Kentucky Law Journal

Volume 77 | Issue 1 Article 7

1988

UCC Section 2-714(1) and the Lost-Volume Theory: A New Remedy for Middlemen?

John Hackley
University of Kentucky

UCC Section 2-714(1) and the Lost-Volume Theory: A New Remedy for Middlemen?

Recently, the New York Court of Appeals utilized a lost-volume analysis combined with the buyers' remedy provisions of the Uniform Commercial Code [hereinafter U C.C.] to benefit a middleman buyer.[1] Fertico Belgium S. A. [hereinafter Fertico] sued its supplier, Phosphate Chemicals Export Association [hereinafter Phoschem], for breach of contract for the late delivery of fertilizer [2] Phoschem's breach forced Fertico to buy more costly fertilizer from another supplier to fulfill an existing contractual obligation to a customer.[3] When the late-delivered Phoschem fertilizer arrived, Fertico accepted it and later profitably resold it to another customer [4]

The court allowed Fertico to recover damages[5] from Phoschem for the increased cost of the cover contract even though

---

[1] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334 (N.Y. 1987). See *infra* notes 2-15 and accompanying text for a discussion of the facts of the *Fertico* case.

[2] *Fertico*, 510 N.E.2d at 335-36. The *Fertico* litigation involved several complicated commercial transactions. In October 1978, Fertico Belgium S. A. [hereinafter Fertico] entered into a contract with Phosphate Chemicals Export Association [hereinafter Phoschem] in which Phoschem agreed to supply Fertico with two shipments of fertilizer. The first shipment was to be 15,000 tons delivered by Nov 20, 1978, and the second was to be 20,000 tons delivered by Nov. 30, 1978. In early November of 1978, Phoschem informed Fertico that the first shipment would not arrive by the contract date, although Fertico had already paid for it. Fertico had not paid for the second shipment and decided to cancel it after Phoschem informed Fertico of the delay. *Id.*

[3] *Id.* Fertico had to have a timely delivery to fulfill its contract with Altawreed, Iraq's agricultural ministry. The belated shipment arrived on Dec. 17, 1978, too late for the Fertico-Altawreed contract. Because Phoschem had informed Fertico that the shipment would be late, Fertico acquired substitute fertilizer from another supplier, Unifert, in mid-November. Fertico supplied Altawreed with the fertilizer purchased from Unifert. *Id.*

[4] *Id.* Fertico sold the late-delivered Phoschem fertlizer to another company, Janssens, for a profit of $454,000 on March 19, 1979. *Id.* at 336.

[5] *Id.* The court found that damages were recoverable under UNIFORM COMMER-

Fertico accepted and profitably resold the late-delivered goods.[6] Additionally, the court allowed Fertico to keep the profit from the subsequent resale of the Phoschem fertilizer [7] The court did not allow Phoschem an offset for the resale profits, because "[t]his offset, on these particular facts, would [have] severely disadvantage[d] Fertico, a trader in fertilizer who both buys and sells, and who would have pursued such commercial transactions had there been no breach by Phoschem."[8] Although the court did not use the term "lost volume," the reasoning it employed to deny an offset was identical to the lost-volume seller theory [9] The court recognized that its "decision [did] not fit squarely within the available remedies urged by the dissent"[10] but found the general remedial scheme of the U C.C. broad enough to accommodate its rationale.[11]

CIAL CODE § 2-712 (1978) [hereinafter U.C.C.], because "Fertico exercised its right as the wronged buyer-trader to cover in order to obtain the substitute fertilizer it required to meet its obligation under its Altawreed contract. " *Fertico*, 510 N.E.2d at 337. *See* U.C.C. § 2-712, comment 1. (All cites to the U.C.C. will be from the 1978 Official Text.)

[6] *Fertico*, 510 N.E.2d at 337-38. The cover contract with Unifert cost $700,000 more than the original contract with Phoschem. *Id.* at 336.

[7] *Id.* at 337-38.

[8] *Id.* at 338.

[9] *See infra* notes 19-83 and accompanying text for a discussion of the lost-volume theory.

[10] *Fertico*, 510 N.E.2d at 338.

[11] The court relied upon U.C.C. §§ 1-106, 2-714(1). The court found that U.C.C. § 1-106

> directs that the remedies provided by the [U.C.C.] should be liberally administered so as to put the aggrieved party in as good a position as if the other party had fully performed. Had Phoschem fully performed, Fertico would have had the benefit of the Altawreed transaction and, as a trader of fertilizer, the profits from the Janssen's sale as well.

Fertico, 510 N.E.2d at 338. Again, the court used language and reasoning of lost-volume cases.

Although the cover remedy of U.C.C. § 2-712 is usually unavailable for one who accepts goods, the court relied on U.C.C. § 2-714(1) to support its award of cover damages:

> Fertico learned of Phoschem's breach after Phoschem had negotiated Fertico's $1.7 million letter of credit, which constituted complete payment for the first shipment. With no commercially reasonable alternative, Fertico took custody of the first shipment but cancelled the second ., having previously notified Phoschem of its breach (U.C.C. § 2-607). The loss resulting to Fertico by having to acquire cover, even in the face of its acceptance of a late-delivered portion of the fertilizer, is properly

The court allowed a recovery of cover damages under U C.C. section 2-712 even though Fertico accepted the late-delivered goods.[12] The court allowed this recovery based on a broad reading of U.C.C. section 2-714(1), which allows a buyer to recover damages "resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[13] Few courts—and even fewer commentators—have discussed this Code provision.[14] Of those who have discussed U C.C. section 2-714, none has interpreted the section as broadly as did the *Fertico* court when it allowed a middleman buyer both to retain the profit from the resale of late-delivered goods *and* to recover cover damages.[15]

The *Fertico* court's unique combination of the lost-volume theory, U.C.C. section 2-714(1), and the cover remedy of U C.C. section 2-712 raises several interesting questions. This Note addresses the following three questions: (1) Can courts utilize *Fertico's* lost-volume analysis in a manner that is consistent with the elements and theories underlying other lost-volume seller cases and lost-profit buyer cases?[16] (2) Does an award of cover damages and the retention of profit derived from the resale of late-delivered goods give a windfall to a middleman?[17] (3) In what cases might courts properly apply the *Fertico* analysis?[18]

I. THE LOST-VOLUME SELLER THEORY

Phoschem sought an offset for the profit Fertico earned on the resale of the late-delivered goods, arguing that if the goods

---

recoverable under § 2-714(1).

Fertico, 510 N.E.2d at 338.

[12] *Id.*

[13] U.C.C. § 2-714(1).

[14] See *infra* notes 125-64 and 213-34 and accompanying text for a discussion of U.C.C. § 2-714 and the authorities that interpret the section.

[15] *Fertico*, 510 N.E.2d at 338-39.

[16] See *infra* notes 19-197 and accompanying text for a discussion of lost-volume seller cases and lost-profit buyer cases.

[17] See *infra* notes 235-40 and accompanying text for a discussion of the windfall given by the *Fertico* court.

[18] See *infra* notes 241-53 and accompanying text for a discussion of the types of cases in which the *Fertico* analysis might apply.

had been delivered in a timely fashion, Fertico would have sold them under its existing resale contract and would not have had the goods on hand to make a second sale.[19] Phoschem reasoned that the late delivery actually made it possible for Fertico to have two resales instead of one.[20] Therefore, Phoschem argued that the profit Fertico earned on the resale of the late-delivered goods constituted "expenses saved in consequence of the seller['s] breach,"[21] and therefore should have been deducted from damages otherwise recoverable under U C.C. section 2-712.[22]

The *Fertico* court denied the offset because had Phoschem delivered the fertilizer in a timely manner, Fertico would have resold it under its existing contract and would have sought other supplies for the subsequent resale.[23] Therefore, the late delivery neither caused additional profits nor created "expenses saved in consequence of the seller's breach."[24] In essence, the court used the lost-volume seller theory to benefit a middleman buyer [25] Although other courts have allowed aggrieved middlemen to recover lost profits from sellers and retain profits earned notwithstanding sellers' breaches,[26] none has used the language and reasoning of lost-volume seller cases to achieve these goals. Therefore, the lost-volume seller theory is the most convenient starting point for an analysis of the *Fertico* rationale. Cases[27]

---

[19] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334, 338 (N.Y. 1987).

[20] *Id.*

[21] *Id.* at 337

[22] *Id.* at 338.

[23] *Id.* at 338-39.

[24] *Id.*

[25] See *infra* notes 30-83 for a discussion of the lost-volume theory.

[26] See *infra* notes 84-197 for a discussion of lost-profit buyer cases.

[27] *See generally* Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251 (4th Cir. 1974) (holding that seller of sweaters was entitled to lost-profits analysis under U.C.C. § 2-708(2) (1978), if seller was lost-volume seller); Comeq, Inc. v. Mitternight Boiler Works, Inc., 456 So. 2d 264 (Ala. 1984) (holding machine tool seller entitled to damages based on lost profits from buyer's breach though seller sold same machine to third party); Snyder v. Herbert Greenbaum and Assoc., Inc., 380 A.2d 618 (Md. 1977) (remanding case to trial court for determination of whether seller was lost-volume seller); Neri v. Retail Marine Corp., 285 N.E.2d 311 (N.Y 1972) (holding that seller of boats was entitled to lost profits caused by buyer's breach notwithstanding resale at the same price that buyer's had contracted to pay, because seller had adequate supply to sell to both; therefore, second buyer did not replace first buyer).

and commentaries[28] regarding the lost-volume seller theory are plentiful, and one easily can observe the elements of a lost-volume recovery in cases where a seller[29] is the aggrieved party

A. *The Theory*

Basically, a lost-volume seller is one who loses a sale, and hence a profit, because of a buyer's breach.[30] A seller loses volume when his buyer breaches and "the seller resells to a buyer who would have bought from the seller even if there had been no breach of the original contract."[31] There are implicit "conditions"[32] within this simple statement: (1) the seller would have sought an additional sale absent the breach;[33] (2) the seller would have made an additional sale absent the breach;[34] and

---

[28] *See generally* Childres & Burgess, *Sellers Remedies: The Primacy of UCC 2-708(2)*, 48 N.Y.U. L. REV. 833 (1973) (suggesting that the lost-profits formula of U.C.C. § 2-708(2) should be the primary formula for seller's remedies); Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 S. CAL. L. REV 283 (1984) (applying economic analysis to U.C.C. § 2-708(2) for retail sales); Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 STAN. L. REV 66 (1965) (criticizing U.C.C. § 2-708 for lack of specificity); Schlosser, *Construing UCC Section 2-708(2) to Apply to the Lost-Volume Seller*, 24 CASE W RES. L. REV 686 (1973) (providing a "construction of section 2-708 which achieves the drafters' goal of providing the lost-volume seller with full damages recovery. " *Id.* at 686); Schlosser, *Damages for the Lost-Volume Seller: Does an Efficient Formula Already Exist?*, 17 U.C.C. L.J. 238 (1985) (providing economic analysis and overview of other commentators' analyses of U.C.C. § 2-708(2) and the lost-volume seller theory); Goetz v. Scott, *Measuring Seller's Damages: The Lost-Profits Puzzle*, 31 STAN. L. REV 323 (1979) (looking with disfavor upon lost-profits formula of U.C.C. § 2-708(2)).

