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U.C.C. § 2-713: ANTICIPATORY REPUDIATION AND THE MEASUREMENT OF AN AGGRIEVED BUYER'S DAMAGES

Early in the common law, when a seller repudiated a contract, the buyer essentially had no remedy or cause of action prior to the contracted date of performance. Later decisions, however, permitted the purchaser to seek a judicial cure by invoking the doctrine of anticipatory repudiation.¹ Entitling an aggrieved party to treat any repudiation as a total breach² and to sue as though the date for performance had arrived,³ the doctrine sanctions recovery of damages for breach of contract if the breaching party has manifested a clear and unequivocal intention not to perform his agreed obligation.⁴

The Uniform Commercial Code incorporates the doctrine of anticipatory repudiation.⁵ The Code provides the aggrieved party with alter-

1. The doctrine was not fully established until 1853, when *Hochster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853), was decided. The court reasoned:

But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it.

Id. at 926.

2. *See, e.g., Ringel & Meyer, Inc. v. Falstaff Brewing Corp.*, 511 F.2d 659 (5th Cir. 1975) (anticipatory repudiation of requirements contract); *Union Minerals & Alloys Corp. v. Port Realty & Warehousing Corp.*, 129 N.J. Super. 41, 322 A.2d 192 (1974) (repudiation of lease); *Finnell v. Bromberg*, 79 Nev. 211, 381 P.2d 221 (1963) (repudiation of stock purchase option).

3. *See, e.g., Higgins v. Kittleson*, 1 Ariz. App. 244, 401 P.2d 412 (1965) (repudiation of contract to exchange ranch for motel); *Lufkin Nursing Home, Inc. v. Colonial Inv. Corp.*, 491 S.W.2d 459 (Tex. Ct. App. 1973) (repudiation of installment note). Some jurisdictions, however, have rejected this doctrine, holding that a repudiation gives the aggrieved party no immediate right to sue for breach of contract. *See, e.g., Tirrell v. Anderson*, 244 Mass. 200, —, 138 N.E. 569, 571 (1923) (renunciation or repudiation of delivery contract "is not such a breach of obligation as gives an immediate right of action").

4. 4 A. CORBIN, CONTRACTS § 973 (1951 & Supp. 1971).

5. Section 2-610 provides an aggrieved party with three options in the event of repudiation. Section 2-611 establishes the repudiating party's right to retract his repudiation. Sections 2-502, 2-711, 2-712, 2-713, 2-716, and 2-723 enunciate the various remedies from which an aggrieved buyer may choose after an anticipatory repudiation.

native courses of action in the event of a repudiation, allowing him either to await performance for a reasonable time or to sue immediately.⁶ Although an aggrieved buyer may recover damages in either situation, their precise measurement under the Code is unclear.

Section 2-713 defines the damage measurement formula following a seller's non-delivery or repudiation as "the difference between the market price when the buyer learned of the breach and the contract price."⁷ Before he is able to measure his damages, therefore, the aggrieved buyer must ascertain the exact time after the seller's repudiation and subsequent failure to perform at which he "learned" of the breach. The Code offers no direct guidance: it defines neither "breach" nor "repudiation,"⁸ and the Official Comments neglect the question entirely.

Courts and buyers alike, then, must determine the point in time at which the anticipatory repudiation becomes a breach in order to calculate properly the aggrieved buyer's damages.⁹ Three construc-

6. Section 2-610 provides:

Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

7. Section 2-713 provides:

Buyer's Damages for Non-Delivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

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

8. For a discussion of the ambiguous treatment of the term "breach" in the Uniform Commercial Code see note 81 *infra* & accompanying text.

9. Many commentators simply have stated that § 2-713 requires measurement of damages at the time the buyer learned of the breach. Whether these writers

tions of section 2-713 are possible. Under a "repudiation date" interpretation, the buyer may measure damages as of the time he learned of the seller's intention to repudiate the contract.¹⁰ An alternative method focuses on the performance date, measuring damages according to the time performance would have been due under the contract.¹¹ Finally, the buyer could use a "reasonable time" measure and fix damages as of a reasonable time following the seller's repudiation.¹²

This Note examines the various constructions of section 2-713 and suggests that the third interpretation, requiring the measurement of damages at a reasonable time after the repudiation, provides the most flexible and equitable method for ascertaining a buyer's damages after a seller's anticipatory repudiation. Although none of the constructions can be reconciled perfectly within the structure of the Code, the reasonable time measure encourages aggrieved buyers to mitigate their losses, an apparent judicial objective,¹³ and fosters the flow of commerce by promoting a speedy resolution of contractual disputes.

are aware of the difficulty involved in interpreting this section is unclear. See, e.g., Coyne, *Some Comments on Contracts and the California Commercial Code*, 1 U.S.F.L. REV. 1, 9-11 (1966); Gilbride, *The Uniform Commercial Code: Impact on the Law of Contracts*, 30 BROOKLYN L. REV. 177, 201 (1964); Hey, *Remedies for Breach of Sales Contract Under the Code*, 7 WASHBURN L.J. 35, 41 (1967); Minish, *The Uniform Commercial Code in Minnesota: Articles 2 and 6—Sales and Bulk Transfers*, 50 MINN. L. REV. 103, 124-25 (1965).

10. Several commentators have assumed without comment that damages under § 2-713 are measured as of the time of repudiation. See, e.g., Squillante, *Anticipatory Repudiation and Retraction*, 7 VAL. L. REV. 373, 387 (1973). Others have expressly approved such a measure. See Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 11 U.C.L.A.L. REV. 78, 124-25 (1963); Comment, *Buyer's Remedies in Sales Cases Under the Uniform Commercial Code*, 2 LAND & WATER L. REV. 420, 435 (1967). In Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DEPAUL L. REV. 1, 18-19, 24 (1964), the author assumes that § 2-713 requires measurement of damages as of the date of the repudiation but criticizes the use of this method.

11. Commentators supporting this interpretation include J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 198 (1972); Phalan, *Uniform Commercial Code — Sales — Summary of Buyers' Remedies*, 16 U. PITT. L. REV. 209, 211 (1955).

12. This interpretation is supported by Taylor, *The Impact of Article 2 of the U.C.C. on the Doctrine of Anticipatory Repudiation*, 9 B.C. IND. & COMM. L. REV. 917, 929-30 (1968), and Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 204-05 (1963). In Davenport, *The Nebraska Uniform Commercial Code: An Introduction and Articles 1 and 2*, 43 NEB. L. REV. 671, 720 n.260 (1964), the author assumes that this is the proper interpretation of § 2-713 but refrains from commenting on the desirability of using this measure of damages.

13. See notes 123, 138 *infra* & accompanying text.

THE COMMON LAW DOCTRINE OF ANTICIPATORY REPUDIATION

Rights and Duties of the Aggrieved Party

Damage awards for breach of contract at common law were designed to place an aggrieved party in the position he would have held if the breaching party had performed fully.¹⁴ Accordingly, compensatory damages resulting from a seller's anticipatory repudiation were calculated as the difference between the contract and the market prices on the date of performance.¹⁵ To ensure that the aggrieved buyer received no more than the benefit of his bargain, however, courts disallowed the accumulation of damages¹⁶ that could have been avoided by reasonable effort, without risk of substantial loss.¹⁷ Consequently, a principle of mitigation, the doctrine of avoidable consequences, emerged under the common law.¹⁸

The majority of courts found no inconsistency in measuring damages as of the performance date while simultaneously requiring mitigation of losses.¹⁹ Rejecting the argument that mitigation imposed a duty on the aggrieved party to "cover" after repudiation by purchasing substitute goods,²⁰ the courts required only that the injured party take no affirmative action to increase his losses.²¹ The early case of *Rockingham County v. Luten Bridge Co.*²² illustrated the application of the doctrine of avoidable consequences. The plaintiff contractor in *Luten Bridge* had just begun construction of a bridge when the defendants repudiated the agreement.²³ Nevertheless, the plaintiff con-

14. 5 A. CORBIN, *supra* note 4, § 992.

