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David Frisch
University of Richmond, dfrisch@richmond.edu

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THE PERFECT TENDER RULE—AN "ACCEPTABLE" INTERPRETATION

Michael A. Schmitt* and David Frisch**

I. INTRODUCTION

THE Uniform Commercial Code was designed to simplify, clarify, modernize, and make uniform the law of commercial transactions.1 As is sometimes the case, however, conflicts arise among various sections which tend to be resolved over the course of time through amendment, scholarly comment, and judicial interpretation. One conflict which seems to have resisted resolution for almost twenty years involves the buyer's right to reject under section 2-6012 and the seller's right to cure under section 2-508(2).3 The conflict is

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* Professor of Law, Southwestern University School of Law. J.D., 1973, Yale Law School.

** Assistant Professor of Law, Delaware Law School. J.D., 1975, University of Miami; LL.M., 1980, Yale University.

1. U.C.C. § 1-102 (1978) provides, in part:
   Purposes; Rules of Construction; Variation by Agreement
   (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
   (2) Underlying purposes and policies of this Act are
   (a) to simplify, clarify and modernize the law governing commercial transactions;
   (c) to make uniform the law among the various jurisdictions.
   [hereinafter all references to the Uniform Commercial Code will be to the 1978 Official Text].

2. U.C.C. § 2-601 reads:
   Buyer's Rights on Improper Delivery
   Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may
   (a) reject the whole; or
   (b) accept the whole; or
   (c) accept any commercial unit or units and reject the rest.

3. U.C.C. § 2-508 provides:
   Cure by Seller of Improper Tender or Delivery; Replacement
   (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may sea-
simple and straightforward. When a seller makes a nonconforming tender, the buyer in a sale of goods transaction may choose to exercise his section 2-601 right to reject—often called the "perfect tender rule." Upon notice of rejection, however, the seller will often attempt to "cure" the defect, asserting the right to cure pursuant to section 2-508(2). To the extent that the seller's right to cure is broadly interpreted, the perfect tender rule becomes something less than perfect. To the extent that section 2-508(2) is narrowly interpreted, the perfect tender rule is strengthened.

The focus of this article will be on the inherent conflict between the buyer's right to reject and the seller's right to cure. We will first review both the scholarly commentary addressing the issue and the judicial interpretations of the rejection-cure conflict. We will then propose a resolution to the conflict, or an acceptable interpretation, which serves to promote the expressed purposes and policies of the Uniform Commercial Code.

II. NON-CONFORMING INTERPRETATIONS OF THE CONFLICT

A. The Commentators

Interpreting the wording of section 2-508(2) and the appropriate scope of its applicability has proven no easy task for legal scholars. Professor Peters notes that the section fails to achieve its principal objective of preventing surprise rejections by unscrupulous buyers by being couched in "remarkably obscure" language. She focuses upon the reference to "monetary allowance" as being the section's principal ambiguity. In exploring three possible readings of this phrase, she finds that all either lead to implausible results or results

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5. See supra note 3.
6. Peters, supra note 4, at 209-16.
7. See supra note 1.
9. Id. at 211-12.
contrary to public policy.\textsuperscript{10} She abandons her interpretative effort by concluding that section 2-508(2) should be amended to eliminate the confusion and that 2-601 should be redrafted to eliminate any outright power to reject.\textsuperscript{11}

Professor Nordstrom asserts that the primary difficulty in interpreting section 2-508(2) lies in determining the subject of the "which" clause.\textsuperscript{12} He interprets the section as being applicable only to "sellers who knew their tender was non-conforming but who reasonably believed that their buyers would accept the non-conforming tender—only to meet a surprise rejection."\textsuperscript{13} The basis of his reasoning is that the application of the section to any other seller would make the reference to monetary allowance redundant, as a seller who believes that his tender is conforming has no reason to consider a reduction in price.\textsuperscript{14} He further contends that as a matter of policy sellers who are mistaken as to the quality of their goods do not merit additional time to do what they agreed to do by a date which has already passed.\textsuperscript{15} Beyond this he offers no further criteria upon which to ascertain when a seller has reasonable grounds to believe that a buyer would accept a nonconforming tender, one of the conditions precedent to the right to cure as specifically set forth in section 2-508(2).

Another approach to the problem focuses upon the good faith of the seller in making the nonconforming tender and, in the alternative, upon the good faith of the buyer in rejecting such a tender.\textsuperscript{16} As one commentator writes: "This approach seems more sensible than any attempt to develop a rigid set of standards under which the factor of good faith (or true surprise) might be lost."\textsuperscript{17} We agree that the good faith of both buyers and sellers plays a central and possibly even pivotal part of the analysis of section 2-508(2) and its effect upon a buyer's right to reject for any nonconformity. We also believe, however, that the express wording of section 2-508(2) relieves not only the courts from the onerous task of determining contract

\textsuperscript{10} \textit{Id.}

\textsuperscript{11} \textit{Id.} at 215-16.


\textsuperscript{13} \textit{Id.} at 321.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}


\textsuperscript{17} \textit{Id.} at 400.
disputes based primarily on findings of the good or bad faith of the parties, but also relieves the parties themselves from the uncertain and unpredictable results which such determinations would necessarily produce.

Professors Summers and White argue:

[A] seller should be found to have had reasonable cause to believe that his tender would have been acceptable any time he can convince the court that (1) he was ignorant of the defect despite his good faith and prudent business behavior or (2) he had some reason such as prior course of dealing or trade usage which reasonably led him to believe that the goods would be acceptable.  

