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The Seller Fiddles and the Clock Ticks: Seller’s Cure and the U.C.C. Statute of Limitations

Jacqueline R. Kanovitz *

When a warranted product fails to perform satisfactorily, before initiating litigation a buyer may allow the seller to attempt repair. In some instances, the Uniform Commercial Code ("U.C.C." or the "Code") forces a buyer to take this intermediate step. Article II of the U.C.C. encourages parties "to work out their differences and so to minimize losses resulting from defective performance."1 In addition, commercial contracts often make repair or replacement of defective parts the buyer's exclusive remedy. Such contract provisions obligate a buyer to accept repair. More often, however, a buyer's self-interest dictates acceptance of the offered repair solutions. Litigation is expensive and time-consuming. Moreover, litigation forces the buyer to choose between an immediate repair or replacement cost or prolonged inconvenience and additional loss from an unrepaired product. For these and other reasons, a buyer may postpone legal action until the seller's repairs have failed.

Section 2-7252 of the Code adopts a short four year statute of limitations for actions on contracts for the sale of goods. Buyers

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1 J. WHITE & R. SUMMERS, A HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-2, at 299 n.23 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

2 U.C.C. § 2-725 (1977) provides in full:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of the action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.
with time-barred claims need legal theories to translate lost cure time into relief from the Code’s limitations statute. The variety of possible fact patterns necessitates different legal theories to accommodate each buyer’s situation. Some contracts contain an exclusive repair remedy provision. Buyers under such contracts need different legal theories from buyers who, after discovering the seller’s breach, voluntarily consent to proposed repair solutions. Even among buyers who voluntarily accept repairs, factual differences require adjustments in the applicable legal theory.

This article presents four theories to lift a section 2-725 time-bar from a suit filed more than four years after delivery if the seller’s ineffective cure consumed a portion of the limitations period. First, the article considers section 2-725’s future performance warranty exception. This exception postpones accrual until the seller’s breach of warranty is or should have been discovered. 3 Second, this article argues that neither a time-of-tender nor a time-of-discovery accrual date is appropriate for contracts with exclusive repair remedy provisions. The correct application of section 2-725 to such contracts requires postponement of accrual until the exclusive repair remedy has failed of its essential purpose and the buyer is free to pursue a legal remedy. 4 Third, this article discusses estoppel for cases with ongoing cure at the end of the limitations period where the seller then induces the buyer to delay legal action with assurances of impending success. 5 Finally, this article considers tolling, sanctioned under section 2-725(4), where cure failed earlier in the limitations period or where the seller gave no assurances. 6

Contemporary section 2-725 analysis has developed with remarkably little sensitivity to Article II’s cure policy. A buyer’s request for greater attention to this policy will be strengthened by demonstrating that altering the normal limitations period after a failed cure will not conflict with the policies underlying section 2-725.

I. Promoting Article II Cure Policy Without Sacrificing Section 2-725 Concerns

A. *Article II Cure Policies*

Encouraging loss minimization through repair solutions in commercial controversies represents a dominant Code theme. This

3 See text accompanying notes 17-33 infra.
4 See text accompanying notes 34-48 infra.
5 See text accompanying notes 49-83 infra.
6 See text accompanying notes 84-98 infra.
policy is expressed in section 2-508's\(^7\) pioneering concept of "cure," a legal device which enables a seller to override a buyer's rejection of the goods. When a buyer rejects non-conforming goods, the seller may use the time remaining in the contract performance period to make a conforming tender. Even though the time for performance has expired, if the seller was ignorant of the non-conformity\(^8\) or if the rejection otherwise came as a surprise,\(^9\) the seller has additional time to cure the non-conformity.\(^{10}\)

Section 2-508 does not authorize a seller to force cure on a buyer who has accepted the goods and then demands a post-acceptance legal remedy.\(^{11}\) Yet, to promote voluntary dispute resolution, the U.C.C. contains numerous assurances that a buyer who cooperates with a seller's unsuccessful repair efforts will not lose impor-

\(^7\) U.C.C. § 2-508 (1977) reads:
(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

\(^8\) For cases holding that a seller's good faith ignorance of the non-conformity satisfies the § 2-508(2) requirement that the seller have reasonable grounds to believe that his tender would be acceptable, see Wilson v. Scampoli, 228 A.2d 848 (D.C. 1967); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968); see also WHITE & SUMMERS, supra note 1, § 8-4, at 322.


\(^10\) Cure under § 2-508 requires the seller to substitute a "conforming tender." In the case of defective new goods that have been rejected, cure can be accomplished by repair, as opposed to replacement, only when the defect can be corrected by minor repairs or adjustments capable of being made without undue inconvenience to the buyer. See note 8 supra. Repair solutions, however, take on increased importance in post-acceptance legal controversies when the goods have been used before their non-conformity is discovered.

Several additional sections make cure mandatory before the buyer can seek his legal remedies. Section 2-612(2), regulating installment contracts, prevents the buyer from rejecting a tendered non-conforming installment if the defect is curable and the seller seasonably offers cure. Section 2-608(1)(a) precludes a buyer who accepts non-conforming goods knowing of the non-conformity from revoking his acceptance unless he accepted on the reasonable assumption that the non-conformity would be cured and his expectations have gone unrealized. Finally, § 2-605(1)(a) effectuates the seller's § 2-508 right of cure by barring a buyer, who in his rejection notice fails to state curable defects ascertainable by reasonable inspection, from obtaining any remedy for the unstated defects.

\(^11\) The seller's § 2-508 right to cure, by its terms, applies only when the buyer rejects the seller's non-conforming tender. When the buyer accepts the goods, but later seeks to revoke his acceptance or asserts a claim for damages, courts have declined to apply § 2-508 by analogy and force the buyer to accept cure as a substitute for the right to a judicial remedy. See, e.g., Johannsen v. Minnesota Valley Ford Tractor Co., 304 N.W.2d 654, 657 (Minn. 1981) (en banc); Ascioilla v. Manter Oldsmobile-Pontiac, Inc., 117 N.H. 85, 90, 370 A.2d 270, 274 (1977); Gappelberg v. Landrum, 666 S.W.2d 88 (Tex. 1984) (replacement offered rather than repairs). Though the Code does not force buyers with grounds for post-acceptance legal remedies to accept cure solutions offered by their sellers, Article II at numerous points fosters voluntary cooperation to achieve this end. See note 13 infra.
tant remedial rights. Specifically, the buyer retains his right to revoke an acceptance of seriously non-conforming goods if he accepts them on the reasonable but unfulfilled assumption that cure will later materialize.\(^\text{12}\) Nor will a buyer be penalized for delaying any required post-breach notifications if cure efforts are continuing.\(^\text{13}\) The Code’s emphasis on cure solutions should be translated into limitations concessions for victims of failed cures unless protecting the buyer would conflict with section 2-725’s policies.

**B. Section 2-725 Policies**

Generally, limitations acts have two purposes: to avoid “staleness” and to protect transactional repose.\(^\text{14}\) The first justification reflects the belief that “stale” evidence hampers a court’s differenti-
ation between a meritorious and a spurious claim. Hence, limitations acts force a litigant to advance his claim before evidence has been lost, memories have faded, and facts have become obscured by time.

Limitations acts, however, are poorly crafted to implement this first goal. Unlike statutes of frauds, similarly concerned with the genuineness of claims, limitations acts disregard the reliability or unreliability of the particular evidence supporting the claim. "Staleness" is deemed to result from the passage of time alone.

Transactional security presents a more compelling reason to bar delayed claims. Even if a "stale" claim is just, fairness dictates that a party without notice of a dispute should not have to defend that transaction years later. As Professor Dawson has noted:

> Even when clear and convincing evidence is available, the assertion of a claim should not be postponed too long. Conduct proceeds on the assumption that a claim withheld from suit has been abandoned; new relationships are gradually built up; to disturb or disentangle them after a considerable lapse of time is socially undesirable.\(^\text{15}\)

Moreover, the drafters of Article II highlighted this second consideration in the explanation of the four year limitations period. The drafters stated:

> This Article takes sales contracts out of the general law limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practices. This is within the normal record keeping period.\(^\text{16}\)

Allowing businessmen to close their books and destroy their records on a transaction confers a considerable commercial advantage. The transactional repose policy, nevertheless, becomes less persuasive if the seller is alerted during the limitations period to the existence of a controversy. In such cases, the seller cannot possibly regard the transaction as closed or run the risk of destroying his records. Timely notice of the buyer's complaint satisfies the concerns underlying section 2-725's emphasis on timely suits. Courts, therefore, should avoid strictly applying section 2-725's four year limitations period and instead should adopt solutions to effectuate Article II's cure policy.

