

UCC BREACH OF WARRANTY AND CONTRACT CLAIMS:  
CLARIFYING THE DISTINCTION

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I. INTRODUCTION

This Article addresses the distinction between breach of warranty and breach of contract claims arising under Article 2 of the Uniform Commercial Code (UCC). The idea to examine this distinction arose following a telephone conversation with a law professor who was preparing to teach an Article 2 Sale of Goods course for the first time. During our conversation, the professor described what she characterized as a humbling experience. A speaker at a trade association meeting nonchalantly stated:

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“Of course you understand there is a difference between an Article 2 breach of contract and a breach of warranty claim.” The professor was alarmed when she realized she had no idea that such a distinction existed. She had understood that any product dissatisfaction claim arising under Article 2 would afford the disappointed buyer with a claim for breach of warranty against the seller, but not for breach of contract. After briefly explaining to my colleague the differences between breach of contract and breach of warranty claims under Article 2, it occurred to me that this distinction is one that often evades law students, lawyers, judges, and perhaps even a few law professors. After further consideration, it also became apparent that a lack of understanding of this distinction also contributes to confusion regarding the relationship between UCC provisions that govern several concepts, including breach of warranty, disclaimers of warranties, revocation of acceptance, and limitation of remedies.

This Article attempts to clarify the distinction between Article 2 breach of warranty and breach of contract claims by examining the existing legal framework that governs these claims. It begins with a brief overview of the provisions of Article 2 that govern UCC express and implied warranties. The Article then discusses breach of warranty and breach of contract claims arising under Article 2 and the differences that emerge from these distinct causes of action. In this regard, the Article enumerates the differing circumstances that give rise to a buyer’s breach of contract claim in contrast to a breach of warranty claim. It concludes that a disappointed buyer of goods possesses a breach of contract claim where goods have been rejected or revoked; where the seller fails to deliver any of the goods the buyer contracted to receive; where the seller repudiates; and in some circumstances, where the seller wrongfully delays delivery of the goods. On the other hand, a disappointed buyer’s breach of warranty claim arises only after the seller has finally accepted the goods as defined in section 2-606, the UCC provision that governs a buyer’s acceptance of goods. The Article then examines cases that illustrate the practical and theoretical significance attached to understanding that breach of warranty and breach of contract are distinct causes of action to which different rules (e.g., statutes of limitations and a seller’s right to cure defects) may apply.

In Part III, the Article explores the conceptual errors that flow from a failure to properly comprehend the distinction between Article 2’s warranty and contract related concepts. It argues that although courts acknowledge the distinct nature of Article 2 breach of contract and breach of warranty claims, judicial understanding of the distinction is often superficial. While

recognizing the distinctive nature of the concepts, courts fail to fully appreciate the ways in which they are inter-related. The Article examines the often complex entwinement of UCC provisions that govern disclaimers of implied warranties, breach of warranty, and revocation of acceptance. This examination demonstrates that frequently courts, in attempting to adjust the rights and duties of buyers and sellers of goods, err in their efforts to navigate these UCC provisions.

In particular, the Article examines two legal issues on which courts have reached contrary results—the impact of a disclaimer of warranties on a buyer’s right to revoke its acceptance of goods; and, whether a buyer can successfully revoke its acceptance of goods where a limited remedy has failed of its essential purpose and the seller has disclaimed all warranties. The Article critically assesses cases in which courts inaccurately conclude that a buyer possesses a right to revoke notwithstanding a seller’s effective disclaimer of all warranties. It also critically examines those cases in which courts have wrongly concluded that the failure of essential purpose of a limited remedy of repair and replacement resurrects a buyer’s revocation of acceptance claim even where a seller has effectively disclaimed all warranties.

The Article concludes that in some instances, the approach adopted by courts regarding these issues stems from erroneous conceptualizations of UCC provisions governing the existence of warranties, revocation of acceptance, disclaimers of warranties, and limited remedies. In other instances, the rules adopted arise from the judiciary’s desire to arrive at characterizations that support recourse for disappointed buyers. The Article argues that when courts adopt rules premised on either of these grounds, they not only afford recourse to buyers where it is unwarranted, but also undermine the UCC’s comprehensive scheme for regulating sale of goods transactions.

## II. DISTINGUISHING ARTICLE 2 BREACH OF WARRANTY AND BREACH OF CONTRACT CLAIMS

### A. *UCC Warranties of Quality*

UCC Article 2 provides for three qualitative warranties.<sup>1</sup> Section 2-313

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<sup>1</sup>Article 2 also provides for an implied warranty of title, which is governed by U.C.C. § 2-312. U.C.C. § 2-312 (2004). This warranty is not considered a qualitative warranty because it

recognizes an express warranty and articulates the conditions that must be satisfied before an express warranty is created and the seller assumes the obligations that inure therein.<sup>2</sup> As stated in section 2-313(2), no formal words are required for an express warranty to arise.<sup>3</sup> Rather an express warranty is created by any affirmation of fact or a promise made by a seller to a buyer that is a part of the basis of the bargain.<sup>4</sup> In addition, an express warranty may be created by a description, model, or sample of the goods.<sup>5</sup> A seller breaches an express warranty when the goods fail to “conform to a promise or an affirmation of fact . . . , or the goods do not conform to a description, sample, or model . . . .”<sup>6</sup>

Article 2 also provides for two implied warranties of quality. Section 2-

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does not relate to the qualitative features of the product sold. *See id.*

<sup>2</sup>U.C.C. § 2-313.

<sup>3</sup>*Id.* § 2-313(2).

<sup>4</sup>*Id.* § 2-313(1); *see, e.g., In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 319–21 (S.D. Ill. 2007) (concluding that courts have reached different interpretations of the basis of the bargain requirement; a majority of courts find no reliance need be shown, one minority finds that specific reliance is required, while another minority finds there exists a rebuttable presumption of reliance); *Keith v. Buchanan*, 220 Cal. Rptr. 392, 398 (Cal. Ct. App. 1985) (explaining that a seller’s representation is presumed to be part of the basis of the bargain, and the burden is on the seller to prove that the representation was not a factor that induced the buyer to enter into the bargain). *See generally* Thomas J. Holdych, *A Seller’s Responsibilities to Remote Purchasers for Breach of Warranty in the Sales of Goods Under Washington Law*, 28 SEATTLE U. L. REV. 239 (2005) (discussing how express warranties can arise); Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 S.C. L. REV. 203 (2008) (discussing the requirements for an express warranty). Under § 2-313’s basis of the bargain requirement, a buyer need not establish reliance in order to prevail on a breach of express warranty claim. U.C.C. § 2-313 cmt. 3. As comment 3 explains:

[A]ffirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.

*Id.*

<sup>5</sup>U.C.C. § 2-313.

<sup>6</sup>*Herring v. Home Depot, Inc.*, 565 S.E.2d 773, 776 (S.C. Ct. App. 2002) (holding that an aggrieved buyer must also establish that the breach caused the damages for which it seeks to recover); *see also Yurcic v. Purdue Pharma, L.P.*, 343 F. Supp. 2d 386, 394 (M.D. Pa. 2004) (holding that to prevail on breach of express warranty claim, a buyer must establish the existence of a warranty, a breach of warranty, and damages proximately caused by the breach); *Husky Spray Serv., Inc. v. Patzer*, 471 N.W.2d 146, 150 (S.D. 1991) (holding the same).

314 sets forth the requirements that must be met in order for the warranty of merchantability to be implied into a sales transaction.<sup>7</sup> It also describes the circumstances under which such a warranty is breached.<sup>8</sup> In a transaction involving the sale of goods, a merchant, who is a seller of goods of the kind,<sup>9</sup> will be charged with an implied warranty of merchantability unless it has been effectively disclaimed.<sup>10</sup> Although section 2-314 articulates several qualitative attributes that must be satisfied in order for goods to be merchantable,<sup>11</sup> the core of the implied warranty of merchantability is that goods must be “fit for the ordinary purposes for which such goods are used.”<sup>12</sup> If goods fail to comply with this standard at the time they are delivered, the implied warranty of merchantability has been breached.<sup>13</sup>

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<sup>7</sup>U.C.C. § 2-314(1).

<sup>8</sup>*Id.* § 2-314(2).

<sup>9</sup>Section 2-104(1) defines when a seller is a merchant of goods of the kind. *Id.* § 2-104(1). Comment 2 to section 2-104 states that the merchant status relevant to the implied warranty of merchantability is a merchant who deals in goods of the kind. *Id.* at cmt. 2; see Daniel K. Wiig, *U.C.C. Article 2 Warranties and Internet-Based Transactions: Do the Article 2 Warranties Sufficiently Protect Internet-Based Transactions with Unprofessional Internet Merchants?*, 12 *FORDHAM J. CORP. & FIN. L.* 717, 721–22 (2007) (discussing merchant status for purposes of Article 2’s implied warranty of merchantability).

<sup>10</sup>U.C.C. § 2-314(1). Section 2-316(2) and (3) articulate the requirements a seller must meet to effectively disclaim the implied warranties of merchantability and fitness for particular purpose. *Id.* § 2-316. Subsection 2 provides, generally, that to be effective a disclaimer must be conspicuous and in the case of the warranty of merchantability, it must mention merchantability. *Id.* § 2-316(2). Subsection 3 articulates other ways in which the implied warranties can be effectively disclaimed. *Id.* § 2-316(3). Warranties can be effectively disclaimed through the use of language like “as is” which is commonly understood to mean that the buyer assumes all risks related to the quality of the goods; through the buyer’s inspection of the goods; and through trade usage. *Id.* See generally Holdych, *supra* note 4 (discussing UCC implied warranties).

<sup>11</sup>Section 2-314(2)(a)–(f) articulates a non-exhaustive list of the qualitative standards with which goods must comply in order to be merchantable. U.C.C. § 2-314. For example, to be merchantable, “goods must pass without objection in the trade under the contract description,” and in the case of fungible goods, they must be of “fair and average quality within the description.” *Id.* § 2-314(2)(a)–(b).

<sup>12</sup>U.C.C. § 2-314(2)(c); see *Zwicky v. Freightliner Custom Chassis Corp.*, 867 N.E.2d 527, 536 (Ill. App. Ct. 2007) (“A product breaches the implied warranty of merchantability if it is not ‘fit for the ordinary purposes for which such goods are used.’”); *Mattuck v. Daimler Chrysler Corp.*, 852 N.E.2d 485, 495 (Ill. App. Ct. 2006) (holding the same).

