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Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller

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APPROPRIATE STANDARDS FOR A BUYER'S REFUSAL TO KEEP GOODS TENDERED BY A SELLER

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I. INTRODUCTION

Tender of delivery by the seller gives the buyer a choice: the buyer can either accept the tendered goods or refuse them. Acceptance makes the buyer liable to pay the purchase price of the goods,[1] although an action for damages protects the buyer's interest if the goods are in any respect nonconforming.[2] The option to refuse the goods can be exercised by rejecting the goods prior to accepting them[3] or by revoking an acceptance already made.[4] An aggrieved buyer who refuses tendered goods is given a different measure of resulting damages because the buyer does not take or retain possession of the goods.[5]

Different legal standards have governed the rights to reject and to revoke under Article 2, and several aspects of those standards have become the subject of increased scrutiny during the revision process. Several of the more controversial issues surrounding the revision concern aspects of the right to reject and to revoke. This Article is directed toward providing a resolution of these issues based on an analysis of the underlying policies. I revisit this subject area, having expressed my views on several previous occasions,[6] and I necessarily draw heavily from that

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1. "The buyer must pay at the contract rate for any goods accepted." U.C.C. § 2-607(1) (1990). Acceptance of goods is defined in U.C.C. § 2-606.

2. The measure of damages most commonly utilized provides the buyer with the difference between "the value of the goods accepted and the value they would have had if they had been as warranted." *Id.* § 2-714(2).

3. *Id.* §§ 2-601, 2-602.

4. *Id.* § 2-608.

5. A buyer who "covers" by procuring comparable goods elsewhere can recover damages based upon the actual cover price expended. *Id.* § 2-712. Otherwise, the buyer's damages are calculated on the contract price/market price differential. *Id.* § 2-713.

6. William H. Lawrence, *Cure in Contracts for the Sale of Goods: Looking Beyond Section 2-508*, 21 UCC L.J. 333 (1989) [hereinafter Lawrence, *Beyond Section 2-508*]; William H. Lawrence, *Cure Under Article 2 of the Uniform Commercial Code: Prac-*

prior work, as my views, for the most part, remain unchanged. A different perspective on these issues is provided by Professor John Sebert, who advocated revisions in this area of Article 2 prior to the appointment of the Article 2 Drafting Committee.[7] I also take this opportunity to respond to several of his positions.

The following four parts of this Article focus on the broad topics affecting the standards that pertain to a buyer's refusal to keep goods tendered by a seller. Part II addresses rejection by the buyer, and continues my argument for retention of the perfect tender rule as the standard to govern a buyer's right to reject. My primary thesis is that adoption of the substantial impairment standard to govern rejections would force application of a standard adopted as a compromise onto a class of contracts for which the compromise is both unnecessary and undesirable. Part III covers the unique rules applied to installment contracts. I acquiesce in the application of the substantial impairment standard to the decision of a buyer to cancel the contract because of nonconformities in one or more of the installments, but contend that the perfect tender rule should govern the right to reject a single installment.

Part IV addresses the buyer's right to revoke an acceptance, and focuses on several issues, including the subjective nature of the substantial impairment standard, the increased limitations on the right to revoke, the effect of a wrongful revocation, use of the goods after revocation, and payment by the buyer for use of the goods prior to revocation. Part V deals with the seller's right to cure a nonconforming tender. This final section covers several controversial issues, including whether the reasonable grounds requirement should be retained, whether repair should constitute an adequate cure, whether a money allowance to the buyer

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tices and Prescriptions, 21 UCC L.J. 138 (1988) [hereinafter Lawrence, *Cure Under Article 2*]; William H. Lawrence, *The Prematurely Reported Demise of the Perfect Tender Rule*, 35 KAN. L. REV. 557 (1987) [hereinafter Lawrence, *Perfect Tender Rule*]; William H. Lawrence, *Cure After Breach of Contract Under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code*, 70 MINN. L. REV. 713 (1986) [hereinafter Lawrence, *Cure Under the Restatement (Second)*].

7. John A. Sebert, Jr., *Rejection, Revocation, and Cure Under Article 2 of the Uniform Commercial Code: Some Modest Proposals*, 84 NW. U. L. REV. 375 (1990).

is an effective cure, and whether a seller should be allowed to cure following revocation of acceptance by the buyer. I also recommend a structural change in Article 2 to facilitate proper application of the cure concept. The discussion throughout this Article is devoted to assisting deliberation in the ongoing revision process.

II. REJECTION

A. *Study Group Recommendation*

A majority of the Study Group recommended that the perfect tender rule be retained as the standard for an aggrieved buyer to reject tendered goods.[8] The recommendation is interesting, given the extensive attacks that a number of commentators have waged against the perfect tender rule.[9] The issue has hardly been resolved through the deliberations of the Study Group. Some members of the Study Group supported an alternative proposal that would replace the perfect tender rule with a requirement that would permit rejection only if a nonconformity "substantially impairs the value of the performance to the buyer."[10] The issue predictably will draw considerable attention

8. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT 158 (Rec. A2.6(1)(A)) (1990) [hereinafter PRELIMINARY REPORT].

9. *See, e.g.*, JOHN E. MURRAY, COMMERCIAL LAW: PROBLEMS AND MATERIALS 119 (1975); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 355-57 (3d ed. 1988); John Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 479-80 (1949); K.N. Llewellyn, *On Warranty of Quality and Society: II*, 37 COLUM. L. REV. 341, 378, 398 & n.146 (1937) [hereinafter Llewellyn, *On Warranty*]; K.N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 566-67 (1940) [hereinafter Llewellyn, *Federal Sales Act*]; Ellen A. 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, 215-16 (1963); Sebert, *supra* note 7, at 422-25; Leonard M. Parkins, Comment, *Substantial Performance: The Real Alternative to Perfect Tender Under the U.C.C.*, 12 HOUS. L. REV. 437, 452-54 (1975).

10. PRELIMINARY REPORT, *supra* note 8, at 159-60 (Rec. A2.6(1)(B)). This substitute standard is the same requirement applied to cases of revocation under Article 2. *See* U.C.C. § 2-608(1) (1990); *infra* notes 94-100 and accompanying text.

from the drafters of the revision.[11] The superior approach to this issue is to retain the perfect tender rule.

B. Inapplicable Rationale

Scrapping the perfect tender rule for the substantial impairment standard would force a standard that was adopted as a necessary accommodation upon a situation where such a compromise is not necessary. Substantial impairment is comparable to the common law concept of material breach,[12] with its accompanying antithetical concept of substantial performance.[13] These common law doctrines were introduced in order to ameliorate the harsh effect resulting from the recognition of constructive conditions of exchange. Lord Mansfield recognized the dependency of covenants in a contract by implying a condition on the order for performance of the covenants in the absence of an express provision in the parties' agreement.[14] By creating an implied-in-law condition on the order of the contracting parties' performances,[15] Lord Mansfield greatly enhanced the risk of forfeiture because the party required to proceed could lose all

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11. The A.B.A. Task Force did not take a specific position on this issue. It, however, did urge the Drafting Committee to "reconsider whether to adopt a substantial performance test, as some members of the Study Group recommend." Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1160 (1991) [hereinafter Task Force]. "The Drafting Committee should carefully consider the benefits and costs of such a rule." *Id.*

12. WHITE & SUMMERS, *supra* note 9, at 358.

13. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 461-64 (3d ed. 1987).

14. *See* Jones v. Barkley, 99 Eng. Rep. 434, 437-38 (K.B. 1781) (paraphrasing the opinion of Kingston v. Preston).

15. Corbin described constructive conditions as follows:

> A certain fact . . . may operate as a condition because the court believes that the parties would have intended it to operate as such if they had thought about it at all, or because the court believes that by reason of the *mores* of the time justice requires that it should so operate. It may then be described as a condition implied by law, or better as a *constructive condition.*

Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 743-44 (1919). *See generally* Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903 (1942) (discussing the underlying policy considerations that shape the law of constructive conditions).

rights on the contract by tendering anything less than complete performance. The forfeiture risk is particularly poignant in situations like construction contracts in which labor and materials expended in a performance that falls short of complete performance cannot be returned to the contractor.[16]

Shortly after introducing the concept of constructive conditions, Lord Mansfield created a doctrinal escape valve to avoid the oppressive results that could follow from the requirement of strict compliance with such conditions. The potentially harsh impact was mitigated by recognizing a less demanding standard for satisfying constructive conditions. This approach has since evolved and has become embodied in the correlative doctrines of substantial performance and material breach.[17] Substantial performance, rather than exact performance, is sufficient to satisfy the constructive condition; the less-than-perfect tender constitutes a nonmaterial breach but the constructive condition is

16. As one court noted:

> There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned.

Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890-91 (N.Y. 1921). Farnsworth and Young elaborated on the unique problems that arise in construction contracts:

> [T]he rule [of substantial performance] has found its chief proving ground in suits on construction contracts.
>
> Why should this be so? Several considerations suggest the answer. As for employment contracts, it is usual for an employer to pay wages at short intervals, and to reserve the power of termination at will. Leases of real property have traditionally been regarded as exempt from the usual contract rules of constructive conditions. As for contracts for the sale of goods, the party who is denied a remedy does not suffer an investment loss, ordinarily, in the same degree as a builder whose earnings prove uncollectible. As for land sale contracts, enforcement is regularly sought in a court of equity, in which there are specialized rules serving some of the same objects as the doctrine of substantial performance.

E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 695 (4th ed. 1988).

17. *See* Boone v. Eyre, 126 Eng. Rep. 160(a) (K.B. 1777).

satisfied,[18] preventing cancellation of the contract by the aggrieved party.[19]

The rationale for adoption of the substantial performance doctrine does not extend to contracts for the sale of goods. Most forfeitures can be avoided in these cases by the breaching seller recovering the tendered goods.[20] Thus, the perfect tender rule does not have to be abandoned in order to achieve just results for the sale of goods.

C. *Advantages of the Perfect Tender Rule*

1. *Enhanced Certainty*

Not only would use of the substantial impairment standard to govern rejection in sales cases apply the doctrine to a class of cases in which it is not needed, it would undercut the benefits associated with the perfect tender rule. The perfect tender rule provides the buyer greater certainty after a nonconforming tender than is possible under the substantial performance standard.[21] A buyer need only ascertain a good faith basis of dissat-

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18. As one court noted:

> The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.

Jacob & Youngs, 129 N.E. at 890.

19. *See generally* Lawrence, *Cure Under the Restatement (Second)*, *supra* note 6, at 714-17.

20. The elimination of all forfeiture is impossible, even in a sales case. The seller may incur costs of freight and insurance for reshipment and administrative costs of resale. Additional costs also are imposed when the buyer retains the defective goods: the cost of adapting the goods to the buyer's use or of disposing of them and covering elsewhere, and the cost of calculating damages. Two scholars who have focused extensively on these costs and their policy-choice implications disagree on which of these cost categories is likely to predominate. Professor Priest assumes that costs associated with reshipment and resale usually will be higher. George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 965 n.10 (1978). Professor Schwartz implicitly assumes that adaptation costs will predominate. *See* Alan Schwartz, *Cure and Revocation for Quality Defects: The Utility of Bargains*, 16 B.C. INDUS. & COM. L. REV. 543, 547-51 (1975).

21. "Plainly, a test as flexible as substantial performance sacrifices predictability to achieve justice." E. ALLAN FARNSWORTH, CONTRACTS 617 (2d ed. 1990).

isfaction with a nonconforming tender in order to reject the goods rightfully.[22] An aggrieved party under the substantial impairment standard, in addition to the good faith determination, must weigh several potentially conflicting considerations that a court might subsequently apply in order to determine whether a suspension or rejection of performance was appropriate.[23] The perfect tender rule provides more certainty.[24]

The consequences associated with the response of an aggrieved buyer make this enhanced certainty desirable. In probably the most-quoted line in material breach jurisprudence, the court in *Walker & Co. v. Harrison*[25] stated the potential risk assigned to the aggrieved party:

> [T]he injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.[26]

In any case in which materiality of the breach is not certain, the aggrieved party faces a Hobson's choice: proceeding as though the breach is material exposes the aggrieved party,

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22. The good faith element is discussed *infra* notes 66-75 and accompanying text.

23. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

24. The comments to the *Restatement (Second) of Contracts* describe the material breach standard as "necessarily imprecise and flexible." *Id.* § 241 cmt. a.

25. 81 N.W.2d 352 (Mich. 1957).

26. *Id.* at 355.

whereas not responding can result in a waiver of that party's rights. The perfect tender rule avoids this problem by giving the injured party more predictable criteria by which to assess the appropriate legal response.[27]

a. Workability of the Substantial Impairment Standard

Professor Sebert supports his position to substitute a substantial impairment standard for the perfect tender rule by bestowing the standard with kudos of workability.[28] He stresses that its use in other contexts has proven to work reasonably well and that "a reasonable consensus is developing concerning how to interpret and apply the substantial impairment standard of section 2-608."[29]

The argument simply validates the wisdom of Lord Mansfield in his choice of a mechanism to alleviate the harshness of forfeitures associated with the introduction of constructive conditions. If material breach analysis had proven to be unworkable, the law of contracts surely would have evolved differently. The argument fails, however, to validate use of the same criteria to replace a more certain legal standard in a context in which its use is not necessary. Surely no one would suggest that the determination of substantial impairment, with its myriad of potentially conflicting criteria, is as certain a legal standard as the perfect tender rule. Anyone who tends toward such a belief should observe first-year law students when the concept of material breach is introduced in their contracts class! Additionally, how many lawyers would prefer to advise an aggrieved buyer or litigate that client's case under a material breach standard rather than the perfect tender rule? Experience has proven that the material breach standard does work reasonably well. It was adopted, however, as a necessary accommodation that resulted in lessening the degree of certainty affecting an aggrieved

27. The choice of the appropriate standard to govern a buyer's rejection was debated extensively prior to the initial promulgation of the Uniform Commercial Code. One of the reasons that the drafters rejected the substantial impairment standard was their belief that "the buyer should not be required to guess at his peril whether a breach is material." Task Force, *supra* note 11, at 1159-60.