While the second of the two suggestions reflects both sound reasoning and a valid interpretation of the comments to section 2-508, we believe that to allow a seller, ignorant of the nature or quality of the goods which he sells, to cure under section 2-508(2) would encourage sloppy business practices and create a right to cure in virtually every instance. This approach is unfounded in the words or purposes of the subsection. To allow a merchant to assert ignorance as a justification for the right to cure is to allow him to assert that which he, by definition, cannot claim. A merchant holds himself out to the public as being one with superior knowledge of the things which he sells. To allow such a seller to come into court, after the fact, and seek relief against a disillusioned buyer based upon ignorance, is to allow the seller to play a devilish and unconscionable trick upon the customers who placed their faith in him.


19. Comment 2 to U.C.C. § 2-508 provides, in part: “However, the seller is not protected unless he had ‘reasonable grounds to believe’ that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract.”

20. See infra Part III.

21. U.C.C. § 2-104 contains the following definition of “merchant”: “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(emphasis added).
Professors Summers and White further advocate forced money allowances for insubstantial nonconformities, even in the absence of a usage in trade obligating a buyer to accept such reductions. The professors assume the position that the section can be conformed "in wise judicial hands" so as to achieve the reasonable expectations of the parties and to thwart the "chiseler who seeks to escape a bad bargain." As will be pointed out shortly, there has been a paucity of wisdom guiding the judicial determinations of the 2-508(2) and 2-601 relationship. The cases show that section 2-508(2) has been not so much directed against "chiseling" buyers but in favor of chiseling sellers. The professors leave their analysis of the section without addressing the scope and meaning of the word "acceptable."

Probably the most pedestrian analysis and application of section 2-508(2), and the one adopted by a number of courts, is suggested by Professor Hawkland. Hawkland’s test focuses upon the magnitude of the defect in determining whether a seller should be given an opportunity to cure. Under this analysis, a seller would be allowed to cure a tender in all cases where the buyer would not be subjected to "any great inconvenience, risk or loss." Though admittedly offering the prospect of ease of application, this approach is not founded on the words of the section and diametrically opposes the clear purport of section 2-601. Again, as with the "good faith-bad faith" approach, the parties are left facing ad hoc determinations and the inconsistent results which these produce. The only difference here is that the focus is upon the magnitude of the defect involved rather than the good faith of the parties. Further, as with the "good faith-bad faith" approach, this analysis fails to take into

22. White & Summers, supra note 18, at 322-23.
23. Id. at 324.
25. Id.
26. Id. at 724.
27. One commentator has pointed out that judicial decisions have failed to consider the clear language of section 2-508(2) when legislating a "magnitude of the defect" test. Note, Uniform Commercial Code—Rejection and Revocation—Seller's Right to Cure a Nonconforming Tender, 15 Wayne L. Rev. 938, 949 (1969). It is the authors' opinion that "[t]he major-minor defect test does not incorporate the element of seller's reasonable belief of acceptability of a tender and for this reason is unreflective of the statutory language." Accordingly, "the right to cure a nonconforming tender after the time for performance has passed shall depend upon whether the seller had reasonable grounds to believe the tender would be acceptable . . . ." Id.
account that there are differing standards of good faith with respect to merchant and nonmerchant buyers and that these differing standards have a bearing upon the effect of the magnitude of the defect. Essentially, a consumer buyer is obligated to exercise only "honesty in fact" in the transaction involved, a purely subjective standard. 28 A merchant, on the other hand, is additionally held to observance of reasonable commercial standards of fair dealing in the trade. 29 With this in mind, the possibility becomes apparent that defective goods which a consumer buyer, in all honesty, finds unacceptable could not, in good faith, be rejected by a merchant buyer. 30

A review of the scholarly commentary shows a wide divergence of opinion as to the proper interpretation of the section 2-601—2-508(2) conflict. The factors suggested include the good faith of the parties, the magnitude of the defect in the product, prior course of dealing, and the amount of the monetary allowance. The result is that the academic literature fails to provide a concise and easily understandable resolution to the rejection-cure conflict.

B. Judicial Interpretations

It is not surprising to discover, after reviewing the various tests and criteria the commentators have proposed, that the language of section 2-508(2) has not received uniform interpretation by the courts when faced with actual contract disputes. What is surprising is the manner in which the courts have avoided, circumvented, and otherwise ignored the specific requirement of section 2-508(2) that before a seller may have time, in addition to that agreed to for performance, in which to cure a nonconforming tender, he must have made such tender reasonably believing that it would be acceptable to the buyer. 31 In fact, most courts, when presented with the issue of a seller's right to cure, have simply ignored the existence of the two subsections in section 2-508. It is often difficult to determine whether the disposition of a particular case was made pursuant to section 2-508(1) or section 2-508(2). 32

28. "Good faith" is defined in a general sense as "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19).
29. In the case of a merchant, good faith requires, in addition to honesty in fact, the "observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b).
30. See infra Part III.
31. See supra note 3.
32. See, e.g., Marine Mart, Inc. v. Pearce, 252 Ark. ___, 480 S.W.2d 133 (1972);
Any discussion of the application of section 2-508(2) by the courts must begin with the case of Wilson v. Scampoli. This case involved a new color television set having a "reddish tinge" to the picture. Refusing to allow the seller to remove the set to make the inspection essential to determine the cause of the defective performance, the buyer first demanded a new set and then sought the return of her money. The appellate court reversed the judgment of the trial court granting rescission of the sales contract. Addressing itself to the seller's right to cure, the court stated: "[A] retail dealer would certainly expect and have reasonable grounds to believe that merchandise like color television sets, new and delivered as crated at the factory, would be acceptable as delivered and that, if defective in some way, he would have the right to substitute a conforming tender." After finding that the seller had the right to cure, the question then before the court was "whether the dealer may conform his tender by adjustment or minor repair or whether he must conform by substituting brand new merchandise." The court went on to declare that adjustments in the nature of a "minor" repair would be an acceptable method of cure.

