William Mitchell Law Review

Volume 5 | Issue 1 Article 6

1979

Commercial Law—Revocation of Acceptance Under U.C.C. § 2-608—Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349 (Minn. 1977)

listed in the schedules may not be the only drugs controlled, and directs citizens to where additional controlled substances are listed, the law provides sufficient notice of what conduct is prohibited.

Although the issues discussed by Justice Otis raise serious questions concerning the rigid application of *ignorantia juris non excusat* in the context of promulgation of rules and regulations by administrative agencies, it is doubtful that an effective and simple alternative could be found which would work less hardship than the original doctrine. The facts in *King* do not indicate that the defendant could not have received adequate notice of the proscribed conduct.[74] In fact, based on the law as previously applied,[75] and the defendant's own actions,[76] it would appear that she had notice that possession of phentermine was illegal.

In upholding the constitutionality of the Minnesota Act and declining to accept a defense based on non-publication of administrative regulations, the *King* court adhered to well-established principles of law. Simultaneously, the national legislative impetus designed to deal with the growing problems of drug abuse in a uniform manner was judicially approved in Minnesota.

Commercial Law—Revocation of Acceptance Under U.C.C. § 2-608—*Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977).

In recent years, the plight of the consumer purchaser of a defective product has improved steadily.[1] By abolishing the requirement of privity, some courts have permitted disappointed purchasers to sue parties in the sales chain of distribution other than the immediate seller for damages.[2] Courts also have permitted buyers to revoke acceptance of defective goods under section 2-608 of the Uniform Commercial Code (U.C.C.) and return the goods to their immediate sellers.[3] In *Durfee v.*

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the defendant was charged, the law simply required filing in the office of the Secretary of State. *See* Minn. Stat. § 15.0413(1) (1976 & Supp. 1977).

74. *See* text accompanying notes 43-73 *supra*.

75. *See* notes 50-73 *supra* and accompanying text.

76. *See* 257 N.W.2d at 698 n.4 (defendant may have shown culpability by concealing the drug in her undergarments).

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1. *See* Spannaus, Book Review, 4 Wm. Mitchell L. Rev. 493, 493 (1978) (reviewing R. Haydock, Minnesota Consumer Law Handbook (1977)).

2. *See, e.g.*, McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); Beck v. Spindler, 256 Minn. 543, 558-62, 99 N.W.2d 670, 680-82 (1959); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 413, 161 A.2d 69, 99-100 (1960).

3. *See, e.g.*, Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. Dist. Ct. App.), *cert. denied*, 263 So. 2d 831 (Fla. 1972); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972).

Section 2-608 of the Uniform Commercial Code (hereinafter cited as U.C.C.) provides:

Rod Baxter Imports, Inc.,[4] after considering for the first time what constitutes substantial impairment, the Minnesota Supreme Court went one step beyond other courts and permitted a Minnesota consumer to revoke acceptance against a party in the chain of distribution with whom the consumer did not have privity.[5]

In *Durfee*, the plaintiff Durfee purchased a new Saab from Horvath Imports, Inc. (Horvath) in St. Paul. During his trip home to Duluth, he experienced a number of mechanical difficulties with the car.[6] After several months of attempted repairs of the many defects, the car began to stall repeatedly.[7] Although the car was towed three times to a Saab dealer in Duluth, the stalling problem was not corrected.[8] After several months, Durfee wrote to the distributor, Saab-Scania of America, Inc. (Saab-Scania), and stated that he would no longer attempt to secure repairs.[9] After sending the letter, Durfee did not drive the car.[10] Durfee

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(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

U.C.C. § 2-608. Section 2-608 is codified at MINN. STAT. § 336.2-608 (1976).

4. 262 N.W.2d 349 (Minn. 1977).

5. *See id.* at 357-58.

6. The seatbelt warning buzzer malfunctioned within a few blocks of the dealer. When the plaintiff immediately returned the car, the salesman tried to correct the problem. 262 N.W.2d at 351. Halfway to Duluth, the buzzer reactivated, compelling the plaintiff's wife "to unhook her seatbelt on the passenger side of the car and hold her finger on the wire inside the seatbelt buckle." Appellant's Brief and Appendix at 3.

