language similar to that which would be added to the text of subdivision 2-612(3).

Yet, there is a danger in posing the question solely in terms of "subjective" or "objective" substantial impairment. The basis for judging substantial impairment under subdivision 2-612(3) is not and should not be the same as that of subdivision 2-608(1). Substantial impairment justifying cancellation of the whole contract is quite different from substantial impairment justifying revocation of acceptance of an installment under section 2-608.\(^391\) Substantial impairment justifying cancellation, that is, "essential," "material," or "total" breach, involves a balancing of the interests of the aggrieved party against those of the breaching party.\(^392\) Although the particular circumstances of the aggrieved party should be taken into account, the issue is not and should not be resolved solely on that basis. Thus, care must be taken not to upset the balancing of interests by confusing the test for cancellation in subdivision 2-612(3)\(^393\) with the unabashedly subjective test for revocation of acceptance contained in section 2-608.

c. **Ability to Cure as Affecting Substantial Impairment of the Whole**

This is an issue that the Drafting Committee should consider even though it is not raised in the Preliminary Report.

Under subdivision 2-612(2), the buyer's rejection or acceptance of a defective installment explicitly turns on whether the default is curable. The test of substantial impairment of the whole contract in subdivision 2-612(3) does not explicitly turn on the curability of the default. Further, subdivision (2) is subject to subdivision (3). Thus, it might be inferred that curability and assurance of cure are irrelevant for purposes of determining whether there is a

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391 Cf. Amendments to Section 7-9 (S.102) Breach in Installment Contracts 1, in the Llewellyn Papers, file J(IX)(2)(b).

392 Comment on Section 7-9, supra note 367, at 6 (quoting with approval Helgar analysis); 2 Williston, supra note 365, at 750-54; 1 A. Corbin, Corbin on Contracts §§ 705-07, at 660-64 (1962); J. White & R. Summers, Uniform Commercial Code 358 (student 3d ed. 1988) (citing Restatement (Second) of Contracts § 241 (1979)). Peters does not disagree with the statement in the text. See Peters, supra note 352, at 225 n.79 (case law inquires closely into the needs of the parties and the availability of market alternatives).

393 What is said here in the text applies also to the Study Group's statement that the substantial impairment test for repudiation under § 2-610 is subjective. See Prelim. Rpt., Part 6, supra p. 1171-72.
substantial impairment of the whole contract under subdivision (3). This inference was not intended by the drafters.

Curability and assurance of cure are factors in determining whether there has been a substantial impairment of the whole contract. The drafters of section 2-612 approved and adopted the analysis of Judge Cardozo in Helgar Corp. v. Warner's Features, Inc.\textsuperscript{394} as to what constitutes a breach of the whole contract. One of the factors Cardozo listed was, "if there is a reasonable assurance that [the default] will be promptly repaired . . ."\textsuperscript{395} Commentators generally agree that curability is a relevant factor.\textsuperscript{396} To refute the inference that might be drawn from the text, the comments to section 2-612 should be revised to clarify the issue of curability under subdivision 2-612(3).

d. Reinstatement of the Contract

(1) The Study Group recommends amending subdivision 2-612(3) by replacing the phrase "reinstates the contract" with "waives the power to cancel."\textsuperscript{397} The justification is that the new language is a more accurate statement of the law. The change seems merely to be a rephrasing because comment 6 to section 2-612 speaks of waiving the right to cancellation. It seems to border on a quibble. If, however, the present language has caused no problems and is adequate to express what is intended, it should be left alone.

Further, the rephrasing may complicate matters. It may prevent a seller who initially treats a breach as partial (by suing only with respect to past installments) from later suing for total breach if the buyer subsequently fails to pay for later installments. This consequence can arise from merger rules of pleading designed to prevent splitting a single cause of action into several suits. Consider the case of a seller who is confronted with the buyer's failure to pay an installment on time. Assume that the defect constitutes a

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\textsuperscript{394} 222 N.Y. 449, 119 N.E. 113 (1918).
\textsuperscript{395} Comment on Section 7-9, supra note 367, at 6 (quoting Cardozo, J.).
\textsuperscript{396} Corbin, supra note 392, § 706; White & Summers, supra note 392, at 358; Lawrence, Cure after Breach of Contract Under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code, 70 Minn. L. Rev. 713, 729-30 (1986); Travailo, The U.C.C.'s Three "R's": Rejection, Revocation and (The Seller's) Right to Cure, 53 U. Cin. L. Rev. 931, 999 n.372 (1984). Cf. 2 Williston, supra note 365, § 467c; Peters, supra note 352, at 225 n.79 (case law on breach of the whole scrutinizes availability of market alternatives).
\textsuperscript{397} Prelim. Rpt., Part 6, supra p. 1174-75.
total breach, but that the seller is uncertain as to this conclusion because of the vagueness of the standard for total breach. This seller may err on the side of caution and choose to continue the contract. The seller would then sue only for the payment then due. Assume further that subsequently, the seller makes another delivery, and the buyer again fails to make any payment. The seller then sues again, this time for total breach. The buyer could defend against this second suit by proving that the initial failure to pay constituted a total breach. Under merger rules, by initially suing for only part of the total breach, the second suit could be barred as an impermissible attempt to split the seller's initial cause of action for total breach into two suits.

This concern prompted the drafters to state in subdivision 2-612(3) that initiating suit as to past installments reinstates the contract. Their rationale for this solution, and apparently the

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398 "Total breach" means a defect that substantially impairs the value of the whole contract under § 2-612(3).

399 5 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 1292, at 3680-81 (rev. ed. 1937); RESTATEMENT OF CONTRACTS § 327 comment b (1932).

400 The language in question first appears in U.C.G. — Revised Uniform Sales Act § 100 (Third Draft, 1943) 41 (available in the A.L.I. Archives, Drawer 202) [hereafter R.U.S.A.—Third Draft, 1943]. The comment accompanying § 100 provides no explanation of the language. However, later events brought to light the reason for the language. In 1956 the N.Y. Law Revision Commission recommended the deletion of language in § 2-612(3) which read that suit only on past installments reinstates the contract. 1956 N.Y. Law Revision Comm'n Report 393. The reason for the recommendation is described in the research analysis of § 2-612 by John Honnold. 1-1955 N.Y. Law Revision Comm'n Report 543 ("Clause in subsection (3) 'or if he brings an action with respect only to past installments' would include an action for consequential damages for such installments and could produce anomalous results . . . . [l]t was recommended that the clause be deleted."). See also Honnold, supra note 357, at 477-78.

The Article 2 Subcommittee of the Editorial Board resisted this deletion. In a report to that Board it stated,

The result [of deleting the language] would be that seller, having a single cause of action for total breach, has forfeited any further claim by trying to split his cause of action. This result is entirely proper in a case of unequivocal repudiation by the buyer, but not in a case where the seller is faced with a breach which might be found to be partial rather than total . . . .

reason for the reinstatement of contract terminology, was that by
instituting the first suit the aggrieved party reestablished its duty
to continue with performance, and, thus, legally converted the
initial total breach into a partial breach. When our hypothetical
seller institutes a second suit for total breach based on the sub-
sequent failure of the buyer to pay, the merger rule would not
apply to the second suit. Consequently, the seller could recover. 401

The "reinstates the contract" language addresses the merger
issue directly. Substituting "waiver of the right to cancel" is not
as clear, for it leaves open the effect of the waiver on the discharge
of the seller's duty to continue with its performance. 402

Nevertheless, the drafters' concern with merger rules is not
clearly expressed. Thus, the comments should be revised.

(2) The Study Group also recommends that the Drafting Com-
mittee consider adding to the text of section 2-612 a statement as
to what conduct under section 2-610 waives the power to cancel. 403
The reason is that it makes sense to have a single subdivision that
deals with waivers for all breaches of the whole contract. A concern
that may underlie this recommendation is that subdivision 2-610(b)
appears to give the aggrieved party more latitude than subdivision
2-612(3) to urge action inconsistent with cancellation without losing
the power to cancel. 404

There are several responses to this recommendation. First,
section 2-610, not subdivision 2-612(3), was intended to cover repudiation. 405 To include language in one section that is applicable

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401 None of this reasoning is made clear in either the text or comments
of § 2-612, possibly because it concerns a matter of procedure. Matters of
procedure were not generally addressed in Article 2, apparently because several
states had provisions in their constitutions requiring acts to deal with one subject.
It was feared that an act dealing with both substance and procedure would violate
these constitutional provisions. N.C.C.U.S.L., Consideration in Committee of
the Whole of the Revised Uniform Sales Act 136 (Aug. 18-22, 1942), reprinted in
(Hein, 1983).

402 As to discharge of the aggrieved party's duty to perform, see Restate-
ment (Second) of Contracts §§ 242, 237, 225 (1981).

403 Prelim. Rpt., Part 6, Rec. A2.6(8)(C), supra p. 1175.


405 See supra text accompanying note 386.
to another will only serve to confuse the scope of these two sections. Second, it may be that the aggrieved party should have more latitude to coax retraction and future performance from a repudiator than from one who has presently breached. It may be that the present breach is material because it cannot be cured. In any event, the Study Group's recommendation deserves very careful consideration before it is implemented.

4. **Revocation of Acceptance Under Section 2-612**

The Study Group recommends revising the comments to section 2-612 to clarify that the remedy of revocation of acceptance is available under section 2-612, subject to the seller's right to cure under subdivision 2-508(1).\(^406\) No reason is given for this recommendation.\(^407\)

It is clear from the drafting history of section 2-612 that the buyer may revoke acceptance of an installment under subdivision 2-608(1)(a) if the seller's assurance of cure fails to materialize.\(^408\) Beyond this situation, the drafting history is silent. Suppose that the buyer accepts an installment which it does not reasonably know to be defective. This buyer may have the right to revoke its acceptance under subdivision 2-608(1)(b). If so, the seller should have the right to cure the defect. This result would seem to follow from subdivision 2-608(3) and subdivision 2-612(2). However, it is the cure rules of subdivision 2-612(2), not subdivision 2-508(1), that apply in this situation. Further, the initial acceptance of an installment not known to be defective should not prejudice the buyer's right to cancel if the defect substantially impairs the value of the whole contract.\(^409\)

5. **Miscellaneous Study Group Recommendations**

The Study Group suggests that the Drafting Committee carefully consider Professor Peters’ recommended revisions to section

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\(^407\) The Study Group's citation to the Patterson article is puzzling. That article does not discuss revocation of acceptance. See Prelim. Rpt., Part 6 n.22, supra p. 1175. (discussing Patterson, U.C.C. Section 2-612(3): Breach of an Installment Contract and a Hobson's Choice for the Aggrieved Party, 48 Ohio St. L.J. 177 (1987)).

\(^408\) See R.U.S.A. - Third Draft, 1943, supra note 400, § 100(1)(b) ("[i]f in the latter case [when the seller gives assurance of cure] the non-conformity is not so cured, he may revoke any acceptance made after such assurances were given.").

\(^409\) Cf. U.C.C. § 2-612 comment 7 (1990). This was also pre-Code law.
These recommended revisions are discussed in the following paragraphs.

a. **Clarify the Various Options on Cure and Assurances**

Peters pointed out that subdivisions 2-612(2) and (3) create several distinctions, some of which turn on cure and assurances of cure, but fail to clearly resolve all of them.\(^\text{410}\) This is a valid criticism, and the Drafting Committee should address this issue. The drafting history indicates that Peters' suggested resolution of the various options is essentially correct.

b. **Evenhanded Application to both Buyers and Sellers**

Here, Peters apparently refers to the fact that subdivision 2-612(2) provides detailed rules on a buyer's rejection or acceptance of an installment and does not adopt a perfect tender rule.\(^\text{411}\) This criticism has already been discussed.\(^\text{412}\)

c. **Reverse the Sequence of Subdivisions 2-612(2) and (3)**

Peters recommends reversing the sequence of subdivisions (2) and (3) so that any non-conforming tender is tested first for its effect on the whole contract, then, only if the contract survives, it should be tested for the effect of the non-conformity on the installment.\(^\text{413}\) Theoretically, what Peters states is true. As a practical matter, however, the aggrieved party will almost always want to know first what its rights are as to the installment. This is so for several reasons: First, the more pressing question raised by a defective installment is whether the buyer must accept it. That question requires immediate response. Second, given the difficulty of predicting whether or not a non-conformity constitutes a substantial impairment of the whole contract, the aggrieved party will often be unsure and will thus proceed cautiously on the basis of the effect on the installment alone. The present sequence of subdivisions (2) and (3) thus represents the more practical sequence.\(^\text{414}\)

\(^{410}\) Peters, supra note 352, at 225-27.
\(^{411}\) Id. at 224-25, 227.
\(^{412}\) See supra text accompanying notes 359-76.
\(^{413}\) Peters, supra note 352, at 227.
\(^{414}\) The drafting history shows that the sequencing of § 2-612(2) and (3) was changed several times.
N. INTRODUCTION: EXCUSABLE NON-PERFORMANCE.

