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Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. 2-607 (3)(a)

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AGAINST NOTICE: A PROPOSAL TO RESTRICT THE NOTICE OF CLAIMS RULE IN U.C.C. § 2-607(3)(a)

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Under section 2-607(3)(a) of the Uniform Commercial Code, a buyer who has accepted goods loses all remedy for a breach with respect to the goods if the buyer does not give the seller notice "within a reasonable time after he discovers or should have discovered [the] breach."[1] The rule appears fair in that it requires the buyer to give notice only within a "reasonable" time. The penalty the rule imposes on the buyer that fails to act "reasonably," however, is harsh: the loss of all remedies even though the seller has in fact breached.[2]

The rule is not an ancient feature of our law of sales. Professor Samuel Williston introduced the rule into our law in section 49 of his 1906 draft of the Uniform Sales Act,[3] in part drawing his inspira-

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1 U.C.C. § 2-607(3)(a) (1977) provides in full:

> (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 . . .

2 Appellate courts have applied the notice rule to overturn large verdicts for buyers. *See, e.g.*, K & M Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106 (6th Cir. 1982) (reversing trial judge's verdict of $1.5 million); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978) (reversing $0.5 million jury verdict), *cert. denied*, 441 U.S. 923 (1979); Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (reversing $24.5 million jury verdict). Under the version of the notice rule advocated in this Article, reversal on the basis of the notice rule would not have been proper at least in the latter two cases and even in *K & M* the buyer should have been able to recover some of its damages. *See infra* notes 32, 101 & 104.

3 Section 49 of the Uniform Sales Act stated in relevant part:

> But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time

tion from a provision in the German Commercial Code.[4] The common law still does not recognize such a rule,[5] and the rule does not

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after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

UNIF. SALES ACT § 49 (1906), *reprinted in* S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 484, at 846 (1909).

4 Section 377 of the German Commercial Code (the *Handelsgesetzbuch* or HGB) provides as follows:

(1) If the sale is for both parties a commercial transaction, the buyer must, insofar as it can be done in accordance with orderly business procedures, inspect the goods immediately after delivery by the seller and if a defect is apparent, immediately bring the defect to the notice of the seller.

(2) If the buyer fails to give notice, the goods are deemed to be approved unless a defect is involved which could not have been discovered by inspection.

(3) If such a defect is later discovered, the notice must be given immediately after the discovery; otherwise the goods are deemed to be approved also in respect to this defect.

(4) Timely sending of the notice suffices to preserve the buyer's rights.

(5) If the seller concealed the defect in bad faith, he cannot rely on these provisions.

HGB § 377 (1897) (author's translation). This provision has remained unchanged since the adoption of the Code in 1897. P. RAISCH, GESCHICHTLICHE VORAUSSETZUNGEN, DOGMATISCHE GRUNDLAGEN UND SINNWANDLUNG DES HANDELSRECHTS 288 (1965).

Professor Williston cited this provision of the German Commercial Code but did not quote it in his treatise. *See* S. WILLISTON, *supra* note 3, § 494, at 864 n.73. In drafting his own version of the notice rule, Williston broadened the rule significantly by making it applicable to all buyers, not just merchants and to all breaches, not just defects.

5 Although the first Restatement of Contracts incorporated the notice rule, RESTATEMENT OF CONTRACTS § 412 (1932), the second Restatement dropped it without explanation in the Reporter's Notes. Because Professor Williston was the reporter for the first Restatement it is possible that the Restatement temporarily adopted the rule because of his influence.

In general, "the courts have thus far been reluctant to transplant the Article 2 notice defense." Clark, *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 U.C.C. L.J. 105, 117 (1982). It is settled, for example, that the notice rule does not apply to a buyer's strict liability cause of action against a manufacturer for defective products. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61, 377 P.2d 897, 899-900, 27 Cal. Rptr. 697, 699-700 (1963); DiPangrazio v. Salamonsen, 64 Wash. 2d 720, 723, 393 P.2d 936, 937-38 (1964); La Hue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 647, 314 P.2d 421, 422 (1957). *But see* Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457, 469 (1972) (argning that sales law notice rule should apply to tort claims for product defects).

Nor have the courts been willing to apply the rule generally to non-Article 2 contracts. *See, e.g.*, Dixie Lime & Stone Co. v. Wiggins Scale Co., 144 Ga. App. 145, 240 S.E.2d 323 (1977) (refusing to apply notice rule to contract for sale and installation of truck scale because damages allegedly arose out of construction of pit and installation of scale—services portion of the contract—and not out of any defect in the good itself); Caparrelli v. Rolling Greens, Inc., 39 N.J. 585, 593, 190 A.2d 369, 373 (1963) (no requirement to give notice of contractor's breach in absence of clause in contract requiring such notice); Friedlander v. Gross, 63 N.J. Super. 470, 474, 164 A.2d 761, 763-64 (1960) (same).

Some courts have applied the section 2-607(3)(a) notice rule by analogy to a few cases outside the scope of Article 2. For example, a bare majority of courts has held that a real estate purchaser's right to sue for breach of the warranty of habitability is conditioned on timely notice. *See, e.g.*, Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380,

govern buyers' other Article 2 remedies of rejection and revocation[6] because, for reasons that do not apply to the damages remedy, they are subject to shorter cut-off rules.[7] This Article asks why the "un-

525 P.2d 88, 92, 115 Cal. Rptr. 648, 652 (1974); Wagner Construction Co. v. Noonan, 403 N.E.2d 1144 (Ind. Ct. App. 1980) (builder-vendor not liable for breach of implied warranty of habitability unless first given notice and opportunity to repair); Kirk v. Ridgway, 373 N.W.2d 491, 496 (Iowa 1985). *But see* Arst v. Max Barken, Inc. 655 S.W.2d 845, 848 (Mo. Ct. App. 1983) (giving seller notice and opportunity to repair are not prerequisites to homeowner's right to damages for breach of warranty of habitability); Lacey v. Edgewood Home Builders, Inc., 446 A.2d 1017, 1020 (R.I. 1982) (declining to extend U.C.C. § 2-607(3)(a) by analogy to sale of real estate); *cf.* Parsons v. Beaulieu, 429 A.2d 214, 218 (Me. 1981) (notice issue not yet decided in Maine); Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978) (en banc) (dictum stating that it would be "desirable" to give sellers notice of breach and opportunity to repair), *overruled on other grounds by* Sharp Bros. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (en banc).

Similarly, courts have applied the notice rule to leases of real estate. Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972); Henderson v. W.C. Haas Realty Management, 561 S.W.2d 382, 387-88 (Mo. Ct. App. 1978); Berzito v. Gambino, 63 N.J. 460, 467, 308 A.2d 17, 22 (1973); *see also* Boehck Constr. Equip. Corp. v. H. Fuller & Sons, 19 Wis. 2d 658, 121 N.W.2d 303 (1963) (extending notice rule to claims for breach of lease of personal property). *But see* U.C.C. § 2A-502 (proposed draft 1986) (proposed Article 2A on personal property leasing expressly rejects a statutory notice rule but sanctions contractual notice rules).

6 Although section 2-607(3)(a) literally purports to bar "any remedy," other notice rules govern the special remedies of rejection and revocation. Both rights are lost if they are not exercised within a "reasonable" time.

The notice rule of section 2-607 would also apply to cut off the buyer's rights under § 2-716 to an award of the specific performance of repair. Although few cases applying the notice rule to specific performance cases are likely to arise because the remedy of damages will usually be adequate, *see generally* E. FARNSWORTH, CONTRACTS § 12.6 (1982), the analysis of the appropriate functions and interpretation of the notice rule are the same for damages claims and claims for specific performance.

The section 2-607(3)(a) notice rule is harsher than the other two because the buyer that has lost the right to reject or to revoke may still have a right to money damages, but the buyer that has failed to comply with the section 2-607 notice rule has no remedy left at all.

7 Commentators have justified loss of the special remedies of rejection or revocation through untimely action on the grounds that delay in exercise of those rights might prejudice the seller who, as a result of the exercise of those rights, must take back goods and find a different way to dispose of them. For example, loss of opportunities to dispose of the returned goods or a disadvantageous shift in the market price of the goods may prejudice the seller. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 8-3, at 309, § 11-10, at 426 (2d ed. 1980); *see also* Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 984 (1978) (arguing that courts should and in fact do interpret "reasonable time" limitation on buyer's right to reject or revoke acceptance "by balancing the cost to the buyer of discovering the defect with the cost to the seller of delay in discovery, typically depreciation of the goods prior to rejection or revocation"). However, Professor Priest also suggests that a principled distinction between the "reasonable time" limitation on notice of rejection or revocation and the similar-sounding limitation on notice of claims cannot be maintained. *Id.* at 976. This position does not account for the differences in the rights cut off by the various notice rules.

Allowing a dilatory buyer to return goods also may raise difficult problems of how and under what circumstances to require the buyer to account for the value of tempo-

reasonably" dilatory commercial[8] buyer of goods should be penal-

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rary possession of the goods. If the buyer is to have the option to undo a transaction that has resulted in transfer of possession and ownership, it is much simpler if the buyer is forced to exercise that option quickly. Third party rights exacerbate the problem. For example, what are the rights of a buyer's creditors who hold Article 9 floating liens that attached to the goods upon the buyer's acceptance, U.C.C. § 9-203(1)(c), if the buyer subsequently revokes?

Finally, it is not so troubling that the special remedies of rejection and revocation, which have the potential to work unfair hardship on the seller, be governed by short cut-off rules because, even if the buyer fails to act fast enough to preserve its right to these special remedies, it will still bave an opportunity to protect its expectation interest through the remedy of damages. None of these factors can justify the penalty that the section 2-607(3)(a) notice rule imposes when the buyer keeps the goods and seeks to vindicate its expectation interest only through money damages.

The official comments to section 2-608 indicate that the time period for giving notice of revocation of acceptance should normally be longer than the time period for giving notice of damage claims: "Since this remedy [revocation of acceptance] will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given. . . ." U.C.C. § 2-608 comment 4. This comment confuses the sequence in which it may be desirable that the buyer consider its various remedies with the policy reasons that are advanced to justify the two different notice rules. The comment also ignores the plain language of section 2-607(3)(a) ("or be barred from any remedy").

[8] The focus will be on the commercial buyer and seller because the rule has always been thought to be most soundly justified in the business setting. At least one court has flatly held the notice rule to be inapplicable to consumers. Fischer v. Mead Johnson Laboratories, 41 A.D.2d 737, 341 N.Y.S.2d 257, 259 (N.Y. App. Div. 1973). Only two states have restricted the notice rule's application by amendments. One has amended section 2-607(3)(a) to exclude consumer goods from its scope. ME. REV. STAT. ANN. tit. 11, § 2-607(7) (Supp. 1986). The other has statutorily eliminated the notice rule in all cases of personal injury, which would comprehend a large portion of consumer claims. S.C. CODE ANN. § 36.2-607(3) (Law. Co-op. 1976).

In addition, federal consumer protection legislation, the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), which applies to all cases in which sellers of consumer goods provide written warranties to their buyers, overrides section 2-607(3)(a) but permits a seller to impose a notice requirement on a consumer. 15 U.S.C. § 2304(b)(1); *see* Mendelson v. General Motors Corp, 105 Misc. 2d 346, 432 N.Y.S.2d 132, 136-37 (N.Y. Sup. Ct. 1980), *aff'd*, 81 A.D.2d 831, 441 N.Y.S.2d 410 (N.Y. App. Div. 1981).

The official comments to Article 2 invite the courts to treat consumer buyers much more leniently than business buyers in determining how quickly notice must be given, U.C.C. § 2-607 comment 4 (" 'reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended"), and the courts have done so. *See* Clark, *supra* note 5, at 115-17 nn. 33-38, 131-33 nn. 92-99 (citing cases). Thus, while courts typically interpret the notice rule to require the business buyer to give notice in substantially less than a year, *see infra* note 67, some courts dealing with consumer buyers have refused to find notice periods almost as long as the four-year limitations period of U.C.C. § 2-725 untimely as a matter of law. *See, e.g.*, Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 351, 378 N.E.2d 1083, 1089 (1978) (almost 4 years); Maybank v. S.S. Kresge Co., 302 N.C. 129, 136, 273 S.E.2d 681, 684 (1981) (3 years).

As Professor Clark points out, the consumer who sues for breach will usually have a parallel strict liability tort suit untrammeled by the rule, *see infra* note 118, and therefore "[t]he really significant Section 2-607 cases are those involving substantial economic loss suffered by a commercial buyer of defective equipment. . . ." Clark, *supra* note 5, at 116.

ized further by complete loss of the damages remedy.

In other areas of the law, notice requirements are standard tools for providing a minimum standard of fairness.[9] Why should fairness not also justify a notice requirement when a buyer seeks to hold a seller liable for breach damages? The costs of complying with the rule cannot be large[10] In fact, giving prompt notice usually serves the buyers' interests.[11] Nevertheless, the rule does impose at least minor costs on all buyers[12] and complete forfeiture on the buyers who run afoul of it. Enforcement of the rule creates the same

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9 One of the most striking uses of a notice requirement is its use to protect the constitutional privilege against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436 (1966). When a governmental body takes adverse action against an individual's interest that is protected by due process, "[t]he minimum requirements of due process are notice and an opportunity for hearing appropriate to the nature of the case." Transco Security, Inc. v. Freeman, 639 F.2d 318, 321 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378 (1970)). The Administrative Procedure Act similarly prescribes notice to all affected parties for both rulemaking, 5 U.S.C. § 553(b) (1982), and adjudications, 5 U.S.C. § 554(b) (1982), and the "notice pleading" and discovery rules of the Federal Rules of Civil Procedure are designed to ensure that a party receives adequate notice of the claims against it. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 60 (1969). The breaching seller is of course protected by the notice requirements imposed by the rules of civil procedure when suit is brought against him. The notice rule is another layer of protection.

10 In general, compliance will cause the buyer to incur costs to inspect—but only to make a "reasonable" inspection—and to report to the seller.

11 Unreasonable delay in giving notice—that is, delay for which the buyer cannot offer a justification based on the reasonable commercial exigencies of its business—may harm the buyer with a valid breach claim in a number of ways. For example, it may result in delaying eventual payment by the seller, or worse, losing a claim against the seller that becomes judgment proof, and it may undermine the credibility of the buyer's evidence of the alleged breach. For further discussion of this point, see *infra* Section II.B.2.

Delay in payment may in effect result in an interest-free loan to the seller. Under typical rules against the recovery of prejudgment interest for "unliquidated" claims, the buyer who delays in presenting a meritorious claim the amount of which cannot be determined exactly without a trial will not be able to recover the time value of the claim during that delay. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5, at 165 (1973). Most claims for a seller's breach in cases in which the goods are actually delivered involve "unliquidated" claims, though courts may increasingly treat them as falling into the category of claims in which the amount in dispute is "ascertainable" and for which the courts will make an exception to the rule against prejudgment interest. *Id.* at 165-66.

Even in states that allow the buyer to recover prejudgment interest on unliquidated claims as a cost of breach, the buyer who unreasonably delays in notifying the seller of the claim may be barred by the mitigation doctrine from recovering the time-value of money during the period of unreasonable delay if it appears that the seller would have made prompt payment had it been notified in a timely fashion.

12 First, there is the obvious risk that the courts, judging the matter by hindsight, will disagree with the buyer's judgment about the steps necessary to insure that notice will be given in a reasonable time. Second, as many of the case reports teach, the buyer must consider that his own personnel will fail to act diligently in defense of the buyer's interests. *See, e.g.*, EPN-Delaval, S.A. v. Inter-Equip, Inc., 542 F. Supp. 238 (S.D. Tex. 1982) (buyer's personnel let huge casting sit in field for approximately 60 days after delivery before noticing obvious nonconformity).

opportunity for "gamesmanship" that is troubling about the strict enforcement of other contractual conditions.[13] The rule operates, at least in some cases, as nothing more than a "booby-trap for unwary buyers"[14] and a naked preference for sellers. Unless there are policies that strongly justify the notice rule, it may be expected to have at least modestly negative economic consequences[15] and, more importantly, a corrosive effect on public respect for law.[16]

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13 *Cf.* Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33, 33-34 (1970) (criticizing as promoting "gamesmanship" the decision in Inman v. Clyde Hall Drilling Co., 369 P.2d 498 (Alaska 1962), which affirmed the dismissal of an employee's suit, filed 12 days after his allegedly improper discharge, on the grounds that the employee failed to fulfill the express contractual conditions of (1) giving written notice within 30 days after the claim arose and (2) refraining from filing suit until 6 months after the notice was given).

14 Several writers have characterized the notice rule, not always disapprovingly, as a type of trap. *See* Clark, *supra* note 5, at 105 ("For the seller, failure of the buyer to give notice is perhaps the first line of defense; for the buyer, it can be a thunderbolt out of the sky."); *id.* at 106 ("case law suggests that many buyers have no real awareness of how failure to give notice of breach can bar any remedy"); Leete, *The Notice Booby-Trap of U.C.C. Section 2-607(3)(a)*, 22 AM. BUS. L.J. 109 (1984); Note, *Commercial Law*—Maybank v. S.S. Kresge: *Reasonable Notice Requirement: A "Booby-Trap" for the Personally Injured Consumer*, 61 N.C.L. REV. 177 (1982) (authored by Jacqueline Riley Clare) (criticizing the North Carolina Supreme Court for holding that injured consumer fulfilled notice requirement by filing suit 3 years after purchase of defective flash-cubes). Those arguing that the rule should not bar the rights of injured consumers clearly have considered the trap-like quality of the notice rule a major reason not to apply it to consumers' tort causes of action. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, LAW OF TORTS § 97, at 691 (5th ed. 1984) [hereinafter W. KEETON] ("As applied to personal injuries, and notice to a remote seller, [the notice rule] becomes a booby-trap for the unwary."); James, *Products Liability*, 34 TEX. L. REV. 192, 197 (1955) (notice rule "may prove a trap" to the consumer injured by a defective product). The courts picked up the "booby-trap" label in holding that the notice rule does not apply to a tort cause of action for products liability. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

15 The immediate effect of barring a valid claim against a seller is to force the buyer to bear the full cost of the seller's breach. At least to the extent that the seller is not subject to competition, the notice rule will thus shield a poorly performing seller from some of the costs of its poor performance. Even in competitive markets, it does not appear that buyers bargain to eliminate the notice rule. *See infra* note 146. Shifting those costs to buyers can only be justified if the rule shields sellers or society from other costs of a substantially greater magnitude.

It might be argued that the buyers' apparent disinclination to contract out of the rule indicates satisfaction with the rule, but it may just as well indicate a belief that the negative impact of the rule is too minor to worry about or that they are not free to contract out of it. *Id.* This Article argues that buyers should not be satisfied with the rule and should at least be free to contract out of it. Even if the notice rule is merely suppletory, inclusion of a notice rule in the Code may skew perceptions of the rule because parties may assume it is the "fairest" rule. Moreover, even if suppletory, inclusion in the Code forces buyers to expend negotiation capital to eliminate it rather than putting the burden on sellers to bargain for the advantage of the rule.

16 *See* S. MERMIN, LAW AND THE LEGAL SYSTEM: AN INTRODUCTION 28-29 (2d ed. 1982) ("[P]eople generally expect legal standards to be reasonable. Laws and decisions that depart too far from this common expectation create enforcement problems and the danger of a spreading disrespect for law.").

Professor Williston's chief justification for including the notice rule in the Uniform Sales Act was the ratification argument: if the buyer keeps the goods for a considerable period of time without complaining, it is reasonable to presume either that the goods comply with contract requirements or that the buyer is willing to accept the goods delivered instead of conforming goods.[17] In most cases this kind of estoppel-by-silence argument so clearly fails to justify cutting off buyers' claims[18] that few courts have adopted the explanation,[19] and it consequently has been totally abandoned.

Today courts and commentators justify the bar of the section 2-607(3)(a) notice rule on the grounds that it prevents commercial bad faith,[20] promotes mitigation and cure,[21] enables the seller to

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17 S. WILLISTON, *supra* note 3, § 488, at 851-52.

18 Williston's explanation may be plausible in some cases, but in many cases it seems equally plausible that the buyer who fails to make a complaint has no intention of relinquishing any rights, especially if the buyer has not yet paid the entire purchase price. Of course, it is entirely implausible to suppose that the buyer who has not yet discovered the breach intends to accept less than full performance or its equivalent in damages. Even in cases in which the inference seems warranted, the fact that the buyer had at one time intended not to seek any damages does not explain why the buyer should not be able to change his mind later, especially if the damages have turned out to be greater than they at first appeared.

As a legal doctrine, the ratification or modification-by-silence argument is a variant of estoppel. Estoppel generally protects one party's reasonable reliance based on another party's behavior. Ratification further protects reliance interests by relieving the relying party of the risk that it might not be able to prove reliance. The justice of protecting "reasonable" reliance interests is powerfully appealing, but the estoppel doctrine provides no way of identifying which reliance is "reasonable." Why should it be regarded as reasonable for the seller to rely on the inference of satisfaction that might be thought to arise from the buyer's prolonged silence, especially when the psychological trnth of the inference is so patently questionable? A justificatory argument employing the estoppel doctrine only raises the question why the protected party's reliance should be protected. As Professor Gilmore so memorably put it, estoppel is "simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for plaintiff." G. GILMORE, THE DEATH OF CONTRACT 64 (1974). Application of estoppel-like arguments may be soundly justified in a given case, but the justification has to be sought outside the doctrine, in an argument that protecting the reliance interests in question will advance specific policy goals.

