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NOTICE OF BREACH IN SALES AND STRICT TORT LIABILITY LAW: SHOULD THERE BE A DIFFERENCE?

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The theoretical differences between the law of sales and that of strict liability in tort are well known. Most noteworthy are variations in the doctrines of privity, disclaimer, limitation of remedies and notice of breach. Generally, privity is not required, disclaimers and limitations of remedies are ineffective and notice of breach is dispensed with in strict tort liability.[1] In sales law, on the other hand, privity of contract may be required, properly drawn disclaimers and limitations of remedies may be effective and timely notice of breach may be a condition to recovery.[2] In addition, a different statute of limitations may apply, and the scope of recovery by non-purchasing third parties may differ depending upon which body of law is being applied.[3]

Close similarities between these two areas of the law are also well established. Most notably, proof of negligence is not a prerequisite, and contributory negligence is generally not a bar to recovery under either theory.[4] These strikingly similar characteristics, seen against the backdrop of their inexplicable differences, strongly suggest that these two theories should be merged so that the right of nonpurchasing third parties

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1. RESTATEMENT (SECOND) OF TORTS, comment *m* to § 402A (1965) provides:

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act.

2. *See* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 16.04[3][a], 19.07 [1]-[2], 19.05 (1970) [hereinafter cited as FRUMER & FRIEDMAN].

3. Layman v. Keller Ladders, Inc., 224 Tenn. 396, 455 S.W.2d 594 (1970), presents a good statement of the policy reasons for applying different statutes of limitations to sales and strict tort claims. *Cf.* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), applying the warranty statute of limitations to a claim based on a theory of strict liability in tort. *See generally* FRUMER & FRIEDMAN, *supra* note 2, § 16A[5][g]. For a discussion of the scope of third-party recovery in strict tort and sales law, see Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970).

4. RESTATEMENT (SECOND) OF TORTS, comment *m* to § 402A (1965), recognizes the theoretical similarity between sales and strict tort law in that proof of negligence is not required under either theory. Comment *n* states that contributory negligence is not a bar to recovery in strict tort, and the same result has frequently been reached in sales law. *See* FRUMER & FRIEDMAN, *supra* note 2, § 16.01[3].

to recover does not turn upon the vagaries of pleading.[5] The thesis of this article is that the requirement of notice of breach in sales law serves beneficial policies. There is, therefore, no justifiable basis for dispensing with the notice requirement as a matter of law merely because an action is grounded upon a theory of tort liability rather than upon a theory of warranty.

SALES LAW AS A VEHICLE FOR THE RECOVERY OF ECONOMIC LOSS

Some courts have taken the approach that personal injury and property damage claims are peculiarly suitable for analysis under the strict liability doctrine, whereas economic loss should be treated under article two of the Uniform Commercial Code.[6] This line of demarcation, although superficially attractive, presents many complications. Not only is it often difficult to distinguish between property damage and economic loss, but it is equally perplexing to find a satisfactory policy justification for treating such types of damage differently.[7] It is unclear, for example, whether the concept of physical harm to property within the meaning of § 402A of the *Restatement (Second) of Torts* is intended to be restricted to situations of immediate physical damage.[8] If the harm must be immediate, then it is unclear why damage resulting from gradual deterioration should be treated differently. The doctrine of strict liability in tort, on the other hand, has not been limited to physical harm to person or property but has been extended in case of public misrepre-

5. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Products Cases*, 18 STAN. L. REV. 974 (1966) [hereinafter cited as Franklin], presents a thorough discussion of the problems inherent in maintaining separate theories of recovery. These problems are particularly acute where common law theories of strict tort conflict with statutory rules under the Code. *See* Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 453 (1969):

> Indeed, the whole trend beginning with [*Greenman v.*] *Yuba* [*Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962)] and section 402A makes beautiful sense if we assume that courts may treat statutes similarly to cases. But how can we square such an assumption with the tripartite system of separating legislative from judicial and executive powers that has been adopted by every American constitution?

See also Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 CASE W. RES. L. REV. 5 (1965) [hereinafter cited as Shanker].

6. Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), is the leading case espousing this view. See the discussion of the problem in Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).

7. The courts in Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), and Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970), rejected the *Seely* approach because they were unable to find a satisfactory basis for distinguishing between economic and other types of loss.

8. *See* Annot., 16 A.L.R.3d 683 (1967); Franklin, *supra* note 5, at 986-88.

sentation to allow recovery for pecuniary loss as well.[9] Apparently the attributes of sales law—such as notice, disclaimer, limitation of remedies and statute of limitations—are not intended to apply to such an action.[10]

The apparent difference between a strict liability action based upon public misrepresentation and an action based upon breach of express warranty under the Code is that in the first instance the misrepresentation is "public" while in the second it is "private." It is unclear why this difference should result in the application of an entirely different legal theory where, for example, there is a manufacturer's warranty given for the benefit of an unknown purchaser or purchasers. Such a warranty could be described as either public or private with equal accuracy.

Subsumed under the proposition that sales warranty law and strict liability have their own proper fields of applicability is the idea that sales law more properly applies to the commercial relations between the buyer and his immediate seller while an action in strict liability lies against any seller in the chain of distribution.[11] This distinction, however, does not withstand analysis. If an action in strict liability should more properly lie against a remote seller then, theoretically, such an action is less suitable against an immediate seller. No such distinction, however, has been made by the courts. Indeed § 2-318 of the Code recognizes the right of certain nonpurchasers to sue for breach of warranty while the comments to that section and others express neutrality regarding the common law expansion of warranty actions against remote sellers.[12] Whatever problems may inhere in dispensing with the privity requirement are in no way peculiar either to sales law or to strict tort liability.

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9. Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966), is a leading case allowing recovery against a remote manufacturer for loss of bargain and loss of use arising from public misrepresentation by the manufacturer. The theory of the case is based on RESTATEMENT (SECOND) OF TORTS § 552D (Council Draft No. 17, 1964).

10. RESTATEMENT (SECOND) OF TORTS comment *m* to § 402A (1965), clearly indicates that sales law restrictions regarding privity, limitation of remedies and notice of breach are not intended to apply to actions under § 402A. Comment *d* to § 402B states that the "difficulties attending the use of the word 'warranty' are the same as those involved under § 402A, and comment *m* under that section is equally applicable here so far as it is pertinent." Comment *a* to § 552D states:

> This Section parallels § 402B, which states the rule as to strict liability for physical harm to a user or consumer of the chattel, where the seller makes a misrepresentation to the public regarding its character or quality. This Section states the same rule, as to liability for pecuniary loss, caused to one who purchases the chattel in justifiable reliance on the misrepresentation. The Comments under § 402B are applicable here, so far as they are pertinent.

