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NOTES & COMMENTS

UNIFORM COMMERCIAL CODE SECTION 2-713 AND THE TIME FOR MEASURING MARKET-CONTRACT DAMAGES: *COSDEN OIL & CHEMICAL CO. v. KARL O. HELM AKTIENGESELLSCHAFT*

I. INTRODUCTION

*Cosden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft*¹ is the most recent court decision to offer an interpretation of the Uniform Commercial Code section 2-713's *learned of the breach* language in an anticipatory repudiation context. White and Summers have noted that "[a] buyer's suit for damages under 2-713 upon an anticipatory repudiation presents perhaps the most grizzly interpretative problem in Article Two: when does one measure the market?"² The problem centers on section 2-713(1)'s phrase "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."³ Three possible interpretations of the phrase *learned of the breach* have been postulated by courts and commentators: (1) when the buyer

1. 736 F.2d 1064 (5th Cir. 1984).

2. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 6-7, at 242 (2d ed. 1980).

3. U.C.C. § 2-713 (1978) provides:

(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 case of rejection after arrival or revocation of acceptance, as of the place of arrival.

learned of the repudiation;⁴ (2) when the buyer learned of the repudiation plus a commercially reasonable time;⁵ and (3) when performance was due under the contract.⁶ The *Cosden* holding interprets section 2-713 to mean that a buyer learns of the breach at a commercially reasonable time after learning of seller's repudiation.

II. CASE BACKGROUND

A. *The Contract*

Early in 1979, Helm Houston, a wholly-owned subsidiary of Karl O. Helm Aktiengesellschaft (hereinafter Helm), contacted Cosden Oil & Chemical Co. (hereinafter Cosden) regarding the purchase of polystyrene.⁷ Cosden agreed to sell to Helm "1250 metric tons of high impact polystyrene" and "250 metric tons of general purpose polystyrene," to be delivered upon Helm's request "in one or more lots" during January and February, 1979.⁸ Helm acquired an option to purchase additional polystyrene. The option amounts were to be delivered in February and March, 1979, under the same terms as the original orders.

On January 22, 1979, Helm requested the first shipment of high-impact polystyrene to be delivered for a January 29 shipping date. The following day Helm telexed Cosden to exercise its option. Helm sent a purchase confirmation regarding the option to Cosden, which received the confirmation on January 29. Cosden shipped 40.8 metric tons of high-impact polystyrene to Helm on approximately January 26 and followed shipment with an invoice on approximately January 31.

B. *The Repudiation*

Polystyrene prices began to rise in late January and continued to rise during the following months. During this period, Cosden began encountering problems at two of its production facilities. Late in January, Cosden informed Helm that delivery under the initial order of high-impact polystyrene might be delayed due to production problems. On February 6, 1979, Cosden informed Helm that it was cancelling the order for general purpose polystyrene and the option

4. See *infra* § V. B. p. 65.

5. See *infra* § V. C. p. 67.

6. See *infra* § V. A. p. 62.

7. Polystyrene is a petroleum based derivative used in the manufacture of molded plastics. 736 F.2d at 1067.

8. *Id.*

amounts because of production problems and the subsequent lack of sufficient quantities of polystyrene to fill the orders. It is noteworthy, however, that Cosden indicated that it intended to honor the high-impact polystyrene order. Helm received a letter confirming the cancellation around February 12. In mid-February, Cosden shipped 571.5 metric tons of high-impact polystyrene invoiced at \$355,950. The invoice specified a payment date of March 15 or 16. Helm then requested delivery of the balance of the high-impact polystyrene for a March 16 shipping date. Cosden indicated that the shipment date was not possible and instead offered to sell Helm 1,000 tons of styrene monomer. Helm refused and requested delivery of the balance of the high-impact polystyrene by March 31. "Around the end of March," Cosden informed Helm that it was cancelling the balance of the high-impact polystyrene order.⁹

C. *The Suit*

Cosden subsequently filed suit in federal court in Texas against Helm, seeking damages for Helm's nonpayment for the delivered high-impact polystyrene. Helm in turn counterclaimed against Cosden for its nondelivery of the contracted-for polystyrene. The jury in the district court proceedings found that Cosden had anticipatorily repudiated the purchases of the general purpose polystyrene and the option amounts and that Cosden's cancellation of the order for the high-impact polystyrene before Helm's failure to pay for the second delivery "constituted a repudiation."¹⁰ The jury fixed the market price for the polystyrene at three different times: "when Helm learned of the cancellation, at a commercially reasonable time thereafter, and at the time for delivery."¹¹ The district court held that Helm was entitled to damages of \$628,676, the "difference between the contract price and the market price at a commercially reasonable time after Cosden repudiated its polystyrene delivery obligations"¹² It also held that Cosden was entitled to a \$355,950 offset against the "damages for polystyrene delivered, but not paid for" by Helm.¹³ Both parties appealed the damages award.

Cosden contended that damages should have been measured

9. *Id.* at 1067-68.

10. *Id.* at 1068.

11. *Id.* at 1069.

