At this point in the analytic framework, we know that a contract formed and that no valid defenses or excuses exist that would relieve a party of its duty. We have used the tools of interpretation and implication to define the duties of the parties. Our next topic focuses on the legal impact of a party’s nonperformance of their contractual duties.

Part IV comprises three chapters covering the following issues.

**A. CHAPTER 24: BREACH OF CONTRACT**

If a party has not performed its contractual duties, then it is in breach unless there is a defense or excuse. The breach may be partial, material, or total. The degree that
one party breaches will determine what options the non-breaching party has. With a *partial breach*, the non-breaching party must still perform its obligations, though he has a right to recover for any damages caused by the *partial breach*. If the breach is *total*, then the non-breaching party need not perform its obligations and may terminate the contract and sue for damages. In the middle of these two is a *material breach*, which allows the non-breaching party to suspend performance until the breaching party *cures* the material breach. If the breaching party does not cure its breach, then the breach ripens into a total breach, which allows the non-breaching party to terminate the agreement.

**B. CHAPTER 25: CONDITIONS TO PERFORMANCE**

Some duties to perform are limited by *conditions*. A *condition* is an event that may activate or terminate the *duty* to perform. Conditions have an important relationship with breach. If a contractual duty is conditioned upon some event occurring but the event never occurs, then there is no requirement that the party perform its contractual duty. If there is no duty to perform, then nonperformance is not a breach. The effect of the nonoccurrence of a condition can be harsh; consequently, courts provide equitable relief through a series of exceptions.

**C. CHAPTER 26: ANTICIPATORY REPUDIATION**

An anticipatory repudiation is an unequivocal and definite statement by one party that they are not going to perform their contractual duties. The difference between a repudiation and breach is in the timing of the refusal to perform. An anticipatory repudiation occurs before the time that performance is due. If one party anticipatorily repudiates the contract, then the other party may terminate the contract immediately without waiting for the time of performance. However, if the non-repudiating party does not act, then the repudiating party may retract the repudiation before the date of performance.
Breach of Contract

LEARNING OBJECTIVES

After completing this chapter, you should be able to:

1. Distinguish between the three different types of breach: (1) a partial breach, (2) a material but not total breach, and (3) a total and material breach.

2. Apply the materiality test to determine the level of breach.

3. Understand when a non-breaching party must give a breaching party time to cure the breach.

4. Determine whether a duty has been discharged by performance or some other means.

5. Explain how the perfect tender rule under the UCC Article 2 differs from the common law’s substantial performance doctrine.

A. OVERVIEW

The duties under a contract must be performed absolutely. If a party fully performs their contractual obligations, then the duty is said to be discharged. Any deviation in the performance, even if it is slight, is a breach of contract. If a house painting contract calls for the painter to complete the job by noon but the painter finishes at 12:01 p.m., then the painter has breached the contract. While any nonperformance is a breach, not all breaches lead to an award of damages.

“Breach” is an emotionally charged word. However, not all breaches occur because one party intended to deprive the other party of the benefit of the bargain in bad faith. A party might have been negligent or made an innocent mistake, or circumstances might have changed such that the nonperforming party found it impossible to carry out his duties. Contracts doctrine even contemplates a concept called
“efficient breach,” where a party intentionally breaches a contract because it is cheaper to pay damages to the non-breaching party than to perform.\textsuperscript{1}

\begin{center}
\textbf{RULE \hspace{1cm} BREACH}
\end{center}

\textit{Restatement (Second) of Contracts §235(2)}

When performance of a duty under a contract is due any non-performance is a breach.

Some breaches are more serious than others. Courts distinguish between the different types of breach to determine the rights of both the non-breaching party and the breaching party. Is the breach so serious that the non-breaching party can terminate the contract? Should the breaching party be given an opportunity to cure its breach? We will explore three different degrees of breach:

1. \textbf{Partial Breach}. A partial breach consists of minor deviations where the breaching party has substantially performed. If the breach is partial, then the non-breaching party must still perform his side of the bargain, though he may seek damages for any loss suffered.

2. \textbf{Material Breach}. A material breach occurs when a party has not substantially performed. A material breach allows the non-breaching party to suspend performance and then provide an opportunity for the other party to cure its breach. If the breaching party cures the material breach, then the material breach has become a partial breach. If the breaching party does not cure the material breach, then it ripens into a total breach.

3. \textbf{Total Breach}. A breach is total when a party has materially breached an agreement and is unwilling or unable to cure the breach. With a total breach, the non-breaching party is justified in not performing his side of the bargain. The non-breaching party may then terminate the contract and seek damages.

By distinguishing between the types of breaches, you will know whether the non-breaching party may suspend performance and terminate the contract or if the non-breaching party must give the breaching party an opportunity to cure the breach.

This chapter first looks at the levels of breach in more detail by examining the methods that courts use to determine the type of breach and whether the breach can be cured. This is followed by a discussion of situations where courts have determined that no breach has occurred because the \textit{duty was discharged}. We will then examine how the UCC differs from the common law in the rules surrounding nonperformance.

\textsuperscript{1} Chapter 27 will explore the consequences of “efficient breach.”
Before going forward, we should define common terms:

**Obligor.** The obligor is the party who owes a contractual or other legal obligation to another.

**Obligee.** The obligee is the party to whom a contractual or other legal obligation is owed.

## B. LEVELS OF BREACH

### 1. Partial Breach/Substantial Performance

If the breach is relatively minor compared to the duties under the contract, the breaching party is said to have **substantially performed** the contract. The terms “substantial performance,” “partial breach,” “minor breach,” and “immaterial breach” are used interchangeably by the courts and have the same meaning.

#### RULE SUBSTANTIAL PERFORMANCE/PARTIAL BREACH

- **Substantial performance occurs when there are only small deficiencies in the quantity or quality of performance where precision is not critical.**
- **If the breaching party substantially performs, then the non-breaching party will not be relieved of his duties, though compensation may be given for any damage caused by the partial breach.**

*Partial breach* is a minor deviation from the contract requirements, where the non-breaching party has received the substantial benefit of the bargain despite the defective performance. To determine whether a breach is partial, we will use the *materiality test* discussed below.

**No right to terminate.** The non-breaching party may not terminate the contract if there has only been a partial breach. The non-breaching party must still perform its obligations, though it can recover money damages for any harm caused by the partial breach. Compare this result with a material breach.

**Right to damages.** In a partial breach, the non-breaching party may recover damages for any harm caused by the partial breach.

The classic case illustrating the *substantial performance* doctrine is *Jacob & Youngs v. Kent* and is also known as the *Reading Pipe case*. The case will come up again in Chapter 30 to illustrate different damage awards when there is a breach of a construction contract.

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2. The rule is derived from the Restatement (Second) of Contracts and case law. See Restatement (Second) of Contracts §§236, 240, 241, and *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).
Case Illustration: Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239 (1921)

Facts. The plaintiff built a country residence for the defendant at a cost of upwards of $77,000 and sued to recover a balance of $3,483.46 that remained unpaid. After the construction ceased in June 1914, the defendant owner occupied the dwelling. There was no complaint of defective performance until March 1915. One of the specifications for the plumbing work provided that “[a]ll wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as ‘standard pipe’ of Reading manufacture.” The reason that Reading pipe was specified was because it known to be a high-quality wrought-iron pipe.

The defendant learned in March 1915 that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to redo the work. The plumbing was encased within the walls except in a few places where it had to be exposed. To redo the work meant more than substituting other pipe. It meant a demolition, at great expense, of substantial parts of the completed structure. The cost of the demolition and replacement would far exceed the amount that the owner owed the contractor for completing the house. The plaintiff contractor maintained that he substantially performed since (1) the pipe from the other factories was of the same quality as Reading pipe, and (2) the use of other pipe was an innocent mistake.

Plaintiff sued to recover the balance owed. At trial, the plaintiff was denied the opportunity to present evidence that the pipe installed was of equal quality to Reading pipe, and the trial court found in favor of the defendant. The plaintiff appealed. The appellate division reversed the trial court, ordering a new trial. The defendant appealed to the New York Court of Appeals.

Analysis. The court held that the plaintiff substantially performed the contract. The contractor made an innocent mistake that resulted in a minor deviation from the contract specifications.

In considering whether the plaintiff had substantially performed, the court focused on the economic harm to the owner rather than the percentage of the work done correctly. Here, a large quantity of the pipe was not of the brand specified in the contract, but the pipe used was of the same quality as the Reading pipe. The owner took possession and did not seek to have the pipe changed. To avoid paying the extra money due to the contractor, the owner argued that the breach was material.

