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# Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code

Michael T. Gibson, *Oklahoma City University School of Law*

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* Professor of Law, Oklahoma City University. J.D., Yale; B.A., University of Nebraska-Lincoln. I thank the Kerr Foundation for the computer equipment which made this project possible and Jay Conison for his computer expertise.

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# I. INTRODUCTION

## *A. Thesis*

The American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") are revising the law of Sales, Article 2 of the Uniform Commercial Code ("UCC").[1] Their work is laudable, for many sections need revision. Most of Article 2's basic concepts predate World War II,[2] and courts have had more than thirty years to unearth problems.[3] In general, the ALI and NCCUSL have updated Article 2 to reflect new technology and business practices,[4] to rectify

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1. In 1990, a study group appointed by the UCC Permanent Editorial Board recommended that Article 2 be revised. *Preliminary Report of the Uniform Commercial Code Article 2 Study Group* (Mar. 1, 1990) [hereinafter *1990 Study Group Report*], *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991).

Since then, a drafting committee has generated several drafts. I have relied on three: AMERICAN LAW INSTITUTE ("ALI") & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS ("NCCUSL"), UNIFORM COMMERCIAL CODE REVISED ARTICLE 2—SALES (Oct. 1, 1995) [hereinafter 1995 DRAFT]; ALI & NCCUSL, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2—SALES (July 1996) [hereinafter 1996 DRAFT]; and ALI & NCCUSL, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2—SALES (Jan. 24, 1997) [hereinafter 1997 DRAFT]. They are available on the Internet at http://www.law.upenn.edu/library/ulc/ucc2/ucc2sale.htm. The 1996 DRAFT warns that NCCUSL has not passed on its ideas and conclusions, and that proposed language may not be used to ascertain legislative intent. *See* 1996 DRAFT.

Unless otherwise indicated, citations to the existing Article 2 are to the 1962 Official Text of Article 2. Earlier drafts and later proposed revisions are identified by date, for example, 1996 DRAFT.

2. The 1962 Official Text notes that many of its provisions derive from the Uniform Sales Act of 1906. *See, e.g.*, § 2-201 Official Comment ("Prior Uniform Statutory Provision: Section 4, Uniform Sales Act"); *see also* 1 U.L.A. xli (master ed. 1989) (table correlating provisions of Uniform Sales Act and Article 2, UCC). The text of the 1906 Act appears in several old Sales treatises. *See, e.g.*, SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 1157 (1909) [hereinafter WILLISTON (1909)]; 3 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 659 (rev. ed. 1948) [hereinafter WILLISTON (1948)].

The 1906 Act was widely adopted in the United States. *See* JAMES BROOK, SALES AND LEASES xix (1994). In 1941, Karl Llewellyn presented an extensive revision to the NCCUSL. *See* REPORT AND SECOND DRAFT, THE REVISED UNIFORM SALES ACT (1941) [hereinafter 1941 DRAFT], *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 269 (1984). This was the basis for all future drafts of Article 2, and Llewellyn was appointed Chief Reporter for Article 2 and the entire Uniform Commercial Code.

3. A table listing when each state adopted the UCC appears in 1 U.L.A. 1 (master ed. 1989).

4. *See, e.g.*, 1997 DRAFT, *supra* note 1, § 2-102(13-15) (definitions of electronic agent, message, and transaction), § 2-103(b) (referring to Article 2B, "Licenses," for computer software).

drafting errors,[5] to clarify confusing sections,[6] and to provide additional protection to consumers.[7]

Unfortunately, a proposed change to Article 2's remedial structure[8] accomplishes none of these purposes. It does not concern new technology; it corrects no drafting error; it confuses an area that previously confused no one; and it creates a controversy by ignoring well-established case law. The remedies of Article 2 are based on the "expectation" interest, which compensates plaintiff for the profits it expected and the costs it incurred while performing the contract.[9] But the revisers propose to limit some aggrieved parties to the "reliance interest," i.e., to costs incurred in reliance on the contract.[10]

My thesis is simple. Part II of this paper uses the purpose of the UCC's remedies, the text of Article 2's remedial sections, and their drafting history to show that Article 2's drafters intended to protect only the expectation interest. Part III surveys 467 Sales cases involving fact patterns where commentators have suggested that reliance damages may be used, and it shows that Sales courts overwhelmingly protect the expectation interest. And Part IV argues that the addition of reliance damages to Article 2, especially by means of the current ALI/NCCUSL proposal, would create several problems.

Let me restate my arguments in quantitative terms. I have read all twenty-four microfilm rolls comprising the personal papers and notes taken

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5. *Compare* Robert J. Harris, *A Radical Restatement of the Law of Seller's Remedies: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV. 66, 99 (1965), *and* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 275-76 (4th ed., student ed. 1995), *and* Neri v. Retail Marine Corp., 285 N.E.2d 311, 314 n.2 (N.Y. 1972) ("due credit for . . . proceeds of resale" language in section 2-708(2) cannot apply to the situation in which section 2-708(2) normally is used), *with* 1997 DRAFT, *supra* note 1, § 2-721(b)(1) (deleting the "due credit" phrase).

6. *Compare, e.g.*, U.C.C. § 2-207 (1962) ("Battle of the Forms"), *with* U.C.C. § 2-206 ("Standard Form Records"), *and* 1997 DRAFT, *supra* note 1, § 2-207 ("Effect of Varying Standard Terms").

7. *Compare, e.g.*, U.C.C. § 2-318(A) (warranties protect "any natural person who is in the family or household of his buyer or who is a guest in the home"), *with* 1997 DRAFT, *supra* note 1, § 2-409(a) (warranties protect "any remote purchaser or transferee that may reasonably be expected to use or be affected by the goods").

8. *See infra* Parts I.D, IV.A.

9. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1982).

10. *See* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 54 (1936) [hereinafter *The Reliance Interest*]. Part II appeared at 46 YALE L.J. 373 (1937). Perdue was one of Fuller's students and credits his professor with the article's ideas and analysis. *See* William R. Perdue, Jr., *Commentary on The Reliance Interest in Contract Damages*, 100 YALE L.J. 1487, 1487 n.118 (1991). In respect to his candor, I shall refer to the work as Fuller's.

on the drafting of Article 2 by its Chief Reporter, Karl Llewellyn.[11] I found no reference to reliance damages. I have examined the twenty-three volumes of the drafts of Article 2 and again, I found no reference to, let alone an endorsement of, reliance damages.[12] Finally, I identified nine types of Sales cases in which reliance damages were *most likely* to occur, and then I read 467 cases involving those fact patterns. Only twenty cases *discussed* the reliance interest, and only fourteen of those twenty decisions actually

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11. THE KARL LLEWELLYN PAPERS [hereinafter KLP] are in the University of Chicago Law School Library and available on microfilm. Part J concerns Article 2 and includes drafts and the transcripts of several ALI and NCCUSL debates which otherwise have not been published. *See infra* note 12. My citations follow the form suggested by THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION (R. Ellinwood & W. Twining rev. ed. 1970).

12. The most accessible source for Article 2's drafts is KELLY, *supra* note 2. Several additional drafts appear in KLP. I have read: DRAFT, UNIFORM SALES ACT, app. 1940 [hereinafter 1940 DRAFT], *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 171 (1984); 1941 DRAFT, *supra* note 2, at 269; NCCUSL, CONSIDERATION IN COMMITTEE OF THE WHOLE OF THE REVISED UNIFORM SALES ACT (Aug. 17-21, 1943) [hereinafter 1943 DRAFT] (This is a transcript of the NCCUSL's floor debate. Llewellyn began each discussion by reading the text of the relevant section.), *reprinted in* KLP, *supra* note 11, at J.V.2.h.; UNIFORM REVISED SALES ACT (SALES CHAPTER OF PROPOSED COMMERCIAL CODE) (Proposed Final Draft No. 1, Apr. 27, 1944) [hereinafter 1944 DRAFT], *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1-272 (1984); UNIFORM REVISED SALES ACT (Apr. 1, 1946) [hereinafter 1946 DRAFT], *reprinted in* KLP, *supra* note 11, at J.VIII.2.a.; UNIFORM REVISED SALES ACT (Jan. 1948) [hereinafter 1948 DRAFT], *reprinted in*, KLP, *supra* note 11, at J.X.2.c.; UNIFORM REVISED SALES ACT §§ 1-42, cmts. (Feb. 20, 1948), *reprinted in* KLP, *supra* note 11, at J.X.2.e.; THE UNIFORM COMMERCIAL CODE (1949) [hereinafter U.C.C. (1949)], *reprinted in* 7 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); UNIFORM COMMERCIAL CODE: TEXT ONLY PRINTING EXCEPT FOR THE ARTICLE ON SALES (ARTICLE 2) AND THE ARTICLE ON EFFECTIVE DATE AND REPEALER (ARTICLE 11) (Mar. 1, 1950), *reprinted in* 9 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); UNIFORM COMMERCIAL CODE (Proposed Final Draft, Text Edition, Spring 1950), *reprinted in* 9 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 185 (1984); UNIFORM COMMERCIAL CODE (Proposed Final Draft (through Article 4), Text and Comments Edition, May 1950), *reprinted in* 10 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); REVISIONS OF ARTICLES 2, 4, AND 9 (Sept. 1950), *reprinted in* 11 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 345 (1984); UNIFORM COMMERCIAL CODE (Proposed Final Draft No. 2, Text Edition, Spring 1951), *reprinted in* 12 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); UNIFORM COMMERCIAL CODE (Final, Text Edition, Nov. 1951), *reprinted in* 12 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 375 (1984); UNIFORM COMMERCIAL CODE (Official Draft, Text Edition, 1952), *reprinted in* 13 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 153 (1984); UNIFORM COMMERCIAL CODE (Official Draft (through Article 4), Text and Comments Edition, 1952), *reprinted in* 14 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); UNIFORM COMMERCIAL CODE (Official Draft (through Article 4), Text and Comments Edition, 1952, with Changes and Modifications Approved by the Enlarged Editorial Board at Meetings Held Dec. 29, 1952, Feb. 16, 1953, May 21, 1953, and Dec. 11, 1953), *reprinted in* 17 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1 (1984); UNIFORM COMMERCIAL CODE (Supp. No. 1 to the 1952 Official Draft of Text and Comments, Jan. 1955), *reprinted in* 17 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 307 (1984).

awarded what either the judge or we would call reliance damages.[13] Thus, in 467 of the cases *most likely* to produce reliance damages, only fourteen (2.9%) did so. As Lord Poo-bah once declared, "I have never seen such unanimity on a point of law in all me life."[14] The drafters of the original Article 2 and the judges of America are all but unanimous. The expectation interest is the stuff of which Sales remedies are made, and there is no need to change.

### *B. Reliance in the Law of Contract*

The ALI/NCCUSL proposal to add reliance damages to Sales law goes back to the beginnings of reliance as a method of formation in Contract law.[15] Traditionally, promises to provide services were not enforceable unless both sides provided bargained-for consideration.[16] But after the turn

13. *See* Cyberchron Corp. v. Calldata Sys. Dev., Inc., 831 F. Supp. 94, 116-18 (E.D.N.Y. 1993) (research and development expenses incurred in trying to produce goods requested by Buyer), *aff'd as modified*, 47 F.3d 39, 46-47 (2d Cir. 1995) (reliance damages combined with reasonable overhead, which is part of the expectation interest); D & G Stout, Inc. v. Bacardi Imports, Inc., 923 F.2d 566 (7th Cir. 1991) (Supplier liable under promissory estoppel for loss Buyer suffered when Supplier breached promise to continue supplying Buyer); Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076 (5th Cir. 1985) (Seller sought only cancellation charges paid to third parties when Buyer canceled contracts); Werner v. Xerox Corp., 732 F.2d 580 (7th Cir. 1984) (despite Buyer's express promise to pay development costs, court labeled award of those costs reliance damages); Standard Structural Steel Co. v. Debron, 515 F. Supp. 803, 810, 812 (D. Conn. 1980), *aff'd without opinion*, Standard Structural Steel Co. v. Debron, No. 80-7810 (2d Cir. Mar. 18, 1981) (supplier of structural steel, who underestimated number of bolts needed, liable for costs of installing extra bolts); Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803 (Cl. Ct. 1993) (under federal regulations, supplier whose bid on government contract was not fairly considered was entitled to bid preparation costs); Keco Indus., Inc. v. United States, 428 F.2d 1233 (Cl. Ct. 1970) (same); Atlantic Bldg. Sys., Inc. v. Atlantic States Constr. Co., 322 S.E.2d 311 (Ga. Ct. App. 1984) (under Georgia common law, plaintiff who recovers on implied-in-fact contract entitled only to reliance damages); Dialist Co. v. Pulford, 399 A.2d 1374 (Md. Ct. Spec. App. 1979) (plaintiff who paid $2,500 for exclusive rights to distribute new—and apparently worthless—product, then learned manufacturer had sold same rights to someone else, entitled to refund of payment and compensation for time and effort invested in developing business); Center Garment Co. v. United Refrigerator Co., 341 N.E.2d 669, 674 & n.7 (Mass. 1976) (despite three years of profits, Buyer did not seek expectation interest); Kleven v. Geigy Agric. Chems., 227 N.W.2d 566 (Minn. 1976) (expectation and reliance damages); Cayuga Harvester Inc. v. Allis-Chalmers Corp., 465 N.Y.S.2d 606, 618-19 (App. Div. 1983) (reliance damages under fraud claim; Buyer did not seek benefit of the bargain damages); Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D. 1982) (direct and consequential expectation damages, plus reliance damages); Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 707-10 (Tex. App. 1988) (reliance damages because estoppel used to override the Statute of Frauds).

14. W. S. GILBERT & A. SULLIVAN, THE MIKADO (1940).

15. *See* 1995 DRAFT, *supra* note 1.

16. *See, e.g.*, Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919); GRANT GILMORE, THE DEATH OF CONTRACT 12-21 (1974).

of the century, judges and scholars began to enforce gratuitous promises, such as gifts to charity or a family member, if the recipient had detrimentally relied on the promise, even if she had not provided consideration.[17] Williston labeled this "promissory estoppel,"[18] although "reliance-in-formation" might have been a clearer term.

The *Restatement of Contracts* endorsed the new doctrine in section 90, and the debate over this section produced the first well-known reference to reliance damages. Although the section's preliminary language directed courts to fully enforce a promise on which someone had relied,[19] two attorneys suggested enforcement only to the extent of the recipient's reliance,[20] thus linking reliance-in-formation with reliance damages. Williston and the ALI rejected the suggestion and insisted on full enforcement.[21]

Eight years later, Lon Fuller's *The Reliance Interest in Contract Damages*[22] revived the reliance damage idea. Fuller divided contract remedies into three interests. The expectation interest gives the most protection, fully enforcing the contract and putting the plaintiff in the position she *expected* to be in had the contract been fully performed.[23] The restitution interest provides the least protection, for it merely requires a defendant to return anything of value he received from the plaintiff.[24] In between, Fuller placed the "reliance interest," which compensates a plaintiff for costs she incurred in reliance on the contract.[25] This gives an intermediate level of protection. While expectation compensates a plaintiff for out-of-pocket costs and expected profit, the reliance interest provides only the former. But it compensates the plaintiff for all costs incurred, while

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17. *See, e.g.*, Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927) (gift pledged to college); DeCicco v. Schweizer, 117 N.E. 807 (N.Y. 1917) (bride's father promised annuity to groom); Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898) (grandfather promised to give granddaughter $2,000). *See also Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. PROC. app. at 85-114 (Apr. 29, 1926) [hereinafter *Debate*] (debate on section 88 (later section 90) includes discussion where hypothetical uncle promised to give nephew $1,000).

18. Note, *Promissory Estoppel*, 13 IOWA L. REV. 332 (1928) [hereinafter *Promissory Estoppel*].

19. *See Debate*, *supra* note 17, at 88 (statements of Mr. Morawetz and Mr. Williston).

20. *See id.* at 95-96 (statement of Mr. Tunstall), 99 (statement of Mr. Coudert).

21. *See id.* at 96, 99, 102-04, 111-12 (statements of Mr. Williston). The final version of section 90 says that a relied-upon promise "is binding" if injustice can be avoided "only by enforcement of the promise." There is no suggestion of partial enforcement, such as that contemplated by the reliance interest. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1982) ("The remedy granted for breach may be limited as justice requires.").

22. *The Reliance Interest*, *supra* note 10.

23. *See id.* at 54.

24. *See id.* at 53-54.

25. *See id.* at 54.

restitution gives her only those costs to the extent they actually benefited the defendant. If she had started to build a house before defendant breached, the expectation interest would protect her profit and any sums spent on labor and materials. The reliance interest would compensate her for the latter, even if those expenses had not benefited the defendant. Restitution would compensate her for only the expenditures which had benefited the defendant.

Like all ideas, promissory estoppel and *The Reliance Interest* had their flaws. Section 90 did not address whether it could be used in situations where the parties had bargained, so its use in commercial transactions was unclear.[26] Although it required the defendant to reasonably expect the plaintiff to rely on the promise, it did not explain how one can rely on a promise which, because it lacked consideration, was legally unenforceable. It did not explain the relationship of promissory estoppel to consideration.[27] It did not say whether its "injustice" requirement was satisfied if the promise maker breached his promise or if the promise recipient must show additional harm. And it did not tell courts how to handle situations in which reliance was difficult to prove or quantify.[28]

*The Reliance Interest* also had its weaknesses. It did not consistently define its namesake doctrine.[29] It did not make its central thesis clear.[30]

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26. Most courts had used promissory estoppel on gifts to charities, to family members, etc. *See* Stanley Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 350-51 (1969); *supra* note 17. The text of section 90 speaks only of "a promise," without any qualifications, but all four of its illustrations involve promises made without any effort to provide return consideration, i.e., gratuitous promises. RESTATEMENT OF CONTRACTS § 90 (1932). Grant Gilmore, while discussing section 90's use in bargained-for transactions in which businesspeople tried but failed to provide consideration, wrote that "attentive study of the four illustrations will lead any analyst to the despairing conclusion, which is of course reinforced by the mysterious text of section 90 itself, that no one had any idea what the damn thing meant." GILMORE, *supra* note 16, at 64-65.

27. Gilmore argues that the extent to which section 90 would undercut the rule of consideration expressed in section 75 was "left entirely unresolved." GILMORE, *supra* note 16, at 64.

28. *See* K. N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 804 (1939) (Once agreement is reached, "the participants in the deal will rely soon, and will rely hard, and will rely in ways absurdly difficult to prove."). For example, if an employee receives a promise of retirement benefits, causing her to stay at her job, how can she prove that had the promise not been made, she would have looked for (and found) another job?

29. *See* Comment, *Once More Into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559, 563 n.32 (1970) [hereinafter *Once More Into the Breach*]; Todd D. Rakoff, *Fuller and Perdue's "The Reliance Interest" as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, 213. Fuller said the reliance interest included "out-of-pocket" costs, such as money spent preparing to perform the contract or any other changes of position incurred because of the defendant's promises. *See The Reliance Interest*, *supra* note 10, at 54.

Fuller was less clear on whether the reliance interest included "opportunity costs," the lost chance to enter similar contracts with third parties, as when a patient cancels a dental appointment,

And its author's sense of his contribution to law was very different than the proposition for which its readers cited it.[31]

Whatever the merits of promissory estoppel and *The Reliance Interest*, American judges proved reluctant to embrace them. A quarter-century passed before the courts used reliance to enforce bargained-for, commercial transactions,[32] although the doctrine's later, widespread expansion in that area was reflected in the *Restatement (Second) of Contracts*' section 90.[33] *The Reliance Interest* took even longer to have an

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costing the dentist the opportunity to book another, paying patient. *See id.* at 74. Sometimes Fuller said that reliance damages included opportunity costs. *See id.* at 54 ("For example, the buyer . . . has neglected the opportunities to enter other contracts."); *id.* at 55 ("[O]pportunities for gain may be foregone in reliance on a promise. Hence the reliance interest must be interpreted as at least covering 'gains prevented' as well as 'losses caused.'"); *id.* at 415 n.218 (unclear in several cases whether "recovery extends to the *entire* reliance interest" since those cases "limited the recovery" to the "loss involved in selling inventory acquired") (emphasis added); *id.* at 417 ("Reliance interest sometimes includes profits lost as well as disbursements.").

But sometimes he excluded opportunity costs. *Id.* at 417 (broadening reliance interest "to include compensation for all the gains prevented in entering the contract would be to defeat whatever policy may have dictated an exclusion of the expectation interest from legal protection."). And sometimes he ducked the issue. *Id.* at 55 ("Whether 'gains prevented' through reliance on a promise are properly compensable in damages is a question not here determined."); *id.* at 74 ("Where the reliance interest is *conceived* to embrace the loss of the opportunity to enter similar contracts with other persons, the reliance and expectation interests will have a tendency to approach one another.") (emphasis added).

30. *See* Rakoff, *supra* note 29, at 214-15. *See also* Perdue, *supra* note 10, at 1488.

31. The usual citations to *The Reliance Interest* are for its identification of the reliance interest and its tripartite structure of contract remedies. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS 841 n.6 (2d ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 344 reporter's note (1982). But Fuller said his main argument was that contract law abandon its "all-or-nothing" approach to damages, under which a plaintiff got her full request for damages or nothing at all. Letter from Lon Fuller to Karl Llewellyn (Dec. 8, 1939), *quoted in* ROBERT SUMMERS, LON FULLER 133 (1984). Instead, Fuller proposed a sliding scale, so a plaintiff with strong evidence of a breach would get more damages and a plaintiff with weaker evidence would receive less. *See id.* He expressed this idea, however, only in two sentences on the last of ninety pages, *see The Reliance Interest*, *supra* note 10, at 420, and I know of only a few courts which have used it. *See, e.g.*, Sullivan v. O'Connor, 296 N.E.2d 183, 187-89 (Mass. 1973) (patient who claims doctor allegedly promised cure should be restricted to reliance damages, since unlikely that any doctor would so contract).

32. A year after *Restatement (Second) of Contracts* section 90 appeared, Judge Learned Hand declined to use promissory estoppel to enforce a subcontractor's promise to a contractor, saying that "an offer for an exchange is not meant to become a promise until a consideration has been received." James Baird Co. v. Gimel Bros., 64 F.2d 344, 346 (2d Cir. 1933). *Baird* discouraged the use of promissory estoppel in bargained transactions, Henderson, *supra* note 26, at 355, until *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958), applied section 90 to almost the same set of facts. By 1969, the "principal application" of promissory estoppel was in bargained, i.e., commercial, transactions. *See* Henderson, *supra* note 26, at 343-44.

33. Comment b speaks of section 90's use in a "commercial setting," and several illustrations involve bargained-for transactions in business situations. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b, illus. 4 (employment), 6 (bank loan), 8-10 (franchises), 13-14 (promises

effect. In the fifty years between its publication and the appearance of the *Restatement (Second) of Contracts*, less than a handful of well-known Contract cases awarded reliance damages,[34] and two recent studies found less than seventy-five meaningful judicial citations to Fuller's ideas.[35] Today, despite the *Restatement (Second) of Contracts*' endorsement of reliance damages,[36] most promissory estoppel cases involving services protect the expectation interest,[37] rejecting reliance even in what should be its stronghold.[38]

### *C. The Reliance Interest and the Law of Sales*

For all the attention reliance damages and promissory estoppel received in Contract law, they went almost unnoticed for fifty years in Sales. We can begin with Williston and Fuller. Williston's Sales materials used only the expectation and restitution interests.[39] In the 1926 ALI debate, he

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by seller and lender to secure insurance on property) (1982).

34. Professor Slawson says only three promissory estoppel cases have been "widely read" as awarding reliance damages. W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 202-06 (1990) (citing Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965), and RCM Supply Co. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982)). The landmark promissory estoppel case of *Drennan v. Star Paving Co.* protected the expectation interest. *See* 333 P.2d at 759.

35. Stewart Macaulay's LEXIS computer search found forty-three judicial citations. Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 266-68. A 1991 search by Fuller's co-author produced forty-one judicial citations. *See* Perdue, *supra* note 10, at 1488. A broader search by Macaulay for judicial discussions of reliance damages produced many more citations, but after he discarded those which had nothing to do with Fuller's arguments, only seventy-three concerned *The Reliance Interest* or reliance damages. *See* Macaulay, *supra*, at 268. Macaulay points out that this translates to only 1.3 citations per year. *See id.* at 271.

36. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d, § 139 cmt. d, § 344(b), § 349 (1982).

37. *See* Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 149 (1987); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 909 & n.24 (1985) (in study of 200 promissory estoppel cases, of the 72 which discussed damages, 60 awarded expectation damages and 12 protected the reliance interest). Some promissory estoppel cases award millions in lost reliance profits. *See, e.g.*, Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549, 1552, 1559 (11th Cir. 1984) ($2 million in lost profits on combined contract/promissory estoppel cause of action).

38. As mentioned earlier, the idea of reliance damages first surfaced in a discussion of promissory estoppel. *See supra* text accompanying notes 18-21. A number of later sources recognize a link between the two doctrines. Slawson, *supra* note 34, at 198.

39. *See* 3 WILLISTON (1948), *supra* note 2, at 681-84 (Uniform Sales Act of 1906 §§ 63-70); WILLISTON (1909), *supra* note 2, §§ 560-83, 587, 596-615; 2 SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT §§ 501-16, 543-92, 594-616 (2d ed. 1924). Note that section 593 concerns "*quantum valebat*," which is an

endorsed only the expectation interest, as did his *Restatement of Contracts*.[40] Meanwhile Fuller made little effort to apply his ideas to Sales law. Fuller noted Williston's general opposition to reliance damages,[41] and he cited a few Sales cases.[42] But he did not discuss the Uniform Sales Act or its remedial scheme. Small wonder, then, that Williston's 1948 *Sales* treatise ignored reliance damages.[43] As for promissory estoppel, Williston recognized it in Contract,[44] but not Sales.[45]

In the 1940s, the drafters of Article 2 excluded reliance damages and promissory estoppel from Sales law.[46] They also ignored a potential bridge between Contracts and Sales. In *Goodman v. Dicker*,[47] the court, without identifying the cause of action or explaining its award, gave a disappointed retailer the money spent preparing for a dealership which never came and denied his claim for lost profits.[48] The preparation costs were the retailer's reliance interest, so if *Goodman* is a Sales case, it would rebut my argument that reliance damages were not connected with the law of Sales. But this exception proves the rule. The court did not mention the 1906 Uniform Sales Act, and today we know *Goodman* as a Contracts case, not as a Sales case.[49]

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old form of restitution.

40. *See supra* text accompanying notes 16-19.

41. *See The Reliance Interest*, *supra* note 10, at 90 & n.61.

42. *See id.* at 92 & n.94 (seed warranty cases), 93 (infected cow), 93 n.68 (requirements contract for natural gas), 94 (sale of oil), 384 (claim of creditor against insolvent buyer).

43. *See* 3 WILLISTON (1948), *supra* note 2, §§ 501-16, 543-92, 594-616.

44. *See* RESTATEMENT OF CONTRACTS § 90 (1932); 1 SAMUEL WILLISTON, CONTRACTS § 139, at 308 nn.23-24 (1920).

45. Since a sale necessarily involved the exchange of goods for a price, automatically providing consideration, there was no need for promissory estoppel.

46. On reliance damages, *see infra* Parts II.A.2, II.B.1-2. On promissory estoppel, see Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 674-704 (1988).

47. 169 F.2d 684 (D.C. Cir. 1948).

48. *See id.* at 685.

49. The 1906 Uniform Sales Act is not cited in the leading UCC treatise, *see* WHITE & SUMMERS, *supra* note 5, at 966, nor in old Sales treatises, *see, e.g.*, LAWRENCE VOLD, HANDBOOK ON THE LAW OF SALES 566 (1959). It also is omitted from Sales textbooks. *See* MARION W. BENFIELD, JR. & WILLIAM D. HAWKLAND, CASES & MATERIALS ON SALES xxvi (3d ed. 1992); JOHN HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING xvi (4th ed. 1976); ROBERT L. JORDAN & WILLIAM D. WARREN, SALES xvi (1992); JOHN E. MURRAY & HARRY M. FLECHTNER, SALES AND LEASES xxii (1994); ALAN SCHWARTZ & ROBERT E. SCOTT, SALES LAW AND THE CONTRACTING PROCESS xxxvii (2d ed. 1991); RICHARD E. SPEIDEL ET AL., SALES AND SECURED TRANSACTIONS xxxiii (5th ed. 1993); DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON THE SALE AND LEASE OF GOODS 392 (2d ed. 1990).

Many Contracts textbooks, however, reprint it in full. *See, e.g.*, JOHN P. DAWSON ET AL., CASES AND COMMENTS ON CONTRACTS 281-82 (1992); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 37-39 (5th ed. 1990); ROBERT S. SUMMERS & ROBERT A.

And so, between the drafting of Article 2 in the 1940s and the revision efforts of the 1990s, few scholars suggested a link between reliance damages and Sales. In 1966, one author wrongly equated the incidental damages of section 2-710 and section 2-715 with Fuller's use of the same phrase for a form of reliance damages.[50] Later, two books expressed uncertainty about whether reliance damages survived the adoption of Article 2,[51] and a 1991 source said that Fuller's idea had "failed to carry the day" in the UCC.[52]

### *D. The ALI-NCCUSL Proposal to Add Reliance Damages to Article 2 of the UCC*

It was not until 1990 that a commentator devoted more than two sentences to the use of the reliance interest in Sales.[53] He cited only one modern Sales case which discussed—but refused to award—reliance damages,[54] and he conceded that reliance damages were appropriate only in "exceptional" Sales cases.[55] He neither reconciled them with section 1-106(1)'s protection of the expectation interest nor explained their interaction with Article 2's expectation-based remedies.

Nevertheless, his idea reappeared in a preliminary report that recommended revision of Article 2.[56] The report recommended no change

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HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 295-97 (1992).

50. *See* Robert J. Nordstrom, *Restitution on Default and Article 2 of the Uniform Commercial Code*, 19 VAND. L. REV. 1143, 1150 (1966). Section 2-710 defines incidental damages as costs incurred by Seller to stop delivery, store goods, and find a new buyer: all necessary steps before Seller can get expectation damages under section 2-706. In contrast, Fuller said incidental damages were expenses incurred outside the context of actually performing the contract. If a retailer rented a store and bought inventory before the landlord breached, the lease payments would be "essential" damages to Fuller and the inventory "incidental damages." *The Reliance Interest*, *supra* note 10, at 78. Article 2's incidental damages are incurred *after* the breach; Fuller's *before*.

51. *See* DANIEL DOBBS, REMEDIES 892-93 (1970); ROBERT HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE ¶ 9.01, at 9-3 (1990).

52. Macaulay, *supra* note 35, at 249 n.9.

53. *See* Roy Ryden Anderson, *Monetary Recoveries for Reliance and in Restitution Under Article 2 of the UCC*, 22 UCC L.J. 248, 250-63 (1990).

54. *See id.* at 259 n.36 (citing Brenneman v. Auto-teria, 491 P.2d 992, 995-96 (Or. 1971)). For a discussion of *Brenneman*, see *infra* text accompanying notes 328-41.

55. Anderson, *supra* note 53, at 259-60.

56. *See 1990 Study Group Report*, *supra* note 1, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1014 (1991).

in the text of section 1-106(1),[57] which endorses the use of the expectation interest throughout the Code. Indeed, the study group suggested that this endorsement reappear at the beginning of Article 2's remedial provisions.[58] Then, after twice endorsing expectation damages as a basic principle of the Code, the report recommended that a new comment "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."[59]

The report's suggestions remain in later drafts of the proposed revised Article 2.[60] A note to the section entitled "Remedies in General" says that while courts are to protect the expectation interest, "other remedial interests, such as reliance and restitution, can be protected under the general damage measure."[61] Another note suggests that sometimes the expectation interest may be "inadequate" and cites a case which ignored section 1-106's command to protect the expectation interest, overlooked Article 2's sections on damages, and declined to award reliance damages.[62]

So after six decades in which hardly anyone—drafter, judge, or

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57. *See id.* Rec. A1(3), at 1-6, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1014 (1991).

58. *See id.* Rec. A1(3), at 1-6, Rec. A2.7(1)(A), at 7-2 to 7-3, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204 (1991).

59. *Id.* at 7-2 to 7-3, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204 (1991). The report also suggested two specific uses of the reliance interest. First, while section 2-708(2) permits a seller to recover lost profits (including reasonable overhead) caused by the buyer's breach, the report says "the seller should also recover any reasonable variable costs incurred in part-performance before the breach," and it labeled those variable costs as "reliance expenses." *Id.* Rec. A2.7(D), at 7-27, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1221-22 (1991). The report also recommended a buyer's consequential damages include "reliance expenditures incurred before the breach which cannot be salvaged." *Id.* Rec. A2.7(12), at 7-38, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1234 (1991).

60. For a more extensive discussion of these proposals, *see infra* Part IV.

61. 1997 DRAFT, *supra* note 1, § 2-803 note 2; 1996 DRAFT, *supra* note 1, § 2-703 cmt. 2.

62. 1996 DRAFT, *supra* note 1, § 2-704 cmt. 1 (citing Bausch & Lomb Inc. v. Bressler, 977 F.2d 720 (2d Cir. 1992)). For a discussion of *Bausch & Lomb*, see *infra* text accompanying notes 276-98, 482-520.

commentator—mentioned reliance damages in conjunction with Sales law, two well-respected groups now wish to make the reliance interest an express part of Sales remedies. The next section will show how this conflicts with the purpose, intent, and text of Article 2.

## II. THE UCC'S DISPLACEMENT OF RELIANCE DAMAGES

Introducing reliance damages into Article 2 conflicts with the UCC's displacement of the reliance interest. One of the Code's overarching purposes is protecting the expectation interest, and Article 2's drafting history and text implement that purpose, leaving no room for Fuller's brainchild. Even Article 2's brief references to Fuller's third interest, restitution, protect the expectation interest and do not open a path for reliance damages.

### *A. The Code's General Remedial Goals*

#### 1. The Fundamental Command of Section 1-106(1)

The key to Article 2's remedies is section 1-106(1), whose location in Part 1, Article 1, of the Code bespeaks its central role. It declares that the Code's remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."[63] Obviously, this is the expectation interest.[64] We may debate how best to accomplish section 1-106's goal, but the goal itself is undebatable. The text uses the mandatory "shall" instead of the permissive "should." Protection of the expectation interest is "*the* end," not "an end" or "the primary end." It is "*the*" remedial goal, and section 1-106(1) recognizes no other.

There is more. Section 1-102(1) commands that "this Act shall be . . . applied to promote its underlying purposes" thus reinforcing section 1-106(1)'s mandatory nature. Judges[65] and scholars[66] recognize that section 1-

63. U.C.C. § 1-106(1) (1962).

64. *See The Reliance Interest*, *supra* note 10, at 54 ("Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise.").

65. *See, e.g.*, Husker News Co. v. Mahaska State Bank, 460 N.W.2d 476, 477 (Iowa 1990); NBD-Sandusky Bank v. Ritter, 471 N.W.2d 340, 343 (Mich. 1991); South Shore Nat'l Bank v. Donner, 249 A.2d 25, 28 (N.J. Super. Ct. Law Div. 1969).

66. *See, e.g.*, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4, at 16 (3d ed., student ed. 1988); Julian B. McDonnell, *Purposive Interpretation of the Uniform*

102(1) is imperative: courts *must* use Code purposes as their primary tools of interpretation. And the purpose of section 1-106(1) is special. While the Code's other main purposes are grouped together in section 1-102(2), the expectation interest receives its own section, section 1-106(1). While section 1-102(2) states general purposes,[67] section 1-106(1)'s protection of the expectation interest is specific. And while section 1-102(2)'s goals apply throughout the Code,[68] section 1-106(1) makes sense largely in the context of Article 2's remedies.[69] Those remedies are the only part of the Code so tightly linked to an Article 1 purpose, and courts respect section 1-106(1)'s command to protect the expectation interest.[70] In so doing, they respect the

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*Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 799-801 (1978); John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 2 (1981).

67. They are to "simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement; [and] to make uniform the law among the various jurisdictions." U.C.C. § 1-102(2) (1962).

68. For example, section 1-102(2)'s goal of permitting the expansion of legitimate commercial practices can be applied to almost any section of the Code. *See id.*

69. Indeed, the first version of section 1-106 appeared at the start of Article 2's remedial provisions. *See* 1941 DRAFT, *supra* note 2, § 56-A(3), *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 513 (1984); 1944 DRAFT, *supra* note 12, § 103, at 54, *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 66 (1984). It moved to its present location in 1949. *Compare* 1943 DRAFT, *supra* note 12, § 103, *reprinted in* KLP, *supra* note 11, at J.V.2.h., at 164, *and* 1944 DRAFT, *supra* note 12, § 1-103(1), *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 66 (1984), *and* 1948 DRAFT, *supra* note 12, § 102, *reprinted in* KLP, *supra* note 11, *with* U.C.C. (1949), *supra* note 12, § 1-106, *reprinted in* 6 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 29 (1984).

70. Some courts expressly recognize section 1-106(1)'s mandatory nature. *See, e.g.*, Allied Canners & Packers, Inc. v. Victor Packing Co., 209 Cal. Rptr. 60, 66 (Ct. App. 1984); Dehahn v. Innes, 356 A.2d 711, 721 (Me. 1976); Industrial Circuits Co. v. Terminal Comm. Inc., 216 S.E.2d 919, 923 (N.C. Ct. App. 1975); Harper & Assocs. v. Printers, Inc., 730 P.2d 733, 736 (Wash. Ct. App. 1986). Others quote section 1-106(1) or use it to interpret Article 2's remedies without explicitly noting its mandatory aspect. *See, e.g.*, Prenalta Corp. v. Colorado Interstate Gas Co., 944 F.2d 677, 690-91 (10th Cir. 1991); Nobs Chem., U.S.A., Inc. v. Koppers Co., 616 F.2d 212, 215 (5th Cir. 1980); Commonwealth Edison Co. v. Decker Coal Co., 653 F. Supp. 841, 844 (N.D. Ill. 1987); Unique Designs, Inc., v. Pittard Mach. Co., 409 S.E.2d 241, 246-47 (Ga. Ct. App. 1991); Frank B. Bozzo, Inc. v. Electric Weld Div., 498 A.2d 895, 898 (Pa. Super. Ct. 1985).

I know of only one exception, a court which somehow subordinated section 1-106 to section 2-713. In *Tongish v. Thomas*, 840 P.2d 471 (Kan. 1992), the seller sold seeds to a buyer who resold them at the same price plus a processing fee. The market doubled; the seller did not deliver; the buyer did not cover. *See id.* at 472. Since the buyer used an outputs contract to resell, the third-party buyer could not force it to deliver. *See id.* Under section 1-106, the court should have awarded the buyer its expected profit, i.e., the processing fee. The court instead granted the buyer the difference between the contract price and the market price under section 2-713, a huge windfall. *See id.* at 476. The court said that section 2-713 was a specific statute which, under traditional rules of statutory interpretation, controlled what the court saw as the more general section 1-106. *See id.* at 473-74. This ignored section 1-102's command to use its purposes when interpreting more 'specific' Code sections, a command which overrides the traditional rule. The court should have

drafters' deliberate selection of the expectation interest as the keystone of Article 2's remedies.

### 2. The Drafters' Endorsement of Expectation Damages

Williston, Llewellyn, and Article 2 rejected Fuller's reliance damages and his suggestion to link formation and remedies. Fuller said that courts should replace "the Contract-No-Contract Dichotomy," which made a promise fully enforceable or not enforceable at all, with an "ascending scale of enforceability" in which weak evidence of formation might justify partial enforcement via the reliance interest.[71] To Fuller, contract litigation should not be an all or nothing affair:[72] a plaintiff with weak evidence of a contract should not receive the same damages as one with overwhelming evidence. For better or worse, this was a revolution at the core of American Contract law.

