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Modernizing Notice of Breach Rules to Preserve Contract Remedies

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MODERNIZING NOTICE OF BREACH RULES TO PRESERVE CONTRACT REMEDIES

Stephen A. Plass*

ABSTRACT

Recently, the legal community has scrutinized the capacity of mandatory arbitration rules to deter or foreclose claims for breach of contract. But little attention has been paid to express and constructive notice of breach rules that are just as effective at foreclosing contractual remedies. While four-year statutes of limitations are typically viewed as the default cutoff time for breach of contract claims, contracting parties, particularly buyers of goods, must act much sooner to preserve their legal remedies. It is now common practice for sellers to require notice of breach within days or weeks of their performance as an express condition precedent to buyers' right to a remedy.

Even in the absence of express notice rules, state laws require that buyers provide notice to sellers within a reasonable timeframe when they discover, or should have discovered, the breach. Failure to provide proper notice bars all buyers' remedies. In effect, failure to satisfy the technical requirement of notice routinely produces forfeiture of contract remedies for the buyer. Such a forfeiture is contrary to the foundational doctrinal promise of adequate remedies for breach, anti-forfeiture rules, and the substantial performance rule for constructive conditions.

Judges adjudicating notice defenses rely on an antiquated legal framework, crafted more than a century ago in a vastly different commercial environment. When the notice requirement was codified in 1906, it impacted merchant buyers who contracted directly with sellers for specific goods. Caselaw shows that sellers raised a notice defense when they sued buyers for the contract price, and that buyers sought an offset to damages by arguing that sellers provided defective goods. In the early twentieth century, courts routinely granted the damages offset for breach of promise, even when notice was untimely. Now, notice issues often arise in adhesive transactions in which buyers contract with downstream sellers of mass-produced goods such as vehicles, food products, dietary supplements, drugs, and medical devices. Sellers are usually aware of the breach or face no repercussions from buyers' failure to provide notice. Product testing, customer complaints, post-sale audits, lawsuits, regulatory policing, and warranty software or warranty claims often give sellers actual notice of their defective performances. Yet judges continue to insist on individualized and particularized notice from each buyer. Judges theorize that sellers will be robbed of their legal rights to cure or settle claims, prepare defenses, or know their terminal point of liability, even though sellers' curative or defensive interests are unimpaired.

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This judicial insistence on notice in the current commercial environment ignores how sellers and buyers respond to breach events. It also incentivizes sellers to fabricate and market defective products because only a small percentage of buyers will complain, and even fewer will satisfy the notice rule. This Article proposes that judges adjudicate notice defenses within the broader framework of the parties' agreement, contract doctrine, and new commercial realities. Specifically, it proposes that judges require sellers to prove material harm when they seek to forfeit buyers' substantive remedies on technical notice-failure grounds. This new standard would provide uniformity in the law and replace the ad hoc exceptions judges have used to avoid the harsh effects of pre-suit notice. A notice-prejudice requirement would also encourage sellers to create better products and honor the warranties they provide when marketing their goods.

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INTRODUCTION

When advocates think about the terminal point for enforcing contractual rights, a statute of limitations of several years comes to mind.¹ Less obvious is the operation of notice of breach requirements. If not properly complied with, notice of breach requirements bar all contract remedies. Providing notice of breach is a default legal rule,² but parties often preempt law-imposed notice rules in favor of express, particularized requirements which courts typically require compliance with.³ It is common for sellers to require receipt of specific forms of notice from buyers in a matter of days or weeks as a precondition to enforcing remedies for breach.⁴ Default legal rules also require notice that must be individualized and particularized, even when all buyers are complaining about the same defect or breach of promises.⁵ Although pre-suit notice is a question of fact to be proved at trial, some courts have found delays in giving notice to be fatal as a matter of law.⁶ And while

1. The Uniform Commercial Code § 2-725 provides: “(1) An action for breach of any contract for sale must 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.” U.C.C. § 2-725 (AM. L. INST. & UNIF. L. COMM’N 2022).

2. See *id.* § 2-607(3)(a).

3. See *ADMIntermare v. Kamca Trading, S.A.*, No. 20-CV-1223 (JPO), 2022 WL 845593, at *2 (S.D.N.Y. Mar. 22, 2022) (holding that express notice rules must be complied with unless at contractual requirement is “manifestly unreasonable”); *Env’t Safety & Health Consulting Servs. v. Crest Energy Partners*, No. 3-CV-5747, 2015 WL 2452458 (E.D. La May 21, 2015) (holding that failure to provide clear and explicit notice within fifteen days as required by the contract results in forfeiture); *Jamison v. First Ga. Bank*, 387 S.E. 2d 375, 377 (Ga. Ct. App. 1985) (holding that bank customer forfeited complaint rights by failing to comply with contractual sixty-day notice provision); *Inman v. Clyde Hall Drilling Co.*, 369 P. 2d 498 (Alaska 1962) (holding that liberty of contract principles command literal enforcement of a thirty-day written notice provision).

4. See *infra* text accompanying notes 203–06, providing a sample of notice provisions commonly used in commercial contracts.

5. See, e.g., *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *4–6 (N.D. Ill. Mar. 1, 2022) (buyer’s lawsuit and customer complaints about the strawberry content of Pop-Tarts did not satisfy notice requirement); *Turk v. Rubbermaid Inc.*, No. 21-CV-270 (KMK), 2022 WL 836894, at *9–10 (S.D.N.Y. Mar. 21, 2022) (pleading that notice was given or will be given, or that the seller got notice from complaints by consumers, regulators or competitors held not sufficient notice); *Rodriguez v. Ford Motor Co.*, 596 F. Supp. 3d 1050, 1054–55 (N.D. Ill. 2022) (each buyer must satisfy their notice obligation); *Powell v. Subaru of Am. Inc.*, 502 F. Supp. 3d 856, 881 (D.N.J. 2020) (holding that the buyer must allege that they gave the seller notice of defect in the specific product they bought to satisfy their notice obligation); *Reid v. Gen. Motors LLC*, 491 F. Supp. 3d 268 (E.D. Mich. 2020) (taking vehicle to dealer for warranty repair not sufficient notice of breach); *Lugones v. Pete & Gerry’s Organic, LLC.*, 440 F. Supp. 3d 226 (S.D.N.Y. 2020) (buyer’s lawsuit does not provide sufficient notice).

6. See *Fearrington v. Bos. Sci. Corp.*, 410 F. Supp. 3d 794, 806 (S.D. Tex. 2019) (noting that notice is a factual question, and the buyer must plead sufficient facts to raise a plausible inference that pre-suit notice was given); *Lincoln Elec. Co. v. Technitrol, Inc.*, 718 F. Supp. 2d 876, 883–84 (N.D. Ohio 2010) (finding a fifteen-month delay in giving notice fatal as a matter of law); *Chemtrol*

notice may be excused when a seller has *actual notice* of the breach, courts have narrowly construed this. Indeed, courts take *actual notice* to mean notice from the litigant buyer, not notice from other sources such as seller's testing or recall of the product, other customer complaints, lawsuits, or regulatory intervention.⁷ Some jurisdictions require notice to remote sellers such as manufacturers.⁸ All of these notice requirements apply irrespective of whether a buyer's claims arise under state or federal law.⁹

By contrast, notice rules in the insurance contract context evolved via the common law to reflect commercial realities. These contracts protect the contractual expectations of both the insurer and the insured.¹⁰ Judges implement a proof of prejudice requirement for insurers when they seek to forfeit coverage because the insured failed to comply with contractual notice requirements.¹¹ Judges also apply the common law doctrine of

Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 636–38 (1989) (finding a two-year delay in providing notice fatal as a matter of law).

7. See *e.g.*, *Allstate Ins. Co. v. Daimler Chrysler*, No. 03 C 6107, 2004 WL 442679 (N.D. Ill. Mar. 9, 2004) (holding that notice may be excused when the seller has actual knowledge of the breach or the buyer is alleging personal injury); *Rodriguez*, 596 F. Supp. 3d at 1054–55 (finding insufficient the buyer's pleadings that the seller had actual knowledge of the defect through 10 years of product testing and consumer reviews showing that its vehicles' trunk lid wire harness was defective); *Block v. Lifeway Foods, Inc.*, No. 17 C 1717, 2017 WL 3895565 (N.D. Ill. Sept. 6, 2017) (holding as insufficient notice, the seller's study that showed its product contained more lactose than advertised); *Muir v. NBTY, Inc.*, No. 15 C 9835, 2016 WL 5234596 (N.D. Ill. Sept. 22, 2016) (holding that consumer complaints are no substitute for individualized notice from buyer).

8. See *In re Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prods. Liab. Litig.*, No. 4:20-MD-02936-SRB, 2022 WL 710192, at *16–17 (W.D. Mo. Mar. 9, 2022) (discussing which states require pre-suit notice to a manufacturer); *Powell*, 502 F. Supp. 3d at 881 (noting that Michigan, Indiana, and Illinois require pre-suit notice to the manufacturer).

9. See *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759, 768 (N.D. Ill. 2022) (noting that federal warranty laws incorporated state rules for notice, so the buyer must give notice even if they are joining a class action suit alleging the same breach by seller); *Davis v. Ricola USA, Inc.*, No. 22-CV-3071, 2022 WL 4131588, at *4–5 (C.D. Ill. Sept. 12, 2022) (buyer's federal warranty claims also fail because the federal warranty law adopted state law notice rules).

10. See *Cooper v. Gov't Emps. Ins. Co.*, 237 A.2d 870, 873–74 (N.J. 1968) (recognizing that insurance contracts are not freely bargained, and the need to balance the interests of the parties by considering the purpose of prompt notice and the penalty of forfeiture for failure to provide it).

11. See *e.g.*, *ALPS Prop. And Cas. Ins. Co. v. Unsworth Laplante, PLLC*, 526 F. Supp. 3d 23, 27 (D. Vt. 2021) (noting that requiring proof of prejudice is the “near-universal American practice” when insurers seek to deny coverage on failure of notice grounds); *Las Vegas Metro. Police Dept. v. Coregis Ins. Co.*, 256 P.3d 958, 963 (Nev. 2011) (holding that the insurer bears the burden of proof on the issue of prejudice because it would be inequitable and impractical to require the insured to prove a negative—that the insurer was not prejudiced); *Prince George's Cnty. v. Loc. Gov't Ins. Tr.*, 388 Md. 162, 169 (2005) (finding that although the insurer was statutorily exempt from proving prejudice, the common law still imposed an obligation to do so); *Northshire Comms. Inc. v. AIS Ins. Co.*, 811 A.2d 216, 220 (Vt. 2002) (noting that “[i]n 1997, this Court departed from nearly sixty years of precedent and adopted a modern view of prompt-notice provisions in insurance contracts by holding that an insured's failure to provide prompt notice does not automatically defeat liability insurance coverage.”); *Coop. Fire Ins. Ass'n of Vt. v. White Caps, Inc.*, 694 A.2d 34 (1997) (noting that the

uberrimae fidei, or utmost good faith, to insurance contracts to ensure that the insured provides notice or discloses all risks that are known (or should be known) that can affect coverage.¹²

In the sale of goods context, notice rules have failed to evolve to reflect commercial realities as insurance contract notice rules have. It has been over a century since buyers were able to seek relief from the common law rule that acceptance of goods barred all remedies.¹³ The rule that replaced it—stipulating that buyers must give notice of breach or be barred from any remedy—remains essentially unchanged since it was codified in 1906.¹⁴ In the early twentieth century, this notice requirement primarily impacted merchants who made arms-length commercial contracts for specific goods.¹⁵ Those merchant buyers were not denied their remedies when they did not seasonably provide notice of breach.¹⁶ Now, the notice defense affects mostly consumer buyers who make contracts of adhesion for mass-produced goods and sue for breach of warranty.¹⁷ Consumer buyers now face opportunistic sales practices in product spaces such as food, drugs, medical devices, dietary

traditional view that forfeiture is appropriate when notice provisions are not complied with has been supplanted by the view that the insurer must prove prejudice to be relieved of its contractual obligations).

12. See *Cont'l Cas. Co. v. Hochschild*, No. A-2267-13T1, 2014 WL 6474297, at *6–7 (N.J. Sup. Ct. App. Div. Nov. 20, 2014) (noting that the doctrine of *uberrimae fidei* has long been applied in certain insurance contract cases, and it “imposes the highest duty on parties to an insurance contract to disclose facts that materially affect the insurer’s risk.”); *Brandwein v. Butler*, 218 Cal. App. 4th 1485, 1488 (Cal. Ct. App. 2013) (noting that the duty of utmost good faith “is embodied in every marine insurance policy”); *Legros v. Great Am. Ins. Co. of N.Y.*, 865 So. 2d 786, 790 (La. Ct. App. 2003) (finding that the duty of *uberrimae fidei* applies to both the insurer and the insured; see also Warren J. Marwedel & Stephanie A. Espinoza, *Dagger, Shield, or Double-Edged Sword?: The Reciprocal Nature of the Doctrine of Uberrimae Fidei*, 83 TUL. L. REV. 1163, 1164 (2009) (observing that the doctrine of *uberrimae fidei* is a mutual one but it is used almost exclusively by insurance companies to void coverage).

13. The Uniform Sales Act of 1906 provided: “In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable thereafter.” Unif. Sales Act § 49 (superseded by the U.C.C. in 1952).

14. See U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM’N 2022) (adopting the notice requirement from the predecessor Uniform Sales Act).

15. See *infra* cases listed in Appendix A. As used in this Article, merchants are commercial parties as contemplated by the Uniform Commercial Code. See U.C.C. § 2-104 (AM. L. INST. & UNIF. L. COMM’N). Merchants therefore include parties who buy goods for fabrication, resale, breeding, farming, or who generally deal in goods of that kind. *Id.*

16. See *infra* notes 123–24 and accompanying text.

17. See *infra* cases in Appendix B and C. The term consumer or consumer transaction refers to buyers who are not resellers of goods but buy for personal, family, or household use. See Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301(1), (3) (1975).

supplements, and vehicles, among other goods.¹⁸ Sellers warrant these goods as having healthy, curative, or reliable qualities, even when they are fully aware that their claims are false.¹⁹ These new commercial realities necessitate a reassessment of the rule of notice to prevent further whittling away of buyers' remedies for breach.

This Article makes the case for a notice-prejudice rule for contracts of goods. It proposes that contractual notice rules, whether express or constructive, be governed by a proof of prejudice standard when sellers seek to forfeit buyers' remedies. The Article shows that strict enforcement of notice rules fails to promote the reasonable expectations of parties by prioritizing a subsidiary contractual requirement of notice over the primary obligations of the parties. Ultimately, strict enforcement results in wronged buyers being denied their minimum adequate remedy for breach.

Part I begins with a survey of Uniform Commercial Code (U.C.C.) section 2-607(3)(a) caselaw to show how judges have interpreted and applied this provision in the courts. It discusses the harsh sufficiency notice requirements judges impose on buyers to preserve their remedies by requiring them to plead notice with particularity akin to the inflexible common law "form of action."²⁰ Part I also describes the defects of a strict approach to notice and highlights judicial failure to test the theory that the seller's interest in investigating, settling claims, or preserving evidence will be harmed absent pre-suit notice. Part II shows that at the time the notice requirement was codified in 1906, it rarely impacted contracts for goods bought by consumers for personal or household use. Merchants in bargained transactions litigated the notice issue in an action for the price by the seller where the buyer sought an offset to damages by arguing that the seller's performance was not as warranted. And in the early twentieth century, courts prioritized the buyer's breach claim over the seller's notice defense, in contrast to today.

Part III provides evidence that a notice-prejudice approach is supported by the U.C.C.'s directive that the law evolves with new commercial realities.²¹ Today, a buyer's failure to provide sufficient

18. See cases cited *infra* note 145.

19. See *infra* notes 140–43 and accompanying text.

20. See James Maxeimer, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN. ST. L. REV. 1257, 1271–72 (2010) (describing the harsh and inflexible common law pleading rule that required facts placing one particular issue in controversy).

21. See U.C.C. § 1-103(a)(2) (AM. L. INST. & UNIF. L. COMM'N) (providing that one of the Code's purposes is "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties[.]"). Comment 1 to § 1-103 also provides that the Code will "provide its own machinery for

notice is typically a seller's defense in breach of warranty suits, often with sellers of mass-produced goods who are aware of the defect or nonconformity that constitutes the alleged breach. This is because the defects were intentional or the seller had actual knowledge of nonconformity from product audits, customer complaints, lawsuits, or regulatory intervention. Part III also shows that particularized notice from each aggrieved buyer ignores the commercial reality that many buyers do not complain about breach, and that sellers typically do not take steps to cure or settle despite buyers giving timely notice of breach. Part IV discusses notice as a contract doctrine and situates it relative to other contract rules. It argues that as an express or constructive condition of a contract, notice is a subsidiary or incidental obligation that should rarely override the parties' core bargain and expectations. It demonstrates judicial failure to apply a rule of substantial performance to constructive notice requirements even though it is a regulatory norm that better advances the parties' contractual expectations. This Part also shows that strict notice rules are in tension with modern warranty regulations and the doctrine of good faith. The Article concludes that contract doctrine and new commercial realities support a proof of prejudice standard when sellers seek forfeiture of a buyer's remedies for breach on notice-failure grounds.

I. INTERPRETING SECTION 2-607(3)(A)

The statute of limitations for filing a breach of contract claim is typically four years.²² However, a buyer of goods may forfeit all rights of recovery in mere days, weeks, or months if they do not notify the seller of breach within the time prescribed by the seller or within a reasonable time after accepting the goods.²³ A seller may be relieved of liability for breach shortly after selling, and forfeiture can occur even when the seller is aware of the breach and unharmed by the buyer's failure to provide notice. In 1925, Judge Learned Hand wrote about this phenomenon:

expansion of commercial practices... [and] applied by the courts in the light of unforeseen and new circumstances and practices." U.C.C. § 1-103 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N).

22. See U.C.C. § 2-725(1) (AM. L. INST. & UNIF. L. COMM'N 2019).

23. See *id.* ("An action for breach of any contract for sale must 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.") In the case of accepted goods, the buyer must provide notice within a reasonable time of breach. See U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM'N).

The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice ‘of the breach’ required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of the buyer’s claim that they constitute breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.²⁴

The result is a windfall for the seller, who avoids a claim for breach—an outcome that contravenes several foundational principles of contract law.²⁵

With constructive notice conditions, Section 2-607(3)(a) facilitates forfeiture of a buyer’s remedies.²⁶ The provision states that “[w]here a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”²⁷ Section 2-607(3)(a) does not specify the requirements for notice, but Comment 4 to this section states that “[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched.”²⁸ Comment 4 also states that the buyer’s rights are saved by notice that “informs the seller that the transaction is claimed to involve a breach”²⁹

The judicial response to this notice rule has been twofold: judges typically focus on the first or second part of Comment 4 to implement

24. *Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 7 F.2d 565, 566 (2d Cir. 1925). For a sampling of cases embracing this proposition, see *Barton v. Pret A Manger (USA) Ltd.*, 535 F. Supp. 3d 225, 244 (S.D.N.Y. 2021); *Singleton v. Fifth Generation Inc.*, 5:15-CV-474 (BKS/TWD), 2016 WL 406295, at *12 (N.D.N.Y. Jan. 12, 2016); *Greenwich Induss., L.P. v. Leggett and Platt, Inc.*, No. 07 C 6550, 2019 WL 1657441, at *5 (N.D. Ill. June 11, 2009); *Drobnak v. Andersen Corp.*, 561 F.3d 778, 785 (8th Cir. 2009); *Aqualon Co. v. Mac Equip., Inc.*, 149 F.3d 262, 266 (4th Cir. 1998); *Se. Steel Co. v. W.A. Hunt Constr. Co., Inc.*, 390 S.E.2d 475, 479 (S.C. Ct. App. 1990); *Stamper Black Hills Gold Jewelry, Inc. v. Souther*, 414 N.W. 2d 601, 605 (1987); *Armco Steel Corp. v. Isaacson Structural Steel Corp.*, 611 P. 2d 507, 515 (1980); *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976); *Silvera v. Broadway Dept. Store, Inc.*, 35 F. Supp. 625, 626 (S.D. Cal. 1940).

25. See U.C.C. § 2-719 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N) (providing that a minimum adequate remedy is essential to a sales contract).

