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## FINDING THE "LOST VOLUME SELLER": TWO INDEPENDENT SALES DESERVE TWO PROFITS UNDER ILLINOIS LAW

Section 2-708(2) of the Uniform Commercial Code<sup>1</sup> (U.C.C.), permits a seller to recover his "lost profit"<sup>2</sup> on a sale when the buyer breaches by non-acceptance or repudiation and a market resale remedy is inadequate.<sup>3</sup> A typical claim for lost profits involves the retail merchant<sup>4</sup> who resells the goods for the same price that the original

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1. U.C.C. § 2-708(2) (1972). The Uniform Commercial Code ["U.C.C." or "the Code"] was drafted between 1944 and 1950 under the joint sponsorship of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 3-4 (3d ed. 1988). The U.C.C. was a response to a growing interest in commercial law reform that was triggered by a lack of national uniformity (for example, only two thirds of the states had adopted the Uniform Sales Act of 1906). *Id.* at 3. The co-sponsors named Karl N. Llewellyn "Chief Reporter" of the Code; he was also the principal draftsman of the Sales Article (Article 2). *Id.* at 3-4. The U.C.C. has been a major success in achieving nationwide acceptance; by 1968, 49 states, the District of Columbia, and the Virgin Islands were operating under the Code. *Id.* at 5. For a brief review of the U.C.C.'s birth, written by the man whose idea it was to create a "comprehensive" commercial code, see Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

2. See *infra* note 39 and accompanying text, distinguishing "profits" as a general remedy for sellers from "profits" as consequential damages.

3. Section 2-708 states in full:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-703), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach. (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

U.C.C. § 2-708.

4. The other major category of potential "lost-volume sellers" is manufacturer-sellers. The particular circumstances of both manufacturer-sellers and retail sellers will be extensively discussed throughout this comment. The availability of a section 2-708(2) profit remedy to other non-lost volume sellers is a topic beyond the scope of this comment. For general discussions of section 2-708(2), see J. WHITE & R. SUMMERS, *supra* note 1, at 313-32; Sebert, *Remedies Under Article Two Of The Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360 (1981). For an argument that 2-708(2) is the seller's primary damage remedy under Article 2, see Childres & Burgess, *Seller's Remedies: The Primacy of UCC 2-708(2)*, 48 N.Y.U. L. REV. 833 (1973). For student articles on recovery of lost profits under section 2-708(2), see Comment, *An Economic View of U.C.C. and the Identification of the Lost-Volume*

buyer had agreed to pay.<sup>5</sup> Although the breached sale has been replaced, the retailer correctly observes that he is not in as good a position as performance by the buyer would have put him in because he has lost the profit from one sale.<sup>6</sup>

Unfortunately, section 2-708(2), which provides a remedy for such "lost-volume sellers,"<sup>7</sup> does not precisely indicate to whom this remedy is available.<sup>8</sup> This is of special concern in Illinois because the United States Court of Appeals for the Seventh Circuit, in *R.E. Davis Chemical Corp. v. Disonics, Inc.*,<sup>9</sup> recently held that under Illinois law profits are indeed available as damages to sellers who can show that the buyer's breach caused them to lose sales volume.<sup>10</sup> In this case of first impression,<sup>11</sup> the court also adopted a three-part

*Seller*, 49 ALBANY L. REV. 889 (1985); Note, *Seller's Recovery of Lost Profits for Breach of a Sales Contract: Uniform Commercial Code Section 2-708(2)*, 11 WM. MITCHELL L. REV. 227 (1985) (lost profit damages an underused remedy available to many sellers).

5. Where the refused goods are resold, the usual remedy would be under section 2-706 (contract price less resale price); however, when the resale price equals the contract price, the formula in section 2-706 will produce only nominal damages. If the goods have not been resold, section 2-708(1) provides a market price-contract price differential as the seller's remedy; again, however, if the original sale was made at the market price, this formula yields only incidental damages. The failure of the section 2-706 and 2-708(1) remedies to produce significant damages is not, alone, reason to approve a profit formula. It may simply indicate that the seller has suffered no harm. HARRIS, *A Radical Restatement of the Law of Sellers' Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 85 (1965).

6. See J. WHITE & R. SUMMERS, *supra* note 1, at 315. For other general explanations of the lost-volume phenomenon and section 2-708(2), see BENDER'S U.C.C. SERVICE § 13.07[4] (1987); W. HAWKLAND, HAWKLAND UCC SERIES § 2-708:04 (1986); R. ANDERSON, ANDERSON ON THE U.C.C. §§ 2-709:21, 25 (1983).

7. The term "lost-volume seller" was coined by Professor Robert Harris, who in the early 1960s authored a series of articles contrasting results in various jurisdictions under the Uniform Sales Act and under the newly enacted Article 2 of the U.C.C. See HARRIS, *supra* note 5, at 97-98; see also HARRIS, *A Radical Restatement of the Law of Seller's Damages: New York Results Compared*, 34 FORDHAM L. REV. 23 (1965); HARRIS, *A Radical Restatement of the Law of Seller's Damages: Michigan Results Compared*, 61 MICH. L. REV. 849 (1963); HARRIS, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 MICH. L. REV. 577 (1962). Unless otherwise noted, citations to Harris are to the 1965 Stanford article. See *supra* note 5.

8. The Code's text only states that the profit remedy is available if the contract price-market price differential of section 2-708(1) is "inadequate to put the seller in as good a position as performance would have done." U.C.C. § 2-708(2).

9. 826 F.2d 628 (7th Cir. 1987).

10. *Davis*, 826 F.2d at 681. The Illinois legislature adopted section 2-708 of the 1958 Official U.C.C. text without change. See ILL. REV. STAT., ch. 26, ¶ 2-708 (1987). Although the *Davis* case arose under the U.C.C. as enacted by Illinois, defining the lost volume seller is a problem of more general concern, both because Article 2 (including 2-708), is the law in 49 states and because every appellate court considering the question has permitted lost-volume sellers to recover profit under section 2-708(2).

11. The *Davis* court expressed surprise that, "given its importance," no Illinois courts had yet decided the question of profit damages for the lost-volume seller. *Davis*, 826 F.2d at 681. See *infra* notes 60-72 and accompanying text for a discussion of the *Davis* case.

test to determine who is a lost-volume seller entitled to the profit remedy of section 2-708(2).<sup>12</sup> Like many other courts and commentators who have dealt with this question, however, the seventh circuit has embraced a test that may well overcompensate many sellers who could be inaccurately labeled "lost-volume" sellers.

This comment will therefore discuss the general problem of the lost-volume seller and offer a proposal to aid judges and juries in making the difficult determination of whether a given seller has indeed lost volume. First, this comment reviews the pre-Code history of lost profit damages—under both the Uniform Sales Act and the common law. This will provide the historical background against which section 2-708(2) was drafted. Second, this comment traces the legislative history of section 2-708(2) and the problems of statutory construction it presents, concluding that the true lost-volume seller is properly entitled to a profit remedy. Third, this comment demonstrates the functional inadequacy of the various definitions of lost-volume seller that courts and commentators have advanced, concluding that a new test for "lost-volume seller status" is needed. Fourth, this comment offers a new two-part test for solving questions of lost-volume seller status. Finally, the comment concludes that Illinois courts should adopt such an approach to ensure that the alternative damages formula of section 2-708(2) is available only in appropriate cases of true lost-volume.

## I. PRE-CODE TREATMENT OF LOST-VOLUME SELLERS

### A. *Lost-Profit Damages At Common Law*

The general goal in awarding damages to sellers for a buyer's non-acceptance of goods is to put the seller in as good an economic position as the buyer's performance would have.<sup>13</sup> In the sale of goods, this is ordinarily accomplished by the general formula that a seller's damages equal the difference between the contract price and the resale price of the goods retained as a result of the breach.<sup>14</sup> Arthur Corbin, however, recognized that such a formula "works" only if the buyer's rejection of the goods makes possible a replacement sale "that he [the seller] could not have made *except for the rejection*."<sup>15</sup> Where the seller is a manufacturer with the capacity to

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12. *Id.* at 684-85. See *infra* notes 68-73 and accompanying text for a discussion of the *Davis* court's lost-volume test.

13. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 591 (3d ed. 1987); accord U.C.C. § 1-106; RESTATEMENT (SECOND) OF CONTRACTS §§ 344(a), 347, comment a (1979).

14. See U.C.C. § 2-706. If the goods are not resold, however, the seller would have to proceed under section 2-708(1) (market price-contract price differential).

15. 5 A. CORBIN, *CORBIN ON CONTRACTS* 541 (1964) (emphasis added).

fill all probable factory orders,<sup>16</sup> or a dealer who, through his producer, can supply all obtainable customers,<sup>17</sup> a buyer's refusal to accept the goods does not itself make possible a second sale in which the profit lost by the buyer's breach can be replaced.<sup>18</sup> Every sale after the breach would have been made *even if the original buyer had fully performed under the contract*.<sup>19</sup> The second sale is not, therefore, a replacement sale and the only savings to the seller that the buyer's breach makes possible is the cost of producing or obtaining the goods which are the subject of the resale.<sup>20</sup> The seller has, however, lost the contract price. The difference between these two figures (contract price and cost) is the seller's "gross profit" on the sale, and is the proper measure of recovery under traditional contract damages theory.<sup>21</sup>

This general principle of damages is aptly demonstrated by the "duty" to mitigate damages in breach of employment contract cases.<sup>22</sup> Where the contract is for full-time personal labor, a court will offset the employee's damages for an unlawful discharge by the amount he did earn, or could have earned with reasonable effort, during the remaining term of the breached contract.<sup>23</sup> The justifica-

16. *Id. See, e.g.,* Teradyne, Inc. v. Teledyne Indus., Inc., 676 F.2d 865 (1st Cir. 1982) (transistor systems); City of Louisville v. Rockwell Mfg. Co., 482 F.2d 159 (6th Cir. 1973) (parking meters); Nederlandse Draaindustrie NDI B.V. v. Grand Pre-Stressed Corp., 466 F. Supp. 846 (E.D.N.Y.), *aff'd*, 614 F.2d 1289 (2d Cir. 1979) (steel).