[29] Obviously, a middleman acts as both a buyer and a seller. Within this Note the term "seller" is used to identify cases in which the aggrieved party is suing in his capacity as a seller. Similarly, the term "buyer" refers to one suing as a buyer.

[30] *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-9 (2d ed. 1980) (providing general description of lost-volume theory).

[31] *Id.* at § 7-7, 271 n.56 (citing Harris, *supra* note 28, at 80-87, and J. WHITE & R. SUMMERS, *supra* note 30, at § 7-9).

[32] Harris, *supra* note 28, at 82.

[33] *Id.* Professor Harris explains that this first condition satisfies at least two concerns: (1) it proves that the plaintiff did solicit someone; and (2) it proves that the plaintiff had not "reached his limit of volume because he could not handle more business without expansion of his plant or drastic revision of his mode of doing business." *Id.*

[34] *Id.* Professor Harris explains that the second condition has "probative value where the resold entity is fungible." *Id.* at 83.

(3) the seller had the capacity to make an additional sale.[35] These conditions appear repetitious. Each condition states, in essence, that the seller must have made an additional sale absent the breach.[36] Practically, though, these conditions provide an analytical framework that courts use to adjudicate lost-volume claims.[37]

B. *The Code*

The adoption of the U C.C. provided an opportunity for sellers to recover from breaching buyers the foregone profits from lost-volume transactions.[38] Specifically, U C.C. section 2-708[39] provides two damage formulas under which sellers can

---

[35] *Id.* at 82 ("Where it is shown that plaintiff was unable to perform an additional contract obviously no volume has been lost that would not have been lost even without breach and resale." *Id.* at 83).

[36] *See generally id.* at 82-83.

[37] Professor Harris explains how the conditions and other evidence help guide courts in lost-volume cases:

> If before trial plaintiff in fact resold a specified entity scheduled for defendant, this resale purchaser can be identified at the trial. If there was no actual resale, the court must determine whether the purchasers available at the time plaintiff should have resold would have met the three conditions. Inferences drawn from the original contract with defendant and the general nature of plaintiff's business are relevant to that determination. Where there is an actual resale, evidence establishing plaintiff's plans should be admitted to determine whether plaintiff would have solicited the purchaser had there been no breach.

Id. at 82 n.79. See *infra* notes 54-72 and accompanying text for a discussion of the analytical framework used by the courts in actual lost-volume seller cases.

[38] *Id.* at 83 ("There is only one Sales Act case in which it is clear that the court comprehended the lost volume phenomenon, and in that case the court refused to take it into account." *Id.* (citation omitted)).

[39] U.C.C. § 2-708 reads as follows:

> § 2-708 Seller's Damages for Non-acceptance or Repudiation
>
> (1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), 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 together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
>
> (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages for non-acceptance is the profit (including reasonable overhead) which the seller would have made from

seek recovery for non-acceptance or repudiation by a buyer.[40] (1) section 2-708(1) provides "a market-damages formula based on the market price at the time and place for tender;"[41] and (2) section 2-708(2) provides "a profit based formula based on the profit the seller expected to realize on the deal."[42] The profit-based formula is applied[43] only when the market-damages section is "inadequate to put the seller in as good a position as performance would have done."[44] U C.C. section 2-708 has stirred much debate.[45]

Although the authors of the U C.C. provided little guidance concerning when the lost-profit analysis of U C.C. section 2-708(2) should apply,[46] courts[47] and commentators[48] have concluded that the section is applicable to the lost-volume seller [49]

---

the full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

[40] *Id*; *see also* Schlosser, *Construing UCC Section 2-708(2) to Apply to the Lost-Volume Seller*, *supra* note 28, at 687-88 (providing the lost-volume seller with two damage formulas); Schlosser, *Damages for the Lost-Volume Seller: Does an Efficient Formula Already Exist?*, *supra* note 28, at 238 (examining economic analyses by other commentators on U.C.C. § 2-708 and providing introductory description of U.C.C. § 2-708).

[41] Schlosser, *Damages for the Lost-Volume Seller: Does an Efficient Formula Already Exist?*, *supra* note 28, at 238.

[42] *Id.*

[43] U.C.C. § 2-708(2).

[44] *Id.*

[45] *See supra* note 28.

[46] Comment 2 to U.C.C. § 2-708 explains:

> The provision of this section permitting recovery of expected profit including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

U.C.C. § 2-708 comment 2.

[47] See *infra* notes 54-72 and accompanying text for a discussion of cases applying U.C.C. § 2-708(2) to lost-volume sellers; *see also* cases cited *supra* note 27

[48] *See supra* note 28.

[49] See *supra* notes 30-37 and accompanying text for a discussion of the lost-volume seller theory.

Therefore, a seller may resell goods a buyer has refused to accept and seek the profit of the lost sale.[50]

One interesting aspect of U C.C. section 2-708 is the language in the second comment, which suggests that goods dealt with under the lost-profit section be "standard priced."[51] This language has been criticized as being misleading.[52] The proper inquiry under U C.C. section 2-708(2) is "not the 'standard pricedness' of the goods the seller is selling "[53] but rather is whether a sale, and hence a profit, is lost because of a buyer's breach.

C. *The Cases*

The best known lost-volume seller case is *Neri v. Retail Marine Corp.*[54] In *Neri*, the New York Court of Appeals addressed an ideal lost-volume situation[55] and applied "[t]he new statute"[56] to allow a seller to recover lost profits. The seller,

---

[50] *See infra* notes 54-72 and accompanying text for a discussion of cases applying U.C.C. § 2-708(2) to lost-volume sellers.

[51] *See* U.C.C. § 2-708 comment 2 (*supra* note 46).

[52] J. WHITE & R. SUMMERS, *supra* note 30, at § 7-9.

[53] *Id.* White and Summers show the futility of basing a lost-volume claim on the "standard pricedness" of goods:

> If the seller is in a market in which the demand for the product exceeds the available supply ., he will lose nothing when one party breaches, and he should recover no damages even if his goods are "standard priced." By the same token when his goods are not standard priced but he loses one sale as a result of one buyer's breach, he needs more than the contract-market differential on the resale to put him in the same economic position as performance would have; he needs the profit on the sale he lost that year.

Id.

[54] 285 N.E.2d 311 (N.Y 1972).

[55] See *supra* notes 30-37 and accompanying text for a general discussion of the lost-volume seller theory.

[56] *Neri*, 285 N.E.2d at 313. The court was referring to the U.C.C. The court specifically addressed the change wrought by the new lost-profits analysis of U.C.C. § 2-708(2):

> Prior to the code, the New York cases "applied the 'profit' test, contract price less cost of manufacture, only in cases where the seller [was] a manufacturer or an agent for a manufacturer" (1955 Report of N.Y. Law Rev. Comm., vol. 1, p. 693). Its extension to retail sales was "designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This

Retail Marine Corporation [hereinafter Retail Marine], contracted to sell a new boat to the buyer, Anthony Neri [hereinafter Neri], for $12,587 40.[57] Neri made a deposit of $4,250 and, within six days, breached the contract.[58] Retail Marine refused to return Neri's deposit, although it was eventually able to resell the boat for the price Neri had contracted to pay [59] Neri sued to recover the deposit, and Retail Marine counterclaimed for the lost profits.[60]

The court held that Retail Marine was entitled to the profit on the lost sale and incidental damages "for storage, upkeep, finance charges and insurance for the period between the date performance was due and the time of resale. "[61] The court quoted at length a commentary that construed section 2-708(2) of the U C.C. in a hypothetical situation similar to that presented by the facts of *Neri*.[62] The *Neri* court did not explain

---

section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods."

Neri, 285 N.E.2d at 313-14.

[57] *Neri*, 285 N.E.2d at 312.

[58] *Id.*

[59] *Id.* Retail Marine sold the boat four months after Neri's breach. *Id.*

[60] *Id.*

[61] *Id.* at 314-15. The court cited U.C.C. § 2-708(2) (*see supra* note 39) to support its award of lost profits and noted that under U.C.C. § 2-710 the code allows a seller to recover incidental damages.

[62] Noting that it was "illustrative of the operation of the rules," the court quoted Dean Hawkland's work:

> [I]f a private party agrees to sell his automobile to a buyer for $2000, a breach by the buyer would cause the seller no loss (except incidental damages, i.e., expenses of a new sale) if the seller was able to sell the automobile to another buyer for $2000. But the situation is different with dealers having an unlimited supply of standard-priced goods. Thus, if an automobile dealer agrees to sell a car to a buyer at the standard price of $2000, a breach by the buyer injures the dealer, even though he is able to sell the automobile to another for $2000. If the dealer has an inexhaustable supply of cars, the resale to replace the breaching buyer costs the dealer a sale, because, had the breaching buyer performed, the dealer would have made two sales instead of one. The buyer's breach, in such a case, depletes the dealer's sales to the extent of one, and the measure of damages should be the dealer's profit on one sale. Section 2-708 recognizes this, and it rejects the rule developed under the Uniform Sales Act by many courts that the profit cannot be recovered in this case.

