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Uniform Commercial Code--Sales--Sections 2-508 and 2-608--Limitations on the Perfect-Tender Rule

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UNIFORM COMMERCIAL CODE—SALES—Sections 2-508 and 2-608—Limitations on the Perfect-Tender Rule

Just as parties to marriage contracts do not always live happily ever after, it is a fact of commercial life that a buyer and seller do not always live happily ever after the consummation of a sales contract. Even when the seller is satisfied with the arrangement, the buyer may try to cancel the contract either because he believes the seller has not and will not live up to his promise, or because changed circumstances have caused the buyer to feel that his purchase was not a good deal.

Buyer attempts to avoid sales contracts can occur in two contexts —merchants dealing with each other at arm's length, and merchants dealing with consumers. Contracts casebooks are full of cases involving merchant-buyers who cornered the glue or bolt market only to watch the price subsequently plummet. It was early observed that such a buyer will "often try to escape from a performance within the

business understanding of the contract, though not quite the legal, if he finds either that he can purchase the very same goods at a cheaper price on the open market or that his resale market has all but disappeared."[1] Of course, the merchant-buyer may be dissatisfied with his seller's performance or delivery, and therefore refuse to accept the tendered goods. In either situation, the buyer's balk deprives the seller of his bargain—the price—and may leave him with a shipment of unwanted goods.

Many cases in recent years have involved consumers who have purchased articles from merchants that have turned out to be defective.[2] When the consumer-buyer discovers a defect or becomes generally dissatisfied with his purchase, he also may try to cancel the contract or have the defective product replaced. Consumers, however, are usually in a weaker position to free themselves from sales contracts than are merchant-buyers. This weak bargaining position is usually a result of the consumer's limited finances and lack of technical knowledge—which may have prevented him from immediately discovering the defect—and of the relative insignificance of the transaction to the seller.[3] On the other hand, a consumer may regret having signed on the dotted line because the purchase looms as too great an expense or because he has discovered that he can make a better buy elsewhere. In such a case the fickle consumer may react like the foiled glue speculator and try to escape his contract.

An apparent solution to the buyer's predicament in all of these situations is to identify a defect in the seller's tender and demand that the contract be cancelled. While the buyer in a construction or personal-service contract must pay for an incomplete performance at the contract price—less damages caused by the breach—as long as the seller's breach is not "material,"[4] this doctrine of "substantial performance" is inapplicable to contracts for the sale of goods.[5] The substantial-performance doctrine guarantees the buyer that he will not have to pay the full contract price for a defective performance, and guarantees the seller that he will get paid for his work even

1. Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782, 801 (1935), quoted in R. SPEIDEL, R. SUMMERS & J. WHITE, COMMERCIAL TRANSACTIONS 719 (1969).

2. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

3. The consumer's weak bargaining position has been widely discussed. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) [2 UCC REP. SERV. 955]; H. BLACK, BUY NOW, PAY LATER (1961); Skilton & Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 MICH. L. REV. 1465 (1967).

4. *See* Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921); RESTATEMENT OF CONTRACTS § 275 (1932); Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903 (1942).

5. *See* R. SPEIDEL, R. SUMMERS & J. WHITE, *supra* note 1, at 716; UNIFORM COMMERCIAL CODE [hereinafter UCC] § 2-601(a).

though he tendered a technically imperfect performance. While the Uniform Commercial Code (UCC or Code) does not recognize this doctrine, it does acknowledge the need for protecting the interests of both buyers and sellers in this type of situation.

I. The Statutory Framework

Section 2-601[6] of the UCC gives a buyer of goods a right to reject for any nonconformity to the contract specifications. While this section essentially codifies the "perfect tender" rule of pre-Code sales law,[7] it expressly limits that rule by referring to section 2-612, which pertains to installment contracts, and sections 2-718 and 2-719, which allow contractual limitations on remedies. Moreover, other provisions in the Code have the effect of restricting the perfect-tender concept.[8] This Note will examine how the courts have applied two such sections—2-508 and 2-608—to protect the interests of buyers and sellers after tender.

In brief, section 2-508 limits the buyer's right to reject for nonconformity under section 2-601,[9] not by narrowing the range of activity available to him, but by giving the seller a right to cure a nonconforming defect.[10] Thus, while the buyer may have the right to reject the initial tender of goods, the parallel right of the seller

6. UCC § 2-601 provides:

> Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
> (a) reject the whole; or
> (b) accept the whole; or
> (c) accept any commercial unit or units and reject the rest.

7. *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, 206 (1963).

8. Other devices for mitigating § 2-601 are § 2-614 (substituted performance on failure of agreed manner of delivery), and § 2-504 (rejection only for "material loss or delay" ensuing from failure to make proper shipment). *See* Peters, *supra* note 7, at 209; and 1 State of New York Law Revision Commn. Report, Study of the Uniform Commercial Code 483 n.240 (1955).

As for the right of rejection itself:

> The Code links the buyer's right to reject with the discoverability of defects. Under 2-513(1) and 2-606(1), the buyer has a right to determine whether he wants to keep tendered goods or not; no implication of acceptance flows from buyer's custody until he had an opportunity to inspect. This opportunity is, however, a double-edged sword, for its availability precludes subsequent rejection for defects immediately discoverable.

Peters, *supra* note 7, at 207.

9. *See* note 6 *supra* and accompanying text.

