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POSTREVOCATION USE: AN IMPERMISSIBLE INTERPRETATION OF THE UCC

Economic exigencies often force buyers, especially consumers, to use defective goods after revocation of acceptance until a substitute becomes available. Some courts have held such a revocation effective despite buyers' continued use of the goods. This Note argues, however, that permitting revocation after use violates the Uniform Commercial Code and gives buyers a gratuitous remedy. Section 2-714, which allows damages for breach of contract, adequately compensates aggrieved buyers who are forced to use defective goods after revocation. Thus, courts should apply a no-use-after-revocation rule; continued use of goods after revocation should invalidate the revocation and injured buyers should resort to their damage remedy.

INTRODUCTION

ARTICLE 2 OF the Uniform Commercial Code1 (UCC or Code) provides relief for a buyer who has accepted2 nonconforming3 goods and wants to escape the bargain. Under section 2-608 of the Code, such a buyer may revoke his acceptance when certain conditions are met and recover both the purchase price and damages for breach.4 To exercise his right of revocation after acceptance, the buyer gives the seller notice of the revocation.5 The buyer is then

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1. Except for Louisiana, all fifty states and the District of Columbia have adopted article 2 of the UCC. See 1A U.L.A. ix (1976 & Supp. 1984) for the statutory citations and effective dates.
2. Acceptance, in the sale of goods context of article 2, means "that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own." U.C.C. § 2-606 comment 1 (1977).
3. The Code defines conforming: "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." Id. § 2-106(2). See also id. § 2-106 comment 2 (the Code intends, with some limitations, to require "exact performance by the seller").
4. Section 2-608 reads in full:
   (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.
5. Revocation "is not effective until the buyer notifies the seller of it." Id. § 2-608(2).
faced with the question whether he may continue to use the goods after revoking his acceptance without invalidating his revocation.

The rescission doctrine, the common-law predecessor of the Code's revocation of acceptance provisions, forbade continued use of the goods by the buyer. Rescission operated as a complete unmaking of the contract and constituted an election by the rescinding party not to seek damages on the contract. The rescinding buyer was required to return, or offer to return, the goods he had received under the contract. Since the theory underlying the remedy was to return the parties to their preagreement status, the buyer's continued use of the goods usually invalidated his rescission. The inclusion of the remedy of revocation of acceptance in the Code signifies a departure from the rescission doctrine. The Code drafters made it clear in comment 1 to section 2-608 that revocation of acceptance is a new remedy designed to enable the buyer to return the goods, recover the purchase price, and, unlike rescission, recover consequential and incidental damages. Unfortunately, the drafters did not explicitly state whether the buyer had a right to continue to use the goods after revocation if the seller refused to take them back, or whether such use destroyed the revocation of acceptance. In resolving this problem, courts have


11. "[T]he duty to render the return performance is revived if the injured party exercises acts of ownership over the property." Restatement of Contracts § 401 (1932) (superseded 1979). This contractual rule has substantially softened: "The availability of other forms of equitable relief, such as a decree . . . for rescission or cancellation may also be considered in choosing the remedy best suited to the circumstances of the case." Restatement (Second) of Contracts § 359 comment c (1979).

12. U.C.C. § 2-608 comment 1 reads in pertinent part: "[T]he 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 of 'rescission' . . . ."
employed drastically different analyses and have reached opposite conclusions.

While postrevocation use problems have arisen in a business context, they most frequently arise in consumer cases, apparently because many consumers cannot afford to store or replace the defective good while awaiting the outcome of a lawsuit against the seller.

In the last fifteen years, several courts have focused on the difficulties that attempted revocation of acceptance presents to buyers, especially those involved in consumer transactions. These courts have attempted to help buyers by rationalizing postrevocation use. In doing so they have imposed the burden of this use on the seller, thereby expanding the remedy of revocation of acceptance. Although these decisions have received a generally favorable response from legal scholars, they have ignored the Code's dictates, encountered serious problems in awarding an offset to the seller for the buyer's continued use, and forgotten about the alternative remedy of damages for breach of contract which is available to the buyer once he has used the goods.

This Note first examines the Code sections governing the buyer's continued use of goods after revocation of acceptance. Next, it describes the various Code interpretations courts have employed to reject or allow postrevocation use and the typical con-

13. See infra note 70 and accompanying text.
14. See, e.g., Minsel v. El Rancho Mobile Home Center, Inc., 32 Mich. App. 10, 188 N.W.2d 9 (1971) (plaintiffs "encountered considerable difficulty in finding another place to live" and consequently continued to live in their mobile home after revoking their acceptance of it); Moore v. Howard Pontiac-Am., Inc., 492 S.W.2d 227 (Tenn. Ct. App. 1972) (plaintiffs continued to use their revoked car after two months in storage because of the "inconvenience and prohibitive cost of other transportation").
17. See infra notes 90-121 and accompanying text.
18. See infra notes 122-53 and accompanying text.
19. See infra notes 154-66 and accompanying text.
20. See infra notes 27-34 and accompanying text.
21. See infra notes 35-40 and accompanying text.
sumer-buyer’s plight that motivates some courts to allow such use. This Note then advocates a no-use-after-revocation rule, based on two arguments. First, analysis of the relevant Code sections suggests that the drafters intended to create such a rule. Second, the problems courts face in awarding a seller an offset for the buyer’s continued use demonstrate the need for a no-use rule. This Note concludes that the damage remedy for a seller’s breach in section 2-714 effectively allows the buyer to recover the benefit of his bargain when he has used the goods after revocation.

I. POSTREVOCATION USE: THE CODE AND THE COURTS’ VARIED RESPONSES

A. Buyer’s Continued Use of Defective Goods Prohibited

The UCC does not specifically state that the use of goods by a revoking buyer will invalidate his revocation of acceptance. It does warn the rejecting buyer that “after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller.” Section 2-608(3) affords rejecting and revoking buyers similar treatment. It states that the revoking buyer has the same rights and duties regarding the goods as if he had rejected them. The revoking buyer is thus placed in the same position as a rejecting buyer; the revoking buyer is treated as if he had refused to accept the goods due to some nonconformity.