II. Theories To Lift Section 2-725 Time-Bars From Cure Victims

This section presents four theories to lift a time-bar from a breach of warranty claim: 1) the future performance warranty ex-

ception; 2) special rules for contracts with exclusive repair remedies; 3) estoppel to assert section 2-725; and 4) repair tolling. Of the four theories offered in this article to extend the normal limitations period, the future performance warranty exception has been narrowly interpreted and thus offers the least promise.

A. Future Performance Warranty Exception

Section 2-725 adopts a four year limitations period beginning when the contract is breached. Section 2-725(2) contains special rules that establish when breach of warranty claims accrue:

A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.17

Most warranties contain some assurance about the product's capabilities and future performance. Even the implied warranty of merchantability promises that in ordinary use the goods will perform comparably to similar goods available on the market.18 Nevertheless, courts have rarely applied the future performance warranty exception.

The chief obstacle to a broad application of the future performance warranty exception has been the interpretation of "explicitly" in section 2-725(2). Courts have interpreted "explicitly" to require that the seller make express assurances in plain, clear and unambiguous language about the product's future performance.19 This requirement eliminates causes of action based on implied warranties; courts have uniformly excluded implied warranties from the future performance exception.20 Courts have not recognized buyers' reasonable expectations that a product would last longer than four years after delivery.21 Courts have also ignored evidence that the product's flaw was not inherently discoverable until the product was used.22 Because the four year limita-

17 U.C.C. § 2-725(2) (1977) (emphasis added). For the full text of § 2-725, see note 2 supra.


21 See Beckmire, 36 Ill. App. 3d at 413, 343 N.E. 2d at 532.

tions period on implied warranties runs from delivery, a buyer suing on an implied warranty should consider other theories for altering the normal limitations period.

Even with express warranties, courts have narrowly applied the future performance exception.\(^{23}\) For an express warranty to fall under this exception, the warranty must expressly cover not only how the goods will perform in the future, but also how long the goods will continue to perform.\(^{24}\) Under the prevailing test, the express warranty must explicitly refer to a specific time period of coverage: for example, one year, a lifetime, 1500 hours of use, 12,000 miles.\(^{25}\)

This test seems to echo the language of the standard new product warranty used by the sellers and manufacturers of cars and similar products. The typical new product warranty contains language similar to the following:

International Harvester Company warrants to the original purchaser each item of new . . . equipment to be free from defects in material and workmanship under normal use and service. The obligation of the Company under this warranty is limited to repairing or replacing as the Company may elect, free of charge and without charge for installation, at the place of business of a dealer of the Company authorized to handle the equipment covered by this warranty, any parts that prove in the Company's

\(^{23}\) Warranties dealing with the product's condition at the time of sale and its performance characteristics have generally been excluded from the future performance exception. See, e.g., Binkley Corp. v. Teledyne Mid-Am. Corp., 333 F. Supp. 1183 (E.D. Mo. 1971), aff'd, 406 F.2d 276 (8th Cir. 1972) (warranty that welder would be capable of performing a precise number of welds per minute); Voth v. Chrysler Motor Corp., 218 Kan. 644, 545 P.2d 371 (1976) (typical new car warranty); Spring Motors Distrib., Inc. v. Ford Motor Co., 191 N.J. Super. 22, 465 A.2d 530 (1983) (warranty that product was designed to give long and reliable service and that maintenance would be inexpensive). Commenting on the future performance warranty exception, Professors White and Summers state:

[I]t should be clear that this extension of the normal warranty period does not occur in the usual case, even though all warranties in a sense apply to the future performance of goods. The quoted portion of § 2-725(2) applies only in a case in which the warranty "explicitly extends to future performance." Presumably such a case would be one in which the seller gave a "lifetime guarantee" or one in which he, for example, expressly warranted that an automobile would last for 24,000 miles or four years whichever occurred first.

White & Summers, supra note 1, § 11-9, at 419.


\(^{25}\) Courts have found warranties qualifying under this test. See, e.g., R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 823 (8th Cir. 1983) (glass units "guaranteed for period of twenty (20) years from date of manufacture" against moisture, film or dust collection resulting from failure of hermetic seal); Rempe v. General Elec. Co., 28 Conn. Supp. 160, 163, 254 A.2d 577, 578 (1969) ("lifetime" warranty on disposal unit); United States Indus. v. Mitchell, 148 Ga. App. 770, 771, 252 S.E.2d 672, 673 (1979) (warranty that product had been treated "to prevent rusting for a period of ten years"); Mittasch v. Seal Lock Burial Vault, 42 A.D.2d 573, 574, 344 N.Y.S.2d 101, 102 (1973) (warranty that burial vault would give "satisfactory service at all times").
judgment, to be defective in material or workmanship within twelve months or 1500 hours of use, whichever occurs first, after delivery to the original purchaser.

* * * * * * *

THIS WARRANTY AND THE COMPANY’S OBLIGATION HEREUNDER IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, all other representations to the original purchaser and all other obligations or liabilities, including liability for incidental and consequential damages on the part of the Company with respect to the sale or use of the items warranted.

Although this warranty may appear to qualify for the future performance exception, case law contradicts this conclusion.26


27 Courts have experienced acute difficulty in applying § 2-725 to contracts that make repairs the buyer’s exclusive remedy. In dealing with similar repair remedy provisions, courts have ruled the buyer’s cause of action accrues on any one of three different dates: (1) when delivery is tendered, see Ontario Hydro v. Zallea Sys. Inc., 569 F. Supp. 1261, 1265-66 (D. Del. 1983); Voth v. Chrysler Motor Corp., 218 Kan. 644, 652, 545 P.2d 371, 378 (1976); Centennial Ins. Co. v. General Elec. Co., 75 Mich. App. 169, 253 N.W.2d 696 (1977); Commissioners of Fire Dist. v. American La France, 176 N.J. Super. 566, 572-73, 424 A.2d 441, 444 (1980); Poppenheimer v. Bluff City Motor Homes, 658 S.W.2d 106, 111 (Tenn. App. 1983), (2) when the buyer discovers (or should have discovered) the seller’s breach of the underlying warranty, see, e.g., Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 821 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979), and (3) when the seller fails or refuses to live up to his repair promise, see Smith v. Union Supply Co., 675 P.2d 338, 335 (Colo. App. 1983); Space Leasing Assoc. v. Atlantic Bldg., Inc., 144 Ga. App. 320, 325, 241 S.E.2d 438, 440-41 (1977).

While most courts hold that the buyer’s claim accrues on tender of delivery, they arrive at this result from several directions. Some correctly observe that new product warranties embody two distinct legal obligations, a warranty and a repair promise. See notes 28-29 infra and accompanying text. In applying § 2-725, however, these courts have ignored the seller’s broken repair promises and typically have focused exclusively on the warranty. See, e.g., Centennial, 75 Mich. App. 169, 253 N.W. 2d 696; Poppenheimer, 658 S.W.2d 106. Because the seller’s warranty that the goods are free from defects is not a future performance warranty, this approach leads to a delivery accrual date. See note 23 supra and accompanying text. Other courts paint themselves into the identical corner by confusing repair promises with warranties. See notes 28-29 infra and accompanying text. Mistakenly characterizing the seller’s obligation as a “repair warranty,” these courts, upon observing that the seller’s “repair warranty” relates to what he proposes to do, not to the future performance of the goods, become forced to adopt tender accrual dates. See, e.g., Ontario Hydro, 569 F. Supp. at 1264.

