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The Case for a Literal Reading of UCC Section 2-708(2)(One Profit for the Reseller)

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The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)

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The author seeks to demonstrate that a literal reading of Uniform Commercial Code section 2-708(2), which would deny a second profit to a reselling "lost-volume" seller, makes good commercial sense. Other commentators have "strained, tugged, or ignored" the language of section 2-708(2) in an effort to give a profit to this reselling seller. The author suggests that, in doing so, these commentators: (1) have ignored the clear and express language of not only section 2-708(2) but also sections 2-706 and 2-709(2); (2) have elevated section 2-708(2) to the role of the aggrieved seller's "primary" remedy while the Code clearly intends that section 2-706 serve as such; (3) may have practically eliminated the mitigation-of-damages principle from sales litigation; (4) have presented extraordinarily difficult and perhaps insoluble practical litigation problems; and (5) have proposed a thesis which may be inconsistent with what the business world expects. The author also suggests that the commentators' analysis may be faulty in that it assumes the existence of a theoretical "buyers' market" which may not, in fact, exist in the real business world.

I. BACKGROUND — THE CODE V. THE COMMENTATORS

MR. SCHLOSSER'S COMMENT[1] again demonstrates the difficulties which he and other commentators have had in interpreting section 2-708(2) of the Uniform Commercial Code[2] to give a

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1 Schlosser, *Construing UCC Section 2-708(2) to Apply to the Lost-Volume Seller*, 24 CASE W. RES. LAW REV. 686 (1973).

2 UNIFORM COMMERCIAL CODE § 2-708(2) [hereinafter cited as UCC]. Throughout this Comment, unless otherwise designated, all references to statutory sections are to sections of the Uniform Commercial Code. Section 2-708(2) provides:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the mea-

profit plus reasonable overhead (usually referred to in this Comment as merely "profit") to the "lost-volume" seller who can resell his goods elsewhere. Specifically, the problem arises because the profit authorized by section 2-708(2) must under its literal language be diminished by the amount of any "proceeds of resale." Where finished goods are involved which can be resold at the original contract price, that credit typically will result in zero damages for the reselling seller.[3] Yet, Schlosser and the other commentators remain convinced that the lost-volume seller is the very person for whom the profit formula of section 2-708(2) was intended, notwithstanding the fact that he is able to recover his full price at a later sale. Thus, they labor mightily to conjure up solutions which will make section 2-708(2) fit him, and, in the process, have engaged in what has been aptly noted as "a certain amount of stretching and tugging"[4] at its statutory language. Schlosser stretches the statutory word "profit" to mean two profits; that is, a profit on the original sale and then a second profit from the resale.[5] Nordstrom tugs at the statutory words "proceeds of resale," arguing that they apply only where partially completed goods as opposed to finished goods are involved.[6]

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sure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

[3] But not invariably. The aggrieved seller may always collect incidental damages from the breaching buyer, which, among other things, would include any costs incurred in connection with the resale of the goods. UCC § 2-710. And, of course, if the parties have agreed to a valid liquidated damages clause under UCC § 2-718(1), the amount thereof may be collected. If there is no such liquidated damages clause and if the buyer made a predelivery deposit, then that deposit could be retained by the aggrieved seller, but only up to 20 percent of the price of $500, whichever is less. UCC § 2-718(2) (b).

[4] Speidel & Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy*, 57 CORNELL L. REV. 681, 693 (1972). It should be noted that Speidel and Clay were discussing damages available to a seller where the buyer repudiates in the midst of production, whereas this Comment deals only with the rights of reselling "lost-volume" sellers of finished goods. *See* note 6 *infra.*

[5] Schlosser, *supra* note 1, at 692.

[6] R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 177, at 541 (1970). This view was also recently accepted by the New York Court of Appeals in Neri v. Retail Marine Corp., 30 N.Y.2d 393, 285 N.E.2d 311, 334 N.Y.S.2d 165 (1972). But, query, why do these authorities distinguish between situations where the goods are finished and those where they are not? According to the commentators, the real evil is that the seller has "lost" a sale. Assuming that this aggrieved seller is a volume seller who produces many lots of goods, why should he "lose" a profit from one lot simply because its expected buyer breached at a time when the goods were still in the process of being manufactured? If the commentators' thesis is correct, should not this seller have the right authorized by UCC § 2-704(2) either to dispose of the goods as salvage or to complete them for resale elsewhere and still collect his full original profit from the original breaching buyer? Having merely raised this question, there will be no further discus-

Harris,[7] Hawkland,[8] and White and Summers[9] neither stretch nor tug. Instead, their suggestion is that section 2-708(2)'s statutory words "proceeds of resale" simply be ignored.