According to section 2-602, an “exercise of ownership” by the buyer after rejection is “wrongful” and does not constitute acceptance. Section 2-606 provides further insight about what constitutes acceptance of goods. It states in part: “Acceptance of goods occurs when the buyer . . . does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.” If use after rejection is considered an “exercise of ownership,” it is then wrongful as

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22. See infra notes 41-76 and accompanying text.
23. See infra notes 77-89 and accompanying text.
24. See infra notes 90-121 and accompanying text.
25. See infra notes 122-53 and accompanying text.
26. See infra notes 154-66 and accompanying text.
27. See supra note 4 for the text of U.C.C. § 2-608.
29. Id.
30. Id.; see id. § 2-606(1)(c).
31. Id. § 2-606(1)(c).
32. See Fecik v. Capindale, 94 Montgomery County L. Rep. 177, 54 Pa. D. & C.2d 701 (C.P. 1971) (continued use is unquestionably an exercise of ownership). But see Note, Revo-
against the seller. Any exercise of ownership by one who does not own the goods, which is what the buyer is claiming through his revocation, must be inconsistent with the ownership of the individual who does own the goods, that is, the seller. Thus, the buyer's use after revocation is both wrongful as against the seller and inconsistent with the seller's ownership; such use may become an acceptance through ratification by the seller.

The court in *Waltz v. Chevrolet Motor Division* appeared to adopt this approach when it examined a buyer's revocation of acceptance of an automobile. The court simply listed Code sections 2-608(3), 2-602(2)(a), and 2-606(1)(c) in a single paragraph and concluded that the Code treats the plaintiffs' continued use of the car after revocation as an invalidation of their revocation.

Not all of the courts that have found postrevocation use to be an invalidation of the revocation—in effect, a second acceptance—have relied on the combination of the three Code sections cited in *Waltz*. Some courts, citing only section 2-602(2)(a), have held that the continued use is wrongful as against the seller, thus the revocation is fatally flawed. Others have applied section 2-606(1)(c), holding that postrevocation use is inconsistent with the seller's ownership and constitutes a reacceptance of the goods. Still other courts have failed to cite any Code section to explain their invalidation of a revocation of acceptance. These courts often rely on the mere assertion that a buyer's use of the revoked goods is "inconsistent"

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34. U.C.C. § 2-606 comment 4 indicates that subsection (1)(c) is intended to cover the situation where a buyer who has rejected the goods subsequently takes action inconsistent with his rejection. The subsection also applies to a revoking buyer who acts inconsistently with the revocation procedure prescribed in § 2-608(3).


36. *Id.* at 816.

37. *E.g.*, Fecik v. Capindale, 94 Montgomery County L. Rep. 177, 54 Pa. D. & C.2d 701 (C.P. 1971) (buyer lost right of revocation, but attempted revocation served as notification of a breach of warranty, thus enabling buyer to maintain action for damages); see also *Concrete Equip. Co. v. William A. Smith Contracting Co.*, 358 F. Supp. 1137 (E.D. Wis. 1973) (court held that defendants were barred from recovery in view of their resumed use of goods, citing § 2-602(2)(a)).

38. *See, e.g.*, Wadsworth Plumbing & Heating Co. v. Tollycraft Corp., 277 Or. 433, 560 P.2d 1080 (1977); *cf.* Bowen v. Young, 507 S.W.2d 600 (Tex. Civ. App. 1974) (holding use of mobile home after valid rejection to be acceptance under § 2-606(1)(c)).

with revocation.\textsuperscript{40}

While many courts believe that postrevocation use should invalidate a revocation of acceptance, there is much disagreement about which analysis is appropriate. Not only does this inconsistency exist, but in the last fifteen years courts have employed a variety of theories to justify, rather than reject, postrevocation use.

B. Buyer's Continued Use of Defective Goods Allowed

1. The Theories

a. Postrevocation Use with Offset to Seller. Some courts have held that use subsequent to a revocation of acceptance is "wrongful as against the seller,"\textsuperscript{41} but does not invalidate the revocation of acceptance.\textsuperscript{42} These courts have simply given damages or an offset to the seller for the buyer's use of the product after revocation.\textsuperscript{43} Their analysis is apparently limited in scope inasmuch as it only focuses on section 2-602(2)(a).\textsuperscript{44}

b. Postrevocation Use Justified by Buyer's Duty to Mitigate Damages. Courts also have concluded that the revoking buyer is under a duty to mitigate his damages.\textsuperscript{45} They base this conclusion on the rationale that revocation of acceptance, unlike the common law remedy of rescission, allows recovery for damages as well as return of the purchase price.\textsuperscript{46}

When mitigation of damages is applied to use after revocation,

\textsuperscript{40} See, e.g., Gigandet v. Third Nat'l Bank, 333 So. 2d 557, 559 (Ala. 1976); Ingle v. Marked Tree Equip. Co., 244 Ark. 1166, 1174, 428 S.W.2d 286, 290 (1968).

\textsuperscript{41} U.C.C. § 2-602(2)(a).


\textsuperscript{43} See, e.g., Stroh, 35 Colo. App. at 203, 530 P.2d at 994; Johnson, 233 Kan. at 1050-51, 668 P.2d at 145.

\textsuperscript{44} Further support for this analysis is found in Note, Revocation Not Barred, supra note 16, at 770:

The language [of § 2-602(2)(a)] is derived from the tort of conversion. But if the essence of conversion is interference with the owner's control over the goods, then buyer here was not a converter. It had lawful possession of [the goods]; it never refused a demand from seller for delivery . . . ; and it never prevented seller from taking them.