10. UCC § 2-508 provides:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

to cure the defect makes avoiding the contract much more difficult. Section 2-608, on the other hand, works in a more circular manner. The thrust of its mitigating force arises from the fact that once acceptance is made, the buyer can revoke his acceptance only if there is a nonconformity which substantially impairs the product's value to him.[11] Since the general right to reject is lost under section 2-608 when the goods are accepted, and since under the terms of section 2-606 acceptance is accomplished fairly easily by "any act inconsistent with the seller's ownership" or by failure to reject after a reasonable opportunity to inspect,[12] the right of revocation is probably as important to buyers as is the right of rejection.[13]

This Note will first consider each of the two sections in isolation —beginning with section 2-508—and then will examine the confusion which has arisen from the courts' failure properly to distinguish between the two provisions.

II. Section 2-508: Cure by Seller of Improper Tender of Delivery; Replacement

A. *Section 2-508(1)*

Section 2-508(1) grants the seller the right to make a conforming delivery to correct a defect in the original tender as long as the

11. UCC § 2-608 provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
  (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
  (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

12. UCC § 2-606 provides:

(1) Acceptance of goods occurs when the buyer
  (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
  (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
  (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

It is possible that the draftsmen intended that § 2-606(1)(c) operate only in the specific case in which the buyer had attempted rejection and had thereafter used the goods. The language of the UCC and of the official comments, however, does not support that interpretation.

13. Concerning the importance of the right of revocation, it has been said: "Because the complexity of many goods and the casualness of most inspections naturally contribute to a high incidence of acceptance, a thorough appreciation of this 'posture' by the commercial lawyer is required." R. Speidel, R. Summers & J. White, *supra* note 1, at 734.

time for contract performance has not expired. This provision approximates the rules developed prior to the drafting of the Code.[14] The pre-Code law, however, placed one significant qualification on the seller's ability to correct a defect by making a conforming delivery—the buyer was not required to accept the second tender if he had reasonably believed that the nonconforming tender was the only one that would be made and had therefore changed his position.[15] The Code has apparently adopted this qualification, although not explicitly. Section 2-508(1) requires that the seller "*seasonably notify* the buyer of his intention to cure." [Emphasis added.] Thus, "If the seller has not indicated his intention to cure and the buyer changes his position, it could readily be concluded that the seller failed to give 'seasonable notice.' "[16]

Possibly because of its similarity to pre-Code law, litigation over section 2-508(1) seems to be nonexistent. However, one case[17] has been criticized for not considering this provision.[18] Moreover, it is difficult to determine how many other cases decided under section 2-508(2) could have come under subsection (1), because the courts do not always identify the date of delivery specified by the contract.

B. *Section 2-508(2)*

Section 2-508(2) provides that when a buyer rejects a nonconforming tender which the seller had "reasonable grounds to believe would be acceptable," the seller may, if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender. The obvious effect of the provision is to extend the seller's time for performance. The language does, however, raise at least two issues that deserve some attention.

1. *Reasonable Grounds To Believe*

The "reasonable grounds to believe" language has caused the courts the most difficulty in interpreting section 2-508. Comment 2 indicates that "reasonable grounds to believe" that the tender would be acceptable "can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract."[19] But the courts, in the de-

14. *See* 2 S. WILLISTON, SALES § 459 (rev. ed. 1948).

15. *Id.*

16. 1 STATE OF NEW YORK LAW REVISION COMMN. REPORT, STUDY OF THE UNIFORM COMMERCIAL CODE 484 (1955).

17. Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) [5 UCC REP. SERV. 30].

18. *See* Note, *Uniform Commercial Code—Rejection and Revocation—Seller's Right To Cure a Nonconforming Tender*, 15 WAYNE L. REV. 938, 946 n.35 (1969).

19. UCC § 2-508, comment 2.

cided cases under section 2-508(2), seem to be developing a "magnitude of defect" test for determining the reasonableness of the seller's grounds.

A District of Columbia case, *Wilson v. Scampoli*,[20] involved a new color television set having a red cast to the picture. Refusing to allow the seller to remove the set for repairs, the buyer first demanded a new set and then sought return of her money. The court, however, permitted cure because only "minor" repairs were required. In so doing, the court quoted Dean Hawkland, an advocate of the magnitude-of-defect approach: "The seller, then, should be able to cure . . . under subsection 2-508(2) in those cases in which he can do so without subjecting the buyer to any great inconvenience, risk or loss."[21] Cure was also allowed in *Bartus v. Riccardi*[22] because the nonconforming product, a hearing aid, was newer and more expensive than the model actually ordered. In a third case, *Zabriskie Chevrolet, Incorporated v. Smith*,[23] the New Jersey superior court refused to permit an automobile dealer to cure a defective transmission. The court found that the defect rendered the new car "practically inoperable,"[24] and therefore held that the seller could not reasonably expect the buyer to accept the car.

The ruling of *Zabriskie Chevrolet* has been criticized as developing a wholly separate major-minor defect test without basis in the Code.[25] While it probably would be contrary to the draftsmen's intent to apply the magnitude-of-defect concept as a conclusive test, such a standard is surely a relevant factor in determining the reasonableness of the seller's expectations.[26] On the basis of the three decisions to date—all handed down by inferior courts—it would be premature to conclude that this factor has become exclusively determinative of whether a seller had reasonable grounds to believe that a tender would be acceptable.[27]

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20. 228 A.2d 848 (D.C. Ct. App. 1967) [4 UCC REP. SERV. 178].

21. Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 MINN. L. REV. 697, 724 (1962), quoted at 228 A.2d at 850 [4 UCC REP. SERV. at 181].

22. 55 Misc. 2d 3, 284 N.Y.S.2d 222 (Utica City Ct. 1967) [4 UCC REP. SERV. 845].

23. N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) [5 UCC REP. SERV. 30].

24. 99 N.J. Super. at 457, 240 A.2d at 204 [5 UCC REP. SERV. at 41].

25. *See* Note, *supra* note 18, at 946-50.

26. *Id.* at 949.

27. In all three of the cases dealing with this issue, the magnitude of the nonconformity could be seen as a factor in determining whether usage of trade would normally allow the seller to cure—*i.e.*, if past usage of trade had permitted the cure of minor defects, then the seller had reasonable grounds to believe that minor defects could properly be cured. In *Zabriskie Chevrolet* the court reasoned that although usage of trade permitted the repair of major as well as of minor defects, such custom was contrary to public policy and should not be judicially enforced. 99 N.J. Super. at 456, 240 A.2d at 204 [5 UCC REP. SERV. at 41]. Another court could just as easily conclude that such custom and usage should be conclusive.

Regardless of whether the magnitude-of-defect concept is seen as an independent test or merely as a factor in determining reasonableness, it does signify an attempt by the courts to protect the buyer as well as the seller. To refuse to permit a seller to make a minor adjustment of a color television set deprives him of his bargain simply because the set may have been jostled somewhat during delivery. On the other hand, permitting a seller to patch up an inoperable car forces the buyer to keep a product for which he did not bargain and which he does not want. To this extent, then, the magnitude-of-defect standard is a useful method of weighing the interests of both parties and protecting their rights under the contract.

The response of the court in *Zabriskie* tended to give more weight to the interests of consumers:

> For a majority of people the purchase of a new car is a major investment, rationalized by the peace of mind that flows from its dependability and safety. Once their faith is shaken, the vehicle loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension. The attempted cure in the present case was ineffective.[28]

This approach also seems to rely on a subjective test based on the consumer-buyer's feelings towards the defective car. The court in *Wilson v. Scampoli*,[29] however, seemed to look solely at objective factors such as the buyer's inconvenience and risk. These cases may nevertheless be reconciled by reference to the reasonableness of the buyer's fears. The *Scampoli* court may have concluded that even if the buyer was subjectively apprehensive about her television set, such apprehension was unreasonable in light of the triviality of the defect. The *Zabriskie* court, on the other hand, apparently concluded that it was reasonable for a consumer's faith in the "dependability and safety" of a new car to be shaken when an integral part —the transmission—broke down shortly after delivery.

Thus, in trying case by case to work out what constitutes "reasonable grounds" for the seller to believe a tender would be acceptable, the courts appear to be trying to carry out the avowed purpose of section 2-508(2)—"to avoid injustice to the seller by reason of a surprise rejection by the buyer"[30]—but in so doing at least one court, in the *Zabriskie* case, has expressed a concern for the con-

28. 99 N.J. Super. at 458, 240 A.2d at 205 [5 UCC REP. SERV. at 42].

29. 228 A.2d 848 (D.C. Ct. App. 1967) [4 UCC REP. SERV. 178]. *See* text accompanying notes 20-21 *supra*.

30. UCC § 2-508, comment 2. *See also* notes 21 & 22 *supra* and accompanying text. In both *Scampoli* and *Bartus* the buyer absolutely refused the seller's curative tender regarding a minor defect, but the sellers in both cases were granted the right to cure.

sumer's interest by taking a restrictive view of the kinds of defects which the seller has a "right" to cure.

2. *Further Reasonable Time*

If the seller establishes that he had reasonable grounds to believe that a tender would be acceptable, section 2-508(2) grants him "a further reasonable time [beyond the contract date] to substitute a conforming tender."[31] As official comment 3 makes clear, the words "further reasonable time" are intended as words of limitation to protect the buyer.[32] That such a limitation is needed, and has been used to protect the buyer from abuse of the right to cure, is illustrated by *Tiger Motor Company v. McMurtry*.[33] In that case the buyer was forced to return a new car at least thirty times during the course of a year to correct a multitude of defects. The Alabama supreme court held that a seller did not have an unlimited period of time to cure under section 2-508(2), but it failed to define specifically what should constitute a reasonable time. The court merely stated that "at some point after the purchase of a new automobile, the same should be put in good running condition,"[34] and concluded that that point had been reached after one year.

In *Bartus v. Riccardi*[35] it was held that one week did not exceed the reasonable-time limit of section 2-508(2). The court, however, seemed to determine this issue on the basis of whether the buyer had changed position between the time of rejection and attempted cure. Finding that the buyer had not purchased a new hearing aid to replace the one that had been mistakenly delivered to him, and which was more expensive that the hearing aid he had ordered, the court concluded that he had not changed his position. It therefore recognized the seller's right to cure. Although the result in *Bartus* was probably satisfactory on the facts there presented, change of position does not seem to be generally acceptable as a conclusive test for determining reasonable time. In a large number of cases—including most consumer cases—a buyer will not take any affirmative action to alter his position since he expects the seller to cure the defect. Thus, in a case like *Tiger Motor*, as long as the buyer does not change his position the seller could go on indefinitely attempting to cure an inoperable product. More properly, a court should determine whether a reasonable time has expired by examining the particular facts before it. Among the factors that could

31. For the full text of UCC § 2-508(2), see note 10 *supra*.

32. UCC § 2-508, comment 3.

33. 284 Ala. 283, 224 S.2d 638 (1969) [6 UCC REP. SERV. 608].

