

# A Unified Rationale for Section 2-607(3)(a) Notification

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### I. INTRODUCTION AND BRIEF HISTORY

An aggrieved buyer that fails to give its seller timely notification of breach, or that gives a timely but insufficient notification, suffers serious and sometimes catastrophic consequences under Article 2 of the Uniform Commercial Code (UCC or Code). On the serious end, a buyer

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entitled to reject must provide its seller with a timely notification<sup>1</sup> that makes it clear that the goods again belong to the seller,<sup>2</sup> with failure as to either timeliness or sufficiency resulting in acceptance rather than rejection.<sup>3</sup> Obvious policy rationales support both requirements. The timeliness requirement creates an incentive for a buyer to exercise its inspection rights quickly.<sup>4</sup> Prompt detection and reporting of a nonconformity is desirable because a cure can be effectuated more quickly, thereby mitigating the harm to both parties. If there is no cure, the seller can maximize the goods' resale value by recovering them quickly and, as nearly as practicable, in the same condition as when they were tendered. Regarding sufficiency, if a notification merely states that there is a problem, the seller could legitimately assume that the buyer intends to accept the goods and that the purpose of the notification is to preserve its right to recover monetary damages. This level of information will not suffice for a rejection:<sup>5</sup> The seller must be made aware that the buyer does not intend to keep the goods so that it can exercise its cure rights or recover the goods. A revocation of acceptance also requires a timely notification that advises the seller that the seller owns the goods,<sup>6</sup> and the underlying policies are the same as in cases of rejection.<sup>7</sup>

Although the consequences of an untimely or insufficient notification provided in connection with an attempted rejection or revocation of

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1. U.C.C. § 2-602(1) (2002). Except as otherwise stated, all references to Article 2 are to the 2002 Official Text, the version in effect immediately prior to the promulgation of the 2003 amendments. References to amended Article 2 are to the 2003 Official Text.

2. *Id.* § 2-401(4) (providing that rejection, whether rightful or wrongful, revests title in seller).

3. *Id.* § 2-606(1)(b) (providing that acceptance occurs upon buyer's failure to make effective rejection).

4. *See id.* § 2-602(1) cmt. 1.

5. *See, e.g.*, *Gen. Motors Corp. v. Acme Ref. Co.*, 513 F. Supp. 2d 906, 911 (E.D. Mich. 2007) (holding that an e-mail requesting a price adjustment is insufficient for effective rejection); *Midwest Generation, LLC v. Carbon Processing & Reclamation*, 445 F. Supp. 2d 928, 933–34 (N.D. Ill. 2006) (holding that complaining about the quality of goods is insufficient for effective rejection).

6. U.C.C. § 2-401(4) (2002) (providing that justifiable revocation of acceptance revests title in seller).

7. The requirement that notification be given within a reasonable time after the buyer discovers, or should have discovered, the breach limits the extent to which the buyer may continue to use the goods and the extent to which the goods depreciate in value before the seller recovers them. Regarding sufficiency, the seller must be advised that the buyer will not be keeping the goods so that it can take steps to recover them. *Id.* § 2-608 cmt. 5 (“More will generally be necessary than the mere notification of breach required under [UCC § 2-607(3)(a)].”). The cure rationale underlying the sufficiency requirement in cases of rejection does not apply, except for the few instances in which courts have read into the Code a postrevocation right of cure. *See, e.g.*, *Phoenix Color Corp. v. Krause Am., Inc.*, 25 F. App'x 133, 138–39 (4th Cir. 2001) (implying that a seller is entitled to cure following revocation).

acceptance are serious,<sup>8</sup> a buyer's failure to notify properly does not, with one exception applicable only to rejection,<sup>9</sup> leave it without recourse because it generally is entitled to a monetary-damages remedy available under section 2-714.<sup>10</sup> Even this remedy, however, may be lost by a failure to give a timely and sufficient notification. Section 2-607(3)(a) provides that "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>11</sup> This rule is a nuclear bomb that, if triggered, eradicates all remedies. One would anticipate that such a catastrophic result must be grounded in appropriate policies but, as we shall see, many of the rationales that have been advanced to support it are thoroughly unconvincing. Note at the outset that the policies underlying the notification requirements in cases of rejection and revocation of acceptance do not apply in this context because the buyer rather than the seller owns the goods and the seller does not have statutory cure rights.

Professor Richard Speidel, to whose memory this tribute issue is dedicated, sought through the Article 2 revision process to ameliorate the harsh effects of section 2-607(3)(a). After he resigned as Reporter in 1999 and the scope of the project was scaled back,<sup>12</sup> the solution he

8. As noted in the text accompanying note 3, a buyer's failure to effectively reject results in acceptance, and one of the consequences of acceptance is that the buyer must pay for the goods at the contract rate. U.C.C. §§ 2-607(1), 2-709(1)(a) (2002). Effective rejection or revocation of acceptance excuses the buyer from this payment obligation and the buyer, in addition, may recover any part of the price that has been paid. *Id.* § 2-711(1).

9. A buyer's failure to identify in its notification of rejection a particular defect that a reasonable inspection would have disclosed precludes it from relying on the defect for any remedial purpose if the seller could have cured the defect. *Id.* § 2-605(1). The same result applies for a comparable omission if both parties are merchants and after rejection the seller makes a written request for a full and complete statement of all the defects upon which the buyer intends to rely. *Id.* § 2-605(1)(b). Although harsh, the rationale for the rule is clear: It creates an incentive for a buyer receiving goods to inspect them thoroughly and to get all the problems out in the open quickly so they can be dealt with by cure or otherwise. Under amended Article 2, the effect of a failure to particularize is limited to loss of the right to rely on an unstated defect to justify rejection. *Id.* § 2-605(1) (amended 2003).

10. *Id.* § 2-607(2) (2002) (providing that, with an exception relating only to attempts to revoke acceptance notwithstanding knowledge of a nonconformity, acceptance does not of itself impair any other remedy for nonconformity).

11. *Id.* § 2-607(3)(a) (emphasis added). The requirement is reinforced in section 2-714(1), which conditions damages on compliance with the notification requirement.

12. Professor Speidel and Associate Reporter Linda Rusch resigned from the revision process in 1999 and the work continued, with a reduced charge, under a reconstituted drafting committee. The unfortunate events leading to the resignations are described in William H. Henning, *Amended Article 2: What Went Wrong?*, 47 DUQ. BUS. L.J. (forthcoming 2009).

drafted retained the support of the reconstituted drafting committee and was included among the amendments promulgated by the Code's sponsors in 2003. His solution captures the essence of the need for postacceptance notification and articulates a viable standard to satisfy that need.