17. A. CORBIN, *supra* note 15, at 541. *See, e.g.,* Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251 (4th Cir. 1974) (sweaters); Kaiserman v. Martin J. Ain, Ltd., 112 Misc.2d 768, 456 N.Y.S.2d 135 (Sup. Ct. 1981) (cars); Neri v. Retail Marine Corp., 30 N.Y.2d 393, 285 N.E.2d 311 (1972) (boats).

18. A. CORBIN, *supra* note 15, at 541-42.

19. *Id.* at 542. As a result of the breach, the seller is able to make *one* sale without any production or inventory cost. Therefore, he ought to be able to recover his contract price less this saved "procurement cost."

20. For manufacturers, the cost of obtaining the goods is the cost of production (labor and materials, but not fixed overhead). *See* Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795 (3d Cir. 1967). For dealers, the cost of obtaining the goods is generally the "wholesale price." *See also* A. CORBIN, *supra* note 15, at 542.

21. *Id. See, e.g.,* Anderson v. United States, 51 Ct. Cl. 228 (1916) (cement); Nelson Equip. Co. v. Harner, 191 Or. 359, 230 P.2d 188 (1951) (asphalt paver); Wilhelm Lubrication Co. v. Bratrud, 197 Minn. 626, 268 N.W. 634 (1936) (oil). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 347, comment f (1979) (volume seller's damage measured by the *net* profit lost on a sale).

22. "Duty" to mitigate is an unfortunate and misleading phrase because the innocent employee who "breaches" such a duty incurs no liability to the employer who breached the contract. The employee is "simply precluded from recovering damages for loss that he could have avoided." E. FARNSWORTH, CONTRACTS 859 (1982). Justice Cardozo once said that such an employee loses his right to recover because "he has broken the chain of causation" by unreasonably rejecting substitute employment, and any loss thereafter suffered is caused by his own action rather than by his former employer. McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 358-59, 169 N.E. 605, 609-610 (1930) (Cardozo, J., concurring).

23. J. CALAMARI & J. PERILLO, *supra* note 13, at 613, 616; E. FARNSWORTH, *supra* note 22, at 862; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 350, comment c and

tion for this subtraction from the value of the employer's promised performance is that *but for* the breach, the employee could not have earned the money from the second job. If these earnings are not subtracted from his measure of recovery, the remedy would put the employee in a better position than the employer's faithful performance under the contract would have put him in. This result is clearly unacceptable under the general theory of contract damages.<sup>24</sup>

Where the contract is for the performance of a specific task, however, one cannot assume that the contractor-employee could not perform *both* the breached contract and a subsequent contract.<sup>25</sup> Therefore, it would be inequitable to use any subsequent, additional contracts to offset the innocent employee's recovery (and thus benefit the wrong-doing employer), unless the employee clearly could not have performed those contracts *but for* the owner-employer's breach.<sup>26</sup> Similarly, in the case of the lost-volume seller, a resale (at the identical price) after the original buyer's breach should not eliminate the seller's damages because the seller would have made the

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illustration 8 (1979); accord *Godson v. McFadden*, 162 Tenn. 528, 39 S.W.2d 287 (1931); *Sutherland v. Wyer*, 67 Me. 64 (1877).

24. See *supra* text accompanying note 13 for an explanation of the goal in awarding general damages for breach of contract.

25. Where such non-exclusive contracts are involved, the contractor is free to enter as many contracts as he can perform, regardless of whether any one of them are breached; the full-time employee who has been discharged, however, can only obtain *other* employment *because* the employer breached. See J. CALAMARI & J. PERILLO, *supra* note 13, at 613-14: "Construction contracts are non-exclusive and a construction contractor's damages are not normally reduced by any earnings attributable to contracts made subsequent to the breach." Farnsworth observes that courts will often assume that a building contractor could have and would have performed both contracts. E. FARNSWORTH, *supra* note 22, at 852-53 n.16; see also RESTATEMENT (SECOND) OF CONTRACTS § 350, comment d, illustration 10 (1979).

26. See, e.g., *Wired Music v. Clark*, 26 Ill. App. 2d, 413, 168 N.E.2d 736 (1960) (damages for breach not reduced by new contract for piped-in music at same location); *M. & R. Contractors and Builders, Inc. v. Michael*, 215 Md. 340, 138 A.2d 350 (1958) (no reduction in damages for subsequent transactions where later sales by builder not a result of the breach); *Koplin v. Faulkner*, 293 S.W.2d 467 (Ky. 1956) (profit made by oil driller from other work after breach not relevant in calculating damages). Where, however, the subsequent construction contract is for the *same* performance, the contractor should not be allowed the benefit of both contracts; but for the breach, the contractor could not have made the subsequent contract, which makes it a true substitute or replacement contract. *But see Grinnell Co. v. Voorees*, 1 F.2d 693 (3d Cir.), *cert. denied*, 266 U.S. 629 (1924) (no subtraction from equipment installer's damages when breached contract with bankrupt owner was replaced by contract with subsequent owner for same performance); see also *Olds v. Mapes-Reeve Constr. Co.*, 177 Mass. 41, 58 N.E. 478 (1900); The *Grinnell* decision is criticized in Note, 34 YALE L.J. 553 (1925). The *Olds* and *Grinnell* cases are clearly wrong. Like the wrongfully discharged employee, the contractors in these cases could not have performed the subsequent contracts but for the original breach, and so the amount earned from such substitute contracts *should* offset the disappointed contractor's damages. The only possible justification for the holdings to the contrary in *Grinnell* and *Olds* is a judicial reluctance to benefit the breaching party by an offset against the damage he has already caused. Such a punitive policy for breach of contract has no place in the Code. See U.C.C. § 1-106.

second sale even if the original buyer had not breached the first sale.<sup>27</sup>

### B. Sales Act Cases

Section 64 was the general damages provision for sellers under the Uniform Sales Act ("Sales Act").<sup>28</sup> Although it did not expressly sanction a recovery of profit for the lost-volume seller, subsections (2), (3), and (4), in various combinations, arguably permitted a profit remedy for the lost-volume seller.<sup>29</sup> Many Sales Act cases ap-

27. "Every new customer would have been supplied even if the buyer had kept the goods and performed the contract." A. CORBIN, *supra* note 15, at 541.

28. About two-thirds of the states operated under the Uniform Sales Act before adopting Article 2 of the U.C.C. R. SUMMERS & J. WHITE, *supra* note 1, at 3. Section 64 of the Uniform Sales Act provides:

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

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

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

UNIFORM SALES ACT § 64 [hereinafter U.S.A.].

29. Some courts found a profit remedy as "the estimated loss directly and naturally resulting . . . from the buyer's breach." U.S.A. § 64(2). See *Smead v. Sutherland*, 118 Vt. 361, 111 A.2d 335 (1955); *Breading v. Champlain Marine & Realty Co.*, 106 Vt. 288, 172 A. 625 (1934); *Popp v. Yuenger*, 229 Wis. 189, 282 N.W. 55 (1938). Other courts fashioned a profit remedy out of section 64(4)'s language requiring profit that would have resulted from performance *to be considered* in the estimation of damages. See, e.g., *Popenberg v. R. M. Owen & Co.*, 84 Misc. 126, 146 N.Y. Supp. 478 (Sup. Ct. 1914), *aff'd*, 221 N.Y. 569, 116 N.E. 1070 (1917). Two other justifications that courts advanced for abandoning the general difference money formula of section 64(3) to find a profit remedy elsewhere were that the situation of lost-volume sellers constituted "special circumstances" within the meaning of section 64(3), or that there was no "available market" for the goods. A. CORBIN, *supra* note 15, at 542 n.85; accord *Harris*, *supra* note 5 at 84. Professor Harris found that those courts denying a recovery for lost profits under the Sales Act decided that the plaintiff had failed to prove there was no "available market" and was, therefore, limited to a different money recovery under section 64(3). *Id.* It is unlikely, however, that market conditions were really distinguishable in the cases where profits were awarded. Compare *Charles St. Garage Co. v. Kaplan*, 312 Mass. 624, 45 N.E.2d 928 (1942) (no evidence auto dealer couldn't sell at "market price" the original buyer had agreed to pay) with *Popp v. Yuenger*, 229 Wis. 189, 212 N.W. 55 (1938) (court found that because 1938 models

proved a lost profit formula,<sup>30</sup> but only one cited lost-volume status as a reason for doing so.<sup>31</sup> In fact, Professor Robert Harris,<sup>32</sup> a U.C.C. pioneer who, in a series of articles contrasting Article Two's provisions with those of the Uniform Sales Act, claimed that in the only Sales Act case properly presenting the question of lost volume, the court declined to award lost profits.<sup>33</sup> Even in the paradigm lost-volume situation of new car dealers,<sup>34</sup> several decisions under the Sales Act rejected any kind of profit remedy.<sup>35</sup> Because of section 64's restrictive language,<sup>36</sup> the vast majority of lost profit cases under the Sales Act involved three distinct profit situations unre-

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were available, there was no longer a market for 1937 models).