Some courts have stumbled upon the correct conclusion that the buyer’s claim under an exclusive repair remedy contract accrues when the seller fails to repair. See Union Supply Co., 675 P.2d at 335; Space Leasing Associates, 144 Ga. App. at 325, 241 S.E.2d at 440-41. These courts, nevertheless, have been unable to tie their intuitively correct hunches into any § 2-725 language that will support them. They attempt to find justification under the future performance warranty exception. The seller’s repair promise is styled a future performance “repair warranty” whose breach the buyer discovers when the seller fails or refuses to repair. This analysis is so transparently flawed that even though these courts reach sound conclusions, their opinions have been largely ignored. The seller’s repair promise is
Courts typically have reasoned that such "warranties" actually contain two distinct promises: (1) a promise that the goods are free from defects in material and workmanship under normal use and service; and (2) a promise to repair part failures occurring within the first twelve months or 1500 use hours after delivery. Only the first undertaking qualifies as a "warranty" under section 2-313's definition. The second obligation, referring to a specific future time or usage period, promises only a remedy that the buyer will have if the goods fail to conform. The seller's second promise does not warrant the future performance of the goods. The seller has not promised that the goods will perform satisfactorily for a year or that the goods will not need repairs: he has agreed only to make repairs free of charge during a specified time period.

This analysis usually has led courts dealing with similar new product warranties to find that the buyer's claim accrues on tender of delivery. Section 2-725(2)'s language refers only to warranties extending to the product's future performance and does not include promises relating to future repairs. Thus, the dominant view

no warranty at all, much less one that explicitly relates to how the goods will perform in the future. See notes 28-29 infra. The correct § 2-725 analysis for these contracts is developed in Part II (B). See text accompanying notes 34-48 infra. For a comprehensive treatment of this subject, see Kanovitz, Warranties with Exclusive Repair-and-Replacement Remedies: When Does the Buyer's Cause of Action Accrue?, 1984 Ariz. St. L.J. 431 [hereinafter cited as Kanovitz]. See also Note, Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?, 17 U. Mich. J.L. Ref. 713 (1984).

28 The seller's promise to repair part failures occurring during the first year is not a warranty as defined by § 2-313 and is additionally disqualified by § 2-316(4). See note 29 infra. Under § 2-313(1)(a), the seller's affirmations of fact and promises which relate to the goods and become part of the basis of the bargain create an express warranty that "the goods will conform to the affirmation or promise." While the seller's repair promise in a sense relates to the goods and may even become part of the basis of the bargain, this promise is incapable of being a warranty because the goods unaided can never conform to it. The § 2-313 definition limits warranty promises to those which relate to qualities, capabilities, and other features that the goods are stated to possess. See Standard Alliance Indus., 587 F.2d at 818 n.10; McCarty v. E.J. Korvette, Inc., 28 Md. App. 421, 425-26, 347 A.2d 253, 257 (1975).

29 That Article II requires a differentiation between warranties and repair promises is not simply found in the § 2-313 definition. See note 28 supra. Anticipating that lawyers and courts might tend to confuse remedy promises with warranties, the drafters attempted a second time to avert this confusion. In § 2-316(4), they warn that disclaimers and contractual limitations on remedies are separate legal devices for insulating sellers from liability because, by necessary inference, warranties and remedies are distinct under Article II. In the commentary, they forcefully make this point:

This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty.


Despite these warnings, courts applying § 2-725 to contracts with exclusive repair remedies often exhibit a confusion that leads to selection of an incorrect accrual date. See note 27 supra.

30 See note 27 supra.
is that the seller's repair promises do not affect the running of limitations on a buyer's breach of warranty claim.\textsuperscript{31}

In *Standard Alliance Industries Inc. v. Black Clawson Co.*,\textsuperscript{32} the United States Court of Appeals for the Sixth Circuit found the prevailing analysis too harsh and insensitive to buyers. The court compared a warranty that the product would perform without malfunction for one year, the remedy limited to repair, with one promising that the product would be free from defects in material and workmanship at delivery, but undertaking to repair defects for one year.\textsuperscript{33} Finding no practical difference between the two, the Sixth Circuit combined the seller's warranty and repair promises and treated the amalgam as a future performance warranty. Under the *Standard Alliance Industries* approach, a buyer's cause of action on a new product warranty accrues when the buyer discovered or should have discovered the non-conformity.

**B. Special Rules for Contracts with Exclusive Repair Remedies**

The dominant approach and the *Standard Alliance Industries* approach both incorrectly analyze section 2-725's application to warranties with exclusive repair remedies. Neither approach accounts for section 2-719's impact on a buyer's right to enforce his claim in court. Section 2-719\textsuperscript{34} expressly sanctions contract provisions making repair or replacement of defective parts the buyer's exclusive remedy for breach. If the contract contains such a provision, the buyer must submit to cure before seeking a legal remedy. Section 2-719 provides, however, that if an exclusive repair remedy "fails of its essential purpose," Article II remedies are automatically applicable.

An exclusive repair remedy fails of its essential purpose whenever the seller cannot correct serious product malfunctions within a reasonable time or otherwise materially defaults on performing the

\textsuperscript{31} For correct § 2-725 analysis of contracts with exclusive repair remedies, see text accompanying notes 34-48 infra.

\textsuperscript{32} 587 F.2d 813 (6th Cir. 1978).

\textsuperscript{33} Id. at 821 n.17.

\textsuperscript{34} U.C.C. § 2-719 (1977) provides, in part, as follows:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair or replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.
repair promise. If the parties have made repair or replacement of defective parts the buyer's exclusive contractual remedy, the seller must have an opportunity to correct malfunctions. The buyer cannot sue for breach of warranty until the defect has been brought to the seller's attention and has remained un-repaired. At this point, the exclusive repair remedy has failed of its essential purpose, and section 2-719(2) activates the buyer's right to seek legal remedies.

Courts adopting time-of-tender or time-of-discovery accrual dates for actions on exclusive repair remedy contracts fail to appreciate the relationship between sections 2-719 and 2-725. Consequently, their accrual treatment violates the generally accepted doctrine that a limitations act will not run against a party until he is privileged to maintain an action. Since section 2-725's language does not reject this principle, courts should hold that a buyer's cause of action under an exclusive repair remedy contract accrues when repair fails and the buyer can sue.

Section 2-725(1) contains conventional limitations act language: "[A]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Section 1-201(1) defines "actions" as "proceedings in which rights are determined." After substituting section 1-201's definition of "actions," section 2-725(1) becomes: "[A]n action for breach of any contract for sale must be commenced within four years after the cause for proceedings in which rights are determined has accrued."

Section 2-725(2) also mirrors conventional limitations act language: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Although section 2-725(2) allocates the risk of delayed discovery to the plaintiff, as traditional limitations acts commonly do, this section presupposes the existence of an "aggrieved party." An "ag-
grieved party” is defined as a “party entitled to a remedy.” In an exclusive repair remedy contract, the buyer does not become an “aggrieved party” until after the remedy has failed and he is entitled to sue.

These definitions overwhelmingly indicate that no premature starting of the section 2-725 limitation period was contemplated for exclusive repair remedy contracts. Why then have most courts adopted a time-of-tender accrual date for contracts with provisions such as the new product warranty?

The answer lies in the courts’ failure to recognize that an exclusive-repair-remedy seller who cannot correct the non-conformity has actually breached the contract twice. Failing to appreciate the dual nature of the seller’s breach, courts have attempted to resolve the controversy under section 2-725(2)’s special warranty accrual rules. This section limits the courts to either a time-of-delivery or a time-of-discovery accrual date.

The standard new equipment warranty, however, embodies two distinct legal obligations: (1) a warranty that the goods are free from defects in material and workmanship; and (2) a promise to repair part failures. The second promise represents an ordinary remedial right to which an aggrieved party is entitled with or without resort to a tribunal.” Because the seller’s repair promise is the promise of a remedy and remedies include nonjudicial as well as judicial ones, it might be argued that a buyer under exclusive repair remedy contracts becomes an “aggrieved party” as soon as the product fails. This would result in § 2-725’s abandonment of the orthodox doctrine that limitation does not run against a party until he acquires a right to maintain suit in court. Such a reading should be rejected. “Aggrieved party” appears here in the context of a limitations act that is adopting rules for when “causes of action” (i.e., causes for proceedings) accrue. The § 2-725 context narrows the meaning of “remedy” and causes an “aggrieved party” under § 2-725 to mean a party who is entitled to a judicial remedy.