\textsuperscript{46} See supra note 12 and accompanying text.
the seller must be compensated for the buyer's use. Section 2-711(1) allows a buyer who justifiably revokes acceptance to "cover" and to be awarded damages under section 2-712.\textsuperscript{47} Those damages include "the difference between the cost of cover and the contract price together with any incidental and consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach."\textsuperscript{48} When the buyer's use of the goods has saved expenses, his recovery must be reduced, or offset, by the value of those savings.\textsuperscript{49}

The duty to mitigate ordinarily arises when the buyer seeks consequential damages under section 2-715(2). Consequential damages resulting from the seller's breach include "any loss . . . which could not reasonably be prevented by cover or otherwise."\textsuperscript{50} Some courts and commentators believe that the Code's reasonableness rule\textsuperscript{51} permits a buyer who cannot obtain substitute goods after he has revoked to continue to use the nonconforming goods in order to mitigate his damages.\textsuperscript{52} Courts have found further support for this rationale in the comment to section 2-604, which lists the options for a revoking buyer.\textsuperscript{53} The comment describes the section as allowing "all reasonable leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative."\textsuperscript{54} Thus, a revoking buyer may continue using the goods as long as he can prove that such use mitigated his damages.

c. Postrevocation Use Justified by Buyer's Need to Preserve Security Interest in Goods. The Code expressly permits postrevocation use only when the buyer must use the goods to preserve his security

\textsuperscript{47} U.C.C. § 2-711(1).
\textsuperscript{48} Id. § 2-712(2) (emphasis added).
\textsuperscript{49} For a discussion of the problems created by awarding the seller an offset for the buyer's continued use, see infra notes 122-53 and accompanying text. Although § 2-608 requires revocation of acceptance before "any substantial change in condition of the goods," the buyer's ability to compensate the seller for use after revocation may obviate the need to prevent later change in the goods. Note, Revocation Not Barred, supra note 16, at 769-70.
\textsuperscript{50} U.C.C. § 2-715(2)(a).
\textsuperscript{51} See infra notes 60-89 and accompanying text.
\textsuperscript{53} Fablok Mills, 125 N.J. Super. at 257, 310 A.2d at 494.
\textsuperscript{54} U.C.C. § 2-604 comment.
Some courts have justified postrevocation use on this basis, and have limited such use to situations where the use preserves the collateral or its value, as the Code prescribes.

Other courts, however, have permitted postrevocation use without demonstrating a need to preserve the collateral or its value, in disregard of the Code's directives.

d. Postrevocation Use Justified by Buyer's Duty of Reasonable Care Under Section 2-602(2)(b). Section 2-602(2)(b) of the Code instructs the buyer to hold the goods "with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them." Courts have used this section to justify a buyer's continued use of goods after revocation.

In Minsel v. El Rancho Mobile Home Center, Inc., the buyers' decision to remain in the mobile home for six weeks after mailing their revocation to the seller did not invalidate the revocation. The court noted that section 2-602(2)(a) proscribes any exercise of ownership as wrongful as against the seller, but it did not end its inquiry with that determination. Rather, the court looked to section 1-102(1), which deals with the construction of the Code, and to section 2-602(2)(b), which discusses a buyer's duty of reasonable care. The court found that the Code requires a liberal construction in order to promote its underlying purposes and policies. One of the purposes cited was the modernization of commercial transaction law. The court stated that in light of section 2-602(2)(b), it would follow the "rule of reasonableness" evident

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55. See id. §§ 2-711(3), 9-207(4).
57. E.g., Wadsworth Plumbing & Heating, 277 Or. at 437, 560 P.2d at 1082 (buyer's continued use of fishing boat after revocation of acceptance held to be a reacceptance under U.C.C. § 2-606(1)(c) since use was not to preserve collateral).
58. See McCullough v. Bill Swad Chrysler-Plymouth Inc., 5 Ohio St. 3d 181, 449 N.E.2d 1289 (1983) (buyer does not waive right to revoke acceptance of automobile by continued use if such use is reasonable).
59. See infra notes 120-21 and accompanying text; Solove, supra note 16, at 1290-91.
60. U.C.C. § 2-602(2)(b).
62. Id. at 13-14, 188 N.W.2d at 11-12.
63. Id. at 13, 188 N.W.2d at 11.
64. Id. at 13-14, 188 N.W.2d at 11.
65. Id. at 13, 188 N.W.2d at 11.
66. Id.
throughout the UCC” when interpreting continued use after notice of revocation. The court concluded that the buyers’ continued use fulfilled the reasonable care requirement of section 2-602(2)(b), noting that the seller did not respond to the buyers’ notification nor did it prove that it was prejudiced by the buyers’ delay in vacating the mobile home.

e. Postrevocation Use Based on a Reasonableness Principle Not Founded in the Code. In several recent cases, courts have forthrightly endorsed postrevocation use when a consumer buyer’s financial position gives him no choice but to continue to use the defective goods. Some courts also have taken this approach when the buyer is a merchant who either cannot obtain substitute goods or is financially unable to replace the goods until the final disposition of his lawsuit. The issue in such cases is whether continued use of the goods was reasonable.

These courts rely on several intertwined principles that they find generally present in the Code. Like the Minsel court, they cite the Code’s rule of reasonableness. Moreover, they assert that the Code’s purpose of modernizing commercial law requires stripping away unnecessary technicalities. Finally, the Code drafters intended that its provisions be liberally construed, so these courts try

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67. Id. at 14, 188 N.W.2d at 11.
68. Id. at 14-15, 188 N.W.2d at 11-12. The Minsel court did not award the seller an offset for the buyers’ continued use, probably because the court considered the continued use “reasonable care” not “wrongful as against the seller.” See id. at 13-14, 188 N.W.2d at 11 (citing U.C.C. § 2-602(2)(a), (b)). Now that courts have begun to allow postrevocation use, however, failure to award offsets creates further unfairness to sellers. See infra notes 109-33 for a discussion of offset damages.
71. Johannsen, 304 N.W.2d at 658; Fablok Mills, 125 N.J. Super. at 257-58, 310 A.2d at 494-95; McCullough, 5 Ohio St. 3d at 183, 449 N.E.2d at 1292.
72. Johannsen, 304 N.W.2d at 658; see also J. WHITE & R. SUMMERS, supra note 33, § 4, at 15-16 (“[T]he law of commercial transactions [should] be, so far as reasonable, liberal and nontechnical.”); Note, Buyer’s Continued Use, supra note 16, at 1383 (“[O]ne of the purposes of the U.C.C. is to ‘de-technicalize’ commercial law.”).
to avoid technical distinctions that obstruct reasonable results.\footnote{73} Thus, these courts examine the reasonableness of the buyer’s conduct under the circumstances to determine whether the subsequent use will bar his revocation action.