<sup>13</sup>The implied warranty of merchantability relates to the condition of the goods at the time they are delivered to the buyer. See, e.g., *Powers v. Am. Honda Motor Co.*, 79 P.3d 154, 157 (Idaho 2003) (explaining that breach of the warranty of merchantability focuses on whether the goods are unmerchantable at the time of delivery). The warranty does not extend to the future performance of the delivered goods. See, e.g., *id.*; *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*,

Elaborating on this standard, one court stated:

[T]o recover for breach of the implied warranty of merchantability, the plaintiff must establish: (1) a merchant sold goods, (2) the goods were not 'merchantable' at the time of sale, (3) the plaintiff or his property was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.<sup>14</sup>

Article 2's other implied warranty of quality is the implied warranty of fitness for particular purpose. The essence of the fitness for particular purpose warranty is that the seller knows or has reason to know of the buyer's purpose and the buyer actually relies on the seller's skill or judgment in selecting goods suitable to meet the buyer's particular purpose.<sup>15</sup> In this regard, Article 2 provides:

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 under the next section an implied warranty that the goods shall be fit for such purpose.<sup>16</sup>

A seller complies with the obligations imposed by the implied warranty of fitness if the goods satisfy a buyer's particular purpose.<sup>17</sup> Thus the

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759 N.E.2d 66, 75 (Ill. App. Ct. 2001) ("An implied warranty of merchantability applies to the condition of the goods at the time of sale and is breached only if the defect in the goods existed when the goods left the seller's control.").

<sup>14</sup>Seaside Resorts, Inc. v. Club Car, Inc., 416 S.E.2d 655, 659-60 (S.C. Ct. App. 1992) (applying North Carolina law).

<sup>15</sup>See U.C.C. § 2-315.

<sup>16</sup>*Id.*

<sup>17</sup>See, e.g., Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc., 785 S.W.2d 13, 17 (Ark. 1990) ("To recover for breach of the warranty of fitness for a particular purpose, the plaintiff must prove that (1) he has sustained damages; (2) at the time of contracting, the defendant had reason to know of the particular purpose for which the product was required; (3) the defendant knew the buyer was relying on the defendant's skill or judgment to select or furnish the product; (4) the product was not fit for the purpose for which it was required; (5) this unfitness was a proximate cause of the plaintiff's damages; and (6) plaintiff was a person whom defendant would reasonably have expected to use the product.").

fitness warranty can be breached even if the goods are fit for their ordinary purpose if they nevertheless fail to satisfy the buyer's particular purpose.<sup>18</sup> In other words, a buyer need not establish that goods are defective in order to recover for breach of the warranty of fitness for particular purpose since a product can be merchantable yet unsuitable for the buyer's particular purpose.<sup>19</sup> A finding that the goods are defective, however, is likely to result in a breach of both the warranty of merchantability and fitness if the latter warranty has arisen.<sup>20</sup> As with the implied warranty of merchantability, section 2-316 governs a seller's disclaimer of the warranty of fitness for particular purpose.<sup>21</sup>

### B. Breach of Warranty

Section 2-714, which is titled "Buyer's Damages for Breach in Regard to Accepted Goods," sets forth the damages that are available to a disappointed buyer when a seller has breached Article 2's qualitative warranties.<sup>22</sup> Section 2-714 is properly invoked, however, only where a buyer has finally accepted goods.<sup>23</sup> A final acceptance occurs when the buyer has sought neither to effectively reject the goods nor rightfully revoke its acceptance of them and the buyer's conduct otherwise falls within the circumstances that trigger an acceptance under section 2-606.<sup>24</sup>

Thus, a buyer who has finally accepted nonconforming goods, and complies with other conditions precedent to its ability to recover damages,

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<sup>18</sup> See U.C.C. § 2-315.

<sup>19</sup> *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 66 (Wyo. 1989) (holding that the warranty of fitness was breached even though there was no defect in tires).

<sup>20</sup> See *Custom Automated Mach. v. Penda Corp.*, 537 F. Supp. 77, 83 (N.D. Ill. 1982) (holding that both the implied warranty of fitness and merchantability were breached when a machine failed to meet industry standards and conform to the buyer's particular needs); *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 363 N.W.2d 155, 163-64 (Neb. 1985) (holding that the warranties of merchantability and fitness were breached when a roof was defective because it leaked).

<sup>21</sup> See discussion *infra* notes 146-51.

<sup>22</sup> See U.C.C. § 2-714.

<sup>23</sup> See *id.* § 2-714 cmt. 1.

<sup>24</sup> See § 2-606(1)(b) (implying that a buyer accepts goods when he fails to effectively reject them). The other circumstances in which a buyer will be found to have accepted the goods under section 2-606(1) are when "after a reasonable opportunity to inspect the goods [the buyer] signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity," or where the buyer "does any act inconsistent with the seller's ownership." *Id.* § 2-606(1).

such as reasonably notifying the seller of a breach, possesses a breach of warranty claim.<sup>25</sup> A buyer's damages for breach of warranty typically will be measured by 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 . . . ."<sup>26</sup> In short, the buyer's recourse generally with respect to nonconforming goods within its possession is to seek damages based on the difference between their expected value and their value as delivered.<sup>27</sup> Section 2-714(3) further provides that, in an appropriate case, a buyer also may recover incidental and consequential damages.<sup>28</sup>

The importance of an acceptance of goods as a predicate to a buyer's ability to invoke the breach of warranty remedy under section 2-714 was articulated by one court as follows:

The UCC classifies buyer's remedies conceptually on the basis of whether (1) the buyer has rejected or revoked acceptance of the goods . . . or (2) the buyer has accepted goods which do not conform to the contract. As such, different remedies are available for a seller's breach prior to and subsequent to acceptance. The breach of warranty remedy appears only under the provisions for "breach in regards to accepted goods," [section 2-714], and, damages for breach of warranty are measured by reference to the

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<sup>25</sup>U.C.C. § 2-607(3)(a) (stating that where a buyer has accepted goods he "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").

<sup>26</sup>*Id.* § 2-714(2); *see Sw. Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991) (holding that section 2-714 delineates the damages for breach of warranty which are available where the buyer has finally accepted defective goods).

<sup>27</sup>*See, e.g., Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 769 (Neb. 1992) (stating that typical damages for breach of warranty are measured by the difference between value of goods as accepted and their value as warranted); *Kelly v. Olinger Travel Homes, Inc.*, 117 P.3d 282, 288 (Or. Ct. App. 2005) (noting the usual measure of recovery as the difference between value of goods accepted and their value had they been as warranted); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 193 (S.C. Ct. App. 1995) ("The formula for calculating direct damages is the value of the goods as warranted less the value of the goods as accepted."); *see also* Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1487 n.187 (2004) (in a breach of warranty action the buyer is entitled to damages measured by the difference between the goods' actual value and their value as warranted in the contract).

<sup>28</sup>U.C.C. §§ 2-714(3), 2-715 (authorizing the recovery of incidental and consequential damages).



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time of acceptance, [section 2-714(2)]. Therefore, an action for breach of warranty cannot arise until after acceptance.<sup>29</sup>

Another court similarly stated:

Generally, a breach of contract claim exists “where the seller fails to make delivery” and a breach of warranty claim is “available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner.” The [Texas] [S]upreme [C]ourt draws the distinction on whether the goods have been delivered *and finally accepted* or not.<sup>30</sup>

The decision to which the *Paul Mueller* court referred is *Southwestern Bell Telephone Co. v. FDP Corp.*, where the Texas Supreme Court differentiated between breach of contract and warranty claims.<sup>31</sup> There the court stated:

The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2-711, and are available to a buyer “[w]here the seller fails to make delivery. The remedies for breach of warranty are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner.”<sup>32</sup>

In summary, the remedies available to a buyer who has accepted goods under section 2-714 are to be contrasted with the remedial options delineated in section 2-711 to which I now turn.

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<sup>29</sup>Nelson v. Davis Modern Mach., 715 P.2d 1052, 1055 (Mont. 1986). *Accord* Scott & Triantis, *supra* note 27, at 1487 n.187 (stating that under section 2-714, “the buyer who takes possession of nonconforming goods may recover damages for any nonconformity in the seller’s performance”).

<sup>30</sup>Paul Mueller Co. v. Alcon Labs., Inc., 993 S.W.2d 851, 855 (Tex. App.—Fort Worth 1999, no pet.) (quoting Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991)) (emphasis in original).

<sup>31</sup>811 S.W.2d 572, 576 (Tex. 1991).

<sup>32</sup>*Id.* (quoting Tex. Bus. & Com. Code Ann. §§ 2.711, 2.714 (Vernon 2009)).

### C. Article 2's Remedies for Breach of Contract

The buyer's remedial options for a breach of contract are delineated in section 2-711. Among the options identified therein are rejection and revocation of acceptance.<sup>33</sup> In this regard, section 2-711 refers to the remedies available "where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance."<sup>34</sup> A buyer who effectively rejects goods and a buyer with a substantively valid right to revoke are deemed not to have finally accepted the goods.<sup>35</sup> For example, rejection and acceptance are viewed as mutually exclusive.<sup>36</sup> Moreover, a buyer who revokes acceptance possesses the same rights and duties of a buyer who rejects.<sup>37</sup> Comment 1 to section 2-711 differentiates its scope of coverage from that of section 2-714. It states "[t]he remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance."<sup>38</sup>

In addition to permitting the rejecting or revoking buyer to cancel the contract, an act similar to rescission,<sup>39</sup> section 2-711 permits such buyers to

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<sup>33</sup> See U.C.C. § 2-711; *see also* Emerson Elec. Co. v. Am. Permanent Ware Co., 201 S.W.3d 301, 310 (Tex. App.—Dallas 2006, no pet.) (recognizing rejection and revocation as breach of contract claims under Article 2).

<sup>34</sup> U.C.C. § 2-711(1).

<sup>35</sup> A buyer who wrongfully rejects (i.e., had no substantively justifiable reason to reject), but does so in a procedurally correct manner, will be deemed to have effectively rejected the goods. *Id.* § 2-606(1)(b). Article 2's principal section that governs acceptance, section 2-606, states, in pertinent part, that a buyer accepts when he "fails to make an effective rejection." *Id.* Therefore, a buyer who follows the procedures for rejecting set forth in section 2-602 will not have accepted goods even if its rejection is substantively wrongful (i.e., the goods are not defective and thus conform to the contract). *See id.* In such an instance, a seller may pursue its remedies for breach by a buyer, but loses its right to sue for the price of the goods. *See* Integrated Circuits Unlimited v. E.F. Johnson Co., 875 F.2d 1040, 1042 (2d Cir. 1989) (holding the same); Brandeis Mach. & Supply Co. v. Capitol Crane Rental, Inc., 765 N.E.2d 173, 178–79 (Ind. Ct. App. 2002) (discussing how a wrongful yet effective rejection precludes acceptance and eliminates a seller's action for the price).

