THE REMEDY PROVISIONS OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE: A PRACTICAL ORIENTATION

Lawrence R. Small*

The Uniform Commercial Code descended upon the State of Washington at midnight, June 30, 1967. The rather chilly reception given the Code by the legal fraternity does not indicate a dislike for its substantive content so much as a distrust of its appearance. The UCC is a bulky document (even excluding the Official Comments), intertwined with a network of cross references, with the awesome, though laudable, goal of establishing a statutory system of policy and procedure for the entire commercial world. Its formidable communication problems tend to overshadow its substantive importance. The slow task of bridging the communication gap was begun in 1959, before the Code was adopted.[1] In an excellent section by

* A.B., Harvard, 1960; LL.B. Harvard, 1963; Instructor, Gonzaga School of Law, 1964-1965.

[1] Johnson, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 34 WASH. L. REV. 78 (1959).

The best, and most widely used, general treatment of the Code is HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964). For the busy lawyer, a more expedient introduction is found in UNIFORM COMMERCIAL CODE PRACTICE HANDBOOK, SALES AND BULK SALES (1958).

section review of Article 2 (Sales),[2] Professor Richard Cosway set out the essential differences and similarities between the then existing (now past) law of our state and the policy and procedures of the Code.

To establish a working relationship with the Code, however, requires more than a comparison between procedure and substance, past and present. Such an approach can be used with the greatest value in interpreting the new sales concepts of the Code, but it does not necessarily provide a guide towards a working application of those concepts. The first purpose of this article is to offer such a working guide, restricted by necessity to a manageable portion of Article 2. Thus, the first part of this article is directed solely towards a threshold comprehension of the new approaches to remedies of the buyer and the seller. Formation and performance concepts may indirectly be involved, but the primary focus will be on the legal machinery of Article 2 which becomes available after the necessary breach by the buyer or seller has occurred. Another purpose of this article is to discuss some of the more important, recent developments under the remedy provisions of Article 2. This discussion will commence after the basic remedy provisions are described.

I. INTRODUCTION

A fundamental principle of the Code is that commercial standards and concepts, rather than artificial criteria imposed by nonbusinessmen, should be used to form and resolve commercial transactions. Most sales transactions are formulated by businessmen, not lawyers, and businessmen bargain for performance. The purpose of a sales transaction is to exchange goods and money; it is not designed, presumably, as the framework for a lawsuit. Without belaboring the point, there should be little protest against the Code for striving to further the commercial objects of a transaction by making it more easy to conclude and more difficult to dispatch a legally binding bargain.[3]

The remedy sections of Article 2 particularly strive to preserve

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[2] Cosway, *Sales—A Comparison of the Law in Washington and the Uniform Commercial Code*, 35 WASH. L. REV. 412 (1960), 35 WASH. L. REV. 617 (1960), 36 WASH. L. REV. 50 (1961), 36 WASH. L. REV. 440 (1961).

[3] Notice, for instance, the liberalizing of the Statute of Frauds restriction in § 2-201 and, conversely, the express binding of a merchant in § 2-205 to the terms of a written offer, to be held open for a period of time regardless of consideration.

In order to simplify reference to the Code, only the basic article and section number will be used. Washington has added the prefix 62A. for codification purposes in WASH. REV. CODE.

the transaction, or at least the fruit that it was expected to produce. Failure to complete performance activates policies and procedures that attempt to approximate that performance. Specific procedures are established to resolve delivery and tender problems while permitting the transaction to continue forward, with a view towards keeping the seller and buyer on an equal footing.[4] For instance, a buyer is given a wholly unqualified power to reject goods that do not conform to the contract; yet his power to reject is undercut by the seller's right to cure the non-conformity and complete the transaction.[5] If the anticipated time for performance has passed, the seller's cure power can be exercised only if he had reasonable grounds to believe that the non-conforming goods would be acceptable, with or without a money allowance. This is entirely consistent with a merchant's approach to contractual good faith, rather than the legalistic criteria of strict conformity.[6]

A further example of the commercial approach is found in the right of either party to receive assurance with respect to the performance of the other party, if there are reasonable grounds for

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[4] "Seller" is defined in § 2-103 (d) and "buyer" is defined at § 2-103 (d). Neither definition states more than self-evident conclusions and, since warranties and other performance standards presume a buyer-seller relationship, more statutory help should have been given at this critical stage of a transaction. For instance, does a consignment contract that is considered a true consignment covered by Article 2, rather than one governed by § 9-102 and Article 9, have a "buyer" and a "seller" within the scope of this definition, despite the agency relationship? This may be critical to the establishment of express and implied warranties in a consignment contract. Obviously, the definitions are founded upon policy considerations and governed by the circumstance of each contract, but more guidance would be helpful. Perhaps the fault lies not with the definitions but with the confused status of consignment contracts in the Code.

[5] § 2-508 (Cure by seller of improper tender or delivery; replacement) states: "(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

"(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender."

§ 2-601 (Buyer's rights on improper delivery) provides: "Subject to the provisions of this Article on breach in installment contracts (RCW 62A.2-612) and unless otherwise agreed under the sections on contractual limitation of remedy (62A.-2-718 and 62A.2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest."

[6] The technical expression of a merchant's standard of good faith is found in § 2-103. The non-merchant has a slightly less stringent responsibility—the simple, ordinary good faith of the guileless consumer. (*See* WASH. REV. CODE 62A.1-201 (19) and WASH. REV. CODE 62A.1-203.) The contrast evokes memories of the difficult distinction, if any, between ordinary and gross negligence in torts.

insecurity.[7] The Code specifically states that, as between merchants, only commercial standards determine the grounds for insecurity. This is not the legal insolvency criterion established by Section 1-201(23), but the commercial concept of insecurity that, as a basis for a remedy, was customarily available only to a seller with retained title.

These examples of commercial reasoning involve actions to be taken prior to breach, and reference to them is made only to illustrate the importance of business concepts under Article 2. For present purposes, it is assumed that a breach has occurred and that the non-breaching party is seeking an approach to his remedies.

