

LAW101DL, COMMERCIAL LAW, Secured Transactions, Professor Widen [draft-02-16-2020 | 2:30 pm]

LECTURE NOTES: CHAPTER 9, TEXT P. 611 and ff.

OUR STORE RESPONDS TO NONCONFORMING GOODS LECTURE NOTES

As lead into Chapter 9, we will use the fact pattern below to ask a number of questions about non-conforming goods. Before turning to this fact pattern, review the chart on TEXT P. 625.

FACTS: On February 15, 2019, Job Creator, Inc., a Delaware corporation (JC) sold an item of equipment to Carl Customer pursuant to a signed delivery contract. This good was delivered to Carl Customer's doorstep on March 15, 2019, by Dan Delivery who is an employee of JC. The contract payment terms are COD. Carl gave Dan a check in exchange for the equipment when Dan arrived at Carl's location. Carl took possession of the equipment, bringing it inside his property and storing it securely. Shortly thereafter, Carl examined the equipment--only to find that the equipment did not conform to the terms of the contract. Carl then wanted to reject the goods (or, alternatively, revoke his acceptance of the goods). Dan returned to JC's place of business, giving Carl's check to Marsha Manager (together with a writing signed by Carl acknowledging receipt of the goods). Marsha deposited the check later that day in JC's deposit account maintained with Big Bank, NA (BB), JC's primary bank who also provides JC with a properly secured revolving credit facility.

Q1. Can Carl rightfully reject the tender and delivery of the equipment on these facts?

A1. On these facts Carl may rightfully reject the equipment.

Analysis: The facts merely state that "the equipment does not conform to the terms of the contract." No indication is given about the nature of the non-conformity or its materiality. This, however, is all we need to know. UCC Article 2, s.2-601, adopts the "perfect tender" rule. Any non-conformity, even a minor or non-material deviation between the goods and the contract terms, entitles Carl to rightfully reject the goods.

[begin statute quote]

s. 2-601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

[end statute quote]

If "the goods or the tender of delivery fail in any respect to conform to the contract" the buyer may reject the whole delivery under s.2-601. Note that goods may be rejected not only if the goods fail to conform but also if the "tender of delivery" fails to conform.

Q2. If a rejection of goods is "rightful" must Carl do anything else to make his rejection effective against JC?

A2. Yes. To make his rightful rejection "effective" against JC, Carl must seasonably notify JC of the rejection. Pursuant to s.2-602(1) a rejection of goods "is ineffective unless the buyer seasonably notifies the seller."

Analysis: Carl must "seasonably" notify JC of his rejection. It does not appear from the statute that this notification must be in writing (though it is a good practice to document the fact of rejection and its timing in some tangible form). Note that the UCC describes when an action is taken "seasonably."

[begin statute quote]

s. 1-205. Reasonable time; Seasonableness.

(a) Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time.

[end statute quote]

So, unless JC and Carl have agreed otherwise, the requirement of "seasonable" notice simply means that notice of rejection must be given within a reasonable time. What is a reasonable time must be determined with reference to the facts of the case.

The requirement that Carl "notify" JC is further informed by another UCC definition provision, s.1-202(d), which does not require that JC actually learn of Carl's rejection. Carl must simply take steps reasonably required to inform JC of its rejection of the goods in ordinary course--and it does not matter whether JC actually comes to know of the contents of the notice.

[begin statute quote]

s. 1-202. Notice; Knowledge.

* * *

(d) A person "notifies" or "gives" a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

* * *

[end statute quote]

Even though notice can be given within the meaning of the Code if the intended recipient of the notice never receives it, the better practice for any material transaction would be to mail the notice, certified and return receipt requested, to provide evidence that notice was given and establish its timing.

Q3. If Carl has made a rightful and effective rejection of the equipment, does JC get any opportunity to cure its breach?

A3. JC has a right to cure a non-conforming delivery following an effective rejection, but only in limited circumstances specified in s. 2-508.