Sections 2-613 through 2-616 deal with the conditions and procedures for claiming excuse due to changed circumstances.25 They also deal, in a limited way, with adjustments that should be made if the excuse claim is valid. These issues are related to but quite distinct from the risk of loss issues in §§ 2-509 and 2-510. Where the subject of the sale has been damaged or destroyed, risk of loss policy determines which party (or its insurer) bears the economic loss without deciding whether the residual obligations to deliver substitute goods or to pay are discharged. A seller in possession at the time of loss, therefore, may bear the risk of loss under § 2-509(3) and still be obligated under § 2-613 to deliver substitute goods.26

There has been much litigation over and even more commentary about §§ 2-613 through 2-616.27

O. CASUALTY TO IDENTIFIED GOODS: § 2-613.

Rec. A2.6 (9).

Although some revisions are recommended in the text and comments to § 2-613, these changes tend to conform to the results of the decisions rather than to break new ground.


Section 2-613 deals with the question under what circumstances the seller is excused where goods identified "when the contract is made. . . suffer casualty without fault"28 of either party before the risk of loss passes to the

25. Mistake claims, to the extent that they can be differentiated, deal with unknown circumstances existing at the time of contracting and are not within the scope of Article 2. See § 1-103.

26. A good example is Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018 (E.D.N.Y. 1982) where goods not identified at the time of contracting were destroyed in shipment before risk passed to the buyer. The court refused to excuse the seller under either § 2-613 or § 2-615(a).


28. Fault is defined as a "wrongful act, omission or breach. . . ." § 1-201(16).
buyer." The answer is where the contract "requires" these goods for its performance. Comment 1 equates "requires" to goods "whose continued existence is presupposed," which is like the "basic assumption" test in § 2-615(a), shorn of the "impracticability" requirement. Arguably, this equation is too broad.

Suppose, however, that goods "required" for performance were destroyed before or identified after the contract was formed. Comment 2 suggests that destruction after formation should be treated under § 2-613, and Comment 9 to § 2-615 suggests that either § 2-613 or § 2-615 could apply to cases of identification before the contract. In any case, there is uncertainty about the standards for excuse in a situation where the basic risk allocation question is constant.

(A) One solution is to redraft § 2-613 to cover all cases where identified goods are destroyed before risk of loss has passed to the buyer. It should be irrelevant when identification occurred or whether the goods conformed at the time of contracting. If such a redraft is done, the Drafting Committee should consider whether a clear test for excuse can be devised. One possibility, taken from § 263 of the Restatement, Second, is this: "When the existence of goods identified at the time of destruction is necessary for the contract, such destruction or deterioration before risk has passed as makes performance impracticable excuses the seller." If this revision were adopted, the Comments should illustrate its application.

(B) Another solution, preferred by a majority of the Study Group, is to repeal § 2-613 and redraft § 2-615 to provide the exclusive standard for excuse in all cases. Under this approach, the comments would be revised to illustrate the paradigm cases to which excuse should be granted. Also, the remedial consequences of excuse under § 2-613 should be integrated with similar provisions in § 2-615(c) to provide a more comprehensive statement.

2. Consequences of Excuse.

Section 2-613 also states the consequences of excuse when the loss is total (contract avoided) or when the loss or destruction is partial (buyer has limited options).

(C) No revisions are recommended in these provisions. If, however, § 2-613 is merged with § 2-615, a new, expanded § 2-615(c) will be needed to provide a more comprehensive solution to post-excuse allocation issues.
SECTION 2-613

The Study Group report recommends several substantive changes to section 2-613. One recommendation would alter the scope of the section and the standards for excuse. An alternate recommendation, endorsed by a majority of the Study Group, would repeal the section and redraft section 2-615 to provide the exclusive standards for excuse. It is difficult to evaluate these recommendations because the concerns that motivated the Study Group to make changes are not described in much detail.

One concern seems to be that it is arbitrary to excuse for destruction of goods identified at the time the contract was formed but not for destruction of goods identified after the contract had been formed. Nevertheless, this distinction accurately reflects both the Code and pre-Code sales law. Fairly early, sales law worked out the distinction between the sale of specific goods ("one bale of cotton marked FM305") and the sale of a quantity of goods ("one bale of cotton"). In the first case, destruction of the marked bale excused the seller from his duty to perform. In the second case, destruction of a bale that the seller had selected to deliver did not excuse him. Various reasons have been advanced for this distinction.

The reason most consistent with the results of the cases is impossibility of performance: it is impossible for the seller to tender conforming goods if the contract calls for a specific bale and that bale has been destroyed. Where the contract calls for one cotton bale, the seller's performance is not impossible, even though the bale selected by the seller has been destroyed, because other conforming bales exist. This is the distinction between "objective"

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417 J. Murray, Murray on Contracts 650-51 (3d ed. 1990). The distinction is adopted in the Restatement (Second) of Contracts. See Restatement (Second) of Contracts § 263 illus. 1, 2 & 5, § 261 illus. 12 (1982).
418 See Wladis, Impracticability As Risk Allocation: The Effect of Changed Circumstances Upon Contract Obligations for the Sale of Goods, 22 Ga. L. Rev. 503, 535 & nn. 141-43 (1988) (enumerating these reasons for the distinction: (1) that it accorded with the presumed intent of the parties, (2) that the seller's performance had become impossible, and (3) that excusing the seller tended to divide the loss of the goods between the parties).
and "subjective" impossibility. The distinction has the virtue of simplicity. The parties can clearly allocate risk by contracting for specific goods, and a court can easily ascertain that allocation from their contract.

Such a clear distinction may well be preferred to one that turns on such nebulous concepts as "failure of a basic assumption" and "impracticability," especially when courts have been notoriously reluctant to grant excuse under the latter concepts. This distinction also roughly parallels the distinction between a producer who sells what it makes, and who, thus, often contracts for identified goods, and a jobber or middleman who buys for resale and who often contracts only for a quantity of goods.

In any event, the distinction is of great antiquity and neither Article 2 nor the Restatement (Second) of Contracts have sought to have it changed.419

Part of the Study Group's concern with section 2-613 may well be what it regards as inconsistent treatment among sellers who identify goods after the contract has been formed. Thus, the Study Group report refers to the uncertainty it believes is created by comment 9 to section 2-615. The comment states that excuse can be granted under either 2-613 or 2-615 for failure of crops to be grown on designated land.420 The key fact in the situation described in the comment, however, is not that the seller identified the crops to the contract after it was formed by planting the crops. The key fact is that the land on which the crops were to be planted was designated when the contract was made. Thus, the seller is excused by crop failure precisely for the same reason that the seller of the marked cotton bale was excused: impossibility of performance. Once the crops planted on the designated land fail, no other conforming crops exist.

Chronologically, the development of the excuse described in comment 9 was effected by a logical extension of the excuse for destruction of specific goods.421 In either case, the principle is the

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419 The Article 2 provisions are § 2-613, which provides an excuse where the sale is of specific goods, and § 2-615. Section 2-615 (and its comments) are conspicuously silent on its application to the sale of a quantity of goods. See supra note 417 (citing The Restatement (Second) of Contracts provisions adopting the distinction).


421 Llewellyn described this extension in an early draft of the comment to the section that is now § 2-615. See Wladis, supra note 418, at 640-41 (quoting relevant text of that draft).
same: the goods described in the contract are unavailable and no other goods exist that can satisfy the contract description.

The Study Group may also be concerned that excuse under section 2-615 requires a showing of impracticability while excuse under section 2-613 does not. This distinction, though, is consistent with pre-Code law and present law. The cases involving the sale of specific goods or goods to come from a designated source grant excuse if the goods in question become unavailable, even though they are goods that are fungible. 422 This point is underscored by the comments to section 2-615. Whenever those comments discuss contracts for goods to be supplied from a designated source, they conclude that the seller should be excused if the designated source fails, without mentioning impracticability. 423 This lack of reference to impracticability is not puzzling if one remembers the principle underlying the excuse: impossibility of performance. No other goods satisfy the contract description. The seller's performance has become impossible and, therefore, impracticable. The omission of the impracticability requirement in section 2-613 and related comments does not mean that it is not required. Rather, it means that the requirement, by the nature of the cases, is satisfied.

Section 2-613 should be left as it is. There is presently no significant uncertainty or inconsistency between it and section 2-615. Combining section 2-613 with section 2-615 may actually cause uncertainty. Courts will puzzle over the reasons for including what are now section 2-613 cases within section 2-615, and may expand or contract the granting of excuse in undesirable ways. Eliminating section 2-613 will also cause renumbering of subsequent sections. This will complicate the task of legal research and should not be undertaken lightly.

[PRELIMINARY REPORT - 2-614]

P. SUBSTITUTED PERFORMANCE: § 2-614.

§ 2-614 provides special rules where an agreed ‘‘berthing, loading, or unloading’’ facility or an agreed ‘‘type of carrier becomes unavailable or


423 U.C.C. § 2-615 comment 5 (discussing failure of exclusive source of supply and failure of production by an agreed source); id. comment 9 (discussing failure of crops to be planted on designated land).
"the agreed means or manner of payment fails because of domestic or foreign government regulation." Even though one party might otherwise be excused, it must accept a commercially reasonable or substantial equivalent.

The drafting of § 2-614 leaves much to be desired. Since no problems of substance appear to have arisen, however, no revision is recommended in the text of § 2-614.

[ TASK FORCE - NONE ]

[ PRELIMINARY REPORT - 2-615 ]

Q. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS: § 2-615.

1. Scope of § 2-615.

Rec. A2.6 (10).

Two non-controversial revisions affecting the scope of § 2-615(a) are recommended by the Study Group.

(A) § 2-615(a) should apply explicitly to sellers and buyers. Thus, the first sentence might provide: "Delay in performance or a failure in whole or part to perform by a seller or a buyer. . . ." This simply confirms statements in the comments and holdings by the courts.29 If so revised, all relevant excuse provisions must also be revised to accommodate the buyer.

(B) The first sentence of § 2-615(a) should be revised as follows: "Except so far as a seller or buyer may have assumed a greater or lesser obligation. . . ." This simply clears up an ambiguity in the existing text and incorporates the buyer as part of the picture.

2. The Basic Assumption Test.

Section 2-615(a) employs a unitary excuse standard, i.e., "basic assumption" plus "impracticability," to govern two categories of "presupposed conditions."

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29. This revision would insure the same test of excuse for both seller and buyer without changing the case results. As a practical matter, courts have rarely excused the buyer's duty to accept and to pay for the goods because of changed circumstances and have almost never excused a buyer for so-called "frustration of purpose." See, e.g., Arabian Score v. Lasma Arabian, Ltd., 814 F.2d 529 (8th Cir. 1987); Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986); Restatement, Second, Contracts § 265.
The first involves "capacity" or "force majeure" events, such as the failure of an assumed source of supply, strikes, act of government or "acts of God or the public enemy." In many cases, these events actually impede the ability to perform. Even without a force majeure clause, courts have been willing to grant relief in these cases, especially if the aggrieved party has made reasonable efforts to find a substitute performance.

The second involves market events, such as inflation, steep cost increases or fluctuating prices, that affect the "incentive" of one party to perform. Performance means a loss on the contract, because either the cost of performance will exceed the contract price or a market opportunity to sell or buy at a better price will be foreclosed by the agreed bargain. The courts, with one notable exception, have been consistently unsympathetic to claims for excuse from "incentive" events.

(C) Despite uncertainty in and controversy over the "basic assumption" test, the Study Group's preference is to leave well enough alone. The test is consistent with that provided in the Restatement, Second and provides the courts with greater flexibility to grant excuse. The courts simply have not accepted that invitation. Nevertheless, the comments should be reviewed and revised to highlight the flexibility of the test and to reject some of the arbitrary limitations carried over from the common law.

3. Governmental Regulations and Orders.

A possible exception to the restrictive interpretation of § 2-615(a) involves governmental regulations or orders. Section 2-615(a) provides that non-performance is excused if "performance as agreed has been made impracticable...by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid." Under this language, the "compliance in good faith." requirement substitutes for the "basic assumption" test. See § 264 of the Restatement, Second.