Where the contract contains both a warranty and repair remedy, the § 2-725 limitation period should run separately on each breach. Standard Alliance Indus., Inc. v. Black Clawson Co., 587 F.2d 813, 892 (6th Cir. 1978); Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co., 35 Cal. App. 3d 948, 111 Cal. Rptr. 210, 216-18 (1973). See also Kanovitz, supra note 27; Note, supra note 27, at 723-24 n.41. Most courts, however, have entirely overlooked this possibility in their limitations analysis. See note 27 supra. Moreover, one court, Centennial Ins. Co. v. General Elec. Co., 74 Mich App. 169, 253 N.W.2d 696 (1977), flatly declined to accord separate limitations treatment for the repair promise and the underlying warranty. The court’s explanation, that it would indefinitely extend limitations, is unsound. Where the seller both warrants the goods and agrees to repair part failures for one year as the buyer’s sole remedy, any breach of the latter promise will occur during the first year; claims brought more than four years thereafter accordingly will be time-barred. Consequently, no indefinite extension of limitations will result.

Sellers sometimes use an abbreviated version of the standard new product warranty, see text accompanying note 26 supra, in which a repair remedy is promised but no affirmations are made about the goods. Where the seller’s promise to repair is unaccompanied by an express warranty, this promise operates as a remedy for breaches of Article II implied warranties. U.C.C. §§ 2-314, 2-315 (1977). That the warranty is implied does not affect the position taken in this article. The buyer’s claim on the broken repair promise should accrue when that promise is broken, see text accompanying note 40 infra, while § 2-725’s operation
contractual commitment and not a warranty. If the goods malfunction during the promised repair period and the seller cannot correct the problem, the seller has now committed two breaches: initially a breach of warranty and later a breach of an ordinary contractual promise. Furthermore, the exclusive repair remedy has failed of its essential purpose; this remedial failure entitles the buyer, for the first time, to litigate the claim.

1. Buyer's Claim For Breach of Repair Promise

To avoid starting the section 2-725 limitations period before the exclusive-repair-remedy buyer can sue, courts should view a broken repair promise as an ordinary contract breach. The relevant accrual language for such a contract breach is found in section 2-725(2)'s first sentence, rather than in the section's second sentence covering warranty breaches. Section 2-725's first sentence provides: "A cause of action accrues when the breach occurs . . . ." Thus, a buyer's claim on a broken repair promise should accrue only after the repair remedy has failed and the buyer may litigate the claim.

2. Buyer's Claim For Breach of Warranty

If an exclusive repair remedy fails of its essential purpose and the buyer claims a breach of warranty, the buyer may still find relief under section 2-725. Under settled principles of limitations act interpretation, an exclusive repair remedy should suspend the running of limitations on the underlying warranty claim until "failure of essential purpose" activates the buyer's right to seek a judicial remedy.

Traditional limitations act analysis postpones accrual of a claim on the underlying implied warranty should be suspended until failure of essential purpose privileges the buyer to sue, see text accompanying notes 41-48 infra.

40 U.C.C. § 2-725(2) (1977). Some contracts obligate the seller to repair the product but fail to make this the buyer's exclusive remedy for breach of warranty. Resort to repairs is optional unless the buyer's contract expressly makes this remedy exclusive. U.C.C. § 2-719(1)(b) (1977). Even so, courts should accord separate accrual treatment to the repair promise and underlying warranty. See Note, supra note 27. However, because resort to a non-exclusive repair remedy is optional with the buyer, such a remedy would not be effective to suspend running of the statute of limitations on the buyer's underlying breach of warranty claim. Thus, the non-exclusive repair remedy buyer's claim on the repair promise should accrue when that promise is broken, while his claim on the underlying warranty should accrue, in accordance with the second sentence of § 2-725(2). See text accompanying notes 17-25 supra.

41 Since the seller's warranty and his repair promise represent separately breached contractual undertakings, courts should accord each separate accrual treatment. See note 39 supra. The exclusive repair remedy buyer's decision to sue for breach of warranty instead of for breach of the repair remedy promise should not affect his remedies under Article II. The Code adopts a policy of liberal administration of remedies to put the aggrieved party in as good a position as if the other had fully performed. U.C.C. § 1-106(1) (1977).
subject to a condition precedent until the condition occurs.\textsuperscript{42} This condition precedent doctrine is a specific application of the general doctrine that normally limitations will not run against a party until he is privileged to sue. Courts frequently apply the condition precedent rule to contracts with arbitration clauses or other specified administrative remedies. When a contract contains such a provision, the limitations period runs only after the required procedures have been completed or waived.\textsuperscript{43}

Article III of the U.C.C. recognizes the condition precedent principle. Section 3-802 provides that, subject to specified exceptions:

$$[W]here an instrument is taken for an underlying obligation \ldots \text{the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation } \ldots .$$\textsuperscript{44}

The comments clarify the phrase "the obligation is suspended":

By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is "revived." Subsection (1)(b) states this result in terms of suspension of the obligation, \textit{which is intended to include suspension of the running of the statute of limitations}.\textsuperscript{45}

The taking of a negotiable instrument suspends the running of limitations on the underlying debt because the holder impliedly agrees to forego legal action until the instrument is dishonored.\textsuperscript{46}

The relationship between a seller's repair promise and the underlying debt is clarified by the statute of limitations.\textsuperscript{42}\textsuperscript{43}\textsuperscript{44}\textsuperscript{45}\textsuperscript{46}

\textsuperscript{42} See Crown Coat Front Co. v. United States, 386 U.S. 503, (1967) (limitations period runs on a contract requiring administrative review of disputes only after required proceedings have ended); Butler v. Local Union 823, 514 F.2d 442 (8th Cir. 1975) (employee's cause of action under collective bargaining agreement accrues only after the required grievance steps have been taken); Ginn v. State Farm Mut. Auto. Ins., 417 F.2d 119 (5th Cir. 1969) (where contract requires accounting or some other act before obligation for payment arises, cause of action for labor and services does not accrue until these acts have been performed); see also I H. Wood, \textit{ supra} note 36, at § 119.

\textsuperscript{43} See Beavers v. Pacific Nat'l Fire Ins. Co., 85 Ga. App. 240, 68 S.E.2d 717 (1952); Kilbreath v. State Farm Auto. Ins. Co., 401 So. 2d 846 (Fla. Dist. Ct. App. 1981); see also 14 G. Couch, \textit{On Insurance} 2d § 50:51 (rev. ed. 1982). These cases demonstrate that when a contract imposes mandatory nonjudicial dispute resolution machinery, limitation does not run against a party while he is resorting to the required process and before, by the terms of the agreement, he can maintain action in court.

\textsuperscript{44} U.C.C. § 3-802(1)(b) (1977).

\textsuperscript{45} U.C.C. § 3-802 comment 3 (1977) (emphasis added).

\textsuperscript{46} Section 3-507(1) (1977) provides that:

1. An instrument is dishonored when

(a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of
ing warranty is analogous to the relationship between the negotiable instrument and the underlying debt. A contractual repair clause gives the seller a right to attempt cure before the buyer may sue. Thus, under an exclusive repair remedy contract, resort to cure and the subsequent failure of cure are made conditions precedent to litigation.

Although section 2-725 does not refer to the condition precedent doctrine, the Code contains two sources of authority for the doctrine’s application. First, section 1-103 provides that, unless specifically preempted, “the principles of law and equity . . . shall supplement . . . [the Code’s] provisions.” Because section 2-725 neither expressly nor impliedly rejects the condition precedent doctrine, the doctrine can be applied to section 2-725 through section 1-103. Second, section 2-725(4) specifies that section 2-725 does not alter the law on tolling. Incorporation of extracode tolling law was intended to avoid a mechanical application of section 2-725’s time-bar rules. Section 2-725(4) thus represents a second basis for applying the condition precedent doctrine to warranties with exclusive repair remedies.

Different arguments, however, must be raised by a buyer who voluntarily cooperated in a repair solution, and later found that the seller could not cure and that a time-bar had fallen on the claim.

C. Estoppel to Assert Section 2-725

The estoppel doctrine is rooted in Anglo-American jurisprudence. Originally known as equitable estoppel or estoppel in...
the doctrine required a misstatement of a past or present fact. This doctrine’s successor, promissory estoppel, has become “the most radical and expansive development” in contract law during this century. Promissory estoppel requires justifiable reliance on another’s promise followed by a reasonable and foreseeable change of position. In many jurisdictions, promissory estoppel has replaced the doctrine’s older form.

