BREACH AND REMEDY FOR THE TENDER OF NONCONFORMING GOODS UNDER THE UNIFORM COMMERCIAL CODE: AN ECONOMIC APPROACH

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Article 2 of the Uniform Commercial Code gives a buyer the right to rescission or damages when goods tendered by the seller do not conform to the contract of sale. In this Article, Professor Priest discusses the origins and text of the Code's nonconforming tender provisions and analyzes the likely effect of the Code's choices of remedy on the economic efficiency of sales. He then examines case law under the Code and concludes that courts, often despite the letter of the statute, have interpreted and applied the nonconforming tender provisions in a manner consistent with minimization of costs.

THIS Article considers the manner in which courts have interpreted and applied the provisions of the Uniform Commercial Code [1] giving a buyer the right to rescind a contract of sale when the goods tendered by the seller deviate from their description in the contract. It shows that, in general, courts regularly have applied a wide variety of statutory provisions in a way which is likely to enhance the efficiency of sales. Economic efficiency never has been recognized explicitly as a standard of Code interpretation and is seldom mentioned as a criterion of decision in judicial opinions. But the *results* of decisions interpreting the Code are consistent with minimization of long-run costs of formation of the contract, of delivery and handling of the goods, and of resolution of disputes arising under the contract.

Part I analyzes the problem of nonconforming tenders from

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[1] The provisions treated in detail in this Article are the following: U.C.C. § 2-508 (seller's right to cure), *see* pp. 971-74, 980-81, 999-1000 *infra*; U.C.C. § 2-601 (perfect tender rule for rejection), *see* pp. 969-72, 975-76 *infra*; U.C.C. § 2-602 (manner of rejection), *see* pp. 973-77, 983-91, 995-99 *infra*; U.C.C. § 2-608 (revocation of acceptance), *see* pp. 972-75, 977-80, 991-99 *infra*; U.C.C. § 2-612 (installment contracts), *see* notes 42 & 124 *infra*. Other provisions are cited incidentally where relevant.

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an economic perspective and explores the circumstances in which refusal of the goods by the buyer is a more efficient remedy than damages. Part II describes the origins of the Code's nonconforming tender provisions as a compromise between the common law's rigid insistence on perfect tenders and the proposals of Karl Llewellyn that sales law be made responsive to modern commercial relationships — proposals consistent in some, but not all, respects with minimization of the costs of breach. Part III shows in detail the various inconsistencies between the letter of the Code and the objective of efficiency. Finally, Part IV reports the results of a study of all reported trial and appellate decisions between 1954 and 1976 in which the buyer attempted to return the goods because they failed to conform to the contract. It shows that those decisions are consistent with minimization of costs as far as one can tell from the facts reported in the opinions. The Article thus concludes that courts have been strongly influenced by the advantages of minimizing costs in their interpretation and application of the legal doctrines of the Code.

The present Article differs from previous studies of the Uniform Commercial Code [2] in its emphasis on the divergence between the formal articulation of the rules and their application in practice. The provisions of the Code were drafted to control a diverse set of sales transactions. Most provisions are general rather than specific and require judicial interpretation in any individual case. As a result, no study of the effect of the Code can be complete without an examination of judicial interpretation. It is the application of the provisions in practice — an application which often ignores their letter — that determines their effect.

I. Minimizing the Costs Imposed by Nonconforming Tenders

In the absence of legal restraints, the terms of a sale are set by voluntary agreement between the parties. It is plausible to assume that a buyer and seller generally will agree to terms which maximize the joint value of the exchange. Legal rules establishing rights and remedies for contracting parties affect the costs of consensual transactions in two respects. First, they affect the costs of reaching a bargain. To the extent that the legal rules anticipate

[2] *See, e.g.*, Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article 2*, 73 YALE L.J. 199 (1963).

Professor Schwartz has discussed the costs imposed by the cure and revocation provisions of article 2, Schwartz, *Cure and Revocation for Quality Defects: The Utility of Bargains*, 16 B.C. INDUS. & COM. L. REV. 543 (1975), but his approach was normative and he did not review case law comprehensively.

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the specific allocation of rights that the parties would have chosen themselves, they reduce the cost of forming a contract.[3] If legal rules require different terms, however, the parties may want to "contract out" of the rules, thereby increasing the costs of contract formation. If the legal rules preclude contrary agreement, the parties may adjust other contractual terms to compensate for their inability to minimize costs. Such adjustments, of course, require negotiation and consequently raise the costs of forming a contract. Second, legal rules influence the costs of settlement of disputes arising after the contract is made.[4] While a buyer and seller presumably will want to resolve a contract dispute in a way that minimizes joint costs, remedies provided by law will affect the costs of negotiating a resolution. Again, if courts resolve a dispute in the way that the parties would have resolved it had they provided for it explicitly in the contract, the costs of negotiating a resolution to the dispute will be minimized. If not, or if the legal resolution of the dispute is uncertain, the costs of negotiating a settlement will be increased.

Analysis of the effects of the Code on the costs of sales transactions requires comparison of the rights and remedies to which a buyer and seller are likely to agree with those provided by law. Section A considers the parties' definition of "conformity to the contract:" their agreement on the characteristics of the goods that the seller is to tender. Section B considers the conditions under which the parties will agree to the remedy of rescission and the buyer's return of goods to the seller, rather than damages, given a failure of the tender to conform.[5]

A. What Constitutes a Nonconforming Tender?

Every sales contract must in some way specify the "tender" agreed upon. It must describe some of the infinite number of identifying attributes of the goods as well as the manner of their delivery. As the number of attributes of the tender described in the contract increases, the cost of negotiating a contract rises. The parties will specify the various characteristics of the tender

[3] Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 293 (1972). *See generally* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[4] *See generally* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 419 (1973).

[5] Throughout this Article, the terms "efficiency" and "cost minimization" are used interchangeably. Efficiency requires the optimum allocation of resources, *i.e.*, the maximization of value net of costs, not only as between the parties, but as to the rest of the world as well. In the case of contract law, it may be assumed that transaction costs are small enough not to affect which goods are exchanged, so that the transaction costs themselves are the only important determinants of net value. Thus efficiency and minimization of these costs coincide.

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only as long as the costs of specification are less than the expected benefits. To the extent that the parties neglect specification in the contract, they leave to courts the task of deducing the attributes upon which they "agreed." A court responding to a concern for efficiency can infer those charcteristics by assuming that the parties would have negotiated the absent term to achieve the greatest mutual gain. This assumption implies that a particular attribute would be required by a contract only when its provision would cost the seller less than it would benefit the buyer.

B. When is it Efficient to Rescind a Contract Because of a Nonconforming Tender?

Once the contract is found to have been breached by a nonconforming tender, the law provides the buyer two possible remedies. He may call off the sale and return the goods to the seller,[6] or he may keep the goods and seek damages for the nonconformity.[7] The costs imposed by these two remedies can be classified into two categories. First, there are allocative costs — the transfer of real resources from one or both of the parties to the outside world. Freight and insurance for reshipment, administrative costs of resale, and fees for attorneys involved in dispute resolution fall into this category. Second are distributive costs, which consist of transfers of resources *between* the parties, as when one party recovers damages from the other. Ordinarily, the minimization of allocative costs will benefit the parties regardless of the distribution of costs between them. However, the distribution of costs will affect allocative costs because each party will strive to minimize his personal share of the joint costs, even if his effort increases joint costs. In fact, in any dispute over the interpretation of a contract, the parties will expend resources in negotiation or litigation, thereby reducing the joint value of the transaction. In the text that follows, the conditions for minimizing the allocative costs of a remedy are first analyzed apart from the effects of the distribution of costs. Then the causes and effects of the distribution of costs between the parties are analyzed separately.

1. Minimizing Allocative Costs of the Remedy. — A judgment awarding damages differs from a judgment returning the goods to the seller in two ways. First, to award damages, the

[6] *See, e.g.*, U.C.C. §§ 2-601, -602, -608. The remedy of rescission existed in the previous uniform statute, *see* UNIFORM SALES ACT §§ 11, 44(3), 69(1) (1906 version), and at common law, *see* 2 F. MECHEM, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY §§ 817, 818, 1210 (1901).

[7] *See, e.g.*, U.C.C. §§ 2-711 to -715. *Cf.* UNIFORM SALES ACT § 69(7) (1906 version) (predecessor to U.C.C.); 2 F. MECHEM, *supra* note 6, § 1210 (common law).

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buyer's loss from the defect must be calculated. Second, if the buyer recovers damages, he keeps the defective goods and must either adapt them for his use or dispose of them, while if the buyer returns the goods to the seller, the seller must dispose of them. Thus, the principal allocative costs of the damage remedy are the buyer's costs of adaptation, or his costs of disposal and cover,[8] and the administrative cost of determining the buyer's loss. If the buyer adapts the goods, the costs are the expenditures the buyer must make to bring the goods into conformity with the contract or the adjustments he must make to use the nonconforming goods.[9] If he resells the defective goods and covers by buying other goods — which will be the more efficient course of action if his costs of adaptation are greater than those of other firms in the market — the costs of breach are the difference between the resale and cover prices, plus the administrative costs to the buyer of effectuating the resale and procuring replacement goods. A damage remedy entails the calculation of these costs — a process which requires the expenditure of resources whether performed by a court or by the parties themselves in settlement negotiations. In addition, the calculation introduces a risk of error to the buyer and seller, respectively, of underestimating or overestimating the buyer's loss, which increases the cost of the damage remedy.

When the buyer is allowed to refuse the defective tender, different costs are incurred. They include the cost of returning the goods to the seller, the cost to the seller of reselling the defective goods, and the buyer's costs of purchasing substitute goods, *i.e.*, the difference between the cover and contract prices plus the administrative costs of effectuating the purchase. If the buyer and seller negotiate toward the efficient remedy, they would likely agree to rescission where the sum of the costs of returning the goods is less than the total cost of the cheaper of the damage remedies.[10]

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[8] The Code allows the buyer to recover these costs if he can prove the nonconformity, *see* U.C.C. §§ 2-711(1)(a), -712.

[9] The buyer's costs of adjustment include purely subjective costs, equal to the amount of compensation a consumer would demand to accommodate himself to a defect without repair or modification.

While legal rules often do not recognize such costs because they are difficult to prove, efficiency requires that the buyer's subjective loss be used as the measure of damages where it is less than the contract-market differential normally so used, *see, e.g.*, id. § 2-713.

[10] Professor Schwartz's analysis of costs is similar to that offered here, *see* Schwartz, *supra* note 2, at 547-51 & n.15, but he assumes implicitly that the buyer's costs of adaptation of defective or repaired goods will ordinarily be high relative to the costs of reselling rejected goods. This assumption leads him to criticize the Code's provisions for cure and revocation of acceptance. *Id.* at 551, 568-69.

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Although the comparison of the costs of rescission and damages appears complicated, it can be simplified. Parties wishing to maximize the *joint* value of the transaction will prefer return of the goods to damages whenever the goods have a greater value in the seller's hands than in the buyer's. The value of the goods in the seller's hands is their market value less the seller's costs of retrieval and resale. The value of the goods in the buyer's hands is the greater of (1) their market value less the buyer's costs of resale, or (2) their value to the buyer after adaptation less the costs of adapting them. If the parties seek to conserve costs, they might first compare the value of the defective goods to the buyer with the market value of the goods. Where the loss from the defect is less to the buyer than to the market, returning the goods is generally not the cheaper remedy. If, however, the value to the buyer of the defective goods is less than the market value, the parties would agree to return the goods to the seller if the seller's costs of resale were lower than the buyer's by an amount greater than the retrieval costs. If the buyer's business involves the sale of defective as well as conforming goods, the buyer's and the seller's costs of resale may be equivalent, so that retrieval costs tip the balance in favor of a damage remedy. However, if the buyer is a consumer or is engaged solely in manufacturing, the value of managerial time necessary to resell the defective goods may be substantial. Then the advantages of the original seller — superior information about potential customers for defective goods and a superior distribution system — may offset the costs of retrieval and make rescission the preferable remedy.

In many cases, the cost of calculating damages may be decisive in determining which is the more efficient remedy, especially where there is no market in goods possessing the particular defect. Since in such cases the buyer's subjective valuation is difficult to ascertain, there is great danger both of the buyer's self-serving testimony and of a failure adequately to appreciate the particular tastes of the buyer. Where the latter factor is dominant, the remedy of returning the goods to the seller is the analogue of the equitable remedy of specific performance, which is awarded in sales of land or other "unique" forms of property because the legal remedy of damages is viewed as "inadequate." [11]

2. Effects of the Distribution of Costs Between the Parties. —

This Article assumes, to the contrary, that the handling and managerial costs involved in retrieval and resale will ordinarily dominate. The consequences of this assumption are elaborated in Part III *infra* and are compared with the results of judicial decisions in Part IV *infra*.

