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UCC Section 2-608: Reasonable Time for Revocation of Acceptance

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UCC SECTION 2-608: REASONABLE TIME FOR REVOCATION OF ACCEPTANCE

I. INTRODUCTION

Before a buyer has accepted non-conforming goods, the Uniform Commercial Code permits him to reject them.1 Rejection must occur within a reasonable time after delivery or tender, and is ineffective unless the buyer seasonably notifies the seller of his rejection.2 If the buyer does not seasonably take such action, he has accepted the goods and may no longer reject them.3 The buyer is not without remedy;4 however, because while a reasonable time to reject may have passed,5 the buyer may still have an opportunity to revoke his acceptance under section 2-608.6

As conditions precedent to revocation, the buyer first must show that the non-conformity substantially impaired the value of the goods to him7 and,  

2. Id. § 2-602(1).
3. Id. § 2-602. Comment 1 provides in part: "A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective."
4. Id. § 2-711 sets forth the various remedies available to a buyer.
5. "The purpose of the rule permitting revocation of acceptance is to give the buyer the remedial advantages of rejection in those circumstances in which his right of rejection could not be exercised fully." W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 1.4103, at 243 (1964).
6. UCC § 2-608 provides that after a buyer has accepted goods, the acceptance may be revoked under the following circumstances: "(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."
7. Id. § 2-608(1). This requirement is considerably stricter than the grounds for rejection, which permit the buyer to reject goods "if the goods or the tender of delivery fail in any respect to conform to the contract . . . ." Id. § 2-601. Just how serious the defect must be in order to be substantial is not stated in the Code, but it has been suggested that the test for substantial impairment is subjective with respect to the needs of the buyer. J. White & R. Summers, Uniform Commercial Code § 8-3, at 260 (1972) [hereinafter cited as White & Summers]. UCC § 2-608, Comment 2 provides in part: "[T]he 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."

For example, where evidence supported a finding that a fast-food operation would not function to meet the special purpose of the buyer, revocation of acceptance of the system was effective. Systems Consultants, Inc. v. Eng Enterprises, Inc., 123 Ga. App. 641, 182 S.E.2d 188 (1971).
second, that the acceptance was made either without discovery of the non-conformity, or with knowledge of the non-conformity but on the reasonable assumption that it would be cured. Revocation of acceptance is not effective until the buyer notifies the seller. Finally, revocation must occur within a reasonable time after the buyer discovers or should have discovered the defects, and before any substantial change occurs in the condition of the goods not caused by these defects. The purpose of this Note is to survey certain factors the courts have weighed in deciding what constitutes a reasonable time to revoke acceptance under section 2-608.

Under pre-Code law, a buyer was permitted to rescind a sales contract upon the seller's breach. Both the common law and the Uniform Sales Act permitted such rescission. However, minor defects repaired immediately after the buyer's complaint do not substantially impair the value of a car to a buyer. Rozmus v. Thompson's Lincoln-Mercury Co., 209 Pa. Super. 120, 224 A.2d 782 (1966). See generally Note, Revocation of Acceptance: The Test for Substantial Impairment, 32 U. Pitt. L. Rev. 439 (1971).


9. UCC § 2-608(1)(a). If made with knowledge of non-conformity and without the assumption of cure, acceptance of goods may not be revoked. See id. § 2-607(2). Although he may be unable to revoke acceptance, the buyer is not prohibited from utilizing other remedies for non-conformity. See note 4 supra. In Ingle v. Marked Tree Equip. Co., 244 Ark. 1166, 1174, 428 S.W.2d 286, 290 (1968), the seller made no assertion either by word or action which could reasonably be construed as a promise to alter the wheels on the combine machine to meet appellant's complaints. In fact, the buyer kept and used the combine after being told it could not be corrected as requested by the buyer, which was inconsistent with revocation. See also Stephens Indus., Inc. v. American Express Co., 471 S.W.2d 501 (Mo. Ct. App. 1971).

10. As a definition of notification, UCC § 1-201(26) provides: "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person 'receives' a notice or notification when (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications."


13. The Code no longer refers to rescission, but instead uses the term revocation. Comment 1 to section 2-608 states the purpose of this change in terminology: "Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks
was to notify the seller of his election to rescind within a reasonable time or be barred from rescission. In deciding cases under the Uniform Sales Act, courts considered such factors as the difficulty of discovering the non-conformity and the course of dealing between the parties (i.e., the seller's assurances and attempts to repair the defects before rescission). Cases decided under section 2-608 continue to follow these principles, and a reasonable time for revocation will include the same elements as a reasonable time for rescission. These factors shall be discussed and analyzed in terms of the Code provision.

II. CODE DEFINITIONS AND COMMENTS

The terms "reasonable" and "seasonable" appear throughout the Code. Although the Code has a section defining "reasonable time," it is less than satisfactory. Section 1-204 states:

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

In effect, section 1-204 contains a circular definition, leaving the reader with only a slightly better idea of the applicable standard than before consulting this section of the Code. However, the drafters of the Code have provided some clues as to their intention in the official comments accompanying the Code sections. Comment 4 to section 2-608 states that since this remedy [revocation] will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond
the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. While the Comment does clarify "reasonable time" to some extent, it adds little to what is readily ascertainable from an analysis of the following relevant Code sections.

Section 2-607(3)(a) states that after acceptance a buyer must notify the seller of breach within a reasonable time after he discovers the breach or he will be barred from any remedy. "Any remedy" would include revocation of acceptance. Therefore, a buyer must have given notice of a breach before revoking acceptance of the non-conforming goods. Since "acceptance of goods occurs when the buyer . . . fails to make an effective rejection," the buyer's remedy of rejection has been precluded by the acceptance. Therefore, revocation of acceptance will naturally occur after the time for rejection has passed. Finally, the Code specifically states in section 2-608(2) that revocation "must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . ." Thus Comment 4 to this section, when stating that a reasonable time will extend "beyond the time for discovery of non-conformity after acceptance," merely paraphrases the Code provision.