Obviously, none of the commentators' solutions appeal particularly to those lawyers and judges who have been trained to apply statutory language rather than to stretch it, to tug at it, or to ignore it. Indeed, the statutory construction problems which must be surmounted if the lost-volume seller who resells finished goods is to get a profit from his original breaching buyer may be even greater than the commentators have yet realized. In addition to section 2-708(2), whose literal language requires a full credit for the proceeds of any resale, there are at least two other Code sections dealing with the damage rights of reselling sellers that seem to require exactly the same result; namely, section 2-706[10] and section 2-709(2).[11] Section 2-706 is of particular interest for several reasons. First, it is the Code section drafted specifically to define the damage rights of aggrieved reselling sellers, and there is no suggestion within it that the profit formula of section 2-708(2) is in any way intended to qualify or be superior to it. Quite to the contrary, that profit formula is expressly stated to be a qualification *only* on the damage remedies set out in section 2-708(1), a section which is essentially concerned with aggrieved sellers who do *not* resell or who resell improperly.[12] Secondly, section 2-706 has been described by the Official Comments as the aggrieved seller's "primary" remedy where a buyer refuses to accept the goods,[13] whereas section 2-708(2) has been described as only his "residuary" remedy.[14] Thus, where the unqualified "primary" remedy (*i.e.*, section 2-706) denies damages to an aggrieved seller who can obtain his full price on a resale, that would seem to

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sion of it. Rather, this Comment will be limited to the situation where the goods were finished at the time of the buyer's breach and then were later resold.

7 Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 99 (1965).

8 W. HAWKLAND, SALES AND BULK SALES 153-54 (1958).

9 J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-13, at 235 (1972).

10 Nordstrom has also recognized that UCC § 2-706 reaches the same zero-damage result which obtains under a literal reading of section 2-708(2). R. NORDSTROM, *supra* note 6, § 177, at 541.

11 UCC § 2-709(2) authorizes aggrieved sellers who cannot readily resell their goods to sue their breaching buyers for the price, but then makes clear that a full credit for any resale proceeds must be allowed if and when resale becomes possible.

12 UCC § 2-704, Comment 1.

13 UCC § 2-706, Comment 2.

14 Schlosser, *supra* note 1, at 688.

pose a formidable interpretive hurdle to the commentators' arguments that this same reselling seller should somehow obtain a different and more favorable result[15] through his "residuary" remedy (*i.e.*, section 2-708(2)).

So the battle lines are drawn between the Code and the commentators. The three sections of the Commercial Code which expressly deal with the damage rights of an aggrieved seller who can resell his finished goods elsewhere by their literal terms all reach exactly the same result which the commentators find so distressing; namely, that no second profit is to be allowed an aggrieved seller of finished goods if he can recover his full purchase price at a later resale.[16] Notwithstanding, the commentators continue to insist that this cannot be so where there is involved a reselling seller who has "lost" a sale. As such, they continue to stretch, to tug, and to ignore section 2-708(2)'s language to achieve what they are sure must be the "correct" result.

Is it just possible that the commentators are mistaken? Is it just possible that the Code drafters intended that their literal words, stated in three separate places, be accepted at face value, and that an aggrieved seller who can resell his goods elsewhere should not receive yet a second "profit" from his original breaching buyer? Equally important, is it just possible that this may be the more sensible commercial result?

II. SOME CONSEQUENCES OF THE COMMENTATORS' VIEWS

A. *The Effect on the Mitigation-of-Damages Principle*

If, as the commentators insist, section 2-708(2) was intended to give an aggrieved lost-volume reselling seller another profit from his original breaching buyer, then one ought to consider the consequences which may follow. Some, at least, might raise a few legal eyebrows. One of those consequences may be that the mitigation of damages principle, thought to be fully applicable to Commercial Code matters, will actually have little function in sales contract liti-

[15] Under the commentators' views, section 2-708(2) works out so favorably for the reseller that White and Summers have tagged it as the "pearly gates through which lost volume sellers may enter." J. WHITE & R. SUMMERS, *supra* note 9, § 7-11, at 229. *See also* text accompanying note 28 *infra*.