28. Sebert, *supra* note 7, at 399, 407.

29. *Id.* at 399.

party's decision on cancellation of the contract. Further embracing the more vague standard under circumstances where it is not necessary is simply not a good policy choice.[30]

In arguing for the adoption of the substantial impairment standard to determine a buyer's right to reject, Professor Sebert contends that certainty and predictability of results will be improved by the change.[31] His contention, however, is not based on the characteristics inherent in the two standards. Rather he asserts that the confusion that has resulted from manipulative actions of the courts and from statutory limitations on the perfect tender rule can be reduced by simply replacing the perfect tender rule with the standard of substantial performance.

This area of Article 2 unquestionably has been accompanied by considerable confusion. I disagree with Professor Sebert on the source of the confusion, however. Many commentators have questioned whether any life remains in the perfect tender rule as it is codified in Article 2.[32] Professor Ellen Peters led the doubters in 1963 when she concluded that the perfect tender rule, as embodied in Article 2, is "a mere shadow of its formerly

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30. Since the element of unjust enrichment present in construction contracts is absent, it makes some sense to put the responsibility for preparing a perfect tender upon the seller rather than getting involved in a complicated evaluation of objective and subjective factors which underlie the substantial performance doctrine. At the very least if the seller has in fact made a defective tender and the buyer's dissatisfaction is honest and genuine, there seems to be less reason for imposing the doctrine of substantial performance upon the attempt to reject.

RICHARD E. SPEIDEL ET AL., TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW 955 (3d ed. 1981).

31. Sebert, *supra* note 7, at 418-19, 423.

32. *See, e.g.*, VERN COUNTRYMAN ET AL., COMMERCIAL LAW: CASES AND MATERIALS 957 (2d ed. 1982); MURRAY, *supra* note 9, at 119; WHITE & SUMMERS, *supra* note 9, at 355-57; Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 589 n.191 (1976); Peters, *supra* note 9, at 206; Sebert, *supra* note 7, at 384-85, 422; George I. Wallach, *The Buyer's Right to Return Unsatisfactory Goods—The Uniform Commercial Code Remedies of Rejection and Revocation of Acceptance*, 20 WASHBURN L.J. 20, 23 (1980); Douglas J. Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby*, 24 DRAKE L. REV. 52, 54-55 (1974); Note, *UCC Section 2-508: Seller's Right to Cure Nonconforming Goods*, 6 RUT.-CAM. L.J. 387, 388 (1974); William B. Murphy, Note, *Uniform Commercial Code—Rejection and Revocation—Seller's Right to Cure a Nonconforming Tender*, 15 WAYNE L. REV. 938, 941 (1969).

robust self."[33] These commentators have advocated use of the substantial impairment standard as a superior approach, and in one instance even contended that "the Code well nigh abolishes the [perfect tender] rule."[34] The influence of this commentary on the courts is hardly surprising,[35] but to advance the tendency of some courts to inject substantial impairment requirements into rejection cases as a reason to adopt that standard is simply argument by bootstrapping. The seeds of confusion were planted by scholars who prematurely reported the demise of the perfect tender rule.[36] The drafters of the revision to Article 2 should not only retain the perfect tender rule; they should strongly reaffirm this position in the comments in order to overcome the legacy of doubts that have been sown as to its efficacy.

The confusion attributed to limitations that are codified in Article 2 on the exercise of the right of rejection under the perfect tender rule is also insufficient to support abandonment of the rule. The primary limitations on rejection are the obligation of good faith[37] and the potential right of the seller to cure[38] the rejected tender.[39] The inclusion of any limitation on the exer-

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33. Peters, *supra* note 9, at 206.

34. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 304 (2d ed. 1980). "The Code rejects the perfect tender rule in sales law, once an open refuge for the technically minded." WHITE & SUMMERS, *supra* note 9, at 15-16.

35. For blatant judicial statements of deviation from the perfect tender rule, see, for example, D.P. Technology Corp. v. Sherwood Tool, Inc., 751 F. Supp. 1038 (D. Conn. 1990) (holding that the Connecticut Supreme Court would require that a delay in delivery of specially manufactured goods must be substantial in order for the buyer to reject under § 2-601, and remanding for determination of whether a 16-day delay was substantial); McKenzie v. Alla-Ohio Coals, Inc., 29 U.C.C. Rep. Serv. (Callaghan) 852 (D.D.C. 1979) (finding that a buyer who has suffered no damage cannot reject because of insubstantial nonconformity); Clark v. Zaid, Inc., 282 A.2d 483 (Md. 1971) (holding that in determining the right of a buyer to reject furniture the court must consider factors such as the nature and extent of damage and whether it could be repaired).

36. In a previous article, I have shown both that these commentators have greatly exaggerated the extent to which the limitations included in Article 2 undercut application of the perfect tender rule and that the limitations on the standard that are codified in Article 2, for the most part, reflect restrictions that the law previously recognized as well. Lawrence, *Perfect Tender Rule*, *supra* note 6, at 559-73.

37. U.C.C. § 1-203 (1990).

38. The primary cure provision in Article 2 is § 2-508.

39. The courts admittedly often have not done an admirable job of applying the good faith concept in the context of rejection or in applying the cure concept in

cise of a legal concept inevitably adds complexity, with a concomitant adverse effect on certainty. The perfect tender rule, however, is not, and should not be, absolute. As subsequent discussion in this Article demonstrates,[40] strong policy reasons support condoning only rejections exercised in good faith and allowing appropriate cure rights for the seller.

Any lessened certainty associated with these limitations on the right to reject will not be alleviated by substituting the substantial impairment standard for the perfect tender rule. The most obvious reason for this conclusion is that the same limitations will apply even if the substantial impairment standard were adopted. Good faith is a pervasive obligation affecting all aspects of a contracting party's performance and enforcement under the contract.[41] Enforcement of a right to reject can be exercised only in good faith, irrespective of the standard adopted to trigger that right. Cure rights also will continue even if material breach is needed to reject.[42]

The continued relevance of the adopted standard once a breaching seller invokes the right to cure is another reason the uncertainty associated with the limitations on a buyer's right to reject will not disappear by changing the standard upon which the right to reject is based. The seller's right is invoked by notifying the buyer of the intent to cure,[43] which has the legal effect of suspending the buyer's rejection.[44] Unfortunately, not all

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general. See the criticisms advanced in Lawrence, *Perfect Tender Rule*, *supra* note 6, at 570-73 (noting the failure of courts and commentators to recognize the role of good faith in rejections); Lawrence, *Cure Under Article 2*, *supra* note 6, at 142-69 (noting problems in most cases of applying the concept of cure); Lawrence, *Beyond Section 2-508*, *supra* note 6, at 337-40, 344-59 (same). Again, however, scholars generally have not supported the courts with helpful commentary.

40. *See infra* notes 65-75 and accompanying text.

41. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1990).

42. "[T]he scope and content of § 2-508 obviously depend upon any revisions made in the 'perfect tender' rule." PRELIMINARY REPORT, *supra* note 8, at 144 (Rec. A2.5(5)(C)).

43. U.C.C. § 2-508(1) and (2) condition the seller's right to cure on seasonable notification to the buyer of the intention to cure.

44. "We agreed that under either subsection [of § 2-508], the buyer's remedies are suspended after receipt of the seller's timely notice until the seller fails to make a timely and proper cure." PRELIMINARY REPORT, *supra* note 8, at 143 (Rec. A2.5(5)(C)).

purported cures will prove to be satisfactory, which raises the question of whether the aggrieved buyer can reject the cure tender. The right to make this subsequent rejection will depend upon whether the cure has provided goods that satisfy the standard adopted to govern the rejection right.[45] Cure no longer operates as a limitation at this point. The aggrieved buyer either accepts or rejects the cure tender. That determination again is clearly more certain under the perfect tender rule than it is under the substantial impairment standard.

b. Troubling Study Group Commentary

A statement in the Study Group commentary that causes concern is the contention that "a statutory requirement of substantial impairment emerges indirectly from the limitations imposed upon § 2-601."[46] This statement is highly inaccurate and can serve only to perpetuate the confusion generated in the past by the failure to maintain proper conceptualizations. The limitation that a buyer's rejection must be exercised in good faith does not have this effect. The right to reject arises when the goods tendered by the seller fail in *any* respect to conform to the contract terms. The good faith requirement prevents abuses

45. In a previous article, I described the situation as follows:

> Following a notification of intent to cure, one of three things will happen: the seller will not go forward with a cure within the respective time allowed; the seller will provide a conforming tender; or the seller will provide another nonconforming tender. In the first instance, the buyer's original rejection will become effective again upon the seller's failure to make a timely cure. The seller would have announced the intent to cure but not have followed through by exercising the right, and further action will not be necessary for an effective rejection. In the second case, a new conforming tender will cure the original nonconformity and will terminate the right of the buyer to reject. Continuing to reject would be wrongful and would constitute a breach by the buyer. In the third situation, the seller's second tender, like the first, is nonconforming, but the buyer's initial rejection covers only the first tender. The buyer will be required to respond to the subsequent tender of ineffectual cure, and failure to do so after a reasonable time to inspect the newly tendered goods will result in their acceptance by the buyer. Since the purported cure does not conform in all respects to the contract, however, section 2-601 gives the aggrieved buyer the right to reject the new tender.

Lawrence, *Perfect Tender Rule*, *supra* note 6, at 567-68 (citations omitted).

46. PRELIMINARY REPORT, *supra* note 8, at 159.

in the exercise of this right by limiting its availability to circumstances in which the buyer is honestly dissatisfied with the tender and in which rejection is consistent with reasonable commercial standards of fair trade. The same good faith requirement would apply if substantial impairment governed the right to reject, but the buyer's right would also be conditioned upon a material breach by the seller.

Applicable trade standards could inject elements of materiality into the good faith requirement. That possibility under the facts of some cases, however, does not support the sweeping assertion that the good faith limitation moves the perfect tender rule toward the substantial impairment standard. Trade usage or course of dealing between the parties might also limit a particular buyer to rejection only for substantial impairment,[47] and, of course, the parties can include such a requirement in their contract terms expressly. These occasions in which the buyer is precluded from insisting upon perfect tender simply represent instances when the parties, through different sources of contract terms (express terms, trade usage, or the implied term of good faith) have contracted out of the perfect tender rule.

The seller's right to cure a nonconforming tender is another significant limitation on the buyer's right to reject, but it does not move the perfect tender rule toward substantial impairment. A seller who invokes the right to cure suspends the effectiveness of the buyer's rejection, and if the seller tenders a cure, the buyer will either accept or reject the cure. Under the perfect tender rule, a buyer acting in good faith could reject a cure tender that does not conform to the contract. Under a substantial impairment standard, the buyer would lack the right to reject a cure tender that does not conform so long as the nonconformity no longer substantially impairs the buyer's interests. Under either approach a consistent legal standard governs the buyer's right to reject both the initial tender and any cure tender. Sec-

47. Lancaster Glass Corp. v. Phillips ECG, Inc., 835 F.2d 652 (6th Cir. 1987) (holding that repeated acceptance of delivery of goods that deviate slightly from an original engineering drawing provided by the buyer constitutes a course of performance that precludes the buyer's right to reject subsequent deliveries).

tion 2-601 states a perfect tender rule, and the right to cure does not move it toward substantial impairment.[48]

The commentary of the Study Group suffers from another common deficiency. It refers to a provision like section 2-608 as a limitation on section 2-601.[49] Section 2-608 covers revocation of acceptance by a buyer, which is possible only following an acceptance.[50] Section 2-601 covers rejection by a buyer, which becomes impossible once the buyer accepts.[51] Revocation is not a limitation on section 2-601; that section has no applicability in the context of a revocation. The codification of the perfect tender rule in section 2-601 does not state a pervasive standard for Article 2; it simply states the standard for a buyer who wants to reject.

Although the perfect tender rule has advantages over the substantial impairment standard and can be used fairly in contracts for sales of goods, the drafters did not adopt it as a singular standard throughout Article 2. The perfect tender rule is stated only in section 2-601, the section that governs a buyer's general right to reject tendered goods.[52] In four other sections the drafters adopted the standard of substantial impairment: section 2-608 on revocation of acceptance;[53] section 2-610 on anticipatory repudiation;[54] section 2-612 on rejection in installment contracts;[55] and section 2-504 on certain grounds for rejection in shipment contracts.[56] Only the last two of the Article 2 provisions that incorporate the substantial impairment standard qualify as true limitations on section 2-601 because they are the only ones that apply to rejections.[57] The rationales that underlie the selection of the substantial impairment standard in each

48. U.C.C. § 2-601 (1990) (Buyer's Rights on Improper Delivery).
49. PRELIMINARY REPORT, *supra* note 8, at 159.
50. U.C.C. § 2-608 (1990).
51. "Acceptance of goods by the buyer precludes rejection of the goods accepted . . . ." *Id.* § 2-607(2).
52. *Id.* § 2-601.
53. *Id.* § 2-608.
54. *Id.* § 2-610.
55. *Id.* § 2-612.
56. *Id.* § 2-504.
57. *Id.*; *id.* § 2-612.

of these contexts are provided in subsequent discussion.[58] For the present, the critical observation is that the initial drafters did not elect a single model of seller performance in choosing between perfect tender and substantial impairment. Rather, they adopted each of the standards in different contexts.

2. Economic Efficiency

Other advantages of the perfect tender rule, in addition to enhanced certainty of application, have been enumerated by scholars. An application of economic efficiency analysis has led two authors to suggest that the perfect tender rule more effectively reduces the costs of nonconforming tender than the substantial performance standard.

> A perfect tender standard indicates clearly the consequences of any non-conformity, facilitating negotiations to minimize the effects of a seller's failure to comply. Since sellers know that even a slight variation may constitute breach, they are encouraged to allocate explicitly the risk of variations from the contract description. Once a breach has occurred, the certainty of the result of any litigation encourages the parties to settle their dispute through private bargaining and reduces the opportunities for strategic behavior.[59]

3. Promote Quality Standards

The perfect tender rule promotes higher standards of quality in the marketplace.[60] The case of *Axion Corp. v. G.D.C. Leasing Corp.*[61] was used by one commentator to demonstrate this

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58. *See infra* notes 76-84 and accompanying text.

59. ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES 244 (2d ed. 1991).

60. Francis A. Miniter, *Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments*, 13 GA. L. REV. 805, 826 (1979). Professor Sebert doubts that the perfect tender rule has this effect and points out that the contention is not supported by empirical evidence. Sebert, *supra* note 7, at 423. Unfortunately, empirical evidence is lacking as support for a substantial portion of legal analysis, including the converse side for this proposition. However, the high standards associated with a legal base that requires perfect tender certainly cannot be disputed.

61. 269 N.E.2d 664 (Mass. 1971).

point.[62] The seller in *Axion Corp.* promised to provide valve-testing equipment with an operating capacity that would be within a five percent deviation from the specifications indicated in the contract.[63]

> A seller might find that it is significantly cheaper to make the machinery capable of operation within a seven percent deviation than to make it operate within only a five percent deviation as required by the contract. He would be gambling that the buyer could not make out a case for substantial impairment independent of the contract and that any damages that the buyer might prove would be less than his cost savings in producing the inferior machine.[64]

In contrast, the perfect tender rule avoids this problem by creating a positive incentive for sellers to produce goods that meet contract specifications.[65]

D. Invalid Complaint

The primary complaint that has been lodged against the perfect tender rule is that it enables a buyer to seize upon an inconsequential defect in the seller's tender in order to avoid a bad bargain.[66] This result would be possible if the right to reject was absolute, but it is not. Section 1-203 provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[67] Rejection is not an automatically executing right but rather must be enforced through action by the buyer.[68] Consequently, the right to reject is limited by the obligation to act in good faith.

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62. Miniter, *supra* note 60, at 825-26.

63. *Axion Corp.*, 269 N.E.2d at 666.

64. Miniter, *supra* note 60, at 826.

65. Another reason why the drafters of the Code rejected the substantial performance standard for rejection by buyers of goods is that "proof of materiality would sometimes require disclosure of the buyer's private affairs such as secret formulas or processes." Task Force, *supra* note 11, at 1160.

66. PRELIMINARY REPORT, *supra* note 8, at 157-58.

67. U.C.C. § 1-203 (1990).

68. "Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." *Id.* § 2-602(1).

The requirement of good faith is an effective mechanism against a buyer abusing the right to reject and cancel a contract. The legitimate expectations of the contracting parties should be fulfilled by performance.[69] A buyer who receives the full measure of performance, in the sense of meeting these expectations, does not have the right to reject, despite some insignificant deviation from the precise contract specifications. The perfect tender rule does not give buyers the power to seize upon the slightest contract deviation, even though it is not important to the buyer, as a pretext for discontinuing the contract. A buyer acts in bad faith by feigning dissatisfaction with the seller's performance when the real motive for rejecting the goods is some other consideration,[70] such as avoiding the contract obligation during a falling market.[71] The good faith requirement of the Code effectively prevents such improper strategic behavior, and thus assures that application of the perfect tender rule will occur only in those instances when it is invoked honestly.[72]

A desirable revision proposed by the majority in the Study Group is to add the phrase "if acting in good faith" as an express limitation to the codification of the perfect tender rule.[73] The benefit that this revision affords is to ensure the applicability of an additional objective standard of good faith in the case of a buyer who is a merchant. Express incorporation of the good faith term in section 2-601 will invoke the Article 2 definition of good faith, which provides that " 'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commer-

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69. E. ALLAN FARNSWORTH, CONTRACTS 536 (1982).

70. At a minimum "good faith" means "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (1990).

71. For a study on buyer attempts to reject during the circumstances of a falling market, see generally Lawrence R. Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782 (1935).

72. Neumiller Farms, Inc. v. Cornett, 368 So. 2d 272 (Ala. 1979) (holding a claim of dissatisfaction with subsequent deliveries of chipping potatoes after the market price declined substantially below the contract price in bad faith, making the refusal to accept a breach); *see also* Printing Ctr. of Texas, Inc. v. Supermind Publishing Co., 669 S.W.2d 779 (Tex. Ct. App. 1984) (holding evidence that buyer rejected to escape the bargain would support a finding of rejection in bad faith, but noting that the seller did not present any such evidence).

73. PRELIMINARY REPORT, *supra* note 8, at 158 (Rec. A2.6(1)(A)).

cial standards of fair dealing in the trade."[74] This application is desirable given the doubts expressed by some commentators as to the applicability of the purely subjective standard to control attempts by a buyer to evade the contract in the circumstances of a falling market.[75]

III. INSTALLMENT CONTRACTS

A. Cancelling the Contract

Section 2-612 governs nonconforming deliveries made under installment contracts.[76] This section does not incorporate the perfect tender rule. Subsection (3) allows the buyer to cancel the contract only when the nonconformity of one or more installments "substantially impairs the value of the whole contract."[77]

The drafters appropriately based the provisions of section 2-612(3) on the Code principles applicable to anticipatory repudiation[78] because cancellation of the entire contract, rather

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74. U.C.C. § 2-103(1)(b) (1990).

75. *See* Honnold, *supra* note 9, at 475-76 (contending that "a legal test framed in terms of the buyer's state of mind is . . . elusive"); Sebert, *supra* note 7, at 387 (arguing the subjective standard is not as effective a check on a nonmerchant buyer).

76. "An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent." U.C.C. § 2-612(1) (1990).

77. Section 2-612(3) provides in its entirety as follows:

> Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Id. § 2-612(3).

The other true statutory limitation on a buyer's § 2-601 right to reject is U.C.C. § 2-504 on shipment contracts. It provides that the failure of a seller to notify the buyer of the shipment or to make a proper contract for transportation of the goods "is a ground for rejection only if material delay or loss ensues." *Id.* § 2-504. This exception to the perfect tender rule is a reaction to earlier case law in which buyers rejected because of some noncompliance with shipping arrangements, even though they did not suffer any perceivable injury. *See* Lawrence, *Perfect Tender Rule*, *supra* note 6, at 588-90.

78. U.C.C. § 2-610 (1990).

than just rejection of a tendered installment, affects performance not yet due. Cancellation in cases of both anticipatory repudiation and defective installments that breach the whole contract is not premised on the concept of rejection of goods not yet delivered. Rejection applies only to goods that have been tendered. Cancellation in cases of executory seller performance is based on the seller's breach of the contractual obligation not to impair the buyer's expectations of the promised performance.[79] The right to cancel the contract, and thereafter sue for total breach[80] arises from an anticipatory repudiation when loss of the performance will "substantially impair the value of the contract to the other."[81] Section 2-612(3) applies the same standard to the right to cancel the entire contract following default or nonconforming tender of one or more installments of a contract.

The perfect tender rule does not require a seller's perfect compliance with the obligation not to impair the buyer's expectation that the promised performance will be forthcoming. Rather, Article 2 distinguishes between impairment of the security of expectations of performance by the other party and impairment of the value of the whole contract. Substantial impairment of the value of the whole contract is necessary before cancellation of executory portions of the contract is allowed.[82] In contrast, impairment of security as to future performance gives the aggrieved party the right to demand adequate assurances of proper future performance, not the immediate right to cancel the contract in its entirety.[83]

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79. "A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." *Id.* § 2-609(1).

80. *Id.* § 2-711.

81. *Id.* § 2-610.

82. "Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract." *Id.* § 2-612 cmt. 6. "The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated." *Id.* § 2-610 cmt. 3.

83. "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance . . . ." *Id.* § 2-609(1). The failure to provide adequate assurances can itself lead to a repudiation: "[T]his section provides the means by which the aggrieved

This approach makes sense because adequate assurances address the buyer's concerns about the seller's performance on future deliveries. The rationale does not support adoption of the substantial performance standard when a seller's tender of delivery in a noninstallment contract fails to meet the contract requirements. The buyer may then invoke the right to reject. In this situation the aggrieved buyer is not concerned with executory provisions of the contract. The rationales supporting the perfect tender rule then predominate.[84]

B. Rejecting Individual Installments

The second subsection of section 2-612 governs the right of a buyer to reject an individual nonconforming installment. It allows the buyer to reject any installment whose nonconformity "substantially impairs the value of that installment and cannot be cured."[85]

The substantial impairment standard incorporated in section 2-612(2) is not justified. This subsection deals with installments actually tendered, and, therefore, is not analogous to the anticipatory breach provisions. The buyer has not accepted the tendered installment yet; consequently, the rationale underlying section 2-608 on revocation of acceptance also does not apply. Karl Llewellyn suggested that "standing relations" warrant separate handling from "single-occasion deals,"[86] but the section

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party may treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time." *Id.* § 2-609 cmt. 2.

84. *See supra* notes 21-65 and accompanying text.

85. U.C.C. § 2-612(2) (1990). Section 2-612(2) provides in its entirety as follows:

> The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

Id.

86. Llewellyn, *On Warranty*, *supra* note 9, at 375-78; *see* Whaley, *supra* note 32, at 53. Whaley argues:

> The policy in installment contracts is to avoid the abrupt termination of a long term contractual relationship merely for technical reasons and to keep the contract going. Where many deliveries are contemplated, minor defects are likely to appear in some installments and it would give the

2-612(2) provisions on cure appear satisfactory to accommodate the interests of the continuing relationship created by an installment contract.[87]

The section 2-612(2) exception to the perfect tender rule is inappropriate. The rationale that supports the codification of the perfect tender rule for rejection in noninstallment cases is equally applicable to the rejection of the tender of a nonconforming installment.[88] The perfect tender rule would enable aggrieved buyers to ascertain their interests with respect to nonconforming installments with greater certainty. When a nonconforming installment is rightfully rejected, the seller can avoid forfeiture by reacquiring the rejected installment. A majority of the Study Group wisely has recommended that the " 'perfect tender' rule should be available to the buyer or seller when an installment fails to conform 'in any respect to the contract.' "[89]

> buyer an unreasonable commercial advantage if he could escape from the contract for the trivial deficiencies which inevitably occur. In an installment contract the buyer has sufficient bargaining position vis-à-vis future shipments to adjust minor defects. But in a single delivery situation no future relationship needs protection, and thus it does not seem unfair to require "exact performance by the seller of his obligations as a condition to his right to require acceptance."

Id. (footnotes omitted) (quoting U.C.C. § 2-106 cmt. 2). This policy articulation explains why the substantial impairment standard is included in § 2-612(3) as a condition to the right to terminate an entire installment contract, but it leaves open the question of why the standard is needed as the basis for the rejection of a single nonconforming tender under § 2-612(2).

87. Section 2-612(2) precludes the buyer from rejecting a nonconforming tender if the seller gives adequate assurances of its cure. U.C.C. § 2-612(2) (1990). The cure provisions are sufficient to keep the contract going. If the seller subsequently is unable to cure the nonconformity, that fact might lead to substantial impairment of the value of the whole contract under § 2-612(3). *See* Graulich Caterer Inc. v. Hans Holterbosch, Inc., 243 A.2d 253 (N.J. Super. Ct. App. Div. 1968) (holding that the inability to cure nonconforming cooked food to be served by the buyer at a pavilion at the New York World's Fair resulted in a substantial impairment).

88. "[T]he reasons for this distinction, which makes the right of rejection turn on whether a contract of sale is to be performed singly or in installments, are less than self-evident." Honnold, *supra* note 9, at 476. "Differing results should not flow solely from the manner in which delivery is taken; if 10,000 widgets are delivered all at once, a perfect tender rule now applies, whereas if they are delivered 5,000 today and 5,000 in seven days, a substantial breach test applies." Miniter, *supra* note 60, at 809.

89. PRELIMINARY REPORT, *supra* note 8, at 178 (Rec. A2.6(8)(A)). "There is no persuasive reason why a substantial impairment test should be invoked for rejection of

The ABA Task Force is not equally enamored with this proposal. Its members believe that the opportunity for the buyer to reject for any defect and the requirement for a precise cure by the seller will increase the likelihood that the deal between the parties will break down.[90] They have expressed concern over the impact on the purported common practice of making up deficiencies in quantity or quality in subsequent installments and of permitting money allowances for deficiencies in an installment.[91]

The concerns of the Task Force are overstated. To the extent that the business practices that it identifies are actually observed, trade usage and course of dealing will permit their continuation. Even in the absence of these practices, the seller in an installment contract has a more generous right to cure the deficiencies than is available to the seller in a contract calling for a single delivery.[92] Applying the perfect tender rule to rejection for a single installment cannot really " 'snowball' partial breaches into total breaches,"[93] because a total breach is governed under the substantial impairment standard of section 2-612(3)—nonconformity or default with respect to one or more installments must substantially impair the value of the whole contract. The current application of section 2-612(2) to a single installment does not preclude a breach by a seller who tenders goods that substantially conform. Breach results from any nonconforming tender. The issue is solely the degree of impairment required for an aggrieved buyer to be able to reject a nonconforming tendered installment.

IV. REVOCATION OF ACCEPTANCE

A. Subjective Standard of Substantial Impairment

The drafters of the U.C.C. adopted the substantial impairment standard for revocation of acceptance. They did so on the belief

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a single installment, although there is a stronger justification for a broader power by the seller to cure in an installment contract." *Id.* at 177-78.

90. Task Force, *supra* note 11, at 1179.

91. *Id.*

92. *See infra* notes 247-53 and accompanying text.

93. Task Force, *supra* note 11, at 1179.

that a buyer should have to meet a higher standard in order to throw nonconforming goods back onto the seller once the buyer has accepted their tender. Several reasons have been offered to support this proposition.

> In the first place, the longer the buyer has the goods, the higher the probability that the alleged defect was caused by him or aggravated by his failure properly to maintain the goods. Secondly, the longer the buyer holds the goods (if he uses them), the greater the benefit he will have derived from them. All of these factors support a rule which makes it more difficult for the buyer who has once accepted to cast the goods and attendant loss from depreciation and market factors back on the seller.[94]

These arguments justify deviating from the perfect tender rule once a buyer accepts goods and subsequently seeks to revoke that acceptance.[95]

The substantial impairment standard for revocation of acceptance is based on the buyer's particular circumstances. In relevant part, section 2-608(1) provides that the buyer may revoke acceptance of goods "whose non-conformity substantially impairs [their] value to him."[96] The subjectiveness of the standard is accurately identified in the comments:

> [T]he test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.[97]

The adoption of this subjective standard has been criticized by a number of commentators.[98] Its adoption is nevertheless con-

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94. WHITE & SUMMERS, *supra* note 9, at 368-69.