Of course, if the buyer represents to the seller by express statement or conduct that he will not seek damages, application of estoppel or ratification might seem justified to avoid injustice in the particular case. But in general, neither estoppel nor ratification alone can provide a satisfactory justification for treating the buyer's silence as the equivalent of a representation that the buyer will not seek to enforce a damage claim for breach of contract.

19 There do not appear to be any early cases stating the ratification argument for the notice rule. Most of the cases on notice decided prior to about 1930 are characterized by a complete lack of any discussion of the policy behind the rule. Starting in about the 1930s cases concerned with the notice rule begin to include a policy-based analysis. In this period, there are a few cases stating the ratification argument. *See, e.g.*, Idzykowski v. Jordan Marsh Co., 279 Mass. 163, 167, 181 N.E. 172, 173 (1932) (notice rule requires "such a notice as to repel the inference of waiver").

20 K & M Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106, 1114 (6th Cir. 1982) ("The underpinning of U.C.C. § 2-607 is a requirement of commercial good faith

collect evidence while still fresh,[22] and promotes settlement.[23] Except for the settlement rationale, these arguments address various kinds of prejudice to the seller.[24] A less widely adopted non-

. . . ."); *see* U.C.C. § 2-607 comment 4 ("the rule of requiring notification is designed to defeat commercial bad faith"); Phillips, *supra* note 5, at 469 (notice rule to prevent "trumped-up claims, bad faith concealment and destruction of evidence"); Note, *Notification of Breach under Uniform Commercial Code Section 2-607(3)(a): A Conflict, A Resolution*, 70 CORNELL L. REV. 525, 540 (1985) (authored by George Frank Hammond) (encouragement of good faith is one of five goals underlying broad fairness notion embodied in section 2-607(3)(a)).

21 City of Marshall v. Bryant Air Conditioning Co., 650 F.2d 724, 728 (5th Cir. 1981) (notice rule encourages cure); Maybank v. S.S. Kresge Co., 302 N.C. 129, 134, 273 S.E.2d 681, 684 (1981) (most important policy behind notice rule is encouragement of cure by seller).

Like the cases, most of the commentators have emphasized the protection of the opportunity to cure as an important policy justification for the notice rule. J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421 ("most important reason for requiring notice is to enable the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer"); Note, *supra* note 20, at 541 (to give seller opportunity to cure); Note, *Notice of Breach and the Uniform Commercial Code*, 25 U. FLA. L. REV. 520, 522 (1973) (authored by Marvin Chavis) (cure). Professor Clark is the only one who mentions mitigation in connection with cure, but he does not spell out the connection: "[another] policy [behind the notice rule] is to enable the seller to make adjustments in manufacturing defect cases; this is a variation of the mitigation theme. To put the matter another way, notice gives the seller a reasonable opportunity to cure." Clark, *supra* note 5, at 110-11.

22 Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 972 (5th Cir. 1976); *see* J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 422; Clark, *supra* note 5, at 111; Phillips, *supra* note 5, at 466-68; Note, *supra* note 20, at 541; Note, *supra* note 21, at 522; Note, *Section 2-607(3)(a): Effective Notification of Breach under the Uniform Commercial Code*, 44 U. PITT. L. REV. 733, 737 (1983) (authored by Patrick A. Milberger).

23 T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 360 (5th Cir. 1980) (notice must encourage settlement); *see* U.C.C. § 2-607 comment 4 (notice should "open[] the way for normal settlement through negotiation"); Clark, *supra* note 5, at 110 (narrowing the policy to encouragement of *pre-litigation* settlement); *see also* Phillips, *supra* note 5, at 468-69; Note, *supra* note 20, at 541; Note, *supra* note 21, at 524; Note, *supra* note 22, at 737.

24 The Sixth Circuit has captured this basic duality of the various rationales for the rule:

> Notice of breach serves two distinct purposes. First, express notice opens the way for settlement through negotiation between the parties. . . . Second, proper notice minimizes the possibility of prejudice to the seller by giving him "ample opportunity to cure the defect, inspect the goods, investigate the claim or do whatever may be necessary to properly defend himself or minimize his damages while the facts are fresh in the minds of the parties."

Standard Alliance Indust., Inc. v. Black Clawson Co., 587 F.2d 813, 826 (6th Cir. 1978) (quoting Note, *supra* note 21, at 522), *cert. denied*, 441 U.S. 923 (1979).

Because the concept of good faith is not necessarily limited to the prevention of specific harm or the promotion of settlement the policy of preventing bad faith might be thought to add a new element. The good faith obligation relevant to the section notice provision, however, concerns only the duty of "good faith in . . . enforcement [of contracts]," set forth in section 1-203 of the Code. That obligation was apparently intended to include the mitigation principle. *See* U.C.C. § 1-106 comment 1; Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 813-14 (1958). It seems fair to suppose that prevention of other kinds of prejudice to the seller may be

prejudice-based argument for the notice rule is that it provides what Professors White and Summers colorfully refer to as "mind balm," the same repose that the statute of limitations provides.[25] Courts and commentators generally agree on the validity of the prejudice-based justifications, but do not agree on the validity of the non-prejudice rationales: the settlement[26] and repose rationales.[27]

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comprehended within the concept of the good faith enforcement obligation. It might possibly encompass promotion of settlement, were the notice rule an apt instrument to promote that policy.

The concept of good faith in enforcement does not, however, appear to add any specific functional arguments for the notice rule to the catalogue of arguments set out in the text. With a single exception, none of the authorities suggesting that good faith provides a basis for the notice rule has discussed what the term means in this context. A recent student note states that good faith requires that "the buyer must not act in a manner which leads the seller to believe that the contract has been properly performed when the buyer actually intends to institute a lawsuit." Note, *supra* note 20, at 544. The suggestion amounts to the ratification theory in new garb, and it is just as incomplete a justification when linked to the concept of good faith as when it stands alone. *See supra* note 18. The assertion that the buyer has a duty to dispel the seller's belief that the buyer will not sue merely raises the question why the duty should be imposed on the buyer. If the rule does not protect the seller from prejudice or further some other policy, then it does not appear justified.

25 J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 422 (repose is a "less important policy behind the notice requirement"); *see* Clark, *supra* note 5, at 111; Note, *supra* note 20, at 541; *see also* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 826 (6th Cir. 1978) (applying Ohio law), *cert. denied*, 441 U.S. 923 (1979); Speakman Co. v. Harper Buffing Machine Co., 583 F. Supp. 273, 277 (D. Del. 1984); EPN-Delaval, S.A. v. Inter-Equip, Inc., 542 F. Supp. 238, 249 (S.D. Tex. 1982) (quoting J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421-22); Petro-Chem, Inc. v. A.E. Staley Mfg. Co., 686 P.2d 589, 591 (Wyo. 1984).

26 There do not appear to be any authorities expressly rejecting the settlement argument for the rule, but its absence from the list of policy justifications advanced by some courts is notable. For example, the widely quoted catalogue of policy reasons advanced by the Colorado Supreme Court is confined to prejudice arguments:

> First, notice provides the seller a chance to correct any defect. Second, notice affords the seller an opportunity to prepare for negotiation and litigation. Third, notice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them.

Prutch v. Ford Motor Co., 618 P.2d 657, 661 (Colo. 1980) (citations omitted); *cf.* J. WHITE & R. SUMMERS, *supra*, note 7, § 11-10, at 421-23 (advancing prejudice and repose arguments for rule).

27 In stating the policy goals for the notice rule, most authorities omit repose though a few courts and commentators have advanced the argument. *See supra* note 25. A few courts have rejected the argument expressly. *See, e.g.*, Mattos, Inc. v. Hash, 279 Md. 371, 377, 368 A.2d 993, 996 (1977) (rejecting argument that notice rule is to protect seller from "stale claims" because that is function of statute of limitations); Frericks v. General Motors Corp., 278 Md. 304, 316, 363 A.2d 460, 466 (1976) (same); *cf.* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 826 (6th Cir. 1978) (citing J. WHITE & R. SUMMERS, *supra* note 7, § 9-6, at 344 for repose rationale, citing *Mattos* for argument dismissing repose rationale, and then relying solely on prejudice justification to justify application of notice rule bar even though evidence of prejudice was tenuous), *cert. denied*, 441 U.S. 923 (1979); Maybank v. S.S. Kresge Co., 302 N.C. 129, 135, 273 S.E.2d 681, 684 (1981) (repose argument "will rarely provide a reason for holding that notice has not been seasonably given.").

Moreover, while some claim the settlement rationale is an independent ground for the notice rule,[28] no one has made that claim for the repose argument.[29]

In view of the uncertain policy basis for the notice rule, it is not surprising that considerable conflict exists over its proper application. The rule's "reasonable time" standard obviously delegates considerable discretion to the courts. With no clear and consistent set of policies to guide their discretion, the courts have reached inconsistent results on what a "reasonable time" is.[30] Similarly, the courts are divided over such issues as what kind of notice the rule requires,[31] whether the notice requirement applies to delay

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28 *See, e.g.*, Clark, *supra* note 5, at 112 (if the seller cannot show prejudice, "the seller could argue that one of the purposes behind Section 2-607(3)(a) is to encourage prelitigation settlement of disputes, and that this purpose is always undercut if the buyer gives no prior notice of breach"); Note, *supra* note 14, at 182 (criticizing Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981), which held that injured consumer's filing of suit three years after explosion of flashcube satisfied notice rule, in part on grounds that three-year delay frustrated settlement).

29 *See* authorities cited *supra* note 25. In suggesting how sellers' counsel should argue a case in which the seller can show no prejudice, Professor Clark recommends resort to the settlement rationale, *see supra* note 28, but does not mention the repose argument even though he lists it as a justification for the rule.

30 Professors White and Summers call this issue "[t]he most vexatious and frequently litigated 2-607(3)(a) question." J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421; *accord* EPN-Delaval, S.A. v. Inter-Equip, Inc., 542 F. Supp. 238, 245 (S.D. Tex. 1982). The issue is particularly uncertain because it is generally treated as a question of fact or a mixed question of fact and law, to be determined hy the trier of fact. *See, e.g.*, Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1102 (11th Cir. 1983) (fact); Carter Equipment Co. v. John Deere Indus. Equip., 681 F.2d 386, 396 (5th Cir. 1982) (fact); Easteru Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 970-73 (5th Cir. 1976) (usually question of fact; applying California law); Clark, *supra* note 5, at 135 (mixture of law and fact).

31 The courts are divided between a strict standard and a lenient standard for the content of notice. The strict standard of notice requires that the buyer "either directly or inferentially, inform the seller that the buyer demands damages upon an asserted claim of breach of warranty." Cotner v. International Harvester Co., 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977); *accord* Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 973 (5th Cir. 1976) (notice must inform seller "that the buyer considers him to be in breach of the contract"; applying California law). The cases are collected and discussed in Note, *supra* note 20, at 534-37 nn. 50-66. The strict standard has been called the majority view. T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 360 (5th Cir. 1980); *see also* Note, *supra* note 20, at 536 n.65 ("strict standard may now be the majority view").

The lenient standard is often said to "require a buyer to notify the seller that 'the transaction is still troublesome and must be watched.' " *Id.* at 530 (quoting U.C.C. § 2-607 comment 4). For a collection of cases using this standard, see *id.* at 530-34. This standard appears to require only that the seller have knowledge of the factual circumstances sufficient to determine that the buyer has grounds for a claim of breach, though most of the cases finding adequate notice also involve some form of complaint by the buyer. *See, e.g.*, Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1102 (11th Cir. 1983) (complaints sufficient if they notified seller that the transaction was troublesome); Lewis v. Mobil Oil Corp., 438 F.2d 500, 509 (8th Cir. 1971) (buyer told seller he was not sure whether oil supplied was appropriate for use in machine);

claims,[32] whether notice can be given by pleadings or after suit has commenced,[33] and whether the notice rule applies to buyers' non-

Boeing Airplane Co. v. O'Malley, 329 F.2d 585, 594-96 (8th Cir. 1964) (notice requirement satisfied by failure of helicopter in presence of seller's expert and by buyer's statement that it was closing down operations because of inadequacies in the helicopter); City Welding & Mfg. Co. v. Gidley-Eschenheimer Corp., 16 Mass. App. Ct. 372, 373-74, 451 N.E.2d 734, 736 (1983) (complaints provided notice of defects even though unaccompanied by express assertion of legal rights).

The Code is remarkably ambiguous on this point. Section 2-607(3)(a) states that the buyer must "notify the seller of breach." This phrase could be taken to require notice of the *fact* of breach or of the buyer's *opinion* that the seller has breached. If notice of only facts is involved, the detailed definition of "notice" in the Code suggests that the seller's actual knowledge should satisfy the requirement. *See* U.C.C. § 1-201(25) ("A person has 'notice' of a fact when (a) he has actual knowledge of it; or . . . (c) . . . he has reason to know that it exists."). If notice of the buyer's opinion is involved, the liberal definition of notice of facts in section 1-201(25) is not literally applicable. Both camps find support in the official comment. *Compare* U.C.C. § 2-607 comment 4 ("[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") *with id.* (statement that required notice must "inform[] the seller that the transaction is claimed to involve a breach").

32 The majority view, by an overwhelming margin, is that the notice rule applies to claims for late delivery. *See, e.g.,* Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 152 (6th Cir. 1983) (applying Ohio law); Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 972-73 (5th Cir. 1976) (applying California law); Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp., 466 F. Supp. 846, 851 (E.D.N.Y.), *aff'd,* 614 F.2d 1289 (2d Cir. 1979); *In re* First Hartford Corp., 63 Bankr. 479, 487 (Bankr. S.D.N.Y. 1986); Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507, 510-11 n.8 (Alaska 1980). Only one case has been found to the contrary. Jay V. Zimmerman Co. v. General Mills, Inc., 327 F. Supp. 1198 (E.D. Mo. 1971).

33 The majority of courts hold that the pleadings or other papers filed in the course of a lawsuit cannot constitute notice, and many of these courts apparently take the position that notice comes too late if it is not given prior to filing suit. For example, in Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 327 A.2d 502 (1974), the Maryland Supreme Court rejected the argument that an answer to a summary judgment motion, filed 8 months after the earliest and 3 months after the latest deliveries of the goods at issue, could fulfill the requirements of U.C.C. § 2-607(3)(a). The court reasoned,

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

273 Md. at 17, 327 A.2d at 514; *accord* 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-607:28 (2d ed. 1971).

Other courts justify this interpretation of the rule as serving the policy goal of encouraging settlement. *See, e.g.*, Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507, 512 (Alaska 1980); Voboril v. Namco Leisure World, Inc., 24 U.C.C. Rep. Serv. (Callaghan) 614, 615 (Conn. Super. Ct. 1978).

At least where consumers are involved, pleadings may constitute adequate notice if timely filed. Shooshanian v. Waguer, 672 P.2d 455, 462-63 (Alaska 1983); Owens v. Glendale Optical Co., 590 F. Supp. 32, 36 (S.D. Ill. 1984); *cf.* Hampton v. Gebhardt's Chili Powder Co., 294 F.2d 172, 174 (9th Cir. 1961) ("notice otherwise given within a reasonable period of time can . . . follow commencement of suit provided it is subsequently and properly pleaded"); Pace v. Sagebrush Sales Co., 114 Ariz. 271, 274, 560

privity warranty suits against remote sellers.[34]

The courts have also divided on a deeper level. On the one hand, certain jurisdictions view the notice rule as a narrowly drawn cut-off rule, like the equitable doctrine of laches, which cuts off claims only if the defendant can show prejudice.[35] The courts in these jurisdictions tend to treat the absence of a showing of preju-

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P.2d 789, 792 (1977) (dictum; pleadings may fulfill notice requirement, but reasonableness is assessed in light of circumstance of case).

34 Authority is fairly evenly split on this issue. For a detailed discussion of many of the cases, see Firestone Tire and Rubber Co. v. Cannon, 53 Md. App. 106, 452 A.2d 192 (1982) (notice requirement not applied to remote seller), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983); Vintage Homes, Inc. v. Coldiron, 585 S.W.2d 886, 888 (Tex. Civ. App. 1979). Another case adheres to the general rule that no notice need be given to remote sellers, but creates an exception in the case of a buyer-farmer who, prior to the problems that arose from the defective herbicide, had worked closely with the remote manufacturer and was even paid to promote the herbicide in his area. Carson v. Chevron Chem. Co., 6 Kan. App. 2d 776, 635 P.2d 1248 (1981).

Most of the cases holding that there is no duty to notify remote sellers are based on the assumption that a buyer's immediate seller will notify its seller upon receiving notice from buyer, thus extending notice up the chain of distribution. They therefore explicitly recognize that the remote seller may raise as a defense buyer's failure to give timely notice to its immediate seller. *E.g.*, Snell v. G.D. Searle & Co., 595 F. Supp. 654, 656 (N.D. Ala. 1984) (applying Alabama law); Owens v. Glendale Optical Co., 590 F. Supp. 32, 36 (S.D. Ill. 1984) (applying Illinois law); Palmer v. A.H. Robins Co., 684 P.2d 187, 206 (Colo. 1984); Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 347-48, 378 N.E.2d 1083, 1086-87 (1978).

Several courts have held that the notice rule does apply to a warranty cause of action against a remote seller. *See, e.g.*, Gross v. Systems Eng'g Corp., 36 U.C.C. Rep. Serv. (Callaghan) 42 (E.D. Pa. 1983) (applying Pennsylvania law); Shooshanian v. Wagner, 672 P.2d 455, 462-63 (Alaska 1983); Branden v. Gerbie, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1978); Parrillo v. Giroux Co., 426 A.2d 1313, 1317 (R.I. 1981); Western Equip. Co. v. Sheridan Iron Works, 605 P.2d 806 (Wyo. 1980).

See also Clark, *supra* note 5, at 126-28 (argning that buyer suing remote seller should have to give notice to remote seller); Leete, *supra* note 14, at 123 (buyer should only have to notify immediate seller); 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, 899-902 (1986) (authored by Arlie R. Nogan) (buyer should be required to take reasonable steps to give notice to remote sellers). This Article does not attempt to resolve this issue because it depends on the strength of the policies to be served by recognizing nonprivity contract actions, not on the purposes of the notice rule, which would appear to apply just as well to nonprivity sellers as to those in privity.

35 *See, e.g.*, Costello v. United States, 365 U.S. 265, 282 (1961) ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."); Ecology Center v. Coleman, 515 F.2d 860, 867 (5th Cir. 1975) (requiring defendant to show "a delay in asserting a right or claim, that the delay was not excusable and that there was undue prejudice to the party against whom the claim is asserted").

Only a few authorities have dealt expressly with the notice rule as a "laches" defense. *See, e.g.*, Kull v. General Motors Truck Co., 311 Pa. 580, 166 A. 562 (1933) (treating notice rule in section 49 of Uniform Sales Act as a "laches" defense). *But see* Phillips, *supra* note 5, at 478 (rejecting that view of rule on grounds that "proof of prejudice may often be impossible" and "establishing that the buyer was free of bad faith or waiver of his rights in not giving early notice may be impossible"; therefore arguing "prejudice should be assumed").

dice as indicative that notice was given within a reasonable time.[36] Most jurisdictions, however, view the rule as a broadly applicable cut-off rule, like the statute of limitations, which applies in all cases. This interpretation of the rule assumes that notice is justified in enough cases to warrant applying it without justification in the individual case.[37] These jurisdictions apply the notice rule even if the seller was not prejudiced by the buyer's delay in giving notice.[38]

This Article attempts to show that these controversies are rooted in disagreement over the scope and strength of the commonly asserted justifications for the section 2-607(3)(a) notice rule. While the notice rule has prompted periodic commentary,[39] no one has critically questioned each of the asserted justifications to ascer-

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36 *See, e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 298-99 (3d Cir. 1961) (consumer buyer); Schlottman v. Pressey, 195 F.2d 343, 346 (10th Cir. 1952) (business buyer; under section 49 of Uniform Sales Act); Palmer v. A.H. Robins Co., 684 P.2d 187, 207 n.3 (Colo. 1984) (consumer buyer); Goldstein v. G.D. Searle & Co., 62 Ill. App. 3d 344, 350, 378 N.E.2d 1083, 1088 (1978) (consumer buyer); *cf.* Orto v. Jackson, 413 N.E.2d 273, 276 (Ind. Ct. App. 1980) (buyer of house did not give notice within reasonable time but suit not barred because it was clear from seller's actions that timely notice would not have served policies thought to lie behind notice rule); Henrick v. Coats Co., 17 Mass. App. Ct. 986, 977, 458 N.E.2d 773, 774-75 (1984) (requiring proof of prejudice in accordance with Massachusetts's version of U.C.C. § 2-318).