30. See *supra* note 29 for sales act cases permitting a profit remedy.

31. See *Popp v. Yuenger*, 229 Wis. 189, 282 N.W. 55 (1938) (measure of dealer's loss on breach of automobile sales contract is difference between dealer cost and sum of cash price and fair market value of trade-in). The *Popp* court cited *Mason & Risch, Ltd. v. Christner*, 47 Ont. L.R. 52 (1920) (court awarded profit remedy for breached car sale on basis of seller's lost volume).

32. See *supra* note 7 for a list of Professor Harris' writings in this field.

33. Harris, *supra* note 5, at 83, citing *A. Lenobel, Inc. v. Senif*, 252 A.D. 533, 300 N.Y.Supp. 226 (1937), modified, 253 A.D. 813, 1 N.Y.S.2d 1022 (1938) (profit remedy dependent upon complexities of car dealer's overhead denied because not in contemplation of the parties). Harris, however, conceded that the *Popp* court, see *supra* note 31, may have understood the argument. Harris, *supra* note 5, at 84.

34. Many of the early Sales Act cases awarding profit as a seller's remedy involved new car sales by dealers. See *Torkomian v. Russell*, 90 Conn. 481, 97 A. 760 (1916) (automobile agent liable for difference between contract price and what car cost agent). *Poppenberg v. R.M. Owen & Co.*, 84 Misc. 126, 146 N.Y. Supp. 478 (Sup. Ct. 1914), *aff'd*, 221 N.Y. 569, 116 N.E. 1070 (1917) (in absence of special circumstances, measure of damages is profit seller would have made); *Stewart v. Hansen*, 62 Utah 281, 218 P. 959 (1923) (dealer could recover profits lost after buyer refused to accept automobile); Commentators have therefore often used automobile dealers as a pedagogical example of volume sellers. See W. HAWKLAND, *supra* note 6; see also Harris, *supra* note 5 at 94, n.141 (car dealer cases have provided most of the lost-volume litigation). For a more recent decision awarding a car dealer his lost profit, see *Kaiserman v. Martin J. Ain, Ltd.*, 112 Misc.2d 768, 450 N.Y.S.2d 135 (App. Term. 1983).

35. See, e.g., *Ford Motor Co. ex. rel. Keyser v. Fry*, 203 Ill. App. 46 (1916) (seller exercising option to retain sum provided in contract as liquidated damages precluded from further recovery); *Chalmers Motor Co. v. Maibaum*, 186 Ill. App. 147 (1914) (recovery of profits erroneous in deceit action for procuring cancellation of order); *Charles St. Garage Co. v. Kaplan*, 312 Mass. 624, 45 N.E.2d 928 (1942) (measure of damages is the difference between the contract price and market price rather than profit); *Babbitt v. Wides Motor Sales Corp.*, 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. Term 1959) (measure of damages for buyer's failure to accept automobile is difference between contract price and market value); *Genovese v. A. Lenobel, Inc.*, 148 Misc. 548, 265 N.Y.S. 338 (Mun. Ct. 1933), *rev'd on other grounds*, 154 Misc. 91, 275 N.Y.S. 521 (App. Term 1934) (where there's an available market for type of automobile sold, measure of damages is difference between market and contract price); *Lowas Garage Co. v. Scheer*, 199 N.Y. Supp. 748 (App. Term 1923) (automobile seller not entitled to recover commissions lost on breached sale); *Schuenemann v. John G. Wollaeger Co.*, 170 Wis. 616, 176 N.W. 59 (1920) (upon buyer's breach, seller may hold property for buyer and recover difference between contract price and fair market value).

36. There is no express authorization in the Sales Act to justify a profit remedy for volume sellers. See *supra* note 28 for the text of section 64 of the Uniform Sales Act.



lated to the lost-volume seller: (1) profit as an alternative remedy where there is no available resale market;<sup>37</sup> (2) profit as an appropriate damages formula for components sellers;<sup>38</sup> and (3) lost profits as consequential damages.<sup>39</sup>

## II. LEGISLATIVE HISTORY OF SECTION 2-708(2)

It was against this background of common law and Sales Act cases that the drafters of Article Two created a truly innovative damages provision:

### *Seller's Damages for Non-acceptance or Repudiation*

... (2) If the measure of damages provided in subsection (1) [contract price less market price] is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.<sup>40</sup>

Unfortunately, this Code section was drafted in stages—the early drafts were designed to address the lost-volume seller,<sup>41</sup> with the

37. In three cases, the court found a profit remedy appropriate because there was no available resale market. *Smead v. Sutherland*, 118 Vt. 361, 111 A.2d 335 (1955); *Breding v. Champlain Marine & Realty Co.*, 106 Vt. 288, 172 At. 625 (1934); *Popp v. Yuenger*, 229 Wis. 189, 282 N.W. 55 (1938). Other courts, however, denied a profit remedy because the seller failed to prove there was no available resale market. *Charles St. Garage Co. v. Kaplan*, 312 Mass. 624, 45 N.E.2d 928 (1942); *Genovese v. A. Lenobel, Inc.*, 148 Misc. 548, 265 N.Y.S. 338 (Mun. Ct. 1933), *rev'd on other grounds*, 154 Misc. 91, 275 N.Y.S. 521 (App. Term. 1934); *Lowas Garage Co. v. Scheer*, 199 N.Y.S. 748 (App. Term 1923). Professor Harris said the decisions finding no available market were "wholly arbitrary" and were made without any effort to define "available market."

38. The component seller is not really given a profit remedy. Where the buyer repudiates before the goods have been completed, the seller recovers the unpaid balance of the contract price less costs saved. This recovery may equal "gross profit" on a sale but only because the defendant-buyer has not prepaid anything. See *Miami Cycle & Mfg. Co. v. National Carbon Co.*, 268 F. 46 (6th Cir. 1920); *Snelling v. Dine*, 270 Mass. 501, 170 N.E. 403 (1930); *Hilltop Sand Corp. v. Simpson*, 225 A.D. 467, 233 N.Y.S. 348 (1929); *Nelson Equip. Co. v. Harner*, 191 Or. 359, 230 P.2d 188 (1951); *Stevenson v. Puget Sound Vegetable Growers Ass'n*, 172 Wash. 196, 19 P.2d 925 (1933).

39. This is, of course, the problem of the classic contracts case, *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). Profit as consequential damages is a remedy of plaintiff-buyers for losses on a larger transaction which were caused by the breach of *this* contract. The second rule of *Hadley v. Baxendale* is that a buyer's consequential damages for a seller's breach are limited to those losses reasonably within the contemplation of the parties at the time the contract was made. E. FARNSWORTH, *supra* note 22, at 873-74.

40. U.C.C. § 2-708(2).

41. Section 2-708 first appeared in one unified section as section 110 of Proposed Final Draft No. 1 of the Uniform Revised Sales Act (1944). As originally written, the section simply provided that where the money difference formula is "inade-

drafters later haphazardly adding language to address the components seller.<sup>42</sup> If read literally, the language of the section which grants lost profit damages to components sellers also effectively denies the same damages to lost-volume sellers.<sup>43</sup> This is odd, however, because to provide lost-volume sellers with a profit remedy was clearly a major goal of section 2-708(2)'s drafters.<sup>44</sup> A further complication appears in Official Comment 2 to section 2-708(2), which

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quate to put the seller in as good a position as performance would have done, then the measure of damages is the *profit* the seller would have made from full performance by the buyer." (emphasis added). *Id.* This section's use of the bare term "profit" made it arguable that such an alternative remedy was available to the assembler (buyer breaches before assembler-seller has the raw goods), the manufacturer (buyer breaches when manufacture partially completed), and the lost-volume dealer (retailer with unlimited access to inventory). See Harris, *supra* note 5, at 97.

When this language became section 2-708 of the 1949 draft of the U.C.C., the official comments made it clear that the profit remedy was at least available to volume dealers, being "designed to eliminate the unfair and economically wasteful results arising under the older law when fixed-priced articles were involved. This section permits the recovery of lost profits in all appropriate cases which would include all standard-priced goods." 1949 Draft of the U.C.C., § 2-708, comment 2.

The resulting statutory muddle remains a quagmire today. On the one hand, the text of section 2-708(2) makes it clear that manufacturers of partially completed goods are to enjoy a profit remedy. On the other hand, comment 2 makes it quite clear that the drafters also intended that lost-volume dealers be awarded their expected profit. Because the official comments are just that—comments, some legislatures adopting the Code's text did not simultaneously adopt the U.C.C.'s official comments. Therefore, one may forcefully argue in these jurisdictions that appending the old "fixed-price" comments to the "manufacturers-oriented" text was an error, and that the plain language of the statute simply precludes a profit remedy for the volume dealer. See Shanker, *The Case for a Literal Reading of U.C.C. Section 2-708(2) (One Profit for the Reseller)*, 24 CASE W. RES. L. REV. 697 (1973).

In 1950, the parenthetical phrase "(including reasonable overhead)" was added to the text. Supplement No. 1 to the 1951 Official Draft. The New York Law Revision Commission tentatively suggested that the language of section 2-708 "would, or at least might," expand the profit test (contract price less cost of procurement) to cases of dealers in fixed-price articles (previous New York cases only applied the profit formula to manufacturer-sellers). N.Y. LAW REVISION COMM., 1 STUDY OF THE UNIFORM COMMERCIAL CODE, 1955 REPORT 643, 695 (reprint ed. 1980). The Commission also believed that a profit remedy for dealers was majority law. *Id.* at 361. The case law, however, does not support this statement. See *supra* notes 30-35 and accompanying text.