[16] To repeat, the three Code sections which reach this result are UCC § 2-706 (the seller's so-called "primary" remedy), UCC § 2-708(2) (the seller's so-called "residuary" remedy), and UCC § 2-709(2) (the seller's special price remedy when resale becomes possible only at a time remote from the breach).

gation. This is because most (although obviously not all)[17] sellers operate, or, at least, claim to operate in "buyers' markets";[18] that is, situations where the seller has more goods to sell than he has customers to buy them. Thus, almost every seller will apparently qualify as the very lost-volume seller who the commentators insist is entitled to a profit under section 2-708(2). As a result, any buyer contracting with such a seller will, upon refusal to accept delivery, necessarily owe damages measured by the seller's profit with apparently no possibility of mitigation.[19]

The full impact of this point can be illustrated by considering the Boeing-TWA example used by White and Summers.[20] In this example, TWA breached its contract to purchase a 747 from Boeing. Boeing then delivered that very same plane to Pan Am, another of Boeing's customers, for the same price.[21] White and Summers argue that Boeing, even though it received the same price for the same plane from Pan Am, nevertheless has still lost the profit which it might have made on the original TWA sale. As such, they urge that TWA must, because of section 2-708(2), pay to Boeing damages measured by that lost profit. And, it is hard to see how any mitigation of damages principle could ever come to TWA's rescue. Under the commentators' views, TWA, having contracted with a volume seller, is inexorably bound to pay at least the profit which Boeing hoped to make, even though TWA never receiveed the plane and even though Boeing received a full price for it on the resale.

Let us now change the facts slightly. Suppose that TWA, realizing that it can no longer use the 747 which it ordered from Boe-

[17] White and Summers point out that the car market immediately after World War II was a "seller's" rather than a "buyer's" market. J. WHITE & R. SUMMERS, *supra* note 9, § 7-9, at 227. A similar situation seems to be developing today in several industries. *See* note 35 *infra.*

[18] But see my criticism of this thesis at text accompanying notes 29-35 *infra.*

[19] Nordstrom has also recognized that "the volume seller does not mitigate his lost profit when he makes a second sale — even of the same goods . . . ." R. NORDSTROM, *supra* note 6, § 177, at 536.

[20] J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 234.

[21] Did White and Summers use the right example to test out their thesis in hypothesizing a "resale" of the TWA plane to Pan Am who already was contractually committed to buy a 747? Is such a transaction even a "resale" of the goods which section 2-708(2) contemplates? Would not the correct example to test out section 2-708(2) be where the "resale" was to a *new* customer who was not already contractually bound to buy a 747 plane when TWA breached? *See* Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract,* 60 MICH. L. REV. 577, 599-601 (1962), which seems to recognize that the question of whether a reselling seller is entitled to a profit under section 2-708(2) becomes a critical issue only where a *new* customer is solicited to buy the original goods. The United example, contained in the next paragraph of the text, reflects this more proper situation for analyzing section 2-708(2).

ing, convinces United to take that same plane off its hands for the same price. Having done so, TWA then assigns its rights to receive delivery of the 747 to United, a power which TWA would seem to have under section 2-210(2). (Or, if TWA prefers, it could accomplish the same result by actually taking delivery of the plane from Boeing and then immediately reselling it to United.) Under these slightly changed facts, one suspects that most lawyers would advise TWA that it has no further responsibility to and owes no damages whatsoever to Boeing. Indeed, one suspects that any competent counsel would advise TWA to follow this course of action in an effort to avoid paying to Boeing the "profit" which the commentators insist it is required to do. Yet, under the logic of the commentators' views, that advice might be faulty. The commentators might well argue that since United can buy 747's only from Boeing and since Boeing has plenty of 747's to sell, it must therefore follow that TWA's actions have caused Boeing to "lose" the further sale and the additional profit which it might have made from United. Thus, even though TWA seems to have acted in good faith to mitigate the damages (profit) for which it might be liable when it could not take the plane, nonetheless, TWA's efforts have proved to be futile and TWA must nevertheless still pay to Boeing its "lost" profit.