Comment 4 to section 2-607 provides that the time of notification of breach must be reasonable, and

20. Buyers' remedies include rejection and revocation. Compare id. § 2-607(3)(a) with id. § 2-607(2) where acceptance with knowledge of non-conformity bars only revocation of acceptance and does not impair other remedies available for non-conformity.
21. Notice of breach does not have to include all defects and objections relied on by the buyer. It need only inform the seller that there is a breach. Id. § 2-607, Comment 4. See id. § 2-605 which requires the buyer to particularize all of the defects he relies on for rejection in order to avoid waiver of his objections.
22. Id. § 2-606(1)(b).
23. In Axion Corp. v. G.D.C. Leasing Corp., 359 Mass. 474, 269 N.E.2d 664 (1971), a buyer discovered defects in a valve testing machine shortly after delivery. The court determined as a matter of law that the rejection was not within a reasonable time, rejecting the buyer's contention that a reasonable time for rejection should be extended because of the complexity of the machine. If the requirements of section 2-608 could be met, including establishing breach, the court recognized the possibility that the buyer could still revoke his acceptance under section 2-608. Id. at 479, 296 N.E.2d at 667.
24. If the defect is easily discoverable, a reasonable time to revoke may pass before the buyer actually discovers the non-conformity. In Michael M. Berlin & Co. v. T. Whiting Mfg., Inc., 5 UCC Rep. Serv. 357, 359 (N.Y. Sup. Ct. 1968), defendant delayed approximately six weeks after delivery before inspecting steel. The steel was defective and could not be processed through defendant's machine. The defendant could have easily determined the thickness of the steel with a micrometer, a measuring device that is easily used and requires no analysis. Although the buyer waited an additional seven weeks before attempting to reject the steel, the court's determination that the rejection was ineffective was mainly influenced by the late inspection, implying that a reasonable time to reject had passed before discovery of the deficiency in the steel: "It is the finding of the court that the defendant did not inspect the steel within the reasonable time contemplated in the UCC." Id. at 360.
is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.\(^\text{25}\)

The policy enunciated in Comment 4 also applies to revocation. However, the consumer's remedy must be balanced against commercial fairness to the seller. While a buyer will not be permitted unjust enrichment,\(^\text{26}\) his use of the goods over a period of time before discovery due to the latency of the defect will not be deemed unreasonable.\(^\text{27}\) Thus, even where a buyer is himself a


\(^{26}\) In Cooper v. Mason, 14 N.C. App. 472, 188 S.E.2d 653 (1972), plaintiff purchased an automobile from defendant. Although he was not satisfied with the car and brought it to the seller several times for service and correction, he had accepted the car and did not attempt to rescind the transaction. It was not until after the car was wrecked in an accident, seventeen months and 30,000 miles later, that the buyer attempted ineffectively to revoke. See text accompanying notes 101-02 infra. An attempted revocation of acceptance of a defective car was also ineffective in Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974), wherein the car had been driven for two years and over 18,000 miles when the buyer attempted to revoke. Due to the depreciation of the car, not caused by its own defects, the court held the two year period before revocation to be unreasonable. See Applebaum v. Falco Leasing Co., 447 S.W.2d 799 (Mo. Ct. App. 1969) (revocation eight months after purchase and four months after discovery of defect in truck, later damaged in an accident, ineffective). See also Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548, 563-64 (D. Conn. 1967) (buyer's use of hoses after notice of rescission was a waiver of right to rescind because hoses could have been replaced within hours); Fablok Mills, Inc. v. Cocker Mach. & Foundry Co., 120 N.J. Super. 350, 294 A.2d 62 (1972), rev'd for jury trial, 125 N.J. Super. 251, 310 A.2d 491 (1973) (question of fact whether revocation of acceptance of knitting machines two years after delivery ineffective). However, if the goods change because of their own defects, the policy of unjust enrichment has no application. I W. Hawkland, A Transactional Guide to the Uniform Commercial Code § 1.4104, at 245 (1964).

\(^{27}\) In American Container Corp. v. Hanley Trucking Corp., 7 UCC Rep. Serv. 1301 (N.J. Super. 1970), sixteen months after the buyer purchased a trailer, it was seized by the police as a stolen vehicle. The buyer's notice of revocation to the seller was given within two weeks of the delivery of the defective title. The buyer had no reason to know of or discover the defective title until the seizure by the police and the revocation thereafter was reasonable. In Chaplin v. Bessire & Co., 361 S.W.2d 293 (Ky. 1962), defects in ice-cream storage equipment developed gradually. The buyer was under a duty to give the seller an opportunity to correct the defects as "the manifestations of faulty performance may not have appeared serious enough to justify such an extreme measure as cancellation." Id. at 297. The court distinguished between defects readily discoverable and those discoverable over an extended period of time during which the buyer had reason to believe that the defects could and would be corrected by the seller. Id. at 298. The court was concerned with prejudice to the seller and noted that the one year delay was not detrimental. "The speculative character of the property is an important factor in determining what is a reasonable time to rescind." Id., citing Brown v. Hassenstab, 212 Ore. 246, 256, 319 P.2d 929, 934 (1957). Cf. Gargotto v. Sherman, 297 Ky. 597, 180 S.W.2d 565 (1944), which involved the sale of a restaurant. The buyers discovered the alleged fraud within nine days after taking over the business, yet continued to operate for two months. The court denied rescission because on discovery of fraud the buyer must act promptly and "will not be permitted to speculate as to the result of the trade and then rescind after it proves to be unprofitable." Id. at 599-600, 180 S.W.2d at 566.
retailer, the court will consider the relative sophistication of the parties in applying these standards.  