11. *See, e.g.*, Hargrove v. Newsome, —— Tenn. ——, 470 S.W.2d 348 (1971); FRUMER & FRIEDMAN, *supra* note 2 § 16.04[3][a].

12. *See* UNIFORM COMMERCIAL CODE § 2-313, Comment 2; § 2-318, Comment 3.

Another rationale for separate theories of liability is that each theory meets the need of a different type of plaintiff. It is argued that article two of the Code is designed primarily for merchants and only secondarily deals with problems peculiar to the nonmerchant consumer or user.[13] Strict liability, on the other hand, is basically concerned with the nonmerchant consumer or user. This explanation, however, is unsatisfactory since there is no discernible pattern for different treatment. The Code treats the merchant dealer specially in many instances and recognizes that different rules apply to the nonmerchant buyer and seller.[14] Moreover, there is no indication in the cases that recovery in strict liability is permitted only if the aggrieved plaintiff is classified as a nonmerchant user or consumer.

The Dichotomy in Historical and Rational Perspective

The more probable explanation for the differences between the law of sales warranty and that of strict tort liability turns on the fact that sales law is codified while the doctrine of strict tort liability has basically evolved by the case law. The development of sales law has to a large extent been frozen by codification, since courts in the exercise of judicial restraint are reluctant to ignore the intent of the legislature. Had sales law developed by common law decision rather than by codification, it is probable that the doctrine of strict tort liability would not have developed separate rules which frequently conflict with those of sales law.

Recognition of the historical reasons for the variations between strict liability and sales law does not, however, justify an irrational perpetuation of such differences. If the elimination of these distinctions requires changes in the tort theory of recovery, the courts are free to make the change. If the change should be made on the warranty side, it should be made by the legislature—unless it can be done within the bounds of reasonable statutory construction.

It is not persuasive to argue that sales and strict tort liability should be maintained as separate bodies of law in the field of products liability to give the plaintiff the benefit of that theory which is more useful to him. Nor does it clarify matters to debate whether strict liability has more characteristics of traditional tort law than of warranty law. A person should not be able to accomplish by one means what for good policy reasons is denied him by another means. Unless a sufficient policy

13. *See* text accompanying notes 69-71 *infra*.

14. *See, e.g.*, Uniform Commercial Code § 2-104, Comment 2; § 2-607, Comments 4-5; §§ 2-316(3)(c), 2-719(3).

reason can be found to justify the existence of separate means, that which is founded on better policy should control.

Because of the close similarities between the two bodies of law, this article is primarily concerned with a comparison of the law of notice in sales and strict tort liability. However, the considerations applicable to notice may apply as well to a products liability action in negligence. As discussed below, there is reason for concluding that the Uniform Commercial Code has made notice of breach a condition to recovery of damages resulting from the sale of defective goods regardless of the theory on which the claim is based. Moreover, the policies for requiring or excusing notice of breach in sales or strict liability in tort seem to apply with equal force to a products liability action based on negligence.

On the other hand, with the complexity of issues that are involved in any determination of timely notice, it is doubtful whether a court, as a matter of law, should bar a claim on the ground of absence of such notice except in the clearest circumstances. In addition, it is debatable whether absence of timely notice should normally be found, as a matter of law, to result in a directed verdict for the defendant where the plaintiff is a layman. Notice, although it serves laudable policies, is but one element in a products liability case. The probable absence of notice may not be sufficiently important to control the outcome of a case where there is any reasonable doubt of the plaintiff's justification for delay or failure to notify.

Scope of the Notice Requirement

In sales law notice of breach is a condition to the assertion of any remedy by the buyer against the seller.[15] In strict liability, on the other hand, there is a marked trend toward dispensing with the notice requirement, at least where personal injuries are involved. According to Frumer and Friedman, the "better view" is that notice is not required in a personal injury case.[16] Prosser states that while the notice requirement is "a sound commercial rule," it "becomes a booby-trap for the unwary" consumer who suffers personal injuries and seeks recovery against a remote seller since such a claimant is seldom "steeped in the business practice which justifies the rule."[17]

Apparently notice of breach of a sales contract was not generally

15. Uniform Commercial Code §§ 2-602(1) (to reject); 2-608(2) (to revoke acceptance); 2-607(3)(a) (to assert any other remedy for breach).

16. Frumer & Friedman, *supra* note 2, § 19.05[1].

17. W. Prosser, Handbook of the Law of Torts 655 (4th ed. 1971) [hereinafter cited as Prosser].

required by the early common law.[18] Moreover, the English Sale of Goods Act contained no notice provision comparable to § 49 of the Uniform Sales Act. This section is the predecessor of Code § 2-607(3)(a), which makes timely notice of breach a condition to the assertion of any remedy by the buyer against the seller after the goods have been accepted.[19]

As a general rule, notice of breach has not been required in tort actions based on a theory of negligence.[20] The Alabama Supreme Court has suggested that the absence of this development may be due to the fact that in a nonsales situation the alleged tortfeasor "or his servant or each was a participant in the happening or occurrence" so that he normally receives notice without any special action being taken by the injured party.[21] This is not usually the case in a sales situation, however, where the buyer and seller are separated when the damage occurs.

At least where a sale of goods is involved, the intent of the Uniform Commercial Code may be to require timely notice of breach as a condition to recovery regardless of the theory used by the buyer. Code § 2-607(3)(a) provides that failure to give such notice will bar the buyer from "any remedy." In *Nelson v. Boulay Brothers Co.*,[22] the Wisconsin Supreme Court disallowed a warranty claim under the Uniform Sales Act because of lack of timely notice but permitted the negligence claim to stand. It reserved decision, however, on the issue of whether the same result would be reached under the "any-remedy" bar of § 2-607(3)(a) of the Code, which was not in effect in Wisconsin when the cause of action arose.

Although the scope of article two of the Code is restricted to the sale of goods, it has been recognized that the notice provisions of that article may be extended by analogy to nonsales situations where the

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18. FRUMER & FRIEDMAN, *supra* note 2, § 19.05[1].

19. (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.

UNIFORM COMMERCIAL CODE § 2-607(3)(a).

20. James, *Products Liability*, 34 TEX. L. REV. 192, 197 (1955) [hereinafter cited as James]. There are exceptions to this rule, as for example where the action is against a municipal corporation for injuries sustained as a result of some condition maintained by the municipality. *See, e.g.*, TENN. CODE ANN. § 6-1003 (1971); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 634 (1955). Another example is illustrated by Coghlan v. White, 236 Mass. 165, 128 N.E. 33 (1920), dealing with a peculiar Massachusetts statute requiring notice of injury to the occupant of any premises on which the claimant is injured by a defective condition caused by snow or ice.

21. Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 103, 122 S.2d 591, 593 (1960).

