

# Notification of Breach UNder Uniform Commerical Code Section 2-607(3)(a) a Conflict a Resolution

George Frank Hammond

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# NOTIFICATION OF BREACH UNDER UNIFORM COMMERCIAL CODE SECTION 2-607(3)(a): A CONFLICT, A RESOLUTION

## INTRODUCTION

Section 2-607(3)(a) of the Uniform Commercial Code requires 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.”<sup>1</sup> This section bars a suit<sup>2</sup> for breach of warranty if the buyer has not met the notification requirement.<sup>3</sup> The Code does not prescribe

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<sup>1</sup> U.C.C. § 2-607(3)(a) (1977).

<sup>2</sup> The literal language of § 2-607(3)(a) bars any “buyer” from pursuing remedies for breach if he has not satisfied § 2-607(3)(a)’s notification requirement. The bar certainly applies to merchants. See *K&M Joint Venture v. Smith Int’l, Inc.*, 669 F.2d 1106, 1115-16 (6th Cir. 1982); *infra* text accompanying note 115; see also *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 827 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 977 (5th Cir. 1976). Some courts, however, have held that the Code does not require consumers to give notification within a reasonable time or that it imposes a more relaxed standard on consumers than on merchants. See Clark, *The First Line of Defense in Warranty Suits: Failure to Give Notice of Breach*, 15 U.C.C. L.J. 105, 115-16 (1982) (citing cases). This Note examines only the standard applicable to merchants.

For an analysis of the notification requirement in breach of warranty and strict tort liability, as applied to both consumers and merchants, see generally Phillips, *Notice of Breach in Sales and Strict Tort Liability Law: Should There Be a Difference?*, 47 IND. L.J. 457 (1972); Annot., 93 A.L.R.3d 363 (1979) (notice requirement in warranty cases as applied to both consumers and merchants).

<sup>3</sup> A buyer’s failure to give any form of notification gives rise to an absolute bar to any remedy the buyer might otherwise seek for breach. U.C.C. § 607(3)(a) (1977); see, e.g., *Klockner Inc. v. Federal Wire Mill Corp.*, 663 F.2d 1370, 1378-79 (7th Cir. 1981) (failure to notify seller of defects in steel rods barred buyer’s suit); *Point Adams Packing Co. v. Astoria Marine Constr. Co.*, 594 F.2d 763 (9th Cir. 1979) (failure to notify barred buyer’s recovery in action for damages caused by failure to supply state of the art safety devices on fishing vessel). See generally Clark, *supra* note 2, at 106-10, 113-14 (discussing impact of § 2-607(3)(a)). This is true even where the lack of notification does not prejudice the seller. *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 511 (Alaska 1980) (“On its face the language of [2-607(3)(a)] allows for no alternative to timely notice . . . . It provides for no excuse from notice such as lack of prejudice.”).

Other issues associated with § 2-607(3)(a) are well settled. Section 2-607(3)(a) applies only after a buyer accepts the seller’s tender of goods. In *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), the court noted that “[§] 2-607(3)(a) by its own terms applies only when tendered goods have been accepted. . . . Thus, [buyers are] under no obligation to give notice of breach with regard to . . . goods which [are] never delivered and, thus, [are] never accepted by the [buyer].” *Id.* at 152 n.40.

A buyer claiming breach must affirmatively plead and prove that he gave the notification required by § 2-607(3)(a). *Roth Steel Prods.*, 705 F.2d at 153; see also *K&M Joint Venture v. Smith Int’l, Inc.*, 669 F.2d 1106, 1111 (6th Cir. 1982) (plaintiff buyer must prove adequate notice); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813,

any form of notification;<sup>4</sup> a buyer may meet its requirements by giving notification either orally<sup>5</sup> or in writing. Although at least one court has noted that the pleadings themselves may constitute notification, even when both parties are merchants,<sup>6</sup> the majority view requires the buyer to give notification prior to filing suit.<sup>7</sup> The ab-

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823 (6th Cir. 1978) ("[I]nasmuch as section 2-607 operates as a condition precedent to any recovery, the burden of proof is on the plaintiff to show that notice was given within a reasonable time."), *cert. denied*, 441 U.S. 923 (1979); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 970 n.31 (5th Cir. 1976) (buyer must both plead and prove notice); *Steel & Wire Corp. v. Thyssen*, 20 U.C.C. Rep. Serv. (Callaghan) 892, 895 (E.D. Mich. 1976) (buyer must both plead and prove notice "as a prerequisite of recovery"); *L.A. Green Seed Co. v. Williams*, 246 Ark. 563, 469, 438 S.W.2d 717, 720 (1969) (buyer must plead and prove notification as condition precedent to recovery); 4 R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 2-607:19, at 30 (3d ed. 1983) (notification is condition precedent to recovery); 3 W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 2-607:07, at 70 (1982) (burden of proof on buyer to show notification was given).

This pleading requirement is not particularly strict. One court has held that a plaintiff successfully pleads notification when his pleadings make the issue "apparent." *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 521, 319 N.W.2d 855, 860 (1982) (modern rules of pleading eliminate merely technical rigor).

Whether adequate notification was given is a question of fact. *E.g.*, *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983) ("issues of timeliness and sufficiency are questions of fact"); *Carter Equip. Co. v. John Deere Indus. Equip.*, 681 F.2d 386, 396 (5th Cir. 1982) (determination of adequacy of notification is jury question); *Standard Alliance Indus.*, 587 F.2d at 823 ("[w]hether proper notice was given is a question of fact"); *Eastern Air Lines*, 532 F.2d at 970-73 (usually question of fact); 4 R. ANDERSON, *supra* note 3, § 2-607:11, at 124-25 (same); 3 W. HAWKLAND, *supra* note 3, § 607:07, at 70 (same). *But see K&M Joint Venture*, 669 F.2d at 1111 ("[T]he question of whether any notice was given, and if so, what the notice consisted of and when it was given is one of fact. However, the question of whether the notice satisfied the statutory requirement is one of the law.").

<sup>4</sup> *Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516, 518 (Colo. Ct. App. 1981); *see also* 4 R. ANDERSON, *supra* note 3, § 2-607:32, at 139. The parties to a contract, however, may modify the requirements of § 2-607(3)(a) to require written notification. *See* U.C.C. § 1-102(3) (1977); *see also* *Prompt Elec. Supply Co. v. Allen-Bradley Co.*, 492 F. Supp. 344, 347-48 (E.D.N.Y. 1980); 4 R. ANDERSON, *supra* note 3, § 2-607:3, at 119; *cf.* U.C.C. § 1-201(3) (1978) (definition of agreement).

<sup>5</sup> Professors White and Summers note:

The law seems well established now that oral notification satisfies the notice requirement of 2-607(3)(a). Section 2-607(3)(a) uses the verb "notify;" that word is defined in 1-201(2) in a way that permits an oral statement to constitute notice. That other Code sections impose writing requirements by using the word "sent" supports this interpretation of 2-607(3)(a).

J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 11-10, at 425-26 (2d ed. 1980) (footnotes omitted); *see also* 4 R. ANDERSON, *supra* note 3, § 2-607:35, at 141; 3 W. HAWKLAND, *supra* note 3, § 2-607:07, at 67; *infra* note 63. The parol evidence rule does not bar admission of evidence to show that oral notification was given. *International Paper Co. v. Margrove, Inc.*, 75 Misc. 2d 763, 765-66, 348 N.Y.S.2d 916, 919 (Sup. Ct. 1973).

<sup>6</sup> *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 274, 560 P.2d 789, 792 (1977) (*dicta*) (based on cases decided under Uniform Sales Act); *cf.* *Hampton v. Gebhardt's Chili Powder Co.*, 294 F.2d 172 (9th Cir. 1961) (notice need not precede filing of original complaint but may follow commencement of suit provided it is subsequently pleaded).

<sup>7</sup> In rejecting the view that the pleadings may fulfill the requirements of § 2-607(3)(a), the Maryland Supreme Court reasoned that

sence of specific guidelines in section 2-607(3)(a) has forced the courts to develop standards for determining what constitutes adequate notification. Some courts have held that virtually any complaint will satisfy the requirement,<sup>8</sup> but others require the buyer to notify the seller that he considers the seller to be legally in breach.<sup>9</sup>

This Note first explores the development and application of these two standards.<sup>10</sup> It then evaluates the standards with respect to the policies underlying the notification requirement and argues that neither standard adequately furthers these policies.<sup>11</sup> The Note then develops an analytical process for evaluating notification under section 2-607(3)(a).<sup>12</sup> Finally, the Note analyzes a series of hypotheticals to illustrate the usefulness of this process.<sup>13</sup>

## 1

### THE STANDARD OF NOTIFICATION UNDER SECTION 2-607(3)(a): THE TWO CONTEMPORARY STANDARDS

#### A. Origins of the Standard of Notification Debate

Section 2-607(3)(a) requires the buyer to "notify" the seller of

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

*Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 17, 327 A.2d 502, 514 (1974). This view is better than that advanced by the court in *Pace*, 114 Ariz. at 274, 560 P.2d at 792, because, were a court "to conclude that a complaint serves as notice [, it] would defeat one of the primary purposes of the notice requirement—settlement of claims and avoidance of litigation." *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 513 (Alaska 1980); *accord Voboril v. Namco Leisure World, Inc.*, 24 U.C.C. Rep. Serv. (Callaghan) 614, 615 (Conn. Super. Ct. 1978) (allowing pleadings to constitute notice would defeat purposes of requirement); *see also infra* notes 90-91, 119-25 and accompanying text (discussing policy of settlement underlying § 2-607(3)(a)).

<sup>8</sup> *See infra* section I.B.

<sup>9</sup> *See infra* section I.C.

<sup>10</sup> *See infra* text accompanying notes 14-86.

<sup>11</sup> *See infra* text accompanying notes 87-126.

<sup>12</sup> *See infra* text accompanying notes 127-34. The major developments this Note discusses all occurred in the 1970s and 1980s. For an extensive discussion of earlier decisions and the historical background of § 2-607(3)(a), *see Note, Notice of Breach and the Uniform Commercial Code*, 25 U. FLA. L. REV. 520 (1973).

This Note does not deal with two other issues presented by § 2-607(3)(a). These are whether a particular notification was given within a reasonable time and whether a buyer must give notification to a remote seller. For a discussion of these issues, *see* 3 W. HAWKLAND, *supra* note 3, §§ 2-607:5, 2-607:06; J. WHITE & R. SUMMERS, *supra* note 5, § 11-10; Clark, *supra* note 2, at 125-38.

