**Comments on k-lia-p-46-47** [8/24/2018 11:37 AM]

**Comment 1**: The contract price is $8 x 100 = $800. The market price at the time [and place] of the tender of performance is $7.10 x 100 = $710. The difference is $90.

A simple damage formula might compare two prices: the contract price and the market price (without requiring that the Seller actually mitigate by taking advantage of the market).

Under Article 2, s. 2-708, the Seller may use this simple formula to compute its damages. Note that the market price used in the formula is that prevailing at both (i) the time of the breach (here, clear on the facts of the problem) and (ii) the place of the tender (here, we might assume the place, but we are not told that fact, we are just told that goods were tendered and not accepted). We need to infer that the market price we are given is that prevailing at the place of tender as well as at the time of tender.

As an aside, you might wonder what the Seller does with 100 crates of apples. If the apples spoil, the Seller actually lost a lot of money by doing nothing. Thus, the Seller has a financial incentive to try to resell the crates of apples even though it may receive a damage award if it does nothing.

Commentators and the Permanent Editorial Board for the UCC have recognized that s. 2-708(1) tacitly assumes that a resale of goods has occurred, even though there is no express requirement that a resale has taken place.

See Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform

Commercial Code Article 2: Preliminary Report 210 (1990) ("Viewed realistically, s 2-708(1) is a surrogate for the resale remedy."); see also Anderson, Damages for Sellers Under the Code's Profit Formula, 40 Sw. L.J. 1021 (1986), at 1026 (noting that under s 2-708(1), "an actual resale ... is presumed"); id. at 1032 ("[T]he formula contemplates an actual resale of completed goods."); Childres & Burgess, Seller's Remedies: The Primacy of UCC 2-708(2), 48 N.Y.U. L. Rev. 833 (1973), at 872 ("[T]he only difference between the 2-706 resale price formula and the 2-708(1) market price formula is the fact of resale, which thereby converts the theoretical market price into a specific resale price."); Goetz & Scott Measuring Sellers' Damages: The Lost Profits Puzzle, 31 Stan. L. Rev. 323 (1979), at 324 ("Such a price differential formula assumes a market in which the seller has a realistic opportunity to replace the buyer's contract.").

**Comment 2**: The fact that the market price on June 1, the date of contract formation, is the same as the market price on July 1, the date of the rejected tender which resulted in breach, is not relevant.

It might appear that Seller has lost nothing because the market price at the time and place for tender is identical to the market price at the time of contract formation. This is wrong, however, because on June 1 Seller acquired a right to receive $8 per crate.

First, it might just mean that Seller entered into a favorable contract. Second, the price of $8 might be appropriate for a forward delivery because the market price for an immediate June 1 delivery is not necessarily the same as a market price for delivery a month hence. Even if we assume that the June 1

market price is for a forward delivery on July 1, it still should not matter because s. 2-708(1) simply compares the contract price actually entered into with the market price at the time and place for tender. Once the contract was formed on June 1, Seller became entitled to receive that price even if it was above market at the time of contract formation.

**Comment 3**: The sale for $7 per crate is a covering or substitute resale. Resales are permitted under s. 2-706. Indeed, a resale seems consistent with the idea of damage mitigation. If the covering resale qualifies, the measure of damages is the difference between the contract price and price received on resale. This difference totals $100. Recall from Comment 1 that Seller has an incentive to substitute a resale, rather than do nothing

However, we need to test whether the resale qualifies under s. 2-706. Certainly, the sale to a nearby supermarket seems commercially reasonable; however, we might pause at the $7 price to a friend when the market price is higher. The statute requires both that the resale be commercially reasonable and that it be made in good faith. Perhaps the sale to a friend at a modest discount is not in good faith [see discussion below]? It is hard to say on these limited facts.

Comment 2 following s. 2-706 tells us that failure to comply with the resale requirements limits Seller to its formula damages under s. 2-708—which is $90.

"Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him or her to that provided in section 2-708."

The sale to the friend's supermarket seems to be a private sale (which is permitted) but it also appears that Seller should have given Natural Foods notice of the sale pursuant to subsection (3) (which was not done on the given facts).

Case law holds that it is the burden of the Seller to affirmatively plead compliance with the notice section of s. 2-706 (and not the Buyer's burden to plead lack of notice as an affirmative defense). See, e.g. **Sprague v. Sumitomo Forestry Co., Ltd.**, 104 Wash.2d 751 (1985). This makes sense because the giving of notice is an element of Seller's entitlement to use s. 2-706 (note that Seller "must" give notice pursuant to subsection (3)).

You might consider whether it would be sufficient if Natural Foods had knowledge of the resale even if Seller did not give notice. What if Natural Foods had told Seller "you better sell those apples before they rot!" but Seller said nothing and simply resold the goods?