The contractor did not operate in bad faith. In actuality, the contractor just mistakenly used pipe from another manufacturer that was the equivalent to Reading pipe. The court concluded that the defect was trivial. Although trivial, the court noted that the owner was due an award of damages for the contractor’s breach. Under these circumstances, however, the damage award would not be the cost to repair the breach, but the reduction in value for the owner because of the contractor’s breach. Here, it would be the difference between a house with Reading pipe and a house with pipe of equal quality. That difference was minimal; consequently the contractor could recover the balance of the money due under the contract.
2. Material Breach

If a breaching party did not substantially perform, then they have materially breached the contract. The distinction between substantial performance and material breach is a line-drawing exercise that requires courts to balance the factors discussed in Section C, Determining the Materiality of the Breach.

Once a breach becomes material, an issue arises as to whether the breaching party is able and willing to cure the material breach. If so, then the non-breaching party must give the breaching party time to cure the breach.

**RULE TYPES OF MATERIAL BREACH**

- If a party has materially breached a contract, then the non-breaching party may terminate the contract unless the circumstances suggest that the breaching party should cure its breach. There, the non-breaching party may suspend performance.
- If the material breach remains uncured, then it becomes a total breach and the non-breaching party may terminate the contract.

**Right to Suspend Performance and Opportunity to Cure**

At minimum, a material breach gives the non-breaching party the right to suspend performance. This gives the breaching party an opportunity or right to cure the breach. If the circumstances suggest that the breaching party might cure their breach, then the non-breaching party should suspend their performance for a period of time to allow the breaching party to fix the problems with its performance. Courts favor giving the breaching party time to cure because of the simple idea ingrained in our society that “nobody’s perfect” and we should give people a “second chance.”

If the non-breaching party terminates the contract without giving the breaching party an opportunity to cure, the non-breaching party risks the possibility that a court determines that a breaching party would have corrected the errors if given an opportunity to do so. If the court concludes that the breaching party would have substantially performed (i.e., partially breached), then the non-breaching party is said to have prematurely terminated the agreement and committed a total breach. In such a scenario, the non-breaching party is transformed into the breaching party because he terminated the contract too early.

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3. The rule is derived from the Restatement (Second) of Contracts and case law.
Case Illustration: Volvo Trucks North America v. Wisconsin Department of Transportation, 323 Wis. 2d 294 (2010)

Facts. A truck dealership had franchise agreements with two truck manufacturers—Peterbilt and Volvo. The dealership changed its business model by focusing exclusively on selling Peterbilt trucks. The transition plan called for promoting the sales of Peterbilt trucks at the expense of Volvo trucks. After phasing out the Volvo truck sales over time, the company would then eventually sell the Volvo franchise.

These actions were a material breach of the dealership’s Volvo franchise contract, which required the dealership to “aggressively sell Volvo trucks.” When sales of Volvo trucks dropped, Volvo served the dealership with notice that it had materially breached the franchise contract and gave the dealership seven months to cure its breach.

The dealership responded by changing its business plan again and sold Volvo trucks aggressively as before. However, at the end of the seven-month period, Volvo was dissatisfied with the dealership’s sales efforts and terminated the agreement. Volvo argued that the dealership had to repair all harm done by the breach.

Analysis. Does a non-breaching party have a right to terminate if the breaching party has cured a material breach into a partial breach? The Wisconsin Supreme Court determined that Volvo did not have the right to terminate the franchise agreement because the dealership had cured its material breach. The Wisconsin Supreme Court noted that allowing for a “cure” of the breach gives a party another chance to perform substantially. The court emphasized that the cure need not lead to perfect performance of the contract. Because the dealership substantially performed, Volvo, which had been the non-breaching party, became the breaching party by terminating the contract too early. The court required Volvo to rescind its termination notice it had served on the dealership.

How Much Time Does a Breaching Party Have to Cure?

The non-breaching party must give the breaching party a reasonable time to cure the breach given the facts and circumstances. The time of performance specified in the contract helps inform the court what the reasonable time to cure should be. Curing a breach does not mean that the breaching party must fully perform. At minimum, the cure must transform the material breach into a partial breach, resulting in substantial performance. In those circumstances, the non-breaching party may then recover for damages caused by the partial breach. After the cure, the non-breaching party may no longer suspend its performance.

“Time Is of the Essence” Clauses

When timing is important for a client, an attorney will often include a “time is of the essence” clause. Such clauses typically state that a party will be in total breach if performance does not occur by a certain date at a certain time. Such a clause typically negates the right of the breaching party to cure. The effect of a “time is of the essence” clause precludes the application of the substantial performance
doctrine. If the party misses the deadline (even by a small amount), then he has
totally breached.

If timing is important to a client, then an attorney should include a “time is of the
essence” clause. However, courts do not always enforce the “time is of the essence”
clause. Such clauses can lead to harsh results if a party misses performance by only
a little time. Some courts consider such clauses “boilerplate” and may excuse the
performance. For the clauses to be enforceable, it should be clear that the intent of
the parties was that performance must be complete by a certain date and time and
that anything less than that would be considered a total breach.

3. Total Breach

If the breach is not curable, then it becomes a total breach. Courts are inconsistent
in using the terms “material breach” and “total breach.” Some courts refer to a
“material breach” as a “total breach.” Know of the inconsistency. Another way
to think about a total breach is to say that it is an “uncured material breach.”

Right to Terminate and Damages. If the breaching party will not cure its breach,
then the non-breaching party may (1) withhold performance, (2) terminate the
contract, and (3) sue for damages. In this scenario, the non-breaching party’s
duties under the contract have been discharged.

C. DETERMINING THE MATERIALITY OF THE BREACH

<table>
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<tr>
<th>RULE</th>
<th>DETERMINING MATERIALITY</th>
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<td>Restatement (Second) of Contracts §241</td>
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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.

5. See Restatement (Second) of Contracts §242, Comment (d).
Determining whether a party's performance is a partial material breach or total breach is a question of fact in which the courts consider all of the surrounding circumstances. As with most factor-based tests, no single factor is determinative. The Restatement factors can be summarized as follows:

1. Amount of benefit received
2. Adequacy of damages
3. Forfeiture suffered by breaching party
4. Likelihood of cure
5. Lack of good faith and fair dealing.

1. **Amount of Benefit Received**

   The primary focus is on the degree to which the injured party received the full performance expected under the contract. The greater the benefit received, the less material the breach. Another way to express this concept is to say that the more the breaching party has delivered what was expected by the non-breaching party, the more substantial the breaching party's performance.

   The question is not an easy one to resolve. There is no set ratio where a percentage of the work completed is substantial. Courts consider the quality and the quantity of the breaching party's performance. To help resolve the issue, courts also consider the purpose of the contract.

   **Case Illustration: O. W. Grun Roofing & Const. Co. v. Cope, 529 S.W.2d 258 (1975)**

   **Facts.** A homeowner contracted with a contractor to install a new roof for $648. The contract described the color of the shingles to be "russet glow," which the contractor defined as a "brown varied color." After the contractor had installed the new roof, the plaintiff noticed that it had streaks, which she described as yellow, due to a difference in color or shade of some shingles.

   The contractor agreed to remedy the situation, and he removed the nonconforming shingles. However, the replacement shingles did not match the remainder, and photographs showed that the color of the roof was not uniform. The evidence was undisputed that the roof was well built and would give the homeowner protection against the elements. However, the roof appeared to be patched, rather than having been replaced. The contractor refused to make further repairs, and the homeowner refused to pay the contract price. A lawsuit resulted.

   **Analysis.** The court held that the contractor did not substantially perform. In deciding, the court focused on the purpose of the contract. The purpose of a homeowner in contracting for a new roof is to receive not only one that is weatherproof but also one of uniform color. Since it was impossible to install replacement tiles that would match the roof, the court awarded the homeowner the damages to compensate her for installation of a new roof.
2. Adequacy of Damages

Courts may find that a breaching party substantially performed if it is possible to accurately estimate the cost to complete the performance. In construction contracts, the defects can sometimes be corrected by hiring someone else to do the work and awarding the excess cost to repair the problem as damages to the non-breaching party. Adequacy of damages is an important factor if a party is seeking specific performance as a remedy — a topic we will cover in more depth in Chapter 33. A court that grants specific performance must make a determination that damages are inadequate as a remedy.

3. Forfeiture Suffered by Breaching Party

If terminating the contract results in a forfeiture to the breaching party, then courts may favor a determination that the breach is not material. Remember, if the court determines the breach is material, then the non-breaching party may suspend performance and terminate the contract. This could cause a significant hardship to the breaching party, who might not be compensated for work they did. A court may favor a conclusion that the breaching party substantially performed if to do otherwise would cause a significant forfeiture for them.