Also on the trip home, the knob on the shift lever fell off and a rattle developed under the dashboard. The plaintiff later complained that the air vents and the windshield washers were ineffective. When the right muffler became defective, the plaintiff had to fix it at his own expense because of the unavailability of parts at the dealer. 262 N.W.2d at 351-52. The salesman had stated that the availability of parts was one of the advantages of the car. *Id.* at 351; *see* Appellant's Brief and Appendix at 2. Later, the plaintiff returned the car to have the rear window defroster, squealing brakes, the accelerator, and the choke repaired and to complain again about many of the earlier defects. When the plaintiff asked the dealer to repair the left muffler and center pipes, the necessary parts were again unavailable. 262 N.W.2d at 352.

7. *See* 262 N.W.2d at 352.

8. The plaintiff repeatedly returned the Saab to his dealer in St. Paul until it began stalling. At that point he began having the car towed to a Duluth Saab dealer; Rod Baxter never had the opportunity to attempt to cure the stalling problem. *See id.*

9. *Id.*; *see* Appellant's Brief and Appendix at A-10 to -11. The six following defects were listed: (1) the passenger seat that had been removed to repair the seatbelt buzzer had not

brought suit against Rod Baxter Imports, Inc. (Rod Baxter), successor to Horvath, and Saab-Scania seeking to revoke acceptance.[11] The trial court, finding that the defects were not substantial enough to justify rescission, awarded Durfee $600 in damages for breach of warranty.[12]

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been reinstalled; (2) stalling; (3) defect in the seat belt warning system; (4) malfunction of temperature gauge or engine overheating; (5) rattle under the dashboard; (6) malfunction of heater when fan was turned on. *See id.*

Revocation is not effective until the seller is notified. U.C.C. § 2-608(2). *Compare* Desilets Granite Co. v. Stone Equalizer Corp., 133 Vt. 372, 340 A.2d 65 (1975) (commencement of action for breach of warranty not notice of revocation when complaint served before buyer discovered nonconformity) *with* Fenton v. Contemporary Dev. Co., 12 Wash. App. 345, 529 P.2d 883 (1974) (notice can be implied in fact from conduct such as not permitting further repair and instituting suit for recovery of price).

Revocation must occur within a reasonable time after discovery of the nonconformity. 262 N.W.2d at 353; U.C.C. § 2-608(2); *see* Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 122-23, 374 A.2d 144, 148-49 (1976) (delay of 14 months not unreasonable because of continuous negotiations and repairs). The time during which the seller attempts to cure does not count against the buyer. 262 N.W.2d at 353 n.4; *see* Dougall v. Brown Bay Boat Works & Sales, Inc., 287 Minn. 290, 299, 178 N.W.2d 217, 223 (1970) (same rule in Minnesota under common law before U.C.C. enactment); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 11, 250 N.W. 713, 715 (1933) (same).

10. 262 N.W.2d at 352. "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." U.C.C. § 2-608(3). Any exercise of ownership over the goods is wrongful. *Id.* § 2-602(2)(a); *see* Stroh v. American Recreation & Mobile Home Corp., 35 Colo. App. 196, 202, 530 P.2d 989, 993 (1975). Use of the goods, however, is not necessarily barred. *See* Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 378 (E.D. Mich. 1977). But extensive use inconsistent with the revocation doctrine that causes a change in the condition of the goods may bar revocation. *See id.* at 378-79. When the buyer has paid the purchase price, the buyer has a security interest in the goods and can hold them but must exercise reasonable care in doing so. *See* Mobile Home Sales Management, Inc. v. Brown, 115 Ariz. App. 11, 562 P.2d 1378 (1977); Jorgensen v. Pressnall, 274 Or. 285, 545 P.2d 1382 (1976). Retaining and using a fishing boat for 32 months has been held not to be for the purpose of preserving it within the meaning of U.C.C. § 2-711(3) and U.C.C. § 9-207(1), (4). *See* Wadsworth Plumbing & Heating Co. v. Tollycraft Corp., 277 Or. 433, 560 P.2d 1080 (1977). The buyer need not return the goods to the seller; the buyer has no further obligation after revocation, one court stated, and therefore may leave the goods for the seller to pick up. McCormick v. Ornstein, 23 U.C.C. Rep. Serv. 888 (Ariz. Ct. App. 1978).

11. *See* 262 N.W.2d at 352.