15. *G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749 (9th Cir. 1963); *McJunkin Corp. v. North Carolina Natural Gas Corp.*, 300 F.2d 794 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962); *In re Marshall's Garage, Inc.*, 63 F.2d 759 (2d Cir. 1933).

16. 5 A. CORBIN, *supra* note 4, § 1039.

17. *Id.*

18. Corbin states: "[L]ikewise, gains that [the aggrieved party] could have made by reasonable effort and without risk of substantial loss or injury by reason of opportunities that he would not have had but for the other party's breach are deducted from the amount that he could otherwise recover." *Id.*

19. *Id.*

20. Cover was required, however, to mitigate consequential damages. *See* notes 45-46 *infra* & accompanying text.

21. *See* 4 A. CORBIN, *supra* note 4, § 983. *See also* notes 23-25 *infra* & accompanying text.

22. 35 F.2d 301 (4th Cir. 1929).

23. The Board of Commissioners of Rockingham County, which voted to award the plaintiff company a contract for construction of the bridge, subsequently resolved to notify the company "that any work done on the bridge would be done by it at its own risk and hazard." At the time of the repudiation, the company had expended approximately \$1,900 on labor and materials. *Id.* at 303.

tinued construction and, upon completion, sued for the contract price.²⁴ Reversing the decision of the trial court, the Court of Appeals for the Fourth Circuit held that the plaintiff builder was entitled to recover only an amount comprised of his expenses prior to the repudiation and his expected contractual profits.²⁵ Upon the defendants' breach all construction should have ceased and the contract should have been treated as terminated.

Although the aggrieved party could not undertake activity increasing the breaching party's damage liability, he was under no converse duty to cover after a repudiation.²⁶ For example, in *Reliance Coopersage v. Treat*,²⁷ a seller of barrel staves repudiated a contract shortly after it had been signed.²⁸ Notwithstanding the seller's refusal to perform, the buyer awaited delivery and brought an action after the performance date, by which time the price of staves had risen substantially.²⁹ The Eighth Circuit rejected the contention that the buyer was obligated to cover.³⁰ It held that damages were to be calculated

24. The plaintiff alleged that the county was indebted in the amount of \$18,301.07. *Id.*

25. The court stated:

His remedy is to treat the contract as broken when he receives the notice, and sue for the recovery of such damages as he may have sustained from the breach, including any profit which he would have realized upon performance, as well as any other losses which may have resulted to him. In the case at bar, the county decided not to build the road of which the bridge was to be a part, and did not build it. The bridge, built in the midst of the forest, is of no value to the county because of this change of circumstances. When, therefore, the county gave notice to the plaintiff that it would not proceed with the project, plaintiff should have desisted from further work. It had no right thus to pile up damages by proceeding with the erection of a useless bridge.

Id. at 307.

26. See note 20 *supra* & accompanying text.

27. 195 F.2d 977 (8th Cir. 1952).

28. *Id.* at 978.

29. The defendant-seller had contracted to deliver 300,000 barrel staves at \$450 per thousand. The market price of staves, which began to rise in August, was found to be as high as \$750 per thousand by December, the agreed time of delivery. *Id.* at 979-80.

30. The jury in the court below had been instructed:

That if the plaintiff by a reasonable effort and without undue risk or expense, after the repudiation, if any, by the defendant of the contract prior to December 31, 1950, could have purchased the staves on the open market at a price in excess of the contract price, then it was the plaintiff's duty to do that and mitigate its damages so far as possible, and the plaintiff would then be entitled to damages only for the difference between the market price of the staves at that time and the contract price.

Id. at 981.

according to the price of staves on the performance date,³¹ regardless of an interim opportunity to obtain less expensive substitute goods.³²

Common law courts rigidly followed the measure of damages espoused in *Reliance Cooperae*. Even when an aggrieved party covered after repudiation, his compensable losses could never exceed the amount that would have been recoverable under a performance date damage measurement.³³ In *Missouri Furnace Co. v. Cochran*,³⁴ which involved a repudiation by the defendant seller of coke, the plaintiff, in a rising market, purchased substitute coke at a price greatly exceeding that provided by the agreement and sued for the difference between the contract and cover prices. By the time of the contracted dates of performance, however, the price of coke had returned to its original

31. *Id.* at 982.

32. The court concluded:

The doctrine of anticipatory breach by repudiation is intended to aid a party injured as a result of the other party's refusal to perform his contractual obligations, by giving to the injured party an election to accept or to reject the refusal of performance without impairing his rights or increasing his burdens. Any effort to convert the doctrine into one for the benefit of the party who, without legal excuse, has renounced his agreement should be resisted.

Id. at 983.

33. If a buyer covered prior to the performance date, however, and the price of the substitute goods was less than the market price on the delivery date, he could recover as damages only the difference between the contract and cover prices. See *Hebron Mfg. Co. v. Powell Knitting Co.*, 171 F. 817 (3d Cir. 1909). Such a result clearly was appropriate because it awarded no damages for losses that the buyer had avoided by reason of his cover. In a few other circumstances courts also awarded damages based on the buyer's cover price. Thus, the amount paid for substitute goods purchased after the delivery date was admissible as evidence of the market price existing on the date of performance, *Sawyer v. Eaton*, 293 F. 898, 899 (1st Cir. 1923), and could have been used in the calculation of damages if the cover had been reasonable. See *Joseph Denunzio Fruit Co. v. Crane*, 79 F. Supp. 117 (S.D. Cal. 1948), *aff'd on other grounds*, 188 F.2d 569 (9th Cir.), *cert. denied*, 342 U.S. 820 (1951), 344 U.S. 829 (1952).

In addition, ascertaining damages as the difference between the contract and cover prices also was allowed when authorized by either the contract itself or a usage of trade. See, e.g., *Keystone Steel & Wire Co. v. Price Iron & Steel Co.*, 345 Ill. App. 305, 103 N.E.2d 143 (1952) (damages fixed by agreement between the parties); *United Sales Co. v. Curtis Peanut Co.*, 302 S.W.2d 763 (Tex. Ct. App. 1957) (damages fixed according to usage of trade). Finally, this measure of damages was applied in a case involving a seller's repudiation of his contract to provide flour for the United States Government. In *United States v. U.S. Foreign Corp.*, 151 F. Supp. 658 (S.D.N.Y. 1957), the Government had purchased substitute flour for export. Because the Government needed to discharge its obligations immediately, the court measured damages as the difference between the contract price and the cost of replacement goods. *Id.* at 660.

34. 8 F. 463 (W.D. Pa. 1881).

level,³⁵ and the court refused to award damages based on the cover price. Faithful to the strict common law philosophy that damages should place the aggrieved party in a position no more advantageous than he would have occupied had the contract been performed in full, the court held that damages must be fixed as of the agreed time of performance.³⁶

The buyer's noncompensable losses in *Missouri Furnace* stemmed from the decline in market price after cover had been completed but before performance was due. The risk of such market fluctuations and the disposition of the case itself have been cited as justifying the common law position that a buyer need not cover after repudiation.³⁷ Such an argument, however, failed to recognize that the buyer's nonrecoverable losses were occasioned not by the market fluctuation per se but by the damage measurement used. Had the court permitted the buyer to measure his damages according to the price paid for the substitute goods, he would have incurred no risk.

The absence of a common law cover requirement may have resulted from other considerations. For instance, during a period of market fluctuation such as that in *Missouri Furnace*, substitute purchases by the buyer might increase the breaching party's damage liability.³⁸ Because such action by the aggrieved party could as easily maximize as minimize the resulting damages,³⁹ common law courts may have been reluctant to impose a duty to cover.⁴⁰ In addition, a cover requirement would force the innocent purchaser to ascertain whether a repudiation

35. *Id.* at 463-64.

36. The court reasoned that:

The rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart

The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture.

Id. at 467.

37. See *Callan v. Andrews*, 48 F.2d 118, 120 (2d Cir. 1931); *Second Nat'l Bank v. Columbia Trust Co.*, 288 F. 17, 26-27 (3d Cir. 1923); *York-Draper Mercantile Co. v. Lusk*, 6 Kan. App. 629, —, 49 P. 788, 790 (1897).