This position may be more widely supported than it appears, however, because considerable authority exists for the proposition that the courts should determine whether the delay in giving notice is reasonable by reference to the policies said to be served by the rule. *See, e.g.*, Maybank v. S.S. Kresge, Co., 302 N.C. 129, 134, 273 S.E.2d 681, 684, (1981); U.C.C. § 1-204(2) ("What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."). *See generally* J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421-26. This view of the notice rule in effect turns the "reasonable time" standard into a rough kind of balance that takes into account the obvious detriment of the cut-off to the buyer, at least in cases in which no purpose of the notice rnle appears to be served, but strikes the balance in favor of the seller whenever application of the rule appears to further a policy thought to be served by the rule. Under this view, those courts that focus exclusively on the prejudice-avoidance function of the notice rule, *see* Prutch v. Ford Motor Co., 618 P.2d 657, 661 (Colo. 1980); *supra* note 26, should in effect require a showing of prejudice before they find that the buyer did not give notice within a reasonable time. Courts that adopt the settlement rationale for the notice rule may find that purpose fulfilled by application of the rule in cases lacking demonstrable prejudice to the seller. *See supra* note 28.

37 *But see* Fischer, *The Limits of Statutes of Limitation*, 16 SW. U.L. REV. 1, 3, 33 (1986) (by manipulating doctrines such as tolling, courts soften clear lines drawn by statutes of limitation to avoid barring potentially meritorious claims).

38 *See, e.g.*, Ashley v. Goodyear Tire and Rubber Co., 635 F.2d 571, 574 (6th Cir. 1980) (there is "no authority" for proposition that a showing of prejudice is required; applying Michigan law); Eaton Corp. v. Magnavox Co., 581 F. Supp. 1514, 1532 (E.D. Mich. 1984) (no prejudice need be shown); Armco Steel Corp. v. Isaacson Structural Steel Co., 611 P.2d 507, 511 (Alaska 1980) (judgment for buyer reversed, even though trial judge expressly found that absence of notice did not prejudice seller, because "[o]n its face the language of [section 2-607(3)(a)] allows for no alternative to timely notice").

39 The U.C.C. notice rule has spawned the following specialized treatments in legal journals from 1963 to 1985: Clark, *supra* note 5; Dillsaver, *Notice of Breach After Acceptance of Tender*, 17 U.C.C. L.J. 220 (1985); Leete, *supra* note 14; Phillips, *supra* note 5; Note, *Notice Requirement in Warranty Actions Involving Personal Injury*, 51 CALIF. L. REV. 586 (1963)

tain the extent to which they individually or collectively justify the rule. This Article undertakes to do so.

This Article argues that only two plausible justifications for the notice rule exist and that each justifies a very different type of rule. If one policy behind the rule is that it secures the benefits of a shorter rule of repose,[40] then a broadly applicable "limitations-style" rule that applies without regard to whether the seller has in fact suffered prejudice is justified. Generally, however, courts have correctly rejected this policy basis because it conflicts with the Uniform Commercial Code's policy against short limitations periods.

The other possible justification for the notice rule is that it protects the seller from prejudice it might suffer as a result of the buyer's delay in giving notice. This rationale, in one form or another, has been the most commonly offered justification for the rule throughout its eighty-year history in the United States.[41] If the

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(authored by Donald P. Newell); Note, *supra* note 20; Note, *supra* note 14; Note, *supra* note 21; Note, *supra* note 22.

40 Courts in this country have largely rejected or ignored this justification. *See supra* notes 27 & 29 and accompanying text.

Modern German scholarship, however, appears to have accepted the justification. For example, one German contracts scholar recently summarized the policies behind the notice rule in the German Commercial Code as follows:

> The basic idea of this rule follows from the need for clarity and speedy wrapping up of business which is typical for commercial transactions. *Ratio legis* is the protection of the seller. He should learn as quickly as possible whether the delivery is "in order" or is objected to by the buyer so that he can have a reliable basis for decisions about further business matters. In addition, he should be protected from difficulties of proof "in which he is likely to find himself with the passage of time."

Marburger, *Die Sachmngelhaftung beim Handelskauf*, 23 JURISTISCHE SCHULUNG 1 (1983) (footnotes omitted; author's translation). Because the German notice rule applies to all remedies and there is no other special notice rule for the remedy of rejection, *id.* at 8, 10, it is difficult to know how much the German commitment to repose reflects the special reasons for insisting of speed in the exercise of rejection and how much it reflects an evaluation of the possible benefits of early repose for damage claims.

41 Since the notice rule first made its appearance in American law in section 49 of the Uniform Sales Act, *see supra* note 3, the courts have viewed the rule as protecting sellers, although the early cases did not specify the evils against which sellers needed protection. *See, e.g.*, Truslow & Fulle, Inc. v. Diamond Bottling Corp., 112 Conn. 181, 187, 151 A. 492, 495 (1930) ("The purpose of the [notice rule] is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly."); Idzykowski v. Jordan Marsh Co., 279 Mass. 163, 167, 181 N.E. 172, 173 (1932) (notice rule "is intended for the protection of the seller against belated claims for damages"); Maggioros v. Edson Bros., 164 N.Y.S. 377, 379 (N.Y. Sup. Ct. 1917) (notice rule "is intended for the protection of the seller . . . to give the seller an early notice of the alleged defects."); S. WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 484a, at 1259 (2d ed. 1924) (retaining the ratification argnment but also adding the statement that the notice rule "avoids the hardship on the seller of allowing a buyer at any time within the period of the Statute of Limitations to assert that the goods are or were defective though no objection was made when they were received"). As noted above, however, the style of court opinions in this early period of the

types of potential prejudice were sufficiently pervasive, this rationale alone would justify the "limitations-style" version of the rule. This Article argues, however, that the buyer's delay in giving notice is unlikely to prejudice the seller in many instances. Consequently, this policy goal justifies at most a "laches-style" rule applicable only if the seller can show that the delay in notice prejudiced it.

Parts I and II of this Article examine the strength and scope each of the policy goals used to justify the notice rule. Part I considers the settlement and repose arguments for the rule. Part II analyzes the argument that the rule prevents prejudice to the seller. Part III applies the conclusions of Parts I and II to specify the ways that courts should apply both statutory and contractual notice rules.

Because the Uniform Commercial Code does not expressly limit the courts from adopting this Article's conclusions, legislative reform of the Code may not be required. However, in order to crystallize the proposals in this Article, as well as to offer specific language to clarify the current language of the statutory notice rule, the appendix sets forth proposed amendments to the relevant Code sections and accompanying official comments.

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notice rule did not generally include any examination of the policy bases for the rule. *See supra* note 19.

In the 1930s and 1940s a few courts began to explain the notice rule, at least in part, as protecting the seller against the loss of opportunity to gather exculpatory evidence while it is still relatively fresh. Texas Motorcoaches, Inc. v. A.C.F. Motors Co., 154 F.2d 91, 94 (3rd Cir. 1946) (prompt notice would have enabled bus manufacturer to gather evidence to refute all or part of passengers' damage claims, thus, minimizing its liability to bus company for claims paid to passengers injured in bus accident); Columbia Axle Co. v. American Automobile Ins. Co., 63 F.2d 206, 207 (6th Cir. 1933) (one purpose of notice rule is "to permit the seller to make inspection of the goods"; other purpose is to give seller early warning of buyer's claims); Hazelton v. First Nat'l Stores, 88 N.H. 409, 412-13, 190 A. 280, 283 (1937) (analogizing notice rule in sales to notice rule for tort claims against municipalities, purpose of which was to enable municipal officers to gather evidence while fresh so that well-founded claims could be settled and false claims resisted).

A few cases in the 1950s raised the possibility that the notice rule could be justified as preserving the seller's opportunity to make a claim over against a manufacturer or supplier. Owen v. Sears, Roebuck and Co., 273 F.2d 140, 143 (9th Cir. 1959); Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 103, 122 So. 2d 591, 593 (1960) ("One reason for the notice requirement . . . is to apprise the vendor that a claim will be made against him and give him an opportunity to prepare a defense or notify his supplier.").

The first cases to view the notice rule as protecting the seller's interest in providing cure appeared in the late 1960s. Wayne Tractor, Inc. v. Shields, 381 F.2d 441 (9th Cir. 1967) (purpose of notice requirement is to enable seller to "minimize any damages or correct the defect"); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 467, 438 S.W.2d 717, 720 (1969) ("The purpose of the statutory requirement of notice to the seller of breach of warranty is to enable the seller to minimize damages in some manner, such as correcting the defect, and also to give the seller some immunity against stale claims.").

For more recent cases and writers espousing prejudice arguments for the rule, see *supra* notes 21-22.

I
THE NONPREJUDICE-BASED ARGUMENTS FOR THE NOTICE RULE

Williston's ratification argument for the notice rule could be viewed as a type of nonprejudice rationale,[42] but subsequent case law suggests that the principal concern of the early cases was to protect the seller from prejudice.[43] The distinct nonprejudice arguments based on settlement[44] and repose[45] were not articulated until

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42 The ratification or estoppel-by-silence argument is an incomplete argument for the notice rule. *See supra* note 18. It is consistent with both prejudice-based and nonprejudice-based arguments. For example, like the repose argument, the ratification argument could be premised on the assumption that there is social utility in creating an expectation that claims unasserted after a certain time period are barred. Or like the prejudice-based arguments, the estoppel-by-silence argument could be justified on the grounds that sellers are likely to rely to their detriment on buyers' apparent satisfaction. The notice rule can be seen as protecting the seller against detrimental reliance, such as loss of rebuttal evidence.

43 *See supra* note 41.

44 Professor Phillips appears to have first advanced the settlement argument in a 1971 law review article. *See* Phillips, *supra* note 5, at 468 ("Timely notice also serves the purpose of settlement."). Although he asserted that both the Code and the cases recognized this function of the notice rule, he cites as authority only the language from U.C.C. § 2-607 comment 4. *Id.* at 468 n.44. His suggestion was echoed by a 1973 student note, Note, *supra* note 21, at 524, and by a court in 1976. Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976). The Fifth Circuit wrote that "the purpose of notice is . . . to open the way for settlement through negotiation between the parties," but cited no authority for that specific statement. *Id.* at 972. Later in the same paragraph, however, it cited both the Phillips article and the student note. *Id.*

45 The earliest statement of a repose argument for the rule that is clearly distinguished from prejudice arguments appeared in 1972 in Professors White and Summers's first edition of their U.C.C. treatise:

> A final, and less important policy behind the notice requirement is to give the defendant that same kind of mind balm he gets from the statute of limitations. There is some value in allowing a seller, at some point, to close his books on goods sold in the past and to pass on to other things.

J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-9, at 344 (1972). Professor Phillips touched on this rationale in his 1971 article when he wrote, "another recurring rationale for the notice requirement is that it tends to prevent stale claims. 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." Phillips, *supra* note 5, at 469 (footnote omitted). It appears, however, that he interpreted the policy against "stale claims" as primarily one of combatting bad faith and fraud, not the promotion of repose for its own sake.

Like Professor Phillips's statement, the rule's earlier rationales that might be interpreted as repose arguments appear concerued with protecting the seller from prejudice, especially from the loss of evidence. After setting forth the ratification argument for the notice rule at some length in his 1909 treatise, S. WILLISTON, *supra* note 3, § 488, at 851-53, Professor Williston concluded that "[t]he merits of [the notice rule in section 49 of the Uniform Sales Act] are its certainty and the limitation of time for disputing the correctness of the seller's performance." *Id.* at 853. He gave no further explanation, however, for preferring an earlier cut-off than the applicable statute of limitations.

Some early cases applying section 49 of the Uniform Sales Act repeat the preference for a rule of repose shorter than the applicable statute of limitations or characterize the rule as cutting off "stale" claims. Given the emphasis on protecting the seller from

the early 1970s. Ironically, the widely adopted settlement rationale does not provide a sound basis for the notice rule, while the largely ignored repose rationale might provide a plausible policy foundation for the rule if it did not conflict with the Uniform Commercial Code's policy against rules that provide quick repose.

A. Promotion of Settlement

The possibility of settlement is a concern in virtually all civil lawsuits. Therefore, if delay in notice really does hinder settlement, the rationale applies to every case. Because the argument appears strong, it has been used to justify application of the notice rule in cases in which no possibility of prejudice to the seller exists.[46] Examination of the argument shows, however, that it is based on questionable premises and policy judgments and should be abandoned entirely as a basis for the notice rule.

The promotion-of-settlement justification for the notice rule depends on the questionable premise that the sooner the parties begin negotiations after breach, the greater the chances of settlement.[47] The premise is crucial to justifying the timeliness requirement of the notice rule. Because the seller cannot enter into settlement negotiations before it has notice of the buyer's claim, the

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harm, however, *see supra* note 41, these cases should not be understood as subscribing to the repose argument for the rule. The courts' only specific references during this early period addressing the possibility of harm to the seller concerned a buyer that first raised its damage claim as an offset to the seller's action for the price. It appears that the courts' main concern was that the buyer's claims were likely to be fraudulent or at least unfounded and that the delay would hinder the seller in mounting a proper defense. For example, in Wildman Mfg. Co. v. Davenport Hosiery Mills, 147 Tenn. 551, 559, 249 S.W. 984, 986 (1923), the court stated that: "the purpose of [the notice rule] . . . [is] to prevent the buyer from interposing belated claims for damages (too often a mere afterthought) as an offset to a suit begun by the seller for the purchase price." *See also* Regina Co. v. Gately Furniture Co., 154 N.Y.S. 888, 889 (N.Y. Sup. Ct. 1915), *aff'd*, 171 A.D. 817, 157 N.Y.S. 746 (N.Y. App. Div. 1916) (notice rule's purpose is to prevent buyer from retaining and using goods without giving notice of breach until after seller has sued for the purchase price.

Courts have continued to mention the policy of protecting the seller against "stale" claims in conjunction with other policies. *See, e.g.*, L.A. Green Seed Co. v. Williams, 246 Ark. 463, 468, 438 S.W.2d 717, 720 (1969) ("The purpose of the statutory requirement of notice to the seller of breach of warranty is to enable the seller to minimize damages in some manner, such as correcting the defect, and also to give the seller some immunity against stale claims.").

46 *See supra* note 28.

47 Another premise underlying the settlement argument is that it is good public policy to promote settlement. Although settlements reduce the cost to the public of providing formal adjudication, imposing limitations or burdens on civil parties' access to tribunals of formal adjudication in order to channel parties into less formal proceedings designed to promote settlement, such as mediation or arbitration, may tend to favor the stronger parties and therefore produce settlements that are not "fair." *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

promotion-of-settlement argument justifies the timeliness requirement on the grounds that it promotes behavior by the buyer (giving notice as soon as possible) that is most likely to achieve the desired policy goal (resolution of disputes through negotiation and compromise). A closely related premise, namely that settlement negotiations started before litigation are more likely to result in settlement than those started after the initiation of litigation, has apparently led some courts to hold that pleadings cannot constitute notice and that notice with or after the pleadings comes too late to satisfy the rule.[48]

Both premises appear to be unwarranted generalizations. The Supreme Court of Alaska, in holding that pleadings could constitute notice, expressly disagreed with the premise that the filing of a complaint deters settlement:

> 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.[49]

Similarly, no basis exists for believing that the mere passage of time before a dispute begins will decrease the chances for settlement.[50]

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48 *See supra* note 33.

49 Shooshanian v. Wagner, 672 P.2d 455, 462-63 (Alaska 1983); *cf.* McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 45-46 (1984) (disputing parties tend not to choose mediation before beginning court proceedings because weaker party sees initiating court proceedings as way of gaining negotiation leverage).

The contrary position would appear to be bolstered by studies of "escalation" during dispute processing. There is reason to believe that in any dispute, the action of appealing to a third party generally involves an escalation of the conflict or a hardening of positions. *See generally* Vidmar, *Justice Motives and Other Psychological Factors in the Development and Resolution of Disputes*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 395, 411-13 (M. Lerner & S. Lerner eds. 1981). It is difficult to know how significant a barrier to settlement this effect is in commercial litigation.

50 No empirical studies exist on the effect of delay in raising a claim on the likelihood of settlement. The empirical studies that have been done on the significance of timing on the settlement process, however, suggest that providing an end point to the settlement process is far more likely to promote settlement than providing an early starting point. *See* J. RUBIN & B. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION 120-24 (1975) (reviewing empirical studies and other sociological literature on the "eleventh hour" effect). According to Professors Rubin and Brown, the empirical studies "lend support to the general proposition that *time pressures increase the likelihood of agreement and tend to be manifested in reductions in bargaining aspirations, demands, and the amount of bluffing that occurs.*" *Id.* at 123 (emphasis in original). They note that even in cases in which the parties initiate bargaining far in advance of anticipated deadlines, "agreement often fails to be reached until the final hour anyway." *Id.* at 121.

These studies suggest that a rule mandating an early trial date once a dispute has begun would be far more effective in promoting prompt settlement than the notice rule.

Passage of time may in fact enhance settlement opportunities.[51] Unless the seller suspects that it has been prejudiced, the buyer's delay is not likely to affect the parties' evaluations of their respective claims.[52]

Even if the premises underlying the promotion-of-settlement argument are sound, the notice rule is poorly designed to further this policy goal. The notice requirement does not guarantee earlier settlement negotiations. Intransigence on either side will effectively frustrate settlement without sanction. Moreover, the cost, delay, aggravation, and, most important of all, uncertainty of civil litigation produce powerful incentives for commercial litigants to pursue strategies that are likely to enhance settlement opportunities.[53] If early notice enhanced settlement possibilities, commercial buyers would give early notice with or without a notice rule. Thus the notice rule is an unnecessary additional incentive. It is objectionable, moreover, because the penalty that the rule imposes on buyers is disproportionate to the asserted social harm. At most, the buyer's delay in giving notice may reduce the chances for settlement. For that minor possibility of harm, the notice rule deprives the buyer of all remedies. The rule is particularly objectionable in cases where the seller has suffered no demonstrable prejudice because it results in a windfall to the seller.

B. The Repose Argument

A second possible nonprejudice justification for the notice rule is that it provides repose for sellers sooner than the one-to-four-year limitations period applicable to Article 2 transactions.[54] Few

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However, other studies have suggested that disputants may actually prefer risking decision by a third party rather than compromising perceived rights in a settlement so that, if processing time is shortened sufficiently, the rate of settlement declines. *See* Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGES' J., Summer 1981, at 36, 39-41 (analyzing data from compulsory arbitration plans in Rochester, New York, over ten-year period).

51 With time, the personnel on one or both sides of a contract dispute may change, leaving new personnel without any personal stake in the outcome relatively more free to achieve a settlement.

52 For example, if the seller suspects that the delay has prejudiced his ability to gather evidence to defend against unfounded claims, the additional uncertainty may widen the gap between the buyer's and the seller's assessment of the strength of the claim. In that case, the settlement rationale is subsidiary to the argument based on protecting the seller's evidence-gathering ability and does not constitute an independent ground for the notice rule.

53 As Professor Leff trenchantly observed in analyzing the factors that might lead a creditor to agree to accept less than full payment of a valid claim, "Under the American law of contracts, after the other party has fully performed his obligations, it is absolutely irrational for you fully to perform yours." Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 5 (1970) (footnote omitted).

54 U.C.C. § 2-725(1) provides, "An action for breach of any contract for sale must

American authorities have advanced the repose argument,[55] and none have treated it as an independent rationale for the rule.[56] Some courts have dismissed the argument on the grounds that providing repose is the function of the statute of limitations.[57]

The repose argument for the notice rule is not necessarily flawed just because the statute of limitations also provides repose. The notice rule imposes a lesser burden on the buyer than the statute of limitations. Although the buyer can satisfy the notice rule with a simple communication to the seller, compliance with the statute of limitations entails filing a lawsuit. Rules that encourage parties to deliberate longer before suing than before complaining may be preferable. Therefore, using the less burdensome notice rule to secure the benefits of repose in a period shorter than would be acceptable in the form of a limitations rule is not necessarily inconsistent with the longer statute-of-limitations periods.[58] It is therefore necessary to consider the arguments in favor of a specifically short rule of repose for buyers' claims.

As with notice rules, both prejudice and nonprejudice arguments justify limitations rules. The prejudice argument will be discussed in the next section in connection with the prejudice arguments for the notice rule. The principal nonprejudice argument is that repose facilitates planning by providing an endpoint to the possibility of claims arising from a transaction.[59]

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be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it."

55 *See supra* notes 25 & 27. Under German law, however, the argument appears to provide significant support for the notice rule. *See supra* note 40.

56 *See supra* note 29.

57 *See supra* note 27.

58 One might argue that the notice rule is justified as a compromise between those who believe that the limitations period is too long and those who believe it is not. In Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974), the Illinois Supreme Court seemed to view the notice rule as that sort of compromise in the context of a personal injury suit. The court rejected the argument that the notice rule only applies to commercial transactions and therefore would not apply to a breach of warranty cause of action for personal injury arising out of the sale of consumer goods. The court stated:

> The acceptance of section 2-725(I) as the appropriate limitation period for actions involving personal injuries predicated on Code liability substantially extends the filing period for such actions beyond the traditional limitation period established by [the Illinois statute of limitations applicable to tort causes of action]. We believe that the notification procedure is therefore proper if such theory of liability is advanced.

Id. at 555, 309 N.E.2d at 554. There is no evidence that the compromise theory in fact played any role in securing acceptance for the notice rule in our law. For the history of the various arguments supporting the rule, see *supra* notes 17, 19-23, 25, 41 & 44-45.

