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Defective Automobiles and the U.C.C.

William T. Stanley, Jr.*

THE AUTOMOBILE WARRANTY DISCLAIMER today is the subject of much controversy and abuse, often with good reason. The automobile purchaser has long suffered from being on the sticky end of a contract of adhesion. Those who own automobiles have all too often had unpleasant experiences with patent flaws, latent defects and shoddy repairs. But sympathy is generally coming to lie with the "aggrieved" buyer, and the warranty disclaimer is now under siege.¹ As these express disclaimers are increasingly invalidated by the courts, a familiarity with the implied warranties of merchantability² and fitness for purpose,³ and a working knowledge of remedies (for buyer and seller) become imperative.

Two interrelated topics will be covered in this discussion: warranty disclaimers under *Henningsen v. Bloomfield Motors*⁴ and under the Uniform Commercial Code (hereinafter referred to as "Code"); and rejection, revocation, and cure under the Code. *Zabriskie Chevrolet v. Smith*⁵ will also be examined, for this particular case contains one of the few opinions which actually attempts⁶ to fully apply the Code and its remedies to a warranty disclaimer situation.

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¹ In a news release of March 19, 1969 the Federal Trade Commission made public its Proposed Guides for Advertising Over-The-Counter Drugs (i.e., non-prescription drugs). Buried deep in the proposed Act is the following:

Guide 12(e). An express "guarantee" or "warranty" should not contain limitations, disclaimers or provisos which purport to deprive members of the public of any rights which they would have in the absence of such express provisions.

This may be the beginning of a significant trend. At least it signals the direction that the F.T.C. may be planning to take, and this in itself is important.

Also see *Federal Trade Commission Staff Report on Automobile Warranties* (undated report presumably published between 1966 and 1969, available through United States Congressman), which was conducted and prepared by the Bureau of Deceptive Practices and Bureau of Economics. In this report are actual case histories of warranty problems, statistics concerning all phases of vehicle reliability and warranty application, advertising, practices, etc.

² U.C.C. Sec. 2-314: (1) Unless excluded or modified (Sec. 2-316), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used.

³ U.C.C. Sec. 2-315: Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

⁴ 32 N.J. 358, 161 A.2d 69 (Supr. Ct. 1960).

⁵ 99 N.J. Super. 441, 240 A.2d 195 (1968).

⁶ Here, although the operation of applying the Code was successful, the patient died. This author feels that a wrong decision was reached.

In the *Zabriskie* case, the defendant, Smith, signed a form purchase order for a new Chevrolet automobile which was to be sold to him by Zabriskie Chevrolet, Inc. This automobile was "represented to the defendant to be a brand-new car that would operate perfectly."⁷ Eight days later, the defendant's wife took delivery of the automobile and was at that time presented with the manufacturer-dealer warranty, which contained a disclaimer clause of which neither she nor the defendant was aware.

The car was driven .7 miles when a small valve in the transmission failed, making the car virtually inoperable. The plaintiff had the car towed to its (the plaintiff's) repair shop and cured the defect by replacing the entire transmission.⁸

The defendant refused to take delivery of the repaired car and asserted a cancellation of the sale.⁹ Plaintiff then brought suit for the purchase price, and the defendant ultimately prevailed in the ensuing litigation.

Warranty Disclaimers

In *Zabriskie*, the warranty disclaimer was in fine print, number nine of eleven clauses, on the back of the sales contract signed by the buyer:

There are no warranties, express or implied, on Chevrolet motor vehicles sold by Dealer except the New Vehicle Warranty which Dealer, as seller, and not as agent of the manufacturer, gives to Purchaser on each new Chevrolet motor vehicle sold by the Dealer.

The court disqualified this disclaimer under Code Section 2-316(2), which reads:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must *mention merchantability* and in case of writing must be *conspicuous*, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous . . . language . . . is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." (Emphasis added.)¹⁰

⁷ *Zabriskie Chevrolet v. Smith*, *supra* note 5, 240 A.2d, at 197, 200.

⁸ The new transmission inserted into the automobile was removed from another brand-new similar vehicle in the plaintiff's showroom. The transmission was factory new and had never been used. This was a fact uncontroverted by the defendant. The precise reason for substitution of a whole new unit rather than replacement was never made clear. However, *quaere*: would not this factory built, new transmission be even a better form of cure than a dealer rebuilt unit (the original with a new valve)?