4. Likelihood of Cure

The more likely that the breaching party will cure their breach and fully perform the contract, the more likely the court will find for substantial performance. Whether it is probable that a breaching party will cure may depend on an assessment of the last factor.

5. Lack of Good Faith and Fair Dealing

If the breaching party is not operating with an intention to fulfill the implied duty of good faith and fair dealing, then the court may conclude that the breach is more material. Good faith and fair dealing is an important factor in a court’s determination of materiality. However, just because a party is operating in good faith does not mean that the nonperformance will be a partial breach. Other factors must also be considered. Additionally, a bad faith breach would not transform

A Note on Factor-Based Tests

As with any factor-based test, there is no bright line that determines the outcome. Instead, the factors serve as guidelines for judges to determine the degree of the breach. The factor-based test for materiality was intentionally drafted to be “imprecise and flexible.” The inherent flexibility allows judges leeway in order to achieve justice.

One consequence of factor-based tests is that the subjective opinion of the judge may come into play. How a particular judge balances the factors may reflect their value system — i.e., whether they favor freedom of contract or equity and fairness. The flexibility of the factor-based test allows judges to apply the law in a way that advances their particular notion of justice.

7. Restatement (Second) of Contracts §241 Circumstances Significant in Determining Whether a Failure Is Material, Comment.
Part IV. Breach, Conditions, and Repudiation

a partial breach into a material one if the non-breaching party substantially received the benefit of the bargain and any damages are adequate.

D. DISCHARGE OF DUTIES

A court might conclude that a party’s nonperformance is not a breach because the duties were discharged. Duties are created at contract formation. If a party fully performs their contractual obligations, then it is said that the duty is discharged. If a party’s duty is discharged, then that party cannot be held in breach. However, performance is not the only way to discharge a duty. A contractual duty can be discharged by agreement, a valid defense, or for other reasons.

Full Performance

Complete and total performance will discharge a party’s duty. However, if any part of their performance is left undone, then the party is in breach and their duty is not discharged.

Tender of Performance that IsRejected

Tender is the act of offering to perform a contractual duty. Traditionally, tender refers to an offer to pay money due under the contract or to deliver goods under a sales contract. However, courts sometimes use this term more broadly to indicate the tendering of any performance. If one party tenders their performance, but it is rejected by the other party, then the duty of the tendering party is discharged.

Agreement by the Parties

The parties could mutually agree to terminate the contract. Such termination is a contract where the parties exchange promises to forgo their original contractual rights. However, both parties’ duties must be executory — i.e., where there are still significant performance obligations under the contract for both sides. If at least one party has fully performed, then there would be no consideration for the mutual rescission.

There are a variety of other ways in which parties might discharge a duty by agreement, such as a novation, contract modification, or accord and satisfaction.8

Valid Defense or Excuse

If a party can prove one of the defenses or excuses discussed in Part 2, then that party’s duties are discharged or in some cases reformed, depending on the defense.9

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8. See Chapter 5 for a discussion of the ways in which contractual duties might be modified.
9. Restatement (Second) of Contracts §235(1).
Occurrence of a Condition

A party may be relieved of a duty because the contract specifies a condition that either activates or terminates a contractual duty. As you may recall, a condition triggers a change in the legal relationship between parties. The interplay between conditions and duties will be studied in more detail in Chapter 25.

Total Breach by the Other Party

If one party totally breaches a contract, then the non-breaching party may justifiably terminate the contract. Such a justifiable termination discharges the duties of the non-breaching party. See the section B.2 above, which discusses total breach.

Case Law

MILNER HOTELS, INC. v. NORFOLK & WESTERN RAILWAY CO.

COMMENTS FOR THE CASE

This case illustrates a classic contractual dispute where each party alleges that the other breached. As discussed in the explanatory material, a non-breaching party must give a breaching party an opportunity to cure a material breach. If the non-breaching party terminates before giving the breaching party a reasonable time to cure the breach, then the non-breaching party has totally breached the agreement.

MILNER HOTELS, INC., Plaintiff v. NORFOLK & WESTERN RAILWAY COMPANY, Defendant

United States District Court, S.D. West Virginia
822 F. Supp. 341
May 20, 1993

FABER, District Judge.

I.

The Milner Hotel, constructed near the turn of the century, is located directly across Princeton Avenue from the Norfolk Southern railroad yard in downtown Bluefield, West Virginia. In 1977, the Norfolk & Western Railway Company (“N & W” or “railroad”), now a subsidiary of Norfolk Southern, entered into a contract with Milner Hotels, Inc. (“the Milner”) to house and feed its transient train crews and other nonresident employees. This contract, as most recently amended in 1989, required the N & W to pay to the Milner $20.25 per day for each room occupied by a railroad employee, but not less than an amount sufficient to cover sixty room occupancies or $1,215.00 per day. This contract with the N & W provided essentially all of the Milner’s business. The hotel had 102 rooms and approximately ninety of these were set aside at all times for the railroad’s use. The hotel appears to have actually discouraged other business.

In exchange for the N & W guaranteeing occupancy, the hotel agreed to provide certain services as set forth in section 1 of the contract which reads, in pertinent part:
The services to be performed at said Hotel by the Operator for Railroad’s employees include the following.

(d) Maintaining at all times good, clean and sanitary conditions throughout the said Hotel;
(e) Observing and complying with all local, state or federal laws and regulations pertaining to the operation of the said Hotel.

Section 10 of the contract was its termination clause. Section 10, as amended, provided:

This agreement shall continue in full force and effect from month to month until terminated by either party giving to the other party at least thirty (30) days prior written notice. However, in the event of any default by either party hereto in the performance of its obligations hereunder which is not cured within 30 days of receipt of notice thereof, the other party may, in addition to other remedies available, terminate this agreement.

At about 7:30 a.m. on March 10, 1991, a Sunday morning, a fire broke out on the second floor of the Milner, apparently caused by an electrical malfunction in an oil heater. The fire was quickly contained and damage from the blaze was limited to a few rooms on the second floor. Smoke damage, however, permeated the entire building and there was extensive water damage from efforts to put out the fire.

The railroad removed all of its employees from the hotel pending repair of the damage. The Milner immediately began to clean and deodorize the building and told the railroad it would be available for reoccupancy in a few days. The railroad had received complaints from its employees about the condition of the Milner and these complaints escalated after the fire. The railroad insisted on a thorough inspection of the building before it would allow reoccupancy by its employees.

This inspection was conducted on March 15, 1991, by representatives of the railroad and of the Milner and by Chief R.M. Poe of the Bluefield Fire Department. A detailed written memorandum of the inspection was prepared which documents numerous violations of electrical and fire codes and identifies the presence of crumbling, friable asbestos at several locations in the hotel. G.O. Turner, Pollution Control Coordinator for Norfolk Southern, who was present for the inspection, advised that airborne transmission or tracking by service personnel and occupants could spread fibrous particles of asbestos from virtually any area where it was located to all other areas of the hotel. The general manager and resident manager of the hotel were informally advised by F.A. Williams, Jr., Superintendent of Terminals for Norfolk Southern, that these conditions would have to be remedied before the railroad would allow its employees to reoccupy the hotel.

A written copy of the memorandum of the inspection setting out the railroad’s position with regard to reoccupancy was provided to Derek Arbogast, General Manager of the Milner, within a week of the inspection. Admitting that it was not in compliance with the codes and that the repair work needed to be done, the Milner obtained several estimates from contractors for completion of the electrical repairs and removal of the asbestos. Estimates of the total cost of this work ranged from $60,000 to $120,000. The estimates themselves reflect the extent of work necessary to bring the hotel up to applicable code standards and to remove or otherwise abate the asbestos problem. An estimate obtained from Hico Specialty Contractors refers to asbestos pipe insulation in the fifth floor hallway, in the basement mechanical room and in a basement room adjacent to the mechanical room; it also refers to boiler insulation and ceiling plaster which may contain asbestos. An estimate obtained from Allied Refrigeration, Inc. to complete the electrical repairs stated: “[T]his is a very difficult job to estimate because of the magnitude of upgrading necessary.”

Before it undertook to have the work done, the hotel asked the railroad for assurances that
the railroad would reoccupy the building upon completion of the work. The railroad refused to give such assurances and, on April 9, 1991, mailed written notice to the hotel that it was terminating the Agreement. In its Complaint, the Milner admits receiving this written notice on April 11, 1991. The notice complies in all respects with the notice provisions of the contract. Thereafter, the hotel's owners elected not to complete the repairs, but instead sold the hotel and its contents at public auction. The auction was held on April 26, 1991, and realized the total sum of $56,000 for the building and its contents.