38. In *Continental Grain Co. v. Simpson Feed Co.*, 102 F. Supp. 354, 363 (E.D. Ark. 1951), *aff'd as modified*, 199 F.2d 284 (8th Cir. 1952), for example, the court stated that if the aggrieved party were forced to cover "the immediate action of the innocent party might not have the effect of mitigating his damages, but might, on the other hand, enhance them."

39. 5 A. CORBIN, *supra* note 4, § 1039.

40. Professors Corbin and Williston believed that the uncertainty of market prices constituted a valid justification for refusing to require cover after a repudiation. 5 A. CORBIN, *supra* note 4, § 1053; 11 S. WILLISTON, *CONTRACTS* § 1397 (1968).

actually had occurred.⁴¹ Substantial losses could result from an inaccurate determination of this question,⁴² and the common law does not compel an injured buyer to take actions involving a risk of loss.⁴³ Finally, because a repudiating seller could purchase substitute goods and thereby limit his own damage liability resulting from future price increases, the courts may have been unwilling to extend the doctrine of mitigation of losses to include a requirement that an innocent buyer cover after a repudiation.⁴⁴

Of the reasons for the absence of a common law cover obligation, only the possibility of increasing the breaching party's damage liability explains the courts' refusal to compensate the buyer for his entire losses in the event that the actual cost of his substitute goods exceeds their market price on the date of delivery. The latter two justifications, that the seller himself could cover and that the buyer need take no risks, suggest only why cover was not required and fail to explain why it was unavailable as a buyer option.

Consequential Damages: Rights and Duties of the Aggrieved Party

The concept of cover was not unknown at common law. To the contrary, when an aggrieved buyer originally contracted for goods with the intention of resale, he could not recover consequential damages for lost profits unless he first sought substitute goods with

41. 4 A. CORBIN, *supra* note 4, § 973.

42. For example, a buyer who covered erroneously believing that a repudiation had occurred might obligate himself under two contracts rather than one. Alternatively, a buyer who failed to comply with a cover requirement while assuming incorrectly that a repudiation had not occurred would be injured to the extent that the market price subsequently rose.

43. See text accompanying note 37 *supra*. The Uniform Commercial Code largely eliminates the risk of incorrectly determining when a repudiation has occurred. See U.C.C. § 2-609, which permits either party to a contract, having reasonable grounds to believe that the other party will not perform, to demand "adequate assurance" of future performance. A failure to provide such assurance within a reasonable period of time, not to exceed 30 days, lapses into a repudiation of the contract. Moreover, at least one court appears to have construed the Code to require unambiguous action to establish a repudiation. See *Farmers Elevator Co. v. Lyle*, — S.D. —, 238 N.Y.2d 290 (1976) (repudiation did not occur until seller reiterated his intention not to perform because buyer, in good faith, refused to believe the seller's first pronouncement).

44. Corbin contends that the seller's ability to obtain substitute goods eliminates the need for the aggrieved party to cover. 5 A. CORBIN, *supra* note 4, § 1053. In a further justification for the common law rule, Williston suggests that an innocent buyer should not be forced to enter into substitute contracts that bind his resources and credit. 11 S. WILLISTON, *supra* note 40, § 1397.

which to make his own deliveries.⁴⁵ Moreover, consequential damages would be awarded only in those situations in which the injured purchaser could not obtain cover.⁴⁶

Thus, if damages for lost profits were desired by the buyer confronted with a common law anticipatory repudiation, he was required to seek substitute goods. If only compensatory damages were involved, however, such attempts to cover created dangers of monetary loss. The distinction between these results derives from the common law standard for measuring damages. In resale situations, the buyer could avoid the risk of market fluctuations by covering after the delivery date, when the market price already would have become a matter of record. Conversely, when substitute goods were purchased prior to the date of performance, similar protections were unavailable.⁴⁷

Under the Uniform Commercial Code, however, the risks associated with cover prior to the performance date have been eliminated by section 2-712,⁴⁸ and the Code expressly permits an aggrieved buyer to purchase substitute goods after repudiation.⁴⁹ The Code's cover pro-

45. See, e.g., *Henderson v. Otto Goedecke, Inc.*, 430 S.W.2d 120, 123 (Tex. Ct. App. 1968).

46. 5 A. CORBIN, *supra* note 4, § 1039.

47. See notes 33-37 *supra* & accompanying text.

48. U.C.C. § 2-712. For text of the provision see note 80 *infra*.

49. U.C.C. § 2-711(1) (a). Section 2-711 provides:

Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

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

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

(b) recover damages for non-delivery as provided in this Article (Section 2-713)

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

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

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

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably

vision should have a significant bearing on the interpretation of section 2-713, regarding the time of breach: given the acceptance of cover as a remedy and the concomitant removal of the common law risks accompanying the purchase of substitute goods, a strict adherence to the performance date measure of damages for a seller's anticipatory repudiation may be unjustifiable.

Date of Breach by Anticipatory Repudiation

In the event of a common law anticipatory repudiation, the aggrieved party could avail himself of several remedial options.⁵⁰ He could elect either to sue immediately⁵¹ or to bring an action at any time after the repudiation,⁵² provided only that the contract had not been reinstated.⁵³ Such a restoration of the contract could occur when the breaching party made a valid retraction before the injured buyer had changed his position materially or otherwise acquiesced in the repudiation.⁵⁴

As a result, if no retraction occurred, the repudiation might be regarded as a breach at any of three different times.⁵⁵ First, because the

incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

50. See notes 51-56 *infra* & accompanying text.

51. 4 A. CORBIN, *supra* note 4, § 959.

52. *Id.* See also *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 493 (10th Cir. 1930); *Continental Cas. Co. v. Boerger*, 389 S.W.2d 566, 569 (Tex. Ct. App. 1965).

53. By retracting the repudiation, the breaching seller could reinstate the contract, thus restoring the rights and obligations of both parties. 4 A. CORBIN, *supra* note 4, § 980.

54. *Id.* Under English law, an anticipatory repudiation had to be formally "accepted" by the aggrieved party before it constituted a breach of contract. Without an acceptance, all of the contractual rights and duties were maintained. 4 A. CORBIN, *supra* note 4, § 981. In the United States, however, a formal acceptance generally was unnecessary. If the injured party materially changed his position, either through the instigation of legal action or by some other means, then the repudiation ripened into a breach. See, e.g., *Guerrieri v. Severini*, 51 Cal. 2d 12, —, 330 P.2d 635, 641 (1958). See generally Comment, *Anticipatory Breach of Contract: A Comparison of the Texas Law in the Uniform Commercial Code*, 30 TEX. L. REV. 744, 749 (1952). American courts also apply the term "acceptance" to refer to the aggrieved party's right of election either to sue immediately or to await the time of performance. This dual meaning continues to cause judicial confusion. See, e.g., *Continental Cas. Co. v. Boerger*, 389 S.W.2d 566, 569 (Tex. Ct. App. 1965).

55. The principle of election is discussed in *Continental Grain Co. v. Simpson Feed Co.*, 102 F. Supp. 354 (E.D. Ark. 1951), *aff'd as modified*, 199 F.2d 284 (8th Cir. 1952). In a suit for seller's breach of contract, the court quoted at length

repudiation gave rise to an immediate right to sue, the date of the breach could be the actual date on which the buyer learned of the seller's refusal to perform. Second, because the aggrieved party might decline to consider the repudiation as final, his subsequent acquiescence in the seller's action would determine the time of the breach. Third, if the buyer chose to await performance, the repudiation would not ripen into a breach until the contractual delivery date.⁵⁶

from *Belisle v. Berkshire Ice Co.*, 98 Conn. 689, 120 A. 599 (1923), which involved a buyer's repudiation of a contract to sell ice:

"On September 3, 1919, (the) defendant absolutely, distinctly, and unequivocally refused to perform its promise, and gave unmistakable evidence of its renunciation. But this did not make a breach of this contract. It remained a subsisting contract unless and until the other party, the plaintiff, gave equally unmistakable evidence of his acquiescence or acceptance of the defendant's repudiation. * * *

"The record before us does not show that the plaintiff had accepted or acquiesced in this defendant's repudiation of this contract. Therefore it was never broken. By its terms it remained in uninterrupted existence until November 1, 1919. At any time until that day this defendant, notwithstanding its letters to the plaintiff, had the right to take the entire quantity of ice specified in its contract. By its refusal to exercise that right within the time limited, it broke its contract on the last day fixed. The trial court correctly held that the breach was made on November 1, 1919. * * *

"When (plaintiff) received notice of this defendant's repudiation of [its] contract, the plaintiff had the right to choose whether he would adopt the repudiation or would treat the contract as still subsisting and assume that this defendant would perform its part before the time for such performance should expire. He chose to follow the latter course. Hence a breach of the contract by this defendant alone did not occur until the time for performance by it had come and passed, and not until then would a cause of action on the contract arise."