12. *Id.*

13. *Id.*

when Helm learned of the repudiation, *i.e.*, on February 6 or 12. Helm contended that the market price on "the last day for delivery" should have been used, *i.e.*, March 31.¹⁴ On review, the Fifth Circuit Court of Appeals rejected both arguments and upheld the district court's use of a "commercially reasonable point after Cosden informed Helm that it was cancelling the three orders."¹⁵

III. THE COURT'S ANALYSIS

While the *Cosden* decision addressed various aspects of the contractual dispute between Cosden and Helm, it is the court's analysis of the appropriate time for the measurement of damages for the anticipatory repudiation of the purchases of general purpose polystyrene and the option contracts that is most significant. The *Cosden* court stated in its opinion that "[t]he aggrieved buyer seeking damages for seller's anticipatory repudiation presents the most difficult interpretative problem"¹⁶ in dealing with the Uniform Commercial Code's Article Two. It also noted that "the interplay among sections 2.610, 2.711, 2.712, 2.713, and 2.723 . . . has been described as 'an impossible legal thicket.'¹⁷

Texas law does not allow a federal court "to certify questions of state law for resolution by its courts."¹⁸ However, since the *Cosden* court could find no Texas cases addressing the measurement of buyer's damages for anticipatory repudiation under section 2-713, the court was free to decide the question. Prior to Texas' adoption of the Uniform Commercial Code, its courts followed the common law tradition of using the performance date to measure damages in anticipatory repudiation cases.¹⁹ The *Cosden* court departed from pre-Code law "[b]y interpreting the time buyer learns of the breach to mean a commercially reasonable time after buyer learns of the repudiation"²⁰ The court noted that "Texas law is clear, that market price at the time buyer learns of the breach is the appropriate measure of section 2.713 damages in cases where buyer learns of the breach at or after the time for performance."²¹ In the four Texas cases cited by the court as having applied the

14. *Id.*

15. *Id.*

16. *Id.* (citing J. WHITE & R. SUMMERS, *supra* note 2, § 6-7 at 242).

17. *Cosden*, 736 F.2d at 1069.

18. *Id.* at 1070.

19. *Id.* at 1070 n.7.

20. *Id.*

21. *Id.* at 1071.

section 2-713 measure of damages, the buyer learned of the breach at or after the performance date.²²

The *Cosden* court, however, viewed as rare the situation in which the seller anticipatorily repudiated the contract and the buyer did not cover.²³ In this context it determined that section 2-610 on anticipatory repudiation²⁴ and the damages provisions of section 2-713 should be considered together.²⁵ Section 2-610(a) stipulates that the aggrieved party may “for a commercially reasonable time await performance by the repudiating party”²⁶ before resorting to the Code’s remedy provisions. The court maintained that these sections considered together “extend the time for measurement beyond when buyer learns of the breach.”²⁷ “To interpret 2.713’s ‘learned of the breach’ language to mean the time at which seller first communicates his anticipatory repudiation would undercut the time that 2.610 gives the aggrieved buyer to await performance.”²⁸ Further, it would undercut section 2-611, which permits retraction of the repudiation.²⁹

22. *Id.* at 1070-71. See *Hargrove v. Powell*, 648 S.W.2d 372 (Tex. Ct. App. 1983); *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743 (Tex. Civ. App. 1977); *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346 (Tex. Civ. App. 1976); *Wilson v. Hays*, 544 S.W.2d 833 (Tex. Civ. App. 1976).

23. *Cosden*, 736 F.2d at 1071.

24. U.C.C. § 2-610 (1978) provides:

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

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

25. *Cosden*, 736 F.2d at 1071.

26. *Id.* (quoting U.C.C. § 2-610(a)).

27. *Id.*

28. *Id.* at 1072.

29. U.C.C. § 2-611 (1978) provides:

(1) Until the repudiating party’s next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to

Since a seller's anticipatory repudiation usually occurs in the context of rising market prices, fixing the measurement of damages at the repudiation date gives the "seller the ability to fix buyer's damages and may induce seller to repudiate, rather than abide by the contract."³⁰ The court noted, on the other hand, that "measuring buyer's damages at the time of performance will tend to dissuade the buyer from covering, in hopes that market price will continue upward until performance time."³¹ The court noted that "[a]llowing the aggrieved buyer a commercially reasonable time . . . provides him with an opportunity to investigate his cover possibilities in a rising market without fear that, if he is unsuccessful in obtaining cover, he will be relegated to a market-contract damage remedy measured at the time of repudiation."³²

The court noted that "[p]ersuasive arguments exist for interpreting 'learned of the breach' to mean 'time of performance,' consistent with the pre-Code rule."³³ However, it acknowledged that such an interpretation would render phrases in sections 2-610 and 2-712 meaningless. Section 2-610's limitation to a commercially reasonable time to await performance would be pointless if the buyer were entitled to market-contract damages as of the date of performance. The same would be true of section 2-712's requirement that a buyer cover "without unreasonable delay."³⁴

The *Cosden* court recognized that "[t]he interplay among the

the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

30. *Cosden*, 736 F.2d at 1072.

31. *Id.*

32. *Id.*

33. *Id.*

34. U.C.C. § 2-712 (1978) provides:

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

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

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

relevant Code sections does not permit, in this context, an interpretation that harmonizes all and leaves no loose ends. We therefore acknowledge that our interpretation fails to explain the language of section 2.723(a) insofar as it relates to aggrieved buyers."³⁵ The court noted, however, that section 2-723 has limited applicability.³⁶ Its use would be rare. An anticipatory repudiation case would have to come to trial prior to the performance date under the contract for section 2-723 to govern. Coupled with the comment to section 2-723, which states that the " 'section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages,' "³⁷ the court found the argument for harmonization of section 2-610 and 2-713 more persuasive. It held that:

[i]n light of the Code's persistent theme of commercial reasonableness, the prominence of cover as a remedy, and the time given an aggrieved buyer to await performance and to investigate cover before selecting his remedy, we agree with the district court that 'learned of the breach' incorporates section 2.610's commercially reasonable time.³⁸

The *Cosden* court based its holding on a careful analysis of section 2-713 and of the anticipatory repudiation sections of the Code. It read these sections in the overall context of Article Two. In its analysis, the court addressed each of the three possible interpretations of 2-713's *learned of the breach* language and drew upon

35. *Cosden*, 736 F.2d at 1072-73.