[11] *See, e.g.*, J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS § 4, at 5–6 (3d ed. 1926); *cf.* U.C.C. § 2–716 (specific performance of a sale where "the goods are unique or in other proper circumstances").

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The analysis thus far has ignored the distribution of the joint costs of breach between the buyer and seller. Because the choice of remedy can affect that distribution, each party may, for selfish reasons, prefer the remedy which, under the analysis so far, is less efficient. Moreover, each party may incur further allocative costs in negotiating or litigating toward the remedy which provides him the greatest personal benefit. Thus, the effects of the distribution of costs may affect not only the choice of remedy, but also the joint cost of the remedy chosen.

The remedy of rescission is designed to place the parties in their precontractual position: the goods are returned to the seller and the contract price is returned to the buyer. Damages, on the other hand, are designed to put the buyer in the position in which he would have been had the contract been performed. The measure of damages is the difference between the value of the goods as described in the contract and the value of the defective goods as tendered — with both values determined as of the time of tender.[12] Consequently, where the value of the goods has declined between agreement and tender, the buyer, by refusing the goods, can gain the difference between the lower market price at tender and the contract price. A rescinding buyer therefore receives more than he would have received had the contract been performed or — what is the same thing — had he been awarded damages.

The same analysis applies where the buyer has bought unwisely, either because he has miscalculated the value of the goods in his own business or a secondary market, or because he has bought without complete knowledge of the suitability of the goods for their intended use. Upon the buyer's receipt of the information showing the goods to be unsuitable, the value of the goods *to him* declines. If the buyer rescinds the contract, the seller must bear the costs of retrieving the goods and reselling them in addition to the cost of any depreciation of the goods while they were in the buyer's possession. The buyer, on the other hand, recovers the full contract price, with which he can purchase more suitable goods.

Costs of retrieval, resale, and administration are not the only costs which must be distributed between the parties. There is also the cost of uncertainty, or risk. Risks in a sale include the possibility of a change in the market price of the goods after agreement and the possibility of a change in the buyer's circumstances. Ordinarily, a contract which specifies the price of goods

[12] This was the measure of damages under the common law and the Uniform Sales Act. *See* sources cited note 7 *supra*. The Code, however, permits other reasonable measures of damages in special circumstances. *See* U.C.C. § 2-714.

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can be assumed to place the risk of a decline in market price on the buyer.[13] Similarly, a sales contract, absent warranties, places the risk of the inappropriateness of product choice on the buyer, who has superior information about the prospective use. Whether explicit or implicit, a contractual allocation of risk between the parties is like any other term of the contract: if legal rules countermand the term preferred by the parties, the costs of negotiation and settlement will rise. Thus, if the legal rules allow the buyer to shift the risk of market decline or inappropriate choice of product onto the seller, the joint value of the contract — and of future contracts of the same type — will be reduced.

Where the price of the goods declines after formation of the contract, the buyer has an incentive to conjure up defects or to exaggerate the materiality of real defects, and to demand rescission rather than damages, regardless of which remedy minimizes allocative costs. A similar incentive exists when the buyer realizes that he has chosen an unsuitable product. As long as the legal rules governing breach and remedy are sufficiently manipulable to offer the buyer a significant opportunity for distributional benefits, he will expend resources in negotiation or litigation in an attempt to gain them. Indeed, a rational buyer will spend nearly as much as the amount of the market price decline, discounted by his probability of prevailing in court.

Two conclusions may be drawn from this analysis. First, courts may reduce the parties' expenditures in attempts to gain distributional benefits by making legal rules certain in application. As legal rules become more certain, the probability of each party's manipulating them to his advantage decreases, and hence he is willing to spend less in such an effort. Second, the parties' expenditures in attempts to achieve private benefits sometimes may be greater than the savings achieved by choosing the remedy which otherwise would minimize allocative costs. For example, suppose that the market price of the goods has dropped $10 since contract formation, that the nonconformity in the goods is obviously trivial, that the buyer's and seller's resale costs are small and equal, and that the cost of shipment from buyer to seller is $4. If the buyer can rescind, the net cost to the parties is the $4 shipment cost, and the buyer avoids the market loss. If the buyer must accept damages, the net cost to the parties is just the cost of determining the buyer's damages, which is zero because the triviality of the defect is obvious. Thus damages are the more efficient remedy.

[13] In common understanding, a sale allocates both the risk and the opportunity of price changes to the buyer. Just as the buyer accepts the risk of a market decline, he gains the benefit of a rise in the market, for the seller cannot opt out of a contract of sale simply to make a better bargain elsewhere.

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However, if the legal rules for choosing the remedy are manipulable, in the case where the parties have equal probabilities of prevailing (50% each), the buyer may expend up to $5 on litigation attempting to avoid his market loss by rescission. And the *seller* may invest up to $5 in litigation trying to avoid bearing the loss which he thought he contracted away. In such a case, the joint expenditure on litigation may be $10, while the savings from avoiding reshipment is only $4. Thus the remedy of damages remains the more efficient, but its true value is never realized unless the legal rules are certain enough to discourage expensive legal disputes.

If the parties to a sale were to negotiate a remedy for a nonconforming tender explicitly, they probably would not limit themselves to an absolute choice between rescission and damages, but would structure a more flexible remedy which would preserve the allocation of risk implicit in a contract of sale at a fixed price. Where allocative costs can be minimized by rescission, the parties would maintain the distribution of risk by allowing the seller to repair the defective tender [14] or to offset the decline in market price against the purchase price to be returned to the buyer. Either such remedy retains the cost advantages of the seller's resale or repair of the defective goods without disturbing the contractual allocation of risk. Similarly, where the goods prove unsuitable to the buyer despite the triviality of the defects, the allocation of risk can be maintained if the buyer reimburses the seller for retrieving and reselling the goods, as well as for depreciation. Even with such flexible remedies, however, there will still be the incentive of distributional benefits as long as the contract is not enforced with certainty. Moreover, the cost of uncertainty will exist whether these remedies are created by the parties or enforced by a court. Since the cost of uncertainty is inevitable and difficult to estimate, the flexibility of legal rules will always make it difficult to determine the most efficient remedy.

II. The Origins and Structure of the Nonconforming Tender Provisions of Article 2

A. Llewellyn's Influence

There is little doubt that Karl Llewellyn, the chief reporter for the Uniform Commercial Code project, was the principal

[14] The Code explicitly gives the seller a limited right to cure nonconforming tenders. *See* U.C.C. § 2-508. For further discussion of this right, see pp. 971-74, 980-81, 999-1000 *infra*.

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architect of the Code's tender provisions.[15] In the 1930's, prior to his appointment as chief reporter, Llewellyn criticized the tender provisions of the Uniform Sales Act and outlined his conception of more appropriate standards for the seller's tender and the buyer's right to refuse defective goods.[16] The views Llewellyn expressed during that period supplied the intellectual foundation for the structure of the tender provisions which ultimately emerged.

Llewellyn's objections to the tender provisions of the Sales Act centered on the rigid "perfect tender rule" adopted from the common law,[17] and on the equally rigid judicial counterrules which that rule had engendered. Llewellyn believed that the perfect tender rule allowed a buyer to rescind on the basis of trivial nonconformities in the tender and to shift the risk of a declining market back onto the seller.[18] He recognized that counterrules limiting the buyer's right of rejection were no better, since they often gave a seller extraordinary power to enforce a sale in bad faith and so had become "a blackjack in the hands of any thug." [19] Under the "unstated defect rule," for example, the buyer could

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[15] *See, e.g.*, Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139, 142 (1970); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270–301 (1973).

[16] *See* Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 564–68 (1940); Llewellyn, *On Warranty of Quality, and Society* (pts. 1 & 2), 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937) [hereinafter cited as *Quality I* and *Quality II*].

Llewellyn's articles relied heavily on a series of student notes published while he was a faculty member at Columbia Law School, *e.g.*, Note, *Return of Part of the Goods Delivered Under a Sales Contract: Harmonizing Legal Theory and Business Practice*, 35 COLUM. L. REV. 726 (1935); Note, *Application of the Doctrine of Substantial Performance in the Law of Sales*, 33 COLUM. L. REV. 1021 (1933); Note, *The Seller's Privilege to Correct an Improper Tender*, 31 COLUM. L. REV. 1005 (1931). *See Quality II, supra*, at 367 nn.65 & 67, 384 n.110, 391 n.130.

[17] Under the perfect tender rule, a buyer was empowered to rescind a sale whenever the goods — or the manner of their delivery — failed to conform exactly and in every respect to the description in the contract. *See, e.g.*, UNIFORM SALES ACT §§ 11, 44, 69 (1906 version); 2 F. MECHEM, *supra* note 6, §§ 1155, 1206, 1210.

This rule may be inefficient because the presence or absence of a defect is not directly related to costs. Where, for example, goods have been specially designed for the buyer, this rule is particularly likely to increase the cost of sales. Damages may be the cheaper remedy since the buyer is likely to place a higher value on goods made to his order than the market, even if the goods depart in some respect from his specifications. Probably for this reason, buyers were apparently prohibited from rejecting specially designed goods under both the common law and the Sales Act. *See* Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457, 459, 464, 470 (1949).

[18] *See Quality II, supra* note 16, at 389.

[19] *Id.* at 392.

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claim breach only on grounds of complaints made, however hurriedly, at the time of rescission.[20] In addition, rescission was held barred by acceptance of part of a shipment or acceptance of the goods with knowledge of their defects.[21]

In his writing, Llewellyn proposed several methods of ameliorating the harshness and unpredictability of these rules. First, he recommended a collection of intermediate remedies for nonconforming tender disputes, such as allowing the seller to cure a defect in the tender by retendering conforming goods or offering a price concession, and allowing the buyer to reject only part of a tender where only part failed to conform.[22] Second, he proposed that loss-shifting be discouraged by replacing the perfect tender rule with a standard of substantial performance, allowing the buyer to rescind only where the tender failed substantially to conform to the contract.[23]

Llewellyn recommended further that a distinction be made between rescission by merchant and consumer buyers.[24] Llewellyn believed that where the buyer is the ultimate consumer, courts are incompetent to determine whether a given defect in the goods results in a substantial impairment of their value to him. "Rescission for a minor defect," he argued, "is . . . essentially an ultimate consumer's remedy: it fits the case of the wallpaper which is just enough off-color, or the radio which is just enough off true, to edge the nerves."[25] Llewellyn contended that merchant buyers, more often than consumer buyers, were able to use defective goods. He — and, later, Code advocates such as John Honnold — vigorously opposed rescission by merchant buyers as

[20] *Id.*; *cf.* U.C.C. § 2-605 (unstated defect rule with limitations).

In 1935, Lawrence Eno published a study claiming that in two-thirds of all cases in which the unstated defect rule had been invoked against buyers, the price of the goods had dropped between agreement and performance. He concluded that the rule was employed chiefly to prevent buyers from misusing the perfect tender rule to shift market risks to sellers. *See* Eno, *Price Movement and Unstated Objections to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782, 814-17 (1935). *See also Quality I*, *supra* note 16, at 707 n.25, 715 & n.47; *Quality II*, *supra* note 16, at 390-92 & n.131.

[21] *See Quality II*, *supra* note 16, at 390-92. *See also* Note, *Return of Part of the Goods Delivered Under a Sales Contract: Harmonizing Legal Theory and Business Practice*, 35 COLUM. L. REV. 726, 727-29 (1935).

[22] *Quality II*, *supra* note 16, at 378, 389-91 & n.130.

[23] *Id.* at 378, 398 & n.146.

[24] *Id.* at 378 n.97, 388, 389.

He also recommended a more lenient standard for rescission where there were defects in documents, which might prevent the buyer from collecting insurance or from transferring the documents to a third party. *See* Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 192 & nn.62-63 (1938); *Quality II*, *supra* note 16, at 378 n.97, 384, 389.

[25] *Quality II*, *supra* note 16, at 388.

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long as the seller would grant the buyer a "price allowance" to compensate for the defect.[26] Both Llewellyn and Honnold seemed to base their distinction between merchant and consumer buyers on intuitively perceived differences in the costs of resale. Both viewed the typical merchant buyer as a commodity broker — one who frequently sells various grades of goods and therefore is able to resell defective or subgrade goods more cheaply than the typical consumer buyer, and often at a cost equal to that of the seller. For such buyers, the remedy of damages — or its equivalent, a price allowance — is more likely to minimize costs.