Section 90 of the First Restatement of Contracts contributed to the expansion of promissory estoppel beyond its original limited role as a substitute for consideration. Today, detrimental reliance on a promise compensates for deficiencies in mutual agreement and for the absence of statute of frauds formalities. In addition, the estoppel doctrine has for many years prevented the unjust use of a limitations defense. Promissory estoppel is frequently ap-

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49 Under the classic formulation, six elements are required for equitable estoppel:
1) There must be acts or language amounting to a misrepresentation or concealment of a material fact;
2) The truth concerning this fact must be known to the party to be estopped;
3) The truth must be unknown to the other party;
4) The conduct must be done with the expectation that it will be acted upon by the other party;
5) The conduct must in fact be relied upon;
6) The other party must act upon it in such manner as to alter his position for the worse.

See 3 J. POMEROY, A TREATISE ON EQUITABLE JURISPRUDENCE § 805, at 191-92 (5th ed. 1941).


51 See notes 49-53 supra and infra and accompanying text.

52 For an excellent general discussion, see Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343 (1969).

53 Section 90 reads: “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932). Section 90 of the Second Restatement principally modifies the remedies available for breach of promises binding because of reliance. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (in particular comment d).

54 For recent developments in promissory estoppel, see generally Henderson, supra note 52; Knapp, supra note 50.

55 See, e.g., Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (contractor’s reliance on subcontractor’s bid makes bid an irrevocable offer); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965) (substantial and foreseeable reliance actionable even though the agreement relied on would have been unenforceable for indefiniteness under traditional contract doctrine); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (damages recoverable for detrimental reliance on preliminary negotiations not yet an offer).

56 See Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950) (oral promise to devise real estate); McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970) (oral promise of employment for more than one year); Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339 (Iowa 1979) (oral promise to sell quantity of grain in excess of $500). See also RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

57 Professor Dawson, writing in 1935, noted that “recognition of estoppel as a ground for suspension of limitation acts has encountered remarkably little resistance in American
plied in settlement negotiations cases. In most jurisdictions a party, who has induced his adversary to delay legal action in the expectation of settlement, may be estopped from asserting a statute of limitations defense if that party breaks off negotiations and denies liability after the limitations period has expired.

A few jurisdictions, however, still apply the legal standards for equitable estoppel. These courts require that the plaintiff's delay be the result of deliberate misrepresentation or intentional deception on the part of the defendant. Nevertheless, the majority of law.\footnote{Dawson, Estoppel and Statutes of Limitation, 34 Mich. L. Rev. 1, 2 (1935). This role for the doctrine long antedates its application as a basis for the preclusion of statute of frauds defenses. \textit{See, e.g.}, Charles Weitz's Sons v. United States Fidelity & Guar. Co., 206 Iowa 1025, 219 N.W. 411 (1928); Chapin v. Merrill, 4 Wend. (N.Y.) 657 (N.Y. Sup. Ct. 1830). The widespread acceptance of this application is manifested by the fact that \textit{Restatement (Second) of Contracts} § 90 comment a, illustration 3 (1981), is taken from McLearn v. Hill, 276 Mass. 519, 177 N.E. 617 (1931) (a case where the defendant was estopped from asserting the statute of limitations because he induced the plaintiff to discontinue legal action).} 58


Courts holding for estoppel claimants frequently have been unaware of the promissory character of the estoppel they have applied and have misstated the theory, \textit{see State Farm Mut. Auto Ins. Co. v. Budd}, 185 Neb. 343, 347-48, 175 N.W.2d 621, 624 (1970); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959); Turner v. Turner, 582 P.2d 600, 602-03 (Wyo. 1978), or refrained from stating it at all, \textit{see McCloskey & Co. v. Dickenson}, 56 A.2d 442, 444-45 (D.C. 1947). Confused terminology in this area probably stems from the fact that this application of estoppel evolved before promissory estoppel was articulated as a distinct legal doctrine. \textit{See note 57 supra}. Under the pretext of applying equitable estoppel, earlier cases often rejected limitations defenses because of the defendant's assurances that an amicable settlement would be reached. Modern courts have begun to appreciate the promissory character of these estoppel cases and are now using appropriate terminology. \textit{See, e.g.}, Shinabarger v. United Aircraft Corp., 381 F.2d 808, 811 (2d Cir. 1967); Huhtala v. Travelers Ins. Co., 401 Mich. 118, 132-33, 257 N.W.2d 640, 647 (1977).
courts do not require misrepresentation or deception for estoppel, and this requirement should certainly not apply to Code-covered transactions. Despite a good faith cure attempt, a seller would violate section 1-203’s requirement of fair dealing if, after inducing the buyer to rely and to delay suit, he then asserted section 2-725 when the repairs failed.

Section 1-203 imposes a duty of good faith in the performance and enforcement of contract obligations. Good faith for a merchant includes honesty and the observance of reasonable commercial standards of fair dealing. A seller who invites reliance must comply with commercial standards of decency. Thus, having induced the buyer to delay and to incur a time-bar, the seller who cannot make the goods conform to the warranty should not deny liability.

Courts deciding commercial disputes should adopt the prevailing approach to estoppel in settlement negotiation cases. Thus, the buyer should prevail over a seller’s section 2-725 defense by proving that reasonable reliance on the seller’s conduct and promises caused the buyer to delay action until the buyer could not maintain his claim.

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60 See note 58 supra.
62 Professors White and Summers, endorsing the application of promissory estoppel to override § 2-210 defenses, find support for this application both in § 1-103’s incorporation of supplemental bodies of law and in the § 1-203 duty of good faith. After quoting from § 1-203, they write: “The foregoing provisions authorize the use of estoppel concepts against a party who unjustifiably misleads another party, however innocently. These provisions may also be used to combat the defendant who otherwise acts in bad faith or fraudulently in setting up the statute as a defense.” WHITE & SUMMERS, supra note 1, § 2-6, at 70. See also Potter v. Hatter Farms, Inc., 56 Ore. 254, 262, 641 P.2d 628, 633 (1982) (“Allowing promissory estoppel as an exception to the Statute of Frauds is consistent with the obligation of good faith.”).
63 See note 58 supra.
64 No court applying § 2-725 has flatly refused to entertain an estoppel argument. When buyers have argued estoppel, courts have either accepted and applied the doctrine, see City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977); Colorado-Ute Elec. Ass’n, Inc. v. Envirotech Corp., 524 F. Supp 1152 (D. Colo. 1981); Biocraft Laboratories, Inc. v. USM Corp., 163 N.J. Super. 570, 395 A.2d 521 (1978), or have recognized the doctrine but found it inapplicable on the facts, see Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 815 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261 (D. Del. 1983); Tomes v. Chrysler Corp., 61 Ill. App. 3d 707, 377 N.E.2d 224 (1978); Neal v. Laclede Gas Co., 517 S.W.2d 716 (Mo. Ct. App. 1974); Jandreau v. Sheesley Plumbing & Heating Co., 324 N.W.2d 266 (S.D. 1982). With one exception, courts in § 2-725 cases have been content with proof that the buyer reasonably relied on the seller’s curative promises and have not required buyers to establish the traditional elements for equitable estoppel. The court in Jandreau, 324 N.W.2d at 272, rejected the buyer’s estoppel claim because the seller was not guilty of “intentionally misleading him into not asserting his legal rights.” This court placed too heavy a burden on the buyer.
1. Introduction of Estoppel into Section 2-725 Jurisprudence

The U.C.C. contains two provisions that support a buyer's promissory estoppel argument in a limitations case: section 1-103 and section 2-725(4). As discussed below, section 1-103 provides the more promising approach.

Section 1-103 provides that principles of law and equity—including estoppel—supplement the Code provisions and that such principles apply unless specifically displaced by a U.C.C. provision. The widespread recognition of estoppel in section 2-201 statute of frauds cases affords a compelling argument to apply estoppel in section 2-725 statute of limitations cases. Section 2-201 and section 2-725 reflect a similar policy concern for the reliability of the evidence used against a defendant. One statute regulates the form evidence must take; the other bars suits based on "stale" claims. In statute of frauds cases, the courts often subordinate the policy of eliminating unreliable evidence to the policy of protecting justifiable reliance. Therefore, courts should adopt the same priority for cases involving the statute of limitations and the timeliness of a suit.