22. 27 Wis. 2d 637, 135 N.W.2d 254 (1965).

policy of the Code is deemed to apply. Thus, the notice requirement was extended "as a matter of policy" to a claim for breach of a lease in *Boehck Construction Equipment Corp. v. H. Fuller & Sons, Inc.*,[23] and in *Caparelli v. Rolling Greens, Inc.*[24] a majority of the court apparently assumed that notice was required in a claim for breach of warranty regarding the habitability of a basement in a sale of realty. The notice requirement of the Code has also been held to apply to a warranty of performance accompanying a sale of goods.[25]

Relaxation of the notice requirement in a sales context has not always depended upon whether the claimant was suing on a theory of negligence or strict liability, as opposed to a theory of warranty. Indeed, one of the more confusing aspects of products liability law derives from the fact that the courts have not clearly distinguished between the theories of strict liability and warranty in determining the right of recovery.[26] The reason for this confusion is that the two theories are historically and conceptually intertwined. The Indiana Supreme Court, for example, held that notice of breach was not required under § 49 of the Uniform Sales Act where the buyer sought recovery for personal injuries.[27] Since § 70 of the Uniform Sales Act provided that nothing in the Act was intended to affect a buyer's right to recover special damages and since a buyer was not required to give notice of breach for personal injuries prior to passage of the Sales Act, the court reasoned that § 49, read in connection with § 70, indicated a legislative intent to retain the lack-of-notice rule as it existed prior to passage of the Act. Such a construction of § 70, however, has been considered strained and not in accord with the natural intent of the section,[28] and it has not been followed by other courts which have generally imposed the notice requirement under the Sales Act regardless of the kind of damages sought.

Similarly, the notice requirement of § 2-607(3)(a) of the Code has been neglected in personal injury actions against a seller with whom the claimant was not in privity on the ground that the provision was

23. 19 Wis. 2d 658, 121 N.W.2d 303 (1963).

24. 39 N.J. 585, 190 A.2d 369 (1963). Two justices were of the opinion that the notice requirement of the Sales Act was inapplicable to a sale of realty.

25. Klein v. American Luggage Works, Inc., 52 Del. 406, 158 A.2d 814 (1960). *See* Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 OHIO ST. L.J. 580 (1970). *See also* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

26. *See* Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).

27. Wright-Bachman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E.2d 713 (1956).

28. Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 122 N.W.2d 737 (1963).

intended to apply only to relations between buyers and sellers who have dealt with each other. For example, in *Tomczuk v. Chesire*[29] the court held that a § 2-318 third-party beneficiary was not required to give notice because he was not a "buyer" within the meaning of § 2-607(3)(a), and in *LaHue v. Coca-Cola Bottling, Inc.*[30] it was held that a buyer was not required to give notice of breach to a remote seller for the same reason.

Such reasoning, at least when applied to a § 2-318 third-party beneficiary, is contrary to the intent of the drafters of the Code as expressed in the comments to § 2-607. Indeed, the comments state that the notice requirement of § 2-607(3)(a) is intended to apply to a claim by a third-party beneficiary under § 2-318.[31] The intent of the Code, however, is less clear with regard to the duty of a buyer to give notice of breach in an action against a remote seller since the Code nowhere expressly provides for such an action. Nevertheless, it seems reasonable to conclude that the notice requirement should apply in that situation as well since the policy for requiring notice is applicable regardless of privity. Moreover, it seems anomalous to require notice on behalf of a nonpurchasing beneficiary under § 2-318 and to dispense with the requirement in other situations where the seller and buyer are not in privity.

It is clear that the notice requirement of § 2-607(3)(a) applies whenever the parties are in privity, regardless of the nature of damages being sought. Nevertheless, the comments to the *Restatement (Second) of Torts*, §§ 402A, 402B and 552D, suggest that no notice is required in strict liability regardless of both the nature of the injury and the presence of privity.[32] The overwhelming majority of cases that dispense

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29. 26 Conn. Supp. 219, 217 A.2d 71 (Super. Ct. 1965).

30. 50 Wash. 2d 645, 314 P.2d 421 (1957). *Cf.* Piercefield v. Remington Arms Co., Inc., 375 Mich. 85, 133 N.W.2d 129 (1965); Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

31. 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.

UNIFORM COMMERCIAL CODE § 2-607, Comment 5. The cross reference for comment 5 is to § 2-318, which is the third-party-beneficiary section in article two.

32. RESTATEMENT (SECOND) OF TORTS, comment *m* to § 402A (1965), states that the notice requirement is inapplicable to an action under that section; comment *d* to § 402B states that comment *m* to § 402A is also applicable to § 402B; and comment *a* to § 552D states that the comments to § 402B are applicable to §552D.

with the notice requirement, however, are restricted to situations where personal injuries are claimed.[33] Here the courts adopting a strict liability approach have decisively parted company with the Code by holding that no notice is required where personal injuries are involved even though the parties are in privity. In order better to evaluate this departure, the purpose of notice must be examined.

THE PURPOSES OF NOTICE

Professor Honnold suggests there is evidence to indicate the notice requirement "grew out of suspicion that buyers were using stale and unfounded claims of breach of warranty as a device to avoid (or scale down) price recovery."[34] It seems equally likely that the requirement arose as an extension of the notice requirement for rescission of contract.[35] Where the buyer intends to rescind, it is important that the seller receive notice of the buyer's intention at the earliest possible date in order to take action to minimize his damages.

The Uniform Commerical Code also imposes a duty upon the rescinding buyer to give the seller notice of defect as soon as it is reasonably discoverable. If the buyer has a right to reject the goods, a primary purpose of such notice is to enable the seller to exercise any

33. *See* FRUMER & FRIEDMAN, *supra* note 2, § 19.05[1]. In Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), where the court allowed recovery of economic loss by a buyer against a remote seller on a theory of strict tort liability, it indicated that the notice requirement would not apply; but the effect of this holding is undercut by the court's alternative finding that the remote seller was not prejudiced by delayed notice because the defect was undisputed and by the finding that the claimant gave timely notice to his immediate seller. *Id.* at 67-68, 207 A.2d at 313.