The Ohio Supreme Court, in \textit{McCullough v. Bill Swad Chrysler-Plymouth, Inc.},\footnote{74} established a five-factor test to determine the reasonableness of postrevocation use. The factors are: (1) Whether the seller provided the buyer with any instructions regarding care of the item upon notice of the buyer’s revocation, (2) whether the “buyer’s business needs or personal circumstances” compelled the continued use, (3) whether the seller made assurances during the period of postrevocation use of cure of the nonconformities or of other recompense for the buyer’s dissatisfaction and inconvenience caused by the defects, (4) whether the seller acted in good faith, and (5) whether the seller was “unduly prejudiced by the buyer’s continued use.”\footnote{75}

Unfortunately, the court left several questions about its test unanswered. It did not establish the necessity or sufficiency of the factors to justify postrevocation use. It did, however, find that all the factors supported revocation in the \textit{McCullough} fact situation.\footnote{76}

2. \textit{The Rationale For Permitting Continued Use}

The misfortune of the \textit{McCullough} plaintiff epitomizes the situation in which courts allow revocation after the buyer’s continued use. The plaintiff, a young clerical worker with limited financial resources,\footnote{77} bought a car and subsequently experienced mechanical difficulties with it.\footnote{78} She made numerous attempts to rectify the problem but without success.\footnote{79} She then sent a letter to the dealer who sold her the car.\footnote{80} In it she “called for the rescission of the purchase agreement, demanded a refund of the entire purchase price and expenses incurred, and offered to return the automobile to

\footnotesize{\textit{McCullough}, 5 Ohio St. 3d at 184-85, 449 N.E.2d at 1294.}
[the dealer] upon receipt of shipping instructions." The dealer failed to respond to the plaintiff's letter. She continued to operate the car, logging 23,000 miles before the trial began.

In affirming the plaintiff's postrevocation use, the court recognized that the plaintiff had little choice but to continue to operate the defective car: "A most unreasonable obligation would be imposed upon [her] were she to be required, in effect, to secure a loan to purchase a second car while remaining liable for repayment of the first car loan." The other option that the plaintiff might have selected seemed equally unrealistic. The Code would have allowed her to resell the car for the seller's account. Under this alternative, however, a buyer will usually receive a low price due to depreciation of the item. Moreover, if the McCullough buyer had subsequently lost her revocation case, she would have had no way to recoup her loss. Even if she were to prevail in her lawsuit, she would still be unable to afford a replacement car until the seller repaid her the car's purchase price.

While the court's solution to Ms. McCullough's problem probably was well-meant, it is problematic for two reasons. First, the defendant-dealer, despite his failure to respond to the plaintiff's problems, bore the entire cost of Ms. McCullough's use of her car from the time of the notice of revocation until the trial. Second, the court's approach ignores the Code's dictate that the buyer may not use a defective good after notifying the seller of revocation of acceptance.

The McCullough court's approach, as well as the other theories, represent attempts by the courts to help the revoking buyer who is constrained by economic exigencies to use the defective good after revocation. Fairly read, however, the Code prohibits such use. Moreover, postrevocation use may work an injustice upon the seller. In no way does the prohibition against postrevocation use leave the buyer remediless; he may still sue for damages.

81. Id.
82. Id. at 182, 449 N.E.2d at 1291.
83. Id. at 184, 449 N.E.2d at 1293.
84. See infra note 115 and accompanying text.
86. Id. at 37.
87. See infra notes 90-121 and accompanying text.
88. See infra notes 122-28, 138-53 and accompanying text (discussing offset problems). But see infra notes 129-37 and accompanying text (discussing advantage to seller of giving offset equivalent to rental value).
89. See infra notes 154-66 and accompanying text.
II. Code Drafters' Intent: No Use After Revocation

A. Generally

The Code drafters apparently intended that postrevocation use would invalidate revocation of acceptance. Section 2-608, which sets out the revocation of acceptance provision, was meant to replace sections 69(1)(d), (3), (4), and (5) of the Uniform Sales Act (USA), which codified the common-law remedy of rescission. Section 69 of the USA provided a buyer with two options when there was a "breach of warranty by the seller." The buyer could refuse to accept the goods, which is analogous to the UCC remedy of rejection, or could rescind the contract, which is analogous to the UCC remedy of revocation.

The USA's broad language included no standard or degree of breach to explain what was necessary to invoke the two remedies. The Code drafters abandoned the USA's broad requirements and crafted a revocation of acceptance provision with a narrow scope. Under U.C.C. section 2-608, a buyer may revoke his acceptance if the lot or commercial unit's nonconformity "substantially impairs its value to him." In drafting the rejection section, on the other hand, the Code authors established a lower standard. Section 2-601

90. U.C.C. § 2-608 comment (Prior Uniform Statutory Provision).
92. UNIF. SALES ACT § 69(1) (superseded 1951), reprinted in I. MARIASH, A TREATISE ON THE LAW OF SALES 780 (1930).
93. UNIF. SALES ACT § 69(1)(c) states:
(1) Where there is a breach of warranty by the seller, the buyer may, at his election
... (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty ... .
95. UNIF. SALES ACT § 69(1)(d) states:
(1) Where there is a breach of warranty by the seller, the buyer may, at his election
... (d) Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.
96. U.C.C. § 2-608.
97. For a discussion of the test that the goods be "substantially nonconforming to him," see J. WHITE & R. SUMMERS, supra note 33, § 8-3, at 305-09 (arguing that "substantially nonconforming" is the same as "substantially nonconforming to him").
allows the buyer to reject "if the goods or the tender of delivery fail in any respect to conform to the contract." The UCC authors could have drafted a revocation section that retained the broad language of the USA or even used the expansive phrasing of the Code's rejection provision, but they chose not to do so. The narrow standard for the revocation of acceptance section indicates that the drafters considered revocation to be a restricted remedy.