Llewellyn's proposals were not directly incorporated into the text which eventually emerged from the drafting process.[27] In fact, the drafting committee reaffirmed, in what is now Code section 2–601, the perfect tender rule for rescission. But while Llewellyn was rebuffed on the content of the principal tender provision, his influence appeared in other ways.

Llewellyn's proposal to limit the ability of buyers to shift losses to sellers in a declining market was realized in several provisions of the Code. Under section 2–508, the seller has the right

[26] *See id.* at 389 ("*Mercantile* (and manufacturing) buyers *of gradable goods* can commonly, but not always, use goods which fit within the range of reasonable mercantile adjustment."); Honnold, *supra* note 17, at 464–65, 471–72.

Llewellyn's proposal for price adjustment gained influence after Honnold reported that the rules of trade associations and commodity exchanges commonly provided for a price adjustment, rather than rejection, as the remedy for nonconforming tenders. *See id.* at 464. The mere fact that a rule has been adopted by a majority of members of a trade association, however, does not prove that it reduces costs for each member.

[27] Llewellyn attempted to implement his proposals in the early drafts of the Revised Sales Act. In the 1941 draft, he introduced explicitly a distinction between merchant and consumer buyers, provided a standard of "mercantile performance" for merchant buyers similar to substantial performance but based on commercial custom, and set up panels of merchant experts to apply the standard in individual cases. *See* REVISED UNIFORM SALES ACT §§ 11-A, 59 to 59-D (2d draft 1941; Llewellyn papers, Univ. of Chicago Law School); Schwartz, *supra* note 2, at 555 n.35. Llewellyn's proposed provision distinguished "exact performance," which could be adopted by agreement, from "mercantile performance," which was satisfied if the goods possessed no substantial defect, "that is, when — (i) the delivered lot is of such character as not in a material manner to increase the risks or burdens which would rest on the buyer under exact performance . . . ." REVISED UNIFORM SALES ACT, *supra*, § 11-A.2(b).

By 1944, both the merchant-jury and the mercantile performance standard had been rejected. *See* REVISED UNIFORM SALES ACT § 91 (Proposed Final Draft No. 1, 1944). Handwritten annotations to Llewellyn's copy of the 1941 draft show that the substantial performance standard was criticized as too general, not sufficiently predictable, and encouraging of chiseling by unscrupulous sellers. REVISED UNIFORM SALES ACT (2d draft 1941), *supra*, at 101–04.

The only aspect of Llewellyn's proposal to establish a panel of merchant experts that survived to the final draft was the incidental reference in Llewellyn's original draft to course of performance and usage of trade. *Cf.* U.C.C. §§ 1–205, 2–208.

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to cure defects in goods which the buyer rejects as nonconforming. Thus, if the buyer attempts to reject because of a decline in price, the seller can repair the nonconformity to maintain the allocation of risks in the contract. Though the buyer may still return the goods after accepting, the standard for revocation of acceptance is significantly higher than that for rejection. The buyer must show that the defect was difficult to discover prior to acceptance or that acceptance was induced by the seller's assurances of conformity or promises of cure. He must also show that the defect *substantially* impairs the value of the goods to him.[28] This higher standard for revocation of acceptance is sensitive to attempts by buyers to shift losses. When the buyer revokes acceptance, he has possessed the goods for a longer period than when he rejects. The passage of time increases both the likelihood of a change in the market price and the buyer's opportunity to discover that he has chosen unsuitable goods. Similarly, the Code provides a stricter standard for rejection in installment contracts, where the time between contract formation and performance typically is greater than in a single delivery contract.[29]

Although Llewellyn's proposed distinction between merchant and consumer buyers was not explicitly incorporated into the general tender standard, several provisions of the Code create such a distinction in practice. For example, section 2–504 precludes rejection where the seller has failed to make a reasonable contract for delivery or has failed to notify the buyer of shipment unless the buyer has suffered "material delay or loss." Section 2–614 precludes rejection, though the seller has failed to comply with the agreed manner of delivery, as long as the seller can show that strict compliance was "commercially impracticable." These provisions do not by their terms distinguish between commercial and consumer transactions, but they are more likely to limit rescission by merchant buyers, who frequently specify the time and manner of delivery in their contracts, than by consumer buyers, for whom deliveries are usually over-the-counter. Similarly, section 2–508, which controls the seller's cure of a defective tender, is likely to affect merchant and consumer buyers differently. Subsection (1) allows a seller to cure defects within the contractual time for delivery. More importantly, however, subsection (2) allows a seller "a further reasonable time" to cure the defect if he had "reasonable grounds to believe" that the initial

[28] U.C.C. § 2–608.

[29] Where the defect is in a single installment, the buyer may reject only if the defect is in the documents, cannot be cured, or substantially impairs the value of the whole contract. Otherwise, the buyer must accept the installment if the seller gives "adequate assurance of . . . cure." *Id.* § 2–612.

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tender would be acceptable to the buyer. This provision is more likely to limit rescission by merchant buyers because it is chiefly by virtue of an ongoing commercial relationship, such as that between merchants, that a seller would have reason to believe a nonconforming tender to be acceptable.

Finally, the higher standards for rejection in installment contracts and for revocation of acceptance effectively differentiate between merchant and consumer buyers. Installment contracts, of course, predominantly involve merchant buyers. The substantial performance standard for revocation of acceptance may also be interpreted as making revocation easier for consumers than for merchants. Under that standard, a buyer may revoke acceptance if the "nonconformity substantially impairs [the] value [of the goods] *to him*." [30] As discussed earlier, Llewellyn thought that rescission was especially appropriate for consumer buyers, because he thought their personal values worthy of recognition. It is plausible that the Code's draftsmen added the phrase "to him" to enable courts to defer to the personal values of consumers in determining the loss caused by the defect. The phrase has little application and uncertain meaning for merchant buyers since the value of defective goods on the resale market is likely to be the same for one merchant as for another.

B. Inefficiencies Resulting from the Imprecision of Llewellyn's Notions

The basic structure and fundamental distinctions of the tender provisions of the Code derive from Llewellyn's proposals, which, as we have seen, were often responsive to costs. While it is overstatement to describe the underlying policy of the Code's tender provisions as the minimization of costs, many of the distinctions incorporated into the Code can be explained, in hindsight, as rational responses to the desire to choose the cheaper remedy. Yet because Llewellyn's perception of the relative costs of the remedies was intuitive and imprecise, and because his objectives were compromised in the course of drafting, specific provisions of the Code depart from cost minimization. As a result, a literal interpretation of the Code will increase the costs of sales transactions in certain common situations involving defective tenders.

The seller's cure of a defective tender provides an initial example. Llewellyn perceived correctly that the joint costs of breach can be reduced if the seller can cure at a cost less than the diminution in the value of the goods because of the defect.[31] Yet he failed

[30] *Id.* § 2-608(1) (emphasis added).

[31] *See Quality II, supra* note 16, at 389. *But see* Schwartz, *supra* note 2, at 547-56 (emphasis on high subjective costs to buyer of being forced to retain repaired rather than new goods).

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to appreciate that the discrepancy between the costs imposed on the seller where the buyer recovers damages and where the buyer successfully rejects will tempt the seller to invest in cure whether or not the value of the goods is enhanced. Where the buyer recovers damages, the seller who fails to cure loses an amount equal to the diminution in the value of the goods because of the defect. This amount establishes an upward constraint on his investment consistent with the joint maximization of value. Where the buyer successfully rejects, however, the seller loses the same amount, as well as the costs of retrieval and resale and the depreciation of the goods while in the buyer's hands. His incentive to invest in cure therefore is increased by the total of these other costs. A decline in the market price of the goods before rejection increases the seller's incentive to invest in cure still further. In either case, the amount invested may be significantly greater than the value of the investment in cure, and the difference will increase the joint costs to the parties from the breach.

The difference in practice between the standards for rejection and revocation of acceptance by merchant buyers and consumer buyers is susceptible to similar criticism. Though this difference has a foundation in efficiency, the rules of the Code implementing it are only crudely related to cost minimization. In general, merchants have lower costs of resale than consumer buyers, so that damages will more often be the cheaper remedy. But not every merchant buyer is able to resell defective goods as cheaply as the seller. Rather, the cost of reselling defective goods is a function of the nature of the particular defect and of the specialization in the buyer's resale trade. The appropriate question for cost minimization is the *relative* resale costs of the buyer and seller. There will be a continuum of merchants' and consumers' resale costs overlapping a similar continuum of those of sellers, so that any broad distinction between merchants and consumers, while efficient in general, will fail in particular cases.

Furthermore, the implementation of the distinction — by a substantial performance standard as opposed to a perfect tender rule — is not directly related to minimization of costs. A defect may be literally "insubstantial," but if the merchant buyer's market is specialized, his costs of reselling defective goods may be higher than the seller's, so that rejection minimizes costs. If the buyer's resale trade is general, it may be less costly for *him* to sell goods that fail to conform in substantial respects. For example, if a manufacturer sends a sporting goods store baseballs instead of golf balls, the nonconformity is substantial, but there is no reason to presume that rejection will minimize costs.

The same may be said about the standards for rejection and

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revocation of acceptance. Where the buyer has retained the goods for a period of time before attempting to return them, it is more likely that the market price or the buyer's information about the goods has changed, but the concept of the "substantiality" of the defect does not precisely capture the effect. Moreover, a defect may be sufficiently serious to raise the buyer's costs of resale above the seller's — so that rescission is the cheaper remedy — although it may not satisfy the substantiality criterion of the Code. Finally, the more lenient standard for revocation by consumer buyers, based on the acknowledgment of their personal values, may also increase the costs of breach. There is little reason to believe that consumers, any more than merchants, will fail to see the advantage of revoking where the market price of the goods has declined. Deferring to the personal values of consumer buyers also exposes sellers to the risk of revocation and the incentive to overinvest in cure where the buyer has chosen unwisely and has found the goods to be unsuitable.

These criticisms suggest that there are significant discrepancies between the effect of the Code's provisions and the ideal of cost minimization. As a consequence, the role of the courts in interpreting and applying the provisions of the Code will be extremely important in determining its practical effect on costs. It is the hypothesis of this Article that the courts have interpreted the Code's provisions in ways that minimize costs in nonconforming tender disputes. As background for investigation of this hypothesis, the next Part analyzes the specific tender provisions more carefully to discover interpretations that might minimize costs and to identify statutory limitations on the ability of the courts to achieve efficiency in sales.

III. Cost Minimization and the Tender Provisions of the Code

This Part examines the text of the Code's tender provisions with respect to rejection, revocation and cure. It compares each provision with economic analysis and considers how courts concerned with reducing the costs of sales might interpret the specific provisions.

A. Rejection

Under section 2–601 of the Code, the buyer has the right to choose between the remedies of damages and rejection if the tender fails to conform to the contract in any respect. The buyer's discretion to select the remedy, however, is not wholly unfettered. If he does any act inconsistent with the seller's ownership of the

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tendered goods, the buyer is deemed to have accepted them under section 2–606. Moreover, the buyer must notify the seller of rejection within a reasonable time after delivery or tender.[32] Even after rejection is effective, the seller may cure a defective tender, as discussed below.[33]

Although a buyer has been denied rejection, he still may recover damages under section 2–714. His recovery, however, is limited by section 2–607(3) to cases in which he has notified the seller of the defects within "a reasonable time after he discovers or should have discovered any breach." These "notice" and "reasonable time" requirements are textually quite similar to the requirements for effective rejection. Therefore, a court denying rejection by invoking one of these requirements also must deny damages, unless it can find the content or timing of a buyer's notification insufficient for a rejection claim but sufficient for a damage claim. To make a principled distinction, however, would require considerable ingenuity.[34] As a result, a court's ability to award a damage remedy rather than rejection is likely to depend heavily upon its interpretation of the "act inconsistent" provision of section 2–606, which precludes rejection but not an award of damages.

