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# Commercial Law-Maybank v. S. S. Kresge: Reasonable Notice Requirement: A Booby-Trap for the Personally Injured Consumer

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## Commercial Law—*Maybank v. S.S. Kresge*: Reasonable Notice Requirement: A “Booby-Trap” for the Personally Injured Consumer

One of the most difficult aspects of warranty law is determining what constitutes a “reasonable time”<sup>1</sup> as the phrase is used in the Uniform Commercial Code (Code) section 2-607(3)(a) requirement that a buyer who has accepted goods “must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .”<sup>2</sup> The issue becomes more troublesome when the notice provision is applied to a personally injured retail consumer, because the requirement often is overlooked and thus operates as a “booby-trap for the unwary.”<sup>3</sup> In its attempt to resolve the uncertainty of section 2-607(3)(a) as employed in consumer injury actions, the North Carolina Supreme Court held in *Maybank v. S. S. Kresge Co.*<sup>4</sup> that a three-year delay in notifying the seller of a breach of an implied warranty of merchantability<sup>5</sup> was not unreasonable as a matter of law and thus did not bar plaintiff from remedy.<sup>6</sup> By failing to find such an extended delay to be unreasonable as a matter of law, the court followed the judicial trend of circumventing the reasonable notice requirement in the statute when the plaintiff is an injured consumer. The court’s elimination of the reasonable notice requirement renders this aspect of recovery for breach of an implied warranty of merchantability similar to the no-notice requirement of a strict liability in tort theory of recovery.<sup>7</sup>

In *Maybank* plaintiff purchased a package of three flashcubes from defendant K-Mart.<sup>8</sup> When plaintiff opened the package on July 21, 1972, none of the cubes appeared damaged. After placing one cube containing four flashbulbs in her camera, plaintiff took four pictures without incident; after placing a second cube on her camera, plaintiff pressed the shutter button and the flashcube exploded. The force of the explosion knocked plaintiff’s glasses off and the corner of her left eye was cut, resulting in temporary blindness; consequently, plaintiff was hospitalized for one week and was absent from work for three weeks. The injury continued to cause the eye to become easily

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1. A. SQUILLANTE & J. FONSECA, 3 WILLISTON ON SALES § 22-11, at 303 (4th ed. 1974). See, Comment, *Notice Requirement in Warranty Actions Involving Personal Injury*, 51 CAL. L. REV. 586, 587 (1963).

2. U.C.C. § 2-607(3)(a) (1978) (enacted in North Carolina as N.C. GEN. STAT. § 25-2-607(3)(a) (1965)).

3. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 97, at 655 (4th ed. 1971).

4. 302 N.C. 129, 273 S.E.2d 681 (1981).

5. “A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” N.Y. GEN. STAT. § 25-2-314(1) (1965); U.C.C. § 2-314(1) (1978).

6. 302 N.C. at 135, 273 S.E.2d at 685.

7. See *infra* text accompanying note 70.

8. 302 N.C. at 130, 273 S.E.2d at 682. Defendant S. S. Kresge Company trades under the name of K-Mart.

fatigued and to affect her reading.<sup>9</sup>

Plaintiff did not complain to the manufacturer, G.T.E. Sylvania, Inc., because she claimed that the carton contained instructions for notification only in the event the flashcube failed to flash—not in the event the flashcube exploded.<sup>10</sup> Nor was defendant informed prior to the institution of plaintiff's suit that the flashcube was defective.<sup>11</sup>

The court of appeals reversed defendant's directed verdict and found that plaintiff's evidence made out a prima facie case of breach of an implied warranty of merchantability.<sup>12</sup> The North Carolina Supreme Court affirmed that part of the court of appeals' decision but held that the court erred in finding that plaintiff's failure to give adequate notice was an affirmative defense waived by defendant when it did not raise the issue.<sup>13</sup> Instead, the court held that notification was a condition precedent to a buyer's action, thus placing upon the plaintiff buyer the burden of pleading and proving that reasonable notification had been given.<sup>14</sup> The supreme court then determined that plaintiff made a prima facie showing that the notice—which was given by the filing of the suit three years after discovery of the defect—was notification within a "reasonable time."<sup>15</sup>

In reaching its decision, the court applied the policies behind the notice requirement to the facts and circumstances of the case. Three policies were mentioned by the court: (1) to enable the seller to make efforts to cure the breach in order to minimize the buyer's damage and the seller's liability;<sup>16</sup> (2) to give the seller a reasonable opportunity to learn the facts so that he may prepare for negotiations with the injured consumer, and if need be, his defense in a suit;<sup>17</sup> and (3) "to provide a seller with a terminal point in time for liabil-

9. *Id.* at 131, 273 S.E.2d at 683.