34. 284 Ala. at 293, 224 S.2d at 647 [6 UCC REP. SERV. at 620], quoting from General Motors Corp. v. Earnest, 279 Ala. 299, 302, 184 S.2d 811, 814 (1966).

35. 55 Misc. 2d 3, 284 N.Y.S.2d 222 (Utica City Ct. 1967). *See* text accompanying note 22 *supra*.

appropriately be considered—in addition to change of position by the buyer—are the amount of inconvenience caused the buyer and the period of time necessary for the seller to complete his cure.[36]

III. Section 2-608: Revocation of Acceptance in Whole or in Part

The finality of the perfect-tender concept of section 2-601 is further eroded by section 2-608, which permits revocation of acceptance under certain circumstances if a nonconformity substantially impairs the accepted product's value to the buyer.[37] As the official comment observes:

> The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.[38]

The section sets out several conditions which must be met before a contract can be avoided through revocation after acceptance.

A. *Section 2-608(1)*

1. *Substantial Impairment of Value*

The first condition of section 2-608 is that the nonconformity must substantially impair the value of the goods to the buyer. Courts have been reluctant to make any general statements concerning what constitutes substantial impairment. As one court has commented: "Each case must be carefully examined on its own merits to determine what is a 'substantial impairment of value.' We are aware that what may cause one person great inconvenience or financial loss, may not another."[39]

Nonetheless, a significant factor in determining substantiality may now be emerging—the concept of "ease of correcting the defect." In a Pennsylvania case, *Rozmus v. Thompson's Lincoln-Mercury Company*,[40] the buyer of a new car twice returned it to the

36. For a discussion of reasonable time in the context of other UCC provisions, see Sutter v. St. Clair Motors, Inc., 44 Ill. App. 2d 318, 194 N.E.2d 674 (1963) [1 UCC Rep. Serv. 125]; Steel v. J.I. Case Co., 197 Kan. 554, 419 P.2d 902 (1966); Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966) [3 UCC Rep. Serv. 397]; Casey v. Philadelphia Auto Sales Co., 428 Pa. 155, 236 A.2d 800 (1968) [4 UCC Rep. Serv. 1012].

37. For the full text of UCC § 2-608, see note 11 *supra*.

38. UCC § 2-608, comment 1. *See also* Hawkland, *supra* note 21, at 725.

39. Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 S.2d 638, 646 (1969) [6 UCC Rep. Serv. 608, 618].

40. 209 Pa. Super. 120, 224 A.2d 782 (1966) [3 UCC Rep. Serv. 1025].

dealer because of a loud noise that it made. Even though the cause of the defect was determined, the buyer demanded that the dealer either give him another new car or return his trade-in. The court remanded this issue to the lower court, stating, "The reason why 'a substantial impairment of value' must take place before a revocation under Section 2-608 may take force is to preclude revocation for trivial defects or *defects which may be easily corrected.*"[41] Similarly, a county court in another Pennsylvania case, *Grucella v. General Motors Corporation*,[42] decided that a defect which hindered the ability to control a car was minor; the court stressed that the car could be, and in fact had been, easily repaired. *Tiger Motor Company v. McMurtry*[43] involved an automobile that the owner had returned to the dealer more than thirty times during a one-year period. The defects were never completely eliminated, and the court held that the buyer had properly revoked his acceptance. Although the opinion was silent on the point, it seems obvious that the extreme difficulty or impossibility of cure influenced the Arkansas court's determination that the impairment was substantial. *Campbell v. Pollack*,[44] a Rhode Island case, likewise involved a defect that was held to be substantial because it could not be cured.[45]

Based on a factual determination, the Oregon supreme court held in *Lanners v. Whitney*[46] that the "unairworthiness" of a used airplane substantially impaired its value to the buyer. Although the court did refer to a dispute in the testimony as to whether the buyer ever made demands for adjustment to the seller, it did not say whether cure was ever attempted or whether it could have been accomplished easily. Thus, this case could be restrictively viewed as simply deciding that airworthiness of a used aircraft is of crucial significance to its buyer. However, the technological defects that cause unairworthiness would also tend to make correction a difficult and significant undertaking. Therefore, *Lanners* may be read to support the general proposition that a factual determination must be made in each individual case in order to determine whether the nonconformity seriously decreased the value of the goods to the buyer. Given this view of the *Lanners* case, the ease of curability of the defect appears to be recognized by at least four courts as one factor which can be properly used to determine the substantiality of a defect.

41. 209 Pa. Super. at 124, 224 A.2d at 789 [3 UCC REP. SERV. at 1027] (emphasis added).

42. 10 Pa. D. & C.2d 65 (Philadelphia County Ct. 1956).

43. 284 Ala. 283, 224 S.2d 638 (1969) [6 UCC REP. SERV. 608].

44. 101 R.I. 223, 221 A.2d 615 (1966) [3 UCC REP. SERV. 703].