⁹ The buyer also stopped payment on the purchase money check.

¹⁰ For the text of the referenced U.C.C. Sec. 2-316(3) (b), see *supra* note 38.

The referenced U.C.C. Sec. 2-316(3) (c) states, "An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

Certainly the fine print on the back of the sales order could not be construed as "conspicuous,"¹¹ and many cases support this view of the court.¹² The language of the disclaimer was not challenged by the court, although other jurisdictions have held that a valid disclaimer of the implied warranties of fitness or merchantability must plainly state that there is no warranty that the product is reasonably suited for use as an automobile.¹³

The facts of the *Zabriskie* case show that the defendant did not receive the "New Car Warranty" booklet, which contained the specific disclaimers, until eight days after signing the sales order form. Presuming that the disclaimer on the sales order form failed, any reference contained in it alluding to the "New Car Warranty" would also fail. The "New Car Warranty" and its disclaimers must be invalid under basic contract principles since additional consideration is lacking to support such a subsequently received warranty.¹⁴

These disclaimers were disqualified for technical reasons, and many courts have employed this refuge to escape having to determine unconscionableness. The *Zabriskie* court went still further to discuss the lack of enforceability of the disclaimers before it, even if all the requirements of Code Section 2-316 (2) *had* been met.¹⁵ The buyer was held to be left

¹¹ U.C.C. Sec. 1-201(10) defines "conspicuous" as being "so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous, (or) . . . if it is in larger or other contrasting type or color."

¹² See *Dailey v. Holiday Distributing Corp.*, 151 N.W. 2d 477 (Iowa Supr. Ct., 1967), where a fine print limitation on warranty found upon the reverse side of a contract was branded by the court as "evasive concealment." See also *Minikes v. Admiral Corp.*, 48 Misc. 2d 1012, 266 N.Y.S. 2d 461 (Supr. Ct. 1966), in which a disclaimer, although on the front of an order, was smaller in type size than the rest of the order printing and was construed to be not conspicuous. See also *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C. 2d 225; 3 U.C.C. Rep. Serv. 808 (Ct. of Common Pleas, 1966), and *Boeing Airplane Co. v. O'Malley*, 329 F. 2d 585 (8 Cir. 1964), where the disclaimer was on the front of the contract in the same size type and color of printing as the main body, but was held to not be conspicuous. The U.C.C. was applicable here as provided by contract.

¹³ See *Willman v. American Motor Sales Co.*, 44 Erie Co. C.U. 51, 1 U.C.C. Rep. Serv. 100 (Ct. of Common Pleas 1961). See also *Boshkoff, Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. Ind. & Comm. L.R. 285 (1963), which applies the same philosophy to Henningsen (pre-Code): "The disclaimer in Henningsen should be considered invalid, not because it was imposed upon a small buyer by a big seller, but because it did not tell the consumer that he might expect his car to fail within a month of purchase."

¹⁴ In *Zabriskie*, *supra* note 5, the Court cites *Diepeveen v. Larry Vogt, Inc.*, 27 N.J. Super. 254, 99 A.2d 329 (App. Div. 1953), in which title to flower bulbs was found to have passed to the buyer previous to the effectiveness of the disclaimer, due to a "standing order." *Mack Trucks of Arkansas, Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. Sco. 99; 6 U.C.C. Rep. Serv. 93 (1969), and *Marion Power Shovel Co. v. Huntsman*, 246 Ark. Sco. 149, 6 U.C.C. Rep. Serv. 100 (1969) are two cases decided under the Uniform Commercial Code which hold that delivery of a disclaimer after a contract is made negates the disclaimer.

¹⁵ U.C.C. Sec. 2-316(2) states that "Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which

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in the possible position of having "to accept the vehicle, even if it did not operate," and the court reasoned that "this was obviously not the buyer's intention."¹⁶ Reliance was placed upon Code Section 2-719 which provides for contractual modification or limitation of remedy:

(1) (a). The agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to . . . repair and replacement of non-conforming goods or parts.

(1) (b). The contractual remedy may be expressly agreed to be exclusive and then it will be the sole remedy.

