there is no windfall here to the buyer simply because the buyer is the breaching party and has broken a promise, making it the party at fault.⁹⁶ The result that entails under sections 2-706 and 2-708 is not only consistent with the expectation theory of recovery at common law, but it also creates no windfall to either party in a loss-increased case.

It is of note that barring a seller’s recovery of increased damages is also consistent with the concept of efficiency. Strong reasons for efficiency support a damages scheme that is indifferent to the reasons underlying the breach and provide damages for only the value of the contract to the promisee.⁹⁷ It would not be efficient to expose the breaching party to damages resulting from its breach that are purely related to an unreasonable increase of damages by the other party.⁹⁸ Accordingly, the limits placed on the recovery of damages that arise from the non-breaching party’s own actions are consistent with this position.⁹⁹

Therefore, the breaching buyer in a loss-increased case has a chance of paying damages in an amount that reflects a reasonable substituted transaction reflective of the seller’s loss, but does not include any amount by which the seller increased damages due to delay or other factors. Such an increase in damages would be inconsistent with an efficient breach¹⁰⁰ and the doctrine of mitigation, and it does not represent a true windfall to the buyer.¹⁰¹ Would the same be true as to actions by the seller, wheth-

92. Hurt, *supra* note 91, at 342–43 (internal citations omitted).

93. *See id.* at 350–52.

94. *See id.* at 347–48.

95. *See id.* at 342–43.

96. *See id.*

97. Eisenberg, *supra* note 57, at 980.

98. *See id.* at 980–82.

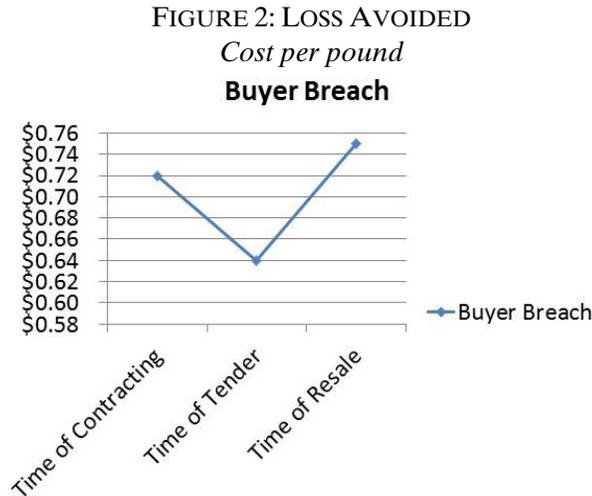
99. *See* discussion *supra* Part III.A.

100. *See* discussion *supra* Part III.A.

101. *See* discussion *supra* Part III.B.1.

er required or not, that lead to a loss avoided? Taking these observations into consideration, it seems that it should be.

b. The Non-Breaching Party Cannot Recover for a Loss It Avoided



In Figure 2, representing a “loss-avoided” case, the time of contracting presents the highest market price for the goods, where a lower price is evident at the time of the contracting for tender of the goods, but a higher than tender and contracting price is present at the time of the resale by the aggrieved seller. That is, over time, the market has recovered, questioning the potential damages owed to the aggrieved seller. Article 2 is clear that any profit made on such resale is kept by the seller.¹⁰² While Article 2 does not require a seller to resell goods, does it permit the seller to collect the profit on resale and to pass on the market-based loss to the breaching buyer, even when the loss on the transaction was avoided?¹⁰³ Alternatively, are the buyer’s damages limited to incidental damages where there is a loss avoided? Which of these is consistent with the expectation policy of section 1-305 and the common law? The answer is in the negative as to the first and the affirmative as to the second. The second position is consistent with the common law.

102. U.C.C. § 2-706 (2011).

103. *Id.* § 2-706(6) (“The seller is not accountable to the buyer for any profit made on any resale.”); *see, e.g., Hessel v. Christie’s Inc.*, 399 F. Supp. 2d 506, 520–21 (S.D.N.Y. 2005) (holding that the seller keeps the profits on resale); *Trienco, Inc. v. Applied Theory, Inc.*, 794 P.2d 1239, 1241 (Or. Ct. App. July 5, 1990) (holding that a buyer that breached a contract for the purchase of a product was not entitled to credit for payment or proceeds of resale); *Conister Trust Ltd. v. Boating Corp. of Am.*, No. M1998-00949-COA-R3-CV, 2002 WL 389864, at *22 n.14 (Tenn. Ct. App. Mar. 14, 2002) (stating that according to the Tennessee Code Annotated, the seller is not required to account to the defaulting buyer for any profit on the resale).

The negative and positive dimensions of the doctrine of mitigation¹⁰⁴ are even more apparent with respect to the loss-avoided case. That is, successful mitigation upon resale may have a positive result for a breaching party who gets the benefit of reasonable limitations on damages for loss avoided.¹⁰⁵ The non-breaching party may argue that it experiences a negative outcome if they are unable to receive the market-based damage, but there is no compensation at common law where there is no loss on the transaction.¹⁰⁶ As before, compensation turns on the avoidability of the loss at hand.¹⁰⁷ While section 2-703 does not require a seller to make a resale, if the loss is actually avoided, then allowing recovery of the market-based damage would not be consistent with the principles of recovery at common law.¹⁰⁸ Simply put, where a loss is avoided, whether resale is required or not, it would be inconsistent with the expectation theory and the doctrine of mitigation to permit a seller to recover a loss avoided in fact.¹⁰⁹

Moreover, a result that *would* pass on additional payments to the seller would appear to provide a “wrongful” windfall.¹¹⁰ As explained by Professor Hurt regarding wrongful windfalls:

These types of gains are not earned by either the provision of capital or services, or warranted to compensate for loss or harm. For a court to award this type of payment, the court would have to ignore the constraints of both law and equity. This type of windfall would give a party compensation when that party has no loss or would attempt to compensate once more a party that has already been made whole.¹¹¹

104. See MURRAY, *supra* note 55, § 123[C], at 779; see also Goetz & Scott, *supra* note 83, at 973.

105. ANDERSON, *supra* note 64, § 1:6; see, e.g., *Am. Seating Co. v. Archer Plastics Inc.*, No. 11-53, 2014 WL 4798522, at *9 (D.N.J. Sept. 26, 2014) (rejecting the breaching buyer’s argument that the reselling seller failed to mitigate, finding instead that the seller acted “reasonably to mitigate its damages” to the benefit of the breaching buyer); *N.R.C., Inc. v. Satis Am. Corp.*, 1986 WL 1064, at *7 (Ohio Ct. App. Jan. 23, 1986) (finding that a seller could collect incidental damages where it mitigated by re-melting coil back into ingot).

106. See Roy Ryden Anderson, *Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference’s Breach of Promise . . . Regarding Article 2 Damage Remedies*, 54 SMU L. REV. 795, 802 (2001).

107. ANDERSON, *supra* note 64, §1:6; see *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 294 (3d Cir. 2014) (holding that an injured party “may not generally recover damages for losses that it could have avoided by reasonable efforts”); *Baird v. Crop Prod. Servs., Inc.*, Nos. CA2011-03-003, CA2011-04-005, 2012 WL 3815314, at *7 (Ohio Ct. App. Sept. 4, 2012) (“[B]efore the doctrine of mitigation of damages or avoidable consequences will operate to impose a duty upon a plaintiff to minimize a loss that he has incurred . . . , the plaintiff must be aware that he has sustained a loss . . .”). *But see* *First Bank & Trust v. Redman Gaming of Louisiana, Inc.*, 131 So. 3d 224, 230 (La. Ct. App. 2013) (refusing to apply the doctrine of mitigation of damages where there was no indication that lender suffered further actual damage as a result of seller’s failure to repurchase the assets).

