ANOTHER TRIP AROUND ARTICLE 2 REMEDIES: WHY THE U.C.C. PRECLUDES SELLERS FROM RECOVERING MARKET PRICE DAMAGES IN EXCESS OF RESALE DAMAGES

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INTRODUCTION

The Uniform Commercial Code (the "U.C.C." or the "Code") was a collaborative effort of the National Conference of Commissioners on Uniform State Laws and the American Law Institute and was enacted by the states to bring uniformity to commercial transactions and confidence to those engaged in interstate commerce.[1] Consequently, the U.C.C. "allows businesses to grow and the American economy to thrive."[2] Yet, despite its long history of serving the American commercial landscape, the U.C.C. is not without controversy. The purpose of this article is to address one particular controversy—whether an aggrieved seller, after reselling the goods, can obtain higher market price damages.

The problem may best be understood through a simple illustration.[3] On January 1, Seller (S) contracted to sell goods to Buyer (B) for $10,000 with delivery to Buyer (B) on February 1. However, Buyer (B) wrongfully rejected the goods on delivery. The market price for the goods then dropped.

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1. THE LAW REVISION COMMISSION FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE 11 (William S. Hein & Co., Inc. 1998) (1955); Jess Cheng, *How to Build a Stablecoin: Certainty, Finality, and Stability Through Commercial Law Principles*, 17 BERKELEY BUS. L.J. 320, 326 (2020); *Uniform Commercial Code*, UNIF. L. COMM'N, http://uniformlaws.org/acts/ucc (last visited June 23, 2021).

2. *Uniform Commercial Code*, *supra* note 1 (summarizing the U.C.C. as "the backbone of American commerce").

3. This article is only concerned with seller remedies after a wrongful rejection. If the buyer has accepted the goods and then breaches, the seller's damages are clear—the seller recovers the unpaid contract price under § 2-709.

Accordingly, when Seller resold the same goods to a Third Party (TP) on February 15, it only received $8,000.[4]

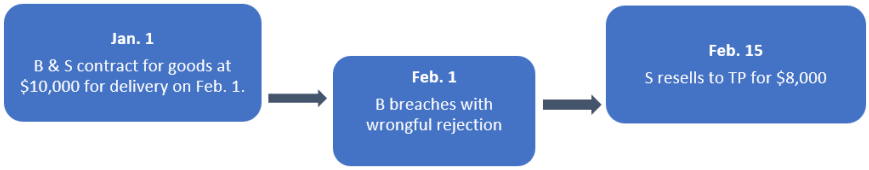

Figure 1. Timeline of Events

Under resale damages, Seller receives the difference between the contract price and resale price or $2,000.[5] Accordingly, Seller's damages place Seller in the same position it would have been had Buyer performed, which is the goal of Code remedies, as Section 1-305 proclaims: the end of remedies is to put the aggrieved party "in as good a position as if the other party had fully performed . . . ."[6]

Seller's Expectations	Resale Damages 2-706
Contract Price = $10,000	Contract Price minus Resale Price = Damages
	$10,000 - $8,000 = $2,000
	Or
	$8,000 (obtained on resale) + $2,000 (contract price/resale differential)
$10,000 ◄	► $10,000

Figure 2. Seller's Expectations Met

However, what happens if the market price of the goods falls below the resale amount, say $6,000 for this illustration? Pursuant to the market price calculation, Seller would be entitled to an award of $4,000, which is the

4. It is assumed in this illustration that the resale requirements have been met for either a private sale or public sale. Otherwise, "[f]ailure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708." U.C.C. § 2-706 cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2012).

5. *Id.* § 2-706(1). For illustration purposes, it is assumed that seller does not have incidental damages, which are recoverable under resale and market price damages. *See id.* §§ 2-706(1), 2-708(1). It is also assumed that seller's resale has met the resale requirements as either a public sale or a private sale. *See id.* §§ 2-706(3)–(4).

6. *Id.* § 1-305(a).

difference between market price and contract price.[7] Accordingly, if Seller is able to recover market price damages, it would receive a higher award from Buyer than it would obtain under resale damages.

Market Price Damages 2-708(1)	Resale Damages 2-706(1)
Contract Price minus Market Price = Damages	Contract Price minus Resale Price = Damages
$10,000 - $6,000 = $4,000 Seller receives $4,000	$10,000 - $8,000 = $2,000 Seller receives $2,000

Figure 3. Market Price vs. Resale Calculations

The illustration may leave the impression that the difference between market price and resale damages is minimal so that this should not be a matter of concern. However, in real-life situations, the difference can be significant—to the tune of thousands of dollars, if not more. For example, in *Coast Trading Co. v. Cudahy Co.*, the windfall[8] to the seller was over $32,000.[9] Yet, in *Tesoro Petroleum Corp. v. Holborn Oil Co.*, the windfall was approximately $3,000,000.[10] These examples simply serve to make the point that this issue matters because significant dollars can be at stake.

Admittedly, the situation posed here is rare. For example, if the seller is a lost volume seller, then damages are based on the seller's lost profit under Section 2-708(2), and the problem identified here is averted. Moreover, if buyer breached after acceptance, then seller gets its contract price.[11] As one commentator noted, "Article: 2 is thus structured to leave little necessary work for the market price remedy to do."[12] Furthermore, this problem is unique to sellers. If the tables were turned and the seller was the breaching party, then Article 2 would not permit the buyer to choose between market price damages or cover damages after buyer covered.

7. *Id.* §§ 1-305(a), 2-708(1).

8. "Windfall" simply refers to an award of damages that exceeds what is necessary to put the aggrieved party in the position it would have been in had the other party performed as required under the contract.

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

10. Tesoro Petroleum Corp. v. Holborn Oil Co., 547 N.Y.S.2d 1012, 1016 (Sup. Ct. 1989).

11. U.C.C. § 2-709(1).

12. Roy Ryden Anderson, *A Look Back at the Future of UCC Damages Remedies: Strategic Behavior and Market Price Damages*, 71 SMU L. REV. 185, 194 (2018).