In order to provide the cost-effective remedy for a defective tender, a court might define an "act inconsistent with the seller's ownership" as one which shows that the buyer's loss from the defect is less than either the diminution in market value of the goods due to the defect or the seller's costs of retrieving and reselling them. For example, the buyer's use or adaptation of the defective goods to fit his particular needs is strong evidence that rejection is not the cost-effective remedy, since the buyer's act shows that the value of the goods to him is likely to exceed their market value. Invoking the "act inconsistent" provision to deny rejection is therefore appropriate because the buyer's own act — adaptation of the goods — discloses that damages are the cheaper remedy.[35]

A court can apply the "notice" and "reasonable time" requirements in a similar way. Because the buyer's failure to satisfy these requirements leads to the denial of both rejection and damages, however, the requirements are most likely to be applied where a

[32] U.C.C. § 2–602(1).

[33] *See* pp. 980–81 *infra.*

[34] *But see* U.C.C. § 2–607, Comment 4.

[35] Interpretation of the "act inconsistent" provision on purely legal grounds has been found confusing and inconsistent. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 251–53 (1972) (provision is "obstreperous"; courts seem to use it as a means of justifying preconceived results). *But see* pp. 989–91 *infra.*

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court has concluded that the contract was not breached. In such a case, the content of the buyer's rejection notice and its timing relative to the discovery of the defect are valuable contemporaneous evidence of the buyer's real attitude toward the defects he alleges. A court may use this evidence to balance the diminution in value of the goods due to the defect against the cost of correcting it and to detect the buyer's attempt to shift losses onto the seller.

Judicial interpretation of the requirements of rejection and notification within a reasonable time also can make the *process* of rejection more efficient. The "reasonable" time for rejection can be defined as the time that minimizes joint costs to the parties. This cost-minimizing time is a function, first, of the cost to the buyer of discovering the defect, either by inspection or through an attempt to use the goods, and, second, of the depreciation of the goods during the period that they are in the buyer's hands but not yet accepted.

No particular provision of the Code takes account of the relative costs of the buyer and the seller of reselling defective goods, or of the costs of calculating the buyer's damages. Nevertheless, the reasonable time and notice requirements, as well as the "act inconsistent" provision, are susceptible to creative interpretation to provide the most efficient remedy. As the difficulty of determining the buyer's damages becomes more apparent to a court, for example, the "reasonableness" of the buyer's attempt to reject becomes more evident. Similarly, courts may be more likely to award rejection where the costs to the buyer of reselling the defective goods are high and where there is evidence that the loss to the buyer from the defect is greater than the decline it caused in the market value of the goods.

B. Revocation of Acceptance

Section 2–608 of the Code provides that a buyer may call off the deal and return the goods to the seller even after acceptance if he can show the following: (1) he reasonably assumed that the seller would cure the defect, or he was induced to accept by the difficulty of discovering the defect or by the seller's assurances of conformity or cure; (2) the nonconformity of the tender "substantially impairs its value to him"; and (3) he revoked within a reasonable time after he discovered or should have discovered the defect and "before any substantial change in condition of the goods which is not caused by their own defects." In addition, the revocation is not effective until the seller is notified.

The justifications which the buyer must make for his initial acceptance generally are consistent with cost minimization. As

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discussed above, where it is difficult — that is, more costly — to discover a defect immediately upon tender rather than after initial use or prolonged inspection, forcing the buyer fully to inspect before acceptance increases costs. Similarly, it is understandable for a buyer to attempt to reduce costs by omitting or delaying inspection after the seller has given assurances that the goods conform or that he will cure any defects.[36] To reduce the costs of delayed inspection where delay is unwarranted, the Code discourages the seller from offering misleading assurances by penalizing him with an award of revocation, unless his assurances as to conformity are accurate and his assurances of cure are fulfilled.

The notice and reasonable time requirements for revocation are similar to those for rejection.[37] Therefore, we might expect courts sensitive to the cost of sales to interpret the requirements in the same way, as encouraging consideration of evidence of the buyer's loss from the defect, the cost of discovering the defect, and depreciation of the goods while in the buyer's possession. This interpretation is given force by the express requirement that there be no substantial change in condition of the goods not caused by their own defects[38] — an obvious response to the greater likelihood of depreciation where the buyer is trying to return the goods after having accepted them. In addition, where the goods themselves have a limited lifetime, as in the case of perishables or seasonal fashions, the provision encourages the buyer to accelerate his inspection and testing procedures to avoid losses due to delay. Finally, as in cases of rejection, courts may interpret the provision creatively in response to evidence that damages are the cheaper remedy.

The chief difference between the standards for rejection and revocation of acceptance is the requirement that, to revoke acceptance, the buyer must show that the defect in the tender "substantially impairs its value to him." While the requirement of substantiality gives a court considerable discretion to award revocation only where it is the cheaper remedy, the modifying phrase "to him," which makes personal values of the buyer determinative, may lead to the opposite result. Comment 2 to section 2–608 advises that the phrase "to him" was intended to preclude consideration of the seller's ability to foresee the effect of the nonconformity on the buyer.[39] This interpretation would, by

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[36] *See* U.C.C. § 2–608, Comment 3.

[37] *Compare id.* § 2–608(2) *with id.* § 2–602(1).

[38] *Id.* 2–608(2).

[39]

> For this purpose the 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

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providing a subjective standard for substantial impairment, render the seller's position more uncertain and hence decrease the expected value of the contract. Therefore, courts which desire to interpret the Code so as to minimize costs are likely to ignore the Comment and interpret the phrase "to him" as implicating all of the buyer's loss from the nonconformity *except* that part which is purely subjective and unforeseeable.

An obvious oversight in the drafting of section 2–608 is that the Code does not compensate the seller for the depreciation of the goods, or for the buyer's use of them, during the period after acceptance and before revocation. Thus the buyer granted revocation gains as a private benefit the value of his use of the goods during his possession. This additional private benefit is likely to encourage the seller to incur greater settlement or litigation costs in an attempt to avoid revocation. A court could invoke the "substantial impairment" provision, or the "substantial change in the condition of the goods" provision, to preclude revocation where the depreciation of the goods or the value of the buyer's use had been appreciable. Where revocation is otherwise the more efficient remedy, however, such a resolution presents courts with the dilemma of having to award the less efficient remedy or provide a windfall to the buyer.

This analysis has general implications for differences between rejection and revocation of acceptance cases. The chief practical difference under the Code is that the buyer is likely to have possessed the goods for a longer period of time when he revokes acceptance than when he rejects. If the "reasonable time" limit for both rejection and revocation of acceptance is determined by reference to the costs of discovering the defect, then revocation cases are likely to involve defects that are relatively more costly to discover than those in rejection cases. Since the costs of discovering defects are typically higher for consumer buyers than for merchant buyers, it is plausible that a greater proportion of revocation cases than of rejection cases will consist of suits brought by consumers. Furthermore, since the remedy of returning the goods to the seller is more likely, in general, to minimize costs if the buyer is a consumer than a merchant, we can predict that a greater proportion of revocation than of rejection suits will be successful.[40] These predictions, however, must remain tentative because it is impossible to predict how courts will resolve

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the seller had no advance knowledge as to the buyer's particular circumstances.

Id. § 2–608, Comment 2.

[40] Differences in sales custom and willingness to litigate are alternative bases for the same prediction. *See* note 116 *infra.*

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the problem of the increased distributional loss to the seller from the greater use of the goods by the buyer prior to revocation.

C. Cure of Defective Tender

Subsection (1) of section 2–508 gives the seller an absolute right to cure before the time for performance, while subsection (2) extends that right "a further reasonable time" if the seller had reasonable grounds to believe that the initial tender would be acceptable "with or without a money allowance." There is no clear explanation in the Code of the consequences of the seller's failure to satisfy the cure requirements. The only explicit reference to a remedy for failure to cure occurs in section 2–608(1)(a), which provides that the buyer may *revoke acceptance* if the seller has not "seasonably cured" the nonconformity. It would, however, be anomalous to force the buyer to meet the stricter standards for revocation of acceptance merely because the seller had *attempted* to cure, though he had failed to do so.[41] It would therefore seem to follow that the buyer's *rejection* becomes effective upon the seller's failure to cure.

These provisions give a court scant authority to control a seller's excessive investment in cure. Prior to the time for performance, there are no limits to a seller's cure. In reviewing attempts to cure *after* the time for performance, a court can find that the seller did not complete the cure within a "further reasonable time" or that he did not have reasonable grounds to believe that the initial defective tender would be acceptable to the buyer. But both of these findings are likely to follow attempts by buyers to reject goods despite the seller's investment in cure, after the costs of cure have been sunk. Although a court conceivably could deny a seller the right to cure because a "reasonable time" had passed, the consequence of such a finding under the Code is an award of rejection or revocation. Neither such remedy may minimize costs since the seller is especially likely to invest excessive amounts in cure where the price of the goods has dropped or the buyer has obtained new information about the goods subsequent to the agreement. Under these conditions, an award of rejection or revocation will grant a windfall to the buyer. Thus the letter of the Code provides two unsatisfactory alternatives: either (1)

[41] Since the seller's right to cure is triggered by the buyer's rejection, *see* U.C.C. § 2–508, in most cases of cure there will be no acceptance to revoke. However, if the tender were defective in an insubstantial manner, and the seller immediately promised a cure, thus forestalling rejection, the buyer might be precluded from revoking acceptance later under the substantial performance standard. The cases, however, have refused to interpret the Code so literally and in a manner so at variance with its intent. *See* pp. 994–95 *infra.*

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denial of rejection or revocation and the consequent encouragement of overinvestment in cure, or (2) a grant of rejection or revocation and the consequent windfall to the buyer. A court could escape this predicament if it could prohibit further cure and limit the buyer to damages, but the letter of the Code does not grant such a power. Since both the buyer's windfall and the seller's overinvestment in cure increase the costs of contracts, it is uncertain how courts will decide cases involving the seller's cure, however avidly they may desire to minimize the costs of sales.[42]

IV. Cost Minimization and the Courts: Code Jurisprudence, 1954–1976

In this Part, we examine various judicial decisions in cases arising under the Uniform Commercial Code to test the hypothesis that courts apply Code law so as to minimize the costs of sales. The hypothesis might seem implausible at first because judicial opinions neither refer explicitly to the criterion of efficiency nor compare the costs and benefits of one holding with those of another, as might a consulting firm or a regulatory agency. Nevertheless, there are several good reasons for our inquiry. First, in the long run, both buyers and sellers benefit from cost-minimizing rules for sales. As we have shown, efficiency is likely to conform to the "intent" of the parties, and it is unlikely that societal interests in a private sale are strong enough to justify overriding the benefits to the parties themselves. Thus, it is a compelling claim or defense on policy grounds for a party to a nonconforming tender case to show that a particular interpretation of a rule will make it more difficult — that is, more costly — to perform such a contract in the future. Second, as the analysis of specific tender provisions has shown, a concern for

[42] The same sort of economic analysis can be applied to installment contracts, defined by the Code as contracts for separate delivery and acceptance of separate lots, U.C.C. § 2-612. Since installment contracts typically remain outstanding over longer periods of time than single-sale contracts, they entail a greater likelihood of private benefits and consequently a greater incentive both for the buyer to fabricate reasons for cancellation and for the seller to invest resources to prevent it. In addition, installment contracts are likely to involve a greater value of goods than single-sale contracts and therefore to permit private benefits of still greater significance.

Though the substantial performance standard for installment contracts, *see id.*, is similar to that for revocation of acceptance, *see id.* § 2-608(1), the greater danger of private benefits in the former suggests that courts sensitive to costs may be less likely to find "substantial impairment" where a buyer seeks cancellation of an installment contract than where he seeks to revoke acceptance in an isolated sale.

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minimizing costs is reflected in many of the purely *legal* requirements and distinctions embodied in the Code. This suggests that, although the language of judicial opinions is ordinarily devoid of economic concepts, the judicial principles may derive from an underlying concern in the law for efficiency. Finally, a showing that judges in general decide cases as if they were attempting consciously to minimize the costs of nonconforming tenders would enhance the predictability of judicial outcomes in individual cases.

There are two principal ways of testing the hypothesis that courts interpret the provisions of the Code so as to achieve efficiency. The first and best test is to compare the judgment rendered in a given case with the efficient result, derived from balancing the costs and benefits as discussed in Part I. This test is limited, however, by the fact that the only available information on costs is that drawn from the opinions themselves, which may not be accurate or complete. A second method for testing the hypothesis is to observe whether the facts that the court views as determinative of its legal holding are similar to those which would be determinative in an economic judgment. If legal rules, regardless of their terminology, give controlling weight to factors bearing on efficiency, it is likely in general that judicial decisions will be consistent with efficiency.[43] In testing the cost minimization hypothesis under these methods, the author reviewed every reported decision from 1954 through 1976 in cases involving the buyer's attempt to return goods to the seller due to their failure to conform to the contract. In all, 183 cases were reviewed, of which 78 involved a rejection issue, 99 an issue of revocation of acceptance, 50 the seller's cure, and 12 an installment contract issue.[44] The litigation studied was not dom-

[43] A third test is comparison of the ease and consistency of judicial resolution of disputes in different categories of cases. The analysis offered here implies that courts are more likely to achieve efficient outcomes consistently in rejection and revocation cases than in cure and installment contracts cases because the structure of the Code and the context of the dispute in cure and installment cases make distributive effects relatively more significant there.