36. *Id.* at 1073. U.C.C. § 2-723 (1978) provides:

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

(2) If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this Article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

37. *Cosden*, 736 F.2d at 1073 (citing the comment to U.C.C. § 2-723 (1978)).

38. 736 F.2d at 1073.

scholarly commentary to support its reasoning.³⁹ The interpretation of section 2-713 which it found most persuasive is one unqualified by exceptions and special circumstances that diminish the overall effectiveness of the rule.

IV. EARLIER DECISIONS

Section 2-713's application to anticipatory repudiation cases has been addressed infrequently in litigation. The one common thread running through the cases, however, is an inconsistency in judicial interpretation of this section. A number of cases have simply equated the phrases *learned of the breach* from section 2-713 with *learned of the repudiation* from section 2-723 with little discussion.⁴⁰ This is the most obvious reading of 2-713.⁴¹ The obvious reading, however, fails to recognize the complexity of 2-713 and its interrelationships with other related Code sections. Despite scholarly commentary supporting this interpretation, no cases unequivocally adopt the performance date standard of measurement for 2-713 damages.⁴² Three cases prior to the *Cosden* decision, however, have attracted attention for their interpretation of 2-713 in the anticipatory repudiation context — *Cargill, Inc. v. Stafford*,⁴³ *First National Bank of Chicago v. Jefferson Mortgage Co.*,⁴⁴ and *Oloffson v. Coomer*.⁴⁵

A. *Cargill, Inc. v. Stafford*

The *Cargill* decision may have added more to the uncertainty surrounding section 2-713 than to its clarification. *Cargill* involved the breach of two contracts for the sale of wheat. The second contract was anticipatorily repudiated by the seller and was the focus of the court's analysis of section 2-713. The July 31, 1973, contract called for a delivery date of September 30, 1973. However, the seller repudiated the contract by letter dated August 21, which was received by Cargill on August 24. Cargill subsequently cancelled

39. *Id.* at 1072.

40. *E.g.*, Sebert, *Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review*, 130 U. PA. L. REV. 360, 372 n.67 (1981); Note, *Commercial Law — Anticipatory Repudiation: A New Measure of Buyer's Damages Under the Uniform Commercial Code*, 56 N.C.L. REV. 370, 378 n.53 (1978).

41. J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 242.

42. See Sebert, *supra* note 40, at 372-73.

43. 553 F.2d 1222 (10th Cir. 1977).

44. 576 F.2d 479 (3d Cir. 1978).

45. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

the contract on September 6. The district court awarded damages to Cargill based upon the September 6 price of wheat without discussing its reasoning for selecting that date.⁴⁶

The *Cargill* court's inconsistent analysis is interesting. After stating that "[t]he basic question is whether 'time when buyer learned of the breach' means 'time when buyer learned of the repudiation' or means 'time of performance' in anticipatory repudiation cases,"⁴⁷ the court went on to hold that damages should be measured at the end of a *commercially reasonable time after repudiation* unless a valid excuse for not covering existed.⁴⁸

The court's discussion proceeded from an acceptance of White and Summers' arguments in favor of a time of performance standard.⁴⁹ The court indicated two reasons for its position. First, the ambiguities of the Code should not result in a clear deviation from the pre-Code time of performance standard. Second, section 2-713's "learned of the breach" and section 2-723's "learned of the repudiation" language do not equate.⁵⁰ Its discussion ignored the possibility that "learned of the breach" could have a meaning of its own. Instead, the court concluded that "damages normally should be measured from the time when performance is due and not from the time when the buyer learns of repudiation."⁵¹ The decision in *Cargill* has been cited by White and Summers "as a decision in our direction"⁵² — that is, in favor of a time of performance standard. Ultimately, the court's holding greatly qualified that initial acceptance of the time of performance standard.

To add to the confusion, the plaintiff, Cargill, argued alternatively for a date of repudiation measurement standard or for a date of performance standard.⁵³ In support of the date of repudiation standard, plaintiff cited *Oloffson v. Coomer*,⁵⁴ a 1973 anticipatory repudiation case regarding a contract for the sale of corn. By reference to *Oloffson*, the *Cargill* court introduced the notion of 2-610's "commercially reasonable time" into the case. After referring to this section, the court discussed section 2-712's provision for the

46. 553 F.2d at 1225.

47. *Id.* at 1226.

48. *Id.* at 1227 (emphasis added).

49. *Id.* at 1226 (citing J. WHITE & R. SUMMERS, *supra* note 2, § 6-4, at 222-34).

50. *Cargill*, 553 F.2d at 1226.

51. *Id.*

52. J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 247.

53. *Cargill*, 553 F.2d at 1226.

54. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

buyer to cover "so long as he does not delay unreasonably."⁵⁵ Citing comment one to section 2-713 that "the market in which the buyer would have obtained cover had he sought that relief"⁵⁶ should operate "as a yardstick"⁵⁷ for forecasting market-contract damages, the court concluded that cover and section 2-713 damages are inextricably intertwined.⁵⁸ The court stated that the buyer should cover at the end of a commercially reasonable time after learning of the repudiation. In the absence of cover, a buyer's damages should be based on the commercially reasonable time after repudiation, unless "a valid reason exists for failure or refusal to cover"⁵⁹

The court's novel assumption that section 2-712's cover is somehow the lynchpin of section 2-713's time for measuring market-contract damages finds no basis in Article Two of the Code. Section 2-712(3) explicitly states that "[f]ailure of the buyer to effect cover within this section does not bar him from any other remedy."⁶⁰ Moreover, section 2-711's index of a buyer's remedies fails to demonstrate any link between cover and market-contract damages. Rather, comment five to section 2-713 asserts that the market-contract damage remedy "is completely alternative to cover,"⁶¹ and comment three to section 2-712 notes that "[t]he buyer is always free to choose between cover and damages for non-delivery"⁶² The *Cargill* court's emphasis on cover also has no basis in the pre-Code time of performance standard that the court purports to adopt. Instead, its reasoning seems to be an unwarranted extension of the Code. There is little wonder that *Cargill* has been cited by commentators and courts to support both the time of perform-

55. 553 F.2d at 1227.

56. *Id.* (citing U.C.C. § 2-713 comment 1 (1978)). Comment 1 provides:

The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

57. *Id.*

58. See *Cargill*, 553 F.2d at 1227.

59. *Id.*

60. U.C.C. § 2-712(3) (1978).

61. Comment 5 to U.C.C. § 2-713 provides:

The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

62. U.C.C. § 2-712 comment 3 (1978).

ance standard and the commercially reasonable time after repudiation standard of measurement for section 2-713 damages. Indeed, the *Cosden* decision cited *Cargill* as a decision reaching “a similar conclusion by different routes.”⁶³

B. *Oloffson v. Coomer*

*Oloffson*⁶⁴ was the principal case cited by the *Cargill* court in support of its use of a market price based upon a commercially reasonable time after repudiation to measure a buyer's damages under section 2-712.⁶⁵ *Oloffson* was a 1973 Illinois case involving the anticipatory repudiation of a contract for the sale of 40,000 bushels of corn. The April contract was repudiated on June 3, 1970, when Coomer indicated that he could not plant the corn due to the wet season. Oloffson continued to request performance and did not cover until after the October and December performance dates had passed. While the court held that damages should be based on the price as of the June 3 repudiation, it took into consideration section 2-610's allowance of a commercially reasonable time to await performance.⁶⁶ Several factors were central to the court's decision: (1) the unequivocal repudiation by Coomer on June 3; (2) the availability of a “well organized and easily accessible market”; and (3) the unreasonableness of the buyer's awaiting performance beyond June 3.⁶⁷

Oloffson's “unreasonableness” plays a significant role in understanding this decision. The court held Oloffson to be a “‘merchant’ with respect to the merchandising of grain” dealing with a nonmerchant farmer, Coomer.⁶⁸ Oloffson failed to inform Coomer that trade usage called for the seller to cancel the contract and pay the buyer the difference between the contract price and the market price on the date of repudiation.⁶⁹ The court interpreted Oloffson's silence in this regard as a lack of good faith. This trade usage and Oloffson's “bad faith” seem to have greatly influenced the decision. The court stated, “We feel that the words ‘for a commercially reasonable time’ as set forth in Section 2-610(a) must

63. 736 F.2d at 1073 n.11.

64. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

65. 553 F.2d at 1226.

66. *Oloffson*, 11 Ill. App. 3d at 920-22, 296 N.E.2d at 873-75; see also U.C.C. § 2-610(a) (1978).

67. *Oloffson*, 11 Ill. App. 3d at 922, 296 N.E.2d at 874.

68. *Id.* at 920, 296 N.E.2d at 873.

69. *Id.* at 922, 296 N.E.2d at 875.

be read relatively to the obligation of good faith that is defined in Section 2-103(1)(b) and imposed expressly in Section 1-203.”⁷⁰ As a result the court based damages on the June 3 repudiation date, and further concluded that the “commercially reasonable time” period for awaiting performance also ended on this date.⁷¹ By its reference to section 2-610(a) in the context of a section 2-713 damage measurement, the *Oloffson* decision has been interpreted to support the commercially reasonable time after learning of the repudiation interpretation of section 2-713.

C. *First National Bank of Chicago v. Jefferson Mortgage Co.*

Subsequent court decisions have relied heavily upon the analysis in *Oloffson v. Coomer*. The plaintiff's brief in *First National* suggested that the bank's case was very similar to *Oloffson* with regard to the measurement of 2-713 market-contract damages.⁷² *First National* involved the anticipatory repudiation of an oral contract to sell mortgage-backed securities. Though investment securities fall under Article Eight of the Code, the court used section 2-713's damages provisions by analogy.⁷³ The comment to section 2-105⁷⁴ provides for such use of Article Two provisions. The *First National* court specifically reversed the district court's interpretation of section 2-713.⁷⁵ The district court had established damages based upon the market price at the time of performance. It relied upon the arguments of White and Summers and upon *Cargill, Inc. v. Stafford*.⁷⁶ The Third Circuit, however, rejected this reasoning and relied instead upon the “New Jersey Study Comment . . . on the meaning of Section 2-713 as enacted by the New Jersey legislature.”⁷⁷ While noting that the Study Comment supported the “plain meaning of Section 2-713,” *i.e.*, “‘at the time the buyer

70. *Id.* at 922-23, 296 N.E.2d at 875.

71. *Id.* at 922, 296 N.E.2d at 874.

72. 576 F.2d at 492-93 n.15.