<sup>13</sup> *See infra* text accompanying notes 135-57.

any "breach."<sup>14</sup> The Code does not define "breach." Moreover, its definitions of "notify" and "notice" do not indicate how specific a buyer's communication to a seller must be in order to meet section 2-607(3)(a)'s notification requirement. The definition of "notify" in section 1-201(26) merely states that "[a] person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."<sup>15</sup> Section 1-201(25), which defines "notice," simply states that:

- A person has "notice" of a fact when
- (a) he has actual knowledge of it; or
  - (b) he has received a notice or notification of it; or
  - (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.<sup>16</sup>

The Code's lack of satisfactory definitions for these terms has allowed courts to develop two interpretations of section 2-607(3)(a)'s notification requirement. Some courts argue that the drafters of section 2-607(3)(a) used the word "breach" to hold the buyer to a strict standard of notice. Under this standard, some courts require the buyer to notify the seller of his intent to hold the seller *legally responsible* for a nonconforming tender, while others require only notification that the buyer considers the seller to be legally in breach.<sup>17</sup> Courts employing the second interpretation of section 2-607(3)(a) argue that the drafters established a lenient standard of notification. Courts following this approach require the buyer to notify the seller that he has made a nonconforming tender, but do not require the notification to indicate whether the buyer intends to seek legal redress.<sup>18</sup>

The drafters of the Code attempted to clarify the notification requirements of section 2-607(3)(a) in official comment four to that section.<sup>19</sup> The comment only creates ambiguity, however, seeming to endorse the lenient standard at one point and the strict standard at another.<sup>20</sup> The second paragraph of the comment provides that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched."<sup>21</sup> This language supports the lenient standard of notification in that virtually any indication of unhappiness by the buyer

<sup>14</sup> U.C.C. § 2-607(3)(a) (1977).

<sup>15</sup> *Id.* § 1-201(26).

<sup>16</sup> *Id.* § 1-201(25).

<sup>17</sup> See *infra* notes 50-66 and accompanying text.

<sup>18</sup> See *infra* notes 31-49 and accompanying text.

<sup>19</sup> *Id.* § 2-607(3)(a) official comment 4.

<sup>20</sup> See 4 R. ANDERSON, *supra* note 3, § 2-607: 43, at 147.

<sup>21</sup> U.C.C. § 2-607(3)(a) official comment 4 (1977).

should inform the seller that the transaction is still troublesome.<sup>22</sup>

In a statement later in the comment, however, the drafters appear to adopt the strict standard of notification: "The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is *claimed to involve a breach* . . ." <sup>23</sup> Thus, rather than clarifying the meaning of the statutory language, the comment can serve to support either reading.

The history of section 2-607(3)(a) provides some guidance as to the drafters' intent. The drafters derived section 2-607(3)(a) from section 49 of the Uniform Sales Act.<sup>24</sup> This section stated: "But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."<sup>25</sup> Most courts<sup>26</sup> construed section 49 to require the buyer to give the seller express notice of his intent to seek legal redress for specified damages.<sup>27</sup> This requirement led to decisions with harsh results for consumers who failed to comply with the purely technical requirements of section 49.<sup>28</sup> In

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<sup>22</sup> See J. WHITE & R. SUMMERS, *supra* note 5, § 11-10, at 425; see also 3 W. HAWKLAND, *supra* note 3, § 2-607:07, at 67 (need only state that there are problems).

<sup>23</sup> U.C.C. § 2-607(3)(a) official comment 4 (1977) (emphasis added).

<sup>24</sup> *Id.* § 2-607(3)(a) official comment (prior statutory provisions); see Note, *supra* note 12, at 521.

<sup>25</sup> Unif. Sales Act. § 49, 1A U.L.A. 99 (1950).

<sup>26</sup> See *Clarizo v. Spada Distrib. Co.*, 291 Or. 516, 524-27, 373 P.2d 689, 693-94 (1962).

<sup>27</sup> See S. WILLISTON, WILLISTON ON SALES § 484b, at 42 (rev. ed. 1948) ("[Notice under § 49] should fairly advise the seller of the defect asserted in the performance of a particular promise or sale; it should repel any inference of waiver, and at least by implication should assert that there has been a violation of the buyer's legal rights."); see, e.g., *Whitfield v. Jessup*, 39 Cal. 2d 826, 830, 193 P.2d 1, 4 (1948) (notice must inform "seller that the buyer intends to look to him for damages"); *Arata v. Tonegato*, 152 Cal. App. 2d 837, 840-41, 314 P.2d 130, 133 (1957) (notice that hair dye burned plaintiff's scalp insufficient because did not state intent to bring legal action); *Dailey v. Holiday Distrib. Corp.*, 260 Iowa 859, 873, 151 N.W.2d 477, 487 (1967) ("Ordinarily this notice must be more than a mere complaint. It shall directly or inferentially inform the other party or parties the buyer or bailee claims breach . . . and damages are demanded."); *Idzykowski v. Jordan Marsh Co.*, 279 Mass. 163, 167-68, 181 N.E. 172, 173 (1932) (must specify with reasonable particularity what constitutes breach); *Clarizo v. Spada Distrib. Co.*, 231 Or. 516, 524, 373 P.2d 689, 693-94 (1962) (must notify seller that "he intends to claim damages"); see also *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 976 (5th Cir. 1976) (same); Note, *supra* note 12, at 536 ("To meet the requirements, the notice must have apprised the seller that he was to be held liable for damages, that the legal rights of the purchaser have [sic] been violated, or must have eliminated any reference that there was a waiver of remedies.") (footnotes omitted).

<sup>28</sup> See *Eastern Air Lines*, 532 F.2d at 976 ("These technical requirements [of § 49] . . . frequently served to deny an uninformed consumer of what was otherwise a valid claim."); see, e.g., *Arata v. Tonegato*, 152 Cal.App. 2d 837, 840-41, 314 P.2d 130, 133 (1957) (complaint of rash caused by seller's hair dye insufficient notice); *Idzykowski*, 279 Mass. at 167-68, 181 N.E. at 173 (complaint of burns caused by seller's shoe polish insufficient notice).

an effort to reduce the possibility that courts would bar meritorious consumer suits on technical grounds, the drafters of comment four to section 2-607(3)(a) eliminated the requirement that the buyer give the seller express notice of his intent to seek legal remedies for specified damages.<sup>29</sup>

Although this history demonstrates the drafters' intent to reject the requirement of *express* notice regarding the buyer's plan to seek legal remedies for specified instances of breach, contradictory language in comment four remains. The uncertainty concerning the proper interpretation of this comment has contributed to the disagreement concerning the standard of notification required by section 2-607(3)(a).<sup>30</sup>

### B. The Lenient Standard of Notification

Courts adopting the lenient standard require a buyer to notify the seller that "the transaction is still troublesome and must be watched."<sup>31</sup> These courts do not require the buyer to notify the seller that he intends to seek legal redress for a breach.<sup>32</sup> Virtually

<sup>29</sup> U.C.C. § 2-607(3)(a) official comment 4 (1977) ("the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy"); see also *Eastern Air Lines*, 532 F.2d at 1976.

<sup>30</sup> One commentator has recently noted the confusion caused by the ambiguity in comment four.

Some courts have given the notice requirements a stricter application than indicated by the Official Code Comment and require the buyer to declare that he regards the seller as guilty of breach of the contract. This view is supported by the rationale that the underlying purpose of notice is to inform the other party so that he can take steps to remedy the condition or give the buyer additional instructions as to the use of the goods.

The confusion in this area probably arises from the ambiguous statement in the Official Code Comment requiring the buyer to inform the seller "that the transaction is claimed to involve a breach."

4 R. ANDERSON, *supra* note 3, § 2-607:43, at 147 (footnotes omitted). See also *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277 n.4 (noting recent development of strict standard).

<sup>31</sup> U.C.C. § 2-607(3)(a) official comment 4 (1977).

<sup>32</sup> For applications of the lenient standard, see, e.g., *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983) (complaints sufficient if reasonable jury could infer that they notified the seller that the transaction was troublesome); *Continental Forest Prods. v. V.S. & Bros. Ltd. Partnership*, 34 U.C.C. Rep. Serv. (Callaghan) 1578, 1579 (9th Cir. 1982) (request that seller "fulfill . . . all orders" sufficient notification that transaction was troublesome) (unreported); *Wilson v. Marquette Elec., Inc.*, 630 F.2d 575 (8th Cir. 1980) (complaints that computer was not working properly); *Alafoss v. Premium Corp. of Am.*, 599 F.2d 232, 235 (8th Cir. 1979) (complaint that fur collars on coats turned yellow and ragged); *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933, 937-38 (7th Cir. 1978) (phone call from buyer expressing unhappiness with laser's performance); *Bonebrake v. Cox*, 499 F.2d 951, 957 (8th Cir. 1974) (letter stating that bowling pin spotters were not installed and needed repairs); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 1509 (8th Cir. 1971) (expression of

any complaint from the buyer to the seller suffices to meet this standard.<sup>33</sup>

*Oregon Lumber Co. v. Dwyer Overseas Timber Products Co.*<sup>34</sup> illustrates the application of the lenient standard. In *Oregon Lumber*, the buyer purchased timber of a particular grade from the seller. The buyer informed the seller on several occasions that the lumber was below grade. The buyer continued to accept delivery, however, and made several payments before refusing to pay the balance due on the contract. The court found that the buyer's early complaints met the requirements of section 2-607(3)(a).<sup>35</sup> Applying the lenient

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doubt to seller that oil supplied was appropriate for use in machine); *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585, 594-96 (8th Cir. 1964) (statements that helicopter failed to lift promised amount of load); *Kirby v. Chrysler Corp.*, 554 F. Supp. 743, 752 (D. Md. 1982) (complaints that manufacturer was delivering vehicles in violation of contract); *Custom Automated Mach. v. Penda Corp.*, 537 F. Supp. 77, 84 (N.D. Ill. 1982) (complaint that machine was not functioning properly); *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771, 780 (D.S.D. 1982) (complaints that aircraft engine was not functioning properly); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 375 (E.D. Mich. 1977) (expression of dissatisfaction with performance of automated machine and need for service calls); *General Instrument Corp. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139, 147 (M.D. Pa. 1973) (oral notice of oil on bomb fuse sleeves), *aff'd without opinion sub nom. Pennsylvania Pressed Metals, Inc. v. Tenneco Chems., Inc.*, 506 F.2d 1052 (3d Cir. 1974); *Chemco Indus. Applicators v. E.I. duPont de Nemours & Co.*, 366 F. Supp. 278, 286 (E.D. Mo. 1973) (complaint to seller's agent that "vegetation was beginning to bud again" after buyer sprayed with defoliant manufactured by seller); *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522, 529 (D.D.C. 1971) (complaint that carbon dioxide for soft drinks smelled like rotten eggs); *Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516, 519 (Colo. Ct. App. 1981) (notation on purchase order that tree roots were improperly wrapped); *Stelco Indus. v. Cohen*, 182 Conn. 561, 565-66, 438 A.2d 759, 761-62 (1980) (repeated oral complaints about defective building materials); *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 445 N.E.2d 19 (1982) (observation of malfunction by seller's agent combined with past requests for service by buyer); *Auto-Teria, Inc. v. Ahern*, 170 Ind. App. 84, 94, 352 N.E.2d 774, 781 (1976) (complaint that car wash brush was working improperly); *Deaton, Inc. v. Aeroglide Corp.*, 99 N.M. 253, 257, 657 P.2d 109, 113 (1982) (complaints that dump truck parts were defective); *Interuational Paper Co. v. Margrove, Inc.*, 75 Misc. 2d 763, 766, 348 N.Y.S.2d 916, 919 (Sup. Ct. 1973) (oral complaint that seller sent a "bad shipment of paper" sufficient to defeat summary judgment motion); *Oregon Lumber Co. v. Dwyer Overseas Timber Prods. Co.*, 280 Or. 437, 442-43, 571 P.2d 884, 887 (1977) (claim that timber was below grade); *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 232 Pa. Super. 242, 258, 336 A.2d 397, 404 (1975) (expressions of "dissatisfactions" with concrete blocks), *aff'd on other grounds*, 474 Pa. 199, 378 A.2d 288 (1977); *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 503 (S.D. 1977) (letter detailing defects, all repaired by seller, sufficient to notify of defects not detailed in letter); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 522-23, 319 N.W.2d 855, 860 (1982) (notice that grain drying equipment not performing as expected).