Although not many courts have grappled with this issue, the topic has garnered debate from scholars over the years. Interest in this issue resurfaced after the Oregon Supreme Court ruled that an aggrieved seller may obtain market price damages, even when those damages exceeded resale damages.[13] In this article, I seek to take another trip around Article 2 damages to add my views to the controversy.[14] Part II provides an overview of the remedies available to buyers and sellers. Part III criticizes the approach adopted by the most recent case on this issue, *Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc*., from the Oregon Supreme Court. Part IV advocates that the solution to this problem is found within the provisions of the Code itself.

I. OVERVIEW OF BUYER AND SELLER REMEDIES UNDER ARTICLE 2

Before addressing the problem presented in the Introduction, it is worthwhile to review the manner in which the Code treats damages for buyers and sellers.

First, as for a buyer, the Code presents two alternatives: cover damages[15] or market price damages.[16] Section 2-711 presents the list of possible recoveries for the aggrieved buyer.[17] Included in that list is damage calculations based on cover or market price. The Code also specifies the relationship between the two remedies—when a buyer covers,[18] the buyer is limited to cover damages and may not seek market price damages. This result is clearly articulated in Official Comment 5 to Section 2-713: "The present section [2-713] provides a remedy which is completely alternative to cover under the preceding section [2-712] and applies only when and to the extent

13. *See* Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531, 540 (Or. 2014).

14. As a long-time admirer of Jimmy Buffett's music (I might even say that his music helped to ease the pain of law school back in the day), I found inspiration for the title of my article in his song "Trip Around the Sun" sung with Martina McBride.

15. Cover is where the buyer goes into the marketplace and purchases "goods in substitution for those due from the seller." U.C.C. § 2-712(1). The buyer's ability to obtain substitute goods, however, is limited. The substitute purchase must be made within a reasonable time, it must be a reasonable purchase, and it must be done in good faith. *Id.* § 2-711.

16. *Id.* § 2-713(1).

17. To clarify, Section 2-711 damages are available to a buyer in situations where "the seller fails to make delivery or repudiates" or where "the buyer rightfully rejects or justifiably revokes acceptance." *Id.* § 2-711(1).

18. The buyer's right to cover is optional. *See id.* § 2-712 cmt. 3 ("Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer.").

that the buyer has not covered."[19] As a result, while the Code provides buyer with the right to seek a market price award, such a recovery is precluded in the event of cover.

As for sellers, Section 2-703 is the parallel section to Section 2-711, as it presents the seller with a list of remedies.[20] In addition to allowing the seller to withhold delivery, stop delivery, or even cancel the contract, Section 2-703 permits resale damages as well as market price damages.[21] Resale damages are presented under Section 2-706, and like buyer's right to cover, seller's right to resell is optional.[22] As for market price damages, that calculation is found in Section 2-708(1).

Does the Code preclude a seller from seeking market price damages after a resale? As stated above, the Code precludes a buyer from seeking market price damages after it covered. The Official Comments provide that clarification. However, unlike buyer remedies, no parallel limitation exists for sellers.[23] And, therein lies the problem. Without a parallel seller limitation, the door is open for "a greedy seller [to] seek a windfall in the form of a larger 2-708(1) recovery."[24]

II. *PEACE RIVER*: A CASE IN POINT

While scholars can debate whether sellers should be permitted to recover market price damages in excess of resale damages, the issue has real-life implications. A case in point is the decision in *Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc*. from the Oregon Supreme Court.[25] The purpose of this part of the article is to (1) offer context for the opinion by providing a brief overview of the case and (2) criticize the approach taken by

19. *Id.* § 2-713 cmt. 5.

20. "This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer." *Id.* § 2-703 cmt. 1.

21. *Id.* § 2-703.

22. Both Sections 2-703 and 2-712 specify that the aggrieved seller or the aggrieved buyer "may" exercise the right to resell or cover the goods. The use of "may" is instructive, as it articulates an option. JAMES F. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: HORNBOOK SERIES (West Publishing Co., 6th ed. 2010), § 7-3, p. 284 n.1 ("Many cases affirm that cover is not mandatory."); *id.* § 8-6, p. 355 ("Resale is not mandatory.").

23. Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 260 (1963) (recognizing the limitation placed on buyer's ability to obtain market price damages but no parallel limitation on seller).

24. WHITE & SUMMERS, *supra* note 22, § 8-7, at 362. White and Summers claim that the Code drafters did not clarify whether a seller can recover more market price damages than resale damages. Yet, they conclude that courts should not permit such a result. *Id*. at 365–66.

25. Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531 (Or. 2014).

the court in permitting the seller to recover market price damages that exceeded resale damages.

A. *A Brief Review of the Case*

Interestingly, the case involved a contract for grass seed, and lots of it—over one million pounds.[26] The case is also interesting for the fact that it involved an international transaction; as the seller, Peace River, was a Canadian company, and the buyer, Proseeds, was an Oregon corporation.[27] When the parties entered into the contract, the agreed price was below the current market price for seed and, thus, was "very favorable" to the buyer, Proseeds.[28] However, overproduction of grass seed in the global market caused the price to plummet by the time that Proseeds was to take delivery.[29] Accordingly, Proseeds refused to purchase most of the seed because it could buy on the open market for substantially lower prices.[30] Peace River stored the seed that Proseeds had agreed to buy and was able to sell it to other purchasers.[31]

At the trial court level, the court found Proseeds to be in breach of the agreement.[32] As for damages, the parties disputed the appropriate damage calculation, with Peace River (seller) seeking damages under market price and Proseeds (buyer) arguing for resale damages.[33] Finding that Peace River would receive a smaller award under resale damages, the trial court rejected Peace River's argument for market price damages and awarded Peace River its resale damages.[34] The Oregon Court of Appeals reversed the trial court's decision, finding that the Code lacks any restriction against a reseller obtaining

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26. Amended Brief On the Merits of Respondent On Rev. at 3, Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., No. S060957, 2013 WL 4398107, at *3 (Or. Mar. 20, 2014).

27. *Peace River Seed Co-Operative*, 322 P.3d at 533.