12. *Id.* The trial court spoke of rescission instead of revocation of acceptance, revocation being the new term employed by the U.C.C. *See id.* Before the recent interpretations of the U.C.C. that recognized the distinction between rejection and revocation of acceptance, the term "rescission" applied to either. *Compare* Wilson v. Scampoli, 228 A.2d 848 (D.C. 1967) (rescission) *with* Dorman v. International Harvester Co., 46 Cal. App. 3d 11, 13 n.2, 120 Cal. Rptr. 516, 518 n.2 (1975) (revocation). The U.C.C. dispensed with the more general terminology, rescission, in favor of separate labels and separate requirements for each. *Compare* U.C.C. § 2-601(a) (buyer may reject) *and id.* § 2-602 (manner and effect of rightful rejection) *and id.* § 2-612 (rejection of installment contract) *with id.* § 2-607 (acceptance precludes rejection; revocation not permitted if acceptance with knowledge of defect unless reasonable assumption of cure) *and id.* § 2-608 (revocation of acceptance). Comment 1 to section 2-608 also comments on the change by stating that "[t]he section no longer speaks of 'rescission,' a term capable of ambiguous application either to transfer

Upon appeal, the supreme court reversed, holding that revocation of acceptance was a proper remedy.[13]

Under the U.C.C., revocation of acceptance is a significant self-help remedy[14] that permits the buyer to return defective goods to the seller, relieves the buyer of any further obligation to pay for the goods, and permits the buyer to recover whatever part of the purchase price has been paid, plus incidental and consequential damages.[15] While a suit for damages for breach of warranty leaves the buyer with unsatisfactory goods, revocation lets the buyer out of the bargain.[16] Because revocation

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of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract." U.C.C. § 2-608, comment 1.

13. *See* 262 N.W.2d at 358. The court set out the seven requirements that must be fulfilled for an attempted revocation of acceptance to be effective: (1) the goods must be nonconforming; (2) the nonconformity must substantially impair the value of the goods to the buyer; (3) acceptance by the buyer must have been with the reasonable assumption of cure; (4) no seasonable cure must have occurred; (5) the seller must have been notified of the revocation; (6) the revocation must have occurred within a reasonable time after discovery of the nonconformity; and (7) the buyer must take reasonable care of the goods after revocation. *See id.* at 353; U.C.C. § 2-608.

In *Durfee*, the automobile had a broken radio aerial that the court characterized as minor and insubstantial. It also had been driven 6300 miles, which the court found to be more troublesome but not troublesome enough to constitute a substantial change that would preclude revocation. 262 N.W.2d at 353 n.4; *see* Zoss v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. 527 (Ind. Super. Ct. 1972) (4200 miles in less than three months; revocation permitted). *But see* Green Chev. Co. v. Kemp, 241 Ark. 62, 406 S.W.2d 142 (1966) (3000 miles over period of six months barred revocation); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 461, 184 S.E.2d 722 (1971) (3400 miles within two and one-half months not within reasonable time).

The court in *Durfee* did not face the issue of whether Durfee's damages should have been reduced by the reasonable value of his use of the car because the defendant failed to request such a reduction. *See* 262 N.W.2d at 353 n.4. Other courts have reduced the plaintiff's award by such an amount. *See* Stroh v. American Recreation & Mobile Home Corp., 35 Colo. App. 196, 202-03, 530 P.2d 989, 993 (1975); Jorgensen v. Pressnall, 274 Or. 285, 291-92, 545 P.2d 1382, 1386 (1976); Moore v. Howard Pontiac-American, Inc., 492 S.W.2d 227 (Tenn. Ct. App. 1973). *See generally* Comment, *Consumer Revocation of Acceptance of Defective Automobiles—Section 2-618 [sic] of the Uniform Commercial Code*, 5 U. TOL. L. REV. 323, 331-32 (1974) (suggesting long-term leasing prices to be used for set-offs).

14. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-1, at 247 (1972).

15. *See* Mobile Home Sales Management, Inc. v. Brown, 115 Ariz. App. 11, 562 P.2d 1378 (1977); Davis v. Colonial Mobile Homes, 28 N.C. App. 13, 220 S.E.2d 802 (1975), *cert. denied*, 289 N.C. 613, 223 S.E.2d 391 (1976); Welken v. Conley, 252 N.W.2d 311 (N.D. 1977). Durfee proved and recovered $116.30 in incidental damages for repair and maintenance costs but failed to prove consequential damages. *See* 262 N.W.2d at 357. The owner's manual purportedly excluded recovery of incidental damages, but U.C.C. § 2-719(2) precluded the invocation of this limitation. *See* 262 N.W.2d at 357.