59 A common justification for statutes of limitations is that they provide peace of mind and contribute to stability of commerce. *E.g.*, Fischer, *supra* note 37, at 2 (they "[p]rovid[e] peace of mind so that people may cleanse their books of potential liabilities which occurred before a certain date" and "[e]nhanc[e] commercial intercourse by free-

Providing a short limitations period for buyers' claims against sellers would enhance the ability of sellers to plan for the future. Reliable information greatly enhances planning. An earlier cut-off for buyers' claims would ensure sellers either knowledge of buyers' claims or a defense against unknown claims sooner than under the regular statute of limitations. Sellers arguably need this special protection because of the informational disadvantage they suffer concerning the condition of the goods they have delivered to their buyers.[60] Because how the courts will exercise their discretion under the "reasonable time" standard is so uncertain,[61] however, the notice rule is a much less apt instrument for providing planning information than a statute of limitations. This is a substantial objection to the repose rationale.

Even if we assume that the notice rule cuts off some claims earlier than the regular limitations period and therefore provides some additional information relevant to sellers' planning, the potential

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ing individuals from the distraction and disruption of litigation"); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments*] ("There comes a time when [one] ought to be secure in his reasonable expectation that the slate has been wiped clean . . ."; "the public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse."). Whether or not the psychological benefit to defendants is a sufficient justification for the statute of limitations, it is not a sufficient justification for the far shorter notice rule unless that function also has economic value. The principal economic value of peace of mind appears to relate to the planning process.

The statute of limitations may also be justified as a tool to reduce the burden on the courts and conserve public funds devoted to the court system by eliminating claims most likely to be tenuous, inconsequential, or costly to litigate because of the loss of direct evidence from the case load. Fischer, *supra* note 37, at 2; *Developments*, *supra*, at 1178.

Unlike the Article 2 limitations rule, the notice rule is a particularly inapt instrument for eliminating cases from the courts. The limitations period begins to run at an easily ascertainable date, tender of delivery of the goods to the buyer, U.C.C. § 2-725(2), and generally expires after the passage of a fixed period of time (four years in the absence of party agreement on a shorter period). *Id.* § 2-725(1). Although the courts may apply tolling rules and other similar doctrines in a way that decreases the certitude with which the limitations bar is applied to individual cases, Fischer, *supra* note 37, at 3, 33, the statute of limitations presents to the courts nowhere near the degree of discretion that the "reasonable time" standard of the notice rule does. The unpredictability of the notice rule is a serious objection to the business planning argument for the rule. It is an even more serious objection to rationalizing the rule as a tool for eliminating litigation because the notice rule will usually present an issue for litigation.

60 Buyers will usually have knowledge of the factual basis for a seller's contract breach claim without the benefit of notice, but the sellers may very likely not have knowledge of the factual basis for the buyer's claims. A seller's claim is usually for the unpaid portion of the price, and usually the buyer will know (or should know) that the seller has delivered goods and expects payment. However, the goods' nonconformance to an express or implied warranty may not become apparent until after the goods have passed into the buyer's exclusive possession and control.

For further discussion of the seller's informational disadvantage, see *infra* Section II.B.1.

61 *See supra* note 30 and accompanying text.

savings seem slight. Enhancement of planning might help sellers avoid costs in a number of ways. Knowing their liabilities earlier could help sellers avoid some costs of credit and default.[62] A shorter cut-off period might also save costs of record retention as sellers can dispose of records sooner.[63] None of the likely savings appear substantial, however. In view of the notice rules and uncertain application and the relatively slight savings that might be realized, it seems doubtful that a prudent seller would choose to rely on the notice rule to save record retention or financial over-extension costs.

Because the possible benefits gained from early repose appear so tenuous, it is questionable whether they outweigh the costs that the notice rule imposes on buyers, small though they may be.[64] Nevertheless, the planning benefits of early repose provide at least a plausible basis for the notice rule.

The policy choice that underlies section 2-725, the Article 2 statute of limitations, is a firmer ground for dismissing the repose justification. Section 2-725(1) accords relatively little weight to benefits to be gained from prompt finality but great weight to costs that rules of repose impose on claimants. Although neither section 2-725(1), the accompanying official comments, nor the sparse legislative and drafting history of the section clearly expresses this policy choice, two salient features of the Article 2 limitations rule support the argument.

First, the official draft of the Article 2 statute of limitations imposes a relatively long limitations period of four years in the absence of party agreement to the contrary. To the extent that states have enacted nonuniform amendments, they have uniformly lengthened the limitations period.[65] One can understand a statutory limi-

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62 If the seller makes credit purchases without making provision for liability for as yet unasserted past breaches, when the liability arises it might force the seller to default on his payments, sell assets at distress value to raise the extra money needed, renegotiate its loans, or, in a really extreme situation, lose equity in collateral through repossession or file for bankruptcy. Any of these courses of action may result in extra costs, which the seller might have avoided by deferring the credit purchase until after it had satisfied its breach liabilities.

Although the odds that any particular seller will actually incur such extra costs because of lack of notice may be low, in the aggregate, better information about outstanding liabilities would give sellers a better opportunity to avoid losses that result from financial overextension. Because situations of default and especially bankruptcy also may involve substantial losses for the creditors involved, earlier repose could result in conservation of total societal wealth.

63 The drafters of the Article 2 limitations period appear to have had this function in mind for the four-year statute of limitations. They argued that the four-year period "is within the normal commercial record keeping period." U.C.C. § 2-725 comment.

64 *See supra* note 12.

65 FLA. STAT. § 95.11(2)(b) (1981) (5 years); IOWA CODE § 614.1(4), (5) (1985) (10

tations period as a balancing of the costs that the rule imposes on claimants against the benefits that the rule generates. A four-year limitations period therefore reflects a legislative decision that, in general, the various policies served by a limitations period, including repose, do not outweigh the costs to claimants for cut-off of claims sooner than four years after they accrue. It is true that section 2-725(1) represents that balancing only in connection with a statute of limitations, not a notice rule, but the length of the limitations period chosen nevertheless suggests a policy against attributing much weight to the benefits of quick repose.

Second, section 2-725(1) prohibits buyers and sellers from contractually shortening the limitations period to less than one year, and a number of states have prohibited contractual shortening of the limitations period altogether.[66] This restriction apparently expresses a policy decision that the benefits of a rule of repose never outweigh the costs to claimants of cutting off their claims before expiration of at least one year.

One could argue that the notice rule is an intentional exception to the policies governing limitations periods. The notice rule does not fall within the literal terms of section 2-725(1) and many courts have interpreted the notice rule to require commercial buyers to give notice in periods substantially shorter than one year.[67] As

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years for written contracts, 5 years for oral); MISS. CODE ANN. § 75-2-725(1) (1972) (6 years); OKLA. STAT. tit. 12A, § 2-725(1) (1981) (5 years); S.C. CODE ANN. § 36-2-725(1), (2) (Law. Co-op. 1976) (6-year limitations period, further lengthened by discovery rule on accrual); WIS. STAT. § 402.725 (1964 & Supp. 1987) (6 years); *cf.* R.I. GEN. LAWS § 6A-2-725(5) (1985) (adding special 10-year rule for breach of warranty arising out of alleged defects in products, apparently for purpose of placing 10-year cap on nonprivity suits against remote sellers).

66 COLO. REV. STAT. § 4-2-725 (1973); FLA. STAT. § 95.03 (1985); MISS. CODE ANN. § 15-1-5 (1972); S.C. CODE ANN. § 15-3-140 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 57A-2-725(1) (1980); *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 16.070 (Vernon 1986) (setting 2-year minimum for contractually specified limitations period; but apparently overridden by one-year minimum in Texas version of U.C.C. § 2-725, TEX. BUS. & COM. CODE ANN. § 2-725(a) (Vernon 1968)); WIS. STAT. § 402.725(1) (1964 & Supp. 1987) (shortening of limitations period enforceable only in contracts between merchants).

67 *See, e.g.*, Mariner Water Renaturalizer, Inc. v. Aqua Purification Systems, 665 F.2d 1066 (D.C. Cir. 1981) (upholding trial court finding that notice 5 to 8 weeks after delivery was untimely); Smith-Moore Body Co. v. Heil Co., 603 F. Supp. 354 (E.D. Va. 1985) (7 months; applying Virginia law); Eaton Corp. v. Magnavox Co., 581 F. Supp. 1514 (E.D. Mich. 1984) (8 months; applying Michigan law); EPN-Delaval, S.A. v. Inter-Equip, Inc., 542 F. Supp. 238 (S.D. Tex. 1982) (65 days; applying Texas law); Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804, 278 S.E.2d 708 (1981) (upholding trial court finding that notice within 2 weeks unreasonable when defect discovered shortly after delivery); Societe Nouvelle Vaskene v. Lehman Saunders, Ltd., 14 U.C.C. Rep. Serv. (Callaghan) 692 (N.Y Sup. Ct. 1974) (3 1/2 months after most deliveries, 1 1/2 months after all deliveries, and at least 1 month after discovery of the defects, which were readily apparent).

pointed out above, notice rules are much less of a burden than limitations periods. Therefore perhaps the legislature was concerned in section 2-725(1) only with limiting how quickly parties must seek access to the courts. Section 2-607(3)(a)'s notice rule arguably is proof that the legislature did not intend to prohibit other rules that bring about repose more quickly as long as they do not require filing a lawsuit sooner than one year after the cause of action accrues.[68]

As a means of redressing or avoiding prejudice to the seller, the notice rule clearly is an exception to the rules set forth in section 2-725(1) because protection against prejudice has long been regarded as an important function of both the notice rule and the statute of limitations.[69] Repose arguments, however, have only recently been advanced and have never played a significant role in justifying the notice rule.[70] Thus, no basis exists to view the notice rule as an exception to the policy disfavoring short limitations periods for the sole purpose of securing the benefits of repose.[71]

In sum, enhancement of business planning might justify a special short limitations period for buyers' claims against sellers, but the justification is not a strong one. Moreover, such a justification

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68 U.C.C. § 2-515(b) also provides for very quick finality and hence might be interpreted as inconsistent with the disfavor of quick repose purportedly underlying section 2-725. section 2-515(b) provides:

> (b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

Under an agreement sanctioned by this section the buyer's rights might be foreclosed at or within a very short time of delivery by the error or oversight of the third party inspector. *Cf.* E. FARNSWORTH, *supra* note 6, § 8.4, at 559-60.

This cut-off rule, however, at least provides a third-party determination of the buyer's rights. The vice of a short limitations or notice period is that the buyer's rights may be foreclosed without any good faith determination of those rights by a neutral third party. Moreover, under a section 2-515(b) inspection, the buyer is assured that a party other than the seller will inspect for defects. Under the notice rule, no inspection necessarily takes place before the buyer loses all of its remedies.

69 The earliest cases under the notice rule in the Uniform Sales Act hinted at prejudice arguments. Cases clearly articulated these arguments by the 1930s. *See supra* note 41. Because the prejudice arguments are of the greatest vintage and clearly predate the enactment of the current U.C.C. notice rule, it would not be reasonable to interpret the one-year minimum in section 2-725 to grant buyers a minimum of one year in which to give notice in cases in which the buyer's delay causes the seller prejudice.

70 *See supra* note 29.

It appears unlikely that any legislature enacted the notice rule on the basis of the repose rationale. The rationale was not even clearly articulated prior to the early 1970s, *see supra* note 45, although by 1968 forty-nine states, the District of Columbia, and the Virgin Islands had enacted the Code with its notice rule. J. WHITE & R. SUMMERS, *supra* note 7, § 1, at 5.

71 The one-year minimum on limitations periods indicates a strong public policy against contractually stipulated notice periods of less than one-year unless the seller can show that it has probably been prejudiced by the buyer's delay. *See infra* Section III.B.

represents a balancing of the benefits and costs imposed by a short cut-off rule that is widely at variance with the approach taken in Article 2's limitations periods.

II

THE PREJUDICE-BASED ARGUMENTS FOR THE NOTICE RULE

Antiprejudice rationales provide the strongest support for the notice rule. The rule arguably protects the seller from two types of prejudice that potentially apply to a wide spectrum of breach claims: (1) loss of the opportunity to cure or otherwise reduce the damage of a breach[72] and (2) loss of evidence to refute unfounded claims of breach.[73] The rule may also prevent two less generally applicable harms: (1) loss of ability to pass liability for breach on to suppliers or carriers because of expiration of the applicable limitations period[74] and (2) loss of the opportunity to avoid similar liability to other buyers of the same or similar products.[75] Many cases, however, do not present the possibility of one of these types of prejudice, and even when prejudice does occur the notice rule's total bar is not always needed to redress the harm.

A. Loss of Mitigation and Cure Opportunities

A common argument for the notice rule is that it is necessary to protect the seller's ability to cure.[76] In circumstances in which cure

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72 *See supra* note 21.

73 *See supra* note 22.

74 Only a very few cases have mentioned this possibility. *See, e.g.*, Owen v. Sears, Roebuck and Co., 273 F.2d 140, 143 (9th Cir. 1959); Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 103, 122 So. 2d 591, 593 (1960).

75 Phillips, *supra* note 5, at 466-67 (citing *Owen*, 273 F.2d at 143).

76 Some say this is the most important policy behind the rule. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421. The right to cure is commonly justified as a protection for the seller against surprise rejection or rejection for trivial defects, not because of real dissatisfaction with the goods, but because of a desire to get out of the contract when there is a drop in the market price. Goetz & Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 997 (1983); Priest, *supra* note 7, at 969-70, 1000 (both Karl Llewellyn and courts implementing cure right in Code manifest this concern); Schwartz, *Cure and Revocation for Quality Defects: The Utility of Bargains*, 16 B.C.L. REV. 543, 545 (1975); *see also* Eno, *Price Movement and Unstated Objectives to the Defective Performance of Sales Contracts*, 44 YALE L.J. 782, 817 (1935) (arguing that most Uniform Sales Act and pre-Uniform Sales Act cases applying waiver doctrine to prevent buyer from relying at trial on defects not advanced at time of rejection involved declining markets). This justification does not apply if the buyer keeps the goods because the only remedy at stake is damages.

The Uniform Commercial Code gives the seller a right to cure only in situations in which the buyer rejects the goods. U.C.C. §§ 2-508, 2-612(2). Some courts have concluded explicitly that no right to cure exists if the buyer seeks damages only. *See* Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974); Boies v. Norton, 526 S.W.2d 651 (Tex. Civ. App. 1975); *see also* J. WHITE & R. SUMMERS, *supra* note 7, § 8-4, at 319 n.75 (citing the foregoing cases); Hillman, *Keeping the Deal Together after Material Breach—Common Law*

by the seller would avoid some of the damages that the buyer would otherwise suffer as a result of the seller's breach, a rule forcing the buyer to give the seller an opportunity to cure is consistent with the mitigation principle, which bars the buyer from recovering damages the buyer could have avoided by taking reasonable measures following the breach.[77] The mitigation principle, enshrined in the Uniform Commercial Code, albeit in a somewhat indirect manner,[78] encourages the minimization of joint costs of breach so as to maximize the total wealth of the concerned parties.[79] The notice rule, consistent with this principle, provides a strong incentive for buyers to give sellers an opportunity to offer cure and thereby minimize the cost of their breaches.

The current notice rule is inconsistent with the mitigation principle, however, in one very important respect. Whereas the mitigation principle only bars that portion of the buyer's damage claim that the buyer could have avoided by reasonable action, the notice rule, as currently conceived, bars the entire claim. The notice rule, contrary to the individualized justice of mitigation, acts as a rule of generalized justice, presuming prejudice in the full amount of the claim.

The mitigation principle requires a type of notice rule in two types of situations. In the first situation, the mitigation principle de-

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Mitigation Rules, the UCC, and the Restatement (Second) of Contracts, 47 U. COLO. L. REV. 553, 586 (1976). As the text following this note argues, these cases are correctly decided if one bears in mind that the mitigation principle may itself protect the seller's interest in curing. *See also* Bonebrake v. Cox, 499 F.2d at 957 (buyer's failure to accept breaching seller's offer to cure "raises . . . the question of whether he has properly mitigated his damages"); Hillman, *supra*, at 586.

A cure right and notice rule generally applicable to damage claims would in effect give the seller the benefit of a clause limiting its liability to repair or replacement. Express contract clauses limiting the buyer's remedy to repair or replacement will be enforced as a reasonable limitation of remedy, U.C.C. § 2-719(1)(a), but absent express agreement, the buyer's remedies should not be construed as so limited.

77 The mitigation principle is also known as the "avoidable consequences" doctrine. *See generally* Goetz & Scott, *supra* note 76; Hillman, *supra* note 76.

78 The remedies sections of Article 2 are premised on the mitigation principle. For example, when the buyer fails to accept or unjustifiably rejects or revokes acceptance of the good but the seller fails to cover, the seller is normally entitled to recover only the difference between the contract price and the market price. U.C.C. § 2-708(1). If there is a market price, resale is possible to mitigate the loss of the sale to the breaching buyer and the seller will be treated as if it has resold even if it has not. The seller can recover the whole contract price only "if the seller is unable after reasonable effort to resell [the goods] at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing." *Id.* § 2-709(I)(b). The drafters of the Code also apparently meant to make the mitigation principle generally applicable to the transactions covered by the Code through the principle of good faith in enforcement. *See supra* note 24. Article 2's only explicit statement of the mitigation principle is the rule that buyers can recover consequential damages resulting from the seller's breach only if they "could not reasonably be prevented by cover or otherwise." U.C.C. § 2-715(2)(a).

79 Goetz & Scott, *supra* note 76, at 969; Hillman, *supra* note 76, at 593-94.

nies the buyer recovery of consequential damages that the seller could have avoided with prompt notice.[80] Nonetheless, the principle only eliminates the buyer's consequential damages claim, not its claims for the costs of cure or diminution in value. If the buyer avoids the damages by dealing with another party, the buyer is not required to deal with the seller at all. Moreover, the mitigation principle does not bar the buyer's claim for consequential damages that prompt cure cannot avoid or reduce.[81]

The second situation in which the mitigation principle requires a type of notice rule is when the buyer knows or should know that the seller is the lowest-cost provider of cure. In such a case the seller should not be liable for the difference between the market cost of the cure and the seller's own lower cost of cure. If the buyer had acted reasonably by giving the seller an opportunity to cure the breach, the buyer could have avoided the differential.[82] The mitigation principle only supports this result if the buyer acts unreasonably.[83] Thus, the mitigation bar is inapplicable if (1) the nature of the

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80 For example, if the seller delivers a defective machine that the buyer needs in its manufacturing process, the buyer may suffer loss of profits during the time it takes to repair or replace the defective machine, but if the buyer acts with reasonable diligence to obtain repair or replacement it can minimize the extent of the loss of profits.

Thus, Professors White and Summers are right in arguing that one legitimate function of the notice rule is to prevent the purchaser of a defective truck from remaining silent about defects in the truck for a year and then recovering for profits lost during that year because of the defect. J. WHITE & R. SUMMERS, *supra* note 7, § 9-6, at 344. However, rather than demonstrating the need for a generally applicable notice rule, the example simply shows how the mitigation principle expressly stated in U.C.C. § 2-715(2)(a) should work.

81 For example, late delivery of a machine may hinder the buyer's performance on a contract with a third party and force it to incur liability to the third party before the seller can possibly repair or replace the machine.

82 Although many courts are loath to require a nonbreaching party to deal further with a breaching party, it appears clear that some circumstances exist in which courts will apply the mitigation principle in such cases. However, there is controversy over the precise circumstances in which that should be true. *Compare* Hillman, *supra* note 76, at 586 (citing cases and arguing that the mitigation principle should "require" a nonbreaching party—under penalty of losing the portion of its damages claim that the party could have avoided—to accept a materially breaching party's offer to perform the original promise, even if with additional terms, if (1) acceptance of the new offer will reduce damages, (2) the injured party can comply with the new offer, (3) the new offer is the best available offer, (4) the offer does not purport to preclude the aggrieved party from pursuing remedies with respect to the original breach, and (5) the breaching party provides adequate assurances of performance) *with* Goetz & Scott, *supra* note 76, at 992-93, 1005-11 (citing cases and arguing that courts have imposed a duty to deal with the breaching party only in cases involving specialized performance because only in the absence of a market for substitute performance is application of the mitigation principle required to ensure minimization of joint post-breach costs). The test stated in the text harmonizes with both of these views. The buyer will have reason to believe that the seller is the lowest-cost provider of cure chiefly in cases in which there is no market for substitute performance.

83 Because of the mitigation principle, the nonbreaching party risks not receiving

breach reasonably suggests that the buyer should have no confidence in the seller's promise of cure, (2) the buyer has no reason to believe that the seller is the lowest-cost source of cure, or (3) the seller conditions its offer of cure on the buyer's agreement to release all damage claims.[84] Only in the unlikely case in which the buyer has no reason to know that the seller can provide the lowest cost cure would the notice rule tend to minimize the parties' joint costs of breach in a way not already clearly required by the mitigation principle.

Many cases will not fall into any of the foregoing categories, and in these cases notice and cure rules that protect the sellers will not minimize joint costs of breach. For example, in many cases sellers may not be the lowest-cost cure providers.[85] Even when the buyer's delay prevents the seller from taking action to avoid some costs of breach, the delay is unlikely to account for all of the buyer's damages.[86] Such cases provide an argument against a flat bar of the buyer's entire damage remedy, but provide justification for a rule that bars damages the seller could have prevented if the buyer had given timely notice.