108. U.C.C. § 2-703 (2011).

109. See *supra* note 103 and accompanying text.

110. Hurt, *supra* note 91, at 351.

111. *Id.*; see *H-W-H Cattle Co. v. Schroeder*, 767 F.2d 437, 439-40 (8th Cir. 1985) (stating that allowing the buyer to collect market price damages after reselling would result in a “windfall, and thus violate the general principle concerning remedies underlying Article Two of the Uniform Commercial Code”); *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1083 (9th Cir. 1979) (claiming that allowing full section 2-708(1) damages would result in “windfall” to the seller, “which we will not sanction”);

Indeed, it should be hard to argue that there is no windfall to the seller in the loss-avoided case if it could collect an additional market-based payment, as the favorable resale at any point in time would have already made them whole under the expectation measure.¹¹² In such loss-avoided cases, providing this type of windfall to an aggrieved seller would seem to be wrongful under this analysis as it turns on providing payment in excess of actual loss.

Moreover, any “benefit” to the buyer here is in no way accidental, but arises due to the application of the proper expectation remedy under contract law.¹¹³ That is, “courts tend to label as windfalls only those gains that are so unjust they must be avoided or disgorged.”¹¹⁴ Labeling a loss avoided as a “windfall” to a breaching buyer suggests we might properly disgorge it as undeserved, simply because the loss avoidance might have been unanticipated due to the efforts of the seller in making a favorable resale, but that does not make a windfall wrongful to the buyer by the natural operation of the expectation principle.¹¹⁵ Although something external to the efforts of the buyer caused there to be a loss avoided, parties contract with the knowledge that their bargain could lead to multiple resulting outcomes.¹¹⁶ The result under sections 2-706 and 2-708 is consistent with the expectation theory of recovery at common law, and it creates no windfall to either party in a loss-avoided case, if a market-based recovery is not permitted.¹¹⁷

Under an expectation theory, the breaching buyer in a loss-avoided case has a chance of paying damages at a figure that reflects a substituted transaction reflective of the seller’s actual reasonable loss, but not including amounts for market-based damages where the seller has actually avoided losses by mitigating, even though not required to do so by the Code. Limiting damages in this manner is consistent with allowing a buyer to pursue an efficient breach¹¹⁸ and the doctrine of mitigation, and it does not result in a wrongful windfall to the seller or an improper benefit to the breaching buyer.¹¹⁹ While the expectation theory firmly limits an aggrieved seller’s ability to collect damages and protects a buyer’s ability to breach without penalty, other than payment of those damages, does a buyer implicitly bear the risk of downward market price fluctuations on the grounds of contractual allocation?

Tesoro Petrol. Corp. v. Holborn Oil Co., 547 N.Y.S.2d 1012, 1012 (N.Y. Sup. Ct. 1989) (“Granting it the approximately \$3,000,000 additional recovery that it seeks would result in a windfall . . .”).

112. Hurt, *supra* note 91, at 350–52.

113. *Id.* at 354.

114. *Id.* at 345.

115. *Id.*

116. *Id.* at 348–49.

117. *See supra* Part III.B.1.a.

118. *See* discussion *supra* Part III.A. Here, efficient breach would only suggest that the non-breaching party recover the actual loss, not more, so that the other party may pursue other opportunities.

119. *See* discussion *supra* Part III.B.1.

2. *The Assumption that a Breaching Party Agreed to Bear the Risk of Downward Market Price Fluctuations*

An understanding of the decision-making process of contracting parties, both at the time of contracting and at the time of breach, might inform the answer to some questions concerning application of the expectation measure of damages in the Code. Simply put, it might be helpful to know how the parties viewed the law of damages prior to breach. Do contracting parties enter into transactions in reliance on the specific measurement of damages that might be available in the event of breach? If so, might this indicate that the breaching party, who agreed to pay a market-based remedy, has an obligation to pay it? If so, we might conclude that the breaching buyer then bears the risk of negative market price fluctuations. The empirical evidence, however, suggests the answer to both questions is no.¹²⁰

While courts and commentators frequently observe that parties plan in the shadow of a clear body of contractual rules, “these assumptions about history and about human relationships are just wrong or so greatly overstated as to be seriously misleading.”¹²¹ In his well-cited work on contractual relationships, Stewart Macaulay explained that contract law is not at the center of transaction planning:

Contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships. There are business cultures defining the risks assumed in bargains, and what should be done when things go wrong. People perform disadvantageous contracts today because often this gains credit that they can draw on in the future. People often renegotiate deals that have turned out badly for one or both sides. They recognize a range of excuses much broader than those accepted in most legal systems.¹²²

Rather, the remedial rules of contract law, including the UCC, are written in a way to promote settlement and compromise, rather than vindication of rights.¹²³

120. See Frisch, *supra* note 20, at 183; see also Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191, 193 (2008) (emphasizing the relationship and sanctions from it); Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1059–60 (2009) (“[T]here is strong evidence that commercial parties prefer to retain the option to enforce their commitments through two sets of rules: an explicit (and formal) set of rules for those parts of their relationship that require legal enforcement and an implicit (and flexible) set of rules for those aspects that respond best to self-enforcement.”); Thomas M. Palay, *A Contract Does Not A Contract Make*, 1985 WIS. L. REV. 561, 562 (explaining that “parties who have . . . strong relational ties with their contracting opposites are not particularly worried about initial terms of agreement . . . [t]hey assume that the contract will be adjusted to their mutual advantage as circumstances change”).

121. Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467 (1985).

122. *Id.* at 467–68 (internal citations omitted).

123. *Id.* at 469–70.

As such, it does not seem likely that any particular application of an expectation measure of damages actually forms part of the contractual agreements, as somehow considered by the parties at the time of formation.¹²⁴ Instead, the opposite seems to be true, that contractual parties proceed in their transaction, sometimes with little thought to critical terms of the deal, let alone the particular rules of the Code related to breach.¹²⁵ Article 2 actually facilitates contractual relationships without any particular forethought by providing a large variety of default terms and gap fillers that dispense with the type of forethought that some courts and commentators attribute them as having.¹²⁶

It is a stretch to think that even sophisticated buyers and sellers plan for the breach of the other party and make decisions with a view toward ensuring the later collection of a contract market price differential remedy in the event of a breach.¹²⁷ Of course, it is not to be said that parties do not consider the legal rules in making their contracts, as sometimes they do and might even limit remedies or adopt a liquidated damages clause, all of which are permitted under the Code.¹²⁸ It would not necessarily be true with respect to transacting in general, though, that parties contract in reliance on the legal rules, particularly when parties do not provide specific contractual language of a remedy.¹²⁹ With respect to sellers, such pre-contractual reliance on a market-based remedy would seem to be even less true in light of the language of the Code suggesting that a seller's *resale* damages are often primary, and sellers that do not comply are "relegate[d]" to the market-based remedy as secondary.¹³⁰

The expectation remedy provides the framework for recovery of damages at common law and under the Code. This remedial framework, though, has been considered here in light of misconceptions involving windfalls and the allocation of risk for downward market fluctuations that sometimes lead evaluators astray in how we apply the basic rules. Having highlighted the misconceptions inherent in the application of the expectation approach, the next section will strip away concerns that

124. Frisch, *supra* note 20, at 183; see Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 5 (suggesting that "it is a delusion to assume that commercial conduct is primarily controlled by what is 'legal'" (citing James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1, 19 (1982))).

125. Frisch, *supra* note 20, at 183.

126. *Id.* at 183-84; see, e.g., *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 539 (Or. 2014) ("[A] seller expects to be able to recover the difference between the contract price and the market price because it is the 'logical and expected measure of damages,' and because the ability to recover market price damages 'is the natural assumption the seller makes in return for the risk inherent in the contract that the sale may not turn out to be economically beneficial to the seller.'" (quoting Gabriel, *supra* note 1, at 453)).

127. Benjamin Alarie & James Dinning, *Remedies and Alternative Contracts*, 44 AM. BUS. L.J. 639, 668 (2007) ("Taking seriously the possibility that the stakes are not sufficiently high to overcome inertia is not difficult to do.").

128. U.C.C. §§ 2-718, 2-719 (2011); see Weintraub, *supra* note 124, at 5-6 (arguing that legal rules affect the "form of future contracts").