102 F. Supp. at 362-63, *quoting from* 98 Conn. at —, 120 A. at 602. *See also* *Daum v. Superior Ct.*, 228 Cal. App. 2d 283, —, 39 Cal. Rptr. 443, 446-47 (Dist. Ct. App. 1964).

56. Corbin suggests that, for a repudiation to become a breach, it need not be accepted. Clearly, however, he was referring to the English rule, *see* note 54 *supra*, which required the injured party to accept a repudiation formally. 4 A. CORBIN, *supra* note 4, § 981. The American rule requires the aggrieved party to take some action, amounting to less than a formal acceptance, that unequivocally manifests his intention to close the contract. A review of the cases cited by Corbin reveals that the English formula was rejected explicitly only once, *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 492 (10th Cir. 1930), but all of the courts upheld the principle of election. *See, e.g., Lagerloef Trading Co. v. American Paper Prods. Co.*, 291 F. 947, 954 (7th Cir.), *cert. denied*, 263 U.S. 706 (1923) ("Seller's act of bringing suit . . . converted the anticipatory rejection into an anticipatory breach."); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) ("[W]here one party repudiates a contract . . .

With respect to the common law measurement of damages, which always have been quantified according to the contract's performance date, the determination of when an anticipatory repudiation actually becomes a breach is largely academic. Under the Uniform Commercial Code, however, the issue is crucial for a proper analysis of section 2-713. Damages under that provision are measured on the date the buyer "learned of the breach." Therefore, an injured buyer must ascertain precisely when a repudiation becomes a breach within the meaning of the statute: on the repudiation date, on the performance date, or at some intermediate time.

POSSIBLE INTERPRETATIONS OF SECTION 2-713

Damages Measured as of the Performance Date

In accordance with the common law⁵⁷ and the legislative history of the Code, section 2-713 may be construed as directing that damages be measured on the date that performance was due under the contract. Although two additional Code provisions support this interpretation, an equal number do not;⁵⁸ further, the inconsistencies within the Code resulting from a performance date rationale commend abandonment of the common law damage measure.

The legislative history of section 2-713 suggests that its drafters intended to continue the common law practice of measuring damages as of the performance date. The current codification derives from section 67(3) of the Uniform Sales Act (USA), which states:

Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. . . .⁵⁹

the injured party has an election to pursue one of three remedies: First, he may treat the contract as rescinded, and recover upon quantum meruit . . . ; second, or he may keep the contract alive for the benefit of both parties . . . ; third, or he may . . . sue to recover . . . for the profits he would have realized . . . "); *Louisville Packing Co. v. Crain*, 141 Ky. 379, —, 132 S.W. 575, 579 (1910) ("[I]f one of the contracting parties elects not to accept the breach or renunciation, but continues to insist upon the performance of the contract according to its terms, then the contract remains open . . .").

57. See notes 14-15 *supra* & accompanying text.

58. Although §§ 2-723 and 2-711 provide inferential support for a performance date measure, §§ 2-610 and 2-712 conflict with such an interpretation. See notes 75-85 *infra* & accompanying text.

59. UNIFORM SALES ACT § 67(3) (1906).

The USA thus codified the common law damage measure, and section 2-713's initial version, in which the drafters intended "to clarify the former rule,"⁶⁰ provided: "(1) The measure of damages for non-delivery is the difference between the price current at the time the buyer learned of the breach and the contract price."⁶¹

The USA's "special circumstances" provision may be equated with the language in section 2-713 regarding when "the buyer learned of the breach."⁶² For example, in New York, under section 67(3) of the USA, if a buyer did not learn of his seller's refusal to deliver until after the date of performance, the courts measured damages according to the market price of the goods at the time the purchaser actually learned of the breach.⁶³ Such a situation involved special circumstances authorizing a potentially higher damage recovery than otherwise would result from a performance date measure, and the language in section 2-713 appears to codify the New York courts' interpretation of the USA.⁶⁴

Moreover, by stating section 2-713's original damage measure in terms of nondelivery, the Code's drafters apparently assumed that the buyer could not learn of the breach within the meaning of the section until the performance date or a time thereafter. In support of this conclusion, the Official Comment to the initial version of section 2-713 merely reiterates that damages are measured at "the time at which the buyer learns of the breach."⁶⁵ The Comment provides no indication that its drafters intended to modify the common law rule by

60. U.C.C. § 2-713, Comment (1952 version).

61. U.C.C. § 2-713 (1952 version).

62. See Patterson, 1 N.Y. LAW REVISION COMM'N REP. 698-99 (1955). In discussing the 1952 version of § 2-713 Patterson stated:

The present New York statute . . . fixes the market value as of the time when the goods "ought to have been delivered". . . . The proposed statute would make "the time when the buyer learned of the breach" determine the market price. This is *apparently* a change in New York law; but actually it probably is not a change in the law as applied by New York courts. In at least two New York cases it was held that the market value was to be measured as of the time when the buyer knew of the default.

Id. at 698 (citation & footnote omitted).

63. See Perkins v. Minford, 235 N.Y. 301, 139 N.E. 276 (1923); Boyd v. L.H. Quinn Co., 18 Misc. 169, 41 N.Y. Supp. 391 (App. Term 1896).

64. See Patterson, *supra* note 62, at 698-99.

65. U.C.C. § 2-713, Comment 1 (1952 version). Comment 1 provides:

Purposes of Changes: To clarify the former rule so that:

1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place

requiring the calculation of damages existing at a time prior to the date of delivery.

In 1962 section 2-713 was modified to provide specifically for damages created by a seller's repudiation or nondelivery, thus incorporating the New York Law Revision Commission's earlier suggested modifications. Failing either to revise the section's language requiring that damages be measured at the "time when the buyer learned of the breach" or to offer a new interpretation of that provision in the Official Comment, however, the amendment introduced an element of ambiguity into the text of section 2-713. Depending on whether a situation involved a repudiation or a nondelivery, a breach apparently could occur under different circumstances at a variety of times; accordingly, damages possibly could be measured at a date earlier than the time of delivery.⁶⁶ Such a deviation from the longstanding damage measures under the common law and the USA certainly would have required further explanation in the Comment,⁶⁷ and the Commission's silence on this question indicates both its failure to recognize the ambiguity and its intention to retain the preexisting rules.

The primary reasons for modifying section 2-713 provide additional support for this view. In its report, the Commission "suggested that section 2-713 be revised . . . to refer to repudiation as well as non-delivery [and] to recognize that the rule as to the measure of damages based on market price is governed by Section 2-723 in certain cases."⁶⁸ The Commission recognized that section 2-723 governs the calculation of damages for anticipatory repudiation in suits reaching trial before a contract's date of performance⁶⁹ but that section 2-713 provides the damage measure in court actions after the time of delivery. Section 2-723 requires that damages "shall be determined according to the

of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

66. See Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 11 U.C.L.A.L. REV. 78, 124-25 (1963), in which the authors assume that damages should be measured at the time the buyer could have covered and that § 2-713 requires damages to be measured as of the date of the repudiation.

