

No. 124285

IN THE ILLINOIS SUPREME COURT

KIMBERLY ACCETTURA and ADAM WOZNIAK,)	Appeal from the Circuit Court
Plaintiffs-Appellants,)	of Kane County
v.)	Trial Court No. 14 CH 1467
VACATIONLAND, INC.,)	Appellate Court No. 2-17-0972
Defendant-Appellee.)	The Honorable David Akemann, Presiding

**ON APPEAL FROM
THE COURT OF APPEALS OF ILLINOIS, SECOND DISTRICT
THE HONORABLE DAVID AKEMANN, PRESIDING**

**BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
AND CONSUMERS FOR AUTO RELIABILITY AND SAFETY
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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I. STATEMENT OF INTEREST

The National Association of Consumer Advocates ("NACA") is a non-profit association of hundreds of attorneys and consumer advocates committed to representing consumers' interests. Our members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

Consumers for Auto Reliability and Safety ("CARS") is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of many landmark laws to protect the public and successfully petitioned the National Highway Traffic Safety Administration and various state agencies for promulgation of consumer protection regulations.

Amici's interest flows from their efforts to protect the uniformity, simplicity, and comprehensibility of Article Two. In the instant case, the rights of consumers and businesses coincide, because businesses also benefit from these principles. It is important that the courts not impose statutory interpretations of the UCC, which add to legal remedies terms and conditions that are not contained in the plain statutory language.

II. ARGUMENT

REJECTION AND REVOCATION: BUYER'S REMEDIES WHEN THE SELLER TENDERS GOODS THAT DO NOT CONFORM TO THE CONTRACT

A. Statutory interpretation

The matter before the court involves an issue of statutory interpretation. In *Sorce v. Naperville Jeep Eagle*, 309 Ill.App.3d 313, 722 N.E.2d 227, 242 Ill.Dec. 738, (2 Dist. 1999), the Appellate Court said:

In construing a statute, it is our duty to give effect to and ascertain the intent of the legislature. *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359, 368, 231 Ill.Dec. 80, 695 N.E.2d 853 (1998). In upholding this duty, we first look to the express language, as it is usually the best indicator of legislative intent. *Nottage v. Jeka*, 172 Ill.2d 386, 392, 217 Ill.Dec. 298, 667 N.E.2d 91 (1996). Statutory language that is clear and unambiguous requires that we not resort to other aids of statutory construction. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 149, 227 Ill.Dec. 753, 688 N.E.2d 90 (1997). It is improper for us to depart from the plain language by reading into the statute exceptions, limitations, or conditions which are not clearly expressed. *Bridgestone/Firestone*, 179 Ill.2d at 149, 227 Ill.Dec. 753, 688 N.E.2d 90.

B. The Uniform Commercial Code is a remedial code which must be applied liberally.

The issues in this matter involve the basic principles regarding the sale of goods which had their beginnings as early as the seventeenth century in a system of rules, customs, and usages, collectively known as the law merchant, that were adopted by merchants and traders to govern their transactions and solve their conflicts. Over the centuries these laws and the related laws dealing with commercial transactions were codified and eventually compiled into a uniform code known as the Uniform Commercial

Code (UCC), that has been adopted by all 50 states, the District of Columbia, and the Virgin Islands.¹

The National Conference of Commissioners on Uniform State Laws and the American Law Institute set forth the guiding principles and purpose of the UCC.

Uniformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction this Comment and those which follow the text of each section set forth the purpose of the various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.²

In support of the guiding principles and purpose of the UCC, and recognizing the basic remedial nature of the UCC, the Illinois legislature incorporated 810 ILCS 5/1-103 into its adoption of the UCC to guide the interpretation of the code:

Sec. 1-103. Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law.

(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) to simplify, clarify, and modernize the law governing commercial transactions;

1 Louisiana was the last of the states to adopt the Uniform Commercial Code, adopting it in 1990, but did not adopt Article 2, Sales, Article 2A, Leases, nor Article 6, Bulk Sales. (<https://www.sos.la.gov/BusinessServices/UniformCommercialCode/Pages/default.aspx>). Illinois version of the UCC is codified at 810 ILCS 5/1-101 *et seq.*

2 *Uniform Commercial Code 1972 Official Text with Comments*, National Conference of Commissioners on Uniform State Laws, The American Law Institute, West Publishing Co., (1972). The issues before the court deal with implementation of provisions of Article 2, Sale of Goods. Article 2 was part of the original Uniform Commercial Code approved in 1951. The Uniform Law Commission and American Law Institute approved a revised Article 2 in 2003, however, because the revision was not adopted in any state, it was withdrawn by both organizations in 2011, and the 1951 version of Article 2 is the most recent official version.