10. *Id.* at 131, 273 S.E.2d at 683. Defendant's third-party claim against G.T.E. Sylvania, Inc. was severed for trial at a later date.

11. *Id.* at 133, 273 S.E.2d at 682-83.

12. 46 N.C. App. 687, 266 S.E.2d 409 (1980). The court of appeals found plaintiff's evidence insufficient to establish claims for negligence, strict liability, and breach of express warranty. The appellate court therefore affirmed the trial court's dismissal of those claims. *Id.* at 692-93, 266 S.E.2d at 411-12.

13. 302 N.C. at 132, 273 S.E.2d at 683. The court of appeals relied on its decision in *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 485, 253 S.E.2d 344, 350, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979). *Reid* required that failure to give notice of breach be asserted as an affirmative defense. 302 N.C. at 133, 273 S.E.2d at 683. Although the timeliness of notification was not challenged by either party at trial, the court of appeals considered this issue *sua sponte*. 46 N.C. App. at 693, 266 S.E.2d at 413.

14. 302 N.C. at 133, 273 S.E.2d at 683. *Accord* L.A. Green Seed Co. v. Williams, 246 Ark. 463, 469, 438 S.W.2d 717, 720 (1969); *Carney v. I. J. Kayle & Assocs.*, 122 Ill. App. 2d 403, 407, 259 N.E.2d 304, 306 (1970); A. SQUILLANTE & J. FONSECA, *supra* note 1, 22-11, at 301.

15. 302 N.C. at 136, 273 S.E.2d at 684.

16. *Id.* at 134, 273 S.E.2d at 684. *Accord*, L.A. Green Seed Co. v. Williams, 246 Ark. at 468, 438 S.W.2d at 720; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-10, at 421 (2d ed. 1980).

17. 302 N.C. at 134, 273 S.E.2d at 684. *Accord* *Owen v. Sears, Roebuck & Co.*, 273 F.2d 140, 143 (9th Cir. 1959); *Columbia Axle Co. v. American Auto. Ins. Co.*, 63 F.2d 206, 208 (6th Cir. 1933); *Truslow & Fulle, Inc. v. Diamond Bottling Corp.*, 112 Conn. 181, 187, 151 A. 492, 495 (1930); J. WHITE & R. SUMMERS, *supra* note 16, § 11-10, at 422.

ity."<sup>18</sup> The court first noted that enabling the seller to cure the breach does not apply to personal injury cases because the damage has already occurred and is irreversible.<sup>19</sup> In assessing the weight to be given the other two objectives, the court relied extensively on Official Comment 4 to section 2-607: "'[a] reasonable time' for notification from a retail consumer is to be judged by different standards [from those of a merchant] so that in [the retail consumer's] case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."<sup>20</sup> Considering this comment and the foregoing objectives, the court determined that the pertinent conflict was between the policy of providing the seller an opportunity to prepare for trial and that of providing an injured good-faith consumer a remedy.<sup>21</sup> Since the facts revealed that the defendant seller could adequately prepare for trial because the exploding flashcube and the carton in which it was purchased were available as evidence, the court found that both policies could be furthered if plaintiff were entitled to go to the jury on the issue of seasonable notice.<sup>22</sup>

As this was a case of first impression in North Carolina, the court had little guidance from North Carolina sources in formulating its opinion. The varied treatment given by courts in other jurisdictions to notice requirements in personal injury actions coupled with the confusion existing over this issue at common law<sup>23</sup> magnified the difficulty of its task.

Originally, common-law courts generally considered the buyer's acceptance of title to goods as a waiver of the seller's liability from certain contractual duties so that notice of defect was seldom at issue.<sup>24</sup> In one case, the New York Court of Appeals found that in the absence of fraud or latent defects, an implied warranty in a contract of sale did not survive acceptance of the goods.<sup>25</sup> The justice of this rule was often questioned.<sup>26</sup> A milder rule was foreshadowed by a court which held that an implied warranty could survive the buyer's acceptance; however, the court emphasized the practical importance of the buyer notifying the seller of defects in the goods.<sup>27</sup> The court

18. 302 N.C. at 135, 273 S.E.2d at 684. The court stated that this is the least compelling policy. *Id.* Accord J. WHITE & R. SUMMERS, *supra* note 16, § 11-10, at 422.

19. 302 N.C. at 134, 273 S.E.2d at 684.

20. U.C.C. § 2-607 comment 4 (1978).

21. 302 N.C. at 135, 273 S.E.2d at 685.