The question is whether this test should provide broader relief than the usual "capacity" or force majeure event. Suppose, for example, that a public utility commission rejects a utility's request to "pass through" higher costs produced by unanticipated events in the performance of a long-term contract. Or suppose that, through extensive deregulation, the government has under-

minded the pricing assumptions upon which long-term contracts for the supply of natural gas are based. Are these "regulations or orders" with which a seller or buyer must comply and, if so, do they make performance of the contract "as agreed" impracticable?

The courts, giving this exception a narrow reading, have answered these questions "no." A government order making performance more expensive is treated as an "incentive" event, and the risk of governmental action is left on the disadvantaged party, unless a flexible pricing provision or a force majeure clause has been included in the contract.

(D) Most of the Study Group agree with this result. Nevertheless, we recommend that the Drafting Committee consider whether the governmental exception is too narrow and, if so, how it might be expanded.

4. Relief if Excuse is Granted.

Sections 2-613(a) & (b), 2-615(b) & (c) and 2-616 provide a limited form of relief if some excuse is granted and set forth the procedures involved in claiming excuse.

(E) Except as required by any merger of §§ 2-613 and 2-615, no revisions are recommended in the text of § 2-615(b) and (c). There is no evidence of substantial problems in the interpretation or operation of these adjustment provisions.31

Beyond this, Article 2 is silent on post-excuse remedies or adjustment. Presumably, either the balance of the contract is discharged or the parties negotiate an agreed settlement and either terminate or continue performance. Although § 2-209(1) facilitates good faith adjustments, courts and commentators have concluded that Article 2 does not impose a duty to negotiate in good faith after changed circumstances unless agreed in the contract. Moreover, the courts and most commentators have rejected the argument that a court may, after concluding that some relief should be granted, impose an adjustment around which the parties may subsequently negotiate.

(F) A majority of the Study Group endorse these results. In short, negotiation and agreed adjustment short of total discharge should be left to the agreement of the parties. Nevertheless, the Study Group recognizes that agreement is a broad concept, that a bargain in fact to negotiate and adjust may be inferred from the commercial setting and that a policy favoring adjustment in some transactions,

particularly long-term supply contracts, may facilitate efficiency and
fairness. Accordingly, we recommend that the comments to § 2-615
be reviewed and revised to emphasize the broader potential of agree-
ment in this important setting.\(^{32}\)

A minority of the Study Group recommend a careful study of
the proposition that Article 2 should foster if not require even broader
duties to negotiate in good faith and to adjust in contracts where
unanticipated disruptions have occurred.

\[\text{[TASK FORCE - 2-615]}\]

\textbf{SECTION 2-615}

The Study Group’s distinction between “capacity” (or “force
majeure”) events and “incentive” events does not accurately de-
scribe the case law.\(^{424}\) If the contract when made does not specify
goods or source and does not contain a \textit{force majeure} clause, most
courts have not been willing to excuse the affected party.\(^{425}\)

The Study Group makes two recommendations for subdivision
(a), which it terms “non-controversial”: (1) include buyers, and
(2) permit the parties to assume a lesser obligation than that stated
in section 2-615(a). Both of these recommendations are evaluated
in the following paragraphs.

1. \textit{Including the Buyer.}

This is not a change of substance. It merely confirms what is
stated in comment 9 and the case law. The Study Group’s rec-
ommendation, however, may be too facile. It assumes that the
“impracticability of performance” standard is equally useful to
define buyer excuse as well as seller excuse. This may not be the

\(^{32}\) See Hillman, \textit{Court Adjustment of Long-Term Contracts: An Analysis Under
Modern Contract Law}, 1987 Duke L. J. 1, 4-17 (1987)(developing such a model).
See also Scott, \textit{Conflict and Cooperation in Long-Term Contracts}, 75 Cal. L. Rev. 2005


\(^{425}\) See Wladis, \textit{Impracticability as Risk Allocation: The Effect of Changed Cir-
cumstances Upon Contract Obligations for the Sale of Goods}, 22 Ga. L. Rev. 503, 600-
case. The Restatement, for example, employs different standards.\textsuperscript{426} The Study Group might consider adding a subdivision to Section 2-615 that would cover buyer excuse and mimic the Restatement rule.

If buyers are to be explicitly included in the text, this change should be accompanied by revision of the comments to provide more guidance on when buyers are to be excused. Before doing this, however, the Study Group should decide whether the game is worth the candle. Given that existing law clearly permits the buyer to claim excuse under Section 2-615, but that courts virtually never excuse buyers, it may be better to leave things as they are.

2. \textit{Permitting Sellers [and Buyers] to Assume Lesser Obligations than those Imposed by Section 2-615.}

Section 2-615 now permits the seller to assume a greater obligation than what is set forth in that section. By implication, it seems that the seller cannot lessen that obligation. This implication seems to be confirmed by comment 8.\textsuperscript{427} Case law and commentators, however, take the position that the seller can lessen his obligation by agreement.\textsuperscript{428} Some of these authorities limit such agreements to those that are commercially reasonable.\textsuperscript{429} In sum, there is confusion over what the "greater obligation" language means.

That language first appeared in the Spring 1950 draft of the Code. The reason for the language is unclear.\textsuperscript{430} The drafters seem

\textsuperscript{426} \textit{Restatement (Second) of Contracts} § 263 (1981) (employing impracticability standard); \textit{id.} § 265 (employing standard of substantial frustration of buyer's principal purpose in entering into contract).

\textsuperscript{427} "'[T]his section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go." \textit{U.C.C.} § 2-615 comment 8 (1990) (emphasis added).


\textsuperscript{429} See \textit{Interpetrol Bermuda Ltd.}, 719 F.2d at 992; Hawkland, \textit{supra} note 428.

\textsuperscript{430} Hawkland, \textit{supra} note 428, at 77-79. Chancellor Hawkland describes drafting history of the "greater obligation" language in § 2-615. He indicates that the language was used to emphasize that the seller could assume the risk of supervening events in ways other than by explicit agreement. \textit{id.} at 78. However, more than just this must have been intended. Comment 8 was amended by adding language that § 2-615 "provides a minimum beyond which agreement
to have been concerned with form contracts which often are overdrafted to give the drafting party maximum latitude to respond to a wide range of supervening events. The effect of the "greater obligation" language apparently was to limit such over-drafted clauses to what is commercially reasonable. Thus, for example, a seller could not enforce a clause that excused his performance for events he caused; nor could he walk away from a sale for failure of transportation facilities if the buyer were willing to take delivery of the goods at the seller's plant.

It seems clear, however, that the drafters could not have intended to prevent the parties from tailoring a force majeure clause to their own circumstances, so long as the resulting clause operated in a commercially reasonable manner. Nevertheless, this result is not very clear in either the text or Comments, thereby warranting some change. Any changes made should provide more explicit guidance to those who draft such clauses and to courts who construe them.

Standards for Excuse

The Study Group's recommendation to leave the "basic assumption" test alone, but to review and revise the Comments, is sound. The Comments should be revised to provide more guidance on troublesome points. Karl Llewellyn put the section upon sound doctrinal footing: unforeseen supervening circumstances rendering performance commercially impracticable. The Comments

may not go." Further the "greater obligation" language replaced the phrase "unless otherwise agreed." Id. Under the Code at that time, if a section did not include the phrase "unless otherwise agreed" or similar language, the rules enunciated in that section were "mandatory and may not be waived or modified by agreement." ALI & NCCUSL, Uniform Commercial Code - Proposed Final Draft—Text Edition § 1-107 (Spring 1950), reprinted in 9 A.L.I. & N.C.C.U.S.L., Uniform Commercial Code Drafts 218 (1984).

431 Wladis, supra note 425, at 564 & n.232. See Comment on Section 6-3 (s.88) Merchant's Excuse by Failure of Presupposed Facilities or Conditions, reprinted in Wladis, supra note 425, at 648-49.

432 Cf. U.C.C. § 2-615 comment 5 (1990) (seller must employ all due measures to see that his source will not fail).


434 U.C.C. § 2-615 comment 8 (1990) (referring to express agreements designed to enlarge upon or supplant provisions of § 2-615); id. § 2-207 comment 5 (referring to clause "enlarging slightly upon the seller's exemption" under § 2-615).

provide insight into some aspects of the doctrine, but not others. If the courts are to exercise more flexibility in excusing for supervening events, the comments need to provide additional guidance in several areas.

1. Underlying Reason and Purpose of the Section. The Comments should make clear that the section adopts the limited obligation theory of contract. That is, the parties ordinarily do not intend to allocate the risk of unforeseen events, thus leaving a gap in the contract. Should the unforeseen event occur, a court is to fill the gap. More specifically, the court should allocate the risk of the event based on what is fair under the circumstances, not on some supposed implicit agreement-based risk allocation which never occurred.436

2. Unforeseen Events. The Comments should clarify that the term "unforeseen" means something like "not expected." This meaning is what the drafters intended,437 and it is consistent with one of the ordinary meanings of "unforeseen."438 For example, the day before the Iraqi invasion of Kuwait, the occurrence of that event was not expected. It was, thus, "unforeseen" under section 2-615.439

436 As early as 1931, Llewellyn endorsed this approach:
Vastly different, as has often been pointed out, is the situation when we approach constructive conditions bottomed on the unforeseen. Not agreement, but fairness, is then the goal of inquiry. This holds of impossibility, and of frustration; it holds of mistake (whether urged to excuse or to ground a new promise of extra compensation). In all of these the question runs to the effect of unforeseen events or discoveries which destroy some presupposition of the deal. The effort is in essence to mark out a range and an apportionment of risks assumed; or more accurately, of risks to be imposed.

437 Wladis, supra note 425, at 573-76.

438 Cf. "Foresee ... 1: to see (as a future occurrence or development) as certain or unavoidable: look forward to with assurance." Webster's Third New International Dictionary of the English Language Unabridged 890 (1981).

439 Though the invasion of Kuwait was unforeseen, whether a party is excused from performing its contract depends upon whether that event caused the impracticability. Thus, a seller of oil under a fixed price contract entered into shortly before the invasion would not necessarily be excused by the invasion and consequent rise in price of oil. Other events at the time of contracting (the OPEC production and pricing agreement, and Iraqi "tough talk" before the
Further, the test for what is "unforeseen" needs to be focused clearly on the information available to the parties at time of contracting, and whether, based on that information, a reasonable person would have expected the event to occur.

It may be necessary to use some term such as "unexpected" or "unanticipated" to effect this clarification. The term "unforeseen" is used in other areas of the law, thus carrying with it some potentially undesirable legal baggage.

3. Impracticability. Some may raise the objection that the test of "unforeseen" described above is too easily satisfied and will undermine the institution of contract. There are two responses to this. First, that test more accurately reflects the allocation of risk intended by the parties. Under the definition of "unforeseen" presently used by courts when applying the "foreseeability" test, almost any event is foreseen. This results in courts enforcing obligations which no party in his right mind would have made had he expected that the event would occur. Second, the seller is not excused simply by showing that an event was "unforeseen." He must also demonstrate that his performance has become impracticable. To satisfy this test, the drafters intended that sellers were to be excused only for extreme cost increases. This high standard in effect gives the benefit of the doubt to the party who wants the contract enforced.

The Comments should, however, be revised to direct the court to weigh the effect of its decision to excuse on both parties and, in close cases, to err on the side of enforcing the contract. These clarifications will result in the frequency of excuse being controlled largely by the impracticability prong of the test. Further, the court will be basing its decision on the effect of its decision upon both of the parties to the contract.

invasion) made it expected that oil prices would rise. On the other hand, if the invasion resulted in the seizure of a tanker full of oil which the seller had selected to fulfill the contract, the seller's delay in obtaining substitute oil might well be excused.

440 The concept of "foreseeability" is employed, for example, in limiting seller liability for consequential damages and in determining tort liability in negligence.

441 U.C.C. § 2-615 comment 4 (1990) ("Increased cost . . . due to some unforeseen contingency which alters the essential nature of the performance."). See Wladis, supra note 425, at 582-84 (commenting on the drafter's intent as to the high level of difficulty necessary to satisfy the impracticability standard).

442 Sometimes it will be necessary for a court to weigh the effect of its decision on non-parties as well, where, for example, a significant public interest is affected by the particular contract.
4. Miscellaneous Study Group Recommendations. The Study Group's recommendations concerning the scope of the governmental regulation excuse and the agreement to negotiate and adjust may not be necessary if the clarifications suggested above are introduced into the Comments. Nevertheless, if the Comments are to be revised to emphasize the broader potential of agreement to negotiate and adjust in the long-term contract, care must be taken to ground such an agreement upon an actual agreement of the parties as manifested by their words, deeds, or usage of trade.