- (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
- (3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of the Uniform Commercial Code, 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, and other validating or invalidating cause supplement its provisions.

C. The sale of goods: two phases

The sale of goods is a finely choreographed transaction between a seller and a buyer in which the responsibilities and remedies of the parties to the transaction are governed by the UCC. If one looks at the transaction, one will see that the sale transaction typically consists of two distinct phases. The first phase consists of the responsibilities and remedies that pertain to the parties before the goods are accepted by the buyer, and the second phase consists of the responsibilities and remedies after the buyer has accepted the goods. The former phase is generally addressed in part 5 of the UCC, and the latter is generally addressed in part 6 of the UCC.

1. Rejection of goods

In every contract for the sale of goods, the seller has the obligation to tender goods to the buyer that conform to the contract, no later than a time that is specified in the contract, at a place chosen by the parties in the contract. Upon the seller's performance of tendering conforming goods within the time and at the place designated, the buyer is obligated to accept the goods and then to pay for the goods. The seller is entitled to acceptance of the goods and payment from the buyer.³ If the seller does not tender conforming goods, then the seller has breached the contract, and the buyer may, without breaching the contract, reject the goods and need not pay for the goods.

3 810 ILCS 5/2-507(1)

The Code does contemplate a situation where the non-conforming tender results in the buyer's rejection of the goods and establishes a limited right for the seller to remedy the non-conforming goods by providing a cure. If the time for tendering conforming goods has not yet passed, the seller, upon seasonable notification given to the buyer, can cure the nonconforming goods by tendering a replacement with conforming goods, or perhaps repairing the goods to make them conform.⁴

2. *Revocation of acceptance of goods*

In situations such as described above, one thing is clear, the non-conformity which allowed the buyer to refuse to accept the goods,⁵ and instead reject the tendered goods was obvious to the buyer so that the buyer's obligation to accept the goods and pay for the goods was never triggered until such time as the nonconformity was seasonably cured. The Code also addresses a situation where the buyer, after recognizing that the goods were nonconforming, would nonetheless to accept the nonconforming goods upon the reasonable assumption that the seller would cure the non-conformity.

Sec. 2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it *unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.*

4 810 ILCS 5/2-508

5 Acceptance of the tendered goods by the buyer precludes rejection of the goods. 810 ILCS 5/2-607(2).

(810 ILCS 5/2-607) (emphasis added)

Official Comment 2 to this section of the code explains:

2. Under subsection (2) acceptance of goods precludes their subsequent rejection. Any return of goods must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

The buyer's remedy of revocation is addressed by the legislature in 810 ILCS 5/2-608:

Sec. 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.

Again, under the plain language of the statute, just as is true when the buyer knows of the non-conformity in the goods before acceptance, when the buyer accepts goods known to be non-conforming, the legislature in 810 ILCS 5/2-608(1)(a) provided a limited right to *seasonably* cure the non-conforming goods. The legislature has explicitly granted the seller a right, albeit limited, to cure the non-conforming goods in section 810 ILCS 5/2-508 and section 810 ILCS 5/2-608(1)(a).

The right has not been granted, however, under section 810 ILCS 5/2-608(1)(b), which is concerned with the situation where the buyer, either because of the difficulty in discovering the non-conformity or because of the assurances of the seller, does not discover the non-conformity before acceptance.

Moreover, that the right is not granted in section 810 ILCS 5/2-608(1)(b) is supported by section 810 ILCS 5/2-608(3) which provides that the buyer has "...same rights and duties with regard to the goods involved as if he had rejected them[,]" i.e. "...to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but ... no further obligations with regard to goods rightfully rejected."⁶

In a case on all fours with the instant matter, also a case of first impression in Michigan, the Michigan Court of Appeals held:

The Legislature explicitly granted the seller a right to cure in M.C.L. ' 440.2508; MSA 19.2508, and implicitly granted a similar right in M.C.L. ' 440.2608(1)(a); MSA 19.2608(1)(a) (acceptance with knowledge of a nonconformity that the seller will seasonably cure). The Legislature granted no such right in M.C.L. ' 440.2608(1)(b); MSA 19.2608(1)(b). We will not read a right to cure into ' 2-608(1)(b) where the Legislature granted that very right in other sections, but did not do so here.