26. See U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM’N).

27. *Id.*

28. *Id.* at cmt. 4. (Comment 4 further provides that “[t]he notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.”). .; see also *Page v. Camper City & Mobile Home Sales*, 297 So. 2d 810, 811–12 (Ala. 1974) (holding that Code drafters did not include a writing requirement for 3(a) notice, but specified the type of notice they envisioned in Comment 4 to § 2-607).

29. U.C.C. § 2-607 cmt. 4 (AM. L. INST. & UNIF. L. COMM’N).

either a lenient or strict approach to applying the notice requirement.³⁰ In adjudicating section 2-607(3)(a) claims, judges using the “strict” approach require buyers to alert sellers not only of the facts of their claims, but also of their conclusion that these facts constitute breach and that they intend to hold the sellers accountable.³¹ This approach results in buyers losing their remedies most of the time when lack of notice is asserted as a defense.³²

To justify their enforcement of an exacting notice rule, judges rely on the theoretical possibility of prejudice to the seller, which notice is intended to prevent. Judges theorize that if buyers do not provide facts that essentially prod sellers into responding, sellers will be robbed of the opportunity to cure the defect; a chance to investigate, gather facts, and preserve evidence in order to negotiate, settle or litigate; and know their terminal point of liability or repose.³³ To secure these seller interests, judges have ruled that notice must precede a lawsuit irrespective of (1) a seller’s knowledge of the breach,³⁴ (2) prior complaints to the seller about the same issue by other customers,³⁵ or (3) previous or pending lawsuits

30. For a good discussion of the strict versus the lenient approach with associated cases, see *Se. Steel Co.*, 390 S.E.2d at 477–79.

31. See *Reid v. Gen. Motors, LLC*, 491 F. Supp. 3d 268, 276 (E.D. Mich. 2020) (holding that the buyer must tell the seller that they are in breach prior to filing a lawsuit or face dismissal of their claims); see also *Lugones v. Pete & Gerry’s Organic, LLC*, 440 F. Supp. 3d 226, 244–45 (S.D.N.Y. 2020) (dismissing the buyer’s warranty claims for failure to plead and prove that 3(a) notice was given).

32. See *Se. Steel Co.*, 390 S.E.2d at 478 (concluding that the strict approach has become the majority rule); see also *infra* Case Appendix B. For examples of the lenient approach, see *infra* note 190.

33. See *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *4–6 (N.D. Ill. Mar. 1, 2022) (holding that the seller’s settlement interests would be eviscerated if the court permitted the buyer’s lawsuit to operate as sufficient notice); *Langner v. Boston Sci. Corp.*, 492 F. Supp. 3d 925, 935 (D. Neb. 2020) (attributing three pro-seller purposes to 3(a) notice: (1) to provide the opportunity to cure; (2) to aid in preparation for negotiation and litigation; and (3) to protect against stale claims); *Reid*, 491 F. Supp. 3d at 274 (attributing two pro-seller policies to 3(a): (1) settlement through negotiation; and (2) avoidance of prejudice to the seller by giving them the chance to cure, inspect, investigate, prepare to defend or mitigate); *Courtesy Enter., Inc. v. Richards Lab’ys*, 457 N.E.2d 572, 279 (1983) (attributing three policies to 3(a): (1) opportunity for settlement; (2) opportunity to prepare for litigation; and (3) opportunity to have repose as provided by statutes of limitations).

34. See *Block v. Lifeway Foods, Inc.*, No. 17 C 1717, 2017 WL 3895565, at *6 (N.D. Ill. Sept. 6, 2017) (buyer cannot rely on the seller’s own study that showed the seller’s awareness of the breach); *Budhani v. Monster Energy Co.*, 527 F. Supp. 3d 667, 685–86 (S.D.N.Y. 2021) (holding that the buyer’s warranty claims must be dismissed for failure to plead pre-suit notice); *Hrdlicka v. Allen*, 137 N.W.2d 725, 727–28 (1965) (holding that the buyer failed to plead pre-suit notice and this was fatal to the buyer’s warranty claims); *In re Frito-Lay N. Am., Inc. All Nat. Litig. II*, No. 12–MD–2413 (RRM)(RLM), 2013 WL 4647512, at *28 (E.D.N.Y. Aug. 29, 2013) (holding that the seller’s awareness that the goods are defective or claim by other buyers against the seller is not sufficient for 3(a) purposes).

35. See *Turk v. Rubbermaid Inc.*, No. 21-CV-270 (KMK), 2022 WL 836894, at *9–10 (S.D.N.Y. Mar. 21, 2022) (complaints by regulators, consumers, or competitors will not satisfy notice requirements); *Cohen v. Subaru of Am., Inc.*, No. 1:20-cv-08442-JHR-AMD, 2022 WL 721307, at *14

about the same product issues against the seller by other buyers.³⁶ In effect, when judges approach enforcement based on the hypothetical possibility of prejudice to a seller when notice is not individualized and particularized, this takes precedence over a buyer's actual loss of remedies. Sellers must face a threat of liability for buyers' remedies to be preserved.³⁷

This prioritization of a seller's interests is remarkable in view of Comment 4's statement that "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy."³⁸ The theoretically strict approach embraced by some judges to 3(a) also makes trivial the fact that "[t]he [U.C.C.]'s requirement was derived from decisional law in California and several other states which sought to ameliorate the harsh common law rule that acceptance of goods by the buyer waived any and all of his remedies."³⁹ Further, the current judicial approach pays lip service to Comment 4's statement that notification need not be "a claim for damages or of any threatened litigation or other resort to a remedy."⁴⁰ To elevate sellers' notice interests, judges avoid reckoning with the hurdles that buyers face when sellers breach. Specifically, strict notice rules fail to acknowledge the preference for the buyer's interests that 3(a) was enacted to promote,⁴¹ and the fact that changed selling practices necessitate a reframed interpretation that guarantees buyers' remedies.⁴² In addition

(D.N.J. Mar. 10, 2022) (seller's knowledge of breach from warranty claims, customer complaints, testing, and complaints to regulators, not sufficient notice); *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 588–591 (S.D.N.Y. 2021).

36. See *Barton v. Pret A Manger (USA) Ltd.*, 535 F. Supp. 3d 225, 246–48 (S.D.N.Y. 2021) (rejecting the buyer's claim that other lawsuits previously filed against the seller by the buyer's lawyer qualifies as sufficient 3(a) notice); *Niles v. Beverage Mktg. USA, Inc.*, No. CV 19-1902 (SJF) (ARL), 2020 WL 4587753, at *6 (E.D.N.Y. Apr. 16, 2020) (rejecting the buyer's claim that similar pending claims against the seller is sufficient 3(a) notice); *Drobnak v. Andersen Corp.*, 561 F.3d 778, 784 (8th Cir. 2008) (holding that other lawsuits against the seller are insufficient notice for 3(a) purposes).

37. See *Bunn v. Navistar Inc.*, 797 Fed. Appx. 247, 254 (6th Cir. 2020) (finding that the buyer's notice of dissatisfaction must be sufficient to communicate breach); *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (1977) (finding that the buyer's notice must sufficiently communicate breach and a demand for damages).

38. See U.C.C. § 2-607 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N).

39. See *E. Airlines v. McDonnell Douglas Corp.*, 532 F. 2d 957, 971 (5th Cir. 1976).

40. U.C.C. § 2-607 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N).

41. See *E. Airlines*, 532 F.2d at 971 (noting that the codification of a notice requirement for the buyer "reconciled the desire to give finality to transactions in which goods were accepted with the need to accommodate a buyer who, for business reasons, had to accept the tendered goods despite unsatisfactory performance by the seller.").

42. See Donald P. Newell, *Notice Requirement In Warranty Actions Involving Personal Injury*, 51 CAL. L. REV. 586, 586–87 (1963) (noting that at common law, the mere acceptance of goods relieved the seller of liability for defects, but the Uniform Sales Act rejected this rule); *Sales. Notice. Limitation of Period of Rejection*, 23 COLUM. L. REV. 593–94 (1923), <https://www.jstor.org/stable/1111370>

to reversing the common law rule that acceptance of goods barred any claims for defects,⁴³ state law dispensed with the requirement of privity between buyers and manufacturers as a precondition for warranty claims.⁴⁴ Courts have dispensed with notice rules for non-purchasers of goods, such as third party beneficiaries, in order to help guarantee that sellers' promises about their goods are honored.⁴⁵ Furthermore, the strict approach is in tension with the modern view that prejudice must be shown when claims of deficient notice are asserted as a basis for forfeiture of contract remedies.⁴⁶ Equally telling is the fact that there is no corresponding rule requiring forfeiture of *sellers'* remedies when sellers fail to give notice in the event of a buyer's breach.⁴⁷

[<https://perma.cc/R2FZ-S38Q>] (reporting that the Uniform Sales Act protected buyers from sellers' attempts to limit the operation of implied warranties for latent defects after goods were accepted); see also U.C.C. § 2-607 cmt. 4 (AM. L. INST. & UNIF. L. COMM'N) ("the rule of requiring notification is designed to defeat commercial bad faith, not deprive a good faith consumer of his remedy."). Courts have also expanded the buyer's notice rights under the U.C.C. by removing the notice requirement for manufacturers who are not direct sellers to the complaining buyer. See *Church of the Nativity of Our Lord v. Qattro, Inc.*, 474 N.W. 2d 605, 610 (Minn. Ct. App. 1991) (holding that the plain language of § 2-607(3)(a), its remedial nature, and "sound economic reasons," support a notice obligation only to sellers who can be expected to notify other parties up the distribution chain."); *Firestone Tire and Rubber Co. v. Common*, 452 A.2d 192, 196 (Md. App. 1982) (rejecting the proposition that the buyer must provide notice of breach to a manufacturer because economic fairness dictates that such upstream notice should be provided by the seller).

43. See Newell, *supra* note 42, at 586–87.

44. See *Mattos v. Hash*, 368 A.2d 993, 996–97 (1977) (reporting the removal of a privity requirement for buyers suing manufacturers).

45. See generally Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173 (2003). Courts have dispensed with notice to sellers in a variety of contexts involving non-buyers. See *Frericks v. Gen. Motors Corp.*, 363 A. 2d 460, 463–64 (1976) (limiting the notice rule to actual buyers and waiving it for third party beneficiaries of the seller's warranty); *Mattos v. Hash*, 368 A. 2d 993, 996–97 (1977) (discussing the U.C.C. 1969 amendments' elimination of the privity requirement with manufacturers without expanding the definition of buyers to include third party beneficiaries). In *re Hydroxycut Mktg. & Sales Prac. Litig.*, No. 09MD2087–BTM (AJB), 2010 WL 1734948, at *2 (S.D. Cal. Apr. 26, 2010) (dispensing with the notice requirement in cases where goods are sold for human consumption). For a discussion of the pre-U.C.C. judicial approach to the notice requirement for non-purchasers, see generally Newell, *supra* note 42, at 586.

46. See, e.g., *Cooper v. Gov't Emp. Ins. Co.*, 237 A.2d 870, 874 (1968) (adopting the neoclassical notice/prejudice rule for insurance contracts); *Comeaux v. Suderman*, 935 S.W.2d 215, 223 (2002) (rejecting a strict compliance approach to notice from grantors of the right of first refusal); see also Eugene R. Anderson et. al, *Draconian Forfeitures of Insurance: Commonplace, Indefeasible, and Unnecessary*, 65 FORDHAM L. REV. 825 (1996) (arguing that forfeiture is a needlessly harsh result for noncompliance with technical contract terms such as notice).

47. For example, § 2-706 of the U.C.C. requires the seller to notify the buyer of their decision to resell the goods when the buyer wrongfully rejects the goods, revokes their acceptance, or repudiates the contract without right. U.C.C. §§ 2-706(3)–(4), § 2-703(d) (AM. L. INST. & UNIF. L. COMM'N 2022). Courts applying these provisions have held that a seller who fails to give proper resale notice loses their § 2-706(1) remedy but can still recover under § 2-708. The seller's remedy under § 2-706 is the difference between the resale price and the contract price, while the remedy under § 2-708 is the difference between the market price and the contract price. Compare U.C.C. § 706(1) (AM.

Critics of the courts' strict approach to notice have identified defects in the judicial rationales for prompt notice, such as a seller's interest in curing, settling, preparing for litigation, or having repose.⁴⁸ Unfair forfeiture of a buyer's remedies is also cited as a flaw in the strict approach.⁴⁹ But there are stronger theoretical and policy justifications for a notice-prejudice rule.⁵⁰

L. INST. & UNIF. L. COMM'N 2022) with U.C.C. § 708(1) (AM. L. INST. & UNIF. L. COMM'N 2022). See also *E. Lynn Fertilizers, Inc. v. CHS, Inc.*, No. 09-2085, 2011 WL 6029329, at *5 (C.D. Ill. Dec. 5, 2011) (holding that the seller's failure to reasonably notify the buyer of the seller's intent to resell bars the seller from recovering the difference between the contract price and resale price as provided in § 2-706(1)); *Fuji Photo Film USA, Inc. v. Zalmen Reiss & Assocs., Inc.*, 930 N.Y.S.2d 174, at *2-3 (Sup. Ct.), judgment entered, (N.Y. Sup. Ct. 2011) (holding that although the seller forfeited their § 2-706(1) remedy by failing to give notice of resale, they may still recover the difference between the market price and the contract price under § 2-708(1)); *Mobil Oil Corp. v. Earhart Petroleum, Inc.*, 213 F.3d 632, 635 (4th Cir. 2000) (holding that even if resale is the seller's only option, the seller must give the buyer notice of resale to recover the difference between the contract price and resale price); *BaII Banking Corp. v. Atl. Richfield Co.*, No. 86 CIV. 6651 (SS), 1993 WL 403963, at *19 (S.D.N.Y. Oct. 7, 1993), *aff'd sub nom.* *BaII Banking Corp. v. Atl. Richfield*, 28 F.3d 103 (2d Cir. 1994) (holding that absent notice of resale, the buyer "could only reasonably anticipate that it would be responsible for the measure of damages specified by § 2-708—the contract price minus the market price at the time of the breach."); *Atl. Aviation Corp. v. Provident Life & Acc. Ins. Co.*, No. CIV. A. 86-533-CMW, 1989 WL101469, at *8 (D. Del. Aug. 2, 1989) (holding that the seller must avail itself of § 2-708 damages when the seller fails to give notice of resale). For a discussion of the seller's make-whole prospects when forced to seek damages under § 2-708 versus § 2-706, see Henry Gabriel, *The Seller's Election of Remedies Under the Uniform Commercial Code: An Expectation Theory*, 23 WAKE FOREST L. REV. 429, 441-47 (1988). See also William R. Cummings, *The Inequitable Interpretation of Reasonable Notification Under Section 2-706(3) of the Commercial Code*, 1989 WIS. L. REV. 199, 201-13 (arguing that the seller should get § 2-706(1) resale damages if the buyer knew or should have known of the resale because the strict or actual notice approach of most courts does not advance the interests of the parties). In addition, when sellers are required to notify buyers that the goods were shipped and fails to do so buyers cannot reject the goods unless they prove prejudice. See U.C.C. § 504(c) (AM. L. INST. & UNIF. L. COMM'N 2022) (requiring material delay or loss to the buyer as a precondition to rejection).

48. See William H. Henning & William H. Lawrence, *A Unified Rationale for Section 2-607(3)(a) Notification*, 46 SAN DIEGO L. REV. 573, 590-93 (2009) (arguing that cure, mitigation, and staleness rationales for 3(a) are not compelling because the seller has no cure rights for accepted goods, the buyer must account for the seller's loss that could have been avoided irrespective of notice, and the statute of limitations is the seller's protection from stale claims); John C. Reitz, *Against Notice: A Proposal to Restrict the Notice of Claims Rule in U.C.C. § 2-607(3)(a)*, 73 CORNELL L. REV. 534, 575 (1988) (arguing that denying the buyer's remedies on notice grounds can only be justified when lack of notice harms sellers); George Frank Hammond, *Notification of Breach Under Uniform Commercial Code Section 2-607(3)(a): A Conflict, A Resolution*, 70 CORNELL L. REV. 525 (1985) (evaluating the lenient and strict approaches to 3(a) and concluding that neither advances the policies that undergird notice); Patrick A. Milberger, Note, *Section 2-607(3)(a): Effective Notification of Breach Under the Uniform Commercial Code*, 44 U. OF PITT. L. REV. 733 (1983) (arguing that 3(a) notice can impair the buyer's prospects of securing full performance from a breaching seller). But see Henry G. Prince, *Overprotecting the Consumer? Section 2-607(3)(a) Notice of Breach In Non-Privity Contexts*, 66 N.C. L. REV. 107 (1987) (arguing that courts have gone too far by eliminating the notice requirement in non-privity cases).

49. See Reitz, *supra* note 48, at 578, 587; Milberger, *supra* note 48, at 733.

50. See Reitz, *supra* note 48, at 539 (arguing that U.C.C. § 2-607(3)(a) is a booby trap for buyers).

Proof of prejudice by a seller to justify the forfeiture of a buyer's remedies can cure the flaws of a theoretical approach to notice detached from its doctrinal and transactional contexts. As an interpretive matter, 3(a) notice should be governed by the substantial performance rules applied to constructive conditions as opposed to the strict compliance rules for express conditions.⁵¹ With respect to doctrine, 3(a) disavows any interest in effecting forfeiture of a buyer's remedies. Notice therefore functions as a subsidiary provision of the contract that should seldom trump the primary promises of the parties. As for the commercial framework, issues stemming from 3(a) commonly arise in breach of warranty actions where sellers are likely aware of their breach.⁵² A strict approach will therefore accommodate further opportunistic practices by sellers seeking to avoid their warranty obligations.⁵³ As an express term or a narrow one implied in law, notice rules should not be elevated above the primary consideration exchanged by the parties.

A. The 3(a) Cases

A buyer who accepts goods must give notice of breach or be barred from any remedy.⁵⁴ Notice can be provided to the seller verbally or in writing,⁵⁵ and it must be provided by the buyer, although some courts have imposed this obligation on sub purchasers and third party beneficiaries of the purchase.⁵⁶ Although 3(a) expressly requires notice only to the seller, some courts require buyers to also notify upstream parties like manufacturers.⁵⁷ To preserve their remedies, buyers must

51. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 365 (6th ed. 2009) ("The general rule governing constructive conditions is that substantial compliance is sufficient. . . . These conditions are "imposed by law to do justice.").

52. See *infra* Case Appendix C for a list of cases in which mass-produced goods that contain the same defect formed the basis of buyers' claims.

53. Disclaimers in warranties and limits placed on remedies often leave buyers with costly and difficult enforcement options as they deal with exclusions and repair and replacement rules. See Lamis, *supra* note 45, at 185–88. Buyers have had to contend with opaque and confusing warranty terms, privity requirements, and arbitration terms that serve as substantial barriers to obtaining a remedy for breach. See *id.* at 211–12. The unavailability of attorney's fees in the U.C.C. has also served as a hurdle to warranty enforcement. See Jean Braucher, *An Informed Resolution Model for Consumer Product Warranty*, 1985 WIS. L. REV. 1405, 1439–40 (1985).

54. See U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM'N).

55. See *Page v. Camper City & Mobile Home Sales*, 202 So. 2d 810, 811 (Ala. 1974); *Smith v. Butler*, 311 A.2d 813, 816 (Md. App. 1923).

56. See *Gazal v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 647 F.3d 833, 841 (8th Cir. 2011) (adopting the majority rule that sub-purchasers are also required to give 3(a) notice), and *Ratkovich ex rel. Ratkovich v. Smithkline*, 711 F. Supp. 436, 438 (N.D. Ill. 1989) (holding that third party beneficiaries must also give pre-suit notice).

57. See *Cohen v. Subaru of Am., Inc.*, No. 1:20-cv-08442-JHR-AMD, 2022 WL 721307, at *13–14 (D.N.J. Mar. 10, 2022) (noting that Alabama, Texas, Illinois, Minnesota, and Arkansas require notice

plead that pre-suit notice was given, and courts often use a very demanding standard in assessing whether such pleadings are sufficient.⁵⁸ Most courts require buyers to plead facts of notice sufficient to trigger a seller's protective or defensive prerogatives, although this is not required by the U.C.C. and might not be in the buyer's interest.⁵⁹

1. Pleading Requirements

A case decided almost one hundred years ago outlines the standard for sufficient notice. In *American Manufacturing Co. v. U.S. Shipping Board Emergency Fleet*, a contract case involving two sophisticated parties, Judge Learned Hand ruled that “[t]he notice ‘of the breach’ required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer’s claim that they constitute breach. The purpose of the notice is to advise the seller that they must meet a claim for damages, as to which rightly or wrongly the law requires that they shall have early warning.”⁶⁰ This interpretation of the notice obligation still dominates notice sufficiency evaluations today,⁶¹ despite increased access to information that often make sellers aware of their breach.⁶²

to remote sellers so buyers from those states must plead that they gave pre-suit notice); *In re Smitty's /CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Prac. & Prods. Liab. Litig.*, No. 4:20-MD-02936-SRB, 2022 WL 710192, at *52 (W.D. Mo. Mar. 9, 2022) (listing the states that require pre-suit notice to manufacturers).

