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UNIFORM COMMERCIAL CODE —
CURE BY SELLER

The enactment of the Uniform Commercial Code is a victory of the commercial world over the legal processes that were evident under the common law and the Uniform Sales Act. The Uniform Commercial Code, commonly referred to as the U.C.C., is an attempt to codify the standards that have existed in commercial enterprise and to apply these standards uniformly throughout the United States.

Such an example is Section 2-508, Cure by Seller of Improper Tender or Delivery; Replacement.¹ This note examines the current application of this provision, with emphasis given to the standards in Oklahoma before adoption of the U.C.C. U.C.C.

The doctrine of cure by the seller is not a new concept in the law of sales, and perhaps was created negatively by the court estopping a seller from denying his title.² This rule was designed to protect the buyer from a seller who sold goods to the buyer in which the seller had no title but subsequently gained good title. An example of this occurred in *Lee v. Woods*.³ The defendant sold a mortgaged mule to the

¹ OKLA. STAT. tit. 12A, §2-508 (1961): Cure by Seller of Improper Tender or Delivery; Replacement.

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

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

² See WILLISTON, SALES §459, 721 (rev. ed. 1948).

³ *Lee v. Woods*, 161 Ky. 806, 171 S.W. 389 (1914).

plaintiff. Neither the buyer nor the seller had knowledge of the mortgage. When the mortgagee brought suit on the lien, the mule was transferred to the sheriff who sold it at a public auction to the defendant. The defendant then tendered the mule to the plaintiff. The plaintiff refused to accept the tender and brought an action for breach of warranty. Applying the doctrine of estoppel, which is normally used to estop a seller, the court adopted a similar line of reasoning to estop the buyer from denying the sale. The court ruled that the defendant had effectively cured his improper delivery.

Oklahoma has been confronted with this problem and seems to be in partial accord with the seller's ability to cure. In *Neosho Motor Co. v. Patterson*,⁴ the buyer purchased a car which had a defective title. The seller promised to produce good title but failed to do so for several months, and the car was repossessed. The court held against the seller stating that his attempted cure was ineffective. The court reasoned that title was an essential part of the contract, and therefore, when title was not tendered, there was a failure of consideration. Therefore Oklahoma seems to be in general accord with Subsection (1) of Section 2-508⁵ in that the seller may cure before the time of stated performance and has foreclosed the question of whether an attempted cure after the date of performance is valid; which is the embodiment of Subsection (2) of Section 2-508.⁶

In *Neosho*⁷ the buyer made several demands on the seller to furnish clear title, but was put off until he brought suit, whereupon the seller furnished the required title. The court indicated that it was incumbent upon the seller to make these

⁴ *Neosho Motor Co. v. Patterson*, 184 Okla. 540, 88 P.2d 632 (1939).

⁵ OKLA. STAT. tit. 12A, §2-508(1) (1961).

⁶ OKLA. STAT. tit. 12A, §2-508(2) (1961).

⁷ *Neosho Motor Co. v. Patterson*, 184 Okla. 540, 88 P.2d 632 (1939).

demands,⁸ and once the demand had been made, and the date of performance had elapsed, an attempted cure by the seller would be ineffective.

Oklahoma has adopted Section 2-508(2)⁹ in total, which provides that a seller may have additional time in which to deliver a conforming tender. Presumably, the effect of this adoption would be to nullify the *Neosho* decision.¹⁰ However, the seller must still act within a reasonable time and must have reasonable grounds to believe that the buyer would accept the conforming tender.

The advantage of this code provision is that in setting guidelines to protect the seller from anticipatory repudiations and breach after the contract date, it places restrictions on the conduct of the seller by requiring him to act in a reasonable manner and in commercial good faith.¹¹

Another relevant question that Oklahoma courts must consider is whether the seller should be permitted to use the buyer's money to cure (clear) an encumbered title. The answer is readily found in Section 9-307¹² which provides that a buyer in the ordinary course of a seller's business takes the

⁸ *Id.* at 633. The court cited *Parrott v. Gillick*, 145 Okla. 129, 292 P. 48 (1930) in which it was stated that the failure to comply with the regulatory provisions . . . does not destroy the consideration for the purchase of said car where the vendee takes possession of and uses the same for a long period of time without demanding a certificate of title.

⁹ OKLA. STAT. tit. 12A, §2-508 (1961).

¹⁰ *Neosho Motor Co. v. Patterson*, 184 Okla. 540, 88 P.2d 632 (1939).

¹¹ OKLA. STAT. tit. 12A, §1-201(19) (1961): Good Faith means honesty in fact in the conduct or transaction concerned.

¹² *Id.* § 9-307. Protection of Buyers of Goods. A buyer in ordinary course of business (*Id.* § 1-201(9)), other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

goods free of a security interest even when the buyer has knowledge of this security interest. Since the buyer is protected by this section from the creditors of the seller, there would be no hardship on the buyer. In addition, this result is more conducive to the effective promotion of commerce, which is, undoubtedly, the underlying purpose of the entire commercial code.

In order to properly interpret Section 2-508(2) of the Code, it must be read in conjunction with Section 2-601.¹³ This is one of the defects of the Code. An attorney reading the remedial sections of the code, set forth in clear and definite terms, would not know of the existence of Section 2-508, and would consequently subject his client to liability and compel his client to accept a later tender of conforming goods. This situation was made obvious in *Bartus v. Riccardi*.¹⁴ The buyer after purchasing a nonconforming hearing aid, returned it to the seller. The buyer neither accepted or rejected the seller's offer for replacement. The buyer later refused to accept replacement of the hearing aid, and the seller brought suit to recover the balance of the purchase price, relying on 2-508. The buyer, however, relied on Section 2-601,¹⁵ which provided for rejection of nonconforming goods. The court rejected the buyer's contention and used Section 2-508(2) to support its holding.

The concept of cure by the seller is a dramatic improvement over existing provisions and will undoubtedly be used to prevent injustices caused by bad faith or surprise rejec-

¹³ OKLA. STAT. tit. 12A, §2-601 (1961): Buyer's Rights on Improper Delivery.

¹⁴ *Bartus v. Riccardi*, 55 Misc. 2d 3, 284 N.Y.S. 2d 222 (Utica City Ct. 1967).

¹⁵ OKLA. STAT. tit. 12A, §2-601 (1961): Buyer's Rights on Improper Delivery.

¹⁶ *Bartus v. Riccardi*, 55 Misc. 2d 3, 284 N.Y.S. 2d 222 (Utica City Ct. 1967). The defendant neglected to take into account section 2-508(2) where the seller may substitute a

tions.¹⁷ The Code gives the buyer considerable protection under the warranty sections,¹⁸ and cure by the seller is a needed balancing provision to prevent injustice to the seller.

Cure by the seller is opposed to the concept of a defective tender being a breach of contract or anticipatory repudiation. It provides a method whereby the seller can make the buyer whole without undue hardship. It is a sensible approach giving the parties the benefits of their bargain.

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conforming tender even after the contract time if he had reasonable grounds to believe that the non-conforming tender would be accepted and if he seasonably notifies the buyer of his intention to substitute a conforming tender.

¹⁷ OKLA. STAT. tit. 12A, §2-508 (1961) Comment 2

¹⁸ OKLA. STAT. tit. 12A, §2-312-318 (1961).