 Shortly after Wilson was decided, a similar situation presented itself in Zabriskie Chevrolet, Inc. v. Smith. Upon driving a new automobile home from the dealer's showroom, the buyer discovered that it was practically inoperable because of a transmission so defective as to require replacement. In its decision, the court focused on what was intended by the term "cure" as used in section 2-508. The court refused to permit the dealer to substitute a new transmission, reasoning that the magnitude of this type of defect upset the peace of mind of the buyer and indeed shattered the buyer's faith in the vehicle. The court reasoned, "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." What is conspicuously absent


34. Id. at 849.
35. Id.
37. Id.
38. Id. at 458, 240 A.2d at 205.
from the decision is any discussion regarding the seller's right to cure.

Some courts have apparently read Wilson and Zabriskie as establishing a "magnitude of the defect" test for determining when a seller may have additional time within which to cure a defective tender, and have themselves applied such a test. In Reece v. Yeager Ford Sales, Inc., the court cited Wilson and held:

[U]nder the Uniform Commercial Code where the buyer rejects the goods or chattels when delivered because they are non-conforming, an offer can be made by or on behalf of the seller to repair or cure the minor defects, which should be accepted by the buyer and rescission could not be had.

Wilson was also relied upon by the court in Beco, Inc. v. Minnechaug Golf Course, Inc. in which the seller was permitted additional time to cure simply because the defects were characterized as minor. A final example of what appears to be the application of a "magnitude of the defect" test can be found in the relatively recent case of Johannsen v. Minnesota Valley Ford Tractor Co. In the court's view "any right to cure should be limited to cases in which the defects are minor, and . . . the seller has no right to cure defects which substantially impair the good's value."

A second theoretical approach to the interpretation and application of section 2-508(2) implicitly adopted by some courts has been to focus on the element of good faith. Since section 2-508(2) is aimed at protecting the seller from surprise rejections, courts have considered good faith surprise at a rejection as constituting "reasonable grounds to believe that a [non-conforming tender] would be acceptable." For example, in Wilson perhaps one of the major factors that went into the court's decision allowing the seller to cure was the fact that the television set was delivered in its original crate. Deliv-

40. 184 S.E.2d at 725 (emphasis added).
41. 5 Conn. Cir. 444, 256 A.2d 522 (1968).
42. 304 N.W.2d 654 (Minn. 1981).
43. Id. at 657.
ery of a factory crated product in ignorance of the defect may have constituted for this court one kind of reasonable tender.\textsuperscript{46} In effect, the court found that the seller was acting in good faith in delivering the television set even though it delivered a nonconforming television set. This approach may also explain why a different result was reached in \textit{Zabriskie}. The dealer had argued that it is the usage of the automobile trade that a buyer accept a new automobile, although containing defects of manufacture, if such defects can be and are seasonably cured by the seller. The court admitted that such a custom may exist but nevertheless rejected it, stating, "[p]erhaps this represents prevailing views in the automobile industry which have, over the years, served to blanket injustices and inequities committed upon buyers who demurred in the light of the unequal positions of strength between the parties."\textsuperscript{46} From this statement one gets the impression that the court was not favorably impressed by the actions of this particular seller nor, for that matter, by the actions of the entire automobile industry.

The seller's good faith may also have been the determinative factor in \textit{Bartus v. Riccardi}.	extsuperscript{47} The buyer had purchased a specified model of hearing aid, but was delivered a different but "new and improved" model. After experiencing difficulty with the hearing aid and discovering that it was not the specific one ordered, the buyer returned it to the seller and refused to deal further with him. Though very little was said about the language of section 2-508(2), the court held that the seller had the right to cure because "under the circumstances the seller had reasonable grounds to believe that the newer model would be accepted . . . ."\textsuperscript{48} It is certainly difficult to question the good faith of a seller who delivers a newer or ostensibly better good than that required by the sales contract.

A third theoretical approach has been based on an interpretation of the phrase "further reasonable time" found in section 2-508(2)—focusing on what is a reasonable time and indeed how long the seller is permitted to try to cure a nonconforming tender. A buyer has been permitted to reject after unsuccessful efforts by the seller to cure or where it is apparent that the particular defect cannot be cured.\textsuperscript{49} Where the seller has attempted to cure but has failed

\begin{itemize}
\item \textsuperscript{45} Wilson v. Scampoli, 228 A.2d 848 (D.C. Ct. App. 1967).
\item \textsuperscript{46} Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. at 456, 240 A.2d at 204.
\item \textsuperscript{47} 55 Misc. 2d 3, 284 N.Y.S.2d 222 (N.Y. City Ct. 1967).
\item \textsuperscript{48} \textit{Id.} at 6, 284 N.Y.S.2d at 225.
\item \textsuperscript{49} \textit{See, e.g.,} Marine Mart, Inc. v. Pearce, 252 Ark. 601, 480 S.W.2d 133 (1972);
\end{itemize}
to do so, the courts, by a simple shift of focus, have been able to completely ignore the question of whether the seller had a right to cure in the first place.\textsuperscript{50}

