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Cure after Breach of Contract under the Restatement(Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code

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INTRODUCTION

The adoption of a right to cure following the time for contract performance has been hailed as one of the most innovative provisions of Article 2 of the Uniform Commercial Code (UCC).[1] The *Restatement (Second) of Contracts*[2] also explicitly recognizes the cure concept,[3] but its version has received sur-

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1. *See* U.C.C. § 2-508 (1978). All references to the Uniform Commercial Code (U.C.C.) are to the 1978 Official Text and Comments. For commentary on U.C.C. cure provisions, see V. COUNTRYMAN, A. KAUFMAN & Z. WISEMAN, COMMERCIAL LAW: CASES AND MATERIALS 957-58 (2d ed. 1982); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-4, at 318, 324 (2d ed. 1980); Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code,* 46 MINN. L. REV. 697, 723 (1962); Honnold, *Buyer's Right of Rejection,* 97 U. PA. L. REV. 457, 473 (1949); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two,* 73 YALE L.J. 199, 210 (1963); Wallach, *The Buyer's Right to Return Unsatisfactory Goods—The Uniform Commercial Code Remedies of Rejection and Revocation of Acceptance,* 20 WASHBURN L.J. 20, 24-28 (1980); Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby,* 24 DRAKE L. REV. 52, 55 (1974); Note, *UCC Section 2-508: Seller's Right to Cure Non-Conforming Goods,* 6 RUT.-CAM. L.J. 387, 388, 391 (1974); Comment, *Uniform Commercial Code: Minor Repairs or Adjustments Must Be Permitted by a Buyer When the Seller Attempts to "Cure" a Non-conforming Tender of Merchandise,* 52 MINN. L. REV. 937, 938-39 (1968).

2. Unless otherwise indicated, all references to the *Restatement* are to the *Restatement (Second) of Contracts* (1979).

3. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 237, 242 (1979). The *Restatement (Second) of Contracts* was undertaken in 1962 under the Reporter leadership of the late Professor Robert Braucher. He resigned as Reporter in early 1971 upon his appointment to the Supreme Judicial Court of Massachusetts. Professor E. Allan Farnsworth then served as Reporter until the completed work was adopted and promulgated by the American Law Institute in

prisingly little scholarly attention.[4] Parties incur liability under both the Code and the *Restatement* when a breach of contract occurs; cure does not discharge that liability. Cure, however, does serve to minimize the damages incurred by the injured party and to preserve the breaching party's rights under the contract by precluding the injured party from cancelling the contract. Cure thus affords the breaching party a second chance at contract performance, subject to the damages occasioned by the initial breach.

This Article critically analyzes the *Restatement (Second) of Contracts* approach to cure. Part I traces the evolution of the cure concept from its sporadic common-law origin to its recognition in the UCC and the *Restatement*. Part II articulates rationales advanced as the basis for the *Restatement* cure provisions, arguing that the *Restatement* cure provisions are not designed to mitigate the effects of the material breach doctrine, but rather are based on the general contract principles of meeting expectations and avoiding waste. Part III critically analyzes the *Restatement* approach, considering problems of both draftsmanship and substance. The Article concludes that problems with the *Restatement* approach need not necessarily prove fatal to the cure concept's place in the common law.

I. THE EVOLUTION OF THE CURE CONCEPT

The cure concept originated in the traditional common law, but it did not receive widespread attention until it was adopted in Article 2 of the UCC. Section 237 of the *Restatement* also incorporates the cure concept and thus expands the concept into general contract law.

A. THE TRADITIONAL COMMON LAW

The traditional common-law contract principles of performance and breach of contract shape the rights and remedies of the parties without regard to the concept of cure. Under the standard common law, every breach of contract gives rise to an

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May 1979. von Mehren, *Preface: Robert Braucher and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 631, 631 (1981).

4. For two of the few discussions of the *Restatement* approach, see E. FARNSWORTH, CONTRACTS §§ 8.15-.18, at 607, 610, 613-15, 617 (1982); Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 594-97 (1976).

immediate remedy.[5] If the breach is material, the injured party can sue for total breach and, in addition, terminate the contract.[6] If the breach is nonmaterial, however, the injured party can sue only for partial breach, cannot stop further performance by the breaching party, and must perform the remainder of his own contract obligation.[7] Materiality of the breach is thus relevant in determining both the extent of the injured party's cause of action and whether the contract can be terminated.

The availability of a cause of action for either total breach or partial breach reflects the law's attempt to distinguish cases of serious breach from those that are relatively minor.[8] The

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5. 4 A. CORBIN, CORBIN ON CONTRACTS § 946, at 809 (1960).

6. *Id.* at 809-10 ("[W]herever the court will hold that A's breach is a total breach, B can regard A's performance as at an end and at once maintain action for damages for all of his injury, past, present, and future."). *See* Coughlin v. Blair, 41 Cal. 2d 587, 598-600, 262 P.2d 305, 311-12 (1953) (failure to install paving and utilities within one year was treated as a total breach). *See also* RESTATEMENT OF CONTRACTS § 274(1) (1932) ("any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange").

7. 4 A. CORBIN, *supra* note 5, § 946, at 811 ("For a partial breach the injured party can maintain action at once; but he is not permitted to stop further performance by the wrongdoer and get damages for the anticipated future non-performance, as well as for the past non-performance constituting the partial breach."). *See* RESTATEMENT OF CONTRACTS § 274(1) (1932); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 829, at 80-81 (3d ed. 1962); *see also* LeRoy Dyal Co. v. Allen, 161 F.2d 152, 156 (4th Cir. 1947) (A seller's departure from the terms of a delivery agreement was "so insignificant as to come within the principle de minimis non curat lex. The seller . . . was therefore entitled to recover the full contract price."); United States Plywood Corp. v. Hudson Lumber Co., 113 F. Supp. 529, 535 (S.D.N.Y. 1953) (contract breaches did "not warrant rescission of the contract in the light of the length of time that elapsed before the claim of rescission, the acts of affirmance of the contract and the rule that breaches to be grounds for rescission must defeat the object of the contract"), *appeal dismissed,* 210 F.2d 462 (2d Cir. 1954).

8. 4 A. CORBIN, *supra* note 5, §§ 945-946. The first *Restatement* provides the following rules for determining the seriousness of the breach, or in other words, materiality of a failure to perform:

> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
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> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
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> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
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> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
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> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The wilful, negligent or innocent behavior of the party failing to perform;

failure to perform any part of a promised contract performance is a breach entitling the other party to damages caused by the breach.[9] All breaches are not of equal importance,[10] however, so the legal effect varies depending on whether the breach is material or nonmaterial.[11]

Materiality of the breach also is relevant to the determination of whether the injured party's performance is excused, that is, whether the injured party can cancel the contract. When the injured party's performance is constructively conditioned on the other party's performance,[12] that condition must be satisfied or the injured party's performance will be excused.[13] Rather than the standard of exact compliance needed to satisfy an express condition,[14] however, a constructive condition is satisfied by substantial compliance.[15] Substantial compliance is less than complete performance and thus constitutes a breach of the contract,[16] but it is sufficient to satisfy the constructive condition to the other party's performance obliga-

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(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

RESTATEMENT OF CONTRACTS § 275 (1932).

9. 4 A. CORBIN, *supra* note 5, § 948, at 817; *cf.* E. FARNSWORTH, *supra* note 4, § 8.8, at 575 ("Nothing less than full performance operates as a discharge.").

10. 4 A. CORBIN, *supra* note 5, § 945, at 808.

11. *See supra* notes 6-7 and accompanying text.

12. Constructive condition has been described as follows:

> A certain fact . . . may operate as a condition because the court believes that the parties would have intended it to operate as such if they had thought about it at all, or because the court believes that by reason of the *mores* of the time justice requires that it should so operate. It may then be described as a condition implied by law, or better as a *constructive condition.*

Corbin, *Conditions in the Law of Contract,* 28 YALE L.J. 739, 743-44 (1919) (emphasis in original). *See generally* Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903 (1942) (an exploration of the policy considerations that underlie the process of identifying constructive conditions in contracts).

13. E. FARNSWORTH, *supra* note 4, § 8.9, at 581.

14. *See* 5 S. WILLISTON, *supra* note 7, § 675, at 184; *see, e.g.,* Friedman v. Decatur Corp., 135 F.2d 812, 814 (D.C. Cir. 1943) (agreement void unless property "made available for industrial use with wharfage facilities and pipe line privilege"); Lach v. Cahill, 138 Conn. 418, 421, 85 A.2d 481, 482 (1951) (contract to purchase house contingent on securing a mortgage); *see also* RESTATEMENT OF CONTRACTS § 250 (1932).

15. Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 241, 129 N.E. 889, 890 (1921); *see* J. MURRAY, MURRAY ON CONTRACTS § 168, at 329 (2d ed. 1974). For a discussion of the origin of the doctrine of substantial performance, see *infra* note 69 and accompanying text.

16. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 11-22(b), at 412 (2d ed. 1977); 3A A. CORBIN, *supra* note 5, § 702, at 315.

tion.[17] Thus, substantial compliance results in a nonmaterial breach and the injured party is precluded from terminating the contract. In contrast, if the breaching party fails to meet the constructive condition of substantial performance, the breach is material and the injured party is excused from performance.[18]

Thus, the relationship between promises and constructive conditions under traditional common law does not allow for the concept of cure. When a party commits a material breach, the constructive condition ordering performances[19] fails, permitting the injured party to cancel the contract immediately. The opportunity and the necessary time to cure the breach are simply not available under this conceptual framework. In the absence of a contractual provision allowing a party to cure,[20] most courts traditionally did not acknowledge such a right.[21] The cure concept did arise in the common law as a few courts allowed some limited rights to cure,[22] but these cases are the exception rather than the rule.[23] As late as 1962, Professor

17. Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 241, 129 N.E. 889, 890 (1921). The New York court stated:

> The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.

Id.

18. J. MURRAY, *supra* note 15, § 168, at 329.

19. For development of the principles affecting order of performance, see E. FARNSWORTH, *supra* note 4, § 8.11, at 585-90; J. MURRAY, *supra* note 15, §§ 159-165; 6 S. WILLISTON, *supra* note 7, § 817, at 30, §§ 829-831.

20. Sellers frequently include provisions for such rights in their sales contracts. *See* Note, *The Seller's Privilege to Correct an Improper Tender,* 31 COLUM. L. REV. 1005, 1007 (1931).

21. Hawkland, *supra* note 1, at 718.

22. The most common limitation was that the cure had to occur within the contract time for performance. *See, e.g.,* McBath v. Jones Cotton Co., 149 F. 383, 386 (6th Cir. 1906) ("[T]he general rule is that a buyer may not reject a delivery of goods conformable to the contract, when made in time, merely because there had been a prior offer of goods not receivable and rejected upon that ground."); Emerson Shoe Co. v. Neely, 99 W. Va. 657, 662, 129 S.E. 718, 720 (1925) (early tender of goods by seller inadequate to support buyer's cancellation of the contract). A right to cure after the contract time for performance generally was not recognized. Hawkland, *supra* note 1, at 712; *see, e.g.,* McDonnell Motor Hauling Co. v. Morgan Constr. Co., 151 Ark. 262, 265-66, 235 S.W. 998, 999 (1921) (buyer's refusal to pay not a breach when seller lacked good title to steam shovel). Courts sometimes did recognize more extended rights to cure. *See, e.g.,* Cohen v. Kranz, 12 N.Y.2d 242, 246, 189 N.E.2d 473, 475, 238 N.Y.S.2d 928, 932 (1963) (seller entitled to a reasonable time beyond the time for performance to correct deficiencies in title to home).