Such is the case under our hypothetically code-perfect disclaimer. But Code Section 2-719 (1), (a) and (b) are subject to Code Section 2-719 (2):

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

The Official Comment to 2-719 calls for "at least adequate remedies" to be available, "thus any clause purporting to modify or limit the remedial provisions of this Article in an *unconscionable* manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed." (Emphasis added.) Cross reference is made in the Official Comments to Code Section 2-302 which gives the court almost plenary power to modify an unconscionable (as defined by the court) contract.¹⁷ The Official Comment to Code Section 2-302 says that "the principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power" (emphasis added).¹⁸ A

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extend beyond the description on the face hereof.'" Contrast this with *Willman v. American Motor Sales Co.*, *supra* note 13. But, theoretically, the requirements of 2-316 could be met even if brightly colored ink, large type, and Willman court language were necessary.

¹⁶ *Zabriskie Chevrolet v. Smith*, *supra* note 5 at 290 A.2d 197. But, quare: in this situation wasn't the buyer given contractual protection as to repairs and replacement parts in the warranty? Would it be unconscionable for the buyer to have to accept an inoperative vehicle if the seller had to cure perfectly within a reasonable time? And is it practically possible or even feasible for any mass-manufacturer to produce complicated mechanical goods with "factory new parts which (will) operate perfectly as represented"? It would seem from the tenor of the language in the *Zabriskie* decision that no substitution of parts by the dealer will be allowed.

¹⁷ An excellent short explanation of the application of Uniform Commercial Code Section 2-302 is found in note, *Bargaining Power and Unconscionability: A suggested approach to U.C.C. Section 2-302*, 114 U. Pa. L. Rev. 998 (1966). For a more detailed account of history and application, see note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 Iowa L. Rev. 843 (1960).

¹⁸ *Campbell Soup Co. v. Wentz*, 172 F. 2d 80 (3 Cir. 1948), cited by the Official Comment to Uniform Commercial Code Section 2-302, involved an agreement for the purchase of carrots. The court refused to enforce the contract against the defendant grower, possibly because he was oppressed in a rising market, but ostensibly

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number of cases are cited by the authors of the Official Comment to Code Section 2-302 to supplement their explanation of Code Section 2-302.¹⁹

The leading cases decided on the basis of unconscionability all have one major common characteristic. Someone has suffered an unconscionable loss with no adequate remedy at law, and the court makes the loser whole through various equitable remedies.

But is the warranty disclaimer in the *Zabriskie* case unconscionable as to the buyer's remedies in this particular situation? The court refers to *Henningsen*, certainly a leading case of historic proportions, although pre-Code. In *Henningsen*, a buyer of a new car drove it 400 miles when it unaccountably went out of control and was totally wrecked. Due to the pulverized condition of the machine, the buyer was unable to make a case of negligence, *prima facie*. So, he sued the automobile dealer on breach of the implied warranty of merchantability, despite the standard disclaimer limiting the buyer's remedy to replacement or repair of defective parts. If the court had not equitably struck down the disclaimer, the buyer would have been left with only a new replacement part for the faulty item precipitating the wreck and a pile of useless junk, the remains of his shiny new automobile. The disclaimer as applied to those circumstances was inequitable and against public policy. The wrath of the *Henningsen* court rightly descended upon the disclaimer as "so inimical to the public good as to compel an adjudication of its invalidity."²⁰

The *Henningsen* decision was partially based upon *Myers v. Land*,²¹ which the *Zabriskie* court also quoted. *Myers v. Land* was decided

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because of several fine print clauses which were not at issue. 2-302 offers a choice, however, of allowing the court to delete only those clauses which it deems unconscionable and enforcing the balance of the contract. See note, Unconscionable Contracts Under the Uniform Commercial Code, 109 U. Pa. L. Rev. 401 at 413 for an expanded discussion of this case and its implications.

In spite of this hopeful admonition by the Comment, the modern trend may be toward equitable justice in spite of contractual agreement. A leading case in this area is *Williams v. Walker—Thomas Furniture Company*, 350 F. 2d 445 (D.C. Cir. 1965), where the court found that if the element of unconscionability is present at the time a contract is made, the contract should not be enforced. Terms such as "absence of a meaningful choice," "little bargaining power," "commercially unreasonable contract" are employed and give an insight into the direction of that court.