All of the above cases are, we feel, of doubtful authority on the question of a seller's right to cure under section 2-508(2). In each case the contract did not specify a date for delivery. It may be argued that the disposition in each case actually could have been made pursuant to section 2-508(1), applying the standard of section 2-309(1) that where no time for shipment or delivery is set forth, delivery is to be made within a "reasonable time."\textsuperscript{51} If a seller's right to cure depends upon application of section 2-508(1) then, of course, the seller's belief in the acceptability of the tender becomes irrelevant. This may explain the lack of attention given to this requirement by the courts. The only decision discussed so far which does allude to the requirement of reasonable belief in the acceptability of the goods is Wilson; however, in Wilson the court simply equated the word "acceptable" with the word "conforming" by concluding that if the seller is unaware that the tender is nonconforming, then he has "reasonable grounds to believe [that a non-conforming tender] would be acceptable."\textsuperscript{52} The focus of the court's attention was not on the right to cure but on the appropriate method of effecting a cure. The same is true for the decision in Zabriskie in which the court assumed a right to cure and focused only on what constitutes an acceptable method of cure.\textsuperscript{53} If these two cases establish a "magnitude of the defect" test, such a test would only be relevant when determining the permissible method of cure, not when determining whether the seller has the right to cure.

Two cases deserve special mention because in both the courts did not blind themselves to the "reasonable grounds to believe would be acceptable" language in section 2-508(2) and did attempt to impart some meaning to this phrase. In Meads \textit{v. Davis},\textsuperscript{54} the

\begin{itemize}
  \item Conte \textit{v. Devan Lincoln-Mercury}, 172 Conn. 112, 374 A.2d 144 (1976);
  \item Hayes \textit{v. Hettinga}, 228 N.W.2d 181 (Iowa 1975);
\end{itemize}

\begin{itemize}
  \item 50. \textit{See cases cited supra} note 49.
  \item 51. \textit{U.C.C. § 2-309} provides, in part:
    \begin{itemize}
      \item \textit{Absence of Specific Time Provisions; Notice of Termination}
        \begin{itemize}
          \item (1) \textit{The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time}.
        \end{itemize}
    \end{itemize}
  \item 54. 22 N.C. App. 479, 206 S.E.2d 868 (1974).
\end{itemize}
The court stated:

Obviously this section deals with the situation in which the seller knows prior to delivery that the goods are not in conformity, but has reason to believe that the buyer will accept. An example of such a situation might be where the buyer orders goods no longer carried by the seller, but the seller has goods which will perform the same function.\(^{55}\)

The court then concluded, however, that the time for performance had not expired and permitted the seller to cure pursuant to section 2-508(1), thereby relegating its discussion of section 2-508(2) to dicta.

The second case is Joe Oil USA, Inc. v. Consolidated Edison Co. of New York.\(^{56}\) After concluding that the seller's time for performance had expired, the court focused on the language of section 2-508(2). The court agreed with the foregoing statement in Meads that section 2-508(2) will permit a seller to cure if he had pre-delivery knowledge of the nonconformity but nevertheless reasonably believed the tender would be accepted. The court, however, refused to accept the assertion that the application of section 2-508(2) is limited exclusively to such circumstances, writing:

The remedy should be available to any seller who has a reasonable good faith ground to believe that the original shipment would be accepted. The dichotomy sought to be advanced by the Nordstrom disciples (which would bar redress to those without predelivery knowledge of conditions causing non-conformity, but affords relief to those who ship despite knowledge of defect or non-conformity) is totally convoluted, unjust and incongruent. The innocent seller who ships his goods in good faith, reasonably believing that they are conforming and acceptable would be given no relief or redress, but all of the curative power of the statute would be made available to a more culpable seller who delivers his non-conforming wares despite existing knowledge of its [sic] defective, non-conforming qualities. It is difficult to believe that a construction rewarding culpability and penalizing innocence is preferable, or consistent with the remedial intent of the creators of this remedy. To the contrary, this Court believes that more compelling equitable considerations exist to extend the § 2-508(2) remedy to those innocent sellers who have no prior predelivery knowledge of non-conformity, and only first learn of a defect following a purchaser's

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55. Id. at ___, 206 S.E.2d at 869.
post-delivery rejection of the merchandise as non-conforming. This construction facilitates the Code’s mandate of liberal construction (UCC § 1-102) and administration (UCC § 1-106[1]) based upon an imposed obligation of good faith in performance and enforcement (UCC § 1-203).57

The judicial resolution of the rejection-cure conflict represented by these cases is by no means clear. There appears to be a tendency to avoid the conflict by resolving the disputes under section 2-508(1). If this cannot be accomplished because the time for performance has clearly elapsed, courts seem to follow the myriad of factors suggested by the academic literature. Resolution of the conflict is determined by various tests, including the magnitude of the defect, the good faith of the buyer or seller, or the ease and ability of the seller to cure. As Summers and White admit, “How one generalizes from the . . . cases . . . is not clear.”58 The current state of the law on the applicability of section 2-508(2) is probably best stated by Professor Miniter.59 After reviewing a number of cases decided under this section, he concludes that the courts have focused on both the substantiality of the defect and the good faith of the parties and states that “[c]ure has therefore become discretionary.”60

III. AN ACCEPTABLE RESOLUTION OF THE REJECTION-CURE CONFLICT

As should be apparent at this point, considerable interpretive difficulties have surrounded section 2-508(2) and its interaction with section 2-601. Courts and commentators alike have addressed the issue of the proper scope and application of the allegedly ill-drafted provision and a myriad of analyses have resulted. We believe that neither difficulty nor confusion need accompany an understanding and application of section 2-508(2). If a clear, reasonable, and practicable interpretation of the section is achieved, the section can become a useful tool in promoting the objectives of the Code without the need for redrafting.