23. Hawkland, *supra* note 1, at 711-12, 715-16, 718.

William Hawkland reported that "cure as a device to rectify defective tenders has never caught on."[24]

B. THE UNIFORM COMMERCIAL CODE

The first extensive adoption of the cure concept came in Article 2 of the Uniform Commercial Code. Section 2-508, in its entirety, provides:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.[25]

The broad right of the seller to cure under subsection (1) applies only when the seller tenders performance early and thus has time remaining for performance during which to attempt cure. The more important and innovative provision is subsection (2) because it allows a seller a reasonable time to cure beyond the time for performance stated in the contract. Both provisions limit the right of the injured buyer to cancel the contract by rejecting the seller's nonconforming tender.[26]

The seller's right to cure arises only upon the buyer's exercise of the right to reject.[27] UCC section 2-601 entitles a buyer

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24. *Id.* at 711.

25. U.C.C. § 2-508.

26. A buyer may reject "if the goods or the tender of delivery fail in any respect to conform to the contract." U.C.C. § 2-601. When a buyer rightfully rejects, the buyer, in addition to recovering damages, may cancel the contract. U.C.C. § 2-711(1).

27. The cure provisions in § 2-508, as well as the accompanying comments, clearly are applicable only following rejection by the buyer. Most commentators thus have indicated correctly that the right to cure does not extend to cases of revocation of acceptance by the buyer under § 2-608. *See* J. WHITE & R. SUMMERS, *supra* note 1, § 8-1, at 293; Hillman, *supra* note 4, at 586; Note, *Commercial Law—The Effect of the Seller's Right to Cure on the Buyer's Remedy of Rescission,* 28 ARK. L. REV. 297, 300-01 (1974) [hereinafter cited as ARKANSAS Note]; Note, *Uniform Commercial Code—Sales—Section 2-508 and 2-608—Limitations on the Perfect-Tender Rule,* 69 MICH. L. REV. 130, 147 (1970) [hereinafter cited as MICHIGAN Note]; Note, *Uniform Commercial Code—Rejection and Revocation—Seller's Right to Cure a Nonconforming Tender,* 15 WAYNE L. REV. 938, 940-41 (1969) [hereinafter cited as WAYNE Note]. A few commentators have tried to find support in the UCC provisions for the right to cure after revocation. *See* Note, *supra* note 1, at 414-15; Comment, *supra* note 1, at 942-43. Courts occasionally have applied § 2-508 to revocation of accept-

to reject a seller's performance "if the goods or the tender of delivery fail in any respect to conform to the contract."[28] With a rightful rejection, the buyer can cancel the contract, recover any of the purchase price paid, and recover damages for total breach.[29] The seller's proper notification to the buyer of an intent to cure, however, has the legal effect of suspending the effectiveness of the buyer's rejection for a period no longer than the remaining contract time under section 2-508(1) or a further reasonable time under section 2-508(2).[30] If the cure does not conform to the contract specifications, other than time for performance, the buyer can reject the tendered cure.[31] The only aspect of the perfect tender requirement[32] that cure eliminates is compliance with the time requirements when the cure is made pursuant to section 2-508(2).

The aggrieved buyer must affirmatively exercise the right to reject before the seller can have any right to cure. Section 2-601 merely establishes the buyer's substantive right to reject goods or deliveries that fail to conform to the contract. To exercise the right to reject, the aggrieved buyer must comply with the procedural requirements of section 2-602(1),[33] which speci-

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ance cases. *See, e.g.*, Bartus v. Riccardi, 55 Misc. 2d 3, 5-7, 284 N.Y.S.2d 222, 224-25 (Utica City Ct. 1967). Several commentators argue that sellers should have the right to cure after revocation. *See* Hillman, *supra* note 4, at 586-87; Whaley, *supra* note 1, at 75-76; Note, *supra* note 1, at 414-15; Comment, *supra* note 1, at 942-43.

28. U.C.C. § 2-601. If the buyer accepts nonconforming goods rather than rejecting them, the buyer is not required to accept a cure offer by the seller. *See* Bonebrake v. Cox, 499 F.2d 951, 957 (8th Cir. 1974). The buyer nevertheless is required to mitigate damages. *Id.* at 957. *See also* Hillman, *supra* note 4, at 586.

29. U.C.C. § 2-711(1).

30. *See* U.C.C. § 2-508. If the seller fails to go forward with a timely cure, the buyer's original rejection will become effective again. A new conforming tender, however, will cure the original nonconformity and will terminate the right of the buyer to reject.

31. The initial rejection would cover only the initial tender by the seller. The buyer also would have the right to reject the tender of the purported cure. Section 2-508(2) allows the seller to cure by substituting a "conforming tender," U.C.C. § 2-508(2), and § 2-601 allows a buyer to reject any goods or tender that "fail in any respect to conform to the contract," U.C.C. § 2-601. Section 2-106(2) provides that "[g]oods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." U.C.C. § 2-106(2).

32. *See* U.C.C. § 2-601. Section 2-601 states, in part, that "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may . . . reject the whole . . . ." *Id.*

33. For a thorough discussion of the distinction between the substantive and procedural aspects of rejection, see J. WHITE & R. SUMMERS, *supra* note 1, § 8-3, at 314-15.

fies that to be effective, the rejection must be within a reasonable time after tender and the seller must be seasonably notified.[34] A buyer waives the right to reject if the buyer purposely or inadvertently accepts a nonconforming tender. A buyer accepts tendered goods when, after a reasonable opportunity to inspect them, the buyer indicates that "he will take or retain them in spite of their non-conformity"[35] or the buyer "fails to make an effective rejection."[36] The aggrieved buyer who accepts a nonconforming tender can sue for the damages caused by the seller's deviation from the contract terms,[37] but can no longer reject the goods.[38] The seller has no cure rights when the buyer accepts.[39]

Section 2-508(2) has a further limitation on the right to cure: the right applies only when the seller "had reasonable grounds to believe" that the initial tender would be acceptable.[40] Comment 2 to section 2-508 states that "[s]uch reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract."[41] Thus Article 2 provides significant rights to cure, but not an automatic opportunity to cure in all cases of breach by a seller.[42]

C. THE *RESTATEMENT (SECOND) OF CONTRACTS*

The *Restatement (Second) of Contracts* significantly changed the responses that an injured party may make to a

34. U.C.C. § 2-602(1).
35. U.C.C. § 2-606(1)(a).
36. U.C.C. § 2-606(1)(b).
37. U.C.C. § 2-714, 2-715.
38. "Acceptance of goods by the buyer precludes rejection of the goods accepted." U.C.C. § 2-607(2).
39. *See supra* note 28.
40. U.C.C. § 2-508(2).
41. U.C.C. § 2-508 comment 2. The comment stresses the underlying policy objective of the section: "Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had 'reasonable grounds to believe' that the tender would be acceptable." *Id.*
42. Article 2 has additional provisions on cure in § 2-612 that govern nonconforming deliveries made under installment contracts. Section 2-612(2) allows the buyer to reject any installment whose nonconformity "substantially impairs the value of that installment and cannot be cured." U.C.C. § 2-612(2). The buyer must accept the installment if the seller gives adequate assurance of its cure. If the nonconformity with respect to one or more installment "substantially impairs the value of the whole contract," the buyer can cancel the contract under § 2-612(3). U.C.C. § 2-612(3). This subsection precludes any right of the seller to cure.

breach of contract from those available under the first *Restatement of Contracts*.[43] The cure concept is incorporated in section 237 of the *Restatement (Second) of Contracts*, which provides in full as follows:

> Except as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.[44]

Section 237 creates a condition to the duty to render performance, and nonoccurrence of the condition has two distinct possible effects.[45] First, as follows from the definition of "condition,"[46] the performance of the nonbreaching party does not become due.[47] The party whose duty is conditional is allowed to suspend performance during the time that the condition has not occurred.[48] For example, a promisor who conditions the obligation to purchase a home on receiving a satisfactory report on the absence of termite infestation is not obligated to proceed before the inspection is made and a satisfactory report is received. Second, the nonoccurrence of a condition discharges the promisor's duty to perform when the condition can no longer occur.[49] The prospective home purchaser would be excused from performance if an adequate ter-

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43. The first *Restatement of Contracts* summarized the traditional common-law approach, discussed *supra* notes 5-24 and accompanying text. It provided:

> In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge.

RESTATEMENT OF CONTRACTS § 274(1) (1932).

44. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).

45. The effects of the nonoccurrence of a condition under the *Restatement (Second) of Contracts* are as follows:

> (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
>
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
>
> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

Id. § 225.

46. "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Id.* § 224.

47. *Id.* § 225(1).

48. E. FARNSWORTH, *supra* note 4, § 8.3, at 543-44.

49. RESTATEMENT (SECOND) OF CONTRACTS § 225(2) (1979). "The unexcused non-occurrence of a condition has two possible effects on the duty subject to that condition. The first effect always follows and the second often

mite report was not provided during the time allowed for occurrence of that condition.

Section 237 of the *Restatement* conditions each party's duty to perform upon the absence of an "uncured material failure" by the other party to perform a promised performance that was due at an earlier time.[50] Although material breach of such a promise under traditional common law also results in failure of the constructive condition ordering performance between the parties, thereby enabling the aggrieved party to sue for total breach and cancel the contract,[51] the inclusion of the cure concept in section 237 precludes these results from happening immediately after the breach.[52] Material breach under the *Restatement* signifies nonoccurrence of the condition, which enables the other party to *suspend* further performance, but the duty of that performance will not be *discharged* until the condition can no longer occur.[53] Section 237 thus envisions a time

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does." *Id.* § 225(2) comment a. *See* E. FARNSWORTH, *supra* note 4, § 8.3, at 543-44.

50. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979). Section 238 deals with performances that are due simultaneously.

> Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

Id. § 238. Comment (a) to § 238 explains the relevance of such an offer to perform to the condition of § 237:

> If a party actually performs, his performance both discharges his own duty (§ 235(1)) and amounts to the occurrence of a condition of the other party's duty (§ 237). But it is not necessary that he actually perform in order to produce this latter effect. It is enough that he make an appropriate offer to perform, since it is a condition of each party's duties of performance with respect to the exchange that there be no uncured material failure by the other party at least to offer performance.

Id. § 238 comment a.

51. *See supra* notes 12-19 and accompanying text.

52. J. MURRAY, *supra* note 15, § 167, at 326 ("Whatever the ultimate judicial evaluation of the new Restatement change, there is a marked change in the traditional rule of the old Restatement that once the determination is made that a breach is material, the effect is to discharge the duty of the injured party.").