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its full expectancy damages if it fails to satisfy the requirements of the mitigation principle or loses the issue in litigation even though it did act in accordance with the principle. Goetz & Scott, *supra* note 76, at 972 (discussing the "tension between performance and mitigation responsibilities"). If courts apply the rule to create a penalty for refusing to deal with a breaching party in certain circumstances, it may also become a tool for bad-faith chiselers attempting to evade a portion of their contractual liabilities because the principle detracts from the clear enforceability of the chiseler's contractual obligation. *Id.* at 978. Therefore, the mitigation principle is satisfied if the nonbreaching party acts "reasonably," and the courts "evaluate the available mitigation strategies from the plaintiff's perspective at the time of breach and do not penalize him if he selected a reasonable strategy that proved retrospectively to be inferior." *Id.* at 974 n.19; *see also id.* at 974-76 nn.19-22 & 25-27 (discussing cases showing courts' general policy in applying the mitigation principle has been to apply it with a degree of liberality toward the nonbreaching party so as to prevent the doctrine from becoming a trap for the injured party). *See generally* D. DOBBS, *supra* note 11, § 3.7, at 186-87.

84 For this final point, see Hillman, *supra* note 76, at 607-09.

85 If the breaching seller's cure involves significant transportation charges, either to ship the defective good to a workshop for repair or replacement or to transport replacement goods, workers, or machinery to the buyer's site, it is especially likely that others can provide cure at lower cost.

86 In one specific situation the buyer's delay in notice would prevent the seller from avoiding costs equal to the full amount of the buyer's claim for breach. That possibility is presented if the seller is in the position to take back the defective good, replace it with a new one, and resell the nonconforming good on a secondary market with virtually no cost. The argument is unlikely to apply to specially designed or manufactured goods. Furthermore, a secondary market for the nonconforming goods must exist, the seller has to have more goods than it can sell on the primary market but no excess with respect to the secondary market, and no significant transportation or other transaction costs must be involved. This situation is unlikely to arise very often.

B. The Evidence-Gathering Rationale

The second prejudice argument that appears to apply to a broad spectrum of cases is the evidence-gathering rationale. According to the evidence-gathering argument, prompt notice increases the seller's chances to gather important evidence to refute a buyer's unjustified claims of breach while the evidence is still relatively fresh.[87] This argument seems especially plausible if the buyer disposes of allegedly defective goods before giving the seller notice, thus denying the seller an opportunity to verify the alleged defect. For example, if a buyer of peaches claims that the seller breached the implied warranty of merchantability by delivering rotten fruit, but the buyer destroyed the peaches before notifying the seller of the complaint, the seller is siguificantly prejudiced.[88]

This rationale presents two problems. First, the argument relies on the premise that sellers, but not buyers, suffer this kind of prejudice because sellers cannot monitor the condition of the goods after delivery. In many cases, however, the seller does not suffer an informational disadvantage with respect to the breach, or the informational disadvantage has no practical consequences. Second, even when the seller does suffer an informational disadvantage, the buyer's delay is more likely to harm the buyer's own case than to harm the seller's defense, so the notice rule is unnecessary. The following section considers each of these objections and proposes a fairer alternative to the notice rule's absolute bar.

1. *Limited Cases in Which Sellers Suffer Informational Disadvantage*

Time is the truth seeker's enemy. Evidence decays with time; memories fade and documents are destroyed or lost. In a very general way, protection against loss of evidence justifies any cut-off rule.[89] Most cut-off rules, however, treat equally all parties to legal disputes. The one-to-four year limitations period of Article 2 applies equally to buyers and sellers.[90] The notice rule, however, de-

87 *See* authorities cited *supra* note 22.

88 *Cf.* T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980) (boll-weevil-infested flour).

89 The United States Supreme Court has stated in oft-quoted language that without statutes of limitations fraud might be perpetrated by the prosecution of stale claims because " 'evidence has been lost, memories have faded, and witnesses have disappeared.' " American Pipe and Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (quoting Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944)); *accord* W. FERGUSON, THE STATUTES OF LIMITATION SAVINGS STATUTES 43, 46 (1978) ("primary purpose of the [original English] statutes [of limitations] was to protect defendant against loss of witnesses and evidence and to protect his acts in reasonable reliance on plaintiff's inaction"; same purpose for U.S. statutes); Fischer, *supra* note 37, at 2; *Developments, supra* note 59, at 1185.

90 *See supra* note 54.

spite the fact that both parties face equal prejudice from the passage of time, applies only to buyers.

The scope of the notice rule restricts it to situations in which the seller has a special concern, not shared by the buyer, over losing important rebuttal evidence. The notice rule applies only to a buyer's claims for damages after it has accepted the goods.[91] The seller loses possession of and access to the goods at delivery. Consequently, after delivery the seller must depend on the buyer for information about the goods' physical state or performance. Once the buyer gives notice of a complaint about the goods, the Code eliminates the informational disadvantage by giving the seller a right to inspect, test, and sample the goods in the possession of the buyer.[92]

The "rotten peaches" case illustrates this type of prejudice. In the peaches case, the buyer destroys the only tangible evidence of the alleged defect before the seller's representatives can see the goods. If a carrier delivered the goods and particularly if the goods were packaged at the time of delivery so that no representative on whom the seller can rely to represent its interest was present when the buyer allegedly discovered the defect,[93] the buyer's delay in giving notice deprives the seller of the one chance to obtain evidence to refute or confirm the buyer's testimony.[94]

Only informational disadvantages with respect to the factual ba-

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91 The language of section 2-607(3)(a) excludes application of the notice rule to claims of nondelivery. Courts have shown no inclination to extend the reach of the notice rule in this regard. *See, e.g.*, Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 152 n.40 (6th Cir. 1983); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. 1975).

92 U.C.C. § 2-515(a) provides:

> In 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; . . .

93 If the seller is shipping the peaches via a carrier under a destination contract (F.O.B. buyer's plant, for example), the seller is liable to the buyer if the peaches are not merchantable when they arrive, U.C.C. §§ 2-319(1)(b), 2-503. Yet the seller is unlikely to have one of its own representatives present at the time the carrier delivers the peaches to the buyer. The buyer's witnesses may therefore be the only witnesses with personal knowledge of the facts relevant to the liability issue.

Of course, the seller is not subject to this disadvantage at all under a shipment contract (F.O.B. seller's warehouse) because the seller is only required to put conforming goods into the hands of a carrier at its warehouse. *Id.* §§ 2-319(1)(a), 2-503(1), (2), 2-504. Moreover, even in a destination contract the carrier may be able to confirm or refute the buyer's testimony concerning the condition of the goods at delivery.

94 If one of the seller's witnesses examined the goods at delivery and can testify that they in fact conformed, the seller suffers no informational disadvantage unless, as a result of the buyer's delay, the seller's witness becomes unavailable and the seller has not preserved the evidence.

sis for the claim of breach justify the notice rule. Disadvantages in respect to knowledge about the buyer's intentions to sue or questions about the extent of consequential damages do not justify the rule. Sellers have no special disadvantage in determining another party's intention to sue.[95] Moreover, delivery of the goods does not effect the seller's ability to gather evidence regarding consequential damages. If the seller knows of factual grounds for the breach claim, it may gather evidence from third parties and thus may not be disadvantaged at all with respect to evidence not under the buyer's exclusive control. With respect to evidence in the exclusive possession of the buyer, the seller can protect itself by seeking information, either directly or indirectly, from the buyer.[96] In neither case would timely notice usually gain the seller any additional rebuttal evidence concerning damages.[97]

If informational disadvantage is the essential reason for limiting the notice rule to buyers' post-acceptance damage claims, and if such informational disadvantage is limited to knowledge of the factual basis for a claim of breach, then the evidence-gathering rationale fails to justify applying the rule to large classes of breach claims. For example, the seller will virtually always know if the goods are delivered late.[98] The buyer's delay in giving notice in such a case

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95 For the seller to exercise his section 2-515 rights requires a "claim or dispute." One might argue from this section that the seller's informational disadvantage is not dispelled by notice merely of the factual basis for a breach claim because until the buyer makes an actual claim, there is no "claim or dispute" to bring section 2-515 into operation. However, if the seller, upon learning of the factual basis for a breach claim, requests access to goods in the buyer's possession for the purpose of verifying the factual allegations of the notice and the buyer refuses the request on the ground that there is no "claim or dispute," the doctrine of estoppel is available to prevent unfairness. It is not necessary to broaden the notion of the informational disadvantage to which the notice rule is addressed in order to take care of this one narrow circumstance.

96 Certainly a buyer that deliberately misleads a seller upon inquiry concerning the likely extent of harm resulting from the seller's breach is courting an estoppel defense to its subsequent claim for much larger damages, at least if the seller can show that it has been prejudiced by relying on the buyer's original low estimate of damages.

97 Courts have never interpreted the notice rule to require the buyer to assert a particular amount of damages. Moreover, the Code provides the seller no special prelitigation right of access to evidence relating to damages issues; section 2-515(a) is limited to testing and sampling the good itself. Although FED. R. CIV. P. 27 authorizes prelitigation depositions and document production in certain cases, it has generally been reserved for perpetuation of testimony and has not been regarded as a discovery tool. C. WRIGHT, LAW OF FEDERAL COURTS § 81, at 543 n.26 (4th ed. 1983); 8 C. WRIGHT & A. MILLER, *supra* note 9, § 2071.

98 If in a destination contract the seller ships the goods in a timely manner but the carrier delays delivery beyond the contractual delivery date, the seller is not likely to know it has breached until it receives notice. However, this situation does not raise evidentiary problems for the seller because there is not likely to be a dispute over the allegation of late delivery. If the seller faces any prejudice in this situation, it is more likely to be loss of the claim against the carrier. *See infra* Section II.C.1. In practice, the risk of this prejudice is likely to be small because carriers usually disclaim or limit liabil-

cannot prejudice the seller by denying him access to evidence of the cause of breach.

Similarly, the evidence-gathering rationale does not justify enforcing the notice rule in many breach-of-warranty cases. The most obvious example involves a seller that already knows of the defect at the time of delivery. The evidence-gathering rationale does not apply because the seller has no informational disadvantage. Nor should the notice rule apply if the allegedly defective goods are available at the time of suit and the passage of time has not prejudiced the seller's efforts to determine if the goods really were defective at the time of delivery. The evidence-gathering rationale thus excludes cases that involve admitted defects or delivery of the wrong goods and cases in which the only issue is whether the goods in question have a defective design.[99]

In sum, the cases that justify special protection for sellers against the potential loss of rebuttal evidence are those in which a bona fide dispute exists over one of the following issues: (1) whether the goods were nonconforming at delivery or (2) whether the goods became nonconforming during the warranty period.

2. *Extent of Prejudice*

An examination of the cases in which the evidence-gathering rationale most strongly justifies the notice rule reveals a paradox. The cases that best justify a notice rule are the same cases in which delay is least likely to constitute any real prejudice to the seller because the buyer's delay will most likely undermine the buyer's own credibility.

Consider again the case of the rotten peaches destroyed with-

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ity for the consequential damages of delay. None of the reported decisions applying the notice rule to delay claims appears to have involved allegations that the delay was the fault of a carrier.

99 This was exactly the situation in EPN-Delaval, S.A. v. Inter-Equip, Inc., 542 F. Supp. 238 (S.D. Tex. 1982), which involved six ten-ton steel heads that had been cast in the wrong shape for the buyer's order. The court held that the buyer's damages claim was barred because the buyer did not give notice for sixty-five days after delivery. *Id.* at 248. Yet there was simply no way in which seller's efforts to protect itself from unfounded claims as to the defect could have been hurt by the delay. Once the buyer raised the complaint, the seller could have verified that the casting was not in the contractually required shape. No reasonable possibility existed that the steel heads could have been in the wrong shape at that time unless they were also in the wrong shape at the time of delivery.

To generalize from this example, any defect claim in which the following conditions are true would not fit the evidence-gathering rationale: (a) the physical evidence of the alleged defect in the goods is available when the buyer eventually makes the claim; (b) no possibility exists that the buyer's misuse or failure to maintain the goods caused the defect; and (c) no reason explains the condition of the goods at the time of the claim other than that they were delivered in that condition.

out any commercial justification before the buyer notified the seller of the alleged defect. Suppose the buyer's witnesses are the only ones who testify that the peaches were rotten at delivery. The very fact that the buyer destroyed the only physical evidence that might have corroborated the buyer's claims without commercial justification before the seller could verify the alleged defect is suspicious. Such suspicious circumstances will tend to undermine the credibility of the buyer's testimony. Moreover, because the buyer accepted the goods, the buyer carries the burden of persuasion on the issue of whether the seller breached.[100]

Because the standard of proof that the buyer must meet is only the "preponderance of the evidence" standard, sellers may fear that doubts raised by the loss of evidence due to the buyer's delay will not be sufficient to prevent the trier of fact from finding for the buyer. Nevertheless, the risk in most cases seems very small. In some cases other evidence may corroborate the buyer's testimony,[101] making it highly unlikely that the lost evidence would have

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100 U.C.C. § 2-607(4).

101 For example, in the "rotten peaches" case a neutral third party's testimony, such as a government fruit inspector prevent at delivery, might corroborate the testimony of buyer's witnesses. *But see* General Matters, Inc. v. Paramount Canning Co., 382 So. 2d 1262 (Fla. App. 1980) (notice rule invoked to bar buyer's claim because buyer destroyed canned grapefruit that state department of agriculture deemed unfit for human consumption without first notifying seller). In such a case, the odds are that the seller will lose if not given the benefit of the notice rule, but scant reason exists to fear that buyer's witnesses are lying.

Although neutral third parties may not always be available to confirm or refute a buyer's claims, other types of corroborative evidence such as movies, photographs, or inspection reports may exist. The corroboration will be strongest if the documentary evidence was made before the buyer decided to file suit, but even if the buyer creates such evidence with litigation in mind, there may be no basis for challenging its authenticity. For example, in Standard Alliance Indus. Inc. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), the court applied the notice rule bar even though the buyer had made a movie of the machine's allegedly defective operation shortly after the buyer filed suit and shortly before the machine was destroyed. *Id.* at 826. The court determined that the buyer's delay in giving notice prejudiced the seller by depriving it of the opportunity to make its own film, but the court also thought that it did not need to address the seller's specific objections to the film. *Id.* at 826-27. The court stated that "UCC § 2-607's notice requirement is designed to forestall the very difficulties [allegations of prejudice] which developed here." *Id.* at 827. Yet if no reason to doubt the movie's authenticity or the accuracy of its depiction of the machine's malfunctions exists, then it is hard to see how the seller was prejudiced. The lack of prejudice in this case is especially clear because the court conceded that "the evidence that the machine was defective was overwhelming," *id.* at 826, and that the jury could properly have found that the seller had full knowledge when it ceased its repair efforts that they "were an utter failure." *Id.* at 824. The court's only suggestion of prejudice is that the seller "may have been able to put on a spirited defense, especially as to damages, had it gotten early notice and followed up by inspecting the machine." *Id.* at 826-27. For an argument that protection against loss of damages evidence is not within the scope of the notice rule, see *supra* text accompanying notes 96-97.

It should also be noted that in a case in which the actual physical evidence of the

refuted the buyer's claims. In cases in which no corroborative evidence exists, the buyer who would lose today under the notice rule would also likely lose if the trier of fact were permitted to consider the merits of the breach claim because the two issues are decided by the same trier of fact[102] and are based on the same factors.[103] But in a significant number of the reported cases, corrobative evidence suggests that the flat bar of the current notice rule shields sellers from liability for actual breaches.[104]

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alleged defect is no longer available at the time of the lawsuit, the seller is entitled to discover any reports or opinions of experts that buyer may have hired to inspect the goods because it would be manifestly impossible for the seller to obtain facts or opinions about the conformity of the good by other means. *See* FED. R. CIV. P. 26(b)(4)(A), (B).

102 Courts have never used the notice rule as a jury control device. Rather, the question whether notice was given within a reasonable time is a question of fact, for the jury if there is one. *See supra* note 30.

103 Because the courts tend to interpret the notice rule in light of its supposed functions, prejudice arguments have strongly influenced the courts even if they do not require a showing of prejudice before applying the notice rule. *See supra* note 36. The buyer's delay will likely result in a decision for the seller if the seller shows that the delay caused the seller to lose the only evidence available to rebut uncorroborated claims by witnesses tied to the buyer. It is hard to imagine that if the court did not apply the notice rule, the same judge or jury would find on the same facts that the buyer carried the burden of showing that the goods were defective.

104 This is especially likely to be the case when the buyer does not seek to recover consequential damages but merely the diminution in value or cost to repair the breach. *See, e.g.*, Mariner Water Renaturalizer of Wash., Inc. v. Aqua Purification Systems, Inc., 665 F.2d 1066 (D.C. Dir. 1981) (water regulators breached warranty because they were not classified by Environmental Protection Agency as purifiers, yet court upheld dismissal of buyer's diminution-in-value claim for delay of 5 to 8 weeks in giving notice); C.R. Daniels, Inc. v. Yazoo Mfg. Co., Inc., 641 F. Supp. 205 (S.D. Miss. 1986) (defects in bags verified at time of suit and not the type that could have resulted from buyer misuse); Parker v. Bell Ford, Inc., 425 So. 2d 1101 (Ala. 1983); Fleet Maintenance, Inc. v. Burke Energy Midwest Corp., 11 Kan. App. 2d 523, 728 P.2d 408 (1986) (engine block contained "pinholes," which could be verified at time of suit and which could not apparently have resulted from buyer misuse in the short period of time the buyer operated the truck); Hydronic Enters., Inc. v. Danal Jewelry Co., 2 U.C.C. Rep. Serv. 2d (Callaghan) 1537 (R.I. Super. Ct. 1986) (seller not challenging buyer's claim that gold solutions were subject to gold shortages; independent testing agent verified shortages); Agway, Inc. v. Teitscheid, 144 Vt. 76, 472 A.2d 1250 (1984) (there was evidence that carpet had suffered substantial deterioration in value in one year); *see also* case discussed *supra* note 99 and two cases discussed *supra* note 101.

Nor can the seller ever show prejudice in cases involving claims for delay in delivery, *but see* cases cited *supra* note 32, or in other cases in which the seller knows of the facts constituting the breach by the time of delivery. *But see* Eaton Corp. v. Magnavox, Co., 581 F. Supp. 1514 (E.D. Mich. 1984) (seller knew at delivery that it had used wrong component, but court found its knowledge irrelevant to notice rule).

In many cases, especially ones involving claims for consequential damages, the seller may have suffered prejudice with respect to the consequential damages claim by reason of the delay in notice without having been harmed with respect to the claim for direct damages. For example, in K & M. Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106 (6th Cir. 1982), it is possible that some of the buyer's claims were for consequential damages which might have been avoided had it given the seller timely notice, but it was also clear that there were substantial defects in the machine. *Id.* at 1115. Lack of

3. *Using Presumptions to Overcome Possible Prejudice*

The foregoing argument indicates that the likelihood of actual prejudice is always so small that the evidence-gathering rationale for the notice rule is in fact very weak. Any lingering concerns about the possibility of prejudice from loss of evidence can be eliminated by granting the seller a rebuttable presumption that specific evidence the seller lost as a result of the buyer's delay would have refuted the buyer's claim.[105] This remedy is more moderate than the absolute bar of the current notice rule and therefore provides a better accommodation of buyer and seller interests.

The seller could not claim the presumption unless it could prove that, as a result of the buyer's delayed notice, it lost the chance to obtain or preserve a specific source of evidence relevant to the breach issue that the seller would not normally have obtained or preserved in the absence of a dispute. In the rotten peaches case, for example, if the buyer, without commercial reason, destroyed the fruit before the seller's representative could inspect it, the court might instruct the factfinder to presume that, had the seller's representative viewed the fruit, she would have testified that it was not rotten. The factfinder could weigh that presumption against the credibility of the buyer's representative who testifies that the fruit was rotten when delivered.[106]

This approach concedes that the mere loss of potentially significant evidence is a prejudice to the seller but avoids the extreme of shielding the seller from liability in cases in which the available evidence strongly indicates that the seller did breach. The presumption formalizes whatever negative inference a factfinder would draw when the buyer's delay in giving notice prevents the seller from obtaining potential rebuttal evidence. Although this approach still overprotects the seller by giving the seller the benefit of a presumption even when the available evidence indicates that the seller in fact breached,[107] it also allows the trier of fact to consider whether the available evidence overcomes the presumption. The alternative of requiring the seller to prove actual harm from loss of evidence would pose an impossible burden of proof for the seller, and the alternative of requiring the seller to demonstrate a likelihood that

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prompt notice should not have changed the seller's liability for the direct damages of repairing the defects.

105 I am particularly indebted to Professor Mary Lou Fellows for having suggested the use of presumptions for this purpose.

106 An alternative rule that requires the buyer to prove breach by "clear and convincing" evidence to overcome the presumption would provide the seller even more protection. This extra level of protection does not seem warranted given the considerable doubt that sellers are actually prejudiced.

107 *See supra* note 104.

lost evidence would have supported the seller's defense would in effect require the court to decide the case on the basis of the available evidence anyway, thus eliminating any protection from the potential prejudice. Requiring the seller to identify specific sources of lost evidence, on the other hand, does not unduly burden the seller because the seller should be able to identify the sources of evidence it could have obtained if notified earlier. The use of presumptions thus is a reasonable way to protect the seller from this form of prejudice.[108]

In sum, the evidence-gathering rationale does not justify section 2-607's broad notice rule. At most the rationale justifies a narrower rule that applies only in situations in which the seller makes a prima facie showing of prejudice by proving that the buyer's unreasonable delay destroyed the seller's opportunity to gather specific sources of evidence to refute the buyer's breach claim. Even in these cases, granting the seller a rebuttable presumption that the lost evidence would have shown that the goods were conforming appears sufficient to overcome the asserted prejudice. The greater protection of the current rule simply shields sellers from liability for actual breaches.