The proposed revolution disconcerted Williston. Just as he had endorsed expectation damages in the ALI debate[73] and the *Restatement of Contracts*,[74] his 1906 Uniform Sales Act protected the expectation interest,[75] and that 1906 Act was the basis for Article 2's remedy provisions.[76] In 1937, Williston rejected Fuller's proposed link between the level of damages and the means used to establish liability,[77] prompting a caustic response.[78]

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said that by failing to cover, the buyer failed to mitigate damages, barring it from lost profits. *See* U.C.C. § 2-715(2)(a) & cmt. 2.

71. Letter from Lon Fuller to Karl Llewellyn, *supra* note 31. He had broached this idea at the end of *The Reliance Interest*. *See The Reliance Interest*, *supra* note 10, at 420.

72. *See The Reliance Interest*, *supra* note 10, at 419-20.

73. *See Debate*, *supra* note 17, at 95-96, 98-99, 103, 111-12; *supra* text accompanying notes 19-21.

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 326 & cmt. b (1982).

75. For example, an unpaid seller was to recover the full purchase price, *see* 3 WILLISTON (1948), *supra* note 2, at app. a, § 63 (1906 Uniform Sales Act), while a buyer could recover the difference between the value of the goods as promised and as delivered. *See id.* § 69(7).

76. The first version of the UCC labeled itself the "Uniform Sales Act, 1940, Report on the Uniform Sales Act to the NCCUSL," and said it was written "within the essential frame of the Uniform Sales Act of 1906 and the case-law thereunder . . . build[ing] at almost every point on the first Act and on theories clearly incorporated therein." 1940 DRAFT, *supra* note 12, at 8, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 174 (1984). Several later versions of Article 2 also were labeled the "Revised Uniform Sales Act," *see, e.g.*, 1941 DRAFT, *supra* note 2, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 269 (1984), and many comments in the final version note their base in the Uniform Sales Act. *See supra* note 2. More specifically, the drafters of Article 2 explicitly said that their goal was to revise the Uniform Sales Act so that it could better accomplish its goal of putting the plaintiff where he would have been had the contract been fully performed. *See infra* text accompanying notes 86-91.

77. Williston wrote that "though reasonable reliance and expectation are doubtless juristic

Llewellyn also clashed with Fuller. At first, Llewellyn seemed impressed by *The Reliance Interest,*[79] but eventually he realized that he and Fuller had dramatically different perspectives on the problems caused by the doctrine of consideration. Fuller wanted a plaintiff lacking sufficient evidence of consideration to use the less-demanding reliance-in-formation (promissory estoppel) and to receive a less-than-expectation award, reliance damages.[80] Llewellyn wanted to reform consideration, eliminating technicalities which hurt deserving plaintiffs.[81] So his new law of Sales disdained reliance-in-formation and emphasized "Agreement," under which a court asked if the parties *in fact* had made a bargain,[82] regardless of consideration's legal technicalities.[83]

This focus on the parties' agreement meant that Article 2's remedies could use only the expectation interest: it was the only remedy based on that agreement. Restitution could be awarded without an agreement; reliance damages were out-of-pocket costs, which are independent of the agreement. Only the expectation interest puts the plaintiff in the position she would have been in had the agreement been fully performed. Williston's Act had tried, albeit imperfectly, to protect the expectation interest, so Llewellyn decided to build on and improve Williston's scheme. Indeed, his concern was that the 1906 Act did not sufficiently protect the expectation interest[84] and sometimes

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reasons for the recognition of contractual obligations, the result is a right-duty relation, and the reasons why the relation is created are interesting but practically unimportant." 5 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1338, at 3764 n.7 (rev. ed. 1936). *See* Rakoff, *supra* note 29, at 209 n.28. Rakoff argues that Williston recognized that contract liabilities once were based on detrimental reliance but that reliance-in-formation was now "a holdover from a period in which contract was not clearly distinguished from tort." *Id.* at 208.

78. Fuller attacked Williston's opposition to reliance-in-formation, Lon L. Fuller, *Williston on Contracts, Revised Edition (Book Review)*, 18 N.C. L. REV. 1, 2-5 (1939), and asked if Williston's exclusion of estoppel might require "a special *Restatement of Estoppel*, or a *Miscellaneous Restatement*." *Id.* at 3 n.3.

79. He described its distinction between expectation and reliance damages as "well taken," and he predicted that it would be relevant to his next article. Llewellyn, *supra* note 28, at 781 n.3. That "next" article did not materialize. *See* Gibson, *supra* note 46, at 680-81 n.172. As far as I know, Llewellyn's only later reference to Fuller was in 1941, when he wrote that "as Fuller and Perdue have insisted with sense and power: [sic] when the legal consequence of obligation is too heavy, the *necessary* judicial reaction is to tighten up on the formation-end, to demand more, before 'an' obligation can be established." K. N. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 875 (1941).

80. *See* Letter from Lon Fuller to Karl Llewellyn, *supra* note 31, and *The Reliance Interest*, *supra* note 10, at 420.

81. *See* Llewellyn, *supra* note 28, at 798-99. *See* Gibson, *supra* note 46, at 671-72.

82. *See* U.C.C. §§ 2-204(1), 1-201(3) (1996).

83. *See* Gibson, *supra* note 46, at 677-704.

84. For example, Llewellyn wrote that the "essential difficulty" with Williston's remedies was the lack of a "cover" remedy. K.N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L.

made that protection expensive and difficult.[85]

This endorsement of Williston's expectation interest gave the debates over Article 2's remedies one goal: finding better ways to protect that interest. The drafters repeatedly lamented judicial departures from the original intent of the Uniform Sales Act[86] and listed ten ways to better fulfill that intent regarding the expectation interest.[87] The 1941 draft explicitly endorsed that interest, saying that the "seller's remedies are founded on the principle that his contract entitles him to rely on receiving, net, the value to him of the price, in return for conforming goods, duly delivered"; the buyer's remedies were similarly phrased.[88] Later drafts also identified Article 2's remedial goal as protecting the expectation interest,[89] and contain

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REV. 558, 568-69 (1940). "Cover" meant purchasing substitute materials at a higher price, but since the 1906 Act lacked a cover formula to compensate for the extra cost of those substitutes, it did not put the buyer in the position he would have been in had the seller fully performed. *See id.* at 569.

85. *See id.* at 569.

86. *See* 1941 DRAFT, *supra* note 2, at 259-61, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 539-41 (1984). Similarly, a later draft said "the seller's remedies are reestablished by this Act along the basic lines of the American practice before the Original Act [the Uniform Sales Act of 1906] . . . . " 1944 DRAFT, *supra* note 12, at 68 (General Comment Introductory to the Uniform Revised Sales Act), *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 80 (1984).

87. These were (1) permitting cover and resale, (2) conditioning specific performance on unsuccessful cover, (3) letting plaintiff use any reasonable market price to calculate damages, (4) changing the way liquidated damage clauses were validated, (5) relaxing *Hadley v. Baxendale*'s, 9 Exch. 341 (1854), stringent foreseeability test for consequential damages, (6) clarifying the right to rescind, (7) protecting consumers against summary resale by plaintiff sellers, (8) balancing sellers' and buyers' remedies, (9) replacing remedies with contract-based remedies, and (10) incorporating mercantile remedies. And one of the draft's three overarching themes was to make "realization or attempt to realize on the goods a normal incident of seller's remedy . . . ." 1941 DRAFT, *supra* note 2, at 259-61, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 539-41 (1984). These ideas improved protection of the expectation interest.

88. 1941 DRAFT, *supra* note 2, § 56-A(3)(a)-(b), *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 513 (1984). *See id.* § 62-D cmt., at 273, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 553 (1984) ("*The compulsion to attempt realization* [of the value of the contract to the seller], before a suit in the amount of the price will lie, is the novel and important feature of this section.") (emphasis added).

The major exception is section 2-713, which lets short-term market swings frustrate section 1-106(1)'s expectation goal. *See* WHITE & SUMMERS, *supra* note 5, at 252. Professor (now Justice) Ellen Peters suggests that section 2-713 is a statutory liquidated damage remedy which would remove it from the expectation-reliance-restitution continuum. *See* Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 259 (1963). White and Summers suggest it may be an historic anomaly. *See* WHITE & SUMMERS, *supra* note 5, § 7-6, at 253.

89. *See* 1943 DRAFT, *supra* note 12, *reprinted in* KLP, *supra* note 11, at J.V.2.a., § 95(1) (plaintiff should "be put in as good a position as if the other party had fully performed"); Miscellaneous Comments to 1943 Draft, Introductory Comment to Seller's Remedies, §§ 104-112, *reprinted in* KLP, *supra* note 11, at J.VI.2.g., p.1 (Seller entitled to "de facto realization of the

numerous efforts to make the recovery of expectation damages simpler and less expensive.[90] As a result, the final text of section 1-106 clearly endorses the expectation interest, and two of the three major changes it says the drafters intended in Williston's 1906 Act improve protection of the expectation interest.[91] In short, while Llewellyn and his fellow drafters understood Fuller's reliance interest, they chose instead to renovate and improve Williston's existing expectation structure.

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value of his contract"); Drafts of Sales Act Comments on Remedies, *reprinted in* KLP, *supra* note 11, at J.VI.2.i., p.1 (remedies should restore Seller to position it would have been in had contract not been breached); File of Sales Act Comments, Introductory Comment to Seller's Remedies, *reprinted in* KLP, *supra* note 11, at J.VIII.2.b. (goal of Seller's remedies is "de facto realization of the value of the contract . . . the difference between the contract price and the cost to him of supplying the goods"); 1944 DRAFT, *supra* note 12, § 103(1), *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 66 (1984) (plaintiff "may be put in as good a position as if the other party had fully performed"); 1946 DRAFT, *supra* note 12, § 102(1), *reprinted in* KLP, *supra* note 11, at J.VIII. 2.a., p.41 (same); 1948 DRAFT, *supra* note 12, § 102(1), *reprinted in* 5 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 283 (1984) (same).

90. They created cover and resale formulas to make damages simpler, more certain, and consistent with mercantile practices. *See, e.g.*, Introductory Comment to the "Cover" Sections, 58-58-H, 1941 DRAFT, *supra* note 2, at 242-43, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 522-23 (1984); § 107/§ 8-5 cmt., KLP, *supra* note 11, at J.VIII.2.a. (Seller resells to fix his damages); § 113/[§] 8-11 cmt., *reprinted in* KLP, *supra* note 11, at J.VIII.2.a. (cover fixes Buyer's damages, eliminating "the often difficult problem of establishing a hypothetical market price"). Merchants survive on performance of contracts, so the drafters' preoccupation with performance carried over to their use of the expectation interest. *See* Nordstrom, *supra* note 50, at 1150. *Cf.* 1941 DRAFT, *supra* note 2, § 61, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 522 (1984) (cover provides Buyer the "agreed benefit" under the contract); *id.* § 61 cmt., at 544 (Seller's price is basic measure of Seller's damages).

They avoided the 1906 Act's extensive use of hypothetical market prices, Introductory Comment to the "Cover" Sections, 58-58-H, 1941 DRAFT, *supra* note 2, at 243, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 523 (1984); its insistence on election of remedies, Introductory Comment to §§ 61-71, 1941 DRAFT, *supra* note 2, at 258, 260-61, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 538, 540-41 (1984); § 63-B, 1941 DRAFT, *supra* note 2, at 276-77, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 556-57 (1984); § 71 & cmt. 3, 1941 DRAFT, *supra* note 2 at 286-87, *reprinted in* 1 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 566-67 (1984); and its ban on lost profits for new business, § 116/§ 8-14 cmt., Files of Sales Act Comments (1946), *reprinted in* KLP, *supra* note 11, at J.VIII.2.b., at 6-10 ("[P]roper evidence" of "cost of operation and probable sales should be enough" to send case to jury; court should allow recovery if "at least a minimum amount of profit can be proved" and award lost goodwill even if approximate.).

91. The first change negates "the unduly narrow or technical interpretation[s]" which have constrained awards; the third loosens the certainty rules which made damages difficult to prove. The second change, which does not concern the expectation interest, prevents use of tort-based punitive damages. *See* U.C.C. § 1-106 cmt. 1 (1996).

### *B. Article 2 Displaces the Reliance Interest*

In light of the drafters' decision to continue using Williston's expectation-based remedies, it is hardly surprising to find that they did not endorse reliance damages, that the text and commentary of Article 2 exclude reliance damages, and that four sections of Article 2 which seem broad enough to permit use of the reliance interest actually protect the expectation interest.

#### 1. The Drafting History

Silence. There is only silence. In the twenty-three volumes of Elizabeth Kelly's *Uniform Commercial Code Drafts* and the twenty-six rolls of microfilm comprising Llewellyn's personal notes on Article 2,[92] I did not find a single reference to the reliance interest. This silence was not based on ignorance. Llewellyn and Fuller corresponded about *The Reliance Interest*;[93] other academic drafters could hardly have overlooked Fuller's article, given its publication in the *Harvard Law Review*; and the ALI, a major sponsor of the Code, had debated the propriety of reliance damages.[94] Yet, I cannot find any reference in the drafting history to reliance damages. The silence is deafening.

#### 2. Article 2's Text and Commentary Exclude the Use of Reliance Damages

Of course, the drafters' silence is not conclusive. But its negative implication is reinforced by the way in which the final text and commentary of Article 2's remedies expressly and implicitly make the expectation interest the exclusive remedy and displace promissory estoppel, a cause of action often linked with reliance damages.

##### *a. Article 2's damage rules displace the reliance interest*

Sometimes the drafters explicitly displaced non-expectation remedies. For sellers, section 2-703's list of expectation remedies is exhaustive,[95] and Comment 1 makes that list exhaustive.[96] Three specific

92. *See* KLP, *supra* note 11, at pt. J.

93. *See supra* note 71 and accompanying text.

94. *See supra* notes 19-21 and accompanying text.

95. Section 2-703 cmt. 1, says the list is exhaustive. Section 2-703 uses language which sounds like restitution, but only in the context of protecting the seller's expectation interest. *See*

seller's damage sections state that if their requirements are met, the seller must receive her expectation remedies.[97] The buyer's expectation remedies also are exclusive.[98] The remaining remedial sections implicitly displace other remedies in three ways. First, the seller's major damage provisions repeatedly instruct courts to protect the expectation interest, even when the reliance interest is easy to calculate. When a buyer breaches, a seller's reliance costs are obvious: how much has she spent producing the goods? Yet the main seller's remedies (sections 2-706, 2-708(1), 2-708(2), and 2-709) protect her expectation interest. As for the buyer, his remedies protect the expectation interest, even when the reliance interest is easy to prove.[99]

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*infra* text accompanying notes 141-70.

96. "This section is an index section which gathers together in one convenient place *all* of the various remedies open to a seller for *any* breach by the buyer." U.C.C. § 2-703 cmt. 1 (1996) (emphasis added). The same language appears in Comment on § 104/§ 8-2, Files of Sales Act Comments (1946), *reprinted in* KLP, *supra* note 11, J.VIII.2.b., at 1.

97. Section 2-708(1) says that "the measure of damages for non-acceptance or repudiation by the buyer *is* the difference between the market price at the time and place for tender and the unpaid contract price." (emphasis added). Section 2-708(2) says that if section 2-708(1)'s remedies fail to "put the seller in as good a position as performance would have done," i.e., if section 2-708(1) fails to protect the seller's expectation interest, then "the measure of damages *is* the profit (including reasonable overhead) which the seller would have made from full performance by the buyer . . . ." (emphasis added). Section 2-709(3) says that a seller who is not entitled to the full price "*shall* nevertheless be awarded damages for non-acceptance" under section 2-708. (emphasis added).

The major exception is the provision for resale, § 2-706(1), which says a seller "may" recover losses incurred on resale. The permissive verb suggests that the resale remedy is not exclusive, but the legislative history reveals otherwise. The earliest comments to that section said that it "prescribes the exclusive measure of the seller's damages" when the seller has properly resold. § 107/§ 8-5 cmt., *reprinted in* KLP, *supra* note 11, at J.VIII.2.b., p.7. That language later disappeared because it would have prevented lost volume sellers (who, by definition, resell goods which a buyer has wrongfully rejected) from seeking lost profits under section 2-708(2).

98. Unlike section 2-703's single list of seller's remedies, the buyer's remedies appear in section 2-711, which lists those available to a buyer who rightfully rejects goods or revokes an acceptance, and in section 2-714, which states the remedy for a buyer who accepts and retains non-conforming goods.

Both sections use exclusive language. Section 2-711 cmt. 1 says, "The remedies listed here are those available to the buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to the buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. [§ 2-714]" *See also* 1943 DRAFT, *supra* note 12, § 105(1), *reprinted in* KLP, *supra* note 11, at J.V.2.a. (Buyer permitted to cover, "or" recover market-based damages, "or" seek specific performance).

99. A buyer's reliance damages often are hard to prove. *See* Llewellyn, *supra* note 28, at 803 (buyers rely in "intangible ways absurdly difficult to prove"). So section 2-712 (the extra cost of substitute goods), section 2-713 (contact price/market price differential), and section 2-714 (difference in value between goods promised and delivered) award expectation damages.

The cover formula protects the expectation interest even if Buyer's reliance damages are clear. If Buyer purchases widgets at $5 each from Seller (declining to purchase from others at $6), Seller breaches, and the Buyer covers at $7, Buyer's expectation damages are the additional cost of cover ($7-$5= $2). His reliance damages are the $1 difference between the cover price ($7) and the price

Second, the minor remedial provisions protect the expectation interest, even when reliance damages might seem appropriate. For example, if a buyer breaches before the seller finishes making the goods, the seller must decide to finish production or to sell the unfinished materials as scrap. What if the seller, using reasonable commercial judgment, overestimates the goods' resellability and spends money finishing what turn out to be useless goods? Full expectation damages would punish the buyer for the seller's incorrect judgment, but denying all damages would punish the seller. Awarding the seller her costs of production, i.e., her reliance interest, seems an easy compromise. Nevertheless, Article 2 protects the seller's expectation interest.[100]

Third, the comprehensiveness of Article 2's remedial scheme implicitly displaces reliance damages.[101] Many judges have said that a "statute's mention of one thing implies the exclusion of another."[102] Article 2 has twenty-five remedial statutes: not one mentions the reliance interest.

But what of the drafters' use of permissive verbs? While some sections say their remedy "is" a certain formula or that the plaintiff "shall" recover according to a particular formula,[103] section 2-706 says the seller "may recover" her losses on resale, and section 2-712(2) says the buyer "may recover" the additional costs of cover. Aggrieved sellers "may" stop delivery or reclaim goods.[104] Does this permissive language allow courts to use non-expectation awards? I think the drafters used "may" for other reasons. Sometimes it lets the plaintiff decide whether to take certain

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he passed up in reliance on Seller's promise ($6). Section 2-712 gives him $2.

100. Section 2-704, Comment 1, says that if resale is not practicable, the seller may seek the full price under section 2-709(1), "which would then be necessary to give the seller the value of his contract."

If the seller does not use reasonable commercial judgment and spends more to finish the goods than they are worth, reliance damages (the production costs) would overcompensate the seller. Limiting the seller to its expectation interest (the contract price) is far more sensible. *See* WHITE & SUMMERS, *supra* note 5, § 7-15, at 285.

101. *See* Kelly v. Miller, 575 P.2d 1221, 1224 (Alaska 1978); Prince v. LeVan, 486 P.2d 959, 962 (Alaska 1971) (when specific Code provisions deal with situation, they should be applied).

102. United States v. Castro, 837 F.2d 441, 442 (11th Cir. 1988) (citations omitted); DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479, 1495 (M.D. Fla.), *aff'd sub nom.* DeSisto College, Inc. v. Linc, 888 F.2d 766, 767 (11th Cir. 1989); Chem-Ash, Inc. v. Arkansas Power & Light Co., 751 S.W.2d 353, 354 (Ark. 1988); Pryor Oldsmobile/GMC Co. v. Tennessee Motor Vehicle Comm'n, 803 S.W.2d 227, 230 (Tenn. Ct. App. 1990). Llewellyn agreed. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 405 (1950).

103. The mandatory "is" or "shall" occurs in sections 2-708(1), 2-708(2), 2-709(3), 2-713(1), and 2-714(2). The permissive "may" is in sections 2-703, 2-704(1), 2-704(2), 2-706, 2-709(1), 2-711, and 2-712.

104. *See* U.C.C. §§ 2-702(1)-(2), 2-705(1) (1995).

actions: it would be strange to *require* an aggrieved seller to stop delivery.[105] Sometimes "may" is used because recovery is conditional upon the plaintiff doing something, such as properly reselling or covering.[106] Sometimes the drafters let the plaintiff choose between several remedies; making one mandatory would eliminate that choice.[107] Sometimes the text seems permissive, but the comments expressly make the text exhaustive.[108]

In summary, Article 2 explicitly or implicitly displaces all non-expectation remedies. The drafters had ample opportunity to protect the reliance interest; there is no evidence that they did.

### *b. Article 2's formation rules exclude reliance damages based on promissory estoppel*

Article 2 displaces reliance damages in another, subtler manner. In service transactions, reliance damages are often linked with the use of reliance to enforce a deal[109] or to override the Statute of Frauds.[110] But Article 2's formation rules displaced promissory estoppel,[111] and the ALI, following Llewellyn's lead, rejected reliance as an exception to the Statute of Frauds.[112]

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105. *Cf. id.*

106. *See* U.C.C. §§ 2-706(1), 2-712(1)-(2) (1995). The 1946 resale formula said it was the seller's "exclusive" remedy when made properly. Comment on §§ 103/8-1 to 111/8-9, Files of Sales Act Comments (1946), at 7, *reprinted in* KLP, *supra* note 11, at J.VIII.2.b.

107. For sellers, section 2-703 gives a choice of remedies. More specifically, section 2-706's permissive language gives a lost volume seller who resells lost profits under section 2-708(2), rather than just section 2-706's cover formula. For the buyer, section 2-711(1) allows a similar choice of remedies.

108. *Compare* U.C.C. § 2-703 ("the aggrieved seller may"), *with* § 2-703 cmt. 1 ("This section is an index section which gathers together . . . *all* of the various remedies open to a seller . . . .") (emphasis added); *compare* § 2-711(1)-(2) (Buyer "may" cover, recover damages for non-delivery, reclaim the goods or obtain specific performance), *with* § 2-711 cmt. 1 ("The remedies listed here are those available to a buyer who has not accepted the goods . . . ."). One section uses *both* permissive and mandatory language. Section 2-714(1) says a buyer who accepts non-conforming goods "may recover" the loss so incurred; section 2-714(2) says that the damage formula for breach of warranty "is" the difference in value between the goods as promised and as delivered.

109. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) & cmt. d (1982).

110. *See id.* § 139 cmt. d.

111. *See* Gibson, *supra* note 46, at 681-82, 686-89.

112. The ALI voted to support Llewellyn's position on this issue. *See Discussion: Proposed Final Draft of the Uniform Revised Sales Act*, 21 A.L.I. PROC. 63, 85-86 (1944); Gibson, *supra* note 46, at 690-96.

### 3. Neither Article 1 nor Article 2 Implicitly Support the Reliance Interest

Although the drafters left a few holes in their expectation-based remedial scheme, none of them are wide enough to admit reliance damages. The first candidate is section 1-106, Comment 2, which makes "equitable relief" available.[113] Since equity includes promissory estoppel,[114] and since the common law links that doctrine with reliance damages,[115] one might infer that the drafters intended to include the reliance interest. But that would conflict with the express text of section 1-106(1). Furthermore, when Article 2 was written, equity did not award monetary relief.[116] Indeed, the drafting history discussed only non-monetary equitable relief: specific performance, restitution, cancellation, reformation, and equitable liens.[117] And while Llewellyn urged courts to be flexible in awarding remedies, he did so in the context of expectation damages.[118]

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113. This follows the drafting history. *See* 1944 Act, § 2 cmt., at 79-80, *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 91-92 (1984) (equity as inherent part of Sales law); Drafts of Sales Act Comments on Remedies, Introductory Comment on Buyer's Remedies, 1944 DRAFT, *supra* note 12, *reprinted in* KLP, *supra* note 11, J.VI.2.i. (unwise to restrict equity); Files of Sales Act Comments (1946), Introductory Comments to Buyer's Remedies, *reprinted in* KLP, *supra* note 11, at J.VIII.2.b. (Act extends equity to Sales law); Commercial Law Materials Part III, Selected Comments on Revised Sales Act, *reprinted in* KLP, *supra* note 11, at J.X.2.h. (criticizing courts who disregard equity).

114. *See* DOBBS, *supra* note 51, § 2.3(5), at 84-85, 87-88.

115. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) & cmt. d (1982).

116. *See* BALLENTINE'S LAW DICTIONARY 634 (1948); BLACK'S LAW DICTIONARY 1012 (2d ed. 1910); JOHN NORTON, POMEROY'S EQUITY JURISPRUDENCE § 108, at 138-39, § 110, at 141-43, 143 n.5 (Spencer W. Symons ed., 1941); WILLIAM F. WALSH, A TREATISE ON EQUITY § 9, at 45 (1930).

To be fair, Pomeroy said that equitable relief could include monetary damages "under very peculiar circumstances," as in cases of contribution, exoneration, a decree of money to be paid from a particular fund, or the distribution of funds when settling an estate or winding down a partnership. NORTON, *supra*, § 112, at 147-49. Another source says equity could award money in cases of account, fifteenth century contracts not under seal for the sale of land, the enforcement of judicial decrees, and equitable enforcement of oral contracts for the sale of land. *See* WALSH, *supra*, § 4, at 22-25, § 15, at 62. None of these examples concern goods.

117. *See* 1944 DRAFT, *supra* note 12, § 2 cmt., at 78-80, *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 90-92 (1984) (restitution, cancellation, reformation, and equitable liens); Commercial Law Materials Part III, Selected Comments on Revised Sales Act, *reprinted in* KLP, *supra* note 11, at J.X.2.h. (restitution and cancellation). For specific performance, see U.C.C. §§ 1-106 cmt. 2, 2-716.

118. *See NCCUSL Debate* (Aug. 13, 1943), *reprinted in* KLP, *supra* note 11, at J.V.2.h., at 175. Similarly, section 1-102, Comment 1, endorses courts which "have implemented a statutory policy with liberal and useful remedies not provided in the statutory text" and which "have disregarded a statutory limitation of remedy where the reason of limitation did not apply." Since

A second potential opening for reliance damages appears in section 1-103, which says that "principles of law and equity, including . . . estoppel" shall supplement the Code's text. One could argue that "estoppel" includes "promissory estoppel," which, as just mentioned, is linked to reliance damages. But section 1-103's drafters intended something much different. "Estoppel" meant to them what "equitable estoppel" means to us.[119] Legal dictionaries of the time distinguish between estoppel by deed, by record, and *en pais*,[120] but they do not mention "promissory estoppel."[121] Even Williston, who coined the term,[122] said that it did "not come within the ordinary definition of estoppel."[123] The Code's drafters left no hint that they intended to dramatically expand the traditional meaning. The New York Law Revision Commission said section 1-103's use of "estoppel" did "not seem to be very significant," since the term was a "long-established principle in Sales law."[124] This hardly endorses a new and controversial doctrine which had yet to be applied in a commercial case.[125] And there is always section 1-106(1)'s command to protect the expectation interest.[126]

The third and fourth provisions which might permit use of the reliance interest appear in section 2-714. Section 2-714(1) lets a buyer who has accepted defective goods recover damages as "determined in any manner which is reasonable"; section 2-714(2) allows "special circumstances" to trigger other, unspecified remedies. These phrases, though vague, do not create openings for reliance damages. By their own terms, they apply only

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section 1-106(1) says the Code's policy is to protect the expectation interest, any judicially-created remedies would have to do the same.

119. The "preclusion of a person from asserting a fact, by previous conduct inconsistent therewith . . . or by an adjudication upon his rights which he cannot be allowed to call in[to] question." BOUVIER'S LAW DICTIONARY: BALDWIN'S STUDENTS EDITION 365 (1940); *see* WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIC LAW DICTIONARY 400 (3d ed. 1940). A similar definition appears in BLACK'S LAW DICTIONARY 648 (1957). Furthermore, when Article 2 was written, the standard remedy for promissory estoppel was full enforcement of the promise, RESTATEMENT OF CONTRACTS § 90, which is, of course, the expectation interest.

120. *See* BOUVIER'S, *supra* note 119, at 365; BLACK'S LAW DICTIONARY 649 (rev. 4th ed. 1968); BALLENTINE'S, *supra* note 116, at 452; SHUMAKER & LONGSDORF, *supra* note 119, at 400.

121. *See supra* notes 116, 119-20.

122. *See* Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950); *Promissory Estoppel*, *supra* note 18, at 332-33 n.5.

123. 1 WILLISTON, *supra* note 77, § 139, at 494.

124. 1 STATE OF NEW YORK LAW REVISION COMM'N REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE 168 (1955).

125. *See* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933).

126. And section 1-103 says other parts of the Code may displace its supplemental principles. U.C.C. §§ 1-103, 1-106(1) (1995).

when the Buyer has accepted defective goods and has not revoked acceptance, i.e., when the Seller has completed performance, albeit defectively. That creates a quandary. Reliance damages put the plaintiff in the position she would have been in had the contract never been made.[127] How can that be done when the Buyer already has accepted the Seller's performance?[128]

Furthermore, judges and scholars have discussed these mysterious clauses[129] exclusively in the context of expectation damages. One court read section 2-714(1)'s "any reasonable manner" language as placing the plaintiff "in the same position which he would have been [in] had the contract not been breached,"[130] i.e., the expectation interest. Others have read section 2-714(1)'s language as a general statement which is more specifically defined by section 2-714(2)'s expectation-based diminution-in-value formula.[131] The other suggested uses are consistent with the expectation interest.[132]

Similarly, section 2-714(2)'s "special circumstances" always has

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127. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1982).

128. All four illustrations to the *Restatement (Second) of Contracts*' reliance damage provision, § 349, involve full repudiation by a defendant who has not yet begun to perform. Section 90, Comment d, also discusses reliance damages, and none of its illustrations involve partial performance by the defendant. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d, illus. 8-9 (no delivery), illus. 10 (reliance before contract created), illus. 11 (promise to refrain from acting), illus. 12 (gift) (1982).

129. One commentator says the courts "[have] yet to broach" the scope or the appropriate damage formula for section 2-714(1)'s "any reasonable manner" language. GEORGE I. WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 10.03, at 10-9 to 10-10 (1981). Others read it as an alternative to section 2-714's diminution-in-value formula, though they do not explain how or when to use it. *See* WHITE & SUMMERS, *supra* note 5, § 10-2, at 364 n.1.

Neither the Code's text nor commentary define section 2-714(2)'s "special circumstances," *see Special Project, Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 117 (1978) [hereinafter *Special Project*], nor have courts, *see* WALLACH, *supra*, ¶ 10.03, at 10-10.

130. Bunch v. Signal Oil & Gas Co., 505 P.2d 41, 43 (Colo. Ct. App. 1972).

131. *See* Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197, 1203 (8th Cir. 1984); Michiana Mack, Inc. v. Allendale Rural Fire Protection Dist., 428 N.E.2d 1367, 1370 (Ind. Ct. App. 1982). *See also* WALLACH, *supra* note 129, ¶ 10.03 at 10-9; WHITE & SUMMERS, *supra* note 5, § 10-2, at 364; Peters, *supra* note 88, at 269. The RESTATEMENT (SECOND) OF CONTRACTS § 347(a), § 347 cmt. b (1982), classifies the diminution-in-value formula as a type of expectation damages.

132. Some say it applies only to late deliveries. *See* Richmond Riders Courier Serv., Inc. v. Dreelin Cellular Sys., Inc., 12 U.C.C. Rep. Serv. 2d (CBC) 719, 720 (Va. Cir. Ct. 1990); WALLACH, *supra* note 129, at 10-9; Peters, *supra* note 88, at 269. One court used it to award the cost of repairing defective goods, Miller v. Badgely, 753 P.2d 530, 536 (Wash. Ct. App. 1988), even though such costs are routinely awarded under section 2-714(2), *see* WHITE & SUMMERS, *supra* note 5, § 10-2 at 365-67. Another said it reduced the certainty required to prove damages, *Lackawanna Leather Co.*, 730 F.2d at 1203, although stronger support is in section 1-106, Comment 1. A third court said section 2-714(1) incorporated common law rules on foreseeability, District Concrete Co. v. Bernstein Concrete Corp., 418 A.2d 1030, 1037 (D.C. 1980), overlooking section 2-715, Comment 2's express discussion of foreseeability.

been read consistently with the expectation interest. Courts most often use it to award the cost of repairing defective goods[133] (which puts the Buyer in the position he would have been in if the contract had been fully performed), to grant consequential and incidental damages,[134] or to adjust section 2-714(2)'s diminution-in-value formula to reflect changes in the value of the defective goods since delivery.[135] A few courts have found special circumstances

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133. *See* Downs v. Shouse, 501 P.2d 401, 406 (Ariz. Ct. App. 1972); Vorthman v. Keith E. Meyers Enters., 296 N.W.2d 772, 777-78 (Iowa 1980) (damages based on value of pigs that died and cost of healing survivors); Perth Amboy Iron Works, Inc. v. American Home Assurance Co., 543 A.2d 1020, 1030-31 (N.J. Super. Ct. App. Div. 1988); Sharrard, McGee & Co. v. Suz's Software, Inc., 396 S.E.2d 815, 819 (N.C. Ct. App. 1990).

Many cases go further and award the cost of replacing (rather than repairing) the item, either because the defective goods had no value or because their uniqueness makes calculating section 2-714(2)'s diminution-in-value formula difficult. *See* R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 273 (8th Cir. 1985); City of New York v. Pullman, Inc., 662 F.2d 910, 918 (2d Cir. 1981); Hospital Computer Sys., Inc. v. Staten Island Hosp., 788 F. Supp. 1351, 1364-65 (D.N.J. 1992); *In re* Barney Schogel, Inc., 12 B.R. 697, 719 (Bankr. S.D.N.Y. 1981); Meldco, Inc. v. Hollyex Carpet Mills, Inc., 796 P.2d 142, 147 (Idaho Ct. App. 1990); Hillcrest Country Club v. N.D. Judds Co., 461 N.W.2d 55, 66 (Neb. 1990); Gem Jewelers, Inc. v. Dykman, 553 N.Y.S.2d 890, 892-93 (1990); Cober v. Corle, 610 A.2d 1036, 1041 (Pa. Super. Ct. 1992); Mountaineer Contractors, Inc. v. Mountain State Mack Inc., 268 S.E.2d 886, 893-94 (W. Va. 1980). *Cf.* Vista St. Clair, Inc. v. Landry's Commercial Furnishings, Inc., 643 P.2d 1378, 1380 (Or. Ct. App. 1982) (extensive delays in repairing and replacing goods were special circumstances justifying damages in addition to costs of repair).

134. *See* County of Hennepin v. AFG Indus., Inc., 726 F.2d 149, 154-55 (8th Cir. 1984); Lewis v. Mobil Oil Corp., 438 F.2d 500, 507 (8th Cir. 1981); Murray v. Kleen Leen, Inc., 354 N.E.2d 415, 422 (Ill. App. Ct. 1976); Adams v. J. I. Case Co., 261 N.E.2d 1, 8-9 (Ill. App. Ct. 1970); Keystone Diesel Engine Co. v. Irwin, 191 A.2d 376, 378-79 (Pa. 1963), *overruled by* R.I. Lampus Co. v. Neville Cement Prods. Corp., 378 A.2d 288, 291-92 (Pa. 1977); Lanphier Constr. Co. v. Fowco Constr. Co., 523 S.W.2d 29, 41-42 (Tex. Civ. App. 1975); General Supply & Equip. Co. v. Phillips, 490 S.W.2d 913, 919 (Tex. Civ. App. 1972). *See also* cases cited in *Special Project*, *supra* note 129, at 117-18 n.366; *Special Project, Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1226 (1987) [hereinafter *Special Project Update*].

Many courts use the "special circumstances" language to award consequential damages, despite sections 2-714(3) and 2-715. *See R.I. Lampus Co.*, 378 A.2d at 291-92 (and cases cited); *Special Project*, *supra* note 129, at 117-18.

135. This happens when Seller fails to deliver good title, and the true owner of the goods reclaims them after Buyer has used them. Some courts use the "special circumstances" language to offset the value of that use. *See* U. J. Chevrolet Co. v. Marcus, 460 So. 2d 1341, 1343 (Ala. Civ. App. 1984); City Car Sales, Inc. v. McAlpin, 380 So. 2d 865, 868 (Ala. Civ. App. 1979), *cert. denied*, 380 So. 2d 869 (Ala. 1980); Ricklefs v. Clemens, 531 P.2d 94, 99-102 (Kan. 1975); Metalcraft, Inc. v. Pratt, 500 A.2d 329, 335-37 (Md. Ct. Spec. App. 1985); Schneidt v. Absey Motors, Inc., 248 N.W.2d 792, 799 (N.D. 1976); *Special Project*, *supra* note 129, at 125 n.392.

Other courts say the lack of good title made the goods valueless when delivered and award their full value under section 2-714(2)'s diminution-in-value formula. *See* Hudson v. Gaines, 403 S.E.2d 852, 854-55 (Ga. Ct. App. 1991); Murdock v. Godwin, 269 S.E.2d 905, 907 (Ga. Ct. App. 1980); Crook Motor Co. v. Goolsby, 703 F. Supp. 511, 521-22 (N.D. Miss. 1988). *Cf.* Masoud v. Ban Credit Serv. Agency, 494 N.Y.S.2d 598, 600 (Sup. Ct. 1985).

when a buyer sought compensation for a judgment paid to or a settlement with a third-party buyer who discovered the defect,[136] compensating the breaching, yet innocent, Buyer for the consequential damages caused by liability to this third party, and letting him keep the profits from the transaction. Some courts have used section 2-714(2)'s special circumstances language when the regular formulas were difficult to use.[137] Others have used it on problems covered by other parts of Article 2,[138] and some apply it to unusual fact patterns.[139] I did not find a single court which used it to protect the reliance interest.

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The Cornell Special Project suggested that the "special circumstances" language could apply to both breaches of title and of warranty, *see Special Project*, *supra* note 129, at 125-28, and some courts have agreed. *See* Intervale Steel Corp. v. Borg & Beck Div., Borg-Wagner Corp., 578 F. Supp. 1081, 1090-91 (E.D. Mich. 1984), *aff'd without opinion*, 762 F.2d 1008 (6th Cir. 1985); Harlan v. Smith, 507 So. 2d 943, 945 (Ala. Civ. App. 1986); Vreeman v. Davis, 348 N.W.2d 756, 757-58 (Minn. 1984). *But see* Shavers v. Massey-Ferguson, Inc., 834 F.2d 970, 973 (11th Cir. 1987) (Buyer's use of tractor after acceptance did not trigger "special circumstances" language).

136. *See* De Weber v. Bob Rice Ford, Inc., 590 P.2d 103, 105 (Idaho 1979); Acme Pump Co. v. National Cash Register Co., 337 A.2d 672, 677 (Conn. Super. Ct. 1974).

137. *See* Downs v. Shouse, 501 P.2d 401, 406 (Ariz. Ct. App. 1972); Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 73 (Idaho 1983); *see also Special Project Update*, *supra* note 134, at 1226-27.

138. *See* Adam Metal Supply, Inc. v. Electrodex, Inc., 386 So. 2d 1316, 1318 (Fla. Dist. Ct. App. 1980) (Buyer accepted and processed raw materials before discovering defect; court awarded cost of processing under section 2-714(2) instead of consequential damages under section 2-715); Toyomenka (Am.), Inc. v. Combined Metals Corp., 487 N.E.2d 1172, 1175-76 (Ill. App. Ct. 1985) (same); Wright v. T & B Auto Sales, Inc., 325 S.E.2d 493, 496-97 (N.C. Ct. App. 1985) (when easily-fixed defects damaged car engine, court used section 2-714(2) to award cost of easy repairs and "special circumstances" language to award cost of new engine, instead of simply using cost of replacement engine to determine the value of the goods for purposes of section 2-714(2)'s regular diminution-in-value formula).