Professor Speidel served as Project Director for the Study Group on Article 2 commissioned in 1987 by the Permanent Editorial Board for the Uniform Commercial Code (PEB). With regard to notification, the Study Group's report stated that section 2-607(3)(a) "operates on the assumption that notice is important to effect a cure, or to facilitate an effort to negotiate a settlement, or to gather and preserve evidence for possible litigation. All of these are laudable purposes."<sup>13</sup> However, the report noted two problems: Some courts had injected too much formalism, as by requiring that a notification specify that a claimed problem constitutes a breach; and by requiring notification of a breach that should have, but had not, been discovered, the provision could deprive a buyer of all remedies even though it lacked actual knowledge of the breach.<sup>14</sup> The report concluded as follows:

Literal interpretations of the notice requirement should be rejected. Either the text of § 2-607(3)(a) or the comments should be revised to require only that the notice inform the seller that problems have arisen or continue to exist with regard to the accepted goods. Also, the comments should clarify that the buyer has no obligation to notify for breaches of which it has no knowledge.<sup>15</sup>

The last draft of revised Article 2 authored by Professor Speidel retained the original rule that conditions remedies on notification within a reasonable time after the buyer discovers or should have discovered the breach, but it added the following sentence: "However, a failure to give timely notice bars the person required to notify the party claimed against from a remedy only to the extent that the party entitled to notice establishes that it was prejudiced by the failure."<sup>16</sup> The comments explained the effect of the sentence as follows:

The focus of requiring notice is to avoid bad faith assertions of breach, not to deprive a person acting in good faith of a remedy. In line with that philosophy, if the notice is untimely, the person who failed to give timely notice is not barred from obtaining a remedy for breach unless the party claimed against demonstrates

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13. PEB STUDY GROUP, UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 167 (1990). These and other policy rationales that have been advanced by courts and commentators are discussed *infra* Part II.

14. *Id.*

15. *Id.* at 168–69. A change in the comments could not have resolved the latter problem because the text of the Code requires notification of a breach that the buyer should have discovered.

16. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2, SALES § 2-707(C)(1) (Proposed Final Draft 1999).

the failure to timely notify resulted in prejudice to that party. For example, prejudice could be demonstrated if the delay in giving notice prevented the party claimed against from collecting evidence relevant to the breach. The party who is alleged to have breached the contract or warranty is ultimately protected from stale claims by the statute of limitations.<sup>17</sup>

The amendments to Article 2 that were finally promulgated in 2003 retain Professor Speidel's prejudice rule but unfortunately fail to retain the quoted language from his comments. Instead, the comments to the amendments explain the prejudice rule as follows:

A failure to give this notice to the seller bars the buyer from a remedy for breach of contract if the seller suffers prejudice due to the failure to notify. *See* Restatement (Second) of Contracts § 229, which provides for an excuse of a condition where the failure is not material and implementation would result in a disproportionate forfeiture.<sup>18</sup>

The premise of this Article is that the approach drafted by Professor Speidel as informed by both of the quoted comments is far superior to the original approach. The denial of any remedy to an aggrieved party because it stumbles with respect to some aspect of a notification is draconian, and section 2-607(3)(a) should not be retained in its present form. It is easy to see why Professor Speidel, who championed fairness in the substance and application of the law, was troubled with the provision.

Drafters, of course, must concern themselves with certainty as well as fairness, and these values are often in tension. The enhanced fairness of amended section 2-607(3)(a) is readily apparent; less apparent is that it also will result in greater predictability. This Article demonstrates how the focus on prejudice to the seller facilitates an appropriate analyses of the timeliness and sufficiency of a notification. The use of a flexible standard that denies remedies only to the extent of seller prejudice addresses the actual impact on the seller, as distinct from the hypothetical impacts considered important by so many courts.

Although the effort to modernize Article 2 has failed thus far in the state legislatures, most of what amended section 2-607(3)(a) would accomplish can be achieved in the courts. The courts, unfortunately, cannot go quite as far as the amended provision because the absence of the words "to the extent" in the original provision means that a notification failure must continue to result in the loss of all remedies. However, the

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17. *Id.* § 2-707 cmt. 5.

18. U.C.C. § 2-607 cmt. 4 (2004).

original provision's requirement that notification be given within a reasonable time and its silence as to the required contents give the courts a great deal of discretion, and they can do much to ameliorate its harsh effects by using only the prejudicial impact of any delay or lack of sufficiency as the basis for determining whether proper notification has been given. Under our suggested approach, a buyer would lose all remedial rights only if its notification failure significantly prejudiced an important interest of the seller. There is nothing novel here—many courts have stressed the prejudicial effect of a delay or lack of sufficiency in support of their conclusions<sup>19</sup>—but we would go even further than some of these courts and require that a seller establish significant prejudice to an important interest before a buyer is deprived of its remedies. Keeping a tight focus on prejudice is consistent with the language of the existing statute, consistent with the original comments properly understood, consistent with the work of Professor Speidel in seeking to revise the statute and comments, and consistent with the ant forfeiture approach of section 229 of the *Restatement (Second) of Contracts*.

## II. POLICIES PURPORTEDLY UNDERLYING THE NOTIFICATION REQUIREMENT

As noted above, proper application of section 2-607(3)(a) requires an assessment of the timeliness of the notification and the sufficiency of its contents. This assessment has been driven by multiple policies that purportedly underlie the notification requirement. The reliance by the courts on different policies to undergird their analysis has led to inconsistent results, creating a level of uncertainty that is intolerable in an area where the stakes are so high.<sup>20</sup> Some of the policies—investigation, settlement, and good faith—are compelling, but merely articulating one of these policies does not provide sufficient insight to permit a proper

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19. See, e.g., *Cole v. Keller Indus., Inc.*, 872 F. Supp. 1470, 1473 (E.D. Va. 1994), *vacated*, 132 F.3d 1044 (4th Cir. 1998) (finding disagreement between trial and appellate courts on the prejudicial impact of destructive testing by the plaintiff); *Fitl v. Streck*, 690 N.W.2d 605, 609 (Neb. 2005) (rejecting seller's argument that buyer's delay in giving notification prejudiced seller's ability to cure); *Wilson v. Tuxen*, 754 N.W.2d 220, 233 (Wis. Ct. App. 2008) (holding that a ten-month delay in reporting diseased cattle prejudiced seller's ability to replace cattle and thereby mitigate harm).

20. "With no clear and consistent set of policies to guide their discretion, the courts have reached inconsistent results on what a 'reasonable time' is." John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. § 2-607(3)(a)*, 73 CORNELL L. REV. 534, 543 (1988) (analyzing carefully each of the rationales that purportedly underlie the notification requirement). "The most vexatious and frequently litigated 2-607(3)(a) question is: what constitutes a 'reasonable time' within which the buyer 'should have discovered any breach' and have notified the seller?" JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 418 (5th ed. 2000).

assessment of the timeliness of a notification or the sufficiency of its contents. The remaining policies—cure, mitigation, and staleness—are either not compelling or are subsumed under one or more of the compelling policies. The discussion here explains the policies and demonstrates how a prejudice-based approach will produce results that are both fairer and more predictable.