Another Code provision utilizing the reasonable time standard is section 2-602, which requires that rejection of the goods be within a reasonable time after their delivery or tender.  

A reasonable time to reject includes an opportunity for the buyer to inspect the goods, and may be fixed by agreement between the parties.  

The Code definitions, standing alone, have little interpretative value. Instead, it is necessary to look to court determinations of reasonable time, which have been decided on a case-by-case basis. Although courts pay lip-service to the doctrine that what is reasonable depends upon the nature, circumstances, and purpose of the transaction, a careful analysis of these cases indicates that certain factors are controlling. These factors will be discussed in the following sections.

28. Birkner v. Purdon, 27 Mich. App. 476, 183 N.W.2d 598 (1970), demonstrates a situation where an inexperienced retailer sought revocation of a contract for the sale of Christmas trees. In affirming the trial court's holding that the revocation was within a reasonable time, the court stated: "There was testimony tending to show that immediate discovery of the defects was difficult because of the time required for the trees to open up after being flattened in transit; that on several occasions defendant had been expressly assured by plaintiff that the trees delivered were of good quality; that, because of the slow build-up of the selling season, it was difficult to judge the merchantability of the trees . . . ; and, finally, that defendant's relative inexperience limited his appreciation of the defects." Id. at 481-82, 183 N.W.2d at 601. Where the buyer and seller are in a commercial setting with equal bargaining power, revocation of acceptance must occur within a "fairly short" period of time. Economy Forms Corp. v. Kandy, Inc., 391 F. Supp. 944, 950 (N.D. Ga. 1974), aff'd mem., 511 F.2d 1400 (5th Cir. 1975) (revocation of concrete forms after six months' use).

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

30. Time to inspect may be limited to immediately after the sale—a rejection twenty-four hours later might be deemed untimely, especially where so provided by the parties or by custom. In Miron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. 1968), the court held that rejection of the purchase of a horse twenty-four hours after the sale was untimely, as custom dictates that the animal be inspected at the time of sale. Cf. Schneider v. Person, 34 Pa. D. & C.2d 10, 2 UCC Rep. Serv. 37 (C.P. Lehigh County 1964), where the court refused to determine as a matter of law that plaintiff was guilty of unreasonable delay in discovery and notification that the horse's legs were injured. Comment 1 to section 2-602 provides: "The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection."  

31. A warranty of satisfaction in the contract may extend the reasonable time to revoke until at least the expiration of the warranty period. Maas v. Scoboda, 188 Neb. 189, 195 N.W.2d 491 (1972). Courts will try to honor contract agreements of time unless they are unconscionable. See 3A R. Duesenberg & L. King, Sales & Bulk Transfers under the Uniform Commercial Code § 14.02[2][c][i] at 14-22 (1974). See also Q. Vandenberg & Sons, N.V. v. Siter, 204 Pa. Super. 392, 399, 204 A.2d 494, 498-99 (1964) (whether warranty provision that all claims are waived unless made within eight days was reasonable under the circumstances was a jury question). For a discussion of Vandenberg, see text accompanying notes 76-78 infra.

32. UCC § 1-204(2).
III. Course of Dealing

The factors most frequently considered by courts in determining reasonable time are the presence of the seller's assurances to the buyer that the defect will be cured and the seller's attempts to repair the defect. When a buyer withholds his revocation in reliance on the seller's representations that a non-conformity will cure itself, or that the seller will correct the defect, courts will find the buyer's ultimate revocation to be timely when such repairs are not satisfactorily made. Since the buyer is generally required to give the seller a reasonable amount of time to cure the defect, a reasonable time to revoke should extend at least until it is obvious that such attempts have failed. The buyer should not be penalized for his continued patience with a seller who promises to correct defects in the goods.

33. Id. § 2-608(1)(b).
34. The buyer may be required to allow the seller to attempt to repair the defect under the terms of the Code and applicable express warranty terms. Tiger Motor Co. v. McMurtry, 284 Ala. 283, 293, 224 So. 2d 638, 647 (1969).
35. E.g., in Parker v. Johnston, 244 Ark. 355, 426 S.W.2d 155 (1968), defendant sold plaintiff a vending machine business. The plaintiff's continual complaints were met by defendant's assurances that business would pick up if plaintiff gave it enough time. After six months, when such did not occur, the plaintiff revoked. The court recognized the buyer's right to revoke, and commented that it could not be said that the plaintiff "slept on his rights." Id. at 359, 426 S.W.2d at 158.
37. Cases arise where a buyer has attempted to revoke and was convinced not to by the seller. After a number of such attempts, the buyer's final revocation is still seasonable. See, e.g., Luther v. Bud-Jack Corp., 72 Misc. 2d 924, 927, 339 N.Y.S.2d 865, 868 (Sup. Ct. 1973) See text accompanying notes 50-55 infra.
38. In most cases the seller attempts to repair but does not properly cure the defect. Where defendant convinced plaintiffs not to revoke acceptance of a mobile home on the assurance that it would be repaired to their satisfaction, plaintiffs' revocation of acceptance seven months later was effective when defendant's attempts at repair were unsatisfactory. Pedrini v. Mid-City Trailer-Depot, Inc., 1 Wash. App. 56, 459 P.2d 76 (1969).
39. For a discussion of how long the buyer must wait to give the seller an opportunity to repair before revoking acceptance, see notes 50-55 infra and accompanying text. UCC § 2-508 gives a seller the right to cure a non-conforming tender after rejection. It is not clear whether the Code drafters intended the same right to exist after revocation. For an interpretation of this Code provision as applied to revocation of acceptance, see Phillips, Revocation of Acceptance and the Consumer Buyer, 75 Com. L.J. 354, 357-58 (1970).
suggested that the reasonable time limitation will commence to run only after the buyer has attempted such adjustment with the seller, and the seller refuses or fails to cure the defect, or refuses to negotiate a settlement. This guideline applies not only to assurances made after acceptance but also to situations where the seller's assurances have induced the buyer to accept and the non-conformity is not cured.