16. *See* Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 354 (1970).

leaves the seller with used goods,[17] however, stiff restrictions on the availability of the remedy have been imposed.[18]

The threshold determination under section 2-608 is whether the nonconformity substantially impairs the value of the goods to the buyer.[19] In *Durfee*, the Minnesota Supreme Court drew an analogy between the concept of substantial impairment under section 2-608 and the principle of material breach under traditional contract law,[20] adopting a common sense approach of analyzing whether defects are minor or sufficient to constitute substantial impairment justifying revocation of acceptance.[21] Under the court's definition, minor defects are those that do not have a

17. *Cf. id.* at 355 (rejected goods that have been subjected to trial use can cause equal injury to seller).

18. *See* 262 N.W.2d at 353; U.C.C. § 2-608; J. WHITE & R. SUMMERS, *supra* note 14, § 8-3, at 253 (revocation requires jumping through more "hoops" than rejection).

19. *See* U.C.C. § 2-608(1). It has been suggested that "the Code means a defect which is not readily repairable or so very basic to the contract, that its lack or malfunctioning causes the buyer to lose a substantial portion of the value of the bargain." Note, *Rejection or Revocation Under the Uniform Commercial Code*, 31 OHIO ST. L.J. 151, 157 (1970).

20. *See* 262 N.W.2d at 353-54; J. WHITE & R. SUMMERS, *supra* note 14, § 8-3, at 257-60.

21. *See* 262 N.W.2d at 354. One court has concluded that a seller's right to cure ceases if the necessary repairs would result in a product different from that originally contemplated by the parties. *See* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 458, 240 A.2d 195, 205 (Law Div. 1968).

Section 2-608 suggests that a subjective test is to be used in classifying defects as substantial or minor. *See* U.C.C. § 2-608(1) ("substantially impairs its value to him"). The inference drawn from the statutory language, that the buyer's circumstances must be considered, is reinforced by the last sentence of comment 2: "the question is whether the nonconformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances." U.C.C. § 2-608, comment 2. *See* J. WHITE & R. SUMMERS, *supra* note 14, § 8-3, at 260; Phillips, *supra* note 16, at 355; Note, *Revocation of Acceptance: The Test for Substantial Impairment*, 32 U. PITT. L. REV. 439, 440-41 (1971). *Compare* Asciolla v. Manter Oldsmobile-Pontiac, Inc., ___ N.H. ___, ___, 370 A.2d 270, 273 (1977) (subjective test means needs and circumstances of particular buyer must be examined, not by reference to buyer's personal belief as to diminution in value of goods, but by trier's objective determination that value to buyer in fact was substantially impaired) *and* Jorgensen v. Pressnall, 274 Or. 285, 545 P.2d 1382 (1976) (subjective determination involving needs and circumstances of the buyer, not those of the average buyer; then objective determination of whether defect in fact substantially impaired the value to the buyer) *with* U.C.C. § 2-608, comment 2. Comment 2 states:

> Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. 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 the seller had no advance knowledge as to the buyer's particular circumstances.

U.C.C. § 2-608, Comment 2.

The *Durfee* court stated that a determination of the type of subjective test which section 2-608 envisions would not be made because the plaintiff had advanced no special circumstances for the court's consideration. *See* 262 N.W.2d at 353 n.5.

significant effect on the operation of the product.[22] Many of Durfee's problems with the car were minor defects that, alone, do not entitle a buyer to revoke acceptance.[23] Only defects that materially interfere with the operation of the vehicle constitute substantial impairment under the court's formulation.[24] Although the *Durfee* court recognized that other courts had found repeated stalling to be sufficient to constitute substantial impairment, the court did not find it necessary to make that determination.[25] The court also was not willing to find that a succession of minor defects warrants revocation, stating that "the succession of minor defects, even if considered in total, perhaps might not constitute substantial impairment."[26] Instead, the court merely held that the combination of the minor defects and the stalling problem experienced by Durfee was sufficient to constitute substantial impairment.[27] Reaching

22. *See, e.g.*, Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976) (trailer with broken cross-member in drawer, leaking water reservoir, empty natural gas bottle, sheared and missing screws in furnishings, peeling roof coating, missing mirror, cracked light globe, hard opening door, ceiling strips seemingly loose); Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 244 A.2d 782 (1966) (loose engine mounting bolts); Bill McDavid Oldsmobile, Inc. v. Mulcahy, 533 S.W.2d 160 (Tex. Civ. App. 1976) (battery cracked).