73. *Id.* at 489.

74. Comment 1 to U.C.C. § 2-105 (1978) provides in part:

“Investment securities” are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities . . . when the reason of that section makes such application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

75. 576 F.2d at 492.

76. *Id.* at 490.

77. *Id.* at 490-91.

learned of the breach,'⁷⁸ the court nonetheless entered into a detailed discussion of section 2-610's allowance for a commercially reasonable time to await performance. Indeed, the court concluded "[s]ince under Section 2-610, an aggrieved party may for a commercially reasonable time await performance, Section 2-713 should be interpreted to measure damages within a commercially reasonable time after learning of the repudiation."⁷⁹

How the *First National* court bridged the gap between the date of repudiation "plain meaning" of section 2-713's "learned of the breach" and a damages measurement based upon "a commercially reasonable time after learning of the repudiation" is not apparent from the decision. The court reasoned that due to the peculiarities of "the GNMA securities market at the time of the anticipatory repudiation, a commercially reasonable time for the Bank to await performance was not shown to have extended substantially beyond the date of repudiation."⁸⁰ *First National*, like *Oloffson* (upon which the court heavily relied), has been interpreted to support the commercially reasonable time after repudiation standard for measuring section 2-713 damages.⁸¹ *Cosden* cited *First National* in support of its holding. The *Cosden* court agreed with *First National* that "the circumstances of the particular market involved should determine the duration of a *commercially reasonable time*."⁸² However, it distinguished the facts of *Cosden* based upon the failure to show "that cover was easily and immediately available in an organized and accessible market and that a commercially reasonable time expired on the date of *Cosden*'s cancellation."⁸³

The outline of the principal cases analyzing section 2-713's *learned of the breach* language in an anticipatory repudiation context indicates that these cases are inconsistent in their reasoning. Each of the three cases noted in this section brings into its analysis factors which obscure the reasoning rather than clarify it. *Oloffson* and *First National* incorporate discussion of the appropriate means for measuring a "commercially reasonable time" into their analysis of the applicable time standard for measuring market-contract damages,⁸⁴ and *Cargill* introduces the notion of a

78. *Id.* at 491-92.

79. *Id.* at 492.

80. *Id.* at 493.

81. *Cosden*, 736 F.2d at 1073 n.11.

82. *Id.* (quoting *First Nat'l Bank*, 576 F.2d at 492). (Emphasis added.)

83. *Id.* at 1073 n.11.

84. *Oloffson*, 11 Ill. App. 3d at 921-22, 296 N.E.2d at 874-75, and *First Nat'l Bank*,

“mandatory” cover requirement into its analysis which is unsupported by the Code itself.⁸⁵

V. COMMENTATORS

Despite the *Cosden* court’s caveat that “[t]he only area of unanimous agreement among those that have studied the Code provisions relevant to this problem is that they are not consistent, present problems in interpretation, and invite amendment,”⁸⁶ scholarly commentary can clarify section 2-713’s *learned of the breach* language. The analysis of commentators on section 2-713 is more diversified than that of the court decisions. The minority position favors interpreting section 2-713 to measure market-contract damages as of the date of performance.⁸⁷ Alternatively, commentators have argued for a date of repudiation⁸⁸ plus a commercially reasonable time after the repudiation standard.⁸⁹

A. Date of Performance

Under the common law, market-contract damages traditionally were measured based upon the market price as of the date of delivery. The Uniform Sales Act codified this common law tradition by stipulating that the damage measure was to be “the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered”⁹⁰ White and Summers have been articulate spokesmen for the performance date standard of measure. Their position rests upon a conviction that the Uniform Commercial Code should not be interpreted to alter fundamentally the common law damage measurement standard in the absence of a clear and express intent to do so.⁹¹ Section 2-713(1)’s *learned of the breach* language is not

576 F.2d at 492-93.

85. See *Cargill*, 553 F.2d at 1227.

86. 736 F.2d at 1069 n.6.

87. See *infra* § V. A. p. 62.

88. See *infra* § V. B. p. 65.

89. See *infra* § V. C. p. 67.

90. Uniform Sales Act § 67(3) (1924) provides:

Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

91. J. WHITE & R. SUMMERS, *supra* note 2, §§ 6-4 — 6-7, at 222-47.

such an express statement in their opinion.

The Code's "basic 1-106 remedial injunction" is to "put the plaintiff in the position performance would have."⁹² White and Summers argue that the Code's cover provisions in section 2-712 do this effectively, and that section 2-713 is an "historical anomaly," which makes sense only if the aggrieved buyer would use the damages to purchase substitute goods.⁹³ They maintain that section 2-713's language "contributes to hopeless confusion" in anticipatory repudiation cases.⁹⁴

Their argument for a section 2-713 performance date standard is multifaceted. First, if a repudiation date standard was intended, why was the word "repudiation" not used?⁹⁵ Second, a repudiation date standard would seem to preclude resort to section 2-610(a)'s provision of a commercially reasonable time to await performance.⁹⁶ Third, the Code drafters had intended "learned of the breach" to "apply only to the case in which there had been no anticipatory repudiation but in which the buyer had learned of the breach only after performance had come and gone."⁹⁷ This part of their argument is founded on the report of Professor Patterson to the New York Law Revision Commission which was studying the potential adoption of the Code in New York. Patterson apparently did not consider the possible anticipatory breach context of section 2-713. He focused instead on the *apparent* change this section would make in New York law. He concluded, however, that no change would result in fact, for "[i]n at least two New York cases it was held that the market value was to be measured as of the time when the buyer knew of the default."⁹⁸ In each case the knowledge of the default arose after the date of performance. Fourth, if section 2-713 was intended to mean repudiation date, parts of section 2-723(1) would be rendered useless. White and Summers deem this a "most elegant argument against the 'plain words' interpretation of section 2-713"⁹⁹ Fifth, unless a performance date standard is used for market-contract damages, section 2-713 "will be inconsistent with the analogous section on

92. *Id.* § 6-3, at 219.