<sup>36</sup> U.C.C. § 2-607(2) (stating a buyer's acceptance precludes rejection of goods); *see, e.g.*, Lile v. Kiesel, 871 N.E.2d 995, 997 (Ind. Ct. App. 2007) (stating that an acceptance of goods precludes a buyer's rejection of them).

<sup>37</sup> U.C.C. § 2-608(3); *See, e.g.*, Highway Sales, Inc. v. Blue Bird Corp., 504 F. Supp. 2d 630, 644–45 (D. Minn. 2007), *rev'd on other grounds*, 559 F.3d 782 (8th Cir. 2009); Scotwood Indus. Inc. v. Frank Miller & Sons, Inc., 435 F. Supp. 2d 1160, 1167 (D. Kan. 2006).

<sup>38</sup> U.C.C. § 2-711 cmt. 1.

<sup>39</sup> Article 2 adopted the term "revocation" to avoid problems fraught by the ambiguity associated with the term "rescission." *See id.* § 2-608 cmt. 1. Revocation was also selected to

prove and recover direct damages,<sup>40</sup> as well as incidental and consequential damages.<sup>41</sup> Specifically, section 2-711 allows the rejecting or revoking buyer to seek damages measured by cover under section 2-712,<sup>42</sup> or market differential under section 2-713,<sup>43</sup> or to seek specific performance under section 2-716.<sup>44</sup> A buyer who elects to reject or revoke does so by asserting a breach of contract action against the seller. In this regard, a state supreme court stated:

Under the UCC, a non-breaching buyer's remedy is dictated by whether the buyer has accepted or rejected the

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make it clear that disappointed buyers were not required to elect between cancellation of the contract and damages for breach of contract. *Id.* Revocation permits an aggrieved buyer to cancel the contract and sue for damages. *See* Lee v. Peterson, 716 P.2d 1373, 1374–75 (Idaho Ct. App. 1986) (discussing ambiguity and the other problems that flow from the term rescission).

<sup>40</sup>*See, e.g.,* Atlan Indus., Inc. v. O.E.M., Inc., 555 F. Supp. 184, 189 (W.D. Okla. 1983) (stating that a buyer who justifiably revokes acceptance is entitled to cover damages); Mercedes-Benz v. Garten, 618 A.2d 233, 242 (Md. Ct. Spec. App. 1993) (stating that a revoking buyer is entitled to remedies under section 2-711 including cover); Am. Bronze Corp. v. Streamway Prods., 456 N.E.2d 1295, 1302–03 (Ohio Ct. App. 1982) (holding that a seller's repudiation of the contract permitted the buyer to cancel and pursue remedies for breach, including cover).

<sup>41</sup>U.C.C. §§ 2-711, 2-715; *see, e.g.,* Mercedes-Benz, 618 A.2d at 243 (revoking buyer entitled to remedies under section 2-711 including incidental and consequential damages); City Nat'l Bank v. Wells, 384 S.E.2d 374, 382 (W. Va. 1989).

<sup>42</sup>U.C.C. § 2-711(1)(a); *e.g.,* Cont'l Sand & Gravel, Inc. v. K & K Sand & Gravel, Inc., 755 F.2d 87, 92 n.5 (7th Cir. 1985) (stating that section 2-711 provides cover as a remedy available to a buyer when a seller fails to deliver or the buyer either rightly rejects or justifiably revokes its acceptance); Omni Electromotive, Inc. v. R.A. Johnson, Inc., 2006 WL 2590120, at \*11–12 (N.J. Super. Ct. App. Div. Aug. 8, 2006) (buyer who revokes is permitted to cover).

<sup>43</sup>U.C.C. § 2-711(1)(b); *e.g.,* O'Brien v. Wade, 540 S.W.2d 603, 605–06 (Mo. Ct. App. 1976) (explaining that a buyer who rejects or revokes can not only cancel the contract but can also recover the difference between the contract and market price of the goods as authorized under section 2-713). Although cover is the preferred remedy, ordinarily, a buyer is free to choose between cover and market damages. *See* U.C.C. § 2-712 cmt. 6. In some instances, however, a buyer will be penalized for not seeking cover damages. *Id.* For example, section 2-715 permits a buyer to recover consequential damages which “could not reasonably be prevented by cover or otherwise.” HGI Assocs. v. Wetmore Printing Co., 427 F.3d 867, 878, 880 (11th Cir. 2005) (articulating the principle that lost profits, consequential damages, are nonrecoverable if they could have been prevented by some means such as cover). Another possible limitation on market damages arises where use of the market formula will allow a buyer a greater recovery than it would have received under the cover remedy. *See* U.C.C. § 2-713.

<sup>44</sup>U.C.C. § 2-711(2)(b); *see* Custom Controls Co. v. Ranger Ins., 652 S.W.2d 449, 453 (Tex. App.—Houston [1st Dist.] 1983, no writ) (illustrating that where a seller repudiates, the buyer can seek specific performance).

goods. A buyer who rightfully rejects the goods can pursue a breach of contract action with [section 2-711]. However, only with acceptance may a buyer seek relief with a breach of warranty action.<sup>45</sup>

In addition to pursuing rejection or revocation under a breach of contract action, breach of contract provides the substantive basis pursuant to which a buyer can assert other claims. If the seller fails to deliver any of the goods for which the buyer contracted, the buyer's cause of action sounds in contract and falls within section 2-711 and not section 2-714 since the buyer clearly could not have accepted what was not delivered. Section 2-711(1) states "[w]here the seller fails to make delivery or repudiates," the breach of contract remedies prescribed in the section are available.<sup>46</sup> Another circumstance where a disappointed buyer will be relegated to a breach of contract rather than a breach of warranty action is where the seller fails to deliver pursuant to a time period set forth in the parties' agreement and the buyer cancels the contract.<sup>47</sup>

#### *D. The Inconsistency Between Breach of Warranty and Breach of Contract*

The inconsistency in allowing a buyer to recover breach of warranty damages and breach of contract claims is illustrated by focusing on the nature of rejection and revocation of acceptance. Although the UCC eschews the use of the term rescission, rejection and revocation are akin to rescission. As one court stated, "[revocation] is, in effect, one form of rescission . . . ."<sup>48</sup> Noting the fundamental difference between a breach of warranty action and rejection and revocation, another court stated "a party

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<sup>45</sup> Kirby v. NMC/Continue Care, 993 P.2d 951, 954 (Wyo. 1999).

<sup>46</sup> U.C.C. § 2-711(1)–(2); see Leggett & Platt, Inc. v. Yankee Candle Co., No. 4:06-CV-366-Y, 2008 WL 723582, at \*5 (N.D. Tex. Mar. 18 2008) (stating that a breach of contract claim arises when a seller fails to deliver promised); Sw. Bell Tel. Co. v. FDP Corp., 811 S.W.2d 572, 576 (Tex. 1991) ("The remedies for breach of contract are set forth in section 2-711, and are available to a buyer '[w]here the seller fails to make delivery.'").

<sup>47</sup> In such an instance, a breach of warranty action would be unavailable because the buyer would not have received any goods to accept. See U.C.C. § 2-711(1). Section 2-711(1) specifically recognizes that a seller's failure to deliver goods constitutes a breach of contract. *Id.*; see Borah v. McCandless, 205 P.3d 1209, 1218 (Idaho 2009) (stating that a seller's failure to deliver goods within a reasonable time gave the buyer action for breach of contract entitling it to remedies available under section 2-711). *Accord Sw. Bell Tel. Co.*, 811 S.W.2d at 576.

<sup>48</sup> Prince v. LeVan, 486 P.2d 959, 963 (Alaska 1971).

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‘may not at the same time successfully pursue both the remedy of rescission and that of an action for damages as they are inconsistent, the first resting upon a disaffirmance and the second resting upon an affirmation of the contract.’<sup>49</sup>

Although it is most commonly cited for the U.S. Supreme Court’s discussion of the economic loss rule concept,<sup>50</sup> *East River Steamship Corp. v. Transamerica Delaval, Inc.* noted the distinction between a breach of warranty and breach of contract claim.<sup>51</sup> The Court stated that rejection<sup>52</sup> and revocation claims are rights that are redressed pursuant to breach of contract theory.<sup>53</sup> “[A] claim of a nonworking product can be brought as a breach-of-warranty action. Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.”<sup>54</sup>

Similarly, the Oregon Supreme Court differentiated Article 2 breach of warranty and breach of contract claims by focusing on their remedial differences:

[A] buyer must accept goods to recover for breach of warranty.

Not only must a buyer accept the goods but, because damages for breach of warranty are designed to compensate for the diminished value of retained goods, the buyer also must not revoke acceptance. As comment 1 to UCC 2-714 explains, “This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by” Thus, damages for breach of warranty are not available to buyers who have

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<sup>49</sup> *Baker v. Wade*, 949 S.W.2d 199, 201 (Mo. Ct. App. 1997) (quoting *Mills v. Keasler*, 395 S.W.2d 111, 116 (Mo. 1965)).

<sup>50</sup> See *infra* notes 66–78 for a discussion of the economic loss rule.

<sup>51</sup> 476 U.S. 858, 872 (1986).

<sup>52</sup> For an articulation of the requirements of an effective rejection, see U.C.C. § 2-602.

<sup>53</sup> *E. River S.S. Corp.*, 476 U.S. at 872.