<sup>33</sup> J. WHITE & R. SUMMERS, *supra* note 5, § 11-10, at 425 ("[A] letter containing anything but the most exaggerated encomiums would seem to tell that the transaction 'is still troublesome and must be watched.'" Similar oral notification would also suffice.).

<sup>34</sup> 280 Or. 437, 571 P.2d 884 (1977). The seller initiated this action to recover the balance due under the sales contract. The buyer counterclaimed, contending it was entitled to partial recovery of money already paid on the contract.

<sup>35</sup> *Id.* at 443, 571 P.2d at 887.



standard of notification, the court held that "[t]he notice may be given in any manner or form sufficient to apprise the seller that there are problems with the transaction."<sup>36</sup> The court concluded that the buyer need not assert his "intention to make a claim for damages or pursue any other remedy"<sup>37</sup> when he notifies the seller of the problem with the transaction.

In cases like *Oregon Lumber*,<sup>38</sup> the number of complaints a buyer makes may lead the seller to infer that the buyer is contemplating a law suit. A buyer need not make numerous complaints to satisfy the lenient standard, however. A single complaint concerning the quality or performance of a product is sufficient.<sup>39</sup>

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<sup>36</sup> *Id.* at 442, 571 P.2d at 887 (citations omitted).

<sup>37</sup> *Id.* (citations omitted).

<sup>38</sup> *Id.* at 437, 571 P.2d at 884; *see also, e.g.*, *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 1983) (numerous complaints concerning copiers); *Wilson v. Marquette Elec., Inc.*, 630 F.2d 575 (8th Cir. 1980) (complaints that computer was not working properly); *AES Technology Sys., Inc. v. Coherent Radiation*, 538 F.2d 933 (7th Cir. 1978) (complaints expressing unhappiness with laser's performance); *Lewis v. Mobil Oil Co.*, 438 F.2d 500 (8th Cir. 1971) (expressions of doubt to seller that oil supplied was appropriate for use in buyer's machine); *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585, 595-96 (8th Cir. 1964) (repeated oral and written complaints that helicopter failed to lift promised load); *Kirby v. Chrysler Corp.*, 554 F. Supp. 743 (D. Mass. 1982) (complaints by car dealer that manufacturer was delivering vehicles in violation of contract); *Horizons, Inc. v. Avco Corp.*, 551 F. Supp. 771 (D.S.D. 1982) (complaints that aircraft engine was not functioning properly), *modified on other grounds*, 714 F.2d 862 (8th Cir. 1983); *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977) (expression of dissatisfaction with automated machine and need for service calls); *Stelco Indus. v. Cohen*, 182 Conn. 561, 438 A.2d 759 (1980) (repeated oral complaints); *Auto-Teria, Inc. v. Ahern*, 170 Ind. App. 84, 352 N.E.2d 774 (1976) (repeated complaints that car washing equipment worked improperly); *Deaton, Inc. v. Aeroglide Corp.*, 99 N.M. 253, 657 P.2d 109 (1982) (complaints that dumptruck parts were defective); *R.I. Lampus Co. v. Neville Cement Prods.*, 232 Pa. Super. 242, 336 A.2d 397 (1975) (oral expressions of "dissatisfactions" with concrete blocks), *aff'd on other grounds*, 474 Pa. 299, 378 A.2d 288 (1977); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 319 N.W.2d 855 (1982) (requests for many service calls).

<sup>39</sup> Virtually any written notification will satisfy the lenient standard. *See, e.g.*, *Continental Forest Prods. v. V.S. & Bros. Ltd. Partnership*, 34 U.C.C. Rep. Serv. (Callaghan) 1578, 1579 (9th Cir. 1982) (unreported) (buyer's request that seller "fulfill . . . all orders" sufficient to notify seller that transaction was "troublesome"); *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) (letter stating that bowling pinspotters not installed and needed repairs); *Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516 (Colo. Ct. App. 1981) (notation on purchase order that tree roots wrapped improperly); *see also J. WHITE & R. SUMMERS, supra* note 5, § 11-10, at 425-26 (virtually any writing satisfactory). Most single oral complaints will also satisfy the lenient standard. *See, e.g.*, *General Instrument Corp. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139 (M.D. Pa. 1973) (oral notice of oil on bomb fuse sleeves), *aff'd without opinion sub nom.*, *Pennsylvania Pressed Metals, Inc. v. Tenneco Chem., Inc.*, 506 F.2d 1052 (3d Cir. 1974); *Chemco Indus. Applicators v. E.I. du Pont de Nemours & Co.*, 366 F. Supp. 278, 286 (E.D. Mo. 1973) (oral complaint to seller's agent that "vegetation was beginning to bud again" after buyer sprayed with defoliant manufactured by seller); *International Paper Co. v. Margrove, Inc.*, 75 Misc. 763, 766, 384 N.Y.S.2d 916, 919 (Sup. Ct. 1973) (oral complaint that seller sent buyer "a bad shipment of paper" sufficient to overcome motion for summary judgment).

Several courts applying the lenient standard have not even required direct communication between the parties. Courts have found sufficient notification where the buyer returned the goods,<sup>40</sup> or the seller's agent saw a machine malfunction.<sup>41</sup> One court found that a letter listing defects later repaired by the seller was sufficient to notify the seller of the defects not detailed in the letter.<sup>42</sup> These courts may rely on the theory that the notification given was sufficient to put the seller on inquiry notice.<sup>43</sup>

A few courts applying the lenient standard have held that a buyer need not notify the seller of a breach in late delivery cases.<sup>44</sup> In *Jay V. Zimmerman Co. v. General Mills, Inc.*,<sup>45</sup> the seller breached by delivering goods late under a contract making time of the essence. The court sustained the buyer's suit for damages, holding that notification of breach was not required in late delivery cases.<sup>46</sup> The court based its holding on its view of the purpose of section 2-607(3)(a)'s notification requirement: "to *inform* the seller of matters which would not normally come to the buyer's attention until *after* the goods came into his possession."<sup>47</sup> The court reasoned that both parties know that a breach has occurred in late delivery cases. Thus, it is unnecessary for the buyer to notify the seller in order to *inform* him of the breach.<sup>48</sup> The *Jay V. Zimmerman* court held in the alternative that even if section 2-607(3)(a) requires notification in late delivery cases, the buyer had given the seller adequate notice by sending a letter stating that the seller had missed the delivery date by a "wide margin."<sup>49</sup>

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<sup>40</sup> *Hoffman's Double Bar Pine Nursery*, 633 P.2d at 519.

<sup>41</sup> *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 1077, 445 N.E.2d 19, 25-26 (1982) (observation of malfunction by seller's agent combined with past requests for service).

<sup>42</sup> *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 503 (S.D. 1977).

<sup>43</sup> See *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522, 528-29 (D.D.C. 1971) (complaint that carbon dioxide for soft drinks smelled like "rotten eggs" sufficient to alert seller that it should inquire further); *Stelco Indus. v. Cohen*, 182 Conn. 561, 566, 438 A.2d 759, 761-62 (1980) (oral notification "sufficient to alert [seller] to the possibility that it might be answerable to [buyer] for breach of . . . warranty"); 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-607:34, at 223 (2d ed. 1971) (arguing that "[w]here the notice as given is sufficient to lead the seller to the defects in the goods, the fact that the notice does not set forth all the facts is not material").

<sup>44</sup> See *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245, 254 (N.D. Ill. 1974) (notification not required where seller did not deliver adequate quantities of liquid oxygen in timely manner), *aff'd on other grounds*, 522 F.2d 469 (7th Cir. 1975); *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198 (E.D. Mo. 1971); *cf. MacGregor v. McReki, Inc.*, 30 Colo. App. 196, 201-02, 494 P.2d 1297, 1299 (1971) (notification given *prior* to delivery that buyer would consider any late delivery to be breach).

<sup>45</sup> 327 F. Supp. 1198 (E.D. Mo. 1971).

<sup>46</sup> *Id.* at 1204.

<sup>47</sup> *Id.* (emphasis in original).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

Courts applying the lenient standard require, therefore, only that the buyer inform the seller that a transaction is troublesome when the seller would not recognize the trouble absent notification.

### C. The Strict Standard of Notification

Courts adopting the strict standard require a more specific notification. One court applying the strict standard has held that 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."<sup>50</sup> Although not all courts employing the strict standard require notification of an intended legal action, they all reject the view that mere notification that the transaction is "troublesome" satisfies section 2-607(3)(a).<sup>51</sup> Although they agree that the notification need not contain specific legal claims or theories, it must inform the seller that the buyer considers the seller to be in breach.<sup>52</sup> Most courts using the strict standard look at the entire course of communication between the parties to determine whether the buyer gave adequate notification of breach.<sup>53</sup>

The leading case adopting the strict standard, *Eastern Airlines v. McDonnell Douglas Corp.*,<sup>54</sup> demonstrates the stringency of that standard.<sup>55</sup> Eastern purchased DC-8 jet aircraft from Douglas for delivery in set intervals. After Douglas fell behind in its deliveries, Eastern indicated that it considered Douglas to be in breach. East-

<sup>50</sup> *Cotner v. International Harvester Co.*, 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977); see also *Atlantic Bldg. Sys., Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420 (D. Mass. 1981) (citing *Cotner* and holding letter requesting credit for replacement parts allegedly missing from original shipment to be inadequate notice).

<sup>51</sup> See *Roth Steel Prods. v. Sharon Steel Co.*, 705 F.2d 134, 153 (6th Cir. 1983); *K&M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106, 1112-13 (6th Cir. 1982); *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359-60 (5th Cir. 1980); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 825 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976); *United Cal. Bank v. Eastern Mountain Sports*, 546 F. Supp. 945, 958 (D. Mass. 1982); *Atlantic Bldg. Sys., Inc.*, 32 U.C.C. Rep. Serv. (Callaghan) at 1420; *Cotner*, 260 Ark. at 889, 545 S.W.2d at 630.

<sup>52</sup> *Eastern Air Lines*, 532 F.2d at 976.