129. See Frisch, *supra* note 20, at 183-84.

130. U.C.C. §2-706 cmt. 2 (2011) ("Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.").

availability of remedies under section 2-703 justifies compensation that exceeds a seller's actual loss.

IV. THE FREEDOM (OR NOT) TO CHOOSE A MARKET-BASED REMEDY UNDER SECTION 2-708(1)

In light of the accepted attributes of the expectation interest, section 2-708 appears on its face not to undercompensate or overcompensate an aggrieved seller. In fact, section 2-708(2) attempts to protect an expectation measure by providing an alternate measure of damages where subsection (1) is unsuccessful in placing the seller in the position the seller would have been had the contract been fully performed.¹³¹ Yet, section 2-708(1) might be criticized for its failure to explicitly provide in the commentary the extent to which an aggrieved seller who has made a resale can take advantage of a market-based remedy.¹³² As discussed above, however, the Code and the common law of contracts operate in such a manner to make clear that an aggrieved seller is only entitled to be placed in the position of full contractual performance.¹³³ There is no reversing this principle to provide that we put the breaching buyer in the position of full contractual performance, which would be inconsistent with the tenets of mitigation. While a seller retains the election of remedies in terms of recovery by section 2-703, any failure in the Code to explicitly address in section 2-708(1) an "expectation cap" on seller's damages is far from fatal in light of the many other guidelines in the Code and common law.¹³⁴ This section will examine issues concerning the application of section 2-708(1).

A. *Should a Seller Who Resells Advantageously be Permitted to Claim the 2-708(1) Remedy?*

*Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc.*¹³⁵ is a good example of one court's struggle with the question of whether a seller should be awarded market damages even though that amount would exceed its actual loss due to an advantageous resale.¹³⁶ In *Peace River*, Proseeds Marketing Incorporated ("Proseeds") was to purchase seeds from Peace River Seed Co-Operative, Limited ("Peace River") at a fixed price over a period of two years.¹³⁷ During the contract period, the price of grass seeds fell dramatically, and Proseeds refused to purchase the seeds.¹³⁸

131. *Id.* § 2-708.

132. Mather, *supra* note 13, at 289 (recommending amendment on this issue in the statutory text for both buyers and sellers, rather than in the commentary).

133. *See supra* Part II.

134. *See* Mather, *supra* note 13, at 289.

135. 322 P.3d 531 (Or. 2014).

136. *Id.* at 535-40.

137. *Id.* at 533.

138. *Id.*

Peace River held onto the grass seed for a period of time, but eventually sold most of the grass seed at a profit above the contract price.¹³⁹ At trial, Peace River claimed damages based upon the contract-market price differential at the time of tender under section 2-708(1), even though its “actual loss” on most of the grass was limited to the incidental damages, if any, related to the costs for storage of the grass.¹⁴⁰ While the trial court limited Peace River’s recovery as to the grass seed where an advantageous resale had been made, the Oregon Supreme Court permitted Peace River to recover the contract-market price differential as to all grass seed regardless of resale.¹⁴¹ In deciding this case, the court acknowledged the policy reflecting compensation measured by full contractual performance underlying section 1-305,¹⁴² yet, it relied primarily on the rejection of election remedies contained in section 2-703,¹⁴³ section 2-706 to not require a resale,¹⁴⁴ and the Code’s otherwise silence on the issue.¹⁴⁵

Peace River supplies an argument for why market damages should not be reduced to the seller’s actual loss: the election of remedies found in section 2-703 is somehow not subject to the general standard of compensation found in section 1-305 which would otherwise cap recovery.¹⁴⁶ Though there is undeniable frustration with the drafters’ failure to specifically resolve this issue, there is considerably more involved here.

Most sale of goods cases arising under multiple provisions of the Code reject any position that allows for the recovery of market-based damages that exceed actual loss.¹⁴⁷ For example, in *Coast Trading Company v. Cudahy Company*,¹⁴⁸ Coast Trading Company (“Coast”), a grain merchant, contracted to sell grain to Cudahy Company (“Cudahy”), a feedlot for cattle.¹⁴⁹ After Cudahy breached due to changed market conditions, Coast resold the grain but did not provide notice to Cudahy as to some of the resales, as required by section 2-706.¹⁵⁰ Some of Coast’s re-

139. *Id.* at 534. The evidence at trial indicated that the seller resold most of the grass seed at \$0.75, though some was sold at \$0.60. *Id.* The market price at the time of tender was \$0.72. *Id.*

140. *Id.*

141. *Id.* at 541.

142. *Id.* at 539.

143. *Id.* at 537–38.

144. *Id.* at 538.

145. *Id.*

146. *Id.* at 540. A comparable result was reached in the case of *Wendling*, but the court did not discuss the resale in its award of market-based damages to the seller. *Wendling v. Puls*, 610 P.2d 580, 584 (Kan. 1980).

147. Eisenberg, *supra* note 5, at 401 (chronicling cases that reject recovery that exceeds actual loss); see, e.g., *H-W-H Cattle Co. v. Schroeder*, 767 F.2d 437, 439 (8th Cir. 1985) (awarding of market-based damages to aggrieved buyer would result in a windfall violating section 1-106); *Nobs Chem., U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212 (5th Cir. 1980).

No one insists, and we do not think they could, that the difference between the fallen market price and the contract price is necessary to compensate the plaintiffs for the breach. Had the transaction been completed, [the Sellers’] “benefit of the bargain” would not have been affected by the fall in market price, and they would not have experienced the windfall they otherwise would receive if the market price-contract price rule contained in [U.C.C.] § 2.708(a) is followed. *Id.* at 215.

148. 592 F.2d 1074 (9th Cir. 1979).

149. *Id.* at 1076.

150. *Id.* at 1077.

sales were advantageous, such that a recovery under section 2-708(1) would have been greater than the resale damages.¹⁵¹ The court declined to award the section 2-708(1) measure of damages, finding it would result in a “windfall” to the seller, which the court would not “sanction.”¹⁵²

A similar case is *Tesoro Petroleum Corporation v. Holborn Oil Company*,¹⁵³ in which a seller of gasoline resold the gasoline after the buyer’s breach.¹⁵⁴ The seller claimed damages measured at the substantially lower market price at tender.¹⁵⁵ Denying the larger recovery, the court explained:

If plaintiff’s damages are measured in accordance with [UCC] § 2-706, it would be receiving the benefit reasonably to be expected when it entered into the alleged contract with defendant. Granting it the approximately \$3,000,000 additional recovery that it seeks would result in a windfall which cannot be said to have been in the contemplation of the parties at the time of their negotiations, and would be inconsistent with the policy of the Code as expressed in [UCC] § 1-106.¹⁵⁶

The failure of the Code’s drafters to specifically address the issue of access to a contract-market price differential, where the seller has eliminated its actual loss due to a resale, is a wholly inadequate basis for resolving this issue. When, for example, the seller’s advantageous resale is factored in, the seller may have no loss to even claim, aside from incidental damages. It makes no sense to conclude that a seller’s preference to recover a loss, which it has not sustained under section 2-708(1), should operate to outweigh the compensation policy set out for the entire Code in section 1-305. The conclusion in *Peace River*, though lengthy, fails to adequately consider the expressed policy of the Code in favor of silence.¹⁵⁷ Thus, the court’s ultimate determination fails to reach an outcome that effectively considers the real position of the aggrieved seller, which was known to the court, and the general policy of the Code.¹⁵⁸

Even if illumination of the misconceptions regarding windfalls and the motivations of the contracting parties are not enough to reign in the seller’s freedom of choice in this area, the expectation principle embodied in section 1-305 and elsewhere in the Code are not silent as to a governing policy. Embedded in this policy are concepts of mitigation and compensation that do not exceed the loss of the aggrieved party.¹⁵⁹ While

151. *Id.* at 1081.

152. *Id.* at 1083.

153. 547 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1989).

154. *Id.* at 1013.

155. *Id.*

156. *Id.* at 1016.