22. *Id.* Following the North Carolina Supreme Court's decision, the parties settled out of court.

23. See, e.g., *Metro Inv. Corp. v. Portland Rd. Lumber Yard, Inc.*, 263 Or. 76, 79, 501 P.2d 312, 314 (1972). See also L. VOLD, *THE LAW OF SALES* 460 (2d ed. 1959); Annot., 93 A.L.R. 3d 363, 368 (1979). The quandary was caused by the "desire to give finality to transactions in which the goods were accepted but also to accommodate a buyer who desperately needed the goods immediately despite their defective quality." *Metro. Inv. Corp.*, 263 Or. at 79, 501 P.2d at 314.

24. 3 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 714 (3d ed. 1961 & Supp. 1981).

25. *Gaylord Mfg. Co. v. Allen*, 53 N.Y. 515, 519 (1873) (stating the prevailing common law rule).

26. L. VOLD, *supra* note 23.

27. *Morse v. Moore*, 83 Me. 473, 480-81, 22 A. 362, 364 (1891) (ice shipped by seller did not conform to contract).

seemed to recognize the necessity of a rule that would be capable of some certainty in its application, that would avoid the hardship on the buyer under the waiver rule, and that would give the seller some protection against stale claims.<sup>28</sup> In an attempt to meet these needs, section 49 of the Uniform Sales Act provided that acceptance of goods does not preclude a buyer's recovery against the seller for breach of warranty, "[b]ut, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise of warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."<sup>29</sup>

Despite the statutory requirement of notice in section 49, several courts fashioned theories that relieved personal injury plaintiffs from this demand in breach of warranty actions. In holding that section 49 was not applicable to personal injury actions, the Supreme Court of Indiana in *Wright-Bachman, Inc. v. Hodnett*<sup>30</sup> relied on an interpretation of section 70 of the Uniform Sales Act, which states that nothing in the statute shall affect the right of a buyer "to recover . . . special damages in any case where by law" such damages are recoverable.<sup>31</sup> Since such damages could have been recovered without notice before the Act, and since damages for personal injuries are special or consequential damages, the court found that section 70 exempted personal injury plaintiffs from the notice requirement.<sup>32</sup> In *Kennedy v. F. W. Woolworth Co.*<sup>33</sup> the New York Appellate Division held that the notice provision had no relation to goods sold for immediate human consumption. The court argued that the operation of the statute should be confined to "sales of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee."<sup>34</sup>

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28. Cf. *Whitfield v. Jessup*, 31 Cal. 2d 826, 828, 193 P.2d 1, 2 (1948) (reasonableness is to be determined from the particular circumstances); *Hazelton v. First Nat'l Stores*, 88 N.H. 409, 412, 190 A. 280, 282 (1937): "'A rule seems desirable which is capable of some certainty in its application and which at the same time avoids the hardship on the buyer of holding that acceptance of title necessarily deprives him of the seller's obligations and also avoids the hardship on the seller of allowing a buyer at any time within the Statute of Limitations to assert that the goods are defective though no objection was made when they were received.'" (quoting 2 J. WILLISTON, WILLISTON ON SALES § 434(a) (2d ed. 1948)).

29. UNIFORM SALES ACT § 49 (1942).

30. 235 Ind. 307, 133 N.E.2d 713 (1956) (plaintiff was injured when ladder purchased from defendant broke, causing scaffold on which plaintiff was working to collapse).

31. UNIFORM SALES ACT § 70 (1942).

32. 235 Ind. at 312, 133 N.E.2d at 715. *Contra* *Wojciuk v. United States Rubber Co.*, 19 Wis. 2d 235a, 235f, 122 N.W.2d 737, 740 (1963):

the purpose of sec. 70 is to make it clear that under the sales act liability arising out of breach of warranty may extend to interest and special damages, even though the remedy provisions of the act do not mention either, and that it was not the purpose of sec. 70 to exempt such elements from the part of sec. 49 which provides that upon buyer's failure to give timely notice of breach, "the seller shall not be liable therefor."

*Id.* at 235e, 122 N.W.2d at 739-40.

33. 205 A.D. 648, 200 N.Y.S. 121 (1923) (candy sold by defendant caused plaintiff's daughter to become ill).

