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Uniform Commercial Code: Minor Repairs or Adjustments Must Be Permitted by a Buyer When the Seller Attempts to Cure a Non-conforming Tender of Merchandise

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Uniform Commercial Code: Minor Repairs or Adjustments Must Be Permitted by a Buyer When the Seller Attempts To "Cure" a Nonconforming Tender of Merchandise

Plaintiff's new television set had a color malfunction when delivered by the seller. Seller unsuccessfully attempted to correct the malfunction in buyer's home and requested the buyer's consent to take the set's chassis to his shop for inspection and minor adjustments or repairs. The seller promised that if the defect could not be repaired the buyer would be given a new television set. The buyer refused to allow removal of the chassis and demanded either a new set or the refund of his purchase price. Seller renewed his offer to repair and the buyer brought an action for rescission. The lower court entered judgment for the buyer, granting rescission which entitled buyer to the return of the purchase price plus interest and costs. On appeal, the Circuit Court for the District of Columbia reversed, *holding* that the seller had a right to attempt to "cure" his nonconforming tender, that minor adjustments and repairs were means of effecting such cure, and that the buyer's insistence upon replacement or refund so interfered with the seller's rights[1] as to defeat the buyer's remedies. *Wilson v. Scampoli*, 228 A.2d 848 (D.C. Ct. App. 1967).

Most early law concerned with the sale of goods included the rigid rule that any material defect in tender of goods constituted a breach of contract giving immediate rise to a cause of action in the buyer.[2] Many courts developed rationales to mitigate this rigidity where the seller's tender, though nonconforming, manifested no intent to repudiate the contract. One of the major mitigating concepts developed was that of "cure," whereby a seller was permitted to substitute a conforming for a nonconforming tender.[3] Historically, cure permitted a seller to liquidate encumbrances upon title,[4] to repurchase and de-

1. *Cf.* Castille v. Champ Auto Sales, 92 So. 2d 131 (La. Ct. App. 1957). *Castille* involved tender of a defective title to an automobile. The court held that the buyer's unreasonable reliance upon his "rights" frustrated the seller's attempts to cure, that cure could have been easily effected with the buyer's cooperation, and that the buyer's actions barred his right to rescind.

2. *See* Starks v. Schlensky, 128 Ill. App. 1, 4 (1906); Wiburg & Hannah Co. v. U. P. Walling & Co., 113 S.W. 832, 834 (Ky. Ct. App. 1908).

3. For a discussion of cure under the common law see Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 MINN. L. REV. 697, 703-04 (1962).

4. *See, e.g.*, Reese v. Kapp, 82 Kan. 304, 108 P. 96 (1910); Jaenke

liver a chattel which had been taken from the buyer by attachment,[5] or to substitute a totally new tender.[6] However, the Uniform Sales Act greatly inhibited the courts' use of cure as a mitigating concept.[7] The Uniform Commercial Code, now widely adopted,[8] has incorporated and revitalized the concept of cure,[9] but the relevant Code sections are so poorly drafted and difficult to locate that they are seldom utilized.[10]

In applying the Code to the facts in *Scampoli*, the court first determined that the sections governing warranties need not be considered, suggesting that where the seller has a right to cure, failure to cure successfully rather than the breach of warranty itself constitutes the breach of contract. The court first determined the reasonable expectancies of the seller by examining section 2-508[11] which governs the cure of nonconforming tenders. Subsection (2) thereof specifies that where the seller had reasonable grounds to believe that the tendered goods would be acceptable he may cure, upon seasonable notification to the buyer, when he is surprised by the buyer's rejection.[12] Since the seller in the instant case delivered the new television set to the buyer in the manufacturer's crating without having in-

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v. Taylor, 160 La. 109, 106 So. 711 (1925); Baranowski v. Linatsis, 95 N.H. 55, 57 A.2d 155 (1948).

5. *See* Lee v. Woods, 161 Ky. 806, 171 S.W. 389 (1914). In *Lee*, the buyer's new mule was attached in foreclosure of a mortgage, and the buyer kept the mule while the various parties fought over title. The court held that the seller had cured the tender where he eventually bought the mule and retendered it to buyer, the buyer having been out of actual possession only a few days.

6. *See* Standard Mfg. Co. v. Slaughter, 122 Ill. App. 479 (1905) (substitution of bond on merchandise); Mann v. Eastern Sugar & Prod. Co., 224 Mass. 100, 138 N.E. 244 (1923).