[44] The sum of these figures exceeds 183 because certain cases involved multiple issues, *e.g.*, cure and revocation.

The principal source for this study was the *Uniform Commercial Code Reporting Service*, which attempts to compile all reported trial and appellate decisions enforcing or interpreting the Code. The author has also reviewed all relevant decisions discovered incidentally in other sources.

Limitations of space naturally precluded citing all arguably relevant cases for each point discussed in text. However, the author has endeavored to provide the clearest examples and counterexamples of consistency with the economic analysis. Lists of all the cases reviewed by the author, classified according to region, temporal distribution, and relevant legal issue, are on file at the *Harvard Law Review* and are available from the author.

It should be noted that the standard for interpretation of these cases is differ-

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inated by the decisions of any single jurisdiction, any particular geographic region, or any particular period of time.

A. Rejection and Revocation of Acceptance

1. Rejection: Interpreting the Contract. — Where the buyer in a rejection case claims that the goods are defective with respect to a characteristic not explicitly described in the contract, a court is required to determine whether or not there has been a breach. The cost minimization hypothesis implies that the court will do so by comparing the cost to the seller of avoiding the alleged defect with the loss suffered by the buyer because of it.

Decisions in this area are consistent with efficiency. One, for example, inferred conformity of the tender from behavior of the buyer — reordering identical goods after discovery of the alleged defect.[45] Here the costs of breach might have been avoided if the buyer had acted upon the information in his possession before the disputed order.

In other cases, the tender, although failing to conform to the letter of the contract, conformed to "customary standards" in the trade [46] or conformed to goods tendered earlier, and was held to have been accepted by a past course of dealing between the parties.[47] These decisions were consistent with the Code's explicit adoption of both the "course of dealing" between parties and the "usage of trade" in an industry as criteria of contract interpretation [48] — criteria which themselves promote efficiency by encouraging buyers to take advantage of economies in information achieved through standardization, trade custom, and established routines of trade.[49]

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ent from that usually employed in legal analysis. Courts seldom, if ever, use economic jargon or mention economic criteria in their opinions. (For an example to the contrary, see note 81 *infra*.) Therefore the standard for interpretation here is not whether the court explicitly adverts to efficiency as a ground for the decision, but whether the *result* of its decision is consistent with efficiency as far as the efficient remedy or course of action can be inferred from *facts* given in the opinion. Where the facts are ambiguously specified in the opinion, reasonable inferences are made.

[45] *See* Herman H. Sticht Co. v. Bradford Equip. Co., 18 Ches. Co. Rep. 305, 50 Pa. D. & C.2d 265 (C.P. 1970).

[46] *See* Wakerman Leather Co. v. Irvin B. Foster Sportswear Co., 34 A.D.2d 594, 595, 308 N.Y.S.2d 103, 105 (mem.) (upholding trial court's finding that goods were merchantable), *leave to appeal denied*, 26 N.Y.2d 614, 311 N.Y.S.2d 1026 (1970).

[47] *See* BoMyte Co. v. L-Co Cabinet Corp., 40 Northumberland L.J. 172 (Pa. C.P. 1968), *aff'd. mem.* 217 Pa. Super. Ct. 811, 270 A.2d 253 (1970).

[48] *See* U.C.C. §§ 1–205, 2–208.

[49] In several cases, courts gave effect to the parties' agreement on procedures for rejection — a course of action which promotes efficiency for the same reasons

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2. The Reasonable Time for Rejection and Revocation of Acceptance. — Part III predicted that courts will define "reasonable time" by balancing the cost to the buyer of discovering the defect with the cost to the seller of delay in discovery, typically depreciation of the goods prior to rejection or revocation, and that courts will deny relief where either the time or manner of the buyer's rejection or revocation indicates that the tender, though alleged to be defective, actually complied with the contract. In general, case law under the Code confirms these predictions. In *Michael M. Berlin & Co. v. T. Whiting Manufacturing, Inc.*,[50] for example, there was a contract for the sale of sheet steel, .090 inches thick. The first delivery was made on April 25, and other shipments were made in May. The buyer, however, did not inspect the steel until early June, when difficulties in its use led to the discovery that the steel was only .080 inches thick and therefore unsuitable for the buyer's purposes. The buyer attempted to reject by letter on July 29, but the seller, who was only a broker, refused to take back the steel, claiming that the original supplier refused responsibility because of the lapse of time. Upon the seller's suit to recover the purchase price, the court framed the legal question as the reasonableness of the buyer's conduct in delaying inspection of the goods until six weeks after delivery and in waiting another seven weeks before rejecting them. The court concluded that the buyer had not rejected within a reasonable time.[51]

The *Berlin* court's justification for its decision illustrates how the costs and benefits of delaying or accelerating inspection and rejection are given controlling weight in the resolution of a legal dispute:

> The court finds that an inspection of the steel to determine its thickness could have been made with a minimum of effort. The inspection presented no difficulty. . . . In addition, the change of plaintiff's position with its source of supply must be considered. . . . The prejudicial position of plaintiff could have been avoided by inspection and rejection of the steel by the defendant within the reasonable time contemplated by the pertinent provisions of the UCC.[52]

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as does adherence to trade custom. *See, e.g.*, SCA Int'l, Inc. v. Garfield & Rosen, Inc., 337 F. Supp. 246, 248–49 (D. Mass. 1971) (agreement on seller's consent before rejection); Max Bauer Meat Packer, Inc. v. United States, 458 F.2d 88 (Ct. Cl. 1972) (agreement on rejection procedure); Koppers Co. v. Brunswick Corp., 224 Pa. Super. Ct. 250, 261–63, 303 A.2d 32, 38–39 (1973) (agreement on time for rejection).

[50] 5 U.C.C. Rep. 357 (N.Y. Sup. Ct. 1968).

[51] *Id.* at 360.

[52] *Id.*

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It is not certain that the *Berlin* court's decision minimized costs in fact. The opinion does not fully explain why the original supplier refused to permit the return of the goods or how the risk of the supplier's refusal was allocated by the buyer and seller in the contract of sale. Nevertheless, once the court had identified for itself the relevant costs of the transaction, it decided the case so as to minimize them. The delay was found unreasonable when the court saw that the cost to the seller could have been avoided "with a minimum of effort" on the buyer's part.

Other decisions interpreting the Code's "reasonable time" requirement do not compare the costs and benefits of delay as explicitly. However, many opinions give controlling weight to the seller's loss of the use of the goods or to the effect of the delay on the buyer's cost of inspection. In *Société Nouvelle Vaskene v. Lehman Saunders, Ltd.*,[53] for example, the buyer rejected clothing purchased wholesale from France three and one-half months after receipt of the first shipment and one month after inspection, claiming that the clothing was improperly sized for the American market. After noting that the goods were seasonal in nature, the court held that the three-and-one-half-month delay was unreasonable under the Code.[54] The court stressed that the buyer had recognized the improper sizing when the garments first had been unpacked to be placed on the sales floor. Thus, the court seemed to be responding either to the loss occasioned by the passing of the season, unbalanced by any difficulty of the buyer in rejecting more promptly, or to the buyer's implied acceptance of the risk of resale despite the defect. In either case, the result was consistent with efficiency.

Similar cases support the view that courts find delay in rejecting or revoking acceptance unreasonable when it is unexcused by the buyer's costs and imposes substantial costs on the seller. The buyer's delay has been held unreasonable where it prevented the seller from curing the defect; [55] or from reinspecting the goods, as the parties had agreed, to confirm the nonconformity; [56] and where the cost to the buyer of inspecting and re-

[53] 14 U.C.C. Rep. 692 (N.Y. Sup. Ct. 1974).

[54] *Id.* at 693. *Cf.* Hays Merchandise, Inc. v. Dewey, 78 Wash. 2d 343, 348–49, 474 P.2d 270, 273 (1970) (revocation of acceptance of Christmas toys); A.C. Carpenter, Inc. v. Boyer Potato Chips, 7 U.C.C. Rep. 493, 495, 28 Agric. Dec. 1557, 1560 (1969) (revocation of acceptance of perishable potatoes).

[55] *See, e.g.*, Koppers Co. v. Brunswick Corp., 224 Pa. Super. Ct. 250, 263–64, 303 A.2d 32, 39–40 (1973).

[56] *See, e.g.*, Max Bauer Meat Packer, Inc. v. United States, 458 F.2d 88, 93 (Ct. Cl. 1972); Mazur Bros. & Jaffe Fish Co., 3 U.C.C. Rep. 419, 423–24, 65-2 Contract App. Dec. 23,303, 23,305 (Vet. Admin. Contract App. Bd. 1965).

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jecting the goods was particularly low so that there was no justification for delay.[57]

On the other hand, where the costs imposed on the seller are relatively small, or the buyer's costs of early inspection and rejection are relatively substantial, the "reasonable time" requirement is found to be satisfied. In one case, the delay in the buyer's notification of rejection was found to be reasonable under the Code precisely because the seller had suffered no loss whatsoever from the delay.[58] In another set of cases, courts excused extended delay in inspection and revocation where the costs of discovering defects at an earlier time were substantial.[59] For example, in *Cervitor Kitchens, Inc. v. Chapman*,[60] the Washington Supreme Court found a building contractor's three-month delay in inspecting kitchen units to be installed in a building under construction insufficient to constitute acceptance. Although the buyer's engineer had witnessed the delivery of the goods and their defects were apparent once they were unboxed, the court affirmed the finding that the delay was reasonable because it was customary in the building trade to store commercial fixtures on a job site without inspecting them prior to installation.[61] Dissenting on other grounds, one justice gave a precise justification for the custom: it "would have exposed the units to unnecessary risk of damage to have unpacked them until just before installation." [62]

This apparent judicial concern for the minimization of costs

[57] *See, e.g.*, ITT-Indus. Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 461, 229 S.E.2d 814, 821–22 (1976).

[58] *See* Th. Van Huijstee, N.V. v. Faehndrich, 10 U.C.C. Rep. 598 (Civ. Ct. N.Y. 1972) (dictum).

[59] *See, e.g.*, White Devon Farm v. Stahl, 389 N.Y.S.2d 724, 728–29 (Sup. Ct. 1976); Rose v. Epley Motor Sales, 288 N.C. 53, 61, 215 S.E.2d 573, 578 (1975); Q. Vandenberg & Sons, N.V. v. Siter, 204 Pa. Super. Ct. 392, 399, 204 A.2d 494, 498 (1964); Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 48–49, 554 P.2d 349, 356–57 (1976). Similarly, where the seller has assured the buyer that the goods conform to the contract, it is less likely that the buyer will incur inspection costs, and courts have permitted extended delay prior to revocation. *See, e.g.*, Trailmobile Div. of Pullman, Inc. v. Jones, 118 Ga. App. 472, 475, 164 S.E.2d 346, 348 (1968); Birkner v. Purdon, 27 Mich. App. 476, 482, 183 N.W.2d 598, 601 (1970); Lawner v. Engelbach, 433 Pa. 311, 316, 249 A.2d 295, 298 (1969).

[60] 82 Wash. 2d 673, 678, 513 P.2d 25, 28 (1973) (affirming trial court finding).

[61] Rejection was denied, however, because the buyer's installation was held to be inconsistent with the seller's ownership. *Id.* at 676, 513 P.2d at 26–27.

[62] *Id.* at 679, 513 P.2d at 28 (Wright, J., dissenting). For a similar holding, see La Villa Fair v. Lewis Carpet Mills, Inc., 219 Kan. 395, 548 P.2d 825 (1976).

In a similar case, the court excused a six-week delay in rejecting electronic accounting equipment, emphasizing that the complexity of the machine and the variety of possible defects made it difficult to determine whether the equipment conformed to the contract. Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325, 330–31 (E.D. Pa. 1973), *aff'd*, 493 F.2d 1400 (3d Cir. 1974).