139. *See* Neilson Bus. Equip. Ctr. v. Italo V. Monteleone, 524 A.2d 1172, 1176 (Del. Super. Ct. 1987) (use of installment payment plan might create "special circumstances"); *cf.* Chaney v. G.M.A.C., 349 So. 2d 519, 521-22 (Miss. 1977) (no special circumstances when Buyer refused to pay for defective truck, and Seller repossessed it, depriving Buyer of its use); Canterra Petroleum, Inc. v. Western Drilling & Mining Supply, 418 N.W.2d 267, 275 (N.D. 1987) (no special circumstances when Buyer accepted goods, stored them, and learned of breach of title warranty before use). White and Summers suggest that section 2-714(2)'s special circumstances language may let courts, when applying section 2-714(2)'s diminution-in-value formula, use the value of the goods to the Buyer, instead of the goods' fair market value. *See* WHITE & SUMMERS, *supra* note 5, § 10-2, at 365-67.

### C. *Article 2 Uses Restitution as a Means of Protecting the Expectation Interest, Not as a Separate Interest*

#### 1. Article 2's Apparent Use of Restitution

What of those sections which mention restitution?[140] Section 2-718 does so twice, and other rules use what seems to be the restitution interest.[141] The drafters referred to restitution,[142] as have several commentators.[143] Can we reconcile these references with the Code's allegedly exclusive protection of the expectation interest? If restitution snuck into the Code, did reliance do the same? I think the answer has five parts: (1) sometimes Article 2 displaces common law restitution, (2) sometimes it incorporates restitution as part of the expectation interest, (3) sometimes it uses restitution as a security device to enable the plaintiff to obtain her expectation interest, (4) sometimes it uses restitution because no expectation interest exists, and (5) sometimes restitution prevents a plaintiff seller from receiving more than her expectation interest.

#### 2. Displacing Restitution

Article 2 displaces restitution in five ways. It eliminates restitution

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140. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(c) (1982).

141. Under section 2-305(4), if contract negotiations break down after Seller delivers or Buyer pays, Buyer must return any goods already received or pay their reasonable value, and Seller must return any portion of the price paid. Sections 2-702, 2-703(a)-(b), and 2-705 allow Seller to stop or withhold delivery from an insolvent Buyer. If Seller breaches before delivery, and Buyer has partially paid, Buyer can recover all payments made, § 2-711(1), and regular damages.

142. An early comment used restitution as an example of a body of law that supplements the Code and said "the remedies provided in this Act do not seek to cover the details of restitution." Comment on § 2, 1944 DRAFT, *supra* note 12, at 78-79, *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 90-91 (1984). A comment on section 1-103 also said that the Code's remedies did not cover restitution, since its "application in appropriate cases is inherent." Selected Sales Comments, 1948 DRAFT, *supra* note 12, *reprinted in* KLP, *supra* note 11, at J.X.2.h., at 6.

143. *See* HILLMAN ET AL., *supra* note 51, ¶¶ 1.06[1][d], at 113-14, 9.03[7][b], at 9-34 to 9-38; 1 GEORGE E. PALMER, LAW OF RESTITUTION § 4.16, at 499-501 (1978); Anderson, *supra* note 53, at 249-50, 263-77; Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 YALE L.J. 14, 15 n.6, 20-21 n.20; Nordstrom, *supra* note 50.

Two commentators argue that section 1-103, the supplementary principles of law provision, lets courts apply pre-Code restitution rules. Anderson argues that section 1-103 lets courts apply pre-Code restitution rules, while Nordstrom assumes pre-Code cases should continue to protect a seller's restitution interest. *See* Anderson, *supra* note 53, at 269;Nordstrom, *supra* note 50, at 1166. Others say section 1-106 overrides restitution. *See* HILLMAN ET AL., *supra* note 51, ¶ 9.03[7][b], at 9-34.

in Statute of Frauds cases[144] and for implied-in-fact contracts.[145] It requires a buyer who accepts defective goods to pay the contract price,[146] rather than the fair market value of the goods, as the common law did.[147] It awards the full contract price to a seller who delivers in a falling market, not just the fair market value of the goods.[148] Finally, it displaces restitution in the rare situation of a buyer who breaches in a rising market after the seller partially delivers. Suppose the contract price is $10 per unit; Seller delivers several, but not all, the goods; their market value rises to $12 each; and Buyer breaches.[149] Common law let Seller cancel the contract and seek restitution, i.e., the $12 market price for the delivered goods;[150] one commentator says UCC section 1-103 preserves this remedy.[151] But Article 2 lets Seller cancel the contract for only the *un*delivered goods (for which restitution is impossible),[152] and it requires Buyer to pay "the contract rate" ($10) for the delivered and accepted goods.[153] A $12 restitution award would exceed the $10 contract price and violate section 1-106's goal of protecting the Seller's

144. At common law, a defendant who used the Statute of Frauds had to disgorge any benefits received from a partially performing plaintiff. *See* Anderson, *supra* note 53, at 272; Mather, *supra* note 143, at 40-41; 2 PALMER, *supra* note 143, § 6.12(a), at 91. But section 2-201(3)(c) enforces the oral contract to the extent of the partial performance, protecting the plaintiff's expectation interest.

145. Common law said these were contracts based on actions rather than words, and it often used restitution damages, especially if the parties had not agreed to an important term. *See* Anderson, *supra* note 53, at 264-67. But section 2-204 eliminates the distinction between regular and implied-in-fact contracts: it says a contract may be formed in any manner sufficient to show agreement, including conduct. If the parties did not agree on a key term, such as price, but still intended to be bound, the court sets a reasonable price, § 2-305(1), and protects the expectation interest. *See* Universal Lite Distrib. v. Northwest Indus., 602 F.2d 1173, 1175-76 (4th Cir. 1979) (promise to sell at "lowest price" not too vague to create enforceable contract: trial court award of lost profits reversed only for lack of certainty).

146. *See* U.C.C. § 2-607(1) (1995). Of course, the buyer will protect his expectation interest by counterclaiming for damages under section 2-714's diminution-in-value formula.

147. *See* Nordstrom, *supra* note 50, at 1179. He and Anderson admit Article 2 supersedes restitution here. *See id.* at 1179-80; Anderson, *supra* note 53, at 270.

148. Hillman presents this unlikely scenario. *See* HILLMAN ET AL., *supra* note 51, ¶ 9.03[7][b][ii], at 9-35. In a falling market, Seller would do its best to deliver in full, and Buyer who received only partial delivery simply would buy cheaper substitute goods. Nordstrom argues that section 1-103 would limit Seller to her restitution interest on the delivered goods, but section 2-709(1)(a) awards Seller the full contract price on *any* goods which Buyer accepts. *See id.*

149. Of course, few buyers would breach if they could acquire $12 goods for only $10.

150. Remember, restitution restores to the Seller the value of her performance, and several commentators base that value on the current market price. *See* Nordstrom, *supra* note 50, at 1164-65; Anderson, *supra* note 53, at 268-69.

151. *See* Anderson, *supra* note 53, at 269. Nordstrom also would permit restitution here. *See* Nordstrom, *supra* note 50, at 1166.

152. *See* U.C.C. § 2-703 (1995).

153. *See* Mather, *supra* note 143, at 20 n.20 (citing U.C.C. § 2-607(1)). U.C.C. § 2-507(1) also says that "Tender entitles the Seller . . . to payment according to the contract."

expectation interest.[154] And, finally, the exhaustive list of Seller's remedies does not mention restitution.[155]

### 3. Incorporating Restitution as Part of the Expectation Interest

Sometimes Article 2 incorporates restitution as part of the expectation measure. After paying part of the price and after receiving and rejecting goods, Buyer may seek cover damages and recover the payments he made.[156] The latter item seems to be restitution. But cover damages (the extra cost of the substitute goods) alone will not put the Buyer in the position he would have been in had the contract been performed;[157] one must also award him the money he had paid Seller. What appears to be restitution really is an integral part of the expectation interest.

### 4. Using Restitution to Obtain the Expectation Interest

Article 2 sometimes uses restitution to help Seller obtain at least some expectation damages. Several provisions let a seller withhold or halt delivery in progress, or reclaim goods already delivered to an insolvent buyer.[158] The latter appears to be traditional restitution, while withholding and halting delivery seem to be preventative restitution. But after Seller withholds delivery or reclaims the goods, she will sue Buyer for her expectation damages.[159] Buyer's insolvency (which triggered Seller's actions) will make it difficult for Seller to collect those expectation damages. Her possession of the goods will enable her to resell them, providing much of her expectation interest. In a sense, these restitution-like remedies provide a security interest to protect as much of Seller's expectation damages

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154. *See* Mather, *supra* note 143, at 20-21 (referring to U.C.C. § 2-703).

155. *See* U.C.C. § 2-703 cmt. 1.

156. *See* U.C.C. § 2-711(1).

157. Assume the contract price was $10 a unit; Buyer had paid $4 before the Seller breached; and Buyer spent $11 on cover. If the contract had been fully performed, Buyer would have spent $10 for a unit worth $10, i.e., he would come out even. With the breach, he has spent $15 per unit ($4 to the original seller and $11 on the substitute) and only received something worth $10, i.e., he's down $5. Using UCC section 2-712 (the cost of cover—$11—minus the contract price—$10) would produce a $1 judgment, leaving him $4 down. The only way to get him to the position he would have been in had the contract been performed is to also award him the $4 he already had paid the original seller.

158. UCC sections 2-702(1) and 2-703(a) permit withholding of delivery; sections 2-703(b) and 2-705 permit stoppage of delivery; and section 2-702(2) allows reclamation.

159. *See* U.C.C. §§ 2-706, 2-708(2) (1995).

as possible.[160]

5. Using Restitution When No Expectation Interest Exists

Article 2's fourth tactic is to use restitution when there is no agreement, and thus, by definition, no expectation interest. For example, the parties may agree to the subject matter of the contract, its quality, the delivery date, etc., but agree to later agree on the price. If they cannot, the court must determine whether they intended to be bound despite the lack of a price term.[161] If they did not, there is no agreement,[162] and we cannot begin to put the plaintiff where she would have been had the defendant performed the non-existent contract. Since there is no expectation interest to protect, awarding restitution does not violate the Code's protection of the expectation interest,[163] which explains the drafting history's explicit reference to restitution.[164]

This explains other fact patterns in which commentators have urged the use of restitution, such as fraud,[165] mistake,[166] and the unintentional conferral of benefits (as when Seller delivers goods to the wrong address or business).[167] In each case, no agreement exists, so there is no expectation interest to protect. The suggested use of restitution in excuse cases[168] has an analogous explanation, since the excuse defense means the court will not enforce the contract.

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160. The legislative history makes precisely this point, saying that the right of stoppage is needed for "protection and resale." KLP, *supra* note 11, at J.VIII.2.b., Comment on § 106 (§ 8-4), at 2. *See also In re* American Food Purveyors, Inc., 1974 WL 21665, at *6-7 (Bankr. N.D. Ga. Aug. 16, 1974) (reclamation should put Seller in as good a position as if Buyer had performed).

161. *See* U.C.C. § 2-204 (1), (3); § 2-305(1) (1995).

162. *See* U.C.C. § 2-305(4) (1995).

163. *See* U.C.C. § 1-106(1) (1995).

164. *See* Comment on § 2, 1944 DRAFT, *supra* note 12, at 78-79, *reprinted in* 2 ELIZABETH SLUSSER KELLY, UNIFORM COMMERCIAL CODE DRAFTS 1, 90-91 (1984). When Anderson urges the use of restitution in contracts implied-at-law (a concept irrelevant to Article 2), his only citation to a modern sale of goods is *In Re Glover Construction Co.*, 49 B.R. 581, 583-84 (Bankr. W.D. Ky. 1985), a U.C.C. § 2-304(5) fact pattern, in which the court found no contract existed because the parties never agreed to a price. *Cf.* Campbell v. TVA, 421 F.2d 293, 297 (5th Cir. 1969) (when Buyer's agent lacked authority to enter the contract, but Seller still delivered, Seller is entitled to fair market value of delivered goods, which the court said equaled the full contract price).

165. *See* Mather, *supra* note 143, at 43.

166. HILLMAN ET AL., *supra* note 51, ¶ 9.03[7][b][iii], at 9-37, agrees that the Code does not displace this use of restitution and points out that this is a non-contract situation. 2 PALMER, *supra* note 143, § 12.6(a), and Mather, *supra* note 143, at 43, agree there is no displacement.

167. *See* HILLMAN ET AL., *supra* note 51, ¶ 9.03[7][b][iii], at 9-37; Mather, *supra* note 143, at 43.

168. *See* 2 PALMER, *supra* note 143, §§ 7.1, 7.5, 7.7(a).

6. Restitution in the Context of Liquidated Damages

Article 2's final restitution references occur in section 2-718, the liquidated damages provision, which twice uses the term "restitution," but only as a means to protect the aggrieved seller's expectation interest, and *only* her expectation interest.

The first reference is in UCC section 2-718(2)(a), which awards a buyer who partially pays before breaching restitution of any amount by which his payments exceed the amount owed the seller under a liquidated damage clause. That clause must be reasonable in light of the actual or anticipated harm caused by any breach, so it reflects the parties' prediction of the seller's expectation interest. Allowing a seller to obtain both the agreed-upon expectation interest *and* any payments the buyer did make would give the seller more than her expectation interest.

UCC section 2-718(2)(b) has the same effect. It permits restitution to a breaching buyer whose payments to the seller exceed twenty percent of the price or $500, whichever is smaller. But UCC section 2-718(3)(a) and (b) then reduce the buyer's recovery by any damages the seller can prove and any benefit the buyer has received under the contract. Seen in this light, the buyer's right to restitution is simply a means by which Article 2 ensures the seller receives her expectation interest, and *only* her expectation interest. Suppose the buyer purchases a $75,000 machine, which cost the seller $60,000 to produce. Buyer pays $50,000 but then refuses to pay the rest. If the seller has not yet delivered and can resell the machinery at the original contract price, her expectation damages under section 2-708(2)'s lost profits formula are only $15,000. Allowing her to keep the buyer's $50,000 payment would give Seller a windfall, making her better than she would have been had the contract been fully performed. The only way to protect her expectation interest—and *only* her expectation interest—is to refund the difference between the buyer's actual payments and the seller's actual damages. The buyer may see this as an action in restitution, but it really is a defense (just like certainty or foreseeability) which enables the defendant/buyer to reduce the plaintiff/seller's damages. In other words, UCC section 2-718(2) and (3) do not use restitution as an end in itself, but only as a way to protect the seller's expectation interest.

In summary, sometimes Article 2 displaces restitution. Sometimes it incorporates restitution as part of the expectation interest, and sometimes it uses restitution to protect that interest. Sometimes it uses restitution to make sure the seller receives no more than her expectation interest. The only time Article 2 awards the restitution interest, in and of itself, is when there is no agreement and no expectation interest. None of these uses conflict with the

Code's goal of protecting the expectation interest: all but the last are tied directly to that interest. The restitution remedies in Article 2 do not weaken the expectation interest's role as the key, central, and exclusive method of calculating damages under Article 2.

### *D. Conclusion*

The intent of Article 2's drafters was, overwhelmingly, to improve the Uniform Sales Act's protection of the expectation interest. The text and commentary of Article 2's damage provisions reinforce that goal, and the only exception—Article 2's rules regarding restitution—was intended as another way to improve Sales law's protection of the expectation interest.

But the drafters' intent is not everything. It has been thirty-some years since most states adopted the UCC. Have courts ignored the intent of Article 2's drafters and rebelled against the Code's expectation mandate? Has the judiciary evaded Article 2's purpose, text, and commentary in order to protect the reliance interest? The overwhelming answer of the next section is "no."

## III. JUDICIAL RESISTANCE TO THE USE OF RELIANCE DAMAGES IN SALES

### *A. Introduction*

Now let us turn to what the courts say. As Llewellyn observed, Sales law is "the work of a multitude of courts, inexpert, busy chiefly on other things, average shrewd and more than average honest, but with no supreme authority over them, [so] the picture yielded is a picture of the democratic process in law-making which the constitutional law field can never rival."[169] In this Sales democracy, if we needed reliance damages, we should find judges who say that.

So I went looking for what judges had to say. I read 467 Sales cases. I did *not* randomly select them. I deliberately looked for cases involving fact patterns in which courts would be *most likely* to protect the reliance interest. These cases fell into four major groups. The first group used reliance in formation to override the Statute of Frauds, to enforce oral options unsupported by consideration, or to create binding deals. In the second group, expectation damages were difficult to quantify, because lost

169. K. N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 725 (1939).

profits were uncertain, the plaintiff was a new business, or the contract did not specify exactly how many goods were sold. A third group was excuse cases. Fourth, and finally, I looked at the Sales cases which Fuller had said were appropriate for reliance damages: purchases of defective seed and purchases of defective machinery which shut down the buyer's entire production line.[170] Some categories were small enough that I read all the cases I found;[171] other categories had so many cases that I read the first hundred.[172] In short, I deliberately sought out reliance on its home turf.

The results? Of the 467 Sales cases I read with fact patterns *most likely* to generate reliance damages, only fourteen awarded such damages.[173] Another six discussed them.[174] Half of the reliance awards were based on a promissory estoppel claim, a cause of action which the Code's drafters opposed.[175] The other cases used reliance damages so rarely and with such questionable logic that they seemed random accidents. Not a *single* case explained why reliance damages were preferable to Article 2's statutory formulas. The table below provides an overview of these results.

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170. *See The Reliance Interest*, *supra* note 10, at 91-92, 91 n.63, 92 n.64.

171. These categories were (a) reliance and the Statute of Frauds, (b) reliance on oral options, (c) reliance as a method of formation, (d) reliance damages and new businesses, (e) excuse cases, (f) the seed/farm products cases, and (g) the production line cases.

172. This happened with cases in which the expectation interest was uncertain and with cases involving output and requirements contracts.

173. *See* cases cited *supra* note 13.

174. *See* Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 731 (2d Cir. 1992) (denying expectation and reliance relief for lack of certainty); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 459-60, 460 n.44 (S.D.N.Y. 1976) (when defective turbine made other machinery useless, Buyer claimed cost of the useless machinery as "reliance damages," and appellate court suggested that trial court might award, as direct damages, expenditures incurred before the breach and "in reliance on the contractual warranties"); Bunch v. Signal Oil & Gas Co., 505 P.2d 41, 43 (Colo. Ct. App. 1972) (awarding expectation damages but labeling them reliance damages); Vulcan Metal Prods., Inc. v. Schultz, 535 N.E.2d 933, 937-38 (Ill. App. Ct. 1989) (unclear whether award was consequential expectation damages or reliance damages); Brenneman v. Auto-teria, Inc., 491 P.2d 992, 996-97 (Or. 1971) (denying expectation and reliance damages for lack of evidence); Eastern Sky Prods., Inc. v. RAM Graphics, Inc., No. 01-A-01-9305-CH00215, 1994 WL 642760, at *3-4 (Tenn. Ct. App. Nov. 16, 1994) (denying expectation and reliance relief because of problems with causation and uncertainty).

175. *See* Gibson, *supra* note 46, at 679-82.

*Table 1: Overview*

| Category | Cases Read | Cases which award reliance damages | Cases which mention but don't award reliance damages |
|---|---|---|---|
| Reliance and the Statute of Frauds | 71 | 1 | 1 |
| Reliance on oral offers (*Drennan*) | 27 | 0 | 0 |
| Reliance as a method of formation | 21 | 7[176] | 0 |
| Cases in which the expectation interest was uncertain in general | 100 | 1[177] | 3 |
| Cases involving new businesses | 32 | 1 | 2[178] |
| Cases involving uncertain quantities | 100 | 0 | 0 |
| Excuse cases | 22 | 0 | 0 |
| Seed warranty cases | 56 | 2 | 0 |
| The production line cases | 38 | 2[179] | 0 |
| **Total Cases** | **467** | **14** | **6** |

### *B. Where Reliance Is Used to Enforce the Agreement*

#### 1. Section 2-201 and the Statute of Frauds

I read seventy-one cases which discussed the use of promissory estoppel to override Article 2's statute of frauds (UCC section 2-201). They

176. Two cases based recovery on principles of federal contract bidding statutes. In a third, the plaintiff sought only reliance damages.

177. One other case awarded expectation damages but labeled them as reliance damages. I included it among the three cases in this category that discussed reliance damages.

178. Both awards could be characterized as reliance or expectation damages.

179. Both plaintiffs failed to request expectation damages.

seemed likely candidates for reliance damages for several reasons. First, symmetry suggests that reliance on the merits should produce reliance relief.[180] Second, awarding expectation damages would let the plaintiff enforce the contract, violating UCC section 2-201(1)'s express language.[181] Third, reliance damages seem a compromise between full damages and no recovery at all: they would let a judge hold the defendant accountable for making the contract while reminding the plaintiff not to blithely ignore UCC section 2-201's writing requirement. Fourth, the *Restatement (Second) of Contracts* section 139 permits reliance damages in such situations.

Of the seventy-one cases I found, forty-one refused to use reliance to override UCC section 2-201, obviating the need to even discuss relief. Of these, sixteen rejected such reliance as a matter of law;[182] sixteen said the plaintiff could use reliance only if she showed section 2-201(1) would cause an unconscionable injury,[183] and nine said the plaintiff produced insufficient

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180. *See* Becker, *supra* note 37, at 152; Henderson, *supra* note 26, at 378, 379 (reliance damages "will likely develop as the standard damage measure under section 90"); *Once More Into the Breach*, *supra* note 29, at 563. *But see* Slawson, *supra* note 34, at 209-10 (rejecting symmetry argument).

181. *See* Becker, *supra* note 37, at 148-49.

182. *See* FMC Fin. Corp. v. Reed, 592 F.2d 238, 243 (5th Cir. 1979); Davis v. Crown Cent. Petroleum Corp., 483 F.2d 1014, 1016-17 (4th Cir. 1973); Starry Constr. Co. v. Murphy Oil USA, Inc., 785 F. Supp. 1356, 1367 (D. Minn. 1992); Futch v. James River-Norwalk, Inc., 722 F. Supp. 1395, 1398-1402 (S.D. Miss.), *aff'd*, 887 F.2d 1085 (5th Cir. 1989); International Prods. & Techs., Inc. v. Iomega Corp., No. CIV. A. 88-7004, 1989 WL 138866, at *4-7 (E.D. Pa. Nov. 15, 1989); Golden Plains Feedlot, Inc. v. Great W. Sugar Co., 588 F. Supp. 985, 993 (D.S.D. 1984); McDabco, Inc. v. Chet Adams Co., 548 F. Supp. 456, 459-62 (D.S.C. 1982); Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); Cox v. Cox, 289 So. 2d 609, 612 (Ala. 1974); C.G. Campbell & Son, Inc. v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); Sacred Heart Farmers Coop. Elevator v. Johnson, 232 N.W.2d 921, 923 n.1 (Minn. 1975); Anderson Constr. Co. v. Lyon Metal Prods. Inc., 370 So. 2d 935, 937 (Miss. 1979); Wilke v. Holdrege Coop. Equity Exch., 265 N.W.2d 672, 674-75 (Neb. 1978); Schott Grain Co. v. Rasmussen, 248 N.W.2d 42, 42 (Neb. 1976); Massey v. Hardcastle, 753 S.W.2d 127, 137-39 (Tenn. Ct. App. 1988); Lige Dickson Co. v. Union Oil Co., 635 P.2d 103, 105-07 (Wash. 1981).

183. *See* Radix Org., Inc. v. Mack Trucks, Inc., 602 F.2d 45, 48 (2d Cir. 1979); C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856-57 (9th Cir. 1977); Caplan v. Roberts, 506 F.2d 1039, 1040-41 (9th Cir. 1974); Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879, 884 (S.D.N.Y. 1991); Columbus Trade Exch., Inc. v. AMCA Int'l Corp., 763 F. Supp. 946, 952-57 (S.D. Ohio 1991); Paper Corp. of the U.S. v. Schoeller Technical Papers, 759 F. Supp. 1039, 1043 (S.D.N.Y. 1991); Western Chance No. 2, Inc. v. KFC Corp., 734 F. Supp. 1529, 1536-38 (D. Ariz. 1990), *aff'd in part, rev'd in part on other grounds*, 957 F.2d 1538 (9th Cir. 1992); Hoffmann v. Boone, 708 F. Supp. 78, 80-83 (S.D.N.Y. 1989); Horn & Hardart Co. v. Pillsbury Co., 703 F. Supp. 1062, 1068-71 (S.D.N.Y.), *aff'd*, 888 F.2d 8 (2d Cir. 1989); Sacred Heart Farmers Coop. Elevator v. Johnson, 232 N.W.2d 921, 923 (Minn. 1975) (after rejecting promissory estoppel as matter of law, court said Buyer's reliance was insufficient injury to permit use of equitable estoppel); Del Hayes & Sons, Inc. v. Mitchell, 230 N.W.2d 588, 593-94 (Minn. 1975); Bernard v. Langan Porsche Audi, Inc., 532 N.Y.S.2d 599, 599-600 (App. Div. 1988); Country-

evidence of actual reliance.[184] Another five cases raised but did not decide the issue of reliance.[185]

Only twenty-four cases used promissory estoppel to override section 2-201. Of these, fifteen were silent about damages.[186] Another eight protected the expectation interest.[187]

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Wide Leasing Corp. v. Subaru of Am., Inc., 520 N.Y.S.2d 24, 24-25 (App. Div. 1987); Swerdloff v. Mobil Oil Corp., 427 N.Y.S.2d 266, 267-70 (App. Div. 1980); Edward Joy Co. v. Noise Control Prods., Inc., 443 N.Y.S.2d 361, 363 (Sup. Ct. 1981); *cf.* Farmers Coop. Ass'n of Churchs Ferry v. Cole, 239 N.W.2d 808, 811-14 (N.D. 1976) (no evidence of fraud, affirmative misrepresentation, or unconscionable conduct).

184. *See* A-Abart Elec. Supply Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1403-04 (7th Cir. 1992); Starry Constr. Co. v. Murphy Oil USA, Inc., 785 F. Supp. 1356, 1365 n.1 (D. Minn. 1992); Don Shreve Lincoln-Mercury, Inc. v. American Honda Motor Co., 32 U.C.C. Rep. Serv. (CBC) 1091, 1093-95 (D. Minn. 1981); Rockland Indus., Inc. v. Frank Kasmir Assocs., 470 F. Supp. 1176, 1179-80 (N.D. Tex. 1979); Austin Power, Inc. v. Insulation Servs., Inc., 467 F. Supp. 110, 113 (N.D. Tex. 1979); Tiffany Inc. v. W.M.K. Transit Mix, Inc., 493 P.2d 1220, 1224-25 (Ariz. Ct. App. 1972); W.H. Barber Co. v. McNamara-Vivant Contracting Co., 293 N.W.2d 351, 357 (Minn. 1979); Darrow v. Spencer, 581 P.2d 1309, 1312-13 (Okla. 1978); H. Molsen & Co. v. Hicks, 550 S.W.2d 354, 356 (Tex. App. 1977, writ ref'd n.r.e.).

185. *See* Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 209, 210-11 (8th Cir. 1976) (Seller sought $450,000 lost profits on oral contract, and, in the alternative, $300,000 in what it called "reliance damages" based on promissory estoppel; appellate court said trial court had failed to distinguish between the two causes of action and remanded for trial); Tripi v. Landon, 488 N.E.2d 610, 612 (Ill. App. Ct. 1986); Maryland Supreme Corp. v. Blake Co., 369 A.2d 1017, 1027 (Md. 1977); Fairway Mach. Sales Co. v. Continental Motors Corp., 198 N.W.2d 757, 758 (Mich. Ct. App. 1972); Gerner v. Vasby, 250 N.W.2d 319, 325 (Wis. 1977).

186. *See* Monetti, S.P.A. v. Anchor Hocking Corp., 931 F.2d 1178, 1186 (7th Cir. 1991); Computer Sys. of Am., Inc. v. IBM Corp., 795 F.2d 1086, 1091-92, 1093-94 (1st Cir. 1986); Allen M. Campbell Co., Gen. Contractors v. Virginia Metal Indus., Inc., 708 F.2d 930, 931-34 (4th Cir. 1983); R.S. Bennett & Co. v. Economy Mech. Indus., Inc., 606 F.2d 182, 187-89 (7th Cir. 1979); Minnesota Farm Bureau Mktg. Corp. v. North Dakota Agric. Mktg. Ass'n, 563 F.2d 906, 908, 914 (8th Cir. 1977); California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 470-73 (D.N.J. 1986); Ralston Purina Co. v. McCollum, 611 S.W.2d 201, 202-03 (Ark. Ct. App. 1981) (court upheld $50,000 jury award without explaining whether it was for lost profits or wasted production costs); Allied Grape Growers v. Bronco Wine Co., 249 Cal. Rptr. 872, 877-79 (Ct. App. 1988); Sloan v. Hiatt, 54 Cal. Rptr. 351, 357-59 (Ct. App. 1966); Decatur Coop. Ass'n v. Urban, 547 P.2d 323, 329-30 (Kan. 1976); Northwest Potato Sales, Inc. v. Beck, 678 P.2d 1138, 1141-42 (Mont. 1984); Buddman Distribs., Inc. v. Labatt Importers, Inc., 458 N.Y.S.2d 395, 397 (App. Div. 1982); Dangerfield v. Markel, 222 N.W.2d 373, 378 (N.D. 1974), *rev'd on other grounds*, 252 N.W.2d 184 (N.D. 1977); Potter v. Hatter Farms, Inc., 641 P.2d 628, 631-34 (Or. Ct. App. 1982); B & W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809, 818-19 (Wyo. 1992).

Five cases mentioned reliance by quoting in full *Restatement (Second) of Contracts* section 139(1) or its predecessor, section 217A (Tentative Draft Nos. 1-7), without paying attention to section 139's brief reference to reliance damages. *See Allen M. Campbell Co.*, 708 F.2d at 933-34; *R.S. Bennett & Co.*, 606 F.2d at 188 n.8; Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342-43 (Iowa 1979); Lige Dickson Co. v. Union Oil Co., 635 P.2d 103, 105 (Wash. 1981); *B & W Glass*, 829 P.2d at 818-19.

187. *See* Dickson v. Delhi Seed Co., 760 S.W.2d 382, 387-90 (Ark. Ct. App. 1988); Distribudor, Inc. v. Karadanis, 90 Cal. Rptr. 231, 234 (Ct. App. 1970); Jenkins & Boller Co. v. Schmidt

Of the seventy-one cases, only one, *Adams v. Petrade International, Inc.*,[188] awarded reliance damages. *Adams* used two common law cases to say that "settled law" linked reliance damages and promissory estoppel.[189] It cited neither an Article 2 section nor case for that proposition, and it did not discuss the conflict between Article 2's rules and its award.[190] Table 2 below shows these results.

*Table 2: Cases Involving Section 2-201(1)'s Statute of Frauds and Promissory Estoppel*

| | |
|---|---|
| *Number of cases read* | 71 |
| *Refused to use promissory estoppel to override section 2-201(1)* | 41 |
| Said promissory estoppel never overrides section 2-201(1) | 16 |
| Said promissory estoppel can be used only if section 2-201(1) would work an unconscionable injury, and the plaintiff had failed to prove such an injury | 16 |
| Said the plaintiff presented insufficient evidence of reliance | 9 |
| *Did not decide the issue* | 5 |
| *Used promissory estoppel to override section 2-201(1)* | 24 |
| Were silent on damages | 15 |
| Awarded expectation damages | 8 |
| Awarded reliance damages based solely on non-UCC case law | 1 |

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Iron Works, Inc., 344 N.E.2d 275, 276-79 (Ill. App. Ct. 1976); Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342-43 (Iowa 1979); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 739, 741-42 (N.D. 1976); H.B. Alexander & Son, Inc. v. Miracle Rec. Equip. Co., 460 A.2d 343, 345 (Pa. Super. Ct. 1983); Atlantic Wholesale Co. v. Solondz, 320 S.E.2d 720, 721-24 (S.C. Ct. App. 1984); Farmers Elevator Co. v. Lyle, 238 N.W.2d 290, 292-93, 294-95 (S.D. 1976).

188. 754 S.W.2d 696 (Tex. App. 1988, writ granted (1989), writ denied (1990)).

189. *Id.* at 709 (citing Sun Oil Co. v. Madeley, 626 S.W.2d 726, 734 (Tex. 1981) (oil and gas lease), and Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965) (contract to loan money)). *Wheeler* was based on three pre-UCC cases and the Fuller and Perdue article. *Wheeler*, 398 S.W.2d at 97.

190. This lack of use of reliance damages *vis-à-vis* the use of estoppel to override UCC section 2-201 is consistent with common law. I found thirty-seven service cases which cited *Restatement (Second) of Contracts* section 139, or its predecessor, section 217A of Tentative Draft Nos. 1-7. Comment d to those sections says that reliance damages may be appropriate when estoppel overrides a statute of frauds. Only three of those thirty-seven cases followed the Comment's suggestion. *See* Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 793-94 (2d Cir. 1986) (plaintiff, as part of service arrangement, bought repair parts which defendant later refused to buy back; court awarded cost of acquiring the parts, rather than costs and lost profits); Palandjian v. Pahlavi, 614 F. Supp. 1569, 1580-81, 1582 nn.1-2 (D. Mass. 1985) (if plaintiff uses reliance, reliance interest is the only equitable award); Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1247-48 (N.Y. 1983). I can provide a breakdown/description of the other thirty-four cases.

### 2. Section 2-205: Firm Offers and Reliance on Oral Bids (the *Drennan* Problem)

Another potential source of reliance damages is the bidding dispute, made famous in *Drennan v. Star Paving Co.*[191] A general contractor receives an oral bid from a supplier, uses that bid to prepare its own bid on a job, and receives the job, only to have the supplier refuse to honor the quoted price. Since the supplier tries to withdraw *after* the general contractor has become bound on its job, but *before* the general contractor accepts the supplier's offer, there is no contract. *Drennan* held that the general contractor's reliance on a subcontractor's bid to perform services made the supplier's bid irrevocable.[192]

*Drennan* should not translate easily into Sales. The deal was not within the common law's Statute of Frauds, whereas every contract for the supply of $500 in goods must satisfy section 2-201(1)'s writing requirements. Moreover, *Drennan* predated the UCC, so it did not have to determine if Article 2's firm offer rule, which makes signed options irrevocable, displaces promissory estoppel. Several Sales courts have rejected *Drennan*,[193] a result consistent with the intent of Article 2's drafters.[194] But other courts have followed *Drennan*.[195] Reliance damages seem appropriate for cases basing enforcement on reliance.[196] Because the expectation and reliance interests are easy to calculate,[197] and because the *Restatement*

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191. 333 P.2d 757 (Cal. 1958).

192. *See id.* at 760. *Restatement (Second) of Contracts* section 87(2) is based on *Drennan*.

193. *See* C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319, 322 (9th Cir. 1974); Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); Tiffany Inc. v. W.M.K. Transit Mix, Inc., 493 P.2d 1220, 1224-25 (Ariz. Ct. App. 1972); C.G. Campbell & Son, Inc. v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); Anderson Constr. Co. v. Lyon Metal Prods., Inc., 370 So. 2d 935, 937-38 (Miss. 1979); Tatsch v. Hamilton-Erickson Mfg. Co., 418 P.2d 187, 189 (N.M. 1966).

194. *See* Gibson, *supra* note 46, at 696-703.

195. *See* cases cited *infra* notes 199-200.

196. *See* cases cited *infra* note 202.

197. Suppose Buyer received three bids for machinery: $10,000 from Defendant, $12,000 from Supplier *Y*, and $13,000 from Supplier *Z*. Buyer relies on Defendant's bid and rejects the other bids. Defendant refuses to perform, so Buyer seeks new bids. *Y* is the new low bidder at $12,500, and Buyer purchases from *Y*. Buyer's expectation interest is the $2,500 extra cost of the substitute goods (*Y*'s $12,500 price minus Defendant's original bid of $10,000). *See* U.C.C. § 2-712 (1995).

Buyer's reliance damages must put it in the position it would have been in had Defendant's promise not been made. If Defendant had not bid, Buyer would have taken *Y*'s $12,000 bid. Defendant's breach caused Buyer to spend $12,500 on substitute goods. Buyer's reliance damages are the $500 difference between the cost of cover ($12,500) and the second-lowest bid originally received (*Y*'s first bid of $12,000). *See Once More Into the Breach*, *supra* note 29, at 569.

Of course, if Defendant had not bid, and Buyer had used *Y*'s higher bid, Buyer might have

*(Second) of Contracts* suggests the use of reliance damages,[198] one might think these latter courts would protect the reliance interest.

They don't.[199] I found twenty-seven Article 2 cases. Six rejected promissory estoppel as a matter of law;[200] five found insufficient facts;[201] and four remanded without ruling on the issue.[202] Only twelve cases used promissory estoppel. Six awarded expectation damages;[203] one split the extra cost of cover between the buyer and the supplier[204] (an award that was neither expectation nor reliance); and five did not discuss damages or were sufficiently vague to prevent identification of the interest protected.[205] None

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increased his own bid and lost the job. *See* Becker, *supra* note 37, at 143; Slawson, *supra* note 34, at 221. And if Buyer doesn't record the next-to-the-lowest bid, the reliance interest cannot be shown.

198. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87(2) cmt. e (1982).

199. Shepard's lists only two cases which cite Comment e: neither refers to reliance damages. *See* First Nat'l Bankshares v. Geisel, 853 F. Supp. 1344, 1356 (D. Kan. 1994); Arango Constr. Co. v. Success Roofing, Inc., 730 P.2d 720, 725 (Wash. Ct. App. 1986).

200. *See* C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319, 322 (9th Cir. 1974); Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); Tiffany Inc. v. W.M.K. Transit Mix, Inc., 493 P.2d 1220, 1224-25 (Ariz. Ct. App. 1972); C.G. Campbell & Son, Inc. v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); Anderson Constr. Co. v. Lyon Metal Prods., Inc., 370 So. 2d 935, 937-38 (Miss. 1979); Tatsch v. Hamilton-Erickson Mfg. Co., 418 P.2d 187, 189 (N.M. 1966).

201. *See* Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp., 632 F. Supp. 1082, 1090-91 (D.D.C. 1986); Cayuga Constr. Corp. v. Vanco Eng'g Co., 423 F. Supp. 1182, 1185 (W.D. Pa. 1976); Cannavino & Shea, Inc. v. Water Works Supply Corp., 280 N.E.2d 147, 149 (Mass. 1972); K.L. House Constr. Co. v. Watson, 508 P.2d 592 (N.M. 1973); Edward Joy Co. v. Noise Control Prods., Inc., 443 N.Y.S.2d 361, 361 (N.Y. Sup. Ct. 1981).

202. *See* Thomas J. Sheehan Co. v. Crane Co., 418 F.2d 642, 643, 645 (8th Cir. 1969); Maryland Supreme Corp. v. Blake Co., 369 A.2d 1017, 1027 (Md. 1977); New England Insulation Co. v. General Dynamics Corp., 522 N.E.2d 997, 999-1001 (Mass. App. Ct. 1988); Cillessen Bros. Constr. Co. v. Frank Paxton Lumber Co., 440 P.2d 133, 135 (N.M. 1968).