<sup>53</sup> See *id.* at 978; see also *K&M Joint Venture*, 669 F.2d at 1114-15 (buyer's conduct did not indicate that it considered seller in breach); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 97 (E.D. Tenn. 1971) (buyer led seller to believe that seller not considered in breach). This examination operates as a policing mechanism to prevent behavior by the buyer that might mislead the seller to believe that the buyer did not consider him to be in breach. See *infra* section II.A.

<sup>54</sup> 532 F.2d 957 (5th Cir. 1976).

<sup>55</sup> Prior to *Eastern Air Lines*, some courts applied the strict standard. See, e.g., *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 18, 327 A.2d 502, 514 (1974) (notice saying "'cash flow has been severely interrupted in the last 60 days, due in part to a quality problem'" was "equivocal" and constituted insufficient notice).

ern's behavior subsequent to the notification, however, indicated its willingness to accept late deliveries.<sup>56</sup> The district court, relying in part on *Jay V. Zimmerman Co. v. General Mills, Inc.*,<sup>57</sup> held that section 2-607(3)(a) did not apply to late delivery cases.<sup>58</sup> The Fifth Circuit reversed, reasoning that "[t]he purpose of the notice is to advise the seller that he must meet a claim for damages."<sup>59</sup> This broad view of the notification requirement's purpose caused the court to conclude that a buyer must notify the seller of breach even in late delivery cases.<sup>60</sup>

Turning to the issue of whether Eastern gave Douglas adequate notification of breach, the *Eastern Air Lines* court held that section 2-607(3)(a) requires the notification to inform the seller "that the transaction is claimed to involve a breach."<sup>61</sup> The court decided that Eastern could not prevail on its motion for summary judgment because it could not prove as a matter of law that it had given Douglas such notification. The court reasoned that by indicating its willingness to accept late deliveries, Eastern may have led Douglas to

<sup>56</sup> Eastern's communications to Douglas could "reasonably be construed as an effort to prod McDonnell Douglas . . . rather than as a claim for breach." *Eastern Air Lines*, 532 F.2d at 978. Additionally, the *Eastern Air Lines* court noted that

Eastern's commercial good faith is subject to further challenge because it continued to negotiate new contracts and amend old ones throughout the period in which the delays occurred. . . . At no time during the negotiation and execution of any of these contracts did Eastern seek a settlement of its claims or even dispute McDonnell's Vietnam excuse. This may very well have led McDonnell to believe that, even though Eastern was unhappy about the delays, it did not consider them to be a breach of the contract.

*Id.* at 979 (footnote omitted). Furthermore, some testimony indicated that Eastern's management had assured Douglas that Eastern would not hold Douglas in breach. *Id.*

<sup>57</sup> 327 F. Supp. 1198, 1204 (E.D. Mo. 1971); see *supra* notes 45-49 and accompanying text.

<sup>58</sup> *Eastern Air Lines*, 532 F.2d at 970-71.

<sup>59</sup> *Id.* at 972 (quoting *American Mfg. Co. v. United States Shipping Bd. E.F. Corp.*, 7 F.2d 565, 566 (2d Cir. 1925) (Hand, J.)).

<sup>60</sup> *Id.* at 971-73. In reaching this conclusion, the court relied in part on the decisional history under § 49 of the Uniform Sales Act. See *supra* notes 24-29 and accompanying text. Saying that "section 2-607 continues the basic policies underlying section 49 of the Uniform Sales Act," 532 F.2d at 972 (footnote omitted), the court rejected the *Jay V. Zimmerman* court's analysis by quoting Justice Learned Hand's interpretation of § 49 in a late delivery case:

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 buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

532 F.2d at 972 (quoting *American Mfg. Co. v. United States Shipping Bd. E.F. Corp.*, 7 F.2d 565, 566 (2d Cir. 1925) (Hand, J.)).

<sup>61</sup> *Eastern Air Lines*, 532 F.2d at 978 (footnote omitted).

believe that it did not intend to take legal action because of the late deliveries.<sup>62</sup> The *Eastern Air Lines* court remanded the case with instructions that a jury determine "whether Eastern's conduct throughout the life of the contracts constituted adequate and timely notice to McDonnell [Douglas] that it was considered to be in breach of the contracts."<sup>63</sup>

The Sixth Circuit, in *Standard Alliance Industries v. Black Clawson Co.*,<sup>64</sup> endorsed the *Eastern Air Lines* view in a case involving a breach of a warranty of quality.<sup>65</sup> In *Standard Alliance*, the seller sold a

<sup>62</sup> *Id.* at 979. The *Eastern Air Lines* court may have been motivated to reject the lenient standard and to adopt the strict standard out of a belief that the lenient standard would be ineffective in preventing misleading behavior. See generally *id.* at 977-80 (discussing Eastern's possibly misleading behavior). Cases citing *Eastern Air Lines* have, however, interpreted it doctrinally, applying the strict standard to any case. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152-53 (6th Cir. 1983); *K&M Joint Venture v. Smith Int'l Inc.*, 669 F.2d 1106, 1112-13 (6th Cir. 1982); *T.J. Stevenson v. 81,193 Bags of Flour*, 629 F.2d 338, 360 (5th Cir. 1980).

<sup>63</sup> *Eastern Air Lines*, 532 F.2d at 980. As this result demonstrates, a court using the strict standard evaluates whether a buyer has given adequate notification by examining the buyer's actions when "taken as a whole." It is therefore possible that "[e]ven though adequate notice may have been given at one point in the transaction, subsequent actions by the buyer may have dissipated its effect." *Id.* at 978; see also *K&M Joint Venture*, 669 F.2d at 1114-15 (fact that machine buyer continued ordering repair and replacement parts for machine from seller and paid for them without protest prevented complaints that machine malfunctioned from constituting notification of breach); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 97 (E.D. Tenn. 1977) (buyer's "entire course of conduct led [seller] to believe that it was not considered to be in breach"). As with the lenient standard, notification may be either written or oral. See *T.J. Stevenson & Co.*, 629 F.2d at 359.

In *Roth Steel Prods.*, a more recent late delivery case, the court reaffirmed the application of the strict standard. The court reasoned that "non-conforming" performance is often equivocal. 705 F.2d at 152 (also stating that § 2-607(3)(a) plainly requires notification of any breach by its express terms). One commentator explains:

Notice is required where the breach is delay of the time of performance by the seller. It might be urged that the seller needs no notice in the case of delivery delayed beyond a date expressly fixed in the contract, for he must be aware that he is violating the provisions of the contract, but though he knows this, he does not know whether the buyer is willing to accept deferred delivery as full satisfaction, and in any event, the words of the statute are plain.

2 R. ANDERSON, *supra* note 43 § 2-607:13, at 211 (footnote omitted).

<sup>64</sup> 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

<sup>65</sup> The strict standard may now be the majority view in both breach of warranty of quality and late delivery cases. *T.J. Stevenson*, 629 F.2d at 360; see, e.g., *K&M Joint Venture*, 669 F.2d at 1106 (notification insufficient when machine buyer continued ordering and paying for repair and replacement parts for machine without protest); *Southern Ill. Stone Co. v. Universal Eng'g Corp.*, 592 F.2d 446, 451-52 (8th Cir. 1979) (concluding that Illinois has adopted the *Eastern Air Lines* standard); *Atlantic Bldg. Syss., Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420 (D. Mass. 1981) (letter requesting credit for missing parts inadequate to notify seller of breach); *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 5833, 589-90 (N.D. Ga. 1977) (two telephone conversations discussing "unusual erosions of certain pieces of pipe" inadequate notification); *Kopper Glo Fuel, Inc.*, 436 F. Supp. at 97 (buyer's "entire course of conduct led [seller] to believe that it was not considered to be in breach"); *Cotner v. International Harvester*

machine for the manufacture of railcar axles. The machine was poorly engineered and continually malfunctioned. The seller repeatedly tried to repair the machine and eventually thought that the buyer was satisfied with the repairs. The buyer then brought suit, alleging a breach of the seller's warranty of the machine. The Sixth Circuit held that section 2-607(3)(a) barred the buyer's claim. The court found that the buyer did not notify the seller that the repairs were ineffective or that the buyer considered the seller to be in breach. The court, citing the language of section 2-607(3)(a), held that the buyer must give the seller notification of "any" breach.<sup>66</sup>

In summary, courts adopting the strict standard require, at a minimum, that the buyer notify the seller, either directly or inferentially, that he considers the seller to be in breach. Courts adopting the lenient standard merely require the buyer to notify the seller that the transaction is troublesome.

#### D. The Differences in Effect of the Lenient Standard and the Strict Standard When Applied to the Facts of Similar Cases

Several courts have decided cases with similar fact patterns but have reached different conclusions because they applied different standards of notification. An examination of these cases illustrates the practical implications of the standard of notice debate.

##### 1. *Late Delivery Cases*

Courts disagree as to whether a buyer must give the seller notification of breach when the seller fails to deliver goods in a timely manner. Courts applying the lenient standard do not require the buyer to give notification of breach in late delivery cases.<sup>67</sup> These courts reason that the purpose of the notification requirement is to inform the seller of the "troublesome" nature of the transaction when he would not otherwise know of the problems.<sup>68</sup> A reasonable seller who fails to make deliveries in a timely manner should realize

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Co., 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977) (buyer's oral complaints to truck salesmen and repairmen inadequate); *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 18, 327 A.2d 502, 514 (1974) (notice saying "cash flow has been severely interrupted in the last 60 days, due in part to a quality problem" was "equivocal" and constituted insufficient notification); *Michigan Sugar Co. v. Jebavy-Sorenson Orchard Co.*, 66 Mich. App. 642, 647, 239 N.W.2d 693, 696 (1976) (notification from buyer to seller that 68 bags of sugar were defective insufficient to notify seller that other bags in shipment were defective). *But cf.* Clark, *supra* note 2, at 123 (*Eastern Air Lines* "seems to run counter to the great tide of cases holding that general statements of dissatisfaction are sufficient.").

<sup>66</sup> *Standard Alliance Indus.*, 587 F.2d at 825.

<sup>67</sup> *See supra* notes 44-48 and accompanying text.

<sup>68</sup> *E.g.*, *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198, 1204 (E.D. Mo. 1971).

that the transaction is troublesome without notification.<sup>69</sup> Therefore, these courts do not require the buyer to notify the seller of the later delivery.

Courts using the strict standard, however, require the buyer to notify the seller of breach in late delivery cases.<sup>70</sup> They reason that the purpose of the notification requirement "is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that [the seller] shall have early warning."<sup>71</sup> Although the seller does not need notification to realize that the transaction is troublesome, he does not know that the buyer intends to seek legal redress unless the buyer so notifies him. Thus, the buyer must specifically inform the seller of his intent to seek damages.