Analysis: There are only two special situations in which JC might cure following a rejection of the equipment by Carl: (1) where the time for performance under the contract has not yet expired; and, (2) where JC had reasonable grounds to believe that the non-conforming delivery would be acceptable to Carl. Note that this right to cure in s.2-508 is available following a rejection of goods BUT NOT following a revocation of acceptance.

The statutory language of s.2-508 gives a cure right only where "tender or delivery by the seller is rejected." It does not give a cure right in the case of revocation of acceptance. It is an open question whether, prior to an effective revocation of acceptance, the seller should have a cure right based upon another section of the UCC. Section 2-608(1)(a) seems to suggest that a cure right be allowed before invoking that section as a basis for revocation of acceptance. This is because the acceptance being revoked under s.2-608(1)(a) was procured upon the implied promise of a cure which never materialized. Though this subsection mentions a "cure" it only

does so to explain why an acceptance was given in the first place, and why the acceptance is now being revoked. Significantly, the real fight under s.2-608(1)(a) will often be over whether a cure was effected "seasonably" and not over whether a cure right exists at all. By its very terms, this subsection contemplates that a cure was offered (or at least reasonably expected for some other reason). There will come a time when "enough is enough" and the buyer need not wait any longer for a cure. In these cases, it does not matter whether s.2-508 mentions rejection and not revocation. This is the situation in *M.C. Morris v. Inside Outside, Inc.*, 185 So. 3d 413 (Miss. Ct. App. 2016). [TEXT P. 619] I do not endorse the parenthetical description of this case which states: "(Mississippi recognizes that right to cure attends revocation even though not required by statute.)" I think the *M.C. Morris* case is simply about whether the cure offered did not come about seasonably. If a buyer accepts a good on the promise of a cure, the buyer must await the cure for a reasonable amount of time (which, in the absence of an agreement, simply means the buyer has to wait for a reasonable amount of time). The real issue is under Section 2-608(1)(b), which does not provide the seller with a right to cure prior to a proper revocation of acceptance. It is simply silent. The implication of silence might be that no cure right is available. However, s.2-608(3) says: "(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." This section might be read to imply a cure right because a buyer rejecting goods is subject to a cure right. Authority seems to favor the view that allowing an opportunity to cure is not a pre-requisite to revocation of acceptance under s.2-608(1)(b). See, e.g., Howard Foss, *The Seller's Right to Cure When the Buyer Revokes Acceptance: Erase the Line in the Sand*, 16 S. Ill. U. L.J. 1, 3 nn.7, 9 (1991); John A. Sebert, Jr., *Rejection, Revocation, and Cure Under Article 2 of the Uniform Commercial Code: Some Modest Proposals*, 84 Nw. U.L.Rev. 375, 391 (1990).

Courts being courts (and the law being complex--and not simply the UCC in isolation), you will find some case law which provides for a cure right when an acceptance is revoked. [TEXT P. 619] See also *Accettura v. Vacationland, Inc.*, 112 N.E.3d 1054 (Ill. App. 2d 2018)(holding that revocation under section 2-608(1)(b) requires giving the seller an opportunity to cure). The right to cure in the case of a revocation of acceptance is not necessarily based exclusively in the UCC statutory language. The *Accettura* case involved a consumer attempting to revoke acceptance. Under Federal Law, the Magnuson-Moss Act. Section 2310(d)(1) allows a consumer to bring suit where he is "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this [Act] or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1) (2012). However, "[n]o action *** may be brought under subsection (d) *** under any written or implied warranty or service contract *** unless the [warrantor] *** is afforded a reasonable opportunity to cure such failure to comply." *Id.* § 2310(e). The Magnuson-Moss Act does not define "reasonable opportunity to cure." Rather, it merely prescribes certain requirements with which a plaintiff must comply in order to recover under section 2310(d). All this being said, the courts in Illinois seem to read the UCC to require a cure right for a seller, even in the case of revocation of acceptance, whether under s.2-608(1)(a) or (b), and not simply in a case of rejection. The Supreme Court of Illinois granted an appeal in this case on Jan. 31, 2019.

Consider the relevant statutory provisions in s.2-508. These two situations arise rarely in practice.