Although section 2-601 permits the buyer to reject the whole if

57. Id. at 389-90, 434 N.Y.S.2d at 632.
58. White & Summers, supra note 18, at 321.
60. Id. at 835.
the goods or tender of delivery fail in any respect to conform to the contract, other sections impact on the buyer's right to reject and consequently narrow the scope of section 2-601. When the seller is required or authorized to send goods to the buyer, section 2-504 specifies that the seller's shipment duties include making a proper contract for shipment, obtaining and tendering the necessary shipping documents, and promptly notifying the buyer of the shipment. The seller's failure to meet these requirements results in an improper tender of delivery, giving rise to the buyer's section 2-601

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61. See supra note 2.

62. U.C.C. § 2-504 provides:

Shipment by Seller

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

63. U.C.C. § 2-503 provides, in part:

Manner of Seller's Tender of Delivery

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is sufficient and dis-
rejection right, however, section 2-504 provides that failure to notify the buyer of the shipment or failure to make a proper contract for shipment is a ground for rejection only if material delay or loss ensues. Therefore, the section 2-601 right to reject arising from an improper tender of delivery will not automatically relieve the buyer of his section 2-301 duty to accept and pay.

A further limitation of the buyer's right to reject occurs with a section 2-612 installment contract. Since, by definition, an installment contract is one which requires or authorizes delivery of goods in separate lots, the buyer's section 2-601 right to reject is qualified in such contracts to situations where "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; . . . if the non-conformity does not . . . substantially [impair] the value of the whole contract [so that] there is a breach of the whole," then the buyer must accept the nonconforming installment if the seller gives adequate assurances of its cure.

Subsection (1) of section 2-508 is clear in its intent and purpose and has not given rise to significant judicial conflict. When a buyer

64. See supra note 2.
65. U.C.C. § 2-301 provides:
   General Obligations of Parties
   The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.
66. U.C.C. § 2-612 provides:
   "Installment Contract": Breach
   (1) 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.
   (2) 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.
   (3) Whenever non-conformity or default with respect to one or more installations 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 nonconforming 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.
67. U.C.C. § 2-612(1).
68. U.C.C. § 2-612(3).
uses his right to reject a nonconforming tender or delivery, and the time for performance has not yet expired, the seller may cure by making a conforming tender if he can do so within the contracted time for performance. In effect, this is a no-harm, no-foul rule. Assuming the seller can cure within the contract time, no harm falls upon the buyer. Thus, the Code expressly prohibits the buyer in this situation from using his right of rejection to get out of the contract. Wise sellers can use this section to prevent rejections by specifying a definite date of delivery, and tendering before that date. Should a defect appear when the buyer inspects, the seller can cure and still be protected by the fact that the time for performance has not yet run.

When, however, the time for performance has run and the buyer rejects, the seller's right to cure is limited by section 2-508(2). It is the interpretive difficulties of this section that have given rise to all the confusion. Comment 2 explains that the purpose of subsection (2) is to "avoid injustice to the seller by reason of a surprise rejection by the buyer." It adds that the seller is not protected "unless he had 'reasonable grounds to believe' that the tender would be acceptable." As we have noted above, academic commentary has focused primarily on the "reasonable grounds to believe" and the "with or without money allowance" phrases of section 2-508(2). Additional comment has been addressed to the good faith requirements in all Code sections mandated by section 1-203, and a substantial-insubstantial test nowhere to be found in section 2-508(2) or its official comments. We have not found any commentary on the word "acceptable," the word we believe is the key to understanding the limits of the seller's right to cure.

The word "acceptable" is nowhere defined in the Code, although what constitutes an "acceptance" is. Under section 2-606 the buyer

69. See supra note 3.
70. U.C.C. § 2-508, Comment 2.
71. Id. (emphasis added).
72. See supra Part IA and notes 4, 12 & 17.
73. See UCC Section 2-508, supra note 16.
74. See Hawkland, supra note 24.
75. The academic commentary focusing on section 2-508(2) has been discussed in Part IA supra. None of this commentary addressed the word "acceptable." At best, they equated it, as the courts have done, with the word "conforming."
76. U.C.C. § 2-606 provides:
What Constitutes Acceptance of Goods
(1) Acceptance of goods occurs when the buyer
is deemed to have accepted the goods if he: a) signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity, b) fails to make an effective rejection by notifying the seller within a reasonable time after the delivery of the goods, or c) does any act inconsistent with the seller's ownership.\(^7\) If the meaning of the word "acceptable" as used in section 2-508(2) can be found by reference to the Code's definition of acceptance in section 2-606, the seller's right to cure would have to arise in situations where the seller had reasonable grounds to believe that the buyer would retain the goods in spite of their nonconformity. Surely the seller does not anticipate that a buyer would reject goods and still do an act inconsistent with the seller's ownership. Equally certain is that a seller could not reasonably expect that a buyer wanting to reject would not do so in a reasonable time with proper notice. In fact, paragraphs (b) and (c) of subsection 2-606(1) are rather like penal provisions, creating a statutory acceptance when the buyer has ineffectively rejected or used the goods as if he had accepted. The major consequence of having found an acceptance is that the buyer, once having accepted the goods, can only revoke his acceptance in accordance with section 2-608.\(^8\) This section essen-