42. In 1955, the U.C.C. Editorial Board added some qualifying language to the section 2-708(2) profit formula, specifically requiring "due allowance for costs reasonably incurred and due credit for any resale." Supplement No. 1 to the 1952 Official Draft (1955). The Board's stated reason for the change was "to clarify the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture." *Id.*

43. There was now no doubt that the profit formula of 2-708 was applicable to manufacturers of partially completed goods, but it no longer worked for dealers of completed goods. To illustrate, assume a car with a dealer cost of \$7,000 and a retail sticker price of \$10,000. If the buyer repudiates his contract, a "profit" remedy should give the dealer \$3,000 in damages. Assume now that the dealer is able to resell the car to another customer for the same \$10,000 price. If "due credit for any resale" must be given to the breaching buyer, the dealer is left with only his "costs reasonably incurred" (incidental damages) and the result is no different than under section 2-706.

44. See *supra* note 41 and accompanying text.

indicates that profit damages should be available in "all appropriate cases, including all sales of standard-priced goods."<sup>45</sup> This comment is dangerously misleading at best because whether goods are "standard-priced" bears no relation to whether the damages formula of 2-708(1) is inadequate, or to whether the seller has lost any volume.<sup>46</sup>

These problems of statutory construction have led one commentator<sup>47</sup> and a few courts<sup>48</sup> to conclude that profits are simply not available as a remedy for the lost-volume seller under section 2-708(2).<sup>49</sup> Nevertheless, even though one has to ignore the plain language of the section to find such a remedy, the vast majority of courts considering the question have been willing to do just that.<sup>50</sup>

45. The 1956 U.C.C. Editorial Board recommendations created a separate subsection for the profit formula, but issued it without comments. It therefore appeared as though dealers were now cut out of the profit remedy—although whether this was by design or unintentional omission is unclear. The comments added to the Official 1957 Text, however, were those of the 1952-53 Drafts and focused on the case of fixed-price articles (lost volume dealers).

46. For example, assume a car dealer, *D*, who has fifty 1989 model cars on his lot. It is the end of the model year and he can get no more 1989s from the manufacturer. If *D* sells all fifty cars at a standard price of \$7500 but there are at least fifty-one willing buyers at that price, a repudiation by one buyer will mean only that the breached sale will be replaced by buyer number fifty-one. Although the cars are "standard-priced" goods, there is clearly no lost volume—*D* could sell only fifty cars whether or not there was a breach. The contract price-market price differential formula of section 2-708(1) is therefore clearly adequate to put *D* in as good a position as buyer's performance would have—*D* had 50 sales and 50 profits. See, e.g., *J. WHITE & R. SUMMERS*, *supra* note 1, at 316 (when demand for cars exceeded available supply after World War II, most dealers lost nothing when a buyer breached). Similarly, even where the price of the good is not fixed (perhaps it fluctuates in a volatile market), if a breach by the buyer results in one less sale, the dealer has lost a profit and the money difference formula in section 2-708(1) will be "inadequate."

47. See Shanker, *supra* note 41, at 700.

48. See *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987) (district court held "lost volume dealers" limited to section 2-706 recovery); *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311, 313 (1972) (trial court found boat dealer's claim for loss of profit "untenable").

49. Given the amount of violence one has to do to the plain language of the statute in order to derive a profit remedy for the volume seller, it is surprising that no decision denying the applicability of section 2-708(2) to volume sellers has been upheld on appeal.

50. See, e.g., *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985), *cert. dismissed*, 476 U.S. 1139 (1986) (applying Washington law to sale of aircraft spare parts); *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982) (applying Massachusetts law to sale of transistor test system); *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981); *Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373 (8th Cir. 1980) (applying Minnesota law to sale of hair spray systems); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251 (4th Cir. 1974) (applying Virginia law to sale of sweaters); *Great W. Sugar Co. v. Mrs. Alison's Cookie Co.*, 563 F. Supp. 430 (E.D. Mo. 1983), *aff'd*, 749 F.2d 516 (8th Cir. 1984) (applying Missouri law to sale of sugar); *Comeq, Inc. v. Mitternacht Boiler Works, Inc.*, 456 So.2d 264 (Ala. 1984) (industrial machine); *Autonumerics, Inc. v. Bayer Indus., Inc.*, 144 Ariz. 181, 696 P.2d 1330 (Ariz. App. 1984) (control systems); *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978) (steel); *Distribu-Dor, Inc. v. Karadanis*, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (1970) (shower doors); *Snyder v. Herbert Greenbaum & Assoc., Inc.*, 38 Md. App. 144, 380 A.2d 618 (1977) (carpet);

The United States Court of Appeals for the Seventh Circuit, in the recent case of *R.E. Davis Chemical Corp. v. Disonics, Inc.*,<sup>51</sup> was only the latest court to reach this conclusion.

### III. DEFINING THE LOST-VOLUME SELLER

The Code itself provides no help in defining who is a lost-volume seller.<sup>52</sup> The official text states only that profit is an allowable measure of damages if the 2-708(1) formula is "inadequate to put the seller in as good a position as performance would have."<sup>53</sup> As already noted, the official comment cryptically states that the profit remedy is available "in all appropriate cases,"<sup>54</sup> which would include "all standard-priced goods."<sup>55</sup> However, because neither the section's text nor its comments provide any substantive guidance on what *are* appropriate cases, courts and commentators are left to interpret the statutory language<sup>56</sup> by reviewing the legislative history,<sup>57</sup> applying rules of statutory construction,<sup>58</sup> and referring to supplementary common law principles.<sup>59</sup>

*Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 334 N.Y.S.2d 165 (1972) (boat); *Lake Erie Boat Sales, Inc. v. Johnson*, 11 Ohio App. 3d 55, 463 N.E.2d 70 (1983) (boat).

51. 826 F.2d 678 (1987). See *infra* notes 60-70 for a discussion of the *Davis* case.

52. Because the expression "lost-volume seller" does not even appear in the text of 2-708, it should not be surprising that the Code offers no definitional clues. Although the official text does not expressly state it, this comment assumes that it was the lost-volume concept in Sales Act and common law and cases that led the drafters of Article 2 to provide a profit remedy for sellers of "standard-priced goods." See *supra* notes 40-50.

53. U.C.C. § 2-708(2). This phrase is a direct reference to the general damage philosophy of the Code:

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

U.C.C. § 1-106.

54. Presumably, "appropriate cases" are those in which the money-difference formula of 2-708(1) is "inadequate."

55. See *supra* notes 45-46 for the history of this curious and misleading phrase.

56. The relevant language from section 2-708(2) is "inadequate to put the seller in as good a position as performance would have."

57. See *supra* notes 40-51 and accompanying text for a discussion of the peculiar legislative history of section 2-708.

58. Rules of construction can be found both within the Code, see § 1-102 (Code to be liberally construed to promote underlying purposes; limitations to freedom of contract acknowledged), and outside the Code, see, e.g., D. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* (4th ed. 1972). In addition, common law principles of statutory construction are applicable when not displaced by the rules of construction in section 1-102. See U.C.C. § 1-103.

59. Section 1-103 provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall sup-

In *Davis*,<sup>60</sup> a purchaser of diagnostic medical equipment repudiated its contract and sued the manufacturer-seller for the return of its \$300,000 downpayment.<sup>61</sup> The seller counterclaimed, arguing that as a lost-volume seller, he was entitled to an offset equal to his lost profit on the breached sale, notwithstanding the fact that he subsequently resold the equipment for the same price.<sup>62</sup> The district court granted summary judgment in favor of the breaching buyer.<sup>63</sup> On appeal, the seventh circuit noted, with some surprise, that the availability of lost profit damages for a volume seller was an issue of first impression under Illinois law.<sup>64</sup> The court reversed,<sup>65</sup> holding that lost-volume sellers *are* entitled to recover profits under section 2-708(2).<sup>66</sup> The court, however, remanded the case to the trial court for a determination of whether the manufacturer qualified as a lost-volume seller.<sup>67</sup> The court specifically held that the seller has the burden of proving (1) that it had the capacity to produce units for both the breaching buyer and the subsequent resale purchaser;<sup>68</sup> (2) that it would have been profitable to have "produced and sold" both units;<sup>69</sup> and, (3) that it would have made the second sale absent the

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plement it provisions.

U.C.C. § 1-103. Therefore, if the text, comments, legislative history and rules of construction are inadequate guides in ascertaining the correct interpretation of a particular Code section, courts should not hesitate to examine other case law, both pre-Code and post-Code, under both the Sales Act and the general common law, to illuminate the meaning of a particular Code passage. See Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 N.W.U. L. REV. 906 (1978).

60. R.E. Davis Chem. Corp. v. Diasonics, Inc., 826 F.2d 678 (7th Cir. 1987).

61. *Id.* at 680. The buyer asked for restitution under U.C.C. § 2-718(2) (ILL. REV. STAT., ch. 26, ¶ 2-718(2) (1985)).

62. *Davis*, 826 F.2d at 680.

63. *Id.* The district court held that where a seller has resold the goods in a commercially reasonable manner, he is limited to a section 2-706(1) recovery of the difference between the contract price and the resale price. Diasonics had resold the goods that Davis refused to accept, *id.* at 682, so it could not recover under 2-708. *Id.* at 680.

64. *Id.* at 681. Because no Illinois court had previously addressed the question, the Seventh Circuit had to predict how the Illinois Supreme Court would rule on the availability of a profit remedy for the volume seller. *Id.* But see *Commonwealth Edison Co. v. Decker Coal Co.*, 653 F. Supp. 841, 844 (N.D. Ill. 1987) (cases and statutory language indicate section 2-708 remedies available only when primary remedy under section 2-706 is unavailable).

65. *Davis*, 826 F.2d at 679.