28. Amended Brief On the Merits of Respondent On Rev., *supra* note 26, at *2.

29. *Id*. at *3.

30. *Peace River Seed Co-Operative*, 322 P.3d at 533; Amended Brief On the Merits of Respondent On Rev., *supra* note 26, at *3.

31. *Peace River Seed Co-Operative*, 322 P.3d at 533.

32. *Id.*

33. *Id*. at 534.

34. Peace River Seed Co-Op., Ltd. v. Proseeds Mktg., Inc., 293 P.3d 1058, 1062 (Or. Ct. App. 2012), *aff'd in part, rev'd in part sub nom.* Peace River Seed Co-Operative, Ltd. v. Proseeds Mktg., Inc., 322 P.3d 531 (Or. 2014) ("Peace River's compensatory damages would be the lesser of the 'difference between the actual sales price received by [Peace River] upon ultimate sale [of the seed] and the contract price with [Proseeds]' or 'the difference between the market price and the contract price on the total production, less the seed purchased and paid for by [Proseeds].'").

market price damages.[35] The Oregon Supreme Court affirmed, holding that a seller is "entitled to recover its market price damages, even if those damages exceeded [seller's] resale price damages."[36]

B. *The Oregon Supreme Court's Flawed Approach*

Before articulating its analysis, the court acknowledged that commentators "have taken two different approaches to this issue."[37] On the one side, commentators argue that sellers have a choice between market price or resale damages. However, on the other side of the debate, commentators advocate that a seller cannot recover more in market price than it could obtain in resale price damages.[38] The court resolved the issue by agreeing with the commentators which advocate for market price damages, "even if market price damages lead to a larger recovery."[39]

The court based its conclusion on three points: (1) the text and context of the U.C.C.'s damages provisions; (2) the legislative history of the Code's damages provisions; and (3) the court's understanding as to seller expectations. In this next section, I will examine the Oregon Supreme Court's analysis and demonstrate the flaws in its approach.

1. Text and Context

The court began its analysis by considering "the statute's text and context to determine the legislature's intent regarding a seller's remedies under the UCC."[40] In doing so, the court made three observations about seller damages: (1) the Code rejects election of remedies for sellers; (2) no limitation appeared in the list of seller's damages, unlike the list for buyers; and (3) Section 2-706 resale damages are permissive.

First, before examining the text of the Code, the court turned its attention to the common law approach for seller damages that existed before the Code's enactment. The court found that the common law subscribed to the doctrine of election of remedies.[41] While common law recognized resale and market price damages as options for the aggrieved seller, the doctrine of election

35. *Peace River Seed Co-Operative*, 322 P.3d at 535.
36. *Id*. at 533.
37. *Id.* at 535.
38. *Id.* at 535–36.
39. *Id.* at 536.
40. *Id.*
41. *Id.*

dictated that, once a seller resold goods, the seller had elected its remedy and, thus, could only recover resale damages. If a seller wanted to pursue market price damages, then the seller had to refrain from reselling the goods. Accordingly, if a seller resold the goods, then "the seller was assumed to have elected resale as [its] remedy and was barred from proceeding under an inconsistent remedy."[42]

The court, though, determined that the Code jettisoned the doctrine of election of remedies.[43] In reaching this conclusion, the court relied on Official Comment 1 to Section 2-703.[44] However, the court only focused on a portion of that Comment. While the Comment does state, "[t]his Article rejects any doctrine of election of remedy as a fundamental policy,"[45] the Comment continues to state: "remedies are essentially cumulative in nature and include all of the available remedies for breach."[46] The court's analysis failed to consider the second half of that sentence. That part of Comment 1 cannot be overlooked because it brings to light the scheme created by the Code for seller damages. In the event that the seller resells the goods but fails to follow the resale requirements in Section 2-706, the seller is not denied damages. Rather, the seller is denied its resale damages but is entitled to recover market price damages under Section 2-708(1).[47] Several courts have followed this scheme in finding the proper measure of damages under Section 2-708(1) when the seller failed to meet the resale requirements of Section 2-706.[48] An oft cited

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42. Henry Gabriel, *The Seller's Election of Remedies Under the Uniform Commercial Code: An Expectation Theory*, 23 WAKE FOREST L. REV. 429, 446 (1988). *See also Peace River Seed Co-Operative*, 322 P.3d at 536 (noting the common law of Oregon as accepting election of remedies); Sloss-Sheffield Steel & Iron Co. v. Stover Mfg. & Engine Co., 37 F.2d 876, 877 (7th Cir. 1929) (in reliance on state case law from Alabama, Kansas, Wisconsin, and others, holding that once seller resold the goods, it made its election and "[could not] now pursue an inconsistent remedy" and, thus, was limited to resale damages).

43. *Peace River Seed Co-Operative*, 322 P.3d at 537.

44. *Id.* at 537–38.

45. U.C.C. § 2-703 cmt. 1.

46. *Id.*

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

48. *See, e.g.*, Republic Bank, Inc. v. W. Penn Allegheny Health Sys., Inc., No. 2:08CV934DAK, 2010 WL 11505104, at *18 (D. Utah July 26, 2010), *aff'd*, 475 F. App'x 692 (10th Cir. 2012) (noting seller still had a remedy under Section 2-708(1) if it failed to give notice); *Tesoro Petroleum Corp.*, 547 N.Y.S.2d at 1016 (acknowledging the interplay between Sections 2-706 and 708(1) when seller is disqualified from receiving resale damages); Great W. Sugar Co. v. Mrs. Allison's Cookie Co., 563 F. Supp. 430, 432 (E.D. Mo. 1983) (finding that seller is not precluded from seeking other remedies when barred from resale damages); B & R Textile Corp. v. Paul Rothman Indus. Ltd., 420 N.Y.S.2d 609, 610 (N.Y. Civ. Ct. 1979), *aff'd sub nom.* B & R Textile Corp. v. Paul Rothman Indus., Ltd., 1979 WL 30097 (N.Y. App. Term. Dec. 7, 1979) (rejecting buyer's argument that seller could not recover market price damages when seller

case that followed this approach is *Coast Trading Company v. Cudahy Company*. In that opinion, the Ninth Circuit Court of Appeals found that the seller did not resell in good faith and commercial reasonableness and, thus, refused to award seller damages under Section 2-706 but turned to the measure of damages presented in Section 2-708(1).[49] Yet, the court recognized that market-price damages would give plaintiff a $32,000 windfall.[50] The court resolved this problem by using Section 2-708(1) as the calculation of damages "but only up to the amount of damages that could be recovered under Section 2-706, that is, plaintiff's actual losses."[51]