As has been previously suggested, it is quite possible that the courts under these slightly changed facts might well rule that TWA, having assigned its rights to United (or having taken delivery of the completed plane and then having resold it to United), has no further damage responsibility to Boeing. And, if that were the ruling of the courts, then it would pose the following interesting dilemma for the commentators to consider. If TWA can mitigate its liability for damages by assigning (or reselling) to United its rights to receive delivery of the plane, then why should not the result be the same when Boeing resells? Indeed, why should not Boeing be under a duty to do likewise; that is, to use reasonable efforts to find a buyer (like United) and sell to it the plane originally intended for TWA? Isn't such reasonable effort by an aggrieved seller to reduce even a contract breacher's damages exactly what the mitigation principle is supposed to require?

Any argument that the mitigation of damages principle should not apply to these reselling situations seems considerably weakened when one considers the results which obtain in a suit for the price under section 2-709(1)(b). This Code section permits a seller (like Boeing) to sue its buyer (TWA) for the price if the seller is unable by reasonable effort to resell the goods (the plane). However, if during this suit, another person (like United) ever appeared who was willing to buy that same plane from the seller (Boeing), then section 2-709(2) requires that the proceeds of that resale be credited in favor of the buyer (TWA).[22] It will be noted that the result obtained in the section 2-709 suit is exactly the same as that which is reached when the mitigation of damages principle is applied to the section 2-708(2) profit formula.[23] And, this is exactly what one would expect. Certainly, it is hard to believe that the Code drafters intended different results simply because the aggrieved seller resells his goods before bringing a price action rather than after it. In either case, TWA (the original buyer) should be excused from further damages[24] just as soon as Boeing, the aggrieved seller, finds another customer (like United) to take the original goods (the 747) for the same price.

B. *The Reversal of Roles of Section 2-708(2) and Section 2-706*

A second curious legal consequence which may flow from the commentators' views of section 2-708(2) is the reduced role which section 2-706 (and also section 2-709(2)) would hereafter play in sales litigation. As mentioned earlier, these are the Code sections expressly written to deal with a reselling seller's damages, and, indeed, section 2-706 has been described as that aggrieved seller's "primary"[25] remedy whereas section 2-708(2) has been described as but his "residuary" remedy.[26] Yet, under the commentators' views, these roles would likely be reversed. Section 2-708(2) would become the aggrieved seller's primary remedy whereas section 2-706 (and section 2-709(2)) would become his residuary remedies. This follows again from the fact that most sellers claim to operate in "buyers' markets"; that is, a situation where the seller has more goods to sell than he has customers to buy them.[27] Thus, these sellers are the

[22] If no buyer (like United) ever appears during the section 2-709 litigation, TWA will have to pay Boeing the price but, at least, will then have the plane — typically a more favorable situation for TWA than paying to Boeing a "profit" and having nothing.

[23] As mentioned earlier, this result, requiring mitigation, seems mandated by the literal language of section 2-708(2). *See* text accompanying notes 3-9 *supra.*

[24] Other than damages mentioned in note 2 *supra.*

[25] *See* notes 12-13 *supra* and accompanying text.

[26] *See* note 14 *supra* and accompanying text.

[27] But see my criticism of this thesis later at text accompanying notes 29-35 *infra.*

very lost-volume sellers with whom the commentators are so concerned and who they claim are entitled to the profit formula of section 2-708(2). Therefore, upon breach by their buyers, these lost-volume sellers will surely claim (and if the commentators are correct, will be allowed) the profit remedy set out in section 2-708(2) rather than the damage remedies of section 2-706 or section 2-709(2). These claims will be made for the obvious reason that the seller could then keep both the full proceeds of any resale of the goods and, as well, get an additional profit from the original breaching buyer. It is undoubtedly for this very reason that White and Summers have described section 2-708(2) as the "pearly gates" through which lost-volume sellers may enter.[28] Thus, in damages litigation involving reselling sellers, the Code sections written primarily to deal with their problem (*i.e.*, section 2-706 and section 2-709(2)) would have little function whereas the "residuary" section (*i.e.*, section 2-708(2)) would assume the primary role, and this seems a curious twist from what the Code drafters apparently intended.

III. THEORY AND THE REAL BUSINESS WORLD

From the preceding discussion, it is clear that allowing a reselling seller another profit under section 2-708(2) cause two problems: (1) it poses formidable problems in statutory interpretation, and (2) it gives rise to consequences that seem to raise legal eyebrows. But, what about the merits of the commentators' arguments? Are they correct in urging that the lost-volume seller who can resell his goods should nevertheless get his "lost profit" from the original breaching buyer? In the theoretical world which the commentators have postulated, perhaps their analysis is correct. But, lawsuits are concerned with actual rather than theoretical situations. And, in the more practical arena of real-life litigation, a rule denying profits to a reselling seller will surely prove to be more workable. Indeed, it may even prove to be more just.