## A. Compelling Policies

### 1. Investigation

Perhaps the most compelling policy rationale advanced in support of section 2-607(3)(a) is that notification alerts the seller to the fact that it might need to conduct an investigation.<sup>21</sup> If, as is usually the case, the problem relates to the quality of the goods rather than to the adequacy of the tender, the seller might want to examine the goods, test them, review its records concerning the transaction, interview witnesses, preserve evidence, and otherwise acquire the information it needs to formulate an appropriate response. After investigating, the seller might decide to increase testing on its remaining inventory, take corrective measures with respect to units still being produced, assert a claim against a third party, warn the buyer about further potential risks, seek a settlement with the buyer through offers to correct the problem or to provide compensation, take some other action, or adopt a combination of measures. If the seller concludes that the alleged problem does not exist or that the problem is not its responsibility, the investigation will prove helpful if it has to prepare for

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21. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (6th Cir. 1983) (stating that notification minimizes the possibility of prejudice to a seller); *E. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976) (stating that notification allows a seller to investigate “while the facts are fresh”); see also WHITE & SUMMERS, *supra* note 20; Barkley Clark, *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 UCC L.J. 105, 110–11 (1982); Debra L. Goetz et al., Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1318, 1323 (1987); Jerry J. Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 466–68 (1972); Harry G. Prince, *Overprotecting the Consumer? Section 2-607(3)(a) Notice of Breach in Nonprivacy Contexts*, 66 N.C. L. REV. 107, 116 (1987); Marvin Chavis, Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. FLA. L. REV. 520, 522 (1973); George Frank Hammond, Note, *Notification of Breach Under Uniform Commercial Code Section 2-607(3)(A): A Conflict, A Resolution*, 70 CORNELL L. REV. 525, 541 (1985); Patrick A. Milberger, Note, *Section 2-607(3)(a): Effective Notification of Breach Under the Uniform Commercial Code*, 44 U. PITT. L. REV. 733, 737 (1983).

litigation. The notification requirement should be applied in a way that protects the seller's legitimate interest in conducting an investigation.

Some courts have imposed forfeitures on buyers without considering the effect of the notification failure on the seller's investigation interest. For example, the court in *EPN-Delaval, S.A. v. Inter-Equip, Inc.*<sup>22</sup> barred the buyer's claim for damages because of what the court considered to be an untimely notification when the seller had delivered huge steel heads cast in the wrong shape. Because the shape could not have been changed after delivery, it is difficult to see how the delay could have adversely affected the seller's investigation interest. This observation does not mean that there might not have been prejudice—the delay might have caused the seller to lose a potential claim against a third party—but on the facts as stated, the result seems excessively harsh. In contrast, the trial and appellate courts in *Cole v. Keller Industries, Inc.* focused on the seller's investigation interest.<sup>23</sup> The plaintiff in *Cole* waited nearly four months to notify the seller about an allegedly defective third step on a ladder, but by that time the plaintiff's testing had destroyed part of the ladder and some of the critical rivets had been lost. Without a prejudicial effect caused by the plaintiff's testing or some other factor, an even longer delay should not have led to a forfeiture of the plaintiff's remedies.<sup>24</sup>

In some circumstances a buyer will have to notify its seller more than once in order to protect the seller's investigation interest. For example, a buyer's notification might lead the parties to agree that the seller should attempt a cure. If the buyer subsequently decides that the cure did not adequately resolve the problem, it should provide another notification so that the seller can initiate a further investigation and formulate an additional response. *Standard Alliance Industries, Inc. v. Black Clawson Co.*<sup>25</sup> is illustrative. The buyer initially notified the seller that the goods did not satisfy a performance warranty and the seller spent five months working on corrections. Although the parties disputed whether, at the end of its efforts, the seller knew that it had been unsuccessful, the court

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22. 542 F. Supp. 238 (S.D. Tex. 1982).

23. 872 F. Supp. 1470 (E.D. Va. 1994), *vacated*, 132 F.3d 1044 (4th Cir. 1998).

24. The appellate court vacated the district court's holding. *Id.* The plaintiff was an employee of the buyer and the appellate court held that a nonbuyer suffering personal injuries is not required to give a notification. With respect to the spoliation, the court indicated that the seller's experts had not been prejudiced in their ability to reach conclusions concerning the cause of the accident because they had sufficiently inspected and tested the ladder prior to the testing by the plaintiff.

25. 587 F.2d 813 (6th Cir. 1978).

concluded that the buyer had impaired the seller's subsequent investigation interest by not notifying it that the problems had continued.<sup>26</sup>

The potential connection between a buyer's notification and a seller's preparation for litigation has led to two distinct tests for sufficiency. The comments foster the division because courts and commentators favoring each test have been able to seize upon one of two sentences as support for their position. The lenient test is premised on the statement that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched."<sup>27</sup> For example, the court in *Olsen v. BBRG Massachusetts Restaurant, Inc.*<sup>28</sup> held that filling out an accident report at the restaurant after the customer fractured two teeth while biting down on a foreign object in a french fry constituted sufficient notification of a breach-of-warranty claim. Comparably, the buyers provided adequate notification of their breach-of-warranty claims in *Munch v. Sears Roebuck & Co.*<sup>29</sup> when they complained to the seller that they were having problems with the goods and requested that it repair them.

The strict test focuses on the statement in the comments that "[t]he notification which preserves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach."<sup>30</sup> For example, in *K & M Joint Venture v. Smith International, Inc.*<sup>31</sup> the Sixth Circuit Court of Appeals reversed the district court's determination that the buyer had given adequate notification, thereby overturning an award of three million dollars in damages. The buyer had notified the seller repeatedly about malfunctions in the machine, the seller's representative had inspected the machine at the job site, and the buyer had informed the seller that it would charge back the cost of repairs. However, the appellate court barred the buyer from

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26. See also *Indus. Fiberglass v. Jandt*, 361 N.W.2d 595, 599 (N.D. 1985) (involving a buyer who was denied a remedy because there was no notification concerning any defects other than the ones the seller corrected).

27. U.C.C. § 2-607 cmt. 4 (2002); see *WHITE & SUMMERS*, *supra* note 20, at 421–22; *Clark*, *supra* note 21, at 119–23; *Hammond*, *supra* note 21, at 530 n.32 (listing multiple case citations).

28. 2005 Mass. App. Div. 23 (Dist. Ct. 2005).

29. 2007 WL 2461660 (N.D. Ill. Aug. 27, 2007).