The Code authors used a high revocation standard because they believed that once a buyer has held goods long enough for an acceptance to occur, he should be able to return the goods to the seller in only limited circumstances. Several policy reasons support this idea. First, if the buyer has had custody of the goods the defect may be his fault. The longer the buyer possesses the goods, the more likely this becomes. Also, the goods depreciate while the buyer is in possession. Furthermore, the buyer receives an increasing benefit from the goods the longer he is able to use them. In sum, "all of these factors support a rule which makes it difficult for the buyer who has accepted to throw the goods and the attendant loss from depreciation and market factors back on the seller." Allowing postrevocation use would be inconsistent with the Code drafters' pattern of restricting the revocation of acceptance remedy. Moreover, the same policies that support a high level of breach in the revocation of acceptance situation militate against

98. U.C.C. § 2-601. But see Whaley, Tender, Acceptance, Rejection and Revocation—the U.C.C.'s "Tarr"-Baby, 24 DRAKE L. REV. 52 (1974) (Code does not require perfect tender); J. WHITE & R. SUMMERS, supra note 33, § 8-2, at 296-97 (arguing that the rejection standard is closer to "substantial nonconformity" than perfect tender).

99. Even though U.C.C. § 2-608 contains further requirements for revocation which are similar to the requirements of rescission under UNIF. SALES ACT § 69, the standard under revocation is still higher than that under UNIF. SALES ACT § 69. UNIF. SALES ACT § 69(3) states:

Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

100. J. WHITE & R. SUMMERS, supra note 33, § 8-3, at 301. See also Johnson v. General Motors Corp., 233 Kan. 1044, 668 P.2d 139 (1983) (buyer's right to reject goods easier to sustain than revocation of acceptance after buyer has held goods for period of time).

101. J. WHITE & R. SUMMERS, supra note 33, § 8-3, at 301.

102. Id.

103. Id.

104. Id.

105. Id.
postrevocation use. If a buyer is allowed to continue to use goods after revocation, he may aggravate the defect that is the basis of his revocation, depreciate the goods further, and derive additional benefit from them at the expense of the seller.

The Code drafters provided additional evidence that they did not intend the new remedy of revocation of acceptance to include continued use of revoked goods in comment 1 to section 2-608. There the authors noted that "the prior basic policy [of section 69 of the USA] is continued [even though] the section no longer speaks of 'rescission.'" The policy behind section 69 of the USA was to prevent a seller from forcing a buyer to perform a bargain that he never intended to make. Under the USA, however, this goal could be accomplished without allowing continued use of the goods after the buyer had rescinded the transaction. The USA provided that the buyer "hold the goods as bailee for the seller" upon the seller's refusal to accept the buyer's offer to return the goods. This imposition of a bailment, which was consistent with the common-law remedy of rescission, implies that the buyer should only hold the goods, not use them. Thus, assuming the Code authors accepted the "prior basic policy" of the USA and yet limited the use of the remedy by requiring a higher level of breach, it is even more unlikely they also would have provided for postrevocation use. The Code authors' restriction of the scope of the USA rescission remedy when they drafted the revocation of acceptance provision, therefore, supports the view that the Code does not allow continued use by the buyer after an attempt to revoke.

B. Exclusive Code Options for the Revoking Buyer

The options for dealing with goods after revocation of acceptance that the Code gives the buyer likewise reveal the Code's disap-

106. U.C.C. § 2-608 comment 1.
107. See Williston, Rescission for Breach of Warranty, 16 HARV. L. REV. 465, 472 (1903). The comment to UNIF. SALES ACT § 69 refers to this article by Samuel Williston, drafter of the Uniform Sales Act, as embodying the policy of that section. In the article, Williston wrote about a horse buyer:

He wants to be perfectly sure that he is getting a sound horse, and if the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make as is any [buyer] if compelled to perform his part of a contract when the [seller] is materially in default.

108. Williston, supra note 107, at 472. UNIF. SALES ACT § 69(5).
109. Where the purpose of a bailment excludes any use of the subject matter or any control or dominion over it other than the physical possession and care, the bailee is regarded as having mere custody. See Chanock v. United States, 267 F. 612 (D.C. Cir. 1920); Williams v. State, 165 Ind. 472, 75 N.E. 875 (1905).
proval of postrevocation use. The Code provides several options for revoking buyers through the Code sections that set out the steps for rejecting buyers, inasmuch as section 2-608 places the revoking buyer in the position of the rejecting buyer. Buyers are classified into two categories in these sections: buyers without a security interest in the goods because no payment has been made on the purchase price and buyers with a security interest to the extent that payments have been made and expenses have been incurred caring for the goods. The Code provides different options for these two types of buyers.

The buyer without a security interest in the revoked goods is instructed under section 2-602 to hold the goods “with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.” The buyer has no further obligations concerning the goods under the section, in contrast to the former requirement under common-law rescission and the USA that the buyer return or offer to return the goods. If the seller fails to give instructions within a reasonable time after being notified of the revocation, section 2-604 allows the buyer to store the goods for the seller, reship them to him or resell them for the seller’s account. The Code explicitly states that such action is not an acceptance or a conversion.