66. *Id.* at 681. The court first determined that the plaintiff who resells *can* jump from section 2-706 to 2-708 because the Code's remedies are "cumulative in nature," *id.* at 683 (citing U.C.C. § 2-703, comment 1), and were intended to destroy the common law doctrine of election of remedies. *Id.* The court also concluded that where the buyer's breach causes a loss of sales volume, a section 2-708(1) measure of damages may not put the seller in as good a position as performance would have. *Id.* at 684.

67. *Id.* at 685. In February of 1989, the parties were still waiting to receive a date for retrial in United States District Court for the Northern District of Illinois.

68. *Id.*

69. *Id.* See *infra* note 72 for an explanation of the *Davis* court's error in including profitability as an element of its lost-volume seller definition.

breach.<sup>70</sup>

The *Davis* court's definition of lost-volume seller is the classic definition first articulated by Professor Harris<sup>71</sup> in 1964, with an additional element added to reflect recent microeconomic criticism of the original test.<sup>72</sup> Harris' definition of the lost-volume seller, therefore, is an obvious starting point: "Resale results in loss of volume only if three conditions are met: (1) the person who bought the resold entity would have been solicited by plaintiff had there been no breach and resale; (2) the solicitation would have been successful; and, (3) the plaintiff could have performed that additional contract."<sup>73</sup>

This definition was the standard for nearly a decade because the lost-volume problem was virtually unlitigated for several years after the 1962 Official Text of the U.C.C. was issued.<sup>74</sup> In the early 1970s, however, several commentators began to attack the economic assumptions that support a profit remedy for the lost-volume seller.<sup>75</sup> The thrust of their argument was twofold. First, they

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70. *Id.* The court placed this burden on the seller because the party claiming injury always bears the burden of establishing its damages. *Finance Am. Commercial Corp. v. Econo Coach, Inc.*, 118 Ill. App. 3d 385, 390, 454 N.E.2d 1127, 1131 (1983).

71. Professor Harris did much of the initial investigative groundwork into sellers' U.C.C. remedies in a series of articles published shortly after the 1962 Official Text was issued. See *infra* text accompanying note 73 for an explanation of Professor Harris' test for lost-volume seller status. See *supra* note 7 for a list of Professor Harris' U.C.C. articles.

72. See *infra* notes 75-79 and accompanying text for a discussion of microeconomic analysis of the lost volume problem. The *Davis* court noted the economic criticism of the lost volume profit remedy and therefore took exception with the definitions of lost volume sellers that other courts had adopted. "In reality, however, the relevant questions include not only whether the seller had the capacity to produce the breached units in addition to its actual volume, but also whether it would have been profitable for the seller to produce both units." *Davis*, 826 F.2d at 684 (citing Goetz & Scott, *Measuring Seller's Damages: The Lost Profits Puzzle*, 31 STAN. L. REV. 323, 332-33, 346-47 (1979)). However, the court here has muddied the waters by confusing the issue of lost-volume seller status with the issue of damages. Under this comment's proposal, a seller may clearly establish that he has lost a sale, yet fail to establish his damages with reasonable certainty. See notes 93-135 and accompanying text for an explanation of the author's proposed test for lost-volume seller status. Whether a particular remedy is available to a given plaintiff is a question quite distinct from whether he will be able to prove his loss under the statute providing the remedy.

73. Harris, *supra* note 5, at 82. The *Davis* court collapsed the first two elements of Professor Harris' test, see *supra* text accompanying notes 68-70, into its own third element (resale would have been made even absent the breach).

74. The first lost-volume cases did not appear until the late 1960s. *Vitex Mfg. Corp., Ltd. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967) (Code not controlling in Virgin Islands, but court applied it because it embodies foremost modern legal thought). Other early cases include *Distribu-Dor, Inc. v. Karadanis*, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (1970); *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

75. See Goetz & Scott, *Measuring Seller's Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV. 323 (1979); Speidel & Clay, *Seller's Recovery of Overhead Under U.C.C. Section 2-708(2): Economic Cost Theory and Contract Remedy Policy*, 57

claimed that due to the law of diminishing marginal returns on additional production,<sup>76</sup> many profit-maximizing firms would choose not to produce the additional units necessary to satisfy the additional marginal buyer who was "lost" due to the original buyer's breach.<sup>77</sup> Second, these critics argued that unless there are no willing buyers at *any* reduced price, the seller has not really lost any volume and the remedy provided by section 2-706 (contract price-resale price differential), is completely adequate to fully compensate the aggrieved seller.<sup>78</sup>

While the former criticism is undoubtedly correct on a theoretical level, it is doubtful whether many real-world firms fit the "profit-maximizing" model hypothesized by the micro-economic critics.<sup>79</sup> It seems more likely that most firms are less than perfectly efficient, that their marginal revenue will exceed their marginal costs, and that they *would* choose to produce the additional units necessary to satisfy the additional lost sale. The latter criticism is irrelevant as a

CORNELL L. REV. 681 (1972); Note, *A Theoretical Postscript—Microeconomics and the Lost-Volume Seller*, 24 CASE W. RES. L. REV. 712 (1973); see also ECONOMIC ANALYSIS OF LAW 59 n.7 (1972).

76. Marginal cost is the cost incurred to produce one additional unit of output. P. SAMUELSON, *ECONOMICS* 450-51 (9th ed. 1973). The theory of diminishing marginal returns is that many firms are operating at such an efficient level of production that increasing production for that extra lost-volume unit might actually be unprofitable because the resulting increase in supply may cause the market price to fall to an overall extent greater than the gross profit on the additional sale. Sebert, *supra* note 4, at 390.

77. If given a choice, a seller in such an efficient market of diminishing returns may actually have decided not to produce the additional goods if the original buyer had not breached. *Id.* In such a scenario, the manufacturer-seller has clearly not lost any volume—he would have made the same number of sales whether or not there had been a breach by the original buyer.

78. See Goetz & Scott, *supra* note 75. The theory here is that a subsequent resale at any price gives the aggrieved seller the benefit of his bargain on one sale; damages under section 2-706, measured by the difference between the original contract price and the resale price, give him the benefit of his bargain on the original sale. *Id.* at 328-29. Thus, the seller has the benefit of two sales and, therefore, has lost no volume.

79. As Professor Sebert indicates, the microeconomic critique is based on a series of questionable assumptions: "(1) that marginal costs are rising such that the production of additional goods for sale to buyer 2 will cause marginal costs to exceed marginal revenue; (2) that the seller knows this fact, and (3) that the seller will act rationally by not making an additional sale to buyer 2." Sebert, *supra* note 4, at 390. These assumptions are unrealistic in several respects. First, because marginal costs are generally quite constant within considerable variations of output, it is the abnormal additional sale in which the marginal cost would exceed the marginal revenue. *Id.* Second, unless the seller has incredibly sensitive accounting procedures, he is unlikely to discover that the marginal sale would be unprofitable. *Id.* at 391. Third, Professor Sebert suggests that most business people would be inclined to make as many sales as their capacity will permit. *Id.* It is even quite possible that full-capacity manufacturers lose volume on a breached sale of standard-manufacture goods, because most such manufacturers have a backlog of orders which will, at some future time, be filled in turn; thus, even the most fundamental premise of the microeconomic critique, that full-capacity manufacturers cannot be lost-volume sellers, is suspect.

matter of statutory construction because the profit remedy is an alternative to the damages formula under section 2-708(1),<sup>80</sup> not to the formula under 2-706(1).<sup>81</sup> The importance of the micro-economic critique is not that it helps prove whether the lost or replacement sale would be profitable,<sup>82</sup> but that it might indicate whether the seller *would* actually make the second sale.<sup>83</sup> Even if the seller would profit from another sale, if the profit was so *minimal* that the seller would have chosen not to make the sale, he has not lost any volume.<sup>84</sup>

Professor John Sebert added immeasurably to the lost-volume discussion with an article published in 1981.<sup>85</sup> He observed that many courts have focused unduly on the seller's capacity to supply all probable buyers in determining whether that seller qualified as a lost-volume seller.<sup>86</sup> In effect, those courts have not applied the sec-

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80. The seller's right to a profit remedy is conditioned on the inadequacy of the section 2-708(1) formula "to put the seller in as good a position as performance would have." U.C.C. § 2-708(2). See *supra* text accompanying note 40 for the full text of 2-708(2).

81. As to the reselling seller's ability to reject the section 2-706 damage formula (contract price less resale price), and jump to section 2-708, see J. WHITE & R. SUMMERS, *supra* note 1, at 309-13. The district court in *Davis* did, however, hold that § 2-708 was available only where 2-706 and 2-709 damages (seller's primary remedies) were inapplicable. *R.E. Davis Chem. Corp. v. Disonics, Inc.*, 826 F.2d 678, 682 (7th Cir. 1987). Although the seventh circuit rejected this view of the Code's sellers remedies, see *supra* note 66, the language of several remedy sections and accompanying comments are reasonably capable of such a construction. See, e.g., U.C.C. § 2-704, comment 1 (2-706 is the "primary" remedy for seller); § 2-706, comment 2 (seller "relegated" to 2-708 if he fails to act properly under 2-706); § 2-709(2) (if seller not entitled to price, damages for non-acceptance under 2-708 are available); § 2-709, comment 7 (to same effect).

82. Proving whether the lost sale would be profitable is not properly an element of any lost-volume test. It is merely a necessary element of proof for any plaintiff-seller's damage claim. In theory, one should be able to demonstrate his status as a lost volume seller and still fail to recover due to inadequate proof of damages, i.e., profit. See *supra* notes 13-21 and accompanying text for the proper measure of damages for the lost-volume seller.

83. See *infra* notes 110-29 and accompanying text, which argue that determining whether both sales (original breached sale and subsequent replacement sale), *would* have been made is the key question in most contested lost-volume cases.