53. RESTATEMENT (SECOND) OF CONTRACTS § 237 comment a (1979). Comment (a) reads as follows:

> A material failure of performance has, under this Section, these effects on the other party's remaining duties of performance with respect to the exchange. It prevents performance of those duties from becoming due, at least temporarily, and it discharges those duties if it has not been cured during the time in which performance can occur.

Id.

period of "uncured material failure"[54] following a material breach during which the breaching party may cure the failure. If the breaching party does cure during this time period, the condition is then satisfied and the nonbreaching party must proceed with performance. A failure to cure triggers the second effect of the nonoccurrence; it discharges the nonbreaching party's duty to perform. The inclusion of the cure element as part of the condition precludes the nonbreaching party's right to terminate the contract immediately upon material breach, but permits that party to suspend the duty of performance until the condition is satisfied through cure.[55]

Section 242 identifies several circumstances to be considered "[i]n determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance."[56] These circumstances determine the length of time available to cure a particular breach.[57] Section 242 incorporates the same circumstances provided in section 241[58] for determining whether a particular failure is material.[59] Hence, both the ma-

54. *Id.* § 237.

55. For a thorough discussion of the power to suspend performance and to terminate the contract under the *Restatement*, see E. FARNSWORTH, *supra* note 4, §§ 8.15-.18.

56. RESTATEMENT (SECOND) OF CONTRACTS § 242 (1979).

57. *Id.* § 242 comment b. Comment (b) reads as follows: "This Section states circumstances which are to be considered in determining whether there is still time to cure a particular failure, or whether the period of time for discharge has expired." *Id.*

58. Section 241 reads as follows:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

59. *Id.* § 242(a). Additional relevant circumstances under § 242 are "the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements," *id.* § 242(b), and

> the extent to which the agreement provides for performance without

teriality of a breach and the time period for cure are for the most part determined by the same criteria. The circumstances dealing with the aggrieved party focus on the extent of deprivation of the benefit expected[60] and the availability of adequate compensation.[61] The circumstances focusing on the breaching party include the extent of forfeiture suffered by the breaching party,[62] the likelihood that the breaching party will cure,[63] and the conformity of the breaching party's behavior with standards of good faith and fair dealing.[64]

Thus, both the *Restatement (Second) of Contracts* and the Uniform Commercial Code explicitly adopt the concept of cure, a distinct departure from the traditional common law approach.[65] Their approaches to cure, however, differ significantly. The next section of the Article examines the rationales underlying the concept of cure in order to determine the sources of those differences.

II. THE RATIONALES FOR CURE

The search for the underlying rationale for a "second chance" at contract performance under the cure concept has suffered to some extent from misdirection. Professor Robert Hillman states that "[t]he drafters of the *Restatement (Second) of Contracts* have attempted to lessen the impact of the material breach doctrine" by precluding the injured party from terminating the contract and restricting that party "to suspending performance until it is too late for the breaching party to cure the default."[66] A need to mitigate the harshness of the material breach doctrine, however, is a shaky rationale for the cure concept; cure is more firmly grounded in the general contract

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delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

Id. § 242(c).

60. *Id.* § 241(a).

61. *Id.* § 241(b).

62. *Id.* § 241(c).

63. *Id.* § 241(d).

64. *Id.* § 241(e).

65. For a discussion of the common law approach, see *supra* notes 5-24 and accompanying text.

66. *See* Hillman, *supra* note 4, at 594. Professor E. Allan Farnsworth, the Reporter for the cure sections of the *Restatement (Second) of Contracts*, cites this passage with approval in his treatise on contracts. *See* E. FARNSWORTH, *supra* note 4, § 8.15, at 607 n.5.

remedial principles of protecting expectations and avoiding waste of resources, while also protecting the breaching party against forfeiture of its contract rights.[67] To understand the differences between the Uniform Commercial Code and the *Restatement* versions of the cure concept and to assess the merit of the *Restatement* approach, one must be able to articulate the policies underlying the cure concept.

The alleged harshness of the material breach doctrine[68] is an inadequate justification for the second opportunity for performance provided by the cure concept. The doctrine of material breach is not inherently harsh. On the contrary, the doctrine was established to prevent forfeitures by parties who had substantially complied with the contract, but who had committed a relatively minor breach.[69] The risk of forfeiture still

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67. Hillman discusses protection of expectations and avoidance of waste in the context of the uncertain extent to which the avoidable consequences rule requires an injured party to accept new offers of performance made by the party who materially breaches the contract. *See* Hillman, *supra* note 4, at 568-70.

68. Hillman cites three examples of how "the material breach doctrine often leads to unjust results." Hillman, *supra* note 4, at 563. A brief examination of these examples suggests that Hillman's assertion may be overstated. The first example does not really involve the material breach doctrine: "parties to a contract may specifically draft conditions in their contract which must occur before the duty of counter-performance arises." *Id.* Hillman uses a "time is of the essence" clause in a construction contract as an illustration. *Id.* If this condition is not met, the court may well be compelled to rule that the party whose performance is conditioned is excused from performance. Yet the condition in this case is an *express* condition. The material breach doctrine is applicable only to *constructive* conditions. The *Restatement* recognizes that if the parties make full performance an express condition in their agreement, neither materiality nor cure can mitigate the effects of nonoccurrence of that condition. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 comment d (1979).

A second supposedly harsh result of the material breach doctrine is that "the trier of fact simply may fail to perceive that a breach did not substantially deprive the injured party of what is bargained for." Hillman, *supra* note 4, at 563. The obvious harshness and inequity in this result, however, does not stem from the material breach doctrine itself, but rather from its incorrect application.

Hillman's last example of unfair hardship to the breaching party is a case in which the circumstances change after a material breach—the breaching party suddenly becomes either able or willing to provide at least partial performance. *Id.* Yet no matter where the law chooses to define the final moment for contract termination or how many "second chances" the breaching party receives, at some point the breaching party will be faced with the consequences of a continuing material breach. Circumstances for breaching parties may change after *any* point the law selects for contract termination.

69. In the famous 1773 opinion of Kingston v. Preston (paraphrased in Jones v. Barkley, 2 Dougl. 684, 689-91, 99 Eng. Rep. 434, 437-38 (K.B. 1781)), Lord Mansfield recognized the dependency of exchanged covenants through

exists for parties who commit a material breach. The possibility of cure is a response addressed to this continued risk of forfeiture.[70] Focusing on the supposedly unjust results of the material breach doctrine as a rationale for the cure concept tends to discount the equitable nature of the doctrine and divert attention from the proper conceptualization of the policies supporting the cure concept. Implementing cure rights produces mitigating effects beyond those provided by the material breach doctrine. The desirability of those effects, however, is not self-evident. What contract and societal values are advanced by cure? How does cure affect the legitimate interests of the contracting parties? One can discover the true rationale for the cure concept by focusing on why this additional response to the risk of forfeiture is desirable.

The true rationale for the cure concept can be found within generally recognized principles of contract remedies. The con-

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the process of implying a condition of the order for performance of the covenants in the absence of an express provision in the parties' agreement. Only a scant four years later, Lord Mansfield was forced in Boone v. Eyre, 1 H. Bl. 273, 126 Eng. Rep. 160(a) (K.B. 1777), to initiate an additional innovative doctrine to prevent the oppressive result that would follow from the traditional requirement of strict compliance with conditions. Even though the breach presented to the court was relatively slight, it was sufficient under the law applied to express conditions to result in the breaching seller's forfeiture of any right to payment on the contract. Lord Mansfield mitigated this harsh impact of the law of conditions by recognizing an easier standard for satisfying constructive conditions that has evolved and become embodied in the correlative doctrines of substantial performance and material breach. *See* Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921).

70. *See infra* notes 86-88 and accompanying text. The law has developed additional mitigating responses to nonliteral contract compliance. For instance, a party who breaches a contract can nevertheless recover at the contract rate for all of the units of a divisible contract that have been substantially performed. *See, e.g.*, Carrig v. Gilbert-Varker Corp., 314 Mass. 351, 357-58, 50 N.E.2d 59, 63 (1943) (contractor recovered for building 20 of the promised 35 houses). Courts now also generally allow a breaching party who cannot recover on the contract restitution for any benefit conferred on the other party. The policy for restitution is stated well in Britton v. Turner, 6 N.H. 481 (1834). The *Restatement* also indicates that a court may excuse a condition solely on the basis that a "disproportionate forfeiture" would result otherwise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 229 (1979). This provision, however, withholds such discretion from the courts if occurrence of the condition "was a material part of the agreed exchange." *Id.* Section 229 "is intended to deal with a term that does not appear to be unconscionable at the time the contract is made but that would, because of ensuing events, cause forfeiture." *Id.* § 229 comment a. *See* Jackson v. Richards 5 & 10, Inc., 289 Pa. Super. 445, 433 A.2d 888, 895 (1981) (noncompliance with express conditions of paying minor outstanding bills and providing evidence of loan application held to be trivial in comparison with contract obligation to purchase business, thereby precluding seller's right to exercise forfeiture clause).

cept of cure is grounded in the belief "that protecting expectations while avoiding waste is, or should be, a primary goal of contract damages."[71] The basis for the cure concept stems from the notion that our remedial system encourages parties to enter contracts[72] by giving damages based on "the benefit of the bargain" for disappointed expectations,[73] rather than trying to deter contract breaches through compulsion or punishment.[74]

The protection of expectations is identified as a paramount objective in the *Restatement* provisions on the law of contract remedies.[75] The compensation available to a disappointed promisee, however, is limited by several principles, including

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71. Hillman, *supra* note 4, at 555.

72. Remedies law for contracts under our legal system is not directed to the question, "How can [people] be made to keep their promises?" but rather to the question, "How can [people] be encouraged to deal with those who make promises?" Farnsworth, *Legal Remedies for Breach of Contract,* 70 COLUM. L. REV. 1145, 1147 (1970). This approach reflects society's interests in contract formation as a means of voluntary redistribution of resources. *See* Hartzler, *The Business and Economic Functions of the Law of Contract Damages,* 6 AM. BUS. L.J. 387, 389-92 (1968).

73. *See* RESTATEMENT OF CONTRACTS § 329 comment a (1932) ("In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract.") Damages are measured as "the net amount of the losses caused and gains prevented by the defendant's breach, in excess of savings made possible." *Id.* § 329. "In short, the plaintiff may recover the value of the defendant's promised performance. In general, this includes any loss resulting in the ordinary course of events from the breach." Speidel & Clay, *Seller's Recovery of Overhead Under UCC Section 2-708(2): Economic Cost Theory and Contract Remedial Policy,* 57 CORNELL L. REV. 681, 684 (1972).

74. Professor E. Allan Farnsworth is a principal proponent of this contracts remedial approach. "Our system, then, is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at relief to *promisees* to *redress* breach." Farnsworth, *supra* note 72, at 1147 (emphasis in original). For discussion of punitive damages, see generally Hartzler, *supra* note 72, at 392; Rice, *Exemplary Damages in Private Consumer Actions,* 55 IOWA L. REV. 307, 309 (1969); Simpson, *Punitive Damages for Breach of Contract,* 20 OHIO ST. L.J. 284 (1959); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change,* 61 MINN. L. REV. 207 (1977).