## 2. *Continuing Use Cases*

A court's choice of notification standard also affects the result in cases where the buyer continued to use the goods after informing the seller of his dissatisfaction with the transaction. In *Lewis v. Mobil Oil Corp.*,<sup>72</sup> Lewis purchased oil from a local Mobil dealer for use in his hydraulic equipment after the dealer warranted that the oil was fit for plaintiff's machine. The machine broke down several times, leading Lewis to ask the dealer whether the oil was appropriate for his machine. Lewis continued to purchase the same type of oil for several months. The Eighth Circuit found that the buyer's complaints were sufficient under the lenient standard to notify the dealer that the transaction was troublesome and held Mobil liable for damages.<sup>73</sup>

In *K&M Joint Venture v. Smith International, Inc.*,<sup>74</sup> the Sixth Circuit absolved the seller from liability under facts similar to those in *Mobil Oil*. In *K&M Joint Venture*, K&M bought a tunnel boring machine from Calweld. After K&M used the machine for a short time, it began to malfunction. K&M complained about the

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<sup>69</sup> See *id.*

<sup>70</sup> See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (6th Cir. 1983); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 971-73 (5th Cir. 1976); *supra* notes 59-60 and accompanying text.

<sup>71</sup> *Eastern Air Lines*, 532 F.2d at 972 (quoting *American Mfg. Co. v. United States Shipping Bd. E.F. Corp.*, 7 F.2d 565, 566 (2d Cir. 1925)); see *Roth Steel Prods.*, 705 F.2d at 152 (seller must have notice of breach to give him opportunity to cure defect or minimize damages).

Courts employing the strict standard also reason that the statute requires notification in late delivery cases by using the term "any breach." See, e.g., *Roth Steel Prods.*, 705 F.2d at 152 (statute requires by express terms).

<sup>72</sup> 438 F.2d 500 (8th Cir. 1971).

<sup>73</sup> *Id.* at 509.

<sup>74</sup> 669 F.2d 1106 (6th Cir. 1982).

machine's "troubles," but continued to order repair and replacement parts from Calweld. The Sixth Circuit held that K&M's complaints did not meet section 2-607(3)(a)'s notification requirement.<sup>75</sup> The court reasoned that K&M failed to give Calweld unequivocal notice of its intent to seek legal redress for the machine's difficulties by continuing to order and pay for parts without protest.<sup>76</sup> Although K&M's communications to Calweld were sufficient to notify Calweld that the transaction was troublesome, they did not meet the strict standard's additional requirement that the buyer inform the seller of his intent to hold the buyer liable for breach.

### 3. Single Complaint Cases

Courts applying different standards have also reached varying results when evaluating the adequacy of single complaints. In *Chemco Industrial Applicators v. E.I. duPont de Nemours and Co.*,<sup>77</sup> Chemco purchased herbicide from duPont that failed to achieve the warranted kill rate. Chemco then complained that "the vegetation was beginning to bud again."<sup>78</sup> The court, relying on decisions applying the lenient standard,<sup>79</sup> found that Chemco had given duPont adequate notification of breach because its complaint informed duPont that the transaction was "troublesome."<sup>80</sup> Thus, Chemco was entitled to consequential damages.<sup>81</sup>

In *Lynx, Inc. v. Ordnance Products, Inc.*,<sup>82</sup> however, the Maryland Supreme Court found that a similar communication was not sufficient notification. In *Lynx*, Lynx contracted to purchase hand grenade fuses from O.P.I. When the fuses did not meet specifications, Lynx sent O.P.I. a letter stating that its "'cash flow has been severely interrupted in the last 60 days, due in part to a quality problem at O.P.I.'"<sup>83</sup> Because the complaint did not refer to a specific group of fuses and failed to assert that O.P.I. had breached the warranty, the court found it was "equivocal" and, therefore, inadequate notification.<sup>84</sup> Thus, the court required more detailed notification

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<sup>75</sup> *Id.* at 1115-16.

<sup>76</sup> *Id.* at 1114-16.

<sup>77</sup> 366 F. Supp. 278 (E.D. Mo. 1973).

<sup>78</sup> *Id.* at 286.

<sup>79</sup> *Id.* (citing *Lewis v. Mobil Oil Co.*, 438 F.2d 500 (8th Cir. 1971); *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964); *Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F. Supp. 1198 (E.D. Mo. 1971)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 273 Md. 1, 327 A.2d 502 (1974).

<sup>83</sup> *Id.* at 18, 327 A.2d at 514 (quoting letter dated Mar. 5, 1973, from Lynx to O.P.I.).

<sup>84</sup> *Id.*



than a lenient standard court, imposing a duty on the seller to specify the aspects of the transaction claimed to involve violations of legal rights.

#### 4. Summary

These examples demonstrate that a court's choice of notification standard will affect the result in some cases.<sup>85</sup> This potential inconsistency undermines the Code's general policy of encouraging uniformity of commercial law.<sup>86</sup> To attempt to resolve the standard of notification debate, this Note will evaluate the two standards of notification against the policies which they are meant to serve.

## II

### A POLICY EVALUATION OF THE TWO STANDARDS

Section 2-607(3)(a) embodies a broad fairness notion that requires the buyer to warn the seller when he considers the seller to have breached the agreement rather than permitting him to surprise the seller with a lawsuit.<sup>87</sup> Five specific goals underlie this broad policy.

First, section 2-607(3)(a) should encourage good faith in commercial transactions. The official comment to section 2-607 states that "the rule of requiring notification is designed to defeat commercial bad faith."<sup>88</sup> Several courts have found that this goal lies at the core of section 2-607(3)(a)'s notification requirement.<sup>89</sup>

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<sup>85</sup> Although the lenient standard requires only that the buyer notify the seller that the transaction is troublesome, the strict standard imposes the additional requirement that the buyer indicate his belief that the transaction involves a violation of legal rights. Thus, a notification that would satisfy a strict standard court would automatically meet the requirements of one using the lenient standard. See *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277 n.4 (D. Del. 1984) (buyer's notification satisfied both standards).

<sup>86</sup> See U.C.C. § 2-607(3)(a) (1977).

<sup>87</sup> See 3 W. HAWKLAND, *supra* note 3, § 2-607:04, at 60-61.

<sup>88</sup> U.C.C. § 2-607 official comment 4 (1977).

<sup>89</sup> See *K & M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106, 1114 (6th Cir. 1982) ("The underpinning of UCC § 2-607 is a requirement of commercial good faith which is met by a prompt notice that the buyer is claiming a breach has occurred."); *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 361 (5th Cir. 1980) (notification requirement encourages "conduct within the bounds of commercial good faith"); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 828 (6th Cir. 1978) (commercial good faith mandates strict standard), *cert denied*, 441 U.S. 923 (1979); *United Cal. Bank v. Eastern Mountain Sports*, 546 F. Supp. 945, 958-59 (D. Mass. 1982) (§ 2-607(3)(a) intended to promote commercial good faith); *Atlantic Bldg. Sys., Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420 (D. Mass. 1981) (meant to "promote good faith in commercial relations"); *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583, 589 (N.D. Ga. 1977) (court must evaluate question of notification under standard of good faith); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 96 (E.D. Tenn. 1977) (court must evaluate parties' course of conduct under standard of good faith).

Section 2-607(3)(a)'s notification requirement should also encourage potential litigants to settle their disputes through negotiation without resort to litigation. The Official Comment to section 2-607 states that the buyer's notification should "open . . . the way for normal settlement through negotiation."<sup>90</sup> A related goal of section 2-607(3)(a) notification is that it should give the seller an opportunity to cure the nonconforming tender, thus eliminating the need for a lawsuit.<sup>91</sup>

Two of the notification requirement's underlying goals are related to litigation. The notification should give the seller an opportunity to prepare for litigation by investigating the buyer's claim.<sup>92</sup> It should also give the seller repose from the possibility of litigation. He should be able to assume that the buyer will not hold him liable for breach absent notification.<sup>93</sup>

The present debate<sup>94</sup> focuses on the question of which standard

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<sup>90</sup> U.C.C. § 2-607 official comment 4 (1977). Courts frequently cite this policy as supporting § 2-607(3)(a)'s notification requirement. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (6th Cir. 1983); see also *T.J. Stevenson & Co.*, 629 F.2d at 360 (notification "must" encourage settlement); *Standard Alliance Indus.*, 587 F.2d at 826 ("express notice opens the way for settlement through negotiation between the parties"); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 972 (5th Cir. 1976) (express notice stimulates settlement); *United Cal. Bank*, 546 F. Supp. at 958-59 (meant to promote settlement); *Atlantic Bldg. Syss., Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420 (D. Mass. 1981) (meant to encourage "compromise"); *Cotner v. International Harvester Co.*, 260 Ark. 885, 889, 545 S.W.2d 627, 630 (1977) ("[n]otice need only be sufficient . . . to open the way for negotiation of a normal settlement").

<sup>91</sup> See *Roth Steel Prods.*, 705 F.2d at 152; see also *Standard Alliance Indus.*, 587 F.2d at 826 ("proper notice minimizes the possibility of prejudice to the seller by giving him ample opportunity to cure the defect"); *Cotner*, 260 Ark. at 889, 545 S.W.2d at 630 (purpose to give opportunity to repair); *Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516, 518 (Colo. Ct. App. 1981) (provides opportunity to cure); *Paulson v. Olson Implement Co.*, 107 Wis. 2d 510, 525-26, 319 N.W.2d 855, 862 (1982) (opportunity to repair "principle reason for requiring notice"); *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 468, 438 S.W.2d 717, 720 (1969) (gives opportunity to cure). 4 R. ANDERSON, *supra* note 3, § 2-607:4, at 120 (opportunity to cure); J. WHITE & R. SUMMERS, *supra* note 5, § 11-10, at 421-22.

<sup>92</sup> See *Standard Alliance Indus.*, 587 F.2d at 826; see also *Roth Steel Prods.*, 705 F.2d at 152 (minimizes prejudice); *Eastern Air Lines*, 532 F.2d at 972 (allows "seller to investigate the claim while the facts are fresh").

<sup>93</sup> See *Cotner*, 260 Ark. at 889, 545 S.W.2d at 630 (some immunity against stale claims); *L.A. Green Seed Co.*, 246 Ark. at 468, 438 S.W.2d at 720 (same); *Voboril v. Namco Leisure World, Inc.*, 24 U.C.C. Rep. Serv. (Callaghan) 614, 615 (Conn. Super. Ct. 1978); 4 R. ANDERSON, *supra* note 3, § 2-607:4, at 120; 3 W. HAWKLAND, *supra* note 3, § 2-607:04, at 6I; J. WHITE & R. SUMMERS, *supra* note 5, § 11-10, at 422.

<sup>94</sup> The commentators mirror the split among the courts between the strict and the lenient standards. For example, Professors White and Summers advocate the lenient standard but virtually ignore the cases where courts have employed the strict standard. See J. WHITE & R. SUMMERS, *supra* note 5, § 11-10. Professor Clark also supports the lenient standard but fails to provide any strong rationale for doing so. See Clark, *supra* note 2, at 105-24. Clark's conclusions may be explained by his failure to isolate those decisions applying § 2-607(3)(a) to transactions between merchants from those involv-

better fulfills these goals. This Note will attempt to answer this question by evaluating each of the standards against the five goals.

### A. Good Faith

Although there is currently an extensive debate as to the proper theoretical conceptualization of "good faith,"<sup>95</sup> there appears to be a consensus that any definition must be context-specific. Actions by parties that a court might label good or bad faith vary according to the situation.<sup>96</sup> This Note, therefore, develops a definition of good faith in the context of section 2-607(3)(a)'s notification requirement by examining the requirement in light of the Code's good faith provisions and the case law.