30. U.C.C. § 2-607 cmt. 4 (2002); see *E. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 976 (5th Cir. 1976) (rejecting the lenient standard and insisting that notification is required to indicate that the transaction is "claimed to involve a breach"); *Hammond*, *supra* note 21, at 534 n.51 (listing multiple case citations).

31. 669 F.2d 1106 (6th Cir. 1982).

any remedy because it never explicitly stated that it considered the seller to be in breach.

Proponents of the strict test apply reasoning that is far too legalistic.<sup>32</sup> Most buyers are not trained lawyers and should not be held to a lawyer's standards concerning terminology and conclusions.<sup>33</sup> If a buyer notifies a seller about a problem from which the seller can reasonably infer that it has not fulfilled all of its contractual obligations, the buyer should not additionally have to articulate the legal conclusion that the seller is in breach.<sup>34</sup> The seller is perfectly capable of inquiring into the cause of the buyer's dissatisfaction,<sup>35</sup> and imposing a complete forfeiture on the buyer for failing to communicate fully its level of concern is a grossly disproportionate response. A focus on the prejudice caused to the seller by the language chosen by the buyer supports application of the lenient test. If a seller acting reasonably interprets a buyer's language as indicating that it does not intend to pursue the matter further and the seller suffers prejudice, as by delaying an investigation until evidence of the cause of the problem is no longer available, a court would be justified in denying the buyer a remedy.

The seller's investigation interest cannot justify the notification requirement in certain circumstances. For example, several courts have

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32. The comments clearly debunk the more extreme approach taken by a few courts. U.C.C. § 2-607 cmt. 4 (2002) states, "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." *But see* Brookings Mun. Util., Inc. v. Amoco Chem. Co., 2000 DSD 28 ¶ 20, 103 F. Supp. 2d 1169, 1177 (holding that a buyer must warn a seller that it will face a claim for damages); Cotner v. Int'l Harvester Co., 545 S.W.2d 627, 630 (Ark. 1977) ("[The buyer] must, either directly or inferentially, inform the seller that the buyer demands damages upon an asserted claim of breach of warranty.").

33. *But cf.* U.C.C. § 2-201(3)(b) (2002). Most courts recognize that an admission for purposes of an exception to the statute of frauds does not require an admission that a contract had been concluded but rather an admission only of facts from which the legal conclusion can be drawn. *See, e.g.,* Guy v. Starwood Hotels & Resorts Worldwide, Inc., 58 U.C.C. Rep. Serv. 2d (CBC) 700, 704 (D.N.H. 2005).

34. *But see* Thomas G. Faria Corp. v. DaMa Jewelry Tech., Inc., 31 U.C.C. Rep. Serv. 2d (CBC) 115, 126 (D.R.I. 1996) (concluding that the buyer's return over a three-year period of a substantial quantity of defective goods did not indicate that it considered the seller to be in breach); S. Ill. Stone Co. v. Universal Eng'g, 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.").

35. The buyer's duty of good faith in enforcing the contract would obligate it to give an appropriate response to such an inquiry, especially in light of U.C.C. § 2-515(a) (2002), which provides that "[i]n furtherance of the adjustment of any claim or dispute (a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other."

held that a buyer must notify a seller about a late delivery.<sup>36</sup> Because the seller must know that it delivered late, little, if anything, could be gained by an investigation. In these and similar cases,<sup>37</sup> there is a strong statutory argument that the notification function is satisfied by the seller's knowledge,<sup>38</sup> and a court that requires an affirmative notification should address the interest to be served. In the ensuing section, the discussion of whether the commencement of litigation constitutes sufficient notification on settlement is relevant to this issue.

## 2. Settlement

A commonly stated advantage of notification is that it might lead to an exploration of settlement between the parties.<sup>39</sup> The comments indicate that a notification is sufficient if it “opens the way for normal settlement through negotiation.”<sup>40</sup> Even if this is a legitimate policy rationale for the notification requirement, some courts have pushed it too far. For example, the court in *T.J. Stevenson & Co. v. 81,193 Bags of Flour*<sup>41</sup> indicated that a buyer needs to encourage settlement in its notification. There is no support for this proposition in the Code, and imposing a burden on the buyer to encourage settlement through its notification

36. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (6th Cir. 1983); *E. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 971–73 (5th Cir. 1976). *Contra Jay V. Zimmerman Co. v. Gen. Mills, Inc.*, 327 F. Supp. 1198, 1202–03 (E.D. Mo. 1971). “The majority view, by an overwhelming margin, is that the notice rule applies to claims for late delivery.” Reitz, *supra* note 20, at 544 n.32.

37. See *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 66 U.C.C. Rep. Serv. 2d (CBC) 726, 731–42 (D.N.J. 2008) (surveying the law of several states regarding issue of whether actual notice, as opposed to knowledge, constitutes sufficient notification); *Eaton Corp. v. Magnavox Co.*, 581 F. Supp. 1514, 1530–32 (E.D. Mich. 1984) (denying remedies under the notification rule even though the seller knew when it delivered the goods that it had used the wrong component).

38. “A person ‘notifies’ or ‘gives’ a notice or notification to another person by taking such steps *as may be reasonably required* to inform the other person *in ordinary course*, whether or not the other person actually comes to know of it.” U.C.C. § 1-202(d) (2008) (emphasis added). “[A] person has ‘notice’ of a fact if the person: (1) *has actual knowledge of it*; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.” *Id.* § 1-202(a) (emphasis added).

39. For an assessment by one commentator that the prospects for settlement should be abandoned as a policy for the notification rule, see Reitz, *supra* note 20, at 550–52.

40. U.C.C. § 2-607 cmt. 4 (2002); see also Clark, *supra* note 21, at 110; Phillips, *supra* note 21, at 468–69; Prince, *supra* note 21, at 116; Chavis, *supra* note 21, at 524; Hammond, *supra* note 21, at 541; Milberger, *supra* note 21, at 736–37.

41. 629 F.2d 338, 360–61 (5th Cir. 1980).

could have the undesired effect of prompting a premature settlement before the buyer has secured any legal advice and learned of the potential waiver consequences concerning other possible claims.

To the extent that the settlement interest standing alone and not in conjunction with another interest—such as the investigation interest, which as we have seen can inform the seller with respect to settlement<sup>42</sup>—supports a notification requirement, timeliness should be measured in relation to the time at which a lawsuit is filed. In other words, a notification is provided within a reasonable time after the buyer discovers or should have discovered the breach if it arrives a sufficient amount of time ahead of the suit to permit normal negotiations to occur. Only by adopting this approach can a court measure a notification's prejudicial effect.