84. Assume that a manufacturer of jumbo jets, in order to fill the additional order represented by the breached sale, must hire another shift of workers at a considerable cost; if he knows this will reduce his gross profit on the next \$5,000,000 sale to a mere \$2500, it is unlikely he will expand his workforce to supply the additional buyer (unless he *knows* he can maintain the additional output in the future). Would the additional "lost" sale be profitable, then? Yes. Has the manufacturer really lost any volume, though? Clearly, he has not.

85. Professor Sebert's article *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, *supra* note 4, at 386-93, is the best available synthesis of the lost-volume debate.

86. *Id.* at 387-88. See, e.g., *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251 (4th Cir. 1974) (existing stock available); *Great Western Sugar Co. v. Mrs. Alison's Cookie Co.*, 563 F. Supp. 430 (E.D. Mo. 1983), *aff'd* on other grounds, 749 F.2d 516 (8th Cir. 1984) (supply exceeds demand); *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846 (E.D.N.Y.), *aff'd mem.*, 614 F.2d 1289



ond element of Professor Harris' lost volume test.<sup>87</sup> Even where a seller's supply greatly exceeds market demand, he loses no volume if he cannot meet the needs of both the particular resale buyer and the original buyer.<sup>88</sup> In order to ensure that courts do not overcompensate sellers by bestowing undeserving lost-volume status on them,<sup>89</sup> courts must do more than simply reemphasize the other two elements of Professor Harris' test.<sup>90</sup> The trier of fact must be made more aware of the many sub-elements which make up each of the test factors<sup>91</sup> and, perhaps, be given a more workable framework of analysis with which to make this decision.<sup>92</sup>

#### IV. LOST-VOLUME SELLERS: A NEW FRAMEWORK FOR ANALYSIS

Lost-volume seller status is a question of fact.<sup>93</sup> Therefore, a series of guidelines are needed for the trier of fact to determine, under the circumstances of the particular case, whether a particular seller

(2d Cir. 1979) (sufficient production capacity); *Autonumerics, Inc. v. Bayer Indus., Inc.*, 144 Ariz. 181, 696 P.2d 1330 (Ariz. App. 1984) (capacity to supply all customers and the breaching buyer); *Kaiserman v. Martin J. Ain, Ltd.*, 112 Misc. 2d 768, 450 N.Y.S.2d 135 (App. Term. 1981) (all retail dealers—who presumably have an inexhaustible supply of goods); *Neri v. Retail Marine Corp.*, 285 N.E.2d 311, 30 N.Y.2d 393 (1972) (unlimited supply of standard-priced goods). Several commentators have run afoul of the same trap. See, e.g., *Childres & Burgess*, *supra* note 4, at 880-81, 886 (lost volume depends on whether seller has unlimited supply of goods); 2 W. HAWKLAND, *supra* note 6, § 2-708:04 (unlimited supply); R. ANDERSON, *supra* note 6, § 2-708:21 (dealers entitled to lost profits).

87. *Sebert*, *supra* note 4, at 389, n.120. The Harris test's second element states that an attempted resale solicitation was or would have been successful. See *supra* text accompanying note 73 for the elements of the Harris test for lost volume status.

88. See *infra* notes 123-26 and accompanying text for an explanation of why the needs of a given resale buyer may determine whether the seller has actually lost any volume.

89. Several courts have recited the Harris test, yet reached incorrect results by ignoring one or more of its elements. See *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985), *cert. dismissed*, 476 U.S. 1139 (1986) (lost profits awarded for breach of contract for sale of spare aircraft parts although large excess inventory for customer would likely be resold *only* by special solicitation efforts); *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981) (award of lost profits upheld even though middleman-seller contractually able to sell *only* to breaching buyer). *But see* *Malone v. Carl Kisabeth Co., Inc.*, 726 S.W.2d 188 (Tex. App. 1987) (court correctly held there was disputed question as to whether seller of chairs had lost volume where seller testified that resale "could not have been made" if chairs had not been in showroom after original buyer breached); *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722 (Me. 1983) (correctly holding that mobile home seller could not claim lost-volume seller status because most likely resale buyer was father of original breaching buyer).

90. The general damage philosophy of the Code is that aggrieved parties should be put in as good an economic position as (but not better than) performance of the contract would have put them in. U.C.C. § 1-106 (Code remedies not punitive).

91. See *infra* notes 113-14 and accompanying text for a discussion of the Harris test's first two elements.

92. See *infra* text accompanying notes 93-104 outlining the author's proposal for a two-pronged test to determine lost-volume seller status.

93. *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, 826 F.2d 678, 684-85 (7th Cir. 1987); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 256 (4th Cir. 1974).

has proven he is a lost-volume seller. Courts must answer two overarching questions to determine if the plaintiff-seller is also a lost-volume seller. If the trier of fact can answer both questions affirmatively, then the seller *has* lost volume and should be entitled to the profit lost on one sale.

The first question is whether the seller *can* make both sales. This comment will call this inquiry the "capacity question."<sup>94</sup> To answer this question, one need only look at the seller's ability to supply the additional lost buyer represented by the repudiated sale.<sup>95</sup> The capacity question does not require courts to scrutinize the peculiar characteristics of either the breached sale or the replacement sale. They need only find that the seller had the ability<sup>96</sup> to make both sales. This is the branch of the lost profit inquiry on which so many courts have fixated.<sup>97</sup> The second question is whether the original sale and the post-breach resale are wholly independent events, with the latter sale likely occurring regardless of whether there was a breach.<sup>98</sup> Where the two sales are "wholly independent" events, the seller has suffered lost volume and a profit award is an appropriate damage remedy under section 2-708(2).<sup>99</sup> This second inquiry will determine the question of lost-volume seller status more often than the capacity question.<sup>100</sup> However, by not looking closely enough at this second question, courts have inappropriately awarded lost profits to many sellers who most likely did not suffer any lost volume.<sup>101</sup> This is a disturbing result because it indicates that the

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94. See *infra* notes 105-09 and accompanying text for a discussion of the capacity question. This is the third element of the Harris test. See *supra* notes 75-79 and accompanying text for the microeconomic critique of a profit for so-called "volume" sellers.

95. The seller, under this branch of the inquiry is therefore isolated without reference to either the original or resale purchasers.

96. The capacity question might be rephrased as "could the seller have supplied two buyers?"

97. Frequently the "analysis" of such courts involves nothing more than the bald statement that the seller is entitled to a profit remedy because he can supply all obtainable customers. See *supra* note 86 for cases in which the capacity issue was apparently dispositive on the question of lost-volume seller status.

98. See *infra* notes 110-29 and accompanying text for a three-part test to determine when there are two "wholly independent sales events."

99. A profit remedy is "appropriate" because it is necessary to put the aggrieved seller "in as good a position as performance" of the contract would have. U.C.C. §§ 1-106, 2-708(2).

100. This is true simply because most retail dealers have access to additional replacement stock and most manufacturers are operating at less than 100% of capacity. See *infra* note 108 for cases where the capacity issue rightly was, or should have been, dispositive on the issue of lost-volume status.

101. In each of the following cases, the facts clearly indicated that the resale was *not* a wholly independent sales event from the original, breached sale: TCP Indus., Inc. v. Uniroyal, Inc., 661 F.2d 542 (6th Cir. 1980) (middleman's contract with petrochemical producer permitted sales only to the breaching third-party buyer); Distribu-Dor, Inc. v. Karadanis, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (1970) (mirrored shower doors recut and re-edged for ultimate resale purchaser); Autonumerics, Inc. v.

section 2-708(1) remedy was entirely adequate,<sup>102</sup> that the court has given the seller an unjustified double profit,<sup>103</sup> and that the general damage philosophy of the entire U.C.C. has been thwarted.<sup>104</sup> This comment therefore suggests a method that courts can employ to more accurately make a decision on the seller's lost volume status.

### A. The Capacity Question

A single question illustrates the capacity branch of this comment's lost-volume test: *Could the seller have supplied both the original and the resale buyer?* On one level, clearly any seller can supply additional buyers. For example, if the seller is a retailer and he cannot get any more widgets from his producer, he *could* go into widget production himself. Alternatively, if the seller is a manufacturer operating at full capacity, he *could* build a plant addition and hire more workers to satisfy the additional buyer's demand for ten extra widgets. This capacity question, however, focuses not on a theoretical ability to supply but rather on a practical ability to supply both buyers.<sup>105</sup>

If a seller can show he had present excess manufacturing capacity or present ready access to additional inventory at the time of the

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Bayer Indus., Inc., 144 Ariz. 181, 696 P.2d 1330 (Ariz. App. 1984) (custom-built control systems altered to needs of resale buyer).

102. The inadequacy of the section 2-708(1) contract price-market price difference formula is a condition precedent to availability of a profit remedy under section 2-708(2). See *supra* note 53 and accompanying text.

103. The central justification of a profit remedy for lost volume sellers is that such a seller deserves the benefit of both the bargains that he made independently of one another. J. WHITE & R. SUMMERS, *supra* note 1, at 315; see also U.C.C. § 2-703 (damages are compensatory in nature and, to that effect, are to be liberally administered). If, however, the seller has not in fact lost a sale, he is entitled to only one profit (the one he earned on resale of the wrongfully rejected goods).