34. *Id.* at 649-50, 200 N.Y.S. at 122. *Kennedy* was followed in *Silverstein v. R.H. Macy & Co.*, 266 A.D. 5, 40 N.Y.S.2d 916 (1943), a breach of warranty action in which plaintiff was injured from a fall while performing gymnastics on a chinning bar sold to him by defendant. The

Most courts refused to follow *Kennedy* and *Wright-Bachman* and found that there should be no distinction between commercial and personal injury plaintiffs. For example, one court held that the notice requirement does apply to the sale of goods for immediate human consumption,<sup>35</sup> thereby refusing to recognize the *Kennedy* distinction between sales of food for immediate human consumption and sales of food for less immediate use. The court pointed out that the general warranty provisions of the Sales Act apply to sales of food and that section 49 likewise should apply.<sup>36</sup> Another court looked to the terms of section 49, which applies to all "goods."<sup>37</sup> As defined in section 76 of the Sales Act, food clearly came within the definition of "goods,"<sup>38</sup> and therefore the section 49 notice requirement was held to be a necessary prerequisite in actions involving the sale of food.<sup>39</sup> One court declined to follow *Kennedy* by refusing to acknowledge a distinction between commercial and personal injury situations, noting that such a distinction "would give rise to innumerable stale claims and create a double standard of recovery."<sup>40</sup> Seeking to explain the anomalous results presented by the above decisions, one court stated that the *Kennedy* and *Wright-Bachman* courts, along with several scholars who have criticized the majority rule that requires notice in personal injury actions, are "expressing dissatisfaction with the statute, rather than a choice between reasonable interpretations of its provisions."<sup>41</sup>

This dilemma continues today because section 2-607(3)(a) of the Uniform Commercial Code carries over the language and case law of section 49.<sup>42</sup> The exception to the requirement of notice carved out by New York courts after *Kennedy* in cases involving the sale of goods for immediate human consumption continues to retain some vitality. In one case plaintiff sustained personal

New York Court of Appeals has not accepted or rejected *Kennedy* or *Silverstein*. In *Sylvester v. R.H. Macy & Co.*, 291 N.Y. 552, 50 N.E.2d 656 (1943) (per curiam), however, a personal injury action in which plaintiff contended that no notice was required or alternatively that notice was given by the institution of the action, the court of appeals affirmed without opinion the lower court's judgment for the plaintiff.

35. *Hazelton v. First Nat'l Stores*, 88 N.H. 409, 413, 190 A. 280, 282 (1937) (in action for damages caused by eating pork chops infested with trichinae, unexplained delay of six months after purchase in giving notice held to preclude recovery). *Accord* *Schuler v. Union News Co.*, 295 Mass. 350, 354, 4 N.E.2d 465, 467 (1936).

36. 88 N.H. at 413, 190 A. at 282.

37. *Baum v. Murray*, 23 Wash. 2d 890, 900, 162 P.2d 801, 806 (1945) (plaintiffs became ill after purchasing sausage infested with trichinae).

38. See UNIFORM SALES ACT § 76 (1942).

39. 23 Wash. 2d at 900, 162 P.2d at 806.

40. *Smith v. Pizitz of Bessemer, Inc.*, 271 Ala. 101, 104, 122 So. 2d 591, 593 (1960) (plaintiff injured when a nightgown caught fire and burst into flames).

41. *Wojciuk v. United States Rubber Co.*, 19 Wis. 2d 235a, 235e, 122 N.W.2d 737, 739 (1963) (plaintiff and husband sought damages for wife's personal injuries sustained when automobile overturned as a result of a blowout).

42. REPORT OF THE LAW REVISION COMMISSION FOR 1955, 1 STUDY OF THE UNIFORM COMMERCIAL CODE 529 (1955). The comment to § 2-607 states that the provision is to "continue the prior basic policies with respect to the acceptance of goods. . . ." U.C.C. § 2-607 comment (1978). Because § 2-607 is a continuation of § 49, most states still rely upon case law decided under the Sales Act as authority for cases holding under the Code. See, e.g., *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 703, 249 A.2d 778, 781 (1968). Section 2-607(3)(a) accords with *Main v. Field*, 144 N.C. 307, 56 S.E. 943 (1907), which held that a buyer of goods has a reasonable time after acceptance to notify the seller of a breach of warranty.

injuries as a result of her use of an oral contraceptive manufactured by defendant, and the court, quoting *Kennedy*, found that the requirement of timely notice did not apply.<sup>43</sup>