23. *See* 262 N.W.2d at 354. The court suggested that the minor defects alone, even considered in total, might not constitute substantial impairment. *See id.* The court's reluctance to find substantial impairment for a combination of annoying but not dangerous defects is consistent with the prevailing tendency to preclude revocation for minor defects. *See, e.g.*, Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 124-25, 224 A.2d 782, 784 (1966) ("The reason why 'a substantial impairment of value' must take place before a revocation under Section 2-608 may take force is to preclude revocation for trivial defects or defects which may be easily corrected."). *But see* Zoss v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. 527, 532 (Ind. Super. Ct. 1972) (minor defects with cumulative effect can substantially impair).

24. *See* 262 N.W.2d at 354. Courts have granted revocation because of various defects. *See* Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. Dist. Ct. App.), *cert. denied*, 263 So. 2d 831 (1972) (stiff power steering, leaking air conditioner, doors not closing properly, steering column almost falling off, engine stopping without apparent cause); Overland Bond & Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972) (transmission falling out on expressway; brakes failing); Bayne v. Nall Motors, Inc., 12 U.C.C. Rep. Serv. 1137 (Iowa Dist. Ct. 1973) (differential "locked up" four days after purchase due to lack of lubricant); Asciolla v. Manter Oldsmobile-Pontiac, Inc., ___ N.H. ___, 370 A.2d 270 (1977) (ice in transmission made car totally inoperable); Jorgensen v. Pressnall, 274 Or. 285, 545 P.2d 1382 (1976) (mobile home with water leaks, air leaks, gaps in "tip-out" and defective doors, cabinets, vents and walls); Henry v. Don Wood Volkswagen, Inc., 526 S.W.2d 483 (Tenn. Ct. App. 1974) (defect under dashboard caused fire), *cert. denied*, (Tenn. Aug. 4, 1975).

25. *See* 262 N.W.2d at 354-55. The court did not say whether the stalling alone would constitute substantial impairment, although it did quote at length from a case in which repeated stalling was held to constitute substantial impairment. *See id.* at 355 (quoting Stofman v. Keenan Motors, Inc., 63 Pa. D. & C.2d 56 (1973)).

26. *Id.* at 354.

27. *See id.*

no definitive interpretation of the substantial impairment test of section 2-608, the court left the question for consideration at a later time.[28]

After making the determination that the defects here constituted substantial impairment, the court addressed the second issue—whether a repair-and-replacement clause in the sales contract prevented Durfee from revoking acceptance.[29] Although section 2-719 of the U.C.C. permits contractual limitation of remedy clauses such as the repair-and-replacement clause in *Durfee,* that section states that the buyer cannot be left without any remedy.[30] According to the supreme court, the finding by the trial court that the Saab could not or would not be placed in reasonably good operating condition[31] constituted an implicit finding

28. After the threshold determination of substantial impairment has been made, the court must consider the circumstances surrounding the buyer's acceptance of defective goods. If the buyer has accepted the goods after discovery of the defect, his acceptance must have been based on a reasonable assumption that the nonconformity would be cured and it has not been cured. U.C.C. § 2-608(1)(a); *see* Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 15, 327 A.2d 502, 512-13 (1974); Performance Motors, Inc. v. Allen, 280 N.C. 385, 395-96, 186 S.E.2d 161, 167 (1972). The buyer cannot revoke if he accepted knowing of the defect but had no reason to assume it would be cured, if he did not know of the defect because he failed to make a reasonable examination which was readily available, or if the seller seasonably cured. Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 15, 327 A.2d 502, 513 (1974). If the buyer accepted the goods before discovering the defect, the buyer's acceptance must have been reasonably induced "by the difficulty of discovery before acceptance or by the seller's assurances." U.C.C. § 2-608(1)(b); *see* Lanners v. Whitney, 247 Or. 223, 233, 428 P.2d 398, 403 (1967); Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966). In listing the requirements of section 2-608, the *Durfee* court stated that the acceptance of the goods must be on the reasonable assumption of cure. *See* 262 N.W.2d at 353. The opinion does not mention the alternative situation of acceptance before discovery of the nonconformity. The plaintiff in *Durfee* was driving his new car home to Duluth when he became aware of some of the defects. Arguably, the plaintiff had not yet accepted the car; but this issue was not directly addressed by the court. *Cf.* Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 453, 240 A.2d 195, 202 (1968) (breakdown of automobile less than a mile from the showroom was during trial period before acceptance).

