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The Middleman's Damages Revisited

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A number of cases take the form A promises to sell to B who, in turn, promises to sell to C. Either A or C breaches and the question is whether B should receive the gain it expected had both transactions occurred (lost profits) or whether it should receive the larger market/contract differential. I had thought that the problem had been resolved. Years ago I wrote a short chapter on the middleman's damages, concluding that the damages should be the contract/market differential, even though the middleman's expected fee was unrelated to that differential.[1] So why revisit the question? A recent article by Roy Anderson argued strongly in favor of the lost profit remedy and he cited a number of recent cases supporting his position.[2] A quick glance at some of these decisions showed that they relied in part on the White & Summers Treatise,[3] which also favored the lost profit remedy. The problem therefore seems alive enough to warrant the revisit.

For a seller's breach, the problem is framed as a conflict between UCC §2-713 (contract/market differential or market damages) and UCC §1-305 (the aggrieved party may be put in as good a position as if the other party had fully performed). If the breach were by the buyer, the alleged conflict is between the two sections of UCC §2-708. UCC §2-708(1) awards the contract/market differential. If, however, that remedy were perceived as "inadequate," UCC §2-708(2) would award the seller its "lost profits." Although the Code language is aimed at the case in which market damages would undercompensate, the courts have extended it to the case in which that remedy would overcompensate. Properly understood, however, there is no conflict.

White & Summers downplay the significance of UCC §2-713, labeling the differential as "statutory liquidated damages." "[P]erhaps the best explanation of 2-713 is that it is a statutory liquidated damage clause, a breach inhibitor the payout of which need bear no close relation to plaintiff's actual loss."[4] They then reject the notion that the damage remedy might have a useful role in deterring breach.[5] "We are unpersuaded by the need to have a liquidated damage clause; we suspect that damage formulas play a minimal part in the decisions of business people who are deciding whether to break a contract. For that reason we reject breach deterrence as an important factor in choosing damage formulae and would choose that formula which best approximates the actual economic loss."[6]

[1] Framing Contract Law, ch. 11.
[2] Roy Ryden Anderson, A Look Back at the Future of UCC Damages Remedies, 71 SMU Law Review, 185 (2018).
[3] White & Summers
[4] §6.4.
[5] For the argument that the market damage remedy provides appropriate incentives. See Robert E. Scott, The Case for Market Damages: Revisiting the Lost Profits Puzzle, 57 U. Chi. L. Rev. 1155 (1990).
[6] §7.12. This quotation is invoked in a number of the cases rejecting market damages.

Anderson characterized these cases as involving hedging contracts:

> A stark example of a claim for market price damages that exceeds the plaintiff's actual loss is demonstrated by cases where the plaintiff has hedged his contract obligation so as to protect against adverse fluctuations in the market price. He has chosen to secure a profit rather than "wager" on the market. By his choice, the plaintiff incurs no market risk and foregoes market advantage. Included in this grouping are the cases where the plaintiff acts, in effect, merely as a broker between a supplier and a buyer, and the profit he receives is fixed by a commission or a discounted price he is given by the supplier. For our purposes both situations are the same in that the plaintiff is guaranteed a fixed profit and incurs no market risk.[7]

The phrase "the plaintiff acts, in effect, merely as a broker" frames the issue. If A breached and B were in fact a broker, then C could sue A directly and A would be liable for the market damages. But when B is only *like* a broker, there is a fundamental difference—B has contracts with both A and C. If both deals go through, B would indeed incur no market risk and it would receive its "guaranteed profit." However, unlike the broker, B is a principal in both contracts and it bears counterparty risk. If A breached, B would remain liable to C. What Anderson and others are, in effect, arguing is that if B were actually a broker, A would be liable to C for market damages, but if B were only acting like a broker, A would only be liable for B's lost profits. The difference between *being* a broker and *acting like* a broker is a big deal. Privity matters. A's liability, I am arguing, should be the same regardless of whether B is a broker or merely acting like a broker. To whom A would be liable would be a matter of contract between B and C.

The acts-like-a-broker characterization fits some of the cases like a glove—B enters into both contracts simultaneously. In others the relationship is quite different. For example, B might enter into a multi-year contract to buy x units per year from A; months later it agrees to sell Y units to C. The case law (and the commentary) does not distinguish on this basis. The more the transaction pairs diverge from the ideal-type, the greater B's exposure to market risk.

An issue raised in some of the cases is how B fared in the second transaction. Anderson notes: "The cases that have caused controversy and disagreement among courts and commentators for well over a century are those where it is clear at the time of trial that B has no liability over to C."[8] White & Summers, advocate the lost profits remedy, but they condition it on B's avoiding liability to C: "[I]n any case in which the buyer's resale purchaser will likely insist upon performance, the buyer's damages should not be limited to the buyer's expected resale profit, for in that case the buyer will be liable in damages to its own purchaser equal to the difference between the buyer's resale contract price and the market price (or will have to cover at market price in order to make

[7] At 199.
[8] At 199.

delivery)."[9] I will refer to this below as the White & Summers proviso. B's liability to its counterparty should be irrelevant. Whether B succeeds in limiting, or erasing, its liability on this contract should not impact its claim against the breaching party. As we shall see, in only some instances does the case law consider B's liability and the treatment is inconsistent.

As Anderson observed, the majority of the cases reject the contract/market differential. In those in which the seller had breached, the courts have split; in those in which the buyer had breached, the courts have restricted B's recovery to its lost profits. Anderson cited a dozen cases; I will examine these in detail in the next two sections. I first will consider the seller-breach cases; the buyer-breach cases will be in the following section. My colleague, Professor Robert Scott read an earlier draft of the paper and chastised me for not being sufficiently forceful in my criticism of some of the decisions; I have tried to rectify that in this draft.

A. Seller Breach

1. *Allied Canners & Packers, Inc. v. Victor Packing Co*.[10]

The facts are a little complicated because the contracts were embedded in a regulatory framework. A federal marketing order established the Raisin Administrative Committee (RAC), which was intended to keep prices up by regulating the flow of raisins to the domestic market. The RAC does so by taking surplus raisins out of the domestic market, allowing these to be sold only outside the western hemisphere. The result is a two-tiered market of "free" raisins that can be sold anywhere and "reserve" raisins that can only be sold abroad. In good times, a substantial amount of raisins will be diverted to the reserve category in order to support high domestic prices. If the price of free raisins were greater than that of reserve raisins, there would be incentives for packers to engage in arbitrage, buying reserve raisins and then reselling them in the domestic market. To prevent this, the RAC sells only to member packers. The packer must file an application to purchase the raisins. It must include the name of the foreign buyer or exporter (who in turn must provide the name of the foreign importer). The identity of the exporter's ultimate purchasers is not revealed to the packer/seller. The information does not assure that the reserve raisins will not reappear in the domestic market, but it gives the RAC quite a bit of control.