In this civil action, originally filed in the Circuit Court of Mercer County, West Virginia, and removed by defendants to this court, plaintiff Milner Hotel seeks damages for breach of contract. The Milner first maintains that the contract obligates the railroad to pay for rental of rooms at the contract rate and to compensate Milner for lost revenues from food service and concessions from the date of the fire until May 11, 1991, the date the termination was effective, regardless of the fact that the hotel was not occupied by the railroad’s employees at any time after the March 10, 1991 fire.

Second, the Milner charges that the railroad wrongfully terminated the contract, causing the plaintiff a loss of revenues for food, lodging and concessions, and forcing the Milner to sell the hotel at a significant loss. The Milner maintains that the fire damage was corrected by April 1, 1991, at which time the hotel was restored to habitability in spite of continuing code violations and the presence of friable asbestos. The Milner contends that there was no indication that the hotel would have to be closed because of the code violations and that it would have made the necessary repairs if the defendant had returned its personnel to the hotel. The Milner also contends that the railroad had been planning to terminate the contract for some time prior to the fire and seized upon the fire as an excuse to do what it wanted to do all along. The Milner demands judgment in a sum in excess of $644,000.

The railroad has moved for summary judgment, contending that it had the right to terminate the Agreement and that the plaintiff was itself in breach of its obligations under Section 1 of the Agreement. Summary judgment is appropriate only when, viewing the facts and the inferences to be drawn therefrom in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A fact is deemed “material” if proof of its existence or non-existence would affect the disposition of the case under applicable law. Summary judgment should be cautiously invoked so that no litigant will be deprived of a trial on a disputed issue of material fact. However, the entry of summary judgment is, upon motion, mandated against a party who fails to make a showing sufficient to establish the existence of an essential element of its case on which it will hear the burden of proof at trial.

II.

Section 10 of the Agreement, as amended, gives the parties an absolute right to terminate it upon thirty days written notice. No cause for termination is necessary. It is undisputed that the railroad gave written notice of termination and that this notice was received by the Milner on April 11, 1991. The Agreement, therefore, ended on May 11, 1991. While the railroad has argued that the second sentence of Section 10 providing for notice of default and subsequent termination on failure to cure was also triggered by the railroad’s actions, the court deems it unnecessary to consider that...
argument. It seems clear beyond question that the absolute right to terminate on thirty days written notice provided for in the first sentence of Section 10, as amended, was properly exercised by the railroad bringing the life of the Agreement to a close on May 11, 1991.

Since the Agreement was properly terminated, the defendant cannot be held liable for any loss sustained by the plaintiff after the effective date of that termination. It is a fundamental principle of the law of contracts that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been performed. In other words, a plaintiff is not entitled to damages beyond his actual loss attributable to defendant’s breach. Here, insofar as the termination was concerned, the contract was performed by the railroad; thus, there was no breach entitling the Milner to damages arising from the termination. Since the railroad had the unqualified right to terminate its Agreement with the Milner on thirty days’ notice, the costs to the Milner occasioned by loss of the railroad’s patronage and the low price realized by the sale at auction of the hotel and its contents are not damages recoverable from the railroad. These losses to the Milner do not flow from any contractual breach by the N & W but are, instead, simply the economic consequences to the Milner of loss of the railroad’s business. The railroad had negotiated into the contract the right to do exactly what it did — terminate its Agreement with the Milner and take its business elsewhere.

The plaintiff argues that during the life of the Agreement the railroad was essentially the Milner’s sole source of business and revenue, and that this long-term relationship defined the defendant’s obligations with regard to termination of the contract. The course of dealing of the parties is, however, under West Virginia law as well as under the general law of contracts, only a method of construing an ambiguous agreement; if the express wording of the agreement is clear, the court must give it effect without reference to the parties’ conduct. The Agreement is clear, and unambiguous language gave the railroad the right to terminate it upon thirty days’ notice for any reason or for no reason.

III.

It remains to be considered only whether the railroad is liable for payment of rent and damages for lost food service and concessions for the period between the March 10, 1991 fire, when it removed its employees from the hotel, and the effective date of the termination. The cases establish that, under West Virginia law, a party who sues for damages for breach of contract must show his own compliance with the contract or that he was prevented or relieved from compliance by the defendant. More recently, the West Virginia Supreme Court of Appeals affirmed this general rule in a dictum in Franklin v. Pence, 128 W.Va. 353 (1945). For it to be barred from recovery of damages by its own breach, the plaintiff’s breach must be material.

Normally, the issue of whether a breach is a material one is a question of fact for the jury. See, e.g., Farnsworth, Contracts, Section 8.16 and cases cited there. Where the facts presented are not in dispute, however, the issue of whether a contract has been performed or breached in a material way is a question of law for the court to decide. The rule is the same where the evidence presented is subject to only one reasonable conclusion. An instructive case on this point is Citizens Home Insurance Co. v. Glisson, 191 Va. 582 (1950). This case was an action by an insurance salesman against his employer for breach of a contract of employment. The plaintiff suffered a stroke and was discharged by the defendant for the reason that he was incapacitated from
fulfilling his obligations under the contract. The case went to trial and the jury returned a verdict in favor of the plaintiff. On appeal, the Supreme Court of Appeals of Virginia reversed, holding that the evidence established plaintiff’s illness and inability to perform his duties under the contract justified termination of it by defendant as a matter of law. In its opinion, the court observed that whether or not justification exists for termination of a contract under the facts and circumstances of a particular case, is usually a question of fact to be determined by a jury. But, in this case, the court concluded, where the facts were not in dispute, it was for the court to make the decision. Therefore, in this case, where the underlying facts are not in dispute, the decision of whether plaintiff’s breach is a material one preventing it from recovering on the contract is a question of law for the court.

There can be little question that the Milner breached its covenant under Section 1 of the contract to keep the hotel in a good, clean and sanitary condition and comply with all laws and regulations pertaining to operation of the hotel. Numerous violations of the electrical and fire codes, plus the presence at several places in the hotel of crumbling, friable asbestos which could be blown throughout the building or carried throughout the building upon the feet of workers and occupants, placed the Milner in violation of its obligations under Section 1 of the Agreement. If this breach was a material one, the railroad had good cause to cease its performance under the contract before the effective date of termination and the Milner cannot recover damages for the railroad’s non-performance during the period between the fire and the termination date. The Restatement (Second) of Contracts §241 (1981) outlines the circumstances which are significant in determining whether a breach of contract is material. That section reads as follows:

In analyzing the material breach issue, what are the legally significant facts that are important to each factor? Which factors carry the most weight in determining that the breach was material?

(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.

The application of these rules to the facts of the case at hand compel the conclusion that the Milner’s breach of the contract was a material breach. First, the railroad was, by the Milner’s breach, completely deprived of the benefit it reasonably expected under the contract, that is, a safe, clean hotel in which to house its employees. The railroad could hardly be expected to subject its employees to the dangers of faulty wiring and airborne asbestos particles once the post-fire inspection revealed the existence and extent of those dangers. Second, there appears to be no way that the railroad could be adequately compensated in damages for the difference between what it bargained for, that is, a safe, clean hotel, and what it stood to receive from the Milner if it had allowed its employees to remain in the hotel. Third, the Milner will, in effect, suffer a forfeiture if this breach is deemed material. The comment and illustrative notes to section 241 in Restatement (Second) of Contracts make
clear that the breach is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and is more likely to be regarded as material if it occurs early, before such reliance. Here, the Milner would have had a much stronger argument if it had incurred costs or otherwise undertaken to complete the necessary repairs to make the hotel conform to the requirements of the contract. The Milner, however, did just the opposite — after estimates were received, the Milner refused to take any further corrective action in the absence of an additional promise from the railroad that it would return its employees to the hotel once the repairs were made. Fourth, once the Milner had refused to make the repairs and had sold the hotel, as it voluntarily elected to do, there was no likelihood whatsoever that it could cure its failure to perform. With regard to the fifth consideration under section 241 of the Restatement (Second) of Contracts, the extent to which the Milner’s performance comports with standards of good faith and fair dealing, there is no evidence that the Milner’s actions were not in good faith and in a spirit of fair dealing. Balancing the five factors, however, leads inescapably to the conclusion that the Milner’s breach was a material breach; the Milner’s good faith cannot overcome the impact of the other four factors.