58. See *Grossman v. Simply Nourish Pet Food Co. LLC*, No. 20-CV-1603 (KAM)(ST), 2021 WL 293774 at *12 (E.D.N.Y. Jan. 27, 2021) (dismissing plaintiff's case because plaintiff only plead that they gave notice of breach and an opportunity to cure). *Petrosino v. Stearn's Products, Inc.*, No. 16-CV-7735 (NSR), 2018 WL 1614349, at *8 (S.D.N.Y. Mar. 30, 2018) (holding that the buyer must plead that pre-suit notice was given, and the pleadings cannot be conclusory). *But see Rich's Restaurant, Inc. v. McFarm Enters., Inc.*, 570 P. 2d 1305, 1306 (Colo. App. 1977) (finding that local pleading rules permit the buyer to “aver generally that all conditions precedent have been performed or have occurred” while the denial of the occurrence of the condition must be plead with particularity).

59. See, e.g., *Warren v. The Stop & Shop Supermarket, LLC*, 592 F. Supp. 3d 268, 285–86 (S.D.N.Y. 2022) (buyer cannot generally plead that notice was provided or will be provided and avoid dismissal of the claim); *Powell v. Subaru of Am., Inc.*, 410 F. Supp. 3d 856, 884 (D.N.J. 2020) (a buyer must plead that seller had actual knowledge of the breach allegation made by buyer, of a particular product that the buyer bought); *Fearrington v. Bos. Sci. Corp.*, 410 F. Supp. 3d 794, 806 (S.D. Tex. 2019) (finding that although pre-suit notice is a factual question to be proved at trial, the buyer must plead sufficient facts to raise a plausible inference that notice was given).

60. *Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 7 F.2d 565, 566 (2d Cir. 1925).

61. See *Aqualon Co. v. Mac Equip., Inc.*, 149 F.3d 262, 267 (4th Cir. 1998) (noting that although 3(a) is a pro consumer-buyer iteration of a stringent common law notice rule, “numerous cases have applied judge Hand’s reasoning to cases involving U.C.C. section 2-607(3)” and Judge Hand’s reasoning is persuasive).

62. See *infra* notes 140–62, and accompanying text.

Today, most 3(a) cases arise in the context of breach of warranty actions brought by consumers.⁶³ These claims stem from contracts that are typically adhesive and contain warranty promises that are limited obligations sellers voluntarily undertake.⁶⁴ Nonetheless, most judges require that buyers' pleadings contain more facts beyond those that alert sellers that they have made a nonconforming tender or that the transaction is troublesome.⁶⁵ Judges adopt a variety of approaches when interpreting the notice obligation. One popular formulation of the notice requirement requires the buyer to alert the seller that "the problems rise to the level of a breach."⁶⁶ Buyers cannot simply tell sellers that the goods are non-conforming.⁶⁷ Another formulation of effective notice requires the buyer to notify the seller that they intend to seek legal redress: "The notice must be more than a complaint. It must, either directly or inferentially, inform the seller that the buyer demands damages upon an asserted claim of breach of warranty."⁶⁸ Still another formulation requires the buyer to provide specific details, but stops short of requiring a claim for damages. With this approach, the buyer must "refer to the particular sale, must fairly advise the seller of any alleged defects and must specify with reasonable particularity what the breach consisted of and repel any inference of a waiver."⁶⁹ Some judges require, "evidence as to the circumstances attending the giving of the notice, the person to whom it was given, and its form and substance, is precise, clear and certain in respect to signification."⁷⁰

The demanding pleading rules of a strict approach to notice increase a wronged buyer's responsibility to provide prompt notice to preserve their contract remedies. Judges adjudicating the sufficiency of complaints often require buyers to alert sellers not only to the goods' nonconformity or buyers' dissatisfaction with them, but also of buyers'

63. See *infra* Case Appendix C.

64. Sellers have the contractual liberty to not give warranties, but they do so as a marketing tool to induce confidence in the goods and improve sales. See Kenneth Chapman & Michael J. Meurer, *Efficient Remedies for Breach of Warranty*, 52 L. AND CONTEMP. PROBS. 107, 116 (1989).

65. See *e.g.*, *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 99 (E.D. Tenn. 1977) (holding that the buyer's repeated complaints and threats to reject future shipments were not sufficient notice of breach).

66. See *Bunn v. Navistar, Inc.*, 797 Fed. Appx. 247, 254 (6th Cir. 2020).

67. See *id.* at 254; see *Reid v. Gen. Motors LLC*, 491 F. Supp. 3d 268, 275 (E.D. Mich. 2020); S. Ill. Stone Co. v. Universal Eng'g Corp., 592 F.2d 446, 452 (8th Cir. 1979); *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (1977); *Truslow & Fulle v. Diamond Bottling Corp.*, 151 A. 492, 495 (Conn. 1930).

68. See *Cotner*, 545 S.W.2d at 630.

69. *Klein v. Am. Luggage Works, Inc.*, 158 A.2d 814, 819 (Del. 1960); see also *Idzykowski v. Jordan Marsh Co.*, 181 N.E. 172, 173 (Mass. 1932); *Niles v. Beverage Mktg. USA, Inc.*, No. 19-CV-1902, 2020 WL 4587553, at *6 (E.D.N.Y. Apr. 16, 2020).

70. See *Idzykowski*, 181 N.E. at 173.

decision to hold sellers legally accountable.⁷¹ The U.C.C. drafters did not impose such a heavy burden on buyers to preserve their legal remedies.⁷² The drafters specified that notice rules were not designed “to deprive a good faith consumer of his remedy.”⁷³ In effect, the U.C.C. removed the technical rigors of notice, but buyers are still required to plead that notice was given with the same particularity required at trial.⁷⁴

The quality of notice 3(a) contemplates is distinguishable from the quality of notice that filing a lawsuit provides. The U.C.C. provides a four-year grace period for filing a lawsuit,⁷⁵ while 3(a) gives the buyer only a “reasonable” time to complain.⁷⁶ Unlike a statute of limitations, 3(a) notice was not intended primarily to permanently cut off claims. As such, it does not have to meet the requirements for stating a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.⁷⁷ A buyer providing 3(a) notice should only have to alert the seller that they have problems with the seller’s performance or that the seller made a nonconforming tender.⁷⁸ But many courts have held that the buyer must surpass these requirements and inform the seller that they breached and will be held accountable.⁷⁹ Courts also generally require that notice comes directly from the buyer.⁸⁰ Even when the seller has independent knowledge of the

71. See *Se. Steel Co. v. W.A. Hunt Constr. Co., Inc.*, 390 S.E.2d 475, 478 (S.C. Ct. App. 1990). See *S. Ill. Stone Co.*, 592 F.2d at 452.

72. See U.C.C. § 2-607(3)(a) cmt. 4 (AM. L. INST. & UNIF. L. COMM’N) (providing that effective notice does not require “a clear statement of all the objections that will be relied on by the buyer. . . [or] a claim for damages or of any threatened litigation or other resort to a remedy.”).

73. See *id.*

74. See *Fearrington v. Bos. Sci. Corp.*, 410 F. Supp. 3d 794, 806 (S.D. Tex. 2019) (holding that pre-suit notice is a question of fact to be proved at trial but the buyer must still plead sufficient facts of notice to raise plausible inference that notice was given); see also *E. Airlines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) (holding that the U.C.C. departed from the technical rigors of notice in consumer transactions).

75. U.C.C. § 2-725 (AM. L. INST. & UNIF. L. COMM’N).

76. U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM’N).

77. See *AK Futures LLC v. LCF Labs Inc.*, No. 8:21-cv-02121-JVS (ADSx), 2022 WL 16859970, at *4 (C.D. Cal. Oct. 5, 2022) (to survive a motion to dismiss for failure to state a claim, the buyer must plead sufficient facts that give fair notice of the grounds for the claim). In cases where fraud is alleged, the buyer may have heightened pleading requirements. See *AHBP LLC v. Lynd Co.*, No. SA-22-CV-00096-XR, 2023 WL 139149, at *4–5 (W.D. Tex. Jan. 9, 2023) (buyer must plead with particularity facts that constitute fraud); see also Henning & Lawrence, *supra* note 48, at 593 (noting that the statutory rule governing stale claims is U.C.C. § 2-725, and judges cannot use § 2-607(3)(a) to rewrite § 2-725); Reitz, *supra* note 48, at 545–47 (observing that some judges view § 2-607(3)(a) as a latches rule while others treat it as a rule for repose, but contract law disfavors short statutes of limitation).

78. See U.C.C. § 2-607(3)(a) cmt. 4 (AM. L. INST. & UNIF. L. COMM’N) (noting that the buyer need only inform the seller that the transaction remains troublesome).

79. See cases cited *supra* note 37 and accompanying text.

80. See *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759, 764–65 (N.D. Ill. 2022) (demonstrating that even a buyer being added to a class action alleging the same breach as other class members must satisfy the notice rule).

breach or was previously made aware of it by customer complaints or lawsuits, the buyer must still provide individualized notice.⁸¹

Buyers lose many 3(a) cases because judges deem their expressions of dissatisfaction with goods insufficient to protect sellers' notice interests. Courts rationalize this harsh treatment by theorizing harm to sellers that is almost never evaluated. Judges emphasize that sellers have the right to investigate, cure, settle, preserve evidence, and not worry about future claims; they believe that without complaint-level notice, these rights will be impaired.⁸² Judges also conclude that the purpose of notice is not merely to let the seller know they provided nonconforming goods, but to reveal the buyer's conclusion of breach and intent to seek a legal remedy.⁸³ By focusing on these theoretical purposes of notice, judges prioritize a subsidiary contract term over the buyer's entitlement to an adequate remedy for breach.

Although cure and repose are legitimate sellers' interests, judges do not generally evaluate whether these or other acknowledged seller interests are impaired in specific cases involving notice. For example, notice is still required when the seller is already aware of the breach and can voluntarily initiate negotiations to cure, settle, or gather and preserve evidence as a litigation precaution.⁸⁴ Judges do not explain why a seller who is aware of their breach should be allowed to rest easy about being sued prior to the tolling of the statute of limitations, which cannot be reduced to less than one year.⁸⁵ In any event, there is no express cure

81. See *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902–03 (N.D. Ohio 2008) (a seller's actual or independent knowledge of the breach not sufficient notice); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 682–83 (E.D. Pa. 2011) (a seller's knowledge of the breach not sufficient 2-607(3)(a) notice); *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512, at *28 (E.D.N.Y. Aug. 29, 2013) (same); *Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 588–91 (S.D.N.Y. 2021) (other customer complaint not sufficient notice); *Barton v. Pret A Manger (USA) Ltd.*, 535 F. Supp. 3d 225, 246–48 (S.D.N.Y. 2021) (a previous lawsuit filed by the buyer's counsel was not sufficient notice); *Lynx, Inc. v. Ordnance Prod., Inc.*, 327 A.2d 502, 514 (Md. 1974) (buyer's lawsuit for breach is not sufficient notice).

82. See *Reid v. Gen. Motors LLC*, 491 F. Supp. 3d 268, 276 (E.D. Mich. 2020) (“by failing to provide notice, plaintiff deprived GM of the opportunity to cure the non-conformance, investigate the claim, or commence settlement negotiations *prior to litigation*”) (emphasis added); *Langner v. Boston Sci. Corp.*, 492 F. Supp. 3d 925, 936 (D. Neb. 2020) (“Without prior notice, Boston Scientific had no opportunity to cure its alleged breach or ascertain facts in preparation for negotiation”); *St. Clair*, 581 F. Supp. 2d at 903 (by failing to give notice, the buyer denied the seller the opportunity to cure, settle, inspect the goods, investigate the buyer's claim, or take steps to mitigate damages or properly defend against the claim).

83. See *Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977).

84. See, e.g., *Rodriguez v. Ford Motor Co.*, 596 F. Supp. 3d 1050, 1054–55 (N.D. Ill. 2022); *Drobnak v. Andersen Corp.*, 561 F. 3d 778, 784–85 (8th Cir. 2009).

85. See U.C.C. § 2-725(1) (AM. L. INST. & UNIF. L. COMM'N).

right for the seller when goods are accepted,⁸⁶ and repose is usually a product of the tolling of the statute of limitations. Judges generally do not acknowledge that sellers can still investigate, negotiate, and settle claims after a suit is filed, or that sellers may have been unable to cure even if notice was given.⁸⁷ In some cases, a seller may have more information than the buyer about the breach or have no interest in curing or settling.⁸⁸ Further, a seller's interest can be protected by an offset in buyer's damages to the extent the seller proves a loss attributable to deficient notice. Judges took this approach when the rule was codified at the turn of the twentieth century.⁸⁹

II. ORIGINAL JUDICIAL RESPONSE TO NOTICE OF BREACH RULES

The commercial context in which notice of breach disputes were adjudicated a century ago varies dramatically from the commercial setting in which they operate today. When the rules were codified in the early twentieth century, notice of breach issues arose primarily in the context of warranty disputes between merchants who often bought on credit or paid with promissory notes.⁹⁰ For example, in one case the

86. See U.C.C. § 2-508 (AM. L. INST. & UNIF. L. COMM'N) (limiting a seller's cure rights to cases where goods have been *rejected* rather than after they have been accepted and determined to be non-conforming).

87. See *Mid Island LP v. Hess Corp.*, 983 N.Y.S.2d 204 (Table), 208 (N.Y. Sup. Ct. 2013) (noting that the litigation process promotes negotiation and settlement for dispute resolution); *Fitl v. Strek*, 690 N.W.2d 605, 609 (Neb. 2005) (finding that pre-suit notification would not have helped the seller to prepare for negotiation or to defend himself because the seller could not fix the defect in the goods). *But see Johnson v. Eisai, Inc.*, 590 F. Supp. 3d 1053, 1062 (N.D. Ohio 2022) (holding that notice may be inferred from the filing of a complaint when the seller had prior knowledge of the defective goods and the defect was not curable).

88. See cases discussed *infra* notes 164–70 and accompanying text.

89. See *id.*

90. A search for notice of breach cases involving goods transactions in the first part of the 20th century produced seventy-one matching results. Sixty-six (92.9%) of these cases involved disputes between merchants in bargained commercial transactions. Only five or seven percent of the cases involved consumer transactions or goods bought for personal or household use. Six (8.4%) of the cases dealt with notice in the context of negotiable instruments because they involved promissory notes or checks that were transferred by the seller and went unpaid because of the buyer's allegation that the seller provided defective goods. The issue in these cases was whether the transferee of the note had knowledge of the breach at the time the note was acquired. Another six (8.4%) of the cases dealt with notice in the context of buyers' claims for consequential damages. In these cases, the issue was whether the sellers had actual or imputed notice that breach of promise or warranty would have radiating consequences and expose the seller to special damages. Only 5 cases dealt with whether the buyer sufficiently pleaded that notice of breach was given. A list of the cases is provided as an Appendix B.

goods in question was pulp bought for the manufacture of paper;⁹¹ in another, it was an alfalfa mill.⁹² Other examples include the sale of five carloads of grapes,⁹³ 5,000 dozen ladies' hosiery,⁹⁴ two lots of bed quilts,⁹⁵ steel bars for auto parts,⁹⁶ a milking machine for cows,⁹⁷ and a corn shredder and husker.⁹⁸ These cases reflect the reality that consumers were rarely impacted by the requirement that notice of breach be promptly provided to preserve remedies.⁹⁹

91. *Nashua River Paper Co. v. Lindsay*, 144 N.E. 224, 225 (1924) (finding that notice of breach of warranty should be particularized for each delivery to avoid a conclusion of waiver by buyer).

92. *Gruendler Patent Crusher & Pulverizer Co. v. Preston Grain & Milling Co.* 215 P. 60, 61 (1923) (holding that purchaser may waive the right to rescind by failing to give timely notice of breach).

93. *Golisano v. Crisafulli*, 190 N.Y.S. 24, 26 (Sup. Ct. 1921) (holding that the seller may recover the contract price in an executory contract that the buyer rescinded without giving notice of breach).

94. *Sorenson v. Keesey Hosiery Co.*, 154 N.E. 826, 828–29 (N.Y. 1926) (finding that the buyer provided effective notice for breach of warranty damages but failed to plead that they gave notice of rescission).

95. *Tausend v. Judson*, 201 N.Y.S. 480, 482 (App. Div. 1923) (holding that the buyer's four-month delay in providing notice of breach was not unreasonable).

96. *Herbrand Co. v. Lackawanna Steel Co.*, 280 F. 11, 17 (6th Cir. 1922) (buyer provided sufficient notice of breach to preserve remedies).

97. *Monroe & Monroe, Inc. v. Cowne*, 112 S.E. 848, 855 (Va. 1922) (holding that express notice of breach requirements are strictly enforced but may be waived by a seller's conduct).

98. *J.I. Case Threshing Mach. Co. v. Gidley*, 132 N.W. 711, 714 (S.D. 1911) (holding that the buyer failed to comply with express notice of breach requirement or prove they were waived).

99. Of seventy-one cases found, only five involved consumer transactions. *Ganoun v. Daniel Reeves, Inc.*, 268 N.Y.S. 325 (N.Y. Mun. Ct. 1933) (imputing notice for consequential damages purposes because the seller sold an unmerchantable can of dog food); *Idzykowski v. Jordan Marsh Co.*, 181 N.E. 172 (Mass. 1932) (consumer bought shoe cleaner that caused injury but did not give effective notice of breach by complaining to a store clerk); *Keystone Furniture Co. v. Danneman*, 10 Pa. D. & C. 503 (C.P. Pa. 1927) (buyer of living room furniture failed to prove existence of implied warranty or that notice of breach was given); *Kennedy v. F.W. Woolworth Co.*, 205 A.D. 648 (N.Y. App. Div. 1923) (father of minor injured by defective candy does not have to give notice of breach for his loss of services claim); *Standard Auto. Co. v. Thurston*, 58 Pa. Super. 160 (1913) (car buyer must provide notice of defects that serve as the basis for calculating their warranty recovery). The cases also revealed that notice was a litigated issue in a variety of other contexts. For example, notice was a recurring issue in warranty of title claims involving real property. *See, e.g.*, *Todd v. State Bank of Edgewood*, 165 N.W. 593 (Iowa 1917) (bank must return the buyer's funds because it had notice of defective performance by seller); *Jones v. Caldwell*, 195 S.W. 122 (Ky. 1917) (plaintiff in a breach of warranty of title case must prove that they were evicted by superior title if defendant had no notice or was not a party to the lawsuit that approved the eviction); *Taylor v. Allen*, 62 S.E. 291 (Ga. 1908) (addressing whether a remote purchaser had notice of a defective warranty of title in an action to recover their purchase money). Notice also affected recovery in tort cases. *See, e.g.*, *Stevens v. Yale*, 127 A. 283 (Sup. Ct. Err. Conn. 1925) (tenant provided sufficient notice to landlord of defective condition on leased premises to activate landlord's duty to repair); *Kennedy v. F.W. Woolworth Co.*, 200 N.Y.S. 121 (N.Y. App. Div. 1923) (state tort law does not require notice of defective performance for a parent's loss of services claim). And one case involved notice in the context of stock purchase. *See Simpson v. Van Laningham*, 183 S.W. 324 (Mo. 1916) (addressing whether the purchaser of two promissory notes for stock purchases had notice that the predecessor noteholder (seller) breached its contract with the note issuer (buyer)); *see also State Bank of Swea v. Lovrenz*, 203 N.W. 427 (Minn.