157. See *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 539 (Or. 2014).

158. Eisenberg, *supra* note 5, at 399 (“[T]he major normative arguments for awarding market-price damages, even when they exceed the promisee’s actual loss, are seriously flawed.”).

159. U.C.C. §1-305 cmt. 1 (2011) (limiting compensation to actual losses); see Eisenberg, *supra* note 5, at 395 (explaining how section 1-305 works with other Code provisions and arguing that allow-

a contract-market price differential is administratively efficient by substituting a bargain for the one lost due to the breach,¹⁶⁰ the measure of loss upon a seller's resale reflects an actual substitute transaction. A buyer is discouraged from breaching a contract in the face of a falling market only to the extent of the actual loss sustained, particularly where the market may drop further prior to the expected date of tender.¹⁶¹ A seller should not be free to opt for an unrealized contract-market price differential loss as an alternative to the actual loss sustained. While the seller recovers its actual loss, the advantages to the buyer in any given situation will depend upon the circumstances of the contract, the market, and any resale by the seller. The aim here is simply to point out that under-compensation is not a concern here where the seller has made an advantageous resale and to identify some of the indications of this conclusion for the question of whether the seller should be free to have their damages measured under section 2-708(1) after they have made an advantageous resale.

B. The Use of Post-Breach Events to Shape a Recovery Under Section 2-708(1)

While the cases shed light on the application of section 2-708(1) in the situation of above-market resales, consideration of how, and to what extent, post-breach events impact the seller's right to choose a market-contract price measure of damages is helpful. Consider, for example, the *Peace River*¹⁶² case, but with a twist: assume that Peace River had not resold the grass seed at the higher market price, and Proseeds breaches prior to the date of tender in a declining market. Prior to the time of tender, Peace River makes a commercially reasonable resale of the grass seed at a price lower than the contract price, but higher than the price ultimately to be had at the time of tender. If Peace River had not made a resale, the damages owed by Proseeds would have been increased by the time of tender in light of the falling market.

This hypothetical further leads us to consider whether, and to what extent, post-breach circumstances that operate to limit an actual loss should be ignored in favor of the cumulative nature of sellers' remedies under the Code.¹⁶³ Applying the *Peace River* reasoning, it would seem that this hypothetical seller could nevertheless collect a remedy under section 2-708(1) if it turns out to be greater than that achieved upon the actual resale.¹⁶⁴ The preceding discussion, however, suggests that this analysis is flawed. Ordinarily, judges take into account the actual loss of a

ing a recovery greater than the actual loss is "contrary to the general principle of [Section] 1-305(a)" (alteration in original) (quoting WHITE & SUMMERS, *supra* note 5)).

160. Frisch, *supra* note 20, at 199.

161. Eisenberg, *supra* note 5, at 399 (noting that arguments in favor of higher damages run the risk of supporting punitive damages).

162. *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531 (Or. 2014).

163. U.C.C. § 2-703 cmt. 1 (2011).

164. *See Peace River*, 322 P.3d at 531.

party in awarding damages based upon “the facts of the individual case.”¹⁶⁵ It is not enough to say that the cumulative nature of remedies, coupled with the Code’s silence on resales that stem the tide of loss, trumps section 1-305’s overriding policy of loss compensation and even section 2-708(2)’s provision of an alternative remedy in cases where a seller has not been put in as good of a position as performance.¹⁶⁶ In order to override a general provision, statutory canons typically look for specific statutory provisions, rather than an interpretation subject to manipulation.¹⁶⁷

Of course, it is possible to ignore post-breach events, but is it sound to do so? Our view of post-breach events is also potentially affected by the timing of the resale, either before or after the filing of a lawsuit by the aggrieved seller.

This Part suggests that using the general policy of section 1-305 to limit the damages recoverable under section 2-708(1) to the actual loss has the advantage of consistency with classic expectation theory, including the doctrine of mitigation. It has suggested that under-compensation of a seller is unlikely and that awarding a windfall to the seller is inconsistent with the remedial policy of the Code. There is little indication that awarding a higher measure of damages under section 2-708(1) would somehow deter breaches when the award would be dependent upon unpredictable fluctuations in the marketplace.¹⁶⁸ This is particularly true in light of the importance of penalties under the Code and common law.¹⁶⁹ Once we recognize that the court in *Peace River* erred in its conclusion that the seller’s actual loss should be ignored in favor of a hypothetical market-based substitute transaction,¹⁷⁰ it becomes apparent that permitting the seller to choose a recovery under section 2-708(1), without regard to post-breach events, would only be justified if those events occurred outside of the time of the court’s measurement of loss.

165. U.C.C. § 2-703 cmt. 1 (2011).

166. KARL N. LLEWELLYN, *On the Current Recapture of the Grant Tradition*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 215, 217 (1962) (directing that statutes be applied “in accordance with [their] purpose and reason”); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521 (1960) (arguing that statutory canons should be considered along with the purposes of the Code at issue).

167. Sarah H. Jenkins, *Construing Laws Governing International and U.S. Domestic Contracts for the Sale of Goods: A Comparative Evaluation of the CISG and UCC Rules of Interpretation*, 26 TEMP. INT’L & COMP. L.J. 181, 198 (2012) (“The specific purposes and policies of a particular section govern the general purposes and policies of the UCC stated in former Section 1-102 and revised Section 1-103. . . . If, however, specific purposes and policies are absent or cannot be discerned, then the general purposes and policies of the UCC should drive the construction and application of the UCC.”).

168. See Roy Ryden Anderson, *Measuring Producers’ Forward Damages for Breach of Long-Term Gas Supply Contracts*, 16 E. MIN. L. INST. 483, 492 (1997) (“The fundamental essence of contract is the voluntary allocation of responsibilities and risks between the parties. In most commercial contracts the primary risk allocator is the price provision when the price is fixed or is otherwise left untied to fluctuations in the market value of the subject matter. The seller bears the risk that the value will later rise, the buyer that it will later fall.”).

169. See U.C.C. § 1-305(a) (2001) (emphasizing that no penal damages can be awarded); *id.* § 2-718(1) (stating that liquidated damages clause that are unreasonably large are “void as a penalty”).

170. *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 546 (Or. 2014).

The Code does not mandate a seller to make a resale, but it clearly anticipates the preference of this remedy in most cases.¹⁷¹ Where the timing of events prior to suit provides the court with an actual substitute transaction, the events arguably provide some limitations on the extent of the remedy awarded.¹⁷² Suppose that in a slight change to the *Peace River* hypothetical, the buyer breaches in the face of a falling market, but the market recovers tremendously shortly after the time for tender under the contract, and the seller is able to capitalize nicely on a resale. The seller in this case should be pleased that the buyer chose not to perform and that losses were avoided. Yet, the seller might still desire to file suit against the buyer even if there are no losses at that time. Perhaps the allure of a windfall might be great in some cases or a seller could be displeased with unrecoverable losses.

In these situations, the restraint on market-based damages seems appropriate. Otherwise, we run the risk of providing a seller a recovery for a loss that it did not suffer, thereby penalizing the buyer for its breach. First, considering post-breach events provides courts with an actual substituted transaction rather than a hypothetical one based upon a market price.¹⁷³ Second, a seller is entitled to retain any profit made on resale under section 2-706 and should not have an additional advantage of being able to capitalize on a shifting market in its favor.¹⁷⁴ The seller should be entitled to recovery of a market-based loss so long as it does not exceed a known, actual loss, considered in light of a known, substituted transaction. In the hypothetical presented, it would appear wrong and inconsistent with the expectation theory to suggest that the court should ignore the known resale that mitigates damages. Considering the effect of the post-breach event, in some cases, as the limit on a market-based remedy has the advantage of avoiding overcompensation and windfalls, as well as providing a court with an actual substituted transaction rather than a general market price.