[PRELIMINARY REPORT - 2-616]

R. PROCEDURE ON NOTICE CLAIMING EXCUSE: § 2-616.

There are no stated procedures for claiming excuse under § 2-613. If excuse is granted, the legal effect and options of the buyer are stated in § 2-613(a) & (b).

Rec. A2.6 (11).

As previously noted, if § 2-613 is merged with § 2-615, the procedures and options when the loss to goods is partial or only a part of the seller's capacity to perform is affected must be integrated into a new subsection that incorporates the buyer and is coordinated with § 2-616. Other than this, no revisions are recommended in the text of § 2-616.

[TASK FORCE - NONE]

[PRELIMINARY REPORT - 2-701]

ARTICLE 2, PART 7:
REMEDIES

A. INTRODUCTION.

Article 2, Part 7 is a particularized application of the Code's general remedial policy contained in § 1-106. Sections 2-701 through 2-710 deal

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33. As currently drafted, both § 2-613 and § 2-615 contemplate that if either all the goods are destroyed or all of the capacity prevented, the contract is discharged. An integrated subsection, in coordination with § 2-616, would have to state (1) the range of the seller's or buyer's options if excuse is partial, (2) the notice and other procedures to which the other party is entitled, and (3) the range of the other party's options if proper procedures are followed. The result is a procedure to facilitate a limited adjustment of contractual obligations after excuse is established.
with seller's remedies, §§ 2-711 through 2-717 deal with buyer's remedies, and §§ 2-718 & 2-719 deal with agreed remedies between seller and buyer. Other provisions of Part 7 deal with the proof of market price, §§ 2-723 & 2-724, and the statute of limitations, § 2-725.

Many of these sections are frequently litigated, and the entire remedial structure has been subjected to extensive analysis and comment in the literature. The issues are important, and there is considerable disagreement on what is a sound approach. This disagreement is reflected in the Study Group's analysis of Part 7.

B. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS NOT IMPAIRED: § 2-701.

Section 2-701 now deals with a minor issue, the remedies available for breach of a "collateral contract," and, therefore, wastes an opportunity to state the basic remedial policies that should structure Part 7.

Rec. A2.7 (1).

We recommend that § 2-701 be retitled "Remedies in General" and the current text be relegated to a subsection. We recommend that new § 2-701 be redrafted and new comments prepared to accomplish the following objectives.

(A) The text should restate the basic remedial objective, i.e., protect the expectation interest, with its limitations on consequential and punitive damages, now expressed in § 1-106(1). The new comments should state that, where appropriate, a court has power to protect reliance and restitution losses resulting from a breach, even if not explicitly recoverable under the text of Article 2.

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2. For a brief overview, see Agenda at 364-67.

3. Only six cases have cited § 2-701.

4. The expectation interest is the aggrieved party's "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." Restatement, Second, Contracts § 344 (a). See generally, Sebert, Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation, 33 UCLA L. Rev. 1565 (1986); Revision at 447-50(questioning the value of Article 2's "four-Tier" Damage Classification).

5. Under the Restatement, Second, Contracts, the reliance interest is the plaintiff's "interest in being reimbursed for loss caused by reliance on the contract, by being put in
(B) The text should provide that a general principle of “mitigation” of damages applies, whether or not mitigation is built into a particular section, and that the defendant has the burden to establish that the plaintiff has failed to take reasonable steps to avoid the consequences of the breach. The comments should state that a breach must be the cause in fact of any claimed loss and that the plaintiff has the burden of proving all direct and consequential damages with reasonable certainty.

(C) The text should state the general principle that remedies are essentially cumulative and any artificial doctrine of election is rejected. Two limitations on this principle should be expressed in general terms: (a) The choice of remedy should not exceed the expectation interest objective stated in § 1-106(1), but this depends upon the facts of each case, and (b) The choice of one remedy forecloses other remedies where there is a fundamental inconsistency or the aggrieved party has relied.

[TASK FORCE - 2-701]

ARTICLE 2 - PART 7

SECTION 2-701

The Task Force agrees with the Study Group’s observations and recommendations regarding section 2-701, subject to the following:

1. We would delete any reference limiting consequential damages. We agree with the Study Group that section 2-710 should be amended to allow a seller to recover consequential damages subject to the appropriate limitations of foreseeability, certainty, and avoidance. Accordingly, any further limitation in section 2-701 would be both confusing and redundant.

as good a position as he would have been in had the contract not been made” and the restitution interest is the plaintiff’s “interest in having restored to him any benefits that he has conferred on the other party.” § 344 (b) & (c). For useful analysis, see R. Anderson, Monetary Recoveries for Reliance and Restitution Under Article 2 of the UCC, 22 U.C.C. L.J. 248 (1990); Gibson, Promissory Estoppel, Article 2 of the UCC and the Restatement (Third) of Contracts, 73 Iowa L. Rev. 659 (1988).

6. The presence of these principles would have saved Judge Posner extra work in Cates v. Morgan Portable Building Corp., 780 F.2d 683 (7th Cir. 1979)(holding that defendant had duty to prove that plaintiff had failed to mitigate).

7. See Peters, Roadmap at 203-06. An implicit policy here controls opportunistic behavior by an aggrieved party making choices among available remedies.
2. Although we agree that the burden of proving that damages could have been mitigated should fall on the defendant, we note that section 2-715 defines consequential damages, in part, as those "which could not reasonably be prevented." By defining damages in this way, section 2-715 suggests that the plaintiff must prove an inability to mitigate as part of her proof of damages. This has led several courts to require, as a prerequisite to a recovery for consequential damages, that the buyer prove that the loss could not have been avoided by cover.443 Arguably, the burden of proof regarding the lack of cover opportunities should be on the buyer because substitute goods are usually readily available on the market, and the buyer is usually best able to explain why she did not access those goods. Accordingly, although we agree that the burden regarding mitigation should generally rest on the defendant, the Task Force recommends that the Drafting Committee consider whether a special rule should be adopted that would require the buyer to prove an inability to cover as a condition to a recovery of consequential damages.

3. We do not understand what the Study Group means by its suggestion that a choice of remedy forecloses other remedies where "the aggrieved party has relied." Perhaps the reference is to reliance by the breaching party. If so, we suggest that the comments to such a revision give examples of how the injured party's choice of remedies might encourage detrimental reliance by the breaching party. The phrase "fundamental inconsistency" is also unclear in this context. We assume that the reference is to discarding a compensatory remedy in favor of one that will overcompensate. If this is correct, then the phrase merely underscores the compensation mandate of section 1-106.

4. The Task Force recommends that the Drafting Committee consider including a comment to new section 2-701 stating that a seller or buyer may recover incidental or consequential damages, if properly proved, even though no general damages are recoverable by sellers under section 2-706, section 2-708, or section 2-709, or by buyers under section 2-712, section 2-713, or section 2-714. Since sections 2-710 and 2-715 only define incidental and conse-

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quential damages, a plausible argument can be made that their recovery is predicated on proof of general damages by the aggrieved seller or buyer.\textsuperscript{444} For example, since section 2-714(3) says that incidental and consequential damages "may also be recovered," does this imply a requirement of a general damages recovery under subsections (1) or (2) of section 2-714? Most courts have assumed not.\textsuperscript{445}

\textbf{[PRELIMINARY REPORT - 2-702]}

\textbf{C. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S INSOLVENCY: § 2-702.}

Rec. A2.7 (2).

The Study Group recommends that the seller's power to reclaim goods from the seller or third parties, whether based upon the buyer's insolvency or the failure of a payment condition, be treated in one section, namely § 2-702. Accordingly, the following revisions are recommended in § 2-702.\textsuperscript{6}

1. Section 2-702(1) provides that a credit seller may refuse to deliver except for cash where it "discovers the buyer to be insolvent" and may also "stop delivery under this Article (Section 2-705)."

(A) The Study Group recommends no revisions in the text of § 2-702(1). Rather, we recommended that it be moved to and stated as the first subsection of § 2-705. See discussion at Rec. A2.7 (4).

2. Section 2-702(2), as now drafted, deals only with the credit seller's power to reclaim goods from an insolvent buyer. It states the limited conditions on and the time for an insolvency reclamation. Section 2-702(2), however, does not explicitly deal with the reclamation rights of the seller, who delivers in exchange for a check which bounces. These are derived from § 2-507(2),

\textsuperscript{444} See Associated Metals & Minerals Corp. v. Sharon Steel Corp., 590 F. Supp. 18, 20-21, 39 U.C.C. Rep. Serv. (Callaghan) 892, 895-96 (S.D.N.Y. 1983) (finding that § 2-710 merely defines the scope of "incidental damages" which are recoverable in connection with an action for: (1) the price, (2) damages flowing from the buyer's nonacceptance of the goods or repudiation of the contract, or (3) a resale of the goods resulting from the buyer's breach) (citing § 2-706(a)), aff'd mem., 742 F.2d 1431 (2d Cir. 1983).


\textsuperscript{6} See Revision at 436-41.
although the reclamation time limitations sometimes have been resolved by reference to § 2-702(2).

(B) Despite arguments to the contrary,9 the Study Group recommends that both grounds for reclamation should be retained and integrated in a revised § 2-702(2). The revision should achieve the following objectives:

(1) Set forth the two common law bases for reclamation, which, in turn, dictate different time limitations.

When insolvency is the basis for reclamation, the “ten day” time limitation in § 2-702(2) should apply, with the following variations: (1) a seller who has received a written misrepresentation of solvency from the buyer should have (1) a “reasonable time” to reclaim and (2) the benefit of a conclusive presumption of reliance on the misrepresentation. Also, a comment should state that payment by a check drawn against insufficient funds does not constitute a written misrepresentation of solvency.

When a conditional delivery by a “cash” seller is involved, the time for a reclamation demand should be a reasonable time after the seller discovers or should have discovered the fact of non-payment. Although this may be more or less than ten days, it is attuned to when the seller should know that there is a problem.

(2) In all other respects, the reclamation rights against the buyer should be the same.

3. Section 2-702(3) states that the “seller’s right to reclaim... is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article.” This version reflects the 1966 Amendment which deleted the phrase “or lien creditor” from the list of third parties whose rights might prevail over the reclaiming seller. The purpose of this revision was to resolve the priority dispute in favor of the seller.10

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9. One line of argument is that the reclamation rights are rooted in common law exceptions to the policy against secret liens and have no place in a modern commercial code. Rather, the seller should be encouraged to create and perfect security interests in the goods. Another line of argument has to do with third parties who deal with the buyer without knowledge of any reclamation rights. Although they have more protection against reclamation than does the buyer, the risk that an uncommunicated reclamation demand will be received before the third party advances credit is real. Accordingly, common law reclamation should be rejected.

10. Without the phrase “or lien creditor,” priority was determined under other state law, which generally favored the seller. See Braucher, Creditor’s Rights Under UCC, Article 2-Sales, 67 Comm. L.J. 218 (1962). As of 1986, only 21 states and the District of Columbia had deleted the phrase “lien creditor.” See Revision at 437.
Obviously, if the seller's reclamation demand is not timely, there is no need for § 2-702(3). But if the demand is timely, the question when the rights of BIOCB's or other GFP's arise is critical. If they arise before the reclamation demand is effective, then the third party's claim to the goods prevails and the seller is, in effect, unsecured.

(C) The Study Committee recommends the following revisions in § 2-702(3) or the comments.

(1) The reclamation rights against third parties, as detailed, should be the same for all sellers;

(2) A timely reclamation demand will be effective against the buyer. To prevail against third parties, however, the seller must recover possession of the goods before their rights attach.

(3) Only the rights of bona fide purchasers for value (including holders of security interests and lessees) and buyers in the ordinary course of business are protected. Other purchasers and lien creditors are subordinate to the timely reclamation demand.

(4) Third parties will be protected when they obtain interests in the goods that entitle them to possession as against the buyer. These rights to possession are determined under other sections, including §§ 1-201(9), 2-403 and 2-716.

(5) For purposes of § 2-403, a secured party under Article 9 may qualify as a good faith purchaser for value. The secured party's security interest, even if unperfected at the time the seller asserts a reclamation right, should prevail without proof of reliance unless the seller can establish bad faith. Thus, in the ordinary transaction, a perfected, after-acquired security interest that attaches when the buyer has rights in the goods will normally prevail, unless the seller is otherwise protected by state or federal law.

(6) The Study Group's tentative conclusion is that a reclaiming seller should not have a right to proceeds. If the goods cannot be reclaimed, the seller has only an in personam remedy against the buyer.11

(7) Since "lien creditor" is not defined in Article 2, we recommend that the Article 9 definition be reviewed for appropriateness and moved to Article 1 for general application.