7. *See* Hawkland, *supra* note 3, at 712. The author states that due to the strict nature of election between rescission and damages under the Uniform Sales Act, the courts found few instances where cure could be fitted into the scheme of remedies.

8. With the exception of Louisiana, all of the states plus the District of Columbia and the Virgin Islands have now enacted the Uniform Commercial Code. The Code is now effective in all enacting jurisdictions including Arizona, Idaho, and South Carolina, where it went into effect January 1, 1968. 22 BUS. LAW 707 (1967).

9. *See* Hawkland, *supra* note 3, at 722.

10. *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, 210 (1963).

11. D.C. CODE ANN. § 28-2-508 (Supp. V, 1966).

12. UNIFORM COMMERCIAL CODE § 2-508, Comment 3 emphasizes that the further reasonable time within which the seller is allowed to cure is a limitation upon the *seller*, and will be determined by the particular circumstances at the time of rejection.

spected it, the court concluded that the seller had no reason to think it would be unacceptable to the buyer.[13] The court stated that the buyer would not have been greatly inconvenienced by the seller's attempts to cure,[14] and that this, coupled with the seller's reasonable surprise at the buyer's rejection, gave the seller a right to cure under section 2-508(2).

The central issue in *Scampoli* thus became whether "repairs" are included in cure under section 2-508.[15] Since no jurisdiction had previously addressed itself to construing cure under the Code, the court turned for guidance to analogous areas. The court stated that several courts and commentators[16] had indicated that minor repairs were acceptable as a means of correcting a minor breach of *warranty* where the buyer was not subjected to any great inconvenience, risk, or loss.[17] Thus, the seller would not be found to have breached his contract when his good faith efforts to avoid a breach by repairing his nonconforming tender were thwarted by the buyer.[18] As a matter of sound commercial policy the outcome in the instant case appears to have merit. However, the court's reasoning left much to be desired in terms of integrated analysis of the problems under several material sections of the Code.

In *Scampoli*, the parties and both the lower and appellate courts dealt with the case as an action for rescission, giving no

13. 228 A.2d at 849.

14. *Id.* at 850.

15. Cure is not defined in § 2-508 or anywhere else in the Code. It could mean the substitution of a new tender for the prior nonconforming tender, major repairs or adjustments, minor repairs or adjustments, or just minor adjustments. Section 2-508 is included in Part 5 of the Sales Article, which contains the sections on Performance. Reference is made to § 2-508 in only one place in Part 6, which contains the sections on the buyer's rights and duties on improper delivery, a cross reference to point 2, and comments to § 2-605. This total failure to relate the seller's cure to a buyer's rejection occurs despite the little use that the courts have made of § 2-508(1), though it is the most frequently encountered under the common law and the novelty of cure as allowed under § 2-508(2). *See* Hawkland, *supra* note 3, at 722. As to cures under § 2-508(2), *see, e.g., The Uniform Commercial Code*, 37 STATE B. CAL. J. 119, 149 (1962). *But see* State Comment, ILL. ANN. STAT. ch. 26, § 2-508 (1965).

16. Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960); L. & N. Sales Co. v. Little Brown Jug, Inc., 12 Pa. D. & C.2d 469 (Phila. County Ct. 1957); W. WILLIER & F. HART, FORMS AND PROCEDURES UNDER THE UCC ¶ 24.07 [4]; Hawkland, *supra* note 3.

17. 228 A.2d at 849.

18. *Id.* at 850. A decisive policy factor in this determination was the court's cognizance that new color television sets frequently required minor repairs to put them in working order.

consideration to the buyer's many remedies under the Uniform Commercial Code. Contrary to the provisions of the Uniform Sales Act and the principles of the common law, the term "rescission" is no longer utilized by the Uniform Commercial Code.[19] Also contrary to the Uniform Sales Act and common law, a buyer under the Code need not make an election between remedies.[20] Under section 2-711(1) a rejecting or revoking buyer may cancel the contract, recover so much of the price as he has paid, cover, and recover damages for nondelivery. Moreover, section 2-711(3) allows a buyer a security interest in any goods held plus expenses incurred due to seller's breach where the buyer, as in *Scampoli*, has paid any part of the price. Further, sections 2-715 and 2-714 set forth the buyer's rights to incidental and consequential damages as well as to damages recoverable for breach respecting accepted goods.

Under the Code, a buyer may either reject a nonconforming tender or revoke his prior acceptance of it.[21] However, since section 2-508 is operative only where the buyer has rejected a nonconforming tender, the *Scampoli* court should first have determined whether the buyer had rejected, or had accepted and subsequently revoked his acceptance of the television set.