93. *Id.* § 6-4, at 224.

94. *Id.* at 225.

95. *Id.* § 6-7, at 243.

96. *Id.*

97. *Id.* at 244.

98. NEW YORK LAW REVIEW COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE: ARTICLE 2 — SALES 364.

99. J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 245.

seller's damages, 2-708."¹⁰⁰ Their "final and most persuasive argument in favor of reading 'learned of the breach' to mean 'time for performance' in anticipatory repudiation cases" is that the traditional common law, the Uniform Sales Act section 67(3), and the Restatement of Contracts section 318 all permitted a date of performance recovery for the buyer in anticipatory repudiation cases.¹⁰¹

The performance date standard also has been adopted by other authors.¹⁰² White and Summers advocate the performance date standard as a matter of Uniform Commercial Code policy. Professor Roy R. Anderson's article adopts this standard not as a matter of policy, but as a demonstration of a persuasive argument worth making for an aggrieved buyer.¹⁰³ While his argument is similar to that in White and Summers, he also introduces an additional line of reasoning. Anderson suggests that section 2-712(1)'s "[a]fter a breach within the preceding section"¹⁰⁴ refers to the four circumstances which section 2-711(1)¹⁰⁵ considers a breach — "[w]here the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance"¹⁰⁶ Anderson reasons that section 2-711(1)'s circumstances do not equate with the traditional common law definition of breach. Therefore, section 2-712's explicit qualification of the breach suggests that "breach" in section 2-713 refers to traditional breach, *i.e.*, at the time of

100. *Id.* at 246.

101. *Id.*

102. *E.g.*, Anderson, *Repudiation of a Contract Under the Uniform Commercial Code*, 14 DE PAUL L. REV. 1 (1964); and Small, *The Remedy Provisions of Article 2 of the Uniform Commercial Code: A Practical Orientation*, 4 GONZ. L. REV. 176 (1969).

103. Anderson, *Learning of Breaches Under Section 2-713 of the Code*, TEX. B.J., Apr. 1977, at 321.

104. U.C.C. § 2-712(1) (1978).

105. U.C.C. § 2-711(1) (1978) provides:

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

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

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

106. Anderson, *supra* note 102, at 319.

performance.¹⁰⁷

Another novel method for interpreting section 2-713 to indicate a performance date damages measure was presented in a 1977 Note¹⁰⁸ which indicates that the legislative history of section 2-713 lends support to the performance standard. It suggests that the initial 1952 text was intended to clarify the Uniform Sales Act damage measure. The 1952 text provided “[t]he measure of damages for non-delivery is the difference between the price current at the time buyer learned of the breach and the contract price.”¹⁰⁹ The Note also suggests that by this section’s “non-delivery” language, the Code drafters assumed one could not learn of the breach “until the performance date or a time thereafter.”¹¹⁰

In 1962, section 2-713(1) was amended to include the references to anticipatory repudiation and to provide the current section 2-723. These amendments only introduced “an element of ambiguity into the text of section 2-713.”¹¹¹ The Code drafters’ silence with regard to these amendments indicates their “failure to recognize the ambiguity and [their] intention to retain the preexisting rules.”¹¹²

B. Date of Repudiation

Commentators have suggested that the most obvious meaning of section 2-713’s *learned of the breach* language is the date of repudiation. The most articulate representative of this interpretation of section 2-713¹¹³ applies the economic analysis of contract law to interpreting section 2-713. Professor Thomas H. Jackson argues that “efficiency (in the sense of moving goods to their highest-value user at least dead-weight cost) suggests limiting the right to use a cover-damages formula to the aggrieved party that makes its cover transaction[s] at a time reasonably proximate to the time it learns of the repudiation.”¹¹⁴ He urges a true date of repudiation measurement standard for market-contract damages and main-

107. *Id.*

108. Note, *U.C.C. § 2-713: Anticipatory Repudiation and the Measurement of an Aggrieved Buyer’s Damages*, 19 WM. & MARY L. REV. 253 (1977).

109. *Id.* at 265 (quoting U.C.C. § 2-713 (1952)).

110. *Id.*

111. *Id.* at 266.

112. *Id.*

113. See Jackson, “*Anticipatory Repudiation*” and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Non-performance, 31 STAN. L. REV. 69 (1978).