C. Should a Seller Who Resells Advantageously be Limited in Its Section 2-708(1) Claim?

There has been ongoing debate over whether an aggrieved seller that has made a resale, either consistent with section 2-706 or not, should be permitted to recover the market-based damage where the market price at the time of tender is lower than the resale price. Consider again the actual case in *Peace River* where the contract for the grass seed was \$0.72 per pound.¹⁷⁵ At the time of tender, the market value was \$0.64.¹⁷⁶

171. U.C.C. § 2-716 cmt. 2 (2011); see Peters, *supra* note 1, at 254 (“The Code most directly fosters recourse to the market in case of breach by those sections which protect actual substitute transactions designed to replace the contract in default.”).

172. See Peters, *supra* note 1, at 254.

173. See *id.*

174. See *id.* at 256.

175. *Peace River*, 322 P.3d at 534.

176. *Id.*

The aggrieved seller later resells when the market price is \$0.75, but chooses to sue to recover the difference between the contract price of \$0.72 and the market value of \$0.64 at the time of tender.¹⁷⁷

One view, put forward by White and Summers among others, is that the seller who resells at \$0.75 might still desire to elect a market-based remedy, perhaps because the seller did not meet all the strictures of 2-706, in terms of commercial reasonableness.¹⁷⁸ The market-based remedy in this case, though, is limited to the actual loss; thus, the seller cannot collect a loss on resales made above the contract price of \$0.72.¹⁷⁹ In so concluding, they try to achieve a remedial structure that provides no more than the actual performance of the contract would have provided, with goods sold for no less than the contract price of \$0.72.¹⁸⁰ Key to this position is section 1-305, which provides for the liberal administration of remedies, but it also states the goal of putting the aggrieved party in the position they would have been in had the other party fully performed, but no more; this suggests that the seller has multiple remedies available but cannot recover more than compensatory damages.¹⁸¹ White and Summers favor the actual substitute transaction over the hypothetical market-based one, so long as it is the buyer's burden to show that the seller resold and that recovery under section 2-708(1) would be greater than recovery under section 2-706,¹⁸² precisely the burden that the buyer satisfied in the case of *Peace River*.¹⁸³

Professor Eisenberg takes a similar position, noting “the major normative arguments for awarding market-price damages, even when they exceed the promisee’s actual loss, are seriously flawed.”¹⁸⁴ While Professor Eisenberg also recognizes that the lack of clarity in the Code could lead to arguments on both sides, he also concludes that the permissive language of section 2-708, regarding availability of resale or market-based damages, is qualified by the directive of section 1-106.¹⁸⁵ Addressing arguments in favor of permitting a higher measure of damages, he observed: “It is true that higher damages will lead to fewer defaults, but this argument has no stopping-point. For example, the argument would support punitive damages for breach of contract as well as cost-of-

177. *Id.*

178. WHITE & SUMMERS, *supra* note 5, § 8-7, 359–60, 362–66; *see* Eisenberg, *supra* note 5, at 394–95.

179. WHITE & SUMMERS, *supra* note 5, § 8-7, 359–60, 362–66; *see* Eisenberg, *supra* note 5, at 399; Sebert, *supra* note 13, at 381 (arguing that “a seller who resells [is] bound by the actual . . . resale price”).

180. *See* WHITE & SUMMERS, *supra* note 5, § 8-7, 359–60, 362–66.

181. *See id.*

182. *Id.* As noted by White and Summers, the failed Article 2 Revision Study Group accepted their position and recommended clarification as to the limitation of damages. *See* Roy Ryden Anderson et al., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1205, 1215 (1991). Of course, the revisions to Article 2 failed and nothing came of this effort. *See supra* note 19.

183. *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 534 (Or. 2014).

184. Eisenberg, *supra* note 5, at 399.

185. *Id.* at 399–400.

completion damages even where the promisee has no intention to complete.¹⁸⁶ Moreover, a number of cases arising under various provisions of the Code are consistent with such a limitation on the collection of market-based damages.¹⁸⁷ Ultimately, he advises against any measure of damages that would result in a windfall, making the non-breaching party better off than the actual performance would have done.¹⁸⁸

Professor Ellen Peters provides an illustration of arguments in favor of allowing a windfall, advocating for a “non-restrictive reading of the various remedies sections to preserve full options to use or to ignore substitute transactions as a measure of damages.”¹⁸⁹ The rationale for this position is the avoidance of “premature election of remedies,” ease of administration, and guarantee to the aggrieved party that they would not lose all remedies in the event of a favorable substitute contract.¹⁹⁰ She argues that this result keeps “goods moving in commerce as rapidly as possible.”¹⁹¹

This argument, however, is flawed. First, the full option of remedies is still preserved without ignoring substitute transactions, but the market-based remedy under section 2-708(1) would operate with a limit. The seller would indeed lose access to a higher measure of damages under this section, but that is fair where market-price damages would exceed the loss, and the resale transaction would provide a better relationship to the actual injury.¹⁹² Second, any difficulty in administration is cured by simply placing the burden on the breaching buyer to prove that there was a resale and that recovery would be greater than recovery under section 2-706,¹⁹³ precisely the analysis done by the trial court in *Peace River*.¹⁹⁴ Moreover, analysis of resales is already commonly the purview of a trial court in terms of application of section 2-706, thus difficulty of administration is not at issue.¹⁹⁵

Professor Peters also suggests that since a breaching buyer cannot force the seller to resell, limiting the amount of market-based damages results in a “profit” to the buyer in the case of a resale.¹⁹⁶ While a buyer cannot force a resale, there is no “profit” to the buyer if the seller does

186. *Id.* at 399.

187. *Id.* at 400–403.

188. *Id.* at 408.

189. Peters, *supra* note 1, at 260–61; see Gabriel, *supra* note 1, at 438 (making substantially the same arguments as Peters).

190. Peters, *supra* note 1, at 261.

191. *Id.*

192. U.C.C. § 2-716 cmt. 2 (2011); see Peters, *supra* note 1, at 259 (“While substitute-contract calculations may bear some relationship to actual injury, it is obvious that the market-contract formulae, especially in the seller’s version, can do so only by the sheerest of accidents.”). Even Peters recognizes that permitting the seller to have the option to choose a market-based remedy when it turns out to be more favorable in terms of increasing damages “is to allow speculation at the expense of the party in breach.” *Id.* at 259.

193. WHITE & SUMMERS, *supra* note 5, § 8-7, 359–60, 362–66.

194. *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531, 532 (Or. 2014).

195. See generally *id.*

196. Peters, *supra* note 1, at 259.

resell favorably. The doctrine of mitigation operates as a reduction of damages collectible by the aggrieved party, not as a profit or windfall to the breaching party.¹⁹⁷ Moreover, it is logical to think that an aggrieved party would prefer to make an advantageous resale at the earliest point possible, rather than litigating for market-price damages later.¹⁹⁸ An argument in favor of a market-based remedy which is based upon leaving the breaching party with the price obtainable at the time of tender¹⁹⁹ fails to take into account the compensatory objective of remedies and the preference for avoidability.

Finally, Professor Peters also argues that the market-contract price differential recovery is akin to a “statutory liquidated damages clause” and holds the party in breach to a “baseline liability.”²⁰⁰ “[M]arket-price damages are not liquidated damages,” and they should not be seen as such.²⁰¹ Even making the analogy, Peters’ approach fails to take into account the specific limitations on liquidated damages clauses in the Code itself that invalidate such provisions that are penal in nature. It would be difficult to conceptualize that the drafters intended to invalidate an express liquidated damages clause that results in a penalty under section 2-718,²⁰² yet would construct a statutory liquidated damages clause with an intention that it be used to effectuate a penalty invalidated elsewhere. The result that Peters wants to obtain—to allow a seller to always collect the windfall of a market-based remedy after an advantageous resale—would not be permitted, absent special circumstances, if viewed as a liquidated damages provision.²⁰³ Moreover, where applicable, liquidated damages clauses are exclusive remedies, rather than optional ones.²⁰⁴

Cases like *Peace River*²⁰⁵ are wrong. Cases like *Coast Trading*²⁰⁶ and *Tesoro Petroleum Corporation*²⁰⁷ are correct. Considerations of efficiency and fairness underlie the expectation principles premise that a promisee is put in the position they would have been in had the other party performed and no more. In the face of this well-known principle, it is not convincing for a party to claim they *expected* to obtain a contract-market price differential in excess of the actual loss.²⁰⁸ In contrast, it is difficult to summon up the same arguments on a broad scale that would support a default contractual rule giving a seller a windfall, making him better off if

197. See discussion *supra* Part III.B.

198. Eisenberg, *supra* note 5, at 395.

199. See Gabriel, *supra* note 1, at 439.

200. *Id.*; Peters, *supra* note 1, at 259.