In Stroh v. American Recreation & Mobile Home Corp., plaintiffs, after signing a purchase agreement, discovered defects in the mobile home they were to purchase from the defendant. They paid for and took possession of the mobile home upon the seller's assurances that the defect would be cured. Plaintiffs made many unsuccessful attempts during the year to have the defendant correct the defects, while the home continually deteriorated. Finally, one year after the purchase, the plaintiffs gave the defendant notice of all known defects and revoked acceptance of the mobile home. Because of the plaintiffs' reliance on the seller's representations that the defects would be cured and their efforts to have defendant cure the defects before revocation, the delay of one year was not unreasonable.

The Stroh case presents the question of how long a buyer may wait to allow the seller to cure before the delay becomes unreasonable. It has been held that a buyer may withhold revocation until it is apparent that the seller will not cure; however, if the buyer delays until after it becomes obvious that the seller cannot or will not repair, he will lose his right to revoke. It is also

42. Murray, supra note 40, at 41.
44. UCC § 2-608(1)(a). When the buyer notifies the seller of defects and the seller nevertheless chooses to tender the goods in that condition, he has "assumed the risk of having [them] returned promptly if the merchandise was not fit for which the purchase was made." Carretta v. Bud Jack Corp., 64 Misc. 2d 689, 691-92, 315 N.Y.S.2d 442, 445 (Dist. Ct. Nassau County 1970).
46. The buyer notified the seller of these defects. Id. at 991. He therefore had given the notice of breach required by section 2-607(3)(a).
47. Possession of goods does not always indicate acceptance. Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968). In Stroh, although it was not disputed that the buyer had accepted the goods, one of the seller's objections to the revocation was the plaintiff's dominion and ownership of the goods. The court rejected this argument, stating that "notice of revocation of acceptance is necessarily a recognition by the buyer that the property belongs to the seller." 530 P.2d at 993.
48. This deterioration was due to defects in the mobile home itself, and thus section 2-608(2) did not preclude revocation. For a discussion of damage to goods not caused by their own defects, see notes 98-102 infra and accompanying text.
49. 530 P.2d at 992.
clear that the seller does not have an unlimited time to cure the defects. Even where the purchase contract includes an express warranty, the buyer may revoke before the expiration of the warranty period. This reflects a general tendency of the courts to side with the buyer. However, the buyer who delays although the seller has made no assurances that the defects will be cured will not be afforded the same treatment.

In contrast to a "no-assurance" situation is the case where a buyer's actual attempts at revocation are met with the seller's promises to correct the non-conformities. In *Ed Fine Oldsmobile, Inc. v. Knisley*, the buyer of a used car attempted to rescind the transaction after learning that the seller's representations were false. Each time he attempted to rescind, the dealer's agents persuaded him not to, promising to correct the non-conformities. As a result, the automobile was in the dealer's shop so often that the buyer had little opportunity to use or inspect it. The court held that the buyer's ultimate revocation was effective, stating that although the vehicle had been driven some 1,500 miles, the buyer had had little opportunity for inspection or continued use, since it was so frequently being repaired.

Every attempt at revocation was forestalled by dealer's assurances and foot-dragging.


53. Apparently, courts view the warranty solely as an obligation of the seller to the buyer and, thus, the buyer need only give the seller a "reasonable" opportunity to cure non-conformities and defects. Tiger Motor Co. v. McMurtry, 284 Ala. 283, 293, 224 So. 2d 638, 647 (1969) (car warranted for twenty-four months—revocation after eleven months); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227, 229-30 (Tenn. Ct. App. 1972) (revocation after nine months on twelve month warranty). Contra, Maas v. Scoboda, 188 Neb. 189, 195 N.W.2d 491 (1972) (buyer required to make good faith attempt to adapt silo to his purposes for one year under a one year warranty of satisfaction included in the contract).

54. "The question we must consider is just how long the buyer must wait and how many unfulfilled promises may be made before he is entitled to revoke his acceptance of an automobile and be returned the purchase price. Our sympathies lie with those who repeatedly return their cars for repairs or service, and get them back in almost the same condition as when the complaints were originally registered." Stofman v. Keenan Motors, Inc., 63 Pa. D. & C.2d 56, 59, 14 UCC Rep. Serv. 1252, 1254 (C.P. Phila. County 1973).

55. Stephens Indus., Inc. v. American Express Co., 471 S.W.2d 501, 507 (Mo. Ct. App. 1971). Although the seller did service a defective machine, there was no evidence of any promises by the seller to cure the defects, nor any indication that the buyer was induced by the seller to retain the machine. Revocation was attempted about one year after delivery and was held to be unreasonable.


57. Id. at 35.

58. Id. at 37-38. For a discussion of revocation and the "lemon" automobile, see Whaley, Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby, 24 Drake L. Rev. 52, 72-78 (1974).
Since the buyer is virtually required to permit the seller to attempt to repair the defects, he must await the time necessary for the seller to effect such a cure. Therefore, the courts have held almost uniformly that under such circumstances the seller is estopped from raising the argument that the buyer's revocation is ineffective due to the passage of time. 59

IV. DIFFICULTY OF DISCOVERY

Under the Code there is a direct correlation between the difficulty of discovery of the non-conformity in the goods and the determination of a reasonable time in which to revoke acceptance. 60 The reasonable period commences from the point when the buyer discovers, or should have discovered, the non-conformity. 61 Since a buyer will necessarily require a substantially greater amount of time to discover defects which are latent, he should accordingly be given a respectively longer amount of time in which to revoke. The elements of latency may be segmented—it may be due to the complexity of mechanical goods, 62 a defect which unfolds gradually, 63 or simply a defect hidden from plain view. 64

In Uganski v. Little Giant Crane & Shovel, Inc., 65 the plaintiff purchased a crane which he found to be very noisy and unable to move on soft sand. The noise persisted even after softer clutch linings and a muffler were installed, until the crane eventually became virtually inoperative. At this point, he gave defendant notice of revocation. The court found that because of the complexity of the machine, 66 plaintiff was justified in relying on the seller's assurances 67 that it would be corrected; thus, plaintiff revoked within a reasonable


60. UCC § 2-608(2) provides in pertinent part that "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . ." Therefore, it follows that the amount of time allowed to discover a defect is proportionate to the difficulty involved in that discovery.