II. The Basic Remedy Provisions

The basic remedy provisions for the buyer and seller under Article 2 provide striking parallels of policy and procedure. When the parallelisms are made apparent, the basic concepts are more easily grasped; the complexities of a single, somewhat unified system can be absorbed more easily than scattered, unrelated provisions. A comparative chart appears at the end of this article which may be a useful reference guide.[8]

The Code purports to establish a unified approach to the remedies of the seller and the buyer, but, unfortunately, it stumbles upon its organizational feet. There are significant and helpful index sections but these are buried in a maze of rule and comment. Once the general remedy sections[9] are extracted from the volume of material, the organizational problem is substantially eased.[10] Neither

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[7] U.C.C. § 2-609.

[8] *Infra*, at 198.

[9] U.C.C. §§ 2-703, 2-711.

[10] § 2-703 sets forth the general remedies of sellers:

"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 (RCW 62A.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 (RCW 62A.-2-705);
(c) proceed under the next section respecting goods still unidentified to the contract;
(d) resell and recover damages as hereafter provided (RCW 62A.-2-706);
(e) recover damages for non-acceptance (RCW 62A.2-708) or in a proper case the price (RCW 62A.2-708);
(f) cancel."

§ 2-711 sets out the buyer's general remedies:

of the two general remedy sections establishes the criteria for breach of the contract, a fundamental fact question, but both sections guide the wronged party to the appropriate remedy. The remedial section then becomes controlling and not only provides the general remedies, but also refers to the incidental or consequential damages that may be available for additional relief.[11] The remedy sections are supplemented by two interpretive principles: (1) the remedies described are all cumulative, subject to certain peculiarities; (2) unless otherwise indicated, election between remedies need not be made—election flows naturally from the circumstances. The old quandary of rescission and tender back of the goods, with the possible effect of waiving any damage claim, has been rejected by this approach.[12]

A. *The Primary Level of Response—Resale and Cover*

The primary remedies for the seller and the buyer are found in Section 2-706 and Section 2-712, respectively. Resale of the goods by the seller under Section 2-706, and cover (purchase of replacement goods) by the buyer under Section 2-712, ordinarily will produce the highest monetary recovery for the wronged party.[13]

"(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (RCW 62A.2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid;

(a) 'Cover' and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (RCW 62A.2-713).

"(2) Where the seller fails to deliver or repudiates the buyer may also:

(a) if the goods have been identified recover them as provided in this Article (RCW 62A.2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (RCW 62A.2-716).

"(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (RCW 62A.2-706)."

[11] For example, § 2-703(d) refers an aggrieved seller to the resale provisions of § 2-706 and § 2-706 expressly allows the incidental damages defined by § 2-710.

[12] *See* Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

[13] § 2-706(1) states:

"(1) Under the conditions stated in RCW 62A.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 (RCW 62A.2-710), but less expenses saved in consequence of the buyer's breach."

§ 2-712 states:

Since the object of the seller's bargain is to produce a sale of his goods, the object of his remedy should be to produce the equivalent of the contract sale in money. His measure of damages under Section 2-706 is the difference between the resale price obtained by the wronged seller and the contract price. The object of the buyer's remedy should be the acquisition of conforming goods. So, the measure of the buyer's damages under Section 2-712 is the difference between the buyer's cost of cover and the contract price. The measure of damages under both sections is new; the Code does not rely upon a finding of the price of the goods at the time and place of tender, nor does it require a determination of an appropriate market. If resort to the market place by the buyer or seller has not produced the expected return, then these sections give the appropriate party a right to the deficiency.

The chief requirements of the Code are those most valued in business relationships: reasonableness and good faith. The resale by the seller must be commercially reasonable, in accordance with the specific requirements of Section 2-706, and the cover action taken by the buyer must be in good faith and commercially reasonable.

Neither resale by the seller under Section 2-706 nor cover by the buyer under Section 2-712 are mandatory. They usually offer the greatest reward; however, strict adherence to the terms of these sections is required in order to secure the greatest advantage for the non-breaching party in relation to the actual cost of the buyer's cover or the actual amount received from the seller's resale, which are the crucial figures in the damage computation. However, problems of proof are substantially lessened in that the objecting (breaching) party must show that the remedy procedure was not commercially reasonable or was in bad faith. The facts that cover goods could have been purchased more cheaply or that resale goods could have been sold for a higher figure do not by themselves establish commercial impropriety.[14]

Even when the seller deviates from the strict terms of Section 2-706, he may still recover under Section 2-708.[15] It would seem

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"(1) After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (RCW 62A.2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy."

[14] *See*, § 2-706, Comment 3 and § 2-712, Comment 2.

[15] U.C.C. § 2-708 provides the measure of the seller's damages for non-acceptance or repudiation by the buyer.

logical that the buyer should have a similar opportunity to seek other remedies if cover is not sought or is misused. However, this is not the case. The seller's failure to conform to the exact provisions of Section 2-706 results only in a diminution of his eventual recovery, but failure to cover by the buyer *may* completely eliminate remedies otherwise available to him. There does seem to be a greater effort, therefore, to compel the buyer to use the cover remedy of Section 2-712, perhaps on the theory that the buyer expected to have conforming goods, rather than money. It seems more consistent with the commercial expectations of the parties that the buyer seek replacement goods. Thus, before a buyer decides not to attempt cover, he should consider these cautionary words:

> The buyer has a choice between covering under the present section and suing for damages under the next section. [2-713]. Subsection (3) [of 712] produces this result, but the wording of this subsection is grossly misleading. The fact is that the buyer's failure to seek cover under the section may mean: (a) he cannot recover damages under the section on consequential damages [2-715]; (b) he cannot replevy under the section on buyer's specific rights to the goods [2-716]; and (c) may mean that he cannot have specific performance if he could have covered. [2-716].[16]

A further cautionary word to the buyer: *do not cover too quickly*. First, be certain that the cure mechanism of Section 2-508 has not worked or is not applicable. A change of position, a financial loss by the buyer, may be ignored by the court if the seller is zealously and correctly attempting to protect his rights under the contract.[17]

B. *The Second-Best Approach—Price and Performance*

If the expected return from the transaction cannot be achieved by resale or cover, then the seller should seek his expectancy in an action for the price, and the buyer should seek the goods themselves in an action for specific performance. The seller's action for the price is established by Section 2-709 and the specific performance power of the buyer is set forth in Section 2-716.[18]

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[16] Cosway, *supra* note 2, 36 WASH. L. REV. at 458.