Victor was a packer and member of RAC. Allied, an exporter, was not eligible for membership. In early September 1976, free raisins were selling for about 43 cents per pound.[11] Victor could buy reserve raisins from RAC at the quoted price of 22 cents per pound. It entered into a contract to sell reserve raisins to Allied which had contracts to sell ten containers (375,000 pounds) in Japan at 29.75 cents; Allied would get a discount of 4 percent, which would net it roughly $4,400 if both transactions went through.

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[9] §6-4.
[10] 209 Cal. Rptr. 60, 61 (Dist. Ct. App. 1984).
[11] *Sun Maid Raisin Growers of California v. Victor Packing Company* (p. 794)

Heavy rains on the night of September 9 severely damaged the raisin crop, destroying perhaps 50% of the new crop.[12] The next day, the RAC withdrew its offer to release reserve raisins to members who had not made the appropriate application and deposit as of 8:30 a.m.. Victor had not yet filed and was unsuccessful in persuading the RAC to release raisins to it. The diversion of raisins from reserve to free had some damping effect on prices in the free market; however, those prices still soared to over 80 cents per pound. (The parties stipulated to a market price of 87 cents).[13]

Victor conceded that it had breached and Allied chose not to cover. One of the Japanese buyers agreed to rescind the contract for three containers; no reason was given in the opinion. The other buyer, Shoei Foods, demanded delivery of the remaining seven containers. Allied said that Shoei would hold off suing it until the Allied-Victor litigation was resolved. Apparently, the statute of limitations expired without Shoei ever bringing suit and there is no indication that Allied paid any damages to Shoei.

The trial court treated Allied as a broker and awarded it the lost "commission," of $4,400. The Court of Appeal rejected the broker label, but then concluded that the contract-market differential would overcompensate Allied. The court took into account circumstances specific to this case: (a) the seller knew that the buyer had a resale contract (a requirement of the RAC); (b) the buyer had not been able to show that it would be liable in damages on its forward contracts with the Japanese buyers; and (c) there was no bad faith on the part of seller–it had not resold to another at a higher price.

The court might have felt sorry for Victor, which had done no wrong (although Victor could have saved itself from being in this situation had it made the appropriate deposit with the RAC before September 10). But Victor, apparently, did not even attempt to argue that it should be excused in any way. The court treated Allied's two contracts with the seller and its buyers as a single transaction and concluded that the 4% discount was all that Allied was entitled to.

Allied's counsel did not help. It asked for the contract-market differential (57.25¢), but only for seven of the ten containers—those for which they had potential liability to Shoei.[14] Indeed, the court noted that "when the trial court asked [Allied's president] whether in the event that damages of $150,281 were awarded, he would consider that to be his company's own money. . . [h]e replied that he would not."[15] Since the statute of limitations precluded Shoei's recovery from Allied, under counsel's theory Allied would have received a windfall.

Victor should have been liable for the full $215,000. It failed to deliver ten containers of raisins; the failure was not excused; and the contract-market differential was 57.25¢ per pound. Allied breached its two contracts as a seller and it was liable for the

[12] *Sun Maid Raisin Growers of California v. Victor Packing Company* (p. 794)
[13] At 62, n. 2.
[14] Counsel also argued, unsuccessfully, that it had suffered reputational harm.
[15] At 66, n. 8.

same amount to its Japanese customers. By luck or skill it reduced that liability (apparently to zero). The decision granted the fruits of that effort to Victor.

2. Tongish v Thomas.[16]

Tongish, a grower of sunflower seeds, entered into a contract with the Decatur Coop Association (Coop) in which he promised to deliver all the output from his 160 acre plot (later reduced to116.8 acres) to a particular processor, Bambino. Bambino was one of the two processors to whom the Coop sold sunflowers. The form contract the Coop signed with Tongish was titled "Confectionary Sunflower Seed Grower Contract With Decatur Coop to be Processed by Bambino Bean & Seed, Inc.[17] The Coop had a separate oral contract with Bambino. The price depended on the size of the seeds–13¢ per pound for large and 8¢ for small. Bad weather caused prices to soar. Tongish complained (perhaps legitimately) about Coop's assessment of the quality of its seeds. It then sold its output at an average price of 20¢ per pound to Danny Thomas. Thomas paid for about half the seeds; its refusal to pay for the remainder is unexplained, although it appears that it was in response to a complaint from Coop. Tongish sued Thomas who paid the balance into court and was dismissed from the action. Meanwhile, Coop intervened, seeking damages for the breach.

The Tongish-Coop contract specified the handling charge of 55¢ per 100 pounds if the seeds came through its elevator and 15¢ per 100 pounds if they went directly from the farm to the processor.[18] The trial court found that Tongish had breached. Coop asked for the contract-market differential, about $5000, but the trial court reckoned that its only loss was the foregone handling charges, 55¢ per hundred pounds, or $455.

The parties differed as to whether Coop would have been liable to Bambino for failure to deliver on its contract. Tongish claimed (almost certainly incorrectly) that it would not be liable at all: "Coop was locked into its profit; while it forward contracted with Bambino, it had no obligation to deliver any sunflowers unless they were actually delivered to it; the contract was an acreage contract and not a contract for a specific quantity."[19]

Coop claimed otherwise: "The Coop owed sunflowers to its buyer who demanded the sunflowers be supplied and failed to pay for sunflowers already delivered. The Coop, per testimony, could not realistically cover due to high prices and very tight supplies of a commodity normally sold on forward contract, and without the sunflowers it had no way to protect itself from its defaulting buyer.[sic]"[20] And further, "The only evidence concerning Bambino's interest in the Tongish sunflowers was that when informed of the failure to deliver to the Coop, Bambino advised the Coop that Coop would either have to

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[16] 829 P.2d 916, 920-21 (Kan. Ct. App. 1992), *aff'd,* 840 P.2d 471 (Kan. 1992).

[17] (Tongish Brief)

[18] Since the trial court used the 55¢ fee, it is reasonable to infer that in the normal course of events, the sunflowers would be sent to Coop's elevator for storage.

[19] (Brief, p. 5)

[20] (Supplemental Brief of Coop, p. 6).

supply the sunflowers or take a reduction in money."[21] "Reduction in money" could mean contract-market differential, but I doubt it. Given that Coop was asking for the contract-market differential, the fact that the lawyers chose not to use that phrase suggests that Bambino was suggesting some lesser amount. The court made no finding as to whether Coop might have any liability to Bambino for its failure to deliver.