61. Id.


66. While the complexity did not impede the buyer from discovering that something was wrong with the crane, he was not aware of the seriousness of the defects until the crane was finally inoperative. Id. at 107-08, 192 N.W.2d at 589.

67. Id. The buyer's reliance on the seller's assurances also affected the outcome of the case. See Part III supra.
time. It may be argued that on these facts, the buyer should not have been permitted to revoke, since he was obviously aware that something was wrong with the crane. However, discovery requires actual knowledge of the defect or non-conformity, and a buyer is not required to revoke until he discovers the seriousness of the defect. In *Uganski*, the extent of the defects did not become evident until the machine became inoperative. Inasmuch as the ordinary consumer cannot realistically be expected to promptly discover defects in complex mechanical goods, *Uganski* illustrates that such discovery will be extended until the buyer realizes not only the existence, but also the extent of the non-conformity.

Similarly, a defect in car wiring was not reasonably discoverable until it caught fire. This "defect was such that it would have been virtually impossible for the plaintiff to discover it before acceptance of the vehicle." Therefore, revocation which occurred shortly after the fire was considered timely by the court. In acknowledging the requirement that revocation must occur prior to a transformation in the condition of the goods which was not engendered by their own defects, the court pointed out that there had been no substantial change in the condition of the car between the date of the fire and the time of revocation.

The second type of latent defect is that which unfolds gradually. The defect (or non-conformity) is present when the goods are accepted, but it lies dormant for a certain period. No particular knowledge or action on the part of the buyer is necessary for discovery. Rather, the requirement is fulfilled merely by passage of time.

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68. 2 R. Anderson, Uniform Commercial Code § 2-608:21 (2d ed. 1971) [hereinafter cited as Anderson].

69. As a condition precedent to revocation, the buyer must show that the defect substantially impairs the value of the goods. UCC § 2-608(1).

70. The buyer probably would not be able to revoke before the breakdown unless he could show that the existing defect of which he was aware substantially impaired his use of the crane. In formulating a subjective test for substantial impairment, one observer submitted that an annoying noise in a car may be sufficient where the noise aggravates the driver's neurological problems. Note, Revocation of Acceptance: The Test for Substantial Impairment, 32 U. Pitt. L. Rev. 439, 441 (1971).


72. Id.

73. Id. Revocation did not actually occur until about six weeks after the incident. Although the plaintiff returned the car to the dealer the following day, he awaited the dealer's determination of whether the damage was covered by the warranty. Revocation occurred about one month after being informed that the damage was not covered. It is clear that the buyer was entitled to wait until he knew whether he was covered by the warranty before invoking the remedy of revocation, and the month delay thereafter was reasonable since there was no substantial change in the condition of the car during this time.

74. Id. Inasmuch as substantial damage to the automobile was caused by an already existing defect, it would be difficult to hypothesize what further substantial damage could have occurred after the fire.

75. Similar to this is a situation where a passage of time in combination with certain actions by the buyer is necessary for the discovery of non-conformities. See text accompanying notes 79-82 infra.
A classic example of this situation was presented in *Q. Vandenberg & Sons, N.V. v. Siter.* Defendant purchased tulip and hyacinth bulbs which were apparently in good condition when delivered, but developed spots one month later. An expert examined the bulbs a few weeks before Easter, at which time the defendant learned of the defects and attempted to revoke acceptance. The nature of the defects was such that they developed only as the season progressed and could not be discovered until flowering time. The court held that it was a jury question whether the contract provision for an eight-day limitation to present claims was unreasonable under these circumstances.

In *Vandenberg,* the delay was caused by the difficulty of discovery of the defect due to its inherent nature. However, gradual discovery of a non-conformity may also be due to the nature of the transaction itself. In *Melms v. Mitchell,* the defendant agreed to sell his cordwood business to the plaintiff, representing that a sufficient amount of dry wood to fill purchase orders could be severed and sold immediately. In addition, the plaintiffs purchased defendant's stock of cut dry wood and therefore had no immediate need to search for more. When this was used up, plaintiffs began to cut more from the property, and found that in the areas where defendant had instructed them to begin cutting, there was not sufficient dry wood to fill their orders. Attempts to find dry wood in other areas of the land were time consuming and unrewarding. Plaintiffs then brought suit to rescind the contract for the purchase of the business. The court held that "[b]ecause of the very nature of the transaction—a sale of standing wood—it is only to be expected that plaintiffs might not discover right away that the quantity of dry wood was not as represented." It was only by surveying and investigating other portions of the land that the plaintiffs discovered with certainty that the quantity of wood available did not conform to defendant's representations. The court held that revocation was within a reasonable time.