[17] For an indication that a change of position by the buyer may become a factor in whether the seller is permitted to cure, *see* Bartus v. Riccardi, 28 N.Y.S.2d 222 (1965).

[18] § 2-709 (Action for the price) states:

"(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstance reasonably indicate that such effort will be unavailing.

Generally speaking, those sections are consistent with the prior law, but there is substantial improvement in the expression by statute of the underlying commercial concepts. As stated in the Official Comments,[19] the action for the price usually is limited to a situation where resale of the goods is impractical; again, this calls for a commercial judgment.[20] This commercial prerequisite parallels the statement in Section 2-716 that the court may decree specific performance where the goods are unique or "in other proper circumstances." This concept of *uniqueness* liberalizes the previously restricted requirements for a right to specific performance. As the Official Comment indicates, specific performance no longer is limited to goods already specified or ascertained at the time of contracting.[21]

To understand completely the seller's rights under Section 2-709, procedurally and substantively, it is necessary to delve into its cross-reference network. An action for the price under Section 2-709 may include goods which *had not been identified* to the contractor prior to breach and to unfinished goods, where reasonable commercial judgment would indicate that the seller should complete the manufacturing process and identify the goods to the contract. This result is reached as follows:

(1) All provisions of Section 2-703 are applicable to all remedy provisions of the seller. Section 2-703(c) permits a seller, after the buyer's breach, to "proceed under the next section respecting goods still unidentified to the contract."

(2) Following that suggestion, the next section, Section 2-704, permits an aggrieved seller to complete manufacture of and wholly identify goods to the contract if this can be done in the exercise of reasonable commercial judgment. This right is independent of other remedy provisions.

(3) Having faced the commercial decision and having pro-

"(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

"(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (RCW 62A.2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages of non-acceptance under the preceding section." *See* § 2-709.

§ 2-716(1) and (2) (Buyer's right to specific performance or replevin) state:

"(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

"(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just."

[19] U.C.C. § 2-708 provides the measure of the seller's damages for non-acceptance or repudiation by the buyer.

[20] U.C.C. § 2-709, Comments 2 and 3.

[21] *Id.*

ceeded to complete manufacture, the goods now are identified to the contract, and Section 2-709(1)(b) permits the seller to sue for the price of these identified goods.[22]

In *E-Z Roll Hardware Mfg. Company, Inc. v. H&H Products and Finishing Corp.*,[23] the failure of the seller to make this determination resulted in reduced damages. In this unreported but noteworthy case, the defendant failed to request shipment of all the articles that he had contracted to buy from the plaintiff. Financial difficulties ensued, and, after receiving payment for all goods shipped, the plaintiff-seller had to determine in what manner he would seek recovery for the raw materials that he had on hand. Upon repudiation by the buyer, he elected to cease manufacture. In the subsequent litigation, the court concluded that the plaintiff did not have an action for the price of the unmanufactured goods under Section 2-709. The seller's damage recovery was consequently limited to the provisions of Section 2-708. The court awarded him the difference between the cost of performance and the contract price including incidental losses sustained. As a result of the price structure of the contract, the plaintiff received less than he had bargained for.

The seller in *E-Z Roll* did not seek the remedy that would have made him whole. Consistent with the presumptions of the Code, had he completed manufacture, it would have been incumbent upon the buyer to show that completion and manufacture of the goods was not reasonable. One can infer from the language of the court that completion of manufacture would have been supported by commercial judgment.

The emphasis placed upon the buyer's inability to effect cover by Section 2-716 again points up the reluctance with which counsel should advise buyers not to attempt cover. The Official Comments indicate that the inability to cover is strong evidence of "other proper circumstances" justifying a demand for specific performance.[24] The inability to cover also is a prerequisite to the right of replevin, established by Section 2-716(3).[25] Thus, even though it is

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22 § 2-709(1), *supra* note 18.

23 4 U.C.C. Rep. Service 1045 (N.Y.S. Ct. 1968). The U.C.C. Reporting Service is a private service, published by Callaghan, and its citation will be used only when no other citation is available.

24 § 2-716(2). *See* note 14, *supra*, and Comment 2 to § 2-716.

25 § 2-716(3) (Buyer's right to replevin) states:

"(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered."

§ 2-502 also permits a replevin type of recovery, the prerequisite being that the

obvious that an attempt to cover will not be successful, some efforts to cover should be made in order to justify the use of other remedies.

C. *The Third Level—Traditional Remedies Based on Market Price*

Having descended from the more certain world of contract price and replacement cost (resale or cover), through the secondary level of specific action (price or the goods), the aggrieved party under Article 2 is relegated to the less satisfying but potentially profitable statutory resales and damages—the remedies that employ market price rather than actual cost as the critical figure in the damage computation.[26]

The parallel nature of these remedies is evident. The seller presumably has selected the remedy of Section 2-708, not by choice, but because the resale mechanism could not be used (or was misused) and because the buyer's wrongful behavior made it impossible to recover the price itself. The buyer, similarly, would not leap with eagerness into the terms of Section 2-713, but is driven there by his failure or inability to cover and the unfitness of the goods for specific performance. The seller acts because of the "nonacceptance or repudiation" of the buyer; the buyer acts because of "nondelivery or repudiation" by the seller. For each, damages are based upon a comparison of market price with contract price, the time for determining market price is either the time for performance or the time of first knowledge of breach and the place for determining market price is the place of tender.

The second paragraph of Section 2-708 states that the seller may recover his profit, if the damage remedy of Section 2-708 (1) is "inadequate." A comparable right may be available to the buyer for profit lost in an expected resale to a third party, if that profit can be established under the foreseeability test for consequential damages.[27] It has been suggested that Section 2-708 (2) is

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seller is insolvent under the definition of § 1-201(23). This section is discussed at pages 187 and 188 of this article.

[26] § 2-708 (Seller's damages) states in part: ". . . 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 (RCW 62A.2-710), but less expenses saved in consequence of the buyer's breach."