34. J. HONNOLD, CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING 218 (3d ed. 1968).

35. Some courts before adoption of the Uniform Sales Act held that the buyer's acceptance of defective goods without protest cut off all his remedies against the seller, while other courts held either that the effect of the acceptance turned on the buyer's intent or that the buyer might still have a remedy for damages although he had lost the remedy of rescission through acceptance; after adoption of the Sales Act, timely notice of breach became a condition precedent to the effective assertion of any remedy for breach of warranty. Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 190 A.2d 369 (1963); 3 S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 484a (rev. ed. 1948) [hereinafter cited as WILLISTON]. Cases under both the Sales Act and the Code treat untimely notice of rescission as having the same effect as untimely notice of breach. *See* Ingle v. Marked Tree Equip. Co., 244 Ark. 1166, 428 S.W.2d 286 (1968); Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964); Gilpin v Colt Co., 7 Tenn. App. 630 (1928). The Code policies favoring cure and prompt disposal of the goods by the seller in a rescission situation are not applicable where the buyer is only seeking damages, and therefore the same promptness of notice would arguably not be needed in a claim for damages as in a claim for rescission. However, while comment 4 to Code § 2-607 recognizes that the requirements as to content of notice are less rigorous where only damages are claimed, it does not indicate that the requirements of timeliness are any less stringent.

right of cure that he may have under § 2-508.[36] Code § 2-605 specifically implements this right by providing that the rejecting buyer must enumerate the defects on which he is relying in order to enable the seller to effect cure.[37] If the buyer is not reasonably able to discover a defect until after he has accepted the goods, he may revoke his acceptance provided he does so before the goods substantially change in condition as the result of nondefect causes and provided he gives notice of defect to the seller as soon as reasonably possible.[38] Arguably, in a revocation situation the Code does not confer a right of cure on the seller.[39] Notice in a revocation situation, therefore, does not serve the same purpose as it does in the case of rejection—unless the seller reserves by contract a right of cure after acceptance. In any event, the seller may need timely notice of revocation of acceptance in order to minimize his damages by disposing of the goods.[40]

Whether the buyer is rejecting, revoking acceptance or claiming damages for breach, the notice requirements of the Code also serve to protect the seller's interest in inspecting the goods so that he may determine the nature of the alleged defect. Code § 2-515 supports this purpose by providing that either party may inspect, test and sample goods in the hands of the other in furtherance of the adjustment of any claim or dispute.[41]

The importance of the seller's interest in inspection is graphically illustrated by *Owen v. Sears, Roebuck & Co.*[42] In *Owen* the buyer

36. UNIFORM COMMERCIAL CODE § 2-508(1) permits the seller to cure upon rejection if the time for performance has not yet expired; § 2-508(2) permits him to cure after the time for tender or delivery has expired if he had "reasonable grounds to believe" that the goods as tendered would be acceptable.

37. Where the rejecting buyer fails to state "a particular defect which is ascertainable by reasonable inspection," such failure will preclude him from relying on that defect either "to justify rejection or to establish breach" if it is shown that the seller could have cured the defect had it been reasonably stated.

38. UNIFORM COMMERCIAL CODE § 2-608(2).

39. *See* Phillips, *Revocation of Acceptance and the Consumer Buyer*, 1970 COM. L.J. 354, 357-58.

40. The duty to dispose of rejected goods rests on the seller except in the special situations enumerated in § 2-603(1). *See* Campbell v. Pollock, 101 R.I. 223, 230-31, 221 A.2d 615, 618-19 (1966).

41. UNIFORM COMMERCIAL CODE § 2-515, comment 2, states that this section is not intended to conflict with the right of the seller or of the buyer to resell rejected goods and that any apparent conflict "is to be resolved by requiring prompt action by the parties." If the buyer intends to dispose of defective goods, it would seem that "prompt action" would require him to notify the seller of breach prior to such sale in order to preserve the seller's right of inspection under this section. Where he is reselling as a rejecting or revoking buyer in order to realize his lien under § 2-711(3), he must give notice in accordance with the requirements of § 2-706(3)-(4).

42. 273 F.2d 140 (9th Cir. 1959).

claimed damages for personal injuries which resulted from being burned by a shirt which he purchased from the defendant. The shirt allegedly caught fire because the cloth was defectively flammable. The buyer waited approximately two years after the date of injury before bringing suit and gave no notice of breach during the interim between the injury and the filing of the action. The appellate court sustained the trial court's direction of a verdict in favor of the defendant on grounds that the claim was barred by an unreasonable delay in giving notice. The defendant argued successfully that if it had been advised shortly after the accident of the kind of shirt involved, it could have identified the lot from which the shirt came and "could have tested similar shirts in the lot for inflammable characteristics."[43]

The *Owen* case illustrates how the seller's interest in inspection may extend beyond the actual goods involved in the dispute. The plaintiff's shirt was allegedly destroyed by the fire "except for the collar, and that was afterwards disposed of."[44] Nevertheless, the court found that the seller had a legitimate interest in inspecting goods of the same lot for purposes of ascertaining its liability or defense. It is inappropriate, therefore, to conclude that the inspection purpose of the notice requirement is necessarily rendered inapplicable merely because the goods are destroyed.

An analogous problem is raised by *Pritchard v. Liggett & Myers Tobacco Co.*[45] In *Pritchard* the plaintiff sought recovery for injuries resulting from lung cancer allegedly contracted from smoking cigarettes manufactured by the defendant. The plaintiff did not give notice of the injury for approximately ten months after he first became ill. The court held that plaintiff's claim was not barred by such delay since there was "no allegation or intimation that defendant has suffered any prejudice by not receiving notice sooner or in a different and more comprehensive form."[46]

Timely inspection would have served no real purpose in ascertaining whether the cigarettes were defective. The issue was whether a causal relationship between cigarette smoking and lung cancer existed, not whether these two events had actually occurred. Whenever an issue of defectiveness is thus abstractly posed, its resolution will turn on scientific or expert data, as the court suggests,[47] and not upon inspection of the

43. *Id.* at 143.
44. *Id.*
45. 295 F.2d 292 (3d Cir. 1961).
46. *Id.* at 299.
47. Besides the fact that the plaintiff was "a layman inexperienced in the scientific

particular goods or of a particular lot of goods.

Closely related to the inspection purpose is that of investigation. Investigation is broader than inspection since it includes such activities of the seller as talking to witnesses and examining its own files to determine if there is any record of a transaction. It is not as easy to dispose of the investigation purpose of notice on grounds of lack of prejudice because of the difficulty in determining by hindsight what a timely investigation would have revealed.

This problem is illustrated by *Columbia Axle Co. v. American Automobile Insurance Co.*[48] The intermediate seller of an axle assembly unit, through its insurer as subrogee, sued its seller for damages incurred by an ultimate purchaser as the result of an alleged defect in the unit. The court found that the plaintiff inexcusably failed to give the defendant notice of the claimed breach until approximately six months after the ultimate buyer had notified the plaintiff of his injury and of his intent to claim damages. The court, therefore, held the plaintiff's notice to be unreasonably late as a matter of law. The plaintiff offered to furnish defendant with the names and addresses of witnesses in the buyer's suit against it, together with the results of metallurgical tests conducted in plaintiff's own laboratory. The court stated that while the results of such investigations were important, such an offer of evidence did not eliminate the prejudice that the defendant suffered as a result of the delayed notice. In reaching this result the court apparently concluded that it is more profitable to investigate new tracks than old ones and that there is more assurance in investigating one's own tracks than someone else's.