75. The introductory note to the chapter on remedies in the *Restatement* stresses the compensatory nature of contract remedies:

> The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from the breach. "Willful" breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party.

RESTATEMENT (SECOND) OF CONTRACTS introductory note, ch. 16, at 100 (1979). *See also id.* § 344 comment a (discussing the purposes of contract remedies).

the avoidance of waste.[76] Loss that could have been avoided through reasonable efforts following breach is not compensable.[77] The injured party is expected to minimize damages even to the extent of taking "affirmative action to avoid loss by making such substitute arrangements as are reasonable under the circumstances."[78] Society depends heavily upon parties entering into contracts as a mechanism for voluntarily reallocating resources,[79] and thus has an interest in remedial measures that avoid excessive damages following a breakdown in the contractual relationship.[80] Hence, in addition to the protection of expectations, the *Restatement* recognizes "the policy of encouraging the injured party to attempt to avoid loss."[81]

In comparing the advancement of these policies through the cure concept and through the avoidable consequences rule,[82] Professor Robert Hillman observes that "[p]ermitting cure of material breach is exactly the purpose of the avoidable consequences rule when applied to offers made by the breaching party."[83] Similar results do occur when the injured party accedes to further performance by the breaching party under either the cure concept or the avoidable consequences rule.

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76. J. MURRAY, *supra* note 15, § 227.

77. The avoidance of economic waste is a major purpose behind limiting recoverable damages to damages that can not be mitigated through reasonable efforts. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 188-91 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33, at 127 (1935).

78. Farnsworth, *supra* note 72, at 1185-86. *See* D. DOBBS, *supra* note 77, § 12.6, at 826, and cases cited therein; C. MCCORMICK, *supra* note 77, § 39, at 140-41.

79. RESTATEMENT (SECOND) OF CONTRACTS introductory note, ch. 16 (1979). *See supra* note 72.

80. Farnsworth, *supra* note 72, at 1183.

81. RESTATEMENT (SECOND) OF CONTRACTS, § 350 comment a (1979). "[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." *Id.* § 350(1). The *Restatement* clearly applies the affirmative aspects of the avoidable consequences rule: "Furthermore, [the injured party] is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise." *Id.* § 350 comment b.

82. Hillman, *supra* note 4, at 555. Although Hillman focuses on the avoidable consequences rule, much of his discussion is applicable to an analysis of the cure concept. The avoidable consequences doctrine prompts injured parties to avoid losses from contract breaches by entering into reasonable substitute agreements. It precludes recovery of damages for breach that could have been avoided through alternative reasonable steps. *See, e.g.*, Rock v. Vandine, 106 Kan. 588, 189 P. 157 (1920); McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 351, 169 N.E. 605, 606, *modified*, 253 N.Y. 533, 171 N.E. 770 (1930). For a more detailed explanation of cure and the avoidable consequences rule, see 5 A. CORBIN, *supra* note 5, § 1039; J. MURRAY, *supra* note 15, § 227.

83. Hillman, *supra* note 4, at 594.

Cure under the *Restatement* corrects the material nature of the breach, precluding cancellation of the contract. The injured party is entitled to the damages caused by the partial breach, but the breaching party avoids paying the additional damages associated with total breach. Under the avoidable consequences rule, the material nature of the breach of the *original* contract is unchanged, but if the injured party accepts the breaching party's offer to continue performance on the contract, a mitigating *substitute* transaction is created. Subsequent performance by the breaching party avoids the loss that would be associated with nonperformance, thereby reducing the extent of damages actually suffered by the injured party. Both the cure concept and the avoidable consequences doctrine promote the objectives of contract remedies; the injured party is adequately compensated by recovery of all the damages that could not be avoided.

If the aggrieved party wrongfully refuses to permit further performance by the breaching party, however, the legal consequences under the two approaches differ significantly. Although ease of expression often leads people to refer to a duty to mitigate damages arising from the avoidable consequences rule, the expression actually is inaccurate.[84] The injured party who unreasonably fails to mitigate will be precluded under the avoidable consequences rule from recovering those damages that could have been avoided, but the injured party will not be liable to the other party.[85] Cure under the *Restatement* functions differently. The breaching party has a right to take steps to correct at least some of the deficiencies causing the breach and thereby lessen the extent of damage suffered by the injured party. The injured party who interferes with the free exercise of that right breaches the implied promise of nonprevention.[86] This breach can make the injured party liable for total breach of contract, even though the other party

84. J. MURRAY, *supra* note 15, § 227, at 460 n.68; Farnsworth, *supra* note 72, at 1184; Hillman, *supra* note 4, at 554 n.1.

85. J. MURRAY, *supra* note 15, § 227, at 460 n.68.

86. 3A A. CORBIN, *supra* note 5, § 767. Preventing the other party from performing is a violation of the duty of good faith. RESTATEMENT (SECOND) OF CONTRACTS §§ 204, 205, 235, 245 (1979); J. MURRAY, *supra* note 15, § 187. *See, e.g.*, Tracy v. O'Neill, 103 Conn. 693, 699-700, 131 A. 417, 419 (1925) (broker entitled to commission when seller prevented execution of written contract); Barron v. Cain, 216 N.C. 282, 284, 4 S.E.2d 618, 620 (1939) (abuse and assault by grand-uncle prevented nephew from performing promise to care for him).

committed the first material breach.[87]

The substantive right to cure, therefore, extends the benefits of cure beyond the benefits of the avoidable consequences rule. In addition to providing a mechanism to minimize the extent of damages suffered by the injured party, the right to cure affords the breaching party the opportunity to correct the material nature of a breach and thus retain the right to demand the other party's performance under the contract. In this way the cure concept goes beyond the avoidable consequences rule in preventing forfeiture of contract rights by the breaching party.

The cure approach advances the policies of contract remedies law to a greater extent than does the avoidable consequences rule because it better protects the breaching party's expectations of minimizing damages and precluding contract cancellation. Just as people are encouraged to contract by an expectation of remedies for breach that compensate them for the actual, unavoidable loss of the benefit of their bargains,[88] a similar incentive stems from the expectation that in the event of their own breach they will be responsible only for the actual, unavoidable losses their breach causes. This expectation is fulfilled by both the cure concept and by the avoidable consequences rule. The unavoidable losses caused by the breach are the most extensive in cases of material breach because a material breach destroys the essential value or purpose of the contract to the injured party,[89] thereby justifying cancellation of the contract. Cure of a material breach, unlike the avoidable consequences rule, reinstates the essence of the contract, and thereby fulfills the breaching party's expectations of both minimizing damages *and* precluding contract cancellation. The prevention of forfeiture associated with cure of a material breach is appropriate because such prevention can be realized while fully protecting the injured party's expectations and avoiding waste. Cure thus mitigates both the injured party's damages and the breaching party's loss of contract rights.

The cure approach is better able to effectuate the policies

87. *See* E. FARNSWORTH, *supra* note 4, § 8.15, at 610; *infra* text accompanying note 156.

88. *See supra* note 72.

89. J. CALAMARI & J. PERILLO, *supra* note 16, § 11-22, at 410-11. *See* J. MURRAY, *supra* note 15, § 167. A New York court noted: "Nowhere will change be tolerated . . . if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract." Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921).

underlying the law of remedies in the *Restatement* than is the avoidable consequences rule because the cure approach includes an additional incentive. The prospect of liability for material breach for interference with the breaching party's cure rights should encourage an injured party to allow a breaching party to cure even in instances in which the injured party might have been willing to forego damages by refusing the breaching party's new offer of performance under the avoidable consequences rule. Consider the following illustration. Builder falls into a dispute with Owner and wrongfully withdraws his work force from the job site, thereby materially breaching the contract between them. Upon recognizing the error, Builder seeks to cure by resuming work under an accelerated schedule, desiring to retain Owner's contract obligation for remaining payments of $10,000. Owner is so incensed by Builder's actions, however, that Owner wishes to have nothing further to do with Builder, even though completion of the project will require paying another contractor an additional $1,000 that Owner cannot recover because of the avoidable consequences rule. This contract with a new contractor would be undesirable in view of the policies of the *Restatement* because it would promote waste through a misallocation of resources.[90] The cure concept adds an additional incentive to refrain from pursuing this alternative. In addition to not recovering the additional money expended to complete the project, Owner would be liable to Builder for the benefit of the bargain remaining under the contract.

This additional incentive accompanying cure not only makes actual waste avoidance more likely, it also helps eliminate the punishment motive, a motive that the *Restatement* disassociated from the law of contract remedies.[91] An injured party's refusal to deal further with the breacher often can stem from a desire to punish the breacher or secure revenge because of the breacher's "bad" actions. The viability of the avoidable consequences rule has been seriously impeded as a waste avoidance mechanism in cases in which breaching parties extend new offers of performance, because many courts have let similar punishment considerations infiltrate their decisions.[92]

90. *See supra* note 81 and accompanying text.

91. *See supra* note 74 and accompanying text; see also *supra* notes 72-73 and accompanying text for a discussion of the compensatory nature of contract remedies.

92. *See* Hillman, *supra* note 4, at 559-60 n.31, 561 n.34 and cases cited therein.

"Such decisions often view the contract breaker as one who should not be 'rewarded' for the breach by 'requiring' the injured party to accept the new offer."[93] By punishing the breacher, these decisions ignore the objectives of compensating injured parties and avoiding waste by compelling contract performance. The cure concept under the *Restatement* makes it more difficult for courts to promote punishment objectives, and more expensive for spiteful injured parties to refuse further performance by the breaching party.

Increasing the incentive for injured parties to mitigate losses by deeming them breaching promisors if they refuse cure does not necessarily lead the cure approach to violate the policy against compelling breaching promisors to meet contract obligations. An injured party may have more legitimate reasons than spite for wanting to preclude cure by the breacher. The injured party may no longer need or desire the contract performance, or if the performance is still desired, it may be available on better terms than under the contract. The injured party is not compelled to allow the breacher to continue, but rather is simply required to compensate the other party for damages occasioned by a denial of the opportunity to exercise cure rights. The cure concept thus is consistent with the principle of economic efficiency[94] reflected in the *Restatement* policy of protecting expectations: "a party may find it advantageous to

93. *Id.* at 560.

94. According to this principle, a breach of contract will result in a gain in 'economic efficiency' if the party contemplating breach evaluates his gains at a higher figure than the value that the other party puts on his losses, and this will be so if the party contemplating breach will gain enough from the breach to have a net benefit even though he compensates the other party for his resulting loss, calculated according to the subjective preferences of that party.