§ 2-713 (Buyer's damages) states: "(1) Subject to the provisions of this Article with respect to proof of market price (RCW 62A.2-723), 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 provided in this Article . . . , but less expenses saved in consequence of the seller's breach.

"(2) Market price is to be determined as of the place of tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival." .

[27] *See* U.C.C. § 2-715(2)(a).

particularly appropriate for requirement contracts,[28] and the Official Comment emphasizes that standard-priced goods may be appropriate for relief under this section.[29]

Assuming that justice does require something in addition to a resale procedure for the seller in these situations, an undesirable uncertainty has been introduced into the Article 2 remedy system by the terms in which Section 2-708 allows damages for lost profits. The necessity of showing inadequacy creates a question of fact, over and above breach and damage questions. For practical purposes, Section 2-708 applies only to the profitable contract, and the end result is the creation of an accessory action for the seller by which he both receives his profit and keeps the goods—more than the full performance he was entitled to expect. If the goods are resold in a way contrary to the requirements of Section 2-706, the seller may still deduct all costs of resale from the proceeds in showing inadequacy for Section 2-708 purposes, regardless of whether these costs are incidental damages under Section 2-710. Justice may require such an opportunity for the seller but this opportunity should not be so open to misuse. This section creates serious interpretive problems in an otherwise definite procedural provision.

Section 2-714 deserves mention here, because it provides a special remedy for the buyer.[30] This section grants the buyer a somewhat open-ended approach to damages for a breach of express or implied warranty. Note particularly that proximate damages, other than those shown by the difference between the value of the goods as accepted and as warranted, may be obtained in special circumstances *in addition to incidental and consequential damages under 2-715*. The *special circumstances* test is just as difficult as the *inadequacy* standard for the seller under Section 2-708. Damages for a breach of warranty have always been somewhat outside the statutory sales system, and there is still uncertainty concerning the relationship of tort theories and statutory warranty theories in the area of products liability.[31] The conceptual foundation of Section 2-714 is unique and judicially unexplored.

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[28] Cosway, *supra*, note 2, 36 WASH. L. REV. at 452 (1961).

[29] U.C.C. § 2-708, Comment 2. The court in Anchorage Centennial Development Co. v. Van Wormer and Rodrigues, Inc., 5 U.C.C. Rep. Service 811 (Alaska, 1968), permitted a party to recover his lost profit on the breach of sale of gold coins specially manufactured for the Alaska Centennial. That this is an obviously appropriate case does not mean that the general provision is not weak.

[30] § 2-714 (Buyer's damages for breach in regard to accepted goods) states in part: "(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

[31] *See* Rapson, *Products Liability under Parallel Doctrine: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965), 3 U.C.C. Rep. Service 672.

D. *Extraordinary Remedies—Reclamation and Recovery of Goods on Insolvency*

The final remedies provide the most obvious parallels between remedies of buyer and seller. Section 2-702 grants the seller power to reclaim goods upon discovery of the buyer's insolvency, as that term is defined by the Code,[32] within *ten days* after receipt of the goods by the buyer. Section 2-502 permits the buyer to recover undelivered goods from the seller, upon the seller's insolvency within ten days after the seller receives payment or the first installment on the price.[33] Both special powers, in addition to a ten-day limitation, are regulated by the procedural restrictions within each section.

It is apparent that the general remedies for the buyer and the seller are structured on three logical levels with definite and parallel policies and procedures. Both the buyer and the seller must exercise commercial judgment at the remedy stage, and this will depend more upon accepted business practices than upon legal rules. The lawyer will guide, but not dictate, the steps to be taken. As yet, the Washington courts have not had much opportunity to deal directly with the Code. It may generally be assumed that those decisions of the past which stress commercial reasoning rather than legal tactics will still be applicable.[34] A lawyer who does not have a working relationship with the Code will be of little help to the court or to his commercial clients. During the transition phase, the next

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[32] U.C.C. Section 1-201(23) states: "A person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law."

[33] § 2-702 (Seller's remedies on discovery of buyer's insolvency) states:

"(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (RCW 62A.2-705).

"(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or intent to pay.

"(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (RCW 62A.2-403). Successful reclamation of goods excludes all other remedies with respect to them."

§ 2-502 (Buyer's right to goods on seller's insolvency) states: "(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price."

"(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale."

[34] U.C.C. ANNOTATIONS (Rombauer, ed. 1966) sets forth an excellent section by section critique of cases with continued relevance in Washington.

five or ten years, it is particularly important to find and understand decisions from other jurisdictions. The second half of this discussion will consider some noteworthy but generally unknown decisions with a practical eye towards underlying commercial concepts and the operation of the damage formulas.

III. Remedies at Work—A Brief Look At Some Recent Developments

The Code's mandate to administer remedies liberally has not been ignored by the courts. In cases decided thus far under the Code, the damage formulas generally have been rather strictly applied, with results that are fairly predictable.[35] The following discussion is primarily intended for the practicing lawyer. Section headings are set forth so that the brief analyses in this part can be collated with the discussion in Part II and the chart in Part V of this article. No attempt has been made here to concoct an artificial thesis with which to link the following comments. Their purpose is simply to communicate and discuss some of the current developments in the law relating to sales remedies under Article 2.

A. *Section 2-615: Seller's Excuse Closely Examined*

Section 2-615 establishes certain bases upon which a seller may be excused from performance. Performance would most likely be excused, ". . . if performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made . . . ."[36] This certainly is not a new principle of contract and sales law,[37] though a businessman usually gives it greater significance than a lawyer. Codification of this standard does, however, provide a means for liberal application of the rule through the added weight of legislative intent.[38]

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[35] The courts seem to be taking a liberal attitude toward awards for attorneys' fees, although Section 2-710 and Section 2-715 (seller's & buyer's incidental damages) do not specifically include attorney's fees as commercially reasonable charges. The court in Procter & Gamble Distributing Co. v. Lawrence American Field Warehouse Corporation, 16 N.Y.2d 344, 213 N.E.2d 873 (1965), stated that legal expenses were recoverable as an item of incidental damages. A contrary conclusion was reached by the judicial officer for the United States Department of Agriculture in Quattelbaum v. Schutt, 27 A.D. 242, 5 U.C.C. Rep. Service 370 (1968). The officer stated flatly that attorney's fees are not considered consequential damages, but he did not refer specifically to either Section 2-710 or Section 2-715.