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

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

77. *Id.*

78. U.C.C. § 2-608 provides:

Revocation of Acceptance in Whole or in Part

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

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
tially limits revocations to situations where the nonconformities are substantial in nature.\textsuperscript{79} Consequently where, prior to acceptance, a buyer could reject for any nonconformity,\textsuperscript{80} after acceptance a buyer can revoke his acceptance only if a substantial nonconformity exists.\textsuperscript{81} If, therefore, the meaning of the word "acceptable" is equated solely with the section 2-606(1)(a) definition of "acceptance," the crucial phrase in section 2-508(2) would read: "which the seller had reasonable grounds to believe would be retained by the buyer in spite of their nonconformity . . . ." Read this way, the seller's right to cure would only arise in situations where the seller knew beforehand that the goods were not conforming, but had reasonable grounds to believe they would be accepted in spite of their nonconformity. Such reasonable grounds of belief arise from various contexts, including prior course of dealing, course of performance, and usage of trade, as well as in the particular circumstances surrounding the making of the contract.\textsuperscript{82}

Equating the word "acceptable" with the section 2-606(1)(a) phrase "retain[ed] by the buyer in spite of their non-conformity" suggests very clearly-defined situations that give rise to the seller's right to cure. Under the facts of \textit{Bartus v. Riccardi},\textsuperscript{83} a seller who knows that the goods are not conforming because they are not the exact goods requested, but rather a newer and improved model of hearing aid for the same price, could rely on the particular circumstances of the case to assert reasonable grounds to believe that the buyer would retain them in spite of their nonconformity. Indeed, any seller providing at the contract price newer or better goods than the contract calls for would be "surprised" by the buyer's rejection. One could also find a rejection "surprising" where a seller delivers nonconforming goods to the buyer, the nonconformity arising because the seller did not have the quantity in stock required by the terms of the contract. If the seller deducted from the price the amount not delivered, and this kind of deduction was a practice in the trade, the buyer's rejection would indeed be surprising. These two examples provide instances where the seller's right to cure

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

\textsuperscript{79} Id.

\textsuperscript{80} See supra note 2.

\textsuperscript{81} See supra note 7.

\textsuperscript{82} See U.C.C. § 2-508, Comment 2.

\textsuperscript{83} 55 Misc.2d 3, 284 N.Y.S.2d 222 (N.Y. City Ct. 1967).
seems proper. If section 2-508(2) were read to be limited to situations where the seller knew beforehand that the goods were not conforming, and had reasonable grounds to believe that the buyer would retain them in spite of their nonconformity, the "perfect tender rule" as embodied in section 2-601 would remain strong and its exceptions would be few. In addition, the scope of the seller's right to cure would be well-defined and clear and could be applied with the kind of uniformity the Code desires to achieve.84

Our review of the judicial constructions of section 2-508(2) shows, however, that clarity and uniformity are not so easily achieved. Perhaps most of the confusion surrounding section 2-508(2) has its origin in the holding of Wilson v. Sampoli.86 As noted above, the court in that seminal case refused to permit the buyer of a defective television set to reject and end the transaction at that point. Rather, the court held that the seller had a right to cure under section 2-508(2) and that the buyer had breached by not permitting the seller to remove goods from the buyer's premises to effectuate a cure.88 The Wilson court accepted the seller's argument that it had reasonable grounds to believe the goods would be acceptable because the television delivered was a brand new, uncrated television. The seller's argument was that he thought the goods would be conforming (and therefore acceptable) because the seller was a retail middleman, and had no reason to suspect that the television was defective.87 The effect of this decision was to set a precedent that permitted sellers to assert the right to cure in situations where they did not know beforehand that the goods were nonconforming. The decision naturally broadens the class of sellers who have a right to use section 2-508(2), and correspondingly narrows the situations in which the seller can effectively assert the right to reject, and thereby cancel the contract.88 It also gives rise to the notion that any time a seller had reasonable grounds to believe the goods were conforming, it would be permitted an additional reasonable time to cure the defect. This enlarges the class of sellers able to invoke the section 2-508(2) right to cure to such an extent that it is easy to understand how courts quickly seized on the substantial-insubstantial defect test suggested by some commentators to preserve, to some

84. See supra note 1.
86. Id. at 849.
87. Id.
88. See White & Summers, supra note 18.
extent at least, the buyer's right to reject and cancel.89

We believe that there are two serious flaws in the position taken by the Wilson court, the first involving equating the word "conforming" with section 2-508(2)'s "acceptable," the second involving the generation of a substantial-insubstantial defect standard never provided for in the interplay between section 2-601 and section 2-508. The notion that the word "acceptable" used in section 2-508(2) can be substituted with the word "conforming" can be dispelled immediately by the realization that the drafters did not say "conforming." If the drafters had meant to say "conforming," it would not have been difficult to use that word in light of the fact that "conforming" is defined in the Code.90 A better approach is to take the position that the drafters said what they meant and meant what they said, namely "acceptable." Furthermore, equating the two words raises serious policy questions. Sellers at the retail level would too easily be allowed to duck their primary duty of tendering conforming goods.91 This result necessarily follows because such retail sellers would always be allowed to cure defective goods that they delivered uncrated and unexamined by alleging that they assumed the goods were conforming. With the availability of cure ever present, such sellers have little reason to inspect goods prior to delivery, naturally resulting in fewer conforming tenders.92 A second reason that equating the words "conforming" and "acceptable" is bad policy is a corollary to the first. The burden of discovering defects is unduly placed upon the buyer. While a buyer is charged with the responsibility of inspecting the goods which he purchases,93 he should not be the one charged with the duty of weeding out factory-grown bad apples. This is especially true when consumer buyers are involved. Consumer buyers of goods such as television sets, refriger-