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in the process of rejection has led one court to hold that the reasonable time for rejection expires immediately upon, or perhaps prior to, the seller's completion of the tender. In *L. J. Robinson, Inc. v. Arber Construction Co.*,[63] the seller tendered fill dirt for use at a construction site. Though a supervisory employee of the buyer was present during each delivery, it was not discovered until after 141 loads of dirt had been delivered that the dirt failed to meet contract specifications. The court denied rejection, finding that the buyer's employee could have inspected and discovered the nonconformities before the dirt had been spread and rolled in place.

It is important to note that the source of this holding is not the text of the Code. Although section 2–606 establishes liability for the buyer's delay, it gives the buyer time to consider whether or not he will reject by providing that "acceptance does not occur until the buyer has had a reasonable opportunity to inspect [the goods]." [64] If "delivery" is defined as the dumping of the dirt at the site, the reasonable time for inspection was practically zero because the dirt was rolled and spread immediately after dumping.[65] On the other hand, delivery might have been defined as the entire process of dumping, rolling and spreading the fill dirt, since parts of the opinion indicate that the seller was responsible for the entire process. Under such an interpretation of "delivery," the court's decision implies that the reasonable time for rejection expired *before* completion of the tender [66] — an interpretation directly at odds with the language of sections 2–606 and 2–602(1).

Either construction represents the subordination of the letter of the Code to the court's desire to minimize costs. In more typical sales cases, the costs of tender are sunk by the time the buyer becomes able to inspect the goods. Thus the Code provision giving the buyer a "reasonable time" to inspect and reject after tender is a useful tool for cost minimization. In cases like *Robinson*, however, the amount that the seller expends on tender depends on actions taken by the buyer. If the Code were interpreted literally in these cases to immunize the buyers from responsibility for their actions, resources might be expended on tender beyond the benefit to the contract.

We have predicted that the requirement of rejection or revocation within a reasonable time will also serve as a tool for

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[63] 292 A.2d 809 (D.C. 1972) (affirming trial court judgment).

[64] *See also* U.C.C. § 2–602(1) ("Rejection of goods must be within a reasonable time *after* their delivery or tender." (emphasis added)).

[65] *See* L.J. Robinson, Inc. v. Arber Constr. Co., 292 A.2d at 811 (by inference).

[66] *See id.* at 812 (by inference).

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denying relief where the time or manner of the buyer's rejection indicates that the contract has not really been breached. Several decisions have so employed that requirement. In *Hudspeth Motors, Inc. v. Wilkinson*,[67] for example, the buyer bought a used truck, allegedly under the assurance that the engine was not burning oil. In fact, as the buyer discovered on the first day of use, it consumed substantial quantities of oil. The buyer did not formally reject the truck until five months later, after the engine had "blown up." The court denied rejection on the ground that the buyer had failed to reject within a reasonable time.

There are a variety of alternative legal grounds for denying the buyer in *Hudspeth* relief, each of which might be consistent with cost minimization. The court might have disbelieved the buyer's claim of warranty; it might have decided that the buyer of a used truck assumes the risk of engine failure; or it might have believed that the buyer failed to mitigate damages after discovering that the engine used oil. The requirement of rejection within a reasonable time, however, is particularly suitable for the resolution of this dispute because the provision focuses attention on the importance of the passage of time after discovery of the defect to the contractual allocation of risks. As discussed in Part II, the passage of time after sale or after discovery of a defect increases the likelihood that the buyer's rejection is based upon a supervening event, the risk of which is not allocated in the contract. In *Hudspeth*, the buyer could not show that the supervening event — explosion of the engine — was due to a defect present at the time of sale; so it is not implausible that allocation of this risk to the buyer would reduce the joint cost of sales.

The widely noted case of *Miron v. Yonkers Raceway, Inc.*[68] illustrates the same point. There, the Second Circuit affirmed a finding that a delay of twenty-four hours prior to the rejection of a racehorse was unreasonable. Evidence showed that it is customary, because it is easy, to inspect the condition of a racehorse at the time of purchase. The buyer's delay, however short, increased the likelihood that the defect — a fracture in the horse's leg — really had occurred after the buyer had taken possession. The court noted that risk of injury to a racehorse after sale is sufficiently great to justify the custom that the buyer ignored.[69]

3. The Requirement of Notification of Rejection and Revo-

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[67] 238 Ark. 410, 382 S.W.2d 191 (1964), *overruled on other grounds*, Stimson Tractor Co. v. Heflin, 257 Ark. 263, 516 S.W.2d 379 (1974). *See also* note 77 *infra*.

[68] 400 F. 2d 112 (2d Cir. 1968).

[69] *Id.* at 118.

Thus the buyer bore the burden of proving that the horse was not defective.

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cation. — The requirement of notification has been imposed straightforwardly to preclude rejection and revocation where the buyer fails to notify the seller or where the alleged notice is so imprecise that a reasonable person would not construe it as an attempt to rescind.[70] Such a literal application of the requirement is usually consistent with efficiency both because the seller may incur expenses in reliance on the buyer's acceptance and because the lack or vagueness of notification may indicate the buyer's belief that there has been no breach.

A better test of the present hypothesis, however, is not whether the courts apply the notification requirement literally, but whether they apply it in a manner *inconsistent* with its literal terms but consistent with minimization of costs. In several cases in which rescission appeared to be the more efficient remedy, courts have found sufficient notification despite the fact that there had been no communication between the buyer and seller which could reasonably be construed as such. In two cases, the notification requirement was found to be satisfied by the buyer's filing suit and refusing to allow the seller to cure; [71] in another, by vague complaints and a refusal to continue payments.[72] Finally, in one case in which the court felt obliged to *deny* rejection because of lack of notification, it nevertheless awarded the buyer the purchase price as damages and gave the seller the right to reclaim the goods.[73] This unusual remedy is rejection in substance but not in form. It is likely to minimize costs, since the goods at issue — equipment designed for the buyer's business — proved useless in their intended application.

4. Rejection: Acts Inconsistent with the Seller's Ownership. — The provision for construing acceptance from an act of the buyer inconsistent with the seller's ownership has been invoked in ways that minimize costs where the buyer's actions with respect to the goods — for example, his continued use of or payment for the goods after rejection — indicate that the goods conform to his purposes.[74] A second cost-minimizing function for the provision is to preclude rejection where some action of the buyer indicates that the remedy of damages is less costly than that of

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[70] *See, e.g.*, Phil Jacobs Co. v. Mifflin, 23 Ill. App. 3d 999, 1001–02, 320 N.E.2d 329, 331 (1974) (per curiam); Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 18, 327 A.2d 502, 514 (1974).

[71] Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976); Fenton v. Contemporary Dev. Co., 12 Wash. App. 315, 529 P.2d 883 (1974).

[72] Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

[73] Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306 (E.D. Pa. 1974).

[74] *See, e.g.*, Ingle v. Marked Tree Equip. Co., 244 Ark. 1166, 428 S.W.2d 286 (1968).

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rejection. In *Bowen v. Young*,[75] for example, the buyer had ordered a mobile home in Texas to be delivered in South Carolina. Upon receipt, the buyer noticed various defects and immediately complained to both the seller and the manufacturer, neither of whom made any attempt to repair the defects. Later the buyer wired the seller to cancel the sale. But, failing to receive any response, the buyer moved into the mobile home, invested $600 in repair and adaptation, and lived in it for over a year. He then had the home moved back to Texas, where he later brought suit seeking rejection. The court of appeals denied rejection but remanded the case for proof of damages, holding that the buyer's dominion over the home subsequent to his admittedly rightful rejection was an "act inconsistent." [76] The central issue in the case was not whether the contract had been breached but whether rejection or damages was the appropriate remedy. The buyer's actions — living in the home and investing significant amounts accommodating it to his purposes — indicated a probability that he placed a value on the home higher than the resale value to the seller. To award the buyer rejection and to force a resale would reduce the joint value of the contract.[77]

Although a buyer's continued possession of goods strongly suggests that he finds them useful, in some situations a buyer's continued use diminishes total costs. It supports the hypothesis of this Article that in such situations courts have permitted rejection. For example, in *Garfinkel v. Lehman Floor Covering Co.*,[78] the buyer complained upon installation of the unsightly appearance of a carpet. Although the seller attempted to correct the condition, the buyer remained unsatisfied. Confronted with a finding that the carpet was defective, the seller argued that rejection should be denied because of the buyer's continued use of the carpet. The court, however, granted rejection, em-

[75] 507 S.W.2d 600 (Tex. Ct. App. 1974).

[76] *Id.* at 603–05.

[77] In a similar case, Woods v. Van Wallis Trailer Sales Co., 77 N.M. 121, 419 P.2d 964 (1966), a New Mexico court found that a mobile home failed to conform to the contract, but denied rejection because of the buyer's inconsistent acts — moving into the trailer and installing gas lines and a washing machine. *See also* F.W. Lang Co. v. Fleet, 193 Pa. Super Ct. 365, 165 A.2d 258 (1960).

There has been confusion over the availability of damages once rejection has been denied because of the buyer's inconsistent action. In Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964), *overruled*, Stimson Tractor Co. v. Heflin, 257 Ark. 263, 516 S.W.2d 379 (1974), for example, damages were denied along with rejection, although this ruling was overturned a decade later in *Stimson*. It is significant that the denial of damages in *Hudspeth* was consistent with cost minimization in that case, although the legal rule that the court subsequently derived from the case is not. *See* p. 988 *supra*.

[78] 60 Misc. 2d 72, 302 N.Y.S.2d 167 (Dist. Ct. 1969).

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phasizing that it would have been costly for the buyer to have removed, transported, and stored the defective carpet.

This case illustrates how judicial interpretation can minimize the costs of sales because it is a clear example of a dispute requiring the application of conflicting Code provisions. Section 2–602(2) provides that a rejecting buyer must make the goods available to the seller, though he "has no further obligations" with regard to them. Yet under the "act inconsistent" provision, a buyer has an obligation not to exercise dominion over the goods or make use of them. In *Garfinkel* the seller had not reclaimed the goods, but neither had the buyer held them aside for the seller's disposition. Instead, he had continued to use them, thus violating a literal interpretation of the "act inconsistent" provision as well as the principle discussed earlier under which continued use had been held to preclude rejection.[79] Nevertheless, the court granted rejection on a theory which seems to minimize costs.

Acts found not inconsistent with the seller's ownership in similar cases include extended experimentation with a computer, because of the complexity of the machine and its intended use; [80] use and attempted repair of an automobile, because of ignorance of the defects and continuous attempts to work out differences with the seller; [81] continued storage of large quantities of grain in a defective silo, because of the high cost of removing the remaining grain; [82] and continued use of defective car-washing equipment until substitute equipment was available, because the continued use served to mitigate damages.[83]

5. Revocation: Substantial Change in the Condition of the

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[79] *See* p. 989 & note 74 *supra.*

For a case similar to *Garfinkel*, see Askco Eng'r Corp. v. Mobil Chem. Corp., 535 S.W.2d 893 (Tex. Ct. App. 1976) (buyer's removal and burial of useless goods, after unsuccessful attempt to process part of shipment, held not to be an act inconsistent with seller's ownership).

Although Llewellyn had argued for exceptions to the enforcement of the "act inconsistent" provision, he never referred to such actions as those in *Garfinkel* and *Askco Engineering. See Quality II, supra* note 16, at 390–92 & n.129. He might have excused Mobil's use of the goods in processing but made no mention of destruction of remaining material as excusable.

[80] Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325 (E.D. Pa. 1973), *aff'd*, 493 F.2d 1400 (3d Cir. 1974).

[81] Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785, 790 n.1 (N.D. Ohio 1974) (rejection served to "minimize losses resulting from defective performance").

[82] The court was conscious that there was no apparent gain to either party from emptying the silo. Maas v. Scoboda, 188 Neb. 189, 195 N.W.2d 491 (1972).

[83] Valley Die Cast Corp. v. A.D.W., Inc., 25 Mich. App. 321, 181 N.W.2d 303 (1970). *See also* Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976) (actually a revocation case, although the court decided the rejection issue); Clark v. Zaid, Inc., 263 Md. 127, 282 A.2d 483 (1971).

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Goods and the Doctrine of the Buyer's Waiver. — The provision prohibiting revocation of acceptance after a "substantial change in condition of the goods not caused by their own defects" might be invoked where a change that the buyer has made in the goods indicates either that the contract was not breached or that damages are the cheaper remedy — that is, as an analogue to the "act inconsistent" provision for rejection. Because the provision focuses on changes in the goods rather than the behavior of the buyer, however, this interpretation has been employed only infrequently. Instead, courts have created a novel doctrine of the buyer's "waiver" of the right to revoke, as well as other remedies unknown to the Code.