The Milner’s contention that its failure to comply with the electrical and fire codes and the presence of asbestos in the hotel are not material breaches is based on its assertion that these defects were not so serious as to render the hotel unoccupiable. The Milner has, however, offered no evidence to this effect in response to the railroad’s motion for summary judgment — it only asserts in its brief that it will offer such evidence at trial. Under the rule of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), once the railroad had established that the condition of the hotel was in violation of the Agreement, it was incumbent upon the Milner to come forward with such evidence in response to the railroad’s motion. Furthermore, the Milner’s conduct subsequent to the fire is inconsistent with its present position that these defects did not render the hotel unoccupiable. The Milner responded to the railroad’s refusal to reoccupy the hotel by accepting the inspection’s determination of the scope of repairs needed and obtaining estimates of the cost to perform such work. The Milner indicated it would perform these repairs if the railroad would guarantee to return its employees to the hotel when the work was done. Thus, the Milner’s actions at that time were entirely consistent with the railroad’s position that the hotel was not occupiable in the absence of the electrical repairs and asbestos abatement, and further supports the conclusion that the Milner was in material breach of the Agreement.

**IV.**

Accordingly, this court, finding that there is no material question of fact to be resolved, concludes as a matter of law:

First, that the defendant railroad properly terminated the Agreement with plaintiff Milner Hotel effective May 11, 1991; and,

Second, that the Milner’s violation of fire and electrical codes and the presence of friable, airborne asbestos in the building constituted a material breach of the Milner’s obligations to provide a clean, safe environment for the railroad workers-employees and to comply with applicable laws and regulations concerning the operation of a hotel. This material breach by the Milner absolves the railroad from any obligation to compensate the Milner for lost revenues for rent, food service and concessions during the period between the fire and the date termination of the contract became effective. The railroad is, therefore, entitled to summary judgment as a matter of law and the court will enter an appropriate judgment order to that effect consistent with this opinion.
E. UCC NONPERFORMANCE RULES

Under the UCC Article 2, the type of nonperformance has an important correlation to the remedy available. In this chapter, we focus on the types of nonperformance and how the non-breaching party may respond.

The UCC differs significantly from the common law because the substantial performance doctrine does not apply when a seller breaches. Although the seller may have an opportunity to cure a breach, ultimately, his performance must be perfect or the buyer may reject any deviation so long as the buyer does so in good faith. We will first examine the ways in which a seller might not perform and then we will examine the perfect tender rule. Finally, we will look at how a buyer might not perform his duties.

1. Seller’s Nonperformance

The UCC specifies four types of nonperformance by the seller: (1) nondelivery, (2) failure to make perfect tender, (3) breach of warranty, and (4) anticipatory repudiation.

Nondelivery

Naturally, if the seller does not deliver the goods, then the buyer may sue for breach and seek a remedy. The remedy would include money damages to compensate for any economic loss the buyer experienced because of the breach. In some situations — where the goods are unique or there is a shortage of a commodity — the buyer may seek specific performance. Buyer’s remedies are discussed in more detail in Chapter 31.

Failure to Make Perfect Tender

Unlike the common law, the seller must perform exactly according to the terms of the contract; otherwise, the buyer may refuse delivery of the goods. Although sellers are given a right to cure their breach, this bright-line rule can cause a hardship for a seller if the defect is trivial. The rule is controversial, and some courts limit its application. See the full discussion below.

Breach of Warranty

A seller may breach by delivering goods that do not conform with either an implied or an express warranty. If the buyer accepts the nonconforming goods, then the seller may still be liable for warranty damages. By accepting the goods, the buyer no longer has the right (under the perfect tender rule) to terminate the contract.

10. See UCC §§2-312 to 317.
11. See UCC §2-606.
Instead, the buyer will keep the goods and receive damages equivalent to the difference between the value of the goods as they were delivered and the value of the goods as they were warranted.

**Anticipatory Repudiation**

Repudiation under the UCC is similar to the common law. The seller repudiates the contract if, before delivery is due, the seller informs the buyer he will not perform his contractual duties. The buyer may then cancel (i.e., terminate) the contract and declare a breach.\(^\text{12}\)

### 2. The Perfect Tender Rule

**RULE** **PERFECT TENDER RULE**

**UCC §2-601 Buyer’s Rights on Improper Delivery**

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

If the seller delivers goods that fail to conform to the contract terms, even if the defect is not material, the buyer may refuse the delivery. Note, however, there exists the **seller’s right to cure** the defect if the time for performance has not expired. The **perfect tender rule** only applies to contracts for a single sale or purchase. If the parties entered an installment contract that anticipates a series of transactions then the rejection may only occur if the non-conformity substantially impairs the value.\(^\text{13}\)

Do not be confused about the use of the word “perfect.” Here, the word “perfect” does not necessarily mean “perfect” in quality. Rather the goods delivered have to conform “perfectly” to the terms of the contract. For example, two parties might enter an agreement for the sale of defective goods, and the delivery of those defective goods according to the terms would be considered a perfect tender even though the goods are not perfect in quality. In determining the terms of an agreement, courts consider both the express terms and those implied by the UCC.

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12. See UCC §§2-610, 611.  
13. See UCC §2-612.
Policy Goals

The rationale behind the perfect tender rule is to set high standards among sellers to help protect buyers from purchasing shoddy merchandise. If a buyer may reject a good for any imperfection, then sellers are less likely to put defective goods into the marketplace or will at least disclose imperfections. The perfect tender rule does not apply to installment contracts because the buyer does not need the protection of the perfect tender rule as much if the parties enter a longer-term commercial relationship.

Rejection and Reasonable Time Requirement

If the buyer rejects the goods, then he must "seasonably notify the seller" of his rejection. The buyer must reject the goods within a reasonable time or he will be deemed to have accepted the goods. Normally, a buyer is given an opportunity to inspect the goods. What is reasonable will depend on the transaction. For example, the time to reject would be shorter if the contract is for the sale of perishable goods, such as strawberries, than if the contract were for the sale of nails or screws, which are not going to go bad in a short time. Of course, the parties could explicitly agree on how much time a buyer has to reject the goods. If a buyer does not inform the seller of any known non-conformity in a seasonable way, then the buyer has accepted the goods.

Revocation of Acceptance

The perfect tender rule only applies if the buyer rejects the goods before acceptance. If the buyer accepts the goods and later discovers that they do not conform, the buyer may revoke his acceptance, but only if the goods substantially deviate from the contract terms. The revocation must occur within a reasonable time after the buyer discovers the non-conformity and before any substantial change in the condition of the goods occurs. If the goods are in the care of the buyer then the buyer must care for the goods until the seller can retrieve the goods in a reasonable time.

Seller’s Right to Cure

If a buyer rejects delivery of goods under the perfect tender rule, then a seller has a right to cure the improper tender provided that the seller acts in good faith and the time of performance has not passed. If the buyer does not give the seller a chance to cure, then the buyer may have breached the contract. If the time for performance has not expired, then the seller must give notice to the buyer that he intends to cure and then make a delivery of conforming goods with the deadline set forth in the contract.

15. See UCC §2-608.
16. See UCC §2-508(1).
If the time of performance has passed, a seller has a second chance to cure if the seller “had reasonable grounds to believe [its nonconforming tender] would be acceptable with or without money allowance. . . .” Under such circumstances, the seller has “a further reasonable time to substitute a conforming tender,” but only if seller seasonably notifies the buyer.

**Exception: Installment Contracts**

An important exception to the perfect tender rule is when the parties have entered an installment contract under UCC §2-612. UCC §2-612(1) defines an installment contract as “one which requires or authorizes the delivery of goods in separate lots to be separately accepted.” For example, a yearlong contract that required a supplier to deliver 100 pounds of steak to a restaurant every week would be an installment contract. For such contracts, the buyer can only reject an installment “if the non-conformity substantially impairs the value of that installment” and the non-conformity cannot be cured by the seller. The buyer is only afforded the right to cancel the entire installment contract if “one or more of the non-conforming installments substantially impairs the value of the whole contract.”

**TEST YOURSELF**

**PERFECT TENDER RULE**

**Question 1**

Buyer and Seller enter into a contract for the sale of 500 neckties and 50 blue neckties at a price of $1 per tie. Delivery was to be by September 1. On August 31, Seller delivered 49 red neckties and 51 blue neckties. Buyer rejected the entire delivery, notifying Seller immediately of the rejection and giving Seller an opportunity to send the correct order by September 1. Seller did not attempt to redeliver the neckties in the correct numbers by September 1. Which of the following is a correct statement of the law?

A. Seller substantially performed the contract; therefore, Buyer breached the contract by rejecting the delivery.
B. Seller substantially performed; however, Buyer need not accept more blue neckties than the original 50 since he did not order 51 blue neckties.
C. Seller breached the contract.
D. Buyer was in breach because one day is not enough time for Seller to cure his breach.