The error of the commentators' analysis may be that it is based on the erroneous assumption that sellers operate in some theoretically perfect "buyers' market"; that is, a situation where it can be shown that the seller has and will in the future have (1) only a predictable and finite number of customers,[29] and (2) an unlimited ca-

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[28] J. WHITE & R. SUMMERS, *supra* note 9, § 7-11, at 229.

[29] White and Summers, in particular, make this assumption in their Boeing-TWA example when they postulate "that Boeing has contract[s] for the sale of [exactly] 100

pacity continually to sell to all new buyers that may appear on the scene.[30] Under these assumptions, it is true that every buyer who reneges on a sales contract theoretically has deprived his seller of a sale and a profit.

However, it is unlikely that any individual seller in the real business world fits into this theoretical model. Few, if any, could prove with any certainty the specific number of customers they will have in the future, and probably none ever have the unlimited capacity to sell to all those who may appear. Rather, where a dynamic and viable business is involved, there are invariably going to be future periods of time when the seller's situation is such that he simply cannot handle new customers. This may be due to such things as temporary shortages of goods, limitations on or breakdowns of productive capacity, shortage of warehousing facilities, temporary unavailability of personnel, and so forth. Further, there are certain fundamental economic laws which dictate that sellers will not service any significant numbers of new customers, simply because it becomes unprofitable to do so. In particular, the economic law of diminishing returns or increasing marginal costs states that as a seller's volume increases, then a point will inevitably be reached where the cost of selling each additional item diminishes the incremental return to the seller and eventually makes it entirely unprofitable to conclude the next sale. Indeed, sellers must operate at or near the point of zero incremental return if they are to be at their most profitable and competitive level.[31] It is thus obvious that efficient and competitive sellers — probably the only ones who exist or can long survive in the

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747's during the coming year." J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 233-34.

[30] *See, e.g.*, Schlosser, *supra* note 1, at 687, which states: "The lost-volume seller is an 'expansible' seller, one who can manufacture (or obtain) as many units as he has buyers." *See also* W. HAWKLAND, *supra* note 8, at 153-54, which states: "If the dealer has an *inexhaustible* supply of cars, the resale to replace the breaching buyer costs the dealer a sale [and] Section 2-708(2) recognizes this . . . ." (emphasis added); R. NORDSTROM, *supra* note 6, § 177, at 536, which assumes "volume sellers who have a *sufficient* supply of goods available to them so that they could make as many sales as they are likely to obtain buyers." (emphasis added); 5 A. CORBIN, CONTRACTS § 1100, at 541 (1964), which states: "If the seller is a manufacturer or producer of the subject of the sale, with capacity to produce *enough* such articles to supply all probable customers, the buyer's rejection does not make possible a second sale that the seller could not otherwise have made." (emphasis added). Corbin is quoted with approval by Schlosser, *supra* note 1, 686-87, and Harris, *supra* note 21, at 581.

[31] There is much written on the economic law of diminishing returns or increasing marginal costs. *See, e.g.*, G. STIGLER, THEORY OF PRICE ch. 7 (3d ed. 1966). [ED. NOTE: For a general discussion of the economic theory applicable to the lost-volume seller see *A Theoretical Postscript: Microeconomics and the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973).]

business world — actually have little or no present capacity to serve additional new customers, and, as such, hardly fit the hypothetical model postulated by the commentators of sellers with unlimited capacity to serve new customers.

For the kinds of reasons just stated, sellers invariably run into tight periods during which they cannot or will not handle additional customers. Thus, any goods still remaining[32] from an earlier "lost sale" make possible during these tight periods an "additional" sale which the seller otherwise could not make. Thus, on balance, the "lost sale" of yesterday is cancelled out by the "additional" sale made possible during the later tight period.

To illustrate this point, assume that Seller has a roadside stand at which he sells containers of "Crystal Lake Water." Customers place their orders for a container of the water at the roadside stand, following which Seller sends his employee, Helper, to Lake Crystal to fetch it. At first blush, this hypothetical illustration appears to be the perfect "buyers' market" regarding which the commentators have based their analyses: there is an apparently inexhaustible supply of water in Lake Crystal which Seller can sell to any and all customers who appear at his stand.