Id. (citing W HAWKLAND, SALES AND BULK SALES 153-54 (1958)).

the requirements of U C.C. section 2-708(2) in depth but found that Retail Marine had lost a sale and a profit because of Neri's breach.[63] Other courts have addressed section 2-708(2) in more detail.[64]

In *Comeq, Inc. v Mitternight Boiler Works, Inc.*,[65] the Alabama Supreme Court discussed the application of U C.C. section 2-708(2) to redress an aggrieved middleman seller. The court found that certain evidence was dispositive of the question of whether a buyer's breach caused lost-volume damage.[66] The plaintiff, Comeq, Incorporated [hereinafter Comeq] ordered an "angle bending roll"[67] which it had contracted to resell to Mitternight Boiler Works, Incorporated [hereinafter Mitternight]. Mitternight breached its contract to purchase the machinery, and Comeq resold it to a third party [68] The court held that Comeq was entitled to recover lost profits under U C.C. section 2-708(2).[69] Although Comeq was not a manufacturer of the machinery, "[t]he record reveal[ed] that, prior to the contract with Mitternight, Comeq had sold approximately 300 angle bending rolls, and after the contract date sold numerous others."[70] Therefore, evidence of Comeq's business practices before and after the breach revealed that Comeq would have been able to fulfill the resale contract and, indeed, would have done so absent the breach.[71] This evidence fulfilled the evidentiary conditions necessary for Comeq to prove it had lost a sale and provided a reason for the court to award lost-volume profits.[72]

---

[63] *Id.*

[64] *See infra* notes 65-72 and accompanying text.

[65] 456 So. 2d 264 (Ala. 1984).

[66] *Id.* at 268-69.

[67] *Id.* at 265. An angle bending roll "is used in the steel fabricating industry to roll angles, channels and beams into circular shapes to be used for supports." *Id.* at 265.

[68] *Id.* at 266.

[69] *Id.* at 269.

[70] *Id.* at 268.

[71] *Id.* at 268-69.

[72] *See supra* note 32; see *supra* notes 30-37 and accompanying text for a discussion of the conditions necessary for a recovery of lost-volume profit.

D *Lost-Volume Rationale and Middlemen*

The *Fertico* case involved a middleman suing its supplier [73] The *Fertico* court apparently realized that a middleman is both a buyer and a seller Courts often apply the lost-volume theory to benefit an aggrieved middleman who sues a breaching buyer [74] It should follow that a middleman who sues a breaching seller ought to be allowed to avoid a setoff against profits made after a breach, if the middleman had the capacity to make the same or even more profit had there been no breach.

The facts in the *Comeq* case,[75] and the reasoning employed by the *Comeq* court, were very similar to the facts and reasoning in *Fertico* [76] The middleman buyer in *Fertico* was able to prove that it had the capacity to make two sales even if Phoschem had delivered the fertilizer on time.[77] Although the *Fertico* court's use of the lost-volume theory was unique in that it benefited a middleman *buyer*, such use of the theory was not extreme. Because the Phoschem goods arrived too late for Fertico to resell them under an existing resale contract, Fertico purchased substitute goods to avoid breaching its resale contract.[78] The court concluded that Fertico's resale of the late-delivered goods—its second resale within a period of four months—was not a sale made possible by the breach, because Fertico had the capacity to make two sales within the period of time involved even if there had been no breach.[79] As in the *Comeq* case,[80] the majority of the *Fertico* court examined the

---

[73] *Fertico*, 510 N.E.2d at 335.

[74] See *supra* notes 30-72 and accompanying text for a discussion of cases applying the lost-volume rationale to benefit middlemen sellers.

[75] See *supra* notes 65-72 and accompanying text for a discussion of the *Comeq* case.

[76] *Fertico*, 510 N.E.2d at 335. The only substantive difference in *Fertico* was that the middleman was suing as a *buyer Id.*

[77] The *Fertico* court concluded that Fertico "would have pursued such commercial transactions had there been no breach by Phoschem." *Id.* at 338. Apparently, the court came to this conclusion based upon two facts: (1) Fertico was in the business of buying and selling fertilizer; and (2) Fertico completed two transactions while burdened with Phoschem's late delivery. *Id.*

[78] *Id.*

[79] *Id.*

[80] *Comeq*, 456 So. 2d 264; see *supra* notes 65-72 and accompanying text for a discussion of the *Comeq* case.

capacity of the middleman and concluded that it would have purchased a second shipment of goods to fulfill a second sale had the Phoschem goods been delivered in a timely manner and resold under the first contract.[81]

The dissenting opinion in *Fertico* expressed doubts about whether Fertico would have made two resales absent Phoschem's breach.[82] To conclude, as the dissent did, that Fertico would not have made a second profitable resale absent the breach appears irrational. Such thinking suggests that Fertico, after a timely delivery, would have suspended its business activities for no reason. The dissent also suggested that a middleman suing as a buyer should not be allowed to use a lost-volume analysis. However, courts have evaluated the selling capacity of middlemen *sellers* to determine if they were in a position to make an additional sale absent a breach.[83] Merely because a middleman is suing in his role as a *buyer* is not a

---

[81] *Fertico*, 510 N.E.2d at 338.

[82] *Id.* at 339 (Titone, J., dissenting). The dissenting opinion vigorously attacked the majority's analysis, suggesting that courts cannot properly apply a lost-volume theory to benefit buyers because "[middlemen buyers] cannot, by definition, be said to have an unlimited supply of goods at [their] disposal for resale," and because "[middlemen are] at the mercy of the wholesale market's price fluctuations." *Id.* at 340-41. Because of these factors, the dissent was uncertain whether Fertico would have made a second resale had there been no breach. Also, because the market conditions absent a breach may have affected the profit Fertico could have earned if it had made two independent resales, the dissent felt uneasy with the majority's conclusion that the profit made on the resale of the late-delivered goods equaled the profit it would have otherwise earned. *Id.* Therefore, the dissent would not have allowed Fertico to keep the resale profit.

Although the dissent was correct in pointing out the difficulties inherent in applying a lost-volume rationale to buyers, the dissent's solution would have created even greater difficulties. Although Fertico did not keep "an unlimited supply" of fertilizer on its warehouse floor, by making two purchases and two sales while burdened with Phoschem's breach, Fertico showed that it had the capacity to carry through with two buy/sell transactions.

Although market conditions might have affected the profit Fertico would have earned had there been no breach, it is more desirable to allow the aggrieved party to retain approximately the same profit it would have earned absent a breach, rather than to allow the breaching party to recover it. Under the dissent's analysis, even if the profit Fertico made on the resale of the late-delivered goods was *less* than the profit it could have earned absent the breach, the breaching seller is credited for it. This line of reasoning is not desirable.

[83] See *supra* notes 54-72 and accompanying text for a discussion of cases in which courts evaluate the selling capacity of middlemen sellers.

sufficient reason to deny application of the same theory he would be allowed to utilize if he were suing as an aggrieved seller

II. BUYERS AND LOST PROFITS

Although the *Fertico* court relied on the lost-volume theory to determine the fate of profits earned by a middleman buyer,[84] it could have looked instead to lost-profit buyer cases to reach its conclusion.[85] No case expressly refers to a "lost-volume buyer," but courts have allowed buyers to recover lost profits in cases that are roughly analogous to lost-volume seller cases.[86] Just as a seller may recover the profit of a sale that was lost because of a buyer's breach, so a buyer may recover the profit lost as a consequence of a seller's breach. Although buyers seek lost profits in sundry situations[87] and under numerous U C.C. provisions,[88] the keystone of most claims of this type is U C.C. section 2-715.[89]

---

[84] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334, 337-38 (N.Y. 1987); see *supra* notes 1-15 and accompanying text for a description of the *Fertico* case.

[85] See *infra* notes 90-197 and accompanying text for a discussion of lost-profit buyer cases.

[86] See *id.*, see also *supra* notes 54-72 and accompanying text for a discussion of lost-volume seller cases.

[87] See *infra* notes 105-97 and accompanying text for a discussion of the sundry situations in which buyers seek lost profits; *see also* R. DUNN, RECOVERY OF DAMAGES FOR LOST-PROFITS §§ 2.1, 2.3, 2.4 (3d ed. 1987) (providing excellent overview of cases in which buyers seek lost profits).

[88] *See* U.C.C. §§ 2-712(2), 2-713(1), 2-714(3).

[89] U.C.C. § 2-715 reads as follows:

> Buyer's Incidental and Consequential Damages
>
> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connnection with effecting cover and any other reasonable expenses incident to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not be reasonably prevented by cover or otherwise; and (b) injury to any person or property proximately resulting from any breach of warranty.

A. *UCC Section 2-715 and Consequential Damages*

U C.C. section 2-715 defines buyers' incidental and consequential damages.[90] As described in section 2-715, buyers' incidental damages are very similar to sellers' incidental damages as described in U C.C. section 2-710,[91] but the definition of consequential damages has no counterpart in sellers' remedies.[92]

U C.C. section 2-715(2) defines consequential damages as "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty "[93] The words "any loss" could be interpreted to give an aggrieved buyer a free hand in asserting claims were it not for the more restrained words that follow them. Section 2-715(2) encourages the mitigation of damages in that consequential damages cannot be recovered if they reasonably could have been "prevented by cover or otherwise."[94] Additionally, the seller must have had "reason to know" of the buyer's needs.[95] Although the language of section 2-715(2) is more relaxed than the language of the pre-Code "tacit agreement" test, which required that the seller have actual knowledge of the buyer's needs,[96] the "reason to know" requirement can still serve to restrain the recovery

---

[90] *Id.*

[91] U.C.C. § 2-710 reads as follows:

Seller's Incidental Damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

[92] One might consider the lost-profits section (U.C.C. § 2-708(2)) to be a rough counterpart; see *supra* note 39 for the text of U.C.C. § 2-708.

[93] U.C.C. § 2-715(2).

[94] *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 10-4, 395-96 (providing explanation of mitigation principle in U.C.C. § 2-715(2)).

[95] U.C.C. § 2-715(2).