45. *Campbell* involved a defect of title. For a similar holding as to installment contracts, see Graulich Caterer, Inc. v. Hans Holterbosch, Inc., 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968) [5 UCC REP. SERV. 369].

46. 247 Ore. 223, 428 P.2d 398 (1967) [4 UCC REP. SERV. 369].

An alternative method of measuring substantial impairment of value is to determine the decrease in the product's fair market value that is caused by the defect. Under this method, if the cost of bringing the goods up to contract conformity is insubstantial in comparison with the contract price, the value would not be substantially impaired. Since the expense of cure should normally vary inversely with the ease of curability, this approach is really a quantification of the ease-of-curability approach. However, the courts have not yet discussed the substantial-impairment issue in these terms.

2. *Grounds of Acceptance*

The second condition which section 2-608(1)[47] imposes on the buyer's right to revoke acceptance concerns the basis of the buyer's acceptance. In order to be able to revoke, the buyer must have accepted the goods on the reasonable but unfulfilled assumption that the nonconformity would be cured. Alternatively, if there had been no discovery of the nonconformity, the buyer's acceptance must have been induced by the difficulty of discovery or by the seller's assurances.

a. *Defects discovered before acceptance.* It is difficult to pinpoint exactly what factors should be used to determine when the buyer has a basis for a reasonable assumption that a known defect[48] would be cured —the 2-608(1)(a) situation—because there appear to be no published decisions involving such a factual situation. A possibly useful line of thinking may, however, be suggested. Under section 2-608(1)(b)[49] a buyer can revoke his acceptance of a product with an *undiscovered* defect if he can show that his acceptance was induced by the seller's assurances that such defects would be cured.[50] It is submitted that a similar, though more flexible, standard could usefully be incorporated into section 2-608(1)(a), since a buyer who accepts a product with a known defect would seldom have a reasonable basis for assuming that the defect would be cured unless he has received some indication, express or implied, to that effect from the seller. Such an indication could be communicated by oral assurances or by written warranty. It is less clear whether, absent a direct expression, an implied warranty of merchantability would be sufficient assurance for

47. *See* note 11 *supra.*

48. Since UCC § 2-608(1)(b) explicitly states that it applies only to acceptances made without discovery of the nonconformity, it appears that § 2-608(1)(a) was intended to apply to acceptances made of products with known defects. Any other construction would mean that both paragraphs (a) and (b) would apply to the undiscovered defect situation.

49. *See* notes 52-64 *infra* and accompanying text.

50. *See* Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964) [2 UCC REP. SERV. 273].

the buyer to assume that a known defect would be cured. That question could turn on the buyer's knowledge of the law of implied warranties at the time of acceptance.[51]

b. *Defects discovered after acceptance.* Paragraph (b) of section 2-608(1) deals with the more common situation of the buyer being unaware of the defect at the time of acceptance. Under those circumstances a buyer may subsequently revoke only if the nonconformity was difficult to discover or if he was induced to accept without discovery because of the seller's assurances. Official comment 3 to section 2-608 notes that with regard to paragraph (b), " 'assurances' . . . can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery." With an amazing uniformity, the cases have demanded actual inducement to delay discovery before they will find "assurances."

In *Lanners v. Whitney*[52] the court explicitly held that assurances of airworthiness were reasonably relied upon by the buyer and that he was thereby actually induced to accept the plane without first inspecting it. In *Rozmus v. Thompson's Lincoln-Mercury Company*[53] the court found that the buyer did not discover the nonconformity before acceptance of the automobile because he had not had an opportunity to drive it. Therefore, "he accepted on the basis of the usual warranties (assurances) which are part of new car sales."[54] It appears that the court engaged in similar reasoning in *Zabriskie*

51. There are several cases which hold that a warranty, whether explicit or implied, can constitute seller's assurances for purposes of UCC § 2-608(1)(b). *See* Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 124, 224 A.2d 782, 784 (1966) [3 UCC REP. SERV. 1025, 1028], in which the court said that "he [the buyer] accepted on the basis of the usual warranties (assurances) which are part of new car sales"; and Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) [5 UCC REP. SERV. 30], in which the court would have allowed revocation based on a breach of implied warranty as an alternative to its finding of rejection. *See also* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 S.2d 638 (1969) [6 UCC REP. SERV. 608], which is interesting for the error the Alabama court made in failing to draw the distinction between paragraphs (a) and (b) of § 2-608(1). In that case a new car was covered by an express warranty. Referring to paragraph (a) without citing it, the court stated that, "Obviously, McMurtry purchased the automobile on the reasonable assumption that any nonconforming defects would be cured." 284 Ala. at 293, 224 S.2d at 647 [6 UCC REP. SERV. at 619]. In that case, however, as in most new-car cases, the buyer did not know of any defects *before* acceptance, as required by paragraph (a). Nevertheless, he still had the option of revoking under paragraph (b), because he had been induced to accept by the seller's assurances in the form of the warranty.

52. 247 Ore. 223, 428 P.2d 398 (1967) [4 UCC REP. SERV. 369]. *See* text accompanying note 46 *supra.*

53. 209 Pa. Super. 120, 224 A.2d 782 (1966) [3 UCC REP. SERV. 1025]. *See* text accompanying note 40 *supra.*

54. 209 Pa. Super. at 124, 224 A.2d at 784 [3 UCC REP. SERV. at 1028].