The Kansas court distinguished *Tongish* from *Allied*,suggesting that Victor's behavior was more justifiable since it had no raisins to sell, whereas Tongish resold the sunflower seeds at a higher price. However, it did not rely on the blameworthiness of the breaching seller. It perceived a conflict between § 1-305 and §2-713, concluding that the latter "should prevail as the more specific statute according to statutory rules of construction." [22] It canvassed the law review literature and concluded that those arguing for the contract-market differential had a better case. It concluded that "[w]hile application of the rule may not reflect the actual loss to a buyer, it encourages a more efficient market and discourages the breach of contracts."[23]

To say that Coop's "actual loss" was only $455 was misleading. Coop's gain on the Tongish contract was $5,000 and its exposure on the Bambino contract was $4,545, so the net result if both contracts had been performed would have been a $455 gain for Coop. Because Coop was a principal in two contracts and not a broker it was subject to counterparty risk. The Coop raised the counterparty risk point in passing in its Reply Brief: "while the Coop had locked in the price it was still exposed to failure of the seller to bring in the grain, failure to receive grain of the standard set, or failure by the Coop's buyer to complete the purchase from the Coop or pay the Coop for grain received."[24]

The crucial point is that Tongish had made an early commitment to deliver sunflowers at specified prices. Enforcing its obligation with the contract-market differential measure of damages made such an early commitment possible. Whether Tongish was liable to an intermediary or the final purchaser depended on whether the intermediary assumed the role of a counterparty (and accepted the associated risks) or acted merely as a broker. Either way, Tongish should have been liable to someone for the contract-market differential.

3. TexPar Energy, Inc. v. Murphy Oil USA, Inc.[25]

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[21] (Supplemental Brief of Coop, p. 8)

[22] At 474. Anderson flips this, arguing that the Code's philosophy (embodied in 1-305) should prevail:

> There is no wisdom in the courts' construction. Section 1-305 is a textbook example of a general provision that is included in an act or code for the very purpose of governing other provisions within its scope. Indeed, § 1-305 has no purpose other than to allow the Code's specific remedy provisions to be written broadly so as to leave the courts flexibility to meld them to the particular facts so that the remedy is applied in compliance with the policies set forth by the provision. In effect, the courts in *Tongish* and *TexPar* simply read the statute out of the Code by leaving nothing for which it to apply. Rather ironically, § 1-305 is actually the more specific provision in that it explicitly bars overly compensatory damages, whereas § 2-713 is silent on the subject. At 201.

[23] At 475.

[24] (Reply Brief, p.2)

[25] 45 F.3d 1111 (1995)

TexPar contracted to buy 15,000 tons of asphalt from Murphy at $53/ton and on the same day agreed to sell 15,000 tons to Starry at $56/ton. Murphy delivered some asphalt, but when the market price reached $80 it stopped delivering. Murphy, with TexPar's consent, negotiated with Starry and, after a few weeks of negotiation, agreed on a price of $68.50. (The market price apparently had dropped during the negotiation period, but the decision is silent on the magnitude.) TexPar agreed to pay Starry the remaining $12.50 for approximately $191,000.[26] TexPar sued Murphy for market damages on the unsent asphalt (14,310 tons)—$386,370. Murphy argued that its liability should be limited to TexPar's expected net of $3/ton ($45,000). The jury granted market damages.

Murphy argued that this would give TexPar a windfall; the court disagreed. It cited *Tongish* and agreed that in a conflict between §1-305 and §2-713, the latter "should prevail as the more specific statute according to statutory rules of construction."[27] It justified the result on policy grounds as well:

> [The] remedy serves the purpose of discouraging sellers from repudiating their contracts as the market rises, if the buyer should resell as did TexPar, or gambling that the buyer's damages will be small should the market drop. It also has the advantage of promoting uniformity and predictability in commercial transactions, by fixing damages on the date of the breach, rather than allowing the vicissitudes of the market in the future to determine damages.[28]

The two subsequent transactions, Murphy's direct sale to Starry and the TexPar-Starry settlement, make this somewhat more complicated than *Allied* and *Tongish*. Unlike in those cases, Starry was made whole. It received 15,000 tons with a net price of $56 (paying $68.50 to Murphy and receiving $12.50 from TexPar). TexPar received $386,370 from Murphy and paid out $191,000 to Starry for a net of $195,370, far greater than the $45,000 it would have received had the deal gone through. Murphy was the loser, selling the entire 15,000 tons, but receiving about $12 less than it would have if it hadn't breached.

Recall that the White and Summers proviso had carved out an exception for the case in which the final buyer, like Starry, was fully compensated. Here, Starry had been fully compensated with the middleman (Texpar) paying about half of its recovery. Because they were treating this as a single transaction, White and Summers did not know how to resolve Texpar's claim: "Should the buyer's damages against its own seller be reduced accordingly? This is a complex question and we are uncertain of the right

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[26] At p. 1113. The numbers don't add up. 15,000 multiplied by $12.50 yields $187,500. Since Murphy had partially performed, TexPar only paid for 14,310 tons—that should amount to $178,875.

[27] At p. 1114. "Notwithstanding Murphy's attempt to distinguish the facts of *Tongish*, we find the reasoning in that opinion sound and helpful to our own analysis." At p. 1114.

[28] At p. 1114.

answer."[29] It was only complex because they did not view each contract as distinct when assessing damages. Taking the Murphy-Texpar contract by itself, Texpar is entitled to the contract-market differential ($80-$53). Confusion arose only because White & Summers treated the four contracts as a single transaction.

Had Murphy simply sold the asphalt to a third party (as Tongish had) it would have received $80 per ton and paid damages to TexPar ($80-$53) which would have put Murphy in the same place as if it had performed. TexPar would have paid damages to Starry ($80-$56), which would have left it with the original $3 spread. And Starry would have been fully compensated. The subsequent transactions, in effect, divided TexPar's liability to Starry between TexPar and Murphy. When Murphy obtained TexPar's consent to deal directly with Starry, it could have (and should have) made clear that any of its contribution to Starry's damages would be offset by reductions in its liability to TexPar. The peculiar outcome was the result of Murphy's failure to obtain consent. Once we recognize that there were four separate contracts the result is straightforward—Murphy breached its contract with TexPar and was assessed the market-contract differential for the breach of that single contract.

4. KGM Harvesting Co. v. Fresh Network[30]

Fresh Network was a lettuce grower that provided lettuce to a number of fast food franchises. Through some of its subsidiaries it supplied all the lettuce for McDonalds. It also supplied other fast food franchises, including Burger King, through a chain of transactions. It sold to KGM, which sold to a lettuce broker named Castellini Company, which in turn sold to Club Chef, a company that chops and shreds lettuce for the fast food industry. Both Castellini and Club Chef bought on a cost-plus basis. Fresh Network would ship the lettuce directly to Club Chef.

The Fresh Network-KGM contract was for a fixed price, 9 cents per pound. The contract recognized that lettuce prices were volatile: Seller: "We agree to supply said product and amount at stated price regardless of the market price or conditions."[31] Buyer: "[Buyer] agrees to purchase said product and amounts at stated price regardless of the market price or conditions, provided quality requirements are met."[32] The contract called for delivery of 14 loads of lettuce per week (one load equaled about 44,000 pounds). At the 9-cent price, that would cost about $55,440 per week.

When the market price soared, the seller refused to deliver and sold to other buyers. The court says that it made a profit on these sales of between $800,000 and

[29] §6.4. Anderson did not have such doubts. Referring to *Tongish* and *TexPar*, Anderson stated: "Both decisions were rendered over 20 years ago. Over time, they have turned out to represent but two discordant outliers that undermine the significant weight of authority." At 201.

[30] 36 Cal.App.4th 376 (1995)
[31] At 382.
[32] At 383.