[begin statute quote]

§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

[end statute quote]

On our facts, for s.2-508(1), assume that the contract between JC and Carl provided that delivery would occur at Carl's location not later than March 21, 2019. As the non-conforming delivery took place on March 15 (assuming JC learned of the non-conformity on that date), JC would have 7 days to make a conforming delivery. To avail itself of this cure right, JC would need to seasonably notify Carl of its intention to cure.

For s.2-508(2), assume that JC had a history of selling used camera equipment to Carl. The camera bodies are either all black or black with chrome trim (with the chrome trim versions selling for a 5% premium). The contract called for chrome trim cameras not later than March 15 but, at the time, JC had only all black cameras available to it. In the past, JC had delivered whichever version of camera it had available (despite the contract specification), and Carl had always accepted them (with an up or down price adjustment, as appropriate). For whatever reason, on this occasion, Carl rejected a delivery of all black cameras on March 15. JC may have a further reasonable time to substitute a conforming tender if it seasonably notifies Carl even though the contract required delivery not later than March 15.

Q4. How can Carl reject goods which he has paid for and taken possession of--i.e. does not taking possession and making payment constitute acceptance of the goods?

A4. Taking possession of the goods and making payment does not constitute acceptance of the goods. Carl has a reasonable time after delivery or tender to reject goods. For an effective rejection, Carl must seasonably notify JC of the rejection as we saw above. This basic requirement allowing notification after delivery appears in s.2-602, along with the requirement of seasonable notice. Details of the buyer's inspection rights appears in s.2-513.

Analysis: The facts state that Carl examined the equipment shortly after he securely stored it. If this inspection occurred within a "reasonable time" within the meaning of the statute, then Carl may reject the goods.

[begin statute quote]

§ 2-602. Manner and Effect of Rightful Rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

* * *

[end statute quote]

UCC Article 2, s.2-513 specifically contemplates that inspection may follow delivery and tender. On our facts, the payment terms were specified to be COD. COD payment terms require immediate payment on tender. Inspection must follow payment in a COD transaction. Moreover, on our facts the contract was a delivery contract. A delivery contract requires the seller to send the goods to the buyer. In such a case, inspection of the goods may be after their arrival. In the general case, the buyer has the right to inspect the goods before payment or acceptance but it need not do so.

[begin statute quote]

s. 2-513. Buyer's Right to Inspection of Goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

[end statute quote]

Article 2 of the UCC contemplates that the buyer will discover any non-conformity during the inspection period. In a case in which the non-conformity is not discovered during the inspection period, the buyer may REVOKE its acceptance of goods, if the statutory requirements for revocation are met (about which more below).

If the buyer rightfully rejects delivery of tendered goods, then the buyer may (i) "cancel" the contract, (ii) "recover" so much of the purchase price as has been paid and (iii) avail itself of the remedies specified in s.2-711--which include the recovery of damages and the right to "cover". The remedies specified in s.2-711 include specific performance, replevin and recovery of the goods in appropriate cases. On our facts, specific performance and similar remedies make no sense because Carl is in possession of the equipment--his goal is not to obtain the equipment but rather to get rid of the non-conforming goods and recover the purchase price he paid COD by check. In the case where Carl has possession of the equipment, s.2-711(3) provides that Carl has a security interest in the equipment to secure repayment of the payments made on the price, as well as certain reasonable expenses.

[begin statute quote]

s. 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

* * *

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

[end statute quote]

On our facts, Carl will have a security interest in the equipment based on its rightful rejection of delivery. It has this security interest to secure repayment of the purchase price that it paid to JC when Dan transferred possession and Carl paid by giving Dan a check in accordance with the COD delivery terms. This security interest depends, in part, on the fact that Carl has the equipment in his possession (e.g. he stored the equipment securely). This security interest should protect Carl against various creditors of JC. However, on our facts, there is one creditor in particular that Carl should be concerned about--BB. Consider the following additional facts.