These recommendations both clarify and tighten the rights of a reclaiming seller who has not perfected a security interest under Article 9. They are made with an eye on § 546(c) of the Bankruptcy Code but not with an intent to conform to § 546(c) as written. Rather, we would prefer to first

11. But see § 546(c) of the Bankruptcy Code.
"do it right" for Article 2 and then lobby for an appropriate revision of § 546(c).12

[TASK FORCE - 2-702]

SECTION 2-702

The Task Force agrees with the Study Group regarding section 2-702.

[PRELIMINARY REPORT - 2-703]

D. SELLER'S REMEDIES IN GENERAL: § 2-703.

Section 2-703 both states the catalogue of remedies that may be available to the seller and identifies the types of breach that trigger those remedies. Rec. A2.7 (3).

The Study Committee recommends the following minor revisions to § 2-703.

(A) Section 2-703 should be made "subject to" revised § 2-701;

(B) It is now a breach when the buyer fails to make a "payment due on or before delivery." But § 2-703 does not state what happens when the payment breach is "after delivery." Can the seller, nevertheless, sue for the price under § 2-709(1)? The answer is unclear, since § 2-703(e) seems to condition access to § 2-709 on a breach listed in § 2-703. If the seller is not entitled to the price, what other remedies are available? Is the seller limited to damages under § 2-708, as § 2-709(3) suggests,13 or does the seller have access to the full catalogue of remedies in § 2-703? This dilemma should be resolved by revising § 2-703 to state "fails to make a payment due on, before or after delivery." It would then be clear that the seller could have access to § 2-709 or any other appropriate remedy listed in § 2-703.

12. There was some sentiment to the contrary.

13. Accord Trimble v. Todd, 510 So.2d 810 (Ala. 1987). If the goods have been delivered and accepted, the seller will have every incentive to sue for the price under § 2-709(1)(a). But that remedy is permissive, not mandatory. Moreover, the buyer may default in payment after delivery but before acceptance. Unless § 2-703 applies here, it is doubtful that the seller could recoup the goods under § 2-706(1), a remedy that depends upon satisfying the conditions in § 2-703. But see Commonwealth Edison Co. v. Decker Coal Co., 653 F. Supp. 841 (N.D. Ill. 1987), holding that § 1-106(1) requires the seller to use § 2-709, if applicable, when § 2-708(2) would put it in a better position that full performance.
In addition, the revision should clarify when the seller can cancel the contract for the buyer's failure to pay on time."

(C) The test for a breach of the "whole" contract should be stated in the text of § 2-703, rather than by reference to § 2-612. Whether an "objective" or "subjective" definition of breach of the "whole" is stated depends upon a policy decision: How difficult should it be to cancel after a rejection, or revocation of acceptance or proper action under § 2-612? An objective test would make it harder to cancel than the subjective test.

(D) Subsection (a) should be revised to include "withhold delivery for insolvency of the buyer or stop delivery by any bailee." This revision implements the recommendation that § 2-702(1) be merged with § 2-705. Cf. § 2A-523.

(E) Subsection (e) appears to limit § 2-708 to breach by "non-acceptance." This limitation is inappropriate. The reference in § 2-703 to § 2-708 should be coextensive to the scope of § 2-708, i.e., "non-acceptance and repudiation."

(F) To implement our recommendation, made at A2.7(8), that a seller should be able to recover consequential damages, a new subsection should be added: "Recover incidental and consequential damages as hereafter provided (Section 2-710)."

[TASK FORCE - 2-703]

SECTION 2-703

We agree with the Study Group regarding section 2-703. Please note, however, that several courts have held that the price action under section 2-709 is a mandatory remedy.46 We believe that the price action should be a mandatory remedy in all cases in which the buyer retains the goods. We also believe that the Drafting Committee should consider providing a comment to section 2-709 to that effect.

[PRELIMINARY REPORT - 2-704]

E. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS: § 2-704.

No revisions are recommended in the text of § 2-704.

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14. See Roadmap at 216-17 (concluding that the seller's power to cancel is "stated badly and without cross references. . . .")

SECTION 2-704

The Task Force agrees with the Study Group that no revisions of section 2-704 are necessary. We do recommend, however, that the Drafting Committee consider adding a comment explaining what “effective realization” means in section 2-704(2).

PRELIMINARY REPORT - 2-705

F. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE: § 2-705.

Section 2-705 is an important extension of a credit seller's right to “refuse” delivery upon the buyer's insolvency, § 2-702(1), and the seller's right to “withhold delivery” upon breach by the buyer. § 2-703(a).

Rec. A2.7 (4).

(A) We recommend that the text of § 2-702(1) be transferred to § 2-705 and renumbered as § 2-705(1). This improves the functional unity of the seller's “self-help” remedies and facilitates the redrafting of § 2-702 to deal exclusively with reclamation rights. The captions to these sections should be amended to reflect the changes.

No other revisions are recommended in the text of § 2-705.

Section 2-705(1) states the grounds for stoppage in transit, § 2-705(2) states how late the right to stop may be exercised against the buyer and § 2-705(3) states how the seller must notify the bailee and the duties of the bailee after proper notification. Although a fair amount of litigation has arisen under § 2-705, no problems of substance have been identified.15

An assumption here is that creditors of the buyer have no possessory rights (as we have defined that term) in the goods as long as the seller can stop delivery against the buyer. § 2-705(2). This is true for goods in the

147 See Anderson, Damages for Sellers Under the Code's Profit Formula, 40 Sw. L.J. 1021, 1035-39 (1986) (defining the term in the following manner: “If realization refers to the seller's lost expectation on the breached contract, the meaning is probably that the seller need only act reasonably and that in mitigating the loss it may look to its own interests as well as those of the breaching buyer.” Id. at 1035.).

15. Note that § 2-705(1) and (2) carefully distinguish between “carrier” and “bailee” but § 2-705(3) mentions only “bailee.” The comments suggest that “bailee” is here used in the Article 7 sense, which includes a carrier. But since Article 2 does not define bailee, this intent should be clarified.
seller’s possession, and § 2-705 simply extends this concept to carriers and
other bailees. This assumption, however, is not stated in the comments.
(B) We recommend that this clarification be made in the com-
ments.

The right to stop delivery is, arguably, one example of a possessory
security interest arising under Article 2. See § 9-113, Comment 1. It remains
perfected (and with priority, we suppose) “so long as the debtor does not
have or does not lawfully obtain possession of the goods.” § 9-113. Pre-
sumably, perfection does not terminate where that buyer obtains possession
from the bailee by fraud.16

[TASK FORCE - 2-705]

SECTION 2-705

We agree with the Study Group regarding section 2-705.

[PRELIMINARY REPORT - 2-706]

G. SELLER’S RESALE INCLUDING CONTRACT FOR
RESALE: § 2-706.

Rec. A2.7 (5).

No revisions of substance are recommended in the text of § 2-
706.

In most cases, an action for the price is the most efficient for the seller.
The agreed price of the goods is obtained without lost volume, see § 1-
106(1), and the post-breach expenses of retrieving, salvaging and disposing
of the goods are avoided. The price remedy, however, is rarely available
where the buyer breaches before accepting the goods. § 2-709(1).

In the absence of “lost volume,” the resale remedy in § 2-706(1) is
the next best thing if the goods are or can be identified.17 On the one hand,
the resale price may exceed the contract price and the seller is not accountable
“for any profit made on the resale.” § 2-706(6).18 If, on the other hand,

16. Peters concludes that, as a practical matter, a seller in possession or control of
the goods can withhold delivery and cancel for breach without any right to “cure” by
the buyer. Roadmap at 217-23. Should the buyer have a right to “cure” similar to that of
the seller?

17. Goods, whether finished or unfinished, can be identified to the contract after
breach, § 2-704(1), and resold. In fact, § 2-706(2) provides that it is “not necessary
that the goods be in existence or that any or all of them have been identified to the contract
before the breach.”

18. Note, however, that a person “in the position of a seller” or a buyer who has
rightfully rejected or justifiably revoked and resold under § 2-706 to protect a security
interest, see § 2-711(3), must account for any excess over the security interest. This is the
rule under Article 9. See § 9-504(2).
the resale price is less than the unpaid contract price, the seller may recover the resale/contract price differential, as adjusted for incidental damages and savings in § 2-706(1). Assuming a realistic exception for "lost volume" cases, this measure of damages is satisfactory.

Lurking beneath § 2-706 are several continuing problems.

1. If the seller sues for damages under § 2-706(1), what statutory conditions must first be satisfied? In addition to giving the buyer in a private resale "reasonable notification of his intention to resell," § 2-706(3), the seller must resell in good faith and in a commercially reasonable manner. § 2-706(1). See also, §§ 2-706(2) & 2-706(4).

Although these conditions are complex and have given some courts trouble, we recommend no revisions.

2. If the seller fails to satisfy the statutory conditions, what residual remedies are available? Comment 2 states that "failure to act properly...deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708." Some courts have held, however, that an attempt in bad faith to satisfy the conditions of § 2-706 should not permit the seller to recover § 2-708 damages that put it in a "better position" than full performance would have.

(A) This limitation, implicit in revised § 2-701, should be made explicit in the Comment.

3. If the seller satisfies the statutory conditions in § 2-706, may it still pursue damage remedies under § 2-708? The current answer is unclear, and the commentators disagree.

(B) We recommend that, in the absence of lost volume, if the seller has notified the buyer and actually resold the goods in good faith and in a commercially reasonable manner, the seller is limited to damages as measured by § 2-706(1).

19. A failure in the resale market means that the seller can recover the contract price under § 2-709(1)(b).
20. Peters argued that the conditions tended to support resale and should be treated as "evidentiary rather than directory." Roadmap at 256.
21. Compare Roadmap at 259-61 (both seller and buyer should have the same options) with Agenda at 380-83 (neither seller who resells nor buyer who covers should recover market damages higher than the resale or lower than the cover price).
22. The problem is to identify sellers who will not be made whole by an otherwise proper resale. The lost-volume seller is, in all probability, such a seller. Since it is difficult to establish whether the seller is in a lost-volume situation, the burden should be put on the buyer to prove that seller could not have made both sales "but for" the breach.
SECTION 2-706

The Task Force agrees with the Study Group regarding section 2-706, subject to the following:

1. We recommend deleting section 2-706(3), which requires that the seller give the buyer in a private resale "reasonable notification of his intention to resell." Unlike a public resale, the notice requirement in a private resale serves no purpose. Further, the seller's failure to meet the technical notice requirement in section 2-706(3) has been strictly construed by the courts, resulting in many cases denying the resale remedy to the seller.448 Such denials resulted even though the resale was in good faith and commercially reasonable.449 Thus, a seller who has not pled and proven an alternative remedy may be denied any recovery.450 We believe that the notice requirement protects no legitimate interest of the breaching buyer, but may work unfairly in delaying a seller from moving promptly to mitigate the loss caused by the breach. We note that there is no corresponding notice requirement in the buyer's parallel cover remedy and that the resale remedy under The United Nations Convention on Contracts for the International Sale of Goods also is not subject to a notice requirement.

2. We recommend that the term "auction sale" be substituted for the term "public sale" in section 2-706 because it more accurately describes what is intended.451

3. In reference to footnote 22 of the Study Group Report, we suggest that the buyer should carry the burden of proving that the seller "would" not have made both sales, rather than "could" not have made both sales. Many sellers operate at less than maximum capacity in order to maximize profits. These sellers will not make additional sales even though they have the capability of so doing. For purposes of computing damages, such sellers should be

treated as at full capacity rather than as lost volume sellers, or the marginal profit of the added sale should be computed.452

[PRELIMINARY REPORT - 2-707]

H. "PERSON IN THE POSITION OF A SELLER:" § 2-707.

No revisions are recommended in the text of § 2-707.

[TASK FORCE - 2-707]

SECTION 2-707

The Task Force agrees with the Study Group that no revisions are necessary for section 2-707.

[PRELIMINARY REPORT - 2-708]

I. SELLER'S DAMAGES FOR NON-ACCEPTANCE OR REPUDIATION: § 2-708.

Subject to § 2-708(2) and § 2-723 (proof of market price), § 2-708(1) provides a formula to measure damages for non-acceptance or repudiation: The "difference between the market price at the time and place for tender and the unpaid contract price" as adjusted upward for incidental damages and downward for expenses saved. In essence, the value of the bargain under § 2-708(1) is the unpaid contract price less the market price of the goods at the relevant time and place.

Section 2-708(2) is available to the seller "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." and measures damages by a "components" approach: The seller may recover the "profit (including reasonable overhead) which . . . would have been made from full performance by the buyer." as adjusted upward for incidental damages and "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

These subsections have given the courts problems and have provided a field day for the commentators. The issues are of two sorts: (1) When should each be applied, and (2) If a particular subsection does apply, what is the proper way to measure damages?