RESTATEMENT (SECOND) OF CONTRACTS reporter's note, ch. 16 (1979). The specific principle is known as the "Kaldor Compensation Principle." *See* Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility,* 49 ECON. J. 549 (1939). Legal analysis of the principle is now quite extensive. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1 (2d ed. 1977); Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency,* 24 RUTGERS L. REV. 273 (1970); Birmingham, *Damage Measures and Economic Rationality: The Geometry of Contract Law,* 1969 DUKE L.J. 49; Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law,* 68 CALIF. L. REV. 221 (1980); Coleman, *Efficiency, Utility, and Wealth Maximization,* 8 HOFSTRA L. REV. 509 (1980); Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract,* 66 VA. L. REV. 1443 (1980); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach,* 77 COLUM. L. REV. 554 (1977); Kennedy & Michelman, *Are Property and Contract Efficient?,* 8 HOFSTRA L. REV. 711 (1980); Polinsky, *Eco-*

refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss."[95]

The cure concept has yet another advantage over the avoidable consequences rule as a means of avoiding waste by allowing further performance by the breaching party; it is easier to apply. Uncertainties tend to dilute the effectiveness of the avoidable consequences rule when it is applied to new offers of performance extended by the breaching party.[96] In addition, application of the rule is complicated by issues such as whether the injured party waives rights under the original agreement by accepting the new offer,[97] the applicability of the preexisting duty rule,[98] and which types of damages fall within the scope of the rule.[99]

The rationale supporting the *Restatement* cure concept thus is tied to the *Restatement*'s policies underlying the law of remedies for breach of contract. Cure not only promotes protection of contract expectations and avoidance of waste, but also prevents forfeiture of the contract rights of the breaching party. The Reporter to the *Restatement* provisions on cure and remedies has explained the accompanying equitable effects of the material breach doctrine and the cure concept:

> It is in society's interest to accord each party to a contract reasonable security for the protection of his justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for avoiding his contractual obligations. . . . [Courts] curb abuse of [the] power to suspend by denying the injured party the power to exercise it if the breach is immaterial, so that minor breaches will not disrupt performance. Courts also encourage the parties to keep the deal together by allowing the injured party to terminate the contract only after an appropriate length of time has passed. They restrain abuse of this power to terminate by denying the injured party the power to exercise it hastily, so that not all delays will bring the contract to an end, and the party in breach will be afforded some time to cure his breach.[100]

The rationales that support the codification of the cure

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nomic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law, 87 HARV. L. REV. 1655 (1974).

95. RESTATEMENT (SECOND) OF CONTRACTS introductory note, ch. 16 (1979).

96. The reluctance of many courts to even apply the rule under these circumstances has been noted previously. *See supra* notes 92-93 and accompanying text.

97. Hillman, *supra* note 4, at 564-67, 571-72 and cases cited therein.

98. *Id.* at 565-67, 573, and cases cited therein.

99. *Id.* at 574-76 and cases cited therein.

100. E. FARNSWORTH, *supra* note 4, § 8.15, at 607.

concept in the Uniform Commercial Code differ from the policy objectives of cure in the *Restatement*. Waste avoidance consistently secured through a reduction in damages resulting from cure by the breaching party is not a Code objective because the right to cure is not available if the aggrieved party accepts the defective tender or delivery and seeks money damages.[101] The right to cure applies only when the buyer rejects the tender because of the seller's noncompliance with the contract requirement.[102]

By limiting cure to the rejection context, the UCC drafters apparently were concerned primarily about the adverse impact of forfeiture in sales contracts. A buyer who accepts goods can recover damages for nonconformities, but must still pay the purchase price for the goods,[103] so there is no forfeiture of the breaching party's contract rights. Following a proper rejection of goods, however, the injured party can cancel the contract, thereby cancelling the other party's contract rights, in addition to recovering damages.[104] Because the seller's performance must comply with the perfect tender rule under the UCC,[105] cancellation is possible, in the absence of cure, even in cases of nonmaterial breach. As the Reporter of the *Restatement* has pointed out, cure "is more important to a seller of goods, who is subject to the perfect tender rule, than it is to a builder under a construction contract, who already has the benefit of the doctrine of substantial performance."[106]

The UCC cure provision also differs in that it apparently requires a higher standard of commercial behavior than does the *Restatement*.[107] The UCC's right to cure, allowed only in cases of rejection by the buyer, applies after the time for contract performance only if "the seller had reasonable grounds to believe [that the nonconforming tender] would be acceptable."[108] This limitation restricts the availability of cure to cases of conformity with this prescribed behavior. Breaching parties

101. *See supra* notes 36-39 and accompanying text.
102. U.C.C. § 2-508. *See supra* note 27.
103. U.C.C. §§ 2-714, 2-607(1).
104. U.C.C. § 2-711(1).
105. U.C.C. § 2-601.
106. E. FARNSWORTH, *supra* note 4, § 8.17, at 614.
107. *See* Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 113-16 (1981); *cf.* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.").
108. U.C.C. § 2-508(2).

who do not comply are, essentially, punished through denial of an opportunity to cure. The *Restatement* does not restrict the availability of cure to cases in which the breaching party had reasonable grounds to believe his performance would be acceptable. Thus, the rationales supporting the provisions for cure under the Uniform Commercial Code and the *Restatement (Second) of Contracts* also differ in the degree of commercial reasonableness expected of the parties.

III. PROBLEMS WITH THE CURE CONCEPT IN THE *RESTATEMENT (SECOND) OF CONTRACTS*

Although the extension of the cure concept into general contract law is a sensible development, the actual approach taken in the *Restatement (Second) of Contracts* presents some serious drafting and substantive problems. These problems are likely to adversely affect the courts' adoption of cure.

A. PROBLEMS IN DRAFTING

The drafting of the *Restatement* unduly intertwines the cure concept with other fundamental contract concepts. Section 237 makes lack of an "uncured material failure"[109] a condition to the other party's duty to perform. With one word, it combines the innovative cure concept with the traditional concepts of material breach and constructive conditions ordering performance.[110] This extreme "efficiency" in drafting probably will prevent the cure concept from receiving the attention it deserves. Section 237 so closely resembles the traditional material breach doctrine that courts can be expected to cite the section while continuing to decide the cases in the usual way. "Uncured material failure" in practice is likely to be read "material failure."

The drafting of section 242 of the *Restatement* enhances the possibility of this intertwining of the cure concept and the material breach doctrine. Section 242 specifies the circumstances that are significant in determining how much time must pass before one party's uncured material failure to perform discharges the other party's remaining duties to perform; section 242 essentially focuses on the time during which cure will be allowed.[111] Section 242 primarily invokes the five cir-

109. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).

110. For a discussion of the traditional concepts, see *supra* notes 6-7, 19 and accompanying text.

111. RESTATEMENT (SECOND) OF CONTRACTS § 242 comment b (1979) ("This

cumstances of section 241, the section used to determine whether a breach is material.[112] This presentation of identical circumstances in adjoining sections to determine both material breach and the time allowed to cure inevitably will contribute further to a hardened coalescence of these concepts in many minds. In practice, the cure concept will be easy to ignore and the *Restatement* is therefore less likely to serve as a catalyst for widespread recognition of cure in contracts that are outside the scope of the UCC.

The drafting problems are compounded by the fact that the area of contract law affected by the cure concept includes some of the most complicated contract doctrines. The consequences of nonperformance of a contract promise are interrelated with a number of concepts, and the issues raised can become quite complex. The temptations to continue applying traditional analysis to these problems and to ignore the cure concept will be great. Cure will be easy to ignore given the lack of attention drawn to it. Decisionmakers focusing on the question predictably will conclude, because of the tight drafting of the *Restatement*, that no significant change in the law was intended by inclusion of the reference to cure. The desire to maintain the known status quo will be enormous. Even persons inclined to give general credence to cure will be hesitant to venture forth when they are uncertain of how cure fits conceptually into the traditional framework of contract law. Better drafting would have helped to avoid confusion over the cure concept.

Poor decision making in cases involving the cure concept under the UCC[113] should have alerted the drafters to the need to expand the *Restatement*'s implementation of the concept. Spurred by the wide array of scholarly statutory construction analyses of section 2-508,[114] the courts' applications of the sec-

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Section states circumstances which are to be considered in determining whether there is still time to cure a particular failure, or whether the period of time for discharge has expired.").

112. *See id.* § 242(a).

113. *See* Schmitt & Frisch, *The Perfect Tender Rule—An "Acceptable" Interpretation*, 13 U. TOL. L. REV. 1375, 1380 (1982). These commentators noted:

> What is surprising is the manner in which the courts have avoided, circumvented, and otherwise ignored the specific requirement of section 2-508(2) that before a seller may have time, in addition to that agreed to for performance, in which to cure a nonconforming tender, he must have made such tender reasonably believing that it would be acceptable to the buyer.

Id.

114. One commentator argues that the right to cure under § 2-508(2) is available only to sellers who know their tender is nonconforming but reason-

tion 2-508 cure provisions of the UCC have been inconsistent and confusing.[115] The courts' treatment of the subject has led two respected commentators to conclude that "[h]ow one generalizes from the . . . cases . . . is not clear."[116] Given this confusion under the UCC approach to cure, a general reference in the Reporter's Note to section 237 of the *Restatement* stating that the term "cure" is broader than it is under section 2-508 of the UCC[117] is inadequate to alleviate the lingering uncertainty over the application of cure under the *Restatement.* This obser-

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ably believe that their buyer nevertheless will find it acceptable. R. NORDSTROM, LAW OF SALES 319-22 (1970). Another commentator would allow cure when the buyer will not face "any great inconvenience, risk or loss." Hawkland, *supra* note 1, at 724. Other commentators apply a "magnitude of the defect" test, restricting cure to relatively minor defects. Wallach, *supra* note 1, at 28; Whaley, *supra* note 1, at 57-59; *infra* notes 148-152 and accompanying text. Another study provides three interpretations of the "with or without money allowance" clause of § 2-508(2). Peters, *supra* note 1, at 211-12. Another approach focuses on the good faith of the parties as the standard for interpretation. Note, *supra* note 1, at 400. Professors James White and Robert Summers, however, provide the best statutory construction analysis:

> [A] seller should be found to have had reasonable cause to believe that his tender would have been acceptable any time he can convince the court that (1) he was ignorant of the defect despite his good faith and prudent business behavior, or (2) he had some reason such as prior course of dealing or trade usage which reasonably led him to believe that the goods would be acceptable.

J. WHITE & R. SUMMERS, *supra* note 1, § 8-4, at 322. Their additional argument in favor of requiring injured buyers to accept money allowances is not, however, grounded in the statutory language. *See id.* at 322-23. For a synopsis of all of these positions, see Schmitt & Frisch, *supra* note 113, at 1376-80.

115. *See, e.g.,* Marine Mart, Inc. v. Pearce, 252 Ark. 601, 607, 480 S.W.2d 133, 137 (1972) (proceeds to question of reasonable time to cure without discussing right to cure); Wilson v. Scampoli, 228 A.2d 848, 850 (D.C. 1967) (citing Hawkland, *supra* note 1, at 724 for the proposition that cure is allowable when buyer will not face great inconvenience, risk or loss); Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654, 657 (Minn. 1981) (limits cure rights to minor defects); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 457-58, 240 A.2d 195, 204 (1968) (proceeds directly to question of adequacy of proffered cure without discussing seller's right to cure); Bartus v. Riccardi, 55 Misc. 2d 3, 6, 284 N.Y.S.2d 222, 224-25 (N.Y. City Ct. 1967) (apparently emphasizes good faith). One commentator has suggested that with judicial gloss on section 2-508, "[c]ure has . . . become discretionary." Miniter, *Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments,* 13 GA. L. REV. 805, 835 (1979).