67. See J. WHITE & R. SUMMERS, *supra* note 11, at 200.

68. N.Y. LAW REVISION COMM'N REP. 399 (1956).

69. Section 2-723 provides in pertinent part:

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

price of such goods prevailing at the time when the aggrieved party learned of the repudiation.”⁷⁰ Accordingly, unless section 2-713 establishes a damage measure based on the market price on the performance date, rather than at the time of the repudiation, it could render section 2-723 superfluous insofar as that provision might apply in a situation involving a seller’s anticipatory repudiation.⁷¹

The Commission’s concern that section 2-713 refer to repudiation as well as to nondelivery resulted from its attempt to synchronize the language of that provision with the terms of section 2-711.⁷² If a seller “fails to make delivery or repudiates,” section 2-711 permits the buyer to recover damages in accordance with section 2-713.⁷³ Referring only to the buyer’s ability to obtain “damages for non-delivery,”⁷⁴ however, section 2-711 apparently presumes that, in both nonperformance and repudiation situations, damages will be calculated as of the date delivery was due under the contract.

Reconciliation of a section 2-713 performance date interpretation with other Code provisions nevertheless is difficult. Section 2-610, for example, provides an aggrieved party with two courses of action in the event of repudiation: he may await performance, or he may resort immediately to any other Code remedy for breach.⁷⁵ Although these options originated with the common law,⁷⁶ the Code, by permitting an aggrieved party to wait only for a commercially reasonable time⁷⁷ before pursuing a remedy, renounces the earlier rule allowing an injured party to await performance until the contractual delivery date.⁷⁸ Enforcement of the limitation placed by section 2-610 upon the

70. For the pertinent text of § 2-723 see note 69 *supra*.

71. The interaction between § 2-713 and § 2-723 may produce anomalous results. Cases with similar factual situations could generate substantially different damage awards, varying only with the time at which the action was brought to trial.

72. For the text of § 2-711 see note 49 *supra*.

73. U.C.C. § 2-711(1) (b).

74. *Id.*

75. For the text of § 2-610 see note 6 *supra*.

76. See notes 50-56 *supra* & accompanying text.

77. U.C.C. § 2-610(a).

78. See generally Leibson, *Anticipatory Repudiation and Buyer’s Damages—A Look into How the UCC Has Changed the Common Law*, 7 U.C.C.L.J. 272 (1975). In support of this conclusion, the original version of § 2-610 codified the common law and contained no limit on the length of time an injured party could await performance. U.C.C. § 2-610(a) (1952 version). The subsequent modification of the provision clearly indicated the drafters’ intent to modify the earlier rule.

Section 2-610 involves a repudiation “with respect to a performance not yet due the loss of which will substantially impair the value of the contract.” U.C.C. § 2-610. Section 2-610(a) permits the aggrieved party to await “performance by

common law waiting period may require the measurement of damages under section 2-713 as of a time prior to the date of performance. Otherwise, an injured buyer would not be penalized for waiting until the delivery date and for accumulating his losses in a rising market.⁷⁹

Section 2-712 also conflicts with an interpretation of section 2-713 that measures damages as of the date of delivery. Under section 2-712, a buyer may cover by purchasing substitute goods without unreasonable delay after a "breach" has occurred within section 2-711.⁸⁰ Section 2-711, however, fails to mention breach; rather, it indexes a purchaser's remedial options in the event of a nondelivery, a repudiation, or a rightful rejection or revocation of acceptance of the seller's goods.⁸¹ Therefore, a seller's repudiation within section 2-711 apparently constitutes a breach within section 2-712, empowering the buyer

the repudiating party" for a reasonable time. If a contract for the sale of goods is in the executory stage, the only substantial "performance" an injured buyer may await is delivery. Because a seller cannot be required to deliver before the performance date, § 2-610(a) could be construed as permitting a buyer to wait for a reasonable time after the performance date. The Code drafters, however, undoubtedly intended that the two uses of "performance" in § 2-610 be construed differently and that under § 2-610(a) the buyer be allowed to await only some preparatory performance indicating the seller's intention to retract his repudiation. Clearly, the drafters' designation of multiple meanings to a term appearing twice in the same Code section is an example of careless draftsmanship.

79. The Code drafters intended to prevent a party who awaited performance beyond a commercially reasonable period of time from recovering the "resulting damages" that could have been avoided. U.C.C. § 2-610, Comment 1. Whether the phrase "resulting damages" refers to compensatory, consequential, or both types of damages, however, is unclear.

80. U.C.C. § 2-712(1). Section 2-712 provides:

"Cover"; Buyer's Procurement of Substitute Goods

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

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

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

81. U.C.C. § 2-711(1). For the text of § 2-711 see note 49 *supra*. A buyer's rejection of the goods or revocation of his previous acceptance technically is not a breach by the seller. Although the Code draftsmen clearly intended that the term "breach" in § 2-712 should refer to a seller's nonconforming tender that provides the basis for a purchaser's rightful rejection or revocation, their anomalous use of language in § 2-712 in referring to § 2-711's specific provisions is another example of careless draftsmanship. See also note 78 *supra*.

to obtain cover within a reasonable time. Not only does the Code's deliberate rejection of the risk associated with common law cover practices warrant the adoption of a new damage rule,⁸² but an interpretation of section 2-713 requiring the measurement of damages only on the contract's performance date also is inconsistent with section 2-712's reasonable time requirement. In fact, a performance date measure permits the purchaser to cover at any time following the repudiation, inasmuch as section 2-712 indicates that a buyer who covers after a reasonable period still may compute his damages under section 2-713.⁸³ Thus, if the buyer covered close to the date of performance so that the market price on the delivery date was equal to his cover price, the measurement of damages as of the performance date essentially would award the cost of his alternative goods, even though he made his substitute purchase after the reasonable time limitation imposed by section 2-712.

In addition to obviating the reasonable time requirement in section 2-712, a performance date measure under section 2-713 may encourage aggrieved buyers to deal in bad faith and may provide sellers with damage liabilities that essentially are punitive rather than compensatory.⁸⁴ For example, a buyer might cover covertly at any time following the repudiation and subsequently sue for damages under section

82. See text accompanying notes 48-49 *supra*.

83. U.C.C. § 2-712(3). For the text of this provision see note 80 *supra*. See also note 84 *infra*.

84. The Code drafters apparently did not intend to require the mitigation of compensatory damages by aggrieved buyers. Comment 3 to U.C.C. § 2-712 provides:

Subsection (3) expresses the policy that *cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.*

However, this subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover.

(emphasis supplied). If damages for nondelivery are measured on the performance date, as intended by the drafters, this Comment permits their accumulation in a rising market, placing no duty on the buyer to cover before the date of delivery and thereby to mitigate his losses. The drafters only limited the recovery of consequential damages rather than "resulting damages," the term used in Comment 1 of U.C.C. § 2-610, see note 79 *supra*, by a purchaser who fails to buy substitute goods. The statement that consequential damages are limited to those that "could not have been obviated by cover" is in accord with the common law rule. At common law, however, the term "consequential damages" referred to damages for losses occurring after the date of performance resulting from a buyer's inability to meet his resale obligations. See text accompanying notes 45-46 *supra*. Provided that a buyer purchases substitute goods in time to satisfy his resale customers, regardless of whether the cover takes place within a reasonable

2-713. If the price of the goods on the performance date was higher than the price of the substitute goods, the purchaser would be over-compensated for his losses.⁸⁵ Moreover, having no need for substitute goods, a purchaser might fail to attempt any cover, notwithstanding the accessibility of an alternative supply, and wait to sue until after the delivery date merely to maximize his recovery from the seller. Assuming that market prices are rising between the time of repudiation and the date of performance, section 2-713 provides little incentive for a purchaser to cover under section 2-712 within a reasonable period after a repudiation. Clearly, an alternative to the common law method of measuring damages under section 2-713 is desirable.

Damages Measured as of the Repudiation Date

Section 2-713 may be construed as requiring that damages be measured as of the date on which the seller repudiates his contract. Although this interpretation derives support both from the express language of section 2-713 and from several additional Code provisions, it conflicts with other sections of the Code. Moreover, in its enforcement, a repudiation date construction fails to protect the interests of the aggrieved buyer adequately.

The repudiation date interpretation draws its strongest support from the express language of section 2-713.⁸⁶ As noted by two authors, the most obvious reading of that provision is that a buyer learns of a breach when he learns of the breaching party's repudiation;⁸⁷ therefore, damages should be measured accordingly. Further, a settled rule of statutory construction requires that a statute be given its plain and natural meaning if its language is clear.⁸⁸ Thus, the supposition that the Code drafters intended section 2-713 to require the measurement of damages as of the repudiation date is reasonable.