203. *See* Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772, 780 (7th Cir. 1976) ($39,992.40 difference between defendant's bid and cost of substitute goods—an expectation award wrongly labeled reliance damages); Jenkins & Boller Co. v. Schmidt Iron Works, Inc., 344 N.E.2d 275 (Ill. App. Ct. 1976) ($33,192 difference between defendant's bid and cost of substitute); Lyon Metal Prods., Inc. v. Hagerman Constr. Corp., 391 N.E.2d 1152, 1153-57 (Ind. Ct. App. 1979) ($7,963 difference between defendant's bid and cost of substitute); Harry Harris, Inc. v. Quality Constr. Co., 593 S.W.2d 872, 873, 874-75 (Ky. Ct. App. 1979) (trial court awarded difference between defendant's bid and next lowest bid received by plaintiff, i.e., reliance damages, but added $1,500 extra costs incurred in buying substitute, i.e., expectation damages; appellate court remanded on mitigation issue); Loranger Constr. Corp. v. E.F. Hauserman Co., 384 N.E.2d 176, 178, 179, 181 (Mass. 1978) ($7,100 difference between defendant's bid and cost of substitute); *cf.* Huntington Beach Union High Sch. Dist. v. Continental Info. Sys. Corp., 621 F.2d 353, 355, 357 (9th Cir. 1980) (Buyer entitled to additional cost of cover rather than just difference between cost of cover and second-highest bid).

204. *See* Powers Constr. Co. v. Salem Carpets, Inc., 322 S.E.2d 30, 32, 35 (S.C. Ct. App. 1984) (affirming without explanation jury verdict of exactly one-half the difference between defendant's bid and plaintiff's cost of cover).

205. *See* Dugan & Meyers Constr. Co. v. Worthington Pump Corp. (USA), 746 F.2d 1166,

awarded only reliance damages.[206] Table 3 below shows the results.

*Table 3: Sales Cases Involving Reliance by a Buyer on an Oral Offer*

| | |
|---|---|
| *Number of cases read* | 27 |
| *Remanded for trial court consideration as to the use of promissory estoppel* | 4 |
| *Declined to use promissory estoppel to protect the buyer* | 11 |
| Rejected promissory estoppel as a matter of law | 6 |
| Rejected promissory estoppel because of bad facts | 5 |
| *Used promissory estoppel to protect the buyer* | 12 |
| Awarded expectation damages | 6 |
| Issued an unfathomable award | 1 |
| Did not resolve the issue of damages | 5 |
| Reliance damages | 0 |

### 3. Reliance as a Means of Formation

At common law, American courts are tempted to protect the reliance interest when a plaintiff uses reliance as a cause of action.[207] Article 2's drafters opposed reliance as a means to create contracts,[208] and most Sales courts respect that intent by enforcing only agreements in which both parties intended to be bound.[209] Nevertheless, I sought sales cases which used

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1176-77 (6th Cir. 1984) (holding that reliance made bid enforceable, but defendant did not breach bid); Allen M. Campbell Co., Gen. Contractors v. Virginia Metal Indus., Inc., 708 F.2d 930, 931-34 (4th Cir. 1983) (reversing judgment on the pleadings and remanding); R.S. Bennett & Co. v. Economy Mech. Indus., 606 F.2d 182, 186-87 (7th Cir. 1979) (remanding to let trial court decide if evidence of reliance was sufficient); Crook v. Mortenson-Neal, 727 P.2d 297, 300, 304 (Alaska 1986) (trial court's $39,745 judgment not explained; appellate court refers to plaintiff's extra costs in hiring a substitute subcontractor—an expectation award—but also compensates plaintiff "for damages incurred due to its reasonable reliance on NGC's promise"); E.A. Coronis Assocs. v. M. Gordon Constr. Co., 216 A.2d 246, 250-53 (N.J. Super. Ct. App. Div. 1966) (remanding for trial).

206. Service cases which follow *Drennan* reveal a similar pattern. *See* notes on file with author.

207. *See* Goodman v. Dicker, 169 F.2d 684, 685 (D.C. Cir. 1948); Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275-77 (Wis. 1965).

208. *See* Gibson, *supra* note 46, at 669-74, 677-82.

209. *See* U.C.C. § 2-204(1), (3) (1995). For cases which found an agreement based on mutual intent to be bound and ignored evidence of reliance, see, e.g., Intersynco Suisse, S.A. v. Amtraco Supply Co., 590 F.2d 55, 56 (2d Cir. 1979); Gumz v. Starke County Farm Bureau Coop. Ass'n, 395 N.E.2d 257, 261-63 (Ind. 1979); Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566, 573-74 (Ind. Ct. App. 1977); Maryland Supreme Corp. v. Blake Co., 369 A.2d 1017, 1021, 1024-27 (Md. 1977); Carolina Builders Corp. v. Howard-Veasey Homes, Inc., 324 S.E.2d 626, 626-28, 629 (N.C. Ct. App. 1985); Gerner v. Vasby, 250 N.W.2d 319, 325-26 (Wis. 1977).

promissory estoppel. I found twenty-one, but only three used the doctrine as the sole ground for decision.[210] Four cases applied reliance to a transaction collateral to the sale of goods.[211] Two other cases used reliance-like government contract bidding regulations, not Sales law.[212] In seven cases, promissory estoppel was discussed because plaintiff had pled it in the alternative to a contract claim.[213] Five other cases were simply sloppy,

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Other courts properly ignored evidence of one side's reliance and found that no agreement existed. *See, e.g.*, Gershman v. IBM Corp., 619 F. Supp. 1530, 1534 (E.D. Pa. 1985) (Seller who built 500 units before contract formed could not recover damages for those units when Buyer changed specifications); Cayuga Constr. Corp. v. Vanco Eng'g Co., 423 F. Supp. 1182, 1185 (W.D. Pa. 1976) (promissory estoppel does not overcome lack of offer and acceptance); Empire Mach. Co.v. Litton Bus. Tel. Sys., 566 P.2d 1044, 1046, 1047-49 (Ariz. Ct. App. 1977) (despite clear evidence of Buyer's reliance, court remanded for trial on whether agreement was formed under section 2-206); Smith v. Boise Kenworth Sales, Inc., 625 P.2d 417, 421-22 (Idaho 1981) (since parties never agreed to purchase and sale of truck, promissory estoppel rejected); D.R. Curtis Co. v. Mason, 649 P.2d 1232, 1233-34 (Idaho Ct. App. 1982) (despite Buyer's resale of wheat allegedly sold to it by farmer, court found no agreement under section 2-204); Harwell Enters., Inc. v. Stevens, 175 S.E.2d 739, 739-40 (N.C. Ct. App. 1970) (despite Buyer's partial payment on machine which Seller proved unable to manufacture, lack of agreement as to terms barred Buyer's action); Bethlehem Steel Corp. v. Litton Indus., Inc., 488 A.2d 581 (Pa. 1985) (despite Seller's reliance, court finds no agreement under section 2-204); Farley v. Clark Equip. Co., 484 S.W.2d 142, 147-48 (Tex. App. 1972, writ ref'd n.r.e.) (when Seller made goods in response to check mistakenly sent by Buyer, check's failure to state quantity, type of goods, or price meant no agreement existed under section 2-204).

210. *See infra* note 215.

211. *See* Universal Computer Sys., Inc. v. Medical Servs. Ass'n, 628 F.2d 820, 825 (3d Cir. 1980) (defendant broke promise to pick up plaintiff's bid at airport, preventing plaintiff from bidding on computer lease; court enforced that promise, but not computer lease itself); Burk v. Emmick, 637 F.2d 1172, 1176-77 (8th Cir. 1980) (when bank wrongly told Seller that Buyer had funds to cover sight draft, and Seller later reclaimed and resold goods at a loss, Seller entitled to judgment against Buyer based on sales contract and against bank on promissory estoppel); Gulf Cities Gas Corp. v. Tangelo Park Serv. Co., 253 So. 2d 744, 747-48 (Fla. Dist. Ct. App. 1971) (defendant Gulf Cities, which participated in contract negotiations between plaintiff and defendant Fuel Gas, estopped from denying it was party to contract); Lawshe v. Glen Park Lumber Co., 375 N.E.2d 275, 277 (Ind. Ct. App. 1978) (promissory estoppel created lien based on homeowners' guarantee to pay for materials sold to general contractor).

212. These two courts found that federal agencies had not fairly considered the plaintiffs' bids, and, while using reliance-like language, ordered compensation based on federal bidding laws. *See* Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803, 805-08, 808 n.8 (Fed. Cl. 1993); Keco Indus., Inc. v. United States, 428 F.2d 1233, 1238-39 (Ct. Cl. 1970).

213. *See* Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 520-22 (8th Cir. 1987) (trial court wrongly gave summary judgment against plaintiff's contract claims; appellate court noted "alternative theory of consideration is promissory estoppel"); United McGill Corp. v. Gerngross Corp., 689 F.2d 52, 53 & n.2 (3d Cir. 1982) (plaintiff presented prima facie case of contract and "alternative ground" of promissory estoppel); Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293, 1297-98 (9th Cir. 1981) (when U.S. Customs agreed to pay artist 100 times value of painting in order to catch third-party smugglers, artist entitled under contract and promissory estoppel for full price of painting); Huntington Beach Union High Sch. Dist. v. Continental Info. Sys., 621 F.2d 353, 357-58 (9th Cir. 1980) (no merit to defendant's theory that promissory estoppel

finding that a contract had been formed but using promissory estoppel as the only cause of action.[214]

In reality, only three cases used promissory estoppel to enforce a goods transaction in which no contract existed.[215] They present a difficult

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justified reliance damages; presence of contract based on consideration justified full damages); Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643, 644-47 (5th Cir. 1974) (in action for specific performance, court found contract under UCC section 2-207 and noted that "[a]dditionally" defendant was estopped from denying the contract); Aronowicz v. Nalley's, Inc., 106 Cal. Rptr. 424, 433 (Ct. App. 1972) (ample evidence of liability on contract or reliance); Bullock v. Joe Bailey Auction Co., 580 P.2d 225, 227-28 (Utah 1978) (agreement and promissory estoppel permit Buyer to retain goods).

214. My favorite example is a decision which said:

> The record shows an offer, acceptance, shipment of the goods by Pedi Bares, the receipt of the goods, and partial payment by P & C. Pedi Bares relied to its detriment on the conduct of P & C. We agree with the trial court that the doctrine of promissory estoppel bars P & C from denying the contract.

Pedi Bares, Inc. v. P & C Food Mkts., Inc., 567 F.2d 933, 936 (10th Cir. 1977). This use of promissory estoppel despite an offer, an acceptance, plaintiff's full performance, and defendant's partial performance makes me wonder if Grant Gilmore was a ghostwriter for the 10th Circuit. *Cf.* GILMORE, *supra* note 16, at 1, 87 ("We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing any more . . . . What is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.'").

The other sloppy cases are *Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp.*, 769 F.2d 1076, 1078-79 (5th Cir. 1985) (despite Buyer's written appointment of Seller as its purchasing agent and several written purchase orders, court based Buyer's liability on promissory estoppel); *Cyberchron Corp. v. Calldata System Development*, 831 F. Supp. 94, 100, 107-09, 113-14 (E.D.N.Y. 1993) (although Buyer wrote Seller demanding performance of its "contractually binding obligation," and "performance under the contract," Buyer promised to pay Seller for expenses incurred in developing the product, and failed to rebut "substantial evidence" that it made promises "to induce" Seller's performance; court upheld Buyer's argument that no contract existed and used promissory estoppel to protect Seller. While the parties had not agreed on price and weight of the goods, section 2-305(1) & (4) let parties create a contract even if they do not agree on price, as long as they intend to be bound. Here the party which denied any intent to be bound (the Buyer) was the same party which had insisted, in writing, that a contract existed.), *aff'd*, 47 F.3d 39, 43-44 (2d Cir. 1995) (no reference to above-described evidence); *Standard Structural Steel Co. v. Debron Corp.*, 515 F. Supp. 803, 805, 811-12 (D. Conn. 1980) (court found parties made "subcontract" for structural steel but used promissory estoppel to hold defendant liable for estimate of how many bolts steel would need), *aff'd without opinion*, 657 F.2d 265 (2d Cir. 1981); and *Southwest Water Services Inc. v. Cope*, 531 S.W.2d 873, 876-77 (Tex. App. 1975, writ ref'd n.r.e. (1976)) (when promoter orally promised land buyers to supply water at reduced rates, court used promissory estoppel to require delivery at rates promised, evading parol evidence rule).

215. In *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1099 (7th Cir. 1981), plaintiffs applied for a franchise. While waiting for an answer, they bought a site and improved it, but Marathon denied their application because of a moratorium on all new franchises. Although Marathon never accepted the plaintiffs' offer, the court used promissory estoppel to find for plaintiffs.

*Werner v. Xerox Corp.*, 732 F.2d 580, 581-84 (7th Cir. 1984), involved a plaintiff who, while developing lathes which Xerox could use to make metal rollers, relied on assurances of a Xerox employee that Xerox would make plaintiff its principal source of rollers. The court found no contract, but used promissory estoppel to enforce the deal.

Finally, in *D & G Stout, Inc. v. Bacardi Imports, Inc.*, 923 F.2d 566, 566-70 (7th Cir. 1991), a

question: should we amend Article 2 to enforce promises which are not agreements? The plaintiffs in one case knew they were acting before the defendant had agreed to their application.[216] The other plaintiffs were experienced businesspeople who should have known the risks they took in acting without an agreement.[217] None of the plaintiffs established an agreement as required by Article 2.[218] None of the courts refer to Article 2. To protect these plaintiffs, the new Article 2 would need a new section equivalent to section 90 of the *Restatement (Second) of Contracts*. At the time of this writing, there was no such section.

Now let us turn to damages. Of the twenty-one "promissory estoppel" decisions, two did not resolve the damage issue,[219] and a third did not explain its damage award sufficiently to identify the interest it protected.[220] Eleven cases awarded expectation damages.[221] Seven

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liquor distributor lost several major suppliers and decided to sell his business before it collapsed completely. One of his two remaining suppliers orally promised to continue to supply him. Relying on that assurance, the distributor rejected a third-party's offer for his business. Unfortunately, that same day the supplier changed its mind, whereupon the distributor's only other large supplier also withdrew its account. The distributor crawled back to the would-be buyer and sold the business for $550,000 less than the original offer. The trial court found the distributor-supplier relationship was terminable-at-will, making reliance unreasonable, but the appeals court invoked Ohio law which gave employees-at-will actions for wrongful discharge.

216. *See Walters*, 642 F.2d at 1099.

217. Werner was an engineer "with considerable experience" in designing and making the goods in question. *Werner*, 732 F.2d at 581. He had been in business for twelve years, and he owned one of only four companies in the world who could make the equipment Xerox needed. *See id.* The plaintiff in *D & G Stout* had been in business for 35 years and the business was large enough that the defendant's actions reduced its value by $550,000. *See D & G Stout*, 923 F.2d at 566-67.

218. *See* U.C.C. §§ 2-204(1), 1-201(3) (1995).

219. *See* Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 522 (8th Cir. 1987) (remanding for determination of damages under contract and promissory estoppel theories); United McGill Corp. v. Gerngross Corp., 689 F.2d 52, 53 n.2, 54 (3d Cir. 1982) (plaintiff established liability under contract and promissory estoppel; remanded for jury trial).

220. *See* Aronowicz v. Nalley's, Inc., 106 Cal. Rptr. 424, 424, 433-35, 440-41 (Ct. App. 1972) (affirming without explanation jury verdict of $78,001, under either contract or promissory estoppel, based on production costs of $436,000 and expected profits of at least $5360 a month).

221. *See* Walters v. Marathon Oil Co., 642 F.2d 1098, 1100-01 (lost expected profits) (7th Cir. 1981); Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293, 1297-98 (9th Cir. 1981) (full price of painting); Universal Computer Sys., Inc. v. Medical Servs. Ass'n, 628 F.2d 820, 825-26 (3d Cir. 1980) (lost profits); Huntington Beach Union High Sch. Dist. v. Continental Info. Sys., 621 F.2d 353, 357-58 (9th Cir. 1980) (cover damages and lost profits); Burk v. Emmick, 637 F.2d 1172, 1176-77 (8th Cir. 1980) (unpaid price); Pedi Bares, Inc. v. P & C Food Mkts., Inc., 567 F.2d 933, 937-38 (10th Cir. 1977) (unpaid balance due on goods delivered); Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643, 645 (5th Cir. 1974) (specific performance); Gulf Cities Gas Corp. v. Tangelo Park Serv. Co., 253 So. 2d 744, 747-48 (Fla. Dist. Ct. App. 1971) (rebates due under contract); Lawshe v. Glen Park Lumber Co., 375 N.E.2d 275, 276-77 (Ind. Ct. App. 1978) (lien for unpaid price); Southwest Water Servs., Inc. v. Cope, 531 S.W.2d 873, 875 (Tex. App. 1975,

decisions labeled their awards as reliance damages.

So let us turn to those seven. Decisions one and two made the same mistakes on the way to their reliance awards.[222] Each used promissory estoppel as a cause of action even though a contract existed;[223] neither mentioned Article 2's damage rules.[224] In both cases, the expectation interest and the reliance interest were the same.[225] And Decision one, while explicitly stating that it awarded only reliance damages, nevertheless gave the seller "reasonable overhead costs,"[226] which are expectation damages.[227]

Decision three is a puzzlement, since Seller, despite a written appointment as Buyer's purchasing agent and several written purchase orders,[228] sought only "expenses and charges incurred in canceling the

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writ ref'd n.r.e.) (specific performance); Bullock v. Joe Bailey Auction Co., 580 P.2d 225, 229 (Utah 1978) (specific performance).

222. *See* Cyberchron Corp. v. Calldata Sys. Dev., 831 F. Supp. 94, 116-18 (E.D.N.Y. 1993) (Seller entitled to research and development expenses incurred in attempting to produce goods requested by Buyer), *aff'd*, 47 F.3d 39 (2d Cir. 1995); Standard Structural Steel Co. v. Debron Corp., 515 F. Supp. 803, 810, 812 (D. Conn. 1980) (supplier of structural steel underestimated number of bolts Buyer would have to install; Buyer entitled to costs of installing extra bolts), *aff'd without opinion*, 657 F.2d 265 (2d Cir. 1981).

223. *See supra* note 214.

224. *See Standard Structural Steel*, 515 F. Supp. at 811-12; *Cyberchron*, 831 F. Supp. at 116-17, *aff'd*, 47 F.3d at 46-47. The trial court in *Cyberchron* cites two Sales cases, *Werner v. Xerox Corp.*, 732 F.2d 580, 584 (7th Cir. 1984), and *Janke Construction Co. v. Vulcan Materials Co.*, 527 F. 2d 772, 780 (7th Cir. 1976), for its award of reliance damages. *Werner* cites only *Janke*, and *Janke*, of all things, protects the expectation interest. *Werner*, 732 F.2d at 584. In *Janke*, a general contractor relied on a subcontractor's bid; the subcontractor backed out; and the general contractor found a substitute at a higher price. *Janke*, 527 F.2d at 774-76. The subcontractor argued "that Janke failed to establish any reliance damages" but the court said the general contractor was entitled to the $39,992.40 additional costs of the substitute goods. *Id.* at 780. While the court used the phrase "reliance damages," its award actually was the expectation interest's cost of cover. *Id.*; *see* U.C.C. § 2-712 (1995). Reliance damages would have been quite different. *See supra* note 197.

*Cyberchron* also cites several *service* cases which link promissory estoppel actions to reliance damages. *See* 831 F. Supp. at 117. It does not refer to any provisions from Article 2.

225. *Standard Structural Steel* awarded the costs of remedying defendant's incorrect estimate, *see* 515 F. Supp. at 812, and repair costs are a common method of calculating damages under UCC section 2-714(2)'s diminution-in-value formula. *See* WHITE & SUMMERS, *supra* note 5, § 10-2(a), at 365-66. *Cyberchron* gave Seller its research and development costs incurred while trying to satisfy Buyer's specifications. *See* 831 F. Supp. at 118. These are reliance damages, but since the court repeatedly said Buyer expressly agreed to pay those expenses, whether or not Seller succeeded in producing an acceptable product, they also are the contract price, i.e., the expectation interest.

226. *Cyberchron*, 47 F.3d at 46.

227. *See* U.C.C. § 2-708(2); RESTATEMENT (SECOND) OF CONTRACTS § 349 cmt. a (1982).

228. *See* Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076, 1078 (5th Cir. 1985). In fairness, I note that the court first identifies Seller's cause of action as a "breach of a purchasing agent agreement," *id.* at 1077, but later says that Sellers "grounded their claims on promissory estoppel." *Id.* at 1079.

contracts with its suppliers."[229] The court did not refer to Article 2.

Decisions four and five used federal government contract bidding rules to award Sellers the costs of preparing their bids because federal agencies had not considered fairly their bids to supply various goods.[230] Neither court used promissory estoppel itself as a cause of action or referred to Article 2 in any way.[231] Nothing in the current Article 2 requires private entities who request bids to consider those bids fairly, nor does the revised Article 2 propose such a rule.

That leaves Decisions six and seven, *Werner v. Xerox Corp.*[232] and *D & G Stout, Inc. v. Bacardi Imports, Inc.*,[233] which link the common law doctrine of promissory estoppel to reliance damages.[234] These decisions resurrect Fuller's idea that contract law should abandon an all-or-nothing approach, in which the plaintiff's failure to establish a contract, even by the narrowest of margins, deprives him of all recovery.[235] Instead, they award a lesser quantity of damages (the reliance interest) to a plaintiff who provides weaker evidence for enforcement (in the form of promissory estoppel). See Table 4 below.

Do these two decisions warrant the use of reliance damages in Sales cases? I think not. They are only two cases out of hundreds of Sales formation opinions, hardly a groundswell of support. And any "groundswell" is hollow. *Werner's* only support for its reliance award was a case which protected the expectation interest;[236] *D & G Stout* overlooked a key Article 2 formation provision and ignored the possibility that it could have fashioned an expectation award.[237] Furthermore, the other pure

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229. *Id.* at 1078-79. Seller was entitled to profits lost on the canceled orders. *See* U.C.C. § 2-708(2) (1995).

230. *See* Grumman Data Sys. Corp. v. United States, 28 Fed. Cl. 803, 808 (Fed. Cl. 1993); Keco Indus., Inc. v. United States, 428 F.2d 1233, 1238-39 (Cl. Ct. 1970).

231. *See Grumman*, 28 Fed. Cl. at 807-12; *Keco*, 428 F.2d at 1237-40.

232. 732 F.2d 580 (7th Cir. 1984).

233. 923 F.2d 566 (7th Cir. 1991).

234. *See id.* at 569-70; *Werner*, 732 F.2d at 584.

235. *See supra* text accompanying notes 71-72.

236. *See Werner*, 732 F.2d at 584 (citing Janke Constr. Co v. Vulcan Materials Co., 527 F.2d 772, 780 (7th Cir. 1976)).

237. Seller's promise resembled a requirements contract under UCC section 2-306(1), but the court found Seller's promise was too indefinite *in duration* to create a contract. *See D & G Stout*, 923 F.2d at 567-68. In so doing, it overlooked UCC section 2-309(2) & (3). Subsection (2) says that if a contract "provides for successive performances but is indefinite in duration it is valid for a reasonable time," though either party may terminate it. Subsection 3 says that such termination requires reasonable notice. Comment 8 explains that section 2-309(3) "recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement." In such a case, expectation damages could be based on the

promissory estoppel Sales case, *Walters v. Marathon Oil Co.*,[238] expressly awarded lost profits.[239] Finally, incorporating these cases into Sales would require Article 2 to adopt some form of the *Restatement (Second) of Contracts* section 90, in direct opposition to UCC sections 2-204 and 1-201(3). Not only would that bring to Sales law the same conflict between contract and tort which tormented Gilmore, it would also force Sales lawyers to add promissory estoppel claims every time a case involved a formation dispute, out of fear that failure to do so might be argued as legal malpractice. That would require courts to spend time resolving needless reliance claims. Introducing reliance damages to Sales would create similar problems. Defense lawyers would feel compelled to argue that the plaintiff should receive only her reliance interest. Such arguments would require additional judicial attention, especially if Article 2's revisers do not provide clear instructions on when courts should use the reliance interest.[240]

*Table 4: Sales Cases That Find for the Plaintiff on the Basis of Promissory Estoppel*

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|---|---|
| *Number of cases read* | 21 |
| *Were silent or unclear regarding damages* | 3 |
| *Awarded expectation damages* | 11 |
| Awarded direct expectation damages | 9 |
| Awarded consequential expectation damages | 2 |
| *Awarded reliance damages* | 7 |
| Involved facts in which the expectation and reliance interests were the same | 2 |
| Had a plaintiff who sought only reliance damages | 1 |
| Based recovery on non-contract causes of action | 2 |

number of goods the aggrieved buyer would have purchased during the period required for reasonable notice. *See* Circo v. Spanish Gardens Food Mfg. Co., 643 F. Supp. 51, 55 n.3 (W.D. Mo. 1985).

238. 644 F.2d 1098 (7th Cir. 1981).

239. *See id.* at 1100-01.

240. Introducing reliance damages to Sales cases using promissory estoppel also would be ironic, since common law courts usually award expectation damages in promissory estoppel cases. While *Restatement (Second) of Contracts* section 90(1) lets courts fully enforce a promise or limit damages "as justice requires," twenty-four of the twenty-nine cases in the Reporter's notes awarded expectation relief. *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 130 (1991). Yorio and Thel claimed to find only nine promissory estoppel cases between 1975-1985 which use reliance damages. *See id.* at 131 n.125. Another study found that 60 of 72 promissory estoppel cases that discuss damages protected the expectation interest. *See* Farber & Matheson, *supra* note 37, at 909 n.24. It cited several cases which awarded large lost profits. *See id.* at 909 n.25.

| | |
|---|---|
| Used federal statutes and regulations with reliance-like language | 2 |
| Based recovery on promissory estoppel | 2 |

### C. Contracts Involving Uncertain Damages

Courts and commentators frequently have said that reliance damages are appropriate when expectation damages are difficult to calculate.[241] Uncertainty arises when a plaintiff's evidence of damages is weak, especially if she seeks future lost profits, when she sues on an output or requirements contract, or when she seeks damages for a new business.

#### 1. General Certainty Problems

Judges developed the requirement of certainty to restrain jury awards in contract.[242] Contract damages must "be shown, by clear and satisfactory evidence, to have been actually sustained" and "shown with certainty, and not left to speculation and conjecture."[243] This gives a plaintiff "a distinctly more onerous burden" than the ordinary preponderance of the evidence rule.[244] Certainty problems occur because of ordinary difficulties in quantifying non-numerical values (what is the market value of an automobile with a rattle in the door?) or determining what might have been (what profits would a retailer have made if Seller had delivered goods as promised?). Although the harsh traditional rule has been relaxed in the past few decades,[245] some suggest it makes reliance damages appropriate.[246]

Article 2 handles certainty problems in a different way. The drafters rejected the harsh common law rule and explicitly made it easier for

241. *See, e.g.*, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 873 n.9 (1986); Becker, *supra* note 37, at 153; *The Reliance Interest*, *supra* note 10, at 374.

242. *See* FARNSWORTH, *supra* note 31, § 12.8, at 873-74, § 12.15, at 921.

243. *Id.* § 12.15, at 921 (quoting Griffin v. Colver, 16 N.Y. 489 (1858)).

244. *Id.* at 921-22.

245. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 (1982); FARNSWORTH, *supra* note 31, § 12-15, at 922. The traditional rule may not have been as harsh as it now seems. Williston wrote in 1938 that if the contract gave plaintiff "a chance to make a profit, the defendant should not be allowed to deprive him of that performance without compensation unless the difficulty of determining its value is extreme. . . . Even a remote chance of profit in such a case is obviously worth something." 5 WILLISTON (1948), *supra* note 2, § 1346, at 3779. He also wrote that courts "would doubtless allow proof of such profits in a case where no other method of estimating the plaintiff's damages was possible and where, therefore, a rejection of the test of anticipated profits would result in denying the plaintiff all substantial relief." *Id.* at 3781.

246. *See* FARNSWORTH, *supra* note 31, § 12-16, at 928; Anderson, *supra* note 53, at 258-59; *The Reliance Interest*, *supra* note 10, at 374, 376-77; Macaulay, *supra* note 35, at 260-62.

plaintiffs to prove their damages with sufficient certainty.[247] They rejected "any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."[248] Appropriately, even those commentators who have suggested that Sales law may use reliance damages when expectation damages are uncertain have conceded that such instances are rare.[249]

Indeed they are. I read one hundred randomly-selected cases[250] from the last twenty years in which one party had questioned the certainty of expectation damages. Ninety-four of the one hundred resolved the damage issue.[251] Eleven denied all damages.[252] Two awarded nominal damages;[253]

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247. *See supra* note 90 and accompanying text.

248. U.C.C. § 1-106 cmt. 1 (1995).

249. Anderson concedes that this gentler certainty rule has left a "paucity of Code cases" in which reliance damages are used, *supra* note 53, at 259, and he does not cite a single Code case in which they are used. Farnsworth says that the situation is not common, *see* FARNSWORTH, *supra* note 31, § 12.16, at 929, and, at 928 n.3, cites one pre-Code goods case, *Gruber v. S-M News Co.*, 126 F. Supp. 442, 446 (S.D.N.Y. 1954).

250. To be more precise, I selected nearly all at random. While working on other sections of this article I stumbled on several cases which expressly discussed reliance damages. Since they opposed my thesis, I thought candor required me to disclose them.

251. The remaining six remanded for new trials on damages. *See* Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1446-49 (10th Cir. 1988); Hawthorne Indus. v. Balfour MacLaine Int'l Ltd., 676 F.2d 1385, 1387-88 (11th Cir. 1982); Berge v. International Harvester Co., 190 Cal. Rptr. 815, 822-23 (Ct. App. 1983); Great West Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331, 1333 (Colo. Ct. App. 1981); Charles R. Combs Trucking, Inc. v. International Harvester Co., 466 N.E.2d 883, 887-88 (Ohio 1984); Fleming Mfg. Co. v. Capitol Brick, Inc., 734 S.W.2d 405, 407-10 (Tex. App. 1987, writ ref'd n.r.e.).

252. *See* Ragen Corp. v. Kearney & Trecker Corp., 912 F.2d 619, 626 (3d Cir. 1990) (Buyer failed to prove value of defective machinery as delivered); Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1105-06 (11th Cir. 1983) (insufficient evidence of lost profits); Consolidated Data Terminals v. Applied Digital Data Sys. Inc., 708 F.2d 385, 394-95 (9th Cir. 1983) (Buyer's lost profits caused by its own actions); Hindustan Zinc Ltd. v. C. Tennant, Sons & Co., 667 F. Supp. 1000, 1011-14 (S.D.N.Y. 1987) (Buyer's testimony about market price unsupported by figures or contracts); Argo Welded Prods., Inc. v. J.T. Ryerson Steel & Sons, 528 F. Supp. 583, 588-89 (E.D. Pa. 1981) (lost goodwill too speculative); Builders Transp., Inc. v. Hall, 360 S.E.2d 60, 61-62 (Ga. Ct. App. 1987) (plaintiff introduced no evidence of market value of goods); Brockman Printing & Servs., Inc. v. Baldwin-Gregg, Inc., 572 N.E.2d 1094, 1100-02 (Ill. App. Ct. 1991) (lost profits unforeseeable and supported inadequately); Harrington Mfg. Co. v. Logan Tontz Co., 281 S.E.2d 423, 424 (N.C. Ct. App. 1981) (insufficient evidence of lost future profits and goodwill); Moini v. Hewes, 763 P.2d 414, 416-17 (Or. Ct. App. 1988) (plaintiffs based all damage calculations on exhibit which they failed to introduce); Fenwal, Inc. v. Mencio Sec., Inc., 686 S.W.2d 660, 665-66 (Tex. App. 1985, writ ref'd n.r.e.) (plaintiff's opinion regarding lost future profits was insufficient evidence); Crow v. Central Soya Co., 651 S.W.2d 392, 394 (Tex. App. 1983, writ ref'd n.r.e) (Buyer failed to prove expenses saved after defective goods shut down Buyer's operation).

253. *See* Buckeye Trophy, Inc. v. Southern Bowling & Billiard Supply Co., 443 N.E.2d 1043, 1046-47 (Ohio Ct. App. 1982) (only evidence of damages was "guesstimate" by plaintiff's

one award was unintelligible.[254] Eighty cases chose between the expectation and reliance interests. Of these, only one protected the reliance interest.[255]

So let us examine the other seventy-nine. Fifty-seven plaintiffs received each type of expectation damages that they had requested.[256] Forty-five of these plaintiffs were Buyers. Of those, seventeen requested and received only direct damages;[257] eight received direct damages and consequential damages for injury to property;[258] sixteen were awarded direct

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employee); Kabco Equip. Specialists v. Budgetel, Inc., 440 N.E.2d 611, 613-14 (Ohio Ct. App. 1981) (no evidence of extent of damage done by leaking washing machine).

254. In *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15, 18-20 (Miss. 1981), Buyer of defective farm equipment partially mitigated by borrowing substitutes. The court awarded $4800 difference between his "investment and the recoupment from the sale of the soybeans. He was not awarded damages for his labor, nor for the normal crop yield in the area." *Id.* at 20. The appeals court quoted UCC section 2-715, said that lost profits were recoverable and foreseeable, and affirmed the lower court award without explanation. *See id.* The award is not the expectation interest, since the trial court explicitly said it did not base damages on the normal crop yield in the area. *See id.* Nor was the award reliance damages, since the court said that "he was not awarded damages for his labor." *Id.*

255. *See infra* text accompanying notes 299-301.

256. This category includes plaintiffs who requested and received direct damages and damages for lost profits, even though they did not receive *all* of the lost profits sought. Such a reduction in the award would be because of the factfinder's assessment of the quality of the plaintiff's evidence, rather than a lack of confidence in the expectation formulas themselves.

257. *See* Apex Oil Co. v. Vanguard Oil & Serv. Co., 760 F.2d 417, 423-24 (2d Cir. 1985) (market price sufficiently proven under section 2-713); Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197, 1203 (8th Cir. 1984) (difference-in-value damages under section 2-714); Eccher v. SBA, 643 F.2d 1388, 1392 (10th Cir. 1981) (rental value of unusable trailers recoverable under UCC sections 2-714 and 2-715); Brigadier Homes, Inc. v. Thompson, 551 So. 2d 1031, 1032-33 (Ala. 1989) (diminution-in-value damages); Harlan v. Smith, 507 So. 2d 943, 945 (Ala. Civ. App. 1986) (opinion testimony on value of mobile home satisfied section 2-714's difference-in-value formula); Dickson v. Delhi Seed Co., 760 S.W.2d 382, 389-90 (Ark. Ct. App. 1988) (direct damages under section 2-712 or section 2-713); Stelco Indus., Inc. v. Cohen, 438 A.2d 759, 762 (Conn. 1980) (cost of repairs under section 2-714); BCS Financial Corp. v. Sorbo, 444 S.E.2d 85, 86-88 (Ga. Ct. App. 1994) (cost of repairs); Alber v. Standard Heating & Air Conditioning, Inc., 476 N.E.2d 507, 510-11 (Ind. Ct. App. 1985) (lost goodwill); Colonial Discount Corp. v. Berkhardt, 435 N.E.2d 65, 66-68 (Ind. Ct. App. 1982) (cost of repairs); Gem Jewelers, Inc. v. Dykman, 553 N.Y.S.2d 890, 891-93 (App. Div. 1990) (cost of replacing defective display cases); Warren v. Guttanit, Inc., 317 S.E.2d 5, 11-13 (N.C. Ct. App. 1984) (difference-in-value and repair costs); Hepper v. Triple U Enters., Inc., 388 N.W.2d 525, 529-30 (S.D. 1986) (section 2-714's difference-in-value formula usable if, on retrial, plaintiff shows number of cattle infected at time of acceptance); Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078, 1084 (Utah 1985) (cover damages for cost of new concrete plus repair costs of removing old concrete and installing new material); Tacoma Athletic Club v. Indoor Comfort Sys., Inc., 902 P.2d 175, 180-81 (Wash. Ct. App. 1995) (costs of repair, but not costs of repair *and* contract price); Nelson v. Logan Motor Sales, Inc., 370 S.E.2d 734, 737 (W. Va. 1988) (difference-in-value awarded); *cf.* Capital Equip. Enters. Inc. v. Wilson Concepts, Inc., 484 N.E. 2d 237, 239 (Ohio Ct. App. 1984) (buyer entitled to market price/contract price differential under section 2-713, but trial court used incorrect market price).

258. *See* Mann v. Weyerhaeuser Co., 703 F.2d 272, 275-76 (8th Cir. 1983) (difference-in-

damages and future lost profits.[259] The remaining four received direct damages, consequential damages for injury to property, and consequential damages for future lost profits.[260]

Ten sellers received all their requested damages. Nine of them received direct damages under section 2-708(2) for lost profits and overhead.[261] And despite the absence of an express provision for a seller's

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value and lost profits awarded because of refunds Buyer gave dissatisfied customers); Atlan Indus., Inc. v. O.E.M., Inc., 555 F. Supp. 184, 188-91 (W.D. Okla. 1983) (cost of cover plus labor wasted in making component parts with Seller's defective plastic); Smith-Wolf Constr., Inc. v. Hood, 756 P.2d 1027, 1030-31 (Colo. Ct. App. 1988) (extra construction costs caused by defective materials plus reasonable overhead); Hudson v. Gaines, 403 S.E.2d 852, 854-55 (Ga. Ct. App. 1991) (diminution in value plus money spent on unsuccessful repairs); Cricket Alley Corp. v. Data Terminal Sys., Inc., 732 P.2d 719, 725-26 (Kan. 1987) (future lost profits); Jacobs v. Rosemount Dodge-Winnebago S., 310 N.W.2d 71, 73, 78 (Minn. 1981) (consequential damages for lost pleasure caused by defective motor home); Carboline Co. v. B.C.D. Co., 712 S.W.2d 453, 454-55 (Mo. Ct. App. 1986) (cost of extra work necessitated by use of defective paint); Lovington Cattle Feeders v. Abbott Lab., 642 P.2d 167, 171-72 (N.M. 1982) (price refund plus decreased weight gain of cattle caused by bad vaccine).

259. *See* Eastern Mountain Platforms Tennis, Inc. v. Sherwin-Williams Co., 40 F.3d 492, 502-03 (1st Cir. 1994) ($1.1 million, including $630,000 in lost profits); American Road Equip. Co. v. Extrusions, Inc., 29 F.3d 341, 342-43 (8th Cir. 1994) ($94,045 lost profits on one product for 1989, but insufficient records on profits for other products); Migerobe, Inc. v. Certina USA, Inc., 924 F.2d 1330, 1337-39 (5th Cir. 1991) (future lost profits on 'loss leaders' *and* on corollary sales they would have generated); Cashman v. Allied Prods. Corp., 761 F.2d 1250, 1253-54 (8th Cir. 1985) (future lost profits caused by defective machine); Horizons, Inc. v. Avco Corp., 714 F.2d 862, 866-67 (8th Cir. 1983) (costs of engine repairs and profits lost by unflyable plane); Cambridge Plating Co. v. NAPCO, Inc., 876 F. Supp. 326, 340-47 (D. Mass. 1995), *aff'd in part and vacated in part*, 85 F.3d 752 (1st Cir. 1996) ($3.4 million for costs incurred and future profits lost, based on expert's predictions); *In re* L.B. Trucking, Inc., 163 B.R. 709, 723-24 (Bankr. D. Del. 1994) (experts' testimony about lost crop yields sufficient to establish consequential damages); Stair v. Gaylord, 659 P.2d 178, 185-86 (Kan. 1983) (lost profits from damaged crop); City Welding & Mfg. Co. v. Gidley-Eschenheimer Corp., 451 N.E.2d 734, 736 (Mass. App. Ct. 1983) (lost future profits and lost goodwill); Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 920-21 (Minn. 1990); Peterson v. North Am. Plant Breeders, 354 N.W.2d 625, 633-34 (Neb. 1984) (future lost profits from damaged crop); North Am. Pump Corp. v. Clay Equip. Corp., 199 N.W.2d 888, 895-96 (N.D. 1972) (commissions lost by Buyer); Schmaltz v. Nissen, 431 N.W.2d 657, 664 (S.D. 1988) (difference between value of promised crop and value of crop as grown, i.e., lost future profits); Haner v. Quincy Farm Chems., Inc., 649 P.2d 828, 830 (Wash. 1982) (future lost profits); Harper & Assocs. v. Printers, Inc., 730 P.2d 733, 737 (Wash. Ct. App. 1986) (lost future profits); Massey Ferguson, Inc. v. Stowe, 686 P.2d 604, 607-08 (Wyo. 1984) (lost profits).