¹⁹ Among these cases are the following: *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P. 2d 1272 Sup. Ct. 1937), where the plaintiff suffered loss when defendant furnished moldy catsup; *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 144 S.E. 327 (1928), where the plaintiff's automobile had certain latent defects such as rendered it reasonably unsuited to the use intended; *Andrews Bros. v. Singer & Co.*, 1 K.B. 17 (1934), where the plaintiff was "stuck" with a used car instead of the new model he ordered; *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (Sup. Ct. 1922), where the buyer was left with a truck which wasn't rebuilt to the standards expected, and wouldn't do the work intended for it.

²⁰ *Henningsen v. Bloomfield Motors*, *supra* note 4, 161 A. 2d, at 95.

²¹ 314 Ky. 514, 235 S.W. 2d 988 (Sup. Ct. 1950).

equitably indicating that for every wrong there must be a right. The decision was justifiable in that a machine failed to fulfill its intended purpose of manufacturing concrete blocks. The theory espoused was more than a breach of warranty. Rather, there was no delivery of that which was bought.

But how is this applicable to *Zabriskie*? Modern leading cases²² decided against the validity of warranty disclaimers have been based upon real need, where the buyer has not, for one reason or another, been made whole as to the terms of the contract and the seller has sought refuge in a disclaimer. Out of these decisions two vaguely distinctive areas of case law have evolved.

The first group consists of those situations in which there is a complete and usually unexpected failure of the machine to accomplish the purpose for which it was intended. Personal injury is often claimed. The failure invariably results in acute and obvious loss to the purchaser (a typical example being *Henningsen*); and it can be a fault in original design such that the machine never works (*Myers v. Land*), or appear later as in *Henningsen*. But loss is always obvious.²³

The second group is built on claims of improper, insufficient or intermittent operation of the machine. These failures are a matter of degree and are characterized as chronic lingering problems which often are not solved by continuous repairs.²⁴ Here, again, the buyer has suffered loss, and is less than whole, although the amount of loss is usually less easy to prove than in the first group.

Zabriskie fits neither of these categories, for the defendant has been made whole. The plaintiff repaired the defect, and the fact that the automobile was as good as new after these repairs was uncontroverted by the

²² See *Greeno v. Clark Equipment Company*, 237 F. Supp. 427 (N.D. Ind. 1965), in which a defective forklift seriously injured the plaintiff; *Seely v. White Motor Company*, 45 Cal. Rptr. 17, 403 P. 2d 145 (Sup. Ct. 1965), where a truck bucked and "galloped," the defendant repeatedly attempted without success to correct the defect and the truck ultimately crashed; *Green v. Northeast Motor Company*, 166 A. 2d 923 (Muni. Ct. App. D.C. 1961), and *Rozen v. Chrysler Corp.*, 142 So. 2d 735 Fla. App. (1962) where the seller never was able to correct defects in the automobile after repeated attempts.

²³ See *Greeno v. Clark Equipment Company*, *supra* note 22; *Seely v. White Motor Company*, *supra* note 22; *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P. 2d 897 (Sup. Ct. 1962), where a Shopsmith lathe failed and caused injury to the plaintiff; *Walsh v. Ford Motor Co.*, 6 U.C.C. Rep. Serv. 56 (N.Y. Sup. Ct. 1969), where the plaintiff was injured in an automobile crash resulting from defects in throttle linkage and related parts.

²⁴ See *Green v. Northeast Motor Company*, *supra* note 22; *Rozen v. Chrysler Corp.*, *supra* note 22; *Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc.*, 68 Ill. App. 2d 297, 216 N.E. 2d 282 (1965), where an air conditioning unit never worked correctly, leaking water, etc.; *Massey-Ferguson, Inc. v. Utley*, 6 U.C.C. Rep. Serv. 51 (Ky. Sup. Ct. 1969), and *Sutler v. St. Clair Motors, Inc.*, 44 Ill. App. 2d 318, 194 N.E. 2d 674, 1 U.C.C. Rep. Serv. 125 (1963), where many attempted repairs of a tractor and of an Edsel automobile respectively were unsuccessful, and recovery was allowed.

defendant.²⁵ How had the defendant been injured? He had suffered no loss, had not changed his position to his detriment, and had been made whole as to the basis of the bargain. The "demands of social justice"²⁶ have certainly been met. Code Section 2-719 calls for "at least minimum adequate remedies," and certainly in this case the buyer had virtually a complete remedy. The cases contained in the Official Comment to Code Section 2-302, as mentioned above, all remedied wrongs in which the buyer suffered a loss and had no recourse under the contract to recover. Such is not the case in *Zabriskie*, in which the court's substitution of a new transmission by the dealer is labeled an "inadequate remedy," unconscionable, and against public policy, allowing Code Section 2-302 by dicta to bar the disclaimer's remedy.