ADDITIONAL FACTS: As noted above, JC has a revolving credit agreement with BB. This credit agreement is secured by a security interest in all personal property assets of JC. JC signed a security agreement stating that it secures all advances and extensions of credit under the revolving credit agreement made from time to time. The granting clause of the security agreement creating the security interest covers, among other assets, "all equipment, inventory, accounts, chattel paper and deposit accounts of JC, whether now owned or hereafter acquired." This kind of security interest is common. In business jargon it is sometimes called a "blanket" security interest (because it covers all the property of the debtor).

Suppose that BB properly filed a financing statement with the Delaware Secretary of State on April 1, 2018, to perfect its security interest. And, suppose that JC's bank account is maintained at BB.

In some cases (such as a sale outside the ordinary course of business), BB's security interest will continue in the equipment despite its sale by JC to Carl. If BB's security interest continues in the equipment, then a conflict between BB's Article 9 security interest and Carl's security interest created by s.2-711(3) may arise. UCC s.9-110 specifically addresses this situation. To properly read this statutory provision, understand that the "debtor" referred to is JC. Until JC obtains possession of the equipment (such as would occur if JC returned the purchase price to Carl, with Carl relinquishing possession at that time), the security interest of Carl is enforceable without the need to satisfy the attachment provisions of s.9-203, no filing is needed to perfect Carl's security interest, Carl's rights are governed by Article 2 and Carl's security interest has priority over the security interest of BB (i.e. a conflicting security interest created by JC). Consider how the provisions of s.9-110 fit our facts.

[begin statute quote]

s. 9-110. SECURITY INTERESTS ARISING UNDER ARTICLE 2 OR 2A.

A security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5) is subject to this article. However, until the debtor obtains possession of the goods:

- (1) the security interest is enforceable, even if Section 9-203(b)(3) has not been satisfied;
- (2) filing is not required to perfect the security interest;
- (3) the rights of the secured party after default by the debtor are governed by Article 2 or 2A; and
- (4) the security interest has priority over a conflicting security interest created by the debtor.

[end statute quote]

Q5. Can Carl accept the equipment by mere silence following his payment and receipt of possession?

A5. Yes. If Carl fails to make an effective rejection, Carl is deemed to have accepted the equipment. This type of acceptance, however, only occurs after Carl has had a reasonable opportunity to inspect the equipment. See s.2-606.

Analysis: For Carl to make an effective rejection of goods, recall that he must seasonably notify JC. In the usual case, this will require that notice be given within a reasonable amount of time following receipt of the goods and, if applicable, payment (if the goods were not simply rejected up front). Once this reasonable amount of time has passed, it is no longer possible to make an effective rejection of the goods. Thus, by default, the passage of time itself operates as an acceptance. In fact, in the vast majority of cases, acceptance by this sort of inaction occurs. Of course, an acceptance may be more overt--e.g. if the buyer says "I accept" or "I accept, despite a non-conformity." And, conduct inconsistent with the seller's ownership may impute an acceptance (e.g., if the buyer modified or customized the goods in some way). The case of *Davis v. Vintage Enterprises, Inc.*, 209 S.E.2d 824 (N.C. App. 1974)[TEXT P. 626] presents a case in which the court must decide on remand whether the plaintiff properly rejected the delivery of a trailer. Alternately, the appellate court in *Davis* notes that the case may be one in which the plaintiff accepted the trailer, but later revoked his acceptance.

[begin statute quote]

s. 2-606. What Constitutes Acceptance of Goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

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

[end statute quote]

Q6. Suppose that Carl fails to make a timely rejection of the equipment, is there any other way that Carl might avoid or cancel the contract in case of a non-conformity of the goods?

A6. Yes. Under limited circumstances Carl may revoke his acceptance of goods.

Analysis: A buyer may REJECT a non-conforming delivery of goods for any non-conformity under the perfect tender rule--whether large, small or trivial. A buyer may REVOKE its acceptance in only limited circumstances--the non-conformity must substantially impair its value to the buyer. Moreover, the acceptance must have occurred either (1) because the buyer reasonably believed the non-conformity would be cured (and it has not been cured) or (2) the buyer did not discover the non-conformity by the time of acceptance because it was difficult to discover or the seller had made assurances (presumably which assurances did not materialize or prove correct). The revocation of acceptance must occur within a reasonable time after the buyer discovered or should have discovered the non-conformity (and prior to a change in condition of the goods not caused by a defect). As in the case of a rejection, a revocation is not effective until the buyer notifies the seller.