201. Eisenberg, *supra* note 5, at 396.

202. U.C.C. § 2-718 (2011) (“A term fixing unreasonably large liquidated damages is void as a penalty.”).

203. Eisenberg, *supra* note 5, at 396.

204. *Id.*

205. *Peace River Seed Coop., Ltd. v. Proseeds Mktg., Inc.*, 322 P.3d 531 (Or. 2014).

206. *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1083 (9th Cir. 1979).

207. *Tesoro Petrol. Corp. v. Holborn Oil Co.*, 547 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1989).

208. Gabriel, *supra* note 1, at 449. Notably, Professor Gabriel fails to take up the doctrine of mitigation, Professor Macaulay’s work on relational contracts, or even the reasons why section 1-305 does not limit compensation. See *id.* at 437–39; see also discussion *supra* Part III.B.2.

the buyer breached than he would have been had the buyer actually performed the deal. It is with this in mind that I turn to the next Part to establish why recovery of a market-based damage should be limited to where the seller has made an advantageous resale.

V. A VIEW OF SECTION 2-708(1) MARKET-BASED RECOVERIES

Karl Llewellyn strived to craft the Code in a way that facilitated the “purposive interpretation” of its provisions.²⁰⁹ That is, courts would be able to, and should, read the Code in light of its purpose.²¹⁰ In fact, in section 1-103, the Code specifically directs that courts should “liberally construe[] and appl[y] [the Code] to promote its underlying purposes and policies” and directs that “the principles of law and equity . . . supplement its provisions.”²¹¹ Llewellyn believed that ambiguity in statutes was inevitable, but that once judges knew the purpose of a statute, they could resolve open questions in the Code consistently:

Borderline, doubtful, or unanticipated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning, and skill is tremendously furthered if the reason which guides application of the same language is the *same* reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense *in terms of the reason*; it provides a real stimulus toward, though not an assurance of, corrective growth rather than straitjacketing of the Code by way of caselaw.²¹²

Thus, section 2-708(1) is one part of a remedial scheme in the Code where remedies are cumulative, yet bounded by the “facts of the individual case”²¹³ and the purposes and policy of the expectation principle.²¹⁴ The expectation measure itself presumes that bargaining parties would select to compensate that interest if given the opportunity to address the issue.²¹⁵ Accordingly, any interpretation of section 2-708(1) that would

209. Maggs, *supra* note 20, at 564–65.

210. *Id.* at 565.

211. U.C.C. § 1-103 (2001).

212. Maggs, *supra* note 20, at 567 (quoting Karl N. Llewellyn, Collection of Karl Llewellyn Papers in the Law School of the University of Chicago, J, VI, I, e at 5 (1944) (unpublished manuscript) (reprinted in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 322 (William Twining et al. eds., 2d ed. 2012) (emphasis in original)).

213. U.C.C. § 2-703 cmt. 1 (2011).

214. *Id.* § 1-305. One must keep in mind, though, that contractual remedies do not ordinarily fully compensate for attorneys’ fees and other costs, for instance, unforeseeable damages. *See, e.g.*, Jean Braucher, *The Sacred and Profane Contracts Machine: The Complex Morality of Contract Law in Action*, 45 SUFFOLK U. L. REV. 667, 674 (2012) [hereinafter *The Sacred and Profane*]; Frisch, *supra* note 20, at 195.

215. Eisenberg, *supra* note 5, at 403; Kades, *supra* note 91, at 1517 (“Courts choose default rules that they believe the parties would have chosen had they anticipated an unanticipated event.”); *see* Weintraub, *supra* note 124, at 3 (“Usage should inform the rule maker; rules should reinforce desirable usage and change as usage and mores change.”); *see also* Victor P. Goldberg, *The Future of Many Con-*

measure damages in a way in which it is unlikely that the parties would have normally agreed to is suspect when we recognize that parties often value the business relationship.²¹⁶ For example, bargaining parties probably *would not normally agree*, absent special circumstances, upon a liquidated damages clause in a contract for the sale of goods along the following lines:

The seller may resell the goods in the event of the buyer's breach. Upon breach, the buyer agrees to pay the seller the difference between the contract price and the market price at the time of tender, if lower, together with incidental damages, if any (the "Compensation"). Buyer shall pay seller Compensation even if the seller resells the goods at a price higher than the contract price at some time other than at tender, and, thereby, has no actual loss arising from the transaction.²¹⁷

A contract with this type of liquidated damages clause will be referred to as a "favorable resale" provision.

The Grass Seed. Suppose a seller and buyer make a contract for the total grass seed over two years for a set number of acres—approximately 50,000 pounds—at \$0.72 per pound.²¹⁸ The contract contains the favorable resale provision. The price of grass drops significantly, and the buyer repudiates the contract. At the time of tender, the market price is \$0.64 per pound. The seller stores the seed and later resells the seed at \$0.75 per pound when the market recovers.

Applying the favorable resale provision, the court would award the seller the difference between the contract price of \$36,000 and the market price at the time of tender of \$32,000 for a total award of \$4,000, despite the fact that the seller suffered no actual costs, aside from the storage. Of course, the seller would also retain the profit on the resale of \$1,500.

In analyzing whether the favorable resale provision would be void as a penalty, an important question is why a buyer would enter into a contract with a favorable resale provision instead of one measured by the

tracts, 52 DUQ. L. REV. 323, 324 (2014) ("Doctrine is, or should be, only about default rules, and the manner in which parties design their relationships should provide insights into how those default rules should be structured.").

216. See generally Braucher, *supra* note 120, at 194 (describing "cowboy contracts" where the party does not rely on "city slicker tricks," but rather honesty and community support); Macaulay, *supra* note 121, at 468 ("The value of these relationships means that all involved must work to satisfy each other."); Weintraub, *supra* note 124, at 5 ("[T]he law should not be contrary to practices that the community perceives as normal and desirable.").

217. While take-or-pay arrangements have been, at times, common in the oil and gas industry, these types of arrangements have not become the norm in most commercial arrangements. See, e.g., Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 731 (2000) (finding that contracting parties are too optimistic on the success of the venture to bargain for an "effective liquidated damages provision"); Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 370 (1990) (asserting that "promisees do not want contractual damage measures that would grant more than their lost expectation").

218. See discussion *supra* Part I and accompanying text.

“anticipated or actual harm of the breach” to the seller.²¹⁹ Why would a buyer agree to a favorable resale provision, rather than one that would allow a resale but require the buyer to pay damages measured at no more than the actual loss, proven either by an actual substitute resale transaction or a hypothetical market-based transaction if no actual substitute was made? The reason would seldom be to confer an additional windfall beyond actual loss on the seller; buyers normally do not make contracts with this in mind. Rather, the typical purpose of the buyer making such a contract is to insure a supply of the grass seed.

With this in mind, it is unlikely that a buyer would ordinarily enter into a contract with a favorable resale provision under which it would be required to pay the seller market-based damages even if the seller resold favorably prior to trial or settlement. Damages measured this way would be disproportionate as to the benefit to the buyer in making the contract (versus buying the spot market), and the cost to the seller resulting from the breach (as in the grass seed hypothetical, incidental damages only).²²⁰ The seller, for its part, would be unlikely to always insist on a favorable resale provision that might ultimately reduce his profitability, since: (1) few buyers will sign these type of contracts, absent special circumstances; (2) it would be unnecessary to do so in light of the anticipated harm the seller will suffer; and (3) the seller could utilize a different type of liquidated damages clause that would address its needs and be more acceptable to the buyer than the favorable resale provision.²²¹

The favorable resale provision is also not one likely to be reflective of an interpretation of expectation principles, as it is unlikely that the parties would have normally chosen this type of measure of damages if they had been consulted and had not otherwise so provided.²²² Recovery of the contract market price differential, even in the face of the favorable resale, is not normally required in order to provide incentives to the buyer for performance.²²³ It is unlikely that a buyer would agree to a favora-

219. U.C.C. § 2-718 (2011); see Hillman, *supra* note 217, at 733 (“The parties’ focus on achieving a ‘fair’ exchange and their aversion to windfalls and penalties also may point to enforcement of agreed remedies.”).