104. U.C.C. § 1-106. See *supra* note 53 for the full text of this section.

105. The capacity inquiry, then, focuses on whether a retailer or manufacturer *could* satisfy both buyers without extraordinary or unusual efforts. Usage of trade, U.C.C. § 1-205(4), and the seller's past behavior would, of course, be relevant here. *Lake Erie Boat Sales, Inc. v. Johnson*, 11 Ohio App. 3d 55, 463 N.E.2d 70 (1983) is illustrative. The court denied a retail boat dealer a lost profit remedy because the only proof of the seller's capacity that was offered was testimony by the dealer's salesman that "to his knowledge," the plaintiff-dealer had an unlimited supply of the same boat that the defendant had purchased. *Id.* at 59, 463 N.E.2d at 73. The court contrasted this with the evidence in an unreported boat dealer case:

The record . . . shows that plaintiff has been in business for twenty years as a company engaged in the retail sale of boats, motors, outboard motors, trailers, [etc.] . . . Plaintiff sold approximately 300 boats in 1978 and 1979 with sales totaling \$1,700,000 in 1978 and about \$2 million in 1979. Plaintiff's president testified that plaintiff is a franchised dealer of Bayliner Marine Corporation products and Bayliner has never refused to deliver any of plaintiff's orders . . . This uncontroverted evidence is sufficient to establish plaintiff as a volume dealer.

*Id.* at 59, 463 N.E.2d at 72-73 (quoting *Modern Marine, Inc. v. Balski*, No. 43411 (Cuyahoga App. May 21, 1981)).

repudiation or non-acceptance, he has made a prima facie case on the issue of capacity.<sup>106</sup> The burden then shifts to the breaching buyer to show that the seller-manufacturer would not have utilized his excess capacity for the extra widget production, or that although the seller had access to extra stock, the seller-retailer would not normally restock.<sup>107</sup> If, however, the seller cannot show excess capacity or ready access to additional replacement inventory, he should have the burden of coming forward with convincing evidence that he would, in fact, have expanded his manufacturing operations, or sought and found replacement stock outside his regular supply channels.<sup>108</sup> If the seller does offer such credible evidence, a question of fact on the capacity issue remains.<sup>109</sup>

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106. The seller must carry the burden of proving his lost-volume seller status because section 2-708(2) affords him a profit remedy only upon a showing that section 2-708(1) damages are inadequate. *Snyder v. Herbert Greenbaum & Assoc., Inc.* 38 Md. App. 144, 153, 380 A.2d 618, 627 (1977). However, because the majority of sellers, whether dealers or manufacturers, are probably lost-volume sellers, see *supra* note 131 and accompanying text, this initial burden is appropriately light. *But see* Goetz & Scott, *supra* note 75, at 329, 348-52 (in a world of efficient profit maximizing firms, it may be presumed that most resale purchases merely replace the original breached sale). However, as suggested earlier, see *supra* note 79 and accompanying text, it is doubtful whether many firms either fit the ideal profit-maximizing model or act consistent with the model if they do fit it.

107. In one section 2-708(2) case, a drug store company breached its contract to buy a large number of sweaters from a wholesaler who resold the refused goods and then sued the drug store, claiming lost-volume status. *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251 (4th Cir. 1974). The drug store company defended by arguing that the wholesaler lost no volume because (1) but for the drug store's large order, the wholesaler would not have had sweaters on hand for the ultimate resale purchaser, and (2) it was sufficiently late in the winter season that the wholesaler would not have restocked sweaters to meet any alleged lost-volume demand. *Id.* at 254.

108. In a number of cases, the capacity question was, or should have been determinative. In one, the sixth circuit erroneously held that a wholesale supplier of petrochemicals was entitled to a profit remedy after the buyer in an exclusive dealing contract refused delivery. *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981). In fact, however, the middleman could not actually have lost a profit as a result of the repudiated sale; the wholesaler's contract with his producer permitted sales to only one company. *Id.* at 547. Therefore, the wholesale seller simply did not have the legal ability, or "capacity," to make a second sale in addition to the sale breached by the original buyer. Nonetheless, the court inexplicably concluded that the issue of lost-volume seller status was "a close one" and, consequently, it was not fundamental error for the trial court to give a lost profit instruction. *Id.*

In *Lake Erie Boat Sales, Inc. v. Johnson*, 11 Ohio App. 3d 55, 463 N.E. 2d 70 (1983), the court correctly held that testimony by a boat retailer's salesman that "to his knowledge," the dealer had an unlimited supply of similar boats, was insufficient to establish that the seller had the "ability" to perform the additional contract lost by defendant's repudiation. *Id.* at 59, 463 N.E.2d at 73.

109. Lost-volume seller status is a question of proof. Seibert, *supra* note 4, at 391. See *supra* note 93 for authorities holding that lost-volume seller status is a question of fact.

### B. Resale as a Wholly Independent Event

A single question also illustrates the inquiry behind the second branch of this comment's lost-volume test: *Would the plaintiff-seller have made a sale to the ultimate resale purchaser even if there had been no repudiation by the original buyer of the goods?*<sup>110</sup> This comment has observed that unless the original sale and the resale after breach are wholly independent events, there is probably no lost volume and a profit award would constitute an impermissible double recovery for the seller.<sup>111</sup> It is on this branch of the lost volume inquiry that most courts have stumbled—if they have addressed it at all.<sup>112</sup> The first two elements in Professor Harris' definition of lost-volume sellers address this concern, but not in sufficient detail to be useful.<sup>113</sup> Furthermore, he does not isolate all the factors that could contribute to a finding that a given resale was a wholly independent event from the original sale<sup>114</sup> and, consequently, whether a given seller has or has not lost any volume.

The three relevant variables involved in a post-breach resale are the seller, the buyer, and the particular goods sold. Only by carefully examining the characteristics of each variable, with a view toward the peculiar facts of the case, can a trier of fact hope to accurately make the rather complicated determination that the resale was a wholly independent event from the original sale.

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110. This might also be termed a causation element. That is, the question is whether the second sale [represented by the resale purchase], was *caused* by the original buyer's repudiation. See *infra* note 117 for a case that recognized a causal, or dependent, relationship must exist between the original sale and the subsequent resale to defeat a lost volume seller's claim for profit.

111. See *supra* notes 98-104 and accompanying text for the framework of this argument.

112. See *supra* note 86 for decisions in which the court focused almost exclusively on the capacity question. Some courts, however, have looked beyond the capacity question and managed to reach correct results. See, e.g., *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722 (Me. 1983) (no lost volume where father of original buyer offered to complete payments on the son's contract).

113. See *supra* text accompanying note 73 for the Harris lost-volume seller test. The first condition precedent to lost-volume seller status under the Harris test (the resale buyer would have been solicited by the seller even had there been no breach) is actually misleading because probable solicitation, alone, is irrelevant. If the resale purchaser would have placed an order with, or bought off the shelf from, the seller in any event, the original buyer's repudiation has cost the seller a profit, irrespective of the fact that he makes no "solicitation" of the resale purchaser.

114. Professor Harris' test does not recognize that the characteristics of the particular goods resold may be probative of whether a resale is a wholly independent event from the original sale. See *infra* notes 127-129 and accompanying text for this comment's argument that the nature of the goods is relevant in deciding this question.

## 1. The Seller

The seller claiming lost-volume status will attempt to show that regardless of whether a breach had occurred on the original sale, he would have made a sale to the ultimate resale purchaser.<sup>115</sup> In other words, the breach of the original sale did not provide the opportunity to make the resale; therefore, the resale is not a replacement sale,<sup>116</sup> the price of which would offset the seller's damages. Instead, the resale is a distinctly separate transaction.<sup>117</sup> In such a case, once the buyer breaches, the opportunity to make the original sale is irretrievably lost.<sup>118</sup> Clearly, the injury to the seller is the profit he would have made on that one sale.<sup>119</sup>

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115. The seller argues that he has done nothing to link the original sale and the resale purchase in a chain of causation. Harris makes the question too narrow by asking whether the seller would have solicited the ultimate resale purchaser. See *supra* note 113.

116. See A. CORBIN, *supra* note 15, at 541-42.

117. The resale is a "wholly independent sales event." Only one court's treatment of the lost volume question indicates a clear understanding of this principle. In *Snyder v. Herbert Greenbaum & Assoc., Inc.*, 38 Md. App. 144, 380 A.2d 618 (1977), a seller-installer of carpeting claimed profit damages when the buyer refused delivery of more than 17,000 yards of carpet that were intended to cover an apartment complex. *Id.* at 147, 380 A.2d at 620. The court astutely explained why section 2-708(2)'s "due credit for proceeds of resale" language is inapplicable to the lost-volume seller:

Logically, lost volume status, which entitles the seller to the § 2-708(2) formula rather than that found in § 2-708(1), is inconsistent with a credit for proceeds of resale. The whole concept of lost volume is that the sale of the goods to the resale purchaser could have been made with other goods had there been no breach. In essence, *the original sale and the second sale are independent events*, becoming related only after breach, as the original sale goods are applied to the second sale. To require a credit for the proceeds of resale is to deny the essential element that entitles the lost volume seller to § 2-708(2) in the first place—*the mutual independence of the contract and the resale.*

*Id.* at 153, 380 A.2d at 625 (emphasis added).

118. See W. HAWKLAND, *supra* note 6, at 332: "[N]o matter how many cars the seller may sell in a given period, he would have sold one more had the [original] buyer not breached." The opportunity to sell to customer 2 is not something which is left with the plaintiff *as a result of the breach*. "The only 'saving' that the buyer's breach makes possible [and that is properly subtracted when computing seller's damages] is the 'cost' of producing or procuring the subject of the sale; the seller is enabled to make one new sale without incurring the cost of a second article of the kind." A. CORBIN, *supra* note 15, at 542.

119. To put the seller in as good a position as performance would have done, he should be given the contract price minus his "cost of procurement." A. CORBIN, *supra* note 15, at 542. For a manufacturer, this will be contract price less variable costs of production. See, e.g., *Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159 (6th Cir. 1973) (parking meters); *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967) (imported cloth processing). For dealers and other middlemen (wholesalers), the measure of damages will be contract price less middleman's purchase price. See *Distribudor, Inc. v. Karadnis*, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (1970).