260. *See* Kaufman v. Van Santen, 696 F.2d 81, 82-83 (8th Cir. 1983) (future lost profits from infected cattle and consequential damages from injury to cattle); Purina Mills, Inc. v. Moak, 575 So. 2d 993, 998 (Miss. 1990) (value of cattle killed by defective feed and lost profits); Haley Nursery Co. v. Forrest, 381 S.E.2d 906, 908 (S.C. 1989) (future lost profits from defective fruit trees and cost of removing and replanting orchard); Barnard v. Compugraphic Corp., 667 P.2d 117, 120 (Wash. Ct. App. 1983) (refund of purchase price, value of data lost, and lost profits).

261. *See* Europlast Ltd. v. Oak Switch Sys., Inc., 10 F.3d 1266, 1275-76 (7th Cir. 1993) (testimony of Seller's president as to orders cancelled by defendant and normal profit margin on such orders sufficient to prove lost profits); R.E. Davis Chem. Corp. v. Diasonics, Inc., 924 F.2d 709, 710-12 (7th Cir. 1991); Oral-X Corp. v. Farnam Cos. 931 F.2d 667, 670-71 (10th Cir. 1991)

consequential damages,[262] one court in an unusual fact pattern did award such damages to a seller.[263]

Finally, the last twenty-three expectation cases gave the aggrieved buyer some, though not all, of the expectation damages it requested.[264]

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(lost royalties on goods Buyer refused to distribute); Camden Iron & Metal, Inc. v. Bomar Resources, Inc., 719 F. Supp. 297, 311 (D.N.J. 1989); Jericho Sash & Door Co. v. Building Erectors, Inc., 286 N.E.2d 343, 343-44 (Mass. 1972); Great N. Packaging, Inc. v. General Tire & Rubber Co., 399 N.W.2d 408, 413 (Mich. Ct. App. 1986); SAB Harmon Indus. v. All State Bldg. Sys., Inc., 733 S.W.2d 476, 488 (Mo. Ct. App. 1987); Scullin Steel Co. v. Paccar, Inc., 708 S.W.2d 756, 761-66 (Mo. Ct. App. 1986) (lost profits and overhead, but retrial required to determine the amount of those profits); Stewart & Stevenson Serv. v. Enserve, Inc., 719 S.W.2d 337, 343-46 (Tex. App. 1986, writ ref'd n.r.e.) (production costs on goods not finished; jury found no profits lost).

262. Although section 2-715 provides for a buyer's incidental and consequential damages, the parallel seller's provision, section 2-710, only discusses incidentals. *See* U.C.C. §§ 2-710, 2-715 (1995).

263. *See* American Original Corp. v. Legend, Inc., 689 F. Supp. 372, 381-83 (D. Del. 1988) (where Buyer, a clam processor, breached promise to supply Seller, a clam harvester, necessary harvesting equipment, reducing harvest, Seller/harvester entitled to future lost profits).

264. *See* Toltec Fabrics, Inc. v. August, Inc., 29 F.3d 778, 780 (2d Cir. 1994) (direct damages and profits lost when Buyers cancelled orders, but no lost profits for future orders); Hendricks & Assocs., Inc. v. Daewoo Corp., 923 F.2d 209, 217-20 (1st Cir. 1991) (one year of future lost profits but not lost profits for other future years); Continental Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc. 755 F.2d 87, 91-92 (7th Cir. 1985) (difference-in-value direct damages, but no future lost profits because of failure to introduce production records); Twin Disc, Inc. v. Big Bud Tractor, Inc. 772 F.2d 1329, 1331-32, 1336 (7th Cir. 1985) ($1.1 million of $2.9 million requested in direct damages and lost profits); West Am. Corp. v. Vaughan-Bassett Furniture Co., 765 F.2d 932, 935 (9th Cir. 1985) (credit for defective goods; only hearsay evidence of lost goodwill); Karlen v. Butler Mfg. Co., 526 F.2d 1373, 1375, 1379 (8th Cir. 1975) (insufficient evidence of consequential damages, but no denial of direct damages); Texpor Traders, Inc. v. Trust Co. Bank, 720 F. Supp. 1100, 1113-14 (S.D.N.Y. 1989) (future lost profits on confirmed orders, but not on potential orders); Custom Automated Mach. v. Penda Corp., 537 F. Supp. 77, 75, 84 (N.D. Ill. 1982) (cost of repairs to defective machinery and production lost because of late delivery, but insufficient evidence of lost goodwill); Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co., 393 F. Supp. 877, 885 (M.D. Tenn. 1975) (Singer-Buyer entitled to costs of "rehabilitating" defective album but not claimed lost profits); Bunch v. Signal Oil & Gas Co., 505 P.2d 41, 42-43 (Colo. Ct. App. 1972) (difference-in-value formula, incorrectly labeled "reliance damages"); First Nat'l Bank v. Dusold, 536 N.E.2d 100, 103 (Ill. App. Ct. 1989) (difference-in-value awarded regarding some appliances, but no replacement costs for others); Seibert v. Mock, 510 N.E.2d 1373, 1377 (Ind. Ct. App. 1987) ($7670 in repair costs; no lost profits); Delano Growers' Coop. Winery v. Supreme Wine Co., 473 N.E.2d 1066, 1074, 1075-77 (Mass. 1985) (difference-in-value damages and $100,000 for lost goodwill); Stark v. Patalano Ford Sales, Inc., 567 N.E.2d 1237, 1241-43 (Mass. App. Ct. 1991) (full direct damages—purchase price plus repair costs—but no consequential damages); Davis Indus. Sales, Inc. v. Workman Constr. Co., 856 S.W.2d 355, 360-61 (Mo. Ct. App. 1993) (difference-in-value, but insufficient evidence of consequential damages); Miller v. Stan Ortmeier Constr. Co., 426 N.W.2d 272, 275-76 (Neb. 1988) (difference-in-value, but no lost future profits); Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 498 A.2d 339, 346-48 (N.H. 1985) (some, though not all, lost future profits, and no damages for lost goodwill, since Buyer's only evidence was personal opinion); Dexter Bishop Co. v. B. Redmond & Son, Inc., 396 N.Y.S.2d 652, 652-53 (App. Div. 1977) (specific performance but no consequential

So what of the reliance interest? Three cases discussed it but then awarded expectation damages. In *Bunch v. Signal Oil & Gas Co.*,[265] Seller misrepresented a truck's age and, in lieu of giving good title, "loaned" its license plates to Buyer. Buyer was arrested, hit with $800 in fees, and forced to sell the truck at a severe loss. The jury awarded $5350 for the misrepresentation, $800 for the fees, and $8000 in lost income.[266] The appellate court struck down the latter for uncertainty[267] but gave Buyer $6150 in "actual expenditures made in reasonable reliance on the performance of the contract or made because of the breach of contract."[268] Despite this language, the court protected the expectation interest. The first $5350 of the award, though described as the value of Seller's misrepresentation, was the loss Buyer suffered when he resold the truck without the title,[269] i.e., the diminution-in-value formula of section 2-714(2). The remaining $800 in fees were consequential damages recoverable under section 2-715(2).

The second case discussed reliance damages because of sloppy lawyering. In *Eastern Sky Productions, Inc. v. RAM Graphics, Inc.*,[270] RAM sold Eastern Sky 1900 T-shirts, each bearing the logo of a musical group, though one band had not given RAM permission to use its name. Eastern Sky junked fifty shirts with the band's name, refused to pay for them, and sought lost profits.[271] The court said that contract damages are to put the injured party in the position it would have been in had the contract been performed (the expectation interest).[272] Unfortunately, Eastern Sky's ineptitude prevented this, failing to introduce obvious evidence about lost

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damages); Custom Harvesting Or., Inc. v. Smith Truck & Tractor Inc., 706 P.2d 186, 189-91 (Or. Ct. App. 1985) (full refund of down payment, but no future lost profits); John D. Hollingsworth On Wheels, Inc. v. Arkon Corp., 305 S.E.2d 71, 73 (S.C. 1983) (Buyer of defective machinery could not recover expected "economies of scale" but could recover future lost profits, expenses caused by machinery, and cost of substitute machinery); Husky Spray Serv., Inc. v. Patzer, 471 N.W.2d 146, 153 (S.D. 1991) (lost profits for some, but not all, jobs which Buyer allegedly lost because of defective crop sprayer); Sweco, Inc. v. Continental Sulfur & Chems., 808 S.W.2d 112, 117-18 (Tex. App. 1991, writ denied) (difference-in-value and some lost profits); *cf.* Eastern Sky Prods., Inc. v. RAM Graphics, Inc., No. 01-A-01-9305-CH00215, 1994 WL 642760, at *3-5 (Tenn. Ct. App. Nov. 16, 1994) (court, by denying Seller's claim for the price of nonconforming goods, effectively gave Buyer his diminution-in-value direct damages under section 2-714(2)).

265. 505 P.2d 41 (Colo. Ct. App. 1972).

266. *See id.* at 42.

267. *See id.* at 43.

268. *See id.* at 42-43.

269. *See id.* at 43.

270. No. 01-A-01-9305-CH00215, 1994 WL 642760 (Tenn. Ct. App. Nov. 16, 1994).

271. *See id.* at *1-3.

272. *See id.* at *3-4.

profits,[273] and claiming $300,000 in lost profits, even though only fifty T-shirts were affected.[274] With no evidence to support an exorbitant claim for expectation damages, Eastern Sky provided equally weak evidence of its reliance damages, and the court declined to award any remedy.[275]

The third case to discuss—but not award—reliance damages is *Bausch & Lomb Inc. v. Bressler*,[276] which is cited in the 1996 and 1995 revisions of Article 2.[277] In 1984, Buyer paid a $500,000 "prepaid royalty" and a $55,000 "down payment" for a three-year exclusive right to distribute Seller's machines.[278] The parties later extended the deal until December 31, 1989. In 1987, Buyer complained that it had received only forty-five of ninety-two units ordered over a six month period.[279] By October 1987, Buyer had more troubles: despite forty percent price cuts, it had 200 units in stock, and sales were declining.[280] Buyer declared that Seller had refused to cure the backlog of undelivered units, invoked its contractual right to manufacture the units itself,[281] and changed its mind. In November, Seller canceled the contract two years early, and Buyer sold its inventory to a third party, who sold the equipment back to Seller for one-fourth its original price.[282] Then Buyer learned that between July 1986 and December 1987, Seller repeatedly had violated the contract by selling directly to customers in Buyer's "exclusive" territory.[283]

The parties' inept record-keeping caused serious problems. Buyer determined before trial that its records were "a total mess" and would not show how many units had been delivered.[284] The same was true of Seller's

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273. The court wrote "Eastern Sky did not attempt to prove how much more successful it would have been had it been able to market" material with the band's logo. *Id.* at *5. Eastern Sky could have introduced evidence of profits it made marketing material with the logos of other bands. Indeed, a year after the band complained, the band allowed Eastern Sky to market its stuff. *See id.* Evidence of profits made after consent was obtained would have been powerful evidence of profits lost during the year. Eastern Sky introduced none of this evidence. *See id.*

274. *See id.*

275. *See id.* at *4-5.

276. 977 F.2d 720 (2d Cir. 1992). The trial court's opinion appears at 780 F. Supp. 943 (E.D.N.Y. 1992).

277. 1996 DRAFT, *supra* note 1, § 2-704 cmt. 1. For a discussion of that citation, see *infra* text accompanying notes 484-523.

278. *Bausch & Lomb*, 977 F.2d at 723-24.

279. *See id.*

280. *See id.* at 725.

281. *See id.*

282. *See id.*

283. *Id.* at 724. Buyer submitted copies of seventy-five Sonomed invoices from sales made within its territory. *See* Bausch & Lomb, Inc. v. Bressler, 780 F. Supp. 943, 957 (E.D.N.Y. 1992).

284. *Bausch & Lomb*, 780 F. Supp. at 953.

records.[285] Since Buyer could not prove how many were not delivered, or whether it would have sold them,[286] it abandoned its claim for direct damages. Instead, it sought (a) return of the $500,000 "prepaid royalty," (b) return of the $55,000 "down payment," (c) the profits which Seller made on its impermissible sales up until its December 1987 cancellation, and (d) the profits which Sonomed would make on further sales in Buyer's territory from the December 1987 cancellation until the contract expired on December 31, 1989.[287]

The first two items—the $555,000 payments—are difficult to classify. They were restitutionary (Buyer sought restoration of payments to Seller); they were reliance damages (Buyer had paid them in reliance on Seller's promise of an exclusive dealership); they were also expectation damages (the $555,000 value of the dealership as promised less whatever value was actually delivered).[288] The last two items—Seller's profits on units it sold within Buyer's territory, and the profits from sales it expected to make in Buyer's territory over the next two years—should have been evidence of Bausch's & Lomb's consequential expectation damages. But the trial court noted that Bausch & Lomb "surprisingly . . . made no claim for its own prospective loss of profits"[289] and said Buyer presented a restitution claim when it argued that "Sonomed would be unjustly enriched" if it was allowed to keep profits from sales it would make between 1987 and 1989.[290]

The trial court awarded Bausch & Lomb $555,000: the $55,000 down payment as "special damages"[291] and the $500,000 royalty payment as both expectation and reliance damages.[292] It rejected the claim for Seller's lost profits, since Buyer failed to show that Seller's sales were "fair and reasonable proof" of Buyer's lost profits.[293]

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285. *See id.*

286. *See id.* at 970. Despite steep price cuts, Buyer still had 200 unsold units, suggesting it could not have sold more units had Seller delivered them, and that additional sales would have been at a loss. *See Bausch & Lomb*, 977 F.2d at 725.

287. *See Bausch & Lomb*, 780 F. Supp. at 967.

288. *See* U.C.C. § 2-714(2) (1995).

289. *Bausch & Lomb*, 780 F. Supp. at 971.

290. *Id.*

291. *Id.* at 968-69.

292. *See id.* at 972. The trial court wrote, "[t]he law of contract damages is intended to compensate the injured party for the loss of the bargain; it is intended to make the injured party 'whole.'" *Id.* The "loss of the bargain" language sounds of the expectation interest. *Id.* The court then explained how Buyer paid $500,000 for an exclusive right and did not receive it, which should entitle Buyer to the value/price of that undelivered right, i.e., $500,000. *See id.* But in the next paragraph, the trial court said that an aggrieved party who cannot establish lost profits with sufficient certainty is entitled to reliance damages. *See id.*

293. *See id.* at 971.

The appellate court let stand the denial of Buyer's request for Seller's profits, but it overturned the $500,000 royalty payment award to the extent it was based on the expectation interest. The appellate court said Buyer failed to prove that it would have earned back the payment, i.e., that it would have made a profit through additional sales if Seller had not violated the exclusive territorial arrangement.[294] The appellate court invalidated the trial court's reliance damage award for the same reason, noting that the trial court itself had suggested that the deal was a losing one for Buyer.[295] But then the appellate court said that even if the contract had been a losing one, Buyer still could use restitution to seek a refund of royalty payments.[296] Since Buyer had made some sales, despite Seller's violation of the exclusivity clause, Buyer had received part of the value for which it had paid and was not entitled to a full refund.[297] So the Second Circuit ordered the trial court to determine how much value Bausch & Lomb had received from the exclusivity clause: Seller would have to restore the rest. The appellate court opined that "[t]he profits Sonomed obtained through its violative sales may, however, provide some evidence of the diminished value of the distribution right,"[298] thereby permitting the trial court to use the evidence which the appeals court said Buyer could not use. In short, the court in *Bausch & Lomb* denied the plaintiff's request for both expectation and reliance relief, while permitting a restitution award. For our survey's purposes, it is a case which *denies* reliance relief.

And so, of the one hundred cases in this part of the survey, we come to the single court which actually awarded the reliance interest. In *Atlantic Building Systems, Inc. v. Atlantic States Construction Co.*,[299] Seller sought the price of goods it had delivered to Buyer; Buyer complained of defects and a forty percent profit margin. The appellate court invoked the doctrine of *quantum valebant* to deny Seller any profit and to award only what the goods were worth:

> The measure of recovery under a contract implied in fact when goods or materials have been furnished . . . is the reasonable value thereof. OCGA § 9-2-7. 'The only valid reason for lost profits necessarily finds its genesis in the contract itself. There being no [express] contract between

294. *See* Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720, 728-29 (2d Cir. 1992).
295. *See id.* at 729.
296. *See id.* at 730.
297. *See id.*
298. *Id.*
299. 322 S.E.2d 311 (Ga. Ct. App. 1984)

the parties, there can be no lost profits.'[300]

The court did not explain why no express contract existed. It did not mention Article 2's abolition of any distinction between express contracts and contracts "implied-in-fact."[301] And it did not refer to section 2-709(1), which gives a seller the full price of goods delivered to and retained by a buyer. In short, the only court to award reliance damages did so in blissful ignorance of Article 2. Table 5 below offers a brief summary of the results of the survey.

*Table 5: Use of Reliance Damages When Expectation Damages Are Attacked as Uncertain*

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| *Number of cases read* | 100 |
| *Did not resolve the issue of damages* | 6 |
| *Resolved the issue of damages* | 94 |
| Denied all remedies | 11 |
| Protected the expectation interest | 78 |
| Protected the buyer's expectation interest | 68 |
| Awarded the expectation interest but labeled it "reliance" | 1 |
| Protected the seller's expectation interest | 10 |
| Made an unintelligible award | 1 |
| Awarded nominal damages | 2 |
| Protected the reliance interest (*Atlantic Building Systems*) | 1 |
| Protected the restitution interest (*Bausch & Lomb*) | 1 |

To recount: in an area which most would consider fertile ground for reliance damages, one out of one hundred courts surveyed protected the reliance interest. I found no complaints about the expectation interest; no suggestions that state legislatures should add reliance damages to Article 2; and no policy discussions about the relative merits of the two approaches. The unavailability of reliance damages simply was a non-issue; it became an issue in *Atlantic Building Systems* only because the court ignored Article 2.

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300. *Id.* at 312 (quoting Fonda Corp. v. Southern Sprinkler Co., 241 S.E.2d 256, 251 (Ga. Ct. App. 1977) (alteration in original)).

301. "Implied-in-fact" contracts traditionally arose when the parties created a contract by actions rather than by exchanging promises. Section 2-204(1) says that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct by both parties which recognizes the existence of a contract.*" U.C.C. § 2-204(1) (1995) (empasis added). While GA. CODE ANN. § 9-2-7 (1995) recognizes implied-in-fact contracts for services or "transfers of property," GA. CODE ANN. § 11-2-204 (1995) would override it regarding sales of goods.

These results testify to Article 2's effective use of cover and resale damage formulas, which make damages relatively easy to determine, and to section 1-106(1)'s relaxation of traditional certainty requirements. Many courts quoted section 1-106, Comment 1, which expressly rejects traditional certainty rules and requires damages to be proven only "with what definiteness and accuracy the facts permit, but no more."[302] Five courts said that approximations were permissible when no better evidence was available;[303] and twelve other decisions said that uncertainty as to the amount of damages does not bar recovery.[304] Three even said that since the defendant's breach prevented the plaintiff from generating the business records needed to support an award of future lost profits, the defendant could not complain about the plaintiff's weak evidence.[305] Indeed, while judges frequently doubted the credibility of testimony or the accuracy of exhibits offered to prove the extent of damages, only one court said that expectation damages generally were difficult to prove.[306] The common law may have

302. U.C.C. § 1-106 cmt. 1; *see, e.g.*, Alber v. Standard Heating & Air Conditioning, Inc., 476 N.E.2d 507, 511 (Ind. Ct. App. 1985) (if damages not provable with mathematical certainty, court will sustain any awarded within the scope of the evidence).

303. *See* Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1446-47 (10th Cir. 1988) (difficulty of ascertaining damages does not make them unascertainable); Eccher v. Small Bus. Admin., 643 F.2d 1388, 1392 (10th Cir. 1981) (damages may be based on "just and reasonable inference, although the result be approximate"); Delano Growers' Coop. Winery v. Supreme Wine Co., 473 N.E.2d 1066, 1076 (Mass. 1985) (Seller who attacked Buyer's evidence of lost goodwill "did not produce any direct evidence at trial . . . which rebutted [Buyer's] evidence of the good will value."); City Welding & Mfg. Co. v. Gidley-Eschenheimer Corp., 451 N.E.2d 734, 736 (Mass. App. Ct. 1983) (awarding lost future profits and lost goodwill based on "somewhat meager" opinion testimony of plaintiff's president); Jacobs v. Rosemount Dodge-Winnebago S., 310 N.W.2d 71, 78 (Minn. 1981) (plaintiff who shows "reasonable certainty" that injury occurred need only prove amount of damages "to a reasonable probability").

304. *See* Oral-X Corp. v. Farnam Cos., 931 F.2d 667, 670-71 (10th Cir. 1991); *In re* Merritt Logan, Inc., 901 F.2d 349, 357 (3d Cir. 1990) (once fact of damages established, amount of actual damages may be estimated); Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 710 (9th Cir. 1990); Cashman v. Allied Prods. Corp., 761 F.2d 1250, 1254 (8th Cir. 1985); Hawthorne Indus. v. Balfour MacLaine Int'l, Ltd., 676 F.2d 1385, 1387 (11th Cir. 1982); Circo v. Spanish Gardens Food Mfg. Co., 643 F. Supp. 51, 54 (W.D. Mo. 1985); Great West Food Packers, Inc. v. Longmont Foods Co., 636 P.2d. 1331, 1333 (Colo. Ct. App. 1981); Gary Builders Supply, Inc. v. Menard, Inc., 378 N.W.2d 98, 100 (Minn. Ct. App. 1985); Purina Mills, Inc. v. Moak, 575 So. 2d 993, 998 (Miss. 1990) ("[S]peculation and uncertainty of amount of damages is no bar to recovery."); North Am. Pump Corp. v. Clay Equip. Corp., 199 N.W.2d 888, 896 (N.D. 1972); Stewart & Stevenson Servs., Inc. v. Enserve, Inc., 719 S.W.2d 337, 346 (Tex. App. 1986, writ ref'd n.r.e.); *cf.* Cook Assocs., Inc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983) (less evidence needed to establish amount of loss than fact of loss).

305. *See* Rogerson Aircraft Corp. v. Fairchild Indus., Inc., 632 F. Supp. 1494, 1501 (C.D. Cal. 1986) (breacher "must bear the risk of uncertainty created by its own conduct"); Merion Spring Co. v. Muelles Hnos. Garcia Torres, 462 A.2d 686, 698 (Pa. Super. Ct. 1983); Cook Assocs., Inc. v. Warnick, 664 P.2d 1161, 1166 (Utah 1983).

306. *See* Albin Elevator Co. v. Pavlica, 649 P.2d 187, 192 (Wyo. 1982).

used reliance damages to handle problems of certainty, but Article 2 deals with the issue directly, without reliance damages.

### 2. Lost Profits for New Businesses

The "new business" rule, which bars as speculative awards of lost profits to businesses which lack a history of profitability,[307] would seem to create a need for reliance damages. Assume Buyer opens a trophy-making shop, buys an engraver for $1000, and spends $5000 on rent and supplies. The machine does not work; the business soon fails; and Buyer loses his investment. He cannot prove with any certainty how many trophies he would have sold if the engraver had worked, so he cannot recover future lost profits. But even a rudimentary records system could prove his out-of-pocket costs, so a court could protect his $6000 reliance interest.

That is not what courts do. I read thirty-two "new business" cases and found that courts either protected the expectation interest or denied damages altogether. Twenty of the thirty-two cases protected all or part of the expectation interest. Five of them awarded only direct expectation damages.[308] Thirteen awarded direct expectation damages *and* lost profits.[309]

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307. *See, e.g.*, FARNSWORTH, *supra* note 31, § 12-15, at 925 & n.25 (citing Paola Gas Co. v. Paola Glass Co., 44 P. 621, 623-24 (Kan. 1896)).

308. *See* Earle M. Jorgensen Co. v. Tesmer Mfg. Co., 459 P.2d 533, 535, 540 (Ariz. Ct. App. 1969) ($3500 cost of repairing defective steel rods, i.e., section 2-714's diminution-in-value formula); Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists, 92 Cal. Rptr. 111, 117-20 (Ct. App. 1971) ($15,000 in difference-in-value damages; lost prospective profits denied as unforeseeable and uncertain); Automark of Texas v. Discount Trophies, 681 S.W.2d 828, 831 (Tex. App. 1984, no writ) (refund of purchase price, i.e., difference-in-value formula of section 2-714), *overruled in part by* Holt Atherton Indus., Inc. v. Heine, 835 S.W.2d 80, 84 n.2 (Tex. 1992) (upholding *Automark's* requirement that estimates of lost profits must be based on objective facts, records, or data, but overruling *Automark's* requirement that those supporting records must be produced in court); Albin Elevator Co. v. Pavlica, 649 P.2d 187, 192-93 (Wyo. 1982) (refund of defective seed price but not other production expenses or lost profits from failed crop); *cf.* Poultry Health Servs. of Ga., Inc. v. Moxley, 538 F. Supp. 276, 277-78 (S.D. Ga. 1982) (although future lost profits were too speculative, once trial court determines if farmer rescinded contract, farmer entitled to direct damages under section 2-712 (cover) or section 2-714 (diminution-in-value) and $5500 in "additional labor and repair costs resulting from the plaintiff's breach" plus cost of removing defective equipment recoverable as consequential damages).

309. *See* Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1450-53 (11th Cir. 1991) ($3.6 million in lost profits); Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 710-11 (9th Cir. 1990) ($252,608 in lost profits); Unique Sys., Inc. v. Zotos Int'l, Inc., 622 F.2d 373, 378-79 (8th Cir. 1980) ($278,040 in lost profits); Rogerson Aircraft Corp. v. Fairchild Indus., Inc., 632 F. Supp. 1494, 1500-09 (C.D. Cal. 1986) ($1,283,487 in lost profits and $1.9 million in overhead); International Technical Instruments, Inc. v. Engineering Measurements Co., 678 P.2d 558, 561-63 (Colo. Ct. App. 1983) ($142,335 in expenses and $11,000 in lost profits); Gary Builders Supply, Inc. v. Menard, Inc., 378 N.W.2d 98, 99-100 (Minn. Ct. App. 1985) ($1370 in

Two more awarded direct expectation damages, damage to other property, and lost profits.[310] Another seven cases denied all requested damages,[311] but three did so for reasons unconnected with the new business rule.[312] And two more did not resolve the issue of damages.[313]

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direct damages and $1000 in lost profits); El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 261 N.W.2d 358, 363-67 (Neb. 1978) ($5500 in diminution-in-value and $8000 in lost profits); Leininger v. Sola, 314 N.W.2d 39, 42-50 (N.D. 1981) (difference-in-value between defective cows and lost profits from delayed milk production); Merion Spring Co. v. Muelles Hnos. Garcia Torres S.A., 462 A.2d 686, 697-98 (Pa. Super. Ct. 1983) ($20,000 in direct damages and $200,000 in lost profits); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 149-50 (Tex. App. 1983, writ ref'd n.r.e.) (difference-in-value and lost profits); Cook Assocs. v. Warnick, 664 P.2d 1161, 1165-67 (Utah 1983) ($100,000 in lost profits caused by delay in delivery); *cf.* W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348, 1349-51 (Fla. 1989) (remanding with instructions that trial court admit testimony of lost profits); Kvassay v. Murray, 808 P.2d 896, 902-04, 906 (Kan. Ct. App. 1991) (same).

310. *See In re* Merritt Logan, Inc., 901 F.2d 349, 358-60, 367 (3d Cir. 1990) (cost of replacement refrigeration system, value of spoiled food, and profits lost when grocery store refrigeration system died); Leoni v. Bemis Co., 255 N.W.2d 824, 825 n.2, 826-27 (Minn. 1977) (contract price of defective goods, wasted costs of advertising, and $7,499.30 in lost profits).

311. *See* Fredonia Broad. Corp. v. RCA Corp., 481 F.2d 781, 804 (5th Cir. 1973) (television station which closed because of Seller's defective goods had never made a profit and its claim for direct damages was "not proved at all to a reasonable certainty"); A & P Bakery Supply & Equip. Co. v. Hawatmeh, 388 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1980) (new business which covered "shortly thereafter" breach with equivalent goods at one-fourth contract price entitled to neither cover damages nor lost profits); Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578, 585-87 (N.C. 1987) (lost profits denied because of problems with causation and certainty; apparently no claim for direct damages); Deaton, Inc. v. Aeroglide Corp., 657 P.2d 109, 114-15 (N.M. 1982) (buyer proved only the difference between its costs and suggested retail price, so damages too speculative); AGF, Inc. v. Great Lakes Heat Treating Co., 555 N.E.2d 634, 640-41 (Ohio 1990) (lost profits denied because testimony lacked specifics regarding price and quantity, accountant did not introduce data to support his conclusions, and Buyer did not submit its own business records); Doner v. Snapp, 649 N.E.2d 42, 44-47 (Ohio Ct. App. 1994) (Buyer who covered by trading defective ostriches for new ones and admitted that conforming ostriches might have hatched "zero to ninety" eggs, denied all damages); Brenneman v. Auto-teria, Inc., 491 P.2d 992, 995 (Or. 1971) (plaintiff proved neither lost profits nor extent of detrimental reliance).

312. Two of them involved plaintiff's attorneys who simply failed to bring the proper evidence to the courtroom. *See AGF, Inc.*, 555 N.E.2d at 641 (accountant did not support conclusions with data, and Buyer did not submit its own business records); *Deaton*, 657 P.2d at 114 (Buyer proved only the difference between its costs and suggested retail price, so damages too speculative). The third plaintiff could not prove that the defendant's breach had done any harm. *See Olivetti*, 356 S.E.2d at 587 (Buyer said it gave up dealership with Seller's competitor based on Seller's false assurances but failed to show that competitor would have engaged it as a dealer).

Two other cases, mentioned earlier, awarded diminution-in-value direct damages but denied future lost profits because of reasons unconnected with the new business rule. *See* Earle M. Jorgensen Co. v. Tesmer Mfg. Co., 459 P.2d 533, 538-40 (Ariz. Ct. App. 1969) (manufacturer who bought steel rods for use in tillers claimed broken rods hurt sales, but its distributors testified that broken rods did not hurt sales); Automark of Tex. v. Discount Trophies, 681 S.W.2d 828, 830 (Tex. App. 1984) (Buyer did not bring any business records to court and provided only personal opinion about hopes for future profits).

313. *See* Blackwood Coal Co. v. Deister Concentrator Co., 626 F. Supp. 727, 731 (E.D. Pa.

Only three of the thirty-two cases discussed what could be characterized as reliance damages. In *Vulcan Metal Products Inc. v. Schultz*,[314] Buyer was a small, would-be entrepreneur (he initially appeared pro se and lost a default judgment) who started a window-making business. He bought equipment and supplies for $6321.33 from Vulcan, but the equipment never worked and his business failed.[315] He spent $1309 for office equipment, $1950 on a six-month office lease, and $17,239 for "windowmaking machinery and equipment" (the court does not explain if this included Vulcan's bill).[316] He claimed that he worked at the business for twenty hours a week, for ten months, at $12 an hour ($9600).[317] Those injuries totaled $36,419, but plaintiff first sought $7150, then increased that request to $57,045.[318] The trial court gave $45,758.50,[319] which the appellate court noted was the exact amount requested by plaintiff, excluding future lost profits, but since the trial court did not explain that award, the appellate court ordered it to make clear that the award did not include future lost profits.[320]

Several aspects of *Vulcan* are unclear. First, since cover may have been possible,[321] Buyer's failure to do so should have denied him consequential damages which cover could have prevented.[322] Second, the court does not say whether Buyer accepted the goods or revoked his acceptance. If he revoked acceptance, then he was entitled to direct expectation damages of either cover (the cost of new parts or a new machine) or the market price/contract price differential.[323] If Buyer did not revoke his acceptance, he should have received the difference in value between the machine as promised and as delivered.[324] His other investments,

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1985) (remanded for consideration of lost profits); Autrey v. Chemtrust Indus. Corp., 362 F. Supp. 1085, 1093-94 (D. Del. 1973) (distributors and dealers who purchased and resold defective chemical unable to prove future lost profits with sufficient certainty but entitled to trial regarding "out-of-pocket expenses"; court neither defines those expenses nor indicates whether plaintiffs sought recovery under section 2-714(2)'s difference-in-value formula).

314. 535 N.E.2d 933 (Ill. App. Ct. 1989).

315. *See id.* at 935.

316. *Id.*

317. *See id.* at 937.

318. *See id.* at 935.

319. *See id.* at 936.

320. *See id.* at 937.

321. One testified "that if the flag bar had been drilled correctly, he could have manufactured a window with Schultz' equipment." *Id.* at 936. A Vulcan employee testified "that by correcting the flag bar's error by hand," he made a window and demonstrated the process to Schultz." *Id.*

322. *See* U.C.C. § 2-715(2)(a) (1996).

323. *See id.* §§ 2-712, 2-713.

324. Since the court decided that the machine did not work, Buyer's section 2-714(2) diminution-in-value award would have been the purchase price of the machine.

including time he had invested in the business, would have been recoverable as consequential expectation damages under section 2-715(2), even if his future lost profits were uncertain. Third, the court's failure to discuss any request for direct damages, and the substantial discrepancy between Buyer's itemized "out-of-pocket expenses" and the court's award,[325] means that I cannot tell if he asked for direct expectation damages, if he received any, or if his requests for out-of-pocket expenses were intended as a reliance-based alternative to direct expectation remedies of cover or diminution-in-value. Fourth, the court's failure to mention a single remedial provision of Article 2[326] confuses the question even more. It may have included out-of-pocket expenses to protect Buyer's reliance interest or as consequential expectation damages. If the court *did* intend to protect only the reliance interest, it failed to make that intention clear or to justify it. Finally, should the trial court on remand require Buyer to prove that he would have made a profit at some point, had it not been for the breach? That question is important because section 1-106(1) expressly puts the plaintiff "in as good a position as if the other party had fully performed . . . ."[327] The *Vulcan* appellate court rejected Buyer's evidence of future lost profits, and if Buyer could not show that his business eventually would have turned a profit, how can he show that, but for the breach, he would have recouped his initial investment? Will awarding his reliance interest violate section 1-106(1) by awarding him *more* than he would have received had the contract been performed?

The second case is *Brenneman v. Auto-teria, Inc.*,[328] in which Buyer purchased land, built a car wash with one automatic and two self-service washers, and gave up after Seller's automatic unit failed, was replaced, and failed again.[329] *Brenneman* has several unfortunate things in common with *Vulcan*. First, it ignores Article 2's damage formulas.[330] Second, it does not explain whether Buyer tried to cover (by purchasing a unit from another manufacturer) or kept the goods and sought diminution-in-value damages under section 2-714(2).[331] Third, although the Buyer did not cover, the court did not discuss whether that should bar Buyer's claim for consequential

325. His out-of-pocket expenses, including labor, totaled $36,419.33, *see supra* text accompanying notes 315-17, but the appellate court said they totaled $45,758.50. *See Vulcan Metal Prods.*, 535 N.E.2d at 937.

326. The appellate court does use Article 2's parol evidence rule. *See Vulcan Metal Prods.*, 535 N.E.2d at 937. Therefore, the court knew that the case was governed by the UCC, but it ignored the Code's damage rules. *See id.* at 936-38.

327. U.C.C. § 1-106(1) (1996).

328. 491 P.2d 992 (Or. 1971).

329. *See id.* at 993.

330. *See id.* at 993-96.

331. *See id.*

damages.[332] And fourth, there were puzzling questions about the Buyer's quantification of his damages.[333] All these uncertainties weaken the case's precedential value.

Nor does *Brenneman* provide much support for the new business rule. In denying Buyer's request for future lost profits, the court noted that Buyer had "an entirely new venture," but it did not invoke the new business rule as a per se bar to recovery.[334] Instead, it used facts which would have doomed a recovery by even an established business. Buyer's two self-service units (though not defective) had operated at a loss, and Buyer merely estimated his future lost profits on the automatic unit, unsupported by any data or records.[335] Nor did he present better evidence on his claim that he sold the land and building at less than it would have been worth with a functioning automatic unit. He did not testify about the price he received for the property:[336] he "gave no reasons or supporting data for his opinion" that he would have received $50,000 more if the automatic unit had worked.[337] Furthermore, the court pointed out that the full price of the automatic unit was only $17,045,[338] implying a simple question: if the defective unit reduced the value of the business by $50,000 but would cost only $17,000 to replace, why didn't Buyer cover?

This brings us to the court's express award of what it calls "out-of-pocket" losses: $1500 in site preparation costs.[339] The court did not explain if this was in addition to the claim for lost profits, an alternative to lost profits, or an alternative to any claim Buyer might have made for direct damages. The court neither recognized that cover would have prevented this loss nor mentioned a single Article 2 damage provision. But it did find that Buyer cannot recover for work done which benefited him.[340] Since the record was "silent as to the value, if any, added to the land by the work in question," the court denied this remaining claim.[341] In other words, Buyer's evidence was so weak that he received nothing. With no damages (reliance or expectation), I hesitate to guess for what *Brenneman* stands.

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332. *See* U.C.C. § 2-715(2)(a) (1996).

333. *See infra* text accompanying notes 334-36.

334. *Brenneman*, 491 P.2d at 994 & n.1 (noting that while some courts consider profits of a new business too speculative, others have said that such profits need only be proven with "reasonable certainty").

335. *See id.* at 994-95.

336. *See id.* at 995.

337. *Id.*

338. *See id.* at 995 n.2.

339. *See id.* at 995.

340. *See id.* at 996.

341. *Id.*

The third case to discuss reliance damages, *Dialist Co. v. Pulford*,[342] expressly awards them but omits several important facts. Dialist sought distributors for plastic trays which, from the judge's description, were probably useless.[343] Pulford paid Dialist $2500 for the exclusive right to sell these trays in a certain area, quit his job, started marketing, spent money, and discovered that Dialist had sold his territory to someone else.[344] He asked for a refund and compensation for the money he had spent and the wages he had lost. Faced with a sympathetic plaintiff, who had no hope of recovering future lost profits under even a lenient certainty test, the court awarded reliance damages.[345]

There are several problems with *Dialist*. We do not know if Pulford requested direct expectation damages, i.e., the difference-in-value between the exclusive distributorship promised and the non-exclusive distributorship received. Second, we have no evidence that he would have recouped his investment even if the distributorship had been exclusive. An award of reliance damages in such a case would violate section 1-106(1)'s admonition to put the buyer in the position he would have been in had the contract been fully performed. Third, the court neither mentions Article 2's damages rules nor explains why its reliance formula is preferable to Article 2's remedial provisions. I suspect that this was because Dialist's actions came close to fraud or misrepresentation: if so, the court should have invoked directly those tort doctrines.[346] Table 6 below shows a summary of my survey of new business cases.

*Table 6: Types of Damages Awarded to New Businesses*

| | |
|---|---|
| *Number of cases read* | 32 |
| *Denied all damages* | 7 |
| *Did not resolve the issue of damages* | 2 |
| *Protected all or some of the expectation interest* | 20 |
| Awarded only direct expectation damages | 5 |
| Awarded direct expectation damages and future lost profits | 13 |
| Awarded direct damages, future lost profits, and out-of-pocket expenses | 2 |
| *Gave awards which could be categorized either as reliance or* | |

342. 399 A.2d 1374 (Md. Ct. Spec. App. 1979).