Acceptance, a technical term under the U.C.C., occurs when a buyer, after a reasonable opportunity to inspect the goods, "signifies to the seller that . . . he will take or retain" the goods, "fails to make an effective rejection," or "does any act inconsistent with the seller's ownership." U.C.C. § 2-606(1).

29. *See* 262 N.W.2d at 355-57.

30. *See* U.C.C. § 2-719. The section provides in part: "the agreement . . . may limit . . . the buyer's remedies . . . to repair and replacement of non-conforming goods or parts . . . ." and "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." *Id.; accord,* Soo Line Ry. v. Fruehauf Corp., 547 F.2d 1365, 1370-71 (8th Cir. 1977); *see* Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 381 (E.D. Mich. 1977); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 121, 122-23, 374 A.2d 144, 149 (1976).

31. 262 N.W.2d at 356 ("Commendable efforts and considerable expense alone do not relieve a seller of his obligation to repair.").

Whether or not the seller has a right to cure in a revocation situation is still uncertain. *See* Phillips, *supra* note 16, at 357-58; Note, *Uniform Commercial Code—Rejection and Revocation—Seller's Right to Cure a Nonconforming Tender,* 15 WAYNE L. REV. 938

that the limited repair-and-replacement clause had failed of its essential purpose.[32] Such a failure also meant that the clause failed to limit the seller's liability[33] and that therefore Durfee could pursue any remedy available under the U.C.C., including revocation of acceptance.[34]

The final issue facing the court in *Durfee* was whether Durfee could revoke acceptance against the distributor, Saab-Scania, even though there were no direct contractual relations between them. While admitting that section 2-608 does "seem to require a buyer-seller relationship,"[35] the court held that Durfee could revoke acceptance against Saab-Scania.[36] Because the buyer of an automobile who relies on the manufacturer's warranty is not barred from recovering damages for a breach of that warranty due to lack of privity, the court held that a

(1969). But if the buyer does submit the goods for repair, the seller must seasonably cure the nonconformity. *See* 262 N.W.2d at 355. The dealer does not have an unlimited time in which to correct the defects. *Id.; see, e.g.*, Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 122-23, 374 A.2d 144, 149 (1976); Overland Bond & Inv. Corp. v. Howard, 9 Ill. App. 3d 348, 360, 292 N.E.2d 168, 177 (1972). If the seller has failed to effect seasonable cure, he cannot argue that, since the defects are repairable, revocation should not be permitted. Repairable defects can still constitute substantial impairment, particularly when the defects shake the faith of the buyer. *See* 262 N.W.2d at 355; Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (Law Div. 1968).

Although it is unclear whether the seller has a right to cure, seasonable cure by the seller will prevent revocation. *See* McGilbray v. Scholfield Winnebago, Inc., 221 Kan. 605, 611, 561 P.2d 832, 837 (1977); Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 15, 327 A.2d 502, 512 (1974); Stofman v. Keenan Motors, Inc., 63 Pa. D. & C.2d 56 (1973); Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby*, 24 DRAKE L. REV. 52, 75-76 (1974).

32. *See* 262 N.W.2d at 356-57.

33. *See id.* The cases in which a limitation of remedy has been ignored have more typically involved situations of the impossibility or the economic inappropriateness of repairs, or an express refusal to make them. *See, e.g.*, Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972) (refusal to perform further repairs); Russo v. Hilltop Lincoln-Mercury, Inc., 479 S.W.2d 211 (Mo. Ct. App. 1972) (car worthless because of total destruction in fire). In *Durfee*, however, the seller was never given the opportunity to attempt repair of the stalling problem. *See* notes 7-8 *supra* and accompanying text.

34. *See* 262 N.W.2d at 356-57. However, "[s]o long as the seller repairs the goods each time a defect arises, a repair-and-replacement clause does not fail of its essential purpose." *Id.* at 356. Unfortunately, this does not aid the buyer confronted with a seemingly endless succession of correctable defects.

35. 262 N.W.2d at 357.