Though it is common for courts to require that a notice requirement be strictly complied with, in the UCC context it appears that courts have sometimes relaxed the notice requirement a bit—to allow knowledge of the sale or a direction to make a sale by the Buyer to satisfy the notice requirement. See, e.g. **Eades Commodities, Co. v. Hoeper** , 825 S.W.2d 34 (Mo. Ct. App. 1992)(and the cases cited therein).

Interestingly, Comment 3 following s. 2-706 suggests that the modest discount of 10 cents per crate is used as follows:

"Evidence of market or current prices at any particular time or place is relevant only on the

question of whether the seller acted in a commercially reasonable manner in making the resale."

The price difference is so small that the instructor would not judge it to cause a failure of a commercially reasonable sale, particularly as the supermarket was close to the point of the failed tender.

The overall point is that the market price at the time of resale is not directly relevant. The UCC calculation simply compares the contract price with the resale price. The market price is only relevant indirectly if a disparity suggests a failure to proceed in a commercially reasonable manner. According to the comment, it does not appear that a market price disparity would bear on the issue of good faith.

In the real world, I would not find it surprising to call a friend in a case like this—but it does raise a good faith issue.

**Comment 4**: Again, we must consider whether the resale qualifies. This seems like a "public" sale rather than a private sale. A public sale is a permitted form of disposition. And, unlike a private sale, no notice need be given to Natural Foods because the apples are perishable.

Thus, unlike in 3. above, the failure to give notice should not potentially disable the use of the cover formula.

However, in Comment 4 to s. 2-706 we are told that the phrase "public sale" means "auction". These roadside sales do not appear to be an auction—though the roadside sales would otherwise appear permitted because a single resale is not required.

The truly interesting feature of the problem is the fact that the resales actually resulted in a better price than the prevailing market price. At $7.50 per crate, the actual loss is only $50. Could Seller make the resales and yet still claim a larger damage amount of $90? If we take the idea in s. 2-703 that the Seller may elect its remedy, the answer would seem to be "YES." **BUT CAUTION!**

This result of allowing a damage award higher than actual damages appears to go against the general mitigation idea—which requires a damage award only to the extent needed to make the innocent party whole (after taking into account self help which in this case further reduced damages!).

And, allowing the higher award seems to go against the specific policy of the Code expressed in s. 1-305 (formerly, s. 1-106) that a party be placed in the position it would have been in following performance. These issues, including a discussion of a prior edition of the White and Summers treatise, appears in **Tesoro Petroleum Corp. v. Holborn Oil Co., Ltd.**, 547 N.Y.S.2d 1012 (1989). In *Tesoro*, the court limited damages to the lower amount.

You should take a close look at the structure of s. 2-706 and compare it to the structure of s. 2-708. You will see that s. 2-706 is really just a formula which compares two different prices. While it is possible to collect for "incidental" damages, there is no additional "add-on" specified. In contrast, s. 2-718 contains a formula (also with the possibility of "incidental" damages) BUT IN ADDITION it contains a subpart (2) which provides for an additional damage amount IF the formula in subpart (1) is insufficient. This subpart (2) concept in s. 2-708 is missing from s. 2-706.

Suppose you are the Seller in problem (4) on p. 47 and that, under the circumstances, your resale transaction is deemed covered by s. 2-706. Some of the case law suggests you are stuck with the $50 under s. 2-706 and may not seek the higher $90 amount under s. 2-708. However, what if, under the circumstances, the $50 amount is insufficient to cover your loss? This might occur, for example, if you were a volume seller of inventory.

**Q**: Can you combine a $50 recovery under s. 2-706 for the loss on resale, with a s. 2-708(2) recovery of an additional amount needed to make you whole—for example, to recover a lost profit on a missed sale?

**A**: Comment 1 to s. 2-703 suggests that, in an appropriate case, you may seek to collect damages under both sections:

"This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."

This combination of s. 2-706 with s. 2-708(2) is not free from doubt, however, because s. 2-708(2) seems to apply only when the amount produced by the formula in s. 2-708(1) is inadequate—and says nothing about an inadequate amount under s. 2-706. Note further that s. 2-708(2) might be seen as providing an alternative to s.2-708(1) and not allow an addition to s. 2-708(1).

Though there is no "election of remedies" doctrine under UCC Article 2, in practice one must take care

that the applicable laws in a particular dispute do not specify an election of remedies—which limit recovery for a plaintiff. For example, if a bank elects to foreclose a mortgage on a house as its "first" remedy, it might be precluded from thereafter seeking a personal judgment against the home owner for any deficiency representing a loss on the sale of the property below the amount secured by the mortgage.

Not every state law scheme for remedies is as liberal as UCC Article 2.