When the notice rule was adopted in 1906, it did not produce the debilitating effects on buyers that it does today. At the time, it affected merchant buyers who could bargain about notice requirements.¹⁰⁰ Further, these merchants were often buying identified goods that were resold or used to produce other goods.¹⁰¹ These buyers therefore had a higher likelihood of discovering the breach promptly. For example, when goods were bought for resale, inspection and complaints by customers gave buyers prompt notice of the defect.¹⁰² In cases where goods were bought to fabricate other products, or, in the case of animals that were bought for breeding, the buyer could also quickly determine if the seller's performance was defective.¹⁰³ Because defective performance had radiating economic impacts on these merchant buyers, they had economic incentives to complain promptly. But even when they did not complain, they were not denied all warranty remedies for failing to give notice of breach.¹⁰⁴ Today, consumer buyers must act promptly and complain of breach with particularity, even when they do not have the incentives or knowledge that merchant buyers have.¹⁰⁵

When merchant buyers in the early twentieth century believed that a promise or warranty was breached, they simply refused to pay; this forced the seller to sue for the contract price.¹⁰⁶ As such, the buyers were not typically consumer plaintiffs suing for breach of warranty, with sellers interposing a failure of notice defense. Instead, notice litigation usually involved sellers of goods suing for breach and nonpayment, with buyers defending or counterclaiming that products were defective, and warranties breached.¹⁰⁷ These counterclaims then triggered a seller's assertion that the breaching buyer failed to give timely notice of their warranty claim and was therefore barred from receiving their damages offset.¹⁰⁸

1925) (the court found that the plaintiff was a holder in due course of the buyer's promissory notes because he got the notes without notice of the seller's breach of warranty).

100. See cases discussed *infra* notes 109–17 and accompanying text.

101. See cases discussed *supra* notes 91–98 and accompanying text.

102. See, e.g., *Sorenson v. Keesey Hosiery Co.*, 154 N.E. 826, 826 (N.Y. 1926) (customer notified the buyer that goods were nonconforming upon arrival).

103. See, e.g., *Nashua River Paper Co. v. Lindsay*, 144 N.E. 224, 224 (Mass. 1924) (paper pulp did not conform to warranty and was therefore not suitable to manufacture paper).

104. See *infra* notes 123–35 and accompanying text.

105. See *Thornton v. Kroger*, No. CIV 20-1040 JB/JFR, 2022 WL 488932, at *102 (D.N.M. Feb. 17, 2022) (observing that consumers are not steeped in the commercial practices in which notice is grounded, so an amended complaint could satisfy the buyer's notice obligation and open the path to settlement).

106. See cases discussed *infra* notes 109–17 and accompanying text.

107. See *infra* notes 114–18.

108. See *id.*

Caselaw exemplifies the typical litigation context in which notice issues arose in the early twentieth century, with merchant buyers as defendants seeking to reduce or avoid damages for breach via warranty counterclaims as defenses. For example, in *Mississippi Shipbuilding Corp. v. Lever Bros. Co.*,¹⁰⁹ *Minneapolis Threshing Mach. Co. v. Huncovsky*,¹¹⁰ and *Meyercord Co. v. Gwilliam Manufacturing Co.*, sellers sued buyers for breach and the contract price.¹¹¹ The buyers then counterclaimed for warranty breach and asked for a damages offset.¹¹² The sellers then argued that notice of the warranty claims was untimely.¹¹³ In *Lindsay v. Fricke*, the seller sued to repossess an engine sold to buyer, and the buyer counterclaimed for breach of warranty.¹¹⁴ The buyer's counterclaim triggered the seller's argument that the buyer failed to provide timely notice as required by the contract.¹¹⁵ Similarly, in *Kelley-Springfield Road Roller Co. v. Coffman*, the buyer of a steamroller was sued for breach and counterclaimed for warranty breach.¹¹⁶ This response triggered the seller's assertion that timely notice was not given.¹¹⁷ These cases exemplify typical notice issues that arose in the early twentieth century, when merchant buyers as defendants sought to reduce or avoid damages for breach by pleading warranty counterclaims as defenses.¹¹⁸ In contrast, consumer buyers today pay for their goods upfront, so when the breach is discovered they have the burden of suing. The seller can interpose a notice defense with great success because consumers are unlikely to be as proactive as twentieth century merchants in complaining promptly about the breach.¹¹⁹

109. See *Miss. Shipbuilding Corp. v. Lever Bros. Co.*, 142 N.E. 332, 333 (N.Y. 1923).

110. See *Minneapolis Threshing Mach. Co. v. Huncovsky*, 202 N.W. 280, 281 (N.D. 1924).

111. See *Meyercord Co. v. Gwilliam Mfg. Co.*, 85 Pa. Super. 33, 35 (1925).

112. See *Miss. Shipbuilding Corp.*, 142 N.E. at 333; *Minneapolis Threshing Mach. Co.*, 202 N.W. at 281; *Meyercord Co.*, 85 Pa. Super. at 35.

113. In *Miss. Shipbuilding Corp.*, the court held that the buyer must provide notice of breach of promise or warranty to preserve their counterclaim. 142 N.E. at 335. In *Minneapolis Threshing* the court found that the buyer had given notice of breach when he attempted to rescind the contract upon discovering the defects in the goods. 202 N.W. at 283. And in *Meyercord Co.*, the court found that the buyer's notice was too indefinite to be effective. 85 Pa. Super. at 37.

114. *Lindsay v. Fricke*, 109 N.W. 945, 947 (Wis. 1906).

115. *Id.* at 948.

116. *Kelley-Springfield Road Roller Co. v. Coffman*, 72 S.E. 749, 751 (W. Va. 1911).

117. See *id.* at 751.

118. Additional examples of this phenomenon can be seen in *Mundt v. Simpkins*, 115 N.W. 325 (Ne. 1908); *McCormick v. Sawyer*, 81 A. 482 (Me. 1911); *Learned v. Hamburger*, 139 N.E. 641 (Mass. 1923); *Goldman v. Great Lakes Foundry Co.*, 203 N.W. 103 (Mich. 1925); *McClarran v. Longdin-Brugger Co.*, 157 N.E. 828 (Ohio Ct. App. 1926); *Keystone Furniture Co. v. Danneman*, 10 Pa. D. & C. 503 (C.P. 1927); *Orange Crush Co. v. Stacy-Merrill Fruit Co.*, 195 N.W. 147 (Minn. 1923); *Samuel v. Del. River Steel Co.*, 107 A. 700 (Pa. 1919); *Peterson v. Denny-Renton Clay & Coal Co.*, 154 P. 123 (Wash. 1916); *Otto v. Braman*, 105 N.W. 601 (Mich. 1905).

119. See *infra* notes 171–72 and accompanying text.

Early twentieth century caselaw also illustrates how merchant buyers were not harmed by their failure to provide notice within a reasonable timeframe. In these cases, judges prioritized enforcement of seller's promises or warranties over sellers' defensive interests in having notice of breach. Although judges in the early twentieth century acknowledged that notice requirements must be met¹²⁰ or quibbled about conclusory statements in pleadings where notice was given,¹²¹ they sometimes waived notice or took an expansive view of what constituted "reasonable" time to ensure that sellers honored their promises.¹²² Critically, late notice did not bar buyers from requesting an offset to damages because of sellers' breach of warranty.¹²³ The early twentieth century cases consistently held that while late notice may bar buyer's action to *rescind* the contract, it did not bar buyer from receiving damages for breach of warranty.¹²⁴ For example, in *Martin v. A.L. Scott Lumber Co.*, a lumberyard seller sold 40,000 pieces of wood to a road-sign manufacturer.¹²⁵ Some of the wood supplied was not cut as required by the contract, but the buyer kept the wood and used it while making the necessary adjustments at some cost.¹²⁶ Months passed before buyer complained to seller about the defects, and seller asserted the notice rule as a defense to a claim for warranty damages.¹²⁷

Martin acknowledged that the common law barred claims for defective goods after they were accepted, and the Uniform Sales Act reversed this rule by permitting recovery for breach after acceptance.¹²⁸

120. See *Monroe v. Cowne*, 112 S.E. 848, 854 (Va. 1922) (holding that contractual or express notice requirements must be strictly complied with unless waived); *J.I. Case Threshing Mach Co. v. Gidley*, 132 N.W. 711, 714 (S.D. 1911) (holding that when a contract particularizes notice of breach requirements, a general objection to the goods will not suffice).

121. See *Hoover Body Co. v. Pendleton*, 95 Pa. Super. 97, 101 (1928) (finding that the buyer's proof that notice of breach was given was "indefinite, vague and evasive").

122. See *Orange Crush Co.*, 195 N.W. at 148 (holding that the reasonable time for notice should be measured from the time the buyer discovers the breach as opposed to when the goods were delivered); *Oglesby Granite Quarries v. Schott Monument Co.*, 6 N.E. 2d 766, 768 (1935) (holding that notice that the goods were for resale can be attributed to the seller because the seller knew that the buyer was a dealer in the goods bought, and therefore could suffer consequential damages if the seller breached its warranty). And, the buyer may be excused from pleading notice with particularity if the buyer alleges that the notice was given and the seller attempted to remedy the defective performance. See *Farr v. Zeno*, 81 Pa. Super. 509, 512 (1923); *W.F. Main Co. v. Fields*, 56 S.E. 943, 944 (1907) (an express two-day notice requirement will not be enforced when the goods have latent defects).

123. See cases discussed *supra* note 112.

124. See *supra* notes 125–36 and accompanying text.

125. *Martin v. A.L. Scott Lumber Co.*, 273 P. 411, 411 (1929).

126. See *id.* at 412 (finding that the buyer incurred labor costs in adjusting and assembling the defective lumber).

127. See *id.* (noting that two months had passed before the buyer complained).

128. See *id.* at 413.

The court noted that the new rule required buyer to promptly inspect goods and notify sellers of any defects because “retention and use of the goods for a considerable period of time without any complaint warrants a strong inference either that the goods are what the contract called for, or that the buyer has agreed to accept them instead of such goods, especially if payment of the price is made without objection.”¹²⁹ The court noted, however, that when the buyer does not seek rescission as a remedy, late notice only goes to the factual question of whether the buyer accepted the defective performance as satisfactory.¹³⁰ In *Martin*, the findings of fact did not support an inference that the buyer “tacitly agreed to take the defective performance as full performance”¹³¹ Therefore, the buyer’s right to warranty damages was not foreclosed: “In this instance, the findings of fact show that, while notice was delayed, the notice given was specific, was recognized and fully acted on by seller, every purpose of notice was fulfilled, the seller suffered no detriment from the delay, and . . . is in no position to complain of it.”¹³²

Similarly, in *Peterson v. Denny-Renton Clay & Coal Co.*, the seller sued for the contract price in a paving brick contract.¹³³ The buyer countered by asking for a damages offset because of the seller’s defective performance, and the seller raised a late notice defense because the buyer only complained after being sued.¹³⁴ The court rejected the notice defense, finding that courts consistently hold that failure to give notice of breach operates as a waiver of a buyer’s rights only in cases where they seek to rescind the contract.¹³⁵ Citing a substantial body of supporting precedents, the court ruled that late notice does not preclude a buyer from receiving a damages offset for warranty breach.¹³⁶

In view of the historical judicial prioritization of merchant buyers’ access to remedies when the notice rule was codified, it is surprising that courts insist on strict notice today. Judges appear to be unaware of the rule’s historical application and fail to acknowledge commercial and legal developments that make strict notice rules outdated.

129. *Id.*

130. *See id.* (finding that in a claim for warranty damages, the buyer’s “failure to inspect or give notice within a reasonable time are evidential facts bearing on the question whether the buyer assented to defective performance in satisfaction of the seller’s obligation and may be very persuasive.”).

131. *Id.* at 414.

132. *Id.*

133. *Peterson v. Denny-Renton Clay & Coal Co.*, 154 P. 123, 124 (1916).

134. *See id.* at 124–25.

135. *See id.* at 125–26.

136. *See id.*

III. THE NEW COMMERCIAL CONTEXT FOR NOTICE

Courts requiring strict compliance with notice rules do not acknowledge their imperative to be responsive to evolving commercial practices as envisioned by the U.C.C. The U.C.C. incorporates the “law merchant” as part of its regulatory construct, unless displaced by the parties,¹³⁷ and was crafted so that it can “be applied by the courts in the light of unforeseen and new circumstances and practices.”¹³⁸ In sum, the U.C.C. is flexible and designed to accommodate the “expansion of commercial practices.”¹³⁹ The commercial context for notice has changed, and sellers are now usually aware of their defective performances. Today, notice disputes often involve mass-produced goods with the same defects, sold to consumers in adhesion contracts. Sellers routinely receive notice of defect or breach from a variety of reliable sources, demonstrated by the data below.

A. Notice from Seller Studies and Testing

Notice rules should reflect the fact that not only are the contracting parties different than in the early twentieth century, but the goods are also different to the extent they are mass-produced. With the advent of mass sales of the same goods that harbor the same defects, sellers gained greater opportunities to receive notice of defects from product testing, customer complaints, lawsuits, or regulatory action.¹⁴⁰ For example, in *Rodriguez v. Ford Motor Co.*, the buyer alleged that the seller knew that the trunk lid wire harness of its vehicles was defective because of ten years of product testing.¹⁴¹ In *Block v. Lifeway Foods*, the buyer alleged that the seller’s own study showed its food products contained 4% lactose contrary to its 1% promise.¹⁴² In both cases, the courts ruled that the sellers’ general awareness of their defective performances did not constitute sufficient notice.¹⁴³ Mass-produced goods with the same defects have also caused buyers to aggregate their claims or to sue in multiple forums.¹⁴⁴

137. See U.C.C. § 1-103(b) (AM. L. INST. & UNIF. L. COMM’N).

138. *Id.* § 1-103 cmt. 1.

139. *Id.* § 1-103(b).

140. See cases cited *infra* note 145.

141. See *Rodriguez v. Ford Motor Co.*, 596 F. Supp. 3d 1050, 1054–55 (N.D. Ill. 2022).

142. See *Block v. Lifeway Foods, Inc.*, No. 17 C 1717, 2017 WL 3895565, at *6 (N.D. Ill. Sept. 6, 2017).

143. See *Rodriguez*, 596 F. Supp. 3d, at 1055; *Block*, 2017 WL 3895565, at *6.

144. See *infra* note 145.

B. Notice from Class Action And Multidistrict Litigation

The advent of class action lawsuits and multidistrict litigation to efficiently accommodate a large number of buyers making the same claim of breach also dramatically expanded sellers' awareness of breach.¹⁴⁵ Mass-produced goods with the same defect affect large numbers of buyers and produce multiple lawsuits making the same claim.¹⁴⁶ Nonetheless, judges continue to insist on individualized notice from each buyer in the lawsuit.¹⁴⁷ Even a buyer joining an ongoing class action must provide individualized notice when alleging the same defective performance already alleged by other class members.¹⁴⁸ In these circumstances, insistence on the same complaint from hundreds or thousands of buyers does not seem justified or essential to protect a seller's interests.

145. A significant number of notice cases being adjudicated now take the form of class actions or multidistrict litigation in which all buyer plaintiffs are alleging that the same conduct or defective performance constitute breach. *See, e.g.*, *Van Zeeland v. Rand McNally*, 532 F. Supp. 3d 557 (N.D. Ill. 2021) (defective GPS tablet); *Powell v. Subaru of Am., Inc.*, 502 F. Supp. 3d 856 (D.N.J. 2020) (defective windshields); *Hamilton v. TBC Corp.*, 328 F.R.D. 359 (C.D. Cal. 2018) (defective trailer tires); *Hummel v. Tamko Bldg. Prods., Inc.*, 303 F. Supp. 3d 1288 (M.D. Fla. 2017) (defective roofing shingles); *Rosa v. Am. Water Heater Co.*, 177 F. Supp. 3d 1025 (S.D. Tex. 2016) (defective residential gas water heater); *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174 (S.D. Cal. 2015) (carcinogen in beverage); *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600 (D. Kan. 2014) (defective outdoor railing products); *Terrill v. Electrolux Home Prods., Inc.*, 2013 WL 5603873 (S.D. Ga.) (defective washing machine); *Martin v. Ford Motor Co.*, 2013 WL 3328231 (E.D. Pa.) (defective rear axle in minivan); *Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074 (E.D. Ark. 2013) (defective plasma TVs); *Lamb v. Graco Child's Products Inc.*, 291 F.R.D. 665 (N.D. Fla. 2013) (defective car seat for child); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546 (D.N.J. 2010) (defective sunroof drain); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128 (N.D. Cal. 2010) (moldy beds); *Porcell v. Lincoln Wood Products, Inc.*, 713 F. Supp. 2d 11305 (D.N. Mex. 2010) (defective insulated glass windows); *Brunson v. La. Pacific Corp.*, 266 F.R.D. 112 (D.S.C. 2010) (defective wood trim); *Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617 (S.D. Fla. 2008) (defective dental implants). Further, class actions and multidistrict litigation did not become popular until the 1970s. *See* Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 92 (2018); (Davis Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013); Douglas Martin, *The Law; The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES (Jan. 8, 1988), <https://www.nytimes.com/1988/01/08/us/the-law-the-rise-and-fall-of-the-class-action-lawsuit.html> [<https://perma.cc/K6XU-ENKV>].

146. *See* cases cited *supra* note 145.

147. *See e.g.*, *Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prods. Liab. Litig.*, No. 4:20-MD-02936-SRB, 2022 WL 710192, at *16–17 (W.D. Mo. Mar. 9, 2022) (discussing the seller's contention that pre-suit notice must come from each buyer and the court's finding with respect to the states that require such notice); *Cohen v. Subaru of Am., Inc.*, No. 1:20-cv-08442-JHR-AMD, 2022 WL 721307, at *13–14 (D.N.J. Mar. 10, 2022) (discussing state law requirements for pre-suit notice from each buyer plaintiff making a breach of implied warranty claim).

148. *See, e.g.*, *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759, 764 (N.D. Ill. 2022).

C. Notice from Regulatory Action

Another commercial development that should impact notice rules is the growth of regulatory policing of products. For example, in *Turk v. Rubbermaid Inc.*, buyers unsuccessfully alleged that complaints by regulators should have been sufficient notice to seller.¹⁴⁹ In *Johnson v. Eisai*, the buyer argued that a Food and Drug Administration (FDA) notice that the purchased drug was unsafe gave the seller notice of breach.¹⁵⁰ Even sellers rely on regulatory disclosures about their products to avoid liability. In *Cristia v. Trader Joe's*, the seller relied on a public service announcement on the Food and Drug Administration's (FDA) website as proof that it did not misrepresent the process by which its juice was produced.¹⁵¹ The court took judicial notice of the FDA's announcement because information on government websites "[is] not subject to reasonable dispute."¹⁵² Sellers therefore have greater opportunities to know when their performances are defective because of regulators' warnings or product recalls.

D. Notice from Technological Developments (Warranty Software)

Warranty commitments which often trigger the notice defense are likely now the most ubiquitous contracts in the commercial world.¹⁵³ Sellers use warranties to signal to buyers that products are of high quality to increase sales and profitability.¹⁵⁴ But affirmations of quality or reliability have been difficult to enforce historically.¹⁵⁵ Initially, many warrantors drafted their warranty promises in an opportunistic way, with prominent affirmations of quality combined with inconspicuous disclaimers of liability for the goods' basic condition or performance.¹⁵⁶

149. See *Turk v. Rubbermaid Inc.*, No. 21-CV-270 (KMK), 2022 WL 836894, at *9–10 (S.D.N.Y. Mar. 21, 2022).

150. See *Johnson v. Eisai, Inc.*, 590 F. Supp. 3d 1053, 1062 (N.D. Ohio 2022).

151. See *Cristia v. Trader Joe's Co.*, No. 22 CV 1788, 2022 WL 17551552, at *2 (N.D. Ill. Dec. 9, 2022).

152. See *id.* at *3.

153. See Lamis, *supra* note 45, at 174–76.

154. See George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981) (noting that better warranties signal higher quality goods thereby increasing consumer confidence and sales); see also Chapman & Meurer, *supra* note 64, at 107, 116 (noting that more comprehensive warranties suggest higher quality goods and provides justification for higher prices to cover warranty expenses and the perceived costs of producing a better product).

155. See, e.g., *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1317 (2nd Cir. 1990) (discussing Congressional response to widespread complaints about motor vehicle manufacturers not honoring their warranties).