Another type of defect, closely related to the previous example, is a defect hidden from plain view. In *American Paper & Pulp Co. v. Denenberg*
a contract provided for the sale of paper, with delivery to a ship, for resale to overseas customers. Samples of the paper were sent directly to the buyer but did not arrive until after the ship carrying the goods had left. The buyer found the samples unsatisfactory, and paid only part of the purchase price with a view towards reaching an agreement with his purchasers overseas. When the goods arrived, the overseas customers rejected them due to their extremely inferior quality. The court found the buyer's subsequent rescission timely, as the quality and condition of the goods could not be determined until their arrival overseas.84

_Melms_ presented a situation where the defects were not really dormant, as they were in _Vandenberg_, but where a passage of time was necessary in order for the buyer to discover that the seller's representations were false. In a sense then, the time during which the buyer surveyed the land was an inspection period. Although the Code does refer to inspection before acceptance,85 such is not specified in terms of revocation. It seems apparent, however, that the buyer should have an opportunity to inspect—such time being included in the stated reasonable time for discovery. Where, as in _Melms_, the actual character of the goods requires time-consuming "inspection" by the buyer, the time in which he should discover defects should be extended accordingly. Similarly, in _American Paper_, the practical impossibility of inspection (and the concomitant discovery of such deformities) prior to its actual delivery, induced the court to extend the period.

In addition to the tests which have been delineated, the courts are influenced by other factors. Whether a court will even consider the difficulty of discovery in determining what constitutes a reasonable time may depend on whether the buyer is an ordinary consumer or a merchant.86 Additionally, the court may recognize that the seller's representations, in combination with the character of the goods, can result in a gradual discovery of the defect by the buyer.87

Moreover, where a simple inspection would have uncovered the defects, a delayed revocation based upon a late inspection is untimely.88 It should be recognized, however, that in such a case it is not the difficulty of discovery that has caused a late revocation, but rather the failure of a dilatory buyer to inspect.

It is oversimplifying the issue to state that discovery requires actual

84. Id. at 613.
85. UCC § 2-513.
86. Michael M. Berlin & Co. v. T. Whiting Mfg., Inc., 5 UCC Rep. Serv. 357 (N Y. Sup. Ct. 1968). "We believe it will be a rare case in which a business buyer is given substantial additional time in which to reject because the defect was 'difficult to discover' . . ." White & Summers, supra note 7, at 262.
87. UCC § 2-608, Comment 3 states: "'Assurances' by the seller under paragraph (b) of subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. . . ."
knowledge, since courts must also look to when discovery should have been made. In practice, in determining a reasonable time for discovery and thus the reasonableness of revocation, the courts consider factors such as latency of defect and ease of inspection, as well as the stated considerations of "good faith" and "substantial justice."

V. DAMAGE TO GOODS

Section 2-608 of the Code provides that revocation must occur "before any substantial change in condition of the goods which is not caused by their own defects." While a buyer will not be penalized for a deterioration of the existing defects, significant deterioration or actual damage to the goods caused by the buyer's delay may prevent effective revocation. In addition to being a condition precedent to revocation, the existence of deterioration or damage is an element courts consider in determining whether the buyer has revoked within a reasonable time. This reflects a policy of commercial fairness and "substantial justice." At the same time, the courts must be careful not to deny a good faith buyer his remedy. This policy requires a careful balancing of the interests of both parties. The buyer should allow the seller to attempt repairs while the seller must permit the buyer to revoke when his attempts to repair fail.

During the interval that the seller is attempting repairs, the goods may deteriorate due to the buyer's continued use of them. Generally, continued use of the goods by the buyer does not in itself bar revocation of acceptance. Anderson, supra note 68, § 2-608:21. "[T]he mere fact that the buyer has suspicions that the goods do not conform and that such nonconformity substantially impairs the value of the contract does not in itself require that he immediately give notice." Id.

UCC § 2-608, Comment 5.

Id., Comment 6.

Id. § 2-608(2).

Such deterioration is caused by the buyer's continued use of the goods over an extended period of time. Fablok Mills, Inc. v. Cocker Mach. & Foundry Co., 120 N.J. Super. 350, 354, 294 A.2d 62, 64-65 (1972), rev'd for jury trial, 125 N.J. Super. 251, 310 A.2d 491 (1973); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974). It has been held that deterioration which occurs while the seller attempts to remedy the defects will not bar a subsequent revocation. Moeller Mfg. Co. v. Mattis, 33 Colo. App. 300, 519 P.2d 1218 (1974). But see Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974), wherein a car was driven over 18,000 miles for a period of two years while seller tried but failed to cure defects. Substantial depreciation in condition of car during the two-year delay before attempting to revoke was held to be unreasonable.


This policy is one of not allowing a buyer to take unfair advantage of a seller. UCC § 2-608, Comment 6. The Comment also states that minor defects in the goods should be disregarded. Id.

The use of the goods by the buyer does not in itself bar revocation of acceptance. Anderson, supra note 68, at 250. In Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227 (Tenn. Ct. App. 1972), plaintiff drove a new car home and noticed that the engine "missed" and on examination discovered other defects. Approximately two months later, he filed suit for rescis-
use of the goods, when based on the seller's assurances that the defects will be cured, is not a bar to revocation. In most instances, the seller will perform repairs and the buyer will then try to make use of the goods. If the defects are still present, the seller will again attempt to repair. This pattern may be repeated many times, and the buyer should not be penalized for a natural deterioration during the passage of time when he is allowing the seller to cure. Two additional policy reasons are submitted for this treatment: first, the buyer should be given an opportunity to test the goods after repairs; and second, it would be unfair to deprive the buyer of use while the seller is attempting repairs.

It has been held, however, that use of a car for two years, while a seller tried to cure its defects, barred revocation because of the "substantial depreciation and a 'change in the condition of the goods . . . not caused by their own defects.'" However, the general rule is that continued use of the goods is proper where the intent is to mitigate damages.

On the other hand, when the buyer alters the goods and then attempts to revoke, courts have refused to allow the revocation. In that event, the goods have been substantially changed by the intentional acts of the buyer.