116. J. WHITE & R. SUMMERS, *supra* note 1, § 8-4, at 321.

117. The reporter's note states: "The term 'cure' is used in a broader sense than in Uniform Commercial Code § 2-508, to include performance by one party before the other party's remaining duties of performance have been discharged, even though the other party has a claim for damages for partial breach because of the delay." RESTATEMENT (SECOND) OF CONTRACTS § 237, reporter's note (1979).

vation is all the more pertinent due to the substantial differences between the *Restatement* provisions on cure and the UCC provisions.[118]

Comments by scholars who have focused on the cure provisions of the *Restatement* vividly demonstrate the confusion that the chosen drafting is capable of producing. Professors John Calamari and Joseph Perillo refuse to adopt the "uncured material breach" terminology "because it appears to complicate the problem."[119] They argue that "[a] breach is either material or immaterial, and it is clear that a breach which is immaterial may become material by remaining uncured for a period of time."[120] Professor Robert Hillman suggests that "[s]ince the factors set forth for determining when a breach is material [section 241] are 'similar' to the factors listed for determining when the injured party's duties are discharged [section 242], the Restatement (Second) approach may merely change terminology, not substance."[121] He also speculates that "[i]t may be that breaches previously held to be immaterial constitute material breaches under the new Restatement, entitling the injured party to suspend performance but not cancel."[122] When scholars as capable as these are forced to speculate about the meaning of the *Restatement* cure provisions, the drafting of the provisions becomes suspect. The problem stems from drafting that lashes the cure concept so tightly to traditional doctrines that it is difficult for cure to attain the separate identity so necessary for its acceptance. While tight drafting ordinarily is a praiseworthy virtue, in this instance tightness may choke the innovation the drafting seeks to promote.

Because the cases decided since the promulgation of the *Restatement* do not pose circumstances in which the opportunity to cure was demanded and refused, discerning the judicial reaction to the cure provisions is somewhat speculative. The opinions in most of the cases decided to date do not include any application of the cure concept.[123] Courts citing section 237[124]

118. *See supra* notes 25-64 and accompanying text.
119. J. CALAMARI & J. PERILLO, *supra* note 16, § 11-22(a), at 408 n.41.
120. *Id.*
121. Hillman, *supra* note 4, at 594 n.218.
122. *Id.*
123. One court, in dicta, states the essence of section 237, including the reference to cure, and the circumstances in which cure could have been relevant. Bob Daniels & Sons v. Weaver, 106 Idaho 535, 539-40, 681 P.2d 1010, 1014-15 (1984). The court, however, never reached the issues of cure or even breach, because it found that the evidence of a purported contemporaneous oral contract was insufficient. *Id.* at 541, 681 P.2d at 1016.

generally use it as authority for the proposition that a material breach by one party excuses further performance by the other party, but the courts fail to give any consideration to the cure concept in these cases.[125] This consistent failure prompts the suspicion that courts are disregarding the relevance of the cure concept and omitting it entirely from their legal analysis in these cases, but until the facts of cases force courts explicitly either to recognize or deny a right to cure, one cannot be certain whether courts are ignoring the cure concept or not.

In continuing to apply the traditional common law doctrine in these cases while invoking the authority of section 237 of the *Restatement*, courts are demonstrating that they do not appreciate the role of the cure concept in section 237. If courts did recognize the import of this role in section 237, they could apply the concept quite easily. The Connecticut case of *Vesce v. Lee*[126] is illustrative. The parties held property as tenants in

124. The earliest cases referencing the *Restatement (Second) of Contracts* cite the comparable provision in the tentative draft. *See* RESTATEMENT (SECOND) OF CONTRACTS § 262 (Tent. Draft No. 8, 1973).

125. Admittedly, cure was probably impossible to effectuate in some of the cases. For example, in one case the breaching lessor vacated the premises adjoining the leased property and rented those premises to another retail business. *See* Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 24 (Iowa 1978). The court found that the parties had entered into a concession lease arrangement wherein the principal host store benefited the smaller enterprise by generating customer traffic and thus increasing the smaller retailer's gross sales. It held that the plaintiff impliedly covenanted to continue operating its business on the adjacent premises during the term of the sublease, and that it materially breached that covenant, excusing any obligation for further rental payments. *Id.* at 29. Another case in which cure would appear to have been impossible is Todd v. Heekin, 95 F.R.D. 184 (S.D. Ohio 1982). There, the court cited § 237 of the *Restatement (Second) of Contracts* as the legal standard in the event of a breach. *Id.* at 186. Due to issues of fact in controversy, the court denied cross-motions for summary judgment. *Id.* The alleged breach was that plaintiff's attorney had improperly disclosed terms of the parties' antitrust settlement agreement. *Id.* at 185.

In other cases, cure might have been possible, but apparently was not attempted; at least the courts did not discuss cure. In one such case, a plaintiff under contract to provide investigation services materially breached the contract because the business was not licensed to conduct such business in Massachusetts. *See* Harness Tracks Sec., Inc. v. Bay State Raceway, Inc., 374 Mass. 362, 365-66, 373 N.E.2d 353, 356 (1978). The court felt that the prospect of the defendant's liability for torts of unlicensed personnel was sufficient to establish material breach. *Id.* In another case an architect breached his employment contract by engaging in a pattern of behavior including tardiness, absence, acting without prior employer consent on company business, and performing private architectural work without bringing the business into the company. *See* Stokes v. Enmark Collaborative, 634 S.W.2d 571, 573-74 (Mo. Ct. App. 1982).

126. 185 Conn. 328, 441 A.2d 556 (1981).

common, and the defendant agreed to purchase the plaintiff's interest for $13,830. The written agreement required the defendant to pay $10,000 immediately and the balance within one year, but the defendant never tendered payment of the $10,000, and the plaintiff sued for a partition by sale seven months later.[127] Those seven months clearly provided a more than adequate period during which to cure the breach, so the court easily could have found an uncured material breach.[128] Instead, without making any reference to the cure concept, the court adopted the trial court's conclusion that, under section 237, the breach terminated the contract.[129]

The court in *Vincenzi v. Cerro*[130] also missed an opportunity to apply the cure analysis. In that case, the defendant agreed to pay $91,000 in five installments as work progressed on the house that plaintiff agreed to build on defendant's land.[131] The defendant refused the plaintiff's demand for the final payment in August on the grounds that the work was not completed and that some of the work was defective.[132] In the suit by the builder, the trial court concluded that because the portion of unperformed work was so minimal, the builder had substantially performed and was entitled to recover the fifth installment minus the cost of completion.[133] The appellate court affirmed this conclusion.[134] Interestingly, the trial court found that work performed by the builder was not completed and approved until November, although the contract contemplated completion in March and final payment was demanded in August.[135] If the performance in August was not substantial, the uncured material breach would have entitled the defendant to suspend his final payment but the builder would have been allowed time to cure the deficiencies. The court might then

127. *Id.* at 330-31, 441 A.2d at 557.

128. The Supreme Court of Virginia had a similar opportunity to find an uncured material breach in R. G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 219 Va. 1, 244 S.E.2d 74 (1978). Plaintiff was held to have materially breached the implied obligation to not prevent the defendant from performing, thereby excusing defendant's promised performance. *Id.* at 118, 244 S.E.2d at 779. The court could have indicated that the plaintiff's delay for nearly one year constituted an adequate time in which to cure. The court, however, did not discuss cure.

129. *Vesce,* 185 Conn. at 334-35, 441 A.2d at 559.

130. 186 Conn. 612, 442 A.2d 1352 (1982).

131. *Id.* at 614, 442 A.2d at 1353.

132. *Id.*

133. *Id.* at 614, 442 A.2d at 1354.

134. *Id.* at 617, 442 A.2d at 1355.

135. *Id.* at 614, 442 A.2d at 1353.

have been inclined to hold that the cure provided during November was timely, thereby satisfying the condition to the defendant's obligation to pay. The defendant thus would have been entitled to suspend his performance, but not to cancel it. The court constrained its application of section 237, however, to the use of comment (d), which simply applies the axiom that the substance of section 237 applies equally to cases in which the issue is posed in terms of whether the party whose performance is due first has substantially performed or whether the breach by that party is material.[136] The court simply ignored the cure concept.

These initial ventures by courts into section 237 of the *Restatement* do not bode well for the successful implementation of the cure concept in general contract law. Although one cannot be certain of the judiciary's reaction to cure until the issue is presented directly, the omission of cure analysis in the material breach cases citing and discussing section 237 shows that the courts have not yet embraced it. When courts do confront claims based on cure, the drafting of the *Restatement* enhances the likelihood that they will decide these cases using the familiar traditional contract concepts.

One possible explanation for the drafters' understated incorporation of the cure concept could be the overall desire to defuse the "controversy over the extent to which the rules formulated in the restatements should reflect a judgment as to what the law is, as distinguished from what the law should be."[137] Professor E. Allan Farnsworth succinctly stated his position when he indicated that "it scarcely behooves the Reporter of a restatement to proclaim too often that he is engaged in innovation."[138] The method of adopting the cure concept sat-

136. *Id.* at 616, 442 A.2d at 1354 (applying comment (d) to § 237 of the *Restatement (Second) of Contracts*). Comment (d) reads:

> A typical example is that of the building contractor who claims from the owner payment of the unpaid balance under a construction contract. In such cases it is common to state the issue, not in terms of whether there has been an uncured material failure by the contractor, but in terms of whether there has been substantial performance by him. This manner of stating the issue does not change its substance, however, and the rule stated in this Section also applies to such cases.

RESTATEMENT (SECOND) OF CONTRACTS § 237 comment d. *See also* Measday v. Kwik-Kopy Corp., 713 F.2d 118, 123 (5th Cir. 1983) (question of sufficiency of employee's performance under a contract was phrased in terms of whether employee had substantially performed).

137. Farnsworth, *Ingredients in the Redaction of The Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 5 (1981).

138. *Id.* at 6.

isfies the incentive to create at least an impression of conformity with the prior law and may have been calculated to divert recognition of it as an addition to general contract law.

If this reason was a motivating factor, it seems misplaced in this instance. The drafters could have avoided the controversy of whether they were adding to the law by recognizing that cure depends for its authority in primary part on a UCC provision and then they could have extended its application to general contract law by analogy. This would have been preferable. A similar approach was taken in *Restatement* section 208, which extends by analogy the UCC section 2-302 provisions on unconscionability, and in *Restatement* section 251, which follows the same course with respect to the UCC section 2-609 provisions on the right to demand assurances of performance.[139] Focusing on the cure concept, the Reporter does acknowledge in subsequent writings that the cure idea has been incorporated by analogy from the UCC,[140] but his main emphasis is on demonstrating its foundation in prior case law.[141] A separate *Restate-*

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139. *Id.* at 11.