The support for a promissory estoppel bar against a section 2-725 defense is more persuasive than for a section 2-201 defense. Section 2-201 lists various methods to satisfy the need for reliable evidence; several of these methods attribute legal significance to a party's detrimental reliance. Arguably, therefore, section 2-201

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65 For the text of § 1-103, see note 47 supra.
68 The title of the original English Statute of Frauds, 30 Car. ch. 5, 8 Stat. at Large 405 (1676), "An Act for the Prevention of Frauds and Perjuries," reveals the legislative purpose. A signed written memorandum was required as a safeguard against fabricated testimony. Limitations acts exhibit a related concern that testimony allowed to grow "stale" ceases to be reliable. See text accompanying notes 14-16 supra.
69 Section 2-201(3)(a) most clearly reflects the policy of protecting detrimental reliance. This section provides that an agreement is enforceable despite the lack of a writing
fully codifies the type of proof acceptable to overcome the lack of statutory formalities. Such an exhaustive list conceivably could preclude the use of common law doctrines through section 1-103 to ameliorate hardships caused by the statute of frauds.\(^{70}\)

In contrast, section 2-725 establishes a harsh doctrine with only one method to avoid the statute's application: timely suit. Section 2-725(4)\(^{71}\) however, incorporates extracode tolling law. Although tolling and estoppel technically represent different legal devices to overcome a time-bar,\(^{72}\) section 2-725(4) belies any statutory intent to displace extracode mitigating doctrines.

Moreover, far less friction with statutory policy results from applying estoppel in section 2-725 cure cases than in section 2-201 statute of frauds cases. With a statute of frauds defense, protecting a buyer's justifiable reliance on the seller's oral promise may sacrifice section 2-201's concern for the reliability of the evidence.\(^{73}\) Limitations act policy, however, need not be similarly compromised to protect a buyer's reliance on the seller's cure promises. Notice from the buyer within the limitations period of a continuing contro-

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where the seller substantially begins or makes commitments to procure goods that are to be specially manufactured for the buyer and are unsuitable for sale to others in the ordinary course of the seller's business. Reliance is also a factor underlying § 2-201(3)(c) which makes oral contracts enforceable with respect to goods for which payment has been made or which have been received and accepted. The Code, however, in both situations protects reliance only when protection is compatible with the statute of frauds' important evidentiary function. With specially manufactured goods, the seller who fails to obtain a memorandum is protected only when he begins manufacture "under circumstances which reasonably indicate that the goods are for the particular buyer." Unlike § 4 of the Uniform Sales Act, § 2-201(3)(c) treats payment for or acceptance of goods as grounds only for partial enforcement of the contract on the theory that such behavior constitutes an unambiguous admission only of a contract for that quantity in fact paid for or accepted. U.C.C. § 2-201 comment 2 (1977).

\(^{70}\) Some courts have rejected the application of promissory estoppel to § 2-201 because they view the statutory alternatives to a memorandum intended as an exhaustive list of situations where oral contracts for the sale of goods for a price of $500 or more are enforceable. Section 2-201 is viewed as a comprehensive displacement of extracode mitigating doctrines. See, e.g., C. R. Fredrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 858 (9th Cir. 1977); Cox v. Cox, 292 Ala. 106, 111, 289 So. 2d 609, 613 (1974); G. C. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979).

\(^{71}\) Section 2-725(4) (1977) reads: "This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective."

\(^{72}\) See text accompanying notes 84-98 infra.

\(^{73}\) Disregard for § 2-201's evidentiary function is illustrated by the numerous decisions holding that a grain elevator's resale of grain in reliance on a farmer's verbal promise overcomes the lack of a writing. See, e.g., Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339 (Iowa 1979); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 547 P.2d 323 (1976); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736 (N.D. 1976); Farmers Elevator Co. v. Lyle, 90 S.D. 86, 238 N.W.2d 290 (1976). The grain elevator's resale of grain to a third party does not confirm or furnish reliable evidence of the existence of an alleged verbal agreement with any particular supplier. Protection for the elevator's reliance is accomplished only by sacrificing § 2-201's evidentiary function.
versy ensures that the seller would not have to defend a suit after having reasonably destroyed the records. Once notified, the seller probably will gather and preserve evidence and therefore will neither be surprised nor prejudiced by a delayed suit.

Buyers with grounds for estoppel should cite section 1-103, rather than section 2-725(4), as authority for this argument. Many jurisdictions refuse to toll the section 2-725 statute of limitations or limitations statutes generally, unless the legislature has approved the specific ground for tolling. A request to create a non-statutory "tolling" exception may cause confusion and an unnecessary rejection of the buyer's estoppel argument. Accordingly, the buyer should base an estoppel argument upon section 1-103.

74 In City of Bedford v. James Leffel & Co., 558 F.2d 216 (4th Cir. 1977), the court set forth an unassailable analysis for incorporating estoppel defenses into § 2-725 jurisprudence. The court stated:

"Our conclusion that this may be a proper case for application of the doctrine [of estoppel] . . . is bolstered by the fact that such application would in no way frustrate the purpose of the statute of limitations. "Statutes of limitation are statutes of repose . . . designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost . . . ." Street v. Consumers Mining Corporation, (1946) 185 Va. 561, 575, 39 S.E.2d 271, 277. A four-year period and "time of breach" rule of U.C.C. § 2-725 were designed "to fix a reasonable time after which merchants and manufacturers could destroy their records with respect to the manufacture and sale of an item without fear of being unable to defend against liabilities subsequently asserted." Engelman v. Eastern Light Co., Inc., (1962) 30 Pa. D. & C.2d 38, 1 U.C.C. Rep 187, 192. See U.C.C. § 2-725, Draftsmen's Comment. However, where an item fails to perform satisfactorily immediately after the sale and the parties engage in extensive and continuing efforts to correct the malfunction, it is unlikely that the pertinent records will be destroyed. Certainly the vendor in such cases cannot claim to have been unfairly surprised when the buyer files suit after it has become clear that the repair efforts will not succeed.

Our conclusion is also reinforced by the belief that refusal to apply the doctrine in cases such as this may encourage premature resort to the courts. Where, as here, a product has been specially designed to meet the buyer's requirements, "start-up" problems are more likely than with more standardized goods. In most cases the manufacturer can correct such problems if given an opportunity to do so. However, a rule that the period of limitations runs from the date of delivery regardless of any repair efforts by the seller would tend to discourage the buyer from providing him that opportunity. In this day of crowded court dockets, reasonable patience should be encouraged in such cases, not discouraged.


76 See, e.g., Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155, 158 (8th Cir. 1979); Sanchez v. South Hoover Hosp., 18 Cal. 3d 93, 553 P.2d 1129, 132 Cal. Rptr. 657 (1976); see also 6 S. WILLISTON, CONTRACTS § 2011 (1938 rev. ed.).
2. The Limitations of Promissory Estoppel

Acceptance of promissory estoppel to avoid section 2-725, however, does not represent a panacea for buyers. First, the doctrine will rarely benefit the buyer of a product that fails at the outset. On the one hand, few buyers will endure four years of product failure and bungled cure attempts; on the other hand, few sellers will endlessly repair a product to retain customer goodwill. Estoppel will arise only when the seller’s corrective efforts extend beyond or end shortly before the normal limitations period. If sufficient time remains to bring an action after the seller abandons repair efforts or after a reasonable buyer should have rejected any future cure attempt, a buyer’s failure to sue within the remaining time will bar him from claiming estoppel. In effect, the seller’s estopping behavior must persist until the buyer suffers an injurious change of position.

Consistent with Article II’s philosophy, courts evaluating the sufficiency of the time remaining after the failure of cure should distinguish sophisticated commercial purchasers from ordinary consumers. In Standard Alliance Industries, Inc. v. Black Clawson Co., the Sixth Circuit found that approximately four months was a sufficient time remaining in the limitations period for a commercial purchaser to consult a lawyer and file a claim.

Second, estoppel may not aid a buyer who has allowed repair

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77 Estoppel requires an irretrievable detrimental change. See notes 49-54 supra and accompanying text. Consequently, a plaintiff may not assert estoppel if ample time remained within which to institute suit before the limitations period expired. In the following cases, the period remaining was deemed sufficient. Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979) (three and a half months); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261 (D. Del. 1983) (over one year); Fablok Mills, Inc. v. Cocker Mach & Foundry Co., 125 N.J. Super. 251, 310 A.2d 491 (1973) (sixteen months); see also Krupa v. Kelley, 5 Conn. Cir. Ct. 127, 245 A.2d 886 (1968); Bryant v. Bryant, 246 S.W.2d 457 (Ky. 1952); Luther v. Sohl, 186 Neb. 119, 181 N.W.2d 268 (1970).