Sections 2-712(1) and 2-610(b) and several leading commentators

period following the repudiation, he suffers no losses for which consequential damages can be awarded. Thus, except in an unlikely situation in which substitute goods are unavailable after a reasonable period of time following the repudiation, the purported limitation on the recovery of consequential damages provides no incentive whatever for a buyer to obtain an early cover and thereby to mitigate his losses in a rising market.

85. One commentator suggests that a buyer should be permitted to cover and sue subsequently for damages under § 2-713. Peters, *supra* note 12, at 260-61. See note 101 *infra*.

86. For the text of § 2-713 see note 7 *supra*.

87. J. WHITE & R. SUMMERS, *supra* note 11, at 198.

88. See, e.g., 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

advance the view that a breach occurs at the time of the repudiation.⁸⁰ As noted, section 2-712 apparently has equated the terms "breach" and "repudiation."⁸⁰ Similarly, section 2-610 (b) permits an aggrieved party confronted with an anticipatory repudiation to pursue any of the Code's remedies for breach,⁸¹ implying thereby that the two terms are synonymous. Because the Code regards a repudiation as a breach of contract, an injured buyer could learn of the breach under section 2-713 when he learned of the seller's repudiation.

Although the breach may occur at the time of repudiation, neither the common law nor the legislative history of the Code supports the view that damages under section 2-713 be measured on that date.⁸² Moreover, section 2-723 implicitly counsels against the adoption of a repudiation date interpretation of section 2-713. Such a construction of the latter section would render the former provision, which requires that damages in anticipatory repudiation suits reaching trial before the performance date be measured according to the market price "at the time when the aggrieved party learned of the repudiation,"⁸³ entirely superfluous as it relates to section 2-713.⁸⁴ Finally, a repudiation date measure of damages under section 2-713 cannot be reconciled with section 2-610 (a), which permits an aggrieved party to await performance by the repudiating party for a reasonable time.⁸⁵ In effect, such a damage measure would negate substantially an injured purchaser's right to await performance: because a seller's repudiation generally occurs in a rising market, an aggrieved buyer would be forced to take immediate remedial action⁸⁶ and to make a premature election of remedies.⁸⁷ If substitute goods were inaccess-

89. See, e.g., 4 A. CORBIN, *supra* note 4, § 981; RESTATEMENT OF CONTRACTS § 318 (1932).

90. See notes 80-81 *supra* & accompanying text.

91. For the text of § 2-610 see note 6 *supra*.

92. See notes 15, 59-74 *supra* & accompanying text. For example, § 338, Comment a in the RESTATEMENT OF CONTRACTS (1932), provides in part:

a. The fact that an anticipatory repudiation is a breach of contract . . . does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of repudiation. Repudiation does not accelerate the time fixed for performance; nor does it change the damages to be awarded. . . .

93. U.C.C. § 2-723 (1). For the pertinent text of § 2-723 see note 69 *supra*.

94. See J. WHITE & R. SUMMERS, *supra* note 11, at 200-01; notes 68-71 *supra* & accompanying text.

95. U.C.C. § 2-610 (a). For the text of § 2-610 see note 6 *supra*.

96. See Anderson, *supra* note 10, at 18-19; Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 11 U.C.L.A.L. REV. 78, 125 (1963).

97. See Comment, *Anticipatory Repudiation Under the Uniform Commercial Code: Interpretation, Analysis, and Problems*, 30 SW. L.J. 601, 617 (1976).

ible, the buyer would suffer noncompensable losses. Consequently, by placing an absolute duty of mitigation upon an aggrieved buyer, a repudiation date measure produces inequitable results for injured purchasers. This inequity commends implementation of an alternative damage measurement under section 2-713.

Damages Measured as of a Reasonable Time After Repudiation

As with the other possible interpretations of section 2-713, a construction requiring the measurement of damages as of a reasonable time following the repudiation cannot be reconciled perfectly with the remainder of the Code. Moreover, such an interpretation deviates both from the common law and the Code drafters' intentions. Nevertheless, a reasonable time measure complements the two important policies adopted by the Code in sections 2-610(a) and 2-712 and offers the courts a standard for ascertaining damages that yields the most equitable results for buyers and sellers.

Section 2-610(a) strongly supports a reasonable time interpretation of section 2-713. In limiting the time that an injured buyer may await the performance of a repudiating seller,⁹⁸ section 2-610(a) implies that a purchaser should not be permitted to receive compensation for his losses resulting from an increase in market prices after a reasonable period has elapsed.⁹⁹ Clearly, a construction of section 2-713 requiring damages to be measured at a reasonable time after the repudiation aids in the enforcement of section 2-610(a). Moreover, this interpretation of section 2-713 comports with the Code's cover remedy in section 2-712. By establishing a uniform standard for calculating compensable losses, both provisions would provide an injured buyer with only those damages amassed before the expiration of a reasonable time after his seller's repudiation.¹⁰⁰ Because damages could never exceed the amount calculated at the time the purchaser should have covered, a reasonable period construction of section 2-713 would discourage buyers from either covering covertly or delaying the

98. U.C.C. § 2-610(a). For the text of § 2-610 see note 6 *supra*.

99. Warning that an aggrieved party who waited beyond a reasonable time cannot recover the "resulting damages" that he could have avoided, U.C.C. § 2-610, Comment 1, the Code drafters may have been referring to the compensatory damages accumulating after a commercially reasonable time following the repudiation. See note 79 *supra* & accompanying text.

100. Section 2-712 expressly limits the cover option to those buyers who purchase substitute goods without unreasonable delay, U.C.C. § 2-712(1). See notes 80-85 *supra* & accompanying text. For the text of § 2-712 see note 80 *supra*.

purchase of substitute goods in an attempt to maximize their losses in an inflationary market.¹⁰¹

A reasonable time interpretation of section 2-713 produces more equitable results than would be possible under the other potential constructions of the provision. As noted, a repudiation date measure could impose serious losses upon an aggrieved buyer who is unable to

101. Thus, the reasonable time interpretation of § 2-713 prevents the occurrence of those conflicts between §§ 2-712 and 2-713 that would accompany a performance date measure. See notes 83-85 *supra* & accompanying text. With respect to a circumstance involving the buyer's covert cover, Professor Peters has noted that although Comment 5 to § 2-713 purports to limit the application of § 2-713 to situations in which the buyer failed to obtain a reasonable cover, the Code itself does not prohibit the buyer from making substitute purchases and then suing for damages under § 2-713. Peters, *supra* note 12, at 260-61. Therefore, Peters suggests that the purchaser should be permitted both to cover and to sue under § 2-713: "[Permitting such action would be] a good deal easier to administer, since it would be most difficult to ferret out from a reluctant complainant information about transactions sufficiently related to the contract in breach to qualify as cover or resale." *Id.* at 261. If the author means that the purchaser who obtains alternative goods would be reluctant to disclose whether he actually had covered or simply that he may be unwilling to disclose his purchase and resale prices, a reasonable period measure under § 2-713 would resolve these problems. Thus, the buyer could be permitted to elect a § 2-712 or § 2-713 remedy because the potential recovery under either provision would be substantially equivalent. Consistent with her analysis, Peters advocates the adoption of the reasonable time interpretation of § 2-713. *Id.* at 267. In suggesting that the Code should be construed to permit a buyer who covers to sue subsequently under § 2-713, the author may be concerned that the denial of this option might withhold recovery from an injured party who makes many purchases after a repudiation but cannot prove which goods were intended to serve as cover. This problem of proof, however, need not result in a denial to the purchaser of a remedy under § 2-712; instead, a court could measure damages as the average of the market prices for the qualifying § 2-712 purchases that reasonably might contain substitute merchandise. See *R.N. Kelly Cotton Merchant, Inc. v. Cox*, 295 Ala. 94, 323 So.2d 426, 429 (1976); cf. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 259 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975) (damages for lost profits resulting from a failure to deliver goods intended for resale measured under § 2-715 as the difference between contract price and average market price at which buyer would have resold).