95. *Compare* Aubrey's R.V. Ctr., Inc. v. Tandy Corp., 731 P.2d 1124 (Wash. Ct. App. 1987) (holding that although the hardware and some programs performed properly, the computer system as an integrated whole did not, and thus substantially impaired its value to the buyer) *with* Iten Leasing Co. v. Burroughs Corp., 684 F.2d 573 (8th Cir. 1982) (holding that the failure of components of a computerized accounting system did not substantially impair the value of the system because the system met the buyer's needs by being operated without the components).

96. U.C.C. § 2-608(1) (1990).

97. *Id.* § 2-608 cmt. 2.

98. One writer contends that

sistent with the drafters' intent to facilitate aggrieved buyers in determining the appropriate response to nonconforming tenders by sellers. The buyer assumes the higher burden of substantial impairment in justifying a revocation of acceptance, but must do so only in the context of the buyer's own circumstances.[99] The situation in which goods substantially conform on an objective basis, but are substantially defective to the particular buyer, would surely be unusual.[100] The aggrieved buyer's response, however, can be limited to the buyer's own case, making the buyer's decision on how to proceed easier. As a general matter, buyers can rely more confidently upon their own circumstances when determining whether to revoke the acceptance. In addition, they can focus the attention of the court and the jury in the event of litigation on how the breach impacted on their own specific needs.

The Study Group appropriately has recommended that the subjective element be included in the other sections of Article 2 in which the substantial impairment standard is contained. The provision on anticipatory repudiation already includes the subjective element.[101] The recommendation thus is to retain the

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> the Official Comment should be ignored [and the buyer allowed to revoke] only if the non-conformity is one that would substantially impair the value of the goods to the ordinary purchaser, unless seller has reason to know of buyer's high standards or special needs, in which case the impairment of the buyer's own particular situation will be the relevant inquiry.

Whaley, *supra* note 32, at 76; *see also* WHITE & SUMMERS, *supra* note 9, at 371 ("Why a buyer should be permitted to measure the seller's tender by such subjective standards is not clear. Judicial attitudes here are by no means uniform, and we think the courts which give a more objective content to the words 'to him' have the better of it.") (footnote omitted); Priest, *supra* note 20, at 979 (suggesting that some courts "are likely to ignore the Comment and interpret the phrase 'to him' as implicating all of the buyer's loss from the non-conformity *except* that part which is purely subjective and unforeseeable").

99. *See* Asciolla v. Manter Oldsmobile-Pontiac, Inc., 370 A.2d 270 (N.H. 1977) (holding that the determination is not made based on the buyer's belief as to the reduced value of the goods, but rather on an objective determination of the value of the goods to the buyer); *Aubrey's R.V. Ctr.*, 731 P.2d at 1128 (holding that substantial impairment "is determined objectively with reference to the buyer's particular circumstances, rather than to his or her unarticulated subjective desires").

100. WHITE & SUMMERS, *supra* note 9, at 371.

101. U.C.C. § 2-610 (1990) ("the loss of which will substantially impair the value of the contract to the other").

subjective element where it is already included[102] and to add it to the provision on cancellation of an installment contract.[103]

The subjective aspect of the substantial impairment standard does not apply to the determination of a breach, but rather it applies to examining the impact of a breach on the buyer. The seller's breach is determined by the nonconformity of tendered goods.[104] The warranty provisions of Article 2 apply to that determination,[105] not any special needs of the buyer. If the seller's tender conforms to the contract specifications, the seller has performed properly and the buyer has neither the right to reject the goods nor the right to revoke the acceptance.

B. Standards for Revocation

The increased difficulty for a buyer to revoke an acceptance, compared to rejecting tendered goods, is furthered through additional requirements that a buyer must meet even though the accepted goods substantially impair the value of the goods to the buyer. If the buyer accepted the goods while aware of the nonconformity, revocation is possible only if the buyer accepted on the reasonable assumption that the nonconformity would be cured, and it is not seasonably cured.[106] A buyer who accepts nonconforming goods while apprised of their defective nature

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102. PRELIMINARY REPORT, *supra* note 8, at 174 (Rec. A2.6(7)(B)) (anticipatory repudiation); *id.* at 170 (revocation of acceptance).

103. *See id.* at 179 (Rec. A2.6(8)(B)). *See generally* U.C.C. § 2-612(3) (1990) (containing the objective test). For a discussion of this section of Article 2, see *supra* notes 76-84 and accompanying text.

104. The preamble provision of § 2-608(1) provides that "[t]he buyer may revoke his acceptance of a lot or commercial unit *whose non-conformity* substantially impairs its value to him." U.C.C. § 2-608(1) (1990) (emphasis added).

> The second inquiry is whether the nonconformity in fact substantially impairs the value of the goods to the buyer, having in mind his particular needs. This is an objective question in the sense that it calls for evidence of something more than plaintiff's assertion that the nonconformity impaired the value to him; it requires evidence from which it can be inferred that plaintiff's needs were not met *because of that nonconformity*.

Jorgensen v. Pressnall, 545 P.2d 1382, 1384-85 (Or. 1976) (emphasis added).

105. *See* U.C.C. § 2-313 (1990) (express warranties); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-315 (implied warranty of fitness for a particular purpose).

106. *Id.* § 2-608(1)(a).

simply has no grounds to throw the goods subsequently back onto seller in the absence of any reasonable basis to assume that the seller had assumed a commitment to correct the deficiency.

In the absence of awareness of the nonconformity, the buyer can revoke only if acceptance was induced by difficulty of discovery of the defect or by the seller's assurances.[107] This standard is tied to the incentive for vigilance that Article 2 places on buyers. An acceptance of tendered goods cannot occur until a buyer has had a reasonable opportunity to inspect the goods.[108] The right to inspect is waived by delay, however. This waiver creates an incentive for buyers to exercise the right to discover defects in tendered goods as promptly as possible. Any right to reject based on discoverable defects that is lost because of inspection delay cannot subsequently be reinstated in the form of revocation of acceptance.[109] The buyer is not prevented from revoking with respect to defects too difficult to discover through a reasonable pre-acceptance inspection. Another special situation involves assurances by a seller concerning the conformity of the goods. Such assurances can lessen a buyer's vigilance in inspecting the goods and discovering a defect.[110] When the buyer is reasonably induced to lessen inspection vigilance and accept, the alternative standard for revocation of an acceptance made without discovery of the nonconformity is satisfied.

The Study Group has recommended that these limitations on the right to revoke an acceptance be retained in their current form.[111] The recommendation is appropriate because the incentive to prompt buyer vigilance is founded on sound commercial

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107. *Id.* § 2-608(1)(b).

108. *Id.* § 2-606(1)(a)-(b).

109. *See In re* Barney Schogel, Inc., 12 B.R. 697 (Bankr. S.D.N.Y. 1981) (holding that a buyer who did not discover a defect in specially manufactured windows until after installation because of a failure to inspect them upon delivery was precluded from revoking acceptance); Hummel v. Skyline Dodge, Inc., 589 P.2d 73 (Colo. Ct. App. 1978) (holding that there is no revocation for defects unknown at the time of acceptance that could have been discovered through a reasonable inspection).

110. "Assurances" by the seller under paragraph (b) of subsection (1) 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.

U.C.C. §2-608 cmt. 3 (1990).

111. PRELIMINARY REPORT, *supra* note 8, at 170 (Rec. A2.6(6)(A)).

policy that could be circumvented in the absence of these restrictions.

C. *Effect of Wrongful Revocation*

Section 2-608 does not stipulate the consequences of a wrongful revocation. It specifies the standards that control a buyer's right to revoke and it states the procedures that the buyer must employ in order to invoke the right, but it does not clarify the legal effect of a buyer invoking a revocation in the absence of an underlying right. The Study Group recommends that a wrongful revocation be considered ineffective.[112]

This recommendation suggests an additional difference between rejection and revocation under Article 2. The power to reject, even in the absence of the substantive right, has been recognized by commentators as consistent with the drafters' intent.[113] Even in the absence of any right to reject, a buyer effectively can do so by notifying the seller within a reasonable time after delivery or tender of goods.[114] Of course, such action by the buyer constitutes a breach[115] and subjects the buyer to damages for the breach.[116] The effectiveness of the rejection, however, prevents acceptance,[117] and thus the buyer cannot be held liable for the purchase price of the goods.[118] The rationale for allowing wrongful but nevertheless effective rejections is economic efficiency. The seller is generally in a better position than

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112. *See id.*

113. *See* 1 STATE OF N.Y. LAW REVISION COMM'N REPORT: STUDY OF THE UNIFORM COMMERCIAL CODE 520 (reprint ed. 1980) (1955) (stating that the "buyer may have the power to make an 'effective' rejection even though his action is in breach of contract and subjects buyer to liability for damages") (written by Professor Honnold); WHITE & SUMMERS, *supra* note 9, at 295; Peters, *supra* note 9, at 241.

114. U.C.C. § 2-602(1) (1990).

115. The obligation of the buyer is "to accept and pay in accordance with the contract." *Id.* § 2-301.

116. *Id.* § 2-703 ("[w]here the buyer wrongfully rejects").

117. *Id.* § 2-606(1)(b) ("Acceptance of goods occurs when the buyer . . . (b) fails to make an *effective* rejection . . . .") (emphasis added).

118. *Id.* § 2-607(1) (providing that acceptance makes the buyer liable to pay for the goods at the contract rate); *id.* § 2-709(1)(a) (allowing for a cause of action for the price of goods accepted).

the buyer to dispose of the rejected goods and minimize damages.[119]

The same rationale has some merit in the context of wrongful revocations, but it is outweighed by other considerations that justify treating revocations differently than rejections. In general terms, the goods are more likely to have deteriorated or depreciated in a revocation context than in rejection cases.[120] The seller's superior ability to dispose of the goods may be decreased when the nature or quality of the goods change.[121] The justifications for making revocation of acceptance less readily available than rejection to an aggrieved buyer also support the refusal to recognize the effectiveness of a wrongful revocation:

> to leave the burden on the buyer with respect to goods which might have depreciated, which he might have used to his benefit, and which he might actually have misused or otherwise damaged, is consistent with the policy of 2-709 and with the idea that the buyer should normally have to pay the price of accepted goods.[122]

The disparate treatment of wrongful rejections and revocations stems from the essential recognition that buyers who reject and buyers who revoke are not similarly-situated parties.

Although the substantive recommendation of the Study Group in this respect is desirable, the proposed method of implementa-

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119. WHITE & SUMMERS, *supra* note 9, at 291-92, 295.

120. The converse is certainly possible in individual cases. For example, the right for an opportunity to inspect might extend the reasonable time to reject several weeks in the case of a complex item, whereas a buyer might accept goods on the date of delivery on the reasonable assumption of cure and then promptly revoke acceptance when the seller renounces any intent to cure. Article 2, however, comports with the following admonition: "a general sales law must avoid trying to cover all situations and provoking litigation by fine distinctions." Ernst Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 439 (1950).

121. The most obvious case in which a seller would not have an advantage in disposing of the goods would apply in situations in which a substantial change has occurred in the condition of the goods. Even if a right to revoke were available, a revocation is not effective under Article 2 unless it occurs "before any substantial change in condition of the goods which is not caused by their own defects." U.C.C. § 2-608(2) (1990); *see* Trinkle v. Schumacher Co., 301 N.W.2d 255 (Wis. Ct. App. 1980) (holding that revocation was not available after drapery fabric had been cut into shades).

122. WHITE & SUMMERS, *supra* note 9, at 297.

tion leaves much to be desired. The Study Group recommends that "[t]he comments should clarify that unless otherwise agreed, a wrongful rejection [sic] is still an acceptance and that the buyer's duties and the seller's remedies are controlled by [sections] 2-607 and 2-703."[123] Professors White and Summers have done an excellent job of pinpointing various Code sections that contribute to the ambiguity concerning the consequence of a wrongful revocation of acceptance.[124] In addition to using the comments to draw the distinction in effectiveness of wrongful rejections and revocations, the drafters of the revision should carefully implement any changes in the text of these sections necessary to implement their intentions.

D. Use of Goods After Revocation

A buyer who successfully revokes an acceptance may jeopardize the effectiveness of the revocation by continuing to use the goods. The same problem exists for a buyer who continues using the goods following an effective rejection. The courts have been inconsistent in dealing with the continued use issue.[125] One line of cases has evolved that preserves the effectiveness of a rejection or revocation so long as subsequent use of the goods is "reasonable" and the seller is compensated for the value of the continued use.[126] This approach recognizes the difficulties associated with a buyer whose financing is committed to the deliv-

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123. PRELIMINARY REPORT, *supra* note 8, at 170 (Rec. A2.6(6)(A)). The reference to rejection in this recommendation was clearly a slip of the pen. The recommendation appears under the discussion of § 2-608 on revocation and the textual discussion preceding the recommendation refers to revocation.

124. WHITE & SUMMERS, *supra* note 9, at 294 n.3, 296-97; *see* U.C.C. § 2-606(1)(b) (1990) (referencing "effective" rejection); *id.* § 2-608(2) (referencing "effective" revocation); *id.* § 2-703 (index of seller's remedies making parallel reference to wrongful rejection or revocation); *see also id.* § 2-709(3) (implying circumstances under which a buyer who wrongfully rejects or revokes nevertheless will not be liable for the purchase price).

125. *See generally* R.J. Robertson, Jr., *Rights and Obligations of Buyers with Respect to Goods in Their Possession After Rightful Rejection or Justifiable Revocation of Acceptance*, 60 IND. L.J. 663 (1985).