<sup>54</sup> *Id.* Accord *Kirby v. NMC/Continue Care*, 993 P.2d 951, 954 (Wyo. 1999) (stating that a buyer who rejects possesses a breach of contract but not a breach of warranty action); see also *Baker*, 949 S.W.2d at 201 (stating that rejection and revocation are mutually exclusive of a breach of warranty claim); *Prince v. LeVan*, 486 P.2d 959, 963 (Alaska 1971) (explaining that revocation and rejection are to be contrasted with breach of warranty); *Stewart-Decatur Sec. Sys., Inc. v. Von Weise Gear Co.*, 517 F.2d 1136, 1139 n.9 (8th Cir. 1975) (stating that a breach of warranty claim can only arise after goods have been accepted and buyer has not rejected goods).

revoked acceptance.<sup>55</sup>

Section 2-608 articulates the buyer's right to revoke acceptance of goods where the value of the goods are substantially impaired to the buyer.<sup>56</sup> Moreover, a buyer has a substantive right to revoke where it has accepted the goods premised either on the assumption the defect in the goods (nonconformity) would be cured<sup>57</sup> or because the defect was difficult to discover either because of its nature or the seller's assurances.<sup>58</sup> Thus assuming the buyer's acceptance is reasonable and the buyer has complied with other requirements, such as the necessity of the buyer giving notice, the buyer is entitled to return the goods to the seller.<sup>59</sup>

At least in cases involving a breach of warranty versus a revocation of acceptance claim, courts often point to the differences in the tests used to assess causes of action for breach of warranty and breach of contract.<sup>60</sup> The test for breach of warranty is often characterized as an objective test in that the goods either fail to conform to an affirmation of fact or promise in the case of an express warranty or fail to be merchantable in the case of the implied warranty of merchantability.<sup>61</sup> In contrast, a breach of contract claim, in the form of a buyer's action to revoke, is said to consist of both objective and subjective elements in that there must be a nonconformity that can be objectively determined, but the nonconformity must substantially impair the value of the goods to a particular buyer.<sup>62</sup> As articulated by one court:

In any case of attempted revocation, the threshold issue is whether the good has a nonconformity which substantially impairs its value to the buyer. Resolution of this factual issue requires the application of a two-part test

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<sup>55</sup> Kelly v. Olinger Travel Homes, Inc., 117 P.3d 282, 288 (Or. Ct. App. 2005).

<sup>56</sup> U.C.C. § 2-608(1). This section reads: "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" under circumstances where the buyer's acceptance was reasonable. *Id.*

<sup>57</sup> *Id.* § 2-608(1)(a).

<sup>58</sup> *Id.* § 2-608(1)(b).

<sup>59</sup> *Id.* § 2-608(2).

<sup>60</sup> Herring v. Home Depot, Inc., 565 S.E.2d 773, 776 (S.C. Ct. App. 2002).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Waddell v. L.V.R.V. Inc., 125 P.3d 1160, 1163 (Nev. 2006) (noting the subjective and objective components of substantial impairment); Allen v. Rouse Toyota Jeep, Inc., 398 S.E.2d 64, 65-66 (N.C. Ct. App. 1990) (noting the same).

which considers both the buyer's subjective reaction to the alleged defect (taking into account the buyer's needs, circumstances, and reaction to the nonconformity) and the objective reasonableness of this reaction (taking into account the good's market value, reliability, safety, and usefulness for purposes for which similar goods are used, including efficiency of operation, cost of repair of nonconformities, and the seller's ability or willingness to seasonably cure the nonconformity).<sup>63</sup>

It is important to note, as discussed *infra*, a buyer has a substantive basis to revoke only if the goods or nonconforming in the first instance.<sup>64</sup>

A factor that may contribute to the confusion between breach of warranty and breach of contract claims is the tendency of courts to characterize a breach of warranty claims as sounding in contract. This is most vividly expressed in cases where a court must differentiate a contract based warranty action from a tort action. An instance where courts have found it necessary to draw this distinction occurs when they address the economic loss rule. An economic loss rule issue arises when an aggrieved buyer seeks to recover in tort, negligence or strict liability, under circumstances where the only injury complained of is a failure of the product to perform in accordance with the contract.<sup>65</sup>

The U.S. Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, articulated the economic loss rule in an admiralty case in which the Court decided "whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss."<sup>66</sup> In rejecting plaintiff's tort claims for damage to a ship's turbines, the Court focused on the substantive bases and the policies that underlie tort and warranty recovery. Quoting a California case, the Court stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing

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<sup>63</sup> *Allen*, 398 S.E.2d at 65.

<sup>64</sup> *See infra* Part III.A.

<sup>65</sup> *See E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 859 (1986).

<sup>66</sup> *Id.*

physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

The tort concern for safety is reduced when an injury is only to the product itself.<sup>67</sup>

Emphasizing that breach of warranty claims arise from the parties' contractual relationship, the Court stated:

Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received "insufficient product value." . . .

Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case . . . .<sup>68</sup>

Like *East River*, other courts have focused on the contractual nature of breach of warranty claims in applying the economic loss rule. In a subsequent case, *Saratoga Fishing Co. v. J.M. Martinac & Co.*, the Court explained its rationale in *East River* by focusing on the contractual nature of warranty claims.<sup>69</sup> The Court stated: "[g]iven the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better."<sup>70</sup> A recent case also illustrates the focus on the contractual

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<sup>67</sup>*Id.* at 871 (quoting *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)).

<sup>68</sup>*Id.* at 872. *Accord* *Turbomeca, S.A. v. ERA Helicopters L.L.C.*, 536 F.3d 351, 357 (5th Cir. 2008) (stating the court would "decline to recognize an exception to the *East River* doctrine for post-sale negligent failure to warn claims: '[I]f the damage is solely to the product itself and is solely economic, there [can be] no tort recovery,' and the purchaser is restricted to a warranty or contract cause or action under maritime law" (citation omitted)); *Isla Nena Air Servs., Inc. v. Cessna Aircraft Co.*, 449 F.3d 85, 87 (1st Cir. 2006); *Massih v. Jim Moran & Assocs., Inc.*, 542 F. Supp. 2d 1324, 1331 (M.D. Ga. 2008) (stating that economic loss only recoverable in tort when there is injury to a person or property other than the defective product at issue).

<sup>69</sup>520 U.S. 875, 880 (1997). *Accord* *Turbomeca*, 536 F.3d at 357 (adopting the holding and reasoning of *East River*); *Isla Nena Air Servs., Inc.*, 449 F.3d at 91 (adopting *East River* rationale that economic loss rule helps to preserve line of demarcation between contract and tort).

<sup>70</sup>*Saratoga*, 520 U.S. at 875.



nature of warranty claims.<sup>71</sup> The owner of a yacht unsuccessfully asserted tort claims against the various parties including the yacht's manufacturer and the maker of the yacht's engine.<sup>72</sup> The yacht was totally destroyed by fire after certain of its components caught fire.<sup>73</sup> Since the only loss was to the yacht itself, the court refused to recognize plaintiff's tort claims.<sup>74</sup> In contrasting tort and breach of warranty claims, the court in *Fanok v. Carver Boat Corp.*, emphasized the contractual nature of the latter by stating:

This distinction between the “defect” analysis in breach of implied warranty actions and the “defect” analysis in strict products liability actions is explained by the differing etiology and doctrinal underpinnings of the two distinct theories. The former class of actions originates in contract law, which directs its attention to the purchaser's disappointed expectations; the latter originate in tort law, which traditionally has concerned itself with social policy and risk allocation by means other than those dictated by the marketplace.<sup>75</sup>

The contractual character of a breach of warranty action was also discussed in *Lockheed Martin Corp. v. RFI Supply, Inc.*, which involved a suit brought by the buyer of an alleged defective fire suppression system.<sup>76</sup> The court found that the economic loss rule precluded a cognizable tort claim since the only damage resulting from the failure of the product was to the product itself.<sup>77</sup> Quoting *East River*, the First Circuit stated, “[e]ven when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law.”<sup>78</sup>

Courts' characterization of breach of warranty claims as sounding in contract in cases where the economic loss rule is at issue is not to be faulted. Such claims arise from the buyer's and seller's contractual

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<sup>71</sup> See generally *Fanok v. Carver Boat Corp.*, 576 F. Supp. 2d 404 (E.D.N.Y. 2008).

<sup>72</sup> *Id.* at 415–17.

<sup>73</sup> *Id.* at 408.

<sup>74</sup> *Id.* at 412.

<sup>75</sup> *Id.* at 411 (quoting *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 737 (N.Y. 1995)).

<sup>76</sup> 440 F.3d 549, 551 (1st Cir. 2006).

<sup>77</sup> *Id.* at 555.

<sup>78</sup> *Id.* at 554.

relationship, and the remedies available for breach of warranty seek to protect the disappointed buyer's expectations. A undesirable consequence, however, of this characterization may be a blurring of the distinction between a breach of warranty and breach of contract claims in transactions involving Article 2. It may lead some to improperly assume that all claims under Article 2 relating to a defective product are subsumed into breach of warranty and ignore that a breach of contract claim is a distinct remedy from a breach of warranty claim.

*E. The Significance of the Distinction Between a Breach of Warranty and Breach of Contract Claim*

As the forgoing discussion reveals, it is well established that courts recognize Article 2 breach of contract and breach of warranty claims as distinct causes of action. It is also clear that the distinction between a breach of warranty and a breach of contract claim (e.g., rejection and revocation) is not merely a matter of intellectual curiosity. Discussion of the following cases reveals that the distinction's significance lies in its impact on the availability of substantive claims and defenses.

In *Highway Sales, Inc. v. Blue Bird Corp.*, the differences between breach of contract and breach of warranty claims were critical to the court's decision as to the governing statute of limitations.<sup>79</sup> A buyer of a recreational vehicle sued a seller and a manufacturer alleging, among other claims, breach of warranty and revocation of acceptance.<sup>80</sup> The court ruled that the buyer's claims for breach of express and implied warranties were time-barred by the governing statute of limitations which provided that all claims alleging breach of warranty must be asserted within one year of breach.<sup>81</sup> Defendants alleged that since the buyer's revocation claim rested on the same facts as its breach of warranty claim, the revocation claim was also subject to the one-year statute of limitations.<sup>82</sup>

The court rejected defendants' argument and found that the buyer's revocation claim was subject to the four-year statute of limitations set forth in section 2-725.<sup>83</sup> The court characterized the buyer's revocation claim as

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<sup>79</sup> 504 F. Supp. 2d 630, 643 (D. Minn. 2007).

<sup>80</sup> *Id.* at 636, 643.

<sup>81</sup> *Id.* at 637-40.

<sup>82</sup> *Id.* at 643.