However, a more careful look at the situation shows that this superficial analysis is faulty. As in any business, there are real constraints on Seller's future ability to sell buckets of Crystal Lake Water to all who may want them. In our illustration, that constraint is Helper. Thus, if Helper can make only 10 trips per day to and from Lake Crystal, then Seller can serve no more than 10 customers per day. Of course, Seller will think he is in the perfect "buyers' market" so long as his experience is that no more than seven customers per day appear at the roadside stand.[33] He then would argue (adopting the commentators' views) that if Customer One on Monday refused to accept delivery of a container of water which he had

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[32] Dealing with perishable items which cannot "remain" presents unique problems which are beyond the scope of this discussion. If, however, such perishables can be resold for the full purchase price, then the Commercial Code sections discussed in this paper would seem to excuse the breaching buyer from further damages.

[33] Obviously, this is a hypothetical case which probably could not take place in the real world of competition. This is because Seller must allocate Helper's entire salary among only seven daily sales, even though Helper is capable of making 10 trips. As such, Seller could soon be driven out of business by a competitor who could easily sell the same water at a lower price by hiring only a part-time helper, so that there was less salary to allocate over the typical seven sales per day. Putting it another way, the seller in the hypothetical seven-sale per day case mentioned in the text seems not to be at his point of zero incremental return and, as can be seen, is not very competitive. *See* text accompanying note 31 *supra*.

ordered, then Seller has lost that sale and its corresponding profit. This analysis would be flawless if Seller never experienced Tight Tuesday. But, suppose on Tight Tuesday 11 customers happened to place orders at the stand for water. Seller would then simply have no way to handle that 11th customer.[34] Or suppose that the usual seven customers appear on Tight Tuesday, but Helper, due to illness or a rainstorm, cannot work that day. Again, Seller cannot handle the situation. Thus, whenever Tight Tuesday arrives, the containers of water left over from Customer One's Monday breach make it possible for Seller to conclude an additional sale on Tuesday. As a result, in the total relevant period, Seller's apparent "loss" of the Monday sale is readily made up.

And, in the real business world, these Tight Tuesdays do in fact come. Production facilities break down, employees get sick, supplies become temporarily unavailable, there is an unusual influx of new customer orders, and so forth. By reason of such occurrences, it would appear that the basic assumption of a perfect "buyers' market" which the commentators have relied upon to reach their conclusions simply may not be applicable to the mass of sellers in the real business world.[35]

IV. Practical Litigation Problems

A. *Speculative Nature of the Evidence*

Professor Harris, at least, has recognized that not all sellers can qualify as lost-volume sellers. He sought to grapple with the problem by suggesting that three conditions must be proven to coexist before a reseller may qualify for the profit set out in section 2-708(2); namely, (1) the person who bought the resold goods would

[34] Unless and until Seller hired a second helper. Of course, it may not be economically profitable for Seller to do so. *See* note 31 text accompanying *supra*. Even if it were, Seller might well have trouble finding a second helper on short or no notice.

[35] For a graphic illustration of this that involved an entire industry, consider the recent situation in the oil industry. In 1972 the commentators undoubtedly would have insisted that oil suppliers were volume sellers dealing in "buyers' markets" and, therefore, entitled to the profit formula set out in section 2-708(2). However, by 1973, that situation had completely reversed for the entire industry. Production of oil products was no longer capable of meeting the demand for them. *See, e.g.*, Dale, *Oil Shortage — The Economy's New Puzzle*, N.Y. Times, Nov. 11, 1973, § 3, at 1. How wrong a court would have been in 1972 to allow a "profit" in favor of an oil company, since by 1973, any oil which a breaching buyer refused to take from it just a few months earlier would make possible an "additional" sale in 1973. A similar situation may also now be developing in other industries, including grain, chemical fertilizer, vitreous china, and paper. *See* Harvey, *Why Has the Land of Plenty Become Land of Shortages?*, Cleveland Plain Dealer, Oct. 21, 1973, § AA, at 5 (Los Angeles Times/Washington Post Service).