114. *Id.* at 72.

tains that "the Code's 'commercially reasonable time' provision should be read narrowly"¹¹⁵ He indicates that the market-contract damages are considered by the Code "as essentially ancillary to the cover formula."¹¹⁶ Indeed, "[i]t appears that the draftsmen intended 2-713's formula to yield approximately the same judgment in noncover cases against the seller as the 2-712 formula would have yielded had the buyer covered."¹¹⁷

Jackson suggests that the burden of proof should be imposed on the aggrieved buyer to "show that any post-repudiation delay on its part before seeking a remedy was commercially reasonable."¹¹⁸ By this means section 2-610(a) could be implemented. "[I]n the absence of such proof, section 2-610(a)'s 'commercially reasonable time' should be deemed to expire when the aggrieved party learns of the repudiation."¹¹⁹ Such an interpretation would reverse the normal assignment of the burden of proof on the breaching party.¹²⁰

A number of section 2-713 commentators have assumed that this section implies a date of repudiation standard, even when they are critical of its use.¹²¹ Perhaps because of this basic assumption, authors have developed less thorough analyses of the repudiation date standard than of the other possible interpretations of section 2-713. Indeed, some of the more interesting arguments have been put forth by those not adopting this standard. One Note indicates that sections 2-712(1) and 2-610(b) consider "that a breach occurs at the time of the repudiation."¹²² According to this view, section 2-712 equates *breach* with *repudiation* and that section 2-610(b) treats the two terms as synonymous.¹²³ Therefore, if the Code regards the terms *repudiation* and *breach* as virtually interchangeable, section 2-713's *learned of the breach* can reasonably be interpreted to mean *learned of the repudiation*.

115. *Id.* at 99.

116. *Id.* at 102.

117. *Id.* at 103 n.113 (quoting J. WHITE & R. SUMMERS, *supra* note 2, § 6-4, at 182-83).

118. Jackson, *supra* note 113, at 100.

119. *Id.*

120. *See id.*

121. *See* Anderson, *supra* note 102, at 16; Hey, *Remedies for Breach of Sales Contract Under the Code*, 7 WASHBURN L.J. 35, 41 (1967) and Small, *supra* note 102, at 185.

122. Note, *supra* note 108, at 270-71.

123. *Id.*

C. *Commercially Reasonable Time After Repudiation*

There are a number of commentators favoring the commercially reasonable time standard of measure for market-contract damages in an anticipatory repudiation case.¹²⁴ This line of reasoning was adopted by the *Cosden* court.¹²⁵ Proponents of this standard primarily focus on harmonizing Code sections 2-610 and 2-713. However, section 2-712 also plays an integral role in this analysis.

Section 2-610(a) provides an aggrieved buyer with an opportunity to await performance for a commercially reasonable time before resorting to the selection of his remedies.¹²⁶ Delay past this commercially reasonable time would cost the aggrieved party recovery of "resulting damage which he should have avoided."¹²⁷ Several commentators have maintained that section 2-610's *commercially reasonable time* should be read into section 2-713's *learned of the breach*. In the absence of such a reading, an aggrieved party who waited a commercially reasonable time under section 2-610(a) and then failed to cover would be relegated to damages based upon the repudiation date. It is illogical "to give an aggrieved party a grace period before requiring him to mitigate and then taking that grace period from him by fixing his basis for damage at the beginning rather than the end of the grace period."¹²⁸ Several factors could lead a buyer into seeking market-contract damages: unavailability of goods, failure to meet section 2-712's "without unreasonable delay" qualification for obtaining

124. See Leibson, *Anticipatory Repudiation and Buyer's Damages — A Look Into How the UCC Has Changed the Common Law*, 7 U.C.C. L.J. 272 (1974-75); Note, *supra* note 108; Seibert, *supra* note 40; and HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-713:03 (1982).

125. See *supra* § III. p. 52.

126. U.C.C. § 2-610(a) (1978).

127. Comment 1 to U.C.C. § 2-610 (1978) provides:

With the problem of insecurity taken care of by the preceding section and with provision being made in this Article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

128. Leibson, *supra* note 124, at 280.

cover, or failure to prove that cover was effectuated.

In addition to section 2-610(a)'s provision of a commercially reasonable time before resorting to one's remedy, section 2-712(1) provides for an aggrieved buyer to cover "without unreasonable delay."¹²⁹ Thus, the Code's primary anticipatory repudiation section and its alternative to market-contract damages, cover, both provide for time within which the aggrieved party may initiate his actions. Why then should section 2-713 be read to provide no such leeway? One explanation suggests that:

to require a wronged party to mitigate immediately upon learning of the anticipatory breach would be to penalize him to a point that would be unconscionable. It would mean that the UCC has altered the common-law and Sales Act notion to the extent that it would penalize the aggrieved party, a result surely not intended.¹³⁰

Professor Sebert maintains that allowing the buyer a commercially reasonable time after repudiation to calculate his damages is consistent with the "Code's dual policies of encouraging cover and permitting an aggrieved party to await performance for a reasonable time after repudiation."¹³¹ This contention is supported by reference to comment one to section 2-713, which states that the market in which the buyer would have covered operates as a baseline for damages.¹³² He further maintains that "the 'end of a reasonable time' measurement date is an appropriate interpretation of the language of section 2-713 because a buyer does not actually 'learn of the breach' until the reasonable time for awaiting performance has expired under section 2-610."¹³³

Another commentator, Ellen Peters, supports this interpretation¹³⁴ by maintaining that "[u]nder 2-610, repudiation and breach are, at least initially, different, although repudiation can ripen into breach, either actively, at the option of the injured party, or passively, at the expiration of a commercially reasonable period of time."¹³⁵ However, she notes that "[n]either of these methods

129. U.C.C. § 2-712 (1978).

130. Leibson, *supra* note 124, at 280.

131. Sebert, *supra* note 40, at 376.

132. U.C.C. § 2-713 comment 1 (1978).

133. Sebert, *supra* note 40, at 377.

134. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 *YALE L.J.* 199 (1963).