343. The defendant claimed that businesses could place advertising on them and give them to consumers to place under their telephones. *See id.* at 1376-77.

344. *See id.* at 1377.

345. *See id.* at 1379-82.

346. See U.C.C. § 2-721 (1996), which permits such actions to be joined with claims for breach of warranty.

| | |
|---|---|
| *expectation awards* | 2 |
| *Awarded reliance damages* | 1 |

In short, only three of thirty-two courts considered reliance damages a reasonable option when confronting a new business's claim for future lost profits. That reflects growing opposition to the new business rule itself. Of the courts surveyed, only three endorsed the traditional rule,[347] and they did not base that endorsement on Article 2.[348] The vast majority of the cases either rejected the new business rule outright[349] or qualified it.[350] The

347. *See* Autrey v. Chemtrust Indus. Corp., 362 F. Supp. 1085, 1093 (D. Del. 1973) (in Florida and Illinois, future lost profits available only to businesses with records of profits); A & P Bakery Supply & Equip. v. Hawatmeh, 388 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1980) (UCC not cited); Albin Elevator Co. v. Pavlica, 649 P.2d 187, 192-93 (Wyo. 1982) (farmer's claim for lost profits and expenses in producing crop with defective seed must be viewed as new business because farmer lacked "extensive experience" in planting spring wheat; lost profits "very difficult" to prove).

348. *See Autrey*, 362 F. Supp. at 1093 (citing only pre-UCC case law: New Amsterdam Cas. Co. v. Utility Battery Mfg. Co., 166 So. 856 (Fla. 1935); Kolberg v. Cities Serv. Oil Co., 99 N.E.2d 152 (Ill. App. Ct. 1951)).

*A & P Bakery*, 388 So. 2d at 1072, cites three common law cases. *See New Amsterdam Cas. Co.*, 166 So. at 856 (pre-UCC); Innkeepers Int'l, Inc. v. McCoy Motels, Ltd., 324 So. 2d 676 (Fla. Dist. Ct. App. 1975) (employment contract); Conner v. Atlas Aircraft Corp., 310 So. 2d 352 (Fla. Dist. Ct. App. 1975) (building lease). *A & P Bakery* also cites one goods case which *awards* lost profits to an established business and does not discuss Article 2 remedies. *See* Ashland Oil, Inc. v. Pickard, 269 So. 2d 714, 723-24 (Fla. Dist. Ct. App. 1972).

*Albin Elevator*, 649 P.2d at 190-91, mentions sections 2-714 and 2-715 but bases its denial of lost profits on *Wyoming Bancorporation v. Bonham*, 563 P.2d 1382, 1385-86 (Wyo. 1977) (denial of bank charter), which in turn is based on a service case, *Vickers v. Wichita State University*, 518 P.2d 512 (Kan. 1974), and two pre-UCC commentators: Note: *The Requirement of Certainty in the Proof of Lost Profits*, 64 HARV. L. REV. 317 (1950) and MCCORMICK, LAW OF DAMAGES (1935).

None of the cases in this footnote refer to section 1-106, Comment 2, or to section 2-715, Comment 4, both of which liberalize proof requirements for consequential damages.

349. *See In re* Merritt Logan, Inc., 901 F.2d 349, 353-58 (3d Cir. 1990); Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 711 (9th Cir. 1990); Rogerson Aircraft Corp. v. Fairchild Indus., Inc., 632 F. Supp 1494, 1500-09 (C.D. Cal. 1986); International Technical Instruments v. Engineering Measurements Co., 678 P.2d 558, 563 (Colo. Ct. App. 1983); W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd., 545 So. 2d 1348, 1351 (Fla. 1989); Kvassay v. Murray, 808 P.2d 896, 903 (Kan. Ct. App. 1991); Leoni v. Bemis Co., 255 N.W.2d 824, 826 (Minn. 1977); Deaton, Inc. v. Aeroglide Corp., 657 P.2d 109, 114 (N.M. 1982); AGF, Inc. v. Great Lakes Heat Treating Co., 555 N.E.2d 634, 638 (Ohio 1990); Doner v. Snapp, 649 N.E.2d 42, 44-45 (Ohio Ct. App. 1994); Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 149 (Tex. App. 1983, writ ref'd n.r.e.); Cook Assocs. v. Warnick, 664 P.2d 1161, 1165-66 (Utah 1983); *cf.* Leininger v. Sola, 314 N.W.2d 39, 40, 42-49 (N.D. 1981) (buyer of defective milk cows told seller he was entering milk business, but new business rule not used).

350. *See* Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1451-52 (11th Cir. 1991) (new business must show track record of profits or at least "a history of diminishing losses"); Unique Sys., Inc. v. Zotos Int'l, Inc., 622 F.2d 373, 378 (8th Cir. 1980) (burden of proof especially heavy for lost profits in new business, but no per se rule against such profits, which may be shown with "reasonable basis to figure the amount"); Fredonia Broad. Corp. v. RCA Corp., 481 F.2d 781,

opinions do not reveal any particular rationale for these changes, though I suspect courts have become uncomfortable with turn-of-the-century restrictions. Gilmore oversimplified when he accused Oliver Wendell Holmes of writing "that, ideally, no one should be liable to anyone for anything,"[351] but courts approaching *this* turn of the century seem far less willing to "let the loss . . . lie where it falls."[352] This modern attitude has some statistical support. A ten-year study found that 70% of new businesses survived at least two years, while 30% survived for eight,[353] and one of the study's authors believes that since they could not distinguish between firms that failed and firms which changed ownership, the survival rate for eight years may be over 50%.[354] A 1990 study of newly-formed firms which belonged to the National Federation of Independent Business showed that 77% survived the four-year sample period.[355] This supports the increasing use of expectation damages for new businesses and helps explain why this area rarely generates reliance damages.

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803-04 (5th Cir. 1973) (while Texas bars lost profits to new businesses, court says it has made "very clear that the factor that the enterprise was new was not controlling, but rather what was conclusive was the record of profits of the enterprise"); Blackwood Coal Co. v. Deister Concentrator Co., 626 F. Supp. 727, 731-32 (E.D. Pa. 1985) (while plaintiff will have "very difficult path to hoe" to prove lost profits, cannot dismiss such a claim as a matter of law); Poultry Health Serv. of Ga., Inc. v. Moxley, 538 F. Supp. 276, 277-78 (S.D. Ga. 1982) (same prohibitions against speculative damages apply to new and established businesses); Earle M. Jorgensen Co. v. Tesmer Mfg. Co., 459 P.2d 533, 538-39 (Ariz. Ct. App. 1969) (recovery of lost profits not barred just because business is new, but lost profits inappropriate where Buyer was in new business, marketing new product); Gary Builders Supply, Inc. v. Menard, Inc., 378 N.W.2d 98, 100 (Minn. Ct. App. 1985) (no per se rule against awarding lost profits to a new business, but frequent lack of evidence means new businesses have more proof problems); El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 261 N.W.2d 358, 363 (Neb. 1978) (new business rule is not "hard and fast": while "many, if not most" new business claims of lost profits are too speculative, they are recoverable if evidence provides a "reasonable certain factual basis" for their computation); Olivetti Corp. v. Ames Bus. Sys., Inc., 356 S.E.2d 578, 585 (N.C. 1987) (no per se rule against awarding lost future profits to new businesses, but such damages "are difficult for a new business to calculate and prove"); Brenneman v. Auto-teria, Inc., 491 P.2d 992, 994 n.1 (Or. 1971) (though case law suggests lost profits recoverable only by "established business with a record of lost profits, it should be permissible, though often difficult, to prove that new business would have earned profits"); Merion Spring Co. v. Muelles Hnos. Garcia Torres S.A., 462 A.2d 686, 696 (Pa. Super. Ct. 1983) (new businesses may receive lost profits but will have more proof problems than established businesses).

351. GILMORE, *supra* note 16, at 16.

352. *Id.* at 16 (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 76-77 (Howe ed. 1963) (1881)).

353. *See* Bruce A. Kirchhoff, *Assessing Firm Failure Fictions*, 9 J. PRIVATE ENTERPRISE 1, 7 (1993) (citing Bruce D. Phillips & Bruce A. Kirchhoff, *Formation, Growth, and Survival: Small Firm Dynamics in the U.S. Economy*, 1 SMALL BUS. ECON. 65-74 (1989)). I thank Patti Monk, Associate Director of the OCU Law Library, for this information.

354. *See id.* at 18-19.

355. *See id.* at 19 (citing ARNOLD C. COOPER ET AL., NEW BUSINESS IN AMERICA (1990)).

3. Output and Requirements Contracts

The certainty problems caused by output and requirements contracts long have been recognized. Sales law calculates damages on a per-unit basis, but output and requirements contracts intentionally leave open the number of items involved. In addition, these contracts often are for long periods of time, requiring speculation about future market prices and profit margins. Indeed, in the first half of this century, many courts considered such arrangements too uncertain to be enforced.[356] A few courts were more lenient and awarded expectation relief.[357] And some judges sought a middle ground, awarding only reliance damages.[358] Common law courts and commentators have suggested a similar solution in service contracts with indefinite terms.[359]

Article 2 changed that. It made output and requirement contracts enforceable[360] and urged specific performance (a form of the expectation interest) as the primary relief,[361] although some drafters preferred specific performance only when monetary damages were inadequate, as when a

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356. *See, e.g.*, Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001, 1004-05 (4th Cir. 1933); Wickham & Burton Coal Co. v. Farmers' Lumber Co., 179 N.W. 417 (Iowa 1920).

357. *See, e.g.*, White Marble Lime Co. v. Consolidated Lumber Co. 172 N.W. 603, 603-06 (Mich. 1919) (where Seller breached requirements contract, uncertainty of market, inconvenience of finding substitutes, disarrangement of Buyer's business, and "impracticability of determining the damages accurately" make any remedy at law inadequate, so specific performance awarded).

358. *See, e.g.*, Goodman v. Dicker, 169 F.2d 684, 685 (D.C. Cir. 1948) (expressly awarding reliance damages, but without explanation). Another traditional example is *Paola Gas Co. v. Paola Glass Co.*, 44 P. 621, 622-24 (Kan. 1896) (where gas company failed to supply gas to factory, trial court should consider costs of building and preparing factory, as well as "the rental value of the idle factory," since lost profits were too uncertain), but commentators have suggested it protected the expectation interest, *see The Reliance Interest*, *supra* note 10, at 74-75, and FARNSWORTH, *supra* note 31, § 12.16, at 931 n.17. A third well-known example is *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 188-91 (2d Cir. 1949) (court awarded Buyer's expenses in preparing foundation for machinery delivered two years late; buyer did not seek profits lost).

359. In employment-at-will contracts, the quantity of hours to be worked is uncertain, and reliance damages may be awarded. *See* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 480 (1987); Becker, *supra* note 37, at 153; *The Reliance Interest*, *supra* note 10, at 414-15. Commentators have suggested the use of reliance damages in other cases involving indefinite prices or quantities. *See* Barnett & Becker, *supra* at 480 n.179; Becker, *supra* note 37, at 153.

360. *See* U.C.C. § 2-306(1) (1996).

361. Section 2-716, Comment 1 urges courts to be more liberal in granting specific performance, and Comment 2 adds that output or requirements contracts are "the typical commercial specific performance situation . . . ." The commentators agree. *See* HILLMAN ET AL., *supra* note 51, ¶ 9.02[7][a], at 9-21 (the longer a supply contract, the greater uncertainty about its future, and the more likely specific performance will be awarded); Caroline N. Bruckel, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation*, 68 MINN. L. REV. 117, 180-81 (1983).

requirements buyer cannot find a substitute long-term supplier.[362] They also suggested that certainty problems could be handled by the sections on anticipatory repudiation and installment contracts,[363] and by Article 2's significantly looser certainty rules. Neither drafters nor commentators suggested reliance damages as a solution.

The case law reflects the drafters' preference for expectation-based monetary relief instead of specific performance. I read 100 output or requirements contract cases. Twenty-six either did not rule on damages or did not describe the damages awarded.[364] Twenty-nine ruled against the

362. *See* Comment on § 117/§ 8-15: Specific Performance, Untitled Folder (*circa* 1946), *reprinted in* KLP, *supra* note 11, J.VIII.2.b., at 4 (mere fact that person seeking specific performance is purchaser for resale insufficient if no good faith effort to secure cover). *See, e.g.*, Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 38-39 (8th Cir. 1975) (specific performance awarded when, during Arab oil embargo, Amoco terminated 10-15 year contract to supply propane and mobile home park could not locate another supplier who would supply propane for more than a few months at any price).

363. *See* Comment on § 117/§ 8-15: Specific Performance, Untitled Folder (*circa* 1946), *reprinted in* KLP, *supra* note 11, J.VIII.2.b., at 1 ("Thus the doctrine that long term installment contracts are almost automatically enforceable specifically because of the uncertainty of damages involved must be rejected in view of Section 3 (§ 7-9) on breach in installment contracts and Section 99 (§ 7-11) on anticipatory repudiation.").

364. *See* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 679-80 (3d Cir. 1991); Intercorp, Inc. v. Pennzoil Co., 877 F.2d 1524, 1526 (11th Cir. 1989) (buyer awarded "compensatory and punitive damages" without explanation); Famous Brands, Inc. v. David Sherman Corp., 814 F.2d 517, 519 (8th Cir. 1987) (overturning summary judgment for defendant); O.N. Jonas Co. v. Badische Corp., 706 F.2d 1161, 1165 (11th Cir. 1983) (reversing directed verdict and remanding for trial); United Indus. Syndicate, Inc. v. Western Auto Supply Co., 686 F.2d 1312, 1317 (8th Cir. 1982) (denying defendant's summary judgment motion); Reigel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793 (5th Cir. 1975) (remanding for trial); American Original Corp. v. Legend, Inc., 652 F. Supp. 962, 971 (D. Del. 1986) (denying motion to dismiss); Slocomb Indus., Inc. v. Chelsea Indus., No. 82-2546, 1983 WL 160582 (E.D. Pa. June 29, 1983) (sufficient writings to satisfy section 2-201); Homestake Mining Co. v. Washington Pub. Power Supply Sys., 476 F. Supp. 1162, 1169 (N.D. Cal. 1979) (declaring that Seller need not supply additional goods), *aff'd on opinion below*, 652 F.2d 28 (9th Cir. 1981); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 137 (N.D. Iowa 1978) (remanding for trial), *rev'd for lack of jurisdiction*, 603 F.2d 1301 (8th Cir. 1979); Darden v. Ogle, 310 So. 2d 182, 186 (Ala. 1975) (remanding for trial); Duval & Co. v. Malcom, 214 S.E.2d 356, 359 (Ga. 1975) (remanding for determination as to whether output contract existed); Cox Caulking & Insulating Co. v. Brockett Distrib. Co., 258 S.E.2d 51, 52 (Ga. Ct. App. 1979) (affirming summary judgment); Cohen v. Wood Bros. Steel Stamping Co., 529 N.E.2d 1068, 1071 (Ill. App. Ct. 1988) (requirements contract satisfied section 2-201); Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 685 (Iowa Ct. App. 1989) (no explanation of damages); McCasland v. Prather, 585 P.2d 336, 341 (N.M. Ct. App. 1978) (overturning trial court's dismissal of action); Gruschus v. C.R. Davis Contracting Co., 409 P.2d 500, 504 (N.M. Ct. App. 1965) (remanding for trial); Feld v. Henry S. Levy & Sons, Inc., 335 N.E.2d 320, 323 (N.Y. 1975) (denying summary judgment motions by both sides); Orange & Rockland Utils., Inc. v. Amerada Hess Corp., 397 N.Y.S.2d 814, 818 (App. Div. 1977) (Buyer demanded goods in bad faith); Varnell v. Henry M. Milgrom, Inc., 337 S.E.2d 616, 620 (N.C. Ct. App. 1985) (section 2-201 barred enforcement of alleged output contract); Merwin v. Ziebarth, 252 N.W.2d 193, 196 (N.D. 1977) (damages not explained); Schaefer v. Commonwealth, 318 A.2d 365, 368-69 (Pa.

aggrieved party: thirteen found that the contract had not been breached[365] while sixteen said there was no contract to enforce.[366]

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Commw. Ct. 1974) (rejecting taxpayer's attack on validity of school district's requirements contract); Tennessee Gas Pipeline Co. v. Lenape Resources Corp., 870 S.W.2d 286, 294 (Tex. App. 1993) (denying summary judgment motion on whether Seller boosted production in outputs contract in good faith), *aff'd in part, rev'd in part*, 927 S.W.2d 565, 573 (Tex. 1996) (holding that UCC section 2-306 does not apply); Brem-Rock, Inc. v. Warnack, 624 P.2d 220, 226 (Wash. Ct. App. 1981) (ordering new trial); Century Ready Mix Co. v. Lower & Co., 770 P.2d 692, 693, 696-97 (Wyo. 1989) (reversing trial court's finding that no requirements contract existed); Meuse-Rhine-Ijssel Cattle Breeders of Canada, Ltd. v. Y-Tex Corp., 590 P.2d 1306 (Wyo. 1979) (denying summary judgment request).

365. *See* U & W Indus. Supply Inc. v. Martin Marietta Alumina, Inc., 34 F.3d 180, 188 (3d Cir. 1994); Brewster of Lynchburg, Inc. v. Dial Corp., 33 F.3d 355, 366 (4th Cir. 1994); Atlantic Track & Turnout Co. v. Perini Corp., 989 F.2d 541, 545-46 (1st Cir. 1993) (Seller did not breach requirements contract); Angelica Unif. Group, Inc. v. Ponderosa Sys., Inc., 636 F.2d 232, 232 (8th Cir. 1980); R.A. Weaver & Assocs., Inc. v. Asphalt Constr., Inc., 587 F.2d 1315, 1316 (D.C. Cir. 1978); Massachusetts Gas & Elec. Light Supply Corp. v. V-M Corp., 387 F.2d 605, 607 (1st Cir. 1967); Northern Indus. Pub. Serv. Co. v. Colorado Westmoreland, Inc., 667 F. Supp. 613, 635-36 (N.D. Ind. 1987) (no breach when Buyers bought only 55% of stated minimum estimate, since section 2-306(1) only bars unreasonable *increases* in requirements), *aff'd without opinion*, 845 F.2d 1024 (7th Cir. 1988); Tennessee Valley Auth. v. Imperial Prof'l Coatings, 599 F. Supp. 436, 441 (E.D. Tenn. 1984) (Buyer cancelled order in good faith); Billings Cottonseed, Inc. v. Albany Oil Mill, Inc., 328 S.E.2d 426, 429-30 (Ga. Ct. App. 1985); Cox Caulking & Insulating Co. v. Brockett Distrib. Co., 258 S.E.2d 51, 52 (Ga. Ct. App. 1979); Teitelbaum v. Hallmark Cards Inc., 520 N.E.2d 1333, 1336-37 (Mass. App. Ct. 1988); Western Sign, Inc. v. Montana, 590 P.2d 141, 144 (Mont. 1979); Loizeaux Builders Supply Co. v. Donald B. Ludwig Co., 366 A.2d 721, 724-25 (N.J. Super. Ct. Law Div. 1976).

366. *See* Zayre Corp. v. S.M. & R. Co., 882 F.2d 1145, 1154-56 (7th Cir. 1989) (section 2-201 barred enforcement); Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 793-95 (4th Cir. 1989) (section 2-201 barred enforcement); Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1120-21 (5th Cir. 1985) (Buyer considered itself free to buy from suppliers other than the Seller); Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 461 (9th Cir. 1979) (Buyer did not promise to buy exclusively from Seller); Interstate Plywood Sales Co. v. Interstate Container Corp., 331 F.2d 449, 452-53 (9th Cir. 1964) (when price was to be determined by prices of five competitors, and those five went out of business, failure of price mechanism meant the contract no longer was enforceable); International Prods. & Techs., Inc. v. Iomega Corp., Civ. A. No. 88-7004, 1989 WL 138866, at *3-4 (E.D. Pa. Nov. 15, 1989) (section 2-201 barred enforcement); Eastern Dental Corp. v. Isaac Masel Co., 502 F. Supp. 1354, 1364-65 (E.D. Pa. 1980) (section 2-201 barred enforcement); Rockland Indust., Inc. v. Frank Kasmir Assocs., 470 F. Supp. 1176, 1178-80 (N.D. Tex. 1979) (section 2-201 barred enforcement); Propane Indus., Inc. v. General Motors Corp., 429 F. Supp. 214, 218-21 (W.D. Mo. 1977) (Buyer did not agree to buy propane only from Seller); Seaside Petroleum Co. v. Steve E. Rawl, Inc., 339 S.E.2d 601, 603 (Ga. Ct. App. 1985) (Buyer did not agree to buy only from Seller); Rangen, Inc. v. Valley Trout Farms, Inc., 658 P.2d 955, 961 (Idaho 1983) (conduct of parties showed they regarded orders as series of contracts, not as requirements contract); Miller v. Sirloin Stockade, 578 P.2d 247, 248-50 (Kan. 1978) (section 2-201 barred enforcement); Cavalier Mobile Homes Inc. v. Liberty Homes, Inc., 454 A.2d 367, 376-77 (Md. Ct. Spec. App. 1983) (no contract; section 2-201 also barred enforcement); W.H. Barber Co. v. McNamara-Vivant Contracting Co., 293 N.W.2d 351, 354-56 (Minn. 1979) (price quotation did not create requirements contract); Barton v. Tra-Mo Inc., 699 P.2d 1182, 1185 (Or. Ct. App. 1985) (section 2-201 barred enforcement); Alaska Indep. Fishermen's Mktg. Ass'n v. New England Fish Co., 548 P.2d 348, 350-52 (Wash. Ct. App. 1976) (section 2-201 barred

Of the study's remaining forty-five cases, six involved output contracts and awarded expectation damages, determining the quantity by using the contract's minimum amount, its contract's estimate,[367] or the number of goods which Seller sold to third parties.[368] Only two of those cases even described the facts needed to prove reliance damages, and both awarded expectation damages.[369] The remaining thirty-eight were requirements contracts which provided little more help to the reliance cause, as judges seemed untroubled by the indefinite number of goods to be purchased. Seven cases awarded specific performance,[370] thus avoiding the quantity problem (two others denied requests for preliminary injunctions).[371] Three cases based the quantity term on the goods the buyer actually purchased as cover;[372] another five provided parallel protection to the seller by using the number of goods the breaching buyer purchased from other suppliers.[373] Five more cases used an estimate contained in the contract;[374]

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enforcement).

367. *See* Cyril Bath Co. v. Winters Indus., 892 F.2d 465, 468 (6th Cir. 1989); Kirkwood Agri-Trade v. Frosty Land Foods Int'l Inc., 650 F.2d 602, 603, 605 (5th Cir. 1981) (when Seller breached outputs contract that estimated production at 10,000 to 12,000 pounds a month, Buyer entitled to market price of 10,000 pounds per month for duration of contract); Harry Thuresson, Inc. v. United States, 453 F.2d 1278, 1281-83 (Ct. Cl. 1972) (damages based on lowest quantity permitted by contract); *see also* Lambert Corp. v. Evans, 575 F.2d 132, 134, 137, 139 (7th Cir. 1978) (after Seller promised to pay $20,000 for usable parts of Buyer's inventory, which had cost Buyer $23,934.31 to produce, Buyer entitled to $20,000, not its production costs).

368. *See* Weathersby v. Gore, 556 F.2d 1247, 1258-59 (5th Cir. 1977) (holding that Buyer who failed to cover after Seller breached output contract for cotton could recover, if entitled to any damages at all, damages under section 2-712, based on cotton actually produced by Seller and sold to others); Pulprint, Inc. v. Louisiana-Pacific Corp., 477 N.Y.S.2d 540, 542 (Sup. Ct. 1984).

369. *See Lambert Corp.*, 575 F.2d at 134, 137, 139 (7th Cir. 1978) (after Evans promised to pay $20,000 for all usable parts of Lambert's inventory, which Lambert had spent $23,934.41 to produce, Lambert *not* entitled to costs of production); *Harry Thuresson, Inc.*, 453 F.2d at 1279, 1281-83 (holding that although Buyer spent $26,194.66 preparing to process material Seller was to deliver under output contract, court awarded net profit Buyer would have earned if Seller had delivered at least the minimum quantity estimated in contract).

370. *See* McLouth Steel Corp. v. Jewell Coal & Coke Co., 570 F.2d 594, 608-09 (6th Cir. 1978); Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 38-40 (8th Cir. 1975); Central Ill. Pub. Serv. Co. v. Consolidated Coal Co., 327 F. Supp. 58, 65 (C.D. Ill. 1981); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 442-43 (S.D. Fla. 1975); R.L. Kimsey Cotton Co. v. Ferguson, 214 S.E.2d 360, 363 (Ga. 1975); Harris v. Hine, 205 S.E.2d 847, 850 (Ga. 1974) (temporary injunction); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 724-25, 728 (Mo. Ct. App. 1979).

371. *See* Columbia Gas Transmission Corp. v. Larry H. Wright, Inc., 443 F. Supp. 14, 24-25 (S.D. Ohio 1977); Kaiser v. Wolf, 18 Pa. D. & C.3d 555 (Ct. C.P. 1981).

372. *See* Gatoil (U.S.A.), Inc. v. Washington Metro. Area Transit Auth., 801 F.2d 451, 454-56 (D.C. Cir. 1986); B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651, 663 (M.D.N.C. 1979); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 364-66 (Mass. 1974).

373. *See* AGFA-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518, 1524 (7th Cir. 1989);

eight courts used estimates of expected needs provided by experts or by the aggrieved party.[375] Two courts, confronting requirements contracts which one side could terminate, said the quantity should be the buyer's requirements during the minimum time needed to provide notice of termination.[376] One seller sought and received only the unpaid balance due

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Universal Power Sys., Inc. v. Godfather's Pizza, Inc., 818 F.2d 667, 673 (8th Cir. 1987); City of Louisville v. Rockwell Mfg. Co., 482 F.2d 159, 165-66 (6th Cir. 1973); Camel Invs., Inc. v. Webber, 468 So. 2d 340, 342-43 (Fla. Dist. Ct. App. 1985); Great N. Packaging, Inc. v. General Tire & Rubber Co., 399 N.W.2d 408, 413 (Mich. Ct. App. 1986).

374. *See* Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1452-53 (11th Cir. 1991) (contract's estimate of vending machines Buyer was to purchase, plus Seller's evidence of profits lost because Buyer also failed to buy coffee and cups to be dispensed from machines); Wallace Steel, Inc. v. Ingersoll-Rand Co., 739 F.2d 112, 115-16 (2d Cir. 1984) (when Buyer breached requirements contract to buy at least 1300 tons a month, jury awarded damages based on that amount); *In re* William Freihofer Baking Co., 1976 WL 23613 (E.D. Pa. May 4, 1976) (headnote says "seller's claim in the amount of the difference between the guaranteed minimum and the actual amount purchased was allowed as an unsecured claim"); Shea-Kaiser-Lockheed-Healy v. Department of Water & Power of L.A., 140 Cal. Rptr. 884, 888-91 (Ct. App. 1977) (when Buyer demanded far more goods than maximum quantity set in contract, Seller entitled to above-contract price on excess goods delivered); *cf.* Prescon Corp. v. Savoy Constr. Co., 267 A.2d 222, 227-28 (Md. 1970) (when Buyer cancelled contract for structural steel needed for Seller's design of building, trial court wrongly limited Seller to cost of preparing blueprints and drawings; remanded for evidence of Seller's lost profits).

375. *See* Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333, 1335, 1341-42 (7th Cir. 1988) (affirming award of lost profits based on jury's estimate of Buyer's requirements, Judge Posner observed "[t]he calculation of damages is estimation rather than measurement, and it is foolish to prolong a lawsuit in quest of delusive precision"); Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276, 1281-82 (4th Cir. 1987) (Buyer awarded profits for 1983 based on records showing customer cancellations and profits for 1984 based on sales agents' testimony of customers who, because of 1983 non-deliveries, did not purchase from Buyer in 1984); Zippy Mart, Inc. v. A & B Coffee Serv., Inc., 380 So. 2d 833, 835 (Ala. 1980) (when convenience stores breached agreement to use coffee service's vending machines and supplies, Seller's damages were not value of the installed machines, but price of supplies stores should have purchased or lost profits regarding those supplies); Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp., 63 Cal. Rptr. 148, 152 (Ct. App. 1967) (despite difficulty calculating value of car dealership, dealer may recover such damages based on expert testimony); Kubik v. J & R Foods of Or., Inc., 577 P.2d 518, 522 (Or. 1978) (in requirements contract, Seller entitled to lost profits on goods which Buyer, using best efforts to resell, would have purchased); Paramount Lithographic Plate Serv., Inc. v. Hughes Printing Co., 2 Pa. D. & C.3d 677 (Ct. C.P. 1977) (using plaintiff's "reconstruction of the work which would have been performed on the press if it had not been moved from defendant's plant"); Syrovy v. Alpine Resources, Inc., 841 P.2d 1279, 1280-81, 1284 (Wash. Ct. App. 1992) (when landowner sold logger, at flat price, all timber logger could cut over two years, and Buyer logged far less than expected, Seller still entitled to full contract price), *aff'd*, 859 P.2d 51 (Wash. 1993); *cf.* Tigg Corp. v. Dow Corning Corp., 962 F.2d 1119, 1129-31 (3d Cir. 1992) (remanding for new trial on damages and discussing expectation remedies under sections 2-708(1), 2-708(2), and 2-709, without explaining how to determine quantity).

376. *See* Circo v. Spanish Gardens Food Mfg. Co., 643 F. Supp. 51, 55 n.3 (W.D. Mo. 1985) (damages regarding contract of indefinite duration limited to time necessary to provide notice); Reisman & Sons v. Snyder's Potato Chips, 1976 WL 23705 (Pa. Ct. C.P. Mar. 23, 1976) (regarding requirements contract terminable on six months notice, trial court should base damages

on the goods actually delivered to a breaching buyer.[377] An imaginative court solved the twin problems of indefinite quantity and duration by holding the contract would remain in effect until Buyer had purchased all the inventory Seller had when Buyer gave notice of termination.[378] Two courts did not trouble themselves about the quantity issue.[379] One case denied a claim for lost profits (Seller had made a losing contract with the defendant), but awarded fixed overhead costs,[380] which are part of the expectation interest.[381] Only one case denied damages as too uncertain.[382] Table 7 below offers a summary of these cases.

*Table 7: Reliance Damages in Output or Requirements Contracts*

| | |
|---|---|
| *Number of output or requirements contract cases read* | 100 |
| *Found that no contract existed* | 16 |
| *Found that no breach had occurred* | 13 |
| *Did not discuss or resolve the issue of damages* | 26 |
| *Awarded damages* | 44 |
| Involved output contracts | 6 |
| Awarded expectation damages | 6 |
| Awarded reliance damages | 0 |
| Involved requirements contracts | 38 |
| Awarded specific performance | 7 |
| Rejected requests for preliminary injunctions | 2 |
| Awarded full monetary relief, including future lost profits | 27 |
| Awarded part of the expectation interest (reasonable overhead) | 1 |

on Buyer's needs for six months).

377. *See* Stacks v. F & S Petroleum Co., 641 S.W.2d 726, 726 (Ark. Ct. App. 1982) (Seller sued only for "outstanding balance owed on gas" supplied under requirements contract).

378. *See* Hamilton Tailoring Co. v. Delta Air Lines, Inc., 1974 WL 21756 (S.D. Ohio Apr. 19, 1974).

379. *See* Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1446-49 (10th Cir. 1988) (when Buyer breached ten-year contract in its first year, Seller could use section 2-708(1)'s market price/contract price differential formula); Canteen Corp. v. Former Foods, Inc., 606 N.E.2d 174, 179, 185-86 (Ill. App. Ct. 1992) (confirming arbitration award of $524,533.12 in lost profits).

380. *See* Scullin Steel Co. v. Paccar, Inc., 748 S.W.2d 910, 913-15 (Mo. Ct. App. 1988).

381. *See* U.C.C. § 2-708(2) (1996) (providing Seller with "profit (including reasonable overhead)").

382. *See* B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651, 663 (M.D.N.C. 1979) (denying consequential damages because Buyer presented insufficient evidence that Seller's breach of requirements contract had cost Buyer any resale customers).

| | |
|---|---|
| *Denied all damages* | 1 |
| *Awarded reliance damages* | 0 |

So what of the reliance interest? Not a single case of the 100 sampled awarded reliance damages. At least four rejected a request for such relief.[383] Judges seemed content with the all-or-nothing approach to contract damages that Fuller opposed. When confronted with indefinite quantities, they found that no contract existed,[384] or they found a way to award expectation relief. They did not take Fuller's suggestion that weaker evidence of a contract should limit compensation to the reliance interest. Instead, they followed section 2-204(3), which says that a contract does not fail for indefiniteness if there is a reasonably certain basis for giving an appropriate remedy. Conversely, if there is not a reasonably certain basis for a remedy, no contract exists.[385] The output and requirements cases unanimously oppose *The Reliance Interest.*

### *D. Excuse*

*The Reliance Interest* argued that reliance damages should play "an important role" in excuse cases: it said that in many close cases, the best solution "may well be to relieve the promisor from his duty, at the price . . . of making good the other party's losses through reliance on the contract."[386] Later commentators have split on the issue,[387] while the *Restatement*

383. *See* Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333, 1336, 1341-42 (7th Cir. 1988) (awarding lost profits even after determining that Seller had incurred no reliance expenses preparing to deliver propane); Lambert Corp. v. Evans, 575 F.2d 132, 137 (7th Cir. 1978) (expressly denying Seller "the full amount of its cost" for goods to be sold); Zippy Mart, Inc. v. A & B Coffee Serv., Inc., 380 So. 2d 833, 835 (Ala. 1980) (when convenience stores breached agreement to use coffee service's vending machines and supplies, damages were not value of machines, but price of supplies stores should have purchased or lost profits of those supplies); Miller v. Sirloin Stockade, 578 P.2d 247 (Kan. 1978) (Statute of Frauds barred enforcement of requirements contract, even though Buyer's breach left Seller huge inventory of perishable food).

384. *See, e.g.*, Hindustan Zinc Ltd. v. C. Tennant, Sons & Co., 667 F. Supp. 1000, 1012-13 (S.D.N.Y. 1987) (no contract due to unilateral mistake); Integrated Micro Sys. v. NEC Home Elec., 329 S.E.2d 554, 556-57 (Ga. Ct. App. 1985) (holding that no requirements contract existed because no quantity was specified); Billings Cottonseed, Inc. v. Albany Oil Mill, Inc., 328 S.E.2d 426, 429-30 (Ga. Ct. App. 1985) (not a requirements contract due to lack of exclusivity); *cf.* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 679-80 (3d Cir. 1991) (remanding for trial on enforceability).

385. *See, e.g., Advent Sys. Ltd.*, 925 F.2d at 679.

386. *The Reliance Interest*, *supra* note 10, at 380.

387. *See, e.g.*, FARNSWORTH, *supra* note 31, § 9-9, at 736; Anderson, *supra* note 53, at 261; Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 575, 591-92 (1983). *But see* Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 505 (1985) (reliance interest often would be "valueless" or "inadequate").

*(Second) of Contracts* makes reliance damages "an option."[388] More importantly for us, two commentators have argued that section 2-615, Comment 6, lets a court protect the reliance interest.[389]

I have four counter-arguments. First, I am not sure how the expectation-reliance-restitution continuum plays in excuse cases. Section 2-615(a) says that late delivery or non-delivery by an excused seller is not a breach of the contract. If there is no breach, what contractual cause of action does a buyer have? Without a contractual cause of action, are the expectation or reliance interests relevant? This may explain why, in common law excuse cases, courts award restitution damages based on a non-contractual, restitution claim.[390]

Second, although Comment 6 of section 2-615 advises courts to consider "the general policy of this Act to use equitable principles," Article 2's drafters recognized "equitable relief" as non-monetary relief, such as specific performance or liens.[391] Third, the commentators who suggest reliance damages recognize that they have little judicial support[392] and agree that restitution is the standard remedy.[393] At least one commentator has criticized reliance damages in the excuse context,[394] and others have suggested other solutions.[395]

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388. RESTATEMENT (SECOND) OF CONTRACTS § 272 (1982).

389. *See* Trakman, *supra* note 387, at 482; Anderson, *supra* note 53, at 263 (citing U.C.C. § 2-615 cmt. 6).

> In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse' adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

U.C.C. § 2-615 cmt. 6

390. *See* FARNSWORTH, *supra* note 31, § 9-9, at 736-37; Anderson, *supra* note 53, at 260; cases cited in *The Reliance Interest*, *supra* note 10, at 381; Harrison, *supra* note 387, at 581.

391. *See supra* note 117.

392. Fuller admitted he had no supporting case law. *The Reliance Interest*, *supra* note 10, at 379-82. Farnsworth says that "few courts" award reliance damages and cites only one case which did. *See* FARNSWORTH, *supra* note 31, § 9-9, at 737 (citing Albre Marble & Tile Co. v. John Bowen Co., 155 N.E.2d 437 (Mass. 1959)). Anderson concedes he has "[l]ittle judicial authority" and cites three cases. Anderson, *supra* note 53, at 261 n.46. The first, *National Presto Indus., Inc. v. United States*, 338 F.2d 99 (Ct. Cl. 1964), was a case of mutual mistake and predated Article 2. *See id.* at 106-12. The second, *Northern Corp. v. Chugash Elec. Ass'n*, 518 P.2d 76 (Alaska), *modified on reh'g*, 523 P.2d 1243 (Alaska 1974), was a contract for services, as was the third, *Albre Marble & Tile Co. v. John Bowen Co.*, 155 N.E.2d 437 (Mass. 1959), cited earlier by Farnsworth. *But see* Trakman, *supra* note 387, at 505 (courts tend to favor the reliance approach).

393. *See* FARNSWORTH, *supra* note 31, § 9-9, at 736-37; Anderson, *supra* note 53, at 260; *The Reliance Interest*, *supra* note 10, at 379; Harrison, *supra* note 387, at 581.

394. *See* Trakman, *supra* note 387, at 505.

395. *See id.* at 506; FARNSWORTH, *supra* note 31, at 736 n.32 and materials cited.

Fourth, courts handling excuse in sales cases have not used reliance damages. I found twenty-two cases in which a party successfully invoked Article 2's excuse provision (section 2-615). Of these, three were silent on damages.[396] Thirteen excused defendant from all liability.[397] Four said that the excused party's only duty was to fairly allocate its supplies among its customers,[398] while two others regarded adjustment of the terms of the contract as a possible remedy.[399] Three plaintiffs had suffered expectation or reliance injuries, but all three courts excused the defendants from all liability.[400] Not one court awarded reliance damages. Table 8 below provides a summary of these decisions.

*Table 8: Excuse Cases*

| | |
|---|---|
| *Number of cases read* | 22 |
| Did not discuss damages | 3 |
| Found the defendant was not liable | 13 |

396. *See* Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363, 366-68 (Mass. 1974); Red River Commodities, Inc. v. Eidsness, 459 N.W.2d 805, 807-09, 811 (N.D. 1990); Paramount Supply Co. v. Sherlin Corp., 475 N.E.2d 197, 206-07 (Ohio Ct. App. 1984).

397. *See* PPG Indus., Inc. v. Shell Oil Co., 919 F.2d 17, 18-19 (5th Cir. 1990); Federal Pants, Inc. v. Stocking, 762 F.2d 561, 566-67 (7th Cir. 1985); Waldinger Corp. v. CRS Group Eng'rs, Inc., 775 F.2d 781, 783-86 (7th Cir. 1985); International Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879 (10th Cir. 1985); Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp., 719 F.2d 992, 999-1001 (9th Cir. 1983); Asphalt Int'l, Inc. v. Enterprise Shipping Corp., S.A., 667 F.2d 261, 263-65 (2d Cir. 1981); Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 996 (5th Cir. 1976) (excusing defendant from liability for delays caused by government procurement programs); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 658 (Miss. 1975); Selland Pontiac-GMC, Inc. v. King, 384 N.W.2d 490, 492-93 (Minn. Ct. App. 1986); Eades Commodities, Co. v. Hoeper, 825 S.W.2d 34, 36-37 (Mo. Ct. App. 1992); Campbell v. Hostetter Farms, Inc., 380 A.2d 463, 464, 467 (Pa. Super. Ct. 1977); Olson v. Spitzer, 257 N.W.2d 459, 463 (S.D. 1977); Process Supply Co. v. Sunstar Foods, Inc., 1979 WL 30091 (U.S. Dept. Agric. Apr. 25, 1979).