If any doubt exists that election of remedies has not been completely removed from Article 2 remedies, Comment 1 concludes by investing courts with authority to rule that the pursuit of one remedy may bar seller from pursuing another alternative: "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."[52] In a true election of remedies situation, the seller elected its remedies once it resold, regardless of whether the seller properly followed the resale requirements. But, that is not how the Code operates, as the whole of Comment 1 makes plain.[53]

The court also took aim at the seemingly different treatment between market price damages for buyers and sellers. For buyers, the Code clarifies that market price "is completely alternative to cover . . . and applies only when and to the extent that the buyer has not covered."[54] A parallel clarification does not appear in Section 2-708(1) for seller's market price damages. Absent a similar limitation, the court concluded that a seller "would not be precluded from seeking a larger damage recovery using the market price measure of damages."[55]

Seller damages, however, do not operate in the same way as buyer damages. As already explained, if the seller resells, but is disqualified from recovering resale damages because it did not follow the requirements of Section 2-706, for instance, it failed to notify the buyer of the resale or the

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resold the goods but failed to provide buyer with notice as required by Section 2-706); Miller v. Belk, 207 S.E.2d 792, 795 (N.C. Ct. App. 1974) (applying Section 2-708(1) damages when seller failed to give notice of resale to buyer).

49. *Coast Trading Co.*, 592 F.2d at 1080.

50. *Id.* at 1081, 1083.

51. *Id.* at 1083.

52. U.C.C. § 2-703 cmt. 1.

53. *See* Anderson, *supra* note 12, at 232 (noting that Comment 1 permits the seller to notify the buyer of its intention to resell "but still recover market price damages if he later decides not to resell or if his resale is found to be unreasonable").

54. U.C.C. § 2-713 cmt. 5.

55. *Peace River Seed Co-Operative*, 322 P.3d at 538.

resale was commercially unreasonable, then seller is relegated to market price damages.[56] The court's reliance on the absence of a parallel seller limitation is misplaced. However, if seller's market price damages did contain a limitation similar to the one that appears for buyer's market price damages, then the Code would contradict itself, as seller would not be permitted to seek market price damages when it is disqualified from resale damages, because once it ventured down the resale route, its fate is fixed. In other words, market price damages are created "as a back-up" for seller.[57] Accordingly, the court's analysis here is akin to comparing apples to oranges – they are both fruits (i.e., both damages), but, because they are completely different kinds of fruit, they offer different nutritional benefits. Likewise, while cover and resale are similar, in that they are both substitute transactions, the Code treats them differently because the resale requirements are more extensive than cover requirements.[58] To impose buyer's restriction on a seller would mean that a seller would be without any remedy if its resale somehow falls short of Section 2-706. The Code rejects such a harsh penalty to befall the seller.

The failure of the *Peace River* court's analysis on election of remedies was to put its full weight behind a few selected Code comments; however, when all of the damage provisions are read in their entirety, a different meaning comes to light.

Next, the court examined the text and context of Code damages. In doing so, the court again noticed a distinction in the Code's treatment of buyer and seller remedies. The court properly recognized a grammatical difference in the list of buyer remedies versus seller remedies. Specifically, it noted that the seller's list lacks the limiting conjunction "or" that appears in the buyer's list.[59] This chart illustrates the court's observation:

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56. U.C.C. § 2-706 cmt. 2.

57. Anderson, *supra* note 12, at 194.

58. For a proper cover, the buyer must make a "reasonable purchase" "in good faith and without unreasonable delay." U.C.C. § 2-712(1). On the other hand, a resale for the seller can be either by private sale or public sale under Section 2-706. In both situations, the seller must notify the buyer of the resale and the resale must be done in good faith and in a commercially reasonable manner. For public sales, the seller must additionally conduct the sale at a usual place for a public sale. *See also* WHITE & SUMMERS, *supra* note 22, § 8-6, at 355.

59. *Peace River Seed Co-Operative*, 322 P.3d at 537.

2-703 **Seller Remedies** "[T]he aggrieved seller *may*"	**2-711** **Buyer Remedies** "[T]he buyer *may*"
"(d) resell and recover damages as hereafter provided (Section 2-706);"	"(a) 'cover' and have damages under [2-712]; *or*"
"(e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);"[60]	"(b) recover damages for non-delivery as provided in this Article (Section 2-713)."[61]

At this point, nothing can be argued. The court's observation is correct. From there, however, the court leapt to the conclusion that the omission of "or" in seller's list must be interpreted as giving the seller the option to choose market price damages, even where the seller already resold the goods.

Thus, although the buyer's index of remedies suggests that a buyer who covers may be precluded from seeking market price damages, the seller's index of remedies does not contain a similar limitation if the seller chooses to resell. "It follows that the text of ORS 72.7030 supports plaintiff's argument that a seller who has resold is not necessarily limited to its resale price damages under ORS 72.7060, but has the option of seeking to recover market price damages under ORS 72.7080."[62]

The court's reliance on the omission of "or" says too much. It failed to explain how the omission of "or" grants seller the ability to seek market price

60. U.C.C. § 2-703 (emphasis added).

61. *Id.* § 2-711 (emphasis added).

