Welcome to this podcast on **The Perfect Tender Rule** brought to you by CALI. I am Professor Scott J. Burnham. In this podcast we will explore UCC § 2-601, which is popularly known as the Perfect Tender Rule.

**We begin at the point in the performance of a contract for the sale of goods where the seller has tendered the goods and the buyer has inspected them and found a nonconformity—something that does not conform to what was promised. Let’s begin by contrasting the common law rule. Under the common law, only a material breach by one party discharges the other party’s obligations. If the breach is immaterial, the other party still has to perform but can recover damages for the breach.**

**The rule in Article 2 appears to be quite different. According to § 2-601, “**if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may … reject the whole.” This is called the “perfect tender rule” because it sounds like the buyer can reject the goods for *any* breach, not just a material one. The problem might be with the manner in which the goods are tendered. For example, the goods are promised by noon and they arrive five minutes late, or they are promised to be delivered by UPS and arrive by FedEx. Or the problem might be with the goods themselves. For example, the seller promised one model and delivered an improved model. Or the seller promised 1000 units and tendered 999. In all of these cases, it sounds like the buyer can reject the goods.

One can see some advantages of this rule. First, it is supposedly easy to apply—no arguing about the degree of the breach. And it gives sellers an incentive to get things right, for the consequences of breach can be harsh if the buyer rejects the goods.

On the other hand, it seems contrary to UCC jurisprudence, which encourages parties not to be quick to get out of their contracts but to work things out. Indeed, in practice, parties often simply agree to a price adjustment in such situations, or the seller otherwise cures the problem. This resolves the problem efficiently and keeps a good working relationship between the parties.

So it is not surprising that there are a number of limitations and exceptions to the rule. For one thing, rejection presumes that the buyer has not accepted the goods. If the buyer has accepted them, it is too late to reject them if a nonconformity is later discovered.

If the buyer does reject them, § 2-602(1) contains important requirements that the buyer has to follow. It provides:

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

According to § 2-605, the notification must indicate the particular defect the buyer is relying on to reject the goods in situations where the seller is able to cure the problem. This is a practical requirement, for § 2-508 gives the seller a right to cure the nonconformity after rejection. If the buyer doesn’t provide this information, it has waived the right to reject and recover damages.

Furthermore, § 2-601 itself contains a number of exceptions to the rule. Let’s look at those.

One express exception is that the perfect tender rule does not apply to installment contracts—contracts in which the goods are to be delivered in installments. In that case, according to § 2-612, a buyer may reject an installment only for a nonconformity that substantially impairs the value of the installment and may cancel the whole contract only if the nonconformity substantially impairs the value of the whole contract.

Another express exception is when the parties have agreed to limit the buyer’s remedies. According to § 2-719(1), the parties are free to do this as long as they make clear that the limited remedy is the exclusive remedy. For example, the parties might agree that the only remedy is to allow the seller to repair or replace the non-conforming goods.

One implied exception is that the parties’ agreement includes course of performance, course of dealing, and usage of trade as described in § 1-303. Those implied terms may establish that the buyer has agreed not to reject in certain circumstances or has agreed to other remedies.

Another implied exception is the obligation of good faith. Section 1-304 provides that “Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.” The obligation of good faith is defined in § 1-201(b)(20): “‘Good faith’ … means honesty in fact and the observance of reasonable commercial standards of fair dealing.” For example, a buyer would be acting in bad faith if it used the nonconformity as an excuse to reject the goods when the real reason was a falling market that made the contract unfavorable.

Given all these limitations and exceptions, the perfect tender rule seems to follow the well-known adage—if it seems too good to be true, it probably is. White & Summers, in their treatise on the UCC, have this to say about it:

We conclude, and the cases decided to date suggest, that the Code changes and the courts’ manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon “substantial” nonconformity. Of the reported Code cases on rejection, few actually grant rejection on what could fairly be called an insubstantial nonconformity, despite language in some cases allowing such rejection.

In conclusion, you should be able to recite the perfect tender rule. “If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole.” You should also be able to apply it in light of the limitations and exceptions to its apparently broad sweep.

I hope you have enjoyed this podcast on The Perfect Tender Rule.

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