One of this Article's Authors would go further and argue that the filing of a lawsuit generally constitutes a notification that properly accommodates the seller's settlement interest because the filing does not preempt opportunities for settlement.<sup>43</sup> This Author notes that the cases that have touted the seller's settlement interest have not focused on the actual prejudicial impact of a notification failure but rather have referred simply to the alleged benefits of notification in the abstract. Professionals disagree among themselves on the psychological aspects of settlement, including whether the commencement of litigation promotes or hinders the likelihood of settlement.<sup>44</sup> Given the uncertainty, this Author concludes that precluding the buyer from all remedies is simply too harsh and that the question should be whether the failure to provide prelitigation notification caused an actual loss or diminishment of the seller's settlement opportunities. For example, a seller that would have settled for all of the buyer's damages but hired an attorney only because the buyer first commenced litigation would be prejudiced if it incurred

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42. See discussion *supra* Part II.A.1.

43. For example, in *Shooshanian v. Wagner*, 672 P.2d 455 (Alaska 1983), the court stated that:

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.

*Id.* at 462–63; see also *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1109–11 (S.D. Ind. 2001); *Solarz v. DaimlerChrysler Corp.*, 47 U.C.C. Rep. Serv. 2d (CBC) 970, 980–82 (Pa. Ct. Com. Pl. 2002) (holding that filing a complaint constituted notification of a breach of warranty claim).

44. Two authors refer to studies by psychologists and game theorists that hold differing assessments of the issue and note the numerous relevant variables. Reitz, *supra* note 20, at 551 nn.49–50; Hammond, *supra* note 21, at 546–47 nn.122–25.

substantial legal fees that it could have avoided with a prelitigation notice.<sup>45</sup>

This Article's other Author disagrees and would not permit a lawsuit to satisfy the notification requirement.<sup>46</sup> A competent buyer's attorney, concerned about possible prejudice, should send the seller a notification as soon as possible. Indeed, prudence will generally dictate that notification be provided even before the attorney is satisfied that filing suit is consistent with the obligations imposed by Rule 11 of the Federal Rules of Civil Procedure and its state counterparts. A notification from an attorney, in itself, conveys a seriousness of purpose and it is difficult to see how the immediate filing of a lawsuit would increase the prospects for settlement. Although the psychology of the situation is admittedly vague, the Author advocating notification is of the opinion that filing in some cases may impede settlement by causing the seller to incur attorney's fees, by causing the cost of settling to increase—even if only in the seller's perception—and by precipitating in the seller a negative emotional response. Because providing notification is prudent anyway and because the prejudice to the seller of not doing so may be real yet hard to prove and measure, this Author would conclusively presume that the seller has been prejudiced if the buyer files a lawsuit without first providing notification.

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45. Courts, however, should reject arguments based solely on abstract impairment. The claim for litigation expenses would not be justified if legal counsel defended the seller in the litigation without making a bona fide effort to settle. *Cf. Fitl v. Streck*, 690 N.W.2d 605, 608–09 (Neb. 2005) (holding that a seller could not base a claim of prejudice on impairment of negotiations because the seller never sought to negotiate).

46. *See, e.g., Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 510–13 (Alaska 1980); *Fleet Maint., Inc. v. Burke Energy Midwest Corp.*, 728 P.2d 408, 410 (Kan. Ct. App. 1986). Some courts have differentiated between claims for economic loss and claims for personal injury and have held that filing a lawsuit is insufficient notification only in the former cases. *See, e.g., Martin v. Home Depot U.S.A.*, 369 F. Supp. 2d 887, 893 (W.D. Tex. 2005) (holding that a consumer buyer's failure to give prelitigation notification barred claims for economic damages allegedly caused by breach of the express and implied warranties); *Hobbs v. Gen. Motors Corp.*, 134 F. Supp. 2d 1277, 1284–85 (M.D. Ala. 2001) (holding that filing a lawsuit is insufficient notification when making a claim for economic damages as opposed to a claim for personal injury); *Perona v. Volkswagen of Am., Inc.*, 27 U.C.C. Rep. Serv. 2d (CBC) 890 (Ill. App. Ct. 1995) (holding that filing a lawsuit is insufficient to meet the notice requirement unless personal injury is claimed), *vacated*, 678 N.E.2d 1048 (Ill. 1997). Although eliminating the notification requirement in cases of personal injury is understandable, the courts that have done so may not have fully considered the availability of strict products liability in tort as an alternative basis for imposing liability.

Even accepting settlement as an appropriate policy rationale, an approach that measures timeliness against the buyer's discovery of the breach or that requires more by way of sufficiency than a simple statement that a problem exists runs counter to the settlement objective. Section 2-607(3)(a) creates an incentive for sellers to challenge the timeliness and sufficiency of a buyer's notification by excessively rewarding success in pursuing that strategy—a classic case of moral hazard. If the seller's challenge succeeds, it bars the buyer from any remedy irrespective of the significance of the seller's breach.<sup>47</sup> Sellers likely would be more open to negotiated settlements, and the settlement amounts likely would be fairer, if the courts focused on the actual prejudice to the seller in dealing with the notification issue.

### 3. Good Faith

Good faith is yet another policy rationale that has been advanced in support of the notification requirement.<sup>48</sup> The comments even state that “the rule of requiring notification is designed to defeat commercial bad faith.”<sup>49</sup> Notification is but one facet of the Code's pervasive mandate that good faith be observed in the performance and enforcement of every contract or duty within its scope.<sup>50</sup> It defines “good faith” to mean “honesty in fact and the observance of reasonable commercial standards of fair dealing.”<sup>51</sup>

Although good faith indisputably applies to notification, it does not appear to have any specific content in that context. Most cases do not address good faith beyond citing the reference to it in the comments. The cases and commentators that go further have not developed much meaning as to what good faith requires in terms of the key issues of timeliness and sufficiency. One of the few cases to analyze the issue with care, and the case that several subsequent decisions purport to

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47. See *Armco Steel Corp.*, 611 P.2d at 512 (“[W]e believe the superior court erred in finding that the lack of prejudice to the seller excused [the buyer's] absolute failure to give notice.”).

48. WHITE & SUMMERS, *supra* note 20, at 418; Goetz et al., *supra* note 21, at 1317–18; Phillips, *supra* note 21, at 469; Hammond, *supra* note 21, at 540; Milberger, *supra* note 21, at 749.

49. U.C.C. § 2-607 cmt. 4 (2002).

50. *Id.* § 1-304 (2008).