Peters also argues, however, that "preservation of the option [to cover under § 2-712 and then sue under § 2-713] encourages recourse to actual market substitutes, since it guarantees to the injured party that he will not lose all remedy in the event of an unusually favorable substitute contract." Peters, *supra* note 12, at 261. The author thus suggests that a buyer should be able to sue for damages, even though he has procured substitute goods at a price more favorable than had been provided in the repudiated contract. Neither the Code nor common law supports such a principle. Cf., e.g., *Acme Mills & Elevator Co. v. Johnson*, 141 Ky. 718, 133 S.W. 784 (1911) (damage recovery for breach of contract disallowed when contract price exceeded market price on date of delivery).

cover,¹⁰² and the adoption of the common law performance date measure would encourage a buyer to accumulate unnecessary losses.¹⁰³ An interpretation of section 2-713 that requires the measurement of damages as of a reasonable time after a repudiation would avoid both of these problems. Moreover, it could be enforced equitably. Thus, in a situation in which replacement goods were unavailable, a reasonable time after repudiation logically would extend to the date of performance.¹⁰⁴

Several conflicts arise, however, if section 2-713 is construed to require that damages be measured at a reasonable time following a repudiation. For example, this rationale cannot be reconciled with section 2-723, which provides that damages in anticipatory repudiation suits reaching trial before the contractual date of performance be measured as of the repudiation date.¹⁰⁵ If the drafters had intended to incorporate into the Code a reasonable time rule for calculating damages, then the special measure in section 2-723 would have been necessary only in those instances when the trial began before a reasonable period had elapsed. Of greater significance, a reasonable time interpretation of section 2-713 alters the longstanding common law damage rule in a manner unintended by the Code's drafters. The Code's legislative history suggests strongly that damages should be measured as of the date of delivery¹⁰⁶ and offers no indication that the drafters modified the common law rule applicable to anticipatory repudiations.

Nevertheless, as previously noted, a court construing section 2-713 cannot adopt an interpretation that implements the Code's entire anticipatory repudiation scheme as foreseen by the drafters. Both a repudiation and a performance date measure conflict with various restrictions in sections 2-610(a) and 2-712.¹⁰⁷ Yet, the inclusion of those provisions in the Code evidences the drafters' deliberate intention to abandon certain common law concepts, and section 2-713's ultimate construction should comport with those reform efforts. Moreover, because section 2-712 eliminates the buyer's risk of covering prior to the

102. See text accompanying notes 96-97 *supra*.

103. See notes 30-32, 84-85 *supra* & accompanying text.

104. See *Cargill, Inc. v. Stafford*, 553 F.2d 1222, 1227 (10th Cir. 1977). A practical difficulty with the reasonable period interpretation is that it may require the determination of damages in a rapidly fluctuating market. This problem could be resolved by calculating damages from the average of the daily market prices existing over a reasonable period following a repudiation. Presently, courts average market prices when measuring damages. See note 101 *supra*.

105. U.C.C. § 2-723(1). For the pertinent text of § 2-723 see note 69 *supra*.

106. See notes 57-74 *supra* & accompanying text.

107. See notes 75-85, 95-97 *supra* & accompanying text.

performance date,¹⁰⁸ strict adherence to the common law damage measures appears unnecessary, and the reasonable time interpretation would be the most appropriate construction of section 2-713.

JUDICIAL INTERPRETATIONS OF SECTION 2-713: CASE LAW
UNDER THE CODE

Only three cases have addressed directly the question of damage measurement under the Code for an anticipatory repudiation; in two, the courts measured damages as of the repudiation date. Nevertheless, both courts offered different reasons for their conclusions, and neither gave sufficient consideration to the various possible interpretations of section 2-713. In *Oloffson v. Coomer*,¹⁰⁹ a 1973 decision by the Appellate Court of Illinois, two contracts made by the parties in April required the defendant, Coomer, to deliver corn in October and December. Less than two months after the contracts were signed, Coomer repudiated; because of exceptionally heavy rainfall, he decided against planting corn. Despite these exigencies, Oloffson refused to accept the repudiation and insisted that Coomer make the promised deliveries. Covering only after both performance dates had passed, Oloffson made his substitute purchases when the market price for corn substantially exceeded both the original contract price and the price on the repudiation date.

At trial, Oloffson contended unsuccessfully that damages should be measured as of the contractual dates of delivery; in sustaining the trial judge's decision to calculate damages as of the repudiation date,¹¹⁰ however, the Illinois Appellate Court determined that Oloffson's right under section 2-610(a) to await performance was limited to a commercially reasonable time and was conditioned on his dealing with Coomer in good faith.¹¹¹ Oloffson failed to comply with either restriction.

In discussing section 2-610, the court noted that the reasonable time limitation contained in subsection (a) restricts a buyer's common law privilege to await a repudiating seller's performance until the contractual date of delivery.¹¹² Moreover, in Oloffson's situation the commercially reasonable time terminated on the day of the repudiation, because Coomer's renunciation of the contract was unequivocal

108. See notes 33-37, 48, 80 *supra* & accompanying text.

109. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

110. *Id.* at 921, 296 N.E.2d at 873.

111. *Id.*, 296 N.E.2d at 874.

112. *Id.*

and substitute goods were readily available.¹¹³ To the extent that the court based its decision on Oloffson's failure to act in good faith,¹¹⁴ however, the underlying rationale for its discussion of section 2-610 and its subsequent approval of the repudiation date damage measure are ambiguous. Oloffson's bad faith resulted from his failure to disclose to Coomer a usage of trade enabling sellers to cancel their contracts by informing the buyer of their intent not to perform and paying the difference between the contract and market prices on the date of cancellation.¹¹⁵ In effect, the court reprimanded Oloffson by refusing to extend the buyer's permissible waiting period beyond the date on which he would have been required to cover if Coomer had been informed of the trade usage.¹¹⁶

The second decision measuring damages as of the repudiation date is *Sawyer Farmers Cooperative Association v. Linke*,¹¹⁷ decided in 1975 by the Supreme Court of North Dakota. Wheat farmer Linke agreed to deliver grain to the Association sometime between July and October, the specific date to be determined by the Association. The contract included a liquidated damage clause providing that in the event of nondelivery Linke would pay the Association the difference between the contractual price and "the highest market value of the same grain and grade on [the] date this contract is closed by the buyer, and the grain ordered in or any date thereafter to which the time for delivery may have been extended by the buyer."¹¹⁸ Linke renounced the agreement on August 15, but the Association neither accepted the repudiation nor attempted to pursue a contractual remedy. Instead, it waited until October 1 before demanding delivery and

113. *Id.* at 922, 296 N.E.2d at 874. Because the Code apparently requires that all repudiations be unequivocal, the court erroneously may have considered this factor in determining that a reasonable time had elapsed. If Coomer's disavowal of the contract had been ambiguous, no repudiation would have occurred; instead, Oloffson could have demanded that Coomer make adequate assurances of future performance. See U.C.C. § 2-609; note 43 *supra*.

114. 11 Ill. App. 3d at 922-23, 296 N.E.2d at 874. Two standards of good faith appear in the Code. U.C.C. §§ 1-201(19), 2-103(1)(b). Section 1-201(19) defines the term as "honesty in fact in the conduct or transaction concerned." For a merchant, § 2-103(1)(b) defines good faith to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

115. Oloffson testified that Coomer had failed to inquire as to the trade usage, stating: "I'm no information sender. If he had asked I would have told him exactly what to do. . . . I didn't feel [it was] my responsibility. I thought it his to ask, in which case I would tell him exactly what to do." 11 Ill. App. 3d at 922, 296 N.E.2d at 875.

116. *Id.*

117. 231 N.W.2d 791 (N.D. 1975).

118. *Id.* at 793.

brought suit only after Linke had reiterated his refusal to perform.

Construing the agreement to require the measurement of damages as of the contract's closing, by whatever means, the North Dakota Supreme Court affirmed the trial court's decision to calculate damages as of August 15, the date of repudiation.¹¹⁹ The court determined that the agreement was closed when the actual repudiation occurred; it relied on the Code, recent cases, and the views of commentators to support its decision that an anticipatory repudiation need not be "accepted" to constitute a breach.¹²⁰ Linke's repudiation, therefore, automatically closed the contract, and the liquidated damages provision of the parties' agreement required that damages be measured according to the market price on that date.