78 Article II invites courts to apply a different standard for consumers than for businessmen in evaluating the timeliness of various required post-breach notices and actions. For example, the drafters state:

The time of notification is to be determined by applying commercial standards to a merchant buyer. “A reasonable time” for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.


Courts have accepted this policy and have shown greater lenience to consumers who have delayed taking required post-breach legal steps. Compare Economy Forms Corp. v. Kandy, Inc., 391 F. Supp. 944, 950 (N.D. Ga. 1974), aff’d without opinion, 511 F.2d 1400 (5th Cir. 1975) (in commercial settings between two businessmen, the reasonable time for required notices and actions will be fairly short), with Frontier Mobile Homes Sales, Inc. v. Trigleth, 256 Ark. 101, 104, 505 S.W.2d 516, 517 (1974) (consumer should not be penalized for continued patience with a seller who promises to cure a nonconforming delivery).
attempts to continue too long. The buyer’s reliance in delaying legal action must be reasonable.\textsuperscript{80} Despite continuing repair attempts, if a seller’s repeated failure indicates or should have indicated an incurable malfunction, the buyer takes a risk in further indulging the seller.\textsuperscript{81}

Finally, a product malfunction may cause consequential damages.\textsuperscript{82} Defective goods may damage the buyer’s other property or lead to consequential business losses. The estoppel doctrine will not help a buyer who, while waiting for the seller to correct the product’s defect, delays suing for consequential damages until more than four years after such a damages claim accrues.\textsuperscript{83} Because the seller’s assurances about repair do not lead the buyer to believe that his other damages will be settled without a lawsuit, he has no inducement to postpone the consequential damages claim. Therefore, a buyer who fails to sue for consequential damages within the normal four year limitations period will lose this portion of the claim.

Granting limitations relief is most appealing when grounds for estoppel exist. A buyer who has been lulled into a fatal delay by unfilled assurances of cure certainly presents a compelling claim for judicial sympathy. For buyers who cannot argue estoppel, section 2-725(4), nevertheless, offers the possibility of tolling relief.

D. Repair Tolling

Significant procedural, as well as substantive, differences distinguish tolling from estoppel.\textsuperscript{84} Tolling suspends the running of


\textsuperscript{82} U.C.C. § 2-715(2) (1977) defines consequential damages as follows:

Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.


\textsuperscript{84} While estoppel is a common law doctrine, courts generally have required statutory authorization before granting tolling relief. See notes 75, 76 supra and note 89 infra. Several statutory grounds for tolling are common. Limitations acts generally are tolled if at the time the cause of action accrues the aggrieved party is an infant, insane, or, under some statutes, imprisoned. See, e.g., ALA. CODE § 6-2-8 (1977); ARIZ. REV. STAT. ANN. § 12-502 (1962); IOWA CODE ANN. § 614.8 (West 1950); MISS. CODE ANN. §§ 15-1-59, 15-1-61 (1972 & Supp. 1983); N.J. STAT. ANN. § 2A:14-21 (West 1952 & Supp. 1983); OKLA. STAT. ANN. tit. 12, § 96 (West 1960); S.D. COMP. LAWS ANN. § 15-2-22 (1984). The running of limitations
the limitations statute while cure is ongoing. Estoppel, in contrast, operates only after the statutory period has expired. Estoppel focuses on the estopped party’s defenses and does not interrupt the limitations period. These procedural distinctions may affect the time remaining for the buyer to sue after the seller’s repair attempts fail. But the more important difference is the judicial enthusiasm that the buyer can anticipate for each of these arguments. Traditionally, courts have been reluctant to read a nonstatutory tolling exception into a limitations act. This reluctance increases when the asserted tolling ground arises after the limitations period has already begun. But the more important difference is the judicial enthusiasm that the buyer can anticipate for each of these arguments. Traditionally, courts have been reluctant to read a nonstatutory tolling exception into a limitations act. This reluctance increases when the asserted tolling ground arises after the limitations period has already begun. Thus, courts frequently reason that also normally is interrupted while the defendant is absent from the state, see, e.g., Ala. Code § 6-2-10 (1977); Ariz. Rev. Stat. Ann. § 12-501 (1962); Conn. Gen. Stat. Ann. § 52-590 (West 1960 & Supp. 1984); Ga. Code Ann. § 9-3-94 (1982); Miss. Code Ann. § 15-1-63 (1972); Nev. Rev. Stat. § 11.300 (1983); N.J. Stat. Ann. § 2A:14-22 (West 1952); Okla. Stat. Ann. tit. 12, § 15-2-20 (1960 & Supp. 1983), or while he fraudulently conceals himself to obstruct prosecution of the claim, see, e.g., Fla. Stat. Ann. § 95.051(c) (West 1982); Ga. Code Ann. § 9-3-96 (1982). Either with or without the aid of a statute, grounds for tolling generally also exist where the defendant fraudulently conceals the existence of the cause of action from the plaintiff. See, e.g., Conn. Gen. Stat. Ann. § 52-595 (West 1960); Ga. Code Ann. § 9-3-96 (1982); Miss. Code Ann. § 15-1-67 (1972). See also Gieringer v. Silverman, 559 F. Supp. 498 (E.D. Wis. 1982); Alaska Airlines, Inc. v. Lockheed Aircraft Corp., 430 F. Supp. 134 (D. Ala. 1977); Twin Falls Clinic & Hosp. Bldg. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982). Beyond these grounds, no reliable generalizations can be made about patterns in tolling statutes.

85 Bomba v. W. L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978).
86 Id.
87 Under a tolling analysis, the time the buyer lost waiting for cure is not counted as part of his four year limitations period. If, for example, the seller attempted for nine months to correct the malfunction, then the buyer may bring suit within four years and nine months after the accrual of the cause of action and still be timely. Little judicial consensus exists, however, about the period that the estoppel claimant may safely delay legal action once the inducement for doing so has been withdrawn. The most common approach to invoking estoppel requires the plaintiff to commence the action within a reasonable time after the stopping circumstances cease to operate. See, e.g., Ott v. Midland-Ross Corp., 523 F.2d 1367, 1370 (6th Cir. 1975); Van Hook v. Southern Cal. Waiters Alliance, 158 Cal. App. 2d 556, 559, 323 P.2d 212, 219-20 (1958). In determining what amounts to a reasonable time, courts often look to the applicable statute of limitations on the original claim either as establishing a presumptively reasonable time for bringing legal action or as fixing the maximum allowable period. See, e.g., In re Pieper's Estate, 224 Cal. App. 2d 670, 690, 37 Cal. Rptr. 46, 60 (1964); Van Hook, 158 Cal. App. 2d at 559, 323 P.2d at 219-220; Lazzaro v. Kelley, 87 A.D.2d 975, 977, 450 N.Y.S.2d 102, 105 (1982); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959); Duncan v. Gaffney Mfg. Co., 214 S.C. 502, 504-05, 53 S.E.2d 396, 396-97 (1949).

Some courts, however, have stated that the plaintiff’s subsequent delay in bringing legal action once an estoppel defense has been acquired will not prevent assertion of the doctrine unless the defendant establishes laches, i.e., that the delay was unreasonable and that the defendant suffered some detriment. See, e.g., Loomis Const. Co. v. Matijevich, 425 S.W.2d 39, 44 (Tex. Civ. App. 1968); see also Annot., 44 A.L.R.3d 629, 670 (1972). The length of the buyer’s delay after the failure of cure thus may be a factor influencing whether he argues an estoppel or tolling theory. For an alternative theory when the buyer delays too long, see note 98 infra.

88 See notes 75, 76 supra.
89 See Kingman’s Committee v. First Nat'l Bank, 246 Ky. 404, 406, 55 S.W.2d 39, 40
“once the statute of limitations begins to run, normally nothing will stop or impede its operation.”

Adopting this conservative attitude, courts both under the common law of sales and under the Code have been remarkably unsympathetic to buyers' requests to extend the limitations period by the sellers' cure time. In rare cases, courts have tolled the limitations statute while cure efforts are ongoing. These courts, however, invariably have required not only repair efforts, but also assurances from the seller that repair will be effective. Thus qualified, the repair tolling doctrine, if recognized at all, actually represents a broader version of estoppel. Courts requiring assurances from the seller emphasize the buyer's reasonable reliance in delaying action, rather than the seller's use of a portion of the limitations period. The buyer's reliance, although essential for estoppel, should be irrelevant to tolling.