[96] *See* J. WHITE & R. SUMMERS, *supra* note 30, at § 10-4. White and Summers present an excellent summary of the "tacit agreement" test and a good discussion of consequential damages; *see also* U.C.C. § 2-715, comment 2 (discussing foreseeability rule of the section as compared to "tacit agreement" test).

of consequential damages.[97] When one sells to a middleman buyer, courts may presume that one knows, at the time of sale, of the middleman's needs.[98]

Courts[99] and commentators[100] have had little difficulty concluding that U C.C. section 2-715(2) is applicable in lost-profit buyer cases. Courts have allowed buyers to recover lost profits under this section in numerous situations,[101] including (1) when the buyer loses a resale profit due to a lack of available cover;[102] (2) when the buyer accepts a non-conforming tender that causes a loss of profit;[103] and (3) when the buyer covers under U C.C. section 2-712 and, notwithstanding the cover, loses profit.[104] Each of these situations is examined below

1. *Lost Profits Without Cover*

A number of courts have allowed buyers to recover lost profits in cases not involving cover [105] Some of these opinions

---

[97] *See generally* Anderson, *The Cover Remedy*, 6 J.L. & COM. 155, 199 (1986) (citing Gerwin v. Southeastern California Ass'n of Seventh Day Adventists, 92 Cal. Rptr. 111 (1971) as example of failure under the foreseeability requirement, but noting rarity of such failures).

[98] *See* R. DUNN, *supra* note 87, at § 2.3, 61.

[99] See *infra* notes 105-97 and accompanying text for a discussion of cases using U.C.C. § 2-715(2) in lost-profit buyer cases.

[100] *See* R. DUNN, *supra* note 87, at §§ 2.1, 2.16-2.19; W HAWKLAND, SALES AND BULK SALES 176 (1976); J. WHITE & R. SUMMERS, *supra* note 30, at 10-4, 391-93; Anderson, *supra* note 97, at 197-200.

[101] See *infra* notes 105-97 and accompanying text for a discussion of the situations in which courts have allowed buyers to recover lost profits; *see generally* R. DUNN, *supra* note 87, at §§ 2.1-2.3.

[102] *See infra* notes 105-24 and accompanying text.

[103] *See infra* notes 125-64 and accompanying text.

[104] *See infra* notes 165-97 and accompanying text.

[105] *See, e.g.*, State Office Sys. v. Olivetti Corp. of Am., 762 F.2d 843 (10th Cir. 1985) (affirming decision that buyer could not have covered, and therefore, could recover lost profits under U.C.C. § 2-715 notwithstanding lack of cover); Larsen v. A.C. Carpenter, Inc., 620 F Supp. 1084 (E.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986) (allowing aggrieved buyers to recover lost profits for a portion of contract goods not covered, but assessing offset for portion covered and profited from); Bende and Sons, Inc. v. Crown Recreation, Inc., 548 F Supp. 1018 (E.D.N.Y 1982), *aff'd*, 722 F.2d 727, (2d Cir. 1983) (allowing buyer lost profits although no cover actually was obtained. The court found that Bende made a good faith effort to obtain cover yet none was available); Allied Canners & Packers, Inc. v. Victor Packing Co., 209 Cal. Rptr. 60 (Ct. App. 1984) (allowing middleman buyer to recover lost profits, but

have addressed U C.C. section 2-713[106] in relation to the recovery of lost profits.[107] These cases are relevant to a discussion of U C.C. section 2-715(2) because they highlight the requirement of that section, which allows an award of consequential damages only if the loss "could not reasonably be prevented by cover or otherwise."[108]

In *Bende & Sons, Inc. v Crown Recreation, Inc.*,[109] a middleman buyer, Bende & Sons, Incorporated [hereinafter Bende], contracted to purchase combat boots from Crown Recreation, Incorporated [hereinafter Crown], in order to resell them to the government of Ghana.[110] When Crown failed to deliver the boots, Bende sought substitute supplies.[111] Despite Bende's efforts, it was unable to procure substitute boots quickly enough to placate the government of Ghana, whose troops urgently needed suitable footwear Consequently, the government purchaser cancelled its order because of the delay [112]

Bende sued Crown, seeking the profit it would have made had Crown delivered the boots.[113] The court quoted U C.C.

---

denying damages under U.C.C. § 2-713); Sun Maid Raisin Growers v. Victor Packing Co., 194 Cal. Rptr. 612 (Ct. App. 1983) (involving partial cover); La Villa Fair v. Lewis Carpet Mills, Inc., 548 P.2d 825 (Kan. 1976) (holding that middleman who rejected for non-conformity may revoke and recover lost profits).

See *infra* notes 165-97 and accompanying text for a discussion of cases involving cover.

[106] U.C.C. § 2-713 reads as follows:

> Buyer's Damages for Non-Delivery or Repudiation
>
> (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.
>
> (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

[107] *See infra* notes 109-24 and accompanying text; *see also* R. DUNN, *supra* note 87, at §§ 2.1-2.3.

[108] U.C.C. § 2-715(2)(a).

[109] 548 F Supp. 1018 (E.D.N.Y. 1982).

[110] *Id.* at 1019-20.

[111] *Id.* at 1020.

[112] *Id.*

[113] *Id.* at 1022.

sections 2-713 and 2-715 in awarding Bende the profit lost due to Crown's breach.[114] Although Bende failed to cover, the court found that "Bende did make a good faith effort to order substitute boots from other suppliers. "[115] The good faith effort apparently satisfied the express condition of U C.C. section 2-715(2)(a) that consequential damages not be awarded if they could have been "reasonably prevented by cover or otherwise."[116]

The *Bende* court did not thoroughly address the issue of whether the breaching seller had to know of the resale contract. It did note, however, that Crown "conceded that it was aware when it contracted with Bende, that Bende was going to resell the boots."[117] Additionally, the court failed to address adequately the potential windfalls present in the market-price formula of U C.C. section 2-713. Rather, the court used the "difference between the breached contract price and the resale contract price" to establish the amount of lost profits.[118]

Allied Canners & Packers, Inc. v Victor Packing Co.[119] addressed in more detail the issue of a court's proper response when an aggrieved buyer seeks recovery under a Code section that would give the buyer a windfall. In *Allied*, Victor Packing Company [hereinafter Victor] breached its contract to sell two shipments of raisins to Allied Canners & Packers, Incorporated [hereinafter Allied]. Allied had contracted to resell the raisins but did not cover after Victor's breach.[120] Instead, Allied sued, seeking damages under the contract price-market price formula of U.C.C. section 2-713 [121] Because the market price of raisins had tripled at the time of Victor's breach, U C.C. section 2-713 presented Allied a golden opportunity to recover more than it would have made had the raisins been delivered and resold as originally planned.[122]

---

[114] *Id.* at 1022-23.
[115] *Id.* at 1022.
[116] U.C.C. § 2-715(2)(a).
[117] *Bende*, 548 F Supp. at 1022.
[118] *Id.*
[119] 209 Cal. Rptr. 60 (Ct. App. 1984).
[120] *Id.* at 61.
[121] *Id.* at 62.
[122] *Id.* at 62-63.

The court did not allow Allied to recover damages under this formula but did allow Allied the profit it lost because of the breach.[123] Obviously, had the court allowed Allied the much larger contract price-market price differential, Allied would have been in a better financial position than it would have been had the original contract been completed. The court correctly concluded that such recovery would violate the general remedial goal of the U C.C.[124]

2. *UCC Section 2-714 and Lost Profits*

The *Fertico* court relied, in part, on U.C.C. section 2-714 which allows buyers to recover damages caused by accepted goods.[125] Although section 2-714 allows recovery of lost profits as consequential damages,[126] the *Fertico* court handled the profit question via a lost-volume analysis.[127] Indeed, the *Fertico* court ignored U C.C. section 2-714(3)[128] which deals with profits, and relied only on the first subsection of U C.C. section 2-714.[129] Although a more detailed analysis of the court's combination of U C.C. section 2-714(1) with the cover remedy of U C.C. section 2-712 is presented below,[130] an analysis of judicial in-

---

[123] *Id.* at 63-66.

[124] *Id.* at 66; *see also* U.C.C. § 1-106.

[125] *See generally* W HAWKLAND, *supra* note 100, at 172-77 (providing an overview of buyer's remedies after acceptance).

[126] U.C.C. § 2-714 reads as follows:

> Buyer's Damages for Breach in Regard to Accepted Goods
>
> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

[127] *Fertico*, 510 N.E.2d at 338-39; see also *supra* notes 1-15 and accompanying text for a discussion of the *Fertico* analysis.

[128] See *infra* notes 213-34 and accompanyng text for a discussion of *Fertico's* unique interpretation of U.C.C. § 2-714.

[129] *Fertico*, 510 N.E.2d at 338-39.

[130] See *infra* notes 213-34 and accompanying text for a discussion of the court's interpretation of U.C.C. § 2-714.

terpretation of U.C.C. section 2-714 and its relationship to questions of profit is pertinent to an examination of *Fertico's* profit analysis.

U.C.C. section 2-714[131] contains two basic formulas for buyers who have accepted non-conforming goods: (1) for breach of warranty, a buyer may recover "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted;"[132] and (2) for a non-conforming tender, a buyer may recover "the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[133] In addition to these basic formulas, under subsection (3) of U C.C. section 2-714,[134] buyers may recover incidental and consequential damages as described in U.C.C. section 2-715 [135]

The formula for non-conformity of tender refers both to breaches of warranty and to "any failure of the seller to perform according to the obligations under the contract."[136] Therefore, the "reasonable" recovery section refers to damages resulting from *any* non-conformity of tender [137] Under this formula, a buyer must prove that any claimed damages were "the ordinary, foreseeable result of the breach."[138]

A number of appellate courts have discussed U.C.C. section 2-714.[139] Of these courts, none has interpreted the first subsec-

---

[131] *See supra* note 126 for the text of U.C.C. § 2-714.

[132] *See id.* at subsection (2); *see also* J. WHITE & R. SUMMERS, *supra* note 30, at § 10-2.

[133] *See* U.C.C. § 2-714(1).

[134] *See id.* at subsection (3).

[135] See *supra* note 89 for the text of U.C.C. 2-715.

[136] U.C.C. § 2-714, comment 2.