[36] § 2-615(a).

[37] *E.g.*, Adams v. Washington Brick, Lime and Manufacturing Company, 38 Wash. 243, 80 P. 446 (1905).

[38] Uniform Commercial Code Annotations at 140 (Rombauer, ed. 1966).

In *United States v. Wegematic Corporation*,[39] the court, using 2-615 for analogy purposes only, declined to adopt the liberal approach which this section apparently intends, on the ground that the result would have been commercially unjustified. The defendant had entered into a contract to provide the Federal Reserve Board with a revolutionary electronic digital computing system. Subsequently, it became apparent to the defendant that engineering difficulties were going to make it impossible to deliver the computer. Cancellation of the contract was requested and denied. The Federal Reserve Board then purchased the necessary equipment from a competitor at an increased cost and obtained a judgment against the defendant for the cost difference and for the expenses incurred by the Board in preparing for the defendant's system (a total of $235,806.00) at six per cent interest. On appeal, the court reviewed prior federal law in this area and, in reliance upon the reasoning of Section 2-615, affirmed the judgment. The appellate court was impressed by the fact that a liberal construction of the section would require the United States, as the purchaser, to assume a portion of the risk of completion of the contract which would ordinarily rest upon the shoulders of the seller.

In *Security Sewage Equipment Co. v. McFarren*,[40] the possibility that a local department of health might not approve the plans for a sewage treatment plant was not deemed such an unforeseen contingency as to excuse a seller's obligations. According to the Ohio court, the risk of such non-approval rests upon the seller, rather than the purchaser, since the seller has a greater knowledge of the engineering problems involved and a greater obligation to obtain acceptance. Therefore, inability to deliver because of engineering difficulties is not a sufficient excuse.

In a reparation proceeding before the Department of Agriculture, a tender of substituted performance following a claim of inability to deliver[41] was construed as a condition precedent to a claim of excuse.[42] Section 2-615 was not applied in that proceeding, but it was obvious that the judicial officer was not inclined to find any basis for shifting the burden of responsibility from the seller to the buyer.

Despite the obvious possibility of using Section 2-615 to align

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39 360 F.2d 674 (2d Cir. 1966).

40 14 Ohio St. 2d 251, 5 U.C.C. Rep. Service 495 (1968).

41 A tender of substituted performance is required in certain circumstances by U.C.C. § 2-614.

42 Corruso—Rinella—Battaglia Co., Inc. v. Delane Corp. of America, 25 A.D. 1098, 3 U.C.C. Rep. Service (1966).

equities between the parties, the courts appear reluctant to embark upon a liberalizing trend. Professor Cosway's apparent invitation to broaden the concept has not yet been accepted.[43] This section is likely to relieve a seller from the type of liability placed upon him in such cases as *Issacsen v. Starret*,[44] where the seller was held to be responsible for performance despite an earthquake and a strike. Nevertheless, the pre-Code decisions in Washington have not yet diminished in importance.[45] Expression of the principle of seller's excuse from performance in statutory form has not broadened its scope. The courts do not yet appear inclined to use the phrase *commercial impracticality* to shift any of the contractual burden to the buyer, and the standard is still the familiar *contemplation of the parties* test. That is, if the event upon which seller bases his request for excuse was reasonably to be contemplated by the parties, at the time of contracting, then he is held to performance of his promise.

B. *Section 2-702: Seller's Reclamation Right Severely Limited*

The right of a seller to reclaim goods under Section 2-702[46] is subject to the rights of a buyer in the ordinary course of business, a good faith purchaser or a lien creditor.[47] Creation of the right

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[43] Cosway, *supra* note 2, 36 WASH. L. REV. 91 (1961), evidently desires the concept of impracticality to be broadened. The emphasis of the Code is upon a commercial approach (*see* Comment 3 to § 2-615) but it does not appear that the Official Comment rejects an equivalence to things past. To do so would thrust the courts further into the performance area of the transaction, where commercial expectations, not judicial reasoning, are foremost. Certainty is particularly desired at this point. Therefore, Professor Cosway's call for liberality seems somewhat non-commercial and has not been heeded as yet by the courts.

[44] 56 Wash. 18, 104 P. 1115 (1909).

[45] *See* decisions referred to in Cosway, *supra* note 2, 36 WASH. L. REV. 91 (1961).

[46] *See* text *supra*, Part II (D).

[47] The Section is set forth at note 33 of this article. The words "or lien creditor" have been deleted in the 1966 amendments to the official text of the U.C.C. The Permanent Editorial Board stated the reason for this deletion in the following note:

PERMANENT EDITORIAL BOARD NOTE ON 1966 AMENDMENT

Source: California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York.

Reason for Change: The cross-reference is confusing, since the only reference to "rights of a lien creditor" found in Section 2-403 is a further cross-reference to Articles 6, 7 and 9, and the relevance of those Articles is not apparent. *In re Kravtiz*, 278 F.2d 820 (3d Cir. 1960), held that the pre-Code law of Pennsylvania was carried forward by the Code, that under that law a defrauded seller was subordinated to a lien creditor who extended credit to the buyer after the goods were delivered to him, and that the buyer's trustee in bankruptcy as an "ideal lien creditor" had the rights of such a lien creditor. The result in Pennsylvania is to make the right of reclamation granted by this section the pre-Code law was otherwise, and the right of granted by this section almost entirely illusory. In most states the pre-Code law was otherwise, and the right of reclamation seems to be fully effective. Moreover, *Finance Corp. v. Edwards*, 304 F.2d 224 (9th Cir. 1962), holds that the trustee in bankruptcy cannot assert the right of such a class of subsequent creditors where there are no actual creditors in the class. Six states have resolved the problem by deleting the words "or lien creditor" from this

indicates that a defrauded seller is to be given preference, as to certain goods, over the general creditors of the insolvent. As a matter of commercial policy, a reclaiming seller also should be preferred over a secured party, particularly when the secured party claims the goods under an after-acquired property clause. To bring the proceeds of the goods within the security interest, simply because the secured party has perfected his claim over after-acquired property by checking the proceeds box on the Financing Statement, produces a commercial injustice. These cautionary steps were taken by the secured party long before the reclaiming seller's goods were even in existence and, in effect, make it impossible for the seller to assert the right granted by this section. The statute does not require this result.