36. *See id.* at 357-58. "Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on." BLACK'S LAW DICTIONARY 1362 (rev. 4th ed. 1968). The rule that there could be no liability without privity originated with Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). In *Winterbottom* the court protected the manufacturer through contractual privity because it feared that otherwise unlimited liability would result. *See id.;* Comment, *Obviousness of Product Dangers as a Bar to Recovery: Minnesota Apparently Adopts the Latent-Patent Doctrine*, 3 WM. MITCHELL L. REV. 241, 241 n.2, 242 n.7 (1977).

plaintiff should not be precluded from recovering from the distributor simply because the remedy sought was revocation, not damages.[37]

In disregarding the privity requirement of section 2-608, the Minnesota court departs from a line of decisions in which other courts have refused to disregard the privity requirement[38] for precisely the reasons dismissed by the Minnesota Supreme Court. First, the language of section 2-608 specifically refers to "buyer" and "seller."[39] Because a seller is itself a purchaser, not an agent of the manufacturer or distributor for purposes of the sale to the consumer, no buyer-seller relationship exists between the buyer and the manufacturer or distributor.[40] When no buyer-seller relationship exists, courts generally have concluded that revocation should be denied.[41] Secondly, the courts have reasoned that revocation, rather than being analogous to other remedies, is a distinct remedy that should not be confused with other remedies.[42]

The action taken by the Minnesota court in holding that lack of privity was not a defense that could be raised by a distributor or manufacturer against whom revocation is sought is not surprising in light of a general movement in Minnesota to do away with the privity require-

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37. 262 N.W.2d at 357.

38. The result was foreshadowed by dictum in an earlier Minnesota Supreme Court decision, in which the court stated:

> Ventoura next contends that rescission lies only between the parties to the sale. Inasmuch as we hold that Ventoura was a party to this sale, we see no need of further discussing this contention. The action is based on a breach of an implied warranty. Rescission is only incidental to a right of recovery for breach of an implied warranty. If Ventoura is liable for a breach of its warranties, it should be sufficient if the right of rescission exists between plaintiffs and Spindler. Rescission only gives rise to the right of recovery.

Beck v. Spindler, 256 Minn. 543, 564, 99 N.W.2d 670, 684 (1959).

In other jurisdictions, there apparently has been no move towards disregard of the privity requirement in the context of revocation. In fact several courts have expressly rejected the theory. *See* cases cited note 42 *infra*.

39. *See* U.C.C. § 2-608.

40. The dealer is an agent only for the purpose of passing the warranty on to the ultimate purchaser. *See, e.g.*, Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 124-25, 374 A.2d 144, 149-50 (1976). *But see* Note, *Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of Its Continuing Warranty of Repair or Replacement*, 7 GA. L. REV. 711 (1973) (manufacturers have voluntarily created privity by warranty of repair or replacement).

41. *See, e.g.*, Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976). *But see* 262 N.W.2d at 357.

42. *See* Voytovich v. Bangor Punta Operations, Inc., 494 F.2d 1208 (6th Cir. 1974) (per curiam); Conte v. Dwan Lincoln-Mercury, Inc., 172 Conn. 112, 374 A.2d 144 (1976); Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972); Reece v. Yeager Ford Sales, Inc., 155 W. Va. 461, 184 S.E.2d 727 (1971). Courts had reached similar conclusions in interpreting the predecessor of the U.C.C. *See, e.g.*, General Motors Corp. v. Earnest, 279 Ala. 299, 184 So. 2d 811 (1966) (applying the Uniform Sales Act); Kyker v. General Motors Corp., 214 Tenn. 521, 381 S.W.2d 884 (1964) (same).

ment in various situations.[43] Furthermore, the court in *Durfee* recognized that if it adhered to the privity requirement Durfee might not have had an adequate remedy because Saab-Scania could not assure the trial court that Rod Baxter, the seller, would continue to exist.[44] The court determined, therefore, that because the distributor profits from the seller's sales, the distributor must take responsibility for the solvency of the seller when a warranty has been breached or when goods are so defective as to justify revocation of acceptance.[45] The court reasoned that a buyer, otherwise justified in revoking acceptance, should not be precluded from exercising this remedy simply because the seller no longer exists or is insolvent.[46]

The question left unanswered by the court in *Durfee* is what lies in the future for the Minnesota buyer who desires to revoke acceptance of a defective product. Does the *Durfee* decision ease the requirements of section 2-608 and thereby render the remedy of revocation of acceptance more readily available to the consumer? Or does the decision merely indicate that the court in the future will use the requirement of substantial impairment rather than the requirement of privity to limit the utilization of the remedy?