Rejection, Revocation, and Cure Under the Code

This area of the Code is one of the least understood and most often abused or avoided;²⁷ yet the concept is not difficult. After an elusive point in time, acceptance takes place and rejection becomes revocation of acceptance. The importance of this fact is more than semantical, for the Code distinguishes the right of revocation of acceptance from that of rejection. The seller's right to cure may also be affected.

The New Jersey Official Comments to Code Section 2-606 correctly allude to the similarity between Code Section 2-606 and Sections 47 and 48 of the Sales Act.²⁸ This similarity is important because it allows the injection of pre-code case law as still valid law.²⁹ Code Section 2-606(1) relates to acceptance:

(a). Acceptance of goods occurs when the buyer after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming.³⁰

²⁵ Words of the plaintiff's Post-Trial Memorandum.

²⁶ *Henningsen v. Bloomfield Motors*, *supra* note 4, 161 A. 2d, at 83.

²⁷ An exception to this statement is *Bartus v. Riccardi*, 284 N.Y. Supp. 2d 222, 4 U.C.C. Rep. Serv. 845 (1967), in which a hearing aid was rejected by the buyer, but the seller was allowed to cure. The code is knowledgeably applied by this court, which also makes reference to excellent notes covering this subject, in 48 Cornell L. Quarterly 13; 29 Albany Law Review 260 (1968).

²⁸ It is interesting to note that the Official Comments to the Uniform Commercial Code and the Uniform Commercial Code cross reference table to the Uniform Sales Act only cross refers 2-606 to U.S.A. 48 and not U.S.A. 47. U.C.C. Sec. 2-513 is, however, referenced to U.S.A. 47.

²⁹ One major difference in the angle of approach is the pre-code concept of the passing of title in dealing with sales problems. Under the Uniform Sales Act a buyer's return of goods to a seller following passage of title to buyer would be a rescission of the contract, not a rejection of the goods. See *Alchian v. McDonald*, 40 Cal. App. 505, 181 P. 77 (1919).

³⁰ U.C.C. 1-204(1) defines reasonable time for taking any action as depending "on the nature, purpose, and circumstances of such action."

(b). Acceptance occurs when the buyer fails to make an effective rejection under 2-602(1), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect.³¹

Code Section 2-513(1) adds weight to the buyers right to inspect before accepting even if he has *previously* inspected the goods:

Unless otherwise agreed . . . 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.

Clearly under the Code a buyer is not deemed to have accepted the goods tendered by the seller until he has had a "reasonable time" to inspect, even though the goods are in his possession, and even though he had a previous opportunity to inspect. This concept is given strength because the framers of the Code deleted the emphasized portion of the Uniform Sales Act, Section 47:

47(1). Where goods are delivered to the buyer, *which he has not previously examined*, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (Emphasis added.)

It is implied in this language that a buyer who has examined goods before delivery and later accepts them waives his right to rescind.³² He has accepted. The Code does not contain this language or its implication (see Code Section 2-606, 2-602, 2-513). This obviously intentional deletion certainly indicates that the intent of the Code's Editorial Board was to ease restrictions on inspection.

Assuming, then, that the buyer has the right under the Code to possess and to inspect the goods prior to acceptance, the next question must be one of reasonable time for inspection by the buyer, and his seasonable notification of the defect to the seller. In this area, case law decided under Uniform Sales Act Sections 47 and 48 would apply (barring the disparity as to previous examination), for as compared above, these provisions are wholly adopted with little change by the Code as to time for notice, etc. These sections of the Uniform Sales Act were generally interpreted as allowing the buyer a reasonable time within which to examine the goods and even to allow the buyer to test the goods for a short time to determine whether or not they conformed to the contract.³³ Many

³¹ *Ibid.*

³² Rescission is a creature of the Uniform Sales Act. It had various often vague meanings. Here the meaning is probably best classed as "revocation of acceptance." The goods are restored to the seller but the contract remains intact. For an expanded explanation and case reference on this subject, see note, 11 UCLA L. Rev. 78, at 91 (1963).