[137] W HAWKLAND, *supra* note 100, at 174.

[138] *Id.*

[139] *See, e.g.*, Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197 (8th Cir. 1984) (buyer, under U.C.C. § 2-714(1), can recover damages determined in any reasonable manner, and mathematical certainty is not required); Mead Corp. v. McNally-Pittsburg Mfg. Corp., 654 F.2d 1197 (6th Cir. 1981) (buyer, notwithstanding cover, can recover for expenses reasonably incurred to cure breach); T. J. Stevenson & Co., v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980) (applying U.C.C. § 2-714(1) to case in which goods deteriorated while in buyer's possession); Ralston Purina Co. v. Hartford Acc. & Indem. Co., 540 F.2d 915 (8th Cir. 1976) (buyer's election to accept non-conforming goods did not cut off action against seller under U.C.C. §

tion as broadly as did the *Fertico* court—allowing a middleman

---

2-714(1, 3)); United States of America for the Use of Fram Corp. v. Crawford, 443 F.2d 611 (5th Cir. 1971) (aggrieved buyer failed to present enough evidence to recover lost profits under U.C.C. § 2-714(1)); *In re* Lamica Corp., 65 Bankr. 849 (Bankr. S.D.N.Y. 1986) (cost of repair of non-conforming goods was reasonable measure of damages under U.C.C. § 2-714(1)); United Cal. Bank v. Eastern Mountain Sports, Inc., 546 F Supp. 945 (D. Mass. 1982), *aff'd*, 705 F.2d 439 (1st Cir. 1983) (allowing buyer an offset equal to buyer's lost profits under U.C.C. § 2-714(1)); *In re* O.P.M. Leasing Services, 61 Bankr. 596 (Bankr. S.D.N.Y. 1981) (U.C.C. § 2-714(1) inapplicable to damages sustained through lease of goods); Omaha Pollution Control Corp. v. Carver-Greenfield Corp., 413 F Supp. 1069 (D. Neb. 1976) (city was allowed incidental and consequential damages under U.C.C. § 2-714(1, 2) notwithstanding acceptance of non-conforming goods); American Elec. Power Co., Inc. v. Westinghouse Elec. Corp., 418 F Supp. 435 (S.D.N.Y. 1975) (incidental and direct damages recoverable under U.C.C. §§ 2-714 and 2-715(1) if evidence at trial proved breach of warranty); D'Orsay Equipment Co. v. U.S. Rubber Co., 199 F Supp. 427 (D. Mass. 1961), *aff'd*, 302 F.2d 777 (1st Cir. 1962) (plaintiff buyer failed to show defects constituting breach of warranty); Jones v. Atkins, 494 S.W.2d 448 (Ark. 1973) (U.C.C. § 2-714(1) is inapplicable where goods were not accepted); District Concrete Co., Inc. v. Bernstein Concrete Corp., 418 A.2d 1030 (D.C. 1980) (damages for reasonably foreseeable injuries caused by non-conforming tender are reasonably recoverable under U.C.C. § 2-714); GNP Commodities, Inc. v. Walsh Heffernan Co., 420 N.E.2d 659 (Ill. App. Ct. 1981) (instruction for damages under U.C.C. § 2-714(1) should not be given until "the time for rejection and revocation of acceptance has passed. "); J.D. Pavlak, Inc. v. Ahern, 352 N.E.2d 774 (Ill. App. Ct. 1976) (damages recoverable under U.C.C. § 2-714 can be limited by contract); Michiana Mack., Inc. v. Allendale Rural Fire Protection Dist., 428 N.E.2d 1367 (Ind. Ct. App. 1981) (expenses for retention of non-conforming goods are not recoverable under U.C.C. § 2-714); Auto-Teria, Inc. v. Ahern, 352 N.E.2d 774 (Ind. Ct. App. 1976) (recovery of "incidental and foreseeable consequential damages for breach of warranty" is allowable and reasonable under U.C.C. § 2-714(1)); S.C. Gray, Inc. v. Ford Motor Co., 286 N.W.2d 34 (Mich. Ct. App. 1979) (interpreting the damage formulas of U.C.C. § 2-714); Fablok Mills, Inc. v. Cocker Mach. & Foundry Co., 310 A.2d 491 (N.J. Super. Ct. App. Div. 1973), *cert. denied*, 315 A.2d 405 (N.J. 1973) (continued use of goods did not waive claims under U.C.C. § 2-714); Carbo Ind., Inc. v. Becker Chevrolet Inc., 491 N.Y.S.2d 786 (N.Y. App. Div. 1985) (cost of engine to replace defective engine "could have been found to be a reasonable cost in rendering" defective car usable. *Id.* at 790); F.D. Rich Housing Corp. v. KPJ Associates, 461 N.Y.S.2d 422 (N.Y. App. Div. 1983) (applying damages for breach of warranty under U.C.C. § 2-714(1, 2)); V Zappala & Co., Inc. v. Pyramid Co. of Glens Falls, 439 N.Y.S.2d 765 (N.Y. App. Div. 1981); Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp., 403 N.Y.S.2d 322 (N.Y. App. Div. 1978) (claims of impairment of reputation and punitive damages for willful breach are not recoverable under U.C.C. § 2-714(1)); Falker v. Chrysler Corp., 463 N.Y.S.2d 357 (N.Y Civ. Ct. 1983) (allowing recovery of damages for breach of implied warranties under U.C.C. § 2-714); Palmer v. Safe Auto Sales, Inc., 452 N.Y.S.2d 995 (N.Y. Civ. Ct. 1982) (translating "non-conformity of tender" from U.C.C. § 2-714(1) to include bad faith modification of contract); Wooten v. Motorola Comm. & Electronics, Inc., 488 P.2d 1284 (Okla. 1971) (failure of notification under U.C.C. § 2-607 bars action under U.C.C. § 2-714(1)); R. I.

buyer to profitably resell late-delivered goods (with retention of the profits under a lost-volume analysis) *and* recover cover damages for higher priced replacement goods.[140] Some courts, though, have discussed the recovery of profit under U C.C. section 2-714.[141]

In *Hall v Miller*,[142] Hall, a dairy farmer, sued a dealer from whom he had purchased cows infected with brucellosis.[143] Due to the resulting infection of Hall's dairy herd, 40 cows had to be killed, and Hall's dairy was quarantined. Hall sought damages for the reduced price he received for the 40 cows and for lost profits on the quarantined dairy [144]

Due to the reduction of herd size caused by the seller's breach, the court upheld an award for lost profits.[145] The reduced number of cows produced less milk and hence, less profit.[146] The court, relying on U C.C. sections 2-714(2) and 2-715(2), found that "the measure of damages for a buyer when the seller breaches a warranty may include both the price difference between goods delivered and the goods expected, [U C.C. section 2-714], and any incidental and consequential damages including lost profits [U C.C. section 2-715]."[147] Under the *Hall* analysis, the consequential damages referred to in U C.C. section 2-714(3) include profits lost because of a breach of warranty and can be awarded in addition to damages calculable under U C.C. section 2-714(2).[148]

Lampus Co. v. Neville Cement Prods. Corp., 336 A.2d 397 (Pa. Super. Ct. 1975), *aff'd*, 378 A.2d 288 (Pa. 1977) (allowing buyer of defective blocks to charge seller with costs of disposal); Wisniewski v. Great Atl. & Pac. Tea Co., 323 A.2d 744 (Pa. Super. Ct. 1974) ("special circumstances showing proximate damages of a different amount will alter the rule," which measures damages as the "difference between the value of the goods accepted and their value as warranted, at the time of acceptance." *Id.* at 747); Agway, Inc. v. Teitscheid, 472 A.2d 1250 (Vt. 1984) (buyer's notice of breach under U.C.C. § 2-607(3)(a) was insufficient; therefore, damages under U.C.C. § 2-714(1) were unavailable).

[140] See *supra* notes 1-15 for a more detailed discussion of the *Fertico* decision.

[141] *See supra* note 139; *see also infra* notes 142-64 and accompanying text.

[142] 465 A.2d 222 (Vt. 1983).

[143] *Id.* at 224.

[144] *Id.*

[145] *Id.* at 225-28.

[146] *Id.* at 227.

[147] *Id.* at 227-28.

[148] *Id.*

Although there are a number of cases that interpret U C.C. section 2-714 as a whole,[149] very little case law interprets the first subsection[150] of the provision in relation to lost profits. There are cases, however, in which courts have held that section 2-714(1) allows an award of damages in addition to those available under the second subsection.[151] Also, there is at least one case holding that U C.C. section 2-714(1), taken alone, provides only a recovery of expenses incurred to cure a breach.[152]

In *Mead Corp. v McNally-Pittsburg Mfg. Corp.*,[153] the defendant, McNally-Pittsburg Manufacturing Corporation [hereinafter McNally], contracted to sell a coal washing facility to Mead Corporation [hereinafter Mead], but failed to complete the facility by the contractual date.[154] Mead sued for breach of contract, and a jury awarded $510,000 in damages to Mead.[155]

McNally appealed the jury award, claiming that the jury had awarded consequential damages despite the fact that the contract entered into excluded consequential damages.[156] The *Mead* court agreed that the contract between the parties excluded consequential damages but found that there were non-consequential damages which equaled or exceeded the jury award; therefore, McNally was unable to show that the general damage award contained consequential damages.[157]

---

[149] *See supra* note 139.

[150] *See* U.C.C. § 2-714, *supra* note 126.

[151] *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 30, at § 10-2, n.3 (citing Acme Pump Co., Inc. v. National Cash Register Co., 337 A.2d 672 (Conn. 1974) and Cambern v. Hubbling, 238 N.W.2d 622 (Minn. 1976)). The *Acme* court held that the plaintiff could recover the cost of a judgment rendered in another case caused by defendant's delivery of defective goods based upon U.C.C. § 2-714(1), in addition to damages under the formula of U.C.C. § 2-714(2). *Acme*, 337 A.2d at 677. The *Cambern* court upheld a jury instruction that "'it is much more reasonable to measure damages by the expense. . '" of correcting a faulty tender than merely by the formula of U.C.C. § 2-714(2). *Cambern*, 238 N.W.2d at 625 (noting that "[t]he Minnesota Code Comment states that subsection (1) is applicable 'where special circumstances show proximate damages of a different amount than those called for by subsection 2-714(2).'" *Id.* at 625, n.5).