51. *Id.* § 1-201(b)(20). In states that have not yet adopted revised Article 1 or have adopted it but retained the original definition of good faith, good faith means different things for merchants and nonmerchants. For nonmerchants it means “honesty in fact in the conduct or transaction concerned.” *Id.* § 1-201(19) (2000). For merchants it means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” *Id.* § 2-103(1)(b) (2002).

follow, is *Eastern Air Lines v. McDonnell Douglas Corp.*<sup>52</sup> The case concerned significant delivery delays under a series of contracts for ninety jets. The jets were scheduled for delivery over a four-year period at a time when the demands of the Vietnam War were affecting aircraft production. The district court, relying on a single letter, concluded that Eastern had given proper notification and granted it summary judgment. The Fifth Circuit Court of Appeals reversed because of the district court's "failure to recognize that the buyer's good faith is the governing criteria under section 2-607."<sup>53</sup> The appellate court noted that, particularly in an ongoing relationship, the buyer's conduct "taken as a whole, must constitute timely notification that the transaction is claimed to involve a breach."<sup>54</sup> In furtherance of its contextual analysis, the court detailed the multiple communications between the parties from the time they both became aware of scheduling shortfalls beginning in early 1966, until Eastern formally presented McDonnell Douglas with a claim for damages in mid-1969. Giving McDonnell Douglas the required benefit of every inference, the court identified how a jury *might* reasonably conclude that the notification was insufficient. First, even Eastern's most strongly worded communications could be construed more as an effort to push McDonnell Douglas into minimizing the war's impact on production rather than as an assertion of breach. Second, Eastern perhaps led McDonnell Douglas to believe that it had not breached for two reasons: (1) it did not contest the assertion that the war had caused the delays until it filed suit; and (2) it continued to negotiate new contracts and amend existing ones with McDonnell Douglas throughout the delays.<sup>55</sup> Finally, although contested by Eastern, McDonnell Douglas testified that Eastern gave assurances it would not seek damages for delays. Based on all the facts and particularly taking into consideration the alleged assurances that Eastern would not seek damages, the court concluded that "Eastern's conduct may well have violated the requirements of commercial good faith,"<sup>56</sup> and it remanded the issue for determination by a jury.<sup>57</sup> In its ruling, the court noted that the district court's record

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52. 532 F.2d 957 (5th Cir. 1976).

53. *Id.* at 977.

54. *Id.* at 978.

55. *Id.* at 978-79.

56. *Id.* at 979.

57. In a subsequent decision, the Fifth Circuit, in affirming a district court decision in favor of a buyer, noted that *Eastern Air Lines* had been tried to the court rather than being decided on a motion for summary judgment. *See* T.J. Stevenson & Co. v. 81,193

was devoid of any evidence concerning reasonable standards of fair dealing in the commercial aviation industry.

Subsequent decisions often draw upon *Eastern Air Lines*, but unfortunately, they do not exercise the same care in analysis. *K & M Joint Venture v. Smith International, Inc.*<sup>58</sup> is illustrative. The buyer of a tunnel-boring machine experienced multiple serious malfunctions from the beginning of a sewer construction project until the time the buyer finally removed the machine from the project and had it rebuilt completely. The buyer notified the seller repeatedly about the problems, had the seller inspect the machine, and indicated fairly early in the process that it would hold the seller responsible for the breakdowns. Allegedly applying the lessons of *Eastern Air Lines*, the majority in *K & M* concluded that the buyer's notification was neither timely nor sufficient because it did not specifically state that the seller had breached a warranty until it filed suit and because its course of conduct in paying the seller for replacement parts without protest was inconsistent with its earlier claim of seller responsibility. The majority thus read the determination in *Eastern Air Lines* that the buyer's continued contracting with the seller *might constitute* bad faith into a finding that such conduct *constitutes* bad faith. The dissent was much more perceptive, pointing out the need to take into consideration the buyer's reliance on the seller for parts and technical assistance with respect to a machine that was critical to its project and was not readily replaceable.<sup>59</sup> An overly strident position by the buyer might have adversely affected its prospects for meeting its contractual deadline on the sewer project.

Another tendency of courts that address good faith in the context of a buyer's notification is to equate good faith with other policies that purportedly underlie section 2-607(3)(a). The Fifth Circuit itself noted

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*Bags of Flour*, 629 F.2d 338, 364 (5th Cir. 1980). The court determined that the record supported the finding that the buyer's conduct had the effect of encouraging commercial good faith because the buyer had provided prompt notification about an insect infestation in delivered flour and had never deviated from its position that the tender was unacceptable.

58. 669 F.2d 1106 (6th Cir. 1982).

59. See also *P & F Construction Corp. v. Friend Lumber Corp. of Medford*, 575 N.E.2d 61 (Mass. App. Ct. 1991), in which the court, without any evidence concerning commercial practices with respect to measuring goods delivered to construction sites, concluded that the buyer should have discovered quarter-inch defects in delivered doors and notified the seller shortly after delivery, notwithstanding the fact that the doors had been delivered early and were a nuisance to have on the construction site. The court in *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977), did much better with industry practices when determining that the frequent complaints of the buyer, a coal broker, concerning the quality of the coal being delivered under ongoing contracts did not constitute adequate notification. The court noted evidence showing that coal brokers routinely complain about quality in the coal industry, and also showing that the broker's claims were undercut by its even more frequent praise of the seller's coal and repeated orders during the period when it was making its complaints.

this tendency in a decision subsequent to *Eastern Air Lines*.<sup>60</sup> The court observed that although other courts endorse the *Eastern Air Lines* analysis, they often define good faith in terms of such policies as investigation, settlement, cure, mitigation, and staleness.<sup>61</sup> In other words, these courts have stripped good faith of any meaning that is independent of the other policies.

The case law demonstrates that, in this context, the courts have not refined the concept of good faith much beyond recognizing that an assessment of good faith is highly dependent on the commercial context, the nature of the parties' contractual relationship, and the totality of their communications. The communications to be examined include those of both the seller and the buyer, and courts should be cognizant of the fact that the obligation of good faith applies equally to both parties.<sup>62</sup> Rather than using good faith as a surrogate for other policies or the lack of good faith as a freestanding basis for barring the buyer from all remedies, it makes more sense to use good faith as an analytic tool under a prejudice-based approach. If a court finds that a buyer has significantly prejudiced its seller's interests by a notification that is untimely or insufficient when considered in the context of their relationship, in light of all their communications, and in light of the standards of honesty in fact and conformity with reasonable commercial standards of fair dealing, then it is justified in barring the buyer from any remedy. As in other instances, amended section 2-607(3)(a) would provide additional flexibility by permitting courts to bar remedies only to the extent of the prejudice.

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60. *T.J. Stevenson & Co.*, 629 F.2d at 359–60.

61. *Id.* at 361 n.49 (criticizing the analysis in *Standard Alliance Industries v. Black Clawson Co.*, 587 F.2d 813, 826 (6th Cir. 1978)); *see also* *Besicorp Group, Inc. v. Thermo Electron Corp.*, 981 F. Supp. 86, 101 (N.D.N.Y. 1997) (citing the comment on good faith and indicating that “[t]he primary reason for requiring notice is to give the seller the opportunity to make adjustments or replacements, opportunities to minimize the buyer’s loss and reduce the seller’s own liability”).