$1,100,000.[33] KGM engaged in self-help, withholding payment on previously delivered lettuce; it covered at the higher market price. Both parties sued. The parties stipulated to a directed verdict on the payments KGM had withheld. The jury awarded KGM's damages for the cost of cover for the May and June deliveries—about $655,000. It also found that KGM had an obligation to pay Castellini.[34]

On appeal, the seller argued that this would overcompensate KGM. Because of the cost-plus nature of the KGM-Castellini contract, it had passed on all but $70,000 to Castellini.[35] Castellini, in turn, passed on all of its loss to Club Chef, which passed on most of its loss to its fast food customers. KGM, it argued, would receive a windfall.

The court disagreed. It distinguished between §2-712 (cover) and §2-713 (market). This should not have made a difference since KGM was covering at the market price. Elsewhere I have argued that cover should be viewed as evidence of market price. If, as in this case, the cover transaction occurred at the time of the breach, it would have been extremely good evidence. [36] The damage formula for the cover transaction, the court asserted, put it in the identical position that performance would have. This would be true regardless of whether KGM compensated Castellini. "This gives the buyer the benefit of its bargain. What the buyer chooses to do with that bargain is not relevant to the determination of damages under section 2712."[37] The court claimed that there was a distinction between §2-712 and §2-713. "The obvious reason is that the cover-contract differential puts a buyer who covers in the exact same position as performance would have done. This is the precisely what is called for in section [1-305]. In this respect, the cover/contract differential of section 2712 is very different than the market/contract differential of section 2713, which 'need bear no close relation to the plaintiff's actual loss.'"[38]

Of course, that was a non sequitur. The court was crystal clear that under §2-712 it should look only at the one contract, but it waffled on §2-713. "[W]e have serious reservations about whether the result in *Allied Canners*, with its emphasis on the good faith of the breaching party, is appropriate in an action seeking damages under section 2713."[39] It did not have to decide what should happen under §2-713, so it could leave that outcome ambiguous. But there is no good reason to take the second contract into account under §2-713 when not taking it into account under §2-712. In both instances, KGM would have a claim under the first contract and how it settled Castellini's claim against it would be irrelevant.

[33] It is not clear what this means. It might be the difference between the 9-cent price and the price the lettuce sold for.
[34] At 382, n. 2.
[35] The court did not explain why there was a $70,000 difference.
[36] See my Reckoning Contract Damages: Valuation of the Contract as an Asset, 75 Wash. & Lee L. Rev. 301 (2018). (hereafter, *Reckoning*)
[37] At 293.
[38] At 293. (quoting White & Summers, at p. 295). I argue in *Reckoning* that this distinction makes no sense.
[39] At 293.

5. H-W-H Cattle Co., Inc. v. Schroeder[40]

HWH, which purchased cattle on commission for feedlots, entered into a contract with Schroeder to buy 2,000 head of cattle at 67 cents per pound. At the same time it contracted with Western Rio to provide 2,000 head of cattle at 67.35 cents per pound. Schroeder was only able to deliver 1,397 head. HWH sued for breach asking for damages of $62,000, the contract-market differential for the remaining 603 head. The trial court awarded it $1,371.83, the lost commissions on the 603 cattle not delivered.

The Court of Appeals affirmed. It rejected the notion that §2-713 applied, arguing that it would give HWH an "undeserved windfall." The court treated the two separate contracts as a single transaction. "We read this admonition from the Code [§1-305] to suggest that a court should look through the form of a transaction to its substance when necessary to fulfill the parties' expectations expressed in the contract. This is precisely what the district court did in this case, by limiting the damage award to HWH to its expectancy interest and thereby avoiding a windfall of some $62,000."[41] The court did not explain why Schroeder had not delivered the 603 cattle, although it hinted at it in a footnote—Schroeder was suing other cattle firms in a separate action, suggesting that it was the victim of a breach by other sellers.[42] The court was, therefore, silent on whether Schroeder had received any compensation from its suppliers, or had sold the cattle at a profit to a third party.

The court did not cite *Allied* which had been decided earlier that year; it did, however, attempt to distinguish the case from *Cargill v Fickbohm*[43] (discussed below). "The instant case is distinguishable from *Cargill* in that Cargill had made the independent decision to hedge its purchase on the futures exchange, thereby contracting with a party unrelated to the transaction with the defendant seller. Here HWH entered into a contract with Schroeder solely to meet the needs of Western Trio, a related company, and as an order-buyer, it never stood to gain more than its $0.35 commission."[44]

Recall that Anderson characterized these cases as hedging contracts. Here the court distinguished this case from a true hedging contract. So, ironically, the court awarded only lost profits where the seller acted like a hedger, but it would have awarded market damages in a true hedging contract. There is no explanation of why a true hedging contract would result in market damages while as-if hedging would result in lost profits. Nor can there be.

6. NHF Hog Marketing, Inc. v. Pork-Martin[45]

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[40] 767F.2d 437 (1985)
[41] At 440.
[42] "Schroeder filed a third-party complaint against several other cattle firms, one of which in turn filed a fourth-party action against Schroeder's agent, C.A. Heldridge. The district court separated these actions from the trial between HWH and Schroeder, and they are not relevant to this appeal." (At 438, n. 2)
[43] At 440.
[44] At 440.
[45] LLP, 811 N.W.2d 116 (2012).

In November 2005 NHF Hog Marketing entered into a master hog-procurement contract (master contract) with J.B.S. Swift; NHF agreed to deliver approximately 750,000 hogs to Swift each year for five years. Two months later it entered into a contract with one of its suppliers, Pork-Martin, to purchase 2,333 hogs per month. The Swift contract was for the market price with adjustments if that price fell outside a specified range. The Pork-Martin contract was for 33 cents less per hundredweight than the price received from Swift. In 2008, the market price for hogs increased and Pork-Martin stopped delivering hogs under the contract, instead selling them to another buyer.

NHF sued, asking for damages totaling $439,844.95—$396,647.45 for the additional amount that Swift would have had to pay to buy hogs when Pork-Martin failed to deliver and $43,197.50 for NHF's commission. The district court awarded only the lost commission and this was affirmed on appeal.

The court cited *Allied Canners* and *H-W-H,* arguing that awarding market damages would give NHF a windfall. It also relied on White & Summers:

> Courts should take care to apply the *Allied* and *H-W-H* limitation narrowly. First, it should be applied only when the defendant proves that the plaintiff's expected resale profit was less than the 2–713 differential; we would not impose the burden of proving the negative on the plaintiff as part of its case in chief. Second, in any case in which the buyer's resale purchaser will likely insist upon performance, the buyer's damages should not be limited to the buyer's expected resale profit, for in that case the buyer will be liable in damages to its own purchaser equal to the difference between the buyer's resale contract price and the market price (or will have to cover at market price in order to make delivery).[46]

So, if NHF were liable to Swift, then, presumably, the court would not have limited recovery to the lost commission. Was it liable? "At the time of trial, Swift had not started any action against appellant to enforce the terms of the master contract, and appellant presented no evidence indicating that Swift was likely to insist on performance."[47] The court did not rule out the possibility that NHF would owe Swift almost $400,000—it merely said that there was no evidence to confirm that Swift would insist on performance. If, however, Swift did finally sue and succeed, NHF would take a substantial loss and would not be able to collect from Pork-Martin. The court need not have speculated about whether Swift would sue NHF. That question would have been answered in a separate litigation between Swift and NHF.