156. See Lamis, *supra* note 45, at 185–87; Priest, *supra* note 154, at 1300–04 (noting that fine print warranty disclaimers often shifted risks associated with product quality back to the consumer); see also Michael J. Wisdom, *An Empirical Study of the Magnuson Moss Warranty Act*, 31 STAN. L. REV. 1117,

Inundated by complaints of warranty deception and abuse, Congress studied the issue and concluded that the many exceptions and exclusions in warranty contracts were unjustified and also that buyers lacked practical mechanisms to enforce sellers' warranty obligations.¹⁵⁷ Congressional studies culminated in the Magnuson Moss Warranty Act to improve warranty clarity, prevent deception, and improve competition.¹⁵⁸

Faced with regulations protecting buyers from faulty products and deceptive warranties, along with the evolution of computer technology, many sellers began using computer software to manage their warranty programs.¹⁵⁹ Warranty software helps sellers lower the cost of processing warranty claims, which amount to tens of billions of dollars annually for manufacturers.¹⁶⁰ But warranty software does more than cut operating costs. It also helps sellers spot defects in manufacturing and assist engineers in improving product design.¹⁶¹ Even more, it gives sellers notice of flaws or defects that may make their goods nonconforming or in breach of warranty.¹⁶²

1120 (1979) (reporting complaints that warranties were misleading because there appeared to be grants of benefits but operated as limitations of liability for the seller).

157. See Lamis, *supra* note 45, at 184–88; see also H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. (1974) reprinted in 1974 U.S.C.C.A.N. 7702, 7708; Wisdom, *supra* note 156, at 1118, 1112 (reporting four Congressional studies and several legislative initiatives during the 1960s and 1970s in response to complaints that warranties were opaque and were not being honored).

158. See Magnuson-Moss Warranty Act, 15 U.S.C. § 2302(a) (1975).

159. See *Warranty Software, Part 1*, WARRANTY WEEK (Jul. 21, 2003), <https://www.warrantyweek.com/archive/ww20030721.html> [<https://perma.cc/ARY8-6E7M>] (discussing widespread manufacturer's reliance on warranty software to manage their warranty programs); see also *Warranty Software, Part 2*, WARRANTY WEEK (Jul. 28, 2003), <https://www.warrantyweek.com/archive/ww20030728.html> [<https://perma.cc/Z4G5-BDCV>] ("In the automotive market, sooner or later virtually every software package has to interact with warranty data."). In addition to the protections offered consumers by the Magnuson Moss Warranty Act, vehicle manufacturers in particular were forced to "modernize and automate this internal warranty claims management and defect reporting systems" because of Transportation Recall Enhancement, Accountability and Documentation Act. See *Warranty in the Biden Administration*, WARRANTY WEEK, (Jan. 28, 2021), <https://www.warrantyweek.com/archive/ww20210128.html> [<https://perma.cc/5ZLM-YGWW>].

160. See also *Warranty Software, Part 2*, *supra* note 159 (discussing the cost and product quality motivations for utilizing warranty software and noting that warranty servicing is a \$9 billion activity for vehicle manufacturers alone). In 2019, American manufacturers spent \$25.9 billion dollars on warranty claims. See *Seventeenth Annual Product Warranty Report*, WARRANTY WEEK (Apr. 16, 2020), <https://www.warrantyweek.com/archive/ww20200416.html> [<https://perma.cc/ZFE4-9T4N>].

161. See *Warranty Software Part 2*, *supra* note 159 (noting that warranty software helps the firm's production arm "spot manufacturing problems at their own factory or at the facilities of parts suppliers.").

162. See *Durso v. Samsung Elecs. Am., Inc.*, No. 12-cv-5352, 2014 WL 4237590, at *4 (D.N.J. Aug. 26, 2014) (reporting the buyer's claim that the seller's warranty software tracked claims and contained data that informed the seller of the nature of the defect the buyer complained about).

Sellers' growing awareness through their warranty management programs that they delivered nonconforming goods makes strict notice rules inconsistent with the commercial reality that many sellers already have the tools to protect their contractual interests. In these circumstances, even without a complaint from a buyer, a seller has sufficient notice of breach to initiate any contract compliance, mitigation, or defensive measures they deem appropriate. The burden should not be on the buyer to meet short notice deadlines or to elevate their complaints to legal claims of breach or threats of lawsuits to preserve their legal remedies.¹⁶³ Continued insistence on individualized and particularized notice is also not responsive to new buying and selling practices once the breach is discovered or known.

E. Buyer and Seller Attitudes in a Mass Sales World

Strict notice rules further reduce a buyer's prospects for relief by presuming that sellers will respond in a cooperative or conciliatory way once notified of breach and after a claim for damages is made. However, studies of commercial dispute resolution practices belie the claim that sellers will cure, settle, or mitigate once informed of the breach. These studies show that awareness of a buyer's legal entitlement is not a source of pressure on sellers to remediate.¹⁶⁴ Sellers respond to the economic realities of remedying the breach and will react in ways they deem rational.¹⁶⁵ Seller's dependence on buyer's patronage, buyer's sophistication, and the cost of compliance, all figure prominently in whether a buyer's complaint will be addressed appropriately.¹⁶⁶ Simply

163. Contract law does not generally permit subsidiary or incidental promises to control remedies, particularly when they produce harsh or inefficient results. *See e.g.*, *Gazis v. Miller*, 892 A.2d 1277, 1280 (N.J. 2006) (rejecting forfeiture of insurance benefits due to late notice because "notice is 'subsidiary to the event that invokes coverage, and the conditions related to giving notice should be liberally and practically construed.'"); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (holding that strict enforcement of a contract term will not be given when the breached provision is incidental and not the main purpose of the contract, and the economic benefit of strict enforcement is greatly disproportionate to its cost). The principle that a contracting party should not get a windfall because their partner committed a minor breach or there was failure of a technical condition is also well established. *See Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. Ct. App. 1921). For a discussion of the divergent views and judicial approaches to securing just remedies when incidental promises are breached, see PERILLO, *supra* note 51, at 525–28.

164. *See Braucher, supra* note 53, at 1487.

165. *See id.* at 1453 (reporting that if the seller is dependent on the buyer's repeat business, they are likely to address complaints).

166. *See id.* at 1149–53; *see also* Samuel I. Becher & Tal Z. Zarsky, *Minding The Gap*, 51 CONN. L. REV. 69, 90 (2018) (reporting that buyers who pose a threat to the seller's reputation and revenues get lenient treatment, while weak, passive, uninformed, and unprofitable buyers do not).

having notice of breach does not necessarily cause sellers to honor their promises or push them to take defensive measures in preparation for litigation. For example, in the financial services industry, lenders admitted that the merits of claims did not determine settlement decisions.¹⁶⁷ Settlement decisions were driven by the customer's profitability because that was rational.¹⁶⁸ This is a departure from the judicial presumption that notice triggers a seller's desire to investigate, remediate, or settle.¹⁶⁹ In effect, curing or settling claims depends on the buyer's economic value to the seller. Buyers that increase profitability will often receive effective, or even special, remedies after complaining to sellers, while others face myriad seller-constructed obstacles to securing their remedies.¹⁷⁰ Judicial failure to acknowledge this commercial reality accommodates harsh forfeitures of buyer's remedies that a notice-prejudice rule can ameliorate.

Strict notice rules also do not account for how buyers behave once they learn that products are defective. In the consumer goods context in particular, studies show that buyers are not proactive in pursuing their contract remedies for breach because of the many practical and structural hurdles they face.¹⁷¹ Judicial demands that buyers assert their legal rights when sellers fail to honor their contractual commitments are therefore in conflict with the commercial reality that buyers are not prone to assert their legal rights or get aggressive with sellers.¹⁷² Placing an affirmative duty on sellers to show prejudice responds to the commercial reality that claims of breach and threats of lawsuits are often ignored because sellers know these are usually empty threats.¹⁷³

167. See CFPB Arbitration Agreement, 82 Fed. Reg. 33210, 33255, 33261, 33394 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

168. See *id.* at 33255, 33260 (reporting that profitability of customers is more determinative of settlement decisions than the merits of claims); see also Braucher, *supra* note 53 at 1407, 1454 (reporting that preservation of the seller's reputation is more likely to coerce settlement or remediation than the buyer's legal entitlements).

169. *Id.*

170. See Amy J. Schmitz, *Remedy Realities In Business-To-Consumer Contracting*, 58 ARIZ. L. REV. 213, 232–33 (2016) (describing strategies such as eliminating phone services for complaints, long hold times on phone calls, rerouting of calls to multiple departments, and limiting staff members' ability or discretion to resolve complaints).

171. See *id.* at 215, 230 (reporting that small-sum negative-value claims are economically infeasible, and buyers often lack the inclination, confidence, or education that make claims practical); see also Braucher, *supra* note 53, at 1410, 1442, 1447 (noting that consumer buyers claims are high risk, face a hostile judiciary, and impractical because of the unavailability of attorney fees in the U.C.C.).

172. See *id.*

173. See Schmitz, *supra* note 170, at 227, 232–33 (reporting that businesses have a poor response rate to complaints and that online reviews and complaint websites are ignored half of the time); see also Braucher, *supra* note 53, at 1405 (reporting that lawsuits by buyers are rare, and that an assertion of legal rights by buyers is not a source of pressure on sellers).

IV. THE CONTRACTUAL HIERARCHY OF EXPRESS AND CONSTRUCTIVE NOTICE

Express or constructive notice requirements are typically subsidiary obligations of the parties in commercial transactions.¹⁷⁴ In the goods context, sellers' promises about the supplied products and buyers' promises to pay are usually the core obligations. Buyer's notice obligations are triggered by seller's default—an event that may not occur. A seller needs to know if a buyer is unhappy with or harmed by seller's defective performance in order to comply with their contractual commitments. When buyers fail to pay, sellers will invariably notify them of their default and sellers' plans for collection.¹⁷⁵ Consumer buyers are not so proactive when sellers default.¹⁷⁶ Buyers may accept the breach because its impact is negligible or because it does not make economic sense to pursue a breach action.¹⁷⁷ A buyer may also want to wait before deciding whether a claim of breach is strategically beneficial.¹⁷⁸ Such realities militate in favor of flexible notice rules tied to the harm to seller caused by any delay.

In some transactions such as option contracts, notice may be a substantive or material term.¹⁷⁹ When an option is sold, the grantor receives payment for the right to be notified in a certain timeframe whether the grantee will exercise their right to buy. In this context, courts require strict compliance with notice rules to avoid judicial modification of contract terms.¹⁸⁰ Because notice is a primary promise in this context, forfeiture is not discouraged when the grantee fails to provide the required notice. For example, in *Thrifty Dutchman, Inc. v. Florida Supermarkets, Inc.*, the grantee failed to give timely notice in

174. See *infra* text accompanying notes 187–97.

175. See Schmitz, *supra* note 170, at 232 (reporting that credit-card issuers sued consumers 41,303 times in one year).

176. See Schmitz, *supra* note 170, at 230 (noting that consumers are not informed and proactive in pursuing their legal remedies); Braucher, *supra* note 53, at 1450, 1456 (reporting that two-thirds of buyers don't complain and that such buyer restraint is folk culture).

177. See Schmitz, *supra* note 171.

178. Not all failure to provide conforming goods qualify as breach because the seller's performance may be excused by law or custom. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (1983). So, pursuing a breach claim immediately might be ill-advised. See also *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 537 (1977) (buyer delayed asserting breach by parts supplier because the buyer feared supplier would not perform the remainder of the contract).

179. See Michael J. Cozzillio, *The Option Contract: Irrevocable Not Irretractable*, 39 CATH. H. L. REV. 491, 535–37 (1990) (reporting that courts treat the time specified for notice of exercise as a material term in an option contract).

180. See *Robinson v. Martel Enters., Inc.*, 337 So. 2d 698, 704 (Miss. 1976) (holding that a thirty-day notice provision in an option contract to purchase land must be strictly enforced because permitting the grantee late notice would in effect be a modification of the parties' contract by the court).

exercising his option to renew a lease.¹⁸¹ This failure resulted in forfeiture of the grantee's renewal rights because the court strictly enforced the notice provision. The court held that strict enforcement was justified because "time is of the essence in an option contract," and grantee's contention that timely notice was sent could not be credited.¹⁸² A majority of courts regard the notice provision of option contracts as a "time of the essence" clause that demands strict enforcement.¹⁸³ For example, in *Ex parte Keelboat Concepts, Inc.*, a restaurant franchisee forfeited the right to renew for twenty additional years because notice of exercise of the option to renew was provided nineteen days late.¹⁸⁴ The widely accepted principle that notice of exercise from the grantee is an essential term in an option contract compels this forfeiture of rights stemming from late notice.¹⁸⁵ As a result, some courts find the failure to provide timely notice as specified in an option contract tantamount to a rejection.¹⁸⁶

However, in goods transactions, notice is not usually a primary contract term. For example, in contracts granting a right of first refusal, all contractual benefits flow from the grantor providing notice of their decision to sell.¹⁸⁷ The grantor of the right must first notify the grantee of an intention to sell to trigger the grantee's obligation to act within the contractually specified time.¹⁸⁸ Without such notice by the grantor, the subject matter of the contract is not open for trading.¹⁸⁹ Courts evaluating the grantor's compliance with notice obligations in this context avoid forfeiture by recognizing the incidental nature of notice, thereby accepting substantial performance as sufficient.¹⁹⁰

181. *Thrifty Dutchman, Inc. v. Fla. Supermarkets, Inc.*, 541 So. 2d 634, 635–36 (Fla. Dist. Ct. App. 1989).

182. *Id.* at 636.

183. *See Robinson*, 337 So. 2d at 703.

184. *Ex parte Keelboat Concepts, Inc.*, 938 So. 2d 922, 925 (Ala. 2005).

185. *See id.* at 925.

186. *See Comeaux v. Suderman*, 935 S.W.3d 215, 220 (Tex. App. 2002).

187. *See Rick Strange & Thomas Fähring, Rights of First Refusal and Package Oil and Gas Transactions*, 53 S. TEX. L. REV. 29, 31 (2011).

188. *See id.* at 31–32 (noting that the grantee must strictly comply with contract terms once notified that the property is for sale).

189. *See id.* at 31 ("a right of first refusal provides the rightholder with the right to purchase burdened property if the owner elects to sell—either at a predetermined price or on the same terms and conditions offered by a third party."); *see also Dyrda v. Golden Nuggets Inc.*, 672 N.W.2d 578, 584 (Minn. App. 2003) ("The requirements for notice that an owner must give to trigger the right of first refusal are generally specified in the parties' agreement."); *Fasken Land & Minerals, Ltd. v. Occidental Premium, Ltd.*, 225 S.W.3d 577, 589 (Tex. App. 2005) ("A preferential right is a preemptive right, which requires a property owner to first offer the property to the right holder at the stipulated price terms in the event the owner decides to sell the property.").

190. *See Fasken Land & Minerals, Ltd.*, 225 S.W.3d at 591 (technical deficiencies in grantor's notice does not make it defective because notice is an incidental term in a preemptive right

In *Comeaux v. Suderman*, the contract required that the grantor notify the grantee in writing of the true and complete terms of any proposed sale to a third party of property leased by the grantee.¹⁹¹ The grantor notified the grantee that they had an offer for the leased premises and some adjoining property, but did not tell the grantee the size of the overall property or the offered terms.¹⁹² The grantor also did not notify the grantee of the earnest money contract made with the third party.¹⁹³ Despite these deficiencies in the notice, the court ruled that it was sufficient.¹⁹⁴ The court found that although the notice was not “a model of clarity” and did not comply with express contract requirements, it was reasonably significant to shift the burden of investigation to the grantee.¹⁹⁵ “When an owner makes a reasonable but defective disclosure of the terms of a proposed sale to another, the holder of the right of first refusal has a duty to undertake a reasonable investigation of any terms unclear to him.”¹⁹⁶ Literal compliance with the contract’s notice rules is not required because notice is an incidental term of the contract.¹⁹⁷

Judicial recognition of notice as an incidental or subsidiary obligation that should not have forfeiture effects can also be seen in liability insurance cases. Like consumer goods contracts, insurance contract terms are usually adhesive, and notice of claim by the insured serves the same purposes.¹⁹⁸ The insurer needs timely notice of claim in

contract); *Comeaux*, 935 S.W.3d at 221 (reasonable but deficient notice by the grantor shifts the burden of inquiry onto the grantee of a right of first refusal); *Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1212, 1214 (5th Cir. 1990) (the grantor of a right of first refusal only needs to prove reasonable disclosure of the terms upon which they are willing to sell); *Ellis v. Waldrop*, 656 S.W.2d 902, 904 (Tex. 1983) (substantial performance of the contractual obligation to give notice of sale to a preferential right-holder is sufficient); *Humphrey v. Wood*, 256 S.W.2d 669, 672 (Tex. Civ. App. 1953) (inquiry notice is sufficient to trigger the grantee’s obligation to exercise their right of first refusal).

191. *Comeaux*, 935 S.W.2d at 217.

192. *Id.* at 217.

193. *Id.*

194. *Id.* at 221.

195. *Id.*

196. *Id.*; see also *Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1212 (5th Cir. 1990) (a preemptive right-holder must undertake a reasonable investigation of unclear terms once notice of a proposed sale is given); *Humphrey*, 256 S.W.2d at 672 (deficient notice is sufficient to force preemptive right grantee to make inquiries to ascertain all the information they are contractually entitled to).

197. See Robert K. Wise et. al, *First Refusal Rights Under Taxes Law*, 62 BAYLOR L. REV. 433, 469 (2010) (observing that the primary contractual rights of a holder of a right of first refusal is the prerogative to purchase the subject matter of the right on the same terms offered by a third party); see also *Fasken Land & Minerals, Ltd. v. Occidental Premium, Ltd.*, 225 S.W.3d 577, 591 (Tex. App. 2005) (indicating that the requirement of notice is incidental to the preferential rights found in a right of first refusal).

198. Like consumer goods transactions, insurance contract terms including the notice of claim provision are usually non-bargained. See *Coop. Fire Ins. Ass’n of Vt. v. White Caps, Inc.*, 694 A.2d 34, 37 (1997). Similarly, in both contexts, notice serves to protect against bad faith conduct, and to accommodate the cure and defense interests of the drafter or party to whom notice is owed. See *id.* at 38.

order to investigate while witnesses are available and the claim is fresh in order to cure or correct dangerous conditions, protect against liability, and calculate premiums.¹⁹⁹ Until the mid-twentieth century, judges approached the notice issue in a rigid or technical manner resulting in forfeiture of benefits for the insured.²⁰⁰ Judges have since recognized that forfeiture of benefits is not part of the reasonable expectations of the parties, and have crafted more commercially sensible rules. Courts now require insurers to provide proof of prejudice when the insured fails to comply with notice obligations.²⁰¹ The modern view is that notice, as a subsidiary term of the contract, should not operate as a “technical escape hatch” for the seller.²⁰²

A. Express Notice and The Full Compliance Rule

A sample of sellers’ terms shows that sellers are making notice of default an express condition precedent to any recovery. As examples, terms of sale for Zippo, Boulevard Buick, Gap, Pandora, Forever 21, Express, Hot Topic, Tesla, GameStop, GoPro, and Nikon all require written notice of dispute and a grace period of thirty to sixty days for seller to respond.²⁰³ Sellers also specify the required content of notice.

199. See *West Bend Co. v. Chiaphua Indus. Inc.*, 112 F. Supp. 2d 816, 822 (E.D. Wis. 2000); see also *Coop. Fire Ins. Of Vt.*, 694 A.2d at 38.

200. See *Cooper v. Gov’t Emp. Ins. Co.*, 237 A. 2d 870, 872–73 (N.J. 1968) (discussing New Jersey notice precedents and noting that judges cited liberty of contract doctrine as the basis for enforcing notice rules literally, irrespective of their forfeiture effects). For a discussion of the evolution of the notice/prejudice rule see Richard S. Mills & Frederick M. Zauderer, *At The Apex of the Arc of the Pendulum: Does FDIC v. INA Spell the Beginning of the End of the Notice Prejudice Rule in Fidelity Cases?*, 4 FIDELITY L. ASS’N. J. 127, 128 (1998). For a description of the economic magnitude of insurance benefits forfeitures stemming from a classical approach to notice terms, see Anderson, *supra* note 46, at 826–36.

201. See *Las Vegas Metro. Police Dept. v. Coregis Ins. Co.*, 256 P. 3d 958, 964 (Nev. 2011).

202. See *ALPS Prop. and Casualty Ins. Co.*, 526 F. Supp. 3d, at 27; *Coop. Fire Ins. Ass’n. of Vt.*, 694 A.2d at 38; see also cases discussed *supra* note 11.