62. *Peace River Seed Co-Operative*, 322 P.3d at 537. The Oregon statutory references comport with the U.C.C. provisions discussed here. For instance, ORS 72.7030 is U.C.C. § 2-703 (seller's remedy list); ORS 72.7060 is U.C.C. § 2-706 (seller resale damages); and ORS 72.7080 is U.C.C. § 2-708(1) (seller market price damages).

after reselling the goods; it simply jumped to that conclusion. As a result of this leap, the court placed too much weight on the omission of "or" and overlooked the very purpose of Section 2-703, which is to simply provide a list of remedies. Official Comment 1 makes this clear: "This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer."[63] Section 2-703 should not be understood as an operative section defining how seller's damages is to be calculated; rather, it is merely a compendium of possibilities that await a seller on buyer's breach – an outline if you will.[64] Stated more astutely, Professor Anderson observes: "The absence in § 2-703 of § 2-711's disjunctive language is explained by the two statutes' different purposes. Section 2-711(1) is a damages formula, whereas § 2-703 is merely a menu of seller remedies."[65]

The court also placed great weight on the presence of "may" in resale damages under Section 2-706. Twice, the Code drafters use "may" in that provision. First, Section 2-706 states that "the seller may resell the goods concerned or the undelivered balance thereof."[66] Then, "may" is used in the next sentence to define the resale calculation: "Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price . . . ."[67] From the use of "may," the court concluded that a seller is not required to seek resale damages when it resells the goods.[68] But, is that really what the Code says? The use of "may" here seems to imply nothing more than the fact that the aggrieved seller is not required to resell when a buyer breaches the contract. In other words, "[r]esale is not mandatory."[69] Once again, the court's analysis went too far.

In short, while the court embarked on a review of the text, it failed to consider context. In context, neither Section 2-703 nor 706 permit the seller to obtain market price damages that exceed resale damages.

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63. U.C.C. § 2-703 cmt. 1.

64. White and Summers refers to Section 2-703 as a catalogue of seller's principal remedies. *See* WHITE & SUMMERS, *supra* note 22, § 8-1, at 341.

65. Anderson, *supra* note 12, at 229.

66. U.C.C. § 2-706(1).

67. *Id.*

68. *Peace River Seed Co-Operative*, 322 P.3d at 538.

69. WHITE & SUMMERS, *supra* note 22, § 8-6, at 355.

2. Legislative History

Following its textual analysis, the court reviewed the legislative history of the Code's damages provisions and concluded that prior drafts of the U.C.C. demonstrate the drafter's intent to permit a seller to recover higher market price damages.[70] The court took particular notice of an early draft of Section 2-706 (written in May of 1949) where one of the comments explicitly stated that resale damages were "the exclusive measure of seller's damages" in situations where the seller resold the goods and that market price damages are "relevant *only* on the question of whether the seller acted with commercially reasonable care and judgment in making the resale."[71] That comment was later revised from a mandatory requirement to a permissive allowance: "If the seller complies with the prescribed standard of duty in making the resale, he *may* recover from the buyer the damages provided for in subsection (1)."[72] The court found that this revision "indicates that the drafters intended for a seller to be able to choose to recover market price damages, even after reselling under [Section 2-706]."[73]

The U.C.C. has an extensive legislative history; yet, the *Peace River* court selected one revision as the basis for its conclusion. Interestingly, the court could have pointed out other examples of changes that may have been equally persuasive, such as the changes to Section 2-703(e). An early draft of Section 2-703 limited the right of the seller to pursue market price damages *only* in situations where the seller did not resell the goods. To that effect, the draft contained limiting language that does not appear in the adopted version:

70. *Peace River Seed Co-Operative*, 322 P.3d at 538.

71. *Id.* (quoting Gabriel, *supra* note 42, at 436).

72. *Id.* at 539 (quoting U.C.C. § 2-706 cmt. 3).

73. *Id.*

Draft of 2-703(e)	**Adopted Version of 2-703(e)**
"[T]he aggrieved seller may"	"[T]he aggrieved seller may"
"(e) *so far as any goods have not been resold* recover damages for their non-acceptance (Section 2-708) . . . ."[74]	"(e) recover damages for non-acceptance (2-708) . . . ."[75]

Nevertheless, we should be careful not to put too much weight on legislative history. The legislative history of the Code is unclear and inconclusive, as Professor Anderson articulates in his recent article.[76] I will not endeavor to repeat the thorough review presented by Professor Anderson. There, Professor Anderson takes the reader on a journey through the Law Revision Commission's Report and describes the Report as "rambling and bewildering," "blatant non-sequiturs," a "dizzying analysis," and "a baffling analytical maze."[77] Professor Anderson concludes his multiple page review with the following pronouncement: "[T]here is no direct statement anywhere in the Commission's Report that simply says that market price damages should be allowed to put the seller in a better position than performance would have done."[78]

Relying on legislative history is messy business. Justice Antonin Scalia, known for his textualist approach to legislative interpretation, eschewed legislative history. In their book on interpreting texts, *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and Bryan Garner detail the numerous problems that arise when courts rely on legislative history. They first noted that American law, for much of its early history, followed the "no-recourse doctrine," which precludes any use of legislative history in interpreting statutory texts.[79] As for the specific problems inherent in reliance on legislative history, they claim that it has the "great potential for

74. THE LAW REVISION COMMISSION FOR 1955, *supra* note 1, at 550 (emphasis added).

75. U.C.C. § 2-703(e).

76. Anderson, *supra* note 12, at 225–28.

77. *Id.* at 223, 225–26.

78. *Id.* at 228.

79. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 369 (2012).

manipulation and distortion."[80] They clarify that legislative history has "something for everyone," and, accordingly, it "creates mischief both coming and going."[81] They also note that legislative history "is ambiguous"; thus, legislative intent should be found in the text itself.[82] Drawing on the theme of ambiguity, Scalia and Garner point out that "[r]ather than resolving uncertainty, legislative history normally induces it."[83]

Scalia and Garner would object to the *Peace River* court's assumption that the prior drafts of the U.C.C. give insight into the drafter's intent.[84] To them, the purpose of legislation is to be "derived from the text, not from . . . legislative history."[85] In addition to the problems noted in the previous paragraph, the notion that the legislature had a view on a particular matter before a court "is pure fantasy."[86] The fact of the matter is that legislators have their own agendas and views, and it is only the enacted law that achieved enough agreement to become enacted law.[87] "It is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law."[88]

Scalia and Garner's objections to legislative history play out here because, as noted above, the drafting history of the Code is ambiguous. The text, then, must be the guiding principle. However, nothing in the Code permits the seller to recover a higher market price award after reselling the goods.