<sup>83</sup> *Id.*

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“essentially a delayed rejection of nonconforming goods by the buyer.”<sup>84</sup> It reasoned that:

[A] revocation claim under UCC § 2-608 is a type of breach-of-contact claim and differs from a breach-of-warranty claim. Although revocation and breach-of-warranty claims may arise from the same facts—as they do in this case—the UCC provides different remedies for, and imposes different requirements on, the two types of claims.<sup>85</sup>

Based on its conclusion that a revocation claim is distinct from a breach of warranty claim, the court ruled that the buyer’s revocation claim was subject to section 2-725’s four-year statute of limitations rather than the one-year statute of limitations for breach of warranty claims.<sup>86</sup>

Defective windows were the goods in dispute in *Ranta Construction, Inc. v. Anderson*.<sup>87</sup> The issue before the Colorado Court of Appeals was whether the failure of a buyer to afford a seller an opportunity to cure nonconforming goods precluded the buyer from pursuing a breach of warranty claim.<sup>88</sup> The court first noted that claims for rejection and revocation are distinct from a breach of warranty claim.<sup>89</sup> Relying on this distinction, the court found that the seller’s right to cure relates to rejection and revocation claims and not to claims for breach of warranty.<sup>90</sup> Ruling in favor of the buyer, the court held it had found “no cases that recognize the general right to cure prior to the assertion of a breach of warranty claim.”<sup>91</sup>

In *Medical City Dallas, Ltd. v. Carlisle Corp.*, a buyer purchased roofing material that carried a twenty-year express warranty against deterioration.<sup>92</sup> Defects in the roofing membrane prompted the buyer to sue the defendant for breach of express and implied warranties.<sup>93</sup> A jury awarded plaintiff damages for breach of express warranty and attorneys’

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<sup>84</sup> *Id.* at 642.

<sup>85</sup> *Id.* at 643.

<sup>86</sup> *Id.*

<sup>87</sup> 190 P.3d 835, 838 (Colo. App. 2008).

<sup>88</sup> *Id.* at 845.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 251 S.W.3d 55, 57 (Tex. 2008).

<sup>93</sup> *Id.*

fees.<sup>94</sup> The attorneys' fees recovery was awarded pursuant to a Texas statute that permits the recovery of attorneys' fees in breach of contract actions.<sup>95</sup>

In determining the availability of attorney's fees, the court had to determine the substantive basis for an Article 2 breach of warranty claim.<sup>96</sup> The court held that the attorneys' fee statute was applicable in an Article 2 breach of warranty action since such a claim is contractual in nature since its focus is on a party's failure to uphold its end of a bargain.<sup>97</sup> Without elaborating the court noted that a breach of warranty claim is a distinct cause of action from a breach of contract claim.<sup>98</sup>

### III. CONCEPTUAL ERRORS DERIVED DISTINGUISHING ARTICLE 2 WARRANTY AND CONTRACT CLAIMS

As the forgoing discussion demonstrates, the distinction between breach of warranty and breach of contract actions under Article 2 can significantly impact buyers' and sellers' rights and obligations. It also reveals that courts have resoundingly acknowledged the distinct nature of Article 2 breach of contract and breach of warranty claims. Nevertheless, judicial understanding of the distinction is often superficial. Courts have erroneously conceptualized the remedies by failing to recognize that, notwithstanding their distinctiveness, breach of warranty and breach of contract claims are intertwined.

A South Carolina case, *Herring v. Home Depot, Inc.*, is instructive in this regard.<sup>99</sup> There a purchaser asserted breach of warranty and revocation of acceptance claims relating to a defective lawn mower.<sup>100</sup> The mower was covered by a two-year limited warranty issued by the manufacturer.<sup>101</sup> The contract between the buyer and seller also contained a limitation of remedies provision that limited the buyer to repair and replacement of covered parts in the event of a breach of warranty.<sup>102</sup> The mower

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 57–59.

<sup>96</sup> *Id.* at 60.

<sup>97</sup> *Id.* at 60–63.

<sup>98</sup> *Id.* at 60.

<sup>99</sup> See generally 565 S.E.2d 773 (S.C. Ct. App. 2002).

<sup>100</sup> *Id.* at 775.

<sup>101</sup> *Id.* at 774.

<sup>102</sup> *Id.*

malfunctioned and several attempts by the manufacturer to repair it were unsuccessful.<sup>103</sup> A jury ruled in favor of the plaintiff on his revocation of acceptance claim and awarded him breach of contract damages of over \$3,000.<sup>104</sup> Reversing the jury verdict, the court of appeals found that the jury's verdict permitting revocation of acceptance without finding a breach of warranty was inconsistent.<sup>105</sup>

The South Carolina Court of Appeals began its analysis by appropriately noting that “[b]reach of warranty and revocation of acceptance are independent, discrete causes of action.”<sup>106</sup> The court's conclusion that the two causes of action “are ‘separate remedies treated in entirely different sections of the Code and they offer separate forms of relief,’”<sup>107</sup> was also fundamentally sound. The court also accurately stated that:

Breach of warranty is an action affirming the contract. In an action for breach of warranty, the buyer retains the goods. Revocation of acceptance, on the other hand, requires the return of the goods and cancellation of the terms of a contract.

Additionally, the tests for a cause of action for breach of warranty differ from those for revocation of acceptance.<sup>108</sup>

The court, however, took a misstep as it concluded its analysis. The court stated that a finding of breach of warranty is not necessary to prevail on a revocation of acceptance claim.<sup>109</sup> In arriving at this result, the court suggests there exists no relationship between a breach of warranty and a revocation of acceptance claim.<sup>110</sup>

As the following discussion reveals, although distinct, Articles 2's breach of contract and warranty concepts bear a close relationship. It examines the two most prominent contexts in which a lack of complete comprehension of the relationship between breach of warranty and breach

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<sup>103</sup> See *id.* at 774–75.

<sup>104</sup> *Id.* at 775.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 775–76.

<sup>108</sup> *Id.* at 776 (footnotes omitted).

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* at 775–76.

of contract manifests: (1) the impact of disclaimers of warranties on a buyer's right to reject and revoke; and (2) the impact of the failure of essential purpose of a limited remedy on the buyer's right to revoke.

A. *Revocation and Breach of Warranty*

Although revocation and breach of warranty are distinct remedies, they are not completely independent. As discussed below, the existence and extent of a warranty is essential to determining whether or not a buyer has a right to reject or revoke. Nevertheless some courts, failing to recognize the connectedness of the concepts, have wrongly concluded that warranty on the one hand, and rejection and revocation on the other, are completely independent of each other. This misunderstanding of the concepts' relationship is vividly illustrated in cases where courts have found that a buyer has a right to revoke even though the seller has effectively disclaimed all warranties.

A leading case that miscasts the relationship is *Blankenship v. Northtown Ford, Inc.*, which involved an attempt by a buyer to revoke its acceptance of a defective automobile.<sup>111</sup> The sole issue before the court was whether the seller's disclaimer of implied warranties barred the buyer from revoking its acceptance.<sup>112</sup> The court rejected the seller's argument that an effective disclaimer of all warranties negates the right to revoke.<sup>113</sup> In contrasting a breach of warranty from a revocation claim, the court stated that whether a buyer has a right to revoke is premised on a subjective standard—if there is a substantial impairment of the goods to the buyer.<sup>114</sup> It concluded, the “evidence unequivocally demonstrated that the substantially defective nature of the vehicle clearly impaired its value to the plaintiffs and thus revocation of acceptance is appropriate even if the dealer has properly disclaimed all implied warranties. We so hold.”<sup>115</sup> The court went on to find that the seller had not effectively disclaimed implied warranties.<sup>116</sup>

A similar approach was taken by the court in *Seekings v. Jimmy GMC of*

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<sup>111</sup> 420 N.E.2d 167,169 (Ill. App. Ct. 1981).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 170.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 171.

*Tucson, Inc.*<sup>117</sup> There a buyer sought to revoke its acceptance against a retailer who asserted the buyer had no such right since the contract conspicuously disclaimed all warranties.<sup>118</sup> The trial court rejected the defendant's arguments on grounds that the disclaimer was unconscionable.<sup>119</sup> The intermediary court found that the disclaimer was not unconscionable and reversed in favor of the defendant.<sup>120</sup> In reversing the court of appeals ruling, the Arizona Supreme Court found that the trial court reached the correct result but for the wrong reason.<sup>121</sup> After finding that the disclaimer was not unconscionable, the court stated "[n]evertheless, we do not find that the disclaimer precludes the remedy of revocation of acceptance."<sup>122</sup> The court reasoned that the UCC's revocation provision should not be read so narrowly as to allow for revocation of acceptance only in cases where "reference to nonconformities refers only to failures to conform to an express or implied warranty."<sup>123</sup> Like the court in *Blankenship*, the *Seekings* court questioned whether all warranties had been effectively disclaimed.<sup>124</sup> In order to reach a desired result, the court found an implied warranty of representation that arose outside of the scope of Article 2 which had not been disclaimed.<sup>125</sup> As explained by the court, the retailer represented to the buyers that they would receive a new motor home and not one that was sold as is.<sup>126</sup>

Notwithstanding the lack of clarity in *Blankenship* and *Seekings*, courts in subsequent cases have adopted them as standing for the proposition that an effective disclaimer of all warranties does not eliminate a buyer's right to revoke. In a recent case, *Iwoi, LLC v. Monaco Coach Corp.*, the defendant argued that since it had effectively disclaimed all warranties through the use of "as is" language, the buyer possessed no revocation claim.<sup>127</sup> Citing to *Blankenship* and Seventh Circuit authority, the federal district court found:

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<sup>117</sup> See generally 638 P.2d 210 (Ariz. 1981).

<sup>118</sup> *Id.* at 215–16.

<sup>119</sup> *Id.* at 216.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.* at 217.

<sup>126</sup> *Id.* at 216–17.

<sup>127</sup> 581 F. Supp. 2d 994, 1004 (N.D. Ill. 2008).

[T]he Seventh Circuit appears to have accepted the general proposition that “[when] the evidence unequivocally demonstrated that the substantially defective nature of the vehicle clearly impaired its value to the Plaintiffs *revocation of acceptance is appropriate even if the dealer properly disclaimed all implied warranties.*”<sup>128</sup>

A similar result was reached in *Murray v. D & J Motor Co.*<sup>129</sup> There the court held that the “right to revoke does not depend upon the existence or breach of any warranty. The buyer may revoke under § 2-608 even though all warranties are excluded. . . . The absence or existence of any warranty is immaterial when considering revocation under Section 2-608.”<sup>130</sup> In reaching this result, the court seized upon the contrast between the elements required to establish revocation versus breach of warranty.<sup>131</sup> Noting that the right to revoke depends on a subjective consideration—whether the nonconformity substantially impaired the value of the goods to the buyer—the court concluded revocation is not limited to a case involving a breach of warranty.<sup>132</sup>

The rule enunciated in the *Blankenship* and *Seekings* line of cases fails to comport with Article 2. In commenting on the error in the *Seekings* court’s analysis, one commentator suggests that the rulings undermine the UCC’s remedial scheme:

[T]here are several problems with this approach.