Timely notice also serves the purpose of settlement. The Code and the cases recognize the importance of notice for this purpose since an early complaint may result in settlement of the dispute before it hardens with the passage of time and the change of conditions.[49] In addition, early notice may enable the seller to minimize his damages by negotiating settlements with third parties and by suggesting ways to prevent further damage.[50]

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complications involved here," the court noted that these complications "took many weeks of preparation and trial to unravel." *Id.* at 299.

48. 63 F.2d 206 (6th Cir. 1933).

49. 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.
UNIFORM COMMERCIAL CODE § 2-607(3)(a), Comment 4.

50. Texas Motorcoaches, Inc. v. A.C.F. Motors Co., 154 F.2d 91 (3d Cir. 1946); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 438 S.W.2d 717 (1969).
Settlement agreements are highly favored in the law and will be upheld when-

Encouraging compromise is one of the most laudable goals of the law. Indeed, much of the sales article of the Code is directed toward furthering this goal.[51] Compromise is not always an unmixed blessing, however. Whenever parties are in an unequal position, as is frequently the case when the claimant is a lay consumer and the seller is a merchant or large manufacturer, the danger of imposition is always present.

Absent a fraudulent settlement, which can be set aside,[52] it may be argued that there need be no concern over the possibility that a claimant may obtain less by settlement than he might have obtained by litigation. The difference in amount may well be eaten up by the expenses and delay of litigation. Such an argument, however, assumes that fraudulent settlements are readily identifiable and easily set aside. The opposite assumption is probably more frequently correct.

Nevertheless, unless there is a substantial indication that the policy served by the notice requirement is more harmful than useful in this context, the presumption should lie in favor of its usefulness because of the desirability of compromise as a general goal of the law. Even if it were shown that there is a substantial problem of imposition through settlement in products liability cases, the solution would not necessarily be to dispense with the notice requirement since this solution eliminates the good as well as the bad that results from the mandate. The more reasonable approach might be to make fraudulent settlements more easily voidable and to increase the sanction for obtaining such a settlement.

Still another recurring rationale for the notice requirement is that it tends to prevent stale claims.[53] This rationale implies more than the policy of repose since it also encompasses knowing waiver, trumped-up claims, bad faith concealment and destruction of evidence. Much of the difficulty in implementing this policy of the notice requirement, however,

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ever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits.

D. H. Overmyer Co. v. Loflin, 440 F.2d 1213, 1215 (5th Cir. 1971).

51. Two of the most notable provisions of article two that encourage compromise are §§ 2-508 (cure) and 2-609 (right to assurance on prospective failure of performance). The various notice provisions, §§ 2-602(1) and 2-605(1) (rejection), 2-607(3) and (5) (notice of breach and vouching-in), 2-608(2) (revocation of acceptance) and 2-706(3) and (4) (resale) serve this purpose. *See also* UNIFORM COMMERCIAL CODE §§ 1-107 (written waiver of breach without consideration); 2-614 (substituted performance); 2-615 (excuse). The general obligation of good faith imposed by § 1-203 should require the parties upon breach to negotiate cooperatively and to minimize damages.

52. 6 A. CORBIN, CORBIN ON CONTRACTS § 1292 (1962).

53. Texas Motorcoaches, Inc. v. A.C.F. Motors Co., 154 F.2d 91, 94-95 (3rd Cir. 1946); Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 103, 122 So. 2d 591, 593 (1960); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 467, 438 S.W.2d 717, 720 (1969); Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 235, 122 N.W.2d 737, 740 (1963).

relates to the problem of determining when a defect should have become apparent. This determination cannot always be based on the date of injury, for in many instances there is also a question of when the claimant should reasonably have associated the injury with a defect in the goods.

The problem is aptly illustrated by *Murphy v. Gilchrist Co.*,[54] where the plaintiff based his cause of action on a rash which he received from wearing pajamas purchased from the defendant. The court held that the claim was barred as a matter of law because of the plaintiff's unreasonable delay in giving notice. The facts established that notice of breach was given 40 days after the rash began, 34 days after the claimant consulted a doctor about the rash and 27 days after the doctor advised the claimant that the rash was attributable to a "local" rather than to a blood condition. The court seemed undoubtedly to have been influenced by the plaintiff's own testimony that "from the beginning" he thought the rash was caused by the pajamas.[55] This case stands in sharp contrast to *Davidson v. Wee*,[56] where the court held that a delay of approximately two months in giving notice of injury was not untimely as a matter of law where the plaintiff was required to seek medical advice to determine the nature and extent of his injury.

The Case Against Notice

Professor James suggests that in personal injury cases the notice requirement "may prove a trap to the unway victim who will generally not be steeped in the 'business practice' which justifies the rule." He therefore concludes that there is "much to be said" for the New York rule which limits the requirement to actions for business loss.[57] Dean Prosser picks up this "business practice" rationale in his handbook on torts and elaborates on its restrictions by arguing that "as applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary."[58]

There is no basis, however, for concluding that the usefulness of the notice requirement applies only to suits involving claims for pecuniary

54. 310 Mass. 635, 39 N.E.2d 427 (1942).
55. *Id.* at 636, 39 N.E.2d at 428.
56. 93 Ariz. 191, 379 P.2d 744 (1963).
57. James, *Products Liability*, *supra* note 20, at 197.
58. Prosser, *supra* note 17, at 655. James' "business-practice" rationale and Prosser's "booby-trap" phrase were picked up by the court in the much cited case of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 61, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1962), and have been widely applied subsequently by other courts in dispensing with the notice requirement.

loss. The foregoing discussion has hopefully demonstrated that the notice requirement serves several purposes in any action for breach involving the sale of goods—though the degree of usefulness may be difficult to measure and may differ with each case.[59] Criticism of the notice requirement, therefore, must be directed not to its lack of usefulness but rather to its oppressiveness on the claimant. In determining this oppressiveness, there are three recurrent factors that can be isolated in the criticism: the nature of the injury, the absence of privity and the lack of knowledgeableness on the part of the claimant.