7. *Cargill, Inc. v. Fickbohm*[48]

On November 30, 1972, Fickbohm agreed to deliver 10,000 bushels of corn to Cargill's elevator in June or July, 1973 at a price of $1.26 per bushel. Cargill immediately

[46] At 119. Quoting White and Summers, §6-4.
[47] At 117.
[48] 252 N.W.2d 739 (1977). The case was not discussed by Anderson. It was decided before any of the other cases discussed in this article.

hedged the transaction at a price of $1.39. The contract contained this clause: "Seller agrees to pay Buyer as damages for default in delivery hereunder the difference between the above specified price and the highest market price at the delivery point for the same grade and kind of grain on the day of default."[49] By mid-December the price had risen and Fickbohm asked how much it would have to pay to cancel the contract; when told it would cost $500, Fickbohm rejected the offer. By the delivery date prices had soared; the elevator was buying at $2.45 and selling at $2.49.

The court labeled §2-713 a liquidated damage clause, but stated that it was irrelevant: "The liquidated damage clause does not come into play here, as Cargill did not show a higher market price for corn for purchase on July 31, 1973, than the regular market price of $2.45 as provided by the statute. Hence we have no occasion to consider that clause in the contract."[50] The court held that damages were the contract-market differential—$11,900.[51]

Cargill had asked for $2.49 per bushel, but the court rejected that: "[T]he market price of corn for sale by the elevator on July 31, 1973, was $2.49 per bushel. Cargill seeks the difference between the per-bushel contract price of $1.26 and the market price of $2.49 for corn *for sale* (as distinguished from $2.45) or an additional 4¢ per bushel. Here Cargill is actually trying to recover as consequential damages its gross profit on grain of 4¢ per bushel, but it has not shown the net profit."[52]

The significant point is that the court dismissed the notion that, contrary to Anderson, the hedge was relevant to determining damages: "Cargill could recover damages although it hedged its purchase by selling 10,000 bushels on the futures exchange. That transaction is of no concern to defendant. Anyway, Cargill would have to buy itself out of its short position and do so at the advanced price of corn."[53] Thus, in the one case in which the aggrieved buyer had explicitly hedged, the court recognized that the hedge was a separate contract and, moreover, that the hedger would be subject to a loss on the hedged contract.

8. Unlimited Equipment Lines, Inc. v. Graphic Arts Centre, Inc.[54]

The case differs from the other cases in that it involves the breach of a "first right of refusal" clause,[55] and that the claimant had not entered into any related transaction. Still, the court considered *Tongish, H-W-H* and *Allied Canners*. Graphic Arts Centre (GAC) sold its equipment to Jefferson Printing Company for $691,000 without first

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[49] At 741.
[50] At 742.
[51] $2.45-$1.26=$1.19. Multiplied by 10,000 yields $11,900.
[52] At 742. (emphasis added)
[53] At 743.
[54] 889 S.W.2d 926 (1994)
[55] "A first right of refusal, or preemptive right, requires the seller, when or if he or she decides to sell, to first offer the property to the holder of the right, either at a stipulated price or at the price and on the terms the seller is willing to sell." At __.

offering the opportunity to Unlimited (UEL) to buy the equipment, whereupon UEL sued. The trial court made a finding of fact that "there was expert testimony that the fair market value of [the] equipment sold to Jefferson Printing was in excess of $1.5 million, and that the equipment's value on an orderly liquidation sale basis was $1.1 million. The difference between the expert's fair market value and the price paid by Jefferson Printing is $860,000. The difference between the fair market value and the orderly liquidation value is $410,000."[56] Since there was no proof that UEL could obtain anything more than the liquidation value, the trial court concluded that UEL should recover $410,000, it described as the contract-market differential under §2-713.

GAC argued that this was excessive and that under §1-305, UEL had failed to prove that it would have obtained a benefit equal to the damages the court awarded, invoking *H-W-H* and *Allied Canners.* The court was skeptical about these cases: "Before addressing the application of these cases to this appeal, we first note that these cases are controversial."[57] The court discussed the White & Summers position and noted that *Tongish* took the opposite position. The court concluded: "We do not need to resolve the conflict over whether and when actual damages may substitute for §2-713 damages because in this case defendants did not prove actual damages. There was no evidence that UEL had an existing resale contract on any of the equipment subject to the first right of refusal. Defendants could not prove UEL's resale profit would be less than the market-contract price differential of §2-713. Accordingly, the trial court did not err by awarding §2-713 damages instead of actual damages."[58]

The decision raises two questions. First, why would there be any difference between actual damages and market damages? Answer: there is no good reason. The alleged discrepancy in cases like *Allied Canners* stemmed from the court's linking of the contracts in which the claimant is both a buyer and seller; here there was no second contract. Actual damages would have been the same as market damages. Second, why would GAC have sold to Jefferson for about 60% of the market price? Answer: almost certainly, they didn't. The so-called market price was most likely the very aggressive valuation by an expert witness. It is hard to imagine that the liquidation value could be so much greater than the price Jefferson paid for equipment that Jeferson would actually use. Nevertheless, these were the "facts" on which the court based its decision. Given the alleged facts, the non-existence of "actual damages," and the irrelevance of the *Allied Canners* line of cases, the decision was correct.

B. Buyer's Breach

1. *Nobs Chemical, U.S.A., Inc. v. Koppers Co., Inc.*[59]

Nobs was the first case dealing with a breach by the buyer. Koppers agreed to buy 1,000 metric tons of cumene from Nobs (and Calmon-Hill) at a price of $540 per ton. Nobs had arranged to buy 4,000 tons from a Brazilian supplier (hereafter BS) for $400

[56] At 938.
[57] At 941.
[58] At 941.
[59] 616 F.2d 212 (1980)

per ton; in addition, it would pay $45 per ton to transport the cumene to Koppers. When the market price collapsed to between $220 and $264 per ton, Koppers breached. Nobs sued, invoking §2-708(1), the difference between the market price and the contract price. It also asked for additional damages to make up for the loss of a quantity discount of $25 per ton because Nobs had reduced its order with BS to 3,000 tons.[60] Koppers argued that §2-708(2) should apply. "If the measure of damages provided in Subsection [1] is inadequate to put the seller in as good a position as performance . . ."[61] "Inadequate" would normally mean that the measured damages would have been too low.[62] The court extended it here, without much discussion, to the case where (it thought) market damages would have been too high. Using a market price of $240 per ton, market damages would have been $300 per ton. The lost profit damages would have been $95 per ton ($540-$45-$400). Nobs argued that market damages would provide proper incentives for the buyer. The court rejected that, relying on the White & Summers damage-rule-doesn't-influence-behavior argument.