In the case of *In re Hayward Weelen Company*,[48] however, a referee in bankruptcy concluded that an inventory financier who had a perfected security interest in after-acquired property prevails, as a good-faith purchaser, over the rights of sellers attempting to reclaim under Section 2-702. Here, three sellers had sold wool to the bankrupt and attempted to reclaim the goods within ten days after delivery. Each seller had complied with the provisions of Section 2-702 and there was no question about the buyer's insolvency. The referee showed a definite preference for the secured party and had no trouble finding that the secured party was a good-faith purchaser for value, as defined by the Code,[49] with the favored position granted by Section 2-403 over a reclaiming seller:

> There appears to be no decision arising under the Uniform Commercial Code which considers or resolves the conflicting interests of a seller of goods to an insolvent buyer and the holder of a security interest in the buyer's after-acquired property. Two commentators have expressed the opinion that the seller's right of reclamation is inferior to a perfected security interest in the goods arising under an after-acquired property clause. Hogan, The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, 38 BUL Rev 571, 580-581; Note, Selected Priority Problems in Secured Financing under the Uniform Commercial Code, 68 Yale LJ 751, 758.
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> While the rule at comon law may have been different, under the Uniform Sales Act (Section 76) and the Uniform Commercial Code (Section 1-201) (44) (b) an antecedent debt constitutes value. I am constrained to conclude, therefore, that Textile, as the holder of a security interest in the debtor's after-acquired inventory, acquired title

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section, and there seems to be no other practicable route to uniformity among the states.

This text, of course, is advisory only and has no relation to our statutes. For further discussion of the *Kravitz* problem, *see* Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14 (1962), in UNIFORM COMMERCIAL CODE HANDBOOK (1964).

[48] 3 U.C.C. Rep. Service 1107 (D. Mass. 1967).

[49] U.C.C. §§ 1-201(32), (33).

> to the goods remaining in Hayward's possession, as a good-faith purchaser for value, and that Textile's rights to such goods are superior to those of the reclamation petitioners. It follows that the reclamation petitions must be denied.[50]

Section 2-702 does not give the defrauded seller the protection he would receive if he had framed his sale as a purchase-money *secured* transaction. If a purchase-money secured party properly complies with the necessary notice provisions, his purchase-money security interest will prevail over the after-acquired claims of a prior secured party even though the prior secured party has perfected his security interest.[51] As a matter of policy, it would seem that the same rights should be extended to a defrauded seller, so long as both the seller and the purchase-money secured party comply with the applicable procedural framework.[52] Goods delivered to an insolvent buyer and thereupon seized by a secured party under his after-acquired property clause certainly constitute a windfall to the secured party. A secured party, particularly one with an after-acquired property clause, usually is fairly close to the debtor's financial condition. If, in fact, a secured party knows of the insolvency, it is more than merely arguable that he should be estopped to assert his privileged status.

In the *Hayward* case, the wool had been processed in the ordinary course of business and money presumably had taken its place. Technically, the referee could have limited the reclamation right to the goods themselves. Such a result would force sellers to police their credit transactions to insure that payment is received before or coincident with disposal of the goods by the buyer. Although a decision based on such an approach still might not have been commercially proper, it would have been supported by a literal interpretation of Section 2-702.

Since Section 2-702's reference to the rights of a good-faith purchaser or lien creditor is qualified by the phrase, "Under this Article (RCW 62A.2-403) . . . ," there should be serious question whether a secured party under Article 9 should gain greater protection than another good-faith purchaser under Article 2. Admittedly,

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[50] *Supra*, note 48, at 1111.

[51] Section 9-312 permits a purchase money security interest to prevail over a conflicting and perfected security interest in the same collateral if certain notice and perfection conditions are met. The reach of an after-acquired property clause is described by Section 9-204.

[52] An attempt to devise magical language, turning a cash transaction into a secured transaction if payment is not received, is not the answer to this problem. The language suggested in Fisher, *U.C.C. Brief No. 9: The Busy Lawyer's Guide to Sales*, 14 PRAC. LAW. 56 (1968) does not solve filing, perfection and goods classification problems involved in any secured transaction.

the Official Comments state that the reference to Section 2-403 (4) incorporates by reference rights given to purchasers and lien creditors by Articles 6, 7 and 9.[53] However, if Section 2-702 is to have any substance, it would seem more logical to limit the interpretation of good-faith purchaser to that involving third parties purchasing from a buyer, as actually contemplated by Section 2-403. Certainly, the right of a seller to reclaim goods constitutes preferential treatment. But it is just as preferential, and less just, to permit a secured party to include goods within the grasp of his after-acquired security interest which, according to Section 2-702, have been obtained through fraudulent representations to the seller by his debtor. The Code does not require the *Hayward* result; indeed, a contrary result would seem more reasonable.

The referee in *In re Behring & Behring*,[54] preferred the claim of a trustee in bankruptcy to goods for which the seller had made an oral demand of reclamation. This oral demand was made prior to the filing of the petition in bankruptcy. Although physical possession of the goods is not required to comply with Section 2-702, the referee held that something more than an oral demand for the return of the goods is required to comply with the *demand* phraseology of the section. In *Stumbo v. Paul B. Hult Lumber Company*,[55] the sellers' claim of a right, under Section 2-702 (3), to take ahead of a secured party with a perfected security interest on inventory, was disallowed because the sellers did not make a proper demand within ten days after the buyer received the goods. These two cases indicate that the seller's assertions of reclamation rights will be strictly viewed and that demands for reclamation must be both timely and in writing. The seller would be wise to send his demand by certified mail, return receipt requested, so as to have proof of proper demand.