1. Section 2-708(1).

Rec. A2.7 (6).

The Study Group recommends several revisions in the text of and comments to § 2-708(1).

Application.

The formula in § 2-708(1) provides a rough measure of the gain in market terms prevented by the buyer’s non-acceptance, repudiation or failure to pay. The measure is not precise and it does not pretend to compensate the seller for any investment (reliance) in the goods before the breach. Thus, § 2-708(1) creates a real risk of either-under-or-over-compensation. See § 1-106(1).23

One possible solution to this risk is to delete § 2-708(1) or to state explicitly that § 2-708(2) is the primary rather than a secondary remedy for wrongful rejection or repudiation. This solution, however, rejects an objective measure with deep historical roots for a more particularized measure, § 2-708(2), that is costly and sometimes difficult to apply.

Another solution is to clarify and limit the cases to which § 2-708(1) applies. Viewed realistically, § 2-708(1) is a surrogate for the resale remedy. Apart from the seller’s reliance interest, the contract price/market price differential is similar to § 2-706(1), in that the market price is a substitute for an actual resale price. The risk of over or under compensation can be reduced, therefore, if the recovery on the two measures is roughly the same and potential reliance losses are removed from the equation.

(A) The Study Group recommends that § 2-708(1) be limited in application to three situations where the goods either have been resold or are available for resale: (1) The seller has resold in compliance with § 2-706 but has “lost volume;” (2) The seller has resold in good faith but otherwise has failed to comply with the conditions of § 2-706; and (3) The seller has not resold in fact, but has identified goods on hand or goods that were intended for the contract.24 The Study Group rejects the application of § 2-708(1) to cases posing the greatest risk of under-compensation, i.e., where, at the time of breach, the seller is in the midst of and does not

23. But see Roadmap at 257-61, where Peters justifies market damage formulas as statutory liquidated damages clauses.

24. See Agenda at 407-08. Professor Sebert would also apply § 2-708(1) where the seller tries but is unable to recover the price under § 2-709(1). This case is incorporated in situation (3), above.
complete production, or of over-compensation, i.e., where the seller has no completed goods on hand.\(^2^5\)

As an alternative, § 2-708(1) could be revised to state that damages should be measured in any way that puts the seller in the same position as full performance would have and that a common way to achieve that result is through the contract price/market price formula. In any event, the comments should provide illustrations to implement the general language.

**Measure.**

*No revisions of substance are recommended in the measure of damages under § 2-708(1).*

The measure of damages under § 2-708(1) 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." A breakdown of this formula indicates the following possible problems.

(a) The "market price" of the goods is "subject to" §§ 2-723 and 2-724, which deal with the establishment and proof of market price.

(b) The Study Group will recommend revisions in § 2-723(1).

The clear language "time and place for tender" avoids proof problems when a claim for breach of an installment contract or breach by repudiation comes to trial after the time for performance has passed. In the installment contract, the seller must establish the market price at the time and place for tender of each installment. In the repudiation case, the same standard applies even though the seller exercised an option under § 2-610(a) to wait more than a commercially reasonable time for performance by the buyer.\(^2^6\)

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25. This recommendation is consistent with Anderson, Damages for Sellers Under the Code's Profit Formula, 40 S.W. L.J. 1021, 1026 (1987), who argues that the "market formula hypothesizes that the seller will be able to resell the goods at the market price at the time and place for tender" in the absence of lost volume. It is also consistent with the view that § 1-106(1) should limit the choice of remedies that overcompensate. It also rejects the reasoning of TransWorld Metals, Inc. v. Southwire, 769 F.2d 902 (2d Cir. 1985), which held that where, at the time of breach, a middleman had made no forward contracts to secure the goods and was, in effect, betting on the market, it ought to have the full benefit, measured by § 2-708(1), of a successful bet. Perhaps a special case can be made for the "unhedged middleman," especially where the measure of lost profits under § 2-708(2) is difficult to prove because no forward contracts establishing the cost of performance have been made. See Comment, UCC § 2-714(1) and the Lost Volume Theory: A New Remedy For Middlemen, 77 Ky L.J. 189 (1988).

(C) The Study Group will recommend revisions in § 2-713(1) to achieve parity with the language and result under § 2-708(1).

Measurement of "market price" when a repudiation claim comes to trial before the time for performance has passed is determined under § 2-723(1).

c) It should be clear that the deduction for "expenses saved in consequences of the buyer's breach" does not include costs that the seller would have incurred to procure or to manufacture the goods. Those savings are already worked into the formula in § 2-708(1). The proper expenses include other costs, such as transportation, that the seller would have incurred but for the breach.

(D) The Comments should be revised to clarify this point.27

2. Section 2-708(2).

Rec. A2.7 (7).

Due to a continuing controversy in the courts and the law reviews, several revisions in the text of and comments to § 2-708(2) are recommended.28

Application.

Section 2-708(2) now applies "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." Courts agree that, in most cases, it is the seller's burden to show inadequacy and that the case is made in two situations: (1) A resale would have produced or did produce "lost volume"29 and (2) the seller, upon breach by the buyer, reasonably stopped performance before the goods were obtained or completed and salvaged. It is less clear whether

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27. Suppose the contract required seller to deliver f.o.b. point of origin. At the time of breach, the seller had produced the goods but had neither prepared them for shipment nor delivered them to a carrier. After the breach, the seller decides not to resell and sues under § 2-708(1). The expenses saved are the costs not incurred in preparation and shipment. The costs incurred in producing the goods and subsequently disposing of them are irrelevant to § 2-708(1).

28. The Study Group has been influenced by the analysis and recommendations by Professor Sebert, Agenda at 383-407.

29. "Lost Volume" means that the seller, but for the breach, would probably have made two sales and thus two profits, one sale to the buyer and another to a third party. "Lost Volume," in its simplest form, exists when the seller has the capacity to make a second sale even though there is no breach in a market where the second sale probably would have been made. Many courts have found lost volume where the seller had capacity and in fact resold the goods after the breach.
inadequacy exists where the seller has incurred no costs toward performance at the time of breach.\textsuperscript{30}

(A) On the assumption that § 2-708(1) is a surrogate for resale and, thus, depends upon the seller having completed goods that could be resold, the Study Group recommends that § 2-708(1) or § 2-708(2) or the comments be revised to state when the seller may invoke § 2-708(2) and that those conditions, at a minimum, include "lost volume," incomplete and salvaged performance and cases where the seller has incurred no cost toward performance. In addition, a majority of the Study Group recommends that the Drafting Committee consider when, if ever, the buyer should be able to compel the seller to use § 2-708(2) because § 2-708(1), if applied, would put seller in a better position than full performance.\textsuperscript{31}

Measure.

There has been much confusion and disagreement over how damages should be measured under § 2-708(2). Although the objective is to determine the "'profit (including reasonable overhead)'" that the seller would have made on the particular contract if performed, the method for making that determination is not clearly stated. This produces confusion and inconsistency when "'lost volume'" and salvaged performance disputes arise and are determined under the same standard.

(B) The Study Group recommends that a different measure of damages be devised for both the "'lost volume'" case and the "'salvaged'" performance case.

In the "'lost volume'" case, the seller has completed goods on hand that were or could have been resold. The total variable costs of performance have been incurred and are tied up in goods which have a market value.\textsuperscript{32} The only question is the "'profit'" that would have been made on the sale.

The first step in measuring that profit is to subtract the total variable cost of performance from the contract price. This leaves a figure that includes profit and overhead. This figure should prevail unless the buyer shows either

\textsuperscript{30} In fact, market fluctuations may give a middleman and opportunity to claim higher damages under § 2-708(1) than under § 2-708(2). Some courts, invoking § 1-106(1), have required the seller to use § 2-708(2) when the damages under § 2-708(1) were higher and the seller had in fact hedged the market risk through forward contracting. E.g., Union Carbide Corporation v. Consumers Power Co., 636 F. Supp. 1498 (E.D. Mich. 1986).


\textsuperscript{32} In short, the reliance interest represents variable costs invested in goods which could be resold.
that the variable costs incurred were unreasonable or the allocation of overhead to the contract was unreasonable.\textsuperscript{33}

(C) The Drafting Committee should consider whether any further adjustments to the "gross profit" figure should be made because a second sale (the "lost volume") would not have been profitable. The possibility is suggested by economic analysis. If the answer is yes, then the scope of the adjustment and who has what burden of proof must also be addressed.\textsuperscript{34}

This measure of damages, because it focuses only on lost profits, should not contain the language, now in § 2-708(2), "due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."\textsuperscript{35}

In cases other than "lost volume," (i.e., "salvaged" performance) the seller may have incurred costs in partial performance before and "resold" for salvage after the breach.\textsuperscript{36} In these cases, the court must determine both the "profit (including reasonable overhead)" that the seller would have made on full performance and should calculate any unreimbursed reliance costs incurred in part-performance. In addition, the seller will have some responsibility to take reasonable action after the breach to minimize reliance costs incurred before the breach. A different standard for measurement will, therefore, be required.

(D) The Study Group recommends the following measure of damages in cases of partial or no performance by the seller at the time of breach:

First, the seller should recover the "profit (including reasonable overhead)" measured by subtracting from the contract price the sum of the variable costs incurred prior to the breach and the variable costs that would have been incurred after the breach.\textsuperscript{37} (KP - TVC).

\textsuperscript{33} For a discussion of the "overhead" problem, see Agenda at 403-07. Scher correctly observes that although "there is no need to distinguish between profit and overhead, it is very important that the variable cost figure be accurate when measuring damages under the contract price less variable cost formula." Id. at 405.

\textsuperscript{34} See R.E. Davis Chemical Corp. v. Diasonics, Inc., 826 F.2d 678 (7th Cir. 1987)(holding that the seller must prove that the second sale would have been profitable). Contra: Agenda at 391(arguing that the burden should be on the buyer to prove that the second sale would not have been profitable because of "rising marginal costs"). See also Schlosser, Damages For the Lost Volume Seller: Does An Efficient Formula Already Exist?, 17 U.C.C LJ 238 (1985)(arguing that no revisions are required to obtain efficient results).

\textsuperscript{35} Because the buyer has, in the exercise of "reasonable commercial judgment," elected to "cease manufacture and resell for scrap or salvage value. . .", § 2-704(2), there will be no completed goods on hand.

\textsuperscript{36} "Variable" as opposed to "fixed" costs are expenses necessary to perform the contract which would not be incurred but for the contract.
The seller has the burden to prove the total variable costs, subject to proof from the buyer that the costs were unreasonable or the overhead allocation was unreasonable.

Second, the seller should also recover any reasonable variable costs incurred in part-performance before the breach. These reliance expenses should be adjusted downward for "any payments or proceeds of resale" received by the seller in salvaging or scrapping the part performance and any payments or proceeds that the buyer proves could have been obtained by reasonable efforts. This process captures the essence of the last clause in § 2-708(2), "due allowance for costs reasonably incurred and due credit for payments or proceeds or resale." It is part of the seller's "duty" to mitigate damages.

Third, this amount should be reduced for any payments made by the buyer under the contract and increased to reflect any incidental and consequential damages proved under § 2-710.

[TASK FORCE - 2-708]

SECTION 2-708

A. Section 2-708(1).

The market formula for sellers is a hypothetical abstraction which at best approximates damages. In the significant majority of cases, a seller will be more accurately compensated by damages measured under section 2-706, section 2-708(2) or section 2-709. The application of section 2-708(1), thus, has great potential for abuse in over and undercompensating sellers.453 The Task Force, thus, agrees with the Study Group that the application of section 2-708(1) should be limited. The limitation should apply to those situations in which damages cannot otherwise be accurately measured. We further agree that the goods must either have been resold or have been unavailable for resale. We question only the first of the three subset situations suggested at page 19 by the Study Group.

As a general proposition, we disagree that a "lost volume" seller should be entitled to damages under section 2-708(1). Such a seller should be restricted to the lost profit under section 2-453 See Anderson, Pitfalls for Sellers and Buyers Under the Market Formula of Section 2-708, 4 THE REV. OF LITIGATION 251, 257-58 (1985).
We recommend that the first subset suggested by the Study Group be changed to read: "The seller has resold in compliance with section 2-706 and has 'lost volume,' but either cannot adequately prove damages under section 2-708(2), or damages under section 2-708(1) would be less than damages under section 2-708(2)."

We also disagree with the Study Group's alternative suggestion at page 20 that the market formula is a "common way" to achieve compensation for sellers. The market formula is rarely an accurate measure of compensation. The inadequacy of section 2-708(1) in the wide range of cases has been demonstrated by the Sebert, Peters and Anderson articles relied upon by the Study Group.