398. *See* Alimenta (U.S.A.), Inc. v. Cargill Inc., 861 F.2d 650, 654 (11th Cir. 1988); Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada) Ltd., 802 F.2d 1362, 1363-66 (11th Cir. 1986); Mansfield Propane Gas Co. v. Folger Gas Co., 204 S.E.2d 625, 626-27 (Ga. 1974); Terry v. Atlantic Richfield Co., 140 Cal. Rptr. 510, 512-15 (Ct. App. 1977).

399. *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 70, 79-80 (W.D. Pa. 1980) (adjusting contract terms); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 135-36 (N.D. Iowa 1978) (stating that "equity may require some adjustment of price . . . ." but, holding that excused party failed to prove what would be equitable adjustment).

400. *See* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 654, 658 (Miss. 1975) (finding no damages to Buyer who relied on purchase of Seller's soybean crop, which drought later reduced severely); Selland Pontiac-GMC, Inc. v. King, 384 N.W.2d 490, 492-93 (Minn. Ct. App. 1986) (holding no damages for Buyer who purchased materials to use with Seller's goods and sold them at a loss after Seller did not deliver); Process Supply Co. v. Sunstar Foods, Inc., 1979 WL 30091 (U.S. Dept. Agric. Apr. 25, 1979) (determining that although late delivery caused Buyer's factory and 30 workers to sit idle for four hours, Seller excused and entitled to full payment for goods delivered).

| | |
|---|---|
| Ordered the defendant to allocate production, pursuant to section 2-615(b) | 4 |
| Adjusted the terms of the contract | 2 |
| Awarded reliance damages | 0 |

### *E. Where Fuller Himself Believed Reliance Damages Should Be Used*

*The Reliance Interest* pays almost no attention to Sales, except to say reliance damages were a well-established remedy in two types of cases. This last section addresses those cases.

#### 1. The Seed Warranty Cases

One of Fuller's few references to Sales concerned farmers who bought and planted seed, only to see it succumb to disease or fail to germinate. In these "seed warranty cases," Fuller said that the use of reliance damages (the cost of planting and cultivation), "seems as firmly established as long judicial use can establish a remedy . . . ."[401] Yet his assertion was contested at the time, and it enjoys little support today.

Many of Fuller's contemporaries disagreed with his poition. Professor McCormick's famous treatise on damages protected the expectation interest, saying courts "frequently" fix damages for a destroyed or injured crop by taking the value of the lost yield and subtracting the farmer's production costs,[402] thereby awarding the farmer's lost profits. Another commentator agreed, saying damages are "the value of a crop . . . such as would ordinarily have been produced that year, deducting the expense of raising it and the value of the crop actually raised."[403] Samuel Williston and another scholar preferred lost profits when the crop germinated

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401. *See The Reliance Interest*, *supra* note 10, at 91-92, 92 n.64 (citing Ferris v. Comstock, Ferre & Co., 33 Conn. 513 (1866)); Vaughan's Seed Store v. Stringfellow, 48 So. 410 (Fla. 1909); Butler v. Moore, 68 Ga. 780 (1882); Crutcher & Co. v. Elliott, 13 Ky. L. Rptr. 592 (1892); Moorhead v. Minneapolis Seed Co., 165 N.W. 484 (Minn. 1917), Lundquist v. Jennison, 214 P. 67 (Mont. 1923); and Reiger v. Worth Co., 37 S.E. 217 (N.C. 1900)).

402. CHARLES T. MCCORMICK & WILLIAM F. FRITZ, CASES AND MATERIALS ON DAMAGES 489 (2d. 1952) (citing Shannon v. Bridges, 165 P.2d 976 (Okla. 1946), and International & G. N. R.R. Co. v. Pape, 11 S.W. 526 (Tex. 1889)).

403. J. G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 61, at 238 (John R. Berryman ed., 4th ed. 1916). Sutherland notes two exceptions. Tennessee awarded the difference in value between the seed as promised and as delivered and Georgia awarded the price of the seed and costs of cultivation, i.e., the reliance interest. *See id.* Sutherland does not say whether Tennessee based the value of the seed on price or on what it might produce. The latter would produce direct damages under section 2-714; the former consequentials under section 2-715.

but was reduced in yield, although they said some courts protected the reliance interest when the crop failed to germinate.[404]

If Fuller overstated his case in 1936, he has virtually no support today. While seed, herbicide, and pesticide manufacturers have used clauses disclaiming warranties, limiting remedies, and excluding consequential damages to reduce drastically the number of unhappy farmers who make it to trial,[405] I found fifty-six cases in which courts considered themselves unrestrained by such clauses.[406] Forty-three courts awarded full expectation damages, both direct and consequential, including profits lost because of reduced yields.[407] Case number forty-four awarded lost profits under the

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404. *See* 2 WILLISTON, *supra* note 39, § 614, at 1543-44. Williston's citations show that courts were split on both ideas. He has a dozen cases for the first proposition, with five in opposition. *See id.* at 1544 n.52. He cites four total failure cases awarding reliance damages, and four awarding consequential damages. *See id.* at 1544 n.53. *See also* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 768, at 1609-11 (9th ed. 1912). I suspect that courts which distinguished between partial and total failures suspected that total failures may have been caused by improper planting, bad weather, etc., not just bad seed.

405. *See, e.g.*, Lindemann v. Eli Lilly & Co., 816 F.2d 199, 200 n.2, 203-04 (5th Cir. 1987) (holding consequential damage exclusion clause limited remedy to $6000 difference in value between herbicide as promised and as delivered, regardless of lost profits or wasted cultivation costs).

406. I included cases involving defective seed, herbicides, insecticides, and fertilizers, as well as cases of livestock injured by defective feed or infected by disease.

407. *See* Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 639, 648 (10th Cir. 1991) ($1.2 million in profits lost on 1984 crop); Herrick v. Monsanto Co., 874 F.2d 594, 595, 598 n.7, 599 (8th Cir. 1989) ($5000 request for price of defective herbicide and $15,170 in consequential damages); Edmondson v. Northrup King & Co., 817 F.2d 742, 745-47, 750 (11th Cir. 1987) ($786,849.79 for lost yields from low germination rate); Martin v. Joseph Harris Co., 767 F.2d 296, 298, 303 (6th Cir. 1985) (difference in value between probable and actual crops; irrelevant that market price had risen so high that farmers still made substantial profit from harvested part of crop); Kaufman v. Van Santen, 696 F.2d 81, 82 (8th Cir. 1983) ($33,800.80 for profits lost when diseased cow infected dairy herd and cut milk production); Agricultural Servs. Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1069 (6th Cir. 1977) (difference in production between good seed and bad seed); R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 753-55 (10th Cir. 1975) (when defective feed ruined high quality swine, Buyer entitled to difference in value between feed as promised and as delivered, plus *either* lost profits while feed used or diminution in value of business caused by herd destruction and loss of reputation); Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 671-72 (5th Cir. 1971) ($10,000 in lost profits and lost business goodwill); Larsen v. A.C. Carpenter, Inc., 620 F. Supp. 1084, 1131-35, 1138-39 (E.D.N.Y. 1985) (10% lost profits from value of crops not produced), *aff'd without opinion*, 800 F.2d 1128 (2d Cir. 1986); Serien Bros., Inc. v. Agri-Sun Nursery, 30 Cal. Rptr. 2d 382, 386-95 (Ct. App. 1994) (profits lost because of infection); Klein v. Asgrow Seed Co., 54 Cal. Rptr. 609, 620 (Ct. App. 1966) (pre-UCC provision, which used same language as section 2-714, awarded difference between reasonable market value of actual crop and value of crop that would have been produced by proper seed, less necessary expenses saved); Prutch v. Ford Motor Co., 618 P.2d 657, 658-59, 662 (Colo. 1980) (value of defects in equipment and profits lost from reduced onion crop); R.A. Jones & Sons, Inc. v. Holman, 470 So. 2d 60, 70-71 (Fla. Dist. Ct. App. 1985) (expected normal yield less amount actually harvested, reduced by costs saved, multiplied by average market price for same crop during season

of injury); Pennington Grain & Seed, Inc. v. Tuten, 422 So. 2d 948, 950, 952 (Fla. Dist. Ct. App. 1982) ($161,000 based on sections 2-714 and 2-715); DeVane v. Smith, 268 S.E.2d 711, 712 (Ga. Ct. App. 1980) (difference between value of cotton actually grown and probable value of crop that would have grown, less prospective expenses saved); Clark v. International Harvester Co., 581 P.2d 784, 803-06 (Idaho 1978) (if remedy limitation clause ineffective, farmer entitled to repair costs and profits lost because of defective tractor); Ouwenga v. Nu-Way Agric., Inc., 604 N.E.2d 1085, 1087-89 (Ill. App. Ct. 1992) ($137,597 in lost profits); Murray v. Kleen Leen, Inc., 354 N.E.2d 415, 421-22 (Ill. App. Ct. 1976) (buyer of infected swine entitled to consequential damages of lost profits and out-of-pocket costs of preparing pens and fences); Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 636-37, 639 (Iowa 1988) (Buyer entitled to 75% of crop loss, but not the interest); Stair v. Gaylord, 659 P.2d 178, 185-86 (Kan. 1983) (profits lost because of defective irrigation hose); Mallory v. Conida Warehouses, Inc., 350 N.W.2d 825, 828 (Mich. Ct. App. 1984) (trial court properly used the Michigan version of sections 2-714 and 2-715 to instruct jury); Missouri Farmers Ass'n, Inc. v. Killion, 708 S.W.2d 801, 803 (Mo. Ct. App. 1986) (farmer entitled to be put in position he would have been in if contract fully performed by seed company, i.e., the difference in the fair market value of the crop as raised and the fair market value of what the crop would have been less expenses saved); Peterson v. North Am. Plant Breeders, 354 N.W.2d 625, 628, 633-34 (Neb. 1984) ($76,519 difference between value of probable crop and crop grown with defective seed); Arigo v. Abbott & Cobb Inc., 448 N.Y.S.2d 311, 312 (App. Div. 1982) (difference between expected and actual yield); Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 593-95 (N.D. 1984) (award of lost profits subject to new trial only because such profits are recoverable only in contract, while judge also instructed jury in tort); Johnson v. Monsanto Co., 303 N.W.2d 86, 92 (N.D. 1981) (difference between value of crop after damaged by herbicide and value it would have had at maturity, less expenses saved and profits made by replanting other crops); Leininger v. Sola, 314 N.W.2d 39, 42-47, 49-50 (N.D. 1981) (net profits from lost milk production); Eichenberger v. Wilhelm, 244 N.W.2d 691, 697-98 (N.D. 1976) (difference between value of probable and actual crop, less expenses saved); Haley Nursery Co. v. Forrest, 381 S.E.2d 906, 908 (S.C. 1989) ($250,000 difference in yield between peach trees as ordered and as delivered, multiplied by expected life of trees); Simmons v. Ciba-Geigy Corp., 302 S.E.2d 17, 18 (S.C. 1983) (difference between value of probable and actual crop, less expenses saved); W.R. Grace & Co. v. LaMunion, 138 S.E.2d 337, 342 (S.C. 1964) (difference between value of probable and actual crops less expenses saved); Schmaltz v. Nissen, 431 N.W.2d 657, 658, 664 (S.D. 1988) (difference between value of probable and actual crops); Swenson v. Chevron Chem. Co., 234 N.W.2d 38 (S.D. 1975) (difference between value of probable crop and value of actual crop, plus full refund of price of defective insecticide); Ford Motor Co. v. Taylor, 446 S.W.2d 521, 528-31 (Tenn. Ct. App. 1969) (difference in value between tractor as promised and as delivered as well as lost profits from unplanted crops); General Supply & Equip. Co. v. Phillips, 490 S.W.2d 913, 921 (Tex. App. 1972) (cost of replacing defective greenhouse roofing and difference between value of actual and probable crops); Hall v. Miller, 465 A.2d 222, 227-28 (Vt. 1983) (when Seller's diseased cattle infected Buyer's herd, Buyer entitled to direct damages and lost profits); Lewis River Golf v. O.M. Scott & Sons, 845 P.2d 987, 989-90, 992-93 (Wash. 1993) (lost profits and lost goodwill available when defective seed seriously reduced profits and forced sale of business at substantial loss); Haner v. Quincy Farm Chems., Inc., 649 P.2d 828, 830 (Wash. 1982) (lost production); Nakanishi v. Foster, 393 P.2d 635, 643 (Wash. 1964) (market value of crops which would have been raised that season, less expenses saved and salvage proceeds from crop); *see also* Perry v. Lawson Ford Tractor Co., 613 P.2d 458, 464-65 (Okla. 1980) (if, on remand, farmer can present sufficient evidence, should receive difference in value between tractor as promised and as delivered, along with value of lost crop minus expenses saved); Albin Elevator Co. v. Pavlica, 649 P.2d 187, 193, 195-96 (Wyo. 1982) (Raper, J., dissenting) (farmer of defective seed entitled to price of seed plus difference between value of crop good seed would have produced and value of crop as raised); *cf.* Adams v. American Cynamid Co., 498 N.W.2d 577 (Neb. Ct. App. 1992) (although jury awarded "the

guise of direct damages, in order to evade Seller's effort to limit Buyer's remedies.[408] Case number forty-five awarded direct damages along with the consequential damages of additional costs incurred in raising defective hogs.[409] Cases number forty-six to fifty failed to explain their damage awards.[410] Cases number fifty-one to fifty-four presented a smorgasbord of awards and rationales.[411]

In the end, only two awards partially protected Fuller's reliance interest. In *Kleven v. Geigy Agricultural Chemicals*,[412] the court said that a consequential damage exclusion clause barred recovery of lost profits and the

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amount of the lost crop," and Seller's disclaimer was unconscionable, appellate court still remanded for new trial); Bemidji Sales Barn, Inc. v. Chatfield, 250 N.W.2d 185, 188-89 (Minn. 1977) (buyer of infected cattle denied lost profits and cost of extra feed and care because Buyer failed to prove how many cattle died and failed to mitigate).

I should note one case cited above expressly declined to award reliance damages. Johnson v. Moncento Co., 303 N.W.2d 86, 94-95 (N.D. 1981) (farmer entitled to lost profits caused by defective herbicide, but *not* the cost of wheat seed, fertilizer, planting, etc.).

408. *See* Hill v. BASF Wyandotte Corp., 311 S.E.2d 734, 736 (S.C. 1984) (difference between value of crop after defective herbicide used and value if herbicide had worked; court claimed any inclusion of lost profits "is merely coincidental as the measure covers direct loss resulting in the ordinary course of events from the alleged breach of warranty").

409. *See* W & W Livestock Enters., Inc. v. Dennler, 179 N.W.2d 484 (Iowa 1970). Farmer bought 408 pigs: 191 died and the rest required extra care and feed to reach market weight. *See id.* at 487. Farmer deleted a request for lost profits and instead sought the difference in value between the 191 fatally-infected pigs as promised and as delivered, the cost of feeding and caring for the dead pigs, and the extra care for the survivors. *See id.* Apparently the survivors were sold for the same price uninfected pigs would have commanded, thus making lost profits inappropriate. The opinion does not suggest why the farmer should not also have received lost profits on the dead 191 pigs. The court awarded the cost of feed provided the now-dead pigs and the extra feed required for the survivors as "special," i.e., consequential damages. *See id.*

410. *See* A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 116-17, 126-27 (Ct. App. 1982) (no explanation of how jury calculated consequential damages); Paullus v. Liedkie, 442 P.2d 733, 736 (Idaho 1968) (difference between $73.75 received for each diseased hog sold for slaughter and "market value of $150 each as breeders"; court does not explain whether market value was at the time of delivery or projected value at maturity); Cambern v. Hubbling, 238 N.W.2d 622, 625 (Minn. 1976) (court, when setting damages for infected animal, should find "expense and result of proper treatment and . . . calculate the effect of either failure or success, or both, rather than base damages on what must be a highly speculative evaluation at the time of sale when the degree of response to treatment is necessarily an unknown factor"); Gold Kist, Inc. v. Citizens & S. Nat'l Bank of S.C., 333 S.E.2d 67 (S.C. Ct. App. 1985) (no explanation of jury award); Hanson v. Funk Seeds Int'l, 373 N.W.2d 30 (S.D. 1985) (no explanation of jury award).

411. *See* Shavers v. Massey-Ferguson, Inc., 834 F.2d 970, 972-74 (11th Cir. 1987) (awarding direct damages without addressing Buyer's request for lost profits); Gold Kist, Inc. v. Williams, 332 S.E.2d 22, 23-24 (Ga. Ct. App. 1985) (since extra work alleviated effects of defective seed, Buyer entitled to price of seed and cost of extra work); Shotkoski v. Standard Chem. Mfg. Co., 237 N.W.2d 92, 97-98 (Neb. 1975) (though farmer normally entitled to lost profits, his lack of records made any award "the rankest form of speculation and conjecture"); Albin Elevator Co. v. Pavlica, 649 P.2d 187, 191-92 (Wyo. 1982) (relieving farmer of duty to pay for defective seed but denying lost profits or wasted production costs).

412. 227 N.W.2d 566 (Minn. 1975).

cost of additional tilling, but it still awarded the costs of using the defective herbicide, thereby partially protecting the farmer's reliance interest.[413] The court did not talk in terms of expectation and reliance interests, nor did it explain why it granted the cost of using the herbicide but not the tillage costs. In *Durham v. Ciba-Geigy Corp.*,[414] the court awarded direct expectation damages (the price of the defective herbicide), consequential expectation damages (the profits lost from reduced crop yields), and some reliance damages (the cost of fertilizer wasted on the crop).[415] So of fifty-six modern cases in which Fuller would have protected the reliance interest, only two partially protected the reliance interest. A summary of these cases is provided in Table 9 below.

*Table 9: The Seed, Livestock, and Farm Equipment Warranty Cases*

| | |
|---|---|
| *Number of cases read* | 56 |
| *Awarded consequential expectation damages for lost profits* | 44 |
| Under the guise of direct damages | 1 |
| *Awarded direct damages plus additional costs of production (a form of cover)* | 1 |
| *Did not explain their awards sufficiently to permit identification* | 5 |
| *Awarded only direct expectation damages* | 3 |
| Relieved farmer of duty to pay for seed | 1 |
| Awarded the additional cost of caring for the crop, i.e., "repair" costs | 1 |
| Made a diminution in value award | 1 |
| *Denied all recovery* | 1 |
| *Protected the reliance interest in some way* | 2 |
| Awarded some reliance damages but rejected others | 1 |
| Awarded reliance damages and consequential expectation damages | 1 |

2. The Production Line Cases

Fuller's second example of Sales cases in which reliance damages were proper was the production line case. If Buyer purchases equipment for use with other machinery, as in a factory production line, and Seller fails to deliver conforming equipment, the other machinery may become wholly or

413. *See id.* at 568-72.
414. 315 N.W. 696 (S.D. 1982)
415. *See id.* at 697, 701.

partially useless.[416] Normally, Buyer would purchase substitute equipment and sue for its extra cost,[417] enabling her to return otherwise idled machinery to work, reducing the lost profits that accompany a production line shutdown. The cover formula puts Buyer in the position she would have been in had Seller fully performed.

Fuller, however, cited three cases in which Buyer could not cover. In two cases, substitute goods were not available.[418] In the third, they were available only after the damage had been done.[419] Another possibility, which Fuller did not mention, was that the defective machine might be installed in such a way that removal or replacement was physically impossible or extremely expensive, preventing any cover.

In Fuller's three cases, each buyer should have received at least direct expectation damages, using the traditional diminution-in-value formula.[420] The controversy is what other damages should be awarded. The expectation interest would award the profits lost while the defective goods shut down or slowed the production line.[421] Fuller, however, suggested that courts award "incidental" reliance damages, a term which he defined negatively and by example. To Fuller, "essential reliance" was "the 'price' of whatever benefits the contract may involve for the plaintiff . . . includ[ing] the performance of express and implied conditions in bilateral contracts . . . preparations to perform . . . and the losses involved in entering the contract itself . . . ."[422] He then wrote "incidental reliance" included "those acts of reliance which are not 'essential' reliance,"[423] such as when a retailer leases store space and buys an inventory to sell there.[424] The rent paid would be essential reliance; the cost of the wasted goods incidental reliance. The difference between expectation and reliance damages is

416. *See The Reliance Interest*, *supra* note 10, at 91 n.63.

417. *See* U.C.C. § 2-712.

418. *See The Reliance Interest*, *supra* note 10, at 91 n.63 (citing Dean v. White & Haight, 5 Iowa 266 (1857) (Seller failed to deliver sawmill, leaving Buyer's engine and boiler useless); Paola Gas Co. v. Paola Glass Co., 44 P. 621 (Kan. 1896) (only suitable power for Buyer's factory was natural gas which Seller delivered to third party)). Today, these buyers might be able to obtain specific performance under the liberalized rules of section 2-716. *See, e.g.*, Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39-40 (8th Cir. 1975).

419. *See The Reliance Interest*, *supra* note 10, at 91 n.63 (citing Cohn v. Bessemer Gas Engine Co., 186 P. 200 (Cal. 1919) (substitute motor for irrigation pump unavailable until after crop died)).

420. *See* U.C.C. § 2-714(2).

421. *See id.* § 2-715(2)

422. *The Reliance Interest*, *supra* note 10, at 78.

423. *Id.* at 88.

424. *See id.* at 78. His distinction between essential and incidental reliance seems to parallel the difference between expectation's direct and consequential damages. Indeed, Fuller said that the foreseeability test of *Hadley v. Baxendale*, 9 Exch. 341 (1854), created no problems for essential reliance but limited incidental reliance damages. *The Reliance Interest*, *supra* note 10, at 87-88.

significant in a production line case. When nondelivery of goods idles other machinery, consequential damages would be the resulting lost profits,[425] but Fuller wanted to award the cost of the idled machinery and workers.[426]

Fuller asserted that cases awarding incidental reliance damages were "legion" and that the three decisions just discussed were part of "an extensive miscellaneous group of cases."[427] So I went looking for production line cases and found thirty-eight. Some fell into more than one category, as when a court granted direct expectation damages and denied incidental reliance damages, and in some the incidental reliance damages were the same as consequential expectation damages.[428] But here is my best attempt at a breakdown.

Ten cases awarded direct expectation damages. Of these, six awarded *only* direct expectation damages.[429] Three gave direct expectation damages and an award that could be described both as consequential expectation damages and incidental reliance damages.[430] One gave direct expectation damages, some consequential expectation damages, and what it wrongly called reliance damages, apparently because Buyer, despite three

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425. Actually, this would include net profits plus all production expenditures incurred.

426. *See The Reliance Interest*, *supra* note 10, at 90-91 & n.63.

427. *Id.* at 91.

428. *See, e.g.*, Wood Prods., Inc. v. CMI Corp., 651 F. Supp. 641, 652-53 (D. Md. 1986) (labor and materials wasted in using machinery); Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306, 1309, 1314-15 (E.D. Pa. 1974) (cost of equipment purchased for use with defective machinery); Elar Invs. Inc. v. Southwest Culvert Co., 676 P.2d 659, 660-62 (Ariz. Ct. App. 1983) (Seller's late delivery caused six month delay in completing townhomes, so Buyer received costs of financing homes during that time).

429. *See* Aluminum Co. of Am. v. Electro Flo Corp., 451 F.2d 1115, 1120 (10th Cir. 1971) (section 2-714 award of labor and materials spent developing product which was to use parts defendant seller never made); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 459-60, 460 n.44 (S.D.N.Y. 1976) (if Buyers prove steam turbine generator was defective, direct damages appropriate under section 2-714(2)); Jay V. Zimmerman Co. v. General Mills, Inc., 327 F. Supp. 1198, 1204-05 (E.D. Mo. 1971) (when Seller delivered defective toys for use as cereal premiums, Buyer entitled to cost of substitute premiums (cover), but not cost of cereal boxes featuring Seller's toy); City Mach. & Mfg. Co. v. A. & A. Mach. Corp., 1967 WL 8832 (E.D.N.Y. Apr. 25, 1967) (difference in value between machine as promised and as delivered; cost of installing machine mentioned but not awarded); Cato Equip. Co. v. Matthews, 372 S.E.2d 872, 874-75 (N.C. Ct. App. 1988) (purchase price of replacement tractor; apparently no consequential damages suffered); Western Paper Co. v. Bilby, 783 P.2d 980, 982-83 (Okla. Ct. App. 1989) (when defects in paper discovered *after* use, printer entitled to cover damages, i.e., labor and material costs for replacement run, rather than cost of labor and material wasted on first run).

430. *See* Wood Prods., Inc. v. CMI Corp., 651 F. Supp. 641, 652-53 (D. Md. 1986) (Buyer's remedy included labor and materials wasted while using machinery); Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306, 1309, 1314-15 (E.D. Pa. 1974) (Buyer's award included cost of equipment purchased for use with defective chiller); Elar Invs. Inc. v. Southwest Culvert Co., 676 P.2d 659, 660-62 (Ariz. Ct. App. 1983) (when Seller caused six month delay in completing townhomes, Buyer's award included costs of financing homes during that time).

years of profits, did not request consequential damages.[431]

Nineteen cases awarded consequential expectation damages: fifteen awarded lost profits,[432] two gave lost profits and other forms of

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431. In *Center Garment Co. v. United Refrigerator Co.*, 341 N.E.2d 669, 672-74 (Mass. 1976), Buyer bought a sign-making franchise, but Seller later cut off all supplies, destroying the business. The court awarded the value of the sign-making machine (direct damages) and $350 in profits lost on existing orders (consequential damages); but it labeled the latter as reliance damages, given "in lieu of an estimate of the net profits the plaintiff would have earned during the unexpired term of the contract." *Id.* at 673-74. The court noted that the "auditor" who originally tried the case, "took the net profits for 1970, 1971, and 1972 to be, respectively, $4,735, $3,199, and $4,386." *Id.* at 671, 674 n.7. The court said that the buyer "does not intimate a preference for the 'expectancy' calculation which might have resulted in heavier damages . . . ." *Id.* at 674.

432. *See* Energy Dev. Co. v. Ingersoll-Rand Co., 913 F.2d 1194, 1201-03 (7th Cir. 1990) (when faulty compressors caused delays in Buyer's production, Buyer entitled to refund of money already paid lessor plus consequential damages equal to interest lost because production delays caused delays in payments from Buyer's customers); National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 499-500 (3d Cir. 1987) (when Seller failed to deliver component parts Buyer needed for machinery to be sold to third party, Buyer entitled to profits lost because of lost resale, but *not* to $227,000 spent designing machinery and preparing production line); Brauer v. Republic Steel Corp., 460 F.2d 801, 802, 805 (10th Cir. 1972) (when pipe broke and required replacement, Buyer entitled to $273,736, which included lost profits); Wullschleger & Co. v. Jenny Fashions, Inc., 618 F. Supp. 373, 378-80 (S.D.N.Y. 1985) (skirt maker who purchased Seller's defective fabric entitled to lost profits on orders cancelled by retailers); Bende & Sons, Inc. v. Crown Recreation, Inc., 548 F. Supp. 1018, 1022 (E.D.N.Y. 1982) (when goods destroyed while risk of loss on Seller, causing retailer's buyer to cancel order, retailer entitled to profits lost from cancelled contract), *aff'd without opinion*, 722 F.2d 727 (2d Cir. 1983); Maru Shipping Co. v. Burmeister & Wain Am. Corp., 528 F. Supp. 210, 216-17 (S.D.N.Y. 1981) (Seller liable for repair costs attributable to defects in its engines plus profits lost by Buyer during repairs); R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 843-44, 846 (N.D. Miss. 1977) (when corrosive antifreeze damaged engines, Buyer entitled to price paid, cost of repairs, and income lost during repairs); Burrus v. Itek Corp., 360 N.E.2d 1168, 1171-73 (Ill. App. Ct. 1977) (when printing press worked at one-sixth capacity, Buyer entitled to difference in value of press as promised and as delivered, plus lost profits and time spent trying to repair); New Mexico *ex rel.* Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc., 746 P.2d 645, 647-50 (N.M. 1987) (Buyer who had to purchase substitute aggregate and reprocess defective aggregate entitled to cost of cover, reprocessing costs (as a form of cover), and $21,000 liquidated damages paid to state); Dunn Buick, Inc. v. Belle Isle Plumbing, Heating, & Air Conditioning Co., 1971 WL 17903 (Okla. Ct. App. May 18, 1971) (Buyer should have been allowed to present evidence of profits lost because Seller's system failed to heat Buyer's showroom); AM/PM Franchise Assocs. v. Atlantic Richfield Co., 584 A.2d 915, 919-26 (Pa. 1990) (if franchisees establish gas was defective, franchisees may recover lost profits from lost sales, lost profits from lost sales of secondary merchandise, and lost goodwill); J. Landau & Co., Inc. v. L-Co Cabinet Corp., 1974 WL 21751 (Pa. Ct. C.P. Mar. 21, 1974) (when Seller's stain turned wood green, ruining some cabinets and requiring repair to others, Buyer entitled to costs of production, lost profits, and overhead on unsalvageable cabinets and costs of repair on others); Arcon Constr. Co. v. South Dakota Cement Plant, 349 N.W.2d 407, 413-15 (S.D. 1984) (when Seller delayed delivery of cement for over a year, Buyer entitled to cost of equipment idled, interest on capital invested in equipment, and profits lost); Sweco, Inc. v. Continental Sulfur & Chems., 808 S.W.2d 112, 115, 117-18 (Tex. App. 1991) (when mills worked more slowly than promised, Buyer entitled to price refund plus lost profits); Cook Assocs., Inc. v. Warnick, 664 P.2d 1161, 1164-66 (Utah 1983) (when Seller delayed delivery

consequential relief,[433] and two awarded other types of consequential damages other than lost profits.[434] On the other hand, four cases denied damages for lost profits.[435] Three cases made awards which I could not decipher.[436] Finally, seven cases confronted facts which suggested an award of incidental reliance damages, such as Fuller preferred. Of these, four

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for eight months, Buyer entitled to lost profits).

433. *See* Beck v. Plastic Prods. Co., 412 N.W.2d 315, 318, 320 (Minn. Ct. App. 1987) (designer who lost contract with MacDonald's because of manufacturer's defective toys entitled to $52,858 in "out-of-pocket losses" and $46,726 in lost profits); Harbor Hill Lithographing Corp. v. Dittler Bros., 348 N.Y.S.2d 920, 923-24 (N.Y. Sup. Ct. 1973) (when supplier breached contract with printer, causing printer to breach contract with customer, printer entitled to $14,650 in "out-of-pocket" costs and $8,965 in lost profits).

434. *See* Kohlenberger, Inc. v. Tyson's Foods, Inc., 510 S.W.2d 555, 561-62, 565-67 (Ark. 1974) (on remand, Buyer entitled to direct damages of difference in value between icemaker as promised and as delivered, plus, with adequate evidence, consequential damages of cost of ice bought from third parties); Acme Pump Co. v. National Cash Register Co., 337 A.2d 672, 676-78 (Conn. Super. Ct. 1974) (company which leased defective machine entitled to be put in same position as it would have been in had manufacturer fully performed, so entitled, under section 2-714(2), to compensation for judgment obtained by finance lessor and, under section 2-715, for payments made to defendant on other equipment bought for use with machinery).

435. *See* Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149, 152, 154 (4th Cir. 1989) (when national supplier, after serious losses, closed steel trap division, local distributor *not* entitled to recoupment damages, i.e., money spent by distributor to develop business for supplier's products, or to lost profits); Wood Prods., Inc. v. CMI Corp., 651 F. Supp. 641, 652-53 (D. Md. 1986) (Buyer entitled to refund of purchase price plus extra costs of using machinery, minus revenue actually generated by machinery, but Buyer failed to prove lost profits with sufficient certainty); Valley Die Cast Corp. v. A.C.W. Inc., 181 N.W. 2d 303, 309 (Mich. Ct. App. 1970) (denying lost profits because of *Allis v. McLean*, 12 N.W. 640 (Mich. 1882), which said that lost profits are commonly uncertain and speculative, awardable only if loss is undisputed and can be determined with almost absolute certainty; court ignores section 1-106(1), Comment 1, and section 2-715, Comment 4); Seaman v. United States Steel Corp., 400 A.2d 90, 93-95 (N.J. Super. Ct. App. Div. 1979). Although plaintiffs introduced evidence of contract lost when defendant's defective steel prevented construction of crane and defendant knew of steel's intended use, lost profits denied because plaintiffs didn't tell defendants "they contemplated any particular contract or work which required the use of the floating crane." *Id.* at 93. The court ignored section 2-715, Comment 2, which rejects this strict test. The court also rejected, without explanation, testimony regarding monthly rental value of crane. *See id.* at 93-95.

436. *See* American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 459-60, 460 n.44 (S.D.N.Y. 1976) (since contract excluded consequential damages, Buyer claimed as "reliance damages" $100 million spent on ancillary equipment. Court said that "expenditures which are not incurred as a consequence of the breach, but which were instead incurred before the breach occurred and in reliance on the contractual warranties, are recoverable as direct damages" and noted that at trial, it would have to decide if ancillary equipment costs are recoverable direct damages or if excluded consequential damages.); Belcher v. Hamilton, 475 S.W.2d 483, 484-85 (Ky. Ct. App. 1971) (buyer of defective freezer awarded purchase price plus "loss of foodstuff," but no explanation as to whether that was price of food to Buyer (reliance damages) or retail value of food (expectation damages)); C.E. Alexander & Sons v. DEC Int'l, 811 P.2d 899, 901, 905-06 (N.M. 1991) ($242,000 in damages awarded without explanation).

denied such relief.[437] Two granted relief as reliance damages, though I must note that one did so in order to evade the effect of a remedy limitation clause,[438] and another ignored strong evidence of lost profits.[439] And in both of these cases, the plaintiff did not request expectation relief.[440] The remaining case did not state whether it was awarding the damages as incidental reliance or as consequential damages under section 2-715(2).[441] Table 10 below summarizes these results.

*Table 10: The Production Line of Cases*

| | |
|---|---|
| *Number of cases read (some fell into more than one category)* | 38 |
| *Awarded direct expectation damages to Buyer* | 10 |
| Awarded only direct expectation damages | 6 |
| Also awarded what could be regarded as either consequential expectation or incidental reliance damages | 3 |
| Also awarded some consequential damages and some of what it called reliance damages[442] | 1 |
| *Awarded consequential expectation damages* | 19 |

437. *See* Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149, 152, 154 (4th Cir. 1989) (when national supplier, after serious losses, closed division, local distributor *not* entitled to recoupment damages, i.e., money spent by distributor to develop business for supplier's products, or for lost profits); National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 499-500 (3d Cir. 1987) (when Seller failed to deliver parts Buyer needed for machinery to be sold to third party, Buyer entitled to profits lost but *not* to $227,000 spent designing machinery and preparing production line); Jay V. Zimmerman Co. v. General Mills, Inc., 327 F. Supp. 1198, 1204-05 (E.D. Mo. 1971) (when Seller delivered defective toys for use as premiums in cereal, Buyer entitled to cost of substitute premiums, but not for cost of now-useless boxes featuring Seller's toy); City Mach. & Mfg. Co. v. A. & A. Mach. Corp., 1967 WL 8832 (E.D.N.Y. Apr. 25, 1967) (Buyer entitled to $3000 difference in value between machine as promised and delivered; court mentioned—but did not award—Buyer's cost of installing machinery).

438. *See* Cayuga Harvester Inc. v. Allis-Chalmers Corp., 465 N.Y.S.2d 606, 618-19 (App. Div. 1983) (after dismissing Buyer's warranty action because of remedy limitation clause, court permits fraud claim regarding defective harvester because "plaintiff seeks not to recover 'benefit of the bargain' damages but rather to be put in the position he would have been in if he had not made the purchase, through the recovery of damages for the value of the crops destroyed or not harvested").

439. *See* Center Garment Co. v. United Refrigerator Co., 341 N.E.2d 669, 673-74, 674 n.7 (Mass. 1976) (when franchiser failed to deliver materials franchisee needed, causing franchisee to fail, franchisee entitled to value of machinery and leftover materials; despite court-appointed auditor's finding that plaintiff had made profit each of prior three years, franchisee did not seek lost profits).

440. *See id.* at 674; *Cayuga*, 465 N.Y.S.2d at 618.

441. *See* Schatz Distrib. Co. v. Olivetti Corp., 647 P.2d 820, 824-26 (Kan. Ct. App. 1982) (Buyer entitled to refund of payments made to Seller and to value of labor wasted trying to make computer work; lost profits denied as speculative).

442. *See Center Garment Co.*, 341 N.E.2d at 673-74, 674 n.7 (damages fell into both categories).

| | |
|---|---|
| Awarded lost profits | 15 |
| Awarded lost profits and other forms of consequential expectation damages | 2 |
| Did not award lost profits but did award other forms of consequential damages | 2 |
| *Denied lost profits* | 4 |
| *Made unclear awards* | 3 |
| *Involved facts which suggested an award of incidental reliance damages* | 7 |
| Denied such relief | 4 |
| Granted incidental reliance damages | 2 |
| Awarded damages which could be either consequential expectation or incidental reliance damages | 1 |

### *F. Conclusion*

Four hundred and sixty-seven cases. Four hundred and sixty-seven cases involving the fact patterns *most likely* to produce reliance damages. And fourteen reliance awards.

## IV. THE ALI-NCCUSL PROPOSED REVISION OF ARTICLE 2'S DAMAGE RULES

### *A. The Proposal*

Even though the express purpose of the UCC's remedial provisions is protecting the expectation interest, even though the drafters of Article 2 intended to improve the Uniform Sales Acts' protection of the expectation interest, even though Article 2's text speaks only of the expectation interest, and even though Sales courts have shown little interest in reliance damages, the revisers of Article 2 would add reliance damages to Sales law.

In 1990, a study group appointed by the UCC Permanent Editorial Board recommended that Article 2's collection of damage rules begin with a new section:

> 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.[443]

Later drafts expand this proposal. First, the main remedial provision now mentions reliance remedies in a comment. Entitled "Remedies in General," the section's text repeats section 1-106(1)'s command to protect the expectation interest,[444] as does the second note.[445] But the same note also declares that "[o]ther remedial interests, such as reliance and restitution, are protected under the general damage measure . . . ."[446]

That leads to the second reference, which appears in a section headed "Damages in General."[447] The 1997 version tells us that:

> To the extent that a breach of contract is not material under section 2-710 or the remedies in this part fail to put the aggrieved party in as good a position as if the other party had fully performed, the aggrieved party may recover compensation for the loss resulting in the ordinary course from the breach as determined in any reasonable manner. . .
>
> Note 1. This section . . . provides a general damage measurement to supplement more particular applications. It is comprehensive enough to protect all of the interests of an aggrieved party, especially where the expectation interest alone is inadequate. Those other interests of the aggrieved party might be the reliance interest, where the aggrieved party would be if the contract had not been entered into, or the restitution interest, restoration of the unjust gains of the defendant to the plaintiff. Thus, the buyer might recover

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443. *1990 Study Group Report*, *supra* note 1, at Rec. A2.7(1)(A), *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204 (1991).

444. "[T]he remedies provided in this article must be liberally administered with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed." U.C.C. § 2-803(a) (1997 DRAFT, *supra* note 1, § 2-803(a)); U.C.C. § 2-703(a) (1996 DRAFT, *supra* note 1, § 2-703(a)); U.C.C. § 2-703(a) (1995 DRAFT, *supra* note 1, § 2-703(a)).