In the midst of these irreconcilable decisions, the North Carolina Supreme Court decided *Maybank* by following the majority rule that reasonable notice is required from a plaintiff suing for personal injury damages.<sup>44</sup> The court dealt primarily with the question whether the three-year notice given by plaintiff was a "reasonable time" within which notice should be given<sup>45</sup> and, in making that determination, focused on the policies behind the notice requirement. The court, however, gave inadequate treatment to these and other policy arguments. One policy the court failed to examine is the significance of reasonable notice in negotiating settlements. The filing of a complaint cannot be "seasonable" notice of a defect; it only serves to give notice of litigation, and therefore avoids one purpose of the notice requirement<sup>46</sup> expressed in comment 4 to section 2-607(3)(a): "[t]he notification which saves the buyer's rights under this Article . . . opens the way for normal settlement through negotiation."<sup>47</sup> The court did point out that one goal behind the notice provision is to "afford the seller a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit,"<sup>48</sup> but it elaborated only on the defense aspect of fact discovery.<sup>49</sup> It is clear that in this instance the settlement policy was unfulfilled since the seller did not receive notice until the action was instituted, thus making it impossible for the parties to reach a settlement before litigation as contemplated by the Code.

Another underlying rationale for the reasonable notice requirement, that of providing the "seller with a terminal point in time for liability,"<sup>50</sup> was mentioned by the court but also was given inadequate treatment. The court felt this to be one of "the least compelling [policies] because a 'reasonable time' is not a point which can be accurately predicted and because the statute of limitations reflects the legislature's judgment as to how long the seller should be subject to suit."<sup>51</sup> This reasoning is unpersuasive, however, because if the statute of limitations alone is sufficient to protect the seller, then the requirement that notice be given in a "reasonable time" would be superfluous; rather, the provision would simply call for notice to be given only if the opportunity to gather evidence still exists. Furthermore, a "terminal point in time for liability" may be inconsequential when a plaintiff's delay in giving notice is justified, but not when there has been a lapse of three years for no apparent reason.

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43. *Fischer v. Mead Johnson Laboratories*, 41 A.D.2d 737, 737-38, 341 N.Y.S.2d 257, 258-59 (1973).

44. 302 N.C. at 133, 273 S.E.2d at 683.

45. *Id.* at 134-36, 273 S.E.2d at 684-85.

46. *See infra* note 74.

47. U.C.C. § 2-607 comment 4 (1978).

48. 302 N.C. at 134, 273 S.E.2d at 684.

49. *Id.* at 135, 273 S.E.2d at 684.

50. *Id.*

51. *Id.* See *J. WHITE & R. SUMMERS, supra* note 16, § 11-10, at 422.

After examining these policies, the court looked to the facts and circumstances in the case and decided that the seller had not been prejudiced since the defective flashcube and carton in which it had been purchased were available at trial. The court therefore focused primarily on the facts and circumstances bearing on the reasonableness of the delay.<sup>52</sup> This method of investigation is consistent with the requirement of section 1-204(2), which provides that "[w]hat is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."<sup>53</sup> The only factor expressly considered in *Maybank*, however, was the "nature" of the purchaser.<sup>54</sup>

In differentiating between the standards to be applied to a retail consumer and a merchant buyer, the court cited comment 4,<sup>55</sup> which distinguishes between the two<sup>56</sup> even though the statute itself does not. Though the comments often aid in the construction of the statute and frequently are accorded great weight, "they have not been enacted by the legislature and are not necessarily representative of legislative intent."<sup>57</sup> The *Maybank* court's primary reliance on comment 4 is, therefore, open to dispute, particularly because the court interpreted comment 4 to be inconsistent with section 2-607(3)(a). The court essentially eliminated the notice requirement for personal injury plaintiffs through the use of a statement that the legislature, for whatever reasons, did not enact. Moreover, the court's reliance on the authority of the comment is inconsistent with its treatment of the settlement policy. While it relied heavily on the comment in order to establish the differing standards to be used for a retail consumer and a merchant buyer, it swiftly dismissed the comment's discussion of the settlement objective.<sup>58</sup>

The court's position could conceivably have been justified by relying on the language of the Uniform Commercial Code itself. Section 2-104(1) defines "merchant" as one who "holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction,"<sup>59</sup> whereas a retail buyer is someone who lacks the special knowledge or the peculiar skill related to the goods that are the subject matter of the transaction. It can be inferred from the section 2-104(1) definition of "merchant" that the purposes of Article 2 would be better fulfilled by holding the merchant buyer to a more "stringent

52. 302 N.C. at 136, 273 S.E.2d at 684.

53. N.C. GEN. STAT. § 25-1-204(a) (1965). U.C.C. § 1-204(2) (1978). In *Schneider v. Person*, 34 Pa. D. & C.2d 10, 12 (C.P. Lehigh County 1964), the Pennsylvania court cited § 1-204(2) in its determination of what constituted "reasonable notice."