Chevrolet,[55] although the language of the decision is not completely clear on this point.

In *Lawner v. Engelbach*[56] the Pennsylvania supreme court, in allowing revocation of acceptance, relied heavily on the buyer's right to inspect under section 2-513(1).[57] In that case, a jewelry dealer claimed that a ring was worth 30,000 dollars and offered to rescind the sale if it were appraised at a lesser value. The buyer paid for the ring and took it to an appraiser who valued the ring at only 15,000 dollars. It is submitted that the court's reliance on a right to inspect under section 2-513(1) was misplaced, even though it was in the spirit of the other decisions requiring inducement to delay inspection. Section 2-513(1) gives the buyer the right to inspect "*before* payment or acceptance" [emphasis added]; under section 2-608, however, acceptance must already have occurred before it can be revoked. The court's alternative approach appears to stand on more solid ground. Under this approach, the court found that the jeweler's original offer to rescind the sale constituted an express warranty under section 2-313(1)(a).[58] When the ring failed to live up to its warranty, the court concluded that the buyer "had the right to revoke her acceptance of the ring under UCC §§ 2-711(1) and 2-608(1)."[59] Thus, the buyer can be seen as having been induced by the seller's assurances to accept the ring without discovery of the defect.

Campbell v. Pollack[60] is one of the few cases decided under section 2-608(1)(b) that does not explicitly mention actual inducement to delay discovery as a necessary element of an assurance. However, the buyer there actually was induced to accept the contents of a car wash business without investigating title, by the seller's assurances that he was selling "everything within the four walls."[61] A New Mexico case, *Grandi v. LeSage*,[62] held that representations

55. 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) [5 UCC REP. SERV. 30]. *See* note 23 *supra* and accompanying text.

56. 433 Pa. 311, 249 A.2d 295 (1969).

57. UCC § 2-513(1) provides:

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

58. UCC § 2-313(1)(a) provides:

(1) Express warranties by the seller are created as follows:
(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

59. 443 Pa. at 316, 249 A.2d at 298.

60. 101 R.I. 223, 221 A.2d 615 (1966) [3 UCC REP. SERV. 703].

61. 101 R.I. at 226, 221 A.2d at 617 [3 UCC REP. SERV. at 705].

62. 74 N.M. 799, 399 P.2d 285 (1965) [2 UCC REP. SERV. 455].

made in a racing form as to the sex of a horse constituted assurances within the meaning of section 2-608(1)(b) for purposes of a claiming-race sale. Since the customs of racing did not allow an inspection before such a race, the effect of the representation was to induce the buyer to delay his discovery. Thus, the seller's assurances can come in the form of explicit oral promises, written warranties, or printed descriptions of the goods.

Seller's assurances are not necessary for a revocation under paragraph (b) if the defect is difficult to discover. In another horse sale case the court in *Miron v. Yonkers Raceway, Incorporated*[63] reasoned that:

> Since a finding of acceptance [under section 2-606(1)(b)] depends upon a finding that there was a reasonable opportunity to inspect, the question whether acceptance may be revoked [under section 2-608(1)(b)] as reasonably induced by the difficulty of discovery before acceptance . . . must be answered by reference to the scope of the inspection which there was a reasonable opportunity to make.[64]

Because the inspection normally allowed at a horse auction would have disclosed the defect of the horse (a broken bone), the court denied revocation. Therefore, in cases based on difficulty of discovery, as well as in cases based on seller's assurances, the buyer's right to inspect often will constitute the determining issue.

B. *Section 2-608(2)*

Whether the buyer discovers the defect before or after acceptance, section 2-608(2) requires that he notify the seller of his revocation of acceptance within a reasonable time after he discovers or should have discovered the ground for it, and before any substantial change in the condition of the goods occurs that is not caused by their own defects.[65] The official comment offers a guideline for defining a reasonable time period:

> Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender.[66]

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63. 400 F.2d 112 (2d Cir. 1968).

64. 400 F.2d at 119-20.

65. For the text of UCC § 2-608(2), see note 11 *supra*.

66. UCC § 2-608, comment 4. Comment 5 states that "More will generally be necessary [under this section] than the mere notification of breach . . . ." The two forms of notice therefore should be distinguished. Notice of breach occurs when the buyer lets the seller know that he is dissatisfied with the goods. Notice of revocation, however, is the buyer's communication, after acceptance, that he no longer wants the goods and that he desires to cancel the sale. According to § 2-607(3), if the buyer does not

This suggestion therefore emphasizes the length of negotiations and attempted adjustments as the major criteria for determining what constitutes reasonable time. However, the courts also seem to be developing the concept of "difficulty of discovery" as another factor in determining reasonable time.

For example, in *Schneider v. Person*[67] a Pennsylvania court refused to decide as a matter of law that 6½ months was an unreasonable period of time for a buyer to wait before revoking acceptance of a horse that suffered from leg splints. Although delays of six[68] and nine[69] months had been found unreasonable as a matter of law in earlier cases, the court stated that those cases were distinguishable because one involved a defect that could have been discovered easily and the other involved a merchant-buyer. Thus, although the *Schneider* case was remanded for a jury determination of whether the delay was unreasonable, the court left open the possibility that 6½ months could be a reasonable time in cases involving consumer-buyers and defects that are difficult to discover. Similarly, it was held in *Grandi v. LeSage*[70] that four months was not an unreasonable time in which to notify the seller of the revocation of acceptance of a gelding which the seller had represented as a stallion. Exhibiting a similar concern that "reasonable time" should reflect the time necessary for a buyer to discover or determine that a defect exists, the Arkansas supreme court in *Parker v. Johnston*[71] held that several months was not an unreasonable time for the buyer of a business to determine positively that the monthly income therefrom was less than the seller had represented.