Cooper v. Mason presents an excellent factual situation in which to evaluate these policy considerations. There, a buyer purchased an automobile from defendant and, unsatisfied with its performance, returned it several times for service and correction. Seventeen months and thirty thousand miles later, the vehicle was wrecked in an accident and the buyer attempted to return it to the seller. The court refused to allow the revocation since the car had been substantially damaged as a result of the accident, and not because of the pre-existing defects. It appears that, had the accident not occurred, the revocation would still have not been seasonable as "[i]t would seem that seventeen months and 30,000 miles exceed a reasonable time for revocation of..."
the purchase of the automobile under the most liberal interpretations of the term.  

As demonstrated by Cooper, in determining whether goods were substantially changed, courts not only consider whether actual damage occurred, but also whether there exists any deterioration caused by a dilatory buyer or deceptive seller.

VI. GENERAL CONSIDERATIONS

Other factors courts rely upon in deciding whether revocation was within a reasonable time fall into the general category of commercial good faith. These include: determination of which party was at fault for the delay, prevention of prejudice to the buyer or seller, and unjust enrichment of the buyer.

The buyer must promptly revoke acceptance of perishable goods. Deterioration of these goods will occur, and inasmuch as this may not be the result of existing defects, revocation is precluded. The basic aim here is to prevent commercial bad faith and to afford the seller the opportunity to mitigate damages, possibly by finding another buyer for the non-conforming goods.

If delay in revocation by a dilatory buyer will prejudice the rights of the seller, the revocation is unreasonable if the buyer could have done so sooner.

102. Id. at 474, 188 S.E.2d at 655 (emphasis in original).
103. The Code requires that good faith be present in all transactions: see UCC § 1-102(3) ("The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . . ."); id. § 1-201(19) ("Good faith means honesty in fact in the conduct or transaction concerned."); id. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").
104. The "fault" referred to here is to be distinguished from the delay resulting from the seller's assurances and attempt to repair. See Part III supra.
106. Similarly, acceptance of a live animal should be revoked promptly since it will be difficult to meet the burden of proving that the defect existed at the time the animal was accepted. Miron v. Yonkers Raceway, Inc., 400 F.2d 112 (2d Cir. 1968). But see Grandi v LeSage, 74 N.M. 799, 399 P.2d 285 (1965), where a horse was obtained for the purposes of breeding. Revocation three months later, when the buyer discovered that the horse was a gelding and could not be used to breed, was effective since the non-conformity obviously existed at the time the horse was purchased.
107. A buyer cannot speculate and then rescind after the transaction appears unprofitable. Gargotto v. Sherman, 297 Ky. 597, 180 S.W.2d 565 (1944).
108. See White & Summers, supra note 7, at 261, discussing the policies behind notice provisions.
109. In Applebaum v. Falco Leasing Co., 447 S.W.2d 799 (Mo. Ct. App. 1969), defendant sold a new truck to the plaintiffs. Within two to three weeks after the purchase, trouble developed and within the next four to six weeks more extensive defects were found to exist. The truck was returned for repairs six to eight times over the next six months. Finally, three months later, the "disgusted" plaintiff dumped the truck in the defendant's yard. While acknowledging that the truck was out of service for more than two-thirds of the time, the court nevertheless held
In *Hays Merchandise, Inc. v. Dewey*, the defendant purchased toy animals from the plaintiff to sell during the Christmas season. Less than half of the expected toys were delivered and on December 1, defendant informed plaintiff that he did not want the rest of the shipment. Another shipment arrived, however, and plaintiff told defendant not to open it but to simply return the toys. Instead, the defendant kept the toys for several months before returning them to the plaintiff. In holding that there was no evidence that the defendant gave the plaintiff notice of revocation prior to mid-February when he returned the unsold goods, the court stated: "In view of the seasonal nature of the toy business and the somewhat faddish demand for certain toys, this delay in giving notice was unreasonable."

In a relatively similar case, defendants purchased carpeting from the plaintiff. Within two weeks after delivery, the defendants discovered that the carpeting had changed color and the nap was defective. They notified the seller's agent and requested that he take it back. When he refused to do so, defendants retained the carpeting, and did not bring an action to rescind the sale until over a year later. The court held that the defendants had waived their rights to rescind the sale by their long delay.

That plaintiffs had not attempted to rescind within a reasonable time. They did not attempt to rescind until dumping the truck, which had additionally been damaged in an accident by this time, in defendant's yard, and there was "no just cause or excuse ... for their failure to do so". Id. at 803. Similarly, in *D'Orsay Equip. Co. v. United States Rubber Co.*, 199 F. Supp. 427 (D Mass. 1961), aff'd, 302 F.2d 777 (1st Cir. 1962), plaintiff purchased rubber milk-dispensing tubes from defendant and later sought to rescind because they would not function properly. The contract provided that claims for breach of warranty were to be made within thirty days. Here, the plaintiff met neither the thirty day contract requirement nor the reasonable time requirement of section 2-608. Although the plaintiff had received complaints about the tubes from his customers, he accepted and paid for subsequent shipments and did not attempt to revoke until approximately one year after the defects were brought to his attention. "This clearly would not be notification within a reasonable time. ..." Id. at 433. And in *Lehigh, Inc. v. Stevens*, 205 Kan. 103, 468 P.2d 177 (1970), defendant-buyer was aware of defects in the vending machines, but continued to buy additional machines and pay instalments for several months. No notice of breach of warranty, and no attempts to rescind or tender back the machines were made until after suit was filed. The court affirmed the trial court's determination that there was no effective attempt to rescind. Id. at 108, 468 P.2d at 182.