The nature of the contract Nobs had with BS is unclear. White & Summers state "Apparently Nobs had a requirements contract with its Brazilian supplier,"[63] although they cite no source for this supposition. The court provided no evidence of the terms of the Nobs' agreement with its supplier. Would Nobs have been liable to BS under the contract, or would the contract have allowed Nobs to reduce its order without breaching? Nobs did not take the 1,000 tons from BS; the court implied that Nobs did not pay anything to BS. Even if this were the case, that could be because Nobs was not liable or because even though it would have been liable, BS chose not to pursue its remedy. If the latter, would its exposure have meant that Nobs could recover, given the White & Summers proviso?

Nobs's other buyers would also have had an incentive to walk away; but apparently they did not. This can be inferred by noting that Nobs had asked for compensation for its loss of the quantity discount.. That does raise a question. Given the market collapse, why would Nobs have lost only the Koppers contract?

Apparently, Nobs was acting as an agent for BS, finding customers for its cumene. If it had been merely a broker, then Koppers would have been liable to BS for the market damages. It was not, however, merely a broker. It definitely had a contract with Koppers and the court treated it as if it also had a contract with BS. (There was a dispute about the existence of the BS contract, but the court held that the finding in the lower court was not clearly erroneous.)[64] If the court had found that there was no contract

[60] The court rejected that claim holding that it was for consequential damages.
[61] At 214.
[62] The section was included to deal with the alleged under-compensation to the "lost volume seller." For an argument on why the lost volume seller doctrine is wrong, see Goldberg, The Lost Volume Seller, RIP, 2 Criterion J. on Innovation, 205 (2017).
[63] §7.12.
[64] "At the trial, G. B. Marinelli, a part owner of Calmon-Hill, who was involved in the cumene transaction with Koppers, testified that Calmon-Hill had an agreement with a Brazilian supplier to furnish 4,000 metric tons of cumene, 1,000 tons of which was for Koppers. He also stated that the entire cost per ton, including insurance and freight, was somewhere between $445.00 and $450.00 for the cumene. Although counsel for Koppers attempted to impeach Marinelli on these points, he remained firm in his assertion that the source

with BS, then the decision would have been straightforward—Nobs had taken a short position in cumene and it turned out that it was right; Nobs would simply receive the contract-market differential.

Despite the dearth of facts, the *Nobs* decision is routinely cited with approval. If the remedy should consider the entire transaction, as Anderson et al insist, then the nature of the second contract ought to be of critical importance. But the opinion was silent and no one seemed to care. If, however, each contract were viewed separately, as I propose, the nature of the second contract would be irrelevant.

2. Union Carbide Corp. v. Consumers Power Co.[65]

In 1974 Union Carbide (UC) entered into a long-term contract with Petrosar to take 27,000 barrels of residual oil per day. Six years later it entered into a seven-year contract to sell 10,000 barrels of oil per day to Consumers Power Company (CPC). The price in the Union Carbide-Consumers contract was determined by a formula—the base price (which it paid Petrosar under the first contract) multiplied by a fixed percentage plus some fixed costs. Months later, prices began to fall and by the end of 1981 the price Consumers was paying substantially exceeded the market price. CPC announced that it would refuse to take any more oil and UC sued for breach. After the breach, Union Carbide paid Petrosar to keep the oil, so-called residual oil production payments (RORP). These payments continued for about a year and a half into 1983; UC then terminated the Petrosar contract, with UC assigning its contract with another utility, Niagara Mohawk (5,000 barrels), and paying about $20 million.[66]

The decision does not provide details on the nature of the UC-Petrosar contract. It seems pretty clear that once UC had entered into the contract with CPC, UC was bound to Petrosar; it is unlikely that UC was initially obligated to take 27,000 barrels per day regardless of whether it had lined up any subsequent sales.

Union Carbide claimed that it was entitled to market damages, estimated at around $120 million. Consumers argued that the contracts shielded Union Carbide from price risk and that market damages would overcompensate it. Instead it argued for lost profits, estimated at around $30 million. The court awarded lost profits. It invoked the White & Summers argument regarding the limited effect of damage remedies on breach deterrence.[67] It also asserted that the Union Carbide contract was "riskless."[68] "No one insists, and we do not think they could, that the difference between the fallen market

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of the cumene was to be a Brazilian supplier. Based on the evidence, the trial court's finding was not clearly erroneous." At 217. I don't know why Koppers was disputing this. If Nobs did not have a contract with a supplier, then, as noted in the text, Koppers would have been liable for market damages.

[65] 636 F.Supp. 1498 (1986).

[66] "Union Carbide's termination of its Petrosar contract was the result of many factors, only one of which was Consumers' refusal to accept further deliveries of residual fuel oil after 1981." (p. 1500)

[67] "White and Summers conclude that statutory damage formulas do not significantly affect the practices of businessmen and therefore 'breach deterrence,' which would be the purpose of the statutory liquidated damages clause, should be rejected in favor of a standard approximating actual economic loss." (At 1502)

[68] "By overcompensation, the court means that Union Carbide would receive greatly more than the riskless benefit of the bargain they would have received if the contract had been performed." (At 1504)

price and contract price is necessary to compensate the plaintiffs for the breach. Had the transaction been completed, their 'benefit of the bargain' would not have been affected by the fall in market price."[69] It also argued that in the face of a conflict, §1-305 should prevail over §2-713: "It is possible that the code drafters intended [§2-713] as a liquidated damage clause available to a plaintiff-seller regardless of his actual damages. There have been some commentators who agree with this philosophy . . . . But, this construction is inconsistent with the code's basic philosophy, announced in [§1-305] which provides 'that the aggrieved party may be put in as good a position as if the other party had fully performed" but not in a better posture.'"[70]

True, if all three parties would have performed, Consumers would not have borne any price risk. But, it bore counterparty risk on two transactions and, in fact, one of those risks materialized. If Consumers would not bear the price risk when it breached, then the other parties would. Petrosar had lost the benefit of its bargain and, prior to the court's opinion, it had received substantial, but partial, compensation from Union Carbide with the RORP's, the Niagara Mohawk contract, and the 1983 settlement.

Instead of recognizing that these payments involved resolution of a separate contract, the court dealt with them by labeling them "incidental damages" for which Consumers was responsible:

> One other matter should be resolved. Under UCC §2-708(2), Union Carbide is entitled to incidental damages. Counsel for Consumers represented at oral argument that the RORP payments which Union Carbide made to Petrosar would fall within the rubric of incidental damages. Consumers' counsel further stated that Union Carbide's payments to Petrosar in settlement of its contractual obligations with them would be incidental damages at least to the extend they can be apportioned to the loss of the Consumers' contract. The court finds that UCC § 2-710 defining a seller's incidental damages can be reasonably interpreted to cover these costs. They are commercially reasonable expenses incurred by the seller as a result of the buyer's breach.[71]

Characterizing these payments to Petrosar—apparently more than $20 million—as incidental damages is a backdoor way of providing some compensation to Union Carbide for its loss on the "riskless" Petrosar contract. There is no reason to treat these costs as an element of the CPC-UC contract. They were the settlement of Petrosar's claim against Union Carbide under a separate contract. There was a large gap between the measured market damages ($120 million) in the Consumers-Union Carbide contract and the settlement ($20-30 million) of the Union Carbide-Petrosar contract. That could reflect Union Carbide's skill in bargaining or, perhaps, inaccurate measurement of the damages.