have been solicited by the seller had there been no breach and resale; (2) the solicitation would have been successful; and (3) the plaintiff could have performed the original contract.[36] Curiously, Professor Harris omits what would seem to be a necessary fourth condition; namely, that the seller is able and willing to sell to all new customers who want his goods in the future.[37] But, no matter how many conditions may be required to qualify the seller for the profit formula of section 2-708(2), it should be noted that they require proof in court not of what actually happened, but rather, of what might have happened. They are inquiries into the unknown and into the speculative. Pragmatic plaintiff's lawyers are fully aware of how difficult it is even to find objective admissible evidence of such matters, let alone to find enough of such evidence to carry the burden of proof required of them. But, the real and perhaps impossible challenge rests upon the judge (or other fact-finder), for he must somehow decide whether the plaintiff has, in fact, "proved" what is really unknowable. Do we really want to develop rules of law that require such prescience from our courts? After all, our courts are administered by human beings, not prophets.

B. *The Uncertainty of Profit and Overhead*

The problems raised by requiring proof of speculative matters are not the only practical difficulties which the litigation under the commentators' views would engender. Even if the seller somehow could prove he is within the theoretical "buyers' market" which the commentators simply have postulated (but unfortunately have never seriously verified), he must still go on to prove the measure of his lost "profit (including reasonable overhead)." On this point, the commentators fully concede that their view poses what may well be an insoluble litigation problem. As White and Summers have stated: "This phrase is likely to be the scene of bloody battles between the accountants of the various parties. One can expect no unanimity among accountants about what is overhead and what is not or about how the overhead is to be allocated to the seller's various contracts."[38] Similarly, Schlosser, citing Speidel and Clay, also ac-

[36] Harris, *supra* note 7, at 82. White and Summers approve the Harris approach. J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 235.

[37] *See* note 30 *supra* and accompanying text for examples of where the commentators have recognized the need for a limitless supply of goods which the seller can sell to all comers.

[38] J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 235.

knowledges "there is much debate over the exact measurement of 'profit' and 'overhead'. . . ."[39] The commentators candidly admit that they "can give no assistance with [these] highly practical problems."[40] Nonetheless, they strongly urge a construction for section 2-708(2) which requires the courts somehow to resolve them.[41] Exactly why do the learned commentators assume that the human lawyers and human judges should be able to solve highly practical litigation questions regarding which they can offer no guidelines whatsoever? And, if the courts should attempt to resolve this profit dilemma, one ought to consider just what will be the end result for the commercial world, as each set of judges and litigants in each individual case comes up with its own unique and ad hoc solutions. That end result may be forecast: on this profit question, where the money stakes are often quite high, there will develop a body of case law which is neither uniform nor predictable. One suspects that practical businessmen and the lawyers who represent them are not likely to consider such unpredictable, inconsistent, and nonuniform law to be the kind of "justice" which they wish to govern their commercial affairs.[42]

The commentators seem driven by a quest for achieving justice in some abstract and theoretical sense. But theoretical justice in the abstract may not always be justice in practical litigation. There seems to be little commercial sense to strain at the language of section 2-708(2) in an effort (1) to make it cover theoretical situations (*i.e.*, a "buyers' market") which probably do not exist in the real world and (2) to require the proof of a profit and overhead, the

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[39] Schlosser, *supra* note 1, at 689.

[40] J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 235.

[41] Indeed, White and Summers announce that they are "await[ing] with anticipation the case . . . which will give us some insight into how the courts should and will resolve disputes between the parties over the definitions of profit, overhead, due credit, etc." J. WHITE & R. SUMMERS, *supra* note 9, § 7-13, at 237-38.

[42] Men of commerce invariably have disdained unpredictable and inconsistent legal solutions to their affairs. Witness the following which was stated at another time, when the commercial world was again arguing for "'a clear statutory basis' . . . in 'lieu of a crazy quilt of contradictory judicial statements.'" The event was the proposal in the late 1930's to add present section 70(d) to the Bankruptcy Act. It was pointed out that under the then existing judicial decisions "'no consistent theory of protected transactions [had] been developed,' and the situation was 'conducive to confusion and uncertainty, with potentialities for argument, "bluffing," litigation, expense and delay.' The law consisted essentially of nebulous vagarities.'" (These quotations are taken from Mr. Justice Harlan's dissenting opinion in Bank of Marin v. England, 385 U.S. 99, 106-07 (1966) (footnotes omitted), where he collected quotations from several leading commercial authorities of the time.) While these words were said in dealing with a different commercial question than that discussed in this paper, they give insight on how the commercial world reacts to inconsistent and unpredictable judicial decisions.