126. On awarding of compensation for post-revocation use, see Erling v. Homera, Inc., 298 N.W.2d 478 (N.D. 1980); *see also infra* notes 147-55 and accompanying text.

ered product[127] or who cannot promptly cover in the marketplace.[128]

The opposing line of cases reflects pre-Code law by providing that any substantial use of goods following their rejection or revocation of acceptance is wrongful against the seller and precludes the buyer from effectively claiming the rejection or revocation.[129] It is bolstered by the provision of section 2-606(1)(c) that an acceptance results when the buyer "does any act inconsistent with the seller's ownership."[130]

In discussing the revocation of acceptance section of Article 2, the Study Group includes a recommendation that the comments "should elaborate when use of the goods should bar revocation under § 2-608(2)."[131] The Study Group also recognizes the relevance of section 2-606 to this issue,[132] indicating that an appropriate answer, in circumstances such as a delay by the seller in trying to cure or a delay by the buyer in covering, is that "the buyer should be able to make use of the goods for a reasonable time upon the payment of reasonable compensation."[133] The Study Group does not make any recommendation to change section 2-606, but does recognize the need for greater clarity. It

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127. *E.g.*, McCullough v. Bill Swad Chrysler-Plymouth, Inc., 449 N.E.2d 1289 (Ohio 1983) (buyer's financial position was limited); Mobile Homes Sales Management, Inc. v. Brown, 562 P.2d 1378 (Ariz. Ct. App. 1977) (most of the buyers' savings were tied up in the mobile home purchase).

128. *E.g.*, Computerized Radiological Servs. v. Syntex Corp., 595 F. Supp. 1495 (E.D.N.Y. 1984) (one year required to obtain another X-ray scanner); Minsel v. El Rancho Mobile Home Ctr., Inc., 188 N.W.2d 9 (Mich. Ct. App. 1971) (buyers continued to occupy mobile home for six weeks following revocation because of their inability to find alternative housing).

129. *E.g.*, Waltz v. Chevrolet Motor Div., 307 A.2d 815 (Del. Super. Ct. 1973); Bassman v. Manhattan Dodge Sales, 5 U.C.C. Rep. Serv. (Callaghan) 128 (N.Y. App. Div. 1968); George v. Fannin, 588 N.E.2d 195 (Ohio Ct. App. 1990); F.W. Lang Co. v. Fleet, 165 A.2d 258 (Pa. Super. Ct. 1960).

130. U.C.C. § 2-606(1)(c) (1990). Conceptual difficulties then follow the determination of the acceptance. Acceptance precludes rejection of the goods accepted. *Id.* § 2-607(2). Following a revocation, the acceptance (or reacceptance in this context) inevitably is made with knowledge of the nonconformity, and does not allow a subsequent revocation because the acceptance would not have been made on the reasonable assumption that the nonconformity would be seasonably cured. *Id.*

131. PRELIMINARY REPORT, *supra* note 8, at 170 (Rec. A2.6(6)(A)).

132. The Study Group also recognizes the relevance of § 2-602(2)(a) to this question. *Id.* at 163-65. For discussion of this provision, see *infra* note 137.

133. PRELIMINARY REPORT, *supra* note 8, at 166.

states as its objective that "limited use should be distinguished from other acts inconsistent with the seller's ownership,"[134] and poses the critical question of whether "ordinary use of the goods [can] be distinguished from an 'act inconsistent with the seller's ownership.' "[135]

The repetition of this terminology in section 2-606 predictably will make the Study Group's laudatory objective more difficult to attain by perpetuating the Code language that a current contrary line of cases has relied upon for support. Giving this latitude through use of the same language in a revision of Article 2 will not promote uniformity of judicial interpretation, notwithstanding some contrary admonitions in the comments, and will increase the difficulty of interpretation even for those courts that are inclined to further the stated objectives of the Study Group. Continued use of goods following notification of rejection or revocation is literally contrary to the ownership rights of the seller,[136] and the terminology is simply too weighted to facilitate the more balanced perspective that the Study Group is encouraging the drafters of the revision to seek.[137]

Helpful insights can be gathered from the experience of the promulgation of Article 2A,[138] although not from the stated reasons for the different approach adopted in Article 2A. The drafters of Article 2A followed many provisions of Article 2, using the latter as a statutory analogue for their drafting efforts.[139] Despite this general approach, they did not incorporate the section 2-606(1)(c) provision. The comments to Article 2A state that the provision was omitted "as irrelevant given the

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134. *Id.*

135. *Id.* at 166 n.9. The ABA Task Force does not make any commentary concerning the revision of § 2-606 or § 2-608.

136. This perspective contributed to pre-Code cases that held that any use of goods precluded rescission as inconsistent with the revesting of title in the seller. *See, e.g.*, Comer v. Franklin, 53 So. 797, 799 (Ala. 1910).

137. Section 2-602(2)(a) adds to the difficulties by providing that "after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller." U.C.C. § 2-602(2)(a) (1990).

138. U.C.C. art. 2A (1990) (Leases).

139. *Id.* § 2A-101 cmt. (Statutory Analogue; Relationship of Article 2A to Other Articles).

lessee's possession and use of the leased goods."[140] This reasoning is certainly dubious in the context of the present discussion. Although a lease gives a lessee possession and use of the leased goods for the duration of the lease term, rejection or revocation by the lessee ends these interests of the lessee and the residuary interest of the lessor predominates,[141] just as rejection or revocation by a buyer ends the buyer's interest in the goods purchased.[142]

Even though Article 2A omitted any provision comparable to section 2-606(1)(c), it made an additional change that can be used to address some of the same issues posed by that subsection of Article 2. One of the alternative methods of an acceptance under Article 2 is for the buyer, following a reasonable opportunity to inspect the goods, to signify to the seller "that the goods are conforming or that he will take or retain them in spite of their non-conformity."[143] In addition to the lessee signifying this intent to the lessor, Article 2A provides for an acceptance when the lessee "acts with respect to the goods in a manner that signifies" comparable intent.[144] This wording is certainly sufficient to deal with cases in which the lessee claims to have rejected or revoked, but acts inconsistently with respect to the goods.[145] It is also balanced enough to allow appropriate cases to be distinguished. For example, a lessee who revokes acceptance, but continues to use the goods in order to mitigate damages or because cover is not immediately available, has not acted

140. *Id.* § 2A-515 cmt.

141. Following rightful rejection or justifiable revocation of acceptance, both buyers and lessees have security interests in the goods in their possession or control to cover payments that they are entitled to recover and expenses incurred in discharging their duties to care for the goods. *Id.* §§ 2-711(3), 2A-508(5).

142. "A 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.* § 2-106(1). A "lease," on the other hand, "means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease." *Id.* § 2A-103(1)(j).

143. *Id.* § 2-606(1)(a).

144. *Id.* § 2A-515(1)(a).

145. *See* Oda Nursery, Inc. v. Garcia Tree & Lawn, Inc., 708 P.2d 1039 (N.M. 1985) (holding, in a landscaping contract, that a buyer who removed allegedly deteriorating plants from their containers and planted them acted inconsistently with the claim of prior rejection or revocation).

with respect to the goods in a manner that signifies a willingness to retain them.[146]

This solution does not eliminate the need to distinguish continued use of goods that will or will not adversely affect an effective rejection or revocation, but it does state a standard that is more appropriately neutral, giving courts needed flexibility to make case-by-case determinations. The drafters of the revision should consider following the lead of the Article 2A section.

E. Compensation for Use of Goods

Another desirable change in the revision of section 2-608 would be to state an obligation of a buyer who revokes to compensate the seller for the use of the goods.[147] A buyer who effectively revokes is relieved of the duty to pay the contract price for the goods,[148] and can recover payments already made to the seller, in addition to damages for breach of contract.[149] The buyer nevertheless may enjoy the use of the goods for periods extending up to several months.[150] This use of the goods can occur prior to the actual revocation,[151] as well as after notification of revocation in appropriate circumstances.[152] To the extent that use confers a benefit on the buyer, the buyer should be required to compensate the seller.

Even though the initial version of Article 2 does not include any reference to a duty to compensate sellers in these cases, an expanding number of courts have imposed such a duty.[153] Be-

146. Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654 (Minn. 1981) (continued use of tractor to complete farming operation mitigated damages); *see also* Vista Chevrolet, Inc. v. Lewis, 704 S.W.2d 363 (Tex. Ct. App. 1985) (buyer's continued use of automobile did not bar revocation when seller made repeated unsuccessful attempts to repair defect), *rev'd on other grounds*, 709 S.W.2d 176 (Tex. 1986).

147. Other commentators in accord include WHITE & SUMMERS, *supra* note 9, at 366-67; Jerry J. Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 357 (1970); Sebert, *supra* note 7, at 415-17.

148. U.C.C. §§ 2-607(1), 2-709(1)(a) (1990).

149. *Id.* § 2-711(1).

150. Stroh v. American Recreation & Mobile Home Corp., 530 P.2d 989 (Colo. Ct. App. 1975) (one year of occupancy before revocation and another 17 months of occupancy subsequent).

151. Pavesi v. Ford Motor Co., 382 A.2d 954 (N.J. Sup. Ct. Ch. Div. 1978).

152. Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654 (Minn. 1981). *See supra* notes 125-46 and accompanying text.

153. *See, e.g.*, *Stroh*, 530 P.2d 989; Johnson v. General Motors Corp., 668 P.2d 139

cause the Code does not displace the applicable principles of common law,[154] these courts appropriately rely on such principles, most notably restitution,[155] which means that the compensation should be based on the benefit received by the buyer, rather than application of the contract terms or calculations based on cost to the seller.

V. CURE

A. The Reasonable Grounds Requirement

After a buyer has properly rejected a nonconforming tender, section 2-508(2) gives the seller an opportunity to cure, provided that the seller had *reasonable grounds* to believe that its initial tender would be acceptable.[156] The provision thus limits the availability to the seller of cure rights following a rejection after the contract time for the seller's performance has passed.[157] The Study Group concluded that the "reasonable grounds" test should be administered expansively, but expressed concern about the imprecision of the test.[158]

A significant degree of confusion surrounds the "reasonable grounds" test, and commentators, unfortunately, have developed a wide array of inconsistent approaches to the statutory construction of the test.[159] The overall performance of the courts

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(Kan. 1983); North River Homes, Inc. v. Bosarge, 594 So. 2d 1153 (Miss. 1992); Jorgensen v. Presnall, 545 P.2d 1382 (Or. 1976).

154. U.C.C. § 1-103 (1990).

155. *Stroh*, 530 P.2d at 993-94; *Johnson*, 668 P.2d at 145; *North River Homes*, 594 So. 2d at 1162; *Jorgensen*, 545 P.2d at 1386.

156. U.C.C. § 2-508(2) (1990).

157. In contrast, § 2-508(1) provides an unfettered right to cure during any remaining contract time. A subsequent corrective tender that is extended before the contract time for performance has expired still provides a buyer with the bargained-for consideration. The Study Group has recommended that a right to cure be extended to cases in which the buyer revokes acceptance while contract time for performance still remains. PRELIMINARY REPORT, *supra* note 8, at 141 (Rec. A2.5(5)(A)). The more controversial issue is whether the cure right should be extended any further in cases following revocation of acceptance. *See infra* notes 212-37 and accompanying text.

158. PRELIMINARY REPORT, *supra* note 8, at 142 (Rec. A2.5(5)(B)).

159. Several writers have erroneously adopted a "magnitude of the defect" test for determining the reasonableness of the seller's belief. *See* WILLIAM D. HAWKLAND, SALES & BULK SALES 121 (2d ed. 1958); Michael A. Schmitt & David Frisch, *The Perfect Tender Rule—An "Acceptable" Interpretation*, 13 U. TOL. L. REV. 1375, 1398

has also been deficient. Many courts have simply ignored the stated limitation in applying section 2-508(2).[160]

Professor Sebert recommends deletion of the "reasonable grounds" test.[161] He would allow sellers an unfettered right to cure following either rejection or revocation,[162] irrespective of any basis for the seller to have a reason to believe the tender would be acceptable. He bases his recommendation on the broader cure rights of the *Restatement (Second) of Contracts*.[163] The concept of cure in the *Restatement* is grounded in the contract remedy principle of protecting expectations of the parties while avoiding waste.[164]

The rationale that supports the codification of the cure concept in Article 2 differs, however, from the policy objectives of the cure provisions contained in the *Restatement*. The Code does not utilize cure consistently as a waste avoidance technique. In the absence of an express term in the parties' contract or a subsequent agreement by which the buyer consents to allow

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(1982); Wallach, *supra* note 32, at 28; Whaley, *supra* note 32, at 57-58; Comment, *Sales of Personal Property—Breach of Warranty—Repair as a Means of Cure Under Secton 2-508 of the Uniform Commercial Code*, 53 IOWA L. REV. 780, 783 (1967). Another approach has been the argument that a seller should be able to cure whenever it will not subject the buyer to great "inconvenience, risk or loss." William D. Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 MINN. L. REV. 697, 724 (1962) [hereinafter Hawkland, *Curing an Improper Tender*]. Another author would preclude cure to any seller who is unaware of a nonconformity of tender. ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES 321 (1970). These statutory constructions are explained and criticized in Lawrence, *Cure Under Article 2*, *supra* note 6, at 156-59.

160. A study concluded that more cases have ignored the requirement in applying the subsection than have addressed it. Schmitt & Frisch, *supra* note 159, at 1380.

161. Sebert, *supra* note 7, at 425-27.

162. For discussion on the proposal to extend cure rights to cases following revocation of acceptance, see *infra* notes 212-37 and accompanying text.

163. Except as stated in § 240, it is a condition of each party's remaining duties to tender performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to tender any such performance due at an earlier time.

RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979). For an explanation of this provision, see Lawrence, *Cure Under the Restatement (Second)*, *supra* note 6, at 720-24.

164. Lawrence, *Cure Under the Restatement (Second)*, *supra* note 6, at 724-35; *see also* Hillman, *supra* note 32, at 555 (introducing a model designed to protect expectations and avoid waste); Sebert, *supra* note 7, at 418-19 (identifying U.C.C. deficiencies concerning rejection, revocation, and cure).

cure,[165] the right to cure is not available if the buyer accepts the defective tender or delivery and seeks money damages. The right to cure under section 2-508 applies only when the buyer rejects the tender because of the seller's noncompliance with contract requirements. Professor Sebert proposes to extend this right to cure to cases following revocation of acceptance, but even that proposal is less inclusive than the *Restatement* approach.