Section 2-601 gives the buyer the options of rejection, acceptance, or partial acceptance. The buyer's rejection, which may be for any nonconformity, must be seasonable[22] and the buyer must avoid any exercise of ownership or failure to take reasonable care of the goods possessed at the seller's disposition.[23] It is arguable that in the instant case rejection occurred upon buyer's demand for a new set or the return of the purchase price and, although buyer retained possession of the set, his abstention from using it[24] met the requirements of section 2-601.

Assuming rejection, the *Scampoli* court should then have examined section 2-605 to determine whether or not the buyer could rely upon the defect alleged to establish breach of the contract. Given the facts in *Scampoli*, where the seller was

19. *See* UNIFORM COMMERCIAL CODE § 2-608, Comment 1.

20. *Id.*; *see* UNIFORM SALES ACT § 69(2): "Where the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

21. The Code has substituted rejection under § 2-601 for rescission of the contract of sale, and revocation of acceptance under § 2-608 for rescission of the sale.

22. UNIFORM COMMERCIAL CODE § 2-602.

23. *Id.*

24. 228 A.2d at 849.

clearly and seasonably aware of the defect upon which the buyer was relying, section 2-605 would seem to present no problem. Had notice of defect been an issue, a different procedure would have obtained.[25]

Having considered these Code requirements, the court should then have proceeded to the question of when a seller has the privilege of substituting a conforming tender. The court in the instant case found, in effect, that section 2-508 cure is interposed between section 2-601 rejection and the buyer's remedies under the Code.[26] Thus, cure acts as a sharp check upon a buyer's rejection of tender. Therefore, if the seller is in a position, as in *Scampoli*, to persuade a court that he had reasonable grounds for believing that his tender would be accepted, the buyer must afford him the opportunity to substitute a conforming tender.[27] Should the buyer refuse to cooperate, the court can find that the seller has not breached his contract.[28]

The seller, however, has only one opportunity to substitute conforming tender[29] and, should he fail, he has breached and the buyer has an action for both ordinary and consequential damages.[30] Had the buyer in *Scampoli* been informed of the Code provisions, he would have been cognizant of the fact that seller had only one opportunity to cure and could have argued that the attempt to cure the set in the buyer's home had exhausted seller's right to cure by substitution.

Assuming, *arguendo*, that the buyer's conduct raised the issue of acceptance,[31] examination of the relevant sections of the

25. Because seller in the instant case had been unable to remove the chassis and diagnose the malfunction prior to trial, buyer would have had the burden of showing that the seller could not have cured even if notified. Section 2-605(1)(a) states that if buyer fails to give seasonable notice to seller of a defect which seller could have cured, buyer is precluded from relying upon it to justify rejection. However, if the defect proves to be one which the seller could not have cured even if given seasonable notice of it, buyer may rely upon that defect to establish breach even though unstated at the time of his rejection. *See* UNIFORM COMMERCIAL CODE § 2-605, Comment 1, discussing the Code policy on notice.

26. 228 A.2d at 849. This can only be implied since nowhere in the opinion is any section other than § 2-508 mentioned.

27. *See* UNIFORM COMMERCIAL CODE § 2-508(2).

28. *See* Castille v. Champ Auto Sales, 92 So. 2d 131 (La. Ct. App. 1957); Bonney v. Blaisdell, 105 Me. 121, 73 A. 811 (1909).

29. American White Bronze Co. v. Gillette, 88 Mich. 231, 50 N.W. 136 (1891).

30. UNIFORM COMMERCIAL CODE § 2-711.

31. The court in *Scampoli* assumed that the buyer's conduct constituted a rejection of the nonconforming tender. Although this assumption is not without merit, some of the facts give rise to a contrary infer-

Code dealing with acceptance is required. Under section 2-606, a buyer will be deemed to have accepted when he signifies to the seller that he accepts the tender whether or not conforming, fails to make an effective rejection within a reasonable time after delivery of tender of the goods, or does any act inconsistent with the seller's ownership. If a buyer is deemed to have accepted tender under section 2-606, his demand for a refund or replacement would constitute not rejection but revocation of acceptance under section 2-608. However, unlike section 2-601, section 2-608 does not incorporate the "rule of perfect tender,"[32] but allows revocation only where the nonconformity substantially impairs the value of the thing tendered.[33]