An illustration of this sort of judicial innovation is a Washington State case, *Hays Merchandise, Inc. v. Dewey*.[84] The buyer there had ordered toys for the Christmas trade, and, after the seller's first shipments contained fewer stuffed animals than he wanted, the buyer cancelled further deliveries. At the time of cancellation, however, a further shipment was in transit, and although the seller authorized the buyer to return the toys, the buyer kept them and sold some of them. He attempted to revoke acceptance of the remainder after the Christmas season had passed. Though the decision denying revocation is straightforward — the buyer's retention and attempt to sell the goods can be construed with little dispute as an acceptance of the risk of resale — the difficulty of justifying such an outcome by the "substantial change in condition of the goods" provision is apparent. The market value of the goods may have declined because the Christmas season had passed, but the condition of the goods had not changed between tender and revocation. In denying revocation the court announced as an independent ground for the decision that the buyer's actions were inconsistent with revocation,[85] but no such limit on the right to revoke is present in the Code.

Courts have denied revocation but awarded damages despite extensive and continued use of the defective goods by the buyer after revocation. In *Underwood v. Monte Asti Buick Co.*,[86] for example, the buyer revoked immediately after discovery of the defect but two years after purchase. After notification, the buyer continued to use the car, and at the time of trial she had driven it over 50,000 miles. The court denied revocation but awarded damages because the car was undeniably defective.

[84] 78 Wash. 2d 343, 474 P.2d 270 (1970) (en banc).

[85] *Id.* at 349, 474 P.2d at 273. However, the court found lack of substantial impairment and unreasonable delay in giving notice as alternative grounds for the decision. *Id.* at 348–49, 474 P.2d at 273.

[86] 73 Pa. D. & C.2d 773, 782 (1976).

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In *Stroh v. American Recreation & Mobile Home Corp.*,[87] the Colorado Court of Appeals interpreted the remedial provisions of the Code to achieve efficiency in a manner even more striking. The court held that the buyer's continued occupancy of a defective mobile home for a year and a half after revoking acceptance was wrongful against the seller, but because the mobile home was substantially defective, awarded revocation and simultaneously awarded damages to the seller equal to the value of the buyer's use of the goods.[88] This remedy cannot be reconciled with any plausible interpretation of the Code's revocation provisions. Rather, it likely serves to minimize the distributional loss to the seller arising from the buyer's revocation.

One might consider the waiver cases to be unworthy of notice, since the buyer's continued use of an allegedly defective product after announcing revocation seems sufficiently inconsistent with his legal claim as to make the denial of revocation automatic. There is evidence, however, that courts have employed the waiver doctrine not in response to the contradiction between the buyer's revocation and his continued usage but in response to costs. In *Jones v. Abriani*[89] and *Minsel v. El Rancho Mobile Home Center, Inc.*,[90] for example, the courts found that the buyer's continued use did not preclude revocation because it might serve to mitigate consequential damages for which the seller was responsible. In *Fablok Mills, Inc. v. Cocker Machine & Foundry Co.*,[91] the court found that because the seller was the only domestic manufacturer of the machine purchased, the buyer was forced to continue use to minimize consequential damages. In *Jorgensen v. Pressnall*,[92] the court held that the buyer's continued use was permissible as protection of his security interest in the goods but awarded the seller an offset for the buyer's use. These decisions illustrate that the common law doctrine of waiver in revocation cases is not slavishly tied to continued and inconsistent usage of defective goods, but is responsive to the relative costs of alternatives available to the buyer.

There is a final set of cases in which courts have invoked the waiver doctrine to deny revocation because of the buyer's usage of the goods *prior* to discovery of the defect. These cases show that courts are sensitive to distributional losses imposed on a seller when the buyer can revoke acceptance and recover the con-

[87] 530 P.2d 989 (Colo. Ct. App. 1975).

[88] *Id.* at 993–94.

[89] 350 N.E.2d 635, 644 (Ind. Ct. App. 1976) (dictum).

[90] 32 Mich. App. 10, 15, 188 N.W.2d 9, 12 (1971).

[91] 125 N.J. Super. 251, 258, 310 A.2d 491, 494–95 (App. Div.), *pet. denied*, 64 N.J. 317, 315 A.2d 405 (1973).

[92] 274 Or. 285, 292, 545 P.2d 1382, 1385–86 (1976) (en banc).

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tract price after the goods have depreciated substantially.[93] In one case, a court awarded the buyer damages for the defect in the same action in which it denied revocation.[94] Indeed, although the Code does not empower such a remedy, courts in eight jurisdictions have awarded sellers damages for buyers' use.[95]

6. Revocation: Substantial Impairment and the Subjective Standard of Valuation. — Although the "substantial impairment" requirement is frequently invoked, the only important function it has served is to allow judges to deny revocation where the defect in the goods seems trivial. While such a function is consistent with cost minimization, it is also consistent with a literal interpretation of the provision. Part III, however, showed that a literal interpretation of the modifying phrase "to him" giving special acknowledgment to the subjective values of buyers — in particular, of consumer buyers — would be inefficient . Therefore the cost minimization hypothesis suggests that courts will interpret the phrase "to him" without deference to subjective losses to the buyer.

Case law strikingly confirms this prediction. The subjective standard of section 2-608 has been the basis for an award of revocation in only two of thirty-eight decisions involving the materiality of the defect.[96] Moreover, even in the single case in which the court's interpretation of the standard was unambiguously subjective, the extent to which the court was willing to disregard efficiency was limited. The court stated that the efficiency of the remedy alone was not determinative, but it awarded the seller damages equal to the value of the buyer's use of the goods

[93] *See, e.g.*, Cooper v. Mason, 14 N.C. App. 472, 474, 188 S.E.2d 653, 655 (1972); Eckstein v. Cummins, 41 Ohio App. 2d 1, 15-16, 321 N.E.2d 897, 906-07 (1974); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 460-61, 184 S.E.2d 722, 726 (1971). *But see* Dopieralla v. Arkansas La. Gas Co., 255 Ark. 150, 152, 499 S.W.2d 610, 611 (1973).

[94] Eckstein v. Cummins, 41 Ohio App. 2d 1, 15-16, 321 N.E.2d 897, 906-07 (1974).

[95] *See* Stroh v. American Recreation & Mobile Home Corp., 530 P.2d at 994; Orange Motors v. Dade County Dairies, Inc., 258 So. 2d 319, 321 (Fla. Dist. Ct. App.), *cert. denied*, 263 So. 2d 831 (1972); American Container Corp. v. Hanley Trucking Corp., 11 N.J. Super. 322, 334-35, 268 A.2d 313, 320 (Ch. Div. 1970); Gawlick v. American Builders Supply, Inc., 86 N.M. 77, 79, 519 P.2d 313, 315 (Ct. App. 1974); White Devon Farm v. Stahl, 88 Misc. 2d 961, 967-68, 389 N.Y.S.2d 724, 729 (Sup. Ct. 1976) (trustee theory); Jorgensen v. Pressnall, 274 Or. at 292, 545 P.2d at 1386; Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227, 230 (Tenn. Ct. App. 1972); Explorers Motor Home Corp. v. Aldridge, 541 S.W.2d 851, 854 (Tex. Ct. App. 1976).

[96] *See* Barrington Homes, Inc. v. Kelley, 320 So. 2d 841, 843 (Fla. Dist. Ct. App. 1975) (interpretation of subjective standard ambiguous); Jorgensen v. Pressnall, 274 Or. 285, 289-91, 545 P.2d 1382, 1384-85 (1976) (en banc).

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prior to revocation.[97] In six other cases, the "subjective" standard has appeared to be the grounds for the decision, but in none were the particular values of the buyers determinative.[98] In fact, in two decisions courts explicitly rejected the interpretation suggested by Comment 2 in favor of an objective standard, more consistent with cost minimization.[99]

7. The Substantive Grounds for Rejection and Revocation of Acceptance. — This subsection examines the hypothesis of consistency of case law with cost minimization in a new way: it ignores the particular legal issue in the case and compares the judicial resolution of the disputes to the efficient resolution as determined from facts reported in the opinion.

Grants of rejection should be much less frequent than the broad language of section 2–601 might imply since the conditions under which rejection will minimize costs are quite limited. Of the sixty-two appellate rejection decisions announced between 1954 and 1976, rejection has been affirmed in only seventeen cases, equal to twenty-seven percent.[100] This aggregate figure, of course, confirms the prediction in only a general way, for it conceals the presence or absence of the particular cost-minimizing conditions in individual cases. One refinement is to distinguish suits brought under section 2–601 by consumers from those brought by merchants. As discussed earlier, the cost minimization hypothesis implies that rejection should be awarded more frequently where the buyer is a consumer.[101] Again, the findings are confirming. Rejection was awarded in eight of eighteen suits brought by consumer buyers (forty-four percent), but in only nine of forty-four suits brought by merchant buyers (twenty percent).

A second way of testing the hypothesis is to examine attempts to reject goods specially designed for the buyer. Since

[97] Jorgensen v. Pressnall, 274 Or. 285, 289–91, 545 P.2d 1382, 1384–85 (1976) (en banc).

[98] Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 So. 2d 638, 646 (1969); Stroh v. American Recreation & Mobile Home Corp., 530 P.2d 989, 992–93 (Colo. Ct. App. 1975); Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 535–36, 358 N.E.2d 382, 386 (1976); Overland Bond & Inv. Corp. v. Howard, 9 Ill. App. 3d 348, 359–60, 292 N.E.2d 168, 176–77 (1972); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 458, 240 A.2d 195, 204–05 (Law Div. 1968); Shofner v. Williams & Pearson Furniture Co., 8 U.C.C. Rep. 48 (Tenn. Ct. App. 1970) (by inference).

[99] *See* Herbstman v. Eastman Kodak Co., 68 N.J. 1, 9, 342 A.2d 181, 185 (1975); Hays Merchandise, Inc. v. Dewey, 78 Wash. 2d 342, 348, 474 P.2d 270, 273 (1970) (en banc). *See also* Moore v. Howard Pontiac-Am., Inc., 492 S.W. 2d 227, 229 (Tenn. Ct. App. 1972).

[100] Citations are on file at the *Harvard Law Review* and are available from the author. *See* note 44 *supra.*

[101] *See* p. 979 *supra.*

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custom-made goods, even if defective in some respect, are likely to be more valuable to the buyer than to anyone else, damages are probably the cheaper remedy in cases involving such goods. Five rejection cases have been decided in which the goods were specially designed for the buyer, and rejection was denied in all but one. In *Beco, Inc. v. Minnechaug Golf Course, Inc.*,[102] a typical example, the seller had begun setting the first portion of specially designed restaurant equipment in position when the buyer refused to allow any further work. The seller voluntarily agreed to make alterations, but before they were completed the buyer rejected all of the equipment as nonconforming. The issue in the case was not whether the contract had been breached, but whether rejection was the appropriate remedy. Although there are no statutory grounds for such a holding, the court denied rejection but awarded the buyer damages for certain nonconformities.[103] The decisions in three other cases denying rejection are similar.[104] Although a court awarded rejection in one case involving custom-made goods, rejection was awarded only because extensive efforts to repair the goods by the seller had been unsuccessful.[105]

A final method of testing the cost minimization hypothesis for rejection cases is to look individually at the seventeen cases in which rejection was awarded. The hypothesis implies that in each, either the costs of reselling the defective goods will be higher to the buyer than to the seller or the costs of calculating the buyer's damages will be high. We have already mentioned that the eight cases in which rejection was awarded to consumer buyers are generally consistent with the prediction. A closer look at these cases provides additional support. Five of the cases involved the purchase of a new automobile from a dealer. In general, it is plausible that a dealer will be able to resell a defective automobile more cheaply than the initial purchaser. These particular decisions, however, are notable for the court's emphasis in each on the relevance of the nature of the defect to the award of rejection. Each of the five cases involved defects of a very complex nature: the fusing of a differential to an axle,[106] transmission failure,[107] emission of smoke and fumes,[108] or mul-

[102] 5 Conn. Cir. Ct. 444, 256 A.2d 522 (1968). Other citations are on file at the *Harvard Law Review* and are available from the author. *See* note 44 *supra*.

[103] 5 Conn. Cir. Ct. at 446–51, 256 A.2d at 524–26.