3. Seller Expectations and Section 1-305

Finally, the *Peace River* court based its conclusion on its understanding of seller expectations. The court's analysis is flawed for two reasons: (1) it failed to appreciate the true expectations that parties have in a sales transaction, and (2) it downplayed the significance of Section 1-305.

The court said that market price damages are the true measure of damages because "a seller expects to be able to recover the difference between the contract price and the market price because it is the 'logical and expected

80. *Id.* at 376.

81. *Id.* at 377.

82. *Id.* at 384 (quoting Justice Thurgood Marshall in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971) ("The legislative history . . . is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.")).

83. *Id.* at 388.

84. *Peace River Seed Co-Operative*, 322 P.3d at 538.

85. SCALIA & GARNER, *supra* note 79, at 56.

86. *Id.* at 376.

87. *Id.* at 392–93.

88. *Id.* at 398 (quoting Laurence H. Tribe).

measure of damages' . . . ."[89] The court continued: "[T]he ability to recover market price damages 'is the natural assumption the seller makes in return for the risk inherent in the contract that the sale may not turn out to be economically beneficial to the seller.'"[90] While the court adopted Professor Gabriel's understanding for this statement as to expectations, it did so without any discussion. However, this understanding of expectations is "circular reasoning that presumes the truth of its every conclusion."[91]

One should ask, what do parties expect in a sales transaction? The answer is relatively simple. Sellers expect that, when they perform by delivering goods that conform to the contract, the buyer will fulfill its promise by paying the agreed amount. Likewise, buyers expect that sellers will fulfill its promise to deliver the goods as promised, and, in return, the buyers will pay the agreed sum.[92] The parties, most likely, give little thought during contract formation to the Code's rules on breach.[93] In other words, the parties expect the agreed performance.

The Code recognizes that the agreed performance is what parties truly expect in Section 1-305. Section 1-305 states that the Code remedies "must be liberally administered to the end that the aggrieved party may be put *in as good a position as if the other party had fully performed* . . . ."[94] The significance of Section 1-305's contribution to this debate cannot be overlooked. First, the provisions in Article 1 apply to all other articles of the Code, including Article 2.[95] Second, the provision here could not be any clearer – the seller is to get the benefit of its bargain, nothing more.

Section 1-305 does not offer a novel approach to contract law. *Restatement (Second) of Contracts* has an essentially identical provision:

> Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in *as good a position as he would have been in had the contract been performed*, that is, had there been no breach. The interest protected in this

89. *Peace River Seed Co-Operative*, 322 P.3d at 539 (quoting Gabriel, *supra* note 42, at 449).

90. *Id.* (quoting Gabriel, *supra* note 42, at 453).

91. Anderson, *supra* note 12, at 240.

92. *Id.* at 241.

93. Jennifer S. Martin, *Opportunistic Resales and the Uniform Commercial Code*, 2016 U. ILL. L. REV. 487, 508 (2016) ("It is a stretch to think that even sophisticated buyers and sellers plan for the breach of the other party and make decisions with a view toward ensuring the later collection of a contract market price differential remedy in the event of a breach.").

94. U.C.C. § 1-305(a) (emphasis added).

95. *Id.* § 1-102 cmt. 1.

> way is called the "expectation interest." It is sometimes said to give the injured party the "benefit of the bargain."[96]

Likewise, Oregon precedent on contract law recognizes this same principle: "When a contract is breached the injured party is entitled to receive what he would have if there had been no breach; he is not entitled to receive more."[97] Interestingly, the *Peace River* court says nothing about this precedent in its decision.

Accordingly, Section 1-305 gives us two points: (1) it states the purpose for Code remedies and (2) in stating that purpose, it places a limitation on remedies. For a seller, that limitation is the position it would have been in had buyer performed. Any award above that is a windfall and, thus, prohibited.

Some courts have agreed that Section 1-305 serves as a limitation on damages. The most often cited cases are *Allied Canners & Packers, Inc. v. Victor Packing Co.* and *H-W-H Cattle Co. v. Schroeder*.[98] In *Allied Canners & Packers*, the court concluded that "the policy of [Section 1-305] that the aggrieved party be put in as good a position as if the other party had performed requires that the award of damages to the buyer be limited to its actual loss, the amount it expected to make on the transaction."[99] Likewise, in *H-W-H Cattle*, the court used the same provision to avoid a $62,000 windfall to the buyer.[100] More recently, in 2012, the Minnesota Court of Appeals followed the reasoning of *Allied Canners & Packers* and *H-W-H Cattle* in applying Section 1-305 to limit buyer to its actual damages rather than permitting buyer to recover market price damages, when those damages exceeded its actual damages.[101] Furthermore, the court in *Tesoro Petroleum Corp. v. Holborn Oil Co.* proclaimed that awarding seller a windfall "would be inconsistent with the policy of the Code as expressed in UCC 1-106 [the predecessor to Section 1-305]."[102]

Recognizing the power of Section 1-305, the buyer in *Peace River* presented that provision as a limitation on damages.[103] The Oregon Supreme

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96. RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981) (emphasis added).

97. Timberline Equip. Co. v. St. Paul Fire & Marine Ins. Co., 576 P.2d 1244, 1248 (Or. 1978).

98. Allied Canners & Packers, Inc. v. Victor Packing Co., 209 Cal. Rptr. 60, 66 (Cal. Ct. App. 1984); H-W-H Cattle Co. v. Schroeder, 767 F.2d 437 (8th Cir. 1985). Professor Anderson discusses these cases more in depth. *See* Anderson, *supra* note 12, at 200.

99. *Allied Canners & Packers*, 209 Cal. Rptr. at 66.

100. *H-W-H Cattle*, 767 F.2d at 439–40.