³³ Williston on Sales § 475 (rev. ed. 1948).

cases support this assumption.³⁴ The New Jersey Study Commission which authored the New Jersey Official Comments to the Code referred to several cases which the *Zabriskie* court picked up as significant.³⁵ In *S. G. Young, Inc. v. B & C Distributors Co.*,³⁶ the buyer held certain resistors longer than a reasonable time (five months), and was held to have waived his right to reject.

Code cases abound which support the buyer's right to inspection of goods after possession, before acceptance.³⁷

In *Zabriskie* the buyer contended that a "spin around the block" and .7 miles of driving was not a reasonable opportunity to inspect. In light of cases noted above, in which latent defects were discovered even months after delivery, the *Zabriskie* court was certainly in the mainstream in ruling that the buyer had not exceeded his "reasonable opportunity to inspect." Also it was noted that the buyer could not have reasonably discovered the latent defect until it noticeably affected the performance of the machine.³⁸ The buyer had the right to inspect the goods before acceptance, and in the *Zabriskie* case he had not yet accepted.

But let us return to the question of what the requisites are which would enable a buyer to rightfully return a defective automobile.

³⁴ See *Anderson Hosiery Co. v. Dixie Knitting Mills, Inc.*, 204 F. 2d 503 (4 Cir. 1953), where a latent defect was not discovered by reasonable inspection before delivery, which was commenced as to the defective goods "a few months after March." Defects were not discovered until the end of June. Promptness of notification was deemed a question for a jury, but reasonable opportunity was given the buyer to inspect and discover defect. Also see *Square Deal Mach. Co. v. Garrett Corp.*, 275 P. 2d 46; *Storz Brewing Co. v. Brown*, 47 N.W. 2d 407, 154 Neb. 204 (Sup. Ct. 1951). An outstanding discussion is found in *Reliance Varnish Co. v. Mullins Lumber Co.*, 213 S.C. 84, 48 S.E. 2d 653 (Sup. Ct. 1948).

Also, the burden of proof of the unreasonableness of time of notice has been held to be on the seller. *Webster v. Klassen*, 109 Cal. App. 2d 583, 241 P. 2d 302 (1952).

³⁵ See *Paul Gerli and Company v. Mistletoe Silk Mills*, 80 N.J.L. 128, 76 A. 335 (1910), which offers a restatement of Uniform Sales Act Section 47; *Woodward v. Emmons*, 61 N.J.L. 281, 39 A. 703 (1898), where a buyer of stonecrushers discovered a defect, but continued to use the machines, thus waiving his right to the defense of total lack of consideration.

³⁶ 23 N.J. Super. 15, 92 A. 2d 519 (1952). New Jersey adopted the Uniform Commercial Code effective January 1, 1963.

³⁷ Typical are: *Myers v. Antone*, 227 A. 2d 56 (D.C. App. 1967), where purchaser executed a contract of sale in March and was allowed recovery upon discovering a faulty heating system in November; *Magnavox Company v. Royson*, 195 Pa. Super. 139, 169 A. 2d 559 (1961), where a buyer held defective goods for possibly as long as 22 months before returning.

³⁸ Citing *Massari v. Accurate Bushing Co.*, 8 N.J. 299, 85 A. 2d 260 (Sup. Ct. 1951), in which packaged bushings were not discovered to be defective for possibly as long as two years. The reasonableness of this length of time was held to be a question for the jury. This overruled any possibility of the *Zabriskie* defendant having waived his rights to claim an implied warranty:

U.C.C. 2-316(3) (b): When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

See the Official Comment to U.C.C. 2-316, number 8, for further explanation.

First, let us assume the buyer had accepted the goods. Under Code Section 2-607 (3) (a):

Where tender has been accepted 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.³⁹

Reasonable time in virtually all cases of this nature has been in terms of weeks or months.⁴⁰ But in *Zabriskie*, possession, discovery, and notice were almost concurrent. Certainly notice was within a reasonable enough period to allow revocation. Under Code Section 2-608 (2) it is again stated that the revocation of acceptance must occur within a reasonable time after acceptance, but more importantly under Code Section 2-608 (1):

The buyer may revoke his acceptance at a lot or commercial unit whose non-conformity *substantially impairs* its value if he has accepted it (a) without discovery of such non-conformity if his acceptance was reasonably induced . . . by the difficulty of discovery before acceptance (emphasis added).