The Task Force strongly disagrees with the Study Group's suggestion that damages under section 2-708(1) should be measured at the time and place for tender in cases of anticipatory repudiation. We suggest that in anticipatory repudiation cases, damages should be measured within a reasonable time after the repudiation, when the time for awaiting performance by the buyer under section 2-610 has expired. We will suggest a similar rule for buyers under section 2-713.

As the Study Group has recommended, a seller seeking recovery under section 2-708(1) must either still have the goods at the time of trial or have resold them prior to trial. In the former case, the seller was either unable to resell or chose not to. If the goods were not reasonably resalable, the seller is entitled to an action for the price under section 2-709 and has no need for recovery under the market formula. If the seller chose not to resell but to retain the goods, that decision indicates speculation by the seller that retention was more valuable. That speculation must have been based on the value of the goods at roughly the time of repudiation, and that value best approximates the basis for the seller's damages. In effect, by not selling, the seller chose to purchase the goods herself at their market value at approximately the time of the repudiation.455

If, on the other hand, the seller has resold the goods in a commercially reasonable manner, then damages should be meas-

454 We are thus in agreement with the Study Group in rejecting TransWorld Metals, Inc. v. Southwire, 769 F.2d 902, 41 U.C.C. Rep. Serv. (Callaghan) 453 (2d Cir. 1985), holding that a "lost volume" seller may recover under § 2-708(1) greater damages than would be allowed by § 2-708(2).

455 See Anderson, supra note 453, at 267-72.
ured under section 2-706 or under a section 2-708(1) measurement that best approximates the resale price. If the resale was without undue delay, the latter measurement would be based on a market price near the time of repudiation. Of course, in an actual resale situation, a "lost volume" seller should recover under section 2-708(2), rather than under section 2-708(1). In sum, the Task Force rejects the Study Group's suggestion that repudiation damages should be measured at the time and place for performance because such a measurement would allow the seller to speculate unfairly at the buyer's expense, and because damages based on the market price near the time of repudiation best approximates the seller's actual loss.

B. Section 2-708(2).

The Task Force agrees with the recommendations of the Study Group subject to the following clarifications.

1. In the text of the Report at note 29, please note that resales do not produce "lost volume" but that breaches do.

2. In the text of the Report at note 31, we suggest that the Study Group's recommendation to the Drafting Committee include the suggestion that the buyer should be able to compel the seller to use section 2-708(2) in all cases in which section 2-708(1) would overcompensate the seller. We believe that any other result would contravene the liberal administration of remedies mandated by section 1-106.456

3. In the text of the Report at note 33, we find confusing the suggestion that a buyer might show that an "allocation of overhead to the contract was unreasonable," because this suggestion might be read to undermine the very basic proposition that fixed costs should always be included as part of the seller's lost profit recovery. In this vein, we suggest that the Drafting Committee consider

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456 We thus agree with cases such as Union Carbide Corp. v. Consumers Power Co., 636 F. Supp. 1498, 1 U.C.C. Rep. Serv. 2d (Callaghan) 1202 (E.D. Mich. 1986) and Nobs Chem., U.S.A., Inc. v. Kippers Co., 616 F.2d 212, 28 U.C.C. Rep. Serv. (Callaghan) 1039 (5th Cir. 1980) (holding that the basic philosophy of Article 2 is to put the aggrieved party in as good a position as if the other party had performed, but no better). We disagree with TransWorld Metals, Inc. v. Southwire Co., 769 F.2d 902, 908, 41 U.C.C. Rep. Serv. 453, 460 (2d Cir. 1985) ("[N]othing in the language or history of subsection 2-708(2) suggests that it was intended to apply to cases in which 2-708(1) might overcompensate the seller.").
deleting the word "reasonable" in reference to overhead in the text of section 2-708(2). The reference is no doubt to situations in which costs that are normally fixed become variable because of circumstances unique to the breached contract.\footnote{See 3 W. Hawkland, U.C.C. Series §§ 2-708, -338 to -339 (1986).} For example, electricity and other utilities are normally overhead; but if a previously shut down plant is reopened solely for purposes of performing the breached contract, electricity and other utilities would then be regarded as variable costs.\footnote{See Vitex Mfg. Corp., Ltd. v. Caribtex Corp., 377 F.2d 795 (3d Cir. 1967).}

4. With respect to the discussion in the text of the Report at note 34 regarding unprofitable resales, we make the following two observations:

(a) As mentioned above, a seller should be considered to have "lost volume" only when she \textit{would} (as opposed to \textit{could}) have made both the sale under the breached contract and the resale. If the resale would have been unprofitable, it is unlikely that the seller would have sold.

(b) A lost volume seller who actually resells the goods at a loss should be restricted to a recovery under section 2-708(2) of the profit lost on the breached contract. A recovery under section 2-706 based on the unprofitable resale would overcompensate the seller by the amount of loss incurred on the unprofitable resale.\footnote{R. Anderson, Damages Under the Uniform Commercial Code § 5:12 (1988) (discussing the concept of "variable" overhead and the Code cases dealing with the problem). See Universal Power Systems, Inc. v. Godfather's Pizza, Inc., 818 F.2d 667, 34 U.C.C. Rep. Serv. 2d (Callaghan) 1748 (8th Cir. 1987).}

\textbf{[PRELIMINARY REPORT - 2-709]}

\textbf{J. ACTION FOR THE PRICE: § 2-709.}

\textit{No revisions are recommended in the text of § 2-709.}

\textit{In the absence of acceptance by the buyer or passage of the risk of loss, § 2-709(1)(a), the seller cannot recover the contract price unless the goods are identified and the market failure standard in § 2-709(1)(b) is satisfied. On balance, this is an efficient solution (it does not force the buyer to take unwanted goods and puts the burden on the least-cost reseller, the seller). In most other cases (since the goods are completed), the damages in § 2-}

\footnote{R. Anderson, A Roadmap for Sellers' Damages Remedies Under the Uniform Commercial Code and Some Thoughts About Pleading and Proving Special Damages, 19 Rutgers L.J. 245, 257 n.28 (1988) (discussing proposition).}
706(1) or § 2-708(1) will provide adequate protection. See § 2-709(3). See also Rec. A2.7(3)(B).

If the seller is entitled to the price under § 2-709(1), the buyer may claim the goods intended for the contract or the net proceeds of any such goods resold by the seller. § 2-709(2). This is, in effect, the seller's version of specific performance, although the remedy clearly acts in rem. Compare § 2-716(1).

[TASK FORCE - 2-709]

SECTION 2-709

The Task Force agrees with the recommendations of the Study Group regarding section 2-709.

[PRELIMINARY REPORT - 2-710]

K. SELLER'S INCIDENTAL DAMAGES: § 2-710.

Upon occasion, a seller will claim consequential losses from failure of the buyer to accept the goods or to make a payment on time. Where payment is involved, the damages may include interest on existing loans that should have been retired or interest on new loans required to substitute for the promised payments. Most courts, relying on § 1-106(1), have held that a seller is not entitled to claim consequential damages under Article 2.37

Rec. A2.7 (8).

The Study Group recommends that § 2-710 be revised by adding a new § 2-710(1) that explicitly grants the seller a right to claim consequential damages. The revision might provide that consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not be reasonably prevented by the seller.

If this recommendation is adopted, §§ 2-706(1), 2-708(1), 2-708(2) and 2-709(1) should be revised to say "together with any incidental and consequential damages as provided in this Article (Section 2-710)."

[TASK FORCE - 2-710]

SECTION 2-710

The Task Force agrees with the Study Group's recommendation that section 2-710(1) should be revised to grant the seller a right to claim consequential damages. We suggest that the Drafting Committee add comments to section 2-710 giving examples of types of consequential losses that a seller might suffer. We also suggest that the comments indicate that it is much rarer for a seller than a buyer to suffer consequential losses. Further, the comments might point out that, at the time of contracting, it is less likely that a buyer would have reason to know of the seller's potential for consequential loss than the seller would know of the buyer's consequential loss.

[PRELIMINARY REPORT - 2-711]

L. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST IN REJECTED GOODS: § 2-711.

Section 2-711 states the catalogue of remedies available to the buyer upon breach by the seller, identifies the types of breach that trigger the remedies and grants the buyer a security interest in goods in his possession after a rightful rejection or a justifiable revocation of acceptance.

Rec. A2.7 (9).

The Study Committee recommends the following minor revisions to § 2-711.

(A) Section 2-711 should be made "subject to" revised § 2-701;

(B) As in § 2-703, the test for breach of the "whole" contract should be stated in the text of § 2-711(1), rather than by reference to § 2-612. For an indication what that test might be, see Rec. A2.7(1);

(C) Section 2-711(2)(a), dealing with § 2-502, should be deleted if the Drafting Committee agrees that § 2-502 should be deleted;

(D) For clarity, a new subsection should be added which states that where the buyer has accepted the goods and is unable justifiably to revoke acceptance, damages may be recovered under § 2-714. Compare § 2A-508.
SECTION 2-711

The Task Force agrees with the Study Group regarding section 2-711.

M. "COVER"; BUYER'S PROCUREMENT OF SUBSTITUTE GOODS: § 2-712.

In general, § 2-712 has worked well. It is a parallel remedy to resale, § 2-706(1), and will be used whenever the buyer needs goods in substitution for those not delivered by the seller and cannot obtain specific performance. Section 2-712(3) provides that the "failure of the buyer to effect cover within this section does not bar him from any other remedy." These alternative remedies are available whether the buyer simply fails to cover at all or tries to cover but does not satisfy the conditions in § 2-712(2). The buyer, however, does not and should not have a duty to cover under § 2-712.

Rec. A2.7 (10).

The Study Group recommends that § 2-712(3) be revised to state that a buyer who effects a proper cover under § 2-712 should be barred from a remedy under § 2-713. This result is now implicit in § 2-711(1), and the explicit revision would be consistent with that proposed for § 2-706(1).38 Furthermore, some of the Study Group believe that the damages of a buyer who attempts to cover but fails in bad faith to comply with § 2-712(1), should be limited to those that should have been awarded under § 2-712.

SECTION 2-712

The Task Force agrees with the Study Group regarding section 2-712.

Further, we agree with those members of the Study Group who suggest that damages for a buyer who attempts a bad faith

38. Sebert concludes that any revision "should make it clear that a buyer who covers cannot obtain market damages based on a market price higher than the actual cover price, and that a seller who resells cannot obtain market damages based on a market price lower than the actual resale price." Agenda at 382.
cover should be limited to those that should have been awarded under section 2-712. Such limitation would be consistent with a similar limitation imposed by the courts on a seller's bad faith resale under section 2-706. Given the potential difficulty of proof, however, the limitation should be suggested by the comments rather than made a part of the text of section 2-712.

[PRELIMINARY REPORT - 2-713]

N. BUYER'S DAMAGES FOR NON-DELIVERY OR REPUDIATION: § 2-713.

Section 2-713, a parallel to § 2-708(1), is available only where the buyer is unable or unwilling to obtain specific performance under § 2-716(1) or "cover" under § 2-712. Even so, there has been some criticism of § 2-713 and some isolated cries for its repeal.

Rec. A2.7 (11).

(A) The Study Group recommends that § 2-713 be retained with the following revision:

A distinction should be made between a breach by non-delivery and a breach by repudiation where the time for measuring damages is involved. Currently, the time for both breaches is "when the buyer learned of the breach." This is inconsistent with the language of § 2-708(1) ("time and place for tender") and § 2-723(1) ("time when the aggrieved party learned of the repudiation"). Although the current language can be justified when the breach is by non-delivery, a majority of the Study Group have concluded that the standard is too uncertain when the breach is by repudiation. Accordingly, except where § 2-723(1) is involved, (i.e., where the trial occurs before the time for performance is due), the majority recommend that when the seller repudiates, the market price for measuring damages under §

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40 See Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 25 U.C.C. Rep. Serv. (Callaghan) 1037 (9th Cir. 1978) (denying award of resale damages together under § 2-706 for failure to satisfy the elements of good faith and commercial reasonableness in suit against buyer for anticipatory repudiation).

39. The remedies of specific performance or cover, if properly effectuated, are inconsistent with § 2-713(1) and should bar pursuit of that remedy.