THE NATURE OF THE INJURY

The primary distinction that personal injury claims may possess, for purposes of determining the propriety of requiring notice of breach, is that the claimant may be incapacitated by the injury and, therefore, unable to give early notice. The cases consistently recognize such incapacity as a valid excuse for delayed notice.[60]

Questions inevitably arise at the outer borders of the concept of capacity, as where the claimant is deceased, is a minor or where an agency relationship exists between an incapacitated claimant and another who knows of the claim but is not incapacitated. If the claimant dies before he can be expected to give notice, the duty to give notice presumably devolves upon his executor or administrator. The issue is less clear, however, in the case of an incompetent minor.[61] And although the

59. UNIFORM COMMERCIAL CODE § 2-607, Comment 4, states that the notice requirement of § 2-607(3)(a) is "designed to defeat commercial bad faith." It is, nevertheless, clear from this and the succeeding comment that the notice requirement is intended to apply to consumer claims for personal injuries. The term "commercial" in comment 4 may perhaps be used in its generic sense as referring merely to sales. Alternatively, since the immediately preceding discussion in comment 4 deals with the stricter standard for notice applicable to the "merchant buyer," the term may be used here to imply that the primary (although not the only) purpose of the notice requirement is to prevent price chiseling of the sort described by Professor Honnold. The "commercial bad faith" referred to in comment 4 must be compared with the statement in comment 5 that even the consumer claiming damages for personal injury under § 2-318 "can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation."

60. *See, e.g.,* Bonker v. Ingersoll Products Corp., 132 F. Supp. 5 (D. Mass. 1955); Whitfield v. Jessup, 31 Cal. 2d 826, 193 P.2d 1 (1948); Downey v. Mahoney, 25 Mass. App. 196 (1962).

61. In Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), the court indicated its unwillingness to bar a minor plaintiff's claim on account of her parents' delay in giving notice of breach: "The law peculiarly favors minors, and delay on the part of her parents or others could not be used to her prejudice." *Id.* at 83. *See also* RESTATEMENT (SECOND) OF TORTS § 488(1) (1965):

> A child who suffers physical harm is not barred from recovery by the negligence of his parent, either in the parent's custody of the child or otherwise.

agency concept has been used to overcome problems of privity,[62] it may be questionable to reverse the process by imposing a duty on the claimant's agent to give notice on behalf of his principal since the agent may not have the same interests in asserting the claim as does the principal.[63]

Conversely, however, it seems clear that notice from whatever source should satisfy the requirement provided the notice is otherwise sufficient.[64] There is no particular value in requiring the claimant himself to give notice as long as the seller is alerted to the claim so that he can take whatever measures he would normally take upon receiving such information.

In most instances the amount of damages claimed from personal injuries is probably substantially greater than the value of the allegedly defective product that caused the injuries. It would not seem to follow, however, that the consumer claiming personal injuries is any less likely to give notice of breach because of the relative or absolute smallness of the product's value. Even though the injured consumer may have no motivation to recover the value of the product, he is motivated to recover for his personal injuries. He may be expected to complain because he feels unjustly injured and wants redress rather than because of the nature of the injury suffered.

Absence of Privity

Prosser argues that "at least until he has had legal advice it will not occur to [the injured consumer] to give notice to one with whom he has had no dealings."[65] Presumably this criticism would apply with equal force if the consumer suffers personal injuries, physical damage to property or pecuniary loss.

Absence of privity may take two forms. One involves a claim by a buyer against a remote seller of the product while the other involves a claim by a nonpurchasing user, consumer or bystander against any seller in the distributive chain. The situations are similar in that in

62. *See, e.g.*, Pendarvis v. General Motors Corp., 6 UCC Rep. Serv. 457 (N.Y. Sup. Ct. 1969), holding that the husband of a wife-purchaser may sue the seller for injuries either as a beneficiary under Code § 2-318 or because the wife purchased the allegedly defective product as agent for her husband as undisclosed principal.

63. *But see* Owen v. Sears, Roebuck & Co., 273 F.2d 140 (9th Cir. 1959), where the court in holding plaintiff's claim barred by lack of timely notice was obviously impressed by the fact that plaintiff's wife was an employee at defendant's store when the injury occurred.

64. In Bonker v. Ingersoll Products Corp., 132 F. Supp. 5 (D. Mass. 1955), one of the grounds for holding that the plaintiff had met the notice requirement was that the plaintiff's mother notified the defendant store of the alleged breach immediately after the plaintiff was allegedly injured by the defendant's product.

65. Prosser, *supra* note 17, at 655.

neither instance has the claimant dealt with the seller personally, but the problem of notice presented by each situation may differ.

There is very little discussion in the case law regarding the duty of a buyer to give notice of breach to a remote seller as a condition precedent to his right to sue that seller. In *Santor v. A & M Karagheusian, Inc.*,[66] the court indicated that timely notice to the immediate seller is sufficient to enable a buyer to sue a remote seller. In *San Antonio v. Warwick Club Ginger Ale Co.*,[67] on the other hand, the court dismissed a claim against an immediate seller for lack of timely notice and failed to consider whether the buyer's earlier notice to the remote manufacturer was sufficient against the immediate seller.

It is perhaps more reasonable to treat notice to an immediate seller as sufficient against a remote seller than vice-versa, in view of the immediacy of relation that exists in the one instance but not in the other. It is also probably in accord with human nature to expect the injured purchaser to give notice of breach to his immediate seller. The buyer normally looks to that seller for repairs or other adjustment. If he has not yet paid the full purchase price, the purchaser may expect a reduction in his cost because of the breach. Even where such factors are absent, an ownership interest in the buyer still exists which may be sufficient to justify an expectation that he will complain to the seller with whom he has dealt. Such psychological motivations, however, may be absent as between a buyer and a remote seller.

Nevertheless, a special situation exists whenever the buyer relies upon express warranties or public advertisements from a remote seller as the basis for his claim. In this situation the buyer admits both knowledge of the seller's identity and either that he relied upon such representations or that they formed a part of the basis of his bargain in the purchase of the goods. It seems reasonable in such a situation to expect the buyer to give notice of the breach to one whose representations induced him to buy, particularly where the incorrectness of those representations forms the basis of the claim for breach. If the reasonableness of requiring notice to a remote seller turns upon whether the buyer could fairly be expected to know that seller's identity, the problem is resolved in most cases by the fact that the name of the remote seller is contained either on the product itself or on the container of the product. In addition, the immediate seller should generally be able to furnish the remote seller's name on request.

66. 44 N.J. 52, 207 A.2d 305 (1965).
67. 104 R.I. 700, 248 A.2d 778 (1968).

A rule that notice to the immediate seller should be deemed sufficient to enable the buyer to sue a remote seller might rest on the assumption that the immediate seller could be expected to notify his own supplier.[68] This assumption may not always prove sound, however. If the immediate seller fails to notify the remote seller, the latter would be prejudiced by his remote status vis-à-vis the claimant. An action by the remote seller against his own buyer for damages resulting from failure to give him notice of the breach could be an inadequate remedy since in many instances the remote seller would be unable to prove that such delayed notice was a substantial cause of his liability.