The limitation of the section 2-508 cure to the rejection of goods by the buyer principally reflects a concern with the adverse impact of forfeiture. A buyer who accepts nonconforming goods can recover damages for the nonconformity, but the buyer must still pay the purchase price of the goods.[166] Therefore, no forfeiture of the breaching party's contract rights results. Following proper rejection of goods, however, the buyer can cancel the contract, thereby extinguishing the other party's contract rights, and also can recover damages.[167] Because the seller's performance must satisfy the perfect tender rule, cancellation is possible, in the absence of cure, even in cases of nonmaterial breach. Professor Farnsworth, the reporter for the *Restatement*, has noted, cure "is more important to a seller of goods, which is subject to the perfect tender rule, than it is to a builder under a construction contract, which already has the benefit of the doctrine of substantial performance."[168] The perfect tender rule, and the corresponding right to cure, are available only in the context of buyer rejection of goods.

The comments to section 2-508 illustrate that subsection (2) strikes a critical balance between the competing interests of the seller and the buyer: the right to cure protects the seller against "surprise" rejections,[169] and the "reasonable grounds" limitation

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165. See Lawrence, *Beyond Section 2-508*, *supra* note 6, at 340-57 and the cases cited therein.

166. U.C.C. §§ 2-607(1), 2-709(1)(a) (1990).

167. *Id.* § 2-711(1).

168. FARNSWORTH, *supra* note 21, at 640.

169. U.C.C. § 2-508 cmt. 2 (1990). The Study Group points out that Article 2 does not include a provision comparable to cure for the buyer, referring to Professor Peters' argument that § 2-511(2) "provide[s] a 'minor analogue' for the buyer." PRELIMINARY REPORT, *supra* note 8, at 139, 140 n.13 (citing Peters, *supra* note 9, at 222 n.73). Section 2-511(2) provides that "[t]ender of payment is sufficient when made by

protects the buyer against improper allegations of surprise.[170] Although cure under section 2-508(2) minimizes the likelihood of forfeiture that accompanies the requirement that the seller comply with the perfect tender rule, the right to cure is available only when the seller makes a bona fide effort to comply. There is no protection for a seller without adequate grounds to believe that the tender is perfect or that commercially legitimate reasons justify the seller's belief that the tender will not cause the buyer to complain. The rejection that the seller subsequently faces must be a surprise because the seller's reasonable expectations were that the buyer would accept the tendered delivery.[171]

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any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it." U.C.C. § 2-511(2) (1990). This is comparable to a seller's right to cure under § 2-508(2). In both instances, one party tenders performance that is not ultimately satisfactory but has reasonable grounds to believe otherwise. This reasonable belief gives rise to surprise when the tender is rejected by the other party. An additional similarity between § 2-508(2) and § 2-511(2) is that both provisions provide further reasonable time to substitute a conforming tender. *Id.* §§ 2-508(2), 2-511(2).

170. "Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had 'reasonable grounds to believe' that the tender would be acceptable." *Id.* § 2-508 cmt. 2.

171. Several commentators have lauded § 2-508(2) as the appropriate provision to prevent a buyer from rejecting goods with insignificant defects because the market price for the goods has fallen and the buyer wishes to escape a bad bargain. *See* WHITE & SUMMERS, *supra* note 9, at 385; Hawkland, *Curing an Improper Tender*, *supra* note 159, at 727; Hillman, *supra* note 32, at 588; Peters, *supra* note 9, at 210; Priest, *supra* note 20, at 971-72; Sebert, *supra* note 7, at 389-95. Others, however, believe that

> [t]his approach attacks the dishonest buyer behavior with the wrong Code provision and misconstrues the objective of that provision in the process. Using section 2-508(2) to preclude rejection by a buyer for a minor breach ignores the "reasonable grounds to believe" limitation contained in the comments of that section in favor of a substantial performance standard, which does not comply with the intent of the drafters. The comments to section 2-508 state that "[s]ubsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer," and goes on to stress that "the seller is not protected unless he had 'reasonable grounds to believe' that the tender would be acceptable." Surely it should come as no surprise to sellers that buyers would like to avoid contracts that become economically unfavorable; and a falling market condition itself certainly does not give a seller grounds to believe that a nonconforming tender would be acceptable. Properly applied, section 2-508(2) does not authorize a seller to cure simply because the buyer has rejected

An absolute right to cure following any rejection would remove a desirable incentive for the seller to provide quality performance in the first instance. Some commentators have pointed out that granting an absolute right may result in an increase in the incidence of sloppy work and may undermine quality standards.[172] Professor Sebert answers that market forces and the importance of developing a reputation for quality products are much greater influences on product quality.[173] While the factors that Professor Sebert identifies are unquestionably influential, the extent of product deficiencies in the marketplace demonstrates that his exclusive reliance on these factors is not persuasive.

Unquestionably, providing a right to cure following any rejection distorts the perfect tender rule. With automatic extensions of time to perform available in all cases, buyers regularly would be deprived of their legitimate expectation of timely performance. Even sellers who are fully informed of the need to comply strictly with timely performance would be afforded additional time to perform. Professor Sebert would not be concerned with distortions to the perfect tender rule because he advocates abolishing it as well.[174] With the perfect tender rule intact, however, the Study Group is correct in recognizing the importance of retaining a test that sellers must meet before claiming the statutory right to cure.

The Study Group's concern over the imprecision of the "reasonable grounds" test is more troublesome.[175] A myriad of circumstances inevitably will arise. Consequently, the applicable standard must be flexible so it can develop over time through

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based upon relatively minor defects when market prices are falling. Lawrence, *Perfect Tender Rule*, *supra* note 6, at 570-71 (citations omitted).

172. Schmitt & Frisch, *supra* note 159, at 1378.

173. Sebert, *supra* note 7, at 426.

174. *Id.* at 422-25; *see also supra* notes 28-29 and accompanying text.

175. Several commentators have also expressed concern. *See* Peters, *supra* note 9, at 210 (referring to § 2-508 as "remarkably obscure") (cited in Hillman, *supra* note 32, at 588); Wallach, *supra* note 32, at 25 ("vague"); Whaley, *supra* note 32, at 56 ("deceptively simple language"); Comment, *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*, 52 MINN. L. REV. 937, 938 (1968) ("poorly drafted"); Note, *supra* note 32, at 391 ("confusing language").

the adjudicatory process.[176] It must be a standard that allows careful scrutiny of the facts of each case.

Attempts to specify more than "reasonable grounds" in the statutory text will deprive the courts of the flexibility needed to achieve just results. The Study Group, for example, recommends that section 2-508(2) apply when the seller is unaware of a nonconformity in the goods and that the section be revised accordingly.[177] Its approach is too blunt. The question should not be asked in the abstract, for the answer inevitably must be that it depends upon the reasons for the seller's lack of awareness.[178] *Wilson v. Scampoli*,[179] a case that has achieved such landmark notoriety as a well reasoned opinion that its holding unfortunately is treated like a widely accepted rule, is helpful in illustrating this point. In *Wilson*, the court found the seller had "reasonable grounds to believe that merchandise like color television sets, new and delivered as crated at the factory, would be acceptable as delivered."[180] This holding should not be accepted as a generalized rule, however, because additional facts that should preclude the same result can be imagined easily. The seller's assumption would not be reasonable, for example, if the seller had received prior recall orders on some of the unsold merchandise or if the television sets sold previously were plagued by an inordinately high number of defects.[181]

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176. "We believe that cure is a remedy which should be carefully cultivated and developed by the courts." WHITE & SUMMERS, *supra* note 9, at 381.

177. PRELIMINARY REPORT, *supra* note 8, at 142-43 (Rec. A2.5(5)(B)).

178. The Study Group cites T.W. Oil, Inc. v. Consolidated Edison Co., 443 N.E.2d 932 (N.Y. 1982), with approval for permitting cure under § 2-508(2) even though the seller was unaware of the nonconformity in its tender. PRELIMINARY REPORT, *supra* note 8, at 142 n.17. The court in *T.W. Oil* stressed, however, that the seller was justified in believing that the initial tender would be acceptable to the buyer because the oil, en route to the United States at the time of contract formation, had been certified for a sulfur content of 0.52% by an Italian refinery. In addition, the court found that while the seller was unaware prior to tender that the oil had a sulphur content of 0.92%, it still could have believed that the shipment would be acceptable because it was aware that Consolidated Edison purchased and burned oil with a sulphur content of up to one percent. Meeting the "reasonable grounds" test was thus dependent upon more than just the seller's unawareness of the nonconformity in its tender. *T.W. Oil*, 443 N.E.2d at 938.

179. 228 A.2d 848 (D.C. 1967).

180. *Id.* at 849.

181. For example, the seller's expert witness in *Wilson* testified that removal of a

Despite the concerns over imprecision, the "reasonable grounds" test is a workable standard when the proper focus is applied. When considered in conjunction with the provisions of the official comments to the Code and the rationale discussed previously,[182] a statement by Professors White and Summers about the test is particularly helpful. They observe:

> [A] seller should be found to have had a reasonable belief that his tender would have been acceptable any time he can convince the court that (1) he would have had such reasonable belief had he not been, in good faith, ignorant of the defect, or (2) he had some reason, such as prior course of dealing or trade usage, which in fact reasonably led him to believe that the goods would be acceptable.[183]

This statement is consistent with the views expressed previously.[184] A seller who should have detected a problem prior to making tender should not be surprised if the buyer rejects. Likewise, a seller who detected a problem but nevertheless proceeded without any commercial justification for believing that the buyer would accept also should not be surprised. Sellers in these circumstances cannot qualify for the right to cure under section 2-508(2). The "reasonable grounds" test as a precondition to a statutory right of cure following rejection should be retained.

B. Repair as a Cure

Another issue raised by the Study Group is whether a seller can effectively cure by repairing the tendered goods rather than providing a substitute tender of new, conforming goods.[185] The Study Group states that repair is recognized as cure when the

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television chassis was frequently necessary with new sets to determine the cause of color malfunction and the extent of adjustment or correction needed to achieve full operational efficiency. *Id.* at 850. Depending on the degree of frequency involved, the seller might reasonably be expected to check the color quality prior to delivery.

182. *See supra* notes 169-70 and accompanying text.

183. WHITE & SUMMERS, *supra* note 9, at 381 (citation omitted). For an extensive study that concludes that the White and Summers approach is the appropriate interpretation, see Gregory M. Travalio, *The UCC's Three "R's": Rejection, Revocation and (the Seller's) Right to Cure*, 53 U. CIN. L. REV. 931 (1984).

184. *See supra* notes 169-81 and accompanying text.

185. PRELIMINARY REPORT, *supra* note 8, at 141-43 (Rec. A2.5(5)(A) & (B)).

agreement of the parties includes an authorization to repair.[186] In the absence of an agreement, the Study Group believes that the answer is not clear and recommends that the Article 2 Drafting Committee resolve the question by revising both subsections of section 2-508.[187]

This question is part of the broader question of determining the scope of an effective cure. Section 2-508 provides a qualifying seller with the opportunity to cure by making a tender or delivery that is "conforming." Performance is "conforming" to a contract under Article 2 when it is "in accordance with the obligations under the contract."[188] The seller's cure tender must be a perfect tender in all aspects of the contract specifications in order to constitute an adequate cure, except that additional reasonable time is allowed when cure is pursuant to section 2-508(2). If the attempted cure does not satisfy this standard, the buyer may reject the substituted goods or their tender as nonconforming. Hence, the perfect tender rule serves as the basis for measuring the adequacy of cure to prevent further buyer rejection.

The same legal standard of "conforming" tender applies to determining whether repair of tendered goods constitutes an adequate cure. Repair should be permitted when the repaired goods enable the buyer to receive the bargained-for consideration. The quality of the repaired goods should not be lessened, and the repair should not leave evidence of its existence.[189] As the court in *Wilson v. Scampoli*[190] indicates, the buyer is not required "to accept patchwork goods or substantially repaired articles in lieu of flawless merchandise."[191] In essence, the repaired goods must satisfy all the applicable warranties in order

186. *Id.* at 142-43. The repair or replacement clause is the most common form of express term creating cure rights. Section 2-719 specifically authorizes these clauses, but also regulates them in some aspects.

187. *Id.* at 141-43 (Rec. A2.5(5)(A) & (B)).

188. U.C.C. § 2-106(2) (1990).

189. Comment, *supra* note 159, at 788; *see* Worldwide RV Sales & Serv., Inc. v. Brooks, 534 N.E.2d 1132 (Ind. Ct. App. 1989) (permitting rejection when offered cure to provide a motorhome with dual roof air conditioning would have left a hole in the roof where the single unit had been installed).

190. 228 A.2d 848 (D.C. 1967).

191. *Id.* at 850.

for the repair to meet the perfect tender rule and to constitute an adequate cure.[192]

Zabriskie Chevrolet, Inc. v. Smith[193] is a case frequently cited on adequacy of repair as a cure under section 2-508. The *Zabriskie* decision is overly restrictive, however. The court found that the replacement of a defective transmission in a new car was not an adequate cure, noting that cure "does not, in the court's opinion, contemplate the tender of a new vehicle with a substituted transmission, not from the factory and of unknown lineage from another vehicle in plaintiff's possession."[194] The facts revealed that the dealer replaced the defective transmission with one from another vehicle on the dealer's showroom floor.[195] Thus the substituted transmission did not appear to have been used or defective, nor did the value of the vehicle appear to have been lessened.

The court in *Zabriskie* also introduced the "shaken-faith" doctrine, which examines the effect that knowledge of the original defect and the repair has on the disappointed buyer. The court stated:

> 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.[196]

The shaken-faith doctrine is useful, provided that it is not applied as a subjective standard.[197] The right to reject arises

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192. Atwood v. Best Buick, Inc., 484 N.E.2d 647 (Mass. App. Ct. 1985) (holding that a vehicle that conformed to the contract and all warranties was not nonconforming and that the buyer could not reject).

193. 240 A.2d 195 (N.J. Super. Ct. Law Div. 1968) (cited in PRELIMINARY REPORT, *supra* note 8, at 141).

194. *Zabriskie*, 240 A.2d at 205.