C. Less Widely Applicable Types of Possible Prejudice

The notice rule might also protect sellers against two other potential forms of prejudice: (1) loss of claims against suppliers or carriers and (2) loss of the opportunity to avoid similar liability to other buyers. Unlike the mitigation/cure and evidence-gathering

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108 One additional possible cost associated with the loss of evidence is the seller's costs of additional uncertainty created by loss of evidence that could have confirmed or rebutted the claim. Greater uncertainty may add to the costs that both parties incur in seeking dispute resolution. For example, dispute resolution in which significant, potentially confirmatory evidence was lost may require greater involvement by company employees than would have been the case if the seller could have obtained confirmation or rebuttal of the buyer's claim through inspection. As a result of the loss, the seller may have to engage in a time-consuming or expensive or less dispositive hunt for evidence.

There are two responses to this argument. First, uncertainty sufficient to create extra costs is only created by loss of significant, potentially corroborative evidence in cases in which the only testimony on an issue of liability or damages comes from witnesses with ties of interest or affection to the buyer. The existence of other evidence that corroborates or refutes the buyer's witnesses makes it much more dubious that the seller will incur extra costs. Of course, the seller may pay extra to dig out the other evidence, but this expense does not necessarily constitute an extra cost. In most cases, the rational seller will seek to gather all economically available evidence to evaluate a claim.

Second, the cost of extra uncertainty should be relatively insignificant. The rational seller attempts to control its claims-evaluation and dispute-settlement costs. The goal of good claims management is to contain the costs of uncertainty. Thus, though some costs associated with greater uncertainty about the validity of the buyer's claim may exist, it is hard to imagine that they are generally large enough to justify a rule that cuts off all of the buyer's remedies for breach.

rationales, neither of these applies to all sellers' breach cases. Nor is either an important current justification for the rule. Nevertheless, in the narrow range of cases to which these justifications apply, they provide a sounder argument for the complete bar of the notice rule than the mitigation/cure or lost evidence rationales.

1. *Loss of Claims Against Suppliers*

Most sellers depend upon goods or services supplied by others to fulfill their performance requirements. Other parties' breaches thus may cause the seller to breach a contract with its own buyers. When that happens, the seller usually hopes to pass on its liability to the breaching supplier, subcontractor, or carrier.[109]

Where a seller's supplier provides defective goods that the seller resells or incorporates into its own product without discovering the defect, the seller risks being caught between two limitations periods, the period that forecloses the buyer's right of action against the seller and the period that forecloses the seller's right of action against the supplier. In both cases, the cause of action for breach of warranty accrues at tender of delivery.[110] If the same four-year limitations period applies to both the buyer's and the seller's causes of action, the statute of limitations forecloses the middleman-seller's suit against its supplier before it forecloses the buyer's suit against the middleman-seller because the supplier had to deliver before the seller did. During the gap, the seller can be forced to bear the full liability for the supplier's breach. One might therefore argue that sellers need the notice rule's protection against liability for third party breaches that the buyer's unreasonable delay in giving notice might force the seller to bear.[111]

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109 The seller may do so through separate lawsuit, by impleading, or by vouching in under U.C.C. § 2-607(5). In some cases, however, the middleman-seller may have had to accept greater liability toward its own buyers than the third parties have accepted *vis-à-vis* the seller. The suppliers may, for example, have insisted on warranty disclaimers that the seller's buyer would not accept or on much shorter limitations periods than the seller's buyer would accept.

110 U.C.C. § 2-725(2). The gap is less likely to occur with respect to claims that a carrier damaged the goods because the cause of action against the carrier generally accrues at the point of delivery to the buyer, the same point at which the buyer's cause of action accrues against the seller. However, for interstate carriage, the period of limitation for damage claims against the carrier is two years. 49 U.S.C. § 11706(c) (1982). Therefore, under a four-year limitations period for suits against the seller, potential for a similar gap of sizable proportions exists. The seller's best defense against this gap is to sell F.O.B. its own plant or warehouse so that it will have no liability for damage to the goods in transit. *See* J. WHITE & R. SUMMERS, *supra* note 7, § 3-5, at 108.

111 The gap does not exist in those jurisdictions in which the courts treat the middleman-seller's claim over against the supplier as a claim for indemnity that does not accrue until the seller pays on the buyer's claim against him. *See, e.g.*, City of Clayton v. Grumman Emergency Prods., Inc., 576 F. Supp. 1122 (E.D. Mo. 1983) (applying Missouri law); *cf.* Falcon Tankers, Inc. v. Litton Systems, 355 A.2d 898, 903, 907 (Del. Super. Ct.

Although the prejudice on which this argument turns is much clearer than in the case of the evidence-gathering rationale, it should not be overstated. By virtue of the position of distributor, dealer, or components assembler, the middleman-seller generally assumes a substantial risk of liability caused by others' poor performance. For example, the component supplier may become bankrupt or simply disappear.[112] Even with the benefit of a notice rule, the buyer's notice within a "reasonable" time may arrive too late for the seller to initiate suit against the third party before the limitations period expires. Thus, the buyers' unreasonable delay in giving notice may increase the number of cases in which sellers bear liability for a third party's breach, but it is not clear that the increase is substantial.

The middleman-seller could reduce or eliminate the risk of the limitations periods gap without a notice rule by obtaining extended warranties from its suppliers.[113] An extended warranty would provide more certain protection against the risk of the gap, but it would also be expensive to the seller because the supplier assumes substantially increased risk. Thus, the costs to sellers for warranties from suppliers probably equals or exceeds the concededly minor costs that the notice rule imposes on buyers. It therefore might be cheaper for sellers to purchase express contractual notice rules in

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1976) (apparently treating claim against supplier as indemnity action because court allows claim more than four years after delivery of allegedly defective goods; applying Colorado law). Of the few courts to have passed on this point, however, a slight majority have held that if the claim is made with respect to a sale of goods, Article 2 requires treating the cause of action against the supplier as accruing at delivery even though the claim may be considered a claim for indemnity. Richardson v. Clayton & Lambert Mfg. Co., 634 F. Supp. 1480 (N.D. Miss. 1986) (applying Mississippi law); PPG Indus., Inc. v. Genson, 135 Ga. App. 248, 217 S.E.2d 479 (1975); Maxfield v. Simmons, 96 Ill. 2d 81, 449 N.E.2d 110 (1983); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984).

The majority view is the better one because the rule on accrual in Article 2 apparently was intended to create a highly predictable cut-off rule. For example, the official comment to section 2-725 states that the four-year limitations period was selected "as the most appropriate to modern business practice. This is within the normal commercial record keeping period." The implication is that the rule is designed to protect business expectations that after four years records of transactions that have not resulted in litigation may be destroyed. The minority view would subvert that goal for most sellers of goods by creating in effect a discovery rule of accrual for at least some claims against sellers of goods.

112 The risk that the seller's claim against a supplier will be uncollectible is reduced considerably if the component supplier is a major company and could be virtually eliminated by such devices as performance bonds or standby letters of credit.

113 Pre-breach agreements to extend the limitations period for goods are not enforceable, U.C.C. § 2-725(1), but an agreement to extend the warranty against defects beyond the delivery date will achieve the same result of lengthening the period from delivery of the components until expiration of the limitation period.

contracts with their buyers than extended warranties in contracts with their suppliers.

This rationale for the notice rule thus essentially argues that the notice rule is the least-cost method of eliminating the risk posed to sellers by the potential gap in limitations periods. Without the notice rule, sellers will likely try to raise their prices to reflect the costs of the additional risk. Buyers, however, would not choose this solution because it would force them to pay for the risk in every case whereas a notice rule would give them an opportunity to avoid the cost by giving reasonable notice. Therefore, the majority of buyers and sellers probably would agree to a notice rule limited to achieve this purposes. Thus, imposing the notice rule for this purpose in the absence of party agreement to the contrary should reduce transaction costs.[114]

The argument does not, however, justify applying the notice rule to all buyers' post-acceptance claims. In many cases the seller does not lose a claim against a third party because of the buyer's unreasonably delayed notice.[115] If the seller has lost a claim, it is not difficult to prove that loss. Buyers and sellers should therefore prefer a notice rule that applies only if the seller shows that he lost a claim against a supplier because of the buyer's delay in giving notice. Because it poses virtually no risk of cutting off buyers' claims when the seller does not suffer this prejudice, such a rule protects sellers from this kind of prejudice at the least cost to buyers.

2. *Loss of Opportunity to Avoid Similar Liability to Others*

The final type of prejudice that is occasionally used to justify the notice rule is the seller's potential loss of opportunity to avoid the same breaches on similar contracts with other buyers.[116] For example, upon receiving notice from a buyer that the wiring in a heating panel is defectively overheating, the manufacturer-seller can check its manufacturing process and components to eliminate the defect in panels subsequently manufactured, thereby saving future

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114 A great deal of literature explores this kind of argument for contract rules. *See, e.g.*, Goetz & Scott, *supra* note 76, at 971.

115 The argument does not apply at all to the seller's liability for its own nonperformance or misperformance. Moreover, there is little likelihood of a gap in the case of claims against service contractors because the period of limitations applicable to claims under written contracts other than contracts for the sale of goods is in many states longer than the four-year rule in U.C.C. § 2-725. *See, e.g.*, FLA. STAT. § 95.11(2)(b) (1985) (5 years); ILL. ANN. STAT. ch. 110, ¶ 13-206 (Smith-Hurd 1984) (10 years); NEV. REV. STAT. ANN. § 11.190(1)(b) (Michie 1986) (6 years); N.Y. CIV. PRAC. L. & R. 213 (McKinney 1978) (6 years); OR. REV. STAT. § 12.080 (1983) (6 years); UTAH CODE ANN. § 78-12-23(2) (1953) (6 years). *But see* CAL. CIV. PROC. CODE § 337 (West 1982) (4 years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986) (4 years).

116 *See supra* note 75.

buyers from this fire danger and shielding the seller from additional liability. Moreover, by minimizing liability for product defects, the seller may reap the benefits of lower products-liability insurance premiums. The lower costs may be reflected ultimately in lower prices. The buyer's delay in giving notice arguably deprives the seller of these benefits.[117]

There are, however, very few cases in which the notice rule is likely to secure these benefits for sellers. Although this argument initially appears strongest in the case of dangerous defects that are likely to cause bodily injury or significant damage to property, it is precisely in this kind of case that the buyer will probably also have strict-liability tort remedies,[118] which under current law are not subject to the notice rule.[119] The range of cases in which the notice rule may impel buyers to give timely notice is thus narrowed.[120]

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117 The argument applies chiefly to mass-produced goods, a large portion of which are sold to consumers. Although commercial buyers also undoubtedly buy substantial quantities of mass-produced goods, the argument is not likely to fit the seller of specially designed and manufactured goods.

118 *See* RESTATEMENT (SECOND) OF TORTS § 402A (1964) (imposing strict liability on seller of defective product that causes "physical harm . . . to the ultimate user or consumer, or to his property"). The chief reason the buyer might be forced to rely on a breach of warranty suit for these damages is the running of the statute of limitations applicable to the tort cause of action. Even in jurisdictions in which the limitations period applicable to tort causes of action is shorter than the period applicable to contracts suits, the tort causes of action do not necessarily extinguish first because the limitations periods for torts do not begin to run until the buyer suffers injury and could reasonably have discovered it. W. KEETON, *supra* note 14, § 30, at 165-68. Because this discovery rule of accrual creates the potential for very long periods of exposure, some states have placed caps on the period of exposure through so-called "repose" statutes, which typically are at least as long as the limitations period for contract suits. *Id.* at 168 n.31.

119 *See supra* note 5.

120 Between business buyers and sellers, however, contract causes of action may remain important, especially in cases in which there is no personal injury or other property damage. *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 18-19, 403 P.2d 145, 151-52, 45 Cal. Rptr. 17, 23-24 (1965) (stating in dictum that a buyer that suffers "economic loss alone," like lost profits as a result of a defect in a good, is not able to recover in tort, but also stating in dictum that tort recovery is available for physical damages to other parts of the defective product caused by the defect itself). The United States Supreme Court has followed many courts in iguoring the second part of the *Seely* dictum and characterizing the *Seely* rule as one that precludes tort recovery "if a defective product causes purely monetary harm," East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 868 (1986) (adopting *Seely* rule for admiralty law), by which the Court meant to preclude tort recovery not only for lost profits but also for the costs to repair the defect and damage done to the rest of the good by the defect. *Id.* at 875. The Court referred to this as the majority rule. *Id.* at 868.

The contrary position is represented by those courts that have extended tort law to cover "economic loss" if caused by a defect that created a danger of personal injury or damage to other property. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981) (tort recovery turns on nature of the defect, the type of risk, the manner in which the injury arose); Russell v. Ford Motor Co., 281 Or. 587, 595, 575 P.2d 1383, 1387 (1978) (attempting to distinguish between "the disap-

Moreover, this form of seller prejudice is speculative. Possibly, the defect in the buyer's goods is an isolated occurrence. Without evidence that other buyers received defective goods, applying the bar of the notice rule entails the risk that the seller may reap a windfall because there is no possibility of other claims. Even if other buyers assert claims, in many cases the seller could not have avoided the subsequent liability even with earlier notice. Notice of defective performance will not necessarily enable the seller to find and solve the problem quickly.[121] Product defects that do not pose risks of personal or serious property injury are less likely to prompt sellers to undertake vigorous efforts to avoid similar liability to other buyers. Recalls of goods already sold or extensive redesign efforts seem especially unlikely.

Because the connection between timely notice and avoidance of similar liability to other buyers is so tenuous, this rationale for the notice rule suggests that it is preferable to limit application of the rule, insofar as it is justified on the basis of this argument, to cases in which the seller has delivered similarly defective goods to other buyers and would not have done so or would have recalled them had it received earlier notice. Unless justified by another rationale, applying the notice rule when there is no such showing of probable prejudice would significantly overprotect the seller. If the rule is limited in this way, it will probably shield a seller from liability for defective products only in a small number of cases.

D. Summary of Prejudice Argnments

The prejudice argnments provide a reasonable justification for the notice rule if a buyer's delay in giving notice causes the seller prejudice. None of the potential types of prejudice, however, are likely to occur in all or even most types of sellers' breach cases. Moreover, the notice rule's complete bar will often bar more of the buyer's claim than the potential or actual prejudice warrants.

The strongest prejudice argument is the seller's loss of claims

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pointed users [no tort recovery] . . . and the endangered ones [tort recovery allowed]"); *cf.* Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 327-29 (Alaska 1981) (discussing cases allowing tort recovery for all damages suffered in "sudden and calamitous" occurrence).

121 The problem may take lengthy study to diagnose and cure. Buyer's delay in giving notice does not necessarily affect the seller's ability to avoid similar liability to others if the seller cannot easily cure the defect. Earlier notice by buyers might stimulate the seller to make greater efforts to solve the technical problems, convince the seller that the harm caused by the potentially defective good is so great that the seller does not deliver any more goods of the same kind, or even convince the seller to recall all similar goods. On the other hand, notice alone may have little effect on the seller. Perhaps only a lawsuit would persuade the seller to pull its goods off the market, redesign them, or at least fix them.

against third parties because of a "gap" in the applicable limitations periods. In many cases, however, sellers could not pass on liability even with earlier notice from the buyer. Loss of opportunity to avoid costs by cure presents a concrete claim of prejudice, but will rarely account for the buyer's entire claim. That the buyer's delay in notice may in some situations deny the seller the opportunity to avoid similar liability to other buyers is plausible, but the argument indulges in considerable speculation. The evidence-gathering rationale is the most tenuous prejudice justification for the notice rules. Even in those cases that best fit the argument, a rebuttable presumption that the lost evidence favored the seller would be fairer then the notice rule's bar. Thus, prejudice to the seller, the strongest policy supporting the notice rule, cannot justify the rule in its present form.

III
Implications of Critique for Application of Statutory and Contractual Notice Rules

The foregoing sections have concluded that the only reasonable justification for the notice rule is protection of the seller against prejudice. This conclusion calls for a number of changes in the way courts interpret and apply current notice rules. This section will first examine the statutory notice rule that applies in the absence of party agreement to the contrary. The section then discusses the degree of freedom that the parties should have to write their own notice rule. Finally, this section considers whether the courts are free to implement this Article's recommendations or whether legislative reform is needed.

A. The Statutory Notice Rule

The conclusions of this Article suggest four areas of change in the application of the statutory notice rule: (1) the content of notice required; (2) the choice between a broadly applicable "limitations-style" rule and a narrower "laches-style" rule; (3) the procedures for applying the "laches-style" notice rule; and (4) the remedy employed to redress prejudice.

1. *The Content of the Notice Required*

The most unjustifiable excesses of the current notice rule result from the prevailing view that the required notice is of the buyer's opinion that the seller has breached. The only prejudice to sellers that a notice rule can redress arises from the informational disad-

vantage that sellers suffer upon delivery of goods to their buyers.[122] Because the informational disadvantage concerns only the factual basis of claims that the goods do not conform to contract requirements,[123] the only notice that the rule should require the buyer to give the seller is either notice of the factual basis for its claim of breach or sufficient notice of the buyer's dissatisfaction so that the seller knows that it may have breached.[124]

A corollary of the minimal content rule is that the notice rule should not apply at all in cases in which the seller knows of the factual basis for the buyer's claim.[125] In those cases, the buyer's notice

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122 Even the more expansive rationale of the repose argument would apply only to cases involving the same informational disadvantage. *See supra* text accompanying note 60.

123 This point has already been argued with respect to the evidence-gathering rationale. *See supra* text accompanying notes 89-97. It is applicable to each of the other prejudice arguments as well.

For example, if the seller knows that it has delivered goods with defective components, the seller knows that it may face liability for the defect and knows enough to assert liability against a component supplier if it believes that the supplier is responsible for that liability. The seller can either initiate suit against the supplier and seek to join the buyer to establish damages or secure the supplier's agreement to waive the limitations period pending three-way settlement negotiations. Once a dispute has arisen, parties can make binding agreements to extend the limitations period for a reasonable amount of time for that dispute. *See* United States v. Curtis Aeroplane Co., 147 F.2d 639, 641 (2d Cir. 1945) (L. Hand, J.); 1A A. CORBIN, CORBIN ON CONTRACTS § 218 (1963). Similarly, knowledge of a defect in delivered goods affords the seller as much opportunity to avoid liability to others for similar defects as notice would.

With regard to the prejudice argument based on cure and mitigation, mere knowledge of the fact that the good does not conform to the warranties is also clearly sufficient to protect the seller's interest in being able to offer cure if it is the lowest-cost source of cure. The seller's interest in avoiding avoidable consequential damages may seem to require knowledge of the damages claimed as well, but the seller is adequately protected by the rule that a party cannot recover consequential damages unless they were foreseeable at the time of contracting. Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854); *cf.* Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975) (proposing to let the buyer recover damages the seller has reason to anticipate at the time of breach). *See generally* E. Farnsworth, *supra* note 6, § 12.14, at 876. Under the mitigation doctrine the buyer cannot recover those damages if it would have been commercially reasonable for the buyer to have sought cure from the seller or from another source. *See supra* Section II.A.

124 Even courts adhering to the strict standard for the content of notice do not require the buyer to specify precisely the nature of the seller's breach. *See* Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 976 (5th Cir. 1976). The buyer's expression of discontent places the seller on notice for purposes of avoiding possible prejudice as does knowledge about the precise way in which the seller has breached.

125 One case has reached this conclusion to penalize knowing misrepresentation. United California Bank v. Eastern Mountain Sports, Inc., 546 F. Supp. 945, 960 (D. Mass. 1982) (refusing to enforce U.C.C. § 2-607(3)(a) notice rule because seller knew of nonconformity but misrepresented to buyer that goods conformed), *aff'd*, 705 F.2d 439 (1st Cir. 1983). Similarly, the notice rule of the German Commercial Code does not protect sellers that "concealed the defect in bad faith." HGB § 377(5) (translated *supra* note 4).

But absent fraud, most cases in the United States permit the seller that knows of the

would be a formality without function, and there would be no justification for applying the notice rule. The minimal content rule also suggests, contrary to current interpretation of the notice rule,[126] that the notice rule should exclude claims for delay in delivery as does the German version of the rule.[127]

Adoption of the most lenient standard for the content of the notice also requires rejection of the related views that (1) the buyer does not give adequate notice if it adopts too conciliatory a tone with the seller[128] and (2) the buyer that continues to place new orders with a seller without explicitly raising breach claims fails to give notice.[129] Sufficiency of the content of notice should be judged only on whether the seller was given either knowledge of the factual basis for the buyer's breach claim or reason to believe that it may have breached. Factors affecting only the seller's evaluation of the buyer's intention of pressing its claim are irrelevant.[130]

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defect to gain the protection of the notice rule. The cases applying the strict standard for the content of notice clearly require something more than seller knowledge of the factual basis for a claim of breach, but even most of the cases applying the lenient standard might be understood to require some expression of buyer dissatisfaction. *See supra* note 31. That requirement is not justified if the seller has clear knowledge that its goods do not comply with the contractual requirements because the seller suffers no informational disadvantage. Application of the notice rule in such cases encourages seller behavior that borders on fraud.