Head v Phillips Camper Sales and Rental, Inc., 234 Mich.App. 94, 104; 593 N.W.2d 595 (1999).

This Court has had a long-standing duty to give effect to and ascertain the intent of the legislature when interpreting or applying a statute, *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359, 368, 231 Ill.Dec. 80, 695 N.E.2d 853 (1998). To accomplish its duty, this court looks to the language of the statute to

⁶ 810 ILCS 5/2-602(2)(b) and (c).

determine the legislature's specific intent, *Nottage v. Jeka*, 172 Ill.2d 386, 392, 217 Ill.Dec. 298, 667 N.E.2d 91 (1996), and if it finds the statutory language to be clear and unambiguous, this Court has always held that it is required that the Court not resort to other aids of statutory construction, and further, that it is improper for this Court to depart from the plain language by reading into the statute exceptions, limitations, or conditions which are not clearly expressed, *Bridgestone/Firestone*, 179 Ill.2d at 149, 227 Ill.Dec. 753, 688 N.E.2d 90.

The statute here, 810 ILCS 5/2-608(1)(b), is clear and unambiguous, and since the legislature did not grant the right of cure in that section, as it clearly did in other sections, applying the cardinal rule of statutory interpretation as this Court expressed in the cases above, the Court should not depart from the plain language by reading into it exceptions, limitations, or conditions which are not clearly expressed. The court below, however, failed to follow this Court's cardinal rule of statutory interpretation when it read into the statute a right to cure that was not granted by the legislature. In doing so, the court below ignored the policies that underlie the distinction in the UCC between rejection as set forth in 810 ILCS 5/2-508 and revocation as set forth in 810 ILCS 5/2-608.

Addressing this issue, the court in *Head* opined:

Further, to incorporate a right to cure into § 2-608 would ignore the policies that underlie the distinction between rejection and acceptance within the UCC. Under M.C.L. § 440.2601; MSA 19.2601, the buyer may reject a tender if the goods “fail in any respect to conform to the contract.” If a buyer rejects a nonconforming tender, the seller may have a right to cure the defect. MCL 440.2508; MSA 19.2508. The seller can also recover damages if the buyer wrongfully rejects. MCL 440.2703; MSA 19.2703. Once the buyer accepts the tender, however, he loses the ability to reject the goods. The buyer must pay for the goods at the

contract rate, M.C.L. § 440.2607(1); MSA19.2607(1), and may only revoke his acceptance if the defect substantially impairs its value to him. MCL 440.2608(1); MSA 19.2608(1). If the defect does not rise to this level of severity, the buyer is limited to those remedies available for a breach of contract. The seller, in turn, loses the right to cure, but gains the benefit of the higher substantial impairment standard for revocation. Further, if the buyer wrongfully revokes, the seller may recover damages. MCL 440.2703; MSA 19.2703.

Head, supra, at 104-105.

By failing to follow this Court's cardinal rule of statutory interpretation by reading into the statute a limitation on the buyer's remedy of revocation which was not clearly expressed by the legislature and which also ignored the policies in the UCC that underlie the distinction between rejection and acceptance, the court below committed error that should be reversed.

3. *Revocation was justified in this case*

Revocation of acceptance is a statutory remedy available to the buyer of goods when the value of the goods is substantially impaired to the buyer. The remedy replaces the older remedy of rescission which required the buyer to elect between the equitable remedy of undoing the contract or accepting the contract and seeking damages for breach. The buyer may seek both remedies under the Uniform Commercial Code.

A focus for the trier of fact is the determination that the value in the goods has been substantially impaired to the buyer. Under Illinois law, the test to be applied in making the determination is not an objective test. It is, rather, a subjective test. *GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill.App.3d 966, 978, 51 Ill.Dec. 245, 420 N.E.2d 659 (1981) (substantial impairment is

measured in terms of the particular needs of the buyer); *Overland Bond & Investment Corp. v. Learthurman Howard*, 9 Ill.App.3d 348, 360 (1st Dist. 1972) (three week delay in repairing the breaks); cf. *Stamm v. Wilder Travel Trailers*, 44 Ill.App.3d 530, 532 (5th Dist. 1976) (repairs that can be made in an hour for a mere \$10 do not constitute a substantial impairment of value for an RV).