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give the seller timely notice of breach, he is left without any remedy. Hence, unless the buyer gives the seller timely notice of breach and timely notice of revocation, he cannot revoke his acceptance.

Following the intent of the draftsmen as expressed in comment 5, the courts have applied different standards for determining what constitutes reasonable time for rejection and reasonable time for revocation. In Campbell v. Pollack, 101 R.L. 223, 221 A.2d 615 [3 UCC REP. SERV. 703] (*see* notes 44-45 & 60 *supra* and accompanying text), the court held that although a reasonable opportunity for rejection under § 2-602 had expired, the buyer nevertheless had timely revoked his acceptance; apparently, the court tacitly decided that a reasonable time under § 2-608(2) had not yet expired. Other cases on reasonable time for rejection under § 2-602 include: Miron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. 1968) (*see* notes 63-64 *supra* and accompanying text); Green Chevrolet Co. v. Kemp, 241 Ark. 62, 406 S.W.2d 142 (1966) [3 UCC REP. SERV. 805]; Trailmobile Div. of Pullman, Inc. v. Jones, 118 Ga. App. 472, 164 S.E.2d 346 (1968) [5 UCC REP. SERV. 1066]; and Shreve v. Castro Trailer Sales, Inc., 150 W. Va. 669, 149 S.E.2d 238 (1966) [3 UCC REP. SERV. 796].

67. 34 Pa. D. & C.2d 10 (C.P. Lehigh County 1964) [2 UCC REP. SERV. 37].

68. General Foods Corp. v. Bittinger Co., 31 Pa. D. & C.2d 282 (C.P. York County 1963) [1 UCC REP. SERV. 168].

69. Necho Coal Co. v. Denise Coal Co., 387 Pa. 567, 128 A.2d 771 (1957).

70. 74 N.M. 799, 399 P.2d 285 (1965) [2 UCC REP. SERV. 455]. *See* note 62 *supra* and accompanying text.

71. 244 Ark. 355, 426 S.W.2d 155 (1968) [5 UCC REP. SERV. 369].

The court in *Lanners v. Whitney*[72] also allowed the buyer to take the time necessary—about three weeks—to inspect fully and discover the extent of the nonconformity before revoking. The court reasoned:

> Plaintiff was not required to notify the defendant of his intention to revoke his acceptance until he was reasonably certain that the nonconformity substantially impaired the value of the airplane to him. . . . His mere suspicions prior to inspection were not sufficient to require notice. . . . Plaintiff was entitled to and did inspect the aircraft and made attempts to adjust the differences between the parties prior to revoking his acceptance.[73]

Thus, reasonable time in *Lanners* was determined with reference to both difficulty of discovery and attempts at adjustment.

In *Tiger Motor Company v. McMurtry*[74] the court looked solely to how long attempts at adjustments had continued, in order to determine what constituted a reasonable time for purposes of section 2-608(2). The buyer had returned his new car to the dealer on at least thirty occasions but the multiple defects were never completely corrected. The court held that a period exceeding one year was a reasonable time for revocation in that case, because of the buyer's constant contact with the seller and the seller's continuous knowledge of the buyer's dissatisfaction. This case presented the type of situation which the Code commentators apparently had in mind when they stated that because the 2-608 remedy would usually be resorted to after attempts at adjustment had failed, the time period should therefore be longer than that allowed for rejection under section 2-602(1).[75]

Finally, section 2-608(2) requires that revocation be made "before any substantial change in [the] condition of the goods which is not caused by their own defects." Apparently, none of the cases decided under section 2-608 have dealt with this issue. Official comment 6, however, seems to indicate that this language is solely concerned with physical deterioration or destruction of the goods. Thus, this language could impose a more restrictive time limit on the buyer's right of revocation when perishable goods are involved.

IV. The Effect of Section 2-508 on Section 2-608

A considerable amount of confusion has arisen over whether section 2-508(2) has any effect on revocation of acceptance under section 2-608. The Code, however, indicates that it does not have

72. 247 Ore. 223, 428 P.2d 398 (1967) [4 UCC Rep. Serv. 369]. *See* notes 46 & 52 *supra* and accompanying text.

73. 247 Ore. at 235, 428 P.2d at 403-04 [4 UCC Rep. Serv. at 378].

74. 284 Ala. 283, 224 S.2d 638 (1969) [6 UCC Rep. Serv. 608].