140. *See id.* ("The ideas of 'cure' and [some damages concepts] have also been used by analogy."); *see also* E. FARNSWORTH, *supra* note 4, § 8.17, at 613-14. In this treatise, Professor Farnsworth states:

> Although the concept of cure was known before the Uniform Commercial Code, the Code must be credited with giving a seller of goods a clear right to cure and with popularizing the word *cure* in this context. The Code provisions on cure apply only to contracts for the sale of goods, but they may be applied by analogy to other contracts.

Id. (footnotes omitted) (emphasis in original).

The only specific reference to cure in the reporter's note to § 237, however, is as follows: "The term 'cure' is used in a broader sense than in Uniform Commercial Code § 2-508, to include performance by one party before the other party's remaining duties of performance have been discharged, even though the other party has a claim for damages for partial breach because of the delay." RESTATEMENT (SECOND) OF CONTRACTS § 237, reporter's note (1979). Compare the explanations for the adoption of the concepts of unconscionability and the right to demand assurances: "[I]n some instances the *Restatement (Second)* incorporates by analogy a new rule that depends largely on a Code rule for its authority." Farnsworth, *supra* note 137, at 11.

141. The reporter's note to § 237 cites one case, Cohen v. Kranz, 12 N.Y.2d 242, 189 N.E.2d 473, 238 N.Y.S.2d 928 (1983), and two famous treatises, 3A A. CORBIN, CORBIN ON CONTRACTS §§ 657-660, 675, 677-678, 700-702, 762 (1960 & Supp. 1980); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 820-828, 839, 841-842 (3d ed. 1962). These authorities, however, do not represent the force of the traditional caselaw. *See supra* note 24 and accompanying text and *supra* note 52.

Several of the cases cited in Reporter E. Allan Farnsworth's treatise on contracts, E. FARNSWORTH, *supra* note 4, §§ 8.15-8.16, at 610-13, do not actually involve the right to cure or to suspend performance. *See, e.g.*, Continental Grain Co. v. Simpson Feed Co., 102 F. Supp. 354 (E.D. Ark. 1951), *modified,*

ment section, comparable to sections 208 and 251 which extend UCC analogies, would have facilitated the separate identification of the cure concept that is essential to its successful implementation.

In addition, the drafters were influenced, most likely, by the need to fit the desired legal effects of cure into the conceptual framework of contract law. The cure concept converts the traditional common law of material breach from allowing immediate discharge of the aggrieved party to allowing temporary suspension of further performance followed by discharge only if a timely cure is not provided. Conceptually, both the suspension and the discharge had to be tied to the constructive condition making the breaching party's performance due before the performance of the aggrieved party. The *Restatement* accomplishes the desired results very efficiently by including both material failure and lack of cure as elements of the constructive condition, thereby establishing the dual effects of the nonoccurrence of a condition. The material failure to perform allows the suspension; the failure to cure the material breach triggers the discharge.

These conceptual objectives, however, could have been realized just as well through drafting that provides a separate section for the cure concept. The substance of section 237 would be preserved by making the constructive condition a material failure that is not cured as defined in the separate section on cure. This change is purely one of form, not substance. It is one that would be neither necessary nor desirable if the drafters were working on a blank slate to codify desirable law. The *Restatement*'s efficient drafting under those circumstances would be worthy of envy and emulation. But the *Restatement* is not a codification and it reflects a substantial body of prior law. The drafting, therefore, would have been improved with a separate section on cure, just as Article 2 of the UCC provides separate sections for rejection and cure. The change, although minor, would have had a major influence in drawing attention to the cure concept and in promoting its useful application.

The drafters did provide separate sections detailing the circumstances to be employed in determining material breach and the circumstances to be used in determining the time available

199 F.2d 284 (8th Cir. 1952); Zulla Steel v. A & M Gregos, 174 N.J. Super. 124, 415 A.2d 1183 (1980); Wasserburger v. American Scientific Chem., Inc., 267 Or. 77, 514 P.2d 1097 (1973); Aiello Constr. v. Nationwide Tractor Trailer Training & Placement Corp., 122 R.I. 861, 413 A.2d 85 (1980).

to effectuate cure. This was certainly necessary to avert hopeless chaos, but the use of identical circumstances in immediately adjoining sections that contain concepts comprising the condition of section 237[142] inevitably contributes to lingering confusion. The drafting still promotes the forseeable tendency to coalesce the concepts of materiality and cure. Even if identical circumstances for determining the two concepts are appropriate,[143] the inclusion of the circumstances for resolving the cure issue in the suggested separate section on cure would promote further recognition that cure is a separate concept from material breach and one that requires its own individualized determination.

The drafting of the cure provisions in the *Restatement* cannot be faulted from a technical standpoint. It is efficient and incorporates the cure concept into the conceptual framework of contract law in an ingenious fashion. The fact that the drafting is in a restatement, however, is the basis for the criticism leveled at it here. The drafters expanded the cure concept into general contract law, but rather than emphasizing the extension by analogy to a UCC provision, the drafters purport to be merely restating traditional contract principles. The drafting scheme strongly reinforces the "continuation-of-current-law" impression and does not provide the identification of the cure concept needed for its successful implementation. The failure of the judiciary to date to embrace the cure concept[144] demonstrates the validity of this criticism.

B. PROBLEMS IN SUBSTANCE

The cure provisions of the *Restatement (Second) of Contracts* also suffer from some serious substantive shortcomings. These problems have an adverse impact upon the realization of the objectives of contract remedies. They appear to have been overlooked by the drafters.

The *Restatement* unfortunately limits the applicability of cure to cases involving a material breach. The cure concept is introduced in section 237, which makes an "uncured material failure" to render performance a condition to the duties of the other party whose performance is due later.[145] Consequently,

142. For a list of these circumstances, see *supra* note 58.

143. See *infra* notes 168-175 and accompanying text for assertion of a contrary position.

144. *See supra* notes 123-136 and accompanying text.

145. *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).

parties who *materially* breach their contracts are entitled to cure, but parties who commit only lesser, *partial* breaches are not. The omission of cure rights in cases of partial breach is inconsistent with the waste avoidance rationale that underlies cure in the *Restatement.* Although damages are not as great in cases of partial breach, waste still can be avoided by curing those breaches.[146] The availability of cure for partial as well as material breaches would protect expectations because the injured party still would be entitled to damages for ultimate losses, and it would also avoid additional waste.

The approach of the *Restatement* stands in stark contrast to case law and commentary under the UCC. The UCC does not base availability of cure on the nature of the breach, but ironically, several courts[147] and commentators[148] have contended erroneously that it does *not* apply to cases of material breach. The language of section 2-508(2) restricts cure after the contract time for performance has passed to cases in which "the seller had reasonable grounds to believe [the non-conforming tender] would be acceptable."[149] The courts and commentators that automatically preclude use of section 2-508(2) for material breaches unwarrantedly apply a "magnitude of the defect" test for determining the reasonableness of the seller's belief, allowing cure for minor but not major defects.[150] This approach does not incorporate the factor of the seller's belief of the acceptability of the tender and therefore does not reflect the statutory language. The seller's right to cure is not precluded automatically just because the defect in the tender is material, and, conversely, the right to cure does not follow under the Code just because the tendered defect is relatively minor.[151]

146. Furthermore, the likelihood of successful cure is probably higher for partial breaches as a whole than for material breaches.

147. *See* Johanssen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654, 657 (Minn. 1981); Reece v. Yeager Ford Sales, Inc., 155 W.Va. 453, 459, 184 S.E.2d 722, 725 (1971).

148. *See* Schmitt & Frisch, *supra* note 113, at 1387; Wallach, *supra* note 1, at 28; Whaley, *supra* note 1, at 57-58; Comment, *Sales of Personal Property—Breach of Warranty—Repair as a Means of Cure Under Section 2-508 of the Uniform Commercial Code,* 53 IOWA L. REV. 780, 783 (1967); *see also* W. HAWKLAND, SALES AND BULK SALES 141 (3d ed. 1976) (The "effect and purpose [of § 2-508(2)] is to prevent the buyer from forcing the seller to breach by making a surprise rejection of the goods because of some minor nonconformity at a time at which the seller cannot cure the deficiency within the time for performance.").

149. U.C.C. § 2-508(2).

150. *See supra* notes 147-148 and accompanying text.

151. J. WHITE & R. SUMMERS, *supra* note 1, § 8-4, at 322 n.81; Hillman,

Extension of the cure concept to both material and partial breaches could have been accomplished easily under the *Restatement*. A separate section on cure again would have been helpful. That section would recognize a general right to cure, thus allowing cure for material and nonmaterial breaches. The constructive condition currently provided in section 237 still would be preserved; the condition would be a material failure that is not cured where cure is determined by using the separate cure section of the *Restatement*. This extension of the availability of cure to cases involving nonmaterial breaches would have been desirable.

The *Restatement* approach also does nothing to alleviate the additional dilemma that the cure concept adds to the considerable burden injured parties already bear under the material breach doctrine. Material breach has been a difficult standard for injured parties because often it is not easily determined. The line between material and nonmaterial cannot be drawn with any degree of exactitude; it depends on balancing a number of factors, which may suggest contrary results, in a case-by-case approach.[152] Injured parties have had to apply this wavering material breach standard to decide when the breaching party has gone far enough to allow termination of the contract relationship. The *Restatement* requires injured parties to apply those identical inexact factors to decide not only that a breach is material but also how much time the breaching party must be allowed to cure the breach.[153] The injured party now bears this burden of line-drawing both in electing to suspend and in choosing to terminate the contract.

The price of erroneously determining whether a breach is material or how much time the breaching party should receive to cure the defect is high. A Michigan court in *Walker & Co. v. Harrison*[154] vividly stated the danger of responding to a breach as material:

> [T]he injured party's determination that there has been a material

supra note 4, at 579-80, 589; Miniter, *supra* note 115, at 835; Peters, *supra* note 1, at 210; Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 357-58 (1970); ARKANSAS Note, *supra* note 27, at 303; MICHIGAN Note, *supra* note 27, at 135-36; Note, *supra* note 1, at 400; WAYNE Note, *supra* note 27, at 949; Comment, *Substantial Performance: The Real Alternative to Perfect Tender Under the U.C.C.*, 12 HOUS. L. REV. 437, 443 (1975).

152. For a list of these factors, see *supra* note 58.

153. *Compare* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979) (factors for determining whether breach is material) *with id.* § 242(a) (factors for determining time allowed for cure).

154. 347 Mich. 630, 81 N.W.2d 352 (1957).

> breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.[155]

The same risk now accompanies a determination that sufficient time to cure has passed, justifying the injured party's termination of the contract. Even if the other party commits a material breach, the aggrieved party who terminates the contract will be liable for total breach of contract if a court later determines that the time allowed for cure was not long enough.[156] Yet, failure of an injured party to respond to a material breach by suspending performance or to respond to an excessive time to cure by terminating the contract constitutes a waiver of those rights.

The additional burdens cast upon the injured party by the cure requirements of the *Restatement* do not always disappear following correct determinations as to materiality of the breach and the time allowed to cure it. When the breaching party does attempt to cure, the injured party again must analyze that party's performance with respect to the material breach standard. A cure that completely remedies the breach does not pose a problem; but a less than complete cure raises the issue of whether there is still a material breach or whether the breaching party has now substantially performed, thus making the breach nonmaterial. If the breach is upgraded to nonmaterial, the constructive condition is satisfied by cure just as it would have been if substantial performance had been rendered initially.[157] Therefore, the injured party only has a cause of action for partial breach and is not allowed to terminate the contract. In a close call on the adequacy of the cure provided by the breaching party, the injured party again faces the difficult material breach question and the dangerous consequences of an erroneous decision.