standard for which none can agree upon. In other places the Commercial Code drafters were quite willing to use workable rules in place of those that might theoretically be more correct for the express reason of avoiding the practical litigation difficulties which the theoretical rule fostered. One such example is section 9-306(4)(d)(ii) which substitutes a workable 10-day rule for tracing proceeds of security interests into comingled funds for the theoretically correct (but practically difficult to administer) rule requiring a perfect tracing of those proceeds.[43] Yet another example is section 2-702. The theoretically perfect legal rule permits a defrauded seller to reclaim his goods at any time from his credit buyer. But proving fraud has historically raised immense practical problems and provided highly unpredictable and nonuniform results. Thus, in place of the historical and theoretically perfect fraud rule, the Code has substituted a more workable litigation rule permitting any seller to reclaim goods for 10 days so long as they were delivered while the buyer was insolvent.

Conceivably, the Code drafters were using a similar approach in writing section 2-708(2). If, in fact, the seller recovers by resale elsewhere the full price (including one profit) for his finished goods, is it not appropriate for the Code to decree that this is the end of that seller's remedies; and that the law simply will not permit that same seller to seek yet a second profit by instituting litigation which will necessarily involve attempts to prove — often with speculative evidence — (1) the existence of a highly unlikely situation (*i.e.*, the perfect "buyers' market") and (2) a standard (*i.e.*, profit plus reasonable overhead) regarding which there is no agreement?

Such an approach would make good statutory drafting sense. And, the approach becomes even more appealing if the practical statutory rule developed which denies a second profit is roughly in accord with the business world's expectations. This point seems not even to have been considered by the commentators, but, indeed, it is a crucial question. Does the business world really expect the second profit which the commentators claim is theirs under section 2-708(2)? Or, is it more likely that most sellers who can recover their full price by reselling their goods elsewhere essentially feel

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[43] One of the practical problems brought about by the tracing rule arises from differences of opinion between accountants as to how one traces money deposited in accounts from which there have been subsequent withdrawals; that is, should one use a first-in-first-out rule to trace the proceeds, a last-in-first-out rule, etc.? How similar this seems to be to the accountants' differences on how to define "profit" and "overhead."

that they have been made whole? To illustrate this point, consider the following scenario involving Sam Seller and his wife:

SAM SELLER: Honey, I had a terrible day at the store — full of aggravation. Ben, that no-good welcher, signed up to buy goods from me and, when I was ready to deliver, he reneged.

WIFE: That Ben is really no good — a first-class chiseler!

SAM: Yeah, but things didn't turn out too bad. When Ben reneged, I called Charley and got him to take the same goods off my hands for the same price I quoted to Ben. So, maybe Ben gave me lots of aggravation, but, at least, I'm getting my money out of the goods and not getting stuck with them.

WIFE: You sure were lucky to find Charley to buy those goods. Bringing a lawsuit against Ben to collect your money would have been lots of trouble and even more aggravation. Thank your lucky stars it is all over.

As the above scenario is written, it certainly suggests that a businessman who can resell his goods elsewhere has no strong feeling or expectation that he is entitled to get yet more from his original buyer. And, if, in fact, this represents the typical scenario in the business world, then has not justice essentially been accomplished? Obviously, the commentators think not. As they view it, the Code drafters intended that the scenario not end as above, but, rather, that the following lines also be added to it.

WIFE: Sam, how much profit do you make on those goods?

SAM: Who knows? Maybe 15 — 20 — 30 percent. It depends which bookkeeper is figuring out the overhead.

WIFE: Do you think that Charley would have bought those goods from you anyway?

SAM: What kind of question is that? Sometimes Charley buys from me and sometimes he buy from others.

WIFE: Do you keep lots of those goods in stock, so that you can sell them all the time?

SAM: Do you think I'm a machine? How can I sell those goods every single day of the year? Sometimes I run out, sometimes my stock boy doesn't show up for work to fill orders, sometimes I'm home sick.

WIFE: Sam, our son, the law professor, told me that if some bookkeeper would say what is your profit and overhead on those goods, and if Charley would say that he would have bought the goods from you anyway, and if you will say that you have lots of those same goods for sale, then you can still sue that no-good welcher, Ben, for another profit.

SAM: *Really!* (*Pause.*) Honey, what's our lawyer's phone number?