195. *Id.* at 197. This substitution was presumably a faster method of cure than waiting for another transmission to be shipped from the factory.

196. *Id.* at 205.

197. *See* WHITE & SUMMERS, *supra* note 9, at 384-85. *But see* Sepulveda v. American Motors Sales Corp., 521 N.Y.S.2d 387 (Civ. Ct. 1987) (holding that the plaintiff's testimony about his apprehensiveness and lost confidence in purchased car created a jury issue as to the impairment of the value of the car for him).

only on a nonconforming tender. The objective standard of warranty obligations applies in determining whether the goods conform to the contract. Repair as a cure should be determined from the perspective of a reasonable buyer. When a repair would leave a reasonable buyer sufficiently apprehensive about the reliability or quality of the product, the buyer fails to receive the bargained for exchange, and the repair is not an adequate cure.[198]

The court in *Zabriskie* focused on the buyer's subjective complaints, and the reasonableness of the buyer's shaken faith was assumed, rather than carefully examined. The buyer argued that he bargained for "a new car with factory new parts, which would operate perfectly as represented."[199] The repaired car appears to have provided the buyer with that consideration. The seller did not install a rebuilt transmission, giving the buyer patchwork goods, but rather, completely replaced it. The facts do not demonstrate that the defect was anything more than an isolated instance, that the replaced transmission would not enable the vehicle to perform as represented, that any other components were defective, or that the events that led to the discovery of the defect in any way changed the performance capabilities of the car.

Bayne v. Nall Motors, Inc.[200] provides a better approach to the shaken-faith doctrine. The court in *Bayne* stressed the "lack of positive knowledge that there was no other damage done" in holding that replacement of the car's differential after its parts welded and locked the drive train was not an adequate cure.[201] The court reasoned:

> The fact that the dealer and manufacturer and their employees strongly believe in the quality of the repaired auto does not make this vehicle as acceptable as a similar automobile that has not experienced the same tremendous internal im-

198. Hemmert Agric. Aviation, Inc. v. Mid-Continent Aircraft Corp., 663 F. Supp. 1546 (D. Kan. 1987) (purchaser experienced lack of confidence and fear in handling characteristics of aircraft purchased for crop-dusting).

199. *Zabriskie*, 240 A.2d at 200.

200. 12 U.C.C. Rep. Serv. (Callaghan) 1137 (Iowa Dist. Ct. 1973).

201. *Id.* at 1140.

> pact and a reasonable buyer could not be expected to be satisfied under the facts herein.[202]

The *Bayne* case aptly illustrates the circumstances in which the shaken-faith doctrine should operate to exclude repairs or the replacement of component parts as an adequate cure. Some courts unwittingly have allowed the doctrine to be used improperly by permitting the buyer to extract another form of cure without examining the objective reasonableness of the buyer's concern.[203]

C. Money Allowance as a Cure

Another question that the Study Group raises, and then defers to the Drafting Committee, is whether a cure can include a money allowance in favor of the buyer in lieu of the tendering of new, conforming goods.[204] Under section 2-508(2), the seller may cure when the seller had reasonable grounds to believe that the initial tender would be acceptable to the buyer "with or without money allowance."[205] In cases in which a seller has reasonable grounds to believe that a money allowance will make a nonconforming tender acceptable, but the buyer nevertheless rejects, the seller may have additional reasonable time to correct the deficiency.

For example, a qualifying seller under a contract calling for a large volume delivery might make a tender that is a few units short but the seller may believe reasonably that the buyer would find a comparable price reduction to be acceptable. By notifying the buyer of the intent to cure if the buyer nevertheless rejects, the seller could tender the missing units promptly, and thus

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202. *Id.* at 1141. Two additional well reasoned cases on this point are Champion Ford Sales, Inc. v. Levine, 433 A.2d 1218 (Md. Ct. Spec. App. 1981) (holding that there is a difference between a car with a new factory-built engine and a repaired car with a shop-rebuilt engine), and Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky. Ct. App. 1978) (pickup truck frame was twisted and diamonded, causing unusual stress and wear to various moving parts of the truck).

203. *See, e.g.*, Asciolla v. Manter Oldsmobile-Pontiac, Inc., 370 A.2d 270 (N.H. 1977) (upholding buyer insistence on replacement of automobile, rather than just the transmission).

204. PRELIMINARY REPORT, *supra* note 8, at 142-43 (Rec. A2.5(5)(B)).

205. U.C.C. § 2-508(2) (1990).

prevent the buyer from cancelling the contract. If the buyer were willing to accept a price allowance, a modification to the contract would be struck,[206] but the seller could not force the modification on the buyer unilaterally.

Joc Oil USA, Inc. v. Consolidated Edison Co.[207] is an example of the appropriate application of the price allowance provision. In this case, the contract contained a provision on price adjustment negotiations. The buyer rejected the performance when certification tests showed the sulfur content of oil tendered by the seller to be excessively high. The parties then met in an unsuccessful attempt to negotiate a price adjustment pursuant to the provision in the contract. The seller offered to cure by substituting a conforming delivery, but the buyer refused the proposed cure.[208] The proffered cure was within the scope of section 2-508: the buyer had rejected the goods and the price adjustment was not required by the contract as the buyer's exclusive remedy for a nonconforming delivery.[209] The court properly found that the seller reasonably believed in the acceptability of the tendered delivery, which was buttressed by the contract term and the buyer's indication of willingness to keep and use nonconforming oil if an appropriate price adjustment could be reached.[210]

The Drafting Committee should be explicit in not authorizing a seller to cure through price adjustment. Rather, the prospects for price adjustment should continue to be merely an element that might affect the reasonableness of the seller's belief that the tendered cure would be acceptable to the buyer despite its

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206. *See* Ethan Dairy Prods. v. Austin, 448 N.W.2d 226 (S.D. 1989) (buyer chose a reduction in price as the remedy for a nonconforming product and the seller acceded).

207. 434 N.Y.S.2d 623 (Sup. Ct. 1980), *aff'd*, 447 N.Y.S.2d 572 (App. Div. 1981), *aff'd*, 443 N.E.2d 932 (N.Y. 1982).

208. *Id.*

209. *Id.* For a similar holding, see McKenzie v. Alla-Ohio Coals, Inc., 29 U.C.C. Rep. Serv. (Callaghan) 852 (D.D.C. 1979).

210. The *Joc Oil* and the *Alla-Ohio Coals* cases demonstrate the difficulty of price adjustment clauses in cases in which the nonconformity is qualitative rather than quantitative. When a few units are missing, the price adjustment can be made by reference to the contract price. When the goods tendered do not comply with the contract requirements, however, securing an adjustment through subsequent agreement can be more difficult to achieve.

nonconformity to the contract. Professors White and Summers will surely disagree with this position. They have argued elsewhere that price adjustment should not be so limited. They believe that "the buyer who complains of some insubstantial nonconformity which can be recompensed by a reduction in the price should be made to accept a reduction as cure even if there is no usage in the trade to accept such reductions."[211]

This position on price adjustment does substantial harm to the underlying policy of statutory cure following rejection. Mandatory acceptance of price adjustment significantly interferes with the buyer's right to receive perfect tender through cure by the seller. It changes the buyer's right to insist on perfect tender in the form of a substitute conforming delivery. It also dilutes the requirement that sellers have "reasonable grounds to believe" that their tender will be acceptable to the buyer in order to qualify for the statutory cure right. Allowing cure through price adjustment effectively transforms the perfect tender rule into the substantial impairment standard by leaving the aggrieved buyer with less-than-conforming goods and monetary compensation for the shortfall. Mandatory price adjustment is simply inconsistent with the perfect tender rule.

D. Cure After Revocation

The position of the Study Group on whether a seller should have a right to cure after a proper revocation by the buyer is uncertain. In its discussion of section 2-508 the Study Group Report indicates that its members disagreed on this aspect of cure and that "[r]esolution of this issue is left for the Drafting Committee."[212] Yet in a specific recommendation under section 2-608, the Study Group stated definitively that the seller should have a right to cure after revocation when the time for performance under the contract has not yet expired, but that "[t]he right to cure, however, shall not be available thereafter."[213] Ir-

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211. WHITE & SUMMERS, *supra* note 9, at 384.

212. PRELIMINARY REPORT, *supra* note 8, at 143.

213. *Id.* at 171 (Rec. A2.6(6)(B)). The A.B.A. Task Force believes that the seller should have the right to cure after revocation of acceptance by the buyer. Task Force, *supra* note 11, at 1141.

respective of the ultimate position of the Study Group, the issue of seller cure following revocation has generated significant controversy.[214]

A statutory right to cure should not be extended to sellers following revocation because the perfect tender rule does not cover the right to revoke. A buyer who otherwise qualifies can revoke only if a nonconformity in the goods substantially impairs their value to the buyer. Consistent with cure following a rejection,[215] the revocation would be suspended upon notification of the seller's intent to cure. Unlike the rejection cases, however, cure would be sufficient to thwart a revocation if it eliminated the substantial impact of the impairment, but nevertheless left the buyer with a nonconforming tender.[216] The buyer's expectation in a sales case is to receive goods that conform to the contract. Cure following revocation may leave a buyer with goods that do not conform in some respect, and only a right to money damages for the deficiency.

The cure approach incorporated in the *Restatement* has precisely this latter effect—a cure effort that raises the level of performance enough to avoid a material breach is sufficient to preclude the aggrieved party from cancelling the contract.[217] The different treatment of a construction contract is again justified, however, by the significant possibility of forfeiture. Even a

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214. Several courts have denied the availability of a right to cure following revocation. Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974); Jensen v. Seigel Mobile Homes Group, 668 P.2d 65 (Idaho 1983); Gappelberg v. Landrum, 666 S.W.2d 88 (Tex. 1984). Despite the limitation of § 2-508(2) to cases of rejection, a number of courts have indicated that the cure rights of that section can apply following a buyer's acceptance of a nonconforming tender. A.F.L. Falck, S.p.A. v. E.A. Karay Co., 639 F. Supp. 314 (S.D.N.Y. 1986); Conte v. Dwan Lincoln-Mercury, Inc., 374 A.2d 144 (Conn. 1976); Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654 (Minn. 1981); North River Homes, Inc. v. Bosarge, 594 So. 2d 1153 (Miss. 1992). Several commentators have also argued that a seller should have comparable cure rights following revocation by the buyer. Hillman, *supra* note 32, at 587; Sebert, *supra* note 7, at 426-28; Travalio, *supra* note 183, at 976-84; Whaley, *supra* note 32, at 75-76.

215. *See supra* note 45 (outlining what happens when seller notifies buyer of intent to cure).

216. Sebert, *supra* note 7, at 427.

217. *See* Lawrence, *Cure Under the Restatement (Second)*, *supra* note 6, at 744-47 (contending that material breaches are entitled to cure, but partial breaches are not).

party who materially breaches can face substantial forfeiture in a construction contract because the material and labor applied in performing cannot be returned upon cancellation of the contract.[218] The opportunity to cure addresses that risk of forfeiture, giving the breaching party a second chance to raise its performance to the nonmaterial breach level required under these contracts. On the other hand, cure in Article 2 is limited in order to alleviate the impact of the perfect tender rule and allow a second chance to meet buyer expectations of receiving a conforming tender. Because the goods themselves are returned to the breaching seller, sellers faced with a rightful revocation of acceptance do not face a forfeiture risk comparable to that faced by construction contractors.

Professor Sebert vigorously objects that denying sellers a right to cure after revocation runs counter to the fundamental policy in the Code of making revocation more difficult than rejection for the buyer.[219] The right to revoke is clearly more limited, and thus more difficult to attain, for reasons that already have been discussed.[220] Increased difficulty of revocation is not an objective in and of itself, however. Just because revocation is more difficult than rejection in some respects does not mean that it therefore must be more difficult in all respects. Other factors must also be taken into consideration. The differing standards of measurement for rejections and revocations, and the attendant potential forfeiture, provide a viable policy basis for providing statutory cure in one context but not in the other.

Extending the cure right in one class of revocation cases clearly would be unjustified. A buyer who accepts goods while aware of a nonconformity is entitled to revoke only if the buyer accepted the goods "on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured."[221] The buyer is allowed to revoke in this situation only after the cure effort has already failed. Sellers in these cases surely should not be afforded a second cure opportunity, but that result

218. A problem with the cure standard under the *Restatement (Second) of Contracts* is that it is available only in cases involving material breach. *Id.* at 744-45.

219. Sebert, *supra* note 7, at 392-93.

220. *See supra* notes 106-11 and accompanying text.

221. U.C.C. § 2-608(1)(a) (1990).

nevertheless follows from the proposals to give sellers a right to cure after revocation.

In respect to these cases, many courts and commentators have failed to recognize the implicit right to cure that is included in sections 2-607 and 2-608.[222] A buyer who accepts nonconforming goods under the assumption that the seller will cure them can revoke due to the defects only if cure does not follow seasonably. Therefore, the buyer implicitly grants the seller in these cases an opportunity to cure *after* acceptance by the buyer but *before* revocation.[223] Where a buyer properly revokes an acceptance made while aware of nonconformities, the seller already will have been given an opportunity to cure. An additional cure right for the seller, who failed to comply initially, is not warranted.

The unavailability of a statutory right to cure following an effective revocation in other contexts—specifically, acceptances made while unaware of the nonconformity—must not be analyzed in isolation, but rather in the context of additional Code provisions. Several provisions create desirable incentives for both parties, thereby balancing the competing interests of buyers and sellers in cases of nonconforming tender. A buyer who is aware of defects in the goods, but nevertheless accepts them without any reasonable belief that the seller will cure, is not allowed later to reverse this position and revoke the knowing acceptance. Standing alone, a buyer's lack of awareness of a nonconformity upon acceptance is not enough. The buyer is afforded a reasonable opportunity to inspect prior to accep-

222. Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 69 (Idaho 1983) ("A right to cure is relevant only when a buyer has rejected the goods prior to a formal acceptance and the Uniform Commercial Code does not allow a seller the right to cure defects following a buyer's acceptance of the goods."); Coyle Chevrolet Co. v. Carrier, 397 N.E.2d 1283, 1289 (Ind. Ct. App. 1979) ("right to cure arises only upon the buyer's rejection"); Linscott v. Smith, 587 P.2d 1271, 1273 (Kan. Ct. App. 1978) ("right to cure . . . arises only upon the buyer's rejection of the goods").