That the court hesitated to define substantial impairment as something less than the major defect combined with the numerous minor defects in the automobile purchased by Durfee may display some of the historical reticence of courts to allow exercise of the revocation remedy.[47] Having eliminated the need for privity, the court may have been seeking to preserve substantial impairment as an obstacle in the path of the consumer seeking to revoke. This is plausible because the court could have found that either the stalling or the combination of minor defects alone amounted to substantial impairment.[48] The court's failure to so

43. For example, the Minnesota court has allowed nonprivity plaintiffs to recover for such things as property damage. *See* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967). The court also has allowed strict liability recoveries for property damages. *See* Milbank Mut. Ins. Co. v. Proksch, 309 Minn. 106, 244 N.W.2d 105 (1976). Other courts have reached the opposite conclusion. *See* State *ex rel.* Western Seed Prod. Corp. v. Campbell, 250 Or. 262, 442 P.2d 215 (1968), *cert. denied*, 393 U.S. 1093 (1969).

44. *See* 262 N.W.2d at 357.

45. *See id.* at 357-58.

46. *See id.* at 357.

47. *See id.* at 353 (seven requirements for revocation); Phillips, *supra* note 16, at 354. In actions for revocation of acceptance, the buyer has the burden of proof of substantial impairment. *See* Elden, *Revocation of Acceptance: Interpretation and Application*, 8 U.C.C. L.J. 14, 15 (1975). One of the principal effects of acceptance is shifting the burden of proof from the seller to the buyer; the buyer must prove every element of U.C.C. § 2-608. *See* Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 480, 269 N.E.2d 664, 668 (1971). Therefore, increasing the standard for substantial impairment increases the buyer's burden of proof.

48. The court, however, avoided giving a precise interpretation of substantial impairment: "The succession of minor defects, even if considered in total, *perhaps might not*

define the requirement allows the court in the future to impose a high threshold of impairment before finding the defects constitute substantial impairment in a given situation.

If the court had this in mind, the elevation of the substantial impairment requirement is unfortunate. Under such a standard, fewer buyers may be able to revoke in the future because of their inability to establish the existence of both major and minor defects in the defective product. On the other hand, the likelihood that more than a handful of buyers will be denied a remedy due to the insolvency of the immediate dealer is minimal. Therefore, maintenance of the privity requirement might have been less inequitable than increasing the threshold of substantial impairment.

The impact of the *Durfee* decision on future attempts by buyers to revoke acceptance under section 2-608 of the U.C.C. is uncertain. The decision of the Minnesota court to disregard the privity requirement, at least when the immediate seller of the defective product is insolvent, is a reasoned one that does no more than rightfully assure consumers that they will not be unjustifiably burdened with defective products. By its decision, the court also recognizes the nature of the relationship between sellers and other parties higher in the sales chain of distribution and places the risk of loss from a defective product on those parties—be they distributors or manufacturers—who benefit, rather than upon innocent buyers. But the court should set forth a standard of what is necessary to establish substantial impairment. Doing so will benefit buyers and sellers alike, as well as the Minnesota trial courts, all of whom must struggle with the application of the substantial impairment requirement until the supreme court finally resolves the issue. When the court is afforded the opportunity, it should reach a decision that recognizes the practical reality that products requiring constant repair are essentially worthless to the consumer.

Criminal Law—GUIDELINES ADOPTED CONCERNING JOINT REPRESENTATION OF MULTIPLE DEFENDANTS—*State v. Olsen*, 258 N.W.2d 898 (Minn. 1977).

The Minnesota Supreme Court has long expressed disfavor with the practice of a single attorney representing multiple defendants in a criminal proceeding.[1] The basis for this view is the strong possibility of a

constitute substantial impairment; however, in combination with the frequent stalling of the Saab, plaintiff has shown substantial impairment." 262 N.W.2d at 354 (emphasis added). *See* notes 19-28 *supra* and accompanying text.

1. *See, e.g.*, State v. Olsen, 258 N.W.2d 898 (Minn. 1977); State v. Taylor, 305 Minn. 558, 561, 234 N.W.2d 586, 588 (1975) (per curiam) (reiterating strong disapproval of joint