[104] *See* R.R. Waites Co. v. E.H. Thrift Air Cond., Inc., 510 S.W.2d 759 (Mo. Ct. App. 1974); Stephens Indus. v. American Express Co., 471 S.W.2d 501 (Mo. Ct. App. 1971); Sal Metal Products Co. v. Rennert, 5 U.C.C. Rep. 826 (N.Y. Sup. Ct. 1968).

[105] *See* Hayes v. Hettinga, 228 N.W.2d 181 (Iowa 1975).

[106] Bayne v. Nall Motors, Inc., 12 U.C.C. Rep. 1137 (Iowa Dist. Ct. 1973).

[107] Menard & Holmberg Rambler, Inc. v. Shea, 8 U.C.C. Rep. 167 (Mass. App.

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tiple defects costing several thousand dollars to repair.[109]. Two opinions draw attention to the difficulty to the consumer buyer of discovering the full extent of the defects, because of the likelihood that other parts of the auto had been affected.[110] This difficulty, of course, increases both the cost of calculating the buyer's damages and the cost to the buyer of reselling the goods, especially relative to the cost of resale to an expert in automobile repair.[111] In cases of this nature, rejection is likely to be the cost-minimizing remedy.

Eight of the nine cases in which rejection was awarded to merchant buyers are equally consistent with the hypothesis. The best example is *Carl Beasley Ford v. Burroughs Corp.*,[112] in which an automobile dealer purchased an electronic accounting system. The system was never accurate, and the seller was never able to correct the defects; so rejection appears to have been a cheaper remedy than damages. Resale by one of the parties was inevitable, and the manufacturer was more likely than the buyer to know about potential customers and alternative uses. Other cases are similar in that the court awarded rejection after evidence was presented showing that the defective goods were substantially valueless.[113] Where goods are valueless, there is no resale advantage between the two parties. Therefore, rejection is the cheaper remedy since the court can avoid calculating the buyer's loss.

Part III predicted that a greater proportion of revocation cases than rejection cases would consist of suits brought by consumers rather than merchants, and that the proportion of revocation awards would be greater than the proportion of rejection awards.[114] The case law is generally confirming. The proportion of consumer revocation suits (56%) is substantially greater than the proportion of consumer rejection suits (29%). In addition, the proportion of suits awarding revocation (55%) is greater than the proportion of suits awarding rejection (27%). This second finding is especially significant, since the Code, as we

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1970); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (Law Div. 1968).

[108] Havas v. Love, 89 Nev. 458, 514 P.2d 1187 (1973) (per curiam).

[109] Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785 (N.D. Ohio 1974).

[110] *See id.* at 790; Bayne v. Nall Motors, Inc., 12 U.C.C. Rep. 1137, 1140 (Iowa Dist. Ct. 1973).

[111] *But see* p. 973 & note 31 *supra.*

[112] 361 F. Supp. 325 (E.D. Pa. 1973), *aff'd*, 493 F.2d 1400 (3d Cir. 1974).

[113] *See, e.g.*, La Villa Fair v. Lewis Carpet Mills, Inc., 219 Kan. 395, 407, 548 P.2d 825, 835 (1976) (goods were "inferior, substandard, nonconforming and wholly undesirable merchandise"); Askco Eng'r Corp. v. Mobil Chem. Corp., 535 S.W.2d 893 (Tex. Ct. App. 1976).

[114] *See* p. 979 *supra.*

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know, has incorporated more stringent requirements for the award of revocation than for rejection.[115] The best explanation for this finding seems to be the sensitivity of courts to the costs of sales transactions.[116]

While the above analysis attributes the greater success in revocation suits solely to the greater proportion of suits by consumers, in fact the rate of success both for consumers and merchants is greater in revocation than in rejection cases. If, however, cases in which the seller chose not to cure the defect — making revocation automatic — are segregated from the revocation cases, the difference between the recovery rates in revocation and rejection suits becomes less marked. Consumers were awarded revocation in 39% of the remaining revocation cases in comparison to 44% of rejection cases, and merchants in 38% of the remaining revocation cases in comparison to 20% of rejection cases. As predicted, the proportion of suits brought by consumers remains higher for revocation than rejection (45% compared to 29%) and the proportion of recoveries is higher for revocation than rejection (40% compared to 27%). The substantial difference between the rates of success in cases brought by merchants, however, remains unexplained.

Another method of testing the hypothesis that courts will minimize costs in revocation cases is to look at those cases involving goods specially designed for the buyer. The results are consistent with the hypothesis but not as strongly as for the rejection cases. Of ten decisions involving specially designed

[115] White and Summers have predicted that the differential rate of success in rejection suits may be only slightly higher, *see* J. WHITE & R. SUMMERS, *supra* note 35, at 255, 257, but to the author's knowledge there have been no previous intimations that the rate of revocation awards would be greater.

[116] An alternative explanation for the fact that consumers bring more revocation than rejection actions is that consumers, unlike merchants, normally do not inspect goods before acceptance, but take the goods home for use, where they later discover the nonconformity. Moreover, the concept of rejection has little meaning for consumers because contracts for sale of consumer goods are seldom made much in advance of delivery.

The different success rate in revocation cases can be explained on grounds of the seller's incentive to litigate. Where the buyer is a consumer, accepted goods are used goods, which are difficult to resell. Where the buyer is a merchant, revocation is likely to entail consequential damages such as loss of trade or production. In either case, a seller is likely to have a greater incentive to litigate a case than in a rejection action, in which goods are likely to have depreciated less and consequential damages are likely to be smaller. This alone explains only the greater volume of revocation actions. However, because the risk of consequential damages is more substantial in relation to litigation costs than the risk of depreciation of consumer goods, the seller to a merchant buyer will have greater incentive to invest legal resources in the hope of avoiding or reducing a damage award. This may explain why the success rate for revocation actions is even higher for consumer buyers (64%) than for merchants (43%).

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goods, revocation was denied in four [117] and awarded in three.[118] Although the three cases in which revocation was awarded may seem inconsistent with the hypothesis, in two the goods appeared to have little value to the buyer,[119] and in the third the buyer had disposed of the goods by the time of trial; so the issue of revocation arose only in connection with the measure of damages.[120]

B. Cure of Defective Tender

Part III showed that the provisions of the Code make it very difficult for courts to devise rules to achieve efficiency where the nonconformity in the goods can be cured. Where the price of the goods or the buyer's information has changed, courts must either permit overinvestment in cure or grant a windfall to the buyer. This dilemma has led to contradictory decisions and to interpretations that are less coherent among the various jurisdictions than interpretations of the Code's rejection and revocation provisions.

Judicial decisions have had some effect in promoting efficiency where the buyer attempts to refuse the seller's cure. The text of the Code, of course, makes no reference to the buyer's right to refuse cure, although it does require that cure be "seasonable." Courts, however, have allowed buyers to reject or revoke acceptance, despite the seller's willingness to continue repair, in situations in which it is plausible that the cost of the seller's investment outweighs the benefits conferred upon the buyer. In *Melby v. Hawkins Pontiac, Inc.*,[121] for example, the

[117] *See* United States *ex. rel.* Fram Corp. v. Crawford, 453 F.2d 611 (5th Cir. 1971); Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 14–18, 327 A.2d 502, 512–14 (1974); Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 479–81, 269 N.E.2d 664, 667–68 (1971); Desilets Granite Co. v. Stone Equalizer Corp., 133 Vt. 372, 374–75, 340 A.2d 65, 67 (1975).

[118] Two were remanded for further proof. *See* Lenkay Sani Prods. Corp. v. Benitez, 47 A.D.2d 524, 525, 362 N.Y.S.2d 572, 573–74 (1975); Fablok Mills, Inc. v. Cocker Mach. & Foundry Co., 125 N.J. Super. 251, 256–57, 310 A.2d 491, 494 (App. Div.), *pet. denied*, 64 N.J. 317, 315 A.2d 405 (1973).

In the final case, the court apparently denied rejection and did not reach the issue of revocation but nevertheless awarded revocation in effect by granting the buyer damages equal to the full purchase price and allowing the seller to reclaim the goods. Puritan Mfg., Inc. v. I. Klayman & Co., 379 F. Supp. 1306 (E.D. Pa. 1974).

[119] Four Sons Bakery, Inc. v. Dulman, 542 F.2d 829, 831–32 (10th Cir. 1976); Regents of the Univ. of Colo. v. Pacific Pump & Supply, Inc., 528 P.2d 941, 943 (Colo. Ct. App. 1974).

[120] Uganski v. Little Giant Crane & Shovel, Inc., 35 Mich. App. 88, 99, 192 N.W.2d 580, 585 (1971).

[121] 13 Wash. App. 745, 746, 537 P.2d 807, 809 (1975). *See also* Tiger Motors v. McMurtry, 284 Ala. 283, 224 So.2d 638 (1969).

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court allowed the buyer to revoke his acceptance after the automobile he purchased had been in the seller's shop for repair for 191 of 197 days since purchase.

Courts have not permitted the buyer to refuse cure, however, where the costs to the seller of effecting cure and the costs to the buyer of waiting for the goods to be cured are low. In *Wilson v. Scampoli*,[122] for example, the buyer was denied rescission because she had refused to allow the seller to remove a defective television to the seller's shop for repair. The court's consideration of costs was explicit: it found that the defect could be cured in a short period of time at a cost of "no great inconvenience" to the buyer.[123] In other decisions courts have prohibited the buyer from refusing the seller's cure in situations where it is plausible that the buyer's refusal to allow cure was motivated by a change in the market price or in his information about the goods.[124]

V. CONCLUSION

The issues raised in the cases surveyed in the previous Part are narrow and have limited implications for the course of commerce. But more significant than the specific resolutions of the disputes themselves is the method that underlies the resolutions. During the first two decades of Code enforcement, courts have

[122] 228 A.2d 848 (D.C. 1967).

[123] *See id.* at 850. Schwartz, however, criticizes this decision. *See* Schwartz, supra note 2, at 553–54.

Similarly, in Reece v. Yeager Ford Sales, Inc., 155 W. Va. 453, 456, 184 S.E.2d 722, 724 (1971), the buyer was denied revocation where the cost of repairing a nonconforming automobile was estimated at $35 to $80, seemingly much less than the cost of reselling the defective car.

[124] *See, e.g.*, Traynor v. Walters, 342 F. Supp. 455, 459–61 (M.D. Pa. 1972); Beco, Inc. v. Minnechaug Golf Course, Inc., 5 Conn. Cir. Ct. 444, 256 A.2d 522 (1968).

Cases arising under the Code's installment contract provision are few in number, but their results are also generally consistent with the hypothesis here. *Compare* Graulich Caterer, Inc. v. Hans Holterbosch, Inc., 101 N.J. Super. 61, 76–77, 243 A.2d 253, 262 (App. Div. 1968) (nonconformity in second installment of German food for World's Fair concession substantially impaired value of whole contract where buyer needed to establish an immediate source of food for the fair), *with* Holiday Mfg. Co. v. B.A.S.F. Sys. Inc., 380 F. Supp. 1096, 1102–04 (D. Neb. 1974) (serious nonconformities over a substantial period of time do not constitute breach where buyer understood that seller was manufacturing by a new process, seller's efforts to cure had been reasonably successful and timely, and delay was not as costly to buyer as in *Graulich*). *See also* Laredo Hides Co. v. H & H Meat Prods. Co., 513 S.W.2d 210, 214–16 (Tex. Ct. App. 1974) (buyer held not to have breached by failure to tender payment within deadline unilaterally imposed by seller, where evidence indicated rising market encouraged seller's anticipatory breach).

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developed coherent interpretations consistent with a model of remedies that minimizes costs.

Support for this proposition is widespread and can be found in the interpretation of virtually every provision of the Code regarding the seller's tender. Moreover, decisions consistent with minimization of costs have not been limited to the literal scope of the Code's provisions. Where necessary, courts have extended Code principles beyond the letter of the Code in ways which minimize costs. Where no appropriate Code principles existed, courts have themselves created doctrines which reduce costs, such as the buyer's waiver of the right of revocation and the award of damages for the buyer's use. In certain cases, courts have refused to adopt interpretations of the Code, such as the subjective valuation standard for revocation of acceptance, which increase the costs of sales transactions.

Certainly the criterion of economic efficiency is nowhere expressed as a basis of the Code in law or policy. Yet the narrow legal doctrines embodied in the Code's provisions are often responsive to an underlying concern for efficiency and are usually applied so as to minimize the costs of sales. Analysis of the costs of a given transaction thus may permit parties to predict the outcome of a judicial decision. And whenever case law diverges from the literal interpretation of the text of a statute, some method of prediction becomes essential.

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