The notice rule adopted in the 1980 United Nations Convention on Contracts for the International Sale of Goods comes closer to adopting the view of this Article by prohibiting the seller from invoking the notice rule to bar a claim that "relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." United Nations Convention on Contracts for the International Sale of Goods art. 40, *opened for signature* April 11, 1980 [hereinafter CISG].

126 *See supra* note 32 and accompanying text.

127 By its terms, section 377 of the German Commercial Code does not apply to delay claims, but only to claims for "defects." *See supra* note 4 (quoting section 377 in full). The notice provision adopted in the 1980 Convention on the International Sale of Goods similarly applies only to claims based on "lack of conformity of the goods," CISG art. 39, and appears to have been intended to exclude delay claims. *See* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 256 (1982).

128 *See* Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 978 (5th Cir. 1976) (buyer's conduct "taken as a whole" must indicate that seller is in breach); Kopper Glo Fuel, Inc. v. Island Lake Coal Co., 436 F. Supp. 91, 97 (E.D. Tenn. 1977) (favorable reports about product greatly outnumbered complaints, thereby failing to provide proper notice of breach).

129 *See Eastern Air Lines*, 532 F.2d at 979 (factor showing failure to fulfill notice requirement was fact that buyer "continued to negotiate new contracts and amend old ones throughout the period in which the delays occurred"); Marshwood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 224, 240 N.W. 392, 398 (1932) (notice under Uniform Sales Act not properly given where plaintiff ordered same product without complaint for 20 months).

130 Such factors are relevant only if the seller makes out a prima facie case for equitable or promissory estoppel. The seller would have to show that the buyer represented either that it had no breach claim (equitable estoppel) or that it would not press its breach claim (promissory estoppel) knowing that the seller would rely on that statement.

2. *Broad Versus Narrow Rule*

The first reason to discard the dominant interpretation of the current notice rule to bar the buyer's entire claim in every case in which the buyer delays notice unreasonably is that the buyer's delay does not harm the seller in the full amount of the claim in many cases. The buyer's delay may prejudice a seller by depriving it of an opportunity to offer cure, but the harm to the seller will hardly ever equal the buyer's whole claim. The loss-of-evidence argument does not even justify barring damages. The only kinds of prejudice likely to cause harm to the seller in the magnitude of the buyer's claim are restricted to rather narrow categories, principally the loss of specific claims against suppliers and the loss of the opportunity to avoid similar liability to other buyers of mass-produced goods. Many cases will not present either of these types of prejudice; the latter in particular seems very speculative in most cases.

The second reason to discard the broad form of the rule is that the possible types of prejudice do not collectively cover all or even most of the possible seller's breach cases. In fact, there are few reported cases which have applied the bar of the notice rule in circumstances that are clearly justified by prejudice to the seller.[131] The current majority interpretation of the notice rule as a "limitations-style" rule therefore is grievously overboard with respect to the only sound rationale for the rule. A "laches-style" rule that requires a showing of prejudice as a condition to invoking the rule's special

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Most importantly, the seller would have to show that it did rely on that statement to its detriment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (promissory estoppel; adding requirement that injustice can only be avoided by enforcement of the promise); *id.* § 84 comment b (equitable estoppel protects "reliance on a misrepresentation of an existing fact").

131 The clearest examples involve consequential damages which could have been avoided or cases in which changes in the goods during the delay deprives the seller of the opportunity to verify the alleged defect. *See, e.g.*, McCune v. F. Alioto Fish Co., 597 F.2d 1244 (9th Cir. 1979) (design defect buyer should have discovered during three years of use led to loss of entire vessel; notice would have permitted seller to cure and therefore lack of notice properly bars claim for loss of vessel); Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804, 278 S.E.2d 708 (1981) (buyer of steel grating and frame which allegedly did not fit together properly upon delivery ground away rim of frame before notifying seller); Hepper v. Triple U Enters., Inc., 388 N.W.2d 525 (S.D. 1986) (year's delay in notifying seller of brucellosis in buffalo prevented ascertainment of degree of infection of herd at time of sale).

There are surprisingly few of these cases among the reported decisions though undoubtedly this is in part due to the lack of a formal requirement under the current rule that the court find prejudice before applying the notice rule bar. A few decisions assert that the buyer's delay prejudiced the seller but fail to give any details to back up that assertion other than the general dimming of witnesses' memories. *See, e.g.*, Smith-Moore Body Co. v. Heil Co., 603 F. Supp. 354 (E.D. Va. 1985); Begley v. Jeep Corp., 491 F. Supp. 63 (W.D. Va. 1980). The statute of limitations, not tbe notice rule, should be used to protect against such generalized claims of prejudice. *See supra* Section III.B.1.

protection would insure that the rule would apply only when justified by rationale.

Supporters of the current interpretation of the notice rule may object that a "laches-style" rule that adds the complex prejudice issue for litigation is likely to increase litigation costs and impose on sellers the risk of failing to prove prejudice that they actually suffer as a result of the buyer's delay. These are potentially serious objections. A rule that overprotects sellers by cutting off some valid claims for no reason may be better for both buyers and sellers than a more complex rule that creates more litigation and fails to protect sellers adequately.

These objections, however, are not persuasive for a number of reasons. The current broad rule so poorly fits the prejudice rationale that in many cases it is an empty formalism, an unfair "booby-trap" with no function other than to disadvantage buyers.[132] Second, the costs of the "laches" rule will not be substantially greater than the costs of the current rule. Even if courts do not require proof of prejudice, the prejudice issue is already present in much litigation: lawyers arguing for the notice rule's bar have long understood the desirability of showing prejudice.[133] Moreover, the costs and risks to sellers of litigating the prejudice issue can be limited by requiring a showing, not of actual prejudice, but only of the likelihood of prejudice. As explained in detail in subsection 3 below, the proposal here is to require only a showing that a reasonable basis exists to believe that the delay in notice caused prejudice to the seller.

Finally, giving full effect to the rejection of short limitations periods implicit in the Article 2 statute of limitations requires adoption of the narrowest conception of the notice rule. Section 2-725 represents a decision to favor protection of buyers' damage remedies over the possible benefits to sellers from a statutory rule of repose of less than four years or contractual cut-off periods of less than one year.[134] The only way to ensure that the notice rule does not undermine those policy choices is to require proof that the buyer's delay in giving notice has or will likely cause the seller prejudice.

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132 *See supra* notes 13-16 and accompanying text.

133 Many decisions applying the notice rule bar take care to point out how the buyer's delay apparently prejudiced the seller. *See, e.g.*, Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 826 (6th Cir. 1978) (making particularly tenuous prejudice argument; *see supra* note 101), *cert. denied*, 441 U.S. 923 (1979). Professors White and Summers expressly encourage sellers' counsel to make the argument. J. WHITE & R. SUMMERS, *supra* note 7, § 11-10, at 421 ("A lawyer cognizant of the policies behind the notice requirement . . . may be able to argue convincingly that a specific time was or was not reasonable in light of those policies [behind the notice rule].").

134 *See supra* text accompanying notes 65-66.

3. *Procedures for Applying the Notice Rule*

If the notice rule applies only upon a showing of prejudice, the procedures that courts currently use in applying the rule should be reversed. Instead of presuming that the notice rule applies and putting the burdens of pleading and proving compliance with the notice rule on the buyer, as courts currently do,[135] the seller should be required to plead the applicability of the notice rule and to carry the burdens of both going forward with the evidence and persuasion that the seller likely suffered prejudice as a result of the delay in notice.[136] If the seller carries those burdens, then the buyer would have to carry the burden of proving that it gave notice within a reasonable time, as under current law.[137]

How much of a showing of prejudice should the seller have to make? If the rule is to protect sellers at all and not unduly increase litigation costs, it cannot require the seller to prove too much. For example, a seller that can show he lost a claim against a supplier as a result of the buyer's delay in giving notice has lost at least the settlement value of its claim. Hence, the seller should not have to prove the claim it alleges it lost against a third party by a preponderance of the evidence. Factual and legal grounds for a claim against the third party sufficient to survive a summary judgment motion should suffice.[138] Similarly, the seller claiming the prejudice of lost opportunity to avoid similar liability to other buyers should have to

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135 The courts early established under section 49 of the Uniform Sales Act that the notice requirement was a condition precedent to the buyer's right to recovery and that the buyer therefore must plead and prove the timely giving of notice as part of its action for breach. Regina Co. v. Gately Furniture Co., 171 A.D. 817, 821, 157 N.Y.S. 746, 749 (N.Y. App. Div. 1916); Schram v. Guttenberg, 198 N.Y.S. 209, 211 (N.Y. Sup. Ct. 1923); Rothenberg v. Shapiro, 140 N.Y.S. 148, 149 (N.Y. Sup. Ct. 1913); Hutchinson v. Renner, 28 Ohio App. 22, 27, 162 N.E. 451, 452 (1928).

The rule is the same today. Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 153 (6th Cir. 1983) (applying Ohio law); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 823 (6th Cir. 1978) (applying Ohio law), *cert. denied*, 441 U.S. 923 (1979); Steel & Wire Corp. v. Thyssen, 20 U.C.C. Rep. Serv. (Callaghan) 892, 895 (E.D. Mich. 1976) (applying New York law). *See generally* Clark, *supra* note 5, at 114-15.

136 It makes sense to put the burdens of pleading and persuasion with regard to the prejudice issue on the seller because the notice rule operates solely for the seller's benefit and the seller is far more likely to have access to the evidence of prejudice than the buyer.

137 *See supra* note 135. The current allocation of these burdens to the buyer on the issue of timeliness of notice makes sense for the same reasons that justify allocating the burdens on the prejudice issue to the seller. The timeliness issue should be decided primarily on the basis of the nature and context of the buyer's business and of the breach in question, and most of the evidence relevant to these issues will be in the hands of the buyer.

138 The seller should not be permitted to make this argument with respect to causes of action against suppliers in any jurisdiction that treats the seller's claim against a supplier as an indemnity claim that does not even accrue until the seller itself is adjudged liable for the supplier's breach. *See supra* text accompanying note 126.

demonstrate reasonable grounds to believe that it has actual liability to another buyer that the seller could have avoided had it received earlier notice.[139]

For the more easily confirmed claim in which the seller alleges that, but for the buyer's delay in notice, the seller could have prevented some of the buyer's damages by offering cure, the rule should require more concrete proof. The seller should have to show by a preponderance of the evidence that the buyer reasonably should have known that the seller was in a position to offer cure and that the cure could have avoided part of the damages claimed by the buyer.

As suggested earlier, the difficulty of formulating an appropriate standard for the requisite showing of the prejudice of loss of evidence is eliminated by employing, instead of a complete bar, the much less drastic remedy of a rebuttable presumption that the lost evidence would have favored the seller. Therefore, all the seller should have to show is that the buyer's delay caused the loss of a specific source of evidence concerning the conformity of the goods.

Section I of this Article suggests another important change in the procedures currently used to apply the notice rule: pleadings in a lawsuit should not be disqualified from constituting notice if they otherwise meet the requirements of the rule.[140] Contrary holdings, especially those suggesting that the opportunity to give proper notice is lost once a lawsuit is filed,[141] seem to drive to an extreme the ill-advised attempt to justify the notice rule as a tool to promote settlement.[142]

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139 The rule would be too rigid if it required the seller to prove a judgment against it or payment of a settlement; a showing that another buyer has grounds for a claim sufficient to withstand summary judgment should be sufficient. Nor should the seller have to prove that it necessarily would have avoided the liability to the second buyer, but only that had it received earlier notice, it would have had a realistic opportunity to avoid the further liability.

140 *See supra* note 49 and accompanying text.

141 *See supra* note 33.

142 Rejection of settlement as a chief policy goal for the notice rule does not necessarily mean that the rule should not be fashioned to encourage settlement, but there are several reasons not to disqualify pleadings from fulfilling the notice rule.

First, as the discussion of the settlement rationale in Section I.A attempted to show, there is no reason to believe that service of pleadings necessarily diminishes the chances for settlement. Second, it would be particularly inappropriate to interpret a narrowly conceived notice rule, like that advocated here, in this way. Under the form of the notice rule suggested in the appendix, the notice rule would not apply in many cases. It would seem especially arbitrary to penalize those buyers that are subject to the notice rule for suing too quickly while leaving the rest free to sue first and negotiate later. Unless the policy of requiring disputants to attempt negotiations before being allowed to institute suit is strong enough to be applied to all civil disputants, there is no reason to interpret the notice rule to have that effect in the limited cases to which it applies.

4. *Remedies for Lack of Notice*

The strongest justification for the notice rule is that it overcomes actual or reasonably likely prejudice to the seller. Even in those cases where there is prejudice, however, it may be so slight that an absolute bar is too harsh a remedy for lack of notice. The notice rule should bar damages only to the extent necessary to overcome prejudice.

For example, in the case of the seller denied an opportunity to cure, the costs that the seller would have had an opportunity to avoid had it received timely notice may be only a small portion of the buyer's actual damages.[143] Loss of a claim against a supplier seems more likely to affect the buyer's whole claim, but it would not if the seller were responsible for some of the defects. Loss of rebuttal evidence also would seem to justify barring the buyer's entire claim. As noted above,[144] however, a presumption can cure that prejudice, so the harsh remedy of an absolute bar is not necessary.

Only where the seller loses the opportunity to avoid similar liability to other buyers is the prejudice likely to equal or exceed the value of the buyer's claim. Thus, when it occurs, this type of prejudice may justify a flat bar. Nevertheless, to prevent too speculative an application of this rationale for the notice rule the seller should be required to prove a basis for actual claims by other buyers and the bar should only apply to the extent of these claims.[145]

B. Contractual Notice Rules

This Article proposes to restrict considerably the application of the statutory notice rule. With this restriction, sellers will have a stronger incentive to bargain for greater protection in an express contractual notice rule; conversely, buyers may wish to contract out of the rule altogether. Hence, it is important to ask whether any reasons exist for restricting contracting parties' freedom to vary the notice rule by contract.

Professors White and Summers have suggested that the notice rule represents a fundamental Article 2 policy. They propose that buyers should not be free to contract out of the notice rule even

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143 This is especially likely to be true if the seller's claim of prejudice rests on its assertion that it is the lowest-cost provider of cure. In that case, the extent of prejudice to the seller is only the differential between the seller's costs of cure and the market cost, not the full extent of the cost of cure.

144 *See supra* Section II.B.3.

145 The seller should not have to prove the exact amounts of its liability to other buyers when the other buyers' claims are not finally determined by judgment or settlement. For unliquidated claims, the bar should apply in an amount for which a reasonable basis exists to believe that the seller may be liable.

though the Code does not explicitly forbid the parties to do so.[146] Examination of the policies underlying the notice rule suggests the contrary: far from representing fundamental policies, the notice rule rests on relatively weak justifications. Although a notice rule tailored to protect only against actual or likely prejudice can be rationalized as the best way of allocating the risks of those types of prejudices between the parties, if the parties choose to allocate more of these risks to the seller by eliminating the notice rule there is no strong policy reason not to enforce that choice.[147]

On the other hand, if the parties choose to allocate more of the risks to the buyer by an express contractual notice provision, the situation is a bit more complex. The Code provides a partial guide. Unlike the statutory rules, contractual notice provisions often specify the form of notice to be given, set a specific time period for notice, or do both.[148] The Code expressly invites parties to specify at least the notice period, as long as the period chosen is not "manifestly unreasonable."[149] Accordingly, courts generally enforce con-

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146 J. WHITE & R. SUMMERS, *supra* note 7, § 3-10, at 137. I have found no cases involving the enforceahility of a contractual notice rule. The dearth of cases suggests that buyers do not seek to contract out of the rule, perhaps because buyers generally underestimate the risk that the notice rule poses for them and therefore are unwilling to expend negotiation capital to eliminate the rule.

147 Only the mitigation principle suggests even a possible public policy that parties should not be free to contradict by contract. Its role in serving the maximization of joint post-breach wealth of the parties and its close connection to notions of causality suggest its centrality to the values underlying the contracts remedies system. *See supra* note 79 and accompanying text; *see also* Goetz & Scott, *supra* note 76, at 967 ("applications of the mitigation principle pervade the specific rules of contract"). But eliminating the notice rule would only eliminate one small aspect of the requirements of mitigation, not the whole principle. Moreover, to the extent that courts enforce liquidated damages provisions without regard to the amount of damages actually incurred, we permit some contractual variation of the mitigation principle. *See* E. FARNSWORTH, *supra* note 6, § 12.18, at 900-02 (generally, reasonableness of forecast of damages in liquidated damages clause to be judged at time of contracting, not in light of damages actually incurred; split of authority whether liquidated damages clause that was reasonable forecast at time of contracting should be enforced if there are no damages at time of breach).

148 *Cf.* T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 342 (5th Cir. 1980) (contractual notice rule for claims with respect to quality of flour required written notice to be sent by registered letter within 10 days after discovery, but in any event within 20 days after tender of delivery, together with sample of allegedly nonconforming flour to be sent within 20-day period).

149 Section 1-204(I) of the Uniform Commercial Code provides:

> Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

To the extent that the notice rule is viewed as a requirement of good faith, as U.C.C. § 2-607 comment 4 suggests, section 1-102(3) of the Code would also be applicable:

> The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine

tractual notice rules as written[150] unless the specified time period is so short that, in view of the nature of the goods and the breaches involved, it would be unreasonable to expect the buyer to have discovered the breaches within the contractual time period.[151]

Analysis of possible justifications for the rule, however, suggests one important way in which the current level of policing express contractual notice provisions is inadequate. Section 2-725(1) expresses a strong public policy decision rejecting the weak planning benefits of repose periods shorter than one year in favor of assuring claimants at least one year in which to exercise their rights

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the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

150 *See, e.g.*, Willis v. West Kentucky Feeder Pig Co., 132 Ill. App. 2d 266, 265 N.E.2d 899 (1971) (enforcing bar of contractual notice rule requiring notice of pigs' illness within 7 days after delivery).

The waiver doctrine, however, has been applied to contractual notice requirements because notice conditions are said to be "practically never a substantial part of the consideration constituting the agreed equivalent of the promised performance of the other party." 3A A. CORBIN, *supra* note 123, § 264, at 513 (1960). In particular, if the seller responds to the buyer's claims within the contractually specified notice period without raising the buyer's failure to give notice in the contractually required form, courts are quick to find waiver of the form requirements. *See, e.g.*, T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 365-66 (5th Cir. 1980) (ongoing informal communications and actions indicating that buyer though the seller was in breach constituted adequate notice); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 255 (N.D. Ill. 1974) (seller's reassurances and promises to remedy problem and failure to mention notice stopped seller from raising defense); Anderson v. Farmer's Hybrid Cos., 87 Ill. App. 3d 493, 497, 408 N.E.2d 1194, 1197 (1980) (seller's acknowledgement of problem and offer of further assistance operated to waive contractual notice provision).

151 *See, e.g.*, Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1215-17 (3d Cir.) (15 day notice period manifestly unreasonable for defect claims concerning chemical contaminant in resin which could not be discovered until resin incorporated into products and sold to and used by ultimate consumers), *cert. denied*, 400 U.S. 826 (1970); Majors v. Kalo Laboratories, 407 F. Supp. 20, 23-24 (M.D. Ala. 1975) (refusing to enforce 120-day notice period against claims for latent defect in soybean inoculant); Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 297 N.Y.S.2d 107, 244 N.E.2d 685 (1968) (refusing on basis of U.C.C. section 2-719 to apply contractual requirement that buyer's claims be made before processing of wool to bar claim for latent defects which could not be discovered until after yarn was processed and finished product washed).

The decisions refusing to bar buyers' claims for latent defects that were not discoverable until after expiration of the contractual notice period have been criticized as upsetting reasonable allocations between the parties of the risk of latent defects. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 7, § 12-10, at 468 (suggesting that such risk allocations should be policed only under extraordinary standard of unconscionability). Surely within limits businesses should be free to allocate the risk of latent defects as they see fit. Therefore, the fact that a defect could first be discovered only after expiration of the contractual notice period should not per se render the notice rule invalid. But unconscionability need not be the only limit on contractual allocation of the risk of latent defects. At least some of the cases may be understood as refusing to enforce contractual notice periods so short that they effectively operate as "booby-traps" to foreclose buyers' rights before they have a realistic opportunity to enforce them.

to a remedy.[152] If that policy is sound, contractual notice provisions that cut off buyer claims in less than one year solely for the purpose of securing the benefits of repose should not be given effect. To enforce a contractual notice period of less than one year, sellers should have to show that the antiprejudice purpose of the rule is served.

In specifying by contract notice periods of one year or more, the parties should be free to adopt the most expansive basis for the rule, namely securing to the seller the planning benefits of a shorter limitations period. Because the parties are free to shorten contractually the limitations period itself to as little as one year, there can be no objection to contractual notice provisions that have the same effect. What constitutes a purpose that would permit the parties to contract for a notice rule that cuts off claims in less than one year depends largely on the strength of the policy against limitations periods of less than one year.

Sellers might, for example, justify a less-than-one-year notice period by claiming to seek protection from the specific prejudices against which the statutory notice rule justifiably shields the seller and from avoidance of the substantial proof problems that this Article's proposed notice rule would impose on the seller. In effect, sellers could claim that contractual notice periods of less than one year should be permitted to secure the benefits of a "limitations-style" rule of more certain application.