203. *Terms and Conditions*, ZIPPO, <https://zippo.co.id/pages/terms-and-conditions> [<https://perma.cc/L8RK-4ZSL>] (last visited Aug. 24, 2023); *Privacy Agreement*, BOULEVARD BUICK GMC, <https://www.boulevardbuickgmc.com/PrivacyPolicy> [<https://perma.cc/Q77R-M9KS>] (last visited Aug. 24, 2023); *Services Terms of Use*, PANDORA, <https://www.pandora.com/legal> [<https://perma.cc/SP7K-AZRZ>] (last visited Aug. 24, 2023); *Terms of Use*, FOREVER21, <https://www.forever21.com/us/termsconditions/terms.html> [<https://perma.cc/X2GG-VB2W>] (last visited Aug. 24, 2023); *Terms and Conditions*, EXPRESS, <https://www.express.com/g/terms-conditions.html> [<https://perma.cc/GQJ7-QL3N>] (last visited Aug. 24, 2023); *Terms and Conditions*, TESLA, <https://www.tesla.com/about/legal> [<https://perma.cc/KTM7-AKBS>] (last visited Aug. 24, 2023); *Membership and General Terms/Conditions*, GAMESTOP, <https://www.gamestop.com/TermsConditions.html> [<https://perma.cc/PD54-ZGBH>] (last visited Aug. 24, 2023); *GoPro, Terms of Use*, <https://gopro.com/en/us/legal/terms#dispute> [<https://perma.cc/M6X5-AXMI>] (last visited Aug. 24, 2023); *Nikon Inc. Terms and Conditions of Sale for*

For example, most sellers require the facts supporting buyer's claim and any supporting documentation to accompany notice.²⁰⁴ Some sellers also require a statement of the relief sought.²⁰⁵

In these contracts that specify the buyers' notice obligations, failure to comply generally results in complete forfeiture of such remedies because it operates as a bar to arbitration.²⁰⁶ Therefore, in addition to controlling a buyer's remedies via particularized notice requirements, sellers' imposition of arbitral adjudication operates as a second barrier to the buyers' prospects for vindication. In this way, buyers face a double barrier to realizing their remedies for breach because the arbitral forum has proved to be an effective deterrent to breach claims, particularly in the consumer context.²⁰⁷

Buyers do not have wiggle room when notice is an express condition in the contract because courts require strict or full compliance with express conditions.²⁰⁸ Unless the prescribed notice is given or waived by sellers, buyers forfeit their remedies for breach. The rule of full

Nikon Products, Software, E-Courses & Tickets, NIKON INC. <https://www.nikonusa.com/en/nikon-store/terms-and-conditions-of-sale.page> [<https://perma.cc/7X9U-KC7Y>] (last visited Aug. 24, 2023).

204. Gap, the clothing retailer, requires such information. *Terms of Use*, GAP, https://www.gap.com/customerService/info.do?cid=6754&ak_r=68633A63B1AD3EoDoCC266E29BCCC69BB854F4BFAC1D00006A72AE60E9443F05#tou_dispute-resolution-arbitration-agreement [<https://perma.cc/9WZG-P5JJ>] (last visited Aug. 24, 2023).

205. Colourpop and Hot Topic are examples of companies that require the buyer's proposed resolution or a statement describing the relief being sought. *Terms of Use*, COLOURPOP, <https://colourpop.com/pages/terms#dispute> [<https://perma.cc/83RG-LRGA>] (last visited Aug. 24, 2023); *Terms of Use*, HOT TOPIC, <https://www.hottopic.com/customer-service/hot-topic-policies/hot-topic-terms-of-use/> [<https://perma.cc/K94M-QWQJ>] (last visited Aug. 24, 2023).

206. See notice rules referenced *supra* notes 173–75.

207. For example, in the financial services sector, the Consumer Financial Protection Bureau (CFPB) found that despite the existence of millions of arbitration contracts binding consumers, arbitration claims are rare. See CFPB Arbitration Agreement, *supra* note 167, at 33295. This low filing rate has incentivized noncompliance with the law. *Id.* at 33392; see also Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191, 244–56 (2020) (demonstrating how private arbitration rules operate to bar contractual remedies for breach).

208. See *ADM Intermare v. Kamca Trading, S.A.*, 20-CV-1223 (JPO), 2022 WL 845593, at *3–4 (S.D.N.Y. Mar. 22, 2022) (express timeframe for notice must be complied with); see also CLAUDE D. ROHWER & ANTHONY M. SKROCKI, *CONTRACTS IN A NUTSHELL* 354 (6th ed. 2006) (“If the parties have manifested by their language that they intend an express condition, the courts generally require that this condition be fully and literally fulfilled before the duty subject to that condition will be found to have arisen.”); *Admiral Corp. v. Cerullo Elec. Supply Co.*, 32 F.R.D. 379, 381 (M.D. Pa. 1961) (“Where there is an express provision in a contract requiring notice of claim or breach of contract, Illinois courts consider such notice provision to be material and a condition precedent to enforcement.”); *Env’tl, Safety & Health Consulting Servs. v. Crest Energy Partners*, No. 13-cv-5747, 2015 WL 2452458, at *6 (E.D. La. May 21, 2015) (holding that failure to provide fifteen-day notice of intent to withhold payment of invoice resulted in forfeiture of rights because the court must enforce the clear and explicit contract terms); *Jamison v. First Ga. Bank*, 387 S.E. 2d 375, 377 (Ga. App. 1989) (bank customer forfeits rights by failing to comply with sixty-day notice provision for complaints about discrepancies in account).

compliance for express conditions is a contract rule of general application and operates in all transactional contexts.²⁰⁹ For example, courts demand strict compliance with express conditions in contracts involving real estate, goods, and services.²¹⁰ A strict approach to constructive notice under 3(a) closely resembles the burden imposed on buyers when the seller expressly prescribes notice requirements in the contract. A prejudice requirement is therefore needed for express notice rules to avoid the harsh result of forfeiture.

The case *Valspar Refinish, Inc. v. Gaylord's Inc.* demonstrates the importance of a prejudice requirement.²¹¹ In *Valspar*, the parties' warranty provision in their automobile paint contract provided that the buyer must provide written notice of default within ten days of discovery and no later than 180 days from receipt of the goods.²¹² When the paint failed to meet contract specifications, buyer emailed seller to complain, and seller attempted to correct the problems without any success.²¹³ The buyer then switched to another supplier, and the seller sued.²¹⁴ In response to the seller's suit for breach, the buyer counterclaimed, alleging warranty breach.²¹⁵ The seller alleged that the buyer's warranty claim must fail because the buyer did not comply with the express notice provisions in the contract, and the court agreed.²¹⁶ The court found that the buyer's email complaint to the seller that the paint would not work qualified as inadequate notice because "the agreement requires that all notices be in writing and hand-delivered or mailed with proof of

209. See ROHWER & SKROCKI, *supra* note 208, at 853 ("All jurisdictions recognize the existence of conditions created by the parties.").

210. *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 745 (Tex. App. 2012) (holding that oral notice of breach was insufficient in parking lot lease contract that provided for written notice and thirty-day opportunity to cure); *Pillar Dev., Inc. v. Fuqua Constr. Co., Inc.*, 645 S.E.2d 64, 67 (Ga. App. 2007) (holding that written notice and fifteen-day opportunity to cure must be complied with in sale of residential lots contract); *MJM Visions, LLC v. CSC Serviceworks, Inc.*, No. 18-CV-04452, 2019 WL 2451936, at *3 (E.D.N.Y. June 12, 2019) (holding that failure to provide written notice and thirty-day opportunity to cure results in forfeiture of all rights in revenue sharing contract for coin-operated laundry machines); *Surgical Principles, Inc. v. Minn. Med. Dev., Inc.*, No. A13-0694, 2014 WL 1660662, at *5 (Minn. Ct. App. Apr. 28, 2014) (holding that a party loses as a matter of law for failing to comply with written notice and thirty-day opportunity to cure requirements in distributor contract); *Triad Constr. Co., Inc. v. Robert Half Int'l, Inc.*, 679 F. App'x 748, 752 (11th Cir. 2017) (holding that late notice results in forfeiture of rights because employment/staffing contract had ninety-day written notice requirement); *Ensler v. Aurora Loan Servs., LLC*, 178 So.3d 95, 98 (Fla. App. 2015) (holding that failure to provide notice of breach and opportunity to cure as required by mortgage loan contract results in forfeiture of rights).

211. See *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W. 2d 359 (2009).

212. *Id.* at 365–66.

213. *Id.* at 363–64.

214. *Id.*

215. *Id.*

216. *Id.* at 364.

delivery.”²¹⁷ Further, “the email does not indicate that a default has occurred, much less describe a default in sufficient detail to give Valspar an opportunity to cure.”²¹⁸ Because the contract did not permit email notice, and the buyer’s notice did not sufficiently detail the default to give the seller an opportunity to cure, the buyer’s warranty claims were barred.

B. Notice As a Constructive Condition and The Substantial Compliance Rule

The need for a notice-prejudice rule is further buttressed by the fact that courts use a substantial performance approach for default rules such as the constructive conditions found in the U.C.C. Unlike with express conditions, the rule governing implied in-law or constructive conditions requires only substantial performance.²¹⁹ In the context of a goods transaction, a substantial performance approach can give teeth to a buyer’s remedial rights by reducing the amount of information the buyer must include in the notice about their dissatisfaction with the goods. Judges employing a lenient approach to 3(a) demonstrate the theoretical soundness and viability of a substantial performance model even though their decisions are not expressly anchored in it.²²⁰

The doctrine of substantial performance “is generally applicable to bilateral contracts for an agreed exchange of performances.”²²¹ In contrast, with goods transactions, the buyer’s obligation is usually limited to payment; it is not intuitive to think that the doctrine will apply to the buyer. The doctrine of substantial performance does not apply to the seller because U.C.C. drafters settled on a perfect-tender rule that

217. *Id.* at 366.

218. *Id.*

219. See ROHWER & SKROCKI, *supra* note 208, at 362–63 (“Justice does not require that a court-construed condition be literally and fully fulfilled before the other party’s duty will arise.”).

220. For example, some judges treat the filing of a lawsuit as effective 3(a) notice on the premise that the rule’s policy rationales of providing the seller with an opportunity to investigate and cure the breach can still be accomplished in the litigation process. See *Mid Island LP v. Hess Corp.*, 983 N.Y.S.2d 204 (Table) (N.Y. Sup. Ct. 2013). Other judges have found expressions of dissatisfaction by buyer that stop short of a damages claim to be sufficient notice on the premise that § 2-607(3)(a) analysis is policy driven. See *N. States Power Co. v. ITT Meyers Indus.*, 777 F. 2d 405, 409 (8th Cir. 1985) (holding that if the buyer’s complaint to the seller was sufficient to prevent surprise, § 2-607(3)(a)’s policies are still furthered); *Speakman Co. v. Harper Buffing Mach. Co., Inc.*, 583 F. Supp. 273, 277 (D. Del. 1984) (holding that § 2-607(3)(a)’s purposes can still be effectuated if the buyer’s expression of dissatisfaction with the goods is deemed sufficient notice).

221. See PERILLO, *supra* note 51, at 377.

requires sellers to provide the precise goods that were contracted for.²²² But the obligation of notice imposed on buyers by 3(a) does impose on them a duty like a performance obligation.²²³ This duty to promptly notify seller of the fact and nature of the breach may be performed with approximate precision or completeness. As an innocent claimant, buyer should be given a very light notice obligation accommodated by a substantial performance model.

Unlike the particularized notice rules that sellers impose, 3(a) does not require notice in writing and does not provide precise sufficiency requirements.²²⁴ As a result, notice can be provided verbally and may be sufficient with varying amounts of content or specificity. A substantial performance model gives buyers a lighter burden to alert sellers of their breach and forces sellers to be proactive in honoring their contractual commitments. Having received allegedly nonconforming or defective goods, a substantial performance model relieves buyer of the obligation to be hyper-vigilant or comprehensive in providing details of breach that cause the seller to respond affirmatively or defensively. Once seller has some information that the transaction is troublesome, a buyer would have met their notice burden, and the seller will remain on the hook should the buyer seek to enforce their contractual remedies for breach later.²²⁵

Once the buyer communicates information to the seller that the transaction is troublesome, the buyer's burden should be met. Once the buyer complains, the seller must act or the buyer should be allowed for some length of time not less than one year to decide if it is advantageous to be more specific or aggressive about pursuing the defective performance.²²⁶ Without a cooperative resolution, a buyer should have sufficient time to decide if it would be better strategically to simply accept the breach or whether it would be economically beneficial to pursue the matter. During this time, the seller will have the freedom to

222. See U.C.C. § 2-601 (AM. L. INST. & UNIF. L. COMM'N); see also Zipporah Batshaw Wiseman, *The Limits of Vision, Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 509–13 (1987) (describing the U.C.C.'s principal drafter's proposal for a substantial performance rule for sellers and the rejection of that proposal because of fear that it would accommodate opportunistic selling practices).

223. See U.C.C. § 2-607(3)(a) (AM. L. INST. & UNIF. L. COMM'N) (requiring the buyer to provide notice of breach in a timely manner to preserve remedies for the seller's breach).

224. See *id.*

225. In any case, buyers may choose not to pursue a breach action for many reasons, including that it does not make economic sense or the breach did not cause a loss.

226. Because the law prohibits repose for a breach in periods less than one year, this cutoff should be the presumptive grace period allotted to the buyer to give notice. See U.C.C. § 2-725(1) (AM. L. INST. & UNIF. L. COMM'N); see also Reitz, *supra* note 48, at 586 (recommending a one-year timeframe for § 2-607(3)(a) notices on the premise that the law abhors short statutes of limitation).

investigate, inspect, preserve evidence, negotiate settlement, or take any other steps necessary to protect seller's interests. However, judges do not use the substantial performance rule, as they should when adjudicating notice issues.

1. Third Party Notice and Waiver Under a Substantial Performance Model

A substantial performance notice model can help preserve buyers' remedies by giving them credit for notice provided by third parties. Mass produced goods often trigger the same complaint from many buyers and produce lawsuits or regulatory intervention for the same defective performances.²²⁷ Sellers' product testing, research, or warranty claims data often reveal their defective performances.²²⁸ In this commercial context, sellers cannot reasonably claim that individualized notice is necessary to protect their interests. Under these circumstances, it would be reasonable for the buyer to expect that seller will remain accountable for contract or warranty promises if the statute of limitations has not run. Sellers can also voluntarily remedy the breach, as is often done with product recalls.²²⁹ Judges that accept lawsuits as an effective substitute for pre-suit notice from buyer also recognize that settlement can be reached even after the lawsuit is filed because "the normal rules of civil procedure are designed to accomplish exactly these tasks within the litigation process."²³⁰ And a seller's notice interests are not implicated when the seller cannot cure the default.²³¹ In such cases, contractual notice does not improve the seller's investigation, negotiation, settlement, or litigation prerogatives.²³²

Further, a substantial performance model can facilitate waiver of notice when the breach or defect is intentional or systemic. There are many warranty cases where buyers lose on notice grounds even though the sellers knew of the defective performances from the outset. For example, in *Gregorio v. Ford Motor Co.*, the buyer alleged that Ford had

227. See *supra* note 145.

228. See *supra* notes 140, 161–62, and accompanying text.

229. See, e.g., N. Craig Smith et. al, *A Strategic Approach to Managing Product Recalls*, HARV. BUS. REV., Sep.–Oct. 1996, <https://hbr.org/1996/09/a-strategic-approach-to-managing-product-recalls> [<https://perma.cc/74A5-4AYN>] (discussing Intel Corp.'s decision to allow customers to return the goods because some customers complained that they were defective).

230. See *Mid Island LP v. Hess Corp.*, 983 N.Y.S.2d 204 (N.Y. Sup. Ct. 2013).

231. See *Fitl v. Strek*, 690 N.W.2d 605, 609 (Neb. 2005).

232. See *id.*; see also *Johnson v. Eisai, Inc.*, 590 F. Supp. 3d 1053, 1062 (buyer alleged that the seller's weight-loss drug caused colon cancer, so the seller was incapable of taking curative measures).

extensive knowledge of transmission problems in the vehicle they bought.²³³ The buyer claimed that Ford acquired this knowledge by testing, consumer complaints, warranty claims, information from Ford dealers, online forums, and complaints to the National Highway Traffic Safety Administration.²³⁴ Additionally, the buyer claimed that Ford had issued special technical and service messages related to the defect.²³⁵ Despite these extensive sources of notice, buyer had their warranty claims dismissed on failure to give notice grounds.²³⁶

The same result was reached in *Reid v. General Motors*.²³⁷ In *Reid*, the buyer alleged that General Motors (“GM”) breached express and implied warranties provided with a flex fuel vehicle she bought.²³⁸ Reid claimed that General Motors marketed and sold the vehicle as being capable of using 85% ethanol or flex fuel, but consistent use of flex fuel resulted in fuel pump and engine problems.²³⁹ Reid also claimed that GM knew of the problem, informed dealers about it, and instructed dealers to say that contaminated fuel caused the problem.²⁴⁰ Despite evidence of seller’s awareness of the alleged breach, Reid saw her warranty claim dismissed on notice grounds.²⁴¹ The judge found that Reid failed to tell GM that they were in breach and that telling the seller that she had problems with the fuel pump or flex fuel did not constitute sufficient 3(a) notice.²⁴²

Another case further illustrates the destructive effects of ignoring evidence that the seller had knowledge of the breach. In *Hobbs v. General Motors Corp.*, the warranty breach stemmed from GM’s representation in the window sticker that the vehicle had a full-size spare tire.²⁴³ Here again, the buyers saw their warranty claim dismissed because the judge found that buyers failed to plead that notice of breach was provided to seller before the filing of their lawsuit.²⁴⁴ Cases involving mass sales of the same goods produced in exactly the same way constitute a significant

233. *Gregorio v. Ford Motor Co.*, 522 F. Supp. 3d 264, 273 (E.D. Mich. 2021).

234. *Id.* at 278.

235. *Id.*

236. *See id.* at 294 (holding that because the buyer did not plead that pre-suit notice was given, his claim must be dismissed).

237. *Reid v. Gen. Motors*, 491 F. Supp. 3d 268, 275 (E.D. Mich. 2020).

238. *See id.* at 271.

239. *Id.* at 273.

240. *See id.*

241. *See id.* at 273, 276.

242. *See id.* at 275 (holding that the seller must be told pre-suit that they breached the contract).

243. *See Hobbs v. Gen. Motors*, 134 F. Supp. 2d 1277, 1278–79 (M.D. Ala. 2001).

244. *See id.* at 1285 (dismissing the buyer’s claim because of failure to plead that pre-suit notice of breach was given).

percentage of notice litigation.²⁴⁵ Sellers of food, drugs, health care products, and other consumer goods warrant them as healthy or having curative benefits, sometimes with full knowledge that these promises are false.²⁴⁶ This commercial reality makes it difficult to justify continued judicial insistence on strict notice rules.

Mass sale cases are also significant because they affect large numbers of buyers and demonstrate that sellers face no prejudice when buyers fail to provide individualized notice of breach. In this context, buyers cannot be accused of engaging in bad faith or exposing sellers to prejudice. In cases where sellers knowingly put nonconforming or defective goods into the stream of commerce, they cannot fairly contend that pre-suit notice is necessary to protect their investigation, negotiation, settlement, or evidence preservation interests. Sellers have all the facts of breach at the outset, and can take remedial, settlement, or defensive steps in the absence of allegations of breach or threats of lawsuit by specific buyers. As a contract partner and breacher, a seller should not be permitted to evade their contractual obligations by using the technical requirement of notice and the hypothetical claim of prejudice to justify not remedying the breach. When sellers have actual notice of the breach, a substantial compliance approach can attribute that notice to buyers or deem it waived.

A strict approach to notice is also in tension with legal developments intended to preserve buyer's remedies for breach. Sellers routinely warrant their goods, and buyers have historically had difficulty enforcing warranty promises. Notice requirements should therefore not undermine legislative attempts to guarantee buyer's remedies for breach.

