

UNIFORM COMMERCIAL CODE

CONTINUED USE OF NONCONFORMING GOODS DOES NOT IN ALL CASES WAIVE THE REVOCATION OF ACCEPTANCE

Deere and Co. v. Johnson, 271 F.3d 613 (5th Cir. 2001).

FACTS: Deere and Company (“Deere”) brought this action to recover the unpaid balance owed on the purchase of a combine from Edward Johnson, Jr. (“Johnson”). Johnson counterclaimed for breach of implied and express warranties and intentional misrepresentations.

In 1994, Johnson purchased a combine from Deere’s dealer by making a down payment and financing the remainder through Deere, using the combine as security for the loan. The combine proved to be a lemon after numerous service requests by Johnson and failed repair attempts by Deere. As a result, Johnson revoked his acceptance in a March 3, 1995 letter, tendered the combine, and requested a replacement. In response, Deere stated they saw no reason to replace the combine and were not willing to accept it back. Despite his continued use of the combine during the harvest season of 1995 and spring of 1996, Johnson made no payments on the loan contract. At trial, the jury awarded Johnson the \$30,634.36 down payment he had made on the combine, but subtracted \$70,000 from this award for the fair rental value of the combine during the period of Johnson’s use.

HOLDING: Reversed and remanded.

REASONING: Typically, the law requires that a buyer return a non-conforming good, purchase a replacement, if necessary, and sue for breach. The rationale behind this is that even non-conforming goods have value, and by requiring a prompt return of the goods, the law enables a seller to resell the goods before they substantially depreciate in value. The Mississippi Supreme Court, however, has also noted that a buyer, with no ability to replace the defective good, suffers substantial injury if forced to cede ownership of that good. Thus, the law balances the competing equities. In cases where the cost of replacement is low, the injury to the seller from the depreciation of the good outweighs the injury to the buyer that results from surrendering ownership. In such cases, the law requires the return of the non-conforming good.

On the other hand, when the cost of replacement is high, the injury resulting to the buyer from returning the good outweighs the seller’s injury of depreciation. In situations such as this, courts do not penalize the buyer when he reasonably retains the non-conforming good.

Mississippi case law has weighed these factors when deciding issues of waiver of revocation by continued use of non-conforming goods. In a case involving a defective copier, the court held that failure to return the copier did vitiate the revocation of acceptance, but noted in dicta that this might not always be true. *J.L. Teel Co., Inc. v. Houston United Sales Inc.*, 491 So.2d 851, 859 (Miss. 1986). Because another copier could have easily been purchased, failure to surrender the copier nullified the attempt to revoke acceptance. Several years later, in *North River Homes v. Borsarge*, 594 So.2d 1153 (Miss. 1992), the court addressed whether a family’s failure to move out of a “lemon” mobile home waived their revocation of acceptance. Because the cost to the family of giving up the trailer was high, the court held that the failure to move out did not waive revocation.

In this case, Johnson’s cost of replacement was high. His credit was adversely affected by failing to make payments on the loan, he was operating close to the margin, and he admittedly could not make but a few of the payments. Under these circumstances, it is unlikely that any dealer would either rent or sell Johnson a replacement combine. Additionally, without a combine, Johnson’s ability to farm would be severely impaired and he could not mitigate damages suffered as a result of the defective combine. Therefore, continued use of the combine did not waive revocation of acceptance of non-conforming goods.

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