Judicial indifference to a request for tolling relief often results from the buyer's failure to present convincing arguments. Article


90 Several courts have noted that the lines between estoppel and tolling are effectively blurred when express assurances that the problem will be corrected are required for "tolling." See City of Bedford v. James Leffel & Co., 558 F.2d 216, 218 n.13 (4th Cir. 1977); A. J. Aberman, Inc. v. Funk Bldg. Corp., 278 Pa. Super. 385, 402, 420 A.2d 594, 602 (1980).
II, nevertheless, contains an inherent rationale for allowing tolling relief. As previously discussed, the U.C.C. emphasizes informal repair solutions to an extent unprecedented under prior law. Article II contains numerous mechanisms to encourage, and sometimes to compel, buyers to undergo cure before pursuing legal remedies. In addition, Article II reassures the buyer that he will not lose important remedial rights by allowing cure if the seller cannot repair the non-conformity. Section 2-725 tests the limits of these statutory assurances.

Granting tolling relief to buyers whose reasonable cure expectations have gone unrealized does not conflict with the policies underlying section 2-725. A seller attempting repair is unlikely to destroy records after four years if a controversy remains. Moreover, the seller's cure attempts may have consumed a significant portion of the buyer's limitations period. Therefore, if a buyer has given the seller the opportunity to cure the breach, the courts should subordinate the seller's desire for transactional security, finality, and repose to the buyer's demand for transactional fairness.

When the seller fails to cure after assuring the buyer that he would, the buyer may have one additional theory. The buyer should contend that the seller's post-breach cure assurances operated as a contractual modification and when the seller broke this promise, a second cause of action accrued. This argument is a first cousin to the one devised in Part II (B) supra for exclusive repair remedy contracts. While no buyers have yet made this argument in a § 2-725 case, § 2-209(1) supplies the necessary foundation. Section 2-209(1) dispenses with consideration for contractual modifications. Courts readily have enforced claims arising from post-breach assurances of cure in other contexts. See, e.g., Southern Concrete Prod. Co. v. Martin, 126 Ga. App. 534, 191 S.E.2d 314 (1972); Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976); Morrison v. Devore Trucking, Inc., 68 Ohio App. 2d 140, 428 N.E.2d 438 (1980); Ruble Forest Prod., Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 524 P.2d 1204 (1974); see also U.C.C. § 2-313 comment 7; R. Nordstrom, Handbook of the Law of Sales § 67, at 206 (1970). Treating the seller's cure promise as a contractual modification should give the buyer the benefit of a second accrual date with four more years to sue for this breach. See Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983) (replacement of defective product by seller restarts the limitations period). If the seller challenges the modification agreement under U.C.C. § 2-209(3) because his cure promise was oral, the buyer has an adequate response. Section 2-209(3) requires that the provisions of § 2-201 be satisfied only if "the contract as modified is within its provisions." Because the goods had already been delivered and accepted before the seller made this cure promise, the contract as modified was no longer within § 2-201's provisions. See U.C.C. § 2-201(3)(c) (1977). Consequently, neither consideration nor a writing is required for a modification agreement entered into after the goods have been delivered. Morrison v. Devore Trucking, Inc., 68 Ohio App. 2d 140, 142, 428 N.E.2d 438, 441 (1980).

Arguing that the seller's cure promise operates as a contractual modification, rather than simply grounds for estoppel or tolling, eliminates several limitations problems buyers might encounter under the other two doctrines. First, the buyer may have delayed bringing legal action too long, after the failure of cure, to secure relief on the original warranty

95 See notes 7, 10-13 supra and accompanying text.
96 See note 13 supra and accompanying text.
97 See notes 14-16, 74 supra and accompanying text.
98 When the seller fails to cure after assuring the buyer that he would, the buyer may have one additional theory. The buyer should contend that the seller's post-breach cure assurances operated as a contractual modification and when the seller broke this promise, a second cause of action accrued. This argument is a first cousin to the one devised in Part II (B) supra for exclusive repair remedy contracts. While no buyers have yet made this argument in a § 2-725 case, § 2-209(1) supplies the necessary foundation. Section 2-209(1) dispenses with consideration for contractual modifications. Courts readily have enforced claims arising from post-breach assurances of cure in other contexts. See, e.g., Southern Concrete Prod. Co. v. Martin, 126 Ga. App. 534, 191 S.E.2d 314 (1972); Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (1976); Morrison v. Devore Trucking, Inc., 68 Ohio App. 2d 140, 428 N.E.2d 438 (1980); Ruble Forest Prod., Inc. v. Lancer Mobile Homes, Inc., 269 Or. 315, 524 P.2d 1204 (1974); see also U.C.C. § 2-313 comment 7; R. Nordstrom, Handbook of the Law of Sales § 67, at 206 (1970). Treating the seller's cure promise as a contractual modification should give the buyer the benefit of a second accrual date with four more years to sue for this breach. See Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983) (replacement of defective product by seller restarts the limitations period). If the seller challenges the modification agreement under U.C.C. § 2-209(3) because his cure promise was oral, the buyer has an adequate response. Section 2-209(3) requires that the provisions of § 2-201 be satisfied only if "the contract as modified is within its provisions." Because the goods had already been delivered and accepted before the seller made this cure promise, the contract as modified was no longer within § 2-201's provisions. See U.C.C. § 2-201(3)(c) (1977). Consequently, neither consideration nor a writing is required for a modification agreement entered into after the goods have been delivered. Morrison v. Devore Trucking, Inc., 68 Ohio App. 2d 140, 142, 428 N.E.2d 438, 441 (1980).
III. Conclusion

Section 2-725 jurisprudence has inadequately considered the effect of lost cure time on the limitations period. Judicial insensitivity to Article II's cure policies has been most pronounced for contracts with exclusive repair remedy provisions. Courts have mechanically applied section 2-725(2) and have accrued a buyer's cause of action under an exclusive repair remedy contract at a time when the contract prevents suit. This article has established the correct section 2-725 analysis for this common and commercially important category of contracts. A buyer's cause of action under an exclusive repair remedy contract should not accrue until the repair remedy fails of its essential purpose and the buyer becomes privileged to sue.

Buyers who voluntarily pursue cure before seeking a legal remedy have two theories available to translate Article II's cure policies into limitations relief. First, courts should invoke section 1-103 to estop a seller, who assured a repair solution and persisted in cure attempts until the buyer's claim was barred, from asserting a section 2-725 defense against the buyer. Second, courts should afford a buyer, who has given the seller ample opportunity to repair, broad tolling protection under section 2-725(4). Courts should prevent a seller from misusing a buyer's good faith indulgences and therefore should reimburse the buyer for time lost while pursuing cure. Subtracting lost cure time from the buyer's section 2-725 limitations period would not be unfair to the seller; after all, the seller's inability to cure caused the need for litigation. Greater sensitivity to Article II cure policies in section 2-725 decisions will increase reliance on repair solutions and will minimize losses in commercial controversies.

breach even with the aid of estoppel or tolling. See note 87 supra; see also note 77 supra. Claiming that the seller's promise to cure modified the contract extends the period four years more. Second, this theory offers an alternative in jurisdictions where courts have been unwilling to carve out nonstatutory tolling exceptions. See notes 75-76, 88-89 supra. By contending that the seller's post breach assurances modified the contract and gave rise to a second cause of action, the buyer avoids asking the court to toll.

If an unusually astute buyer foresees limitations problems when the seller requests an opportunity to cure, the buyer can protect himself by requiring the seller to agree in writing to waive limitations in the event his cure efforts fail. Such waiver agreements are not prohibited by § 2-725(1). This section precludes agreements extending the limitations period only when they are entered into as part of the original contracts. Courts traditionally have been willing to enforce agreements waiving limitations defenses entered into after a breach. See, e.g., Leachman v. Beech Aircraft Corp., 694 F.2d 1301 (D.C. Cir. 1983); Union Bank of Switzerland v. HS Equities, Inc., 457 F. Supp. 515 (S.D.N.Y. 1978); see also 1A A. Corbin, CONTRACTS § 218 (1963).