Although the privilege of cure is not available under section 2-508 when the buyer revokes his acceptance,[34] cure by a seller is inferentially encompassed within section 2-608. When the buyer accepts tender on the reasonable assumption that its nonconformity will be cured, subsection 2-608(1)(a) allows a later revocation only when the seller subsequently fails to cure. Although the seller has had an opportunity to cure prior to the buyer's revocation under (1)(a), that privilege is not explicitly incorporated in subsection 2-608(1)(b). However, the official comments to section 2-608 speak of good faith attempts at adjustments between the parties and prevention of surprise,[35] as does section 2-508.[36] Thus the conclusion that cure is not available would seem to be contrary to the underlying policy of the Code. In addition, subsection 2-608(3) states that once a buyer has revoked his acceptance of a tender of goods he has the same duties with regard to them as if he had rejected them. Moreover, given the strong policy of the Code encouraging reason-

ence. In the instant case the buyer had possession of the television set for two days before the seller's serviceman called to attempt to adjust the set. Also, the buyer continued to exercise dominion over the goods throughout the negotiations between the parties up to the time of appeal. 228 A.2d at 849.

32. *See* S. WILLISTON, SALES (rev. ed. 1948), for a discussion of this problem. *See also Project—A Comparison of California Sales Law and Article Two of the Uniform Commercial Code, Part II*, 11 U.C.L.A.L. REV. 78 (1963), for a brief discussion of the "rule of perfect tender."

33. *See* UNIFORM COMMERCIAL CODE § 2-608(1)(b).

34. Section 2-508 is applicable only when the buyer is deemed to have rejected the nonconforming tender. *See* UNIFORM COMMERCIAL CODE § 2-508(2) & Comment 2.

35. UNIFORM COMMERCIAL CODE § 2-608, Comment 5.

36. UNIFORM COMMERCIAL CODE § 2-508, Comment 2 states that a primary objective of § (2) is to prevent the injustice of a surprise rejection by the buyer. *See* Hawkland, *supra* note 3, at 722-23; Peters, *supra* note 10, at 210.

able negotiations between parties, the courts would be justified in concluding that a seller has a right to cure when the buyer has revoked under subsection 2-608(1)(b), as well as when the buyer has rejected under subsection 2-601(1)(a).

In addition to neglecting the basic Code policy calling for the systematic application of related Code provisions, *Scampoli* contains other serious problems of analysis. For example, the use of the term "rescission" by the parties and the court could have affected the buyer's remedies. A plaintiff who chooses under the Code to reject or revoke his acceptance of nonconforming tender can seek both restitution and consequential damages.[37] A plaintiff who seeks rescission is restricted by common law to restitution damages returning him to his original position only.[38] In the instant case the difference between restitution and restitution plus consequential damages was arguably insignificant, but as between two commercial entities, a nonconforming tender might give rise to very substantial consequential damages.[39] Moreover, *Scampoli* demonstrates that the plaintiff's failure to utilize Code procedures and language in no way precludes the defendant from doing so in his defense. Therefore, a buyer's attorney, seeking to maintain a strong pretrial bargaining position vis-a-vis the seller in a nonconforming tender situation, should seek those Code remedies and procedures affording a maximum recovery and avoid asking for rescission.

In addition, the analysis of case law by the *Scampoli* court was weak. Although the *Scampoli* court found it unnecessary to consider the buyer's claim of breach of warranty by the seller, it did base its definition of "cure" upon an analogy to two cases ostensibly concerned with remedies for breach of implied warranties.[40] However, the sellers in both cited cases made repairs

37. UNIFORM COMMERCIAL CODE §§ 2-711, -714, -715. *See* text accompanying notes 19 & 20 *supra*.

38. RESTATEMENT OF RESTITUTION § 157 (1937).

39. *See, e.g.*, Barrett Co. v. Panther Rubber Mfg. Co., 24 F.2d 329 (1st Cir. 1928) (plaintiff-buyer recovered $192,837.18 damages, including payment for injury to the company's good will ($20,000.00) and products that had to be destroyed because defective).

40. Hall v. Everett Motors, Inc., 340 Mass. 430, 165 N.E.2d 107 (1960); L. & N. Sales Co. v. Little Brown Jug, Inc., 12 Pa. D. & C.2d 469 (Phila. County Ct. 1957). The court was clearly inconsistent with respect to warranty in the instant case. The opinion does not reach plaintiff's claim of a breach of warranty by the seller but, when attempting to determine what cure included, the court looked to the remedies for breach of implied warranties.