62. Only a few courts have addressed a seller’s good faith obligations in this context. *See, e.g.*, *N. States Power Co. v. ITT Meyer Indus.*, 777 F.2d 405, 410 (8th Cir. 1985) (holding that notice was sufficient when a seller insisted that it had no responsibility and did not inform buyer of its internal concerns over liability, despite receiving from the buyer notification of the product’s catastrophic failure and a copy of a consultant’s report blaming the failure on defective design); *T.J. Stevenson & Co.*, 629 F.2d at 364 (finding that the seller acted much less reasonably than the buyer and noting in particular how the seller’s quick denial of insect infestation in its flour suggested a lack of investigation).

## B. Noncompelling Policies

### 1. Cure

Giving a seller an opportunity to cure is one of the most common rationales advanced for the notification requirement.<sup>63</sup> The rationale is curious because sellers do not have a statutory right to cure in the context of section 2-607(3)(a)<sup>64</sup> and a seller cannot bootstrap its way into additional cure rights through the notification responsibilities allocated to the buyer.

Even though Article 2 does not create applicable cure rights, a buyer and seller can agree that the seller may cure a defect at any time.<sup>65</sup> They can make the agreement in the original contract<sup>66</sup> or through a subsequent modification. In the context of section 2-607(3)(a), the agreement will be part of the settlement process. The seller's interest in avoiding further liability through cure is thus largely subsumed by the settlement rationale, and perhaps also the investigation rationale. If the seller is the least-cost cure provider, the mitigation rationale might also be implicated, although that rationale is generally not compelling. Other

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63. See, e.g., WHITE & SUMMERS, *supra* note 20; Clark, *supra* note 21, at 111; Goetz et al., *supra* note 21, at 1318; Prince, *supra* note 21; Chavis, *supra* note 21; Hammond, *supra* note 21; Milberger, *supra* note 21, at 749; Arlie R. Nogay, 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, 899 (1986); see also *Standard Alliance Indus.*, 587 F.2d at 826; *Hoffman's Double Bar Pine Nursery v. Fyke*, 663 P.2d 516, 518 (Colo. Ct. App. 1981); *Paulson v. Olson Implement Co.*, 319 N.W.2d 855, 862 (Wis. 1982).

64. The key provision on cure is U.C.C. § 2-508 (2002), which by its terms applies only to cases of rejection. Section 2-612(2) refers to cure as it relates to an installment of goods, but again the context is rejection. Section 2-607(3)(a) applies only if the goods have been accepted, and acceptance precludes rejection. A few courts have applied section 2-508(2) cure rights following revocation of acceptance. See *supra* note 7 and sources cited therein. An implicit prerovocation cure right applies under section 2-608(1)(a) if the buyer discovers a nonconformity in the goods but nevertheless accepts them on the reasonable assumption that the nonconformity will be cured. A failure of notification under section 2-607(3)(a) can hardly ever impair this implicit right to cure because the buyer's obligation of good faith will preclude it from revoking based on an uncured problem if the buyer has not notified the seller of the need for a cure. For a discussion of cure, see generally William H. Lawrence, *Cure in Contracts for the Sales of Goods: Looking Beyond Section 2-508*, 21 UCC L.J. 333 (1989).

65. See U.C.C. § 2-719(1)(a) (2002).

66. The predominant consensual cure agreement is the "repair or replace" clause, which if agreed to be exclusive becomes the buyer's sole remedy. *Id.* § 2-719(1)(a). Such a clause creates a cure right, but the buyer's other remedies are restored if the clause fails its essential purpose, such as if the seller either cannot or will not provide a timely cure. *Id.* § 2-719(2). A buyer's duty of good faith precludes it from attempting to force a failure of essential purpose by withholding notification of a problem, and by providing notification, it satisfies the requirements of section 2-607(3)(a).

than these specific contexts, which are discussed elsewhere in this Article,<sup>67</sup> there is no basis for advancing cure as a policy basis supporting the notification requirement.

## 2. Mitigation

Another rationale for the notification requirement that courts sometimes rely upon is mitigation of damages.<sup>68</sup> The idea is that timely and sufficient notification permits a seller to take reasonable steps to minimize the harm suffered by the buyer and thereby to minimize its exposure to damages. However, in most cases, notification will be irrelevant for this purpose, and in any event, the consequences of a buyer's failure to mitigate the harm is built into the Article 2 remedy provisions themselves.<sup>69</sup> Holding that a buyer failed to give proper notice on the basis of the mitigation rationale means that the buyer is precluded from all remedies even though the court could have simply limited the damages to those that the buyer could not have reasonably avoided.

The most obvious Code provision on mitigation—because it is the only explicit statement—is the limitation of a buyer's consequential damages to losses, “which could not reasonably be prevented by cover or otherwise.”<sup>70</sup> Thus, an aggrieved buyer cannot enhance its recovery of lost profits by delaying its notification to the seller after discovering that defective goods will have a negative impact on production.<sup>71</sup> Aside

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67. See *supra* Part II.A.2 (discussing the settlement rationale); Part II.A.1 (discussing the investigation rationale); *infra* Part II.B.2 (discussing the mitigation rationale).

68. See, e.g., *E. Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976) (stating that early notification allows a seller to minimize damages); *Voboril v. Namco Leisure World, Inc.*, 24 U.C.C. Rep. Serv. (CBC) 614, 615 (Conn. Super. Ct. 1978) (stating that delayed notification prevents a seller from minimizing damages).

69. U.C.C. § 2-715(2)(a) (2002).

70. *Id.* See, for example, *Dan J. Sheehan Co. v. Ceramic Technics, Ltd.*, 605 S.E.2d 375 (Ga. Ct. App. 2004), in which the buyer did not notify the seller that the tiles supplied were the incorrect size until four months after their receipt and installation. The court relied on the mitigation principle in denying the buyer a remedy because of the late notification. However, under section 2-715(2)(a), the buyer would have been precluded from recovering any avoidable consequential damages related to removal of the tile and reinstallation of the correct size. Mitigation would not have justified denial of damages calculated under section 2-714, meaning in this case that the difference in value between the tile if it had been as warranted and the tile as delivered.

71. Notification is also generally irrelevant with respect to consequential damages in the form of personal injury or property loss, which cannot be recovered unless they are proximately caused by a breach of warranty. U.C.C. § 2-715(2)(b) (2002). See, e.g.,

from incidental damages,<sup>72</sup> the other damages provision applicable to accepted goods is section 2-714(2), which measures damages for breach of warranty by the difference between the value of the goods if they had been as warranted and their actual value at the time and place of acceptance. In other words, the damages are calculated at a time before the buyer could possibly notify the seller, making delay in notification irrelevant to mitigation.