[begin statute quote]

§ 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

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

[end statute quote]

Q7. Suppose the equipment is non-conforming but Carl failed timely to reject the goods (and circumstances did not allow for a revocation of acceptance): Is there anything Carl can do to remedy the situation?

A7. Yes. Carl still may exercise remedies for breach of contract.

Analysis: Failure to reject the equipment simply means that Carl has accepted the equipment and is obligated to pay the price for the goods (if he has not already done so). "The buyer must pay at the contract rate for any goods accepted." See s.2-607(1). Carl may not "cancel" the contract and walk away. However, s.2-714 is a section that specifically authorizes a Buyer to seek damages for a non-conformity. Note, however, that to seek damages for a non-conformity "the buyer must, within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . ." See s.2-607(3).

WARNING: If a buyer fails to give this notice, the buyer will be liable for the price AND will have no remedy for damages. IMPORTANT: the requirement that the buyer give notice is not limited to a claim for breach based on a non-conformity of the goods to the contract. Notice must be given of "any breach" within a reasonable

time after the buyer discovers or should have discovered the breach. See, e.g. JM Smith Corporation v. Cherokee Pharmacy and Medical Supply Inc., 2016 WL 7971313 (D. S.C. 2016)(holding that notice must be given pursuant to s.2-607(3) to assert a claim based on improper pricing). [TEXT P. 620] BURDEN OF PROOF: The burden of proof is on the buyer to show that timely notice was given. This is why sending a tangible notice with proof of mailing is a good practice.

[begin statute quote]

§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(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.

[end statute quote]

Q8. What is Carl supposed to do with the equipment, if anything, following his rejection?

A8. On our facts, because Carl has already paid the price for the goods, Carl has a security interest in the equipment to secure repayment of the purchase price. Carl may proceed to sell the equipment to a third party to recover the purchase price.

Analysis: If Carl elects to proceed with a sale of the equipment, he must comply with the requirements of s.2-706 as if he were a seller reselling goods for which a buyer had breached by failing to take delivery. Unlike a reselling seller, however, Carl must account to JC for any proceeds received on the sale of the equipment in excess of that needed to repay the purchase price paid. See s.2-706(6). If Carl had not paid the purchase price (and did not have a security interest in the equipment) Carl would have a duty to hold the equipment with reasonable care at the seller's disposition for a time sufficient to permit JC to remove the equipment. See s.2-602(2)(b).

On our facts, we are not told whether Carl is a merchant. A merchant buyer has additional duties with respect to rightfully rejected goods. See s.2-603. In brief, if Carl is a merchant buyer and JC has no agent or place of business at the market of Carl's location (i.e. where rejection occurred in our fact pattern), subject to Carl's security interest, Carl has a duty to follow any reasonable instructions given by JC. If no such instructions are received and the goods are perishable (not likely to be the case with the equipment) or threaten to decline speedily in value (maybe with respect to the equipment in special circumstances), then Carl has an obligation to make reasonable efforts to sell the equipment.

[begin statute quote]

s. 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

[end statute quote]

Q9. Following a rejection or a revocation of acceptance of the equipment, who has title to the equipment--JC or Carl.

A9. Upon rejection or revocation of acceptance, title to the equipment pass back from Carl to JC.

Analysis: The return of title to JC shifts the risk of loss back to JC (subject to a claim by JC if Carl breaches its obligations to take reasonable care of the equipment). Following return of title to JC, if Carl exercises control over the equipment (other than the proper exercise of remedies pursuant to its security interest, if applicable), it may negate the rejection or revocation of acceptance. However, in certain limited cases, a buyer may continue to use non-conforming or defective goods following the giving of a notice of revocation if the continued use was "reasonable." Whether continued use was "reasonable" depends on the facts of the case, including consideration of whether the business needs or personal circumstances of the buyer compelled continued use. The "reasonable use" exception applies in the case of a notice of revocation but not so clearly in the case of a rejection. This makes sense because a revocation of acceptance typically would occur when the buyer later discovers a non-conformity. By that time, the buyer might have incorporated the use of the non-conforming good into its work flow.