445. *See* U.C.C. § 2-803, note 1 (1997 DRAFT, *supra* note 1, § 2-703, note 2) ("Subsection (a) directs the court to protect the so-called 'expectation' interest. This restates the principle in section 1-106(1) . . . .").

446. U.C.C. § 2-703, note 2 (1996 DRAFT, *supra* note 1, § 2-703, note 2). The 1995 Draft uses almost identical language. *See* U.C.C. § 2-703, note 2 (1995 DRAFT, *supra* note 1, § 2-703, note 2) ("Other remedial interests, such as reliance and restitution, can be protected under the general damage measure in § 2-704.").

447. U.C.C. § 2-704 (1996 DRAFT, *supra* note 1, § 2-704); § 2-704 (1995 DRAFT, *supra* note 1, § 2-704); *see also* U.C.C. § 2-804 (1997 DRAFT, *supra* note 1, § 2-804).

> reliance damages as an alternative if expectation cannot be proved with reasonable certainty.[448]

The 1996 and 1995 Drafts use the same language, except that in the place of the last two sentences just quoted, they cite, without explanation, *Bausch & Lomb, Inc. v. Bressler*.[449]

A third reference appeared for the first time in the 1997 Draft:

> 3. An issue that the drafting committee might address is whether there should be a limitation on reliance based damages or restitution based damages when those damages exceed the expectancy. One situation where those damages may exceed the expectancy is noted above, when the expectancy is too speculative or cannot be proven. Another situation where those damages may exceed the expectancy measure is when the contract is a losing contract. That is, expectancy is a negative number. The reliance or restitution measurement will provide a higher measurement. Should the code allow a person to be better off if the other person breaches than if the person performs the contract? This could lead to the person with a negative expectancy into 'goading' the other party into breaching in order to recover reliance or restitution damages.[450]

A fourth reference defines consequential damages to include unreimbursed reliance expenses.[451] The fifth and final reference says:

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448. U.C.C. § 2-704 (1997 DRAFT, *supra* note 1, § 2-804).

449. *See* U.C.C. § 2-704, note 1 (1996 DRAFT, *supra* note 1, § 2-704, note 1); U.C.C. § 2-704, note 1 (1995 DRAFT, *supra* note 1, § 2-704, note 1) (citing Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720 (2d Cir. 1992)). The potential ramifications of this citation are discussed *infra* in text accompanying notes 484-523.

450. U.C.C. § 2-804, note 3 (1997 DRAFT, *supra* note 1).

451. "Consequential damages . . . usually include lost business profits, but courts will occasionally award damages for loss of good will, unreimbursed reliance and various disruption losses caused to the buyer or third parties." U.C.C. § 2-806, note 2 (1997 DRAFT, *supra* note 1, § 2-806, note 2); U.C.C. § 2-706, note 1(a) (1996 DRAFT, *supra* note 1, § 2-706, note 1(a)); § 2-706, note 2 (1995 DRAFT, *supra* note 1, § 2-706, note 2). The 1997 Draft gives this example: "Seller makes a special expenditure in preparation to perform which will not be reimbursed by Buyer's full performance. After breach, Seller is unable to salvage the investment. The unreimbursed expenditure is recoverable as consequential damages." U.C.C. § 2-806, note 2(a) (1997 DRAFT, *supra* note 1, § 2-806, note 2(a)).

The 1995 Draft placed reliance damages in the text, saying that "If required in the circumstances to avoid compensation disproportionate to the breach, the court ma;y [sic] exclude or limit recovery for loss of profits and allow recovery only for loss incurred in reliance or otherwise." U.C.C. § 2-706(b) (1995 DRAFT, *supra* note 1, § 2-706(b)).

> (b) A seller may recover damages measured by other than the market price, together with incidental and consequential damages, including:
>
> (1) lost profits, including reasonable overhead, resulting from the breach of contract determined in any reasonable manner; and
>
> (2) reasonable expenditures made in preparing for or performing the contract if, after the breach, the seller is unable to obtain reimbursement by salvage, resale, or other reasonable measures.[452]

Although subsection (b)(2) does not use the term "reliance damages," a later note speaks of awarding a seller who stops work "both lost profits and unreimbursed reliance expenditures."[453]

### *B. An Evaluation of the Proposal*

#### 1. The Conflict With the Purpose of Article 2's Remedies

The existing UCC identifies one—and only one—purpose for its remedial sections: "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."[454] The 1997 Draft expressly retains that purpose as the keystone of Article 2's remedies. Since this is the language of the expectation interest, how can a court protect a conflicting interest?

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452. U.C.C. § 2-821(b)(1)-(2) (1997 DRAFT, *supra* note 1, § 2-821(b)(1)-(2)); *see also* U.C.C. § 2-721 (1996 DRAFT, *supra* note 1, § 2-721); U.C.C. § 2-721 (1995 DRAFT, *supra* note 1, § 2-721).

453. U.C.C. § 2-821, note 5 (1997 DRAFT, *supra* note 1, § 2-821, note 5); U.C.C. § 2-721, note 5 (1996 DRAFT, *supra* note 1, § 2-721, note 5); U.C.C. § 2-721, note 5 (1995 DRAFT, *supra* note 1, § 2-721, note 5). I should note two references to restitution. The revisions preserve current references to restitution in conjunction with liquidated damages. *Compare* U.C.C. § 2-718(2)-(3) (1962), *and* U.C.C. § 2-809(b)-(c) (1997 DRAFT, *supra* note 1, § 2-809(b)-(c)). The 1997 Draft also says a remedy limitation may not deprive the aggrieved party of a minimum adequate remedy, "such as restitution for any benefits conferred on the party in breach." *See* U.C.C. § 2-810(2) (1997 DRAFT, *supra* note 1, § 2-810(2)).

454. U.C.C. § 1-106(1) (1962).

2. Clarifying Article 2's Protection of the Expectation Interest

Two references to the reliance interest merely clarify what the expectation interest includes. First, there is the lost-volume seller who partially manufactures goods and, when the buyer breaches, properly halts production and salvages what she can.[455] To put her where she would have been had the contract been fully performed, a court must award her lost profits *and* the labor and materials she used to partially produce the goods. The existing formula does not make this clear, defining her damages as "the profit (including reasonable overhead) which Seller would have made from full performance by the buyer . . . ."[456] Read narrowly, "the profit" could mean the difference between the contract price and her production costs, i.e., the money she expected to take to the bank. To give her what she would have made from full performance, "the profit" must be read broadly as the sum needed to compensate her for production costs *and* to provide the leftovers to take to the bank. Using section 1-106(1), common sense, and other language requiring "due allowance for costs reasonably incurred" (which is broad enough to cover production expenditures), commentators[457] and courts[458] have used the broader reading.

To eliminate any doubt, however, the revisers reworded the existing formula into (1) the lost profits (used in the narrow sense), including reasonable overhead, and (2) "reasonable expenditures made in preparing for or performing the contract," if Seller cannot recover them through salvage or resale.[459] A note states that this protects the expectation interest,[460] which

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455. *See* Peters, *supra* note 88, at 273-74; Richard E. Speidel & Kendall O. Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy*, 57 CORNELL L. REV. 681, 689-94 (1972); Robert Childres & Robert K. Burgess, *Seller's Remedies: The Primacy of UCC § 2-708(2)*, 48 N.Y.U. L. REV. 833, 863-64 (1973).

456. U.C.C. § 2-708(2) (1962).

457. *See, e.g.*, Speidel & Clay, *supra* note 455, at 690 n.35, 692-94.

458. *See, e.g.*, Detroit Power Screwdriver Co. v. Ladney, 181 N.W.2d 828, 833-34 (Mich. Ct. App. 1970) (if section 2-708(2) controls, Seller entitled to expected profits plus costs incurred to produce machine, minus machine's scrap value); Industrial Circuits Co. v. Terminal Communications Inc., 216 S.E.2d 919, 922-24 (N.C. Ct. App. 1975) (Seller entitled to lost profits and "expenditures for labor and materials reasonably made in part performance of the contract, to the extent that they are wasted when performance is abandoned") (citations omitted); Stewart & Stevenson Serv. v. Enserve, Inc., 719 S.W.2d 337, 342-44 (Tex. App. 1986) (citing Peters, *supra* note 88, at 273, Speidel & Clay, *supra* note 455, at 693-94, Childres & Burgess, *supra* note 455, at 863-65, before using "costs reasonably incurred" language to compensate Seller for production expenditures).

459. U.C.C. § 2-821(b) (1997 DRAFT, *supra* note 1, § 2-821(b)).

460. *Id.* at note 5. ("Subsection b measures damages by profits that the seller would have made upon full performance."). The notes to section 2-821 may have a slight internal contradiction. The first paragraph indicates that section 2-821(b), which awards profits and production costs, measures damages by "profits that the seller would have made by full performance," indicating that profits

the structure of the text confirms. Instead of letting a lost-volume seller recover lost profits *or* reasonable expenditures (which would let a court choose between expectation and reliance damages), the text awards lost profits "and" reasonable expenditures,[461] showing that the latter are an essential part of the expectation interest.

The second clarification concerns consequential damages. The 1997 Draft says while these include lost profits, courts occasionally award lost "good will, unreimbursed reliance and various disruption losses caused to the buyer or third parties."[462] These can include investment in a production line or research and development expenses made useless because of a seller's failure to deliver conforming goods. Compensation for these injuries is an essential part of the expectation interest, for direct damages alone will not put a buyer in the position he would have been in had the contract been fully performed. Article 2[463] and current case law already protect these injuries,[464] and the 1997 Draft makes this protection more clear.

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and costs combine to produce the expectation interest. Note 6, however, speaks of a seller's lost profits and unreimbursed reliance expenditures.

The 1995 Draft also made production costs a part of the expectation interest:

> A seller who stops work and salvages . . . may have both lost profits and unreimbursed reliance expenditures. Subsection (b)(2) allows recovery of those expenditures as well, provided that the seller has made reasonable efforts to mitigate losses. Thus, in this case, *the amount needed to put the seller in as good a position as full performance includes* both lost net profits, reasonable overhead, and unreimbursed reliance.

§ 2-721(b) cmt. 5 (1995 DRAFT, *supra* note 1, § 2-721(b)) (emphasis added).

461. *See* U.C.C. § 2-821(b) (1997 DRAFT, *supra* note 1, § 2-721(b)).

462. U.C.C. § 2-806, note 2 (1997 DRAFT, *supra* note 1, § 2-806, note 2).

463. *See* U.C.C. § 2-715(2)(a) (1962).

464. *See, e.g.*, Beck v. Plastic Prods. Co., 412 N.W.2d 315, 318, 320 (Minn. Ct. App. 1987) (designer who lost contract with McDonald's because of manufacturer's defective toys entitled to $46,726 in lost profits and $52,858 in "out-of-pocket losses"); Harbor Hill Lithographing Corp. v. Dittler Bros. 348 N.Y.S.2d 920, 923-24 (Sup. Ct. 1973) (when supplier breached contract with printer, causing printer to breach contract with customer, printer entitled to $8965 in lost profits and $14,650 in "out-of-pocket" costs); J. Landau & Co. v. L-Co Cabinet Corp., 1974 WL 21751 (Pa. Ct. C.P. Mar. 21, 1974) (when Seller's stain turned wood green, ruining some cabinets, Buyer entitled to lost profits, overhead, and costs of production on unsalvageable cabinets); *cf.* American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 459-60, 460 n.44 (S.D.N.Y. 1976) (since contract excluded consequential damages, Buyer claimed as "reliance damages" $100 million spent on ancillary equipment. Court said that "expenditures which are not incurred as a consequence of the breach, but which were instead incurred before the breach occurred and in reliance on the contractual warranties, are recoverable as direct damages."); Acme Pump Co. v. National Cash Register Co., 337 A.2d 672, 676-78 (Conn. Super. Ct. 1974) (company which leased defective machine should be put in same position as it would have been in had manufacturer fully performed, so entitled, under section 2-714(2), to compensation for judgment obtained by finance lessor and, under section 2-715, for payments made to defendant on other equipment bought for use with machinery). *But see* Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149, 152, 154 (4th Cir. 1989) (when national supplier, after serious losses, closed division, local distributor *not* entitled

3. Losing Contracts

What of contracts whose full performance would have *hurt* the aggrieved party? In such a case, reliance damages will exceed the expectation interest, and the revisers ask if recovery should be limited to the latter. Assume Seller sells at $10 a unit, spends $14 to produce each, and then, after Buyer rejects them, resells them for the market price of $9 a unit. If Buyer had fully performed, Seller would have received $10 and spent $14, losing $4 overall. With the Buyer's breach, Seller has received $9 in revenue (the resale price) and spent $14, leaving her $5 down. Under section 1-106(1) and the relevant Article 2 section,[465] she receives the $1 needed to move her from where she is ($5 down) to where she would have been with full performance ($4 down). Her reliance interest would be the $5 difference between the $14 she spent and the $9 she received. Since the 1997 Draft protects the reliance interest,[466] it asks if it should limit "reliance based damages or restitution based damages when those damages exceed the expectation . . . . Should the code allow a person to be better off if the other party breaches than if the person performs?"[467]

The question is a bit surprising. The 1997 Draft leaves section 1-106(1) unchanged;[468] it repeatedly reaffirms the expectation purpose of Article 2 remedies;[469] and it retains the statutory resale formula used

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to recoupment damages, i.e., money spent by distributor to develop business for supplier's products, or for lost profits); National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 499-500 (3d Cir. 1987) (when Seller failed to deliver parts Buyer needed for machinery to be sold to third party, Buyer entitled to profits lost but *not* to $227,000 spent designing machinery and preparing production line).

465. *See* U.C.C. § 2-706 (1962).

466. *See* U.C.C. § 2-803, note 1 (1997 DRAFT, *supra* note 1, § 2-803); U.C.C. § 2-804, note 1 (1997 DRAFT, *supra* note 1, § 2-804).

467. U.C.C. § 2-804, note 3 (1997 DRAFT, *supra* note 1, § 2-804). I should note that part of this same comment may contain a slip: it refers to the expectation interest being "a negative number." The actual expectation interest, the amount necessary to put the aggrieved party where she would have been had the contract been fully performed, is a positive number: the $1 difference between the contract price ($10) and the resale price. If the court awards that $1, the seller receives $9 from the resale, and the seller has spent $14 on production, the seller will *end up* $4 in the hole (which I assume is the negative number to which the revisers refer); if Buyer had fully performed, Seller would have spent $14 on production and received $10 from Buyer, again leaving Seller $4 in the hole.

When the revisers spoke of the expectation interest being a negative number, they were referring to the position in which the seller would have been in had the contract been fully performed (that -$4). The expectation interest actually is *the amount of the court judgment* necessary to place the seller in the position in which the seller would have been in had the contract been fully performed ($1).

468. The Draft revises only Article 2, not Article 1.

469. *See* U.C.C. § 2-803(a) (1997 DRAFT, *supra* note 1, § 2-803(a)).

above.[470] But it later gives us one specific example of its concerns with reliance damages that exceed the expectation interest:

> Seller makes a special expenditure in preparation to perform which will not be reimbursed by Buyer's full performance. After breach, Seller is unable to salvage the investment. The unreimbursed expenditure is recoverable as consequential damages.[471]

Here, the expectation interest would deny recovery of consequential damages, while reliance interest would grant it. I vote for the former on two grounds: the explicit endorsements of the expectation interest in section 1-106(1) (1962) and section 2-803 (1997 Draft), and the lack of causation. The example says Buyer's full performance would not reimburse Seller for its expenses, so the cause of Seller's injury was its own decision to spend money it knew it would not recover under the contract.[472]

4. "If It Ain't Broke . . . "

One of the revisers' tasks is to solve problems created by the current Article 2. I am not aware of significant problems caused by Article 2's exclusive protection of the expectation interest, nor have the revisers identified any. The *1990 Study Group Report*'s addition of reliance damages to Sales cited three sources.[473] The first was *Restatement (Second) of Contracts*,[474] begging the question of how the general concept of the reliance interest will interact with the expectation-based, specific statutes of Article 2.

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470. *Compare* U.C.C. § 2-706(1) (1962), *with* U.C.C. § 2-819(a) (1997 DRAFT, *supra* note 1, § 2-819(a)).

471. U.C.C. § 2-806, note 2(a) (1997 DRAFT, *supra* note 1, § 2-806, note 2(a)).

472. I must note that section 2-806, note 2, correctly says that consequential damages can include lost profits and unreimbursed reliance losses. These "unreimbursed reliance losses" are discussed in the production line cases, *see supra* text accompanying notes 416-42, as when Buyer, after spending $1 million on machinery to be used on a production line, obtains defective machinery from Seller. If Seller's defective machine renders the rest of the equipment useless, the cost of that equipment is what Fuller called "incidental" reliance damages, *see supra* text accompanying notes 423-24, while the cost of the equipment and the profits lost because of the line's shutdown are consequential expectation damages recoverable under section 2-715(2)(a). *See supra* cases cited in notes 432-34.

473. *See 1990 Study Group Report*, *supra* note 1, at Rec. A2.7(1) n.5, *reprinted in* Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204-05 n.5 (1991).

474. The provision cited, RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1982), defines the reliance interest.

The second source was a law review article which cited only one Sales case governed by Article 2, and that case declined to award reliance damages![475] The third source was an article which used Article 2's text and drafting history to oppose the use of reliance as a means of formation in Sales cases and which said nothing about reliance damages.[476] The *1990 Study Group Report* gave no further clues as to its rationale.

Later drafts provide little more help. The 1997 Draft mentions two inadequacies in Article 2: a seller who spends money which it knows it will not recover even if the buyer fully performs[477] and an aggrieved party who cannot prove damages with adequate certainty.[478] I do not know if the first deserves compensation,[479] and the second is so uncommon[480] that the draft refers only to a Buyer who does not receive the custom goods he ordered, cannot get specific performance, cannot cover, and, because the goods are customized, cannot establish a market price.[481] Seller has gone bankrupt—the only reason to deny specific performance where cover was impossible—[482] making a suit for reliance damages pointless. And the example does not identify Buyer's reliance interest: existing law lets Buyer recover, as part of its expectation damages, any part of the price paid to Seller.[483]

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475. *See 1990 Study Group Report*, *supra* note 1, at Rec. A2.7(1)(A), at n.5, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204-05 n.5 (1991) (citing Anderson, *supra* note 53). Anderson, in turn, cites Brenneman v. Auto-teria, Inc., 491 P.2d 992 (Or. 1971). *See* Anderson *supra* note 53, at 259 n.36. For a discussion of *Brenneman*, see *supra* text accompanying notes 328-41.

476. *See 1990 Study Group Report*, *supra* note 1, at Rec. A2.7(1)(A), at n.5, *reprinted in* Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documants of Title, Committee on the U.C.C., *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1204-05 n.5 (1991) (citing Gibson, *supra* note 46). I am delighted that the Study Group read my work, but the citation is puzzling.

477. *See* U.C.C. § 2-806, note 2(a) (1997 DRAFT, *supra* note 1, § 2-806, note 2(a)).

478. *See* U.C.C. § 2-804, notes 1 & 3 (1997 DRAFT, *supra* note 1, § 2-804, notes 1 & 3).

479. Section 1-106(1) tells a court to put the Seller where it would have been if the contract had been fully performed. By definition, full performance would not have reimbursed Seller for these costs.

480. *See supra* Part III.C.1.

481. *See* U.C.C. § 2-804, note 1 (1997 DRAFT, *supra* note 1, § 2-804, note 1).

482. *See* U.C.C. § 2-716, note 2 (1962) ("inability to cover is strong evidence" of special circumstances justifying specific performance).

483. Section 2-711 (1962) says that if the seller fails to deliver or the buyer rightfully rejects or revokes acceptance of the goods, then the buyer may recover so much of the purchase price as has been paid and seek other remedies, including replevy of the goods, § 2-711(2)(b), or recovery of them from an insolvent seller, §§ 2-711(2)(a), 2-502 (1962). Recovery of the purchase price is an essential part of the expectation interest, *see supra* text accompanying notes 156-57, and the right of reclamation under section 2-502 is similar to the restitution provisions of section 2-702 and section

The earlier drafts provide only one additional clue as to why Sales needs the reliance interest, and that is a citation which created more questions than it answered.

### 5. *Bausch & Lomb Inc. v. Bressler*

The 1995 and 1996 Drafts cited *Bausch & Lomb, Inc. v. Bressler* in conjunction with their call for reliance damages,[484] probably because it considered, in descending order, the expectation, reliance, and restitution interests. But it has other interpretations, none of them pretty. Buyer paid $555,000 for exclusive rights to distribute Seller's machines from 1984 until December 31, 1989.[485] If Seller fell behind in deliveries, Buyer could make the machines instead.[486] In 1987, Buyer said that Seller had missed deliveries, costing Buyer sales,[487] despite "a massive crash sales operation," with forty percent discounts.[488] In late 1987, Buyer invoked its right to manufacture, only to reverse course: on December 9, a third party purchased all of Buyer's inventory.[489] Meanwhile, Seller terminated Buyer's exclusive distributorship two years early.[490]

Unfortunately, Buyer's records were too inaccurate and incomplete to prove whether or by how much Seller was behind in deliveries.[491] Seller's records were equally useless.[492] And Buyer discovered that in 1986-

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2-703, which are part of the expectation interest, *see supra* text accompanying notes 158-60.

484. "This . . . section provides a general damage measurement to supplement more particular applications. It is comprehensive enough to protect all of the interests of an aggrieved party, especially where the expectation interest alone is inadequate. *See* Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720 (2d Cir. 1992)." § 2-704, note 1 (1995 DRAFT, *supra* note 1, § 2-704, note 1); § 2-704, note 1 (1996 DRAFT, *supra* note 1, § 2-704, note 1).

485. The original contract created an exclusive world-wide distributorship from 1984 to 1986. In 1986, the contract was extended until December 31, 1989, and the exclusive territory limited to the United States and Canada. *See* Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 723-24 (2d Cir. 1992). Buyer paid a $500,000 "prepaid royalty" and a $55,000 "down payment" to be refunded at the end of the contract. *Id.* at 724.

486. *See id.* at 724-25.

487. *See* Bausch & Lomb, Inc. v. Sonomed Tech., Inc., 780 F. Supp. 943, 949 (E.D.N.Y. 1992).

488. *Id.* at 971.

489. The third party resold that inventory to Seller for $1 million less than Buyer had paid for the inventory. *See Bausch & Lomb*, 977 F.2d at 725.

490. *See id.* at 725.

491. The trial court said the records were "a total mess," and that Buyer had recognized their uselessness long before trial. *Bausch & Lomb*, 780 F. Supp. at 953-54. The appellate court said Buyer found its records "in disarray, making it difficult . . . to establish that [Seller] had failed to timely cure its default." *Bausch & Lomb*, 977 F.2d at 725.

492. *See Bausch & Lomb*, 780 F. Supp. at 953.

87 Seller had sold directly to customers in Buyer's exclusive territory.[493] That gave Buyer three injuries:

1. Seller had not delivered all the goods Buyer had ordered in 1986-87,
2. Seller had violated Buyer's exclusive territory in 1986-87, and
3. Seller had cancelled Buyer's exclusive distributorship two years early, depriving it of all distributorship rights from 1987 to 1989.

The first injury usually would justify direct and consequential expectation damages. The former would have been the cost of cover or the difference between the contract price and market price of the goods.[494] But Buyer neither had purchased nor manufactured substitute goods,[495] and Buyer's slumping sales (despite heavy discounts)[496] made a contract price-market price recovery unpromising. In any case, since Buyer did not know how many units Seller had not delivered,[497] Buyer could prove neither direct nor consequential damages.

What of the second injury—Seller's 1986-87 invasion of Buyer's territory? Buyer had received *some* distributorship rights, so its direct damages were the difference between the value promised (a year or so of exclusive territory) and delivered (non-exclusive territory).[498] The $555,000 price is "powerful evidence" of the promised value.[499] If Seller had violated Buyer's territory for, say, one-fifth of the contract, one could award one-fifth the contract price, i.e., about $110,000. Hardly exact, but well within Article 2's normal toleration of uncertainty.[500]

Consequential damages are more troubling. Here, Buyer could claim that Seller's improper sales (*sans* middleman) reduced Buyer's sales, since Seller could undercut Buyer's price. Buyer could not prove that it

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493. Buyer introduced copies of 75 invoices by Seller as evidence. *See id.* at 957. Seller's president admitted on the stand that his company had made improper sales and estimated his firm owed Buyer $10,000 to $15,000 for those sales. *See id.* at 958.

494. *See* U.C.C. §§ 2-712, 2-713.

495. The contract permitted Buyer to self-manufacture if Seller fell behind in deliveries. *See Bausch & Lomb*, 977 F.2d at 724. Buyer invoked this right on October 23, but on November 17, reversed that decision. *See id.* at 725. Self-cover is permitted under section 2-712. *See* Dura-Wood Treating Co. v. Century Forest Indus., 675 F.2d 745, 752-54 (5th Cir. 1982); Cives Corp. v. Callier Steel, Pipe & Tube, Inc., 482 A.2d 852, 857-59 (Me. 1984); Harrington Mfg. Co. v. Logan Tontz Co., 253 S.E.2d 282 (N.C. 1979); Milwaukee Valve Co. v. Mishawaka Brass Mfg., Inc., 319 N.W.2d 885, 888-90 (Wis. 1982).

496. *See Bausch & Lomb*, 780 F. Supp. at 971.

497. *See id.* at 953-54.

498. *See* U.C.C. § 2-714(2).

499. *See* WHITE & SUMMERS, *supra* note 5, § 10(2)(b), at 368.

500. *See supra* Part III.C.1, especially text accompanying notes 302-05.

would have sold units to everyone who bought them from Seller, but the fact that this proof problem was caused by Seller's breach would cause some courts to reduce their certainty requirements and compensate Buyer for a clear injury.[501]

But what was that injury? If Seller had not violated Buyer's territory, how many more units might Buyer have sold, with how much profit on each sale? In requirements contracts like this, courts have quantified the goods involved by using the minimum quantity set in the contract[502] or the number of units Seller wrongly sold to third parties.[503]

But what profit would Buyer have made on each sale? We know what Buyer would have paid Seller, but we do not know what Buyer would have received on resale. We might use the price Seller received on its improper sales, but the appellate court rejected this approach because of insufficient proof that Buyer would have made all the sales that Seller did. I assume this was because Seller undercut Buyer: some customers who bought from Seller would not have paid Buyer's higher price.[504] That and Buyer's slumping sales suggest this was a losing contract, for which Buyer deserved no consequential damages.

But weren't the slumping sales and the heavy discounts triggered by Seller's breach? Seller's direct sales may have depressed the market, lowering Buyer's sales and profits.[505] If so, some courts refuse to condone a seller whose very breach prevents a buyer from proving its damages,[506] and section 1-106 admonishes that "[c]ompensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more."[507] If Buyer could correlate its sales and price slumps with Seller's invasion of its territory, we could use Buyer's

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501. *See* cases cited *supra* note 305.

502. The contract required Buyer to order 666 units between July 1986 and December 1987, about the period of Seller's improper sales. *See Bausch & Lomb*, 780 F. Supp. at 948. If Buyer actually sold, say, 500 units, then its damages could be based on 166 unsold machines. *See* cases cited *supra* note 374; *cf.* cases cited *supra* note 367 (using minimum amount or estimate in output contracts).

503. *See* cases cited *supra* note 368. Here, Buyer introduced copies of 75 Seller's invoices. *See Bausch & Lomb*, 780 F. Supp. at 957-58.

504. I note that this fact undercuts the second alternative suggested for quantifying the number of goods involved. *See supra* note 503.

505. Unfortunately, neither court gives us much information about how many units Buyer sold, their prices, the availability of comparable units, or the general market.

506. *See* cases cited *supra* note 305. Other cases say that approximations of damages are permitted when no better evidence is available. *See, e.g.*, Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1447 (10th Cir. 1988) ("The fact that damages are difficult to ascertain does not, however, mean they are unascertainable."); cases cited *supra* notes 302-04.

507. U.C.C. § 1-106, note 1.

profits per unit in 1984-86 to approximate its 1986-87 profits.[508] Otherwise, Buyer has an almost impossible proof burden, and Seller escapes liability despite a clear breach proven by its own invoices. The appellate court obviously knew more about the facts than I, but its opinion seems to reflect the traditional common law certainty rules which the Code long ago rejected.[509]

The third injury was Seller's termination of Buyer's exclusive distributorship in November 1987 instead of December 1989. As just discussed, Buyer's direct damages would be the difference in value between the exclusive territory promised for these two years and what Buyer actually received, while consequential damages could be based on earlier profits.[510]

The Buyer, trial court, and appellate court took a different approach and made several mistakes.[511] First, even though the trial court said Article 2 governed the case,[512] neither court mentioned an Article 2 remedial section.[513] Second, both courts ignored section 1-106, note 1's relaxation of traditional certainty rules.[514] Third, Buyer, trying to avoid the problem of quantifying its 1988-89 sales, focused on its $555,000 payment and demanded a full refund,[515] even though Buyer had received at least some benefits, as Seller did not start direct sales until two years into the contract. Fourth, neither court hinted that Buyer even tried to introduce expert

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508. This assumes, of course, that Buyer had sufficient records to prove its 1984-86 profits and that no major changes in the market, technology, etc., were the cause of Buyer's sales slump. If Seller proved such changes occurred, then the denial of profits here was correct.

509. *See* U.C.C. § 1-106, note 1; *supra* text accompanying note 90.

510. There is a subtler way to calculate Buyer's direct damages. Section 2-711(1) (1962) says if Seller fails to deliver, Buyer may cancel and recover "so much of the purchase price as has been paid." Was not the $555,000 part of the price paid? If the contract required Buyer to order 5000 units at $10,000 each, the *real* price per unit was $10,000 *plus* the appropriate percentage of the royalty fee. With a $555,000 fee for 5000 hypothetical units, the royalty per unit would be $110, making the real price $10,110 a unit. Here, Buyer had to order 754 units between November 1987 and December 31, 1989. *See* Bausch & Lomb, Inc. v. Sonomed Tech., Inc., 780 F. Supp. 943, 948 (E.D.N.Y. 1992). Using our hypothetical royalty fee of $110 per unit, Buyer would be entitled to a $82,940 refund of payments for undelivered goods.

511. I apologize for this critique. Hindsight always is better than foresight, especially in this complex, unusual damages problem.

512. *See Bausch & Lomb*, 780 F. Supp. at 962.

513. *See id.* at 965-73; *see also* Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720, 728-31 (2d Cir. 1992).

514. Both courts denied Buyer recovery for profits lost when Sonomed violated the contract's exclusive territorial arrangement because Buyer could not prove that it would have made these same sales if Seller had not breached. *See Bausch & Lomb*, 780 F. Supp. at 971; *Bausch & Lomb*, 977 F.2d at 728. That almost impossible burden of proof permits sellers to breach exclusive territorial arrangements with impunity. In fairness, I wonder how much of the decision was based on Buyer's other evidentiary difficulties.

515. *See Bausch & Lomb*, 780 F. Supp. at 967.

testimony about the value of the exclusive territory which it did receive. Fifth, Buyer's request for damages was unclear or misread by the trial court:

> At the outset, the Court notes that, surprisingly, B & L has made no claim for its own prospective loss of profits. In Plaintiff's Exhibit 148, at item 4, the plaintiff apparently seeks the profits based on the sales made by Sonomed during the period December 24, 1987 to December 31, 1989. Also, in Plaintiff's Exhibit 150, the plaintiff claims as its profits, 'the excess profits earned by Sonomed in selling at prices above those which it would have sold to B & L.' The plaintiff further states that 'Sonomed would be unjustly enriched . . . were it to retain those excess profits.' In Plaintiff's Exhibit 150, B & L sets forth the sales made by Sonomed during the period between December 24, 1987 and December 31, 1987 and during the years 1988 and 1989.[516]

The reference to unjust enrichment suggests the court read this as a request for restitution, which was inappropriate, since Buyer had not transferred those lost profits to Seller.[517] But Buyer's reference in the preceding sentence to Plaintiff's Exhibit 150 suggests Buyer was trying to quantify its lost sales, just as courts have done with other breaches by sellers of requirements contracts.[518]

The trial and appellate courts instead read this as a claim for Seller's profits. The counter-intuitiveness of a *Buyer* seeking *Seller's* profits probably doomed this claim from the start. The trial court found the claim was too uncertain and awarded, as reliance damages, the royalties Buyer paid "in reliance upon the contract."[519] The appellate court agreed that expectation damages were uncertain, shifted to reliance damages,[520] and then denied them, saying Buyer had failed to prove it would have recouped the royalties it had paid Seller.[521] Thus, the appellate court denied expectation

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516. *Id.* at 971.

517. Restitution awards only what one party (Buyer) has given another (Seller), not what Seller had acquired from third parties. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(c) (1982).

518. *See* cases cited *supra* note 368.

519. *Bausch & Lomb*, 780 F. Supp. at 971-72.

520. *See* Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720, 728-29 (2d Cir. 1992).

521. *See id.* at 729. This indicates another potential error. The court correctly denied consequential damages if this was a losing contract for Buyer. But that should not have affected Buyer's *direct* diminution-in-value damages under section 2-714(2), which awards the difference in value between what was promised and what was delivered, regardless of whether the promised goods would make a profit for Buyer. If Buyer orders a machine for $10,000, and the machine delivered works at 90% capacity, making it worth $9,000, section 2-714(2) awards direct damages

and reliance damages[522] for the same reason.

But the appellate court noted that restitution often is available at common law on a losing contract, and it said that:

> B & L would be entitled to recover as much of the $500,000 payment it made to Sonomed as it can show unjustly enriched Sonomed. . . .
>
> . . . .
>
> In order to determine how much of the $500,000 payment Sonomed must pay to B & L under a restitution theory, the district court must ascribe a value to the distribution right B & L enjoyed for the years preceding the Agreement's termination and then use it as an offset to the $500,000. As set forth above, the reasonable value of the benefit unjustly received, not the contract price, determines the amount of an award in restitution. However, the contract may provide probative evidence of the value of the benefit. . . . Indeed, in the absence of a readily available market price, the value that the parties ascribed to a benefit in their contract may be the best valuation measure available to the court. . . .
>
> . . . .
>
> The district court should also take into account the fact that B & L did not receive the exclusive distributorship promised by Sonomed in the Agreement. As set forth above, Sonomed sold its products in various parts of B & L's exclusive territory even before it terminated the Agreement. These violative sales may have diminished the value of the benefit B & L received, although it may be difficult to calculate the amount of the diminution. The profits Sonomed obtained through its violative sales may, however, provide some evidence of the diminished value of the distribution right.
>
> We thus . . . direct the court on remand to grant a restitutionary award to B & L consistent with this opinion.[523]

In other words, having denied expectation and reliance damages as

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of $1,000. I have not read a section 2-714 case which asks if the machine was part of a profitable production line.

522. *See id.* I am not sure why the court did not require Seller to prove the amount of the offset to which it was entitled.

523. *Id.* at 729-30.

uncertain, the appellate court ordered restitution using the same evidence which made expectation and reliance uncertain.

So for what can we cite *Bausch & Lomb*? It does successively consider the expectation, reliance, and restitution interests, but of the 467 cases I read for this article, it is the only one which does so. I am sure the revisers did not intend to endorse *Bausch & Lomb*'s failure to mention a single Article 2 damage formula. I doubt they intended to reverse Article 2's loosening of certainty requirements, as *Bausch & Lomb* seems to do. And why is the only judicial support for reliance damages a case which *denied* reliance damages (and for the same reasons that it denied an expectation award)? Whatever the merits of reliance damages in Sales, the deletion of *Bausch & Lomb* from the 1997 Draft is welcome.

### *C. Conclusion: Bearded Ladies and Karl Llewellyn*

But in the end, what is the harm of referring to the reliance interest? Most references are to reliance as a component of the expectation interest, rather than to reliance as a separate interest to be awarded in and of itself. Perhaps Llewellyn answered that question. Speaking of a different conflict,[524] he wrote:

> To be sure, no line of analysis can properly be said to be wrong, merely because it divides mankind, say, into such a dichotomy as those who are bearded ladies and those who are not. But such a line of analysis does suggest the presence of more bearded ladies than there are, which tends to mislead.[525]

That is my concern with the revisers' frequent references to reliance. Those who know Article 2 will understand that these references merely identify part of the expectation interest, as endorsed by section 1-106(1), the drafting history, and courts. But defense attorneys less familiar with Sales may be misled: to them, the reliance references may appear as an alternative to, or a limitation on, the expectation interest. One need only combine the 1997 Draft's statement that "[o]ther remedial interests, such as reliance or restitution, are protected under the general damage measure . . . ."[526] with

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524. Llewellyn was attacking the tendency of courts to divide contracts into "bilateral" or "unilateral" contracts. *See* Karl N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance I*, 48 YALE L.J. 1, 36 (1938).

525. *Id.* at 36.

526. U.C.C. § 2-803, note 2 (1997 DRAFT, *supra* note 1, § 2-803, note 2).

its statement that damages may be "determined in any reasonable manner"[527] to turn the reliance interest into a defense argument.

An example of how that can happen is very close at hand. Promissory estoppel's use of reliance as a means of formation was based upon legitimate concern for a limited number of hapless, sympathetic plaintiffs badly burned by their ignorance of traditional rules of consideration,[528] and it was long excluded from matters commercial.[529] But it moved into the stream of commerce and business in the 1960s,[530] began to swallow up contract (at least according to Gilmore) in the 1970s,[531] and has become commonplace in commercial contract litigation in the 1990s. Today, many promissory estoppel claims are based upon the same promise which the plaintiff has unsuccessfully used to establish a contract:

> [T]he evidence of an agreement is weak, and the plaintiff has tried to pair his marginal contract claim with a reliance argument in the forlorn hope that two swings at the same pitch will produce better results than one. In these cases, the promissory estoppel count merely duplicates the contract count, needlessly consuming court time, energy, and effort.[532]

Why did this happen? In part, it was because enough cases used promissory estoppel to make it a viable cause of action, and what lawyer looking at a difficult contract claim will give up an alternative, back-up cause of action? If she does, does she risk a legal malpractice action for failure to plead an arguable claim?

I fear the same problems with the 1997 Draft's references to reliance damages, for they may give defense lawyers a way to whittle down a

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527. U.C.C. § 2-804 (1997 DRAFT, *supra* note 1, § 2-804).

528. *See, e.g.*, Kirksey v. Kirksey, 8 Ala. 131 (1845) (widow who abandoned farm and moved self and children sixty miles across rural Alabama in reliance on brother-in-law's promise of a home); DeCicco v. Schweizer, 117 N.E. 807 (N.Y. App. 1917) (daughter who married Italian count after father promised to pay her $2500 a year until her death); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959) (long-time secretary to corporation president who retired in reliance on board of directors' resolution to pay her pension); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965) (young couple who gave up jobs, moved family, and sold at a loss a business they had bought and developed, in reliance on statement that they needed only $18,000 to acquire a Red Owl grocery store).

529. *See* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 344-455 (2d Cir. 1933).

530. *See* Henderson, *supra* note 26, at 355.

531. *See* GILMORE, *supra* note 16.

532. Gibson, *supra* note 46, at 708. A 1988 survey of 110 cases which pay more than marginal attention to *Restatement (Second) of Contracts* section 90 produced more than 20 such needlessly-duplicative claims. *See id.* at 708 n.371.

plaintiff's expectation claims. Indeed, without clear limits on the use of reliance damages, would a defense lawyer now have a responsibility to protect her client by asking the judge to award reliance damages? Will such attempts to whittle away at Article 2's expectation formulas become common? How much time—litigants' time, lawyers' time, and judges' time—will these unnecessary claims for reliance damages consume? I apologize to those who have invested so much time and effort into the revision of Article 2's remedies, but we do not need reliance damages in the law of Sales.