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<sup>128</sup> *Id.* at 1005 (emphasis in original).

<sup>129</sup> See 958 P.2d 823, 828 (Okla. Civ. App. 1998). See generally Peter G. Dillon & Alvin C. Harrell, *Revocation of Acceptance Under UCC Section 2-608 As a Remedy in a Consumer Sales Transaction Involving Conflicting Oral Quality Representations and Standardized Quality Warranty Disclaimer Language*, 25 OKLA. CITY U. L. REV. 269 (2000) (criticizing the result reached in *Murray*).

<sup>130</sup> *Murray*, 958 P.2d at 828; see *Page v. Dobbs Mobile Bay Inc.*, 599 So. 2d 38, 42 (Ala. Civ. App. 1992) (stating a buyer may revoke acceptance of goods even where the seller has disclaimed all warranties); *O’Neal Ford, Inc. v. Earley*, 681 S.W.2d 414, 416 (Ark. Ct. App. 1985) (stating that a modification of a buyer’s warranty rights does not foreclose revocation of acceptance); *Freeman v. Hubco Leasing, Inc.*, 324 S.E.2d 462, 469–70 (Ga. 1985); *Esquire Mobile Homes, Inc. v. Arrendale*, 356 S.E.2d 250, 252 (Ga. Ct. App. 1987) (stating that revocation of acceptance is available as a remedy even where a seller has disclaimed all warranties); see also *Herring v. Home Depot, Inc.*, 565 S.E.2d 773, 776–77 (S.C. Ct. App. 2002) (citing approvingly to *Seekings* and suggesting that revocation is not dependent on existence of warranty rights).

<sup>131</sup> See *Murray*, 958 P.2d at 827–30.

<sup>132</sup> *Id.* at 828.



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The *Seekings* approach relies on a seller's implied "representation" concerning the quality of the goods, . . . which the court treats as outside the scope of the Article 2 warranty rules and thus not subject to disclaimer. This tactic renders the elaborate Code warranty provisions virtually meaningless since they can be finessed merely by finding an implied "non-warranty representation." Surely the drafters did not promulgate three separate warranty-of-quality provisions (sections 2-313, 2-314, and 2-315) and a carefully crafted warranty disclaimer section (section 2-316) so courts could ignore these provision at their whim. Rather, the drafters quite clearly intended U.C.C. sections 2-313 through 2-316 to be the source of rules governing a seller's obligations concerning the quality of goods.<sup>133</sup>

Apart from being result driven, the rule adopted in the *Seekings* and *Blankenship* line of cases may also stem from an unwarranted extension of the notion that breach of warranty and revocation of acceptance claims are different remedies provided under the UCC. While the remedies and the elements required to establish them differ, they are not so distinct that one bears no relationship to the other.<sup>134</sup> *Blankenship's* adherents, in focusing on the substantial nonconformity element of a revocation claim, ignore the buyer's burden of establishing a nonconformity in the goods as a predicate to its right to revoke.<sup>135</sup> Under Article 2, the mere fact that goods may not perform as the buyer desires does not necessarily mean that the goods fail to conform to the contract.<sup>136</sup>

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<sup>133</sup>Harry M. Flechtner, *Enforcing Manufacturers' Warranties, "Pass Through" Warranties, and the Like: Can the Buyer Get a Refund?*, 50 RUTGERS L. REV. 397, 425-26 (1998).

<sup>134</sup>Compare U.C.C. § 2-314, and *id.* § 2-315, with *id.* § 2-608(1).

<sup>135</sup>See Flechtner, *supra* note 133, at 430-32 (criticizing the *Blankenship* line of cases for dispensing with the requirement of the existence of a nonconformity as an essential element of a buyer's revocation claim); David Frisch, *Buyer's Remedies and Warranty Disclaimers: The Case for Mistake and the Indeterminacy of U.C.C. Section 1-103*, 43 ARK. L. REV. 291, 323-24 (1990) (commenting on the confusion resulting from the lack of clarity in *Blankenship* and *Seekings*). *But see* Manning Gilbert Warren III & Michelle Rowe, *The Effect of Warranty Disclaimers on Revocation of Acceptance Under the Uniform Commercial Code*, 37 ALA. L. REV. 307, 325 (1986) (arguing that the decision in *Seekings* finds support in the UCC's definition of the nature of the nonconformity that must exist to sustain a revocation of acceptance claim).

<sup>136</sup>See U.C.C. § 2-608(1).

Therefore, a buyer seeking to revoke its acceptance must establish that the goods are nonconforming such that the value of the goods is substantially impaired as to the buyer.<sup>137</sup> Thus a critical requirement to a viable revocation claim is establishing a nonconformity.<sup>138</sup> Whether a good is conforming turns on express and implied terms of the contract.<sup>139</sup> Goods conform to a contract if “they are in accordance with the obligations under the contract.”<sup>140</sup> A determination of a seller’s obligations under the contract is based on the express terms of the contract as supplemented by UCC gap-filler provisions and inferred from circumstances such as trade usage and prior course of dealings.<sup>141</sup> Where a seller effectively disclaims all implied warranties, it owes the buyer no obligation relating to the quality of the goods.<sup>142</sup>

Section 2-316 sets forth the requirements with which a seller must comply in order for it to effectively disclaim the implied warranties of merchantability and fitness for particular purpose.<sup>143</sup> A seller can effectively disclaim all warranties by including conspicuous “as is” language in its contract with a buyer.<sup>144</sup> As made clear by Comment 7 to section 2-316, the effect of “as is” language is to disclaim all warranties.<sup>145</sup> It provides: “[G]eneral terms such as ‘as is,’ ‘as they stand,’ ‘with all faults,’ and the like . . . are understood to mean that the buyer takes the

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<sup>137</sup> *Id.*

<sup>138</sup> *See* *Manassas Autocars, Inc v. Couch*, 645 S.E.2d 443, 447 (Va. 2007) (stating that nonconformity of goods is an element of a buyer’s revocation claim). *Accord* *Camara v. Hill*, 596 A.2d 349, 352 (Vt. 1991) (explaining that revocation requires that goods are nonconforming); *see* *Herbert v. Harl*, 757 S.W.2d 585, 589 (Mo. 1988); *Bus. Commc’ns, Inc. v. KI Networks, Inc.*, 580 S.E.2d 77, 79 (N.C. Ct. App. 2003) (explaining that a buyer may revoke acceptance if “the goods are non-conforming and the non-conformity substantially impairs the goods’ value to him”); *Nat’l Bank of Charleston v. Wells*, 384 S.E.2d 374, 379–80 (W. Va. 1989) (stating that the existence of a nonconformity is an essential element of a revocation claim); *see also* *Griffith v. Latham Motors, Inc.*, 913 P.2d 572, 577 (Idaho 1996) (“Whether an express or implied warranty has been breached is included in the revocation determination only in the sense that a breach of a warranty could substantially impair the value of the goods to the buyer.”).

<sup>139</sup> *See* U.C.C. § 2-106(2) (instructing to look only to obligations under the contract).

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* § 1-201(3) (defining agreement broadly to include express terms and terms arising out of the circumstances surrounding the transaction).

<sup>142</sup> *See id.* § 2-316 cmt. 7; *Olson v. U.S. Indus., Inc.*, 649 F. Supp. 1511, 1521 (D. Kan. 1986); *Ace, Inc. v. Maynard*, 423 S.E.2d 504, 509 (N.C. Ct. App. 1992).

<sup>143</sup> *See* U.C.C. § 2-316(2).

<sup>144</sup> *Id.* § 2-316(3)(a).

<sup>145</sup> *See* U.C.C. § 2-316 cmt. 7.

entire risk as to the quality of the goods involved.”<sup>146</sup>

A consequence of an “as is” disclaimer is that the seller possesses no responsibility to the buyer if the buyer receives defective goods.<sup>147</sup> Consequently, a buyer can sue the seller neither for breach of contract nor breach of warranty for defects in the goods.<sup>148</sup> In other words, an effective “as is” disclaimer extinguishes all UCC recourse a buyer might have with regard to a defective product, including claims for rejection and revocation of acceptance that a buyer might otherwise assert against the seller.<sup>149</sup> The buyer’s rejection and revocation claims are nonexistent because the goods, even if defective, conform to the contract since the existence of a nonconformity is an essential element of a buyer’s rights to reject or revoke.<sup>150</sup> Consequently, although breach of warranty and revocation of acceptance are discrete causes of action, the existence of a warranty is instrumental in determining whether a buyer has a right to reject or revoke its acceptance of goods.<sup>151</sup>

It would appear that the only instances in which the right to pursue a contract action against a seller is totally unrelated to the existence of a warranty would be where a seller fails to deliver, delivers a deficient quantity, or fails to deliver in a timely fashion.<sup>152</sup> Otherwise, there is a relationship between the breach of contract (i.e., rejection and revocation) and the existence and breach of a warranty.

*Frank Griffin Volkswagen, Inc. v. Smith* exemplifies the conceptually sound approach.<sup>153</sup> There, a buyer sought to revoke its acceptance of an alleged nonconforming automobile.<sup>154</sup> The defendant automobile dealer argued that because it had disclaimed all warranties it incurred no contractual obligations to the buyer, which could provide the basis of a right

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<sup>146</sup> *Id.*

<sup>147</sup> *See Harden v. Ford Motor Co.*, 408 F. Supp. 2d 309, 312 (E.D. Mich. 2005).

<sup>148</sup> *See Ducharme v. A & S RV Ctr., Inc.*, 321 F. Supp. 2d 843, 856 (E.D. Mich. 2004).

<sup>149</sup> *See id.*

<sup>150</sup> *Frank Griffin Volkswagen v. Smith*, 610 So. 2d 597, 602 (Fla. Dist. Ct. App. 1992) (explaining that failure of essential purpose of a limited remedy will not resurrect a buyer’s revocation claim where a seller has disclaimed all warranties and thus owes no obligation to the buyer).

<sup>151</sup> *See id.* at 600 (suggesting that a contractual obligation arising from a warranty can serve as the basis for a revocation claim).

<sup>152</sup> *See* U.C.C. § 2-316 cmt. 7 (2004) (no claim concerning the quality of goods).

<sup>153</sup> *Frank Griffin*, 610 So. 2d at 601–02.