101. NHF Hog Mktg., Inc. v. Pork-Martin, LLP, 811 N.W.2d 116, 118–19 (Minn. Ct. App. 2012).

102. *Tesoro Petroleum Corp.*, 547 N.Y.S.2d at 1016.

103. *Peace River Seed Co-Operative*, 322 P.3d at 539.

Court, however, quickly bypassed the buyer's argument that Section 1-305 precludes a windfall to the seller and instead adopted Professor Gabriel's understanding as to seller expectations.[104] As explained above, that understanding misses the mark as to what parties actually expect in these types of transactions.

In an interesting twist, the *Peace River* court dismissed the buyer's windfall concern by claiming that it is the buyer who receives a windfall when the seller resells because the seller's resale reduces the damages that the buyer must pay.[105] Once again, the court's analysis is amiss. The point of U.C.C. damages is not to punish the breaching party but to put the parties in the position they would have been in had performance occurred. That is the clear reading of Section 1-305. The point is, did the seller get the benefit of its bargain? Anything above that is to be avoided. Take for example the following simple illustration: Buyer and Seller enter into a signed contract for 1,000 widgets for a total price of $1,000. Seller delivers conforming widgets, but Buyer breaches by refusing to take delivery. Seller then resells the same widgets (after giving Buyer notice and conducting the sale in a commercially reasonable manner) for $800. Seller expected to receive $1,000 in the transaction and, thus, is $200 short of its expectation, which is the amount owed by Buyer to put Seller in the position had Buyer performed. What does Seller really want from the deal? Seller wants its $1,000. Does it matter that Seller received only $200 from Buyer? No, because Seller expected to receive $1,000 on the deal and that is what Seller achieved in the end ($800 from resale and $200 from Buyer).

Allowing a seller to recover a higher market price damage would give the seller more than what it expected. As a consequence, the seller is placed in a better position than it would have been in had the buyer performed, which is not allowed by Section 1-305. And, if the seller does better, then the buyer is being punished for its breach, which is also not allowed by Section 1-305. In a sense, Section 1-305 is a barrier to keep remedies in check.[106] The *Peace River* court, however, kicked that barrier right over.

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104. *Id.* at 539–40.

105. *Id.* at 540 n.8.

106. *See* Martin, *supra* note 93, at 515 (recognizing that Section 1-305's goal is to put "the aggrieved party in the position they would have been in had the other party fully performed, but no more [which] suggests that the seller has multiple remedies available but cannot recover more than compensatory damages").

III. THE RESOLUTION

Part II of this Article articulated the flaws in the *Peace River* court's analysis. Here, I bring together several of the points raised above to demonstrate that the solution to this problem is found within the Code itself.

But, first, a quick explanation of the manner in which the Code should be interpreted. Karl Llewellyn, the father of the Uniform Commercial Code,[107] envisioned a "purposive interpretation" of the Code and its provisions:

> Llewellyn and his collaborators wanted to require and facilitate the "purposive interpretation" of the U.C.C.'s provisions. In other words, they did not want judges necessarily to apply the U.C.C.'s provisions as they were literally written. Instead, they wanted judges to understand the goals of the law, and to interpret and apply its provisions to carry out the law's purposes.[108]

According to Llewellyn, "[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose of objective, is nonsense."[109] For Llewellyn, "ambiguity in statutes was inevitable"; by consulting the defined purpose though, judges can resolve Code ambiguities consistently.[110]

The "purposive interpretation" imprint is prevalent in the Code in two respects: (1) it is expressly stated in the Code and (2) each Code section contains "Official Comments" that explain the goals of the individual sections.[111] First, at the outset of the Code, the Code declares the manner in

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107. Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 541–42 (2000) (noting that the Code achieved nicknames such as "Karl's Kode" and "Lex Llewellyn" because of the pivotal role Karl Llewellyn played in its drafting and implementation); Sean Michael Hannaway, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 964 (1990) (same); John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 38 (1988) (observing that Karl Llewellyn was not only the "father of the UCC" but also the "principal draftsman of Article 2"). The "father" title has not only been applied by legal commentators but also courts. *See, e.g.*, La Sara Grain Co. v. First Nat'l Bank of Mercedes, 673 S.W.2d 558, 565 n.4 (Tex. 1984); Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing, 15 Cal. Rptr. 3d 70, 79–80 n.12 (Cal. Ct. App. 2004).

108. Maggs, *supra* note 107, at 564 (citations omitted). *See also* Martin, *supra* note 93, at 518.

109. Maggs, *supra* note 107, at 565. Llewellyn likewise commented that "construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization." Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 419 (1997).

110. Martin, *supra* note 93, at 518.

111. Maggs, *supra* note 107, at 566.

which it is to be interpreted. It states, "[t]he Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies. . . ."[112] The Code then identifies three such purposes and policies:

> (1) to simplify, clarify, and modernize the law governing commercial transactions;
>
> (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
>
> (3) to make uniform the law among the various jurisdictions.[113]

Second, the drafters included Official Comments to each Code provision to highlight the purpose or goal of each section to "aid the interpretive enterprise . . . ."[114] "Llewellyn wanted the comments to reveal 'where the particular sections are trying to go.'"[115]

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112. U.C.C. § 1-103(a) (formerly § 1-102). To stress the point, the Code drafters reiterated the notion of "purposive interpretation" in Official Comment 1 to Section 1-103:

> The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

113. *Id.*

114. Nicholas J. Johnson, *The Statutory UCC: Interpretative License and Duty Under Article 2*, 61 CATH. U. L. REV. 1073, 1088 (2012); *see also* A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 996, 996 (1991) ("The function of the Comments as conceived by Professor Llewellyn was to assist the courts in their application of the Code by providing an authoritative guide to the purposes and reasons for each section."). Interestingly, the Code itself "has no provision which expressly authorizes or approves use of the comments or gives any special dignity to them. The text is silent." Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 599 (1966).