135. *Id.* at 266.

seems particularly attuned to pinpointing when the fact of breach has been 'learned.'"¹³⁶

The general arguments favoring a commercially reasonable time standard are also supported by emphasizing that the desirability of achieving parity between "the cover remedy of section 2-712 and the damage remedy of section 2-713 . . . is obvious, because the buyer should not be put in a position in which he must speculate as to which remedy is more beneficial to him. Nor should he be permitted to speculate at the expense of the seller."¹³⁷

D. Counter-arguments

The analysis of section 2-723¹³⁸ has played an important role in arguments for the various interpretations of 2-713's *learned of the breach*. For example, White and Summers used it to support a performance date standard,¹³⁹ Jackson used it to argue against a commercially reasonable time standard,¹⁴⁰ and other commentators have assumed it forms the basis for equating section 2-713's *learned of the breach* with a repudiation date standard. It has thus been viewed by many as the most effective counter to the commercially reasonable time standard for measuring market-contract damages.

The *Cosden* decision addressed this argument directly, maintaining that section 2-723's operation is particularly limited.¹⁴¹ Sebert, despite his belief that section 2-713 is in "urgent need [of] revision,"¹⁴² emphasizes that "it is also possible to interpret the existing provision in a reasonable and consistent manner."¹⁴³ Section 2-723(1) provides a special rule for anticipatory repudiation cases that come to trial prior to the performance date under the contract,¹⁴⁴ which stipulates that "any damages based on market price (Section 2-708 or Section 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation."¹⁴⁵

As noted in the *Cosden* decision, as well as by commentators, the

136. *Id.*

137. HAWKLAND, *supra* note 124, § 2-713:03, at 369.

138. U.C.C. § 2-723 (1978).

139. J. WHITE & R. SUMMERS, *supra* note 2, § 6-7, at 245.

140. JACKSON, *supra* note 113, at 111.

141. 736 F.2d at 1072-73.

142. Sebert, *supra* note 40, at 374.

143. *Id.*

144. U.C.C. § 2-723(1) (1978).

145. *Id.*

operation of section 2-713 in an anticipatory repudiation case has been fairly limited. The operation of section 2-723 should be even more limited, since a trial is required prior to the performance date. However, despite this very limited applicability, commentators have considered section 2-723 of equal weight with sections 2-610 (anticipatory repudiation) and 2-712 (cover) in interpreting section 2-713's *learned of the breach*. One could argue, however, that section 2-723's reference to section 2-713 damages based on the market-contract price differential is an indication that this section is *changing* the time standard in the particular circumstances of a trial prior to performance. Section 2-723 is changing both the seller's damages measured under section 2-708 from the performance date and the buyer's damages measured under section 2-713 from the learned of the breach date to a date of repudiation standard. In this interpretation the choice of the word *repudiation* rather than *breach* is central. It puts both section 2-708 and section 2-713 on a different basis in an anticipatory repudiation case coming to trial before performance date, than in the usual case which comes to trial after the performance date.

The most persuasive arguments against a performance date standard for market-contract damages under section 2-713 are: (1) it does violence to the actual vocabulary used in this Code section; and (2) it undercuts the Code's cover and commercially reasonable time limitations. If section 2-713 is interpreted as a performance date standard, there is no incentive for a buyer to cover. The buyer is encouraged to speculate on increased damages in a rising market by not covering early. Even if the buyer covers at some point after the repudiation and prior to the performance date, he could wait just long enough to cover so as not to qualify under section 2-712's "without unreasonable delay" limitation. Such a buyer could still hope to collect market-contract damages under 2-713 as of the performance date. Presumably, a performance date standard renders void the application of comment one to section 2-610 regarding failure to act within a commercially reasonable time, or alternatively the performance date is deemed to be within such a time period. In this scenario, the buyer has the best of both worlds — his goods and a damage award potentially in excess of his costs in obtaining them. Such a damage standard "may encourage aggrieved buyers to deal in bad faith and may provide sellers with damage liabilities that essentially are punitive rather than compen-

satory."¹⁴⁶ There can be little doubt that under this standard, a seller would be unable to calculate the risks of an anticipatory repudiation. It has been suggested that this would lead to economically inefficient results, for it would discourage efficient breaches.¹⁴⁷

As noted by the discussion of the commercially reasonable time after repudiation standard,¹⁴⁸ a repudiation date standard for market-contract damages penalizes the aggrieved party. This runs counter to the Code's purported intent to place the aggrieved party in the same position that performance does.

VI. CONCLUSION

From the analyses of the various commentators that have been discussed, the arguments favor the adoption of a commercially reasonable time after repudiation standard for measuring market-contract damages. Such a standard appears to be the "most flexible and equitable method for ascertaining a buyer's damages after a seller's anticipatory repudiation."¹⁴⁹ The *Cosden* court's analysis is the most thorough and articulate statement by a court to date of this position. It may well serve as a persuasive precedent for future decisions, particularly given the support that this position finds in the scholarly literature. There is little doubt, however, that section 2-713 needs revision, or at the very least, further clarification by the Code's Permanent Editorial Board. As has been suggested, "[t]he inability of the courts to reach a reasoned consensus concerning the application of section 2-713 in the anticipatory repudiation situation indicates the urgent need for revision of that section."¹⁵⁰ The *Cosden* decision does not crystallize this consensus. It is, however, a well-reasoned argument for adoption of the "commercially reasonable time" standard. Perhaps, the *Cosden* decision will serve instead to expedite the revision of section 2-713.

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146. Note, *supra* note 108, at 269.

147. Jackson, *supra* note 113, at 108.

148. *See supra*, § V. C. p. 62.

149. Note, *supra* note 108, at 255.

150. Sebert, *supra* note 40, at 374.