[152] *See Mead*, 654 F.2d 1197; *see also infra* notes 153-63 and accompanying text.

[153] 654 F.2d 1197 (6th Cir. 1981).

[154] *Id.* at 1198.

[155] *Id.* at 1199.

[156] *Id.*

[157] *Id.* at 1206-11.

In the course of its opinion, the *Mead* court described the types of damages that may be awarded under U C.C. section 2-714(1), as distinguished from those found in U C.C. section 2-715(2). The court noted that U C.C. section 2-714 "differentiates between damages 'resulting in the ordinary course of events from the seller's breach' U.C.C. § 2-714(1) and 'any incidental and consequential damages under the next section. ' [U C.C.] § 2-714(3)."[158] The court found that consequential damages are not "incurred in order to cure the immediate defect in performance,"[159] but "usually encompass lost profits expected under contracts between the aggrieved party and third parties, and other expenses *not* incurred in order to cure the immediate defect in performance."[160] Because Mead had to spend large amounts of money to cure the defect in McNally's performance, these expenses fit the description of damages "resulting in the ordinary course of events from the seller's breach"[161] and were recoverable notwithstanding the contractual exclusion of consequential damages.[162]

The Mead decision indicates that U C.C. section 2-714(1) alone will not allow the recovery of consequential (lost-profit) damages. This decision, however, was based on a contract that excluded the award of consequential damages.[163] Most cases apply U C.C. section 2-714 as a whole and allow the recovery of consequential damages as well as expenses related to curing a faulty tender [164]

3. *UCC Section 2-712, Cover, and Lost Profits*

Under U C.C. section 2-712,[165] an aggrieved buyer may purchase goods to replace those a seller failed to deliver.[166] The

---

[158] *Id.* at 1209, n.17

[159] *Id.* (citing J. WHITE & R. SUMMERS, *supra* note 30, at 318-21).

[160] *Id.*

[161] U.C.C. § 2-714(1).

[162] *Mead*, 654 F.2d at 1209-11.

[163] *Id.* at 1201.

[164] *See supra* note 139.

[165] U.C.C. § 2-712 reads as follows:

"Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may

buyer may then recover "from the seller as damages the difference between the cost of [the] cover and the contract price together with any incidental or consequential damages ., but less expenses saved in consequence of the breach."[167] This section allows a buyer "to meet his 'essential need.'"[168] The buyer may replace the goods originally sought and charge the breaching seller with any increase in cost necessitated by the breach. In most cases, this formula will put a buyer "in as good a position as if the [seller] had fully performed,"[169] without resorting to incidental or consequential damages under U C.C. section 2-715 [170] If an aggrieved buyer is able to procure similar goods quickly, then there is little likelihood of lost profits or other consequential damages.[171] There are situations, though, in which buyers may seek more than the difference between the cover price and the contract price as suggested by U C.C. section 2-712.[172]

A number of courts have addressed the ability of buyers to obtain both cover damages and lost profits.[173] Basically, if a

---

"cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

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

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

[166] *Id.* The buyer may also recover damages under U.C.C. § 2-712 if the seller delivers, but the buyer rejects or revokes acceptance. *Id.*

[167] *Id.*

[168] J. WHITE & R. SUMMERS, *supra* note 30, at § 6-3, 216.

[169] U.C.C. § 1-106(1).

[170] J. WHITE & R. SUMMERS, *supra* note 30, at § 6-3, 216.

[171] *Id.*

[172] See *infra* notes 173-87 and accompanying text for a discussion of the situations in which a buyer may seek more than the cover price-contract price differential.

[173] *See, e.g.*, Chemetron Corp. v. McLouth Steel Corp., 381 F Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975) (allowing lost-profits award and cover damages in situation involving insufficient delivery); *Larsen*, 620 F Supp. 1084 (allowing farmers' organization lost-profits award for seller's failure to deliver seed potatoes but requiring 30 percent reduction in award for members who covered, planted, and reaped profits notwithstanding breach); Atlan Ind., Inc. v. O.E.M., Inc., 555 F Supp. 184 (D.C. Okla. 1983) (denying lost-profits award because it merely

seller's breach caused a profit loss to the buyer notwithstanding the buyer's cover contract, courts will allow the buyer to recover the lost profit. Of course, as indicated in U C.C. section 2-712(2), this recovery is subject to the requirements of U.C.C. section 2-715 [174]

Chemetron Corp. v McLouth Steel Corp.[175] provides an excellent example of a case where the buyer recovered damages for both lost profits and cover expenses. Chemetron Corporation [hereinafter Chemetron] contracted to purchase a minimum of 975 tons of liquid nitrogen and oxygen from McLouth Steel Corporation [hereinafter McLouth].[176] McLouth, in turn, promised to ship up to 1,950 tons of the product per month if Chemetron requested that amount. The parties entered into the contract in 1964 and renewed the contract in 1970.[177] After the renewal, McLouth consistently failed to provide the amount of gas needed by Chemetron for resale to its customers.[178] Therefore, Chemetron sought the product from additional sources to bolster the inadequate amount supplied by McLouth.[179] Despite these efforts, Chemetron could not procure enough of the product to fully supply its customers and therefore had to "institute an allocation program under which its customers received only 50 to 80 percent of their needs."[180] The court recognized that Chemetron could not have cancelled its contract with McLouth without doing itself even more harm.[181]

---

represented the increased cost of cover contract that had already been awarded to buyer); Alliance Tractor & Implement Co. v. Lukens Tool & Die Co., 281 N.W.2d 778 (Neb. 1979) (allowing buyer lost profits only for portion of loss that could not have been prevented by cover).

[174] *See supra* notes 90-98 and accompanying text.

[175] 381 F Supp. 245 (N.D. Ill. 1974).

[176] *Id.* at 249.

[177] *Id.*

[178] *Id.* at 250.

[179] *Id.*

[180] *Id.*

[181] *Id.* The court explained:

> Under these circumstances it would have been commercially unfeasible for Chemetron to cancel its contract with McLouth notwithstanding McLouth's breaches, for Chemetron would obviously have been in an even worse position and less able to serve its customers if it had received no product at all from McLouth instead of the quantities, however insufficient, that McLouth made available.

Id.

The replacement product that Chemetron purchased from other suppliers was more costly than McLouth's. Therefore, Chemetron sued seeking damages for the difference between the cover price and the contract price as measured under U C.C. section 2-712,[182] *and* damages under U C.C. section 2-715(2) for the profit lost because of the reduced volume of the resale contracts.[183] The court allowed Chemetron to recover both.[184] The court determined that the proper calculation of the lost profit was "the average selling price [in the resale area] less both the price Chemetron would have paid McLouth and a pro rata share of Chemetron's distribution costs."[185]

Obviously, the *Chemetron* decision was carefully crafted to place the aggrieved middleman in the same position it would have been absent the breach.[186] Had the court not allowed Chemetron to recover the difference between the cover price and the contract price, Chemetron would have lost the amount it paid for the higher priced goods; likewise, without a recovery of lost profits, Chemetron would have lost the profit it otherwise would have made from resales of the product.[187]

The facts of the *Chemetron* case were ideal for an award of both cover expenses and lost profits. Other courts have refused to award both cover and lost-profit damages when such awards would give aggrieved buyers a windfall.[188] In *Atlan Industries, Inc. v O.E.M., Inc.*,[189] a court allowed a buyer to recover cover damages but refused to award lost profits to the buyer.[190] Atlan Industries, Incorporated [hereinafter Atlan], contracted to sell plastic products to O.E.M., Incorporated [hereinafter O.E.M.],[191] but delivered defective goods. Therefore, O.E.M. revoked its previous acceptance and covered by

---

[182] *Id.* at 258.

[183] *Id.*

[184] *Id.* at 258-59.

[185] *Id.* at 259.

[186] The general remedial goal of the U.C.C. is to place the aggrieved party in the same position it would have been had there been no breach. U.C.C. § 1-106.

[187] *See generally Chemetron*, 381 F Supp. at 249-50.

[188] *See supra* note 173; *see also infra* notes 189-97 and accompanying text.

[189] 555 F Supp. 184 (D.C. Okla. 1983).

[190] *Id.* at 191.

[191] *Id.* at 186.

purchasing more costly goods from General Electric.[192] Because of the higher cost of the cover goods, the court allowed O.E.M. to recover damages under the cover remedy of U C.C. section 2-712.[193] O.E.M. also sought lost-profit damages because it lost money on the resale of the higher priced cover goods.[194] The court denied recovery of this amount, finding that the lost profit on the resale was caused only by the higher cost of the replacement goods.[195] Because the court had already awarded O.E.M. an amount equal to the increased cost of cover, "[had] the court award[ed] [O.E.M.] a recovery for lost-profits ., [O.E.M.] would [have] enjoy[ed] a double recovery "[196] Since the award of cover damages was, in itself, an award of the profit lost on the transaction, any further award would have created a windfall.[197] Although the *Atlan* court differed from the *Chemetron* court on the question of lost profits, both courts attempted to place an aggrieved middleman buyer in the same position that it would have been absent the seller's breach.

III. THE FERTICO AMALGAMATION

The *Fertico*[198] court combined several strands of the law regarding buyers' *and* sellers' remedies. Each of these will be examined in light of the sources discussed above and with regard to the unique interpretation used by the *Fertico* court.[199] Additionally, a simplified economic analysis of the *Fertico* decision will be presented to measure the effect of the court's rationale.[200]

---

[192] *Id.* at 187

[193] *Id.* at 189.

[194] *Id.* at 190.

[195] *Id.* at 191. The court stated: "To the extent that [O.E.M.] lost profits on its contract with its customer, the court finds that the lost-profits were solely due to the increased cost for [the product] from General Electric." *Id.*

[196] *Id.*

[197] *Id.*

[198] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334 (N.Y. 1987).

[199] *See infra* notes 201-34 and accompanying text.

[200] *See infra* notes 235-40 and accompanying text.