2. Warranty Regulations and Notice

Permitting sellers to evade their contractual obligations on inflexible and technical notice grounds for buyers did not occur when the rule was adopted in 1906 and should not be permitted now in view of current commercial realities. Contracting parties are entitled to the benefit of the bargain, and sellers routinely provide warranties to assure buyers

245. See *infra* Case Appendix C.

246. See, e.g., *Pierre v. Healthy Beverage, LLC*, No. 20-4934, 2022 WL 596097, at *1 (E.D. Pa. Feb. 28, 2022) (buyer alleged that the seller did not honor promise that iced tea was lightly sweetened); *Johnson v. Eisai, Inc.*, 590 F. Supp. 3d 1053, 1057 (N.D. Ohio 2022) (buyer alleged that weight-loss drug caused cancer contrary to the seller's promises); *Floyd v. Pepperidge Farm, Inc.*, 581 F. Supp. 3d 1101, 1106 (S.D. Ill. 2022) (alleging that the seller misled the buyer about the butter content of crackers).

that their products are sound. Sellers have the power to make warranty promises opaque, place limits on them, or otherwise limit buyers' remedies for breach.²⁴⁷ State statutes prohibit sellers from disclaiming express warranties and grant buyers implied warranties to ensure that sellers honor the reasonable expectations of buyers.²⁴⁸ Opportunistic practices by sellers also led to the enactment of a federal warranty law to address complex or opaque promises, disclaimer of implied warranties, and the absence of attorney fees for buyers to make their claims economically viable.²⁴⁹

Despite the emergence of state and federal warranty protection for buyers, strict notice rules continue to subject buyers to a complete lack of remedies even when sellers' interests are not impaired. In contrast, "it is of the very essence of a sales contract that at least minimum adequate remedies be available."²⁵⁰ For buyers experiencing breach, many hurdles stand in the way of realizing an effective remedy. From the outset, buyers may not know of the breach, or they may be unaware that they have implied warranty protection.²⁵¹ Even when buyers are aware, studies show that they typically do not complain but instead choose to switch brands or sellers.²⁵² For the handful of buyers determined to pursue their remedies for breach, proof requirements and the cost of litigation can serve as effective impediments to vindication.²⁵³ Attorney fees are unavailable for some categories of warranty promises,²⁵⁴ and small sum claims may make the economics of litigation unattractive for both attorneys and buyers.²⁵⁵

247. Although the states have adopted the implied-in-law warranty rules of Article 2 of the U.C.C., these provisions also permit disclaimer of implied warranties and permit sellers to severely restrict the types of remedies buyers may get. *See* U.C.C. §§ 2-316, 2-719(11)(a) (AM. L. INST. & UNIF. L. COMM'N).

248. *See, e.g., James River Equip. Co. v. Beadle Cty. Equip., Inc.*, 646 N.W. 2d 265, 270–71 (S.D. 2002).

249. *See* Magnuson-Moss Warranty Act, 15 U.S.C. § 2301-12 (1982). This federal warranty law requires full and conspicuous disclosure of warranty terms to improve consumers' understanding of their warranties. *See id.* § 2302. It also prohibits the disclaimer of state law implied warranties when a written qualifying warranty is given. *Id.* § 2308. And it provides for attorney fees for prevailing consumers. *Id.* § 2310(d)(2).

250. U.C.C. § 2-719 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N).

251. *See* Braucher, *supra* note 53, at 1421.

252. *See id.* at 1452.

253. *See id.* at 1442 (noting that warranty cases are typically high-risk, small recovery undertakings in which buyers face a hostile judiciary).

254. Attorney's fees are available only when a Magnuson Moss warranty is given, and this requires a written promise related to material and workmanship affirming that they are defect-free, or promises to refund, repair, replace or otherwise remedy product failure. *See* 15 U.S.C. § 2301(6).

255. Negative-value claims are typical in consumer contract cases, and this often makes pursuit of contract remedies a fool's errand. *See* *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 239–40 (2013) (Kagan, J., Ginsburg, J., Breyer, J., dissenting).

Judges continue to treat notice of breach as the trigger for honoring warranty promises rather than sellers' delivery of non-conforming or defective goods.²⁵⁶ A notice-prejudice rule will give practical meaning to the doctrine of good faith, which is implied in all contracts and cannot be disclaimed.²⁵⁷

3. A Bigger Role for The Obligation of Good Faith

Requiring buyers to specify breach and their intent to seek damages accommodates opportunistic conduct that is frowned upon in contract law. Both the common law and statutory rules impose an obligation of good faith in every contract.²⁵⁸ That obligation cannot be disclaimed by the parties,²⁵⁹ and they cannot evade the duty of good faith because "in virtually all jurisdictions the duty of good faith and fair dealing is implied into every contract."²⁶⁰ The purpose of the good faith duty is to ensure that the parties' intentions and reasonable expectations are honored.²⁶¹ Good faith also protects against discriminatory abuse of power²⁶² and provides further support for a notice-prejudice rule.

When sellers render defective performances, the strict approach to notice shifts the burden to buyers to pursue their remedies. Despite

256. The U.C.C. imposes on sellers the obligation of perfect tender. See U.C.C. § 2-601 (AM. L. INST. & UNIF. L. COMM'N). Goods must conform precisely to contract specifications or the buyer has the prerogative to reject them. *Id.* Code drafters settled on the perfect tender rule to prevent sellers' opportunistic practices such as unloading defective goods on buyers.

257. See U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N) ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement); Good faith is defined as "honest in fact and the observance of reasonable commercial standards of fair dealing." See U.C.C. § 1-201(20) (AM. L. INST. & UNIF. L. COMM'N). In the marine insurance context, the condemnation of sharp practices is even greater because the parties' obligation is one of utmost good faith or *uberrimae fidei*; see also Elizabeth Germano, *A Law and Economic Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) In Marine Insurance Law for Protection and Indemnity Clubs*, 47 ST. MARY'S L.J. 727, 740–51 (2016) (describing the origin and evolution of the doctrine of utmost good faith).

258. See Restatement (Second) of Contracts § 205 (1981); U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N).

259. See U.C.C. § 1-302 (AM. L. INST. & UNIF. L. COMM'N).

260. See *R.I. Charities Trust v. Engelhard Corp.*, 109 F. Supp. 2d 66, 74 (D.R.I. 2000); see also *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.*, 636 S.E. 2d 139, 142 (Ga. App. 2009) (stating that the implied duty of good faith is an "overarching presumption" in contract law).

261. See *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308, 1318–19 (S.D. Fla. 1999); *Amoco Oil Co. v. Ervin*, 908 P. 2d 493, 498 (Colo. 1985); see also *Stamero v. Stamero*, 889 A.2d 1251, 1259 (Pa. Super. 2005) (good faith prevents the parties from evading the *spirit* of the bargain); *White Stone Partners, LP v. Piper Jeffrey Cos., Inc.*, 978 F. Supp. 878, 881 (D. Minn. 1997) (avoiding the spirit of the bargain is a type of bad faith).

262. See *Stamero*, 889 A.2d at 1261 (holding that husband cannot unilaterally and voluntarily reduce his income to adjust his alimony obligation).

being the innocent party, buyers must particularize their concerns and coerce sellers into taking remedial action.²⁶³ Sellers, meanwhile, are not required to do anything while buyers flounder with inartful or late notice of breach. This notice model offends the implied duty of good faith. As Judge Posner noted, “[t]he parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at their performance stage is required even if not an explicit duty of the contract.”²⁶⁴ Good faith facilitates mutually dependent, cooperative relationships and helps to protect against opportunistic behavior.²⁶⁵ And in the context of adhesion contracts that are typical in consumer goods transactions, good faith helps to ensure remedies for buyers who generally have no say about the terms of sale.²⁶⁶

The implied duty of good faith therefore supports a cooperative model, in which seller shares in the responsibility of ascertaining exactly where buyer stands in respect to the defective performance. When buyers indicate that the transaction is troublesome, sellers’ obligation to cooperate in remedying the problem should be triggered. If a buyer identifies a defect in a seller’s performance, the seller should become proactive in providing a solution. Having performed their part of the bargain, buyers should not be required to chase after sellers or threaten them with lawsuits to preserve their contract remedies. Sellers should be as keen as buyers to ascertain the nature of the breach and take the initiative to resolve it or to prepare for litigation. The obligation to prove prejudice gives teeth to the doctrine of good faith by forcing sellers to be proactive in remedying the breach.

As the supplier of goods, the seller is in the best position to know if the goods conform to the contract or if they are defective in some way. While all defects or nonconformities may not be known before delivery, inspection, or use of the goods, sellers are often aware that the product supplied does not conform to warranty promises.²⁶⁷ In other cases, sellers may learn of their defective performance from buyers’ complaints or other expressions of dissatisfaction. Because sellers are in a unique position as the producer or supplier to know about defects or breaches of warranty, sellers’ obligation of good faith requires that they take a more active role in responding to buyers’ complaints.

263. See *Cotner v. Int’l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977).

264. *Market St. Assocs. Ltd. P’ship v. Frey*, 941 F. 2d 588, 595 (7th Cir. 1991).

265. See *id.* at 595; see also *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F. 2d 542, 548 (6th Cir. 1981) (the duty of good faith acts to control opportunistic conduct).

266. See *Ball Four, Inc. v. 2011-SIP-1 CRE/CADC Venture, LLC*, 526 B.R. 848, 852 (D. Colo. 2014).

267. See *supra* note 146.

This proactive model of good faith has long been recognized in the context of insurance contracts. The doctrine of *uberrimae fidei* (or utmost good faith) serves as an apt analogy.²⁶⁸ The utmost good faith doctrine posits that the party in the best position to know facts or circumstances material to the contractual risk must communicate that information to their contract partner.²⁶⁹ The doctrine, which is often utilized in insurance cases, does not excuse failure to disclose material facts even when that failure is innocent because it requires perfect candor.²⁷⁰

Sellers responsible for warranty promises enjoy a similar status as the insured with respect to having superior knowledge about the nature of the goods and their compliance with warranty obligations. Failure to comply with the utmost good faith doctrine results in the insured's forfeiture of coverage.²⁷¹ When sellers fail to exercise good faith after buyers complain, they should have to prove prejudice to forfeit buyers' remedies. By placing the onus on sellers to prove prejudice, sellers will more likely cooperate in ascertaining buyers' ultimate position or remedying the breach. A majority of courts accept this proof of prejudice approach and apply it in a variety of contexts.²⁷² For example, in *Cooperative Fire Insurance Association of Vermont v. White Caps Inc.*, the insured did not provide notice of claim for eighteen months although the contract required prompt and immediate notice of claim.²⁷³ The court held that the insurer must prove that it suffered substantial prejudice from the late notice in order to deny benefits because a "reasonable

268. The utmost good faith doctrine is well suited to the 3(a) context because sellers, as originators or suppliers of goods, are in a unique position to know of defects in the same way the insured is familiar with the risks of the product being insured presents. See Marwedel, Espinoza, *supra* note 11, at 1164–65 (2009) (describing the insured's expansive disclosure obligations in marine insurance contracts and noting that insurance companies are the only real beneficiaries of this stringent good faith doctrine). And Judge Learned Hand, whose strict approach to notice is widely cited with approval, was also a keen advocate of the utmost good faith doctrine. See *Btresh v. Royal Ins. Co. of Liverpool*, 49 F.2d 720, 721 (2d. Cir. 1931) (holding that "[t]he assured under a marine must disclose to the underwriter all circumstances known to him that materially affect the risk.").

269. See *id.* at 165–66.

270. See *Matter of Liquidation of Union Indem. Ins. Co. of N.Y. v. Am. Centennial Ins. Co.*, 89 N.Y.2d 94, 107 (1996) (finding that an innocent failure to disclose material facts regarding insurance coverage constitutes breach of the duty of good faith); *Miller v. Lumbermens Mut. Cas. Co.*, 488 So. 2d 273, 278 (1986) (finding that the doctrine of *uberrimae fidei* requires "absolute perfect candor.").

271. See *Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 N.Y.2d at 107.

272. See *Coop. Fire Ins. Ass'n of Vt. v. White Caps, Inc.*, 694 A.2d 34, 34 (1997) ("Traditionally, an insurer was released from its contractual obligations if its insured committed an unexcused breach of the prompt-notice provisions of the policy, regardless of whether the insurer was prejudiced by the delay. Past decisions of this Court have adhered to this rule when the policy plainly makes notice a condition precedent to coverage. . . . During the past several decades, however, the traditional view has been largely supplanted, and a majority of jurisdictions now apply the rule that an insurer must prove it was prejudiced from the delay before it may be relieved of its duties.") (citations omitted).

273. See *id.* at 35.

notice clause is designed to protect the insurance company from being placed in a substantially less favorable position. . . .”²⁷⁴ Other courts addressing this issue have reached the same conclusion. For example, in *Las Vegas Metro. Police Dept. v. Coregis Insurance Co.*, the police department submitted a claim against the insurer ten years late.²⁷⁵ The Supreme Court of Nevada ruled that such a late notice of claim does not by itself support a conclusion of prejudice to justify summary judgment for the insurer.²⁷⁶ The court also ruled that the insurer bears the burden of proof of prejudice to establish a late-notice defense.²⁷⁷

Sellers do not simply rely on the U.C.C.’s default rules to secure notice of breach from buyers. Sellers have the contractual liberty to specify the notice rules for breach, and they often do.²⁷⁸ They are free to impose notice of default obligations on buyers in adhesion contracts that are particularly prevalent in consumer transactions.²⁷⁹ In view of sellers’ broad contractual prerogatives to specify notice requirements, and the commercial reality that sellers are usually aware of their defective performances, buyers should not face forfeiture of remedies unless sellers are prejudiced by the failure to give notice.

CONCLUSION

Notice rules need to evolve to comport with twenty-first century realities. The courts’ strict approach to notice of breach produces unpredictable and harsh results for buyers that are inconsistent with parties’ reasonable expectations. In applying strict notice rules, judges are not guided by the original thrust of the rule, structure of the bargain, broader contractual norms, or commercial developments. Specifically, judges are not sensitive to the fact that notice cases often involve mass-produced goods that have the same defects of which the seller is aware. Judges also do not generally treat notice as a subsidiary contract term or default rule that imposes minimal burdens on the buyer. Further, judges

274. *Id.* at 38.

275. *Las Vegas Metro. Police Dept. v. Coregis Ins. Co.*, 256 P.3d 958, 959 (Nev. 2011).

276. *Id.*

277. *Id.*

278. *See, e.g.,* *Admiral Corp. v. Cerullo Elec. Supply Co.*, 32 F.R.D. 379, 381 (M.D. Pa. 1961) (“Under Illinois law the parties may define their rights and obligations independent of statute by fixing a definite period within which notice of claim or suit must be brought. Where there is an express provision in a contract requiring notice of claim or breach of contract, Illinois courts consider such notice provision to be material and a condition precedent to enforcement.”) (citations omitted).

279. *See AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 347 (2011) (stating that “the times in which consumer contracts where anything other than adhesive are long past.”).

do not apply the doctrine of good faith or the anti-forfeiture principles of contract law as a counterweight to preclusive notice rules. Notice rules therefore must be adapted by requiring proof of prejudice as a precondition to forfeiture on notice-failure grounds. This change will not only provide a sound and uniform rule for notice, but it will likely incentivize sellers to create better products and honor the promises that lure buyers to purchase their goods.

CASE APPENDIX A

See *Oglesby Granite Quarries v. Schott Monument Co.*, 6 N.E.2d 766 (Ohio App. 1935); *Ganoung v. Daniel Reeves, Inc.*, 268 N.Y.S. 325 (Mun. Ct. 1933); *Balcer Bros. Motor Coach Co. v. Nieman*, 242 N.W. 820 (Mich. 1932); *Idzykowski v. Jordan Marsh Co.*, 181 N.E. 172 (Mass. 1932); *William C. Atwater & Co. v. Panama R. Co.*, 175 N.E. 189 (N.Y. Ct. App. 1931); *Weinstein v. Ken-Wel Sporting Goods Co.*, 246 N.Y.S. 270 (1930); *Old Pueblo Motors v. Ysias Abarca*, 288 P. 666 (Ariz. 1930); *Tinius Olsen Testing Mach. Co. v. Wolf Co.*, 146 A. 541 (Pa. 1929); *Martin v. A.L. Scott Lumber Co.*, 273 P. 411 (Kan. 1929); *C.H. Mountjoy Parts Co. v. San Antonio Nat. Bank*, 12 S.W.2d 609 (Tex. Civ. App. 1928); *Hoover Body Co. v. Pendleton*, 95 Pa.Super. 97 (1928); *Genuine Pan. Hat Works v. Paragon Hat Co.*, 245 Ill. App. 531 (1927); *Keystone Furniture Co. v. Danneman*, 10 Pa. D. & C. 503 (1927); *Sorenson v. Keesey Hosiery Co.*, 154 N.E. 826 (N.Y. 1926); *Williamsburgh Stopper Co. v. Bickart*, 134 A. 233 (Conn. 1926); *McClarran v. Longdin-Brugger Co.*, 157 N.E. 828 (Ohio App. 1926); *Fries, Beall & Sharp Co. v. Livingstone*, 12 F.2d 150 (D.C. Cir. 1926); *Citizens' State Bank of Edgerton, Mo. v. Shay*, 245 P. 147 (Kan. 1926); *Meyercord Co. v. Gwilliam Nfg. Co.*, 85 Pa. Super. 33 (1925); *State Bank of Swea v. Lovrenz*, 203 N.W. 427 (Minn. 1925); *Stevens v. Yale*, 127 A. 283 (Conn. 1925); *Goldman v. Great Lakes Foundry Co.*, 203 N.W. 103 (Mich. 1925); *Minneapolis Threshing Mach. Co. v. Huncovsky*, 202 N.W. 280 (N.D. 1924); *U.S. v. Dewart Milk Products Co.*, 300 F. 448 (M.D. Pa. 1924); *Nashua River Paper Co. v. Lindsay*, 144 N.E. 224 (Mass. 1924); *Sedlacek v. Welpton Lumber Co.*, 197 N.W. 618 (Neb. 1924); *Miss. Shipbuilding Corp. v. Lever Bros. Co.*, 142 N.E. 332 (N.Y. 1923); *Tausend v. Judson*, 201 N.Y.S. 480 (App. Div. 1923); *Pennington Grocery Co. v. Wood & Co.*, 223 P. 368 (Okla. 1923); *Orange Crush Co. v. Stacy-Merrill Fruit Co.*, 195 N.W. 147 (Minn. 1923); *Kennedy v. F.W. Woolworth Co.*, 200 N.Y.S. 121 (App. Div. 1923); *Learned v. Hamburger*, 139 N.E. 641 (Mass. 1923); *Gruendler Patent Crusher & Pulverizer Co. v. Preston Grain & Milling Co.*, 215 P. 60 (Wash. 1923); *Farr v. Zeno*, 81 Pa.Super. 509 (1923); *Monroe & Monroe, Inc. v. Cowne*, 112 S.E. 848 (Va. 1922); *Herbrand Co. v. Lackawanna Steel Co.*, 280 F. 11 (6th Cir. 1922); *Wright v. General Carbonic Co.*, 114 A. 517

(Pa. 1921); *Golisiano v. Crisafulli*, 190 N.Y.S. 24 (App. Div. 1921); *Baruch v. D.G. Dery, Inc.* 188 N.Y.S. 453 (App. Term 1921); *Mayfield v. George O. Richardson Mach. Co.*, 231 S.W. 288 (Mo. App. 1921); *Spitz v. Lamport*, 112 A. 552 (Me. 1921); *Stone v. Molby Boiler Co.*, 185 N.Y.S. 651 (App. Div. 1921); *Storey v. Stokes*, 100 S.E. 689 (N.C. 1919); *Samuel v. Del. River Steel Co.*, 107 A. 700 (Pa. 1919); *Advance Rumley Thresher Co. v. Briggs Hardware Co.*, 206 S.W. 587 (Mo. App. 1918); *Arundel Sand & Gravel Co. v. Irwin*, 70 Pa. Super. 546 (1918); *Wallace v. L.D. Clark & Son*, 174 P. 557 (Okla. 1918); *Hesse v. Gude Bros.-Kieffer Co.*, 170 N.Y.S. 211 (Sup. Ct. 1918); *Walters v. Ditto*, 170 P. 47 (N.M. 1917); *Bowdler v. Billings-Chapin Co.*, 47 App. D.C. 164 (1917); *Todd v. State Bank of Edgewood*, 165 N.W. 593 (Iowa 1917); *Baker State Bank v. Grant*, 166 P. 27 (Mont. 1917); *Jones v. Caldwell*, 195 S.W. 122 (Ky. 1917); *Simpson v. Van Laningham*, 183 S.W. 324 (Mo. 1916); *Peterson v. Denny-Renton Clay & Coal Co.*, 154 P. 123 (Wash. 1916); *Buffalo Wholesale Hardware Co. v. Hodgeboom*, 152 N.Y.S. 900 (Sup. Ct. 1915); *Charles Syer & Co. v. Lester*, 82 S.E. 122 (Va. 1914); *Fink v. Marr*, 142 P. 482 (Wash. 1914); *Standard Auto. Co. v. Thurston*, 54 Pa. Super. 160 (1913); *Sherrill v. Coad*, 138 N.W. 567 (Neb. 1912); *Gaar, Scott & Co. v. Nelson*, 148 S.W. 417 (Mo. Ct. App. 1912); *Fetzer v. Haralson*, 147 S.W. 290 (Tex. Civ. App. 1912); *McCormick v. Sawyer*, 81 A. 482 (Me. 1911); *Kelley-Springfield Road Roller Co. v. Coffman*, 72 S.E. 749 (W. Va. 1911); *J.I. Case Threshing Mach. Co. v. Gidley*, 132 N.W. 711 (S.D. 1911); *Obenchain & Boyer v. Inc. Town of Roff*, 116 P. 782 (Okla. 1911); *Raymond Bros. Impact Pulverizing Co. v. Pa. Black Filler & Paint Co.*, 42 Pa. Super. 601 (Pa. 1910); *Advance Thresher Co. v. Vinckel*, 121 N.W. 431 (Neb. 1909); *Taylor v. Allen*, 62 S.E. 291 (Ga. 1908); *Mundt v. Simpkins*, 115 N.W. 325 (Neb. 1908); *W.F. Main Co. v. Fields*, 56 S.E. 943 (N.C. 1907); *Lindsay v. Fricke*, 109 N.W. 945 (Wis. 1906); *Otto v. Braman*, 105 N.W. 601 (Mich. 1905); *Rochevot v. Wolf*, 89 N.Y.S. 142 (N.Y. App. Div. 1904); *Citizens' State Bank v. Cowles*, 80 N.Y.S. 598 (N.Y. App. Div. 1903); *U.S. Nat. Bank v. Floss*, 62 P. 751 (Or. 1900); *Rhea Thielens Implement Co. v. Racine Malleable & Wrought Iron Co.*, 89 Ill. App. 463 (Ill. App. Ct. 1900).