In substance, therefore, the right of a seller under Section 2-702 is almost as shaky as his buyer's credit. In *In re Mel Golde Shoes, Inc.*,[56] the appellate court had to rely on common law principles in order to conclude that a reclaiming seller prevailed over a general creditor attaching the goods before the reclamation right was asserted. In reaching the commercially correct result, the court noted the confusion caused by the absence of any substantive scope for the rights of lien creditors in Article 2 and the referral in Section 2-403 (4) to the definition of lien creditor in Article 9 (9-301). The

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53 U.C.C. § 2-702, Comment 3 states in part: "Moreover, since Section 2-403(4) incorporates by reference rights given to other purchasers and to lien creditors by Articles 6, 7 and 9, such rights have the same priority."

54 5 U.C.C. Rep. Service 600 (N.D. Tex. 1968).

55 444 P.2d 564 (Ore. 1968).

56 403 F.2d 658 (6th Cir. 1968).

case of *In re Kravitz*,[57] would permit a trustee in bankruptcy to prevail if the petition is filed within the ten-day period.[58] Elimination of the clause "lien creditor" (and presumably the *Kravitz* result), as proposed by the Permanent Editorial Board, would not strengthen the section substantially. The Code has approached the problem too diffidently and the courts, with regard to secured parties, do not seem inclined to strengthen judicially the Section 2-702 remedy.

C. *Section 2-706: Application of Commercial Reasonableness*

As described earlier, Section 2-706 is the primary remedy available to a wronged seller. If the resale mechanism is properly applied, he will have the best and most easily proven damage award. *Foster v. Colorado Radio Corporation*[59] illustrates the problem of the proper application of the resale principle when only a portion of the contract for which damages are sought is within the coverage of the Code. The appellant breached her promise to purchase certain assets of a New Mexico radio station and a substantial award was granted pursuant to a stipulation that damages would be measured by the difference between the resale price and contract price. Her contention on appeal was that she did not receive notice of resale and that, therefore, the appellee was not entitled, as a matter of law, to the award given by the trial court. The court acknowledged that Section 2-706 requires that notice be given to the debtor of any private, negotiated resale, and it further acknowledged that this is a condition precedent to recovery. However, only a portion of the contract was found to relate to assets considered *goods* under the Code and the court found that these assets amounted to about ten per cent of the value of the total assets sold. The award was reduced only by an amount equal to that sum.

On the other hand, the court was unwilling to accept the appellee's theory that the sale of the *goods* was only incidental to the contract's main purpose of transferring the station as a going concern. The Code applies to *any* goods considered moveable under its definition.[60] Any award related to those goods, no matter what relationship the goods bear to the total value and purpose of the contract, must comply with Article 2, specifically Section 2-706, if the damage formula set forth in that section is to be used.[61]

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[57] 278 F.2d 820 (3d Cir. 1960).

[58] *See* note 47 *supra*.

[59] 381 F.2d 222 (10th Cir. 1967).

[60] *See* U.C.C. § 2-105.

[61] For an extensive review of the basic concept of commercial reasonableness under § 2-706, developed by analogy to § 9-504 (the basic section on disposition of

Under the Uniform Sales Act in Washington, judicial construction could shift the burden of proof between the seller and the buyer, depending upon location of title.[62] Title to the goods now has only a limited purpose,[63] and has no relation to the remedy. No longer will it be the determining factor. In *Old Colony Trust Company v. Penrose Industries Corporation*,[64] the court concluded that the seller, in addition to the procedural steps of Section 2-706 and Section 9-504, must show honesty in fact in his conduct and the transaction concerned, the good-faith standard of Section 1-201. Once that is accomplished, the burden of showing the non-reasonableness of a disposition falls upon the complaining party. This analysis closely follows the apparent commercial intent and responsibility of the parties and a contrary conclusion would not honor the commercial foundation of the Code.

D. *Section 2-711: Cancellation and Cure*

On the buyer's side, Section 2-711 has some substantive content, in addition to its primary index function: it clearly establishes the buyer's cancellation power and subsequent damage rights.[65] Cancellation is not equated with the older concept of rescission. The buyer is not required to tender the goods as a condition precedent to the exercise of any remedy, nor is his cancellation power affected by the old problem of whether a remedy at law exists. The exercise of a remedy, including cancellation, is not an equitable action and no election of remedies is involved.[66]

The operation of this section is complicated by reference to *rightful* rejection or revocation of acceptance by the buyer.[67] His right to cancel the contract and then seek other damages arises only after this foundation of rightfulness is established. Both rejection and, to a certain extent, revocation of acceptance involve the parallel right of the seller to cure.[68] Consequently, the practical question is raised, whether a buyer can cancel a contract immediately, no matter what the cause, without giving the seller a right to cure the defect.

This question is illustrated by the case of *Zabriskie Chevrolet*,

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collateral under Article 9), *see* Old Colony Trust Co. v. Penrose Industries Corp., 4 U.C.C. Rep. Service 977 (E.D. Pa. 1968). This case clearly placed the burden to establish the non-reasonableness of a resale upon the complaining party.

62 *See* Cosway, *supra* note 2, 36 WASH. L. REV. 449 (1961).

63 *See* U.C.C. § 2-401.

64 *Id.*

65 *See* text at 179-80.

66 *See* Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967).

67 §§ 2-601, 2-602 and 2-608 define these concepts.

68 U.C.C. § 2-508.

Inc. v. Smith,[69] where an automobile had been sold to the defendant under a purchase agreement. The defendant's wife took possession of the vehicle and attempted to drive it home that evening. However, substantial defects became apparent less than a mile from the showroom. The defendant stopped payment on his check for the balance of the purchase price and notified the plaintiff to pick up the car the next morning. The problem was found to be a defective transmission, and the plaintiff replaced it with another transmission removed from a new vehicle then on the plaintiff's showroom floor. Defendant refused to take delivery of the repaired vehicle and maintained that the contract was cancelled. The court concluded that the obvious breach of warranty had given the defendant the right to claim a breach of contract. Whether defendant is considered never to have accepted the vehicle or to have revoked his acceptance of it, there was no question that his prompt action fully indicated his intention to refuse acceptance of the car and allowed him to cancel the contract.