Other courts have approached the problem of the time when the breach occurs by holding that the breach is more or less suspended

under *express* warranties and in neither case was the right to cure an issue.[41]

There is, however, some support for the court's conclusion that cure includes minor repairs or adjustments. In *Bonney v. Blaisdell*,[42] a pre-Code case, the court held that minor defects discovered during the trial run of a power boat did not constitute a breach of contract, and that the seller had a right to make minor repairs and adjustments as a part of cure.[43] The court in *L. & N. Sales Company v. Stuski*[44] noted with approval that the seller had been given an opportunity to repair and adjust the merchandise, holding that after prolonged attempts by the seller to cure, the buyer could bring an action for breach of contract.[45] Moreover, in dealing with revocation of acceptance, the draftsmen of the Code state that it is expected that a revocation will be sought "only after attempts at adjustment have failed."[46] Although the Code nowhere defines "cure," it seems reasonable to believe that such attempted "adjustments" could include minor repairs.

A more serious problem with the rationale of the instant case is that the court's analysis suggests that buyers will be held to a stricter observance of the Code's requirements than will sellers. Finding that section 2-508 was applicable, the court noted that a seller will be allowed to cure only when surprised by the buyer's rejection if the seller is proceeding under subsection (2).[47] The official comments clearly state that where the seller has reason to believe that his tender may be unacceptable, he has no statutory right to cure.[48] In the instant case the seller's expert testified that new color television sets frequently malfunction when delivered. Thus the seller could not in fact

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while the seller attempts to cure the nonconforming tender, becoming operative only if the second tender fails. *See* Bonney v. Blaisdell, 105 Me. 121, 73 A. 811 (1909); L. & N. Sales Co. v. Stuski, 188 Pa. Super. 117, 146 A.2d 154 (1958).

41. In both *Hall* and *L. & N. Sales Co. v. Stuski*, the central issue was whether or not the seller's disclaimer of warranties was effective. In neither case did the courts do more than merely note that the seller had attempted to repair the merchandise, and in neither case did cure influence the outcome.

42. 105 Me. 121, 73 A. 811 (1909).

43. *Id.* at 124-25, 73 A. at 812.

44. 188 Pa. Super. 117, 146 A.2d 154 (1958).

45. *Id.* This remedy was contrary to that sought in *Scampoli*. *See* note 13 *supra* and accompanying text.

46. UNIFORM COMMERCIAL CODE § 2-608, Comment 4.

47. 228 A.2d at 849.

48. UNIFORM COMMERCIAL CODE § 2-508, Comment 2.

have been surprised by the defect in the buyer's set, but rather by the buyer's refusal to allow minor repairs. The court apparently found this surprise reasonable and sufficient. However, this reasoning is faulty since *Scampoli* is the first case under the Uniform Commercial Code to interpret cure to include repairs. The court would have been on firmer ground had it relied upon a theory of commercial custom,[49] strongly implied in the expert's testimony and sanctioned by the Code. Moreover, the instant case subjects buyers to the inconveniences inherent in the acceptance of defective goods. It may be unreasonable to expect many of today's highly sophisticated manufactured goods to be perfect when delivered, but it seems equally unreasonable to put the full burden of quality control upon buyers, many of whom have neither the time nor the ability to demand performance of the dealer or manufacturer.[50]

The decision in *Scampoli* leaves several major questions unasked and unresolved. Notably, the court does not address itself to the issue of how to distinguish between minor and substantial repairs. Seemingly, this problem of cure under the Code is twofold: the extent of physical repair which buyer must tolerate before the tender is so altered that it ceases to be what was within the reasonable contemplation of the parties, and the amount of time within which the seller may perform his one opportunity to cure the defect.[51]

Cure is a very important concept in our technological society. The draftsmen of the Code have definitely strengthened the buyer's obligation to accept tender.[52] *Wilson v. Scampoli*

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49. *Id.* The prior course of dealings, course of performance, or usage of trade are mentioned as examples giving rise to reasonable expectations.

50. The public policy advanced by the courts with respect to finding strict liability on the part of the sellers and manufacturers of chattels would seem to be applicable here. The trend seems to be towards maximum protection and minimum inconvenience for consumers. To require manufacturers and dealers in *Scampoli* situations to assume the major burden for quality control would seem to be consistent with that rationale. One of the best statements of the policy in this area is to be found in Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). *See also* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

51. *See* note 12 *supra.* It is submitted that repairs and adjustments cease to be minor in nature and the buyer should be permitted his Code remedies upon a showing that the buyer is being unreasonably inconvenienced, regardless of the physical extent of the work being done.

52. *See also* Honnold, *Buyer's Right of Rejection,* 97 U. PA. L. REV. 457, 473-74 (1949).