CASE APPENDIX B

Of the seventy-two section 2-607(3)(a) cases considered, sixty-seven cases or ninety-three percent dealt with breach of warranty claims against the seller. *See Agway, Inc. v. Teitscheid*, 472 A.2d 1250 (Vt. 1984); *Amerol Corp. v. Am. Chemie-Pharma, Inc.*, No. CV 04-0940 (JO), 2006 WL 721319 (E.D.N.Y. Mar. 17, 2006); *Aqualon Co. v. Mac Equip., Inc.*, 149 F.3d 262 (4th Cir. 1998); *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507 (Alaska 1980); *Artistic Carton Co. v. Thelamco, Inc.*, No. 1:06-CV-316-TS, 2009 WL 3060205 (N.D. Ind. Sept. 22, 2009); *Ashley v.*

Goodyear Tire & Rubber Co., 635 F.2d 571 (6th Cir. 1980); *Branden v. Gerbie*, 379 N.E.2d 7 (Ill. App. Ct. 1978); *Bronze Bushing Co. v. N. Am. Mfg. Co.*, No. 68852, 1996 WL 157337 (Ohio Ct. App. Apr. 4, 1996); *Budhani v. Monster Energy Co.*, 527 F. Supp. 3d 667 (S.D.N.Y. 2021); *Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605 (Minn. Ct. App. 1991), *aff'd*, 491 N.W.2d 1 (Minn. 1992); *Cliffstar Corp. v. Elmar Indus., Inc.*, 678 N.Y.S.2d 222 (N.Y. 1998); *Cole v. Keller Indus., Inc.*, 132 F.3d 1044 (4th Cir. 1998); *Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120 (E.D.N.Y. 2018); *Colpitts v. Blue Diamond Growers*, No. 20 CIV. 2487 (JPC), 2021 WL 981455 (S.D.N.Y. Mar. 16, 2021); *Cosgrove v. Or. Chai, Inc.*, No. 19 CIV. 10686 (KPF), 2021 WL 706227 (S.D.N.Y. Feb. 21, 2021); *Drobnak v. Andersen Corp.*, 561 F.3d 778 (8th Cir. 2009); *Firestone Tire & Rubber Co. v. Cannon*, 452 A.2d 192 (Md. App. Ct. 1982), *aff'd*, 456 A.2d 930 (Md. 1983); *Ford v. Barnard, Sumner & Putnam Co.*, 294 N.E.2d 467 (Mass. App. Ct. 1973); *Fred J. Miller, Inc. v. Raymond Metal Prod. Co.*, 290 A.2d 527 (Md. 1972); *Frericks v. Gen. Motors Corp.*, 363 A.2d 460 (Md. 1976); *Gatt Trading, Inc. v. Sears, Roebuck & Co.*, No. CIV.A.3:02-CV-1573-B, 2004 WL 2511894 (N.D. Tex. Nov. 8, 2004); *Gazal v. Boehringer Ingelheim Pharms., Inc.*, 647 F.3d 833 (8th Cir. 2011); *Geib v. Oshkosh Truck Corp.*, No. CV 940135932S, 1997 WL 576431 (Conn. Super. Ct. Sept. 2, 1997); *Gen. Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262 (Fla. Dist. Ct. App. 1980); *Goldstein v. G. D. Searle Co.*, 378 N.E.2d 1083 (Ill. App. Ct. 1978); *Gorman v. Am. Honda Motor Co.*, 839 N.W.2d 223 (Mich. App. Ct. 2013); *Great Am. Ins. Co. v. M/V Handy Laker*, No. 96 CIV. 8737 (BSJ), 2002 WL 32191640 (S.D.N.Y. Dec. 20, 2002), *aff'd sub nom.* *Great Am. Ins. Co. v. M/V Handy Laker*, 348 F.3d 352 (2d Cir. 2003); *Greenwich Indus., L.P. v. Leggett & Platt, Inc.*, No. 07 C 6550, 2009 WL 1657441 (N.D. Ill. June 11, 2009); *Grossman v. Simply Nourish Pet Food Co.*, No. 20-CV-1603 (KAM)(ST), 2021 WL 293774 (E.D.N.Y. Jan. 27, 2021); *Hrdlicka v. Allen*, 137 N.W.2d 725 (Neb. 1965); *Idzykowski v. Jordan Marsh Co.*, 181 N.E. 172 (Mass. 1932); *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 155 F. Supp. 2d 1069 (S.D. Ind. 2001); *In re Ford Motor Co. E-350 Van Prod. Liab. Litig.* (No. II), No. CIV03-4558(HAA), 2008 WL 4126264 (D.N.J. Sept. 2, 2008); *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413 RRM RLM, 2013 WL 4647512 (E.D.N.Y. Aug. 29, 2013); *In re Hydroxycut Mktg. & Sales Pracs. Litig.*, No. 09MD2087 BTM CAB, 2011 WL 2006352 (S.D. Cal. May 23, 2011); *In re McDonald's French Fries Litig.*, 503 F. Supp. 2d 953 (N.D. Ill. 2007); *Int'l Paper Co. v. Margrove, Inc.*, 348 N.Y.S.2d 916 (N.Y. Sup. Ct. 1973); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977); *Lynx, Inc. v. Ordnance Prod., Inc.*, 327 A.2d 502 (Md. 1974); *Malawy v. Richards Mfg. Co.*, 501 N.E.2d 376 (Ill. App. Ct. 1986); *Mattos, Inc. v. Hash*, 368 A.2d 993 (Md. 1977); *Mid Island*

LP v. Hess Corp., 41 Misc. 3d 1237(A) (N.Y. Sup. Ct. 2013); Moosbrugger v. McGraw-Edison Co., 170 N.W.2d 72 (Minn. 1969); Muehlbauer v. Gen. Motors Corp., No. 05 C 2676, 2008 WL 4542650 (N.D. Ill. July 22, 2008); Niles v. Beverage Mktg. USA, Inc., No. CV191902SJFARL, 2020 WL 4587753 (E.D.N.Y. Apr. 16, 2020), report and recommendation adopted, No. 19CV1902SJFARL, 2020 WL 3445730 (E.D.N.Y. June 24, 2020); N. States Power Co. v. ITT Meyer Indus., 777 F.2d 405 (8th Cir. 1985); Page v. Camper City & Mobile Home Sales, 297 So. 2d 810 (Ala. 1974); Panda Cap. Corp. v. Kopo Int'l, Inc., 662 N.Y.S.2d 584 (N.Y. App. Div. 1997); Quinn v. Walgreen Co., 958 F. Supp. 2d 533 (S.D.N.Y. 2013); R. I. Lampus Co. v. Neville Cement Prod. Corp., 378 A.2d 288 (Pa. 1977); Ratkovich By & Through Ratkovich v. Smithkline, 711 F. Supp. 436 (N.D. Ill. 1989); Rock Creek Ginger Ale Co. v. Thermice Corp., 352 F. Supp. 522 (D.D.C. 1971); Royal Typewriter Co., v. Xerographic Supplies Corp., 719 F.2d 1092 (11th Cir. 1983); Rush v. Whirlpool Corp., No. 07-2022, 2008 WL 509562 (W.D. Ark. Feb. 22, 2008); Silvera v. Broadway Dep't Store, 35 F. Supp. 625 (S.D. Cal. 1940); Smith v. Butler, 311 A.2d 813 (Md. App. Ct. 1973); Singleton v. Fifth Generation, Inc., No. 515CV474BKSTWD, 2016 WL 406295 (N.D.N.Y. Jan. 12, 2016); S. Ill. Stone Co. v. Universal Eng'g Corp., 592 F.2d 446 (8th Cir. 1979); Speakman Co. v. Harper Buffing Mach. Co., 583 F. Supp. 273 (D. Del. 1984); Stearns v. Select Comfort Retail Corp., No. 08-2746 JF (PVT), 2009 WL 4723366 (N.D. Cal. Dec. 4, 2009); Stella v. LVMH Perfumes & Cosms. USA, Inc., 564 F. Supp. 2d 833 (N.D. Ill. 2008); T. J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980); Thompson Farms, Inc. v. Corno Feed Prod., 173 Ind. App. 682, 366 N.E.2d 3 (Ind. Ct. App. 1977); Timmerman v. Hertz, 238 N.W.2d 220 (Neb. 1976); Tomasino v. Estee Lauder Co., Inc., No. 13-CV-4692 ERK RML, 2015 WL 4715017 (E.D.N.Y. Aug. 7, 2015). The remaining five cases dealt with a variety of breach issues unrelated to warranty. *See* Am. Mfg. Co. v. U.S. Shipping Bd. Emergency Fleet Corp., 7 F.2d 565 (2d Cir. 1925) (buyer failed to give notice of breach for late delivery); E. Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) (seller contended that buyer provided late and inadequate notice of breach for late delivery of airplanes); Fitl v. Strek, 690 N.W.2d 605 (Neb. 2005) (buyer brought fraud action for altered baseball card two years after purchasing it); Se. Steel Co. v. W.A. Hunt Constr. Co., 390 S.E.2d 475 (S.C. Ct. App. 1990) (buyer failed to give notice of defective performance in steel contract); Stamper Black Hills Gold Jewelry, Inc. v. Souther, 414 N.W.2d 601 (N.D. 1987) (seller contended that buyer failed to give timely notice for late delivery of jewelry); Summit Apparel, Inc. v. Promo Nation, Inc., 25 N.Y.S.3d 773 (N.Y. App. Term. 2015) (buyer failed to provide notice of late delivery of t-shirts).

CASE APPENDIX C

A search for notice of breach cases involving goods transactions adjudicated in 2022 produced forty-seven results.²⁸⁰ Forty-two or eighty-nine percent of these cases involve consumer transactions, and many were class actions. Food sales represented the largest single category of cases at twenty-five percent. *See Cristia v. Trader Joe's Co.*, No. 22 CV 1788, 2022 WL 17551552 (N.D. Ill. Dec. 9, 2022) (cold pressed juice); *Thornton v. Kroger*, No. CIV 20-1040 JB/JFR, 2022 WL 488932 (D.N.M. Feb. 17, 2022) (beef); *Floyd v. Pepperidge Farm, Inc.*, 581 F. Supp. 3d 1101 (S.D. Ill. 2022) (crackers); *Kinman v. Kroger Co.*, 604 F. Supp. 3d 720 (N.D. Ill. 2022) (cheese); *Jacobs v. Whole Foods Mkt. Grp., Inc.*, 621 F. Supp. 3d 894 (N.D. Ill. 2022) (rice); *Cruz v. D.F. Stauffer Biscuit Co., Inc.*, No. 20 Civ. 2402 (PGG) (JLC), 2022 WL 4592616 (S.D.N.Y. Sept. 29, 2022) (cookies); *Cox v. Star Brands N. Am., Inc.*, No. 3:22-CV-141-NJR, 2022 WL 16786019 (S.D. Ill. Nov. 8, 2022) (pretzels); *Ledezma v. Upfield US Inc.*, No. 22 C 1618, 2022 WL 16553039 (N.D. Ill. Oct. 31, 2022) (vegetable spread); *Hamidani v. Bimbo Bakehouse LLC*, No. 22-cv-01026, 2023 WL 167513 (N.D. Ill. Jan. 12, 2023) (bread); *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505 (N.D. Ill. Mar. 1, 2022) (Pop-Tarts); *Mogull v. Pete and Gerry's Organics, LLC*, 588 F. Supp. 3d 448 (S.D.N.Y. 2022) (chicken eggs); *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759 (N.D. Ill. 2022) (dog food); *Gordon v. Target Corp.*, No. 20-CV-9589 (KMK), 2022 WL 836773 (S.D.N.Y. Mar. 18, 2022) (toddler drink); *Warren v. Stop & Shop Supermarket, LLC*, 592 F. Supp. 3d 268 (S.D.N.Y. 2022) (crackers); *Pierre v. Healthy Beverage, LLC*, No. 20-4934, 2022 WL 596097 (E.D. Pa. Feb. 28, 2022) (iced tea); *Valiente v. Unilever U.S.*, No. 22-21507-CIV-LENARD/LOUIS, 2022 WL 18587887 (S.D. Fla. Dec. 8, 2022); *Harman v. Taurus Int'l Mfg., Inc.* 586 F. Supp. 3d 1155 (M.D. Ala. 2022); *Hill v. AQ Textiles LLC*, 582 F. Supp. 3d 297 (M.D.N.C. 2022); *Julian v. Ethicon, Inc.*, No. 21-cv-354 (MJD/BRT), 2022 WL 23624 (D. Minn. Jan. 3, 2022); *Anderson v. Unilever U.S., Inc.*, 607 F. Supp. 3d 441 (S.D.N.Y. 2022); *Slafter v. Haier US Appliance Sol., Inc.*, 605 F. Supp. 3d 1102 (S.D. Ill. 2022); *Dwyer v. Allbindo, Inc.*, 598 F. Supp. 3d 137 (S.D.N.Y. 2022); *Shoner v. Carrier Corp.*, No. 20-56327, 2022 WL 1120525 (9th Cir. Apr. 14, 2022); *Biesterfeld v. Ariosa Diagnostics, Inc.*, No. 1:21-CV-03085, 2022 WL

280. There were many other notice cases, but they involved courts taking judicial notice of facts or the seller's assertion that the buyer failed to plead sufficient facts to state a *claim* rather than provide *notice of breach*. *See, e.g., AK Futures LLC v. LCF Labs Inc.*, No. 8:21-cv-02121-JVS (ADSx), 2022 WL 16859970 (C.D. Cal. Oct. 5, 2022) (Rule 8 of the Federal Rules of Civil Procedure requires the buyer to plead facts that give fair notice of claim and the grounds to support it); *AHBP LLC v. Lynd Co.*, No. SA-22-CV-00096-XR, 2023 WL 139149 (W.D. Tex. Jan. 9, 2023) (buyer must plead facts with particularity in a fraud claim, to satisfy Rule 9(b) of the Federal Rules of Civil Procedure).

972281 (N.D. Ill. Mar. 31, 2022); Tappana v. Am. Honda Motor Co., 609 F. Supp. 3d 1078 (C.D. Ca. 2022); Partie v. Ethicon, 609 F. Supp. 3d 1127 (D. Nev. 2022); Davis v. Ricola USA, Inc., No. 22-CV-3071, 2022 WL 4131588, (C.D. Ill. Sept. 12, 2022); Doherty v. Infuserve Am., Inc., No: 8:21-cv-0454-KKM-AEP, 2022 WL 3043034 (M.D. Fla. Aug. 2, 2022); Watkins v. Great S. Wood Preserving, Inc., No. 4:21-cv-1344-CLM, 2022 WL 4538833 (N.D. Ala. Sept. 28, 2022); Bayne v. Target Corp., No. 1:21-cv-05938 (MKV), 2022 WL 4467455 (S.D.N.Y. Sept. 23, 2022); Taylor v. Walter Kidde Portable Equip., Inc., No. 1:21CV839, 2022 WL 4450271 (M.D.N.C. Sept. 23, 2022); Salcedo v. Nissan N. Am., Inc., CV 22-4152-GW-MARx, 2022 WL 16705004 (C.D. Cal. Nov. 2, 2022); Borgman v. Yamaha Motor Corp., USA, No. 3:19-cv-0285-HRH, 2022 WL 13918852 (D. Alaska Oct. 24, 2022); Absolute Resols. Inv., LLC v. Citibank, No. 22 Civ. 2079 (VM), 2022 WL 17992199 (S.D.N.Y. Dec. 29, 2022); Crown Cell Inc. v. Ecovacs Robotics, Inc., No. 21-cv-07890-SI, 2022 WL 17082670 (N.D. Cal. Nov. 18, 2022); Pelayo v. Hyundai Motor Am., Inc., No.: 8:20-cv-01503-JLS-ADS, 2022 WL 2200414 (C.D. Cal. Mar. 2, 2022); Reynolds-Sitzer v. EISAI, Inc., 586 F. Supp. 3d 123 (N.D.N.Y. 2022); Johnson v. Eisai, Inc., 590 F. Supp. 3d 1053 (N.D. Ohio 2022); Rojas v. Bosch Solar Energy Corp., No. 18-cv-05841-BLF, 2022 WL 717567 (N.D. Cal. Mar. 9, 2022); *In re Smitty's/CAM2 303 Tractor Hydraulic Fluid Mktg., Sales Practices & Prods. Liab. Litig.*, No. 4:20-MD-02936-SRB, 2022 WL 710192 (W.D. Mo. Mar. 9, 2022); Rodriguez v. Ford Motor Co., 596 F. Supp. 3d 1050 (N.D. Ill. 2022); ADMIntermare v. Kamca Trading, S.A., No. 20-CV-1223 (JPO), 2022 WL 845593 (S.D.N.Y. Mar. 22, 2022); Turk v. Rubbermaid Inc., No. 21-CV-270 (KMK), 2022 WL 836894 (S.D.N.Y. Mar. 21, 2022); Riley v. General Motors, LLC, 591 F. Supp. 3d 259 (S.D. Ohio 2022); Cohen v. Subaru of Am., Inc., No. 1:20-cv-08442-JHR-AMD, 2022 WL 721307 (D.N.J. Mar. 10, 2022); Simmons v. Augusta Aviation, Inc., 596 F. Supp. 3d 1363 (S.D. Ga. 2022.); *Inst. of Multidimensional Medicine v. Metagenics, Inc.*, No. 22-1308 (JEB), 2022 WL 10440101 (D.D.C. Oct. 18, 2022). The prevalence of food cases continues in 2023. *See, e.g.*, Hawkins v. Coca Cola Co., No. 21-CV-8788 (KMK), 2023 WL 1821944 (S.D.N.Y. Feb. 7, 2023) (flavored drink); Hoffman v. Kraft Heinz Foods Co., No. 22-CV-397 (KMK), 2023 WL 1824795 (S.D.N.Y. Feb. 7, 2023) (flavored water); Crawford v. Ariz. Beverage USA, No. 22-cv-220-DWD, 2023 WL 1100260 (S.D. Ill. Jan. 30, 2023) (lite beverages).