A. *Fertico's Lost-Volume Rationale*

Fertico accepted late-delivered goods although they arrived too late to be resold under Fertico's existing resale contract.[201] Fertico kept the goods and later resold them at a profit.[202] The court allowed Fertico to keep the profit from the resale of the late-delivered goods, because "[h]ad Phoschem fully performed, Fertico would have had the benefit of the [first resale] and, as a trader of fertilizer, the profit from the [second resale] as well."[203]

Disregarding the remainder of the court's opinion,[204] this reasoning is sound. In the area of sellers' remedies, an aggrieved seller may recover for a profit that was lost because of a buyer's breach even if the seller resold the same product, if the seller had the capacity to make a second sale had the breach not occurred.[205] Other courts have allowed middlemen buyers to recover for profits that were lost because of a seller's breach.[206] Each of the substantive buyer's remedy provisions of the U C.C.[207] allows the recovery of consequential damages, which have been interpreted to include lost profits.[208] Additionally, at least one court has allowed a middleman buyer to retain the profit made from the resale of goods delivered in an insufficient amount in addition to recovering other damages.[209] Therefore, if a middleman buyer makes a profit that it would have made absent the seller's breach, surely it should be allowed to retain the profit.

By adopting a rationale similar to those presented in lost-volume seller cases and lost-profit buyer cases, the *Fertico* court

---

[201] *Fertico*, 510 N.E.2d at 336.

[202] *Id.*

[203] *Id.* at 338.

[204] See *infra* notes 213-33 for a discussion of other portions of this opinion.

[205] See *supra* notes 30-72 and accompanying text for a discussion of the lost-volume theory and cases applying it to aggrieved sellers.

[206] See *supra* notes 84-197 and accompanying text for a discussion of cases in which buyers sought lost profits and other damages under U.C.C. §§ 2-712, 2-713, 2-714, and 2-715.

[207] *See supra* notes 84-197 and accompanying text.

[208] See *supra* notes 84-197 and accompanying text for a discussion of cases that interpret consequential damages as including lost profits.

[209] *See supra* notes 175-87 and accompanying text.

apparently concluded that the middleman would have purchased the replacement goods, or similar goods at the same price, to fulfill the *second* resale contract had there been no breach.[210] Without explanation, the court concluded that the cost of the second purchase of fertilizer would have been the same whether or not a breach had occurred.[211] Although this reasoning properly led the court to conclude that Fertico's profit on the two transactions was the same as it would have been absent the breach, and to allow Fertico to keep the resale profit from the late-delivered goods, it is incompatible with an additional award of cover damages.[212]

B. *UCC Section 2-714(1) and "Cover" Within Fertico*

The *Fertico* court allowed a middleman to recover under the cover remedy of U C.C. section 2-712, even though that section allows cover damages only when there has been "a breach within the preceding section."[213] This statement limits the cover remedy to breaches as defined in U C.C. section 2-711: "[w]here the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance. "[214] Although there was no breach as defined by U C.C. section 2-711, the *Fertico* court held that "[t]he loss resulting to Fertico by having to acquire cover, even in the face of its acceptance of a late-delivered portion of the fertilizer, is properly recoverable under section 2-714(1)."[215] The *Fertico* court relied on the language of U C.C. section 2-714(1), which allows an *accepting* buyer to recover damages "for any nonconformity of tender . *in any manner which is reasona-*

---

[210] *Fertico*, 510 N.E.2d at 338. The court felt that "Fertico would have pursued [these] commercial transactions had there been no breach by Phoschem." *Id.*

[211] *See infra* notes 235-40 and accompanying text. The court apparently concluded that the profit made from the two resales was the same as it would have been if there had been no breach by Phoschem. In fact the Fertico court referred to the profit made on the resale of the late-delivered goods as a "transactionally independent profit." 510 N.E.2d at 338.

[212] See *infra* notes 235-40 and accompanying text for a discussion of the windfall provided by the court's analysis.

[213] U.C.C. § 2-712(1).

[214] U.C.C. § 2-711(1).

[215] *Fertico*, 510 N.E.2d at 338.

ble."[216] The court used the "reasonableness" standard of U C.C. section 2-714(1) to give an accepting buyer the right to cover damages and to eliminate the requirement of U C.C. section 2-712 that cover only be awarded where there is a breach as defined in U C.C. section 2-711.[217]

The *Fertico* court's combination of U C.C. sections 2-714(1) and 2-712 to form a single remedy contradicts established scholarly thought. Although few cases[218] have discussed the cover remedy of U C.C. section 2-712 in connection with the recovery of damages caused by accepted goods as provided in U C.C. section 2-714(1), Professors White and Summers have concluded that the remedies provided by these two sections are "mutually exclusive."[219] Additionally, Professor Hawkland[220] has addressed hypothetical situations similar to the facts of *Fertico*[221] and has concluded that buyers may recover under U C.C. section 2-714(1) if they accept tenders that are nonconforming because of insufficient or late deliveries,[222] but that buyers accepting late deliveries may not recover cover damages. The *Fertico* dissent quoted Hawkland:

> *In the case of a shortage of quantity*, the buyer usually will establish his damages by covering. That is to say, he will go into the market and buy goods to substitute for those that the seller wrongfully failed to deliver In the case of a late shipment that otherwise conforms to the contract, the *accepting* buyer has no need to cover.[223]

The dissenting justice agreed with Professor Hawkland that buyers may recover under U C.C. section 2-714(1) for late deliveries, but that cover "is used only to replace goods that

---

[216] U.C.C. § 2-714(1) (emphasis added); see also *supra* notes 125-64 and accompanying text for a discussion of cases applying U.C.C. § 2-714.

[217] *See supra* note 214 and accompanying text; *see also* U.C.C. § 2-712(1).

[218] See *supra* notes 125-64 and accompanying text for a discussion of a few cases that touch on U.C.C. § 2-714(1).

[219] J. WHITE & R. SUMMERS, *supra* note 30, at § 10-2, 375.

[220] *See Fertico*, 510 N.E.2d 334, 340 (Titone, J., dissenting) (citing 3 W HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-714:05, at 384-85).

[221] *See supra* notes 1-15 and accompanying text for a discussion of the facts of *Fertico*.

[222] *See* W HAWKLAND, *supra* note 220, at 2-714:05.

[223] *Fertico*, 510 N.E.2d at 340, n.2 (emphasis in original).

were either not delivered or not accepted."[224] The dissenting justice, however, failed to recognize that in commercial transactions a late delivery can be as damaging as an insufficient delivery or no delivery If a middleman buyer is forced to replace goods that have not been delivered in time for the intended resale to a third party, then the middleman buyer should be allowed to recover the increased cost of the replacement goods.

Whether a court should allow a middleman buyer to accept and resell the late-delivered goods is a separate issue. On this point, the dissent's hesitation in stretching the available U C.C. remedies may have provided a more practical result than the majority's unique analysis. Even accepting the majority's theory of the "reasonable" recovery standard of U C.C. section 2-714(1) and the relaxed rules for the recovery of cover damages, Fertico's acceptance and resale of the late-delivered fertilizer was *unreasonable.* The majority opinion stated that Fertico had no choice but to accept the late-delivered fertilizer because Fertico had paid for the goods on a letter of credit.[225] The majority did not adequately explain why Fertico could not have rejected or revoked its acceptance of the late-delivered goods. If Fertico had rejected the late-delivered goods and covered, it could have sued for cover damages without relying on U C.C. section 2-714. Fertico then could have purchased even more fertilizer to fulfill the second resale contract rather than disposing of the late-delivered fertilizer via the second resale contract.[226]

The dissent suggested that allowance of cover *and* retention of resale profits created a double recovery [227] Rather than identify which rationale was improper, the dissent attacked both the majority's lost-volume rationale[228] *and* the award of cover damages,[229] suggesting that Fertico should not be allowed to

---

[224] *Id.*

[225] *Id.* at 338.

[226] *Id.* at 337-38. Fertico resold the late-delivered fertilizer to another company, Janssens, and made a profit on the transaction. *Id.* at 336.

[227] *Id.* at 339.

[228] See *supra* note 82 and accompanying text for a discussion of the dissent's attack on the majority's lost-volume analysis.

[229] See *supra* notes 223-24 and accompanying text for a discussion of the dissent's attack on the majority's award of cover damages.

keep the resale profits or to recover cover damages through the majority's broad reading of U C.C. sections 2-714(1) and 2-712.[230] Although the dissent and the majority were not in agreement on all elements of the case, both were partially correct. The dissent correctly asserted that, under the facts of the case, retention of the resale profits derived from late-delivered goods *and* recovery of cover damages would lead to a windfall.[231] The majority came to the correct conclusion concerning the disposition of the resale profits,[232] but created a windfall by stacking cover damages on top of the retained profit.[233] The following simplified economic analysis of the *Fertico* case supports these conclusions.[234]

C. *The Economics of Fertico*

To measure the effect of the *Fertico* court's decision, it is easiest to supply hypothetical dollar amounts to analyze the position Fertico would have been in both with and without Phoschem's late delivery.[235] Assume initially that Phoschem (Seller One) timely delivered the fertilizer to Fertico (Middleman Buyer) for $400 and that Fertico resold it to Altawreed (Ultimate Buyer One) for $600, earning $200 on the first transaction. If Fertico then purchased a similar amount of fertilizer from Unifert (Seller Two) for $450 and resold it to Janssens (Ultimate Buyer Two) for $750, Fertico would have earned $300 on the second transaction. The total profit from the two transactions absent Phoschem's late delivery would have been $500:

---

[230] See *supra* notes 213-17 and accompanying text for a description of the majority's rationale.

[231] See *infra* notes 235-40 and accompanying text for a discussion of the windfall resulting from the majority's analysis.

[232] See *supra* notes 201-12 and accompanying text for a discussion of the court's lost-volume rationale.

[233] *See infra* notes 235-40 and accompanying text.

[234] *Id.*

[235] *See supra* notes 1-15 and accompanying text for the actual figures involved in the case.