Although this goal may seem reasonable,[153] enforcing such a rule presents the possibility that the contractual notice rule will cut off the buyer's claim even though the seller was not prejudiced. If the one-year minimum represents strong public policy—and the very existence of a minimum that parties cannot contract out of indicates that it does—then sellers should not be permitted to circumvent that policy solely for the purpose of simplifying their proof problems. This conclusion is especially warranted by substantial

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152 *See supra* text accompanying notes 65-71.

153 The use of a broad "limitations-style" contractual notice rule to protect the seller against the burden of having to prove damages that the seller could have avoided had it received notice in time to offer cure is subject to the objection that the absolute bar imposed by the rule would very likely have no reasonable relationship to the prejudice actually suffered by the seller. One might therefore object to the broad form of the rule on the grounds that it would be a type of contractual penalty. *See generally* E. FARNSWORTH, *supra* note 6, § 12.18. The soundness of our disinclination to enforce contractual penalties, however, is debated. *See, e.g.*, Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (arguing that the rule against enforcement of penalties should be abandoned and that liquidated damages provisions should be policed only by unconscionability doctrine).

doubt that sellers in general suffer prejudice as a result of the buyer's delay in giving notice.

For several reasons, the one-year minimum should be interpreted as a strong public policy decision that warrants restrictions on contractual notice rules. First, courts historically have been inimical to very short limitations periods. Long before the enactment of the Uniform Commercial Code with the one-year minimum limitation period for sale of goods, courts would not generally enforce unreasonably short contractual limitations periods.[154] Similarly, the Code permits contracting parties to stipulate a set period of time in which notice must be given to satisfy the notice rule as long as that period is not "manifestly unreasonable."[155] The relevant official comment explains that "provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract."[156] Thus the drafters of the Code recognized that too short a cut-off period could in effect "eliminate" remedies whether the cut-off was a notice rule or a statute of limitations.

Second, the Code manifests a strong policy of ensuring parties meaningful remedies for contract rights. Section 2-719(2), for example, provides a buyer with all the normal remedies for breach

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154 *See, e.g.*, Herman v. Northwest Airlines, 222 F.2d 326, 328 (2d Cir.) (L. Hand, J.) (contractual limitations period for suits by passengers against common carriers must be reasonable), *cert. denied*, 350 U.S. 843 (1955); Page County v. Fidelity & Deposit Co., 205 Iowa 798, 800, 216 N.W. 957, 958 (1927) (refusing to enforce contractual provision requiring suit on surety bond to be instituted between 60 and 90 days after default); South & Cent. Am. Commercial Co. v. Panama R.R., 237 N.Y. 287, 142 N.E. 666 (1928) (Cardozo, J.) (refusing to enforce term in bill of lading requiring notice of claim within 60 days and suit within 60 days thereafter; court regarded recent federal legislation not strictly applicable that prohibited notice rules and set 2-year minimum limitations period for certain bills of lading as setting standard of reasonableness). The rule outside of Article 2 is still the same. *See* Camelot Excavating v. St. Paul Ins. Co., 410 Mich. 118, 301 N.W.2d 275 (1981).

This Article does not contend here that the courts uniformly found relatively short time periods to be unreasonable, *cf.* Gooch v. Oregon Short Line R.R., 258 U.S. 22 (1922) (30-day notice provision upheld); The Finland, 35 F.2d 47 (E.D.N.Y. 1929) (same), but only that they generally recognized a minimal requirement of reasonableness. As Justice Cardozo's opinion in *Panama R.R.* reflects, some legislation also showed a concern to regnlate very short notice and limitations periods. The Michigan Supreme Court has laid down as guidelines for the determination of reasonableness that

> [t]he boundaries of what is reasonable under the general rule require that the claimant have sufficient opportunity to investigate and file an action, that the time not be so short as to work a practical abrogation of the right of action, and that the action not be barred before the loss or damage can be ascertained.

Camelot Excavating, 410 Mich. at 127, 301 N.W.2d at 277. A number of states have carried the policy in favor of protecting claimants' rights so far that they have forbidden contractual shortening of the limitations period applicable to sales. *See supra* note 66.

155 *See supra* note 149.

156 U.C.C. § 1-204 comment 1.

when an exclusive or limited remedy "fail[s] of its essential purpose," and section 2-719(3) voids contractual limitations on consequential damages if the limitation or exclusion is "unconscionable."[157] The obvious policy in each of these provisions is to prevent sellers from using sales contracts to lure contracting parties into agreements with illusory rights. Although the Code does not entirely eliminate caveat emptor,[158] to the extent that the seller makes any warranties, the Code requires that the buyer must be given a meaningful remedy for breach and some minimum time in which to exercise the right to a remedy. Failure to protect buyers in this manner would result in a much more insidious form of caveat emptor than the total absence of any warranties.

For these reasons, this Article's proposed notice rule would apply the same procedures for pleading and proof to contractual notice periods of less than one year as it would apply to the statutory notice rule. Contractual notice periods of one year or more would be enforceable unless manifestly unreasonable in view of the specific goods and the specific breaches involved. To enforce shorter contractual notice periods, the seller should have to show, as under the statutory notice rule, that it likely suffered prejudice by reason of the buyer's delay.[159]

C. Need for Statutory Reform

Courts can implement many of the proposed changes in the application of the statutory and contractual notice rules without legis-

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157 *Id.* § 2-719.

158 The Code allows sellers to disclaim warranties. Section 2-316(2) permits disclaiming both of the implied warranties of merchantability and of fitness for a particular purpose as long as the form requirements of that section are met. The implied warranty of merchantability can even be disclaimed orally as long as the word "merchantability" is used. Section 2-316(3)(a) makes it even easier for the seller to disclaim implied warranties by using special disclaimer language like "as is" or "with all faults." Warranties of title and against infringement can likewise be excluded as long as the exclusion uses "specific language" or the circumstances clearly indicate to the buyer that the seller does not make those warranties. *Id.* § 2-312(2).

159 *See supra* Section III.A.3.

The proposal is consistent with the modern trend in interpreting notice provisions, presentment-of-claims clauses, and similar timeliness provisions in insurance contracts. Courts are increasingly refusing to find insurance coverage barred for failure to give notice of a claim in the manner and within the time prescribed by express insurance contract clause unless the insurer shows that the delay prejudiced or at least likely prejudiced it. *See, e.g.*, Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968); Great American Ins. Co. v. C.G. Tate Constr. Co., 303 N.C. 387, 279 S.E.2d 769 (1981) (discussing cases manifesting trend toward requiring proof of prejudice); A & W Artesian Well Co. v. Aetna Casualty and Surety Co., 463 A.2d 1381 (R.I. 1983). *See generally* R. KEETON & A. WIDISS, INSURANCE LAW § 7.2 (forthcoming 1988); Note, *Commercial Law*—Great American Insurance Co. v. C.G. Tate Construction Co.: *Interpretation of Notice Provisions in Insurance Contracts*, 61 N.C.L. REV. 167 (1982) (authored by Henry Ralston).

lative reform of the Uniform Commercial Code. The Code does not specify the content of the notice required, leaving the courts to decide what standard to apply.[160] Therefore, within the loose strictures of stare decisis, state courts are free to choose the minimal standard. Holding, as one court has, that the notice rule does not apply to delay claims in general,[161] also does not raise any significant conflict with the legislature because that interpretation follows from adoption of the minimal standard for content of notice. Similarly, the Code leaves open the allocations of burdens of pleading and proof on the notice issue.

With regard to this Article's two central proposals—(1) requiring a showing of prejudice and (2) limiting the bar to the extent necessary to overcome the prejudice shown—the courts may not be as free to change the law in the absence of legislative authorization. The first proposal is argnably within the power of the court, but similar argnment for the second proposal is more tenuous.

The language of the Code's notice rule neither explicitly supports nor refutes an interpretation requiring a showing of prejudice. Many courts have in effect interpreted the "reasonable time" standard of the rule to reflect a rough balance of the interests of the buyer in obtaining a remedy against the interests served by the notice rule.[162] Because the legislatures have not provided any guidance on the policy goals underlying the notice rule, the courts are free to construe them as broadly or narrowly as they think proper. An interpretation requiring a showing of prejudice is merely another way of striking the balance.

The second proposal raises more of a problem because the notice rule has never been thought of as imposing anything other than an absolute bar in the cases to which it applies. How can a court justify converting the absolute bar into a *pro tanto* cut-off? Several possible answers are available, but none of them entirely solves the problem.

The prejudice least likely to justify barring all of the buyer's claim is loss of opportunity to cure. When the seller demonstrates such a loss, the court might use the mitigation principle to justify barring only the costs that the seller could have avoided. The court could hold that the mitigation principle adequately protects the seller against the prejudice of being held liable for breach costs that the buyer could have avoided by acting reasonably and that, thus, application of the notice rule for this purpose is an unnecessary du-

160 *See supra* note 31.

161 *See supra* note 32.

162 *See supra* note 36.

plication of function.[163]

The proposal that courts should employ presumptions to remedy loss of the opportunity to gather rebuttal evidence is subject to the strongest objection on the grounds of legislative preemption. The chief prejudice argument advanced by courts to justify and guide their application of the rule under the Uniform Sales Act was the possibility that the seller would lose rebuttal evidence because of the buyer's delay in giving notice.[164] Thus, it seems likely that in enacting the notice rule in the Uniform Commercial Code the legislatures were adopting the view that the absolute bar of the notice rule is justified at least in cases in which the seller loses an opportunity to gather significant evidence.

The best response to this argument is that the rule has no prejudice to remedy if the seller is given the benefit of a presumption. Where not expressly limited by the legislature, courts have inherent power to employ presumptions and burdens of proof.[165] Traditionally, courts place the burden of production of evidence on the party with best access to the relevant evidence.[166] Courts should also be free to employ presumptions to prevent the careless or deliberate behavior of one litigant from prejudicing the opposing litigants' defense or prosecution.[167] Nevertheless, to eliminate any doubt on this point, state legislatures should amend section 2-607(3)(a) to authorize courts to overcome prejudice through means less drastic than a complete bar.[168]

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163 The mitigation principle itself, however, probably does not protect the seller that is in fact the lowest-cost provider of cure if the buyer does not reasonably know that the seller is or may be the lowest-cost provider. *See supra* text following note 84.

164 *See supra* note 41.

165 Courts do this so often it arouses no comment. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (shifting burden on personal jurisdiction issue from plaintiff to defendant "who purposefully has directed his activities at forum residents"). That courts cannot avoid doing so follows from the observation that "the legal rules of entitlement and responsibility form not a system of absolute rules, but rather a system of presumptions." Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 582 (1973).

166 E. CLEARY, MCCORMICK ON EVIDENCE § 337, at 950 (3d ed. 1984). But "[t]his consideration should not be overemphasized." *Id.*

167 The fact that the absolute bar of the notice rule has commonly been justified on the grounds that it protects against loss of evidence arguably shows that the rule was intended to have a broader prophylactic function, and not to be limited to cases in which actual prejudice could be shown. But if courts reject that view, as urged here, in recognition that the assumed prejudice is not so prevalent or clear, then it would not make sense to apply the rule as an absolute bar if a lesser remedy could adequately overcome the prejudice.

168 *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (in case of breach of promise made binding by promissory estoppel).

CONCLUSION

By applying the section 2-607(3)(a) notice rule broadly to all buyers' damage claims, courts have made the rule a mere "booby-trap" that introduces a large measure of sport into many breach cases against sellers. This would be an unjust criticism of the rule if there were a broadly applicable satisfactory justification for the rule, but there is not. The strongest argument that would apply to all cases is the repose argument, but it is not very compelling and, in any event, conflicts with the Code's general policies disfavoring quick repose.

The notice rule is needed, if at all, to protect sellers against potential prejudice. A broadly applicable notice rule might be warranted if the likelihood of prejudice were substantial in a sufficiently large proportion of cases. Careful examination of the possible kinds of prejudice, however, shows that the most likely types of prejudice are neither particularly prevalent nor clear. A broad prophylactic rule is therefore far too blunt an instrument for protection against prejudice. Enforcement of the notice rule where no prejudice is shown is siguificantly at odds with the Article 2 policies on limitation periods. The statutory notice rules, as well as express contract notice periods of less than one year, should therefore be restricted to cases in which sellers can show a reasonable likelihood that the buyers' delay has caused them prejudice.

This Article's proposed notice rule may seem to create complex issues for litigation where none existed before, thereby threatening to render the rule virtually useless for achieving any reasonable measure of seller protection. The appearance is misleading. Because the "reasonable time" standard grants wide discretion to the courts and because showing prejudice is regarded as a good way to influence that discretion in favor of barring the claim, the existing statutory notice rule raises the same complex issues as does the proposed rule.[169] Thus, the proposed form of the rule does not add complex issues, but provides better guidance to courts and counsel in addressing issues already present. Moreover, requiring the seller to prove prejudice eliminates the unpredictable issue of the buyer's timeliness in cases in which the seller has no evidence of prejudice.[170]

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169 *See supra* note 133.

170 The proposed rule should also produce more consistent decisions on the timeliness issue because that issue would be addressed solely to the question of whether the buyer acted reasonably in failing to discover the defect and give notice earlier. Under current law, the timeliness issue is confused with the issue of whether the notice rule should apply at all, *see supra* notes 36 & 133, but under the proposed rule, whether the rule should apply would be decided first in evaluating the seller's evidence of prejudice. The issue of timeliness would concentrate on how quickly a business of the size, com-

Application of the foregoing analysis to express contractual notice rules depends heavily on the perception that Article 2 bespeaks a strong public policy against short cut-off rules. It seems clear that it does and that the policy is relevant to contractual notice rules, as well as to contractual limitations periods. In particular, the one-year minimum for contractual limitation periods established in section 2-725(1) is explicable only as a policy decision not to permit very short cut-off rules to frustrate the exercise of rights apparently granted by contract. Perhaps very short cut-off periods are a particularly troublesome form of caveat emptor because they introduce such an obvious sporting element into the contracts remedies system.

Recognition of the policy's relevance to notice rules may call into question whether the Code's minimum time rule needs revision. Perhaps it needs strengthening in favor of the buyer. One alternative is to ensure that buyers have a realistic opportunity to vindicate their rights under contractual warranties by preventing the imposition of a very short notice period under any circumstances. At least one state appears to have adopted that view.[171] Such a rule, however, defeats the notice rule's purpose of protecting the seller from prejudice that arises in some cases from even very short periods of delay. A better accommodation of the policies behind notice rules and minimum limitations periods is the one advanced here. Where the notice rule clearly functions to protect the seller from likely prejudice, the policy of protecting the seller should outweigh the policy of protecting the buyer;[172] if the seller cannot show likely prejudice then the policy of preventing complete frustration of the buyer's rights for the minimum period should be paramount.

Perhaps the minimum cut-off policy needs relaxing in favor of sellers. A one-year minimum limitations period may be too long when business buyers are involved. There is no reason that the minimum limitations period and the minimum notice period have to be identical, but state legislatures, not courts, should make the policy decision whether to make a distinction. At least one state legislature has adopted a shorter minimum for the notice period than for the limitations period,[173] presumably on the ground that it is less bur-

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plexity, and sophistication of the buyer could reasonably be expected to inspect, detect, and report defects of the kind and apparent seriousness of the defects at issue.

171 *See* TEX. CIV. PRAC. & REM. CODE ANN § 16.071(a) (Vernon 1986) ("A stipulation that requires notification within less than 90 days is void.").

172 *Cf.* MASS. GEN. L. ch. 106, § 2-318 (1984) (requiring showing of prejudice before notice rule will bar recovery against nonprivity seller).

173 *Compare* TEX. CIV. PRAC. & REM. CODE ANN § 16.071(a) (Vernon 1986) (voiding less-than-90-day notice stipulation) *with* TEX. BUS. & COM. CODE ANN. § 2.725(1) (Vernon 1968) (one year minimum for contractual limitations periods for sales of goods).

densome for the buyer to comply with a short notice rule than with a short limitations rule.

This Article has not attempted to determine the best choice for these minimum time periods. The choice will inevitably be somewhat arbitrary. As long as the only minimum specified by the legislature is the one-year rule for contractual limitations periods, it ought to be taken as a limitation as well on contractual notice rules that require no showing of prejudice because the notice rule is as final a cut-off rule as the statute of limitations. Whatever the optimal set of minimum time periods may be, the policy judgments underlying the statutory limitations and notice rules should be coordinated. Although notice rules protect important seller interests in certain cases, the courts and legislatures should be more hostile than they have been to both statutory and contractual notice rules that are employed where no discernible need to protect the seller is present. The restricted form of the notice rule advocated here would limit the rule to its proper functions and ensure that it does not operate as a mere "booby-trap."

APPENDIX

PROPOSED REINTERPRETATION OF NOTICE OF CLAIMS RULE CAST IN FORM OF AMENDMENTS TO THE UNIFORM COMMERICAL CODE

Note: Language from the current statute that is to be deleted is enclosed in brackets; language to be added is italicized.

PROPOSED AMENDMENTS TO U.C.C. § 2-607(3)

(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;]

(a) *to the extent that the seller shows that he likely suffered prejudice as a result of the buyer's delay in giving notice and the court determines that the prejudice cannot be overcome by some less drastic means, the buyer is barred from any remedy for breach of warranty (pursuant to Sections 2-312 through 2-315) if the buyer does not show that he gave the seller notice of the lack of conformity within a reasonable time after he discovered it or ought to have discovered it; and* [the current subpart (b) would follow unchanged].

(7) Express contractual agreements fixing the reasonable time for giving notice or relieving the seller from the requirement to show prejudice in order to invoke the protection of the notice rule in subsection (3)(a) above are enforceable to the extent the contractual notice requirement does not purport, either as written or as applied, to cut off the buyer's rights in less than one year, but no contractual agreement requiring the giving of notice in less than one year after acceptance shall be enforced unless the seller makes the showing of prejudice required under subsection (3)(a) above.

PROPOSED OFFICIAL COMMENTS TO REPLACE OFFICIAL COMMENT 4 TO U.C.C. § 2-607

4a. The purpose of the notice requirement in subsection (3)(a) is to protect the seller from prejudice that the seller might suffer as a result of the buyer's unreasonable delay in asserting a claim for money damages after acceptance of the goods. There are several different types of prejudice which the seller might suffer as a result of the buyer's unreasonable delay. For example, the buyer may have incurred damages as a result of the seller's breach which the seller could have avoided had he received timely notice by offering to cure. In accordance with the rule against recovery of avoidable damages, the notice rule would bar recovery of those damages that the buyer could have avoided by giving timely notice.

Similarly, the seller may be prejudiced if the buyer's notice comes too late for the seller to institute suit before expiration of the limitations period applicable to the seller's suit against a third

party—typically a supplier or carrier—who may be liable to the seller for all or part of the seller's liability to the buyer. The notice rule bars the buyer's recovery of those damages that the seller more likely than not could have passed on to the third party if the buyer had given timely notice.

Delay in notification to the seller may also deprive the seller of an opportunity to avoid similar liability to other buyers by detecting and correcting a defect in design, manufacture, or handling of similar goods. In this case, if the entire extent of the liability to the seller is known, the buyer's damages should be reduced by that amount, but not below zero. However, if the full extent of liability to others is not known, as often may be the case, the only possible remedy is to bar the buyer's entire claim for damages.

Finally, delay in giving the seller notice may prejudice the seller's ability to defend against unfounded or fraudulent claims by preventing the seller from obtaining or preserving a significant source of evidence that might have shown the buyer's claim of nonconformity to be unfounded. However, prejudice of this kind can usually be overcome by giving the seller the benefit of a presumption that the lost evidence would have been favorable to his defense.

4b. The seller is entitled to the protection of the notice rule only if he is reasonably likely to have been prejudiced by delay in notice. If the seller has notice of the nonconformity itself, even though the buyer may not have indicated what legal position she intends to take with respect to the nonconformity, the seller has sufficient information to know that he should be concerned about the possibility of any of the aforementioned types of prejudice. Therefore, the notice rule should not apply to protect a seller who has actual knowledge of the nonconformity even through the buyer has given no notice. For this reason, the notice rule does not usually apply to buyers' claims for delay in delivery.

4c. Because the notice rule is for the protection of the seller, the seller should have to invoke it by pleading it and by carrying the burdens of producing evidence and persuasion on the issue of the extent to which the delay in notice caused prejudice to the seller.

4d. Even if the seller has likely suffered prejudice as a result of delay in the buyer's giving notice of the nonconformity, the notice rule does not cut off any part of the buyer's damage claim if the buyer in fact discovered the nonconformity and gave notice within a reasonable time. The reasonableness of the buyer's actions in this regard is to be judged in the context of a reasonable buyer in the particular situation of the actual buyer in question. More exacting standards for promptness of inspection and the giving of notice are to be applied to merchants than to consumers. Due consideration is

to be given to the apparent seriousness of the nonconformity, as it reasonably appeared to the buyer upon discovery.

PROPOSED NEW OFFICIAL COMMENT 9 TO U.C.C. § 2-607

9. Subsection (7) is added to make it clear that for notice periods of less than one year the parties are not free to contract out of the requirement that sellers demonstrate the likelihood of prejudice before they are entitled to invoke the notice rule to bar a buyer's claim. This rule is necessary to prevent the parties from circumventing the Section 2-725(1) prohibition on limitations periods shorter than one year.