The seller could have reasonably assumed by the buyer's silence that he had decided to retain the goods after all. This situation is somewhat analogous to acceptance of an offer by silence, which is generally permitted. See *J. Calamari & J. Perillo, Contracts* § 33 (1970). Notice of revocation of one small lot was given prior to the revocation in February. Id. at 348, 474 P.2d at 273. An important consideration in the court's decision in *Hays* was the prejudice to the seller by the buyer's delayed revocation, which occurred long after Christmas. Where "there is no evidence to indicate that the seller was any more prejudiced by the cancellation ... than it would have been a year earlier," reasonableness of the revocation is a jury question. *Chaplin v. Bessire & Co.*, 361 S.W.2d 293, 298 (Ky. Ct. App. 1962)

110. 78 Wash. 2d 343, 474 P.2d 270 (1970) (en banc)
111. The court noted the distinction between notice of breach and notice of revocation, and decided that this was an "adequate and timely notice of breach." Id. at 348, 474 P.2d at 273
112. Notice of revocation of one small lot was given prior to the revocation in February 78 Wash. 2d at 348, 474 P.2d at 273.
113. Id. at 348-49, 474 P.2d at 273. An important consideration in the court's decision in *Hays* was the prejudice to the seller by the buyer's delayed revocation, which occurred long after Christmas. Where "there is no evidence to indicate that the seller was any more prejudiced by the cancellation ... than it would have been a year earlier," reasonableness of the revocation is a jury question. *Chaplin v. Bessire & Co.*, 361 S.W.2d 293, 298 (Ky. Ct. App. 1962)
114. 55 Ill. App. 2d 348, 838 (1965)
115. Id. at 353, 204 N.E.2d at 841.
Where the seller's own actions contribute to the delay, a buyer's resultant delay in revocation is reasonable. In *DeCoria v. Red's Trailer Mart, Inc.*, plaintiff, the purchaser of a defective mobile home, telephoned the defendant over forty times requesting, to no avail, that he correct the defects. A repairman was finally sent, but he failed to cure the defects. The plaintiff continued to complain and finally, more than one year after delivery, brought suit to revoke the acceptance. The court found the delay reasonable. A situation may arise where the seller avoids the buyer. Because of the seller's unavailability, the buyer cannot notify him of defects. When the seller finally receives such notice, he cannot assert the defense of unreasonable delay in revocation.

*Lanners v. Whitney* demonstrates the many facts, circumstances and requirements of section 2-608 which a court must consider in deciding whether a buyer's revocation occurred within a reasonable time. *Lanners* involved the purchase of a used airplane. Included in the contract was defendant's agreement to conduct a "100-hour" inspection of the plane in order to determine its airworthiness and to replace any defective parts. The plane was delivered to plaintiff with assurances that the inspection had been made. Several days after delivery, the plaintiff took a long flight and encountered difficulties with the plane, and upon his return so notified the defendant. An inspection by the FAA revealed that the plane had been unairworthy at the time of delivery. A second inspection confirmed this finding, and plaintiff was in constant communication with defendant until his revocation three weeks later.

In analyzing the case, the court reasoned that: (1) plaintiff reasonably relied on defendant's representations that the plane was airworthy; (2) plaintiff failed to reject within a reasonable time and had therefore accepted the plane; (3) the unairworthy condition of the plane materially impaired its value to the plaintiff; (4) plaintiff was induced to accept the plane without inspection because of defendant's assurances; (5) plaintiff gave the defendant notice of breach immediately upon discovering the defects and had thus preserved his remedy of revocation; (6) prior to the inspections, plaintiff had no certain knowledge of the extent of the defects in the airplane; and (7) plaintiff

118. Id. at 895-96, 491 P.2d at 243.
119. In *Davis v. Vintage Enterprises, Inc.*, 23 N.C. App. 581, 209 S.E.2d 824 (1974), a buyer of a mobile home was not given the keys to the home until three weeks after its delivery. Upon moving in, he discovered that serious flooding resulted when it rained. Numerous calls to the seller went unanswered. Finally, an employee made several visits to the trailer, but rendered no substantial repairs. The court remanded the case to determine whether the buyer's letter of complaint to defendant was a rejection or a revocation. Id. at 588-89, 209 S.E.2d at 829-30. It was necessary to determine which remedy existed, as rejection and revocation are governed by different rules.
120. 247 Ore. 223, 428 P.2d 398 (1967).
121. Generally, more than one factor will be present in a case. For the purposes of this Note, discussion of cases was generally limited to the specific principle being illustrated.
122. A "100-hour" inspection is the examination of an aircraft as prescribed by the FAA. 247 Ore. at 226, 428 P.2d at 400.
attempted to adjust the differences between the parties. The court concluded that
considering all the circumstances, we hold the delay of less than three weeks, between . . . when the unairworthy condition of the [plane] became known, and . . . the date on which notice was given defendant of his intention to rescind, was not an unreasonable delay.123

VII. CONCLUSION

As stated in the Code, determination of the timeliness of revocation will turn on the nature, purpose and circumstances of the transaction.124 In applying this standard, courts consider factors such as course of dealing, difficulty of discovery, damage to the goods, and commercial good faith. Thus, what ostensibly appears to be a vague definition has been rendered more certain by court interpretations of reasonableness. As has been demonstrated, "[t]ime, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injurious or unjust consequences."125 Although this standard is applied on a case-by-case basis, and what is reasonable in one case may be unreasonable in another, the factors considered, i.e., the "other circumstances," are relatively consistent. Therefore, reasonable time for revocation of acceptance, albeit lacking a precise meaning, is not an arbitrary concept—it may be defined in each situation by reference to principles of good faith and substantial justice which govern the factors that courts consider and weigh in their final determination of what constitutes a reasonable time.

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123. Id. at 235, 428 P.2d at 404.
124. UCC § 1-204(2).
125. Hogan v. Tucker, 77 S.W. 197, 199 (Ky. 1903), citing Hoggins v. Becraft, 31 Ky (1 Dana) 28, 30 (1833) (emphasis added).