[69] At 1502.
[70] At 1502.
[71] At 1504.

I suspect that in this case (and in some of the others)[72] market damage claims were inflated. But that is not justification for substituting the lost profits remedy.

3. *Diversified Energy, Inc. v. Tennessee Valley Authority*[73]

Diversified entered into a long-term contract to deliver coal (10,000 tons per week) to TVA. The contract required that all the coal come from the Sigmon Coal Company. Diversified was to pay Sigmon the full purchase price less a commission of 98 cents per ton. From that commission Diversified would have to pay 22 cents per ton to a third party, Billy Evans, so had there not been a breach it would have netted 76 cents per ton. After substantial litigation, the courts concluded that TVA had breached. Diversified argued that it should receive the contract/market differential ($5.13 per ton). TVA argued that Diversified was only entitled to what it would have received had the contracts been fully performed (98-22=76 cents per ton).

The court opted for the latter with virtually no discussion: "A non-breaching party is entitled to be placed in the same position it would have enjoyed had the defendant abided by the contract, but is not entitled to more than the benefit of his bargain . . . . A damage award which fails to adhere to this principle is unreasonable as a matter of law . . . .The UCC, including §2-708 has adopted this philosophy. *See, e.g, Nobs Chemical, U.S.A., Inc. v. Koppers Co., Inc.*"[74]

Nowhere does the court take into account the possibility that Diversified might be liable to Sigmon and/or Billy Evans. The court had no concern about the accuracy of Diversified's market damages claim, only about its relevance. The notion that the lost profit remedy put Diversified in "the same position" would be correct only if Diversified had no potential liability under its other two contracts. Otherwise, it is a big loser.

4. *Purina Mills, L.L.C. v. Less*[75]

On the same day in 1997, Purina entered into two ten-year contracts. It agreed to buy weanling pigs from Perennial and sell the pigs to Less for the same price. Perennial agreed to buy feed from Purina and Less agreed to buy Purina feed or pay $3 per pig. About five years into the agreement, Less stopped accepting pigs and Purina declared that Less had repudiated the contract. At the time of the breach, the contract price was $35 per pig, but the market price was only $18.38. Purina claimed market damages of $1,267,275—the difference ($16.62) times the number of pigs not yet delivered (76,250).[76] Less argued for the lost profits of $3 per pig ($228,750).

[72] Recall my skepticism regarding the measurement in *Unlimited Equipment Lines, Inc. v. Graphic Arts Centre, Inc.* In repudiations of long-term contracts, like Union Carbide's, the courts simplistically apply §2-723. I have argued elsewhere that this is wrong; see *Reckoning.*

[73] 339 F.3d 437 (2003).

[74] At 446.

[75] 295 F.Supp.2d 1017 (2003)

[76] This is another example of applying §2-723

Less argued that market damages would overcompensate Purina and the court agreed. Purina, it argued, lost the present value of $3 per pig, $216,092.15. The court cited *Nobs*, *Union Carbide*, and *Diversified* in arguing for the lost profit remedy. In each case, said the court, the paired contracts would insulate the intermediary from price fluctuations. However, the court claimed this case was different:

> In *Nobs Chemical*, *Union Carbide* or *Diversified Energy* . . . the plaintiff-sellers were not required to accept the contract goods from their suppliers; hence, the breach by the buyers did not compromise the sellers' expected market insulation. In this case, the Lesses' repudiation resulted in Purina losing its 'contracted for' market insulation, in that Purina, in order to recoup the cost of the weanling pigs it had to purchase from Perennial Pork, is now required to resell the weanling pigs *subject to* the market for weanling pigs; *subject to* the very market fluctuations that it *expected to be insulated against* as a benefit of its bargain with the Lesses.[77]

That is, at first glance, the White & Summers proviso should result in Purina receiving market damages.I should first note that the distinction is dubious. As the previous sections indicated, there is nothing in the three decisions to support the notion that the intermediary would not have been liable to the original seller. Indeed, in *Union Carbide* the seller had already made a substantial payment. In the other two cases, the court was silent on whether the intermediary had a legal obligation.

In *Purina*, the liability to the original seller (Perennial) was clear and, the court suggested, that might have been sufficient to warrant giving Purina market damages: "The Lesses' repudiation stripped Purina of its contracted for security from market price fluctuations. If there were no other factors to consider, the court would comfortably find that Purina was entitled to contract/market damages as the Lesses' repudiation destroyed Purina's expectancy interest and Purina was helpless to stop it."[78]

However, the court concluded, there was another factor. Days after the breach, Concord Valley Pork acquired all of Perennial's assets, including the Perennial-Purina contract. Concord offered Purina the option of buying out the agreement for a lump sum of $100,000, but Purina refused.[79] "This case is unique in that the court could find no other case involving the appropriate damage award of a seller who bargained to be insulated from market fluctuations, yet knowing that the buyers had repudiated, refused an option extended by the supplier to buy out of the third-party agreement, and therefore remained contractually bound to accept the contract goods from its supplier after the buyer's breach."[80]

The court held that by assuming the market risk in the Concord contract, Purina

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[77] At 1045. (emphasis in original)

[78] At 1045.

[79] "Almost serendipitously, *mere days* after learning of the Lesses' repudiation, Purina was given the option by Concord Pork to buy out of the remainder of the contract between Purina and Concord for the sum of $100,000.00." At 1045 (emphasis in original)

[80] At 1044.

lost its claim for market damages in the Less contract:

> [Purina] made the conscious choice to remain in this position by refusing the buyout option offered by Concord. In this instance, where Purina itself distinctly declined the opportunity to protect its expectancy interest in market insulation, the court finds no reason why it should protect the expectancy interest Purina perfunctorily cast aside through an award of contract/market damages.[81]

So, had Concord not made the offer to Purina, the court might have adopted the White & Summers proviso, awarding market damages to Purina (and Purina would have been liable to Concord). If Purina had accepted the offer, Purina would have only been able to collect lost profits ($228,750) and, perhaps, reimbursement for the $100,000 payment it would have made to Concord. By rejecting the offer, the court held, Purina could only recover its lost profits from Less, but would remain liable to Concord, presumably for Concord's market damages.

The court appears to have been quite confused as to what would happen if Purina were awarded market damages:

> Some scholars have worried that restricting an aggrieved seller to lost profits damages would lead to opportunistic breaching by the buyer, . . . however in this instance it appears as though *not* restricting Purina to lost profits damages would encourage large, corporate sellers not to mitigate their damages, but rather hold out for 'guaranteed' contract/market damages—as appears to be the case in this instance.[82]

This fails to recognize that Purina would still have been responsible for its contract with Concord. There was no "guarantee." If Purina didn't take the pigs, it would be liable to Concord for breach of that contract. If it did take the pigs and resold them, it would bear the price risk. The court suggested that Purina did continue to take pigs under the Concord contract and that at the time of the decision it was selling them at a profit.[83] If so, that would mean that Purina guessed right on the future pig prices. But these were hardly "'guaranteed' contract/market damages, since the prices could have gone down as well.