54. 302 N.C. at 136, 273 S.E.2d at 684. Other factors often considered by courts include: the nature of the goods, *see, e.g.*, *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wash. App. 551, 519 P.2d 278 (1974); the nature of the defect or breach, *see, e.g.*, *Steiner v. Jarrett*, 130 Cal. App. 2d 869, 280 P.2d 235 (1954); the type of seller, *see generally* 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-607:36 (3d ed. 1981); and any circumstances serving to excuse or justify an otherwise unreasonable delay, *id.* at § 2-607:37.

55. 302 N.C. at 135, 273 S.E.2d at 684-85.

56. U.C.C. § 2-607, comment 4 (1978).

57. *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979). The comments were not enacted by the General Assembly. *See* Law of May 26, 1965, ch. 700, 1965 N.C. Sess. Laws 768.

58. *See supra* notes 20-23 and accompanying text.

59. U.C.C. § 2-104(1) (1978).



standard of commercial conduct than . . . the retail consumer."<sup>60</sup> As a result of the more rigorous standard of conduct expected of a merchant, it follows that a less rigorous standard should be expected of a consumer who must give notice under section 2-607(3)(a).

Not only is the *Maybank* decision weakened by its fundamental reliance on comment 4, but the court's refusal to find three years to be an unreasonable delay as a matter of law stands contrary to the majority of cases dealing with reasonable notice requirements in personal injury actions. Although the requirement of notice within a "reasonable time" seems to be a qualitative requirement in that the facts and circumstances of each case should be considered, it is significant that quantitative considerations seem to have influenced many courts. One court, in determining that notice given by the injured plaintiff to the seller twelve months after the injury was not given within a "reasonable time," specifically considered cases in which notice given more than one year after breach was found to be unreasonable as a matter of law in the absence of explanation.<sup>61</sup> In California this quantitative consideration is manifested in section 340(3) of the California Code of Civil Procedure, which is a one-year statute of limitations that has been interpreted to apply to all personal injury or death actions, regardless of whether they arise in tort or in contract.<sup>62</sup>

Courts that have not found a one-year or more notice untimely as a matter of law have cited compelling reasons for not doing so. An Illinois court, for example, refused to find that notice given almost four years after plaintiff's injuries was unreasonable notice.<sup>63</sup> In that case, plaintiff suffered a stroke on October 21, 1967 as a result of taking oral contraceptives, but she did not learn of the contraceptive's potential for causing strokes until she read January 1970 Senate committee findings related to oral contraceptives.<sup>64</sup> The court explained that a person complaining of a breach of an implied warranty must have some knowledge of the identity of the causal agent before he or she may ascertain to whom notice should be directed; therefore, the plaintiff was al-

60. A. SQUILLANTE & J. FONSECA, *supra* note 1, § 22-11, at 300. Section 1-102(1) provides that the Code "shall be liberally construed and applied to promote its underlying purposes and policies." N.C. GEN. STAT. § 1-201(1) (1965); U.C.C. § 1-102(1) (1978).

61. *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 708 n.2, 248 A.2d 778, 782 n.2 (1968) (plaintiff sustained injuries to hand while opening bottle of soda water). One key factor that influenced the court's decision was the unavailability of evidence. 104 R.I. at 709, 248 A.2d at 782-83. In *Wagmeister v. A.H. Robbins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1978), in which plaintiff became pregnant and delivered a stillborn baby despite prior implantation of a Dalkon Shield, the court held that notice given thirty months after the delivery did not satisfy § 2-607(3)(a) as a matter of law. *Id.* at 966-67, 382 N.E.2d at 24-25. In several cases in which less than one year's notice was given, courts found notice to be unreasonable as a matter of law even when there was justification for the delay. *E.g.*, *Silvera v. Broadway Dep't Store, Inc.*, 35 F. Supp. 625 (S.D. Cal. 1940) (7½ months after discoloration of forehead from hatband not timely notice); *Hazelton v. First Nat'l Stores*, 88 N.H. 409, 190 A. 280 (1937) (plaintiff injured by eating pork chops infested with trichinae; unexplained delay of six months held to preclude recovery). *See also* Annot., *supra* note 23, § 11, at 399-402.

62. Freedman, *Products Liability Under the Uniform Commercial Code*, 10 PRAC. LAW. 49, 62 (1964).

63. *Goldstein v. G. D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978).

64. *Id.* at 345-46, 378 N.E.2d at 1085.

lowed to go to the jury on the issue whether the notice given on October 15, 1971 was seasonable.<sup>65</sup> Unlike that case, there was no significant policy reason in *Maybank* to impede a finding that a three-year delay was untimely.

In light of the aforementioned difficulties with the *Maybank* decision, it seems probable that the court had a strong unarticulated motive for holding that plaintiff's delay was not per se unreasonable. Perhaps the court was acting consistent with those courts before it, such as the *Wright-Bachman* and *Kennedy* courts, which created distinctions to abrogate the notice requirement for personal injury plaintiffs. The court appears to have accomplished this abrogation by replacing the notice requirement for personal injury consumer-plaintiffs with a judicially mandated no-notice requirement similar to that in a strict tort liability theory of recovery.<sup>66</sup>

Much of the confusion encountered in the application of the reasonable notice provision of section 2-607(3)(a) has arisen from the development of the theory of strict tort liability and its application to transactions normally considered to be within the ambit of contract law.<sup>67</sup> The Uniform Commercial Code applies to warranties arising out of contract, while strict tort liability applies to breaches of warranty arising in tort; however, the "two theories overlap resulting in parallel but different rules governing the same problem."<sup>68</sup> The breach of contract warranty theory of recovery has proved to have some undesirable complications for the injured plaintiff. Notice, the *sine qua non* of a contract warranty action, is often overlooked by the injured plaintiff buyer because "it seems so utterly out of place in a personal injury action."<sup>69</sup> On the other hand, one of the virtues of strict tort liability actions is that the notice requirement does not apply.<sup>70</sup> It has been suggested that perhaps the notice provision should operate only in instances in which buyers

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65. *Id.* at 351-52, 378 N.E.2d at 1089. Evidence of bad faith also existed on the manufacturer's part; prior to plaintiff's injury, the manufacturer was aware of complaints by contraceptive users of injuries similar to those sustained by the plaintiff. *Id.* at 351, 378 N.E.2d at 1089. Even in cases involving less than a one-year delay, the courts had justifiable reasons for finding that the plaintiff should be allowed to go to the jury on the notice issue. *E.g.*, *Bonker v. Ingersoll Prods. Corp.*, 132 F. Supp. 5 (D. Mass. 1955) (plaintiff, injured by eating defendant's canned food product, had several operations during the next three months, was confined to bed for over a month and could not swallow for four months after the injury; whether notice given four months after injury and two weeks after final operation was given within reasonable time was deemed jury question).

66. The North Carolina General Assembly has not adopted strict liability in products liability cases. See N.C. GEN. STAT. § 99B-1 (1979).

67. Note, *Notice of Breach and The Uniform Commercial Code*, 25 U. FLA. L. REV. 520, 520 n.5 (1973). The doctrine of strict tort liability was first espoused in Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

68. Note, *supra* note 67, at 527.

69. Woods, *The Personal Injury Action in Warranty—Has the Arkansas Strict Liability Statute Rendered it Obsolete?*, 28 ARK. L. REV. 335, 339 (1974).

70. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900, (1964); J. WHITE & R. SUMMERS, *supra* note 16, § 11-10, at 421. Other problems avoided by strict liability actions are privity requirements and disclaimers. Annot., *supra* note 23, at 371. Breach of warranty actions often have been favored by plaintiffs because all that must be proved to establish the seller's liability is that the product was defective at the time it left the seller's or manufacturer's possession, not that the seller or manufacturer was negligent. Woods, *supra* note 69, at 336.

could conceivably use stale and unfounded claims of breach of warranty to avoid or to lower payment for goods.<sup>71</sup> Moreover,

[i]f the legislatures believed that there should be a notice provision or an exceptionally short period of limitation in product liability cases, why did they not extend this protection to vendors and makers in *all such cases* (whether grounded on negligence or warranty), since the practical problems of stale claims and fraud are the same in both types?<sup>72</sup>

Despite the burdens presented the plaintiff by section 2-607(3)(a), the language of that section is broad and a majority of courts have held it applicable in cases involving personal injuries.<sup>73</sup> Nonetheless, in order to circumvent the statute, courts have resorted to rather transparent devices such as holding that a long delay may be "reasonable,"<sup>74</sup> as the *Maybank* court has done, or finding that the provision was not intended to apply to personal injuries,<sup>75</sup> as the *Wright-Bachman* and *Kennedy* courts did. Such decisions present an impediment to the protection of sellers, one of the goals of the Code.<sup>76</sup> The language of the notice provision applies to personal injury actions and therefore would offer protection to sellers, but the limitation of that provision which comes from court holdings and not revisions of the statute serves to defeat that purpose.<sup>77</sup> It is self-evident that courts disfavor the lack of notice defense when it is invoked against an injured consumer.<sup>78</sup> Nevertheless, the Code recognizes instances in which a seller's liability can be limited by failure to give notice. "[I]f legislative supremacy means anything, it must mean that the courts cannot create a new rule of strict tort liability that will displace the products-liability scheme of the Uniform Commercial Code."<sup>79</sup> The *Maybank* court arguably has made a move in that direction by refusing to find a three-year delay, for which there was no justified excuse, to be unreasonable as a matter of law.

A solution to the tendency of courts to evade the notice provision would be to amend the statute to exclude personally injured consumer buyers,

71. James, *Products Liability* (pt. 2), 34 TEX. L. REV. 192, 197 (1955).

72. *Id.* at 197-98 (emphasis in original).

73. Note, *supra* note 67, at 587.

74. PROSSER, *supra* note 3, § 97, at 655. Another circumvention tactic used by the *Maybank* court was declining to find that notification given by the filing of plaintiff's action was not notification as contemplated by the Code. See 302 N.C. at 136, S.E.2d at 685. Section 2-607(3)(a) clearly states that unless proper notice is given, the buyer is barred from any remedy; therefore, a summons and complaint (exercising a remedy) arguably cannot constitute a notice as contemplated by the Code. *Solomon & Son v. Thomas*, 45 Luzerne Leg. Reg. R. 269 (C.P. Luzerne County, Pa. 1955) (court granted leave to amend the complaint); A. SQUILLANTE & J. FONSECA, *supra* note 1, § 22-11, at 308. *But see* *Simons v. Clemco Indus.*, 368 So. 2d 509 (Ala. 1979) (court did not require notice prior to filing of suit); *Goldstein v. G. D. Searle & Co.*, 62 Ill. App. 2d 344, 378 N.E.2d 1083 (1978) (filing of complaint as notice allowed in personal injury action in light of the less stringent policy toward retail consumers).

75. PROSSER, *supra* note 3, § 97, at 655-56.

76. Note, *supra* note 67, at 525.

77. *Id.* at 525-26.

78. J. WHITE & R. SUMMERS, *supra* note 16, § 11-10, at 423.

79. TITUS, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 755 (1970).

thereby accomplishing strict liability via warranty instead of tort.<sup>80</sup> In effect, this would enforce the present wording of section 2-607(3)(a) in commercial situations and would abandon the notice requirement in consumer cases.<sup>81</sup> This approach has been codified in subsection 7 of Maine's version of section 2-607, which provides: "Subsection 3(a) shall not apply where the remedy is for personal injury resulting from any breach."<sup>82</sup> South Carolina has effectively achieved the same result by amending subsection (3)(a) to include the following: "however, no notice of injury to the person in the case of consumer goods shall be required."<sup>83</sup> The Permanent Editorial Board for the Uniform Commercial Code rejected suggestions for such amendments for the following reason: "[T]he amendment to subsection (3)(a) may have merit, since notice may be dispensed with by classifying the liability as a strict liability in tort. But it seems unnecessary if 'reasonable time' is read as suggested in Comment 4."<sup>84</sup> This position is troublesome for two reasons: (1) comment 4 is not part of the statute, and (2) requests for amendment were made in the face of conflicting treatment given section 2-607(3)(a) and comment 4 by courts in deciding personal injury cases, thus defeating the goal of uniformity.

In *Maybank* the North Carolina Supreme Court has in effect furthered the trend of courts to create a new rule similar to the requirements of strict tort liability. Unfortunately, it has done this by relying primarily on comment 4, instead of the statute itself, and by deemphasizing any policies that would weigh in favor of the seller. Through its decision, the court has virtually written out the notice requirement of section 2-607(3)(a) for personal injury plaintiffs. In light of the supreme court's opinion and until the North Carolina legislature recognizes the need to amend the Code, a defense lawyer must be cognizant of the court's proclivity to find that a delayed notice in a personal injury suit will in all likelihood not be found to be unreasonable as a matter of law.

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80. Freeman & Dressel, *Warranty Law in Maryland Product Liability Cases: Strict Liability Incognito?*, 5 U. BALT. L. REV. 47, 76 (1975). Prosser suggested that problems with warranty might have been solved by amending the Code. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966).

81. Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAW. 118, 124 (1978). Notice might be required in personal injury actions in order to guard against claims generated by afterthought. See, e.g., *Wojciuk v. United States Rubber Co.*, 19 Wis. 2d 235a, 235f, 122 N.W.2d 737, 740 (1963). The statute of limitations, however, should provide enough protection against this. See, e.g., *Simmons v. Clemco Indus.*, 368 So.2d 509, 514 (Ala. 1979).

82. ME. REV. STAT. ANN. tit. XI, § 2-607(7) (Cum. Supp. 1981).

83. S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1977).

84. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3, 48 (1967).