Lost profit damages for both middlemen and manufacturers are measured by the "gross profit" on the lost sale with no subtraction made for a seller's "fixed" overhead costs. *Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (8th Cir. 1980); *accord Scullin Steel Co. v. Paccar, Inc.*, 708 S.W.2d 756 (Mo. App. 1986). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 347, comment f (1979)

However, if the plaintiff-seller has made special sales efforts outside the scope of his normal business operations in an effort to "unload" the item which the buyer has refused to accept, then resale looks less like a normal sale in the regular course of his business and more like an efficient replacement of the breached sale.<sup>120</sup> Such special efforts might include advertising, soliciting customers when the seller usually trades off street traffic, or highlighting the breached item on the showroom floor.<sup>121</sup> Any of these actions would tend to indicate that the seller would not have solicited the ultimate resale purchaser except for the breach;<sup>122</sup> therefore, any lost volume is illusory.

## 2. The Particular Needs of the Buyer

The most frequently neglected factor in lost-volume seller status cases is the resale buyer's particular needs.<sup>123</sup> Professor Sebert notes that without a close examination of this question, a court cannot determine whether the particular buyer *would have* bought from the seller even if the original buyer had not breached.<sup>124</sup> To illustrate, if the resale buyer was in the market *only* for an orange convertible which he could buy "off the lot," and the seller only had such a car because the original buyer breached his special order contract, there is no lost volume even though the dealer passed the capacity test<sup>125</sup> and even though he took no special actions to resell the vehicle.<sup>126</sup> On the other hand, if the resale buyer was in the mar-

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(lost volume seller entitled only to recovery of "net profits"). The first circuit, in *Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865 (1st Cir. 1982), strongly disagreed with the RESTATEMENT position, finding that a net profit recovery does not give the aggrieved seller his "reasonable overhead" as specifically provided by section 2-708(2). *Id.* at 868-69 n.4.

120. See Sebert, *supra* note 4 at 388-90.

121. See *id.* at 388-89 n.120.

122. The normal seller's remedy in this situation would be under section 2-706.

123. In the following cases, the court determined lost-volume seller status without identifying an actual, or even a putative, resale purchaser: *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1985), *cert. dismissed*, 479 U.S. 957 (1986) (aircraft parts); *Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (5th Cir. 1980) (blood plasma); *Autonumerics, Inc. v. Bayer Indus., Inc.*, 144 Ariz. 181, 696 P.2d 1330 (Ariz. App. 1984) (custom built control systems); *Capital Steel Co., Inc. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978) (steel).

124. Sebert, *supra* note 4, at 388. There is always the possibility that even the overstocked dealer or the manufacturer with excess capacity might not be able to meet the resale buyer's peculiar needs without the refused goods on hand. *Id.*

125. See *supra* notes 105-09 and accompanying text for a discussion of the capacity question branch of this comment's lost volume test.

126. Similarly, if time was of the essence for the resale purchaser, he may have bought his car from the dealer only because the particular repudiated vehicle was immediately available. Because the vehicle's immediate availability was a result of the original breach, the resale is not a wholly independent event and the seller has not lost any volume; he has merely replaced the breached sale.

ket for a Chevrolet of the same general type and style of the car that the original buyer refused, then it seems likely that the dealer would have sold some type of car to the resale purchaser anyway. In that case, the original buyer's breach has effectively cost the dealer one sale and, therefore, one profit.

### 3. *The Particular Goods*

In theory, an investigation into the subjective mindsets and objective manifestations of both the buyer and the seller should be sufficient to determine whether a resale is a wholly independent sales event.<sup>127</sup> In practice, however, this can be a nebulous inquiry with few reliable guideposts.<sup>128</sup> The trier of fact must therefore also consider the characteristics of the particular good that the original buyer rejected and that the resale buyer subsequently purchased. In general, the more unusual or specialized the particular item, the more likely that its subsequent resale is merely a replacement sale, the result of special sales efforts or the similarly peculiar tastes of the resale buyer.<sup>129</sup> For example, if the seller's actions are ambiguous and it is difficult to tell from the buyer's testimony whether he would have bought a different car if the breached one had not been available, the fact that it was an odd color might rightly lead the factfinder to conclude that it was a replacement sale rather than a wholly independent sales event.

#### C. *Burdens of Proof*

If the scenarios in part IV of this comment<sup>130</sup> create the impression that most retailers will qualify as lost-volume sellers, that is

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127. See *supra* notes 115-26 and accompanying text for a discussion of the seller and resale purchaser's roles in determining lost-volume seller status.

128. See Shanker, *supra* note 41 (so-called "volume" dealers should be limited to one profit because of insurmountable difficulties in proving lost volume); Sebert, *supra* note 4, at 389 n.123 (most lost-volume sellers will settle for a lesser recovery under 2-706 because of the difficulty of proving lost volume and the increased litigation costs of trying to).

129. Perhaps this is why comment 2 to section 2-708 refers to "fixed-priced" articles. If a dealer's goods are all "standard" (that is, part of a regular line and not made to specifications of buyer) and "fixed-priced," it is much more likely that resales of such non-specific goods will be wholly independent sales events; the seller will not have to make special efforts to unload a standard stock item and a resale purchaser would buy the identical item off the shelf even if the particular item refused by the original buyer was not available.

Nonetheless, despite its probative value and support in the language of comment 2, no court has adopted a statutory interpretation limiting a section 2-708(2) profit remedy to only those lost volume sellers who deal in standard, fixed-price articles. See *supra* notes 41-46 and accompanying text for the origins of comment 2 to section 2-708.

130. See *supra* notes 115-22.



probably correct.<sup>131</sup> Therefore, in the case of retail dealers and wholesaling middlemen, their status as such should be sufficient to establish a prima facie case that the resale was a wholly independent sales event from the original sale.<sup>132</sup> Lost-volume determinations, however, are much more difficult to make in the case of manufacturer-sellers.<sup>133</sup> A manufacturer-seller should therefore be required to produce additional evidence in order to establish a prima facie case.<sup>134</sup> A manufacturer must show that he did not produce goods to the original buyer's unusual specifications, nor make special solicitation efforts to complete the subsequent resale, i.e., that he sold to the ultimate resale purchaser in the normal course of business. The defendant-original buyer could, of course, rebut the seller's prima facie case by showing that the resale purchaser did, in fact, buy *only because* the specific goods refused by the original buyer were available.<sup>135</sup>

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131. See Sebert, *supra* note 4, at 389 (most merchants of relatively standard goods will be lost-volume sellers); Childres and Burgess, *supra* note 4 (section 2-708(2) the primary seller's remedy under the Code). *But see* Goetz & Scott, *supra* note 75 (even most merchant sellers unlikely to have lost volume as consequence of buyer's breach).

132. A virtual presumption that dealers should be afforded a profit remedy is at least implicit in comment 2 to section 2-708(2), which says the profit remedy is available in "all appropriate cases, which would include all standard priced goods" (an apparent reference to the automobile dealer cases). See N.Y. LAW REVISION COMM., 1 STUDY OF THE UNIFORM COMMERCIAL CODE, 1955 REPORT, 693 (reprint ed. 1980).

133. Manufacturers are more likely than either dealers or middlemen to (1) procure the goods upon special order; (2) sell articles that are neither "fixed-priced" nor standard; and, (3) make special solicitations if the buyer refuses delivery on what will normally be a large volume of goods. All these factors suggest that fewer manufacturer-sellers will be legitimate lost-volume sellers.

134. See *supra* note 13 for factors which make a manufacturer's lost volume status inherently more debatable.

135. The burden of ultimately proving his lost-volume status remains, at all times, with the seller because the language of 2-708(2) requires an affirmative showing that section 2-708(1) damages are "inadequate." *Famous Knitwear Corp. v. Drug Fair*, 493 F.2d 251 (4th Cir. 1974); R. ANDERSON, *supra* note 6, at 394. It is only the burden of *proceeding* that shifts to the defendant-buyer once the seller has established his prima facie case of lost volume. See *supra* notes 105-29 and accompanying text for factors tending to indicate seller has suffered no lost volume.

If either the district or appellate courts in the *Davis* case had applied the test proposed in this comment, it is not clear what the result would have been. There are simply too few factual details in the reported opinion. Assuming, however, that Dasonics was a seller with excess manufacturing capacity, then on remand, Dasonics' status as a lost-volume seller should turn on whether the subsequent resale of the equipment was a wholly independent event.

To establish a prima facie case on this element, Dasonics would need to show that they did not produce the equipment to Davis' unusual specifications, i.e., the manufactured equipment was essentially fungible, and that they resold the rejected diagnostic equipment in the normal course of business—without any unusual solicitation efforts. Davis could then rebut this prima facie case by offering not only evidence that Dasonics made special solicitation efforts or that the rejected goods were made to particularly unusual specifications, but also any evidence that the resale purchaser would not have bought from Dasonics *but for* the contemporaneous availability of *this particular* diagnostic equipment.

### CONCLUSION

If Illinois courts agree with the seventh circuit that lost-volume sellers are entitled to a profit remedy under Uniform Commercial Code section 2-708(2), they will face the difficult but necessary task of deciding which sellers are entitled to this remedy. Courts in other jurisdictions have too frequently permitted a profit remedy to underserving sellers because previous lost-volume seller definitions were either inadequate or poorly applied. Because it comports with the general damages philosophy of the U.C.C. and produces results consistent with the general common law theory of contract damages, Illinois courts should adopt the two-step analysis of "capacity" and "wholly independent sales event" to ensure that the section 2-708(2) profit remedy is only available to true lost-volume sellers.

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