115. Maggs, *supra* note 107, at 566. Nevertheless, the Official Comments are not binding but considered highly persuasive. *See, e.g.*, *In re* Adoni Grp., Inc., 530 B.R. 592, 598 (Bankr. S.D.N.Y. 2015) ("Official Uniform Comments do not have the force of law, but are nonetheless the most useful of several aids to interpretation and construction of the Uniform Commercial Code."); Quality Wood Designs, Inc. v. Ex-Factory, Inc., 40 F. Supp. 3d 1137, 1146 n.6 (D.S.D. 2014) ("Many courts have observed that the Official Comments to the UCC, while not binding, are useful and persuasive in interpreting the UCC."); Smith v. First Union Nat'l Bank of Tenn., 958 S.W.2d 113, 116 (Tenn. Ct. App. 1997) ("The official comments, while not binding, are very persuasive in interpreting the statute to which they apply."). *See also* WILLIAM D. HAWKLAND & FREDERICK H. MILLER, HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES § 1-103:10 [REV] (Carl S. Bjerre ed., 2019) ("The case law indicates that courts are more influenced by the Official Comments than by any other thing, except decided cases on the same matter.").

Following "purposive interpretation," the Code gives us the purpose or goal for remedies. That purpose is clearly stated in Section 1-305: (1) to put the aggrieved party "in as good a position as if the other party had fully performed" and (2) to avoid penal damages.[116] As explained in Part II, the *Peace River* court dismissed the significance of Section 1-305, which gave the court the avenue to award damages in excess of resale damages. Here, it is accurate to observe that neither Sections 2-706 nor 708 limit seller damages to resale damages in the event that seller resells. However, courts must consider Section 1-305 because it is part of the same legislative act. One rule of statutory interpretation is the "whole-text canon."[117] This canon "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[118] Unfortunately, Scalia and Garner observe that this canon is perhaps the most overlooked canon by judges.[119] Certainly, the *Peace River* court's approach failed in this regard. Nevertheless, interpreting the text as a whole is essential to determine meaning because statutes often contain "many interrelated parts that make up the whole"; accordingly, meaning is achieved from the document as a whole.[120] "[T]he meaning of a statute is to be looked for, not in a single section, but in all the parts together and in their relation to the end in view."[121]

Relying on the absence of a limitation in seller's damages to conclude that a seller may receive Section 2-708(1) damages above what it would have received had the buyer performed, as the *Peace River* court did, fails to read the Code in its entirety and, thus, fails to account for Section 1-305. In other words, neither Section 2-706 nor 708 need to repeat the limitation that is already present in Section 1-305, as "the clear intention" of U.C.C. remedies is to "place the parties in the same position as if the contract had been performed."[122] Consequently, Section 1-305 acts as a "safeguard . . . that continues to protect against windfall recoveries of market price damages."[123]

116. U.C.C. § 1-305(a).

117. SCALIA & GARNER, *supra* note 79, at 167.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 168 (quoting Justice Benjamin Cardozo).

122. Union Carbide Corp. v. Consumers Power Co., 636 F. Supp. 1498, 1501 (E.D. Mich. 1986).

123. Anderson, *supra* note 12, at 244; *see also* Martin, *supra* note 93, at 521 ("In light of the Code's—and Llewellyn's—directive toward interpretation promoting the underlying purposes and policies, an interpretation of section 2-708(1) should not prevail that would be inconsistent with a result that the Code prohibits generally . . . .").

While the text of Section 1-305 is sufficient alone to preclude market price damages in excess of resale damages, the Code gives additional support within Article 2. Specifically, the last sentence in Official Comment 1 of Section 2-703 gives courts authority to exclude certain damages. That sentence states: "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case."[124] The comment does not give further explanation as to what situations would give rise to bar a remedy. Yet, further explanation is unnecessary because, using the whole-text canon, the explanation is already given in Section 1-305. Because Section 1-305 states the purpose of remedies, the rules for seller remedies must be read in light of Section 1-305. Therefore, any situation that would not put the aggrieved party "in as good a position as if the other party had fully performed"[125] would qualify as a bar. Returning to Llewellyn, judges should "understand the goals of the law . . . and . . . interpret and apply its provisions to carry out the law's purposes."[126] Well, judges need not look too far into the Code to locate the purpose for remedies—it is Section 1-305. When viewing Official Comment 1 of Section 2-703 in conjunction with Section 1-305, clarity emerges: an aggrieved party's remedy is limited to the position the party would have been in had the other party fully performed.

Returning to the illustration presented at the beginning of this article: Seller contracted to sell goods to Buyer for $10,000, but Buyer wrongfully rejected the goods on delivery. However, because of a drop in market price, Seller could only resell the goods to a Third Party for $8,000. Had the transaction been completed, as contemplated by the contract, the Seller's "'benefit of the bargain' would not have been affected by the fall in market price"; accordingly, Seller "would not have experienced the windfall [it] otherwise would receive if the market price-contract price rule [of Section 2-708(1)] is followed."[127] Thus, Seller should not receive the higher market price damages because such a reward would contradict the Code's policy on remedies.[128]

124. U.C.C. § 2-703 cmt. 1.

125. *Id.* § 1-305(a).

126. Maggs, *supra* note 107, at 564.

127. Nobs Chem., U.S.A., Inc. v. Koppers Co., 616 F.2d 212, 215–16 (5th Cir. 1980).

128. *Union Carbide Corp.*, 636 F. Supp. at 1501.

CONCLUSION

Admittedly, the Code may not be as clear as we may like it to be, and its lack of clarity has led to debate among commentators and also contributed to conflicting court opinions. While the problem presented in this article is not one to arise frequently, the failure of courts to get it right can have significant consequences, not only monetarily but also in running afoul of the Code's policy for remedies. Yet, a clearer picture emerges when we return to the text, purpose, and context of the Code. Indeed, one need not look very deep into the Code, as Section 1-305 provides the answer. The answer given there is clear and simple: any award that puts the seller in a better position than it would have been in had the buyer performed is not allowed. As one judge rightly noted, courts should be "reluctant to endorse any position that runs counter to this policy."[129] Therefore, a seller should not be awarded market price damages that exceed resale damages.

129. *Id.*