223. Champion Ford Sales, Inc. v. Levine, 433 A.2d 1218, 1222 (Md. Ct. Spec. App. 1981) (holding that the seller has right to cure when the "buyer accepts nonconforming goods with the expectation that the nonconformity will be remedied"). This implicit statutory right to cure after the goods have been accepted never applies to an acceptance when the buyer was unaware of the nonconformity at the time of accepting. If the buyer has not yet discovered the nonconformity, the acceptance could not have been made under a reasonable assumption that it would be cured.

tance,[224] which will be waived if not exercised in a timely manner.[225] Vigilance in the inspection is further promoted by denying revocation whenever a reasonable inspection should have revealed nonconformities that are later discovered.[226] When reasonable assurances by the seller lead a buyer to lessen the vigilance of his or her inspection, the seller's responsibility is recognized by preserving the right of subsequent revocation.[227] The denial of a right to cure following revocation because of a defect that was too difficult to discover clearly means that the seller's statutory cure rights are tied to the buyer's early discovery of the defect, which obviously will not occur in many cases of latent defects.[228] Still, the seller is the party responsible for that defect. Furthermore, an acceptance induced by seller assurances, or by the latency of the defect, also has significant adverse statutory consequences for the buyer. The buyer loses the right to reject,[229] bears a higher burden in order to revoke,[230] and is precluded from revoking if the defect takes too long to manifest itself.[231]

The section 2-508 cure right and the implicit statutory cure right following acceptance both reflect a timing factor as well. Section 2-508(2) postpones the buyer's right to perfect tender

224. U.C.C. §§ 2-513, 2-606(1)(a)-(b) (1990).

225. *Id.* § 2-606(1)(b) (providing that acceptance results after "the buyer has had a reasonable opportunity to inspect" the goods if the buyer does not make an effective rejection).

226. *Id.* § 2-608(2). These incentives are desirable, since an early detection of a deficiency generally will be advantageous. The nature and extent of the problem can be investigated sooner, responsibility for the deficiency can be discerned more readily, and the consequences of a breach can be minimized more easily. Vigilance in discovering defects and prompt action to cure together provide the buyer with a conforming cure tender relatively close to the time for performance under the contract.

227. *Id.* § 2-608(1)(b).

228. Vigilance in inspection will not aid discovery when the defect is latent or otherwise difficult to detect.

229. U.C.C. § 2-607(2) (1990) (providing that the right to reject, which would have been available if the defect had been discovered, is lost upon acceptance).

230. *Id.* § 2-608(1) (providing that the defect must substantially impair the value of the goods to the buyer to allow for revocation).

231. *Id.* § 2-608(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.").

when the time for the seller's performance has expired, but even then it affects only the time of ultimate seller performance. By allowing the seller only a "further reasonable time" during which to cure,[232] the section serves to minimize interference with the buyer's right to receive perfect tender. Similarly, the implicit cure right is invoked only when the buyer is aware of the nonconformity in the goods but nevertheless acquiesces in a cure effort by the seller. The timing of the discovery of the defect is the same. The difference is in the response by the buyer: rejection, followed by the seller invoking the statutory right to cure; or acceptance, based on an assumption of cure, invoking the implicit right to cure. In either instance, the buyer is entitled, within a further reasonable time for the seller to respond, to an effective cure from the seller.[233] The primary objective of curing the offending nonconformity close to the time specified in the contract for the seller's performance is just as possible under the implicit cure approach as it is under section 2-508. That time period could be extended considerably, however, if cure was allowed following revocation.

Professor Sebert argues that this analysis concerning the timeliness of cure is not persuasive.[234] He dismisses the relevancy of the proximity of cure to the contract date for tender, and instead compares the speed of the seller's cure following revocation with the time involved for the aggrieved buyer to obtain adequate cover.[235] He argues that even if the cure occurs months after the seller's initial tender, it should not be deemed

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232. *Id.* § 2-508(2).

233. If the seller's cure does not provide goods whose quality is perfect tender, the buyer who rejected can then reject the cure tender. Similarly, an aggrieved buyer who accepted can revoke following an inadequate cure effort. The correlation between these two courses is not exact, however. Having accepted the goods, the buyer who affords a seller the implicit right to cure cannot effectively refuse a cure tender that corrects the substantial impairment but still does not provide perfect tender. Pratt v. Winnebago Indus., 463 F. Supp. 709 (W.D. Pa. 1979) (holding that the buyers of motor home who allowed the seller to repair faulty transmission could not revoke based on additional nonconformities that did not substantially impair the value of the goods); *see also* Dehahn v. Innes, 356 A.2d 711 (Me. 1976) (denying revocation by the buyer who accepted goods under the expectations that the seller would cure, upon failure of the seller to cure because the defects were "de minimis").

234. Sebert, *supra* note 7, at 393 & n.106.

235. *Id.*

untimely if it occurs before the buyer would be able to cover elsewhere.[236]

This argument raises three specific concerns. First, the proposals to permit cure following revocation are not based on allowing the right only when the seller can cure faster than the buyer can cover. The right to cure has never been based on such an event or assumption, and the adoption of such a standard would promote undesirable consequences.[237]

Second, the comparison of time to cure and time to cover overlooks an essential difference between those two options. A buyer who revokes because of substantial impairment can regain the right to perfect tender by turning to the market to cover. That same buyer, if required to yield to a cure effort, will sometimes have to be satisfied with a cure that provides less than what the contract requires.

Third, the determination of the time needed to cure, and even whether the cure effort will be successful, can be determined in the final analysis only by allowing a seller to proceed. If the cure effort fails, the buyer can revoke and cover, but only following the delay involved with ineffective cure.

The rights of a seller to cure after rejection, and after acceptance but before revocation, are both provided to alleviate some of the potential impact of the perfect tender rule. By requiring full compliance with the contract terms, this rule obviously sets a high standard for sellers. These statutory cure rights allow a second opportunity to perform for sellers who qualify, while interfering only minimally with the buyer's rights to perfect tender.

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236. *Id.*

237. Basing the right to cure on a priority system of actions taken by the parties following nonconforming tender by the seller would induce hasty cure and cover efforts. Furthermore, it would produce duplicative efforts of the parties. If both efforts were nearly complete before one of them was realized, the effort and expense of the other party could be rendered meaningless.

E. Cure Beyond Section 2-508

1. Additional Sources of the Right to Cure

Although the cure concept is a desirable innovation of contract law, it has not fared particularly well in Article 2. Both courts and commentators frequently have erred in applying the cure concept. One of the biggest problems has been the failure to give adequate recognition to four additional sources of the right to cure within the scope of Article 2. These additional sources are the implicit right to cure following acceptance under section 2-607, express terms in the contract, consensual cure in the absence of express terms, and the unique aspects of cure in installment cases. The section 2-607 implicit cure right has already been discussed.[238] Courts have generally recognized express terms which allow a seller to repair or replace defective goods,[239] although these cases have not generally been perceived as involving cure.[240] The discussion here will focus on the remaining two sources of the cure right.

Even if neither the Code nor the parties' contract terms provide a defaulting seller with a right to cure a nonconforming tender, the cure opportunity might be attained by consent. The seller might offer to correct the deficiency and receive an affirmative response from the buyer, or the buyer might request, or even demand, a cure. Neither contracting party can force the other side to acquiesce, but when attained, consent creates cure rights in addition to the ones provided in the Code and the original contract terms. Mutual consent of the contracting parties is necessary because this additional cure right is created as a modification of the initial contract. Although the terms of the modification agreement must then control the extent and timeliness of

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238. *See supra* notes 222-23 and accompanying text.

239. *See, e.g.*, Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973) (holding valid a limitation of remedy to repair or replacement of defective parts which was expressly stated in the contract for sale of a tractor).

240. For a case that should have been governed by the valid "repair or replacement" provision in the contract, but in which the court became improperly involved with issues of § 2-508 cure and revocation, see Reece v. Yeager Ford Sales, Inc., 184 S.E.2d 722 (W. Va. 1971).

cure rights, several courts have erroneously forced such cases into an analysis under section 2-508.[241]

The right to cure a nonconforming tender under an installment contract pursuant to section 2-612(2) differs in several respects from the right to cure under section 2-508.[242] Unlike the general section on cure, the installment section does not distinguish cases based on whether the contract time for performance has or has not expired. The cure section applies only on a buyer's rejection,[243] but the installment section prevents the buyer from rejecting the nonconforming performance if cure is possible.[244] Under the general section, sellers must seasonably notify buyers of the intent to cure,[245] whereas installment contract sellers must give adequate assurance of the cure of nonconforming installments.[246] In installment contracts the buyer must accept the tendered installment based on the assurance of cure,[247] whereas under section 2-508, the buyer has already rejected the nonconforming tender and can await the cure effort of the seller before responding further.[248] Section 2-612(2) does not refer to the section 2-508(2) condition that the seller have "reasonable grounds to believe" that the nonconforming tender would be acceptable to the buyer.[249] Finally, under section 2-

241. *See* Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co., 393 F. Supp. 877 (M.D. Tenn. 1975) (applying § 2-508 to case involving post-rejection consensual cure); Ramirez v. Autosport, 440 A.2d 1345 (N.J. 1982) (buyers did not even reject until after consensual cure efforts failed).

242. Section 2-612(2) provides that when a nonconforming installment does not substantially impair the value of the whole contract, the buyer must accept the installment if the seller gives adequate assurance of its cure. U.C.C. § 2-612(2) (1990).

243. *Id.* § 2-508.

244. *Id.* § 2-612(2).

245. *Id.* § 2-508.

246. *Id.* § 2-612(2).

247. *Id.*

248. *Id.* § 2-508. The Drafting Committee should change this part of § 2-612(2). The requirement to accept means that if the seller's attempted cure is not adequate, the aggrieved buyer must be able to revoke the acceptance of the installment rather than being able to reject the uncured tender. The difference becomes significant in light of the Study Group recommendation to change § 2-612(2) to apply the perfect tender rule as the standard governing buyer rejection of a nonconforming installment. PRELIMINARY REPORT, *supra* note 8, at 178 (Rec. A2.6(8)(A)); *see also supra* note 88.

249. U.C.C. § 2-508(2) (1990).

508(2), a price allowance is generally not a sufficient cure,[250] but under section 2-612(2) "[c]ure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price."[251] These differences demonstrate that the two sections establishing the seller's right to cure do not interact. Only section 2-612(2) applies to cases of nonconforming tenders of installments. Many courts and commentators who have addressed the statutory right to cure a nonconforming installment have failed to recognize these distinctions.[252]

The absolute right to cure given to sellers under section 2-612(2) is sensible. The installment contract creates a continuing relationship between the buyer and seller that extends beyond the single nonconforming delivery, and the buyer is not entitled to cancel that contractual relationship unless the value of the entire contract has been substantially impaired.[253] The parties must continue to deal with each other in the future, making preconditions for allowing the seller an opportunity to correct a curable tender less desirable.

2. *Restructuring Recommendation*

Many of the difficulties with applying the cure concept probably can be traced to the codification of section 2-508 as a free-standing provision entitled "Cure by Seller of Improper Tender or Delivery." It has led courts and commentators to focus on section 2-508 whenever the cure issue is raised, rather than giving adequate recognition to the additional sources of the right

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250. *See supra* notes 100-05 and accompanying text.

251. U.C.C. § 2-612 cmt. 5 (1990).

252. *See, e.g.*, Bodine Sewer, Inc. v. Eastern Ill. Precast, Inc., 493 N.E.2d 705, 713 (Ill. Ct. App. 1986); Bevel-Fold, Inc. v. Bose Corp., 402 N.E.2d 1104, 1108 (Mass. App. Ct. 1980); Graulich Caterer, Inc. v. Hans Holterbosch, Inc., 243 A.2d 253, 261 (N.J. Super. Ct. App. Div. 1968); Continental Forest Prods., Inc. v. White Lumber Sales, Inc., 474 P.2d 1, 4 (Or. 1970). The recommendation of the Study Group that in an installment contract "the seller should have power to 'cure' the nonconformity which is as broad as that granted in § 2-508(1), even though the time for performance of that installment has passed," PRELIMINARY REPORT, *supra* note 8, at 178 (Rec. A2.6(8)(A)), seems to suggest that members of the Study Group were unaware of the extent of cure rights provided under § 2-612(2).

253. U.C.C. § 2-612(3) (1990). *See supra* notes 76-84 and accompanying text (discussing cancellation of installment contracts).

to cure in Article 2 cases. By tending to pigeonhole most cure cases into section 2-508, courts and commentators have distorted the role intended for cure in sales transactions and thus generated significant error and confusion.

Given these unfortunate tendencies, the Drafting Committee should eliminate section 2-508 as a free-standing provision. The section applies only in cases in which a buyer has properly rejected; thus it would be preferable to incorporate the provision into section 2-601, which deals with the buyer's right to reject. The cure right of section 2-508 has the effect of suspending the effectiveness of the buyer's rejection, so it logically should become part of the rejection provision. The Study Group's sensible recommendation to extend a comparable section 2-508(1) right to cure following revocations in which the time for performance has not yet expired[254] could then be added to the revocation provision of section 2-608. These organizational changes should facilitate an appreciation of the contexts in which the current section 2-508 cure right properly applies. In addition to these changes in the text, the Drafting Committee should use the comments to draw attention to the additional sources of cure rights.

VI. CONCLUSION

Despite the substantial controversy that has surrounded many of the issues concerning a buyer's refusal to keep goods tendered by a seller, the Study Group wisely has not recommended major departures from the current Article 2 approach. Sound policy reasons support most of the doctrinal approaches of the original drafting, although some changes are needed as well. Rather than deficiencies in the underlying doctrines, the extent of the controversies suggest the need to improve the form in which the provisions are drafted. One of the most significant means to advance understanding in this area is to articulate the relevant policies that form the basis for the drafting choices.

254. PRELIMINARY REPORT, *supra* note 8, at 171 (Rec. A2.6(6)(B)). *See supra* note 213 and accompanying text.