In many situations the propriety of requiring the buyer to give notice to a remote seller may turn upon the buyer's knowledgeableness, the presence or absence of warranties and advertisements by the remote seller or upon other factors indicating whether the buyer could reasonably be expected to give such notice. In any event, half a loaf is better than none. Absence of privity is certainly no excuse for lack of notice where privity exists and, therefore, this excuse should not be used as a justification for dispensing with the notice requirement in most personal injury claims.

The problems inherent in requiring notice of breach by the nonpurchasing claimant are substantially the same as those involved in requiring the purchaser to give notice to a remote seller. The basic difference is that the nonpurchaser lacks any ownership interest in the goods. How much the absence of an ownership interest should affect a determination of the reasonableness of requiring prompt notice of breach will depend on the facts of the particular case. There are many nonpurchasing claimants, such as members of the purchaser's immediate family, whose interest in the goods may be substantially identical with that of the purchaser himself. To the extent that the reasonableness of the notice requirement is deemed to turn upon such factors as the knowledgeableness of the claimant and the ease of determining the seller's identity, absence of an ownership interest should not be controlling.

Lack of Knowledgeableness on the Part of the Claimant

Probably the main criticism of the notice requirement goes to the claimant's assumed lack of knowledgeableness. He is the "lay consumer," who is unversed in the complicated ways of commercial law and accordingly should not be expected to conform to those ways. This argument,

68. *Cf.* the "vouching-in" procedure of Uniform Commercial Code § 2-607(5)(a). This procedure, however, is not a substitute for the notice requirement of § 2-607(3)(a).

of course, has no peculiar application to personal injury claims. Such an argument does have substantial appeal, particularly at a time when consumer interests are the focus of a belated but justified public concern. The appeal, however, runs the risk both of overstatement and of disregarding the countervailing interests that justify the notice requirement.

The lay consumer's lack of knowledgeableness relates only to the degree of such knowledgeableness based on the particular facts of each case and, therefore, does not indicate that notice should be dispensed with as a matter of law whenever personal injuries are involved or privity is absent. As the Alabama Supreme Court has said in *Smith v. Pizitz of Bessemer, Inc.*:[69]

> [I]t may well be that the retail purchaser, the victim of personal injury, is too unlearned in the ways of commerce to be held to the same standards as the experienced merchant. If so, this consideration properly goes, in our opinion, to the question of what is a reasonable time for notice to be given on the facts of the particular case.[70]

The comments to the Uniform Commercial Code apparently agree with this conclusion since they recognize that a more relaxed standard of what constitutes a "reasonable time" for notice is applicable to the lay consumer.[71]

Allowing a "lack of knowledge" defense leaves open the possibility that any claimant who can make the slightest pretense of being a "lay consumer" may plead lack of knowledge of his duty to give timely notice. But such a plea can be balanced against all the facts of the particular case and need not be taken at face value where the circumstances point to a contrary conclusion. Products liability is a relatively new and rapidly changing field of the law. It is entirely conceivable that in a case like *Pritchard* the claimant might not recognize his cause

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69. 271 Ala. 101, 122 So. 2d 591 (1960).

70. *Id.* at 103, 122 So. 2d at 593.

71. UNIFORM COMMERCIAL CODE § 2-607, Comment 4, provides in pertinent 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.

Comment 5 to the same section, dealing with the duty of the § 2-318 beneficiary to give notice, states:

> 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.

of action until he consults a lawyer. But such claims are probably atypical of the majority of products liability suits in which a potential claimant would normally suspect defectiveness when damage occurs.

Moreover, one should not discount the power of the law as an educational device. If notice is required in sales cases, people will become aware of the requirement. How widespread this awareness will become depends upon the effort made to educate the public. It is helpful if man's proclivities accord with his education. The primary consideration, however, is to determine that the educational goal is desirable. Once this determination is made, other problems should be classified not as objections to the goal but as difficulties to be met in the educational process.

The extent to which the claimant may reasonably be expected to give notice of breach is directly related to the degree of specificity required of such notice. It has been stated that notice of breach must fairly advise the seller of the alleged defect, must refer to the particular sale so far as is practicable and must "assert, directly or by reasonable inference, 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."[72]

A substantial portion of the litigation on the issue of sufficiency of notice concerns the question of what constitutes an assertion "directly or by reasonable inference" that the buyer is claiming a violation of his legal rights.[73] *Wojciuk v. United States Rubber Co.*[74] is fairly illustrative of the problem. In that case the claimant suffered injuries as the result of an accident which occurred when a new tire blew out while the plaintiff was driving on vacation. On the day of the accident the buyer called his seller and said: "Herb, what kind of tires did you sell me? . . . We had a blowout and a terrible accident resulted from it."[75] The Wisconsin

72. Nashua River Paper Co. v. Lindsay, 249 Mass. 365, 370, 144 N.E. 224, 225 (1924). In Nugent v. Popular Markets, Inc., 353 Mass. 45, 228 N.E.2d 91 (1967), the court held that notice is sufficient if it includes the claimant's name and address, the nature of the injury and claimant's intent to claim damages.

73. *See* FRUMER & FRIEDMAN, *supra* note 2, § 19.05[2]; cases cited in Annot., 53 A.L.R.2d 270 (1957). *Compare* Arata v. Tonegato, 152 Cal. App. 837, 314 P.2d 130 (1957) (oral complaint and exhibit of rash to seller held insufficient notice); Idzykowski v. Jordan Marsh Co., 279 Mass. 163, 166, 181 N.E. 172, 173 (1932) (telling seller how product injured buyer's hands "so other people would be careful" held insufficient) *with* McAnulty v. Lema, 200 Cal. App. 2d 126, 19 Cal. Rptr. 72 (1962) (whether buyer's generalized expressions of discontent to the seller constituted sufficient notice of breach held to be a question for the jury); Clarizo v. Spada Distrib. Co., 231 Ore. 516, 373 P.2d 689 (1962) (buyer's flat rejection of seller's offer to reduce price of goods claimed to be defective held to be sufficient notice of breach).

74. 19 Wis. 2d 224, 122 N.W.2d 737 (1963).

75. *Id.* at 235, 120 N.W.2d at 53 (1963).

Supreme Court initially held that the notice was insufficient as a matter of law since it failed to apprise the seller that the buyer was asserting a legal claim for damages. The court then reversed itself on rehearing, holding that the issue of sufficiency presented a question for the fact finder.

The lay consumer can hardly be expected to assert his claim in legal terms, nor can he necessarily be expected to assert that he even thinks he has a legal claim against the seller. The comments to § 2-607 of the Code state that the purpose of notice is only "to let the seller know that the transaction is still troublesome and must be watched."[76] All that is essentially needed of the claimant is that he complain and not that he threaten suit. In many instances the nature of the defect may not be manifest to the claimant when he does complain, and in such a situation the most that can reasonably be expected of him is a statement that the product is troublesome.[77] It seems inappropriate to expect the claimant both to voice his dissatisfaction at the earliest possible date and to assert his rights at that time as fully as he might normally do after the nature of the defect has become manifest. The main objective of notice is to let the seller know that the buyer is experiencing trouble with the product. Once such notice has been given, the obligation to obtain further information may then reasonably be placed on the seller.