The purpose underlying section 2-604 limits what the buyer may do with respect to goods after revocation of acceptance. He may take a variety of actions to preserve the goods in order to “reduc[e] the stake in dispute” between the parties as long as he acts in good faith. Section 2-604 intends that a seller who is forced to take back goods after proper revocation by the buyer recover as much of the value of the goods as possible in the form of the goods themselves. Thus, it obligates a buyer to take good faith measures to preserve the goods in the postrevocation period. Inasmuch as use will almost always decrease the value of the goods, thereby increasing the stake in dispute, use is generally incompatible with the preservation and salvage objectives of section 2-604. Buyer options

110. See supra text accompanying note 29.
111. U.C.C. § 2-711(3).
112. Id. § 2-602(2)(b).
113. Id. § 2-602(2)(c).
114. UNIF. SALES ACT § 69(1)(d).
115. U.C.C. § 2-604.
116. Id.
117. Id. § 2-604 comment.
under section 2-604, then, include use only in the extremely rare case when use would serve the preservation and salvage objectives.

Section 2-711 of the Code grants revoking buyers an express remedy. It permits them to "cover" and recoup damages under section 2-712. Thus, the buyer may in good faith make any reasonable purchase of goods to substitute for those due from the seller, and may recover the difference between the cost of cover and the contract price. The Code treats a buyer with a security interest differently from one without such an interest. A revoking buyer has a security interest in the goods to the extent of payments that have been made and expenses that have been incurred in caring for the goods. This security interest gives the buyer the right to use the goods by application of section 9-113 but only in the limited circumstances spelled out in section 9-207(4). Under section 9-207(4) a secured buyer "may use or operate the collateral for the purpose of preserving the collateral or its value." Thus, the Code explicitly permits use of revoked goods only in a very limited and undoubtedly rare instance: when that use will preserve the goods.

The Code specifies the options for a revoking buyer in considerable detail. The fact that use of the goods after revocation was even mentioned in one section indicates that the drafters considered it an option for the revoking buyer and felt that it should be severely limited. Had they intended use to be an option for an unsecured buyer, it is difficult to understand why they chose not to include it among the options listed in section 2-604 inasmuch as they did include it in those sections dealing with a secured buyer. Finally, had the Code drafters contemplated allowing unlimited use, they would not have placed such severe restrictions on use by secured buyers after revocation.

118. U.C.C. § 2-711(1)(a), (b) states in pertinent part:
(1) Where . . . the buyer . . . justifiably revokes acceptance then with respect to any goods involved . . . the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
   (a) "cover" and have damages under [U.C.C. § 2-712] as to all the goods affected . . . or (b) recover damages for non-delivery as provided in [U.C.C. § 2-713].
119. Id.
120. Id. § 2-711(3).
121. Id. § 9-207(4).
III. OFFSET PROBLEMS CREATED BY THE COURTS’ EXPANSION OF REVOCATION OF ACCEPTANCE

"An 'offset' may be defined as a claim that serves to counterbalance or to compensate for another claim."\(^{122}\) In cases where use after notice of revocation has occurred the seller usually is awarded an offset for the buyer's continued use of the revoked goods. This amount is then set off against the returned purchase price demanded by the buyer.

The Code makes no mention of an offset award, either for use prior to or subsequent to revocation. The Code's silence concerning an offset for prerevocation use is probably attributable to its requirement that the revocation occur "before any substantial change in condition of the goods which is not caused by their own defects."\(^{123}\) A few Code cases, however, have permitted the buyer to revoke the acceptance after use and have credited the seller with the value of the buyer's use prior to the revocation.\(^{124}\) Courts have given the seller this credit when the buyer, relying on the seller's assurances and continued attempts to fix the goods, substantially changes the goods.\(^{125}\) This approach appears to be consistent with the equitable theory of restitution which the Code implicitly preserves.\(^{126}\)

An offset for the buyer's continued use has been awarded more frequently in postrevocation use cases in which use after a revocation of acceptance was allowed.\(^{127}\) In making the offset award,

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123. U.C.C. § 2-608.


126. U.C.C. § 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions" (emphasis added).

these courts also look to the general principles of equity retained in the Code under section 1-103. 128

A. Offset Based on Rental Cost

Some courts have set the measurement for the offset as the rental value of the goods for the time they were used by the buyer. 129 These courts act in harmony with the spirit of revocation, recognizing that it differs from a damage award for a breach of warranty. In a damage award, the buyer receives the difference between the values of what was promised and what was delivered. 130 Under revocation, however, the buyer escapes the bargain, and throws any loss resulting from depreciation of the goods back upon the seller. 131 When a court calculates the offset with rental costs of a similar good, it is only allowing depreciation occurring from the date of receipt of the goods until the date of notice of revocation to be forced back onto the seller. Depreciation occurring after notice of revocation is given to the seller is considered part of the rental cost and is thus paid for by the buyer.

Although rental cost may appear to be the most equitable method of calculating the seller's offset, it raises several problems. Revoking acceptance of a car provides an illustration. First, rental cost calculation has a harsh effect upon the buyer. If the cost of renting an auto from a retail short-term auto agency is used, a great deal of the purchase price could be consumed in only a short period of time. 132 The use of long-term leasing prices appears to be a fairer basis for offset calculation. 133 It would be inequitable, however, to allow the lower cost of long-term leasing only if postrevocation use continued for more than a year. This approach would reward the buyer whose lawsuit stretched over a long period of time.

Second, the rental cost calculation does not include the buyer's costs incurred through using a defective automobile. The buyer

129. E.g., Jorgensen, 274 Or. at 292, 545 P.2d at 1386; Pedrini, 1 Wash. App. at 61, 459 P.2d at 79.
130. U.C.C. § 2-714(2).
133. Id. at 332.
may have received the benefit of transportation, but he also was burdened by the inconvenience of constantly returning the car for repairs, uncertainty in planning, missing of work, and general annoyance. The Restatement of Restitution allows the application of this countersetoff, and the Code provides incidental and consequential damages to a revoking buyer in section 2-715. Unfortunately, cases allowing the seller rental value as an offset for continued use usually include no discussion of section 2-715 and fail to take into account these buyer inconveniences.