These burdens are alleviated considerably, although not completely, for buyers under the UCC. The uncertainty as to the time to cure is comparable because under section 2-508(2)

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155. *Id.* at 635, 81 N.W.2d at 355.

156. E. FARNSWORTH, *supra* note 4, § 8.15, at 610.

157. The comments to the *Restatement* confirm that a cure does not have to provide exact compliance in correcting deficiencies to be effective: "Even if the failure is material, it may still be possible to cure it by subsequent performance without a material failure. In the event of cure the injured party may still have a claim for any remaining non-performance as well as for any delay." RESTATEMENT (SECOND) OF CONTRACTS § 237 comment b (1979).

the seller is given only a reasonable time to cure.[158] The application of the perfect tender rule rather than the material breach/substantial performance standard,[159] however, gives the injured buyer more predictable criteria to use in deciding how to respond to both a nonconforming tender and the tendered cure.[160] Even a performance standard requiring full compliance with the contract specifications, however, cannot always eliminate all doubts, but such a standard is easier to cope with than trying to target the variable range of substantial performance based upon multiple, potentially conflicting criteria. Injured parties' determinations of when they can be discharged from their contract obligations thus are more difficult under the *Restatement* than under the UCC.

The *Restatement* could have alleviated the injured party's burden somewhat by requiring the breacher to provide adequate assurances that performance is forthcoming before receiving an opportunity to cure.[161] The necessary use of the material breach standard[162] precludes use of the perfect tender rule of the UCC, but the uncertainty associated with determining the length of time that must be allowed for cure before the

158. U.C.C. § 2-508(2). *See, e.g.,* Marine Mart, Inc. v. Pearce, 252 Ark. 601, 607, 480 S.W.2d 133, 137 (1972); Transcontinental Refrigeration Co. v. Figgins, 179 Mont. 12, 21, 585 P.2d 1301, 1306 (1978).

159. "Substantial performance is a term of law which conveys little, if any, meaning to the lay mind and ordinarily sends the lawyer to his digests to discover the most recent illustrations of its judicial use." Steel Storage & Elevator Constr. Co. v. Stock, 225 N.Y. 173, 179, 121 N.E. 786, 787 (1919).

160. *Contra* Honnold, *supra* note 1, at 472 ("Experience, it is believed, shows that this is one of the areas in the law where it is impossible to escape questions of degree, and that, as Justice Holmes was fond of saying, any appearance of exactness is an illusion." (footnote omitted)).

161. The adequate assurances requirement would be analogous to § 2-609 of the UCC. *See generally* Note, *A Right to Adequate Assurance of Performance in All Transactions: U.C.C. § 2-609 Beyond Sales of Goods,* 48 S. CAL. L. REV. 1358 (1975).

162. Concern over the risk of forfeiture prevents application of the perfect tender rule to a wide range of cases. E. FARNSWORTH, *supra* note 4, § 8.12, at 593. In contracts for services such as building contract cases, the nonconforming performance usually cannot be returned to the breaching builder. *See* E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS 891-92 (3d ed. 1980). As the New York court in Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921) stated:

> There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned.

Id. at 242, 129 N.E. at 890-91. Predictability had to be sacrificed to achieve justice by preventing forfeiture in these cases.

aggrieved party is allowed to terminate the contract could be addressed. In many cases a requirement of adequate assurances could ease significantly the difficulty of this determination. If assurances are not provided, the injured party obviously would not need to wait for cure. When assurances are provided, the breaching party would have indicated in advance the steps planned to correct the deficiency and the envisioned timetable. This information would not clear up injured partys' doubts in all instances, but they generally would be better off with knowledge of the breacher's intentions and abilities to cure than they would be without such knowledge.

Depending upon the circumstances that led to the breach, the requirement of adequate assurance before cure rights are triggered would have to be liberally construed in some cases. Compare the situation in which the breacher simply refuses to pay with the case in which the breacher is temporarily unable to pay. In the former case, precise and convincing assurances would be necessary, whereas assurances indicating probable success should be sufficient in the latter case. If the insolvent breacher can demonstrate the likelihood of reversing its bad financial position, the assurances should be adequate, but they would not be adequate if based on nothing more than hopes for better success in the future. If an adequate assurances requirement is not liberally construed in these types of cases, cure would be available only for parties who currently have the ability to perform.

Requiring a breaching party to provide adequate assurances of performance in order to secure the right to cure would have the additional advantage of eliminating waste that the *Restatement* approach promotes. In many cases the breaching party will have neither the desire nor the ability to effectuate a cure. The *Restatement* nevertheless takes an across-the-board approach under which the injured party upon a material breach is allowed initially only to suspend performance. The injured party is not discharged until the possibility of cure can no longer occur. The delay in discharge that occurs when the breaching party either cannot or does not intend to cure increases the likelihood that the injured party's damages will be increased needlessly. If the breaching party was required to provide adequate assurances of cure to preclude discharge of the contract following a material breach, the injured party would be in a better position to act expeditiously to mitigate damages in situations in which cure is improbable.

The *Restatement* does not ignore this problem of delay, but rather attacks it primarily through provisions affecting the length of time for cure instead of affecting the availability of the cure right. The only occasion when there is no time allowed for cure is when "timely performance is so essential" as to preclude any delay in discharge.[163] Thus the *Restatement* usually provides an opportunity to cure following a material breach.[164] The circumstances that affect the length of time for cure recognize the delay problem by including "the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances"[165] and "the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements."[166] These factors certainly address the problem of damages increased through delay in a situation in which cure is improbable. In addition to leaving the burden of assessing these factors on the injured party, however, these factors do not attack the waste avoidance problem as directly as an initial requirement for adequate assurances of cure would. Therefore, they are not likely to be as effective.

The final substantive problem with the *Restatement* cure provisions is the inclusion of some of the circumstances used to determine the length of time allowed for cure. Cure should be allowed as long as the objectives upon which it is premised can be advanced. Some of the five circumstances made relevant through section 242(a)—the identical circumstances for determining materiality of a breach[167]—are inappropriate. The essential consideration is whether the injured party can be compensated adequately for being deprived of any of the bargained-for benefit.[168] The extent of forfeiture[169] should not be balanced against uncompensable loss because the prevention of forfeiture through cure should be available only when the rea-

163. RESTATEMENT (SECOND) OF CONTRACTS § 242 comment a (1979).

164. *Id.* ("Ordinarily there is some period of time between suspension and discharge, and during this period a party may cure his failure.").

165. *Id.* § 242(a) (§ 242(a) includes this factor by referring to § 241, in which this factor appears as subsection (d)).

166. *Id.* § 242(b).

167. *See supra* notes 58-59 and accompanying text.

168. RESTATEMENT (SECOND) OF CONTRACTS § 242(a) (1979) (§ 242(a) includes this factor by referring to § 241, in which this factor appears as subsection (b)).

169. *Id.* § 242(a) (§ 242 includes this factor by referring to § 241, in which this factor appears as subsection (c)).

sonable expectations of the injured party can be protected through compensation for losses incurred through the breach.[170] As long as forfeiture can be avoided through cure and the injured party can be made whole through compensation, cure is appropriate. Similarly, the extent to which injured parties are deprived of bargained-for benefits[171] should be irrelevant, the issue being whether injured parties can be adequately compensated for deprivations of expected benefits, be they large or small. The desirability of requiring adequate assurances of cure as a prerequisite to the availability of the cure right, as discussed above,[172] obviously means that adequate assurances are an appropriate consideration for determining the time allowed for cure.[173] Because all parties to contracts are bound to an implied obligation of good faith in the performance and enforcement of the contract,[174] consideration of the breacher's cure actions in view of that standard[175] is also an appropriate consideration affecting the time permitted for cure. Therefore, the *Restatement* circumstances for determining the time allowed for cure that are objectionable are the extent to which the injured party is deprived of the bargained-for benefit and the extent of forfeiture the breacher might otherwise incur.

Thus, despite the *Restatement (Second) of Contracts* admirable adoption of the cure concept, the actual language adopted suffers from some serious deficiencies. The drafters could have enhanced greatly the value and workability of cure if they had addressed these problem areas.

CONCLUSION

The incorporation of the cure concept in the *Restatement (Second) of Contracts* is the latest step in the evolution of the right of a breaching party to correct a deficient tender of performance. Sporadic attempts to develop cure occurred previ-

170. *See supra* notes 84-88 and accompanying text.

171. RESTATEMENT (SECOND) OF CONTRACTS § 242(a) (1979) (§ 242(a) includes this factor by referring to § 241, in which this factor appears as subsection (a)).

172. *See supra* text following note 161.

173. *See* RESTATEMENT (SECOND) OF CONTRACTS § 242(a) (1979) (§ 242(a) includes this factor by referring to § 241, in which this factor appears as subsection (d)).

174. *Id.* § 205.

175. *Id.* § 242(a) (§ 242(a) includes this factor by referring to § 241, in which this factor appears as subsection (e)).

ously in the common law, but courts generally allowed injured parties to terminate the contract after a material breach, without any opportunity for the breacher to cure the deficiencies. Article 2 of the Uniform Commercial Code provided the first extensive recognition of cure rights. Now the *Restatement* provides that an aggrieved party should be able to terminate a contract only following an uncured material breach.

The extension of the cure concept to contracts other than those for the sale of goods under the UCC is desirable. It serves to avoid economic waste by mitigating damages that would otherwise be recoverable against the breacher. At the same time, however, it protects the reasonable expectations of the injured party because all damages that are not avoidable are recoverable. Cure makes this protection as well as waste avoidance available while also preserving the breaching party's continuing rights under the contract.

Despite the desirability of the cure concept, its expression in the *Restatement* raises troublesome problems. The drafting so tightly intertwines the cure concept with contract principles of conditions, material breach, and the factors for determining material breach that it does not provide adequate identification of cure to promote its adoption and application by the judiciary. The present failure of courts to apply the cure concept adds credence to this observation. The substance of the *Restatement* cure provisions also presents serious problems, including the limitation of cure to cases of material breach, the failure to alleviate the additional burden that cure imposes on injured parties in determining the appropriate response to breach, and the use of identical factors to determine both the materiality of a breach and the time allowed to cure a material breach.

Although all of these problems represent serious shortcomings that detract from the likelihood of widespread utilization of the cure concept, they need not prove fatal. Scholars can draw attention to the cure concept and promote its expanded application. If cure receives additional attention in legal literature, the extremely tight drafting of the cure concept in the *Restatement* should not hinder the use of the provision. Moreover, when courts do begin to apply the cure concept, they can alleviate the substantive difficulties. The *Restatement* does not control a court as a statute does, so the courts should exercise their discretion in developing cure through the evolution of case law. The cure concept will then be recognized as a welcome addition to the basic principles of general contract law.