89. See Hawkland, supra note 24.
90. "Goods or conduct, including any part of a performance, are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." U.C.C. § 2-106(2).
91. See supra note 65.
92. See supra note 90.
93. U.C.C. § 2-513 provides, in part:
Buyer's Right to inspection of Goods
(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.
See also supra note 76, at 2-606(1)(a).
ators, automobiles, and other appliances have certain expectations with regard to their purchases. When such a buyer discovers that the item purchased is defective, he is forced to suffer the frustration (sometimes exceedingly high) and the delay of jousting with the seller for a remedy. Often the remedy comes in the form of repair. Even assuming that the repair is sufficiently accomplished, the buyer is left having bought and paid for something he did not agree to purchase—a repaired item.

An equally serious objection to equating the words "acceptable" and "conforming" arises from courts which attempt to limit the broad class of sellers such an equation begets by adopting a "magnitude of defect" test. The drafters of the Code expressly provide for such a test in two instances—for goods which have been accepted and for installment contracts. Good policy reasons for using such a test in these two situations are apparent. Restricting buyers who accept goods to revocation only for substantial defects encourages buyers to make use of their section 2-513 right to inspection and their corresponding section 2-601 right to reject for any nonconformity. With installment contracts, the substantial defect test resolves the confusion under common law as to when and if buyers could extricate themselves from contracts requiring a series of deliveries by alleging a minor nonconformity in one of the shipments. The rigid requirement of section 2-612(2) limiting the buyer's right to revoke acceptance for substantial breaches which cannot be cured encourages the adjustment and completion of such contracts, thus facilitating modern commercial transactions.

The application of a magnitude of the defect test in situations where an acceptance is not found, however, is somewhat puzzling. As mentioned above, application of such a test in rejection cases is clearly contrary to the intent and purport of section 2-601. It also finds no express support anywhere in the Code. Furthermore, application of such a test clearly ignores the distinction which the Code makes between cases where an acceptance has occurred and those where it has not. Implying such a test from the language of section 2-508(2) amounts either to blindness or plain disregard for the fact


95. See supra notes 66 & 78.

96. See Peters, supra note 4, at 223-27.

97. See supra note 66.

98. See supra note 1.
that the drafters did not intend a magnitude of the defect test to attend the right to reject. If they had, the drafters would have simply written it into the Code with as much ease as they did when drafting section 2-608.

Assuming, therefore, that the drafters of the Code specifically chose to use the word “acceptable” as distinct from the word “conforming,” we are back to the position that the only sellers given a right to cure by section 2-508(2), and the further reasonable time to cure the section affords, are those sellers who actually knew beforehand that the goods were not conforming, but had reasonable grounds to believe that the buyer would retain them in spite of their nonconformity. This essentially is the classic Nordstrom position so forcefully decried in Joe Oil USA, Inc. The major objection to this somewhat restrictive literal reading of section 2-508(2) is that sellers who knew they were delivering nonconforming goods were afforded the cure remedy, while “innocent” sellers who did not, and perhaps could not, know of the nonconformity were not given an additional reasonable amount of time to cure. If left at this level, it would indeed seem unfair to permit those who knowingly breach to cure while denying innocent breaching persons such as retailers a similar right. This clearly is the dilemma that led the Joe Oil USA court to afford the seller the right to cure.

A relatively simple way to avoid this apparent injustice is to charge all sellers with knowledge of nonconformities. Comment 2 to section 2-508(2) states that “[t]he seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract . . . .” This would impute constructive knowledge of the nonconformity to sellers who do not “open the crates,” thus permitting such sellers to assert that they initially qualify for the right to cure under section 2-508(2) by knowing that the goods were not conforming. The result of such “imputed knowledge” would be that both innocent and knowing sellers of nonconforming goods could cure if they had “reasonable grounds to believe [that goods] would be acceptable.” It is at this point that the academic focus on the “reasonable grounds to believe” test becomes useful. Rather than

100. Id.
101. Id.
102. U.C.C. § 2-508(2), supra note 3.
103. See U.C.C. § 2-508(2), supra note 3.
equating "acceptable" with "conforming" and suffering the confusion that results, courts could address in each instance the question of whether or not a seller, knowing that the goods were not conforming, had reasonable grounds to believe that the buyer would retain such nonconforming goods in spite of the nonconformity. The literature surrounding the "reasonable grounds to believe" test emphasizes the factors of good faith and the magnitude of the defect. As we discussed above, the combination of the use of these tests without a clear understanding of the class of sellers to which they apply and the misequation of the words "acceptable" and "conforming" has resulted in confusion and lack of predictability.

The concepts of good faith and substantial defect can actually be seen to work hand-in-hand once the word "acceptable" is taken literally. Assuming the seller knows that the goods are not conforming, when will that seller have reasonable grounds to believe that the buyer will retain them? Professor Hawkland argues that the buyer's right to reject implies a good faith rejection.\textsuperscript{104} He then makes use of the magnitude of defect test to ascertain whether the rejection was made in good faith or not. Substantially defective goods are always subject to rejection, while goods having only minor defects are not.\textsuperscript{105} The problem with this analysis is that it recognizes no distinction between merchant and nonmerchant buyers, whereas the Code makes a clear distinction between the good faith requirements of merchants and nonmerchants. The test of good faith for the nonmerchant is honesty in fact.\textsuperscript{106} The merchant, however, is required to be not only subjectively honest, but is further held to the observance of reasonable commercial standards of fair dealing in the trade.\textsuperscript{107} Recognizing this distinction aids in understanding the situations in which a buyer's rejection can be seen to be made in good faith.