<sup>154</sup> *Id.* at 599.

to revoke its acceptance of the goods.<sup>155</sup> The court rejected the rule and reasoning adopted in cases such as *Seekings* and *Blankenship*.<sup>156</sup> The court concluded that the buyer could not revoke its acceptance against the dealer because the buyer has “proved no breach of a contractual obligation which rendered the automobile nonconforming” where the seller had disclaimed all warranties.<sup>157</sup> Thus, there exists no “contractual obligation which can serve as a basis for a buyer’s later revocation of acceptance.”<sup>158</sup> A Florida appellate court recently reaffirmed *Frank Griffin*.<sup>159</sup> Similarly, in *Drew v. Boaters Landing Inc. of Fort Myers*, the court rejected a buyer’s attempt to revoke its acceptance of vessel where the parties’ contract disclaimed all warranties.<sup>160</sup>

Recently, courts interpreting Michigan law have adopted the rule and reasoning of *Frank Griffin*.<sup>161</sup> In *Harden v. Ford Motor Co.*, a buyer of a mobile home sought to revoke its acceptance against a seller.<sup>162</sup> The parties’ contract, however, contained a conspicuous disclaimer of warranties.<sup>163</sup> Noting the split in authority, the court concluded that the better reasoned approach is not to allow a buyer to pursue revocation of acceptance where a seller has disclaimed warranties.<sup>164</sup> In *Sautner v. Fleetwood Enterprises, Inc.*, another Michigan federal district court followed the rule adopted in *Harden*.<sup>165</sup> In a case involving a buyer’s attempt to revoke a motor home, the court held if “the relevant language in the agreement as to quality has been effectively disclaimed, there is no nonconformity in the goods sufficient to establish a claim for

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<sup>155</sup> *See id.* at 601–03.

<sup>156</sup> *See id.*

<sup>157</sup> *Id.* at 603.

<sup>158</sup> *Id.* at 599.

<sup>159</sup> *Drew v. Boaters Landing Inc. of Fort Meyers*, No. 2:07-cv-252-FtM-29DNF, 2007 WL 2700987, at \*3 (M.D. Fla. Sept. 13, 2007).

<sup>160</sup> *Id.*; *see also* *Giallo v. New Piper Aircraft, Inc.*, 855 So. 2d 1273, 1275–76 (Fla. Dist. Ct. App. 2003) (noting that revocation of acceptance is unavailable where a seller has disclaimed all warranties).

<sup>161</sup> *See Sautner v. Fleetwood Enters., Inc.*, No. 05-73252, 2007 WL 1343806, at \*5–6 (E.D. Mich. May 8, 2007); *Harden v. Ford Motor Co.*, 408 F. Supp. 2d 309, 312–13 (E.D. Mich. 2005); *Ducharme v. A & S RV Ctr., Inc.*, 321 F. Supp. 2d 843, 855–56 (E.D. Mich. 2004).

<sup>162</sup> *Harden*, 408 F. Supp. 2d at 311.

<sup>163</sup> *See id.* at 310–11.

<sup>164</sup> *See id.* at 312–13; *Ducharme*, 321 F. Supp. 2d at 855–56.

<sup>165</sup> *Sautner*, 2007 WL 1343806, at \*5.

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revocation.”<sup>166</sup>

In yet another case where a seller disclaimed all warranties, the disappointed buyer was not permitted to revoke his acceptance since the automobile conformed to the contract.<sup>167</sup> As stated by another court: “Absent any warranty by the lessor/seller in this situation there is nothing to which the goods must conform, *ergo* there can be no non-conformity. Consequently, the buyer could not revoke acceptance as against the seller.”<sup>168</sup>

In *City of South Burlington v. Towle-Whitney Associates, Inc.*, a federal court applying Vermont state law suggested that whether the buyer has a breach of contract claim is determined initially on whether the goods are defective.<sup>169</sup>

This position finds scholarly support as well. As one commentator as noted:

A determination of the existence or non-existence of a nonconformity requires reference to the terms of the

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<sup>166</sup> *Id.* at \*5–6.

<sup>167</sup> *Haight v. Dales Used Cars, Inc.*, 87 P.3d 962, 966 (Idaho Ct. App. 2003).

<sup>168</sup> *Konicki v. Salvaco, Inc.*, 474 N.E.2d 347, 352 (Ohio Ct. App. 1984). *Accord* *Schneider v. Miller*, 597 N.E.2d 175, 177 (Ohio Ct. App. 1991) (stating there is no right to rescind or revoke where all warranties are disclaimed).

<sup>169</sup> No. 1:05-CV-230, 2007 WL 2745721, at \*7 (D. Vt. Sept. 20, 2007). Other jurisdictions in which courts hold that an exclusion of warranties bars revocation claims include: *Pidcock v. Ewing*, 371 F. Supp. 2d 870, 881 (E.D. Mich. 2005); *U.S. Roofing, Inc. v. Credit Alliance Corp.*, 279 Cal. Rptr. 533, 545–46 (Cal. Ct. App. 1991) (concluding that a lessee could not revoke against the lessor since the goods conformed to the contract where the lessor had effectively disclaimed all warranties); *Va. Alpaca Farm & Breeding Co. v. Vickers*, No. HNT-L-588-03, 2005 WL 1389123, at \*7 (N.J. Super. Ct. Law. Div. Apr. 11, 2005) (stating there is no right to revoke acceptance where the seller disclaimed all warranties); *Young v. Hessel Tractor & Equip. Co.*, 782 P.2d 164, 168 (Or. Ct. App. 1989) (adopting precedent establishing that when a seller “disclaimed *all* warranties and the vehicle conformed to the contract, there was no possible nonconformity under the [seller’s] obligations in the contract that could serve as a basis for revoking the acceptance”); *Crume v. Ford Motor Co.*, 653 P.2d 564, 566–67 (Or. Ct. App. 1982) (holding a disclaimer of warranties precludes revocation and expressly rejecting result reached in *Seekings*). *See also* *Cohen v. N. Ridge Farms, Inc.*, 712 F. Supp. 1265, 1269–70 (E.D. Ky. 1989) (no right to rescind where all warranties disclaimed); *Hemmert Agric. Aviation, Inc. v. Mid-Continent Aircraft Corp.*, 663 F. Supp. 1546, 1552 (D. Kan. 1987) (“A nonconformity includes breaches of implied and express warranties as well as any failure of the seller to perform pursuant to his contractual obligation.”); *Beneficial Commercial Corp. v. Cottrell*, 688 P.2d 1254, 1256–57 (Mont. 1984) (concluding that where a lessor did not disclaim all warranties, the lessee had not been deprived of opportunity to reject).

contract, including the law of warranty. . . [T]he courts do not look with favor on disclaimers that purport to disclaim responsibility for what the seller has in essence agreed to sell. But if the only relevant language in the agreement as to quality has been effectively disclaimed, no nonconformity in the goods sufficient for revocation can exist. If the goods are sold “as is,” comment 7 to 2-316 states the “buyer takes the entire risk as to the quality of the goods.”<sup>170</sup>

In summary, it’s conceptually unsound for court to allow a buyer to revoke where a seller has effectively disclaimed all warranties. Courts that allow buyers to revoke in these situations are in essence creating and imposing warranty obligations on sellers that the buyer contracted away. They also manifest a lack of understanding of the relationship between the existence of a warranty and revocation of acceptance. The consequence of courts’ attempts to reach results that they perceive as fair to buyer’s, or of their misunderstanding of the relationship between warranty and revocation, is flawed interpretations and application of the UCC remedy provisions.

### *B. Limited Remedies Provisions and the Right to Revoke*

Another illustration of the misunderstanding of the relationship between a breach of warranty and revocation arises in cases involving limited remedies provisions. As discussed *supra*,<sup>171</sup> section 2-316 permits sellers to disclaim all implied warranties.<sup>172</sup> Section 2-719 permits a seller to modify the remedies available to a buyer in the event that a seller breaches the contractual obligations it owes to a buyer.<sup>173</sup> Section 2-719 provides that “the agreement may provide for remedies in addition to or in substitution for those provided in this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts.”<sup>174</sup>

Sellers will often limit or exclude warranties under section 316,<sup>175</sup> and

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<sup>170</sup> 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-4, at 565 (5th ed. 2006 & Supp. 2008) (footnotes omitted).

<sup>171</sup> See *supra* notes 143–52 and accompanying text.

<sup>172</sup> See U.C.C. § 2-316(2) (2004).

<sup>173</sup> *Id.* § 2-719(1)(a).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* § 2-316.

limit or modify remedies under section 719.<sup>176</sup> In addition, sellers commonly grant buyers limited express warranties, disclaim the implied warranties of merchantability and fitness, and limit remedies for breach of the limited express warranty to repair and replacement of defective parts. Assuming such a limited remedy provision complies with the requirements of section 719, the effect of these provisions, taken in tandem, is two-fold.<sup>177</sup> The buyer is granted a limited warranty that defines the circumstances under which a seller will be held liable to the buyer.<sup>178</sup> If the goods fail to conform to the obligations arising pursuant to the express warranty it has given, the seller is responsible for having breached it.<sup>179</sup> Ordinarily, such a breach gives rise to a breach of warranty claim if the buyer elects to keep the nonconforming goods.<sup>180</sup> In the event that the buyer elects to return the goods, the buyer would be able to reject or revoke its acceptance.<sup>181</sup>

The effect of a limited remedies provisions, such as for repair and replacement of defective parts, is to displace all remedies that the UCC would otherwise allow a buyer to pursue in the event that the goods fail to conform to the seller's contractual obligation.<sup>182</sup> If a buyer has finally accepted the goods, a limited remedy of repair and replacement eliminates a disappointed buyer's ability to sue for breach of warranty damages under section 2-714(2) as a means of recourse.<sup>183</sup> An effective limited remedy of

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<sup>176</sup> *Id.* § 2-719(1).

<sup>177</sup> *See* § 2-719 (requiring that a limited remedy constitute the exclusive and sole remedy available to the buyer in the event the seller breaches its contractual obligations). *See id.* § 2-719(1). Since the UCC views all remedies as cumulative, contractually agreed upon remedies are available in addition to UCC remedies unless the contract expressly limits the buyer to the contractually agreed upon remedies. *Id.* § 2-719 cmt. 2. Comment 2 states: "Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." *Id.* Unlike section 2-316, which requires that disclaimers of implied warranties be conspicuous, *id.* § 2-316(2), the text of section 2-719 imposes no conspicuousness requirement. *Id.* § 2-719. Some courts, however, have read a conspicuousness requirement into section 2-719. *E.g.*, *Adams v. Am. Cyanamid Co.*, 498 N.W.2d 577, 588 (Neb. Ct. App. 1992) (requiring that such clauses be conspicuous); *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1093 (Wyo. 1989) (reading conspicuousness requirement into section 2-719).