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17. See UCC §2-508(2).
18. Id.
19. See UCC §2-612(2).
20. See UCC §2-612(3).
Question 2
Buyer and Seller enter into an agreement for the sale of 1,000 bushels of wheat with delivery by Wednesday at 10 a.m. Seller delivers 990 bushels of wheat on Tuesday at 4 p.m. Buyer rejects the delivery. Seller attempts to deliver 1,000 bushels of wheat on Wednesday at 10 a.m. Buyer does not accept the delivery, stating that Seller violated the perfect tender rule on Tuesday, thereby allowing Buyer the right to terminate the contract. Which of the following is the best statement of the law?

A. Buyer breached by wrongfully rejecting properly tendered goods.  
B. Buyer breached on Tuesday because Seller substantially performed by delivering 990 out of the 1,000 bushels of wheat due under the agreement.  
C. Seller did not exercise his right to cure in time to perform the contract.  
D. Seller would be given a reasonable time after Wednesday at 10 a.m. in order to attempt delivery again.

See page XX for the answers.

3. Buyer’s Nonperformance

There are three ways in which a buyer might not perform his duties: (1) wrongful rejection of goods, (2) failure to make payment, and (3) anticipatory repudiation.\(^{21}\)

Wrongful Rejection of Goods

If a seller offers perfect tender but the buyer refuses to accept the goods, then buyer has breached the contract. If the seller is entitled to additional time to cure an imperfect tender and the buyer refuses to give seller the opportunity to cure, then the buyer has breached. Determining whether a buyer has wrongfully rejected goods can bring up issues of interpretation to resolve whether the goods conformed to the contract terms. If it can be established that a party was acting in bad faith in rejecting goods, then some courts will not let a buyer use the perfect tender rule to avoid performance.

Negotiating the Contract: The Impact of the Perfect Tender Rule

Given the harsh result on sellers of the perfect tender rule, one strategy in contract negotiation is for sellers to build terms into the contract language that give the seller room for a certain amount of non-conformity. A seller might do this in several ways, including:

- Specifying that some percentage of the goods delivered may be defective.
- Limiting express and implied warranties.
- Providing a range of time for delivery rather than a specific delivery date.

\(^{21}\) See UCC §2-703.
**Case Illustration: Neumiller Farms, Inc. v. Cornett, 368 So. 2d 272 (Ala. 1979)**

**Facts.** Buyer was a dealer of potatoes who purchased from farmers and then resold to food manufacturers. Buyer contracted to purchase potatoes from several small farmers at $4.25 per hundredweight. The contract specified that the potatoes be “suitable for chipping.” Buyer accepted several orders; however, after the market price fell to $2.00 per hundredweight, Buyer began to reject deliveries, saying that the potatoes were not suitable for chipping.

**Analysis.** The court found that Buyer did not reject the deliveries in good faith. The court looked at the course of performance of the parties to determine what was meant by “suitable for chipping.” The court found that Buyer breached the duty of good faith and fair dealing in making its determination, since the rejected potatoes were essentially the same as those that had been previously accepted. That the market price had dropped below the contract price was evidence that the buyer was acting in bad faith.

**Failure to Make Payment**

As consumers, we are used to paying for items when we receive them. However, many commercial contracts provide that the buyer has 30 days from delivery to pay the seller. The amount of time and any other terms vary, depending on the negotiation between the parties. Naturally, if the buyer does not pay according to the agreement, then failure to make payment is a breach.

**Anticipatory Repudiation**

Anticipatory repudiation results when the buyer informs the seller before performance is due that buyer will not perform. The rules are complex; repudiation is discussed in more detail in Chapter 26. Like the common law, the UCC provides the wronged seller with some practical responses. Naturally, the seller’s duty to deliver the goods is discharged and can withhold delivery or stop the delivery of any goods in transit. The seller may also terminate the contract and seek damages.

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**Case Law**

**RAMIREZ v. AUTOSPORT**

**COMMENTS FOR THE CASE**

This case traces the history and policies behind the perfect tender rule in comparison to the common law. Note how the court traces the rule from the nineteenth century but also discusses how the reasonable expectations of buyers in the twentieth century led to changes in a softening of the rule.
POLLOCK, J.

This case raises several issues under the Uniform Commercial Code ("the Code" and "UCC") concerning whether a buyer may reject a tender of goods with minor defects and whether a seller may cure the defects. We consider also the remedies available to the buyer, including cancellation of the contract. The main issue is whether plaintiffs, Mr. and Mrs. Ramirez, could reject the tender by defendant, Autosport, of a camper van with minor defects and cancel the contract for the purchase of the van.

The trial court ruled that Mr. and Mrs. Ramirez rightfully rejected the van and awarded them the fair market value of their trade-in van. The Appellate Division affirmed in a brief per curiam decision which, like the trial court opinion, was unreported. We affirm the judgment of the Appellate Division.

Following a mobile home show at the Meadowlands Sports Complex, Mr. and Mrs. Ramirez visited Autosport's showroom in Somerville. On July 20, 1978 the Ramirez and Donald Graff, a salesman for Autosport, agreed on the sale of a new camper and the trade-in of the van owned by Mr. and Mrs. Ramirez. Autosport and the Ramirez signed a simple contract reflecting a $14,100 purchase price for the new van with a $4,700 trade-in allowance for the Ramirez van, which Mr. and Mrs. Ramirez left with Autosport. After further allowance for taxes, title and documentary fees, the net price was $9,902. Because Autosport needed two weeks to prepare the new van, the contract provided for delivery on or about August 3, 1978.

On that date, Mr. and Mrs. Ramirez returned with their checks to Autosport to pick up the new van. Graff was not there so Mr. White, another salesman, met them. Inspection disclosed several defects in the van. The paint was scratched, both the electric and sewer hookups were missing, and the hubcaps were not installed. White advised the Ramirez not to accept the camper because it was not ready.

Mr. and Mrs. Ramirez wanted the van for a summer vacation and called Graff several times. Each time Graff told them it was not ready for delivery. Finally, Graff called to notify them that the camper was ready. On August 14 Mr. and Mrs. Ramirez went to Autosport to accept delivery, but workers were still touching up the outside paint. Also, the camper windows were open, and the dining area cushions were soaking wet. Mr. and Mrs. Ramirez could not use the camper in that condition, but Mr. Leis, Autosport's manager, suggested that they take the van and that Autosport would replace the cushions later. Mrs. Ramirez counteroffered to accept the van if they could withhold $2,000, but Leis agreed to no more than $250, which she refused. Leis then agreed to replace the cushions and to call them when the van was ready.

On August 15, 1978 Autosport transferred title to the van to Mr. and Mrs. Ramirez, a fact unknown to them until the summer of 1979. Between August 15 and September 1, 1978 Mrs. Ramirez called Graff several times urging him to complete the preparation of the van, but Graff constantly advised her that the van was not ready. He finally informed her that they could pick it up on September 1.

When Mr. and Mrs. Ramirez went to the showroom on September 1, Graff asked them...
to wait. And wait they did — for one and a half
hours. No one from Autosport came forward to
talk with them, and the Ramirezes left in
disgust.
On October 5, 1978 Mr. and Mrs. Ramirez
got to Autosport with an attorney friend.
Although the parties disagreed on what
occurred, the general topic was whether they
should proceed with the deal or Autosport
should return to the Ramirezes their trade-in
van. Mrs. Ramirez claimed they rejected the
new van and requested the return of their
trade-in. Mr. Lustig, the owner of Autosport,
thought, however, that the deal could be sal-
vaged if the parties could agree on the dollar
amount of a credit for the Ramirezes.
Mr. and Mrs. Ramirez never took possession
of the new van and repeated their request for
the return of their trade-in. Later in October,
however, Autosport sold the trade-in to an
innocent third party for $4,995. Autosport
claimed that the Ramirez' van had a book
value of $3,200 and claimed further that it
spent $1,159.62 to repair their van. By subtract-
ing the total of those two figures, $4,159.62,
from the $4,995.00 sale price, Autosport
claimed a $600-700 profit on the sale.
On November 20, 1978 the Ramirezes sued
Autosport seeking, among other things, rescis-
tion of the contract. Autosport counterclaimed
for breach of contract.