Because merchants are held to the more objective commercial standards of the trade, it becomes understandable that a seller would be genuinely surprised by a rejection from a merchant buyer on the grounds of an insubstantial nonconformity.\textsuperscript{108} Indeed, if such a seller could establish that it was not a practice in the trade or that the merchant buyer had accepted goods with minor nonconformities

\textsuperscript{104} See Hawkland, supra note 24.
\textsuperscript{105} Id. See supra note 28.
\textsuperscript{106} See supra note 28.
\textsuperscript{107} See supra note 28.
\textsuperscript{108} See Hawkland, supra note 24.
in the past, he would have established both that the merchant buyer
did not act in good faith and that his own belief that the goods
would be accepted was reasonable. ¹⁰⁹ A buyer purchasing a $100,000
printing press, for example, could not in good faith reject the press
and cancel the contract because of a scratch on the front panel. For
merchant buyers, then, the good faith and magnitude of defect tests
work together to give fairly objective guidelines to the rejection-cure
interplay.

The situation changes drastically, however, when we substitute a
consumer buyer for the merchant buyer. The good faith required of
a consumer purchaser is mere honesty in fact—a subjective test.
Certainly when the defect is major, the consumer purchaser (as well
as the merchant buyer) should have the ability to reject and cancel.
Even had the consumer accepted the goods by definition, his right
to revoke his acceptance would remain if a substantial defect ex­
ists.¹¹⁰ What about the new car that is scratched, however, or the
television with a reddish tinge? It is hard to believe that such a con­
sumer, in all subjective honesty, would not prefer a new item rather
than a “repainted” or “fixed” television. Indeed, when the seller
readily exchanges the good for a new item, the consumer buyer will
normally accept the new item and the rejection-cure relationship be­
comes moot. Sellers, however, are more likely to want to cure by
fixing the item, as is shown in the Wilson and Zabriskie cases.¹¹¹
Should the consumer buyer be forced to accept such cure, even if
the defect was only minor, or should the consumer buyer be afforded
the right to reject and cancel, demanding a brand new product in
place of the nonconforming product (and, in effect, agreeing to a
new contract)? The answer, of course, depends upon the proper in­
terpretation of the seller’s right to cure under section 2-508(2).

Piecing the parts of the section 2-508(2) puzzle together in light
of the issues discussed provides a clearer picture. The sellers who
may attempt to assert section 2-508(2) are sellers who have either
actual or constructive knowledge that the goods sent were not con­
forming. These sellers must then show, to rightfully claim an addi­
tional reasonable amount of time to substitute conforming tender,
that they had reasonable grounds to believe that the buyer would
retain the goods in spite of their nonconformity. Can sellers in good

¹⁰⁹. See supra notes 3 & 29.
¹¹⁰. See supra note 76.
faith reasonably expect merchant buyers to retain the goods if the nonconformity is minor? The answer is obviously in the affirmative. Can sellers in good faith reasonably expect consumer buyers to retain the goods if the nonconformity is minor? The answer is obviously in the negative.

The controversy and confusion surrounding the rejection-cure interplay need not have occurred had courts initially read section 2-508(2) and section 2-601 literally. A literal reading gives the buyer the right to reject for any nonconformity. This "perfect tender rule" could have remained strong had the courts literally read section 2-508(2) to apply only to those sellers who knew beforehand that the goods were not conforming, but had a reasonable belief that they would be accepted in spite of the nonconformity. Almost blindly, however, the courts followed the early case of Wilson v. Scampoli and included in the class of sellers afforded the section 2-508(2) right to cure sellers who did not know that the goods were nonconforming.112 This naturally generated a substantial-insubstantial test not literally found in either the sections or the comments to section 2-508 and section 2-601.

Recognizing that courts feel compelled for reasons of justice to aid innocent or unknowing sellers of nonconforming goods just as they are directed to aid knowing sellers of nonconforming goods, we have proposed a "constructive knowledge of defect" rule to bring both innocent and knowing sellers of nonconforming goods under section 2-508(2); however, if the courts recognize that "acceptable" cannot be equated with "conforming," the breadth of the seller's right to cure remains limited to those surprising situations where merchant buyers reject for insubstantial defects. We feel that this understanding of the rejection-cure relationship provides more objective tests to ascertain section 2-508(2)'s proper scope and thereby affords a predictive aspect to the rejection-cure relationship not currently available. The final result will be that sellers will once again know what they are expected to deliver, and buyers will know what to expect.

IV. Conclusion

A survey of both the case law and the commentary on section 2-508(2) demonstrates that it has been the subject of inconsistent interpretation. As a consequence, it is difficult to predict when or

112. See cases cited supra note 49.
under what circumstances a seller will be permitted to cure a non-conforming tender after the time for performance has expired.

Our analysis indicates that a right to cure under section 2-508(2) should depend on whether or not the seller had reasonable grounds to believe the tender would be acceptable. Whether reasonable grounds exist for the seller’s belief would depend on all factors involved in the particular sales transaction. Furthermore, the fact that a seller is ignorant of a defect in the product should not result in an automatic right to cure. The seller should be charged with knowledge of the true condition of what he is selling. Such an approach is consistent with the language of section 2-508(2) and can easily be applied by the courts. If this approach is used, section 2-508(2) will truly provide a uniform standard for determining a seller’s right to cure while preserving and protecting already existing rights and remedies of a buyer under the Code.