<sup>178</sup> *See* U.C.C. § 2-316.

<sup>179</sup> *See id.* § 2-719(1).

<sup>180</sup> *See id.* § 2-714.

<sup>181</sup> *See id.* § 2-711.

<sup>182</sup> *See id.* § 2-719(1).

<sup>183</sup> *See id.* § 2-719(1)(a).

repair and replacement also precludes a buyer who has accepted the goods from later revoking its acceptance of them.<sup>184</sup> In short, an effective limited remedy eliminates all other remedies, including breach of warranty or breach of contract (e.g., rejection and revocation of acceptance).<sup>185</sup> The buyer's UCC remedies, including damages for breach of warranty, rejection, and revocation, are resurrected where a determination is made that the limited remedy fails of its essential purpose.<sup>186</sup>

In this regards, section 2-719 provides that “[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”<sup>187</sup> A failure of essential purpose occurs when a seller is either unable or unwilling to repair the defective goods such that the buyer has lost a substantial value of the bargain.<sup>188</sup> Because revocation is a UCC remedy, a buyer's revocation claim can be restored if the limited remedy fails of its essential purpose.<sup>189</sup>

Notwithstanding the differences between disclaimers of warranties and limitation of remedies provisions, a few courts have erred in holding that the failure of the essential purpose of a limited remedy invalidates a disclaimer of implied warranties.<sup>190</sup> An Alabama state court so held in *Page v. Dobbs Mobile Bay, Inc.*<sup>191</sup> An automobile dealer, who sold a

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<sup>184</sup> See *U.S. Achievement Acad., L.L.C. v. Pitney Bowes, Inc.*, 458 F. Supp. 2d 389, 405–06 (E.D. Ky. 2006) (demonstrating that an effective limited remedy provision of repair and replacement precludes revocation of acceptance claim).

<sup>185</sup> See U.C.C. § 2-719(1)(b).

<sup>186</sup> *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 626 (Ill. 2006) (stating that where a limited remedy fails of its essential purpose, a buyer is able to pursue other remedies afforded by the UCC); *Young v. Hessel Tractor & Equip. Co.*, 782 P.2d 164, 167 (Or. Ct. App. 1989) (stating that a limited remedy fails of its essential purpose when a seller is unable or unwilling to repair defects and thus deprives the buyer of the substantial value of the bargain); *Murray v. Holiday Rambler, Inc.*, 265 N.W.2d 513, 521 (Wis. 1978).

<sup>187</sup> U.C.C. § 2-719(2).

<sup>188</sup> *Young*, 782 P.2d at 167; *Herring v. Home Depot, Inc.*, 565 S.E.2d 773, 776 (S.C. Ct. App. 2002) (explaining that a limited remedy fails “if the seller is unwilling or unable to repair or replace the product or if there is an unreasonable delay in the repair or replacement of the product”).

<sup>189</sup> *Rose v. Colo. Factory Homes*, 10 P.3d 680, 684 (Colo. Ct. App. 2000); *Young*, 782 P.2d at 167 (stating that if a remedy fails of its essential purpose, revocation becomes available to the buyer); *Murray*, 265 N.W.2d at 521 (stating that a buyer can invoke all UCC remedies including revocation when limited remedy fails of essential purpose).

<sup>190</sup> See, e.g., *Page v. Dobbs Mobile Bay, Inc.*, 599 So. 2d 38, 42 (Ala. Civ. App. 1992).

<sup>191</sup> *Id.*



vehicle to a buyer, disclaimed all warranties.<sup>192</sup> The buyers received a limited express warranty from the manufacturer that was coupled with a limitation of remedies provisions.<sup>193</sup> The court first found that the dealer's disclaimer of all warranties was effective.<sup>194</sup> Notwithstanding the dealer's disclaimer of all warranties, the court held the buyer was entitled to revoke as against the retailer, in part, because the limited remedy had failed of its essential purpose.<sup>195</sup> Similarly, in *Advanced Computer Sales, Inc. v. Sizemore*, the court permitted a buyer to revoke its acceptance of goods when a limited remedy failed of its essential purpose notwithstanding an explicit disclaimer of warranties.<sup>196</sup>

Other courts, however, have wisely rejected arguments that confuse the relationship between a limited express warranty, a limited remedy provision, and the buyer's right to reject or to revoke its acceptance of goods.<sup>197</sup> In *Palmucci v. Brunswick Corp.*, a buyer attempted to revoke his acceptance of a boat notwithstanding a limitation of remedies provision that provided: "Our obligation under this Warranty shall be limited to repairing a defective part, or at our option, refunding the purchase price or replacing such part or parts as shall be necessary to remedy any malfunction resulting from defects in material or workmanship as covered by this Warranty."<sup>198</sup> The court appropriately stated that section 2-608 permits a buyer to revoke acceptance of nonconforming goods that substantially impair the product's value to the buyer.<sup>199</sup> It held, however, that the right to revoke does not accrue where a product is sold with a limitation of remedies.<sup>200</sup> According to the court, revocation is available under such circumstances only if the limited remedy fails of its essential purpose.<sup>201</sup> As stated by the Wisconsin

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<sup>192</sup> *Id.* at 40.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 41.

<sup>195</sup> *Id.* at 42.

<sup>196</sup> 366 S.E.2d 303, 305 (Ga. Ct. App. 1988). *Accord* *Roberts v. Morgensen Motors*, 659 P.2d 1307, 1312 (Ariz. Ct. App. 1982) (stating that "when the limited remedy of repair and replacement fails of its essential purpose, the buyer may justifiably revoke his acceptance" even if the seller disclaimed warranties).

<sup>197</sup> *See, e.g., Palmucci v. Brunswick Corp.*, 710 A.2d 1045, 1047 (N.J. Super. Ct. App. Div. 1998).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

Supreme Court, where the limited remedy fails of its essential purpose, the “buyer may then invoke any of the remedies available under the UCC, including the right to revoke acceptance of the goods.”<sup>202</sup>

A similar result was reached in *Frank Griffin Volkswagen, Inc. v. Smith*, where a dealer’s contract with a buyer disclaimed all warranties.<sup>203</sup> The manufacturer provided a limited express warranty and a limited remedy of repair and replacement.<sup>204</sup> When the manufacturer’s limited remedy failed of its essential purpose, the buyer claimed its right to revoke against the dealer had been restored.<sup>205</sup> Rejecting the buyer’s argument, the court held that the failure of the limited remedy would not permit the buyer to revoke its acceptance against the seller who had adequately disclaimed all warranties.<sup>206</sup>

Another court explained that the conceptual error that occurs when a court validates an otherwise effective warranty disclaimer because a limited remedy fails of its essential purpose stems from confusion regarding the following:

[T]he distinction [that is] made in the Code between disclaimers of warranties . . . and limitation of remedies . . . Though related, these concepts are different in that disclaimers attempt to limit the circumstances of liability while remedy limitations restrict the buyer to certain forms of relief. When a limited remedy fails of its essential purpose, 2-719(2) abrogates only the remedy limitation and not the warranty disclaimers.<sup>207</sup>

Thus, where a limitation of remedies provision complies with section 2-719 and does not fail of its essential purpose, the buyer cannot sue to recover damages for breach of warranty or reject or revoke its acceptance of the goods if such remedial options are excluded.<sup>208</sup> To hold otherwise represents a misinterpretation of the relevant UCC provisions.

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<sup>202</sup> *Murray v. Holiday Rambler*, 265 N.W.2d 513, 521 (Wis. 1978).

<sup>203</sup> 610 So. 2d 597, 601–02 (Fla. Dist. Ct. App. 1992).

<sup>204</sup> *Id.* at 598.

<sup>205</sup> *Id.* at 601.

<sup>206</sup> *Id.* at 601–02.

<sup>207</sup> *Ritchie Enters. v. Honeywell Bull, Inc.*, 730 F. Supp. 1041, 1047 (D. Kan. 1990). *Accord* *Iron Dynamics v. Alstom Power, Inc.*, No. 1:06-CV-357, 2007 WL 3046430, at \*5 (N.D. Ind. Oct. 15, 2007) (citing to *Ritchie Enterprises* with approval).

<sup>208</sup> *Ritchie Enters.*, 730 F. Supp. at 1047.

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## IV. CONCLUSION

As the forgoing discussion illustrates, courts acknowledge the distinction between Article 2's breach of warranty and breach of contract remedies. This Article has sought to demonstrate, however, that in more than one context, judicial recognition of the distinction fails to equate to comprehension of the conceptual differences that underlie the remedies on the one hand and their connectedness on the other. This lack of understanding contributes to outcomes that fail, in turn, to appreciate the relationship between concepts such as disclaimers of warranties and revocation of acceptance, and limited remedies and revocation of acceptance. As discussed above, courts have accurately concluded that under Article 2 breach of warranty and breach of contract constitute distinct claims. Yet they fail to appreciate the role that the existence and breach of warranty plays in determining if a buyer possesses a breach of contract claim. This has resulted in decisions where courts have mistakenly found that the existence or nonexistence of a warranty bears no relationship on a buyer's ability to establish a right to reject or revoke its acceptance of goods. Proceeding from this premise, some courts have erroneously concluded that buyers can revoke their acceptance of goods in cases where sellers have disclaimed all warranties. Similarly, in failing to see that these concepts are distinct yet related, some courts have also failed to appreciate that a disclaimer of warranties, depending on its scope, may preclude a buyer from revoking its acceptance even where a limited remedy has failed of its essential purpose.

This Article has also attempted to demonstrate that erroneous judicial conceptualizations of buyer's remedies under Article 2 and courts' frequent inability to assess the delicate interplay between these remedies profoundly impacts the rights and duties of buyers and sellers of goods. In some instances, courts have afforded buyer's rights by imposing obligations on sellers that lack support in the provisions of Article 2. When courts adopt rules premised on their inability to appreciate the interplay between Article 2's buyers' remedies or on their desire to provide relief to buyers, they afford recourse where it is unwarranted and undermine the UCC's comprehensive scheme for regulating sale of goods transactions.<sup>209</sup>

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<sup>209</sup> See *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 653 (Okla. 1990) (describing the UCC as providing a "comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction . . .").