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# OVERPROTECTING THE CONSUMER? SECTION 2-607(3)(a) NOTICE OF BREACH IN NONPRIVITY CONTEXTS

HARRY G. PRINCE†

*Professor Prince examines the requirement of Uniform Commercial Code section 2-607(3)(a) that a buyer give timely notice to a seller of any breach in accepted goods that prove defective. In this Article, Professor Prince argues that courts have overprotected the consumer by minimizing, and in some cases eliminating, the notice requirement of section 2-607(3)(a). The Article posits that courts have been especially prone to eliminate notice in cases in which remote vendees or third party beneficiaries have been injured by defective goods. Courts have thus been concerned with protecting the consumer, but Professor Prince argues the purposes and construction of section 2-607(3)(a) demonstrate the need to ensure that a seller receive adequate notice of breach in accepted goods. After a thorough analysis of judicial discussion and legislative treatment of Code notice requirements, Professor Prince urges a "liberal but proper" construction of section 2-607(3)(a), which would both protect the unwary consumer and ensure that the seller receives timely notice of an alleged breach.*

Plaintiff argues that notification is unnecessary where the action involves sale of goods for human consumption and that this requirement should only be applied in commercial transactions.

We reject plaintiff's construction of Section 2-607(3)(a) . . . . We believe that the notification procedure is therefore proper if [a breach of contract] theory of liability is advanced. To hold otherwise might permit a defendant to be confronted with a stale claim thereby preventing the marshaling of evidence for a defense. It would also countenance a selective disregard of various requirements set forth in the Code based solely upon the nature of the action. If the Code is the basis of recovery, a plaintiff will not be permitted to fulfill only certain requirements while neglecting others.<sup>1</sup>

The plaintiff before the Illinois Supreme Court in *Berry v. G.D. Searle & Co.* presented a compelling case—a consumer brought an action for breach of contract after suffering permanent, partial paralysis as a result of cerebral vascular

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1. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 555-56, 309 N.E.2d 550, 554-55 (1974) (citations omitted).

accident or, more commonly, a stroke.<sup>2</sup> The stroke allegedly resulted from the purchase and ingestion of oral contraceptives manufactured and distributed by codefendants G.D. Searle & Co. and Planned Parenthood of Chicago.<sup>3</sup> Considering the relative circumstances of the parties, it is easily imaginable that the compassion of the court would be with the injured consumer and that she would therefore have the benefit of a sympathetic construction of the law. Nonetheless, the consumer's argument for exemption from the notice requirement was rejected. The court stood fast on the general principle that an action brought under the Uniform Commercial Code ("the Code") must be governed by all of its relevant provisions, even if applying that principle meant the injured consumer would be barred from any remedy because of failure to give the seller notice of the breach as required by section 2-607(3)(a).<sup>4</sup>

Section 2-607(3)(a) is addressed to situations in which a buyer keeps the goods despite some nonconformity in the seller's tender but then elects to seek a remedy for breach of contract.<sup>5</sup> Notice is especially important in this situation because the goods are kept by the buyer instead of being thrust back on the seller, the latter of which occurs when the buyer either rejects the goods or revokes an initial acceptance.<sup>6</sup> The seller very possibly would be unaware of an alleged breach until provided notice. Section 2-607(3)(a) requires that the buyer

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2. *Id.* at 550, 309 N.E.2d at 551-52.

3. *Id.*

4. The section reads: "(3) Where a tender has been accepted (a) the buyer 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 . . ." U.C.C. § 2-607(3)(a) (1978).

5. The notice requirement applies to all breaches of contract, including a breach of warranty, which is usually the more specific consumer claim. Clark, *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 U.C.C. L.J. 105, 110 (1982).

6. Generally speaking, and apart from the possibility of simply overlooking the defect, the buyer has three options on the tender of nonconforming goods by a seller. The first option for the buyer is to reject all or part of the goods. See U.C.C. § 2-601. The buyer must make an effective rejection under § 2-602, including the mandatory giving of notice as required by subsection (1). The import of the requirements for effective rejection is that the buyer must refuse acceptance and thrust the goods back on the seller, at least technically if not physically. See *id.* § 2-602 comment 1 ("A tender or delivery of goods made pursuant to a contract of sale, even though wholly nonconforming, requires affirmative action by the buyer to avoid acceptance."); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 8-1, at 293 (2d ed. 1980) ("Somewhat simplified, rejection is a combination of the buyer's refusal to keep delivered goods and his notification to the seller that he will not keep them."). For a thorough treatment of the mechanics of and limitations on rejection of nonconforming goods, see R. HENSON, *THE LAW OF SALES* § 5.02 (1985); J. WHITE & R. SUMMERS, *supra*, § 8-3.

A second option for the buyer who receives nonconforming goods is to accept and later revoke the acceptance. This ability to reverse acceptance is an exceptional remedy and can be done only if the restrictive provisions of § 2-608 can be satisfied, including the subsection (2) requirement that notice be given to make a revocation of acceptance effective. See J. WHITE & R. SUMMERS, *supra*, § 8-3 ("Since revocation of acceptance always occurs after acceptance and may occur long after the seller regarded the transaction as closed, a buyer who might have rejected with ease must in theory at least meet several additional conditions to revoke acceptance."). The essential purpose of a proper and effective revocation of acceptance is to force the seller to retake nonconforming goods. See R. NORDSTROM, *LAW OF SALES* § 143 (1970).

The third option for the buyer in receipt of nonconforming goods is to decide to keep the goods despite the nonconformity and then seek a remedy for the breach of the contract. It is only in this third course of action that the buyer does not take action to force the goods back on the seller. Although notice from consumers is required for both of the other courses of action without exception, it is particularly important in the third instance because the seller will not see the goods returning.

give notice within a reasonable period of time or be barred from any remedy. The *Berry* court was unwilling to conjure up an exception to section 2-607(3)(a) for certain consumer transactions<sup>7</sup> as a minority of courts previously had done under similar statutory provisions.<sup>8</sup> The *Berry* court was guided by the fundamental and essential principle that an action enjoying the relative advantages of proceeding under the Code must also satisfy all the rigors of the Code.<sup>9</sup>

The Illinois courts have not faithfully adhered to the general dictate in *Berry* that the whole of the Code,<sup>10</sup> including the section 2-607(3)(a) notice requirement, should apply to cases brought thereunder. More particularly, some Illinois appellate courts have concluded that notice of breach in cases of accepted goods should not be required from consumers who are not in privity with the seller from whom they have sought a remedy.<sup>11</sup> The lack of privity in the cases exists either because the consumer is a remote vendee pursuing an action against a manufacturer or seller with whom there has not been a direct transaction, or because the aggrieved consumer, rather than being a buyer of the goods, is a third party beneficiary who uses, consumes, or otherwise is affected by the

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7. It is clear that the text of § 2-607(3)(a) does not include an exception for consumer or personal injury cases. See *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 303, 315 So. 2d 579, 581 (1975); R. HENSON, *supra* note 6, § 5.04(d), at 175-76; Clark, *supra* note 5, at 116. Similarly, the predecessor § 49 of the Uniform Sales Act was not generally viewed as exempting consumer or personal injury actions. See *Smith v. Pizitz of Bessemer, Inc.*, 271 Ala. 101, 103, 122 So. 2d 591, 592-93 (1960); James, *Products Liability*, 34 TEX. L. REV. 192, 196-97 (1955).

8. See *Bennett v. Richardson-Merrill, Inc.*, 231 F. Supp. 150, 153-54 (E.D. Ill. 1964); *Smith v. Pizitz of Bessemer, Inc.*, 271 Ala. 101, 103-04, 122 So. 2d 591, 593 (1960); *Kennedy v. F.W. Woolworth Co.*, 205 A.D. 648, 649-50, 200 N.Y.S. 121, 122 (1923); 5 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 28.17, at 465 (2d ed. 1986).

9. Some courts have recognized the need to ensure that Code provisions are not selectively applied. In *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 62 (M.D. Fla. 1982), the Federal District Court for the Middle District of Florida stated that "[t]o recognize an action against a seller for breach of implied warranty not subject to the restrictions and limitations set forth in Article 2 would substantially frustrate one of the fundamental purposes for which the U.C.C. was adopted—to help simplify, clarify, and make uniform the law of commercial transactions." A similar view was expressed in an Oregon case: "In [a prior case] the majority of this court recognized the existence of two separate remedies [for personal injuries], one, strict liability in tort, and the other, implied warranty, provided by the Uniform Commercial Code. When the Uniform Commercial Code remedy is sought it logically should be accompanied by both the benefits and the detriments expressly provided by the statute." *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 285-86, 512 P.2d 776, 781 (1973) (Denecke, J., concurring); *accord Parillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981); *Smith v. Pizitz of Bessemer, Inc.*, 271 Ala. 101, 103-04, 122 So. 2d 591, 593 (1960); see also *Kaiser v. Hennis*, No. CA-6832 (Ohio Ct. App. May 27, 1986) (Hoffman, J., dissenting) (LEXIS, States library, Ohio file) ("Clearly, if a party wants to dance to the fast music of the UCC, he has to 'pay the piper' by observing the provision that affect [sic] him.").

10. Speculation might suggest that the court's steadiness resulted in part from defendants' failure to make an appropriate challenge to the propriety of the notice during the lower court proceedings. *Berry*, 56 Ill. 2d at 556, 309 N.E.2d at 555. Because of the lack of objection the court found it unnecessary to review the sufficiency of the notice, and the requirement of notice did not bar the action by plaintiff in the case. *Id.* This observation, however, should not detract from the court's emphatic statement that § 2-607(3)(a) would apply in consumer personal injury cases.

11. At least two Illinois cases subsequent to *Berry* have required that a buyer give notice to a remote seller. See *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 966, 382 N.E.2d 23, 25 (1978); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 140-41, 379 N.E.2d 7, 8-9 (1978). However, other cases construing Illinois law have not required notice from consumers to remote sellers. See *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36 (S.D. Ill. 1984); *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 501 N.E.2d 376, 384 (1986), *appeal denied*, 108 Ill. Dec. 418, 508 N.E.2d 729 (1987); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347, 378 N.E.2d 1083, 1086 (1978).

relevant goods.<sup>12</sup> Other jurisdictions are also split on the applicability of the section 2-607(3)(a) notice requirement to nonprivacy consumers.<sup>13</sup>

The Illinois appellate courts could deviate because the objection to the lack of notice in *Berry* was raised solely by defendant, Planned Parenthood Association of Chicago.<sup>14</sup> Planned Parenthood was the immediate seller in the case and its objection did not squarely present the issue of whether notice to a remote seller is required. The *Berry* court's concern with notice, however, appeared not to be limited to the immediate seller. In resolving the issue the court's discussion was phrased in response to the general assertion that personal injury cases or consumer transactions should be exempt from the notice requirement.<sup>15</sup> The court also noted that neither of the defendants had properly raised the issue of notice.<sup>16</sup> For support, the court cited cases which had required, at least tacitly, that remote vendees give notice to nonprivacy sellers.<sup>17</sup>

A review of the decisions that hold section 2-607(3)(a) notice is not required from nonprivacy consumers indicates selective application of the Code provision is effectively occurring, despite the principle enunciated in *Berry*, through a construction of the section so uneven that it nears disregard. The text of section 2-607(3)(a) does not expressly address nonprivacy consumers. Construing the section, however, to exempt remote vendees and third party beneficiaries from the notice requirement is starkly inconsistent with the recognized purposes and official comments of the section. In addition, the exemption of nonprivacy consumers disrupts the symmetry in the rule and leads to a number of illogical and unfair results. The courts that have exempted nonprivacy consumers from compliance with section 2-607(3)(a) have used rigid literalism in interpretation. The same courts appear to be influenced by exaggerated perceptions of consumer naivete and to confuse contract warranty and tort products liability causes of action.

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12. "Vertical privity," or the lack thereof, relates to the transactional relationship between parties in a distributive chain—for example, the manufacturer, distributor, wholesaler, retailer, and the end buyer. "Horizontal privity" addresses persons coming in contact with the goods after the ultimate sale to the end buyer and typically includes the buyer's family members, guests, or employees and occasionally includes strangers. "Double" or "diagonal" nonprivacy refers to a combination of vertical and horizontal nonprivacy, as when a nonbuyer pursues an action against a remote seller. See *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 583-84, 489 A.2d 660, 674-75 (1985); W. HAWKLAND, UCC SERIES § 2-318:01 (1984).

13. Jurisdictions with decisions requiring notice from remote vendees include Alabama, Alaska, Arkansas, Illinois, Oregon, South Dakota, Texas, and Wyoming. Jurisdictions with decisions not requiring notice from remote vendees include Alabama, Colorado, Illinois, Maryland, Pennsylvania, and Texas. Third party beneficiaries have been excused from giving notice by courts construing law in Alabama, Connecticut, Georgia, Florida, and Maryland. See cases cited *infra* notes 152-53.

14. *Berry*, 56 Ill. 2d at 556, 309 N.E.2d at 554.

15. *Id.* at 555-56, 309 N.E.2d at 554-55.

16. *Id.* at 556, 309 N.E.2d at 555.

17. *Id.* (citing *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973); *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 248 A.2d 778 (1968)). The courts in *Redfield* and *San Antonio* appeared to assume that a buyer must give notice to a remote seller. See *Redfield*, 266 Or. at 289, 512 P.2d at 781; *San Antonio*, 104 R.I. at 704-05, 248 A.2d at 780; see also *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 115, 452 A.2d 192, 197 (1982) (reading *Redfield* and *San Antonio* to require notice), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983).

Nevertheless, the position that section 2-607(3)(a) does not apply to non-privity consumers has gained an alarming degree of acceptance by the courts. This trend portends a substantial effect because the notice requirement has been at issue in significant consumer-oriented litigation. The consumer cases include not only oral contraceptive cases,<sup>18</sup> such as *Berry*, but also other actions involving health-threatening products such as asbestos liability cases<sup>19</sup> and litigation over the Dalkon Shield and other intrauterine birth control devices (IUDs).<sup>20</sup> Disputes concerning section 2-607(3)(a) notice also have been raised in a large number of actions for breach of warranty in sales of automobiles,<sup>21</sup> mobile homes,<sup>22</sup> and other major consumer goods,<sup>23</sup> as well as for breach of contract in the purchase of a wide variety of consumer goods.<sup>24</sup>

The primary thesis of this Article is that many courts have gone too far in their efforts to protect the consumer in litigation against merchants by improperly construing section 2-607(3)(a) to eliminate the requirement of notice in non-privity cases. The comments to section 2-607(3)(a) leave little doubt that courts should treat the consumer more liberally than the merchant in assessing compli-

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18. See *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978); *Fischer v. Mead-Johnson Laboratories*, 41 A.D.2d 737, 341 N.Y.S.2d 257 (1973); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973).

19. See *Adams-Arapahoe School Dist. v. Celotex Corp.*, 637 F. Supp. 1207 (D. Colo. 1986); *Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984); see also *Graham v. Wyeth Laboratories*, 666 F. Supp. 1483 (D. Kan. 1987) (alleged breach of warranty when child suffered brain damage after receiving vaccination); *Simmons v. Clemco Indus.*, 368 So. 2d 509 (Ala. 1979) (silicosis allegedly resulting from defective sandblasting hood); *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 501 N.E.2d 376 (1986) (defective bone plate inserted during surgery), *appeal denied*, 108 Ill. Dec. 418, 508 N.E.2d 729 (1987).

20. See, e.g., *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654 (N.D. Ala. 1984); *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290 (D. Colo. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (en banc); *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1978); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1978); *Coody v. A.H. Robins Co.*, 696 S.W.2d 154 (Tex. Ct. App. 1985). For a history of the Dalkon Shield and resulting litigation which had led the A.H. Robins Company into Chapter 11 reorganization under the Federal Bankruptcy Code, see *Hawkinson*, 595 F. Supp. at 1295-1306; *Courie, The A.H. Robins Saga*, A.B.A. J., July 1, 1986, at 56.

21. See, e.g., *Begley v. Jeep Corp.*, 491 F. Supp. 63 (W.D. Va. 1980); *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985); *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977) (en banc) (sale of automobile); *Burns v. Volkswagen of America, Inc.*, 97 A.D.2d 977, 468 N.Y.S.2d 958 (1983).

22. See, e.g., *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886 (Tex. Civ. App. 1979); *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196 (Tex. Civ. App. 1973).

23. See, e.g., *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59 (M.D. Fla. 1982) (sale of motorcycle); *Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977) (sale of houseboat), *aff'd*, 574 F.2d 984 (8th Cir. 1978); *Parzek v. New England Log Homes, Inc.*, 92 A.D.2d 954, 460 N.Y.S.2d 698 (1983) (log home building kit); *Carlson v. Rysavy*, 262 N.W.2d 27 (S.D. 1978) (purchase of modular home).

24. Other types of consumer cases concerning § 2-607(3)(a) notice include purchases of food-stuffs, *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 13 (1972) (suit based on sale of soda); *Nugent v. Popular Mkts., Inc.*, 353 Mass. 45, 228 N.E.2d 91 (1967) (food allegedly containing splinters); *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 248 A.2d 778 (1968) (defective bottle of soda); other home products, *Towe v. Justis Bros., Inc.*, 290 A.2d 657 (Del. Super. Ct. 1972) (defective refrigerator); *Leeper v. Banks*, 487 S.W.2d 58 (Ky. Ct. App. 1972) (defective starch); *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681 (1981) (defective flash cubes); *Agway, Inc. v. Teitscheid*, 144 Vt. 76, 472 A.2d 1250 (1984) (defective carpet); and a burial casket, *Wilcox v. Hillcrest Memorial Park*, 696 S.W.2d 423 (Tex. Ct. App. 1985), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986).

ance with the section,<sup>25</sup> but some courts have gone beyond liberal construction to the point of distortion. The distortion of the section is improper because it steals from the merchant significant protection that the Code, as finally drafted and generally enacted into law,<sup>26</sup> provides in disputes over breach in accepted goods. Moreover, the distortion arguably is unnecessary because a properly flexible construction of section 2-607(3)(a) provides all of the liberality with regard to giving notice that the consumer fairly needs without taking from the merchant the basic right to have reasonable notice of an alleged breach in accepted goods.

Part I of this Article includes a brief discussion of the origin and purposes of section 2-607(3)(a). The focus then turns to a more detailed study of the general construction of the section. Part II of the Article addresses the nonprivity situations in which consumers<sup>27</sup> are very likely to be involved: cases in which the remote vendee seeks a remedy from a manufacturer or seller, and cases in which the consumer seeking relief is a third party beneficiary rather than a buyer. These two situations present circumstances lacking a direct transaction between the consumer and the seller whom he seeks to hold liable for breach of contract. These situations, therefore, raise the essential question whether notice of breach ought to be required from the consumer in nonprivity cases.

### I. ORIGIN, PURPOSES, AND CONSTRUCTION OF SECTION 2-607(3)(a)

During this century the courts have uniformly moved toward increasing manufacturer or seller liability to consumers, which have included remote vendees and third party beneficiaries.<sup>28</sup> While much attention has been focused on attempts to limit some of the advantages widely given to the consumer in the

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25. For relevant text of U.C.C. § 2-607(3)(a) comment 4, see *infra* text accompanying note 108. Courts have gone beyond the grant of more liberal time to the consumer, as advocated in comment 4, to accept the broader concept that the standards for sufficiency of notice for consumers is less rigorous than for merchants. See *Shooshanian v. Wagner*, 672 P.2d 455, 462 (Alaska 1983); *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 274, 560 P.2d 789, 792 (1977); *Industrial Fiberglass v. Jandt*, 361 N.W.2d 595, 597-98 (N.D. 1985). Courts were previously inclined to apply a more liberal standard to consumers under the Uniform Sales Act § 49. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298 n.16 (3d Cir. 1961).

26. A review of the Uniform Commercial Code Reporting Service State Correlation Tables reveals that only three states have legislation that modifies the text or effect of § 2-607(3)(a). U.C.C. Rep. Serv. (Callaghan) Correlation Tables (1987). Maine and South Carolina have specifically altered the reading of § 2-607. See ME. REV. STAT. ANN. tit. 11, § 2-607 (1973); S.C. CODE ANN. § 36-2-607 (Law. Co-op. 1966). Massachusetts has limited the effect of § 2-607(3)(a) through its formulation of § 2-318. MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1974). The law in these states is discussed in more detail *infra* notes 241-44 and accompanying text.

27. Somewhat surprisingly, relatively few cases raise the issue of notice to be given by a remote merchant buyer to a manufacturer or seller. See *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). Why cases of that type are scarce is not apparent. In contrast, the prevalent structure of the § 2-318 provisions extends third party warranty coverage to natural persons and thus minimizes the possibility of merchant buyers having third party beneficiary standing under the UCC. Nonetheless, most principles advocated in this Article as being applicable to remote buyers or third party beneficiaries should be equally applicable to merchants who happen to come within one of those categories.

28. See James, *supra* note 7, at 192; Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1534 (1987). But cf. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 3-22 (1970) (outlining changes in law affecting manufacturer liability but questioning whether shift has been truly "dramatic").

area of tort products liability,<sup>29</sup> there is also room to question whether the courts have gone too far in the area of warranty liability in contract. The major movement in the area of contract liability has been the elimination of privity as a requirement for the bringing of an action against a seller.<sup>30</sup> On elimination of the privity requirement, significant issues have emerged concerning the defenses a seller might have in an action by a nonprivity consumer. These issues include the manner in which express or implied warranties might be created in the nonprivity context, the proper application of statutory limitations periods, the seller's ability to disclaim or exclude warranties, and the application of the notice requirement to nonprivity cases.<sup>31</sup> Some of these issues pose particularly difficult problems and remain unresolved by the courts. The requirement of notice of breach, however, is one of the defenses that requires and readily lends itself to resolution by the courts.

The applicability of section 2-607(3)(a) to nonprivity cases is overshadowed by the many cases that involve consumers with personal injuries in litigation against manufacturers or sellers with substantial wealth. In this context courts appear to bypass or ignore normal rules of statutory construction. A review of the relevant cases suggests the courts have overreacted to the well-worn idea that the consumer suffers from naivete and, therefore, is enormously over-matched in attempting to obtain a remedy from a merchant manufacturer or seller.<sup>32</sup> A tendency to distort section 2-607(3)(a) is further complicated by the disinclination of many courts to allow for the possibility that initiation of a lawsuit itself may be an appropriate means of giving notice.<sup>33</sup> However, the courts might be less inclined to eliminate the notice requirement if initiation of a lawsuit could possibly constitute notice. The immediate result of these and other difficulties is that the notice requirement has eroded; more generally, as one jurist has suggested, the consumer plaintiff now has the clear advantage in personal injury cases.<sup>34</sup> It is doubtful that the advantage granted to the consumer

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29. See, e.g., Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602 (1983); Phillips, *To Be Or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55 (1986); Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603 (1985). Of course, overlap exists in cases that involve both tort products liability and contract warranty liability. And although some courts have confused the two separate causes of action, the two theories of recovery do have different elements and distinguishable underlying principles. See *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 569-70, 579-81, 489 A.2d 660, 667-68, 672-73 (1985). For a detailed discussion of the overlap and distinctions, see *infra* notes 211-26 and accompanying text.

30. See *infra* notes 138-144 and accompanying text.

31. Traditionally, the defenses a seller might have in an action for breach of contract in general or breach of warranty in particular would include: (1) lack of privity; (2) preclusion of limitation of warranty through disclaimer; (3) exculpatory acts by the plaintiff such as contributory negligence, assumption of risk, or misuse; (4) statute of limitations; and (5) failure to give notice of an alleged breach. See *Morrow v. New Moon Homes, Inc.*, 518 P.2d 279, 292 (Alaska 1976); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 569-70, 489 A.2d 660, 677 (1985); J. WHITE & R. SUMMERS, *supra* note 6, §§ 11-1 to -10.

32. See *infra* notes 184-210 & 284-92 and accompanying text.

33. See *infra* text accompanying notes 116-37.

34. According to one judge,

It seems to us that in the never ending process of adjusting settled rules of law to changing conditions in society the courts have taken seven league boot strides toward equalizing the positions of injured plaintiffs, manufacturers, distributors and retailers. Within the "distributive chain" the relative positions have not only been equalized, as was long overdue,



in contract from the negation of the section 2-607(3)(a) notice requirement is fair or warranted.

### A. *Origin and Purposes of Section 2-607(3)(a)*

The origin of the notice provision of section 2-607(3)(a) is well-documented<sup>35</sup> and requires only brief repetition. The genesis of the section is found in an older common-law rule, prevalent in some jurisdictions, that acceptance of goods by a buyer would waive any claim he might have for breach by the seller.<sup>36</sup> Under this rule the options for the buyer were to reject the goods and sue for breach or to accept the defective tender of goods and thereby waive any claim for breach.<sup>37</sup> If a buyer found himself in desperate need of the goods, then he would have to accept them and forego any remedy for breach.<sup>38</sup>

Some courts eventually created an exception in favor of the buyer by allowing the buyer to accept the goods but preserve any claim he might have for breach by giving notice of the breach to the seller.<sup>39</sup> This approach gained a wider acceptance on its inclusion in section 49 of the Uniform Sales Act.<sup>40</sup> Although section 49 was applied with difficulty to consumer cases,<sup>41</sup> the rela-

but the advantage, if any now exists, has shifted to the injured plaintiff. In Michigan he may proceed in warranty or tort (despite some rather paradoxical language in [a prior case].) In warranty, courts responded to the "ever-growing pressure for protection of the consumer, coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens."

*Piercefield v. Remington Arms Co.*, 375 Mich. 85, 92-93, 133 N.W.2d 129, 132 (1965) (O'Hara, J., dissenting) (quoting *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 241, 109 N.W.2d 918, 921 (1961)).

35. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 971-73 (5th Cir. 1981); *Metro Inv. Corp. v. Portland Road Lumber Yard, Inc.*, 263 Or. 76, 78-80, 501 P.2d 312, 314 (1972); W. HAWKLAND, *supra* note 12, § 2-607:07, at 66-70; L. VOLD, *HANDBOOK ON THE LAW OF SALES* 460-62 (2d ed. 1959).

36. See *Eastern*, 532 F.2d at 971; *Whitfield v. Jessup*, 31 Cal. 2d 826, 828, 193 P.2d 1, 2 (1948); *Metro Inv. Corp.*, 263 Or. at 79, 501 P.2d at 314; L. VOLD, *supra* note 35, at 460.

37. See *Metro Inv. Corp.*, 263 Or. at 79, 501 P.2d at 314; James, *supra* note 7, at 197.

38. See *Metro Inv. Corp.*, 263 Or. at 79, 501 P.2d at 314; L. VOLD, *supra* note 35, at 460.

39. See *Eastern*, 532 F.2d at 971; *Hazleton v. First Nat'l Stores Inc.*, 58 N.H. 409, 412, 190 A. 280, 282 (1937); *Metro Inv. Corp.*, 263 Or. at 79-80, 501 P.2d at 314; L. VOLD, *supra* note 35, at 460-61.

40. See *Metro Inv. Corp.*, 263 Or. at 79-80, 501 P.2d at 314; W. HAWKLAND, *supra* note 12, § 2-607:07, at 66-70. Section 49 of the Uniform Sales Act read:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail [sic] to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

UNIF. SALES ACT § 49 (1906).

41. See 3 S. WILLISTON, *WILLISTON ON SALES* § 22-11, at 301 (4th ed. 1974). A statement of the popular construction of the § 49 notice requirement can be found in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air Co.*, 97 Idaho 348, 355, 544 P.2d 306, 313 (1975) (quoting *Barni v. Kutner*, 45 Del. 550, 76 A.2d 801 (Super. Ct. 1950)), *overruled on other grounds by State v. Mitchell Constr. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984):

It must (1) refer to particular sales, so far as practicable; (2) fairly advise the seller of the alleged defects; (3) repel the inference of waiver; (4) assert, directly or by reasonable infer-

tively vibrant requirement of privity at the time largely prevented the problems consumers have faced under section 2-607(3)(a).<sup>42</sup>

The provisions of section 2-607(3)(a) borrow heavily from those of section 49,<sup>43</sup> but liberalize the notice requirement and move away from courts' unduly technical constructions of section 49.<sup>44</sup> Despite this general liberalization, the erosion of the privity requirement contributes more to the current difficulties in interpreting section 2-607(3)(a) than do any textual differences from section 49.

A more general goal served by the notice requirement of section 2-607(3)(a), suggested by its origins, is the balancing of the buyer's interest in having an action for defects in accepted goods with the seller's interest in having the books closed on a transaction unless the buyer objects within a reasonable period of time.<sup>45</sup> In addition to this general goal of fairness, courts have consistently identified three more specific purposes served by the notice requirement

ence, that the buyer is claiming a violation of his legal rights, although it need not take the form of an express claim for damages or threat of such.

See also *Adler v. United States*, 270 F.2d 715, 719 (8th Cir. 1959) (citing cases); *Carlson v. Rysavy*, 262 N.W.2d 27, 30 n.1 (S.D. 1978) (notice under the Uniform Sales Act "must refer to particular sales, . . . must at least fairly advise the seller of the alleged defects; and . . . must be such as to repel the inference of waiver.") (quoting *Gilger v. Montgomery Lumber Co.*, 73 S.D. 599, 47 N.W.2d 281 (1951)).

42. The assault on privity as a requirement for pursuit of a cause of action against a seller began as early as 1916 in the case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), but picked up significant momentum in more recent years. See 5 F. HARPER, F. JAMES & O. GRAY, *supra* note 8, § 28.16; Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

43. See *Eastern*, 532 F.2d at 972; *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298 n.16 (3d Cir. 1961); 3 S. WILLISTON, *supra* note 41, § 22-11, at 297.

44. Courts occasionally construed § 49 of the Uniform Sales Act to require a buyer's express notice of intent to seek legal redress for specified damages. See *Eastern*, 532 F.2d at 976; *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 522-23, 319 N.W.2d 855, 861-62 (1982); L. VOLD, *supra* note 35, at 461-62. Concern over this exacting construction was reflected in comment 4 to § 2-607, which provides:

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 of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

U.C.C. § 2-607 comment 4.

45. In *Courtesy Enters. v. Richards Laboratories*, 457 N.E.2d 572 (Ind. Ct. App. 1983), the court noted:

What runs throughout all these considerations is the seller's right to rely upon the finality of a transaction after the elapse of a particular period of time. The buyer is not barred from asserting a breach if he does so before the seller may reasonably expect that the transaction has ceased to be problematic. UCC Section 2-607, Comment 4. The premise is balancing fairness to the buyer, who may encounter defective merchandise, with fairness to the seller, who is entitled to rely upon conclusiveness of a sale at some point.

*Id.* at 577.

that benefit the seller in particular.<sup>46</sup> First, notice gives the seller an opportunity to correct a defect or otherwise minimize damages. Second, if correction is not forthcoming or achievable, notice gives the seller an opportunity to negotiate a settlement or prepare for litigation by investigating the facts while still fresh. Third, the requirement of timely notice offers more general protection against stale claims. Some courts have also noted that the seller may benefit from notice by avoiding delivery of defective goods to other buyers<sup>47</sup> or by asserting a timely claim against a third party from whom the defective goods may have been purchased.<sup>48</sup>

These widely recognized purposes refute any suggestion that the requirement of notice of breach in accepted goods is a mere technicality; the seller actually does benefit from receiving notice. The importance of section 2-607(3)(a) to the seller should be underscored, because many courts have devalued its purposes when considering whether notice ought to be required from nonprivity consumers. These courts have then proceeded to adopt an overly restrictive, literal reading of the section, despite the instances of actual or potential prejudice that can be found in a number of consumer and commercial cases.<sup>49</sup> Professors White and Summers offer as an example the case of *Henningsen v. Bloomfield Motors, Inc.*,<sup>50</sup> by stating that "the Henningsens notified Chrysler so late in their famous case that Chrysler was not even able to find and inspect the automobile in which Mrs. Henningsen was injured."<sup>51</sup> Although no-

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46. See, e.g., *Eastern*, 532 F.2d at 972-73; *Agristor Leasing v. A.O. Smith Corp.*, 634 F. Supp. 1208, 1221 (D. Kan. 1986); *Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1103 (Ala. 1983); *Hepper v. Triple U Enters., Inc.*, 388 N.W.2d 525, 527 (S.D. 1986); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 591 (Wyo. 1984); see also *Dowdle v. Young*, 1 Ariz. App. 255, 256, 401 P.2d 740, 741 (1965) (same purposes served by notice provisions of Unif. Sales Act § 49).

47. *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380, 525 P.2d 88, 92, 115 Cal. Rptr. 648, 652 (1974); *Voboril v. Namco Leisure World, Inc.*, 24 U.C.C. Rep. Serv. (Callaghan) 614, 615 (Conn. Super. Ct. June 13, 1978); *Hepper v. Triple U Enters., Inc.*, 388 N.W.2d 525, 527 (S.D. 1986).

48. *Bennett v. Jansma*, 329 N.W.2d 134, 138 (S.D. 1983).

49. See, e.g., *Smith-Moore Body Co. v. Heil Co.*, 603 F. Supp. 354, 357 (E.D. Va. 1985) (notice coming four years after initial injury and seven months after plaintiff learned of defendant's involvement effectively prevented timely investigation, negotiation, settlement, and timely deposition of witnesses); *Begley v. Jeep Corp.*, 491 F. Supp. 63, 66 (W.D. Va. 1980) (notice coming two and one half years after learning of alleged defect arguably prevented timely investigation, negotiation, settlement, and timely deposition of witnesses); *Parker v. Bell Ford, Inc.*, 425 So. 2d 1101-03 (Ala. 1983) (court persuaded that failure to give notice of defects in truck pre-empted possibility of repair and minimization of loss); *White v. Mississippi Order Buyers, Inc.*, 648 P.2d 682, 684 (Colo. Ct. App. 1982) (with defect in perishable items—livestock—failure to give notice until after the livestock had died or been resold pre-empted investigation of facts relevant to alleged breach, attempts to cure, and negotiation of resolution); *Courtesy Enters., Inc. v. Richards Laboratories*, 457 N.E.2d 572 (Ind. Ct. App. 1983) (lack of prompt notice led to further deterioration of defective goods and increase in loss); *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 452 A.2d 192 (1982) (in accident caused by automobile tire blowout, lack of notice to remote manufacturer resulted in having no chance to inspect evidence), *aff'd*, 295 Md. 528, 456 A.2d 430 (1983); *Bennett v. Jansma*, 329 N.W.2d 134, 138 (S.D. 1983) (lack of prompt notice precluded minimization of damages and effective investigation of facts, and made difficult possible action against seller's seller); *Carroll Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 657-58 (Tex. Ct. App. 1984) (alleged lack of notice prevented seller from pursuing claim against his own seller).

50. 32 N.J. 358, 161 A.2d 69 (1960).

51. J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 422.

tice is not required in strict liability tort cases,<sup>52</sup> and perhaps for good reason,<sup>53</sup> it is equally clear that the Uniform Commercial Code seeks to avoid the prejudice to the seller by requiring a buyer's prompt notice of an alleged breach.

In addition to the other purposes served by the section 2-607(3)(a) notice requirement, the requirement may assist the promotion of dispute resolution outside the judicial process. Because the backlog of cases in both federal and state courts now stands at alarming rates,<sup>54</sup> judges should be particularly receptive to enforcing Code provisions that might promote settlement or early termination of lawsuits.<sup>55</sup>

## B. Construction of Section 2-607(3)(a) Notice Requirement

Prior discussions of section 2-607(3)(a) have identified several aspects of construction that courts have addressed in applying the notice requirement.<sup>56</sup> The general construction issues include (1) the form of notice; (2) to whom notice should be given; (3) the content of notice; (4) the effect of actual knowledge of the breach by the seller; (5) the timing of notice; (6) the effect of a lack of prejudice from failure to give notice; and (7) whether the initiation of a lawsuit may serve as notice. The following discussion is directed toward the general problems which arise in applying section 2-607(3)(a) in the context of nonprivity consumer cases.

### 1. The Form of Notice

Courts and commentators have almost uniformly agreed that the form of notice under section 2-607(3)(a) may be either written or oral.<sup>57</sup> Although the idea has been advanced that notice coming from merchants, as opposed to con-

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52. See RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965).

53. Courts and commentators have offered the theory that the general absence of a notice requirement in tort is attributable to historical developments. Historically, the tortfeasor was likely to be present at the time the tort occurred and therefore notice was not required. See *Smith v. Pizitz of Bessemer, Inc.*, 271 Ala. 101, 103-04, 122 So. 2d 591, 593 (1960); Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 462 (1971). In addition, it is likely that the shorter statutes of limitation in tort causes of action, typically one or two years, prevent the issue of staleness from arising. One would be hard pressed, however, to assert that early notice in tort actions would not yield the same benefit to defendants as in contract actions. See J. DOOLEY, MODERN TORT LAW § 32.25 (1977).

54. For recent discussions of apparent state and federal court case backlogs, see Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986), and comments thereon, Dobbs, *Can You Care for the People and Still Count the Costs?*, 46 MD. L. REV. 49 (1986); Saks, *If There Be a Crisis, How Shall We Know It*, 46 MD. L. REV. 63 (1986); Priest, *supra* note 28; Samuelson, *The Litigation Explosion: The Wrong Question*, 46 MD. L. REV. 78 (1986); Marvell & Daniels, *Are Caseloads Really Increasing?*, 25 JUDGE'S J. 34 (1986).

55. Evidence exists that manufacturers and sellers are often responsive in settlement when presented with a consumer complaint. See Braucher, *An Informal Resolution Model of Consumer Products Warranty Law*, 1985 WIS. L. REV. 1405, 1453-54.

56. See, e.g., Clark, *supra* note 5, at 105; Dillsaver, *Notice of Breach After Acceptance of Tender*, 17 U.C.C. L.J. 220 (1985).

57. See, e.g., *Barrington Corp. v. Patrick Lumber Co.*, 447 So. 2d 785, 789 (Ala. Civ. App. 1984); *Oden & Simes Used Cars, Inc. v. Thurman*, 65 Ga. App. 500, 500-01, 301 S.E.2d 673, 674 (1983); *Dowling v. Southwestern Porcelain, Inc.*, 237 Kan. 536, 544, 701 P.2d 954, 960 (1985); Clark, *supra* note 5, at 118-19.

sumers, should be written rather than oral,<sup>58</sup> that position has not gained any measurable following. Common sense would suggest that oral notice is likely to be more difficult to prove than written notice;<sup>59</sup> but if the oral notice can be proven, then it should be just as effective as written notice. Notice may come in one or several communications,<sup>60</sup> and with regard to consumers courts have shown great flexibility in determining what conduct may constitute acceptable notice. In *Palmer v. A.H. Robins Co.*<sup>61</sup> the Colorado Supreme Court concluded that a physician who had sold an IUD to a patient had been given notice when the patient presented herself to the physician in a life-threatening condition.<sup>62</sup>

## 2. To Whom Notice Should Be Given

The text of section 2-607(3)(a) states simply that notice is to be given to "the seller." The complication likely to arise is that notice may be given to a third party other than the seller who is being sued, either because of a close relationship between the seller and the third party or with the intent that the third party will inform the correct seller of any difficulties with the goods. In this connection two related factors may have particular relevance to the consumer cases. First, in construing section 2-607(3)(a) courts have utilized section 1-201(26) of the Code, which provides:

A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.<sup>63</sup>

In light of section 1-201(26), courts have read section 2-607(3)(a) to require only that reasonable steps be taken to cause notice to reach the appropriate seller. If those steps are taken, the courts have concluded it does not matter whether the seller actually receives the buyer's notice.<sup>64</sup> Under this reasoning, circumstances

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58. See *VLN Corp. v. American Office Equip. Co.*, 536 P.2d 863, 867 (Colo. Ct. App. 1975); *Badger Produce Co. v. Prelude Foods Int'l*, 130 Wis. 2d 230, 245, 387 N.W.2d 98, 105 (Ct. App. 1986).

59. See *Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516, 518-19 (Colo. Ct. App. 1981); Clark, *supra* note 5, at 118-19.

60. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359 (5th Cir. 1980), *reh'g denied sub nom. ADM Milling Co. v. T.J. Stevenson & Co.*, 651 F.2d 779 (5th Cir. 1981); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 591 (Wyo. 1984).

61. 684 P.2d 187 (Colo. 1984).

62. *Id.* at 206-07; see also *Malavy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 501 N.E.2d 376 (1986) (hospital that had sold bone plate to patient had notice of breach when its employees observed removal of the defective plate during surgery), *appeal denied*, 114 Ill. 2d 547, 508 N.E.2d 729 (1987).

63. U.C.C. § 1-201(26).

64. See, e.g., *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1313 (D. Colo. 1984); *Barrington Corp. v. Patrick Lumber Co.*, 447 So. 2d 785, 788 (Ala. Civ. App. 1984); *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo. 1980) (when notice through dealer actually reached remote manufacturer there was no need for additional direct or formal notice); *Carroll Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 657 (Tex. Ct. App. 1984); cf. *American Honda Motor Co. v. Boyd*,

may arise in which the immediate seller is an appropriate conduit through which a buyer might convey reasonable notice to a remote seller.

A second and related point is that an immediate seller in some cases may be considered an agent for a remote seller, so that notice to the agent will be effective as to the remote seller. An example of this relationship is found in *Mountain-Aire Refrigeration v. General Electric Co.*,<sup>65</sup> in which the Arizona Supreme Court found that a sales and service franchisee had effectively been authorized to act as agent for the remote manufacturer-franchisor for the purpose of receiving notice of breach.<sup>66</sup> The net effect of these two factors is that notice given by an aggrieved buyer to an immediate seller—particularly in consumer cases in which liberal standards are applied—may be considered effective notice to the remote seller, provided the immediate seller can be legitimately designated as either agent for the remote seller or the appropriate conduit for dispatching notice to the remote seller.

### 3. The Content of the Notice

A clear consensus exists that section 2-607(3)(a) establishes a more liberal standard for the content of notice than had previously existed under section 49 of the Uniform Sales Act. Courts have disagreed, however, over just how far the liberalization properly should go. There is little doubt that notice must sufficiently identify the transaction or goods for which a breach is being claimed,<sup>67</sup> but courts have differed on whether the notice must go beyond a statement of dissatisfaction to include an express allegation of breach or assertion of a legal right.<sup>68</sup> The difference of opinion over the construction of section 2-607(3)(a)

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475 So. 2d 835, 839 (Ala. 1985) (notice was effective when actually passed on to manufacturer by dealer).

65. 146 Ariz. 30, 703 P.2d 577 (1985).

66. *Id.* at 33, 703 P.2d at 580; *accord* *Hinchcliffe v. American Motor Corp.*, 184 Conn. 607, 621-22, 440 A.2d 810, 817 (1981) (bringing car into dealer for repairs was sufficient notice for dealer and manufacturer); *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 63-64, 433 A.2d 801, 810-11 (1981) (court interpreted warranty provisions providing that service problems related to the manufacturer's warranty should be referred to the local dealership as establishing the dealer as agent for the manufacturer for the purpose of receiving notice of an alleged breach of the contract's warranty provisions). *Contra* *Bennett v. Jansma*, 329 N.W.2d 134, 137 (S.D. 1983) (livestock auctioneer was seller's agent for purpose of selling property but not for purpose of receiving notice of breach).

67. In *Lynx, Inc. v. Ordinance Prods., Inc.*, 273 Md. 1, 327 A.2d 502 (1974), the court stated:

Where there has been more than one transaction between the parties some identification of the particular sale or transaction as to which the complaint is made by the buyer must be contained in the notice or the notice would fail its essential purpose because the seller then would not understand to what the notice referred.

*Id.* at 13, 327 A.2d at 511; *see also* *Ford v. Barnard, Sumner & Putnam Co.*, 1 Mass. App. Ct. 192, 194-95, 294 N.E.2d 467, 469 (1973) (notice was ineffective when buyer called defendant seller with complaint of defect in goods but did not identify herself).

68. Although some courts seem to raise the possibility that a "claim for damages" might also be required, the prevailing view is that a claim for damages was frequently a requirement under § 49 of the Uniform Sales Act, but is not required by § 2-607(3)(a). *See, e.g.,* *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 523, 319 N.W.2d 855, 861-62 (1982) (identifying claim for damages as part of Uniform Sales Act § 49 not included in § 2-607(3)(a) notice); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 591-92 (Wyo. 1984) (holding "clearly erroneous" jury instructions requiring notice to state "that the buyer looks to the seller for damages"); *see also* U.C.C. § 2-607 comment 4 (1978) ("Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy.").

results more from overly broad generalizations about the section and its comments than from any actual conflict within the section.

Those taking divergent viewpoints on the content of notice have usually chosen to emphasize different aspects of comment 4 to section 2-607. Illustrations of the opposing positions appear in the White and Summers treatise on the Uniform Commercial Code<sup>69</sup> and the prominent section 2-607(3)(a) case of *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*<sup>70</sup>

The White and Summers treatise states that the standard for the content of notice under section 2-607(3)(a) is so extremely liberal that a buyer merely needs to indicate a transaction is troublesome, and for that purpose "a scribbled note on a bit of toilet paper will do."<sup>71</sup> The United States Court of Appeals for the Fifth Circuit held differently in deciding the *Eastern* case. The *Eastern* court essentially took the position that the notice must indicate not only that the buyer is dissatisfied with the transaction, but also that the transaction is claimed to involve a breach of the contract.<sup>72</sup>

As some courts have recently suggested, however, both White and Summers and *Eastern* go too far in their respective positions when read as establishing general standards for the content of notice.<sup>73</sup> The White and Summers construction of a liberal standard for the content of notice is based in the part of comment 4 to section 2-607 that states the notice merely needs to be such as "to let the seller know that the transaction is still troublesome and must be watched."<sup>74</sup> Comment 4 goes on to state, however, that the notice must be such that it "informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."<sup>75</sup> This latter portion of the comment was emphasized by the *Eastern* court in arriving at an apparently more demanding construction of section 2-607(3)(a).<sup>76</sup> Although it indicated consumers might be held to a less demanding test than merchants,<sup>77</sup>

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69. J. WHITE & R. SUMMERS, *supra* note 6.

70. 532 F.2d 957 (5th Cir. 1976).

71. White and Summers state:

Finally, what constitutes sufficient notice under 2-607(3)(a)? How explicit must it be? May it be oral? Must it threaten litigation? Quite clearly the drafters intended a loose test; a scribbled note on a bit of toilet paper will do . . . . Under [comment 4], it is difficult to conceive of words which if put in writing, would not satisfy the notice requirement of 2-607. Indeed, a letter containing anything but the most exaggerated encomiums would seem to tell that the transaction "is still troublesome and must be watched."

J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 425; see also *City Welding & Mfg. Co. v. Gidley-Eschenheimer Corp.*, 16 Mass. App. Ct. 372, 373-74, 451 N.E.2d 734, 735-36 (1983) (complaints of defects enough even if unaccompanied by express assertion of legal rights); *Hepper v. Triple U Enters., Inc.*, 388 N.W.2d 525, 527 n.4 (S.D. 1986) (notice need not include buyer's intention to look to seller for damages); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 889 (Tex. Ct. App. 1979) (general statement of dissatisfaction is sufficient notice).

72. *Eastern*, 532 F.2d at 978. The *Eastern* Court stated, "The buyer's conduct, then, taken as a whole must constitute timely notification that the transaction is claimed to involve a breach." *Id.*

73. See *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 408-09 n.3 (8th Cir. 1985); *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277 nn.3 & 4 (D. Del. 1984).

74. See *supra* note 71. For the full text of comment 4 see *supra* note 44.

75. U.C.C. § 2-607(3)(a) comment 4. For the full text of comment 4 see *supra* note 44.

76. *Eastern*, 532 F.2d at 976-78.

77. *Id.* at 977.

the *Eastern* court rejected the idea that the general standard for adequate notice under section 2-607(3)(a) would be a minimal standard, such as that advocated by White and Summers.<sup>78</sup>

The United States Court of Appeals for the Eighth Circuit recently observed that the drafters of the official comments should be presumed not to have intended to establish conflicting standards for the construction of section 2-607(3)(a). Therefore, the two interpretive statements within comment 4 should be harmonized to construct a consistent guideline.<sup>79</sup> The court went on to suggest that in harmonizing the potentially conflicting statements, courts should be mindful that the notice be sufficient to serve all the recognized purposes of section 2-607(3)(a),<sup>80</sup> including the need to let the seller know that she needs to investigate the events concerning the alleged breach so as to be able to answer a potential lawsuit. Viewed in light of the need to serve the underlying purposes of section 2-607(3)(a), it is not surprising that in some circumstances a note of dissatisfaction on a piece of toilet paper will be sufficient, but in other contexts such informal notice will not sufficiently apprise the seller that she must answer a claim for breach.

An example of the type of case in which informal statements of dissatisfaction would be sufficient is *Melody Home Manufacturing Co. v. Morrison*.<sup>81</sup> In that case a consumer purchaser of a mobile home made repeated complaints about a severe defect in the home's water system and other problems.<sup>82</sup> In the context of a one-time purchase of great significance for the consumer, the seller should have been sufficiently alerted by the complaints that not only was the transaction troublesome and in need of continued vigilance, but also the consumer was very likely to seek some remedy for breach if the problems remained unresolved.

The Supreme Court of Wisconsin emphasized the importance of the context in assessing the effectiveness of notice in *Paulson v. Olson Implement Co.*<sup>83</sup> Although the court decided that Wisconsin law did not require that an express claim for damages be included in the notice, it cited examples of prior cases in which the facts warranted a greater or lesser allegation of breach in the notice. The examples included a case in which the buyer called the seller long distance

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78. The *Eastern* court wrote:

However, the fact that the Code has eliminated the technical rigors of the notice requirement under the Uniform Sales Act does not require the conclusion that any expression of discontent by a buyer always satisfies section 2-607. As Comment 4 indicates, a buyer's conduct under section 2-607 must satisfy the Code's standard of commercial good faith. Thus, while the buyer must inform the seller that the transaction is "still troublesome," Comment 4 also requires that the notification "be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation."

*Id.* at 976.

79. *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 408 n.3 (8th Cir. 1985).

80. *Id.* For a discussion of the purposes of § 2-607(3)(a), see *supra* text accompanying notes 45-53.

81. 502 S.W.2d 196 (Tex. Civ. App. 1973).

82. *Id.* at 200-02.

83. 107 Wis. 2d 510, 319 N.W.2d 855 (1982).



to report that the tires he purchased had blown out and resulted in "a terrible accident."<sup>84</sup> The *Paulson* court reasoned that in such a context the buyer did not need to assert a claim for damages; the buyer would have called only because he believed the seller bore some responsibility for the accident. The court concluded:

Inherent in notice is the concept of reasonableness. The seller must be informed by the buyer that the buyer considers him (as opposed to others) responsible to remedy a troublesome situation. The Code seeks to eliminate an element of unfair surprise where a seller has not been informed that a situation is troublesome and, therefore, cannot take steps to correct it but only later has a lawsuit filed against him.<sup>85</sup>

In the contexts of *Melody Homes* and the cases cited in *Paulson*, the real likelihood of a lawsuit should have been apparent to the seller, even though the buyer did not explicitly assert that he intended to pursue a legal remedy for breach.

*Eastern* is an example of a case going very much in the opposite direction. The most important aspect of the *Eastern* case in this regard is that Eastern Air Lines and McDonnell Douglas were in the midst of a continuing contractual relationship in which they were faced with substantial extenuating circumstances, including the United States' involvement in the Vietnam War.<sup>86</sup> Both parties recognized and acknowledged the exigency of the situation during the more than three years of performance under the contract.<sup>87</sup>

The *Eastern* court noted that the conduct of Eastern, the buyer, over the contractual period included some statements of protest over the delays in delivery, but also reflected mutual, amicable efforts to accommodate the government-caused delays.<sup>88</sup> This equivocal course of conduct gave McDonnell Douglas, the seller, a basis for asserting that the complaints or statements of dissatisfaction made by Eastern were not enough to constitute notice that Eastern might ultimately seek a remedy for breach.<sup>89</sup> Eastern's equivocal conduct not only

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84. *Id.* at 523-25 n.8, 319 N.W. 2d at 861-62 n.8 (citing *Wojciuk v. United States Rubber Co.*, 19 Wis. 2d 224, 120 N.W.2d 47 (1963)).

85. *Id.* at 525 n.8, 319 N.W.2d at 862 n.8.

86. The court wrote:

Although McDonnell produced evidence that some of the deliveries were late because of strikes and labor shortages, the heart of its defense was that most of the delays were caused by the rapid military buildup occasioned by the war in Vietnam. During the 1966-1968 escalation of the war, the Government asked the aviation industry to accord specific military projects priority over civilian production.

*Eastern*, 532 F.2d at 964.

87. *Id.* at 962-64.

88. *Id.* at 977-80. The court stated:

We note first that even Eastern's most strongly worded communications can reasonably be construed as an effort to prod McDonnell Douglas into minimizing the Vietnam War's impact upon production rather than as a claim for breach. As we have seen, Eastern's March 15, 1966 letter to Douglas—perhaps its single most forceful expression of dissatisfaction—can be viewed as a request for aid in minimizing the impact of the delays rather than an assertion that Douglas had violated the contract.

*Id.* at 978.

89. *Id.* at 978-80. The court of appeals ultimately held that the trial court erred in deciding as a matter of law that Eastern was not required to give § 2-607(3)(a) notice because McDonnell Douglas was already aware the deliveries were late or, in the alternative, that sufficient notice had been given.

undermined the import of its statements of dissatisfaction, but also might have caused McDonnell Douglas reasonably to believe that any potential claims had been waived.<sup>90</sup>

The *Eastern* court pronounced that "[t]he buyer's conduct, then, taken as a whole, must constitute timely notification that the transaction is claimed to involve a breach."<sup>91</sup> Subsequent courts have read this statement in *Eastern* to require that, for buyers to give effective notice, they must always go beyond a statement of dissatisfaction and indicate they consider the seller to have committed a breach.<sup>92</sup> A careful review of the decision reveals that this reading of *Eastern* is simply wrong. The *Eastern* case was marked by the presence of an ongoing contractual relationship and equivocal conduct by the buyer. The difficulty created by equivocal buyer conduct, in *Eastern* consisting of alternating statements of dissatisfaction and expressions of amicable relations, is that it may well lull the seller into the belief that defective performance has been forgiven.<sup>93</sup>

As subsequent decisions have indicated,<sup>94</sup> a proper reading of the *Eastern*

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*Id.* at 970. The court further held that the issue of the sufficiency of notice under § 2-607 should have been submitted to the jury. *Id.* at 979-80.

90. The court concluded that the issue of waiver would be subsumed under the determination whether adequate notice had been given. *Id.* at 979 n.63.

91. *Id.* at 978.

92. See, e.g., *K&M Joint Venture v. Smith Int'l*, 669 F.2d 1106, 1113 (6th Cir. 1982) ("the critical issue is whether the seller 'had notice it was considered to be in breach' . . . mere notice that a transaction is 'troublesome' is not enough") (quoting *Standard Alliance Indus. v. Black Clawson*, 587 F.2d 813 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979)); *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 452 (8th Cir. 1979) ("It is not enough that the seller be given notice of the mere facts constituting a nonconforming tender; he must also be informed that the buyer considers him to be in breach of the contract."); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 96 (E.D. Tenn. 1977) ("At a minimum it must be apparent from a written notice that the buyer, in fact, is claiming breach of the particular contract involved.").

93. *Courtesy Enters., Inc. v. Richards Laboratories*, 457 N.E.2d 572, 579 (Ind. Ct. App. 1983); *Industrial Fiberglass v. Jandt*, 361 N.W.2d 595, 598-99 (N.D. 1985).

94. In *Lafayette Stabilizer Repair, Inc. v. Machine Wholesalers Corp.*, 750 F.2d 1290 (5th Cir. 1985) (applying Florida law), the United States Court of Appeals for the Fifth Circuit found that the mere making of complaints about problems a buyer had with a piece of lathe equipment was sufficient to satisfy the notice requirement of breach in accepted goods without the buyer expressly indicating that the transaction was believed to involve a breach. The court stated:

The district court specifically found that [the buyer] notified [the seller] on more than one occasion that the lathe was not working, i.e., not cutting the API connections, despite efforts to repair it. This finding may be construed as providing adequate notice under Florida law. Under Florida law, the notice must be "both sufficient and timely." *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 973 (5th Cir. 1976). The determination of whether the notice complies with the legal requirements "typically depend[s] upon the reasonableness of the buyer's efforts to communicate his dissatisfaction." *Id.* "The question of reasonableness must be determined from the circumstances in the individual case." *Id.* (citing *Prichard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298 (3d Cir. 1961)). While [the seller] contends that no adequate notice was received until six months after the sale, the facts show that the problems with the lathe were continuing and that the repeated efforts to repair it were unsuccessful, with [the buyer] eventually being told that the machine needed rebuilding. That [the buyer] was patient in trying to have the machine repaired does not render its eventual notification requesting a refund of the purchase price inadequate or untimely when the circumstances as a whole are considered.

*Lafayette*, 750 F.2d at 1294.

Complaints or statements of dissatisfaction were enough in *Lafayette* without the buyer expressly alleging a breach by the seller. The factual distinction between *Lafayette* and *Eastern* is that *Lafayette* involved a one-time purchase of a single item with a more sharply defined need to tender presently conforming goods rather than an ongoing contractual relationship with equivocal conduct

case does not call for magic words of notice that make an express assertion of breach in every case. Rather, a proper interpretation of *Eastern* calls for an express assertion of breach when necessary to counteract equivocal conduct or because of other particular circumstances. The presence of these additional factors will determine whether the scribble on a piece of toilet paper will be enough or whether the buyer will need to give a more explicit statement of intent to hold the seller liable for breach.

Close scrutiny of these cases reveals that the divergence of opinions concerning the content of adequate notice under section 2-607(3)(a) is unwarranted and more imaginary than real.<sup>95</sup> Simply stated, adequate notice is that which is sufficient to satisfy the purposes of the section, particularly the need to put the seller on notice of a possible lawsuit. Such a rule is adequate whether the case involves merchants or consumers. Although in most consumer cases one would expect a lesser statement of dissatisfaction to constitute sufficient notice, there are likely to be other consumer cases involving circumstances that require the aggrieved buyer to give something more than a mere statement of dissatisfaction to alert the seller to the possibility of needing to answer a lawsuit.<sup>96</sup>

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throughout by the buyer. Even though the buyer in *Lafayette* cooperated in attempts to resolve the defects, *id.*, as had the buyer in *Eastern*, the circumstances in the case made it clear that such efforts were limited and they did not prevent the seller from being on notice that if the defects were not resolved the buyer would be likely to pursue legal remedies for breach. *Id.*; see also *Royal Type-writer Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983) (complaints of breach of warranty were sufficient notice even though buyer continued to order goods when seller promised to resolve problems).

The Fifth Circuit Court of Appeals reached a result very similar to that of *Lafayette* in *Reynolds Metals Co. v. Westinghouse Elec. Corp.*, 758 F.2d 1073 (5th Cir. 1985) (applying Texas law), even though there was much less notice to the seller. In *Reynolds* the buyer purchased an electrical transformer that failed within a year after it was put into service. *Id.* at 1074-75. The buyer immediately shipped the equipment back to the seller and made a claim for breach of warranty. Upon being told by the seller that the equipment was out of warranty, the buyer paid for the repair and did not make a claim again until the filing of a lawsuit two years later. *Id.* at 1075-76. Even with this scant notice and somewhat equivocal post-breach action on the buyer's part, the court held that a jury's finding of adequate notice was reasonably supported by the facts. *Id.* at 1078.

In addition to the subsequent Fifth Circuit cases, decisions from other jurisdictions support a limited reading of *Eastern*. These other cases—which apply a more demanding reading of *Eastern* by requiring notice that the transaction is claimed to involve a breach—primarily involve the type of ongoing contractual relationship and equivocal buyer conduct that characterized the *Eastern* case. See, e.g., *K&M Joint Venture v. Smith Int'l*, 669 F.2d 1106 (6th Cir. 1982) (applying California law) (because buyer continued to order replacement parts from seller and to pay as billed without protest, any claim that buyer considered seller to be in breach negated); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977) (complaints that were interspersed among more numerous glowing reports of satisfaction were insufficient notice).

95. See *Northern States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 408 n.3 (8th Cir. 1985). But cf. *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1065-66 (Colo. 1986) (court finding that the giving of notice under more stringent California standard instead of more liberal Texas standard may have affected jury verdict).

96. In *Agway, Inc. v. Teitscheid*, 144 Vt. 76, 472 A.2d 1250 (1984), the buyers made an initial complaint about pilling or deterioration in new carpet and were assured by the seller that the pilling was normal and would cease after several vacuumings. *Id.* at 77, 472 A.2d at 1251. Subsequently, the pilling stopped on two carpets but not on a third. The buyers, however, failed to renew their complaint while at the same time promising the seller that the remaining portion of the purchase price would be paid. *Id.* The buyers did not complain again until answering a lawsuit by the seller for the price. *Id.* at 78-80, 472 A.2d at 1252. In assessing the effect of the initial complaint by the consumer buyers, the court quoted *Eastern* for the proposition that "[e]ven though adequate notice may have been given at one point in the transaction, subsequent actions by the buyer may have dissipated its effect." *Id.* at 79, 472 A.2d at 1252 (quoting *Eastern*, 532 F.2d at 978).

#### 4. The Effect of Actual Knowledge of the Breach

Several courts have had occasion to ponder the effect, apart from any notice given by the buyer, of the seller's independent knowledge of the facts constituting a breach. Judge Learned Hand offered what has become a generally accepted resolution for this situation in *American Manufacturing Co. v. United States Shipping Board Emergency Fleet Corp.*,<sup>97</sup> when he stated:

The notice "of the breach" required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.<sup>98</sup>

The import of Judge Hand's statement is that, whether or not the seller knows of the alleged defect, he needs to have an indication the buyer wants some redress for a breach.<sup>99</sup> Although Judge Hand's holding predated the Code, courts have been nearly uniform in following his lead; only a minority of courts have taken the position that actual knowledge obviates the need for the buyer to give notice.<sup>100</sup> The courts in the minority have little reasoning to support their position other than the argument that actual knowledge somehow prevents the seller from being prejudiced by the lack of notice from the buyer. The minority approach overlooks the fact notice is required not merely to convey information about the alleged breach, but to warn that a claim for breach is being asserted.<sup>101</sup>

#### 5. The Timing of Notice

Section 2-607(3)(a) requires that the buyer notify the seller of a breach in accepted goods "within a reasonable time after he discovers or should have discovered any breach."<sup>102</sup> What is a reasonable period of time to give notice, as

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97. 7 F.2d 565 (2d Cir. 1925).

98. *Id.* at 566.

99. Judge Hand's statement almost certainly overstates the likelihood that the seller will know of the alleged defect. In a great many reported cases, the seller believed that conforming goods were delivered only to learn later that the goods were nonconforming. In either case, the seller should be entitled to notice as to whether the buyer will overlook the defects or make a claim for breach.

100. Compare *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 825-26 (6th Cir. 1978) (following Judge Hand's approach), *cert. denied*, 441 U.S. 923 (1979); *Oden & Sims Used Cars, Inc. v. Thurman*, 165 Ga. App. 500, 501, 301 S.E.2d 673, 674-75 (1983) (same) with *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198, 1204 (E.D. Mo. 1971) (because of seller's actual knowledge of breach, buyer "is not required to give notice of breach in any particular manner or form, nor is he required to assert an intention to make a claim for damages or to pursue any other available remedy.").

101. In *Eastern*, the court pointed out that the *Jay V. Zimmerman* approach reflects the view that the "sole function of section 2-607 is to inform the seller of hidden defects in his performance . . . . Section 2-607's origins, however, reveal that it has a much broader function." *Eastern*, 532 F.2d at 971. The court went on to conclude that "[g]iven these undeniable purposes, it is not enough under Section 2-607 that a seller has knowledge of facts constituting a non-conforming tender; he must also be informed that the buyer considers him to be in breach of the contract." *Id.* at 973.

102. Although the section's phrasing contemplates that notice will normally be given after acceptance, it possibly might be given prior to acceptance. See *MacGregor v. McReki, Inc.*, 30 Colo. App. 196, 494 P.2d 1297, 1299 (1971) (buyer informed seller that a subsequent late delivery would

dictated by the provisions of Uniform Commercial Code section 1-204(2),<sup>103</sup> is determined by looking at all the circumstances in light of the purposes to be served by giving section 2-607(3)(a) notice.<sup>104</sup> This question generally is considered to be one for the finder of fact, but on regular occasions courts determine that a delay in giving notice was too long as a matter of law.<sup>105</sup> A determination that notice is too late as a matter of law should be made only on the basis that the purposes of section 2-607(3)(a) make it unfair for the buyer to proceed—when, for example, the notice comes too late to allow the seller either to investigate the facts on which the allegation of breach is based or to pursue a claim against a more remote seller.<sup>106</sup>

Courts are more generous with consumers than merchants in determining when a delay in giving notice is reasonable.<sup>107</sup> Comment 4 to section 2-607 supports that approach, as do the practicalities involved. Comment 4 states in part:

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 of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.<sup>108</sup>

Comment 4 reflects the view that the consumer quite often will take longer to appreciate the nature of a breach and to realize the seller may be liable for it.<sup>109</sup> Nevertheless, if a consumer has not notified a seller of a breach for an unreasonable period of time, then the notice should be considered untimely.<sup>110</sup> To hold

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be breach of contract). *Contra* Klockner, Inc. v. Federal Wire Mill Corp., 663 F.2d 1370, 1379 n.3 (7th Cir. 1981) (in dictum construing § 2-607(3)(a) to render notice of breach before acceptance ineffective).

103. "What is a reasonable period of time for taking any action depends on the nature, purpose and circumstances of such action." U.C.C. § 1-204(2) (1978).

104. *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277 (D. Del. 1984); *White v. Mississippi Order Buyers, Inc.*, 648 P.2d 682, 684 (Colo. Ct. App. 1982); *American Fertilizer Specialists v. Wood*, 635 P.2d 592, 596-97 (Okla. 1981); *see also* *Slemmons v. Ciba-Geigy Corp.*, 57 Ohio App. 2d 43, 51, 385 N.E.2d 298, 304 (1978) (defining meaning of "should have discovered" to include defects that are apparent in ordinary course).

105. *See, e.g., Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1103 (Ala. 1983); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 514-15 (Alaska 1980); *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 274, 560 P.2d 789, 792 (1977).

106. *See, e.g., Steel & Wire Corp. v. Thyssen Inc.*, 20 U.C.C. Rep. Serv. (Callaghan) 892, 897 (E.D. Mich. 1976); *Bennett v. Jansma*, 329 N.W.2d 134, 137-38 (S.D. 1983).

107. *See, e.g., Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290, 1294 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. 1978); *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 274, 60 P.2d 789, 792 (1977).

108. U.C.C. § 2-607 comment 4.

109. *See, e.g., Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1978) (consumer was initially confused about identity of remote manufacturer of allegedly defective goods); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978) (plaintiff took considerable time before discovering that contraceptive pill may have caused stroke).

110. In *Southerland v. Northeast Datsun, Inc.*, 659 S.W.2d 889 (Tex. Ct. App. 1983), plaintiffs suffered physical injury and property damage when the mobile home they had purchased caught fire because of a leak in the propane heater. Plaintiffs waited three years and eleven months before giving notice to the seller without any apparent explanation. The court held that such delay was too long as a matter of law. *Id.* at 892-93. Similarly, in *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1978), plaintiff discovered the breach on October 31, 1972, when she learned

otherwise would effectively read into section 2-607(3)(a) an unwarranted exception for consumers.<sup>111</sup>

## 6. Lack of Prejudice as Excuse for Delayed Notice

The issue of lack of prejudice arises in those situations in which the giving of notice is delayed without reason, but the seller apparently is not deprived of an opportunity to correct the problem, achieve a settlement, or investigate all the relevant facts. This lack of prejudice could occur when a breach results in personal injury or property damage that denies any cure, appears to present no problem of disappearing facts, and is as prone to settlement at a later date as it may have been at the time of breach.<sup>112</sup> The lack of prejudice has also been raised in cases in which the particular action is one of a series against a manufacturer based on recurrent, similar breaches, and so the defendant has reason to anticipate that other actions will be forthcoming.<sup>113</sup> These cases may also be viewed as posing an issue of whether notice has come in a timely fashion; that is, the lack of prejudice goes a long way toward determining that the notice should be considered timely.<sup>114</sup>

On the other hand, the purported nonprejudicial delay may be considered to render notice ineffective for at least two reasons. First, the delay in giving notice may raise the possibility of the buyer's bad faith. Even though no demonstrable prejudice is felt by the seller, one can argue based on comment 4 to section 2-607 that a long and unexplained delay by the buyer in giving notice evidences bad faith and renders the notice ineffective. A buyer acting in good faith would be expected to seek a prompt resolution of any dispute. A second reason that nonprejudicial delay may render notice untimely is that allowing a lawsuit when the buyer has no excuse for a prolonged delay may result in less tangible harm. This approach anticipates a more general staleness resulting from simple delay and penalizes that delay through the barring of a remedy. The foundation for this conclusion is the concept that one goal of section 2-607(3)(a) is to protect the seller from claims on contracts justifiably thought to

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that a contraceptive device had failed and that she was pregnant. She then delivered a stillborn baby on February 19, 1973. No complaint was filed until June 2, 1975, and separate notice to defendants was not given until September 26, 1975. The appellate court upheld the trial court's dismissal on the grounds that notice was not timely as a matter of law. The opinion reveals no explanation for the 30- to 35-month delay between the discovery of the breach and the giving of notice. *Id.* at 966-67, 382 N.E.2d at 24-25.

111. See Comment, *Commercial Law—Maybank v. S.S. Kresge: Reasonable Notice Requirement: A "Booby-Trap" for the Personally Injured Consumer*, 61 N.C.L. REV. 177 (1982).

112. See, e.g., *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 135-36, 273 S.E.2d 681, 684-85 (1981). In *Maybank* the buyer delayed three years before giving notice after suffering a personal injury that the seller could not have remedied on prompt notice. The allegedly defective goods were preserved and made available as evidence at trial.

113. See *Adams-Arapahoe School Dist. v. Celotex Corp.*, 637 F. Supp. 1207, 1210 (D. Colo. 1986) (seller was subject to large number of suits for breach of express and implied warranties based on sales of asbestos products); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 351, 378 N.E.2d 1083, 1089 (1978) (seller was defendant in large number of prior suits based on alleged defects in oral contraceptives).

114. See *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 350, 378 N.E.2d 1083, 1088 (1978) (if no prejudice, then notice must be timely, citing *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961)).

be closed. To allow the buyer to pursue an unexplainably delayed claim would be an unfair surprise to the seller. Consequently, even without proving specific prejudice on the part of the seller, a time should come when a claim will be barred under section 2-607(3)(a) simply because the buyer has sat on it for too long.<sup>115</sup>

### 7. Initiation of Lawsuit as Notice of Breach

The courts are divided on the question whether the initiation of a lawsuit may constitute the notice of breach in accepted goods required by section 2-607(3)(a).<sup>116</sup> Although the idea of requiring notice before the commencement of a lawsuit has great intuitive appeal, careful consideration leads to the conclusion that section 2-607(3)(a) should not be read to require prelitigation notice. Rather, the filing of a complaint should be sufficient as long as all the requirements and purposes of the notice rule are satisfied.<sup>117</sup>

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115. Several courts have specifically held that prejudice need not be shown. *See, e.g.,* *Ashley v. Goodyear Tire & Rubber Co.*, 635 F.2d 571, 574 (6th Cir. 1980); *Smith-Moore Body Co. v. Heil Co.*, 603 F. Supp. 354, 357 (E.D. Va. 1985); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 512 (Alaska 1980). Other courts have reached consistent decisions on the facts. *See* *Salmon Rivers Sportman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 356, 544 P.2d 306, 314 (1975) (under Uniform Sales Act § 49, a four-year unexplained delay in giving notice could not be reasonable); *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 967, 382 N.E.2d 23, 25 (1978) (court held that 30-month unexplained delay in giving notice was unreasonable without searching for prejudice); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 141-42, 379 N.E.2d 7, 9 (1978) (unexplained delays of 39 months from breach and 15 months from learning identity of seller were too long for notice to be reasonable).

116. Cases indicating that notice may come by initiation of a lawsuit, at least in some circumstances, include *Graham v. Wyeth Laboratories*, 666 F. Supp. 1493, 1499-1500 (D. Kan. 1957) (applying Kansas law); *Adams-Arapahoe School Dist. v. Celotex Corp.*, 637 F. Supp. 1207, 1210 (D. Colo. 1986) (construing Colorado law); *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36 (S.D. Ill. 1984) (applying Illinois law); *Shooshanian v. Wagner*, 672 P.2d 455, 462 (Alaska 1983) (complaint filed by a retail consumer, rather than merchant, within a reasonable period of time is sufficient notice); *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 274, 560 P.2d 789, 792 (1977); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 207 n.3 (Colo. 1984) (stating in dictum that lawsuit may be sufficient in context of a retail purchase); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 351-52, 378 N.W.2d 1083, 1088-89 (1978); *Smith v. Stewart*, 233 Kan. 904, 910-14, 667 P.2d 358, 363-66 (1983) (consumer would not be barred from remedy for failure to give prelitigation notice when less than a month had passed between discovery of breach and filing of lawsuit); *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 136, 273 S.E.2d 681, 685 (1981) (allowing for possibility of lawsuit as notice, at least with consumers); *see also* *Hampton v. Gebhardt's Chili Powder Co.*, 294 F.2d 172, 174 (9th Cir. 1961) (applying California law under the Uniform Sales Act, court holds notice need not be given before the beginning of lawsuit as long as it is given before it is pled); *Davidson v. Wee*, 93 Ariz. 191, 199-200, 379 P.2d 744, 749 (1963) (not requiring prelitigation notice under the Uniform Sales Act); *Silverstein v. R.H. Macy Co.*, 266 A.D. 5, 9, 40 N.Y.S.2d 916, 920 (1943) (no need for prelitigation notice).

Cases indicating that initiation of a lawsuit will not be sufficient notice include *Atlantic Bldg. Sys. Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420-21 (D. Mass. 1981) (applying Georgia law); *Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1103 (Ala. 1983); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 512-13 (Alaska 1980); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 469, 438 S.W.2d 717, 720 (1969); *Voboril v. Namco Leisure World, Inc.*, 24 U.C.C. Rep. Serv. (Callaghan) 614, 615 (Conn. Super. Ct. 1978); *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 17, 327 A.2d 502, 514 (1974); *Hepper v. Triple U Enters., Inc.*, 388 N.W.2d 525, 529 (S.D. 1986).

117. Significantly, allegations of breach by the seller are often raised as counterclaims by buyers who have failed to pay for goods, and so have been sued by the seller for the price of goods accepted. A degree of judicial suspicion, if not hostility, can be detected in cases in which the buyer appears to be raising the allegation of seller's breach in a counterclaim as a desperate attempt to fend off the seller's action for the price. *See, e.g.,* *Klockner, Inc. v. Federal Wire Mill Corp.*, 663 F.2d 1370,

The requirement of notice as a prerequisite to bringing a lawsuit does exist in some circumstances, such as in statutes governing tort actions against governmental entities.<sup>118</sup> A competent attorney acting on behalf of a plaintiff buyer should be aware of the possibility of such a prelitigation notice requirement. Indeed, it is rather instinctive to think that one should first give notice and only in the absence of settlement bring a subsequent legal action. The intuitive element seems to lead to an approach to section 2-607(3)(a) reflected in the Williston treatise.<sup>119</sup> The authors state:

[S]ome courts have found that the mere filing of the complaint was sufficient notice. Such a solution offends one's sense of fair play and the concept of notice. A summons and complaint is hardly within the spirit of either the Uniform Sales Act or the Uniform Commercial Code requirement of the giving of timely notice. The requirement of the giving of notice cannot be circumvented.<sup>120</sup>

Apart from intuitive reasoning, some courts have justified the rejection of a complaint as constituting notice on the basis that a properly framed complaint must include a pleading that notice to the seller has been previously given.<sup>121</sup> Under this approach pleading of notice is considered a precondition to a proper action for recovery of any remedy against a seller for breach in accepted goods.

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1378-80 (7th Cir. 1981) (notice coming after eight months in counterclaim deemed too late and witness credibility questioned); *International Paper Co. v. Margrove, Inc.*, 75 Misc. 2d 763, 766, 348 N.Y.S.2d 916, 919-20 (Sup. Ct. 1973) (alleged notice in counterclaim deemed ineffective because it was "not genuine" but "feigned, frivolous"). The West Virginia Supreme Court, in *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980), went so far as to state that "[t]he primary purpose of [§ 2-607(3)(a)] is to prevent the buyer from accepting goods and later refusing to pay for them on the basis of an alleged breach of contract." *Id.* at 29-30, 268 S.E.2d at 302.

A buyer who stops payment because of an alleged breach would be expected to have given at least minimal notice to the seller. Fairness would demand, however, that an aggrieved buyer have an opportunity to demonstrate the effectiveness of notice given through the filing of a counterclaim if a court adopts the more general position that the filing of a complaint may suffice. Despite the suspicion that may justifiably be raised under this scenario, cases may arise in which the dissatisfied buyer refrains from the initiation of a lawsuit because of hopes of resolving the matter through future negotiations, satisfaction with simply stopping payment on the goods, or a distaste for litigation. *See, e.g., American Fertilizer Specialists, Inc. v. Wood*, 635 P.2d 592, 593-94 (Okla. 1981) (buyer stopped payment and purchased substitute goods when fertilizer did not work and raised counterclaim when sued); *Oregon Lumber Co. v. Dwyer Overseas Timber Prods. Co.*, 280 Or. 437, 441, 571 P.2d 884, 885 (1977) (buyer made only partial payment because of defect in goods and then counterclaimed when sued for price); *Carroll Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 655 (Tex. Ct. App. 1984) (buyer ceased payment when goods proved defective and raised counterclaim when sued).

118. *See, e.g., Corboy, Shielding The Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities*, 28 DE PAUL L. REV. 609, 613-15 (1979) (discussing Illinois statute requiring that notice be given to governmental entities).

119. 3 S. WILLISTON, *supra* note 41, § 22-11.

120. 3 S. WILLISTON, *supra* note 41, § 22-11, at 301 (footnotes omitted). Further, "[a]s a commonsense rule, it must be said that it is not within the spirit of fair play and liberal interpretation to consider the commencement of an action as the giving of notice under the Code." *Id.* at 313 (footnote omitted).

121. *See Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1102-03 (Ala. 1983); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 467-68, 438 S.W.2d 717, 719 (1969); *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 17, 327 A.2d 502, 514 (1974); *see also Hampton v. Gebhardt's Chili Powder Co.*, 294 F.2d 172, 174 (9th Cir. 1961) (citing cases under Uniform Sales Act § 49 employing similar analysis); *Dowdle v. Young*, 1 Ariz. App. 255, 256-58, 401 P.2d 740, 741-42 (1965) (although lower court entered directed verdict for seller because buyer did not plead notice, appellate court reversed and remanded to determine whether buyer knew or ought to have known about breach).



Therefore, the notice a seller receives from the initiation of a lawsuit cannot satisfy the requirements of section 2-607(3)(a).<sup>122</sup> The Maryland Court of Appeals employed this reasoning in *Lynx, Inc. v. Ordnance Products, Inc.*<sup>123</sup> The court stated:

Since the existence of a right of action is conditioned upon whether notification has been given the seller by the buyer, where no notice has been given prior to the institution of the action an essential condition precedent to the right to bring the action does not exist and the buyer-plaintiff has lost the right of his "remedy." Thus the institution of an action by the buyer to recover damages cannot by itself be regarded as a notice of the breach contemplated under either sections 2-607(3)(a) or 2-608(2) [concerning notice of revocation of acceptance].<sup>124</sup>

Although this position does have some logical underpinning, it becomes transparent when viewed in the light of the countervailing arguments.

The basic premise for the argument that a complaint should constitute notice under section 2-607(3)(a) is the simple fact that the section's language does not expressly state a requirement of prelitigation notice.<sup>125</sup> Section 2-607(3)(a) requires that "[w]here a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered breach notify the seller of breach or be barred from any remedy . . . ."<sup>126</sup> Certainly the drafters could have used language that expressly required notice before the commencement of litigation, but the adopted language simply does not do so. Moreover, comments 4 and 5, although addressing the matters of timeliness, content, and application to beneficiaries, do not state that prelitigation notice is required by the section.<sup>127</sup>

Going beyond the neutrality of the section 2-607(3)(a) language, an even more compelling argument for the acceptance of a lawsuit as notice is the inability to devise a viable requirement of prelitigation notice within the structure of the section. Consider, for example, the possibility that a party might give notice one week and file a lawsuit the next.<sup>128</sup> No fathomable purpose is served by having a prelitigation notice requirement that can be satisfied in that manner. Section 2-607(3)(a) certainly does not establish any minimum amount of time by which the notice must precede the initiation of a lawsuit. Significantly, the courts and authors which have asserted that section 2-607(3)(a) requires prelitigation notice have not addressed the issue of a waiting period. If one were determined, however, to establish a minimum period of time for the notice to precede

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122. See Clark, *supra* note 5, at 114-15; Dillsaver, *supra* note 56, at 234-36.

123. 273 Md. 1, 327 A.2d 502 (1974).

124. *Id.* at 17, 327 A.2d at 514.

125. Smith v. Stewart, 233 Kan. 904, 910, 667 P.2d 358, 363 (1983).

126. U.C.C. § 2-607(3)(a) (1978).

127. For text of comments 4 and 5, see *supra* note 44 and *infra* text accompanying note 258.

128. See, e.g., Redman Indus. v. Binkey, 49 Ala. App. 95, 274 So. 2d 621, 624 (1973) (lawsuit initiated approximately one week after the giving of notice); Wagmeister v. A.H. Robins Co., 64 Ill. App. 3d 964, 965, 382 N.E.2d 23, 24 (1978) (amended complaint filed approximately two weeks after the giving of notice).

litigation, resort could be had to the recurrent gap filler of the Uniform Commercial Code, the standard of "reasonableness."<sup>129</sup> Perhaps the reasonable time for notice to precede litigation would be enough time to provide an ample opportunity for negotiation of settlement or investigation of the alleged breach. The fault in incorporating such a rule into section 2-607(3)(a) is that the benefit that might be gained from requiring such a waiting period might well be lost in burdening the courts with yet another vague and difficult question to resolve in determining whether an action had been properly brought.

Another compelling argument for allowing a complaint to serve as section 2-607(3)(a) notice is that the initiation of a lawsuit, if made in a timely manner, can effectively serve all the identified purposes of the requirement of notice of breach in accepted goods.<sup>130</sup> The timely initiation of a lawsuit would protect the seller from stale claims and encourage investigation of the facts while fresh. The initiation of the lawsuit would not prevent the seller from offering to correct the defect, if such were feasible in the case. The seller would also be alerted to avoid sending out defective goods to other buyers and could pursue any action he might have against his own seller or some other responsible third party.

The Alaska Supreme Court on one occasion reasoned that the lack of prelitigation notice would prevent negotiation or settlement of claims,<sup>131</sup> but later expressed a more enlightened view in *Shooshanian v. Wagner*:<sup>132</sup>

The majority of courts do not allow the filing of a complaint to serve as notice. We disagree, and are of the opinion that a complaint filed by a retail consumer within a reasonable period after goods are accepted satisfies the statutory notice requirement. The filing of a complaint is certainly not a bar to the negotiation and settlement of claims. To the contrary, the prospect of going to trial is often a powerful incentive to a defendant to investigate the claims against it and to arrive at a reasonable agreement. A defendant may more easily and effectively prepare for either settlement or trial when it may compel discovery and so determine for itself the basis for a plaintiff's claims of liability. Allowing a consumer's complaint to serve as notice will not prevent a defendant manufacturer from raising the issue of timeliness if it has been prejudiced by an unreasonable delay.<sup>133</sup>

Although the court's comments were made in the context of a consumer action,<sup>134</sup> the analysis seems equally applicable to merchant buyers.

A final argument against the requirement of prelitigation notice is the diffi-

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129. See Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185-86 (1967) (on use of the term "reasonable" throughout the Code).

130. The purposes of § 2-607(3)(a) are discussed *supra* notes 45-48 and accompanying text.

131. *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 510 nn. 13-15 (Alaska 1980) (construing a statutory provision essentially identical to § 2-607(3)(a)).

132. 672 P.2d 455 (Alaska 1983).

133. *Id.* at 462-63.

134. The *Shooshanian* court went on to consider the specific impact on consumers and observed:

A consumer unfamiliar with commercial practices should not be barred from pursuing a meritorious claim because he was unaware of the need to notify a remote seller of breach before bringing suit. . . . In some cases, a consumer may not even know who produced an allegedly defective product until he files a complaint and begins discovery. A rule requir-

culty of resolving a case in which a lawsuit is filed promptly after a breach but without prior notice.<sup>135</sup> An absolute bar to any remedy for a buyer acting with such promptness would seem unjustified, because the purposes of section 2-607(3)(a) could be satisfied by the giving of notice through the complaint. Further, a complete denial of remedy to a consumer in such a position would conflict with the general import of comment 4 to section 2-607, which provides that the purpose of the notice requirement is "to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."<sup>136</sup> One would also question the denial of a remedy to a merchant who in good faith promptly files a lawsuit without giving prior notice.

One resolution for the buyer who promptly files a lawsuit without otherwise giving notice would be to dismiss the action without prejudice so as to allow the complaining buyer the opportunity to give timely notice and then file the complaint anew. Such a procedure would simply amount to a wasteful exercise of chasing the plaintiff out of one courthouse door while allowing reentry through another.<sup>137</sup> A more efficient and preferable solution would be to allow the filing of a lawsuit, whether by consumer or merchant, to constitute notice, provided it was done in a timely manner and otherwise satisfied the purposes of section 2-607(3)(a).

## II. NONPRIVITY CONSUMERS AND SECTION 2-607(3)(a) NOTICE

Courts have deemphasized privity as a prerequisite for consumer actions

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ing notice prior to suit could effectively prevent an injured consumer from joining a manufacturer as a party defendant in a suit already begun.

*Id.* at 463 (citation and footnote omitted). The Alaska Supreme Court sought to distinguish *Shooshanian* from *Armco* on the basis that the former involved a consumer rather than a merchant. At least one other writer has observed that the distinction appears to be rather superficial, especially because the buyers in *Shooshanian* were alleging breach in goods that were being incorporated into a building that was to be used for both commercial and residential purposes; *id.* at 457. See Braucher, *supra* note 55, at 1430 n.145.

135. *Smith v. Stewart*, 233 Kan. 904, 667 P.2d 358 (1983), presented such a scenario. The case involved a contract for the sale of a yacht from one consumer to another; the contract included an express six-month warranty against dry rot. *Id.* at 905, 667 P.2d at 360. Dry rot was discovered on the yacht just before the end of the express warranty period, and the buyer filed a lawsuit three weeks later. *Id.* Although there was a factual dispute over whether oral notice was given prior to the initiation of the lawsuit, the court assumed that no such notice was given for the purpose of examining the propriety of a summary judgment decision. *Id.* at 909-10, 667 P.2d at 363. In that context the court decided that the filing of a lawsuit before the conclusive giving of notice should not be a bar to the buyer's action. *Id.* at 914, 667 P.2d at 366. Though the court accepted "the general proposition of law that the giving of notice within a reasonable period of time to the seller, pursuant to [§ 2-607(3)(a)], is a condition precedent to filing an action for recovery of damages for breach of implied or express warranties," it nonetheless held that "[u]nder the totality of circumstances herein, none of the purposes of the notice within a reasonable time requirement of [§ 2-607(3)(a)] would be served by blind adherence to the generally appropriate 'condition precedent' concept." *Id.*

136. U.C.C. § 2-607 comment 4 (1978); see *supra* text accompanying note 108.

137. This exercise was apparently engaged in by the court and parties in *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1978). The plaintiff first filed a complaint on June 2, 1975, and after its dismissal filed an amended complaint on August 14, 1975. The amended complaint was dismissed on defendant's motion on September 8, 1975; but leave was granted to file an amended complaint apparently because no prelitigation notice had been given. Notice was then given on September 26, 1975, and the second amended complaint, filed approximately two weeks later, alleged service of notice of breach on both defendants in the case. *Id.* at 965-66, 382 N.E.2d at 24-25.

against sellers in vertical privity situations, which involve remote vendees who wish to recover a remedy from a seller up the distributive chain, and horizontal privity situations, which involve not the actual buyer but a third party beneficiary seeking to recover from the seller.<sup>138</sup> Uniform Commercial Code section 2-318 has paved the way for the elimination of the requirement of horizontal privity.<sup>139</sup> Three alternative versions of section 2-318 were included in the 1966 official text.<sup>140</sup> Almost every state has enacted a form of section 2-318 that extends the seller's warranty liability for some types of harm horizontally beyond the actual buyer to an additional group of third party beneficiaries, who might include family members, any natural persons, or any persons who might foreseeably use, consume, or be affected by the goods.<sup>141</sup>

The elimination of the requirement of vertical privity has largely been the result of judicial decisions that have allowed a remote vendee with a claim of breach to pursue an action against his seller's seller or a similar party with whom the vendee had no contract.<sup>142</sup> Courts have placed some limits on the

138. See *supra* note 12 and accompanying text.

139. In some jurisdictions the courts have recognized an ability to go beyond the dictates of § 2-318 in determining the limits of horizontal privity. See, e.g., *Green v. A.B. Hagglund & Soner*, 634 F. Supp. 790, 794 (D. Idaho 1986) (construing Idaho law); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 288 n.25 (Alaska 1976); R. HENSON, *supra* note 6, § 6.10, at 250 ("regardless of the language in any adopted version [of § 2-318], many courts seem to have been fairly adventurous in reaching whatever results may have seemed appealing on any given day").

140. The three alternative versions of § 2-318 vary in the scope of third parties and harm included. The text of the section reads:

SECTION 2-318 THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED.  
NOTE: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)

ALTERNATIVE A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ALTERNATIVE B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ALTERNATIVE C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

U.C.C. § 2-318 (1966).

141. For state adoptions and variations of § 2-318, see 3 R. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 2-318:3 (1981); W. HAWKLAND, *supra* note 12, § 2-318.

142. Section 2-318 of the 1972 Official Text of the Uniform Commercial Code provided three alternative provisions addressing third party beneficiaries and the requirement of privity. See *supra* note 140 for the text of § 2-318. The most popular option, Alternative A, had an effect on horizontal privity but did not address the matter of vertical privity. Comment 3 to § 2-318 indicated that this consequence was intentional. Comment 3 reads in part:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to the buyer who resells, extend to other persons in the distributive chain.

remedies that are recoverable in the absence of vertical privity. Some states, for example, continue to require vertical privity in order for a buyer to recover for economic loss as opposed to personal injury or property damage.<sup>143</sup> Courts have not been uniform in establishing which parties may recover for what type of harm in the absence of privity, but in virtually every jurisdiction some consumers will have standing to recover for some types of harm.<sup>144</sup>

As the law has expanded to allow nonprivity consumers standing to obtain remedies from sellers, it has embodied for them a distinct advantage over buyers with privity: the possibility of avoiding the notice requirement of section 2-607(3)(a). Despite whatever harsh consequences might result, a consumer buyer who does have privity with the seller and seeks to recover for a breach in accepted goods cannot avoid the notice requirements of section 2-607(3)(a).<sup>145</sup> A consumer with privity might well have the benefit of a very liberal reading of section 2-607(3)(a) by a court inclined to tilt the Code in favor of the aggrieved consumer. Those courts, however, undoubtedly would be compelled somehow to find compliance with section 2-607(3)(a). This might be done through the granting of a very generous time for the giving of notice,<sup>146</sup> the application of a liberal standard as to what would suffice as notice,<sup>147</sup> or perhaps the finding that the filing of a lawsuit would constitute notice.<sup>148</sup> But ultimately, the courts would require compliance with section 2-607(3)(a).

For those aggrieved buyers and third party beneficiaries who are not in privity with the allegedly breaching seller, the possibility exists of completely

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U.C.C. § 2-318 comment 3 (1972). The states that adopted Alternative A were thus left to develop law concerning the requirement of vertical privity without the aid of the Uniform Commercial Code. See *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 287-88 (Alaska 1976). Further, the effect of Alternatives B and C on vertical privity is uncertain at best; therefore, the case law on the requirement of vertical privity has been of prime importance. See, e.g., *id.* at 288-89; *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 57-58 (Mo. Ct. App. 1981); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 585-87, 489 A.2d 660, 675-76 (1985); cf. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 466, 438 S.W.2d 717, 718-19 (1969) (by statute, vertical privity no longer required); *Frericks v. General Motors Corp.*, 278 Md. 304, 315, 363 A.2d 460, 466 (1976) (third party beneficiary of warranties not required to give notice); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810 (Wyo. 1980) (requirement of vertical privity eliminated by statute).

143. See *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 750-55, 675 P.2d 887, 895-99 (1984); *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 58 n.9 (Mo. Ct. App. 1981); *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 348-49, 432 N.Y.S.2d 132, 133-34 (Sup. Ct. 1980); Comment, *Enforcing the Rights of Remote Sellers Under the UCC: Warranty Disclaimers, The Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Nonprivity Context*, 47 U. PITT. L. REV. 873, 881-82 n.54 (1986); Note, *Enforcing Manufacturers' Warranty Exclusions Against Non-Privity Commercial Purchasers: The Need for Uniform Guidelines*, 20 GA. L. REV. 461, 465 n.16 (1986).

144. See J. WHITE & R. SUMMERS, *supra* note 6, §§ 11-2 to -7 (discussing variant factors in state laws affecting seller liability to nonprivity parties).

145. Some courts have suggested the notice requirement be waived altogether for consumers with personal injuries resulting from defective goods. These cases are properly read to mean, however, that the cause of action is really one in tort rather than in contract, and that the notice requirement does not apply for that reason. See, e.g., *McCormack v. Hanksraft Co.*, 278 Minn. 322, 339-40, 154 N.W.2d 488, 499-501 (1967); *Fischer v. Mead-Johnson Laboratories*, 41 A.D.2d 737, 737-38, 341 N.Y.S.2d 257, 259 (1973) (mem.); *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 34, 268 S.E.2d 296, 302 (1980).

146. See *supra* notes 102-11 and accompanying text.

147. See *supra* notes 67-96 and accompanying text.

148. See *supra* notes 116-37 and accompanying text.

avoiding the section 2-607(3)(a) notice requirement for breach in accepted goods. A basic reason for this result is that many courts purportedly have read the language of section 2-607(3)(a), which is phrased in terms of "buyer" and "seller," in a literal manner.<sup>149</sup> The literal reading results in a construction that requires notice to the immediate seller only, and prevents its application to a buyer making a claim against a remote seller. Similarly, many courts have decided that a literal reading of the term "buyer" in section 2-607(3)(a) precludes its application to third party beneficiaries.<sup>150</sup>

A fairer reading of section 2-607(3)(a) reveals that it does permit an interpretation that would impose the requirement of notice on a remote vendee. The section does not by its express terms limit its application to buyers and sellers who are in privity with each other. Further, comment 5 to section 2-607(3)(a) directly addresses the question of notice being required from third party beneficiaries and gives a clear indication that notice ought to be required in such cases.<sup>151</sup>

The issue whether notice ought to be required in the nonprivity contexts, even if under a very liberal construction, is certain to continue to arise in consumer sales cases. The courts that have considered the question are nearly evenly split on whether notice should be required from remote vendees.<sup>152</sup> In contrast, the courts have nearly unanimously agreed that notice is not required

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149. See *infra* notes 161-73 and accompanying text.

150. See *infra* notes 256-83 and accompanying text.

151. See *infra* notes 258-83 and accompanying text.

152. Ascertaining the exact alignment of the courts on this question is made difficult by the fact that many courts have effectively required notice from a remote vendee without expressly considering the precise issue. See *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 115, 452 A.2d 192, 197 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983). Such courts seem to accept the symmetrical argument that the buyer is obligated to give notice to any seller against whom standing is permitted. See *infra* notes 227-34 and accompanying text. Among the cases requiring notice from the remote vendee to the seller are *Parker v. Bell Ford, Inc.*, 425 So. 2d 1101, 1103 (Ala. 1983); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 292 (Alaska 1976) (express holding); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 467, 438 S.W.2d 717, 719 (1969); *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 966, 382 N.E.2d 23, 25 (1978); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 140-41, 379 N.E.2d 7, 8 (1978); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 284, 512 P.2d 776, 781 (1973) (express holding); *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 704-05, 248 A.2d 778, 780 (1968); *Carlson v. Rysavy*, 262 N.W.2d 27, 29-30 (S.D. 1978); *Wilcox v. Hillcrest Memorial Park*, 696 S.W.2d 423, 424 (Tex. Ct. App. 1985) (express holding), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 811 (Wyo. 1980) (express holding); see also *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298-99 (3d Cir. 1961) (requiring notice from remote vendee under § 49 of the Uniform Sales Act); *Spada v. Stauffer Chem. Co.*, 195 F. Supp. 819, 821 (D. Or. 1961) (requiring notice from remote vendee to manufacturer or seller); *Dailey v. Holiday Distrib. Corp.*, 260 Iowa 859, 873-74, 151 N.W.2d 477, 487-88 (1967) (requiring notice from remote vendee under § 49 of the Uniform Sales Act).

The cases holding that notice is not required from the remote vendee to seller include *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984); *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36 (S.D. Ill. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206 (Colo. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347, 378 N.E.2d 1083, 1086 (1978); *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 118, 452 A.2d 192, 198 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983); *Hickman v. Bross*, 58 Pa. D. & C. 137, 140 (1972); *Vintage Homes v. Coldiron*, 585 S.W.2d 886, 888 (Tex. Ct. App. 1979); see also *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 355, 544 P.2d 306, 313 (1975) (notice from remote vendee not required under § 49 of the Uniform Sales Act); cf. *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 785-86, 635 P.2d 1248, 1256 (1981) (notice to remote seller normally not required, but exception exists when the remote seller is involved in sales transaction).

from third party beneficiaries.<sup>153</sup> Commentators are in general agreement that notice should be required in both the nonprivity contexts.<sup>154</sup>

Considering the broad acceptance of the proposition that reasonable notice of an alleged breach serves good and legitimate purposes when the buyer is in privity with the seller, the reluctance of many courts to require notice from nonprivity consumers is surprising if not exasperating. One would assume that early notice would serve the same legitimate purposes in the nonprivity contexts and that courts, therefore, would be inclined to apply the requirement.<sup>155</sup> Nonetheless, the trend of the courts is toward excluding the requirement of notice under section 2-607(3)(a) in nonprivity situations.

Close scrutiny of the justifications offered by those courts exempting nonprivity consumers from the requirement of notice under section 2-607(3)(a) reveals great weaknesses. The weaknesses include overly literal interpretation, disregard of the section's purposes, and exaggerated perceptions of consumer naivete.

#### A. *Remote Vendees and Notice of Breach*

The defenses available to the seller in an action brought by a remote ven-

153. See *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981) (construing Iowa law); *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984) (construing Alabama law in dictum); *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1982) (construing Florida law); *Simmons v. Clemco Indus.*, 368 So. 2d 509, 513 (Ala. 1979); *Tomeczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 222-23, 217 A.2d 71, 74 (1965); *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 620, 194 S.E.2d 513, 515 (1972); *Mattos, Inc. v. Hash*, 279 Md. 371, 376-78, 368 A.2d 993, 996-97 (1977); *Frericks v. General Motors Corp.*, 278 Md. 304, 310, 363 A.2d 460, 463-64 (1976); see also *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 129-30 (2d Cir. 1963) (notice of breach of warranty not required from remote vendee); *Chapman v. Brown*, 198 F. Supp. 78, 85 (D. Haw. 1961) (notice requirement not applicable to nonbuyer); *La Hue v. Coca-Cola Bottling, Inc.*, 50 Wash. 2d 645, 646-47, 314 P.2d 421, 422 (1957) (construing Uniform Sales Act § 49). But see *Cline v. Prowler Indus.*, 418 A.2d 968, 976-77 (Del. 1980) (indicating that "greatly liberalized" notice requirement should apply in all sales cases, apparently including third party beneficiaries); *Lariviere v. Dayton Safety Ladder Co.*, 525 A.2d 892, 898 (R.I. 1987) (expressly applying notice requirement to third party beneficiary); *Parrillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981) (holding based on implicit requirement of notice from third party beneficiary); *Petro-Chem, Inc. v. A.E. Staley Mfg. Co.*, 686 P.2d 589, 591 (Wyo. 1984) (stating broad requirement of notice from all who assert a claim against a seller); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo. 1980) ("buyer" includes any person who makes a claim under § 2-318 and notice is required).

154. See W. HAWKLAND, *supra* note 12, § 2-607:06, at 64 (decisions obviating notice from third party beneficiaries described as "somewhat dubious in view of comment 5" to § 2-607(3)(a)); R. HENSON, *supra* note 6, § 5.04(d), at 174-76 (possibility that a third party beneficiary might not be required to give notice described as an "aberration"); J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 424-25 (noting that comment 5 to § 2-607 affirmatively requires notice from third party beneficiaries); Clark, *supra* note 5, at 126-27 ("the better approach is to read 'the seller' to mean 'any seller who is sued in the warranty action'"); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 998-1001 (1966) (reading the Code to conclude that requirement of notice in nonprivity cases "would seem inescapable"); Phillips, *supra* note 53, at 464 (noting that the policy reasons for notice requirement apply regardless of privity); cf. 3 R. ANDERSON, *supra* note 141, § 2-318:12 (although noting that courts have decided the "privity-bounded" language of § 2-607(3)(a) precludes the requirement of notice from a third party beneficiary, author indicates that "[a]ll the reasons given in support of requiring a buyer to give notice to his seller are present in the case of the nonprivity plaintiff").

155. See 3 R. ANDERSON, *supra* note 141, § 2-318:12; J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 424-25 ("If the manufacturer is to be held responsible for the buyer's losses, he needs the protection of timely notice at least as much as the buyer's immediate seller.").

dee<sup>156</sup> is an issue of great importance in light of the likelihood that the remote seller, severally or jointly with the immediate seller, will often be liable for injury resulting from defective goods.<sup>157</sup> The defenses available to the remote seller include, of course, the requirement of section 2-607(3)(a) that the buyer give reasonable notice or be barred from any remedy.<sup>158</sup> Given the increased vulnerability of the remote seller, the purposes and goals of section 2-607(3)(a) arguably are often better addressed by requiring that notice of an alleged breach be given to the remote seller rather than the immediate seller. Notice to the remote seller may well be required to effectively set in motion any real efforts at curing defects, attempting settlement, or investigating facts. Additionally, the remote seller will often be the actual party who needs protection from stale claims. Ironically, the exemption of remote vendees from the notice requirement will mean that the seller will have fewer defenses available in an action brought by a party with whom the seller has not contracted than would be available in an action brought by the seller's immediate buyer.

The number of courts that have explicitly decided whether notice should be required from a remote vendee has increased recently,<sup>159</sup> but a large number of states remain that have not addressed the issue, have touched on the dispute only implicitly, or have left the question open without any definite resolution.<sup>160</sup>

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156. The usual players in the nonprivity cases are merchants as the sellers and consumers as the remote vendees or third party beneficiaries. Less frequent cases involve merchant buyers bringing actions against remote sellers. *See, e.g.,* Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 544 P.2d 306 (1975); Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985). In a lawsuit of the latter type, this discussion should be applicable with perhaps minor adjustments. It is less likely that cases will arise involving merchant third party beneficiaries, because the statutory versions of § 2-318 tend to limit recovery to natural persons rather than corporate entities. *See* 3 R. ANDERSON, *supra* note 141, § 2-318:16. To the extent that a merchant or corporate entity could have standing as a third party beneficiary, the discussion in this Article should apply.

157. The remote seller is quite often the party with the deep pocket as well as the party who is deemed to have made the relevant warranty.

158. The elimination of privity as a primary hurdle raises questions about the operation of the other defenses. The courts have made progress in some areas by deciding, for example, that the Uniform Commercial Code statute of limitations will apply to nonprivity consumer actions for breach of warranty and will run from the date of the consumer's purchase. *See, e.g.,* Patterson v. Her Majesty Indus., Inc., 450 F. Supp. 425, 433 (E.D. Pa. 1978); Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 554, 309 N.E.2d 550, 554 (1974); Redfield v. Mead, Johnson & Co., 266 Or. 273, 276-77, 512 P.2d 776, 778-79 (1973). The courts have split on questions such as the availability of contributory negligence as a defense, *Mattos, Inc. v. Hash*, 279 Md. 371, 382 n.2, 368 A.2d 993, 999 n.2 (1977) (citing relevant cases), and have hardly begun to address other questions such as the effectiveness of warranty disclaimers, *see* Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 588, 489 A.2d 660, 677 (1985).

159. *See supra* note 152.

160. In *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), the New Jersey Supreme Court was faced with an action by a merchant buyer against a remote seller. The court ultimately decided that the action was time barred, but held that the merchant buyer could recover from the remote seller on a breach of contract claim despite the lack of privity. *Id.* at 582, 489 A.2d at 674. Other courts subsequently read the *Spring Motors* case to eliminate the requirement of vertical privity for consumer buyers as well. *See, e.g.,* Walsh v. Ford Motor Co., 612 F. Supp. 983, 985 (D.D.C. 1985). The *Spring Motors* court declined to rule on several questions concerning the defenses available to a seller in an action by a remote vendee, including the requirement of notice of breach in accepted goods under § 2-607(3)(a). 98 N.J. at 588-89, 489 A.2d at 677. In Texas a split exists among the appellate courts. The Texas Court of Appeals, in *Wilcox v. Hillcrest Memorial Park*, 696 S.W.2d 423 (Tex. Ct. App. 1985), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986), took direct issue with the earlier decision of the Texas Court of Civil Appeals in *Vintage*



The states that have directly addressed the question have offered several competing analyses supporting or denying the requirement of notice from a remote vendee. A statutory construction argument is ordinarily used to deny a reading of section 2-607(3)(a) that would require notice from a remote vendee; that is, some courts have held that a literal reading of the section limits its application to only the immediate buyer and seller. Courts that have adopted the literal reading have typically misconstrued or ignored the purposes of section 2-607(3)(a).

Courts that have refused to require notice from the remote vendee have also relied heavily on the premise that requiring a consumer buyer to give notice to a remote seller would be unfair because of consumer naivete or lack of sophistication. These courts also have shown confusion over whether the cause of action for breach of warranty is one that lies in contract or in tort, which does not require notice. Other considerations that these courts have entertained include the need for symmetry in expanding the availability of Code remedies and the vouching in process of section 2-607(5).

### 1. Statutory Construction

Some courts have concluded that a literal reading of section 2-607(3)(a) requires a buyer to give notice only to his immediate seller.<sup>161</sup> Section 2-607(3)(a) reads: "Where a tender has been accepted the buyer 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>162</sup> In what is essentially a "plain meaning" approach, courts have construed the term "the seller" in section 2-607(3)(a) to mean only the immediate seller who actually sold the goods to the buyer claiming breach.<sup>163</sup> Similarly, other courts have concluded that because the section refers to acceptance of tender, the section necessarily refers only to the seller who has made the tender to the buyer.<sup>164</sup> The strength of this

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Homes, Inc. v. Coldiron, 585 S.W.2d 886 (Tex. Civ. App. 1979), which had decided that notice was not required from a remote vendee to a seller, *id.* at 888. The *Wilcox* court reasoned that notice was indeed required by an accurate reading of § 2-607(3)(a). 696 S.W.2d at 424-25 (citing *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196 (Tex. Civ. App. 1973)). The Supreme Court of Texas upheld the *Wilcox* judgment on an alternative basis and reserved judgment on the issue of whether notice was required from the remote vendee. 701 S.W.2d 842, 843 (Tex. 1985). A split also exists within the Illinois appellate courts, with at least two panels having read the seminal case of *Berry* as requiring notice from a remote vendee. *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 966, 382 N.E.2d 23, 25 (1978); *Branden v. Gerbie*, 62 Ill. App. 3d 138, 140-41, 379 N.E.2d 7, 8-9 (1978). Other courts construing Illinois law have held that the notice requirement does not apply to remote vendees. *Owens v. Glendale Optical Co.*, 590 F. Supp. 32, 36 (S.D. Ill. 1984); *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 501 N.E.2d 376, 384 (1986); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347, 378 N.E.2d 1083, 1086 (1978).

161. See, e.g., *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206, 206 (Colo. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 347, 378 N.E.2d 1083, 1086 (1978); see also *Ruderman v. Warner-Lambert Pharmaceutical Co.*, 23 Conn. Supp. 416, 417-18, 184 A.2d 63, 64 (1962) (construing similar language in § 49 of the Uniform Sales Act).

162. U.C.C. § 2-607(3)(a) (1978).

163. The gist of the "plain meaning" approach is that unambiguous statutes with plain and clear language require no interpretation by the courts. In following this approach, courts have refused to consider the purpose of a statute or its legislative history. See *Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299-1300 (1975).

164. One example of such an interpretation appears in an Illinois case:

argument is obvious; a literal reading is always a primary tool of statutory interpretation.<sup>165</sup>

The plain meaning argument in this instance, as often is the case,<sup>166</sup> also has obvious weaknesses. The first flaw in the argument is that the language does not actually deny its possible application to remote sellers. The section could have been phrased to apply clearly and strictly to immediate sellers only, by a flat statement that notice must be given to the "immediate seller." Alternatively, section 2-607(3)(a) could have been written to require that the notice be given by the buyer to "his seller" as was done in section 2-607(5).<sup>167</sup> The language employed in section 2-607(5) effectively precludes any doubt that it refers to the buyer's immediate seller only. The Code drafters could have made section 2-607(3)(a) equally limited in scope. Notably, section 2-607(5) is also more restrictive in the form of notice required. It demands "written notice" unlike section 2-607(3)(a), which simply requires "notice." Section 2-607(3)(a) is not phrased in the restrictive manner of section 2-607(5) and can be construed to mean that the buyer must give notice to the seller from whom he seeks a remedy. A remote seller is in fact one of "the sellers" in the distributive chain.

A second weakness with the literal reading of section 2-607(3)(a) is that the definition of the term "seller" in Article 2 allows for flexibility in the term's meaning. Section 2-103(1)(d) provides: "In this Article unless the context otherwise requires . . . [s]eller means a person who sells or contracts to sell goods."<sup>168</sup> This definition of "seller" depends on having sold goods; remote sellers fall within that definition. Moreover, even granting that the term "seller" might normally mean only the immediate seller, a strong argument can be made that the application of section 2-607(3)(a) to remote sellers is the very sort of

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[T]he only tender which could have been accepted by plaintiff was that of her immediate seller, the retailer. Therefore, because section 2-607(3)(a) provides for notification to the seller "[w]here a tender has been accepted," we believe the word "seller" as used in that section necessarily refers only to the immediate seller and, accordingly, we conclude that a buyer is required to give notice of breach only to his immediate seller.

Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 347, 378 N.E.2d 1083, 1086 (1978).

165. A Maryland court stated:

[I]t is a cardinal rule of statutory construction that a statute should be construed so as to give effect to the real intent of the Legislature. But in ascertaining that intent, a court must first look to the language of the statute. "If there is no ambiguity or obscurity in the language of a statute, there is usually no need to look elsewhere to ascertain the intent of the legislature."

Frericks v. General Motors Corp., 278 Md. 304, 314, 363 A.2d 460, 465 (1976) (quoting Maryland-Nat'l Capital Park & Planning Comm'n v. Mayor of Rockville, 272 Md. 550, 555-56, 325 A.2d 748, 752 (1974)); see also County of Du Page v. Graham, Anderson, Probst & White, Inc., 109 Ill. 2d 143, 150-51, 485 N.E.2d 1076, 1079 (1985) ("Where that language is unambiguous, a court must enforce the law as enacted without considering other aids."); Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo. 1986) (en banc) ("Where the language is clear and unambiguous, there is no room for construction.").

166. See generally McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 801-16 (1978) (evaluating a "plain meaning" interpretation of the U.C.C.); Murphy, *supra* note 163 (discussing the application of the plain meaning rule to statutory interpretation).

167. See Wilcox v. Hillcrest Memorial Park, 696 S.W.2d 423, 425 (Tex. Ct. App. 1985) (discussing the important distinction between the terms "the seller" and "his seller"), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986). For the text of § 2-607(5), see *infra* note 246.

168. U.C.C. § 2-103(1)(d) (1978).

context in which the term "seller" should have a broader meaning. This construction is also supported by section 1-102(5)(a), which states that "unless the context otherwise requires words in the singular number include the plural."<sup>169</sup> Sections 1-102(5)(a) and 2-103(1)(d) weigh against the pedestrian argument that the term "the seller" can only mean the immediate seller, and thus support the view that the remote vendee should be required to give reasonable notice to any seller from whom a remedy is sought.

Furthermore, a restrictive and literal reading of section 2-607(3)(a) is inconsistent with good Code methodology. The nature and purpose of the Code suggest that it is a statute which should not be given to an overly literal construction.<sup>170</sup> Section 1-102(1) states that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies."<sup>171</sup> Comment 1 to section 1-102 elaborates on the principle:

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.<sup>172</sup>

Certainly other sections in Article 2—and in the Uniform Commercial Code generally—contain language that is susceptible to different readings but is given a broader application than a strict literal reading would render.<sup>173</sup> The broader reading is applied, ideally, because it is consistent with the purposes and goals served by the section. These underlying purposes of section 2-607(3)(a) support a very strong argument that the section should be read to require notice to remote sellers.

## 2. Consistency with Purposes of Section 2-607(3)(a)

A statutory provision that is subject to more than one interpretation should be construed in light of its purposes and goals. The purported literal reading of section 2-607(3)(a) is inconsistent with the purposes served by the section. The recognized purposes of the section are to allow the seller opportunity to correct the breach or minimize damages, attempt settlement through negotiation, investigate the facts in preparation for litigation, and protect the seller from stale

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169. *Id.* § 1-102(5)(a).

170. See Carroll, *Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; Or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139, 149-50 (1970); McDonnell, *supra* note 166, at 795-801; Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 1-4 (1981); Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 609.

171. U.C.C. § 1-102(1).

172. *Id.* § 1-102 comment 1.

173. Section 2-201(3)(c) provides a ready example. The section provides that no writing is required for statute of fraud purposes "with respect to goods for which payment has been made and . . . received." *Id.* § 2-201(3)(c). An early decision read this section literally to require full payment but subsequently a near unanimity of courts have allowed the section to apply to part payment of a single unit. See 2 R. ANDERSON, *supra* note 141, § 2-201:193.

claims.<sup>174</sup> Because the remote manufacturer or seller will often be the party ultimately chargeable in the event that a breach has actually occurred,<sup>175</sup> the remote seller frequently will be the real party at interest with regard to the possibility of correcting defects, attempting settlement, preparing for the possibility of litigation, and avoiding stale claims. Consequently, all of these purposes are served by requiring notice from the remote vendee to the seller; thus, a substantial case can be made for applying section 2-607(3)(a) to this category of non-privity cases.<sup>176</sup>

Even though they have adopted the purported literal reading of section 2-607(3)(a), some courts have attempted to square the literal construction of the section with its purposes by denying that these purposes are served by notice to the remote seller.<sup>177</sup> More specifically, these courts have denied that notice effectively serves the goals of protecting the seller from stale claims or allowing attempts at correction of defects and minimization of damages.<sup>178</sup> One error made by those courts is the failure to differentiate between the more general purpose served by the statute of limitations and the more specific aim of protection from stale claims. The statute of limitations provides an absolute outer limit of time in which a claim can be brought. Statutes of limitations reflect a societal judgment that the public good is served by extinguishing all potential claims and liability after a sufficient time has passed, without regard to the validity of the claim or actual prejudice done to a party by virtue of the passage of time.<sup>179</sup> The policy of protection from stale claims, which is much akin to the equitable

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174. See *supra* notes 45-48 and accompanying text.

175. The impetus behind the continued emergence of strict products liability in tort and the elimination of the requirement of privity in breach of contract actions is the perception that in the modern marketplace the consumer purchases goods made and advertised by remote manufacturers, who should be held responsible for defective products. See *infra* note 188 and accompanying text.

176. A Texas court made such an argument:

To hold [that § 2-607(3)(a) requires that a buyer give notice only to his immediate seller] would frustrate the purpose underlying the notice requirement of section 2.607. The buyer is required to notify the seller that a breach of warranty has occurred in order to give the seller an opportunity to inspect the product to determine whether it was defective and to allow the seller an opportunity to cure the breach, if any . . . . It would be untenable to allow a buyer . . . to recover damages for breach of warranty from a remote seller or manufacturer who was never even made aware that the product in question was defective and who, consequently, never had an opportunity to remedy the defect to the buyer's satisfaction before litigation was commenced or even to inspect the product to ascertain if indeed a defect existed.

*Wilcox v. Hillcrest Memorial Park*, 696 S.W.2d 423, 424 (Tex. Ct. App. 1985), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986).

177. See *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514-15 (Ala. 1979); *Frericks v. General Motors Corp.*, 278 Md. 304, 313-16, 363 A.2d 460, 465-66 (1976); *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 134-35, 273 S.E.2d 681, 684 (1981).

178. See, e.g., *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 134-35, 273 S.E.2d 681, 684 (1981).

179. See generally Callahan, *Statutes of Limitation—Background*, 16 OHIO ST. L.J. 130, 136-37 (1955) ("Protection of the social interest in individual stability is the purpose which most nearly accords with the apparent scope of the statutes."); Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 836-38 (1983) ("moldy evidence" and logistical difficulties created by stale claims overburden the courts and delay the hearing of timely claims); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) ("[C]ertainty of the fixed time periods clearly serves the interests of everyone.") [hereinafter *Developments*]. The purposes served by statutes of limitations are often stated to be (1) protecting defendants from stale claims; (2) saving the courts from the burden of resolving stale claims; and (3) enhancing

doctrine of laches, has more relevance to the argument that a seller may be prejudiced by inexcusable delay in pursuing an action even though the statute of limitations has not yet run.<sup>180</sup>

The objective of protecting the seller from stale claims finds its basis in comment 4 to section 2-607, which indicates that a primary goal of section 2-607(3)(a) is to protect the seller from commercial bad faith.<sup>181</sup> Such commercial bad faith would be found if the merchant buyer simply sat on a claim and allowed the facts to grow stale, thereby making it more difficult for the seller to defend. No acceptable reason can be put forth for allowing a consumer to be exempted from the requirement of good faith in giving notice under section 2-607(3)(a). If a consumer buyer intentionally or unexplainably sits on a claim to the prejudice of the seller, his claim for breach should be barred—just as with the bad faith merchant, and even though the statute of limitations may not yet have run.

The courts have also overstated the argument that remote sellers need no opportunity to correct defects or minimize damages in consumer cases. Such truth as does exist in that argument is found in personal injury cases, which lack a meaningful possibility of correcting the defect or minimizing the damages because of the nature of the harm suffered. In *Berry*,<sup>182</sup> for example, the defendant sellers probably could do little to correct or minimize the damage done by the oral contraceptives. However, it should be observed, first, that not every consumer case is a personal injury case. Second, and more important, it should not be expected that each separate purpose of section 2-607(3)(a) will be served in every case by the giving of notice. A particular case may not present an opportunity for correcting defects or minimizing damages, but this does not mean the seller will not need an opportunity to investigate the facts while fresh or protection from a stale claim.<sup>183</sup> One would expect in the *Berry* case, for example, that defendants would have wanted the injured buyer to undergo a physical examina-

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societal stability by limiting the life of unsettled claims. See Note, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 202-03 (1986).

180. One federal court discussed protection from stale claims:

One of the factors to be considered is, did the delay in giving notice or its form prejudice the seller? The Pennsylvania cases have approached the prejudice question by engrafting the doctrine of laches onto Section 49 of the Uniform Sales Act . . . "Laches," the Pennsylvania Supreme Court said in *In re Grote's Estate*, 1957, 390 Pa. 261, 269, 135 A.2d 383, 387, "arises when a defendant's position or rights are so prejudiced by length of time and inexcusable delay, plus attendant facts and circumstances, that it would be an injustice to permit presently the assertion of a claim against him."

*Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298-99 (3d Cir. 1961); see also *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1250 (9th Cir. 1979) (two elements of the defense of laches are inexcusable delay and prejudice to the defendant); *Developments*, *supra* note 179, at 1183-85 (outlining historical development of laches doctrine).

181. See *supra* text accompanying note 108 (quoting portion of comment 4 to § 2-607); see also *Hazelton v. First Nat'l Stores Inc.*, 88 N.H. 409, 412-13, 190 A. 280, 283 (1937) (purpose of requiring notice is to "give the seller timely information that the buyer proposes to look to him for damages"); *Tripp v. Renhard*, 184 Or. 622, 643, 200 P.2d 644, 653 (1948) (very purpose of notice requirement is to substitute a shorter time than the limitation period for the presentation of warranty claims).

182. See *supra* notes 1-4 and accompanying text.

183. See R. HENSON, *supra* note 6, § 5.04(d), at 175-76.

tion by a medical expert as soon as possible to verify the cause of the physical injury. Additionally, in personal injury cases the remote seller may have an interest in reaching an early settlement with the consumer, which may in fact go toward minimizing the damages.

Ignoring or misconstruing the purposes of a section of the Uniform Commercial Code in arriving at a construction is outrageous. Yet the courts that have adopted the literal reading of section 2-607(3)(a) have very nearly done just that. As one might suspect, the courts had underlying reasons for their decisions, which can be found in two related sources: the concern that consumer buyers are so naive in commercial dealings that they need special protection when seeking remedies from merchant sellers; and the persistent confusion between the cause of action in tort for strict products liability and the cause of action in contract for breach of warranty.

### 3. Consumer Naivete or Unwariness

Although courts have often justified their denial of a requirement of notice to remote sellers based on a literal reading of section 2-607(3)(a), the late Professor William Prosser revealed an equally significant rationale behind this trend in an often-used quotation concerning the requirement of notice in the nonprivity context. Professor Prosser expressed disapproval of the notice requirement in nonprivity personal injury cases, stating:

As between the immediate parties to the sale, [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby trap for the unwary. The injured consumer is seldom "steeped in the business practice which justifies the rule," and at least until he has legal advice it will not occur to him to give notice to one with whom he has had no dealings.<sup>184</sup>

The decisions citing this catchy statement or otherwise reflecting a presumption of consumer naivete are sufficiently numerous to justify suspicion that a predominant reason courts interpret section 2-607(3)(a) as not requiring notice in the nonprivity consumer contexts is the fear that to do so would unfairly disadvantage the consumer.<sup>185</sup> Although courts have been preoccupied with consumer naivete, they generally seem to have given little thought to the real likelihood that to dispense with notice altogether will in many instances be un-

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184. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 97, at 691 (5th ed. 1984) (quoting James, *supra* note 7, at 197) [hereinafter *PROSSER ON TORTS*].

185. See *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206 (Colo. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 349, 378 N.E.2d 1083, 1088 (1978); *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 116-17, 452 A.2d 192, 197 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983); see also *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1983) (stating that courts generally hold notice requirement inapplicable when consumers not "buyers" under § 2-103(1)(a)); *Simmons v. Clemco Indus.*, 368 So. 2d 509, 515 (Ala. 1979) (relying on the reasoning of cases decided in other jurisdictions without engaging in an actual discussion of consumer lack of sophistication).

fair to the merchant seller.<sup>186</sup> A number of cases can be cited in which the complete abandonment of the notice requirement resulted in potential or actual unfairness to the merchant seller.<sup>187</sup>

Additionally, the perception of consumer disadvantage because of naivete or lack of business sophistication is overstated. A close look at the Prosser statement reveals that it is fairly riddled with fallacious assumptions. First, the statement embodies a presumption that the nonprivity consumer is so lacking in knowledge about remote sellers that he will not realize he may have the basis for a lawsuit against a remote manufacturer or seller. This assertion flies in the face of a primary premise supporting the elimination of privity and expanded liability of remote manufacturers and sellers for breach of contract: courts have reasoned the modern marketplace has developed to the point that the consumer very often buys on the strength of the remote manufacturer's or seller's brand name or advertising promises rather than simply on the basis of some dickering with the immediate seller.<sup>188</sup> This same premise would overwhelmingly support the proposition that the modern consumer is very likely to consider the possibility of a lawsuit against a remote manufacturer-seller, if not distributor-seller, whenever the accepted goods are defective.<sup>189</sup> Indeed, in many cases the consumer is extremely familiar with the remote manufacturer-seller and is likely to consider immediately the possibility that the remote manufacturer may be liable for harm caused by its defective product.<sup>190</sup> Therefore, the consumer very often is as likely to consider an action against the remote seller as the immediate seller.

Further, the Prosser assessment presumes that the remote seller will be truly remote in every case. This presumption ignores the possibility that in some cases the transaction or negotiations may involve three parties—buyer, seller, and remote seller. *Carlson v. Rysavy*<sup>191</sup> presents the example of a consumer who visited the manufacturing plant of the remote seller before deciding to buy a

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186. In a rare but unsympathetic case of judicial acknowledgement of the seller's interest in notice, a Maryland appellate court noted:

Remote sellers will have to rely on each successive buyer carrying out his respective obligation under the law [in passing notice on to his seller], which, in most instances, he will have an economic incentive to do. If there is to be a hardship, it will have to fall on the manufacturer or distributor who placed or maintained the defective goods in the marketing stream.

*Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 118, 452 A.2d 192, 198 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983).

187. See cases cited *supra* note 49.

188. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296-97 (3d Cir. 1961); *Patterson v. Her Majesty Indus., Inc.*, 450 F. Supp. 425, 430 (E.D. Pa. 1978); *Rothe v. Maloney Cadillac, Inc.*, 142 Ill. App. 3d 937, 942-45, 492 N.E.2d 497, 500-02 (1986); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615-16 (1958); *Kassab v. Central Soya*, 432 Pa. 217, 227-28, 246 A.2d 848, 853 (1968).

189. The buyer can be expected to recognize initially the possibility of action against the party that had the national notoriety. Once a buyer begins to be aware that remote parties may be liable, it would be expected that lower-profile remote sellers are likely to be sought out as well.

190. See Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. FLA. L. REV. 520, 530 (1973); Phillips, *supra* note 53, at 473 (for proposition that remote vendee will often be aware of the identity of manufacturer of defective goods).

191. 262 N.W.2d 27 (S.D. 1978).

mobile home from the local dealer.<sup>192</sup> The remote seller in such a case is not truly remote and unknown to the buyer.<sup>193</sup> The approach to section 2-607(3)(a) that absolutely dispenses with the requirement of notice from the remote vendee to the seller denies courts the flexibility to decide that fairness requires prompt notice in a particular case because the remote seller is not truly removed from the consumer buyer's knowledge.<sup>194</sup>

A related question involves the role to be played by the consumer's attorney in these types of cases. Consumers seldom pursue legal actions on their own. The normal course of action for the consumer is to obtain the assistance of counsel when he decides to pursue a legal action. In that respect consumers are really no different from merchants. Although some merchants may be sufficiently "steeped" in commercial law to appreciate for themselves the need to give notice of breach, surely a great number of merchants rely on counsel to address such matters.<sup>195</sup> Similarly some consumers, because of common sense or experience, appreciate the need to let the seller know of an alleged breach. Most consumers, however, depend on counsel to address that type of matter. If consumers generally acted on their own in pursuing remedies, then Prosser's concern about unwariness would be more valid. Because of the common utilization of legal counsel, consumer buyers should not be considered totally inept in pursuing remedies and excused from giving notice in the nonprivity cases.<sup>196</sup>

The Prosser perception of the unwary consumer does have a valid aspect, but it can be addressed without completely abandoning the requirement of notice. The valid concern is found in those cases in which the consumer pursues an action for breach without counsel or delays in seeking the aid of counsel because of commercial or legal inexperience. Comment 4 to section 2-607 indicates the appropriate manner of addressing this concern is to factor the consumer's inexperience into the determination of whether the notice has been given

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192. *Id.* at 29.

193. See *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 785, 635 P.2d 1248, 1256 (1981) (farmer-buyer of chemicals was in direct communication with remote seller before buying from retailer); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 591, 489 A.2d 660, 678 (1985) (Handler, J., concurring) (finding tripartite transaction in which merchant buyer specified that its seller would incorporate equipment made by particular remote manufacturer); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 513, 319 N.W.2d 855, 856-57 (1982) (manufacturer participated in discussions between retailer and farmer-buyers of farm equipment).

194. See Phillips, *supra* note 53, at 474-76 (asserting that the better approach would be to judge the reasonableness of notice on the basis of the consumer's knowledge in each particular case, rather than eliminating the requirement of notice as a rule of law because of presumed consumer lack of knowledge).

195. Consider the case of *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 315 So. 2d 579 (1975), in which plaintiff apparently was the owner of a small business. After being injured while using the allegedly defective goods, the buyer immediately gave very informal, oral notice of the breach before retaining counsel and sending a more formal letter of notice some eight months later. *Id.* at 301-02, 315 So. 2d at 580. This scenario is not unlike what might be expected from a consumer.

196. See R. HENSON, *supra* note 6, § 5.04(d), at 177; Franklin, *supra* note 154, at 997; Note, *supra* note 190, at 530. Professor Henson expresses the view that the consumer's attorney should carry the burden of giving notice, stating: "If a failure to give notice were considered to bar a remedy, as it should be, this would put the onus on a lawyer who has not done a job properly, and a malpractice action against the lawyer should provide a suitable remedy for a consumer as well as employment for yet another lawyer." R. HENSON, *supra* note 6, § 5.05, at 177.



within a reasonable time.<sup>197</sup> The Permanent Editorial Board for the Uniform Commercial Code endorsed this approach, at least to a degree, in its 1966 report. The Board criticized the South Carolina amendment of section 2-607(3)(a), which precluded application of the section to consumer personal injury cases<sup>198</sup> by stating that the exception seemed "unnecessary if 'reasonable time' is read as suggested in comment 4."<sup>199</sup>

Allowing the consumer a properly generous time to give notice<sup>200</sup> provides a resolution that not only guards against the requirement becoming a "booby trap" for the nonprivity consumer, but also ensures the merchant will receive notice within a reasonable time under the particular circumstances. A delay in notice because a nonprivity consumer is inexperienced or acting without counsel should be allowed, but not without limit. As a general rule, the merchant should not be made to suffer through elimination of the notice of breach requirement because of the consumer's presumed lack of knowledge.

The last point is further buttressed by a review of the Code sections that establish special rules for merchants and therefore, to some degree, create exceptions in favor of consumers.<sup>201</sup> A review of those sections reveals that a number of them apply particularly to transactions "between merchants." The sections also reflect the perception that practices among merchants are more sophisticated than those involving nonmerchants.<sup>202</sup> Several of the other merchant rules reflect the position that by virtue of regularly dealing in goods, merchant sellers take on greater responsibility at the stages of contract formation and performance and in their dealings with third parties.<sup>203</sup> The only sections that place a greater obligation on merchant buyers after a breach are sections 2-327(1)(c) and 2-603, which give the merchant a greater duty to take care of goods that must be returned to the seller.<sup>204</sup>

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197. According to comment 4, "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." U.C.C. § 2-607 comment 4 (1978).

198. For the text of the amended South Carolina statute, see *infra* note 242.

199. AMERICAN LAW INST. & NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, REP. NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 48 (1967).

200. See *supra* notes 102-11 and accompanying text. In addition, allowing a complaint or the initiation of a lawsuit to serve as notice helps guard against unfairness to the consumer. See *supra* notes 116-37 and accompanying text.

201. The merchant rules are discussed in Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985). Professor Hillinger cites fourteen special merchant rules. *Id.* at 1143 n.11; see also Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 542-45 (1987) (listing in appendix the merchant rules proposed by Professor Llewellyn and their ultimate disposition).

202. See U.C.C. § 2-103(1)(b) (1978) (defining good faith); *id.* § 2-201(2) (statute of frauds exception); *id.* § 2-207(2) ("battle of forms" rule on deviant acceptance); *id.* § 2-209(2) ("no oral modification" clauses); *id.* § 2-605(1) (request for particularization of defects); *id.* § 2-609(2) (request for adequate assurance).

203. See *id.* § 2-205 (firm offers); *id.* § 2-312(3) (warranty of title); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-402(2) (rights of creditors); *id.* § 2-403(2) (entrusting of goods); *id.* § 2-509(3) (passing of risk of loss).

204. See *id.* §§ 2-327(1)(c) & 2-603(1). For a discussion of the possibility that this type of duty should apply to nonmerchants, see Hillinger, *supra* note 201, at 1158-62 (suggesting an absence of good reasons for not imposing a "reasonable duty" on a nonmerchant to take care of rejected goods).

Noticeably missing from the special merchant rules are any provisions reflecting a presumption that consumer or nonmerchant buyers are going to be handicapped by inexperience in pursuing remedies for breach. Rather, the rules concerning rejection and revocation of acceptance place the same burdens on merchants and consumers, including the need to give reasonable notice to the seller.<sup>205</sup> To the extent that the merchant rules reflect any presumption of a lack of sophistication on the part of the consumer, the presumption arises at the time of contract formation. This distinction is justified, because at the time of contract formation the consumer may well be acting without counsel and may indeed suffer from a disadvantage by virtue of having little experience with relevant business practices.<sup>206</sup>

An example of the Article 2 protection of the consumer at the contract formation stage is found in section 2-209(2).<sup>207</sup> In order to establish a valid clause prohibiting oral modifications in a standard form agreement supplied by a merchant, section 2-209(2) requires that a consumer separately sign such a provision.<sup>208</sup> Another example is found in the statute of frauds provisions of section 2-201(2),<sup>209</sup> wherein a failure to respond to a confirming memorandum precludes a statute of frauds defense for merchants but not consumers.<sup>210</sup> These observations about the general treatment of the consumer in Article 2 demonstrate that the consumer is provided increased protection at the contract formation stage, but not when seeking remedies for breach. This approach comports with the logic that at the time of seeking remedies for breach, most consumer buyers are going to enlist the aid of an attorney and, presumably, stand on equal footing with the merchant sellers. Remote vendees and other consumers may purchase goods on their own, but they often pursue remedies for breach

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205. Sections 2-602 and 2-608 govern rejection and revocation of acceptance, respectively, and neither section creates for consumers any special allowances or exemption from giving notice. Comment 5 to § 2-608 does state that "[f]ollowing the general policy of this Article, the requirements of the content of notification are less stringent in the case of the non-merchant buyer," but does not suggest that the buyer should be excused from the requirement of giving notice. U.C.C. § 2-608 comment 5.

206. This scenario occurred in *Smith v. Stewart*, 233 Kan. 904, 667 P.2d 358 (1983), in which one consumer contracted to buy from another nonmerchant a boat to be used by his family as a pleasure craft. The two consumers negotiated and executed the sales agreement on their own without the assistance of counsel, but after defects in the boat were uncovered and a dispute arose both parties retained counsel. *Id.* at 905, 667 P.2d at 360.

207. This section reads: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party." U.C.C. § 2-209(2).

208. Although the language of § 2-209(2) is somewhat convoluted, its effect is to require a special signature to make a "no modifications except in writing" clause binding on a consumer when a merchant's standardized form is used. *See* R. NORDSTROM, *supra* note 6, § 43 ("[T]he consumer will be protected unless such a clause is brought to his attention for his signature.").

209. This section reads:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) [establishing statute of frauds writing requirements] against such party unless written notice of objection to its contents is given within ten days after it is received.

U.C.C. § 2-201(2).

210. *See* R. HENSON, *supra* note 6, § 1.02, at 4-5.

with the assistance of attorneys and should be held to the requirement of giving notice of breach in accepted goods.

#### 4. Confusion of Contract Warranty with Strict Products Liability

Another factor motivating courts to excuse consumers from the section 2-607(3)(a) notice of breach requirement is the recurrent confluence of claims based on breach of warranty in contract with those based on strict products liability in tort.<sup>211</sup> Both causes of action typically find application in cases in which a consumer purchases goods that prove defective and cause personal injury or property damage. The tort cause of action does not present an issue of notice, however, because the strict products liability doctrine does not require notice to the responsible seller as a prerequisite to stating a proper claim.<sup>212</sup>

A reasonable basis exists to suggest that courts which have decided that section 2-607(3)(a) notice of breach should not apply in the nonprivity contexts have been overly influenced by the tort rules. Such courts have effectively eliminated the notice requirement in both tort and contract claims, and have repeated what some courts did in personal injury cases predating adoption of the Uniform Commercial Code.<sup>213</sup> Most of the nonprivity cases in which courts have decided that section 2-607(3)(a) notice does not apply involve personal injury, and evidence exists that courts may still be confusing contract and tort causes of action.<sup>214</sup> The confusion results in part from the coincidental development of the doctrine of strict products liability in tort and the undoing of the requirement of privity as a basis for asserting a claim of breach of warranty.<sup>215</sup> Despite

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211. Some commentators have discussed the injection of elements of fault into strict products liability issues. See Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 23 (1983) (noting that strict liability has "overtones" of culpability and "elements" of fault). That distinction does not affect the ensuing discussion and therefore the tort claims will simply be referred to as "strict products liability" claims.

212. See RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965). But see Phillips, *supra* note 53 (questioning the nonapplication of a requirement of notice in tort cases).

213. In *Kennedy v. F.W. Woolworth Co.*, 205 A.D. 648, 200 N.Y.S. 121 (1923), the court stated:

The complaint to be sufficient did not need a notice under section 130 of the Personal Property law. . . . To require a complaint which, whatever its nomenclature of form, is really grounded on tortious elements, to indicate a notice of rejection or claim of damage within a reasonable time on account of defect of edible goods in a retail transaction, would strain the rule beyond a breaking point of sense or proportion to its intended object.

*Id.* at 649-50, 200 N.Y.S. at 122; see also *Bennett v. Richardson-Merrell, Inc.*, 231 F. Supp. 150, 153-54 (E.D. Ill. 1964) (construing Illinois law under the Uniform Sales Act § 49 not to require notice of breach of implied warranty of fitness for human consumption); *Wright-Bachman, Inc. v. Hodnett*, 235 Ind. 307, 312, 133 N.E.2d 713, 715 (1956) (construing § 49 not to require notice in personal injury cases); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 339-40, 154 N.W.2d 488, 501 (1967) (treating breach of contract action involving personal injury as one for tort strict liability).

214. See *Fischer v. Mead Johnson Laboratories*, 41 A.D.2d 737, 341 N.Y.S.2d 257 (1973); *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 28-30, 268 S.E.2d 296, 302-03 (1980) (dictum); *W. HAWKLAND*, *supra* note 12, § 2-607, at 63; Comment, *supra* note 111, at 180-81.

215. See generally *Cline v. Prowler Indus.*, 418 A.2d 968, 976 (Del. 1980) (finding strict liability has basis in tort and contract, areas are "intertwined"); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 285, 512 P.2d 776, 781 (1973) (Denecke, J., concurring) (noting the historical, parallel development of strict liability in both tort and contract and problems associated with distinguishing the two); PROSSER ON TORTS, *supra* note 184, §§ 97-98 (comparing the development of strict liability in warranty and strict liability in tort); *Franklin*, *supra* note 154, at 996-1004 (discussing impact of

some questioning of the distinction between contract warranty and tort strict products liability claims,<sup>216</sup> the two causes of action have definite differences.

The cause of action for strict liability in tort finds its basis in a societal judgment that one sending inherently dangerous goods into the marketplace should be held responsible for personal injury and property damage caused by those goods.<sup>217</sup> Further, courts and legislatures have decided that the manufacturer is in a better position than the individual consumer to bear the risk of loss resulting from dangerous products.<sup>218</sup> A cause of action for breach of contract warranty, however, is founded on the basic concept that the seller has delivered to the consumer buyer less than he promised.<sup>219</sup> The cause of action accrues from a promise, whether express or implied, that is breached and, therefore, the warranty cause of action is contractual in nature.

Although courts and commentators have debated over the propriety of the overlap between the two causes of action,<sup>220</sup> the coexistence of two potential causes of action arising out of one transaction must be accepted as the current state of the law.<sup>221</sup> It is less than clear that the overlap is something to be avoided.<sup>222</sup> A consumer will occasionally have difficulty making out one claim

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Code breach of warranty action on tort strict liability); Phillips, *supra* note 53 (arguing that notice should not be dispensed with merely because an action is grounded in tort).

The acceleration of the fall of privity in contract is usually tied to the decision in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). The beginning of general theories of tort strict products liability is usually dated to *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Professor Franklin does detail some earlier developments. Franklin, *supra* note 154, at 990-92.

216. Professor Prosser once asserted that the breach of warranty action was "born of the illicit intercourse of tort and contract." Prosser, *supra* note 42, at 800; *see also* Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 109 (1972) (stating that the law of warranty "has always had one foot in contract and the other foot in tort"). *But see* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 728-34 (1970) (rebutting argument that warranty is a product of pure tort theory and asserting that warranty finds its historical basis in contract).

217. *See Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 902, 27 Cal. Rptr. 697, 701 (1962); PROSSER ON TORTS, *supra* note 184, § 98; Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 IND. L.J. 593, 593 (1986).

218. *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 109 (3d Cir. 1985); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 567-68, 489 A.2d 660, 666 (1985); RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

219. *See Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 571, 489 A.2d 660, 668 (1985); PROSSER ON TORTS, *supra* note 184, § 92.

220. *See* Wade, *supra* note 211, at 1-4.

221. *See Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 570, 489 A.2d 660, 667-68 (1985); *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 279, 512 P.2d 776, 779 (1973); Wade, *supra* note 211, at 3. Every jurisdiction except Louisiana has adopted the warranty provisions of Article 2, and approximately 45 states have adopted § 402A of the Restatement (Second) of Torts or a similar doctrine. Gaebler, *supra* note 217, at 594 n.5. Delaware appears to be the only state deciding that Article 2 pre-empts the products liability area. *See Cline v. Prowler Indus.*, 418 A.2d 968, 980 (Del. 1980); Wade, *supra* note 211, at 3.

222. An early commentator noted reasons for the overlap:

Indeed, in many cases an action as for tort or an action as for a breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty.

If one by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort. The tort consists in his having been, by fraud and falsehood, induced to make the

but not the other.<sup>223</sup> However, a division of the causes of action follows naturally from the fact they address different legal principles. The strict products liability claim requires the consumer to prove that the product was unreasonably dangerous.<sup>224</sup> The breach of contract claim requires the buyer to show that a representation as to the quality of the goods was explicitly or implicitly made and that the goods failed to meet the warranty.<sup>225</sup> In addition to differences in the burdens of proof, the statutes of limitations may be different, disclaimers are likely to be effective in contract but not in tort, and notice is required only in the contract claim. Ultimately, the remedial goals of the tort and contract claims are different. Tort remedies are aimed at returning the injured party to the status quo ante, which involves undoing the harm. In contrast, the contract remedy is designed to give the buyer the value agreed to be exchanged in the bargain.<sup>226</sup>

It is somewhat understandable that confusion in the courts would have occurred because of the parallel development of strict products liability in tort and the elimination of privity as an essential element in contract actions, with the resulting effect that notice was excused in some contract warranty claims. Present-day courts, however, should recognize the differences between the two existing causes of action, and not allow the confluence to result in the slighting of the statutory requirement of notice of breach in accepted goods when a contract cause of action is advanced. If the consumer seeks to recover a remedy from a seller as a remote vendee in an action for breach of contract, then the buyer must satisfy the requisites of the Uniform Commercial Code, including the giving of reasonable notice of breach in accepted goods.

## 5. Preservation of Symmetry and Legislative Intent

The concept of preservation of symmetry is simple but very logical: to the extent the seller is exposed to potential liability to additional nonprivity parties, balance or symmetry should be preserved by providing to the seller the normal Code defenses to an action for breach of contract.<sup>227</sup> Courts have given varying responses to this proposition in deciding whether the section 2-607(3)(a) notice requirement should apply to nonprivity consumers. Although several courts have been persuaded that when a breach of contract action is extended to remote vendees they should be subject to the same requirements and limitations as im-

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purchase. There is a broken contract, but there is also something more: There is deception to the injury of the purchaser in procuring the contract to be made.

1 T. COOLEY, *TORTS* 169-71 (4th ed. 1932).

223. See *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 570-71, 489 A.2d 660, 668 (1985); PROSSER ON TORTS, *supra* note 184, § 92, at 664-67; Phillips, *supra* note 53, at 457.

224. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

225. See Wade, *supra* note 211, at 7 (primary concern of Article 2 is "enforcing the sales contract").

226. See Wade, *supra* note 211, at 24.

227. Briefly, the defenses that ordinarily might be available to the seller would include the notice requirement, statute of limitations, misuse or similar conduct by the buyer, and warranty disclaimer or limitation. See *supra* note 158.

mediate buyers,<sup>228</sup> other courts have implicitly rejected the symmetry argument. The latter decisions rest largely on the reasoning that requiring notice from a consumer to a remote manufacturer or seller would be too much to ask of the consumer, and that notice given to an immediate seller will naturally flow upward to the remote seller.<sup>229</sup> Apart from severe doubts about the arguments that the consumer is too naive to recognize the need to give notice<sup>230</sup> and that notice given to an immediate seller will flow up to the remote seller,<sup>231</sup> the concept of preserving symmetry is both rational and persuasive.

The lack of symmetry and logic in exempting remote vendees from the notice requirement becomes increasingly obvious when one considers the effect of such an approach on the notice defenses that are available to immediate and remote sellers. If a buyer fails to give any notice at all, he cannot sue the immediate seller but may still pursue a cause of action against the remote seller. This result is incongruous with the fact the immediate seller by virtue of proximity is more likely to be aware of a breach than is the remote seller, who may be many transactions removed from the plaintiff. Nonetheless, the consumer who fails to give notice at all will yet be able to bring an action against a remote seller in the distributive chain. One way courts may mitigate this result is to decide that the failure to give notice to the immediate seller will be a good defense for the remote seller. Although at least three courts have adopted this approach,<sup>232</sup> the approach offers no assurance or even likelihood that notice given to the immediate seller will reach or benefit the remote seller. The remote seller, though, would have as a defense the buyer's failure to give a notice that was neither given to the remote seller nor would have benefited him in any way.<sup>233</sup> This result makes no more sense than would allowing the immediate seller to defend by asserting that no notice was given to the remote seller.<sup>234</sup>

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228. See *Morrow v. New Moon Homes, Inc.*, 518 P.2d 279, 292 (Alaska 1977); *Prutch v. Ford Motor Co.*, 40 Colo. App. 129, 134, 574 P.2d 102, 106 (1977), *rev'd*, 618 P.2d 657 (Colo. 1980); *Wilcox v. Hillcrest Memorial Park*, 696 S.W.2d 423, 424-25 (Tex. Ct. App. 1985), *writ of error denied*, 701 S.W.2d 842 (Tex. 1986); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo. 1980).

229. See *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 655-56 (N.D. Ala. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 349, 378 N.E. 2d 1083, 1087-88 (1978); *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 116-18, 452 A.2d 192, 196-97 (1982), *aff'd*, 295 Md. 528, 456 A.2d 830 (1983); see also *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 223, 217 A.2d 71, 73 (1965) (conceding the desirability of maintaining symmetry through the requirement of notice from third party beneficiaries, but declaring that requiring symmetry would be a legislative function).

230. See *supra* notes 184-210 and accompanying text.

231. See *infra* notes 245-54 and accompanying text.

232. See *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984); *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1313 (D. Colo. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 349, 378 N.E.2d 1083, 1087-88 (1978).

233. See, e.g., *Malawy v. Richards Mfg. Co.*, 150 Ill. App. 3d 549, 501 N.E.2d 376, 384 (1986). The immediate seller had notice promptly upon discovery of the defect, but the remote seller did not receive notice until 40 months later. Under the approach followed by the case cited, *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978), the remote seller would have been able to defend on the lack of notice to the immediate seller even though he did not benefit from it in any way.

234. See *Leeper v. Banks*, 487 S.W.2d 58, 59-60 (Ky. 1972) (notice given to remote manufacturer was ineffective in suit against immediate seller); *San Antonio v. Warwick Club Ginger Ale Co.*,

Under the construction of section 2-607(3)(a) that would require a buyer to give notice to immediate and remote sellers, each seller would stand separately as to the defense. The essence of section 2-607(3)(a) is the idea that a party who later is to be charged with having committed a breach should have notice at that time so as to minimize liability and avoid prejudice in resolving the matter. To the degree that Article 2 is to be expanded to assign greater liability to remote sellers, the expansion should be accomplished in an equitable manner by preserving for the seller, as much as is possible, the normal defenses under the Code.

Symmetry is also related to the question of legislative intent. Although discussions of legislative intent have been included more often in decisions considering whether notice ought to be required from third party beneficiaries,<sup>235</sup> at least one court has found it relevant to the question of whether notice of breach in accepted goods should be required from remote vendees. The Maryland Court of Special Appeals in *Firestone Tire & Rubber Co. v. Cannon*<sup>236</sup> noted that when the legislature expanded warranty coverage to include remote seller liability to nonprivity parties, it also could have amended section 2-607(3)(a) to require notice from remote vendees.<sup>237</sup> The court reasoned that because the legislature did not specifically require such notice from remote vendees, it must not have intended such a requirement.<sup>238</sup>

The Maryland court did concede, however, that it was essentially guessing about legislative intent: there was no way to certify that the state legislature had recognized the relationship between privity and notice or considered the possible application of section 2-607(3)(a) to remote vendees.<sup>239</sup> Indeed, because the elimination of the vertical privity requirement has largely been the result of judicial decisions,<sup>240</sup> the vast majority of legislatures have seldom specifically considered whether notice should be required from remote vendees. The only three legislatures that can be deemed to have considered the question are those in Maine, Massachusetts, and South Carolina. In these three states either section 2-607 or section 2-318 has been directly altered to change the application of the notice requirement.<sup>241</sup>

Even in the three states where the law on notice of breach in accepted goods was specifically altered, the impact was not to differentiate generally between the notice required from privity and nonprivity parties. The Maine and South Carolina laws were altered to eliminate the requirement of notice in personal injury cases.<sup>242</sup> These modifications do not indicate that the respective legislatures

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104 R.I. 700, 708, 248 A.2d 778, 780 (1968) (notice given to remote seller within four months, but not to immediate seller until eight months later, was ineffective as against immediate seller).

235. See *infra* notes 293-309 and accompanying text.

236. 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983).

237. *Id.* at 118, 452 A.2d at 198.

238. *Id.*

239. *Id.*

240. See *supra* notes 142-44 and accompanying text.

241. ME. REV. STAT. ANN. tit. 11, § 2-607 (1964); MASS. ANN. LAWS ch. 106, § 2-318 (Law. Co-op. 1974); S.C. CODE ANN. § 36-2-607 (Law. Co-op. 1966).

242. In Maine § 2-607 was changed by the addition of a subsection, which reads: "Subsection

contemplated a different requirement for privity or nonprivity parties. Massachusetts law was altered to eliminate the requirement of notice in nonprivity cases, but only when the failure to give notice does not result in demonstrable prejudice to the remote seller.<sup>243</sup> The Massachusetts version of section 2-318 is somewhat atypical in that it is designed to cover products liability cases that would be addressed in most other jurisdictions by section 402A of the Restatement (Second) of Torts.<sup>244</sup>

Apart from what can be gleaned from these limited changes in the mentioned states, the only ascertainable legislative intent is that to be found by virtue of a state's adoption of Article 2, including section 2-607(3)(a). The legislative adoption of section 2-607(3)(a) suggests that to the extent most legislatures have considered the question, they have favored the principle of reasonable notice to a seller who is accused of a breach. As the courts expand warranty liability of sellers to remote vendees they would be wise to preserve the ascertainable legislative design, which includes the requirement of reasonable notice as a prerequisite to an action for breach.

## 6. Up-Flowing Notice and Section 2-607(5) Vouching In

A number of courts have reasoned that the buyer should not be required to give notice to remote sellers because the immediate seller and others in the distributive chain will pass the notice up to preserve rights against their own sellers under section 2-607(3)(a).<sup>245</sup> This reasoning hints at the vouching-in provisions

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(3), paragraph (a) shall not apply where the remedy is for personal injury resulting from any breach." ME. REV. STAT. ANN. tit. 11, § 2-607(7) (Supp. 1986). The Maine legislature also altered § 2-725(2) to indicate that personal injury claims are subject to the general tort statute of limitations, *id.* § 2-725(2), thus suggesting some conscious intent to adapt the Code provisions to cover what otherwise might be tort cases. In South Carolina § 2-607(3)(a) was changed to read:

Where a tender has been accepted

(a) the buyer 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; however, no notice of injury to the person in the case of consumer goods shall be required.

S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1966).

243. Section 2-318 in Massachusetts now reads:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the operation of this section. Failure to give notice shall not bar recovery under this section unless the defendant proves that he was prejudiced thereby. All actions under this section shall be commenced within three years next after the date the injury and damage occurs.

MASS. ANN. LAWS ch. 106, § 2-318 (Law. Co-op. 1974).

244. See *Hayes v. Ariens Co.*, 391 Mass. 407, 412, 462 N.E.2d 273, 277 (1984); *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353, 446 N.E.2d 1033, 1039 (1983).

245. See *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 206 (Colo. 1984); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 348-49, 378 N.E.2d 1083, 1087 (1978); *Cannon*, 53 Md. App. at 118, 452 A.2d at 198; see also *Carson v. Chevron Chem. Co.*, 6 Kan. App. 2d 776, 785, 635 P.2d 1248, 1255-56 (1981) (court favorably citing position that consumer should be able to direct notice of defects to immediate seller,



of section 2-607(5).<sup>246</sup> The import of section 2-607(5) is that an immediate seller may give notice to his seller that he has been sued and force the remote seller either to enter and defend the suit or be bound in any subsequent action by adjudication of common questions of fact decided in the first litigation.<sup>247</sup> Courts might be inclined to use this section as a basis for denying a right to notice to remote sellers on the theory that the scheme of section 2-607(5) provides an appropriate mechanism for the remote seller to receive indirect notice of an alleged breach as it flows upward from the buyer to the immediate seller to any remote sellers. Substantial flaws exist in the perception that notice given to the immediate seller will flow up to reach remote sellers against whom the buyer might decide to bring an action.

The court in *Goldstein v. G.D. Searle & Co.*,<sup>248</sup> which appears to have been the starting point of the up-flowing notice concept, stated wistfully:

The relevant inquiry here, however, is whether the Code requires that the notice given to the immediate seller be transmitted upstream . . . . It appears to us that section 2-607(3)(a) provides such a requirement by viewing the acceptance of each tender of the goods moving down the distributive chain as a distinct and separate transaction. In this manner, whether one or more of those upstream of the consumer in the distributive chain is ultimately sued for breach of the implied warranty by the consumer, the Code envisions that when the consumer's notice of breach is given to his immediate seller, such person to preserve any right of action he may have for breach of implied warranty will give notice to his immediate seller, and so on upstream until the seminal point of the distributive chain is reached. . . .

The implied warranty of the manufacturer is tendered along with the goods to the ultimate consumer by his immediate seller, and notice to the immediate seller in the ordinary course of events enures to the benefit of the remote manufacturer.<sup>249</sup>

Two fallacies exist in the *Goldstein* analysis. First, the intermediate buyer may

who would then decide if correction was within his ambit or if the notice of breach should be passed upstream to the remote seller).

246. U.C.C. § 2-607(5) reads:

Where the buyer is sued for breach of a warranty or other obligation for which the seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.

*Id.*

247. *Begley v. Jeep Corp.*, 491 F. Supp. 63, 65 (W.D. Va. 1980); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 521, 380 N.E.2d 571, 580 (1978); R. HENSON, *supra* note 6, § 5.04(c).

248. 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1978).

249. *Id.* at 348-49, 378 N.E.2d at 1087.

not have an action for breach of warranty against his own seller, perhaps because of an effective disclaimer. Second, the intermediate buyer may have a means of recovery against his seller for indemnity without having to state a cause of action for breach under Article 2.<sup>250</sup> In any event, the typical posture of the reported cases suggests it is far from clear that notice given to the immediate seller will flow up to the remote sellers. These cases also suggest that the buyer will often choose to sue the remote seller only.<sup>251</sup>

As for vouching in, section 2-607(5) notice has different requirements and serves a very different purpose than section 2-607(3)(a).<sup>252</sup> Section 2-607(5) creates an option for the benefit of the immediate seller that allows him to bind his own seller to adjudication of facts in an action by the buyer. Section 2-607(5) in no way assures that the remote seller will have the sort of early notice to be provided under section 2-607(3)(a). First, it is worth repeating that the section 2-607(5) vouching-in process is indeed optional to the immediate seller; she may

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250. Apart from pursuing a separate cause of action for breach under Article 2, the immediate seller may well have an action for common law implied indemnity. The action would be under the common law, because Article 2 has no indemnity provision. Common-law indemnity is based on the equitable principle that a faultless party may obtain indemnity when the wrongful act of the indemnitor causes liability to a third party. Common-law indemnity has been applied in sale of goods cases. See *Henry Heide, Inc. v. WRH Prods. Co.*, 766 F.2d 105, 112 (3d Cir. 1985) (construing New Jersey law); *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 386 N.W.2d 618, 626 (1986). Although vouching in may bind the remote seller to determinations of law common to both litigations, statutory vouching in would not be necessary for implied indemnity. In *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980), the court stated:

[The remote seller] asserts as a first defense that it was given no timely notice by the [immediate seller] of the plaintiff's [buyer's] claim for injuries arising out of the defective product. Under the principles of implied indemnity, however, notice to the indemnitor is not required unless the indemnitee seeks to bind the indemnitor to the original judgment.

*Id.* at 28, 268 S.E.2d at 301-02. But see *City of Clayton v. Grumman Emergency Prods., Inc.*, 576 F. Supp. 1122, 1128 (E.D. Mo. 1983) (construing § 2-607(5) vouching-in notice to be element of claim for indemnity).

251. See *Cannon*, 53 Md. App. at 121-22, 452 A.2d at 200 (Lowe, J., concurring). In responding to the majority's up-flowing notice argument, the concurring justice stated:

To rationalize as fair warning for a lack of notice requirement by suggesting that an installer will notify a retailer, who will notify a wholesaler, who will notify a distributor, who will notify a subsidiary, who will notify a manufacturer, is hardly convincing. That such a relay team would ever exist is not too likely, since here as in most cases, the initial [sic] seller and the ultimate manufacturer are not attacked upon related theories. In this case the retailer . . . apparently retained . . . the installer, which Firestone suggests caused the blowout by pinching the tube upon improper installation. Neither [the installer nor the retailer] had any great incentive to notify Firestone propitiously to investigate that possibility. Rather, the year and a half that elapsed during which the crucial evidence to make such determination disappeared, enured to their benefit when the deep-pocketed manufacturer was ultimately sued.

*Id.*

252. One district court distinguished the two notice requirements as follows:

[T]he intermediate seller is required to give notice of a breach of warranty to his seller under subsection 3(a) in order to preserve his rights, but he may also give him notice of litigation regarding the breach if he wishes to bind him to adjudication of common questions of fact arising out of suit by the subpurchaser.

*Begley v. Jeep Corp.*, 491 F. Supp. 63, 65 (W.D. Va. 1980); see *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 521, 380 N.E.2d 71, 579-80 (1978); see also R. HENSON, *supra* note 6, § 5.04, at 173-74 (vouching-in notice must be in writing, must state that the remote seller will be bound by adjudication in the first case, and is not subject to the same time strictures as breach notice); Clark, *supra* note 35, at 138-45 (discussing policy considerations and pitfalls of vouching-in procedure under § 2-607(5)).

elect not to vouch in the remote seller and may still be able to pursue an indemnity action later. Second, the timing of the vouching-in process is tied to the initiation of a lawsuit against the immediate seller rather than her receipt of notice of breach from the buyer. A buyer might conceivably give effective notice of breach soon after acceptance and then wait years before actually initiating litigation. Not only may the lawsuit come much later than the reasonable time for giving notice under section 2-607(3)(a), but the buyer may well decide to seek a remedy from the remote seller without ever bringing suit against the immediate seller. In this event there would not be the initial act to start any upward flow of vouching in notice to the remote seller.

The one aspect of up-flowing notice and the vouching-in process that may be relevant to the requirement of notice under section 2-607(3)(a) is that in some cases actual notice may be received by the remote seller as a result of these processes. There are two ways in which the receipt of such notice may properly satisfy section 2-607(3)(a) with regard to the remote seller. First, in some cases a court might decide that the giving of notice to the immediate seller should be chargeable to the remote seller because of an agency or quasi-agency relationship between the two sellers.<sup>253</sup> Second, a court might decide under appropriate circumstances that the giving of notice to the immediate seller was the appropriate mode for giving notice under Uniform Commercial Code section 1-201(26), which requires only that one take "such steps as may be reasonably required to inform the other in the ordinary course whether or not such other actually comes to know of it."<sup>254</sup>

Through liberal but sound interpretation of section 2-607(3)(a), notice to the immediate seller may result in notice being chargeable to the remote seller. However, such decisions should rely on the existence in fact of some tie between the immediate and remote seller rather than doing away completely with the requirement of notice on the fallacious grounds that up-flowing notice or the vouching-in process will normally lead to the receipt of notice by the remote seller.

### B. *Third Party Beneficiaries*

The obvious difference between a third party beneficiary and a remote vendee is simply that the former is not a buyer and has not been party to a sales transaction.<sup>255</sup> Despite this basic difference in status, a review of the cases reveals that much of the foregoing discussion concerning the requirement of notice from a remote vendee to a seller is also relevant in considering the applica-

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253. See *supra* notes 65-66 and accompanying text.

254. U.C.C. § 1-201(26) (1978); see *supra* notes 63-64 and accompanying text.

255. Arguably, if § 2-607(3)(a) cannot be construed to require notice from a remote vendee to a nonprivy seller, then it would follow that the section should not be read to require notice from a third party beneficiary. If one concludes, however, that notice should be required from a remote vendee to a seller, as the foregoing section argues, then the possibility logically follows that the requirement of notice of breach in accepted goods might also be required from a third party beneficiary. Moreover, if one reads § 2-607(3)(a) in light of comment 5 to require notice from third party beneficiaries, then it would follow that notice from remote vendees to nonprivy sellers ought to be required as well.

tion of section 2-607(3)(a) to third party beneficiaries. This discussion of the requirement of notice from a third party beneficiary is divided into three issues: the construction of section 2-607(3)(a) in light of comment 5 to that section; the perception of consumer unwariness in situations involving third party beneficiaries; and the legislative intent governing the extension of warranty coverage to third party beneficiaries by virtue of adoption of section 2-318.

### 1. Statutory Construction and Official Comment 5

Virtually all courts addressing the question have decided that the requirement of notice of breach in accepted goods should not be applicable to third party beneficiaries.<sup>256</sup> Those courts have decided against the notice requirement primarily on the basis of a literal reading of section 2-607(3)(a).<sup>257</sup> The text of the section requires that "the buyer" must give notice. Therefore, courts have reasoned, it could not apply to a third party beneficiary because he is not a buyer. Courts have reached this conclusion despite the fact that the text of section 2-607(3)(a) does not specifically address the possibility that notice might be required from third party beneficiaries. The text of section 2-607(3)(a) expressly establishes notice requirements for buyers; it does not prohibit the possible requirement of notice from third parties.

More disturbingly, these courts have exempted third party beneficiaries from the need to give notice despite an extremely clear indication in comment 5 to section 2-607 that notice ought to be required. Comment 5 reads:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.<sup>258</sup>

Comment 5 contemplates that the third party beneficiary is required to give notice to a seller of the defective goods if the beneficiary intends to pursue a claim based on the breach.

The intent of comment 5 is made even clearer by the indication of the necessary adjustments to be made in the third party beneficiary context. The comment indicates that the timing of notice for the third party beneficiary should be

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256. See *supra* note 153.

257. See *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981) (construing Iowa law); *Snell v. G.D. Searle & Co.*, 595 F. Supp. 654, 656 (N.D. Ala. 1984) (dictum); *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1982); *Simmons v. Clemco Indus.*, 368 So. 2d 509, 513 (Ala. 1979); *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 223, 217 A.2d 71, 73 (1965); *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 620, 194 S.E.2d 513, 515 (1972); *Frericks v. General Motors Corp.*, 278 Md. 304, 314, 363 A.2d 460, 465 (1976).

258. U.C.C. § 2-607 comment 5.

adjusted and keyed to the discovery of breach through injury, rather than through inspection upon acceptance of tender, because the third party beneficiary will not inspect upon tender. The comment also indicates that the third party beneficiary should be viewed as liberally as the consumer buyer with regard to the timing of notice; this allows additional time that may be necessary for the nonbuyer to become aware of the facts relevant to his legal situation. But ultimately, the comment embodies the proposition that good faith would require a third party beneficiary to give reasonable notice to a seller he expects to hold liable for damages resulting from an alleged breach.<sup>259</sup>

Despite the clear import of comment 5 to section 2-607, the courts that have concluded third party beneficiaries should not be required to give notice have either patently misused, ignored, or discredited comment 5. The misuse of comment 5 began with the seminal case of *Tomczuk v. Town of Cheshire*.<sup>260</sup> *Tomczuk* involved a child who was injured while playing on a bicycle during a visit to another child's home.<sup>261</sup> The bicycle had been purchased by the parents of the child in whose home the injured party was a guest.<sup>262</sup> The injured child and her parents then brought suit as third party beneficiaries against the immediate seller and the remote manufacturer.<sup>263</sup> The case thus involved both a remote seller and a third party beneficiary. The remote manufacturer of the bicycle defended against a claim for breach of warranty on the grounds that plaintiffs had not alleged the giving of notice within a reasonable period of time. The manufacturer asserted, by drawing on the logic of symmetry,<sup>264</sup> that because the third parties were given the right of a buyer to bring suit against the remote seller they should have the duty of a buyer to give the seller reasonable notice.<sup>265</sup>

The Connecticut Superior Court in *Tomczuk* rejected the manufacturer's argument for requiring notice, primarily on the basis that a literal reading of section 2-607(3)(a) required notice from buyers only and to immediate sellers only.<sup>266</sup> The court also cited comment 5 to section 2-607 as supporting its decision. The court, however, quoted only the second sentence from comment 5 and edited it to read: "Such a [third party] beneficiary does not fall within the reason of . . . [2-607(5)] in regard to discovery of defects and the giving of notice

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259. See J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 424-25; Phillips, *supra* note 53, at 464; Note, *supra* note 190, at 531; see also W. HAWKLAND, *supra* note 12, § 2-607:06 (questioning the decisions exempting third party beneficiaries from the notice requirement).

260. 26 Conn. Supp. 219, 217 A.2d 71 (1965).

261. *Id.* at 220, 217 A.2d at 72.

262. *Id.*

263. *Id.*

264. See *supra* notes 227-34 and accompanying text.

265. The court recounted the remote manufacturer's argument:

[The manufacturer] further claims that since the plaintiffs seek to impose on it all the duties imposed by the Uniform Commercial Code on sellers, it is only reasonable that [the manufacturer] be given the notice rights of a seller, since the underlying theory of notice is to give the defendant an opportunity to inspect allegedly defective goods so that he can assess his liability.

*Tomczuk*, 26 Conn. Supp. at 220-21, 217 A.2d at 72.

266. *Id.* at 222, 217 A.2d at 73.

within a reasonable time after acceptance, since he has nothing to do with acceptance.”<sup>267</sup> The court thus took a limited portion of comment 5 concerning the timing of notice coming from third party beneficiaries and distorted it to deny application of the notice requirement. The *Tomczuk* court ignored the two sentences immediately following, which make clear the third party beneficiary’s obligation to give notice.

The *Tomczuk* court not only took the sentence out of context but also edited the sentence in a misleading manner. The *Tomczuk* court rewrote the sentence to suggest that the remote seller is due notice only under the vouching-in provisions of section 2-607(5), when in fact comment 5 has nothing to do with the section 2-607(5) provisions concerning notice for vouching-in purposes. The mistake in editing might conceivably be an honest mistake in determining the interplay between section 2-607(3)(a) and section 2-607(5), especially in light of the fact that the case was decided in 1965 shortly after the promulgation of the Code.<sup>268</sup> Patently taking a quoted sentence out of context, however, is not easily explainable or excusable. Ironically, even the *Tomczuk* court admitted that requiring notice from a third party beneficiary to a seller would be “more just or equitable,”<sup>269</sup> but it proceeded with a rigid, literal reading of section 2-607(3)(a) and misuse of comment 5.

Subsequent courts have compounded the *Tomczuk* court’s misreading of comment 5 by following the decision without commenting upon the erroneous and misleading editing.<sup>270</sup> The United States Court of Appeals for the Eighth Circuit engaged in a similar misuse of comment 5 and relegated to a footnote a curt acknowledgment that a portion of the comment states notice should be required from third party beneficiaries.<sup>271</sup>

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267. *Id.* at 223, 217 A.2d at 74.

268. See generally M. BENFIELD & W. HAWKLAND, CASES AND MATERIALS ON SALES 2-7 (2d ed. 1987). The Code became effective in Connecticut on October 1, 1961. *Id.* at 7.

269. *Tomczuk*, 26 Conn. Supp. at 223, 217 A.2d at 73. The court stated:

Simply because the legislature created certain rights in a third party beneficiary as to express or implied warranties, in adopting [§ 2-318], does not mean that by implication such a beneficiary must give notice of an alleged breach to the manufacturer. . . . Even though it might seem more just or equitable that such a beneficiary be required to give notice in the same manner as a buyer, this court cannot legislate what [the remote seller] seeks here.

*Id.* at 222-23, 217 A.2d at 73.

270. The courts favorably citing *Tomczuk* include *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981); *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 620, 194 S.E.2d 513, 515 (1972); *Frericks v. General Motors Corp.*, 278 Md. 304, 314-15, 363 A.2d 460, 465-66 (1976); see also *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 (M.D. Fla. 1982) (not citing *Tomczuk*, but citing cases that follow it). But see J. WHITE & R. SUMMERS, *supra* note 6, § 11-10, at 424-25; Note, *supra* note 190, at 531-32 (criticizing the *Tomczuk* decision and stating that comment 5 require notice from the third party beneficiary to the seller).

271. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1107 n.9 (8th Cir. 1981) (construing Iowa law). The *McKnelly* court stated:

By its terms, Section 2-607(3)(a) applies only to a buyer who has accepted tender of goods from a seller. It does not expressly apply as between an injured third person other than the buyer and a manufacturer instead of a seller. The official comments to the notice provision state that a beneficiary does not fall within the reason of the section in regard to discovery of defects and giving of notice within a reasonable time.

*Id.* at 1107 (citation omitted). The court then stated in the footnote:

Even when squarely confronted with the import of comment 5 that notice should be required from third party beneficiaries, courts have denied section 2-607(3)(a) that effect. In *Frericks v. General Motors Corp.*<sup>272</sup> the Maryland Court of Appeals responded by devaluing the importance of the official comments to the Uniform Commercial Code. The court stated in part:

[The defendant sellers] have also relied on . . . Comment 5 to section 2-607 in support of their contention that third party beneficiaries are required to give notice of breach. While the official comments are a valuable aid to construction, they have not been enacted by the Legislature, and "[t]he plain language of the statute cannot be varied by reference to the comments."<sup>273</sup>

Although it is true that the comments are not legislative history in the sense they do not reflect the deliberations of the state legislatures that adopted the Code,<sup>274</sup> the comments are entitled to interpretive weight because they reflect the deliberations of the drafters of the Code.<sup>275</sup> A general consensus exists among scholars and courts that the comments are an important tool in construing the Code.<sup>276</sup> Moreover, it is particularly striking that the courts have generally relied on the comments to section 2-607 in determining the proper

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We have not overlooked that comment 5 to Section 2-607 also states that a beneficiary might properly be held to the use of good faith in notifying the seller that an injury has occurred once he becomes aware of the legal situation. We need not concern ourselves with the nature or scope under Iowa law of this obligation of good faith notification, because we hold only that the Iowa Supreme Court, under the totality of the circumstances would not apply the notice provision to [the plaintiff].

*Id.* at 1107 n.9. An almost identical mistreatment of comment 5 was given by the United States District Court for the Middle District of Florida in *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 n.7 (M.D. Fla. 1982).

272. 278 Md. 304, 363 A.2d 460 (1976).

273. *Id.* at 312, 363 A.2d at 464 (quoting *Wright v. Bank of Cal. Nat'l Ass'n*, 276 Cal. App. 2d 485, 490, 81 Cal. Rptr. 11, 14 (1969)).

274. See M. BENFIELD & W. HAWKLAND, *supra* note 268, at 12; J. HONNOLD, *CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING* 12-14 (5th ed. 1984); R. NORDSTROM, *supra* note 6, § 6.

275. See M. BENFIELD & W. HAWKLAND, *supra* note 268, at 12; Skilton, *supra* note 170, at 602-03.

276. See *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 287-88 n.24 (Alaska 1976) ("Although Alaska's legislature did not enact the Official Comments as part of Title 45, and we do not find them necessarily controlling in all instances in interpreting the Code, they are of persuasive assistance in construction and application of the code." (citations omitted)); M. BENFIELD & W. HAWKLAND, *supra* note 268, at 12 ("[The comments] were prepared with care, are closely integrated with each section of the Code and constitute valuable aids to construction and, in particular, uniform construction." (footnote omitted)); J. WHITE & R. SUMMERS, *supra* note 6, § 4 ("Besides the text itself, the Official Comments appended to each section of the Official Text of the Code are by far the most useful aids to interpretation and construction." (footnote omitted)). Another author states:

There is a wealth of material in the Comments; that material was before the legislatures when the Code was adopted; and that material should not be overlooked as a source of Code construction. The Comments often explain why certain statutory language was chosen, what policies were sought to be adopted or rejected, and how the section under consideration harmonizes with other parts of the Code. This material is too valuable to be ignored.

R. NORDSTROM, *supra* note 6, § 6 at 10 (footnote omitted); cf. J. HONNOLD, *supra* note 274, at 12-14 (cautioning against improper use of the comments).

construction of the notice requirement in the privity context,<sup>277</sup> but have frequently resisted the clear dictate of comment 5 in determining the application of section 2-607(3)(a) to third party beneficiaries.

A particularly important goal of the Uniform Commercial Code is to promote uniformity of the law. At the outset of the official text, the general comment states that the purpose of the comments is to aid in obtaining a "substantial uniformity of construction."<sup>278</sup> Despite the inclination of the courts to follow the comments whenever possible,<sup>279</sup> the comments properly would be subject to disregard if they should contradict or prove inconsistent with the official text of the Code.<sup>280</sup> But such is not the case with comment 5. Even though some courts have accepted the superficial view that a contradiction exists by reasoning the section requires notice only from buyers and the comment establishes a "contradictory" requirement of notice from third party beneficiaries who are nonbuyers,<sup>281</sup> more careful scrutiny leads to a different conclusion.

Comment 5 does not contradict or narrow section 2-607(3)(a). It does not exempt from the notice requirement persons expressly included by the text or impose the requirement on persons expressly exempted from notice by the text. Rather, comment 5 can be viewed as serving to refute the possibility that section 2-607(3)(a) carries a negative implication—the implication that by establishing a notice requirement for buyers the section inferentially prohibits the requirement of notice from nonbuyers. In this respect comment 5 to section 2-607 is similar to comment 3 to section 2-318, which makes clear that by establishing third party standing in certain cases, the section does preclude standing in additional cases.<sup>282</sup>

Comment 5 suggests an application of the section to an additional, related group of nonbuyers who might have standing under the Code to bring suit against the seller. Importantly, this possibility of additional nonprivity parties maintaining an action for breach of warranty was subject to some great variance in the state law at the time of drafting of the Code.<sup>283</sup> It is logical that the

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277. For general citations to the use of the comments in construing the notice requirement, see *supra* notes 56-137 and accompanying text, and cases cited in Dillsaver, *supra* note 56, at 221 n.5.

278. U.C.C. general comment.

279. See M. BENFIELD & W. HAWKLAND, *supra* note 268, at 12; J. WHITE & R. SUMMERS, *supra* note 6, § 4.

280. See J. HONNOLD, *supra* note 274, at 14 ("if the statutory provisions adopted by the legislature contradict or fail to support the Comments, the Comments must be rejected"); R. NORDSTROM, *supra* note 6, § 6; J. WHITE & R. SUMMERS, *supra* note 6, § 4.

281. See *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59, 64 n.7 (M.D. Fla. 1982); *Frericks*, 278 Md. at 312, 363 A.2d at 464.

282. See Skilton, *supra* note 170, at 617-21. After making a convincing argument that comment 3 to § 2-318 serves to refute a negative inference, Professor Skilton proceeds to raise the issue of applying § 2-607(3)(a) to third party beneficiaries. Although he does not specifically offer a resolution, Professor Skilton hints that § 2-607(3)(a) should be read with a negative inference but puts forth no clarifying or supporting analysis. *Id.* at 620-21.

283. The matter of the right of third party beneficiaries to sue, in light of the absence of privity, was subject to great dispute. For instance, comment 3 to § 2-318 explained the reason for the 1966 change: "There appears to be no national consensus as to the scope of warranty protection which is proper, but the promulgation of alternatives may prevent further proliferation of separate variations in state after state." U.C.C. § 2-318 comment 3. The disparity in state law is also noted by the



drafters of the Code might not have thought, or might have been hesitant, to write into the text a requirement of notice for third party beneficiaries when the law among the jurisdictions allowing standing to sue was subject to great variance.

## 2. Consumer Naivete or Unwariness

Considering that a real conflict or contradiction between the text of section 2-607(3)(a) and comment 5 does not exist and that the official comments generally are given great weight by the courts, one is left to search for some convincing reason why the courts would not follow the comment in the case of third party beneficiaries. One reason that courts might shy away from requiring notice from third party beneficiaries is because of the continued confusion of contract actions with tort products liability actions, which do not require notice to the seller.<sup>284</sup> A more prevalent reason for not following comment 5 to section 2-607 is the view that it would be unfair to the consumer third party beneficiary to require her to give notice to a party with whom she has not dealt because of perceived "consumer naivete or unwariness." As discussed earlier,<sup>285</sup> the judicial perception of consumer unwariness is very doubtful in its accuracy.

The judicial perception of "consumer unwariness" regarding third party beneficiaries is based on several questionable presumptions. The perception presumes that the third party beneficiary is unaware of the possibility of pursuing a claim for an injury against some seller of the goods, that the third party beneficiary is acting without the aid of legal counsel, and that the third party beneficiary is without knowledge of the identity of the seller. The first two presumptions will almost certainly be wrong in the majority of cases. The consumer third party beneficiary, like the remote vendee discussed above, is likely to pursue a legal action against the seller with the aid of counsel, who is chargeable with knowing the law. Even without the immediate aid of counsel, the proliferation of litigation against widely known remote manufacturers and sellers has almost certainly resulted in a general public awareness of the possibility of lawsuit against those remote parties by consumers who suffer injury caused by defective goods. Consequently, the third party beneficiary is very likely to be aware of the possibility of pursuing an action against the seller or manufacturer of the goods.

As to the presumption that the third party beneficiary will not know the

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perambulatory suggestion that the section would be omitted altogether if ever made a part of federal law. See also PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE REP. NO. 2, at 39-40 (1964); PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE REP. NO. 1, at 70 (1962) (citing controversy and lack of consensus on extension of warranty coverage to third parties).

284. See *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1107 (8th Cir. 1981). The court stated: "[T]here is authority that the better view, both under the Uniform Commercial Code and the Uniform Sales Act, is that the notice provision is inapplicable to third parties, at least where personal injuries rather than economic losses are sustained." *Id.* (citations omitted). For a more complete discussion of the confusion of contract and tort causes of action, see *supra* notes 211-26 and accompanying text.

285. See *supra* notes 184-200 and accompanying text.

identity of the sellers or manufacturers for the purpose of giving them notice, courts should recognize that in a majority of cases the third party beneficiary will not be a complete stranger to the transaction. The structure of section 2-318 reflects a likelihood the third party beneficiary will be a relative, friend or guest, or employee of the purchaser.<sup>286</sup> In the many cases in which the third party beneficiary is a member of the buyer's family or holds a similar relationship, the third party beneficiary undoubtedly would have access to the same information the buyer would have in determining legal rights and potentially liable parties. One could go so far as to say that the third party beneficiary generally will be as able as the buyer to give notice but in many jurisdictions will be excused nonetheless.

In the Maryland case of *Mattos, Inc. v. Hash*,<sup>287</sup> for example, the employee-third party beneficiary allegedly was the party who actually dealt with the seller on behalf of his employer, and was nearly equivalent to being a buyer.<sup>288</sup> The defendant seller, therefore, argued that requiring notice from the third party beneficiary in this case would not have been any less reasonable than a requirement of notice from the employer-buyer.<sup>289</sup> The court's rather terse response was that the relevant Code sections simply do not require notice from a third party beneficiary. The court did not address the fairness of imposing such a requirement.<sup>290</sup>

The relationship between the third party beneficiary and buyer in the *Mat-tos* case is typical. The facts in the leading cases applying section 2-607(3)(a) to third party beneficiaries overwhelmingly support the conclusion that the third party beneficiary will very probably have a relationship with the buyer that will permit access to information about the sales transaction.<sup>291</sup> Even in the case in

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286. For the text of § 2-318, see *supra* note 140. The most popular version of § 2-318 gives standing to family members or guests of the buyer; the two other versions extend warranty coverage to natural persons or any person who might reasonably be expected to use, consume, or be affected by the goods. See U.C.C. § 2-318; J. WHITE & R. SUMMERS, *supra* note 6, § 11-3, at 402-05. The alternative versions of the section generally contemplate some tie between the seller and the third person affected by the goods. See U.C.C. § 2-318.

287. 279 Md. 371, 368 A.2d 993 (1977).

288. *Id.* at 377, 368 A.2d at 996.

289. *Id.*

290. *Id.* at 377, 368 A.2d at 996-97. In *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1474 (11th Cir. 1986), the plaintiff sought to avoid the notice requirement in a breach of warranty action on the grounds that he was a third party beneficiary and not the purchaser of the goods. The plaintiff alleged that at the time of purchase "his father went with him and paid for the motorcycle" involved in the case with the understanding that the plaintiff would repay his father. Under Alabama law, if plaintiff succeeded in proving that he was not "the buyer," he would have no obligation to give notice despite his intimate involvement in the transaction. *Id.* at 1474 (citing *Simmons v. Clemco Indus.*, 368 So. 2d 509, 513 (Ala. 1979)).

291. The nexus between the third party beneficiary and the buyer is obvious in the leading cases. See *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1103 (1981) (third party beneficiary was employee); *Simmons v. Clemco Indus.*, 368 So. 2d 509, 511 (Ala. 1979) (third party beneficiaries were employees and their spouses); *Tomczuk*, 26 Conn. Supp. at 220, 217 A.2d at 72 (third party beneficiary was guest in home); *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 619, 194 S.E.2d 513, 515 (1972) (third party beneficiary was family member); *Frericks*, 278 Md. at 306, 363 A.2d at 461 (third party beneficiary was guest in automobile). A rare case presenting the possibility of a third party without access to the buyer is *Taylor v. American Honda Motor Co.*, 555 F. Supp. 59 (M.D. Fla. 1982), in which the injured party was in possession of an allegedly defective motorcycle, but there was little evidence as to how he had acquired it. *Id.* at 63. If one speculates that it was the gift

which the third party beneficiary is a stranger, it can be argued that he should be chargeable with investigating what sellers or other parties may be responsible for a defective product causing the injury. The beneficiary will have to do so for the purpose of identifying the parties against whom he might bring a lawsuit, if not for the purpose of giving notice of breach.

The one legitimate concern in this area for the third party beneficiary is that it may take longer in some cases to gather information or realize the possibility of recovering against the remote seller. To the extent a third party beneficiary may truly suffer from a lack of information about the buyer, seller, and sales transaction, comment 5 to section 2-607 addresses that concern by allowing the third party beneficiary the benefit of a liberal time in which to give notice to a seller.<sup>292</sup> The time allowed the third party beneficiary would presumably include time to become apprised of the legal situation, to investigate the origin of the defective goods, and to acquire the assistance of legal counsel. However, the third party beneficiary—like a merchant or consumer buyer—should not be able to delay notice to the disadvantage of the seller without reason. A liberal construction of the period for giving notice would sufficiently protect the third party beneficiary without absolutely depriving the seller of the basic right to receive reasonably prompt notice.

### 3. Legislative Intent

The courts that have disregarded comment 5 to section 2-607 and decided that notice should not be required from third party beneficiaries have often raised the issue of legislative intent to further buttress their construction of section 2-607(3)(a).<sup>293</sup> These courts have reasoned that if the legislatures had intended to extend the requirement of notice of breach in accepted goods to third party beneficiaries, then they would have done so expressly when they adopted section 2-318 giving third party beneficiaries the right to sue for breach of warranty.<sup>294</sup> These courts reason that because the legislatures did not amend section 2-607(3)(a) to apply explicitly to third party beneficiaries, the legislatures must have intended not to require notice from third party beneficiaries.

In light of the general paucity of legislative history on the adoption of the Uniform Commercial Code or Article 2,<sup>295</sup> it is difficult to obtain an accurate indication of legislative intent. In fact, the courts that work along this path do

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of a donor with whom the third party no longer had contact, then perhaps the identity of some sellers in the distributive chain would be made difficult. But even in this case the injured party certainly had no difficulty identifying American Honda as a possible party defendant, because the motorcycle carried the brand name. *See id.*

292. According to comment 5 of § 2-607, "What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here . . . ." U.C.C. § 2-607 comment 5.

293. *See* *Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979); *Tomczuk*, 26 Conn. Supp. at 223, 217 A.2d at 73; *Frericks*, 278 Md. at 314-16, 363 A.2d at 465-66.

294. *See, e.g., Simmons v. Clemco Indus.*, 368 So. 2d 509, 514 (Ala. 1979) ("If the legislature intended to require warranty beneficiaries to give notice, then it is presumed the legislature would have included such a provision particularly in light of the other specific amendments [defining warranty liability for personal injury].").

295. Legislative history in individual states frequently is not available. When it is, the history

so only in the very sparse light that comes from the text of the Code sections as adopted.<sup>296</sup> Divining legislative intent on the application of section 2-607(3)(a) from the form of section 2-318 adopted is a very uncertain process. In *Cannon*<sup>297</sup> the Maryland Court of Special Appeals acknowledged the dubiousness of the approach, but pursued it nonetheless. The Maryland legislature had adopted the Uniform Commercial Code, including section 2-607, in 1964 but subsequently eliminated the requirement of privity in actions for breach of warranty in 1969.<sup>298</sup> The majority opinion observed that the action of the legislature in failing to expand the application of section 2-607(3)(a) while giving additional parties the right to pursue breach of warranty actions could raise three alternative inferences: (1) aware that the notice requirement applied only to buyer and immediate seller, the legislature intended no change; (2) aware of the statutory language, the legislature assumed that section 2-607(3)(a) would automatically be expanded to cover nonprivity consumers; or (3) the most likely alternative, it never thought about the problem.<sup>299</sup>

Little evidence is available to dispute the *Cannon* court's conclusion that the legislature probably did not consider the issues that were collateral to the expansion of warranty coverage to third party beneficiaries. To read the failure of a legislature to speak to an issue as an indication a rule of law was considered and rejected is unsound.<sup>300</sup> It would be reasonable to assume, however, that the legislature was more concerned with defining the class of persons to be given the benefit of warranty coverage under section 2-318 than addressing the peripheral, albeit important, issues raised by such extension. Justice Lowe concurred in the *Cannon* decision but disagreed with the majority's reasoning. The concurring opinion stated in part:

I do not agree with the moral rationale that either justice or "fair play" supports [a finding of legislative intent not to require notice to nonprivity sellers], nor can I imagine with the majority that the Legislature could have been aware of the problem and desired to make no change. In a society surviving on mass production, the removal of the privity shield exposed the financial stability of manufacturers by creating an entire new vista of suits by plaintiffs and a fruitful field for specialization in the legal professions. To think that the Legislature

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usually reflects only the nonuniform amendments. See J. WHITE & R. SUMMERS, *supra* note 6, introduction § 4, at 12.

296. None of the courts that use legislative intent to support the argument that the notice requirement should not be applied to third party beneficiaries offer citation to any actual legislative history. Cf. *Cannon*, 53 Md. App. at 119-20, 452 A.2d at 199 (Lowe, J., concurring) (using limited documentary history to support argument that legislative intent was uncertain at best).

297. See *supra* notes 236-39 and accompanying text.

298. *Cannon*, 53 Md. App. at 118, 452 A.2d at 198.

299. *Id.* The *Cannon* court was immediately concerned with a remote vendee, *id.*, but the sections cited and the reasoning applies equally to the third party beneficiary context.

300. "Legislative inaction is a weak reed upon which to lean in determining legislative intent." *Berry v. Branner*, 245 Or. 307, 311, 421 P.2d 996, 998 (1966). See generally *Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n*, 359 F.2d 318, 333 (5th Cir. 1966) ("Legislative silence is a Delphic divination"); H. Miles Foy III, *Some Reflections On Legislation, Adjudication And Implied Private Actions In The State And Federal Courts*, 71 CORNELL L. REV. 501, 521-22 (1986) (noting problems with the argument that legislative silence can be an indication of legislative intent).

would consciously effect such a revolutionary change and intentionally deprive fair warning, even to the exposed giants that a crippling blow may be struck, is insulting to the General Assembly. It is one thing to accuse it of lack of knowledge, forgivable in an era when it was beginning to emerge from an antiquated system. It is quite another to charge it with invoking procedural unfairness.

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Procedural fair play, like procedural due process, must be equally provided not only to the poor or individual consumers but to the rich, and to the corporate goliaths as well. . . . We have made manufacturers "equally" vulnerable by abolishing privity. They should be equally equipped to defend themselves fairly by reasonable forewarning.<sup>301</sup>

Justice Lowe's emphatic comments go beyond the circumstances of the case at hand to the more general and essential point that attributing legislative intent because of a failure to expressly address a question is more unreasonable than simply acknowledging the legislative oversight and then supplying a reasonable construction of the statute.

The Massachusetts legislature is one which has spoken directly to the issue. The legislators amended the adopted version of section 2-318 to provide specifically that notice from nonprivity parties was not required absent demonstrable prejudice to the seller being sued.<sup>302</sup> The Massachusetts Appeals Court has observed: "[The Massachusetts version of] section 2-318 is explicit that the burden is on the [seller] to prove prejudice in cases . . . in which there was no notice of any breach of warranty prior to the commencement of the action."<sup>303</sup>

Other than Massachusetts, the only states to address the question to some degree are Maine and South Carolina. The law in those two states effectively pre-empts the application of section 2-607(3)(a) in cases involving consumer personal injury.<sup>304</sup> The actions of these two states reflect a principal concern with a category of injury.<sup>305</sup> The modifications to the notice requirement do not distinguish between those parties with privity and those not in privity.

Noting the action of the Massachusetts legislature as the only state action that has specifically addressed the requirement of notice in nonprivity cases, one important observation and two conclusions can be drawn. The observation is that Massachusetts has not adopted section 402A of the Restatement (Second)

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301. *Id.* at 120-23, 452 A.2d at 200-01 (Lowe, J., concurring). Justice Lowe stated that he separately concurred for two reasons: "First to point out to the Legislature its obvious oversight in 1969 and secondly to remind the Court of Appeals . . . [that] it is constitutionally endowed with the authority to regulate the *procedure* of the judicial process to ensure fair play." *Id.* at 122, 452 A.2d at 200 (citations omitted).

302. MASS. ANN. LAWS ch. 106, § 2-318 (Law. Co-op. 1984); *see supra* note 243; *Henricks v. Coats Co.*, 17 Mass. App. Ct. 976, 458 N.E.2d 773, 775 (1984); *Cameo Curtains, Inc. v. Philip Carey Corp.*, 11 Mass. App. Ct. 423, 427, 416 N.E.2d 995, 998 (1981).

303. *Henricks v. Coats Co.*, 17 Mass. App. Ct. 976, 458 N.E.2d 773, 775 (1984).

304. *See* ME. REV. STAT. ANN. tit. 11, § 2-607 (1973); S.C. CODE ANN. § 36-2-607 (Law. Co-op. 1976); *supra* note 242 and accompanying text.

305. The Maine statute exempts application of § 2-607(3)(a) to "personal injury" cases, *see* ME. REV. STAT. ANN. tit. 11, § 2-607(7) (1973), and the South Carolina statute exempts "notice of injury to the person in the case of consumer goods," S.C. CODE ANN. § 36-2-607(3)(a) (Law. Co-op. 1976).

of Torts, which defines strict products liability.<sup>306</sup> Instead, the warranty provisions of Article 2 have been structured to cover personal injury cases.<sup>307</sup> In this respect Massachusetts law is rather unusual and provides only limited insight into the likely contemplations of legislative bodies in other states. Most other states have adopted some form of strict products liability in tort<sup>308</sup> in addition and as an alternative to Article 2 and section 2-318.<sup>309</sup>

Nonetheless, one can draw at least two conclusions based on the Massachusetts legislative conduct. First, the action taken by the Massachusetts legislature suggests that it perceived a need to act in an explicit manner to exempt nonprivity parties from the notice requirement. One could infer that in the absence of language speaking to the issue, the legislature believed that the statute and comments required notice. Based on this inference, if other legislatures had intended to exempt third party beneficiaries from the notice requirement, then they should have spoken up as the Massachusetts legislature did.

The second point to note about the Massachusetts legislation is that it does not completely exempt nonprivity parties, including third party beneficiaries, from the application of section 2-607(3)(a). Rather, third party beneficiaries are exempted from giving notice only when the failure to do so does not result in demonstrable prejudice to the seller. Needless to say, the prudent third party beneficiary will always want to provide reasonable notice rather than risk the possibility that the failure to do so might result in provable prejudice to the seller.

Ultimately, the Massachusetts statute means that although the seller will have the burden of proof on the issue of prejudice, he will have the benefit of the section 2-607(3)(a) requirement of notice of breach in accepted goods even in third party beneficiary cases. If the failure of the third party beneficiary to give notice results in prejudice to the seller, as determined by reference to the purposes of section 2-607(3)(a),<sup>310</sup> then the third party beneficiary will be barred from any remedy under Article 2. The Massachusetts legislation changes the mechanics and burden of proof, but effectively preserves the essence of section 2-607(3)(a): the seller will have the benefit of reasonable notice and will be protected from the harm flowing from a lack of notice of alleged breach. For the many other states that have not spoken directly to the issue, it would be too

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306. *Swartz v. General Motors Corp.*, 375 Mass. 628, 630-31, 378 N.E.2d 61, 63-64 (1978).

307. *Hayes v. Ariens Co.*, 391 Mass. 407, 412, 462 N.E.2d 273, 277 (1984); *Swartz v. General Motors Corp.*, 375 Mass. 628, 630, 378 N.E.2d 61, 63-64 (1978). The Massachusetts courts view the action for breach of warranty as sounding essentially in tort. *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353, 446 N.E.2d 103, 1039 (1983).

308. The count of states having adopted § 402A of the Restatement (Second) of Torts or a similar rule numbers more than 40. See V. COUNTRYMAN, A. KAUFMAN & Z. WISEMAN, *COMMERCIAL LAW CASES AND MATERIALS* 1030 (2d ed. 1982); Gaebler, *supra* note 217, at 594 n.5.

309. 3 R. ANDERSON, *supra* note 141, § 2-318:6.

310. See *supra* notes 45-48 and accompanying text. Massachusetts law—before the amendments to § 2-318 affected § 2-607(3)(a)—required consideration of the purposes in determining the adequacy of notice. See *Nugent v. Popular Mkts., Inc.*, 353 Mass. 45, 48-50, 228 N.E.2d 91, 93-94 (1967); *Ford v. Barnard, Sumner & Putnam Co.*, 1 Mass. App. Ct. 192, 194, 294 N.E.2d 467, 468 (1973). It follows that the purposes would be considered in determining the existence of prejudice from the lack of reasonable notice.

presumptuous to read into the legislative inaction an intent to rob the seller of his fundamental right to reasonable notice.

### CONCLUSION

The prospect of a seller becoming liable to a remote vendee or third party beneficiary for breach of contract has increased significantly through the widespread elimination of the requirement of privity to maintain an action for breach of contract. Although it is fundamentally sound that liability for injuries caused by defective goods should be placed on the seller, it is equally basic that the seller ought to have an adequate opportunity to defend and to minimize damages the defective goods may have caused. The requirement of notice of breach in accepted goods is intended to preserve these basic rights to the seller.

To the extent that legislatures and courts have found it appropriate to increase the number of parties to whom the manufacturer or seller may be liable, justice requires the seller at least to benefit from the normal defenses that can be fairly and reasonably applied in the nonprivity contexts. The section 2-607(3)(a) requirement of notice of breach in accepted goods is one defensive rule feasibly applicable to both the remote vendee and the third party beneficiary. Furthermore, the notice requirement serves legitimate purposes as effectively in nonprivity cases as in privity cases. The arguments against applying the notice requirement prove terribly flawed on close scrutiny.

Several judges have observed that the consumer now has the clear advantage in actions against sellers and manufacturers for injury in goods that prove defective. It is up to the courts, however, to impose two important limitations: the consumer advantage should not swing so far as to become unfair and, more specifically, an action brought under Article 2 of the Uniform Commercial Code should satisfy all the relevant requirements of the Code, not just selected provisions.

The concern of the courts for the consumer is well placed as long as it is reflected in a willingness to construe liberally the requirements of section 2-607(3)(a). The proper measure of liberality should allow the consumer both a generous period of time in which to give notice and a flexible standard for the sufficiency of notice, which should include the allowance of the timely initiation of a lawsuit to suffice as notice. Consumer interests, however, are overprotected when courts completely eliminate the requirement of notice of breach in accepted goods. Courts should not lose sight of the basic section 2-607(3)(a) objective of balancing the interests of the buyer or third party beneficiary in pursuing an action for breach in accepted goods of the seller with the interest having protection from the harm that would result if he closed the books on a transaction only to find it to be the subject of a lawsuit a long time thereafter. A liberal but proper construction of section 2-607(3)(a) will prevent it from becoming an overly technical "booby trap for the unwary consumer," but will protect against prejudice to the seller by ensuring notice of an alleged breach within a reasonable time after its discovery by either privity or nonprivity consumers.

A simple review of recent court decisions on these issues leads to the expect-

tation that courts will continue to exempt nonprivity parties from notice requirements, especially third party beneficiaries. The courts should, however, be receptive to arguments that underscore the inequality in exempting the notice requirement, as well as the lack of statutory foundation for the position.

In the absence of a correction within the courts on this issue, the legislatures should address specifically the question of notice and nonprivity parties. In addressing such questions, the legislatures should be reminded of the distinction between tort and contract causes of action. Recognizing the interests of all parties and the policies underlying the section 2-607(3)(a) notice rule, the legislatures should address directly the question whether good reason exists to excuse consumers from notifying a remote seller that a lawsuit for breach of contract may be forthcoming.