Proof of Notice

Where proof of notice is required, the consensus is that the burden both of pleading and of proving timely notice or excuse for its absence rests on the claimant.[78] However, the Federal Rules of Civil Procedure, which are substantially followed in many states, place the burden on the defendant to plead laches as an affirmative defense.[79] Failure to give timely notice arguably constitutes laches within the meaning of these

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76. Uniform Commercial Code § 2-607, Comment 4.

77. *Compare* Mack Trucks, Inc. v. Sunde, 19 Wis. 2d 129, 119 N.W.2d 321 (1963) (seller's knowledge that buyer was having trouble with the goods and was trying to have them repaired held insufficient to constitute notice of breach) *with* Lewis v. Mobil Corp., 8 UCC Rep. Serv. 625 (8th Cir. 1971) (seller's knowledge that buyer was having trouble with the goods held sufficient to satisfy notice requirement).

78. Owen v. Sears, Roebuck & Co., 273 F.2d 140 (9th Cir. 1959); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 438 S.W.2d 717 (1969); Avant Garde, Inc. v. Armtex, Inc., 4 UCC Rep. Serv. 949 (N.Y. Sup. Ct. 1967); Holowka v. York Farm Bureau Co-Op. Ass'n, 2 UCC Rep Serv. 445 (Pa. C.P. 1963).

79. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . laches . . . ." Fed. R. Civ. P. 8(c).

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occcurrence shall be made specifically and with particularity.

Fed. R. Civ. P. 9(c).

rules.[80] Laches, however, is normally treated as an equitable defense while proof of notice, when required, is often held to be a question for the jury. But even if the burden of pleading laches rests on the defendant, it does not follow that the burden of proof should also be placed upon him.[81] The policy which dictates that the burden of proof be placed on the party more likely to have knowledge of the facts would suggest that this burden be placed on the claimant.

Some cases indicate that the question of notice does not present an issue for the jury if there is no indication that the seller was prejudiced by lack of notice.[82] Such an approach seems questionable, since proof of prejudice may often be impossible. There may be no way of showing that the seller would have been benefited by early investigation and efforts toward settlement. In addition, establishing that the buyer was free of bad faith or waiver of his rights in not giving early notice may be impossible. In view of the nature of the policies that favor giving notice, prejudice should be assumed and the burden of persuasion as to timeliness of notice or as to excuse for its absence should rest on the claimant throughout the case.

The rubric for establishing whether the issue of notice presents a question of law or of fact is the same as that generally applied—whether reasonable men could differ as to the proper inferences to be drawn from the facts taken in the light most favorable to the claimant.[83] Many cases resolve the issue of notice against the claimant as a matter of law. Perhaps such treatment of the issue is the real "booby-trap for the unwary." The considerations are far too complicated to justify such treatment, at least where the lay consumer is involved. Where excuse for failure to give notice rests solely on the assertion of the lay claimant that he was unaware of his duty in this regard, the fact finder must still determine the complicated issue of whether such an assertion is bona fide.

Notice, though it may well be a desideratum in sales cases, frequently constitutes a relatively minor element in the total context of a case. Many other factors must be weighed along with notice. Thus, if the

80. Failure to give timely notice of breach under the Uniform Sales Act was described as giving rise to a defense of "laches" in Kull v. General Motors Co., 311 Pa. 580, 166 A. 562 (1933).

81. C. McCORMICK, EVIDENCE 673 (1954); James, *Burdens of Proof*, 47 VA. L. REV. 51, 59-60 (1961).

82. *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 299 (3d Cir. 1961); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 67-68, 207 A.2d 305, 313 (1965). *See also* Shanker, *supra* note 5.

83. Columbia Axle Co. v. American Auto. Ins. Co., 63 F.2d 206, 208 (6th Cir. 1933); San Antonio v. Warwick Club Ginger Ale Co., 104 R.I. 700, 708, 248 A.2d 778, 782 (1968); WILLISTON, *supra* note 35, § 484a.

claimant is asserting a trumped-up claim, it will normally take many factors other than an inadequately explained failure to give notice to establish this fact. Moreover, where proof of liability is otherwise strong, the quantum of evidence necessary to establish timely notice or excuse for its absence should be correspondingly diminished.

Courts seemingly tend to resolve issues as a matter of law in those contexts where they are not in sympathy with the policy of the law. Lack of sympathy should hardly obtain, however, where the issue is the timeliness or sufficiency of notice or the adequacy of excuse for not giving notice. Such issues, when viewed in the overall context of the case, seem more akin to contributory negligence, which is generally left to the jury.[84] It seems inappropriate for the courts to exclude all evidence on the issue of notice. If there is any issue that a jury can be expected to handle effectively, it is the issue of bad faith or fraud. Even where evidence of bad faith is absent, the jury should be entitled to weigh the issue of notice as a defense similar to laches. It hardly seems reasonable to exclude such evidence because of the possibility that the jury may give it either a greater or a lesser weight than it deserves. Once it is conceded that the notice issue is relevant, evidence on the issue should be admitted so that it can be weighed with all the other relevant facts and circumstances in the case.

CONCLUSION

The current trend toward dispensing with the notice requirement in products liability cases is probably attributable to disaffection with the "niceties of sales law."[85] But the realities of sales practice indicate that the notice requirement serves useful purposes and is not unreasonably burdensome in any single category of cases. The most appealing cases for consistently dispensing with the requirement involve claims against a seller with whom the claimant is not in privity. But even then the claimant may know the remote seller's identity, and, therefore, it may be reasonable to expect him to give notice. Lack of prejudice from failure to give notice should not be assumed, since such an assumption under-

84. F. HARPER & F. JAMES, TORTS 1207 (1956); PROSSER, *supra* note 17, at 418. Although Code § 2-607(3)(a) states that the buyer "must" give notice within a reasonable time after breach is or should have been discovered, the standard for determining reasonableness is quite flexible. "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." UNIFORM COMMERCIAL CODE § 1-204(2).

85. *Cf.* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962): "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."

estimates the beneficial policies served by the notice requirement. Moreover, to dispense completely with the notice requirement runs afoul of the statutory intent expressed in Code § 2-607(3)(a).

On the other hand, a directed verdict against the lay claimant for failure to give timely notice or to offer adequate excuse for such failure should be uncommon. The unsophisticated claimant may not know that he is expected to give notice of breach. Determination of such a claimant's bona fides should normally be left to the fact finder.