In a limited number of circumstances, timely notification to a seller might lead to a reduction in the harm suffered by the buyer. For example, even though a seller does not have a statutory right to cure in the context of section 2-607(3)(a), it might nevertheless be able to cure at the least cost to the buyer. Courts, however, have been reluctant to require a buyer to deal further with a breaching seller.<sup>73</sup> A seller might also be able to advise the buyer of a third party that can make repairs cheaply, or it might be able to instruct the buyer on a technique that will keep the goods functioning pending repair. It might even be able to warn the buyer of an impending threat of personal injury or property damage that the buyer otherwise would not have perceived.<sup>74</sup> Nevertheless, given that the chance that notification will result in mitigation is quite small and that courts routinely apply mitigation principles to preclude buyers from recovering damages that they could have avoided, mitigation does not provide a meaningful rationale for the notification requirement.

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Amcast Indus. Corp. v. Detrex, 779 F. Supp. 1519, 1541 (N.D. Ind. 1991) (holding that a buyer escalated the costs of mitigation by not taking precautions against contamination or requiring seller to do so), *aff'd in part, rev'd in part*, 2 F.3d 746 (7th Cir. 1993); Wal-Mart Stores, Inc. v. Wheeler, 586 S.E.2d 83, 84, 86–87 (Ga. Ct. App. 2003) (finding that a seller could not have reduced the damages after an injury occurred in a case in which a purchased bow release detached from the bow and struck the buyer in the mouth).

72. Incidental damages arise most often in cases of nondelivery or rejection, whereas U.C.C. § 2-607(3)(a) (2002) deals only with accepted goods. In cases of acceptance, buyers usually incur incidental damages—the cost of inspection, for example—before they discover or should have discovered the breach, and in any event, recovery is limited by a reasonableness requirement. *Id.* § 2-715(1).

73. For excellent discussions that argue for limited application of mitigation principles in this context, see Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Towards a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 992–93, 1005–11 (1983); Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 586 (1976).

74. See, for example, *Hapag-Lloyd, A.G. v. Marine Indemnity Insurance Co. of America*, 576 So.2d 1330 (Fla. Dist. Ct. App. 1991), in which the buyer discovered a wiring problem in a machine but continued to use it for an additional four weeks, at which time it exploded. The court denied recovery because notification to the seller after the explosion was too late. If the notification had occurred earlier, the seller could have warned the buyer of the danger. The same result could have been reached by finding that the harm was not the proximate result of the breach.

### 3. Staleness

Another purported rationale for requiring notification is the prevention of stale claims.<sup>75</sup> In addition to its relationship to the objective of giving the seller an opportunity to assess the facts while the evidence is fresh, which is subsumed by the investigation rationale, this rationale is tied to the principle of finality. Some courts and commentators refer to the objective of repose—allowing a seller that has not been informed of a breach for some time to close the books on the transaction without concern that it might later have to face a claim of liability.<sup>76</sup>

Preventing stale claims is the function of the statute of limitations and it is a mistake to inject it into the discussion of section 2-607(3)(a). Article 2 claims must be brought within four years of the date of accrual,<sup>77</sup> which in the case of warranties is ordinarily the date on which tender of delivery occurs.<sup>78</sup> If a seller is concerned about staleness, it can bargain for a shorter limitations period.<sup>79</sup> Using a buyer's failure of notification to cut off its rights before the limitations period runs effectively rewrites the statute of limitations.

In any event, the notification requirement cannot satisfy the objective of providing repose. Under section 2-607(3)(a), a buyer of goods does not have to provide notification until it discovers or should have discovered the breach, and until the limitations period runs, there is always the possibility that a latent defect will manifest itself. If the limitations period has not run, a seller cannot close its books on a transaction and achieve peace of mind merely because it has not yet heard about a problem.

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75. See *Brookings Mun. Util., Inc. v. Amoco Chem. Co.*, 2000 DSD 28 ¶ 17, 103 F. Supp. 2d 1169, 1176; *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 92 (Cal. 1974); *Clark*, *supra* note 21, at 111; *Prince*, *supra* note 21, at 115; *Hammond*, *supra* note 21.

76. See *WHITE & SUMMERS*, *supra* note 20, at 418–19 (referring to repose in this context as “mind balm”); *Prince*, *supra* note 21, at 115.

77. U.C.C. § 2-725(1) (2002).

78. *Id.* § 2-725(2). The cause of action for a warranty that explicitly extends to the future performance of the goods accrues when the buyer discovers or should have discovered the breach. *Id.*

79. The parties may in their original agreement reduce the limitations period to not less than one year. *Id.* § 2-725(1).

### III. CONCLUSION

The Authors have sought to demonstrate in this Article that the current section 2-607(3)(a) does not provide sufficient guidance to the courts and that many of the rationales routinely advanced in support of the notification requirement are inapt. Court decisions applying the section reveal a level of inconsistency that borders on, and perhaps crosses into, incoherence. Much is at stake here, and a court should not lightly deprive a buyer of the benefit of its bargain. As noted above, many courts that have precluded buyers from pursuing remedies have buttressed their conclusions by noting that a particular delay has prejudiced a seller's rights, and these courts are worthy of praise.<sup>80</sup> However, the Authors' preference is the approach of those courts that have made the search for prejudice the central focus of their analysis.<sup>81</sup> The Authors are especially critical of those courts that have decided that, as a matter of law, the passage of what seems like a long period of time constitutes an unreasonable delay without any reference to the effect of the delay on the seller.<sup>82</sup> The only rationale that could possibly justify such a result is the prevention of stale claims, and as many have shown, achieving that goal is exclusively the province of the statute of limitations.<sup>83</sup>

Although an enactment of the amended section 2-607(3)(a) is preferable because of the flexibility provided by its "to the extent" language, this may not occur anytime soon. Courts nevertheless should not be deterred as they are free to adopt a prejudice-based approach. This is an encouraging solution, thereby providing buyers and sellers with greater certainty and achieving fairer results.

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80. *See supra* Part II.A.1–2.

81. *See, e.g.*, *Wal-Mart Stores, Inc. v. Wheeler*, 586 S.E.2d 83, 86 (Ga. Ct. App. 2003) (holding that a consumer's twenty-four month delay in providing notification did not preclude remedies absent showing of prejudice by seller).

82. *See, e.g.*, *Joseph Brazier, Ltd. v. Specialty Bar Prods. Co.*, No. 06-cv-01416-WDM-KLM, 2008 WL 791942, at \*6 (D. Colo. Mar. 21, 2008) (holding an eight-month delay in providing notification that acceptance of blank steel shotgun barrels was revoked to be unreasonable as a matter of law); *Bako v. Crystal Cabinet Works, Inc.*, 44 U.C.C. Rep. Serv. 2d (CBC) 1048, 1054 (Ohio Ct. App. 2001) (deciding that homeowners who failed to notify stain supplier of warranty breach for almost seven months precluded from all remedies).

83. *See supra* Part II.B.3.