This theory grew directly out of the Uniform Sales Act, in which Section 69(1) (d) allowed the buyer to "rescind" the contract in the case of breach of warranty,⁴¹ and refuse the goods or return them for price paid if already accepted. If the seller committed a material breach of the contract, "rescission" was generally allowed in accordance with the universal principle of contract law that the obligation on each side is impliedly conditioned on receiving the agreed counter performance.⁴² Williston said that the desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. The remedy of rescission, if allowed at all, was to be allowed on broad principles of justice.⁴³ The decisions allowing rescission did not generally make the right dependent upon the importance of the warranty or the extent of the breach of it.⁴⁴ Honnold⁴⁵ traces a slow retreat from "an inflexible rule of rejection."⁴⁶

³⁹ Under U.C.C. 2-607(4) the burden of proof is on the buyer to establish any breach with respect to the goods accepted.

⁴⁰ Typically: *Mahurin v. Schneck*, 390 P. 2d 576 (Ariz. Sup. Ct. 1964). Buyer bought business as of Feb. 1, learned of deficiencies and notified seller to remedy on Feb. 11. The seller did not remedy. Buyer then wrote a letter of rescission Feb. 18. This was held seasonable notice. *Boe v. Thorburn Herseth, Inc.*, 134 N.W. 2d 33 (N.D. Sup. Ct. 1965), held that 10 days after the purchase of a tractor was adequate time for rescission. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F. 2d 292 (3rd Cir. 1961), held that a ten month delay following the removal of the buyer's cancerous lung was not a bar to notice.

⁴¹ Under the Uniform Sales Act Section 69(1) (d), where there is a breach of warranty by the seller, the buyer may at his election "rescind the contract."

⁴² Vold, *Handbook of the Law of Sales*, 494 (1931).

⁴³ Williston, *supra* note 33 at § 608.

⁴⁴ *Ibid.*

⁴⁵ Honnold, *Buyer's Right of Rejection*, 97 U. Pa. L. R. 457 (1948-9).

⁴⁶ *Id.* at 97, U. Pa. L. Rev. 460.

In the area of revocation of acceptance Code decisions bear out the Uniform Sales Act demand for substantial or material impairment of value to the purchaser.

However, much to Honnold's distress,⁴⁷ the right of *rejection* under the Code takes another tack. The Code time limit for rejection is described as "reasonable" in Code Section 2-602 (1) (a):

Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer reasonably notifies the seller.⁴⁸

But the right of rejection under the Code is based upon the theory of "perfect tender," or delivery conforming to the contract in every respect under Code Section 2-601:

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.

Immediately, the definition of "conformity" becomes basic. Under Code Section 2-106 (2):

Goods . . . are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

The Official Comment to Code Section 2-106 says that Code Section 2-106 (2) is intended to continue the policy of requiring *exact performance* by seller of his obligations as a condition to his right to require acceptance.

So to allow revocation of acceptance, the Code demands a defect significant enough to *substantially* impair the value of the goods to the buyer. Yet, rejection is permitted upon *any* imperfection of tender. There can be no question that the *Zabriskie* automobile did not conform to the contract, or that the defect, however small, caused a substantial impairment of value to the buyer. The remedies of rejection or revocation of acceptance are both open to this particular buyer.

Revocation of acceptance and rejection both indicate the right of the buyer to return the goods to the seller, a simple concept. But is the contractual relationship terminated, or does the seller have a right to cure the defect and retender the goods? Generally, courts have avoided the issue by retaining the Uniform Sales Act concept (as it later became interpreted)⁴⁹ of granting "rescission" for substantial breach of warranty, and ignoring the Code.

⁴⁷ Honnold, *supra* note 44.

⁴⁸ U.C.C. Sec. 1-204 (2) indicates that an action is taken "seasonably" when it is taken "at or within a reasonable time."

⁴⁹ Noted as "the slow retreat," Honnold, *supra* note 44.

The "Buyer's Remedies in General" is the caption of Code Section 2-711:

Where . . . the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved . . . the buyer may cancel and . . . (recover) so much of the price as has been paid.

On its face this couldn't be a more obvious statement. But a disastrous blow would be dealt to free commerce if every buyer could reject for the smallest flaw⁵⁰ and cancel his contractual obligation under Code Section 2-711, so the Official Comment to Code Section 2-711 qualifies the application:

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for the delay involved.⁵¹

Also, the Official Comment to Code Section 2-106, which demands that goods be conforming to the contract, supports this qualification:

However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of Section 2-508 . . . moreover usage of trade frequently permits commercial leeways in performance.