A defense that is often asserted to revocation is that the buyer has not provided the seller with a sufficient opportunity to cure the problem that caused the impairment in value. Stated in another way: The seller was always willing to cure the problem, or the seller never refused to work on the problem or the problem could have been solved by the seller easily and/or inexpensively. This defense is really a red herring. It is put forward by the defendant in an attempt to confuse the trier of fact. As stated above, UCC 2-608(1)(b) does not require that the buyer provide the seller with an opportunity to repair before revocation can be effective. It provides only that there be a non-conformity that is devaluing in the view of the buyer, and that the buyer notifies the seller of the revocation. That is precisely what occurred in the case at bar.

The mere concept asserted by the defendant/appellee, that “cure” by the seller, in and of itself, can negate the buyer's revocation would seem to be a curious perversion of the statute. It is also a misstatement of the law. Similarly, it is interesting to note that the good intentions of the seller to attempt to cure the substantial impairment are also irrelevant to revocation. The commendable efforts of the seller to offer to cure or to in fact attempt to cure the non-conformity, does not relieve the seller of his obligation to deliver conforming goods. Whether the

seller acted in good faith or in bad faith with regard to the non-conforming goods, the buyer loses the substantial benefit of his bargain, and that justifies the buyer's revocation.

While it is true that the non-conformity which establishes the substantial impairment of value is often a physical non-conformity in the goods themselves, it is not required that it be a physical one. *Overland Bond, supra*, also stands for the proposition that a loss of confidence in the seller and manufacturer is a sufficient non-conformity to sustain plaintiff's burden of showing substantial impairment of value. In *Hart Honey Co. v Cudworth*, 446 N.W.2d 742 (S.Ct. ND 1989), the court held that breach of warranty can be a nonconformity that triggers and sustains revocation. In that case, a failure to timely deliver the goods was held to be a substantial impairment. In *Aamco Transmission v Air Systems, Inc.*, 459 N.E.2d 1215 (Ind.App. 1984), the court held that a repair which took two weeks when it was initially promised to be completed in one day, constituted a substantial impairment of value, sustaining a revocation.

In the case at bar, the plaintiff consumers have established that the value of the RV to them has been significantly impaired. They cite a defective condition of water leaking into the RV during inclement weather which not only caused destruction to the structure of the RV, but also to the electrical system. Their expert established the diminished value as ninety percent of the purchase price, i.e., that the RV was essentially worthless. They also site that attempts at repair were neither seasonable nor reasonable in length of time, and as a result, they lost confidence in the ability of the seller and the manufacturer to properly

cure this RV. They have lost the benefit of their bargain, and their revocation is justified.

III. CONCLUSION

The case at bar requires the court to interpret a clearly written, unambiguous statute. To do so, the court should apply its cardinal rule of statutory interpretation, to first look at the language chosen and used by the legislature to determine the legislature's intent for the statute. If the language is plain and unambiguous, as is the case with the Uniform Commercial Code as enacted by the Illinois Legislature, the plain language should be applied as written and the court should not read into the statute any exceptions, limitations, or conditions which were not clearly expressed by the legislature. The court below committed error by failing to follow this cardinal rule of statutory interpretation, and its ruling should be reversed.

Plaintiff-Appellants have factually established, seemingly without dispute, that the value of the RV that they purchased has been substantially impaired to them, the buyers. In addition, it is undisputed that the Plaintiff-Appellants did give notice of the condition that made the RV non-conforming and their resulting revocation to the seller. In doing so, they have fulfilled the requirements for justifying their revocation of the RV. The trial court committed error when it granted Defendant-Appellee's motion for summary judgment by reading into the statute governing revocation, a condition precedent, i.e., a reasonable right to cure *after* being given notice of revocation, which is not found in the plain language of the statute as enacted by the Illinois Legislature. Because of the error committed

by the trial court and affirmed by the Court of Appeals, Second Division, the trial court's judgment and the Court of Appeals affirmance should be reversed.

Respectfully submitted,
National Association of Consumer Advocates,
Consumers for Auto Reliability and Safety

/s/ Peter S. Lubin

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the appendix, is 13 pages.

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NOTICE OF FILING AND PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct: I, Peter S. Lubin, certify that I e-filed the above Brief of the National Association of Consumer Advocates and Consumers for Auto Reliability and Safety as Amici Curiae in Support of Plaintiffs-Appellants with the Clerk of the Supreme Court, and that I served a copy of this Brief of the National Association of Consumer Advocates and Consumers for Auto Reliability and Safety as Amici Curiae in Support of Plaintiffs-Appellants to the person(s) listed in the Service List by e-mail transmission to email address(es) listed in the Service List, at or before the hour of 11:59 p.m. on or before March 11, 2019.

/s/ Peter S. Lubin

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