Finally, the main rationale behind allowing continued use after revocation is to make the remedy of revocation of acceptance available to the buyer of average means who cannot afford to store, reship, or resell the goods. If a court chooses to award the seller a rental cost offset, the buyer's remedy will be inequitably minimized.

B. Offset Based on the Value of Reasonable Use

To prevent such unfairness to the buyer, other courts have taken a different approach when awarding an offset to the seller. Instead of restoring to the seller the value he lost by the continued use and depreciation of the goods, the court charges the buyer for the benefit he received by such use. However, such an award may be less than satisfactory to the seller for several reasons. In many cases the use value of the defective goods to the buyer may be trifling or nonexistent. Generally, the use value will not equal the further decline in the goods' overall value due to depreciation after notice of the revocation was given. The buyer thus pushes this additional loss back on the seller.

The Kansas Supreme Court, in Johnson v. General Motors Corp., discussed the issue of compensating the seller for the

134. Id. at 331.
136. Comment, supra note 132, at 331. See also Pedrini v. Mid-City Trailer Depot, Inc., 1 Wash. App. 56, 459 P.2d 76 (1969) (seller is entitled to reasonable rental cost of mobile home from buyer who received beneficial use).
137. See supra notes 77-89 and accompanying text.
buyer's continued use. It concluded that "[t]he proper set-off is the value of use of the goods received by the buyer after revocation of acceptance." The court believed that this result followed from the purpose of allowing revocation after acceptance: "to restore the buyer to the economic position the buyer would have been in if the goods were never delivered."

The *Johnson* case involved the revocation of a truck purchased for $11,119.65. The truck had been driven for two months and for 1,700 miles before notice of revocation was given. The buyer drove the truck an additional sixteen months before the case was tried. The revocation was held valid, and the only issue on appeal was the validity of the offset awarded to the seller for the buyer's postrevocation use.

The trial court had adopted a depreciation method presented by a General Motors expert witness for calculating the offset award. The witness had testified that an identical vehicle leased for a term of 18 to 24 months depreciates at a rate of 2.75% per month. The trial court used this figure to arrive at an offset of $4,702.94 which was 42% of the original purchase price. Thus, when an offset method includes a depreciation factor, the buyer suffers hardship while the seller is compensated for the buyer's postrevocation use of the goods.

The Supreme Court of Kansas rejected the trial court's calculation because it allowed the seller "to recover a setoff based upon a period of time from the seller's refusal to accept back defective goods until there is a judicial determination that the seller was wrong not to accept the buyer's revocation of acceptance." The Court instead relied on a Federal Highway Administration booklet entitled "Cost of Owning and Operating Automobiles and Vans 1982" as its basis of calculation. The booklet indicated that the value the plaintiff received from the use of the truck was 10.7 cents a mile. Since the plaintiff had driven the truck 14,619 miles after

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141. *Id.* at 1052, 668 P.2d at 146.
142. *Id.* at 1051, 668 P.2d at 145 (emphasis added).
143. *Id.* at 1052, 668 P.2d at 145-46.
144. *Id.* at 1046, 668 P.2d at 142.
145. *Id.* at 1051, 668 P.2d at 145.
146. This figure excluded all costs of operation, maintenance, lessor's return on capital, insurance and other expenses to obtain pure depreciation. *Id.*
147. *Id.*
148. *Id.* at 1052, 668 P.2d at 146.
149. *Id.*
150. The booklet stated that the cost of owning and operating a vehicle similar to the truck purchased by the buyers was 33.2 cents per mile. "After deduction of maintenance, gas
giving notice of revocation, the correct offset was calculated to be $1,565.23, which was 14% of the original purchase price.\textsuperscript{151}

The result of this lower offset is to burden the seller by the depreciation cost of use after notice of revocation. Courts have justified this result on the grounds that the seller could have avoided further depreciation of the goods simply by accepting the buyer’s revocation.\textsuperscript{152} This is an inadequate rationalization for such an inequitable result.

The delay between the notice of revocation of acceptance and the final judicial decision of whether the revocation is valid or not creates the need to calculate offset. In a perfect judicial system, the validity of the revocation of acceptance would be known the day of the notice. However, there is usually a considerable amount of time between the filing of a lawsuit and its final disposition. Should the seller refuse to take back the goods upon the buyer’s attempted revocation, the buyer may be burdened with nonconforming goods for a considerable period of time. Admittedly, the buyer’s decision whether to use the defective item after revocation is difficult, especially when it is a necessary consumer good for which payments are due. The seller, however, should have the right to challenge the revocation of acceptance. It is not fair to place the burden of continued use on him simply because of the buyer’s difficult financial position.

Thus, while a reasonable use offset based on the method used by the Johnson court allows the buyer to escape a bad bargain, it places all the resulting burden on the seller. The seller pays all depreciation costs of the goods occurring from the time of his receipt of notice from the buyer until the final disposition of the case. The Code authors did not allow for continued use after revocation—even if they had, the remedy of revocation was obviously not intended to allow the buyer to revoke and then to continue to use the deprecating goods without having to pay for them.

This dilemma over the calculation of offset is another indication that the Code authors did not intend to permit postrevocation use. The courts that allow such use imply that buyers would be remedyless otherwise. These courts, however, have failed to consider sec-

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 1052, 668 P.2d at 145-46; McCullough v. Bill Swad Chrysler-Plymouth, Inc., 5 Ohio St. 3d 181, 185, 449 N.E.2d 1289, 1293 (1983).
tion 2-714 of the Code, entitled "Buyer's Damages for Breach in Regard to Accepted Goods."\(^{153}\)

IV. DAMAGES—AN APPROPRIATE REMEDY WHERE POSTREVOCATION USE HAS OCCURRED

Section 2-711(1)(a) damages for revoked goods and section 2-714 damages for accepted goods are merely alternative benefit-of-the-bargain measures.\(^{154}\) A buyer, bound to his acceptance because his continued use made his revocation of acceptance ineffective, may still pursue damages for breach of contract under section 2-714.\(^{155}\) While revocation enables the buyer to escape the bargain and throw resulting depreciation back on the seller, a damage award will give the buyer the difference between the values of what was promised and what was delivered. Although the buyer must retain possession of the goods, he is compensated for what he did not receive. The Code authors have provided this alternative remedy and it should be employed when a buyer has continued to use goods after he has revoked acceptance.