5. *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc*.[84]

In July 2008, United Polychem (UPC) agreed to purchase from Westlake five million pounds of ethylene per month during calendar year 2009 at a fixed price of $0.54 per pound. Ethylene is produced from ethane which is derived from oil. Oil prices in July had soared to $147 per barrel, but by November had fallen to $30. Ethylene prices were

[81] At 1046.
[82] At 1046.(emphasis in original)
[83] "At this time another entity, Plymouth Feed Company, purchases from Purina almost 100% of the weanling pigs that Purina purchases from Concord Pork—most often at a profit to Purina." At __, n. 18.
[84] 688 F.3d 232 (2012)

not quite so volatile, but by October the price had fallen to 42 cents per barrel.[85] UPC repudiated; Westlake's damage expert claimed that in 2009 the average price of ethylene had fallen to 26.81 cents per pound. Assuming that damages were the contract-market differential, he concluded that Westlake's damages were $16.3 million. The jury awarded market damages of $6.3 million with no explanation for the difference. UPC argued that Westlake should only be entitled to its lost profits, about $2 million. According to UPC's expert witness, "it is noteworthy that Westlake's profit expectations that it originally hoped to lock on its arbitrage transaction as of July 2, 2008 was approximately $2 million."[86]

Westlake did not have a contract with an ethylene supplier, nor did it purchase any ethylene. According to the court "Westlake originally intended to procure ethylene from a supplier to meet its contractual obligation to deliver ethylene to UPC. After UPC repudiated, Westlake reasonably chose not to acquire the ethylene."[87] Instead of arguing that the contract with UPC stood on its own and that it had taken a risky short position, Westlake attempted to tie it to its purchase of ethane. "It is undisputed that after Westlake completed the deal with UPC, it purchased enough ethane to fulfill its obligations to UPC. Thus, while Defendants state this 'is not a case of Westlake being stuck with ethylene and therefore facing a drop in prices,' they cannot avoid the fact that this is a case of Westlake being stuck with ethane and facing a drop in prices."[88] However, the court held that the ethane purchase had a dual purpose, to make ethylene for UPC and to supply its own subsidiary. Because Westlake had not purchased any ethylene, argued UPC, awarding Westlake more than its lost profit would constitute a windfall.

The court deemed Westlake's decision not to purchase ethylene important: "In *Nobs*, we made special note of the fact that the plaintiffs in that case never acquired the goods from the supplier after they learned of the defendant's repudiation; thus, there could be no action for either the purchase price or resale."[89] It then concluded: "As with the plaintiff in *Nobs*, had the instant transaction been completed, Westlake's 'benefit of the bargain' would not have been affected by the fall in market price, and thus it would not have experienced the windfall it otherwise would receive if [the] market price/contract price rule were followed."[90]

Unlike in *Nobs*, and the other cases discussed in this article, Westlake did not have a contract with a supplier. All it had was an *intention* to buy. It would not, therefore, be in breach with any supplier. Westlake had taken a short position in ethylene—this was hardly the riskless position that the lost profits advocates invoke. Instead of attempting to link its purchase of ethane to this contract, Westlake should have emphasized that there was only one contract. What it intended and what it did in contracting for a different product (ethane) ought to have been irrelevant.

[85] Westlake Petrochemicals v. United Polychem, 2010 WL 2884415 (S.D.Tex.) (expert testimony of Kenneth M. Stern for the defense, ¶18)
[86] Stern report, ¶62.
[87] At 244.
[88] Westlake Brief, Westlake Petrochemicals v United Polychem, 2011 WL 5007498 (C.A.5), 48-49.
[89] At 243.
[90] At 244.

III. Concluding Remarks

As Anderson said, the majority of the middleman decisions opt for a lost profits remedy. The treatises, and some of the decisions, disparage the contract-market differential as statutory liquidated damages that differ from "actual damages." The Corbin treatise treats the buyer and seller cases differently. For the seller's breach, it approves *Tongish* and states: "Contrary cases should be disapproved, as they encourage contract breaking and allow a breaching seller to profit by his or her own breach."[91] When the buyer breaches, however, it argues that market damages would give the seller a windfall, citing *Nobs* and *Purina.*[92]

The majority of the decisions (including all in which the buyer breached) treat the two separate contracts as part of the same transaction. My critique is simple. The two contracts are separate and damages should be reckoned under each without regard for the other. The middleman is not merely a broker; it is a party in two separate, albeit related, transactions and bears the counterparty risk in each. If C could have sued A directly (as in the brokered contracts) then A would have been liable for market damages. C could not, however, because of a lack of privity. Privity does matter, but it is precisely because B was in privity with both A and C that it should be able to collect market damages from the breacher in one contract and be liable to the other party in a second contract.

There is no conflict between market damages and actual damages. Suppose that A sold to B for $1 and B simultaneously sold to C for $1.10. When performance came due, the market price had risen to $1.50 and A breached. Anderson et al argue that actual damages are what B would have received if both deals had gone through—ten cents. The question can be posed differently. If the B-C deal had been performed, what compensation would B need to be made whole? The answer would be 50 cents. When framed this way, the market damages and the actual damages are the same.

I will conclude by noting that Mel Eisenberg added a wrinkle to the lost-profit position. He summarily rejected the market damages measure: "Cases like *Tongish* and *KGM* are wrong; cases *H-W-H, Allied Canners, Nobs,* and *Diversified* are right."[93] However, he partially qualified this by including a possible disgorgement remedy for some of the cases in which the seller breached: "In some cases, a seller breaches for the purpose of reselling the contracted-for goods at a better price. In these cases, the appropriate measure of damages is normally not expectation damages, but disgorgement –that is, the profit that the seller makes from breach –because the buyer will have paid a premium for the seller's implicit promise not to resell the goods to a later overbidder."[94] So, perhaps he would have required disgorgement by a few of the breaching sellers—Tongish, Fresh Network, and Pork-Martin. Breaching buyers would presumably have

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[91] *Corbin on Contracts*, § 60.14 Buyer's General Damages for Total Breach.

[92] *Corbin on Contracts* § 60.17 Seller's General Damages

[93] Melvin Eisenberg, Conflicting Formulas for Measuring Expectation Damages, 45 Ariz. St. L. J. 369, 403.

[94] At 404, n.88.

nothing to disgorge. Disgorgement would, I think, mean that the breacher disgorge the contract-market differential so this would be equivalent to an award of market damages in the first place, but only for a few of the cases.[95] The disgorgement remedy seems to leave the nonbreacher at risk for damages on its second contract; nothing in Professor Eisenberg's argument says otherwise.

[95] There is no particular reason, given his belief that the claimant had only suffered lost profits, for the disgorged money to go to the claimant rather than someone else.