The Code establishes two interrelated good faith requirements for merchants, one subjective and one objective.<sup>97</sup> Section 1-201(19) defines good faith as "honesty in fact in the conduct or transaction concerned."<sup>98</sup> This section in conjunction with section 1-203, which states that "[e]very contract or duty within this Act imposes an obligation of good faith in its . . . enforcement,"<sup>99</sup> creates a subjective standard<sup>100</sup> that applies to all parties to a contract. If a

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ing consumers. The cases applying the strict standard have uniformly stated that it applies only between commercial parties. *See supra* note 2; *see also infra* note 110 and accompanying text (arguing that higher standard of good faith applies to merchants).

On the other hand, Ronald Anderson has noted the benefits of the strict standard. He has not recognized, however, that the lenient standard may prove more advantageous than the strict under some circumstances. *See* 4 R. ANDERSON, *supra* note 3, § 2-607:43, at 147.

<sup>95</sup> The articles dealing with the general obligation of good faith include: Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) [hereinafter cited as Burton, *Breach of Contract*]; Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981) [hereinafter cited as Burton, *Good Faith Performance*]; Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619; Summers, "Good Faith" in *General Contract Law and the Sale Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) [hereinafter cited as Summers, "Good Faith"]; Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) [hereinafter cited as Summers, *General Duty*].

<sup>96</sup> Professor Summers, for example, argues that it is impossible to formulate a definition of good faith divorced from the context in which it is to be applied. *See* Summers, "Good Faith," *supra* note 95, at 195-267; Summers, *General Duty*, *supra* note 95, at 820. Other commentators propose theories less dependent upon context than that advanced by Professor Summers, but all would probably agree with Professor Farnsworth that concepts of good faith are only slightly less varied than concepts of religious faith. Farnsworth, *supra* note 95, at 667-68.

<sup>97</sup> *See* 1 W. HAWKLAND, *supra* note 3, § 1-203:01, at 155-56 (§ 1-201(1)(a) creates subjective standard whereas § 2-103 creates objective standard).

<sup>98</sup> U.C.C. § 1-201(19) (1977). The official comment to this section does not define the term "honesty." *See generally* U.C.C. § 1-201 official comment (1977).

<sup>99</sup> U.C.C. § 1-203 (1977).

<sup>100</sup> J. WHITE & R. SUMMERS, *supra* note 5, § 6-3, at 218.

party did not knowingly behave dishonestly, then he has not acted in bad faith.<sup>101</sup> The Code establishes the objective standard of good faith for merchants in section 2-103, which states that “[g]ood faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”<sup>102</sup> Thus, merchants must act with both subjective and objective good faith.<sup>103</sup>

A definitional problem arises in delineating the objective and subjective standards of good faith because the Code does not define “honesty” or “reasonable commercial standards of fair dealing in the trade.” In the absence of clear definitions, one can hypothesize an almost infinite variety of forms of questionable behavior that the drafters may have intended to prevent.<sup>104</sup> Thus, courts must impose a theoretical framework upon the two concepts if they are to have meaning within the specific context of section 2-607(3)(a).

Professor Robert Summers has developed one possible framework.<sup>105</sup> In his view, we can best conceptualize good faith requirements as “excluders.”<sup>106</sup> He suggests that by categorizing the types of behavior that courts have excluded as bad faith in a particular context, we can derive a functional definition of good faith for that context.<sup>107</sup> Thus, a functional definition of good faith in the context

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<sup>101</sup> Farnsworth, *supra* note 95, at 668.

<sup>102</sup> U.C.C. § 2-103(1)(b) (1977). The official comment to this section provides no guidance as to how this term is to be interpreted. See generally U.C.C. § 2-103 official comment (1977).

<sup>103</sup> Farnsworth, *supra* note 95, at 75-78; see also 1 W. HAWKLAND, *supra* note 3, § 1-203:01, at 155-56.

<sup>104</sup> One commentator has suggested that the Code’s drafters may have used the word “honesty” to prevent only actual deceit or “to encourage commercial actors to behave in the most reasonable manner under the circumstances, considering the interests of other parties.” Gillette, *supra* note 95, at 622. The Code drafters themselves disagreed as to the definition of “honesty.” *Id.* at 625.

<sup>105</sup> See generally Summers, *General Duty*, *supra* note 95, at 810-35.

<sup>106</sup> Summers, “*Good Faith*,” *supra* note 95, at 195-267. Professor Summers’s theory has been criticized on the ground that it allows virtually any type of behavior to be classified as “bad faith.” See Burton, *Breach of Contract*, *supra* note 95, at 369-70 (“[t]he good faith performance doctrine consequently appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable or inconsistent applications”) (footnotes omitted); Gillette, *supra* note 95, at 643; cf. Burton, *Good Faith Performance*, *supra* note 95, at 21 n.136. Professor Summers has responded to these critiques by arguing that overextension cannot occur if a court using excluder analysis reasons by analogy and in terms of the rationales presented by earlier cases when it determines whether certain behavior indicates bad faith. Summers, *General Duty*, *supra* note 95, at 823-34.

Whether or not Summers’s model should be the means by which a court chooses to define good faith, it provides a workable method for determining what courts actually define good faith to be. By looking at the types of behavior courts exclude in the name of good faith, one can determine what courts consider good faith to be in that context.

<sup>107</sup> Summers, “*Good Faith*,” *supra* note 95, at 220; see also Summers, *General Duty*, *supra* note 95, at 822. Professor Summers would not limit the definition of good faith to

of section 2-607(3)(a) can be derived by identifying the types of behavior that have already been excluded.

Courts applying the good faith requirement to evaluate the adequacy of notification usually note that the Code requires commercial actors to behave in accordance with a subjective standard of good faith,<sup>108</sup> but they evaluate the notification only against the objective standard of good faith. They generally do not need to use the subjective standard because section 2-607(3)(a) cases seldom involve actual dishonesty.<sup>109</sup> Consequently, courts cite the objective standard as the principal basis for holding merchants to a stricter standard of notice than consumers.<sup>110</sup>

To fulfill the objective good faith requirement in the context of section 2-607(3)(a),<sup>111</sup> the buyer must not act in a manner which leads the seller to believe that the contract has been properly performed when the buyer actually intends to institute a lawsuit. In *Eastern Air Lines v. McDonnell Douglas Corp.*,<sup>112</sup> the court of appeals remanded with instructions for the jury to resolve the liability issue by determining whether Eastern's behavior, in the context of business practices in the aviation industry, may have led the seller, Douglas, to believe no contract dispute existed when, in fact, one did.<sup>113</sup> Even though the notice of breach might irreparably damage

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"honesty in fact" or "reasonable commercial standards of fair dealing in the trade." See generally Summers, "Good Faith," *supra* note 95, at 195-267; Summers, *General Duty*, *supra* note 95, at 810-35.

<sup>108</sup> See *infra* note 110; see also U.C.C. §§ 1-203, 1-201(19) (1977).

<sup>109</sup> Another reason courts may not use the subjective standard is that the objective standard imposes a higher duty of good faith than the subjective standard. Thus, once a court has determined that a merchant has met or failed to meet the objective standard, it has resolved the good faith issue and need not move on to consider the subjective standard.

<sup>110</sup> See *K & M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106, 1115-16 (6th Cir. 1982); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 827 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 977 (5th Cir. 1976); *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91, 96 (E.D. Tenn. 1977).

<sup>111</sup> See, e.g., *K & M Joint Venture*, 669 F.2d at 1114 (order of and payment for repair and replacement parts "is inconsistent with the claim that K & M considered Calweld liable); *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583, 588-90 (N.D. Ga. 1977) (failure of buyer to provide notification in order to protect business relationship misled seller); *Kopper Glo Fuel, Inc.*, 436 F. Supp. at 97 (favorable buyer reports misled seller even though buyer complained on two occasions); cf. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 364 (5th Cir. 1980) (buyer behaved in good faith by promptly giving notice of breach and discontinuing business relationship); *Donnell & Mudge, Inc. v. Bonita Leather Fashions, Inc.*, 8 U.C.C. Rep. Serv. (Callaghan) 699, 700-01 (N.Y. App. Div. 1971) ("[buyer's] undeviating course of conduct in continuing . . . to make payment after payment, unconditionally, cannot be construed as anything other than 'a waiver and estoppel to make the claims with respect to the alleged defects'") (citation omitted).

<sup>112</sup> 532 F.2d 957 (5th Cir. 1976).

<sup>113</sup> See *supra* notes 54-63 and accompanying text.

an ongoing and essential business relationship, the court refused to relax the application of the good faith requirement to tolerate misleading behavior.<sup>114</sup>

Other courts cite the good faith requirement to support their application of the strict standard, but they have not used it to characterize a specific type of behavior as indicative of bad faith. Instead, these courts have used the objective standard of good faith as a rationale for imposing a higher standard of notification on merchants than on consumers.<sup>115</sup> Thus, the objective good faith requirement in the context of section 2-607(3)(a) means the absence of activities by the buyer that mislead the seller regarding the buyer's intention to institute a lawsuit.<sup>116</sup>

Given this contextual definition of good faith, it is necessary to determine which standard better prevents misleading behavior. Certainly the strict standard prevents misleading behavior by forcing the buyer to clearly and unambiguously inform the seller that the buyer believes there has been a breach of contract. Moreover, most courts applying the strict standard further protect against misleading behavior by examining the entire course of communications between the parties.<sup>117</sup>

In contrast, notification that the transaction is "troublesome" does not clearly convey the existence of a breach. Courts using the lenient standard also do not stress the need to examine the entire course of communications between the parties, but base their decisions on individual complaints considered in isolation from other communications between buyer and seller. Many of these courts find virtually any individual complaint adequate to constitute notification under section 2-607(3)(a).<sup>118</sup> Thus, to the extent that lenient standard courts limit their scrutiny of the transaction and do not require the buyer to clearly convey the existence of a breach, the strict standard is a superior method for preventing misleading behavior. A closer examination suggests, however, that the strict standard is not necessarily superior to the lenient standard in preventing misleading behavior. A court applying the lenient stan-

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<sup>114</sup> *Eastern Air Lines*, 532 F.2d at 979 n.62 (5th Cir. 1976). Other courts have agreed with this view. See, e.g., *Clow Corp.*, 442 F. Supp. at 589-90 (requiring notification even though failure to give notification was a necessary business decision).

<sup>115</sup> See, e.g., *Standard Alliance Indus.*, 587 F.2d at 828 (stating that good faith mandates strict standard and places greater burden of notification on merchants than on consumers); *Atlantic Bldg. Sys., Inc. v. Alley Constr. Corp.*, 32 U.C.C. Rep. Serv. (Callaghan) 1414, 1420 (D. Mass. 1981) (same).

<sup>116</sup> Although courts currently only characterize misleading behavior as indicative of bad faith in the context of § 2-607(3)(a), the good faith concept is flexible and the scope of its application may expand in the future.