This would indicate that the framers of the Code desired perfect tender, but also an equitable balance on the sellers side through Code Section 2-508 and trade customs:

- (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 (emphasis added).

In *Zabriskie*, Code Section 2-508(1) is satisfied as to seasonability of notice of intent to cure, which was simultaneous with the buyer's rejection. The retender of goods was made "within a day or so of the complaint,"⁵² and should be considered within the contractual time for delivery. If it is considered to be past the contractual dead-line, Code Section 2-508(2) would apply. Then the question of "reasonable grounds" arises. Did the seller reasonably believe that the automobile would be acceptable?

⁵⁰ Commonly referred to as the "perfect tender rule."

⁵¹ See U.C.C. Sec. 2-508.

⁵² *Zabriskie Chevrolet v. Smith*, *supra* note 5, Plaintiff's Post-Trial Memorandum.

Plaintiff Zabriskie Chevrolet, Inc. is a dealer. According to the facts, the plaintiff completed a dealer's routine checklist including seventy items of preparation and inspection of the new automobile, including a road test, which the vehicle passed. No evidence of the defect which appeared later was found by the plaintiff or noticed by the defendant⁵³ until the defendant drove .7 miles at which time the faulty valve failed to operate.

Externally, before it hindered the operation of the vehicle, the latent defect was not detectable. Referring to the helplessness of the buyer, the court said "to have the automobile inspected by someone with sufficient expertise to disassemble the vehicle in order to discover latent defects before the contract is signed, is assuredly impossible and highly impractical." Reversing the thrust of the court, must the dealer disassemble the vehicle before tender, to be "reasonably sure" that it had not latent defects and was acceptable? Of course not.

Finally, the problem of the conformity of the retendered automobile must be considered. The defective part was small and could be replaced by a skilled mechanic. It was not replaced; rather, a new transmission was substituted, possibly to save time⁵⁴ or possibly because the dealer did not have a replacement valve. The facts are not clear, but the result is. The vehicle was "as good as new," according to the plaintiff and this fact was uncontroverted by the defendant. The new replacement transmission was a factory built unit which was new and unused, hardly of "unknown lineage" as the court indicated. Certainly tender of this repaired vehicle met the contractual obligations, and should not have been invalidated as a "cure" which endeavors by substitution to tender a chattel not within the agreement or contemplation of the parties.

Conclusion

The disclaimer warranty may be in its death throes, but it will probably remain with us for a time. The skillful practitioner often can avoid its confinements by finding technical flaws or applying the unconscionability doctrine. But once past this hurdle, remedies must be considered; and it is here that courts have shown little knowledge of the Code. It would appear that few attorneys have relied upon Code Section 2-508, 2-106, 2-711, or 2-601, but this is the law. The *Zabriskie* case is unique in that it contains an unusually complete examination of a disclaimer problem in light of the Code. But, in spite of the reasoning, the decision is dangerous if it signals any trend, because the law of perfect tender

⁵³ *Ibid.*

⁵⁴ A survey of a number of Cleveland's large Chevrolet dealers indicated that to remove, tear down, rebuild, and replace a transmission of this type would take 9.5 hours by the "book," but a good mechanic could better this by an hour. Switching transmissions as was done in *Zabriskie* takes about one hour.

must be offset by the right of the seller to implement a reasonable cure. The Code does not define "cure," and this may be a weak point. But it is questionable if anyone could apply a uniform definition without weighing each individual application. Here is the weakness in the *Zabriskie* decision. The court demanded too precise a cure; and with this same expectation the court stated by dicta that the buyer was injured and not accorded "at least adequate remedies" under Code Section 2-719. Some latitude must be allowed. This is the intent of the Code, and anything less will foster a new breed of Llewellyn's contract-dodgers⁵⁵ and destroy the sanctity of contractual relationship.

⁵⁵ "If the contract-dodger cannot be bothered, if all he needs is a rhinoceros hide to thumb his nose at his creditor with impunity, more and more men will become contract-dodgers . . . and as between individual enterprises, the competition of the contract-dodger will drive the contract keeper into lowering his own standards of performance on pain of destruction." Llewellyn, *What Price Contract?* 40 *Yale L. J.* 704, n. 47 (1931).