Transaction One		Transaction Two
Seller One		Seller Two
$400 (cost)		$450 (cost)
Middleman		Middleman
$600 (resale)		$750 (resale)
Ultimate Buyer One		Ultimate Buyer Two
$200 Profit	+	$300 Profit

Total Profit = $500

Now assume that Phoschem failed to deliver the $400 shipment on time, but that Fertico accepted it. Assume that, to fulfill its contract with Ultimate Buyer One, Fertico "covered" by purchasing a similar amount of fertilizer from Seller Two for $450 and resold it to Ultimate Buyer One for $600, earning a profit of $150. Assume further that Fertico subsequently resold the late-delivered Phoschem fertilizer to Ultimate Buyer Two for $750, earning a profit of $350. The total profit from the two intermixed transactions with a late delivery would be $500:

Transaction One		Transaction Two
Seller One		Seller Two
$400 (cost)		$450 (cost)
Middleman		Middleman
$600 (resale)		$750 (resale)
Ultimate Buyer One		Ultimate Buyer Two
Profit on Goods acquired from Seller Two = $150	+	Profit on Goods acquired from Seller One = $350

Total Profit = $500

With a late delivery, the goods originally targeted to go to Ultimate Buyer One go instead to Ultimate Buyer Two; likewise, the goods that would have gone to Ultimate Buyer Two go instead to Ultimate Buyer One. Although the profit on *each* transaction would differ from the profit on each transaction absent a late delivery, the *total* profit would be the same whether or not there is a late delivery of the first shipment.[236]

---

[236] *See infra* note 239.

This holds true, whether or not there is a late delivery of the first shipment, if two conditions remain constant: (1) the middleman would have paid the same price for the second supply; and (2) the second resale contract would have been for the same price.[237] Although the dissent expressed concern that the market conditions would have been different had there been no breach, and that the total profit from the two transactions would have differed,[238] the majority concluded that if the first shipment had been delivered timely, Fertico's total profit on the two transactions would have been the same as it was with a late delivery [239] If Fertico, indeed, earned the same total profit with the breach as it would have absent the breach, and if Fertico should be allowed to keep the profit derived from the resale of the late-delivered goods, then an award of cover damages *in addition* to the retained profit represents a windfall.[240]

IV WHERE MIGHT THE FERTICO ANALYSIS APPLY?

Although the *Fertico* decision[241] allowed a double recovery,[242] there may be situations where a middleman should be allowed to keep resale profits from late delivered goods *and* recover a portion of the increased cost of replacement goods. To keep profits derived from the resale of late-delivered goods,

---

[237] These "conditions" are merely a more detailed manner to determine whether the total profit would have differed.

[238] *See supra* note 82.

[239] *Fertico*, 510 N.E.2d at 338. The court made several statements which indicate that the profit would have been the same with or without the late delivery, and that the costs of the purchase contracts would have been the same. The court referred to the profit Fertico made on the resale of the late-delivered fertilizer as "transactionally independent. " *Id.* The court stated that had the late-delivered fertilizer arrived on time, "Fertico would have had the benefit of the Altawreed transaction and, as a trader of fertilizer, *the profits from the Janssens' sale as well.*" *Id.* (emphasis added). If Fertico, without the late delivery, would have had "the profits from" the second resale absent the late delivery, then the late delivery must have caused no change in either the total cost or total resale prices that Fertico paid and received.

[240] Under the hypothetical, Fertico would recover $50 more than it would have earned absent the breach.

[241] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334 (N.Y. 1987).

[242] See *supra* notes 235-40 and accompanying text for a discussion of the windfall given by the *Fertico* court.

a middleman should have to prove that he had the capacity to earn at least as much profit as if there had been no breach.[243] The middleman in *Fertico* was able to prove this, but to recover cover damages under U C.C. sections 2-714(1) and 2-712, a middleman should have to show two additional elements: (1) that the retention and resale of the late-delivered goods was reasonable;[244] and (2) that there was a loss of profit despite retention and resale of the late-delivered goods.[245]

A. *A Reasonable Acceptance of Late Deliveries*

If a middleman accepts a late delivery and seeks to recover cover damages for goods purchased to replace the late-delivered goods under a resale contract, the middleman will have to seek recovery under U C.C. section 2-714(1). This section allows buyers to recover damages caused by accepted goods "in any manner which is reasonable."[246] Because the cover remedy was not designed for accepting buyers,[247] to prove that cover is a "reasonable" form of recovery under U C.C. section 2-714(1), a middleman should have to prove, at the very least, that rejection and revocation were impracticable. The *Fertico* court held that Fertico's retention and resale of late-delivered goods was reasonable because Fertico had paid for the goods on a letter of credit.[248] The court did not adequately explain why Fertico could not have rejected or revoked its acceptance of the goods. Had Fertico rejected and purchased replacement goods to fulfill its existing obligation, it could have sued Phoschem for cover damages and purchased more fertilizer to fulfill the second resale contract.[249]

Although the *Fertico* court failed to show that Fertico's actions were reasonable, there may be situations where a mid-

---

[243] *See supra* notes 73-81 and accompanying text.

[244] *See infra* notes 246-53 and accompanying text.

[245] *See infra* notes 254-56 and accompanying text.

[246] U.C.C. § 2-714(1).

[247] *See supra* notes 213-17 and accompanying text.

[248] *Fertico*, 510 N.E.2d at 338.

[249] Assuming that there was not a shortage of goods on the market, Fertico could have rejected and saved incidental damages that were incurred to store the fertilizer for four months.

dleman could accept and still receive cover damages under U C.C. sections 2-714(1) and 2-712. In the *Chemetron* case,[250] a court held that a middleman purchaser of goods delivered in an insufficient quantity could recover cover damages notwithstanding its acceptance of the faulty tender Because of a shortage of goods on the market, the middleman in *Chemetron* would have been in an even worse position had it rejected the insufficient deliveries.[251] Therefore, the *Chemetron* court allowed the middleman to accept the insufficient quantity, cover for the amount not delivered, retain the profit from the resale of the insufficient delivery, *and* sue for the increased cost of the cover goods.[252]

Perhaps a middleman who retains and resells late-delivered goods could show that the goods had to be accepted and resold because a rejection would have reduced the total volume of goods it could have resold in a given period of time. If a middleman could prove that a rejection of late-delivered goods would have caused it harm, it might receive the same treatment the *Chemetron* court gave a middleman who accepted and resold an insufficient delivery [253]

B. *Proof of Cover Damages*

The *Fertico* decision created a windfall because the court concluded that the middleman's total profit was unaffected by the late delivery [254] Therefore, an award of cover damages actually placed the middleman in a better position than he would have been in absent the breach.[255]

From an economic standpoint, there may be situations where a middleman should be allowed to keep resale profits from late-delivered goods *and* recover a portion of the increased cost of replacement goods. If, for example, a middleman normally buys goods in a stable long-term market, he might prove that

---

[250] Chemetron Corp. v. McLouth Steel Corp., 381 F Supp. 245 (N.D. Ill. 1974).

[251] See *supra* notes 175-85 and accompanying text for a discussion of the *Chemetron* case.

[252] *See supra* notes 175-85 and accompanying text.

[253] *Id.*

[254] *See supra* note 239.

[255] *See supra* notes 235-40 and accompanying text.

a replacement purchase on the spot market made necessary by a late delivery was more costly than a purchase normally would have been on the long-term market. In other words, although a middleman might have two profitable resales notwithstanding a late delivery, he might show that his total profit from the two transactions was reduced because he had to pay more for a quick purchase to replace the late-delivered goods, and that had there been no breach, the purchase necessary to fulfill a second resale would have been less costly on a long-term market. If a middleman could show this by proof of market conditions, he should be allowed to keep profits derived from the resale of the late-delivered goods *and* recover cover damages. The cover damages would then represent profits lost as a consequence of the seller's breach and would be necessary to place the aggrieved middleman in the same position he would have been in had there been no breach.[256]

CONCLUSION

The *Fertico*[257] decision represents an expansion of buyers' remedies. Although the *Fertico* analysis gave a windfall to a middleman,[258] there may be situations in which a middleman could resell late-delivered goods, keep the profits, and recover part of the expense of higher priced replacement goods.[259] If other courts follow New York's precedent, they must carefully

---

[256] An accepting middleman buyer who is able to show an increased cost due to the late delivery of goods might prefer to seek a "quasi-cover" remedy in the form of consequential damages available to an accepting buyer under U.C.C. §§ 2-714(3) and 2-715(2). By looking to these sections for recovery, the middleman buyer could avoid the somewhat tenuous argument proposed by the *Fertico* court, i.e., that one who accepts late-delivered goods can recover under U.C.C. § 2-712. See *supra* notes 213-26 and accompanying text for a discussion of the *Fertico* court's combination of the cover remedy of U.C.C. § 2-712 and the recovery of damages under U.C.C. § 2-714(1). If a middleman buyer dealing in two buy-sell transactions attempted to recover the increased cost caused by late-delivered goods, he might experience difficulty in proving that "the seller at the time of contracting had reason to know" of the middleman's "particular requirements and needs." U.C.C. § 2-715(2)(a); *see also supra* notes 90-197 and accompanying text concerning consequential damages.

[257] Fertico Belgium S. A. v. Phosphate Chemicals Export Ass'n., Inc., 510 N.E.2d 334 (N.Y 1987).

[258] *See supra* notes 235-40 and accompanying text.

[259] *See supra* notes 241-56 and accompanying text.

adhere to the remedial goal of the U C.C.. an aggrieved party should only be placed in the position that it would have been in had there been no breach.[260] If a middleman retains and profitably resells late-delivered goods, he will have to prove that he would have earned those resale profits (or even more profit) notwithstanding the breach, if he is to keep the profit.[261] A middleman would have to prove two other elements to recover a portion of the cost of higher priced replacement goods: (1) that retention and resale of the late-delivered goods was reasonable;[262] and (2) that the total profit from the resale of the retained goods and the replacement goods was actually less than would have been made had there been no breach.[263] Whether a middleman could successfully prove these elements is unknown. Nevertheless, the *Fertico* decision, though flawed, could provide the impetus for such claims.

John Hackley

[260] U.C.C. § 1-106.

[261] *See supra* notes 73-82 and accompanying text.

[262] *See supra* notes 246-53 and accompanying text.

[263] *See supra* notes 254-56 and accompanying text.