<sup>117</sup> See *supra* notes 50-66 and accompanying text.

<sup>118</sup> See *supra* notes 33-39 and accompanying text.

dard could use the good faith requirement as a policing doctrine. After determining that a particular communication informed the seller that the transaction was troublesome, the court could undertake an independent examination of the entire course of communications between the parties to determine whether the buyer had misled the seller. Thus, courts using the lenient standard could prevent misleading behavior as well as courts using the strict standard.

## B. Settlement

Although the theory of legal bargaining is primitive at present,<sup>119</sup> it does support the conclusion that neither standard of notification is superior in encouraging settlement. In a bargaining situation, a threat that constitutes adequate notification under the strict standard<sup>120</sup> (e.g., "I consider you to be in breach.") may be conducive to settlement,<sup>121</sup> but it may result in increased levels of conflict by causing the other party to take a similarly inflexible position.<sup>122</sup> A more flexible complaint that would only comply with the lenient standard of notification (e.g., "Hey, there's some trouble with this transaction.") might create a cooperative atmosphere in which the parties resolve the difficulty to their mutual benefit.<sup>123</sup> If

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119 As one analyst has noted, "[a]lthough negotiation has been studied extensively by game theorists, economists and social psychologists, legal scholars have not examined the process of bargaining." Lowenthal, *A General Theory of Negotiation, Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 70 (1982) (footnotes omitted).

120 According to Professor Lowenthal, "[a] threat is a communication from one party to a second indicating that, if the second party does not settle according to terms acceptable to the first party, the first party will take action unpleasant or detrimental to the second party." *Id.* at 86. An explicit claim that another party has breached a contract, with its implied threat of litigation, meets this definition.

121 A highly credible threat, for example, increases the chances of settlement. *See id.* at 86-88.

122 *See* Deutsch, *Conflicts: Productive and Destructive*, in CONTEMPORARY SOCIAL PSYCHOLOGY 159, 164 (D.W. Johnson ed. 1973) ("Threat induces defensiveness and reduces the tolerance of ambiguity as well as openness to the new and unfamiliar; excessive tension leads to a primitivization and stereotyping of thought processes."); *see also* Lowenthal, *supra* note 119, at 88 ("[T]he use of threat[s] strengthens the competitive interests of the party being threatened, and thus, increases the risk of retaliation, rigidity, and costly escalation.") (footnotes omitted); *cf.* Hamner, *Effects of Bargaining Strategy and Pressure to Reach Agreement in a Stalemated Negotiation*, 30 J. PERSONALITY & SOC. PSYCHOLOGY 458, 464 (1974) ("These results suggest that . . . a tough strategy reduces the probability of reaching an agreement . . ."). Intuitively, one would expect threats of litigation to result in hostile reactions.

123 *See* Lowenthal, *supra* note 119, at 88-89; *see also* Deutsch, *supra* note 122, at 166 (process of negotiation factor in determining outcome); *cf.* Hamner, *supra* note 134, at 465 ("subjects who faced a soft-strategy opponent responded with a higher concession rate").

In general, a cooperative bargaining process stimulates settlement better than a competitive process because it encourages open and honest communications between the parties, aids in the "recognition of the legitimacy" of the other party's position, and creates a friendly atmosphere between the parties. Deutsch, *supra* note 122, at 165.

the buyer makes the complaint too flexible by omitting information sufficient to communicate his dissatisfaction and readiness to litigate, it may still satisfy the lenient standard, without giving the seller incentive to settle.<sup>124</sup> Therefore, neither standard is always better at promoting settlement.<sup>125</sup>

### C. Opportunity to Repair

Neither standard is clearly superior in providing the seller with an opportunity to repair. Notification that is sufficient under either standard informs the seller of the need for repair. But the strict standard makes the imminence of a breach of contract suit manifest and thereby provides the seller with an incentive to cure the problem. Thus, the strict standard may be superior.

### D. Opportunity to Prepare for Litigation

The strict standard gives the seller a greater opportunity to prepare for litigation than the lenient standard. A mere claim that the transaction is troublesome is equivocal<sup>126</sup> and does not necessarily inform the seller of a *need* to prepare for litigation. Notification from the buyer that he considers the seller legally to be in breach clearly provides the seller with notice of the necessity for prelitigation preparation.

### E. Repose from the Possibility of Litigation

The strict standard of notification better serves the goal of giving the seller repose from the possibility of litigation than the lenient standard. Under the strict standard, the seller knows that he does not face a legal claim unless the buyer specifically notifies him

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<sup>124</sup> Conflict can have the beneficial effect of stimulating parties to attempt settlement only if the communication from the dissatisfied party makes the satisfied party sufficiently aware of the difficulties in the relationship to cause him to reevaluate his position. See Deutsch, *supra* note 122, at 163. Thus, if a buyer fails to give the seller any indication of serious difficulty in the transaction, the seller will have no reason to reevaluate his position and the notice will not encourage settlement.

<sup>125</sup> Ideally, notification must inform the buyer of a problem, but should not be so severe as to deter negotiations. The superiority of either the collaborative or competitive bargaining model at achieving settlement depends upon numerous factors such as the flow of information between the parties, the mode of communication, the payoff structure of the negotiation (e.g., zero-sum or nonzero-sum), the size of the negotiation agenda, the normative aspects of the negotiation, the continuing relationship of the parties apart from the negotiation, and the personality and values of the negotiators. See Lowenthal, *supra* note 119, at 69-114; see also Deutsch, *supra* note 122, at 166-67 (factors determining success or failure of a bargaining strategy: (1) process, (2) prior relationship of parties, (3) characteristics of parties, and (4) role of third parties); Hamner, *supra* note 122, at 464 (chance of settlement increased with increased extrinsic pressure for each settlement).

<sup>126</sup> See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 152 (6th Cir. 1983).



of the asserted contract breach. Because of the equivocal nature of a mere claim that the transaction is troublesome, the lenient standard fails to provide the seller similar repose from the possibility of litigation.

### III

#### A PROCESS FOR ANALYZING THE ADEQUACY OF NOTIFICATION UNDER SECTION 2-607(3)(A)

##### A. Theoretical Development

A method for analyzing the adequacy of notification under section 2-607(3)(a) is necessary for two reasons. First, neither standard is consistently superior in promoting the goals of section 2-607(3)(a).<sup>127</sup> Second, because section 2-607(3)(a) does not require the buyer to notify the seller by a single act, a court must have some method to analyze several disparate acts of communication.<sup>128</sup>

The analysis for determining the adequacy of a buyer's notification should reflect the goals of section 2-607(3)(a)'s notification requirement. A mechanical application of either the strict or the lenient standard would not, however, be the best method of attaining these goals. Rather, courts should evaluate the parties' conduct against each of the goals of notification to determine the extent to which they have been met.<sup>129</sup> At times the results of these evaluations will be inconsistent. For example, an explicit notification of breach might be necessary to give the seller an opportunity to repair but a guarded notification may be more helpful in facilitating a settlement.<sup>130</sup> Courts will have to make value judgments between goals in these cases.

In resolving conflicts between the policies, the goal of encouraging good faith merits top priority because the Code expressly imposes this obligation.<sup>131</sup> The goal of encouraging settlement ranks

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<sup>127</sup> See *supra* section II.

<sup>128</sup> T.J. Stevenson & Co. v. 81,193 Bags of Flour, 629 F.2d 338, 359 (5th Cir. 1980).

<sup>129</sup> Several commentators have recognized the importance of the policies behind § 2-607(3)(a) but have not used them to propose a process for evaluating notice under § 2-607(3)(a). Instead, these commentators have advocated one standard or the other. They have also failed to recognize all five of the policies underlying the notification requirement. See generally 4 R. ANDERSON, *supra* note 3, § 2-607:4, at 119-20 (purpose to allow cure, preparation for litigation, and protection against stale claims; advocating strict standard); J. WHITE & R. SUMMERS, *supra* note 5, § 11-10, at 421-23, 425 (opportunity to cure, preparation for litigation, repose from the possibility of litigation; advocating lenient standard); Clark, *supra* note 2, at 110-11 (encourage settlements, prepare for litigation, opportunity to cure, protection from stale claims; advocating lenient standard). For an interesting discussion of the policies behind the notification requirement as they relate to strict liability in tort and to sales, see generally Phillips, *supra* note 2.

<sup>130</sup> See *infra* section III.B (giving examples).

<sup>131</sup> U.C.C. §§ 1-203, 1-201(19), 2-103 (1977) (Code good faith sections).

second because comment four to section 2-607(3)(a) mentions this as a justification for the notification requirement.<sup>132</sup> The goal of providing an opportunity for the seller to cure ranks third because of its role in reducing the likelihood of litigation. The opportunity to prepare for litigation takes fourth place because, unlike the first three goals, it does not encourage the search for alternatives to a lawsuit. The lowest priority goes to the goal of giving sellers repose from the possibility of litigation because the Code, in section 2-725, imposes a statute of limitations that more directly addresses the issue of eliminating stale claims.<sup>133</sup> Because the importance of these goals depends upon the fact pattern of a given case, however, courts should not rigidly adhere to this priority system.<sup>134</sup>

### B. Examples of the Process in Action

Several examples should clarify this process of analyzing the adequacy of notification under section 2-607(3)(a). These examples illustrate that the evaluation of conduct against these five separate goals may produce conflicting results. They also make clear the desirability of using this process rather than mechanically applying the strict or lenient standard. This Note will proceed by analyzing two polar cases: one presenting a clearly acceptable example of notification, the other a clearly unacceptable example. The Note will then examine several intermediate cases.

#### 1. *Polar Case: Notification Clearly Meeting Section 2-607(3)(a)'s Notification Requirement*

Buyer (*B*) contracted to purchase wheat from Seller (*S*). *S* delivered the wheat to *B* in a timely manner, but it was infested with vermin. Upon discovering *S*'s imperfect tender, *B* sent *S* the following letter:

I have just received the wheat I ordered from you. Upon delivery I discovered that the wheat was infested with vermin. Because of your imperfect tender I will not accept any future deliveries of your wheat until further notice. I would like to arrange a time to negotiate a settlement in this matter, but if I can't reach a compromise with you I will take legal recourse.<sup>135</sup>

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<sup>132</sup> *Id.* § 2-607(3)(a) official comment 4 (notice meant to encourage settlement).

<sup>133</sup> See U.C.C. § 2-725 (1977). To the extent that the courts advocating the strict standard have analyzed the facts in terms of these policies, they are examples of this process.

<sup>134</sup> Courts should not apply any priority scheme too rigidly. In some cases, the possibility of settlement may be negligible. Under these circumstances the policy of giving the seller an opportunity to prepare for litigation should take second place.

<sup>135</sup> The facts of this hypothetical follow loosely those of *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338 (5th Cir. 1980).

*B*'s conduct in this situation meets all the goals of section 2-607(3)(a)'s notice requirement. First, *B* behaved in good faith. In the context of section 2-607(3)(a), misleading behavior is indicative of bad faith.<sup>136</sup> In this hypothetical *B* did not mislead *S*. He clearly indicated that he considered *S*'s tender to be nonconforming, that he was considering legal action, and that he refused to accept further deliveries until the problem was solved. Therefore, *B*'s notice met the standard of good faith imposed by section 2-607(3)(a).