The court's decision does not indicate any awareness of one substantial issue in the case, that is, whether the seller was given a proper opportunity to cure and whether the defendant should have accepted the cured vehicle. In interpreting Section 2-508,[70] the court should have determined whether the time for performance had expired. If that time had expired, then the seller's right to cure was extinct regardless of what type of transmission was tendered. Clearly the seller had no reasonable grounds to expect that the buyer would accept a car with a defective transmission, but did he not have the right to expect that the buyer would accept the car with a replacement transmission? The court felt that its function was to decide whether cure was accomplished by the tender of the substituted transmission, and it assumed that the substituted transmission was not equivalent in value to a transmission coming from the factory. Therefore, the defendant would not have had the vehicle that he intended to purchase, even if cure had been allowed.

It appears that the court in *Zabriskie* tried to treat the problem as an equity matter. In doing so, it overlooked the commercial expectations of both parties and, particularly, the commercial importance of a warranty obligation of a seller. This obligation places on the seller the responsibility to replace defective parts. Is there not also, even in equity, an element of responsibility on the buyer to accept the repaired vehicle? It is submitted that factors of this nature should be considered and analyzed by the courts in determin-

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[69] 99 N.J. Super. 441, 240 A.2d 195 (1968).

[70] The section is set forth in note 5, *supra*.

ing the proper approach to the commercial steps taken by the parties. A buyer should consider the cure powers of a seller before blithely cancelling the contract.[71]

E. *Sections 2-712 and 2-713: Failure to Cover and the Availability of Alternate Relief*

Section 2-712 states that a buyer's measure of damages may be the difference between the cost of cover and the contract price.[72] In *Draper v. Minneapolis Moline, Inc.*,[73] the court emphasized that "cover" required a purchase or a contract to purchase goods, and that it is not satisfied simply by an estimate of what the purchase price would have been if cover had been accomplished. In this case, a dealer contracted to sell a tractor to a farmer; the tractor, however, was subject to a prior security interest held by the manufacturer, and the manufacturer foreclosed on the dealer before delivery of the tractor to the farmer. The trial court found first that the tractor was sufficiently identified to the contract under the provisions of Section 2-501,[74] to give the farmer a special property interest, and then turned to a consideration of damages. The appellate court approved an award of $397.00 for unanticipated expenses incurred for spring plowing, but it rejected the trial court's award of $2000.00 for cover since the award was based solely upon an estimated purchase price for another tractor.

The farmer had standing to sue the manufacturer because of Section 2-722, a technical section giving a right of action to either party to a contract for sale who has a special property interest in the goods, if that contract is interfered with by a third party (in this case, the secured party). Section 2-722, however, does not establish any measure of damages. There is a question, then, concerning what section and what measure of damage would have been available to the farmer, since he should have covered properly

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[71] Cancellation was awarded in Graulich Caterer, Inc. v. Hans Holterbosch, Inc., 5 U.C.C. Rep. Service 440 (N.J. 1968). This case arose under § 2-612, the installment contract provision of the Code, and involved the unsuccessful tender by plaintiff of two sets of foods for use in a pavilion at the New York World's Fair. Since neither set of tendered food conformed with the original sample, the court found that the contract was breached under the provisions of § 2-612 and the cancellation was proper under § 2-711. Cancellation was obtained only after several attempts to cure had been unsuccessful.

[72] § 2-712 is set forth in note 13, *supra*.

[73] 5 U.C.C. Rep. Service 972 (Ill. App. 1968).

[74] Section 2-501 establishes the concept of identification and the creation of a special property interest in the buyer. The circumstances creating "identification" fall far short of the old passage of title theory; in this instance, identification occurred promptly upon execution of the contract, as the tractor already was in the dealer's possession.

under Section 2-712. Failure to attempt cover for the goods eliminates the buyer's replevin right.[75] A tractor is not unique; therefore, specific performance is not available. Section 2-713 would seem to be the most appropriate remedy provision. Assuming that the measure of damages provided by this section would be incorporated into the right of action against the third party established by Section 2-722, the buyer would be entitled to the difference between the market price at the time the buyer learned of the breach and the contract price, together with any incidental and consequential damages. Failure to attempt cover should not bar him from this remedy.

Section 2-723 provides for proof of the market price, and the buyer in *Draper* should have been able to achieve a greater monetary reward, assuming there was a significant difference between his contract price and the market price.

IV. Conclusion

Unless a working relationship can be established with the remedy provisions of Article 2, analysis of the underlying commercial concepts is very difficult. The courts, as yet, have strictly applied the damage formulas. Novel approaches and liberal results have not been popular. At this point, it is safe to say that the courts, in applying Article 2, have sought to preserve commercial expectations in both the formulation and remedy aspects of a transaction. Such an emphasis may result in more cases being limited, as judicial precedent, to their particular facts. But the parties to a transaction are concerned only with commercial results, and not with trends in the law. The remedy provisions may always be a frustrating area for lawyers, because of the absence of "controlling" cases, but the confidence of businessmen in the commercial soundness of their transactions will be increased. The latter accomplishment illustrates the true value of the Uniform Commercial Code.

V. Comparative Chart of Seller's and Buyer's Remedies

This chart provides a quick comparison of the standard remedies of the seller and the buyer, listed in a descending order of desirability. A brief statement of the basic measure of damages set forth by each section is included, together with the condition precedent where applicable.

Seller's Remedies	*Buyer's Remedies*
Index section: 62A.2-703	Index section: 62A.2-711

[75] *See* U.C.C. § 2-716.

A. Statutory resale of goods—62A.-2-706 (Contract price less resale price.)	Purchase of replacement goods (cover) —62A.2-712 (Cost of cover less contract price.)
B. Action for the price—62A.709 (Resale cannot be accomplished reasonably.)	Specific Performance of Contract—62A.-2-716 (Requires that goods be unique, or "in other proper circumstances.")
C. Secondary statutory resale—62A.2-708 (1) (Difference between market price at time and place of tender and unpaid contract price.)	Damages for non-delivery or repudiation—62A. 2-713 (Difference between market price upon learning of breach and contract price.)
D. "Quick" reclamation of goods—62A.2-702 (Upon discovery of buyer's insolvency; demand within 10 days of receipt of goods.)	"Quick" recovery of goods—62A.2-502 (Seller insolvent within 10 days after receipt of first installment of price; requires tender of unpaid portion of price.)