II

Our initial inquiry is whether a consumer may
reject defective goods that do not conform to
the contract of sale. The basic issue is whether
under the UCC, adopted in New Jersey as
N.J.S.A. 12A:1-101 et seq., a seller has the
duty to deliver goods that conform precisely
to the contract. We conclude that the seller is
under such a duty to make a “perfect tender”
and that a buyer has the right to reject goods
that do not conform to the contract. That con-
clusion, however, does not resolve the entire
dispute between buyer and seller. A more
complete answer requires a brief statement of
the history of the mutual obligations of buyers
and sellers of commercial goods.
In the nineteenth century, sellers were
required to deliver goods that complied exactly
with the sales agreement. See Filley v. Pope, 115
U.S. 213, 220 (1885) (buyer not obliged to
accept otherwise conforming scrap iron
shipped to New Orleans from Leith, rather
than Glasgow, Scotland, as required by con-
tract); Columbian Iron Works & Dry-Dock
Co. v. Douglas, 84 Md. 44, 47 (1896) (buyer
who agreed to purchase steel scrap from United
States cruisers not obliged to take any other
kind of scrap). That rule, known as the “perfect
tender” rule, remained part of the law of sales
well into the twentieth century. By the 1920’s
the doctrine was so entrenched in the law that
Judge Learned Hand declared “(t)here is no
room in commercial contracts for the doctrine
of substantial performance.” Mitsubishi Goshi
Kaisha v. J. Aron & Co., Inc., 16 F.2d 185,
186 (1926).
The harshness of the rule led courts to seek
to ameliorate its effect and to bring the law of
sales in closer harmony with the law of con-
tracts, which allows rescission only for material
breaches.. Nevertheless, a variation of the per-
fect tender rule appeared in the Uniform Sales
Act. N.J.S.A. 46:30-75 (purchasers permitted to
reject goods or rescind contracts for any breach
of warranty); N.J.S.A. 46:30-18 to -21 (warran-
ties extended to include all the seller’s obliga-
tions to the goods). The chief objection to the
continuation of the perfect tender rule was that
buyers in a declining market would reject goods
for minor nonconformities and force the loss
on surprised sellers.
To the extent that a buyer can reject goods
for any nonconformity, the UCC retains the
perfect tender rule. Section 2-106 states that
goods conform to a contract “when they are
in accordance with the obligations under the
contract”. N.J.S.A. 12A:2-106. Section 2-601
authorizes a buyer to reject goods if they “or
the tender of delivery fail in any respect to con-
form to the contract”. N.J.S.A. 12A:2-601. The
Code, however, mitigates the harshness of the
perfect tender rule and balances the interests of buyer and seller. . . . The Code achieves that result through its provisions for revocation of acceptance and cure. N.J.S.A. 12A:2-608, 2-508.

Initially, the rights of the parties vary depending on whether the rejection occurs before or after acceptance of the goods. Before acceptance, the buyer may reject goods for any nonconformity. N.J.S.A. 12A:2-601. Because of the seller’s right to cure, however, the buyer’s rejection does not necessarily discharge the contract. N.J.S.A. 12A:2-508. Within the time set for performance in the contract, the seller’s right to cure is unconditional. . . . Some authorities recommend granting a breaching party a right to cure in all contracts, not merely those for the sale of goods. . . . Underlying the right to cure in both kinds of contracts is the recognition that parties should be encouraged to communicate with each other and to resolve their own problems. . . .

The rights of the parties also vary if rejection occurs after the time set for performance. After expiration of that time, the seller has a further reasonable time to cure if he believed reasonably that the goods would be acceptable with or without a money allowance. N.J.S.A. 12A:2-508(2). The determination of what constitutes a further reasonable time depends on the surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer. . . . Those circumstances also include the length of time needed by the seller to correct the nonconformity and his ability to salvage the goods by resale to others. . . . Thus, the Code balances the buyer’s right to reject nonconforming goods with a “second chance” for the seller to conform the goods to the contract under certain limited circumstances. . . .

After acceptance, the Code strikes a different balance: the buyer may revoke acceptance only if the nonconformity substantially impairs the value of the goods to him. N.J.S.A. 12A:2-608. This provision protects the seller from revocation for trivial defects. It also prevents the buyer from taking undue advantage of the seller by allowing goods to depreciate and then returning them because of asserted minor defects. Because this case involves rejection of goods, we need not decide whether a seller has a right to cure substantial defects that justify revocation of acceptance. See Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 378 (1978) (right to cure after acceptance limited to trivial defects).

Other courts agree that the buyer has a right of rejection for any nonconformity, but that the seller has a countervailing right to cure within a reasonable time.

One New Jersey case, Gindy Mfg. Corp. v. Cardinale Trucking Corp., suggests that, because some defects can be cured, they do not justify rejection. 111 N.J. Super. 383, 387 n.1 (1970). Nonetheless, we conclude that the perfect tender rule is preserved to the extent of permitting a buyer to reject goods for any defects. Because of the seller’s right to cure, rejection does not terminate the contract. Accordingly, we disapprove the suggestion in Gindy that curable defects do not justify rejection.

A further problem, however, is identifying the remedy available to a buyer who rejects goods with insubstantial defects that the seller fails to cure within a reasonable time. The Code provides expressly that when “the buyer rightfully rejects, then with respect to the goods involved, the buyer may cancel.” N.J.S.A. 12A:2-711. “Cancellation” occurs when either party puts an end to the contract for breach by the other. N.J.S.A. 12A:2-106(4). Nonetheless, some confusion exists whether the equitable remedy of rescission survives under the Code.

The Code eschews the word “rescission” and substitutes the terms “cancellation”, “revocation of acceptance”, and “rightful rejection” . . . . Although neither “rejection” nor “revocation of acceptance” is defined in the Code, rejection includes both the buyer’s refusal to accept or
keep delivered goods and his notification to the seller that he will not keep them. White & Summers, supra, s 8-1 at 293. Revocation of acceptance is like rejection, but occurs after the buyer has accepted the goods. Nonetheless, revocation of acceptance is intended to provide the same relief as rescission of a contract of sale of goods. . . . In brief, revocation is tantamount to rescission. Similarly, subject to the seller’s right to cure, a buyer who rightfully rejects goods, like one who revokes his acceptance, may cancel the contract . . . We need not resolve the extent to which rescission for reasons other than rejection or revocation of acceptance, e.g. fraud and mistake, survives as a remedy outside the Code. . . . Accordingly, we approve Edelstein and Sudol, which recognize that explicit Code remedies replace rescission, and disapprove Ventura and Pavesi to the extent they suggest the UCC expressly recognizes rescission as a remedy.

Although the complaint requested rescission of the contract, plaintiffs actually sought not only the end of their contractual obligations, but also restoration to their pre-contractual position. That request incorporated the equitable doctrine of restitution, the purpose of which is to restore plaintiff to as good a position as he occupied before the contract. . . . In UCC parlance, plaintiffs’ request was for the cancellation of the contract and recovery of the price paid. N.J.S.A. 12A:2-106(4), 2-711.

General contract law permits rescission only for material breaches, and the Code restates “materiality” in terms of “substantial impairment”. See Herbstman v. Eastman Kodak Co., supra, 68 N.J. at 9. The Code permits a buyer who rightfully rejects goods to cancel a contract of sale. . . . Because a buyer may reject goods with insubstantial defects, he also may cancel the contract if those defects remain uncured. Otherwise, a seller’s failure to cure minor defects would compel a buyer to accept imperfect goods and collect for any loss caused by the nonconformity. . . .

Although the Code permits cancellation by rejection for minor defects, it permits revocation of acceptance only for substantial impairments. That distinction is consistent with other Code provisions that depend on whether the buyer has accepted the goods. Acceptance creates liability in the buyer for the price, and precludes rejection. . . . Also, once a buyer accepts goods, he has the burden to prove any defect. . . . By contrast, where goods are rejected for not conforming to the contract, the burden is on the seller to prove that the nonconformity was corrected. Miron v. Yonkers Raceway, Inc., 400 F.2d 112, 119 (1968).

Underlying the Code provisions is the recognition of the revolutionary change in business practices in this century. The purchase of goods is no longer a simple transaction in which a buyer purchases individually-made goods from a seller in a face-to-face transaction. Our economy depends on a complex system for the manufacture, distribution, and sale of goods, a system in which manufacturers and consumers rarely meet. Faceless manufacturers mass-produce goods for unknown consumers who purchase those goods from merchants exercising little or no control over the quality of their production. In an age of assembly lines, we are accustomed to cars with scratches, television sets without knobs and other products with all kinds of defects. Buyers no longer expect a “perfect tender”. If a merchant sells defective goods, the reasonable expectation of the parties is that the buyer will return those goods and that the seller will repair or replace them.

Recognizing this commercial reality, the Code permits a seller to cure imperfect tenders. Should the seller fail to cure the defects, whether substantial or not, the balance shifts again in favor of the buyer, who has the right to cancel or seek damages. N.J.S.A. 12A:2-711. In general, economic considerations would
induce sellers to cure minor defects. . . . Assuming the seller does not cure, however, the buyer should be permitted to exercise his remedies under N.J.S.A. 12A:2-711. The Code remedies for consumers are to be liberally construed, and the buyer should have the option of cancelling if the seller does not provide conforming goods. . . .