75. *See* note 64 *supra* and accompanying text.

such an effect. Section 2-508(2) reads, in part: "(2) Where the buyer *rejects* a non-conforming tender . . . the seller may . . . have further reasonable time to substitute a conforming tender."[76] Since rejection of goods must take place *before* acceptance—as defined in section 2-606—occurs, and since revocation of acceptance can occur only *after* the buyer has accepted the goods, the 2-508(2) right to cure cannot arise when revocation is attempted. Nevertheless, some courts have assumed that a seller may attempt cure after receiving notice of revocation of acceptance.[77]

Part of the confusion may be attributed to the Code's apparent inequity, since it is conceptually difficult to see why a seller should have a right to cure when the buyer *rejects*, but should not have such an opportunity when the buyer *revokes* his acceptance. This incongruity is heightened by the apparent ease with which acceptance can occur—when the buyer "does any act inconsistent with the seller's ownership."[78] Additional confusion arises from the fact that courts frequently will hold in the alternative that if the buyer did not accept the goods, he properly rejected; if he did accept the goods, he properly revoked.[79] Or a court may simply say that assuming arguendo that acceptance was made, the buyer accomplished proper revocation.[80]

As a result, courts have applied section 2-508 to cases where there was no certainty that acceptance ever occurred. Thus, in *Bartus v. Riccardi* the court held that the "further reasonable time" language of section 2-508(2) permits the seller to cure after revocation

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76. (Emphasis added.) For the full text of UCC § 2-508(2), see note 10 *supra*.

77. *See* notes 81-83 *infra* and accompanying text.

78. UCC § 2-606(1)(c). *See* note 12 *supra* and accompanying text. The confusion is enhanced by the fact that courts have differed over whether acceptance has arisen from an identical set of facts. For example, the court in Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) [5 UCC REP. SERV. 30], held that a buyer did not accept a car merely by driving it home. That court reasoned that the first few miles in a new car constituted a "reasonable opportunity to inspect" under § 2-606(1)(a), and that therefore the first drive should not be construed as an acceptance. 99 N.J. Super. at 452-53, 240 A.2d at 201-02 [5 UCC SERV. REP. at 38]. However, in Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966) [3 UCC REP. SERV. 1025], the court held that driving a new car home does constitute acceptance:

> He [the buyer] executed the conditional sales contract which provided that he acknowledged the acceptance of the Mercury in good order, and he drove it from the showroom to his home. Section 2-606 . . . provides that acceptance takes force when the buyer either signifies his acceptance to the seller or does an act inconsistent with the seller's ownership.

209 Pa. Super. at 784, 224 A.2d at 784 [3 UCC REP. SERV. at 1027].

79. *E.g.*, Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d (1968) [5 UCC REP. SERV. 30].

80. *E.g.*, Tiger Motor Co. v. McMurtry, 284 Ala. 283, 224 S.2d 638 (1969) [6 UCC REP. SERV. 608].

of acceptance has been attempted.[81] Although the Alabama court found a proper revocation in *Tiger Motor,* it still felt obliged to discuss cure. Without mentioning section 2-508, it cited *Zabriskie Chevrolet* on the cure issue, and held that the seller did not have an unlimited time to cure defects.[82] Similarly, the discussion by the New Jersey court in *Zabriskie Chevrolet* in connection with its alternative holding that revocation was accomplished if rejection was not, implied that section 2-508 would be effective under either situation.[83]

While section 2-608 does introduce the concept of cure in relation to sellers' assurances under paragraph (1)(a), this mere mention does not confer on the seller any right to cure after acceptance. Cure may properly be considered as a factor in determining substantial impairment of value to the buyer[84] and reasonable time for notification of revocation.[85] But it is submitted that the notion that a seller has a right to attempt cure after a buyer gives notice of revocation of acceptance is a faulty conclusion reached by courts which have confused sections 2-508 and 2-608.

V. Conclusion

The confusion which has developed concerning sections 2-508 and 2-608 may also be attributable to the fact that these two sections tend to serve the same general purpose; the emphasis of each section, however, does differ. Section 2-508 protects sellers who are willing and able to live up to their promises but who have failed, in relatively minor respects, to make perfect tenders. In cases like *Tiger Motor* and *Zabriskie Chevrolet,* however, the courts, when construing that provision, have also kept in mind the interests of unsophisticated consumers. Similarly, while section 2-608 grants buyers the post-acceptance right to cancel purchases of defective goods, courts in cases like *Bartus* have protected sellers against buyers who unreasonably complain of trivial defects, by emphasizing, for example, the substantial-impairment requirement.

The net effect of these two sections is to de-emphasize the finality of the buyer's acts of acceptance and rejection—under appropriate circumstances a seller may cure his defective tender, and under other circumstances a buyer may revoke an inopportune acceptance. In determining when the conditions exist that trigger these rights

81. 55 Misc. 2d 3, 6, 284 N.Y.S.2d 222, 224 (Utica City Ct. 1967) [4 UCC Rep. Serv. 845, 847]. *See* text accompanying note 22, and see note 30 *supra.*

82. 284 Ala. at 293, 224 S.2d at 647 [6 UCC Serv. Rep. at 619-20].

83. 99 N.J. Super. at 453-54, 240 A.2d at 202-03 [5 UCC Serv. Rep. at 39-40].

84. *See* notes 39-46 *supra* and accompanying text.

85. *See* notes 66-75 *supra* and accompanying text.

to reject and to revoke, the courts have tended to examine the particular facts of each case. Such factual scrutiny is necessary since the cases often turn on the application of the words "reasonable" and "substantial." Moreover, it appears that more than one court has based its decision on a consideration whether the buyer is trying to avoid his obligation or whether he has a legitimate complaint about the delivered goods. Thus, a particular case may simply turn on which party can establish the most factors that, in light of the guidelines provided by sections 2-508 and 2-608, support the reasonableness of his position.