In *Jones v. Abriani*,\(^ {156}\) the plaintiff-buyers sued for rescission\(^ {157}\) of a mobile home yet continued to use it "for a substantial length of time."\(^ {158}\) The trial court awarded the plaintiffs compensatory and punitive damages, and the defendants appealed.\(^ {159}\) The court of ap-

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\(^{153}\) U.C.C. § 2-714 states:

1. Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

3. In a proper case any incidental and consequential damages under the next section may also be recovered.


\(^{157}\) It was not clear whether the buyer's complaint requesting rescission rested on the theory of rejection under U.C.C. § 2-601 or revocation of acceptance under § 2-608. *Id.* at 567, 350 N.E.2d at 643.

\(^{158}\) *Id.* at 573, 350 N.E.2d at 646. No specific dates were given so it is impossible to determine how long they lived in the home before trial.

\(^{159}\) *Id.* at 560, 350 N.E.2d at 639.
appeals upheld the damage award even though it believed postrevocation use is allowed under the Code. The court wrote:

While rejection or revocation of acceptance is available to the plaintiffs in this case, we cannot say that those are the only reasonable remedies for such a wrong. Where the plaintiffs have wrongfully used an item for a substantial length of time after a valid rejection or revocation of acceptance has taken place, as in the case at bar, it may be appropriate for the trial court to let the parties accept the goods and then receive damages for the cost of repairs, rather than rescinding the contract.160

The plaintiffs in the case were awarded compensatory damages sufficient to repair all the defects in the trailer.161 Thus the buyers eventually received what they bargained for—a mobile home without defects. The trial court's damages-only approach obviated the need to rationalize postrevocation use and to calculate an offset award for the seller. Consequently, the most reasonable approach when postrevocation use is involved is for courts to require the buyer to use his alternative benefit-of-the-bargain remedy.

An examination of the ludicrous result that is possible in a case like Fablok Mills, Inc. v. Cocker Machine & Foundry Co. lends further support to this approach.162 In that case, a New Jersey appeals court reversed the trial judge's ruling that continued use of defective knitting machines by the plaintiff, a fabric manufacturer, invalidated its revocation of acceptance. The appeals court allowed the plaintiff to revoke its acceptance of the machines163 even though it had used them until they had no value.164 In a situation like that in Fablok Mills, the plaintiff will likely recover the same amount under either the damage remedy or the remedy of revocation of acceptance if rental cost is used to calculate the offset for the seller.165

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160. Id. at 573-74, 350 N.E.2d at 646 (emphasis added).
161. Id. at 575, 350 N.E.2d at 647.
163. The plaintiff was only allowed to revoke acceptance of 6 of the 10 machines involved, because it missed the statute of limitations on the first 4. Id. at 262, 310 A.2d at 497.
164. "The buyer depreciated the machines for tax purposes over an estimated useful life of eight years using the double declining-balance method." Note, Revocation Not Barred, supra note 16, at 772 n.55 (citing Appendix of Defendant-Respondent at Da71-Da72, Fablok Mills).
165. If it is assumed (1) that the contract price is evidence of the value of the promised goods, (2) that the cost of cover is zero, and (3) that the rental value of the defective machines over the seven-to-eight-year period that buyer used them is equivalent to the value of the delivered goods, then upon buyer's proving seller's breach, its recovery under either measure would be the same.

Id. at 772 n.56.
Since the result is the same or very similar regardless of which remedy is used, it appears foolish for courts to apply a strained analysis in an attempt to make postrevocation use appear to be permitted by the Code.

In most instances of postrevocation use a damage award will adequately compensate the buyer for the seller's breach. The buyer will not be able to push depreciation back on the seller or completely escape the bargain he has made since his continued use denies him the right to use the remedy of revocation. Thus, a damage remedy in such a situation is the only one completely fair to all the parties involved.

V. CONCLUSION

Courts have recently begun to rationalize postrevocation use under the Code. They have done so in an effort to make the remedy of revocation of acceptance available to consumer-buyers who lack the financial means to follow the Code's express options for the treatment of revoked goods.

At first glance, application of the remedy of revocation of acceptance in cases involving postrevocation use appears fair, especially when consumer-buyers are involved. On closer examination, however, it is inequitable to either the buyer or the seller depending on how it is applied. While the remedy allows the buyer to continue to use the defective goods after notice of his revocation, such use can subject him to an outrageous offset against his returned purchase price if the court calculates this award using the rental cost principle. If the court uses a reasonable use value in calculating the offset award, however, the buyer is in a better position but the seller is treated inequitably. He is made to bear the cost of the buyer's continued depreciation of the goods after his notice of revocation. Thus, either application of the remedy is unacceptable.

Courts faced with a buyer's postrevocation use should avoid using the remedy of revocation of acceptance. They should instead apply the benefit-of-the-bargain damage remedy. This approach enables the buyer to recover money damages sufficient to repair the

166. Damages may fail to be an adequate compensation if the item is a "lemon" that has no single irreparable defect, but rather a succession of major and minor problems. See Note, Buyer's Right to Revoke Acceptance Against the Automobile Manufacturer for Breach of Its Continuing Warranty of Repair and Replacement, 7 GA. L. REV. 711 (1973).

167. See supra notes 41-76 and accompanying text.

168. See supra notes 129-37 and accompanying text.

169. See supra notes 152-53 and accompanying text.
goods and bring them into conformity with what the seller promised to deliver. By consistently using a damage theory, courts will regain sight of the Code's goal of uniformity in commercial law and avoid the inequitable results that the remedy of postrevocation use now allows.

PATRICIA J. HRUBY

170. U.C.C. § 1-102(2)(c).