40. E.g., Childres, Buyer's Remedies: The Danger of Section 2-713, 72 Nw. U.L. Rev. 837 (1978).

41. The language "learned of the breach" protects a buyer who does not learn that a seller has failed to deliver on a promised date until after that date has passed. See N.Y. Law Rev. Report 697-99 (1955).
2-713(1) should be determined at the time when and place where the seller agreed to tender delivery and that the same approach be applied to installment contracts.42

A minority favor a time for measurement that is closer to the time for breach. Favored by the courts and some commentators,43 the critical point is the expiration of a reasonable time after the seller learns of the repudiation. This point limits damages to the time when the buyer should have covered and eliminates the possibility that the buyer will speculate on a shifting market.44

A lurking problem concerning the possible limitation of § 1-106(1) on the choice of § 2-713(1) remains. Suppose a middleman purchases goods for resale from a producer for $1.00 per pound and immediately resells them for $1.15 per pound. The producer fails to deliver when the market price rises to $1.80 per pound at the time and place for tender. The middleman, however, does not cover and settles the contract with the resale buyer for a nominal amount. Should the buyer-middleman recover $.80 per pound under § 2-713(1) or only the profit he would have made if the resale had taken place, some $.15 per pound? Clearly, $.80 per pound puts the middleman in a better position than full performance by the seller would have.45

(B) The Study Group recommends that the Drafting Committee consider whether the buyer (and, in similar situations, the seller) should be so limited in the use of § 2-713(1). This should be done in conjunction with the drafting of and the comments to the revised § 2-701.

42. This position is supported, in part, by the aggrieved party's difficulty in learning when the other party has repudiated. Rarely will the words or conduct of alleged repudiation be clear and unequivocal. A final answer may not be given until the trial. If so, it is unreasonable to tie the aggrieved party's damages to an uncertain time in the past, particularly where the breaching party created the uncertainty. This argument is less persuasive when the repudiation time is clear or the aggrieved party has smoked out a repudiation under § 2-609(4).

43. See Cosden Oil v. Karl O. Helm Aktiengesellschaft, 736 F.2d 1064 (5th Cir. 1984); Agenda at 372-80; Jackson, Anticipatory Repudiation and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance, 31 Stan. L. Rev. 69 (1978); Roadmap at 267. The market price is determined at a time no later than when the buyer should have covered. In repudiation cases, this would be at the expiration of a commercially reasonable time after the buyer learned of the repudiation. See § 2-610(a). Contra: J. White & R. Summers, Uniform Commercial Code § 6-7 (3d ed. 1988).

44. To avoid speculation, the buyer should be limited to the market price at the time it could reasonably cover (or resell) after learning of the repudiation.

45. Allied Canners & Packers, Inc. v. Victor Packing Co., 162 Cal.App.3d 905, 209 Cal. Rptr. 60 (1984) (buyer limited to profit that would have been made on resale).
SECTION 2-713

The Task Force agrees with the recommendations of the Study Group that section 2-713 should be revised to distinguish between damages for a breach by non-delivery and those for a breach by repudiation. We disagree with the majority, however, and agree with the minority regarding the time and place where market price should be measured under section 2-713 in anticipatory repudiation cases. Although court decisions on this issue have differed, we note that recent decisions have not adopted the position recommended by the majority of the Study Group.461 Further, to the best of our knowledge, among the many commentators who have addressed the question, only Professors Summers and White462 side with the majority of the Study Group.

We recommend that the Drafting Committee revise section 2-713 to provide that in anticipatory repudiation cases, the market price for measuring damages should be determined at the time and place that the seller agreed to tender delivery only if the buyer can demonstrate a valid reason for not having covered. If the buyer could reasonably have covered following the repudiation, however, the market price should be measured at the time and place the buyer should reasonably have covered.463

We suggest that this recommendation satisfies the concern of the Study Group majority regarding the aggrieved party’s difficulty in learning when or whether the other party has repudiated. If the aggrieved party’s doubts in either regard were reasonable, those doubts could provide sufficient reason why the buyer did not cover and would justify measuring damages at the time and place for tender. We recommend no special rule regarding installment contracts. If the buyer could not cover with a reasonably acceptable substitute, installment contract damages should be measured at the times and places for tender as promised by the breached contract.

463 This recommendation is strongly influenced by the analysis of the court in Cargill, Inc. v. Stafford, 553 F.2d 1222, 21 U.C.C. Rep. Serv. (Callaghan) 707 (10th Cir. 1977).
Otherwise, damages should be measured based upon the price of the reasonably available cover contract.

We agree with the Study Group recommendation A2.7(11)(B) and suggest that the limitation applied by the court in the Allied Canners case is consistent with the compensation limitation in section 1-106.

[PRELIMINARY REPORT - 2-714]

O. BUYER’S DAMAGES FOR BREACH IN REGARD TO ACCEPTED GOODS: § 2-714.

Section 2-714 provides two measures of “direct” damages for the seller’s breach where the buyer has accepted the goods, the first for “any non-conformity of tender,” § 2-714(1), and the second for breach of warranty, § 2-714(2). Both are somewhat imprecise, and this imprecision is accentuated in § 2-714(2) where the difference in value test may be displaced where “special circumstances show proximate damages of a different amount.” In essence, if “special circumstances” show that the difference in value test in § 2-714(2) will not put the buyer in as good a position as full performance, the court may develop an appropriate remedy under the more general standard in § 2-714(1).

Rec.: A2.7 (12).

The Study Group recommends no revisions in the text of § 2-714. We do recommend, however, that the comments be revised to illustrate by cases some of the lines that should be drawn. For example, the comments should confirm that the buyer’s reasonable cost to repair is an appropriate way to determine the difference in value under § 2-714(2), even though that cost plus the value of the goods received may exceed the contract price.” Similarly, the com-


46. See Anderson, Buyer’s Damages for Breach in Regard to Accepted Goods, 57 Miss. L.J. 317 (1987). According to Anderson, “special circumstances” have been found in claims for breach of warranty of title and for loss of crops of livestock caused by defective goods. In addition, the exception has been used to shift the time for measuring damages from acceptance to tender and to provide more compensation to a buyer who has over-mitigated damages. Id. at 356. See Roadmap at 269-75.

47. Continental Sand & Gravel v. K & K Sand & Gravel, 755 F.2d 87 (7th Cir. 1985).
ments could identify prototypic cases where “special circumstances” show damages of a different amount.\textsuperscript{48} Finally, the comments should clarify that “special circumstances” are not a condition to the recovery of consequential damages under § 2-715(2)(a).

[TASK FORCE - 2-714]

SECTION 2-714

The Task Force agrees with the observations and recommendations of the Study Group regarding section 2-714. We further recommend that the comments be revised to give examples of cases that are governed by subsection (1) of section 2-714.\textsuperscript{465}

[PRELIMINARY REPORT - 2-715]

P. BUYER’S INCIDENTAL AND CONSEQUENTIAL DAMAGES: § 2-715.

1. Incidental damages.

Incidental damages include expenses incurred by the buyer after breach associated with a rightful rejection or “effecting cover.” They also include “any other reasonable expenses incident to the delay or other breach.” § 2-715(1). This catch-all category should cover expenses incurred to reduce or avoid consequential damages under § 2-715(2)(a).

Although the line between incidental and consequential damages may be difficult to draw, the Study Group recommends no revisions in the text of § 2-715(1).

\textsuperscript{48} In Chatlos Systems, Inc. v. National Cash Register Corp., 670 F.2d 1304 (3d Cir. 1982), the seller breached a warranty that a particular computer system would meet the buyer’s particular purposes. There was evidence that another more expensive system would meet those needs. The court upheld a judgment under § 2-714(2) that the value of the goods as warranted could be measured by the value of the different system. The court rejected the dissent’s argument that § 2-714(2) was limited to the value of “the” goods, i.e., the particular system delivered, “if they had been as warranted,” but did not rely on the “special circumstances” exception. Arguably, that exception should apply, since the buyer’s particular needs, which the seller agreed to meet, would not be met unless the value of the different system were calculated.

At least one member of the Study Group thinks that this case is “dead wrong.”

\textsuperscript{465} See Anderson, Buyer’s Damages for Breach in Regard to Accepted Goods, 57 Miss. L.J. 317, 326-29 (1987).
2. **Consequential damages.**

Consequential damages include losses resulting from the fact that the buyer is unable to use the promised goods for the period between breach and cure or replacement. These losses may be reliance expenditures incurred before the breach which cannot be salvaged or profits lost during the time in question which cannot be avoided by "cure" or cover. To recover consequential damages, the buyer must establish that the losses resulted from "general or particular requirements and needs of which the seller at the time of contracting had reason to know," § 2-715(2)(a), and prove them with reasonable certainty, see revised § 2-701. The seller, however, may be able to establish that the buyer could have reasonably "prevented" the losses by "cover or otherwise."

Rec. A2.7 (13).

No revisions are recommended in the text of § 2-715(2)(a). We endorse the current text's effort to relax the foreseeability requirement in exchange for an enhanced duty to "mitigate" damages and approve of the judicial interpretations of the section.

The Study Group supports the retention of § 2-715(2)(b), which permits the recovery for "injury to person or property proximately resulting from any breach of warranty." The nature of the loss should not determine when a buyer can sue for breach of warranty. But a buyer who asserts such a claim should be subject to the same defenses and limitations as a buyer who suffers only economic loss from breach of warranty. Rec. A2.3(8).

[TASK FORCE - 2-715]

**SECTION 2-715**

The Task Force agrees with the observations and recommendations of the Study Group and makes the following two additional recommendations.

1. We recommend that the Drafting Committee consider whether a recovery of incidental damages, like consequential damages, is subject to the general requirements of foreseeability and mitigation. Arguably, these requirements are implicit in the overarching reasonableness requirement in both section 2-715(1) and section 2-710.466 It may also be implicit in the duty of good faith.

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2. We recommend that section 2-715(2)(a) be revised to make clear that the seller has the burden of proof on the issue of mitigation, i.e., whether the loss could be reasonably prevented by cover or otherwise. As noted above in our discussion of section 2-701, by defining consequential damages in terms of the mitigation requirement, section 2-715(2)(a) arguably requires the buyer to prove that the loss could not be reasonably avoided as part of her special burden of proving consequential loss. The recommended revision might read: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know, but recovery for such loss shall be reduced to the extent the seller can show that it could have been reasonably prevented by cover or otherwise . . . ."

[PRELIMINARY REPORT - 2-716]

Q. BUYER'S RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN: § 2-716.

Despite the invitation in § 2-716(1) to expand the scope of specific performance and similar arguments in the literature, there is no evidence in the reported opinions that courts have accepted the opportunity.

Rec. A2.7(14).

Because flexibility is built into § 2-716(1), the Study Group recommends no revision that would clarify or expand the power of a court to grant specific performance.

(A) We recommend, however, that § 2-716(1) be revised, in coordination with § 2-718(1), to expand the power of the parties to agree in advance for specific performance. A question to be decided by the Drafting Committee is whether every agreement for specific performance is enforceable or whether the parties, at the time of


50. A possible exception is the use of specific performance to enforce long-term contracts for the supply of energy. See, e.g., Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975).
contracting, must make a reasonable forecast that the goods are "unique" or that "other proper circumstances" will arise.

The history of the "replevin" right in § 2-716(3) is unclear and, despite the modernization in most states of the replevin statutes, we have no evidence that replevin has been regularly used as an alternative to specific performance. Similarly, there is no evidence that replevin is needed to adequately protect the buyer.  

(B) Accordingly, a majority recommend that § 2-716(3) be deleted. The factors justifying replevin would, in most cases, satisfy the "special circumstances" requirement of § 2-716(1). As such, § 2-716(1), which is not limited to identified goods, appears to be a more complete goods oriented remedy. At the same time, the court can further protect the buyer by issuing a temporary injunction against breach.

[TASK FORCE - 2-716]

SECTION 2-716

The Task Force agrees with the observations and recommendations of the Study Group regarding section 2-716. As discussed below regarding section 2-718, we disagree with the Study Group's recommendation to expand the ability of the parties to agree to damages. We agree, however, with the recommendation to expand the party's ability to agree in advance to specific performance. These positions are not inconsistent because specific performance is always a compensatory remedy. Thus, an agreement for specific performance does not conflict with the compensation mandate of section 1-106. An agreement by the parties to provide for other than compensatory damages, however, directly conflicts with section 1-106.

51. See U.S.A. § 66, which provided: "Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld."

52. See Roadmap at 233-39, where Peter's questions the utility of replevin, particularly where the buyer is in competition with creditors of the seller. See also Report of the Law Revision Commission 576-79 (replevin right inconsistent with Code's theory about property).

53. An advantage of replevin, which asserts that the seller is wrongfully withholding goods in which the buyer has a property interest, is that the buyer may obtain possession after a hearing in a shorter period than under § 2-716(1). The disadvantages are that the seller can appeal, the buyer must post a bond and the power of the court to give complete relief is limited.