Subsequent to *Oloffson* and *Sawyer Farmers*, generalizations regarding judicial interpretations of section 2-713 in situations involving anticipatory repudiations remained impossible.¹²¹ The particular circumstances of those cases enabled the two courts to avoid examining the ramifications of the alternative damage measures possible under section 2-713. In *Oloffson*, the plaintiff's bad faith was integral to the court's adoption of a repudiation date measure; in *Sawyer Farmers*, the contract itself included a damage measure. Nevertheless, in both cases the courts evinced a willingness to accept a time other than a contractual date for delivery as the time of the breach. Moreover, in *Oloffson* the court clearly was influenced by the restriction enunciated in section 2-610, which mandates corrective action by a buyer within a reasonable period after the repudiation.¹²² Because a seller usually repudiates in a rising market, these judicial considerations might have been construed to impose on an aggrieved buyer a general duty to mitigate his damages.¹²³

119. *Id.* at 794.

120. *Id.* at 794-95. See also notes 54-56, 89-91 *supra* & accompanying text.

121. *Cf.* *Hurt v. Earnhart*, — Tenn. App. —, 539 S.W.2d 133 (1976), in which the court measured damages under § 2-713 as of the repudiation date. Because both parties requested specifically that this damage measurement be applied, however, *Hurt* provides little guidance for future interpretations of § 2-713.

122. The requirement in *Oloffson* that an aggrieved buyer must cover on the repudiation date if substitute goods are readily accessible was cited with apparent approval in *Farmers Elevator Co. v. Lyle*, — S.D. —, —, 238 N.W.2d 290, 295 (1976).

123. See also *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181, 183 (W.D. Tenn. 1974) (aggrieved buyer of soybeans who had knowledge that seller would be unable to deliver "could not, in good faith, modify its contracts with [the seller] in a way which would, in view of past weather conditions and the trend in the market, almost inevitably result in compounding, rather than limiting, any injury to" the buyer). But see note 84 *supra*.

The issue of damage measurement under the Code for anticipatory repudiation thus was unsettled in 1977, when the Court of Appeals for the Tenth Circuit, in *Cargill, Inc. v. Stafford*,¹²⁴ adopted the reasonable time interpretation of section 2-713.¹²⁵ In *Cargill*, Stafford, a grain elevator operator, contracted over the telephone on July 31 with Cargill, a cash merchandiser of agricultural commodities, to deliver 26,000 bushels of wheat by September 30. Dissatisfied with a provision in Cargill's written confirmation of the contract enabling the buyer to cancel, Stafford repudiated the agreement in a letter received by Cargill on August 24. Thereafter, the buyer urged performance from Stafford until September 6, when Cargill cancelled the contract and claimed that Stafford owed it the difference between the contract price and the September 6 market price. Nevertheless, at trial, Cargill argued that it should receive damages calculated on the repudiation date or, in the alternative, on the date of performance. The trial court instead selected September 6 as the time to measure damages.¹²⁶

On appeal from the lower court's decision, the court of appeals determined that the time the buyer "learns of the breach" in anticipatory repudiation cases is the time of performance.¹²⁷ Reasoning that the Code drafters had not intended to alter the common law measurement of damages, the court concluded that "under [section 2-713] damages normally should be measured from the time when performance is due and not from the time when the buyer learns of the repudiation."¹²⁸ The court further rejected Cargill's argument that damages should be based on the repudiation date, distinguishing both *Oloffson* and *Sawyer Farmers*. Unlike *Sawyer Farmers*, the damages in *Cargill* were not measured pursuant to a contractual provision.¹²⁹ In *Oloffson*, the commercially reasonable time for which the buyer could suspend his performance under section 2-610(a) ended on the date of repudiation because substitute goods were readily accessible and because the Code's obligation of good faith imposed additional time limitations.¹³⁰

124. 553 F.2d 1222 (10th Cir. 1977).

125. *Id.* at 1227.

126. *Id.* at 1225.

127. *Id.* at 1226.

128. *Id.* See also notes 57-74 *supra* & accompanying text.

129. 553 F.2d at 1226. See text accompanying note 118 *supra*. Although the court in *Sawyer Farmers* measured damages pursuant to a liquidated damages provision, it initially had to determine the date of the breach. If damages under § 2-713 are to be measured at the time of the breach, the court in *Cargill* erred in disregarding *Sawyer Farmer's* analysis.

130. 553 F.2d at 1226.

Despite the court's determination that damages under section 2-713 should be measured as of the performance date, it nonetheless concluded: "If substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due."¹³¹ This statement, which diametrically opposes the court's earlier conclusion regarding damage measurement on the performance date, in effect insures that the performance date measures will not be implemented unless a valid reason exists to refuse to cover.¹³²

In reaching its conclusion adopting the reasonable time interpretation of section 2-713, the court in *Cargill* was influenced by section 2-712's requirement that cover be completed without unreasonable delay.¹³³ In fact, the court's analysis suggests that Comment 1 of section 2-713, which provides that "[t]he general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief,"¹³⁴ codifies the reasonable time interpretation of the provision. Such an assertion, however, conflicts with the court's prior determination that the Code drafters intended to adopt the performance date construction of section 2-713.¹³⁵ More importantly, the court's indication that Comment 1 supports a reasonable time damage measure in the event of an anticipatory repudiation overlooks the history of the provision. Written in 1952, Comment 1 accompanied the original version of section 2-713,¹³⁶ which measured damages in terms of nondelivery. In 1962, when the present version of section 2-713 was adopted, Comment 1 was not modified to reflect any variations in its previous interpretation. Because of the drafter's silence, the Comment actually supports the performance date interpretation rather than the reasonable time construction of section 2-713.¹³⁷

The court's inadequate explanation of its contradictory constructions of section 2-713 diminishes *Cargill's* precedential value. If the court had recognized that none of the three possible interpretations of section 2-713 harmonizes completely with other Code provisions, it could have implemented the reasonable time measurement as the con-

131. *Id.* at 1227.

132. *Id.*

133. *Id.* For the text of § 2-712 see note 80 *supra*.

134. U.C.C. § 2-713 Comment 1. For the text of Comment 1 see note 65 *supra*.

135. 553 F.2d at 1226.

136. U.C.C. § 2-713 (1952 version). For the text of the 1952 version of § 2-713 see text accompanying note 61 *supra*.

137. See text accompanying note 67 *supra*.

struction most conforming to the Code drafter's entire anticipatory repudiation scheme.

Notwithstanding the defects in *Cargill's* rationale, the decision is valuable in having adopted the most appropriate interpretation of section 2-713. In addition, the case continues the trend of *Oloffson* and *Sawyer Farmers* in accepting a time other than the performance date as the time of breach in an anticipatory repudiation case under the Code. Moreover, *Cargill* extends previous case law by recognizing that section 2-712, as well as section 2-610(a), may limit the maximum compensatory losses that a buyer may recover in an anticipatory repudiation suit. The Tenth Circuit's opinion therefore further promotes the emergence of a judicially imposed duty of mitigation on aggrieved buyers.¹³⁸

CONCLUSION

Because each of the three potential constructions of section 2-713 conflicts irreconcilably with other Code sections, a definitive interpretation of the several provisions on a buyer's remedies in the event of anticipatory repudiation is impossible. Nevertheless, a reasonable time measure is the preferable construction of the provision. Such an interpretation would complement the common law reforms incorporated by the Code's drafters in sections 2-610 and 2-712 and thereby prohibit the inequitable results possible under either a repudiation or a performance date measure. In addition, a reasonable time construction could implement any sensible duty of mitigation imposed by the judiciary upon an aggrieved buyer. Finally, by encouraging a purchaser to resort to the Code's cover remedy encompassed in section 2-712, the adoption of a reasonable time damage measure under section 2-713 would promote the renewed flow of commerce in the event of a seller's anticipatory repudiation.

138. See note 123 *supra* & accompanying text.