To summarize, the UCC preserves the perfect tender rule to the extent of permitting a buyer to reject goods for any nonconformity. Nonetheless, that rejection does not automatically terminate the contract. A seller may still effect a cure and preclude unfair rejection and cancellation by the buyer. . . .

III

The trial court found that Mr. and Mrs. Ramirez had rejected the van within a reasonable time under N.J.S.A. 12A:2-602. The court found that on August 3, 1978 Autosport’s salesman advised the Ramirez not to accept the van and that on August 14, they rejected delivery and Autosport agreed to replace the cushions. Those findings are supported by substantial credible evidence, and we sustain them. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974). Although the trial court did not find whether Autosport cured the defects within a reasonable time, we find that Autosport did not effect a cure. Clearly the van was not ready for delivery during August, 1978 when Mr. and Mrs. Ramirez rejected it, and Autosport had the burden of proving that it had corrected the defects. Although the Ramirez gave Autosport ample time to correct the defects, Autosport did not demonstrate that the van conformed to the contract on September 1. In fact, on that date, when Mr. and Mrs. Ramirez returned at Autosport’s invitation, all they received was discourtesy.

On the assumption that substantial impairment is necessary only when a purchaser seeks to revoke acceptance under N.J.S.A. 12A:2-608, the trial court correctly refrained from deciding whether the defects substantially impaired the van. The court properly concluded that plaintiffs were entitled to “rescind”—i.e., to “cancel”—the contract.

Because Autosport had sold the trade-in to an innocent third party, the trial court determined that the Ramirez were entitled not to the return of the trade-in, but to its fair market value, which the court set at the contract price of $4,700. A buyer who rightfully rejects goods and cancels the contract may, among other possible remedies, recover so much of the purchase price as has been paid. N.J.S.A. 12A:2-711. The Code, however, does not define “pay” and does not require payment to be made in cash.

A common method of partial payment for vans, cars, boats and other items of personal property is by a “trade-in”. When concerned with used vans and the like, the trade-in market is an acceptable, and perhaps the most appropriate, market in which to measure damages. It is the market in which the parties dealt; by their voluntary act they have established the value of the traded-in article. . . .

The ultimate issue is determining the fair market value of the trade-in. This Court has defined fair market value as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.” In re Estate of Romnes, 79 N.J. 139, 144, 398 A.2d 543 (1978). Although the value of the trade-in van as set forth in the sales contract was not the only possible standard, it is an appropriate measure of fair market value.

For the preceding reasons, we affirm the judgment of the Appellate Division.
**KEY CONCEPTS**

These key concepts are discussed in this chapter:

- **Partial Breach, 539**  
  Substantial Performance, 539
- **Material Breach, 541**  
  Right to Cure, 541
- **Total Breach, 543**
- **Discharge of Duty, 546**
- **UCC: Seller’s Nonperformance, 553**  
  The Perfect Tender Rule, 554
  Seller’s Right to Cure, 554
- **UCC: Buyer’s Nonperformance, 557**

**PROBLEM SOLVING AND ANALYSIS**

1. In a contract for the construction of a 100-story office building, Owner gave Builder a complex set of instructions that included very precise specifications. Builder constructed the building according to each specification, except for one. The specifications stated that the doors to the offices on the top floor use a certain brand of screw. However, Builder made an innocent mistake and used screws of a different brand than those specified. The screws used were identical in quality to the brand specified in the contract. Has Builder breached the contract?
   a. Builder has not breached because of the substantial performance doctrine.
   b. Builder has breached and is liable for any damage accruing from his breach.

2. In preparation for the hurricane season, Barney, who owns beachfront property in Florida, enters into a contract with XYZ Contractors to have a wall built to prevent waves from reaching his house. The contract requires that the wall be finished by June 1, which is the start of the hurricane season. The contract has a clause which states “time is of the essence.” During the last week of May, the wall is still 30% incomplete. Even if XYZ Contractors worked around the clock, they would miss the June 1 deadline — a fact that they acknowledge. Barney terminates the contract and hires another contractor to finish the wall. Was Barney obligated to provide XYZ Contractors with sufficient time to cure the breach? Explain your reasoning.

3. Builder has a contract with Owner to build a house for $1 million according to a set of specifications. Builder mistakenly uses a different kitchen fixture than what was specified; however, the problem can be remedied for $100. Owner asserts that Builder has breached and terminates the contract, refusing to pay the unpaid balance due, which is $100,000. Has Builder breached to the extent that Owner may terminate the agreement? Explain your reasoning.

4. Builder and Company entered into a contract for the construction of a shopping center for $2.5 million. The contract provided that Company would make progress payments — i.e., partial payments as construction progressed.

Builder finished construction of the shopping mall, except for one minor piece. Because Builder was angry with Company over a dispute unrelated to this transaction, Builder intentionally did not install the doors at the front of the shopping center. Company can have another contractor install the doors for only $500. Company refuses to pay Builder the unpaid balance of $400,000.
Is Builder’s breach so material that Company can withhold performance? Explain your reasoning.

5. Paul is a baseball pitcher who enters into a contract with a minor-league baseball club to be their star pitcher for 75 games over a four-month period. After playing in 12 games, Paul becomes ill and cannot pitch. The manager of the minor-league club immediately hires another pitcher and fires Paul. Paul recovers after missing five games and attempts to rejoin the club; however, the manager refuses, stating that Paul materially breached, giving the manager the right to terminate.

Was Paul’s failure to perform a material breach? If Paul’s failure is not a material breach, then what is the effect of the manager’s refusal to allow Paul to come back for the rest of the season? Explain your reasoning.

Are there any additional facts would you like to know?

6. Builder contracts to build a house for Owner for $500,000 over the course of ten months. There are ten monthly progress payments of $50,000 that Owner must make to Builder. Without justification, Owner fails to make a $50,000 progress payment. Builder needs the progress payments to pay his expenses. Builder stops work on the house, and a week goes by. Has Builder breached the contract by not working during the week? Explain your reasoning.

7. Assume the same facts as in the hypothetical above, but Owner tenders the progress payment after a two-day delay. Builder refuses to accept the payment and does not resume work. Builder notifies Owner that he is terminating the contract. Who has breached and to what extent? Explain your reasoning.

8. Buyer and Seller entered a contract for the sale of a certain quantity of iron at a specified price with delivery on a certain date. The contract stated that the iron was to come from Scotland. However, Seller shipped the same quantity and quality of iron from Holland because it was faster to do so.

Buyer rejected the entire shipment based on the origin even though the delivery conformed to the contract terms in every other way — quality, amount, date of delivery, etc. The real reason for Buyer’s rejection was that the price of iron had dropped between the date of contract formation and the date of delivery.

Assume that Seller brings a breach of contract claim. What would be Buyer’s argument that Seller breached the agreement? What would be Seller’s best response? Explain your reasoning.

9. Jay and Shelly Van Orden (the Van Ordens) purchased materials and supplies from Master Log Homes, Inc. (Master Log) for constructing a log home. They later contracted with Ervin Construction Company (Ervin), to complete construction on that home for $84,500. The contract provided that Ervin would be paid monthly as work progressed. The contract further provided that all work would be completed in a workmanlike manner.

After Ervin worked for four months constructing the log home, the Van Ordens complained about the workmanship, including gaps in the corners of the log walls, gaps in the horizontal joints, improperly installed beams and improper finish work. The Van Ordens sent Ervin a letter enumerating the defects.

In the construction and home building business, a log home is rustic in nature, and some gaps, cracks, warping, and rough finish in the logs and beams are expected and permissible in such homes. Although the home was structurally sound, there were some defects in the way that Ervin had constructed the home up to that point. Many defects that existed in the unfinished structure were correctable.
Ervin responded to the Van Ordens’ letter with a letter acknowledging that there were cracks in the logs that ran from the inside of the house to the outside, which allowed air to flow into the house; unsealed windows; and trim along the edge of the roof decking that was not finished. Ervin assured the Van Ordens these problems would be corrected.

Ervin continued to work for two more months without being paid and then sent an invoice for $13,000 that reflected the progress made during those two months. The Van Ordens assured Ervin they would pay the invoice and sent Ervin a check. When Ervin attempted to cash the check, it was returned by the bank for insufficient funds on May 21. Ervin promptly notified the Van Ordens that unless they paid the check and gave assurance that future payments would be timely, Ervin would withdraw from the job site. On May 22, after receiving no assurance from the Van Ordens, Ervin withdrew. The Van Ordens hired another contractor to complete the construction on their log home.

Ervin brought a breach of contract action against the Van Ordens to collect the unpaid balance on the contract. The Van Ordens denied liability and counterclaimed against Ervin for breach of contract and breach of warranty.

If you were a trial judge hearing the case without a jury, how would you rule as to which party breached? Explain your reasoning.