DAVIS V. VINTAGE ENTERPRISES, INC.

[TEXT P. 626] Davis v. Vintage Enterprises, Inc., 209 S.E.2d 824 (N.C. App. 1974)

This case presented three possible inquiries for the trial court on remand.

"The pleadings and the evidence in this case raise an issue as to whether the plaintiff seasonably rejected the mobile home and notified the defendant of such rejection. While the plaintiff did not allege that he revoked his acceptance of the mobile home, the evidence raises this issue also; and, if the court should conclude that the plaintiff did not reject the goods, it then should consider whether the plaintiff justifiably revoked his acceptance."

"If the court should conclude that the plaintiff did not reject and did not revoke his acceptance, it then would be necessary for the court to consider the final issue raised by the pleadings and the evidence, i.e., whether the defendant breached its implied warranty of fitness. The measure of damages in that event 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 damages of a different amount,' G.S. § 25-2-714(2), plus incidental damages and such consequential damages as were within the contemplation of the parties. G.S. § 25-2-715."

[TEXT P. 636] The TEXT reprints what the trial court decided with respect to damages, apparently in the first trial. The court appears to have computed damages in an amount at odds with the direction later given by the appellate court (or, at least, not clearly following the statutory formulation). It seems that the court initially awarded a total of \$900 in damages, for a loss computed in two different ways: one based on a loss of fair market value of \$900 and a second for \$900 for breach of express and implied warranties. Further, no mention is made of possible incidental or consequential damages. Per s.2-714, the basic damage calculation for breach of warranty should have been: "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." However, as the appellate court noted in its remand, you only get to the damage calculation if the goods were accepted (and acceptance was not properly revoked).

On remand, the trial court found that the plaintiff had made an effective rejection of the mobile home. It found the plaintiff was entitled to the return of its purchase price, but did not find any incidental or consequential damages. On a further appeal, the appellate court found that the facts amounted to a revocation of acceptance (rather than a rejection), and remanded for a determination of incidental and consequential damages. *Davis v. Colonial Mobile Homes*, S.E.2d 802 (N.C. App. 1975).

2. QUESTION ABOUT VALENTINO

Does the successor section 9-110, supra, with its new subsection on priority, change the outcome in Valentino? No.

It's arguable that neither old 9-113 nor new 9-110 was intended to apply in this situation. It was intended for a case in which the buyer was not the debtor, such as: Seller [the debtor] owns equipment subject to a security interest created by Seller in favor of Lender. Seller sells equipment to Buyer. Lender's security interest continues. Buyer pays Seller for the equipment and then either rejects or revokes her acceptance giving rise to a 2-711(3) security interest. In this case, Buyer's Article 2 security interest would have priority over Lender's security interest created by Seller. You could argue in Valentino, however, apart from 9-110, that Defendant assignee took subject to Plaintiff's claims and defenses under section 9-404. Because the seller's rights against Plaintiff were subject to Plaintiff's claims secured by the Article 2 security interest, the assignee Defendant was subject to them, too, and its security interest was subordinated.

On January 15, 2019, JC sells an item of equipment to Carl Customer. This good is delivered to Carl Customer's doorstep. The payment terms are COD--and Carl pays cash for the equipment. Carl takes possession of the equipment. Immediately thereafter, Carl examines the equipment--only to find that the equipment does not conform to the terms of the contract. Carl then wants to reject the goods (or, alternatively, revoke his acceptance of the goods).

How is this basic fact pattern analyzed? Break the fact pattern down into a number of discrete and important subsidiary questions.

Can Carl rightfully reject the goods or revoke acceptance of the goods? Does a rightful rejection or revocation of acceptance depend on the nature of the nonconformity?

What are Carl's rights and duties with respect to the equipment following rejection or revocation of acceptance?

When is there a conflict between Carl's rights in the equipment and the rights of BB based on its security interest in JC's assets?

If there is a conflict between Carl's rights in the equipment and BB's security interest, which party's interest prevails?