220. See discussion *supra* Part I and accompanying text.

221. See generally Braucher, *supra* note 120, at 678 (explaining that contracting parties value relationships and reputation and do not often file lawsuits even when they can); Macaulay, *supra* note 121, at 468 (“[P]eople engaged in business often find that they do not need contract planning and contract law because of relational sanctions.”); Weintraub, *supra* note 124, at 7 (“The reasons that most promises, even commercial bargains, are kept, probably have more to do with non-legal than with legal sanctions.”); see also Oren Bar-Gill & Omri Ben-Shahar, *Exit From Contract*, 6 J. LEGAL ANALYSIS 151, 152 (2014) (describing how, in the consumer realm, “sellers work hard to generate customer loyalty, transforming traditionally one-off transactions into long-term relationships” by providing more incentives).

222. See generally Macaulay, *supra* note 121, at 469 (“American contract remedies are limited and reflect a fear of awarding too much.”); see also Braucher, *supra* note 120, at 669 (“Contract law in action seems to involve recognition of a need for flexibility about adjustment, release, and forgiveness, operating in tension with promise-keeping, as an important part of promissory morality.”).

223. Macaulay, *supra* note 121, at 467 (explaining that it is “just wrong or greatly overstated as to be seriously misleading” to believe that without contract law performance of contracts would be “high-

ble resale provision, unless it sets a very high value on the grass seed. Indeed, in such cases, if an actual resale puts the seller at the profit level—or perhaps above it—that it would have obtained if the buyer had performed, then it may be said that the seller has realized the expectation in spite of the buyer’s breach. This later result would be completely consistent with the doctrine of mitigation and provide no wrongful windfall to either party whereas the favorable resale provision would not be consistent with mitigation principles and would seem to sanction the award of a windfall to the seller if used in the contract.²²⁴

In light of the Code’s—and Llewellyn’s—directive toward interpretation promoting the underlying purposes and policies, an interpretation of section 2-708(1) should not prevail that would be inconsistent with a result that the Code prohibits generally and would specifically prohibit under another section of Article 2. While parties have broad power to shape their own agreements under section 1-302, the abhorrence in contract law of penalties runs deep and long.²²⁵ Notably, the favorable resale provision, much akin to the interpretation and result advocated by some commentators,²²⁶ would likely run afoul as being a penalty under section 2-718 because it would not be drafted to compensate “an amount which is reasonable, in light of the anticipated or actual harm caused by the breach.”²²⁷ The favorable resale provision would not be a reasonable estimate of damages where (1) it is known that there may be no loss at all if a favorable resale is made and (2) it ensures the highest measure of damages the buyer could be asked to pay. It would surely deter breaches, but it would open the doorway to punitive damages for breach of contract,

ly uncertain”); Weintraub, *supra* note 124, at 6 (“If we over-enforce, companies will be driven toward the spectrum’s extremes, the spot market and vertical integration.”).

224. See discussion *supra* Part III.B.

225. See Anderson, *supra* note 5, at 1076 (describing how a draft provision from the failed Article 2 “drew heated criticism, primarily from the ABA Task Force, largely on the bases that the provision conflicted with the compensation mandate . . . and that there is no historical antecedent in the law of contract for a ‘substantial’ overcompensation limitation”); William H. Loyd, *Penalties and Forfeitures*, 29 HARV. L. REV. 117, 125–26 (1915) (giving a historical overview of the law against penalties and forfeiture that still permits recovery).

226. See discussion *supra* Part III.C.

227. U.C.C. § 2-718 (2011); *Id.* §1-305. Section 2-718(1) reads: “Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.” *Id.* § 2-718(1). See RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) (“A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”). For a good discussion on when a liquidated clause is a penalty, see *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (stipulating that a penalty is one designed to assure a party more than its damages); see also Roy Ryden Anderson, *Liquidated Damages Under the Uniform Commercial Code*, 41 SW. L.J. 1083, 1110 (1988) (cataloguing the workings of section 2-718, and advising that “[p]arties should never draft a liquidated damage clause so as to allow the aggrieved party ‘to eat his cake and have it too’”); Gregory Scott Crespi, *Measuring “Actual Harm” For the Purpose of Determining the Enforceability of Liquidated Damages Clauses*, 41 HOUS. L. REV. 1579, 1590–91 (2005) (arguing that actual harm for purposes of determining whether a liquidated damages clause is a penalty should take into account the non-recoverability of damages due to avoidability so as to not overcompensate).

even where a seller has no actual loss.²²⁸ It is hard to advocate for a statutory interpretation of a default remedial provision that would not likely be permitted on a widespread basis if done through liquidated damages clauses, particularly where section 1-305 directs that “penal damages . . . [can only] be had . . . [if] specifically provided in [the Uniform Commercial Code] or by other rule of law.”²²⁹

Moreover, a favorable resale provision should not be confused with valid “take-or-pay” or “alternative performance” contracts. The Washington Supreme Court explained the difference of the alternative contract:

An alternative contract allows a promisor to render one of two or more alternative performances either one of which is mutually agreed upon as the bargained-for . . . exchange for the [other party’s] return performance. By comparison, a liquidated damages provision is a sum of money agreed upon in advance that is a reasonable forecast of just compensation for the harm caused by breach. If the liquidated damages provision is either not a reasonable forecast or if the harm is easy to ascertain, then the provision is an unlawful penalty. Whether a contract provides for alternative performance or for liquidated damages is a question of factual interpretation that does not rely upon the form of words used by the parties. The distinguishing factor between the provisions is that the parties intended the options to give the promisor a real choice between reasonably equivalent choices. This means that at the time fixed for performance either alternative might prove more desirable and that the parties did not intend the device to assure the performance of the [other] option.²³⁰

The true alternative contract is not an unenforceable penalty. It offers a choice that a party might actually prefer contractual performance, whereas an unenforceable penalty is usually found where it is designed to give the injured party more than its actual damage incurred.²³¹ The favorable resale provision is designed to provide the non-breaching seller with more than its loss, not a real choice to the other party.²³²

In short, a favorable resale provision would not be required by either efficiency or fairness, particularly where it would indicate that a penalty may arise for one party and a windfall for the other.²³³ Rather,

228. Eisenberg, *supra* note 5, at 399.

229. U.C.C. § 1-305(a) (2001).

230. Minnick v. Clearwire U.S. LLC, 275 P.3d 1127, 1130–31 (2012) (internal quotations and citations omitted) (holding that an early termination fee of \$180, which reduced over the life of the contract, for a telecommunications agreement was not a liquidated damages provision where it gave the consumer the ability to not perform because a real option existed due to the possibility that it might be more desirable); see *Lake River Corp.*, 769 F.2d at 1290 (finding that a take-or-pay contract was unenforceable as a penalty where it was “designed to assure Lake River more than its actual damages”).

231. See *Lake River Corp.*, 769 F.2d at 1290.

232. Eisenberg, *supra* note 5, at 399.

233. Braucher, *supra* note 120, at 193 (“An unhappy party could not only refuse to deal again but also spread negative word of mouth that might poison business as well as personal relationships, so

damages in such cases should be based upon the amount necessary to reimburse the seller for incidental costs, where the seller has been fully mitigated by resale, even if not in conformance with section 2-706. This would be true whether or not a seller is required to mitigate, if the seller in fact does mitigate.²³⁴ A measure of damages that is tied to a seller's actual loss compensable under expectation principles would be consistent with the notion of employing a rule that the parties would have chosen upon consultation.

Consider now the following hypothetical to examine whether this position holds true under a classic expectation measure of damages at common law:

*The Actress.*²³⁵ Suppose an actress and a movie studio enter into a contract for the actress to star in a film for the price of \$750,000. The bargaining parties probably *would not agree*, absent special circumstances, upon a liquidated damages clause in a contract for the services along the following lines:

Actress should obtain another comparable job upon total breach by studio. Upon breach, studio agrees to pay actress \$750,000 (the contract price), together with any incidental damages (the "Compensation"). Studio shall pay actress the Compensation even if actress takes another role paying a similar or the same rate of pay.

Studio repudiates the contract. Actress stars in a movie for a competing studio and earns \$800,000.

Much of the same analysis can be made here as in the favorable resale provision hypothetical. The Actress has fully covered her damages, and if she is awarded the liquidated damages here, she will recover \$750,000. It is unlikely that a studio, absent special circumstances, would have agreed to a provision measuring damages for cancellation in this manner or that this measure of damages is necessary to provide the stu-

that adjustment of disputes according to fairness norms was highly likely" with relational sanctions, rather than formal ones.)

234. See discussion *supra* Part III.B.1.

235. This hypothetical is based on the well-known contracts case of *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970). It is possible to argue that some cancellation clauses can be drafted to be akin to an option, but none is intended here. See Victor P. Goldberg, *Bloomer Girl Revisited or How to Frame an Unmade Picture*, 1998 WIS. L. REV. 1051 (1998). Moreover, this hypothetical is not intended to take any position, in favor or not, on golden parachute agreements and whether they are unenforceable as penalties. There are arguments on both sides, but the analysis focuses on whether the clause is a reasonable estimate of damages in the totality of the circumstances. See generally Susan Martin, *Platinum Parachutes: Who's Protecting the Shareholder?*, 14 HOFSTRA L. REV. 653 (1986) (arguing that many courts have found that golden parachute agreements are unenforceable as penalties where there was not arm's length bargaining and the agreement was not reasonable under the totality of the circumstances). See, e.g., *In re Bush Indust., Inc.*, No. 04-12295, 2005 WL 1083000 (W.D.N.Y. Mar. 8, 2005) (rejecting \$264,000 "windfall payment" to employee under change of control agreement as a penalty); *Worth v. Huntington Bancshares, Inc.*, 540 N.E.2d 249, 255 (Oh. 2010) (holding that while golden parachute agreements may be void as penalties, the contract at issue "was not excessive or tainted by self-dealing or conflict of interest"); *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 220 A.2d 263, 268-69 (Conn. 1966) (finding a golden parachute an unenforceable penalty when an employer terminated a contract prior to the expiration of its term, and the employee, at its option, could treat the termination as a breach and collect \$100,000 in liquidated damages).

dio with incentives for efficient behavior.²³⁶ Such a result, as under the Code, would, absent additional facts, be seen as a penalty, and if used as a liquidated damages clause, would be void as such.²³⁷ Under the strictures of the doctrine of mitigation, we expect the actress to mitigate, if possible, and disallow any damages to her that are avoidable. This is consistent with expectation theory, providing no penalty to the breaching studio, and no windfall to the actress.

A rule that states where a buyer breaches a contract for the sale of goods, the seller's damages should be measured in a way that takes into account a favorable resale known to the parties prior to settlement, or the court prior to adjudication, also finds support in the attempted Code provision process. To address concerns of overcompensation, the reporter's note explained:

[T]he court, if requested by the defendant, may deny a particular choice when that remedy under the circumstances puts the aggrieved party in a better position than full performance would have done. In most cases, this will occur when the aggrieved party's choice of damages based upon the difference between contract and market price substantially exceeds the profits that would have been made by full performance. Subsection (c) also rejects the view that the exercise of one remedy, such as resale by the seller, automatically precludes a subsequent choice to pursue another remedy, such as market damages. Again, the question is whether the choice exceeds the expectation principle.²³⁸

This commentary reflects the well-entrenched idea that damages should be limited to actual compensation. This clarification would have led to a result that would permit a seller to choose a remedy but would limit damages in excess of an expectation principle. While market damages would not be unavailable, they could not exceed an actual loss. Of course, underlying this limitation on damages is that the Code does not attempt to provide compensation for all losses that a seller might have, for instance consequential damages or attorney fees, but rather evaluates loss on a narrower basis.²³⁹

Returning to section 2-708(1), while the market price differential is a central concept to remedial damages under the Code, it should only be used consistently with the policies expressed in the Code as a whole. In

236. See generally Macaulay, *supra* note 121, at 468 ("Even discrete transactions take place within a setting of continuing relationships and interdependence.").

237. U.C.C. § 2-718(1) (2011).

238. See generally Proposed U.C.C. § 2-703(c) (Discussion Draft Oct. 1, 1995); *id.* § 2-703 reporter's note 4. See also Roy Ryden Anderson et al., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1205 (1991) (recommending that the text under § 2-701 should state that "[t]he choice of remedy should not exceed the expectation interest objective stated in § 1-106(1)"). Interestingly, later in the provision process the new Reporter was Henry Gabriel, who himself took a position in the commentary that would disallow recovery of a market based differential adverse to his earlier position. See, e.g., U.C.C. § 2-713 cmt. 7 (amended 2003); Gabriel, *supra* note 1, at 449.

239. See Braucher, *supra* note 120, at 677; Frisch, *supra* note 20, at 208-09 (arguing that overcompensation should only be disallowed when all costs, including litigation, are taken into account).

light of the numerous provisions adverse to penalties and with objectives to put a party in the position they would have been in had full performance occurred, the market price differential is limited when it is inconsistent with traditional contract doctrine expressed in the Code.²⁴⁰ The Code makes clear that the pursuit of a remedy is sometimes barred, which should arguably include cases where access to the market price remedy would lead to a windfall to a seller that has already been compensated through resale.²⁴¹ Such a seller has not only been compensated through the resale, but also retains a profit on the resale.²⁴² An approach that measures damages based upon a known actual, favorable substitute transaction of resale, even if not in compliance with section 2-706, brings the measurement closer to the actual harm caused by the breach. Ultimately, a view of section 2-708(1) that eliminates overcompensation while leaving the buyer's damages for breach limited to incidental damages is sound.

VI. CONCLUSION

The expectation interest applies equally to breaches in transactions under the Code and the common law of contracts to place the aggrieved party in as good a position as it would have been in had the contract been fully performed, but only in that position. More specifically, the aggrieved party's expectation remedy should not place them in a position in which they are better off due to the breach through collection of losses not actually suffered by the buyer. One purpose of this Article has been to explore the reach of the expectation doctrine under the Code and some common misperceptions about remedies.

Why is a better understanding of the reach of expectation damages and these misperceptions helpful? This Article has attempted to show that there are sufficient consequences that follow a breach of the sales contract in terms of preservation of a remedy to the aggrieved party. First, exploring common misconceptions concerning the limits of the expectation interest should lead to a better understanding of the proper allocation of windfalls and losses between the parties. Second, this Article raises questions concerning some approaches to market-based damages under section 2-708(1) that seem to overemphasize ensuring the losses born by a breaching buyer and providing insufficient consideration to the possibility of overcompensating an aggrieved seller.

This Article strives to present a better balanced application of U.C.C. section 2-708(1) that preserves the aggrieved seller's right to elect its remedy in most cases, subject to a limit of the seller achieving the position equivalent to full contractual performance only. To the extent that judicial resolutions to cases arising under section 2-708(1) depend upon

240. See Anderson, *supra* note 238, at 1205.

241. See *supra* Part IV.C; U.C.C. § 2-713 cmt. 7 (amended 2003).

242. See *supra* Part IV.B; U.C.C. § 2-706(6) (2011).

an understanding of the expectation interest without falling victim to common misperceptions related to windfalls, mitigation, penalties, and the like, it is hopeful that this Article will aid in the application of damages in the instance of advantageous seller resale.