*B*'s letter was sufficient to notify *S* of the need to settle the dispute. A buyer's complaint should be strong enough to notify the seller that he must settle the dispute or face litigation. It should not be so threatening, however, that it elicits an antagonistic response from the seller.<sup>137</sup> *B* adequately notified *S* because he indicated that litigation was possible, but also communicated his desire to reach a compromise through negotiations.

The letter also gave the seller an opportunity to cure the defect. *B* informed *S* of the need to cure by telling him of the nonconforming tender. He provided *S* with an opportunity to cure by offering to participate in settlement negotiations.<sup>138</sup>

*B*'s letter gave *S* the opportunity to prepare for trial by informing him that there would be litigation if negotiations failed.<sup>139</sup> The notice also gave *S* a certain repose from the possibility of litigation by relieving him of uncertainty as to *B*'s intent.<sup>140</sup> In summary, *B*'s letter met all of the goals underlying section 2-607(3)(a) and, therefore, constituted adequate notification of breach.

## 2. *Polar Case: Notification Clearly Insufficient Under Section 2-607(3)(a)'s Notification Requirement*

*B* purchased a machine from *S*, but it malfunctioned shortly after *B* accepted delivery. *B* asked *S* to repair several specified defects. *S* repaired these problems and inspected the machine in search of any latent defects. The machine subsequently malfunctioned for reasons other than those leading to *B*'s earlier request for repairs. *B* did not tell *S* about the new difficulties and continued to order replacement parts for the machine from *S*. In fact, *B* told *S* that he was satisfied with the machine in order to protect his ongoing business relationship with *S*. *B* then brought suit against *S* for breach of warranty, claiming that the earlier requests for service had satisfied section 2-607(3)(a).

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<sup>136</sup> See *supra* text accompanying notes 111-16.

<sup>137</sup> See *supra* notes 119-25 and accompanying text.

<sup>138</sup> See *supra* section II.C.

<sup>139</sup> See *supra* section II.D.

<sup>140</sup> See *supra* section II.E.

*B*'s behavior, taken as a whole, constituted bad faith. *B* led *S* to believe the contract had been satisfactorily performed, when *B* actually intended to sue *S* for breach.<sup>141</sup> Although the machine malfunctioned after the initial repairs, *B* continued to deal with *S* and expressed satisfaction with *S*'s efforts. In essence, *B* encouraged *S* to believe that his repairs had alleviated the troublesome aspects of the transaction. Thus *B* acted in bad faith and a court relying on the priority scheme set forth earlier should bar his breach of warranty action.<sup>142</sup>

*B*'s communication failed to inform *S* of the need to pursue settlement.<sup>143</sup> *B* expressed satisfaction with the machine after the repairs. Thus, *S* could reasonably believe that its repairs had solved any problems and that there was no need to pursue settlement negotiations.

*S* did not have an opportunity to repair the machine before *B* filed suit.<sup>144</sup> *B* notified *S* of the problems with the transaction before the difficulties that led to the suit developed. *B*'s communication did not even put *S* on inquiry notice because *B* had expressed satisfaction with *S*'s actions after *S* had already repaired and *inspected* the machine. Thus, *B* failed to give *S* notification of the need to cure the defects in order to avoid litigation.

Similarly, *B*'s actions denied *S* the opportunity to prepare for litigation prior to the filing of the complaint.<sup>145</sup> *S* had no reason to believe that *B* was planning to sue and thus had no incentive to investigate the transaction to prepare for litigation.

Finally, judicial acceptance of *B*'s contention that his earlier request for repairs was satisfactory notification of breach would contradict section 2-607(3)(a)'s goal of providing the seller repose from the possibility of litigation.<sup>146</sup> *B*'s request was made before he knew of the defects upon which he based his claim. *B* never indicated that he was contemplating legal action. If a court accepted *B*'s contention, virtually any claim would satisfy section 2-607(3)(a). Sellers would face the prospect that all buyer complaints would be adequate notification of breach, even if the action was based on defects totally unrelated to those contained in the buyer's communication. Because the notification failed to meet any goals of the notification requirement, section 2-607(3)(a) bars *B*'s action for breach of warranty.

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<sup>141</sup> See *supra* text accompanying notes 111-16. See generally section II.A (analyzing policy of encouraging commercial good faith).

<sup>142</sup> See *supra* text accompanying notes 131-33.

<sup>143</sup> See *supra* notes 119-25 and accompanying text.

<sup>144</sup> See *supra* section II.C.

<sup>145</sup> See *supra* section II.D.

<sup>146</sup> See *supra* section II.E.

### 3. *Intermediate Cases*

Many fact patterns will not be as easy to analyze as the two polar cases. Three intermediate hypotheticals in which only some of the goals are met illustrate that the results of the analysis may conflict and how a court should resolve these conflicts. The first two cases in this series are examples of inadequate notification under section 2-607(3)(a); the last case sets forth facts meeting the section's notification requirement.

a. *Good Faith Primary*. Buyer (*B*) contracted with Seller (*S*) to purchase airplanes. The contract specified that *S* would deliver the planes by March 31, 1982. *S* had delivered only half the required number of planes by August 6, 1982. On April 15, 1982, *B* sent *S* the following telegram: "I am still awaiting delivery of planes. You should have delivered them on March 31. I think you are in breach of our contract." A week later, however, *B* telephoned *S* and said: "You know, *S*, it turns out we need more planes than we thought. Would you consider a contract for ten more?" Four days later *B*, in an effort to protect the ongoing business relationship, told *S*: "We really don't plan to sue you for the delay in delivering our planes. We understand that things have been rough in the airplane industry lately. We only were trying to hurry you up by threatening to sue. We weren't serious."

Two weeks after *B*'s last communication with *S*, *B* brought suit against *S* for breach of contract. In his pleadings, *B* alleged that his telegram to *S* satisfied section 2-607(3)(a).<sup>147</sup>

If a court analyzed *B*'s telegram in isolation, it would find that the goals of encouraging settlement, providing an opportunity to cure, and providing an opportunity to prepare for litigation were met.<sup>148</sup> The telegram indicated the nature of the nonconforming tender and informed *S* of *B*'s intent to litigate unless the defect was remedied or a satisfactory settlement was reached. Thus, a court looking only at this single incident of notice, as many lenient standard courts do, would find that *B*'s telegram satisfied section 2-607(3)(a)'s notification requirement.

A court examining the entire relationship between the parties, however, would find *B*'s behavior to be misleading and indicative of bad faith. According to the hierarchy of notification goals, encouraging good faith takes precedence over encouraging settlement when determining whether to bar the buyer's action for breach of warranty.

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<sup>147</sup> The facts of this hypothetical are loosely based on *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976).

<sup>148</sup> See *supra* sections IIB.-E.

A court may police against commercial bad faith under section 2-607(3)(a) in two ways. First, it may proceed by examining a single incident of notification (e.g., *B*'s telegram) to determine whether it encourages settlement, gives the seller an opportunity to cure and an opportunity to prepare for litigation, and gives the seller repose from the possibility of litigation. If the court finds that the single incident of notification meets these goals, it can then examine the parties' entire relationship to determine whether the buyer misled the seller.<sup>149</sup>

Alternatively, the court may first examine the parties' relationship for evidence of the buyer's misleading behavior and proceed to evaluate specific incidents of notification only after concluding that the buyer did not mislead the seller. The two methods produce the same result.<sup>150</sup>

In this case, the two telephone calls constitute misleading behavior because they led *S* to believe that the telegram was not notification of breach but was merely a prod to speed up delivery of the planes. *B*'s additional order reinforced *S*'s perception that *B* did not consider the transaction to involve a breach. *B*'s telegram taken alone satisfied section 2-607(3)(a), but *B*'s entire course of behavior negates this conclusion. Thus, the notification fails to meet section 2-607(3)(a)'s requirements.

b. *Settlement Primary.* *B* purchased a machine from *S*. Shortly after taking delivery of the machine, *B* called *S* and said: "I'm having some trouble with the machine but it is working." *B* did not call *S* again and filed suit for breach of warranty three weeks later.

*B* did not lead *S* to believe that he did not consider *S* to be in breach of contract. He never indicated that he was satisfied with the transaction nor did he continue to deal with *S* and thereby imply to *S* that he was satisfied with the transaction. Thus *B*'s phone call met section 2-607(3)(a)'s standard of good faith.<sup>151</sup>

*B*'s message did not, however, stimulate settlement.<sup>152</sup> His action was equivocal because it did not inform the seller of the source of the machine's "troubles." *S* could reasonably infer that the machine was working fine but *B* was having trouble learning to operate it, or that there were some problems with the machine that *B* was willing to tolerate. In any case, *B*'s message failed to give *S* any incentive to settle and thus failed to meet section 2-607(3)(a)'s goal of encouraging settlement. For the same reasons, *B*'s call did not

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149 See *supra* notes 117-18 and accompanying text.

150 See *id.*

151 See *supra* note 116 and accompanying text.

152 See *supra* notes 119-25 and accompanying text.

give *S* an opportunity to cure the defect or to prepare for litigation, and did not give the seller repose from the possibility of litigation.<sup>153</sup> Therefore, section 2-607(3)(a) bars *B*'s suit for breach of warranty against *S*.

c. *Encouraging Settlement Takes Priority over the Opportunity to Prepare for Litigation and Repose from Possibility of Litigation.* *B* had an ongoing agreement to purchase widgets from *S*. *B* knew that *S* had a history of refusing to negotiate settlements with buyers who threatened suit. In fact, *S* had a policy of litigating whenever buyers threatened to bring a suit, reasoning that such a policy would discourage buyers from making such threats. After dealing with *S* for several years, *B* received a batch of nonconforming widgets from *S*. *B* was faced with a dilemma. He could expressly inform *S* of the breach and fulfill the literal terms of section 2-607(3)(a) but give up any hope for settlement. Alternatively, he could ask *S* to fix the problem but fail to give *S* an opportunity to prepare for litigation or repose from the possibility of litigation by not indicating that he contemplated legal action. If *B* followed the first course of action, it would clearly meet section 2-607(3)(a)'s notification requirement. By its terms, the section does not forbid the buyer from giving an overly antagonistic notice of reach.<sup>154</sup> But *B* wanted to settle the problem without court action and thus sent *S* the following letter: "I have just received order no. 2047. The widgets in this lot are not up to your usually high standard of quality. Please contact me so we can agree on a way to clear up this problem." *B*'s letter fulfills section 2-607(3)(a)'s notification requirement.

Normally this letter would not encourage settlement because it does not provide the seller with an incentive to settle in order to avoid litigation.<sup>155</sup> In fact, *B*'s message does not even indicate that *S* made a nonconforming tender, saying only that the widgets in the order had fallen below the quality of those usually delivered. Similarly, *B*'s letter neither informs *S* of a need to prepare for litigation nor relieves *S* of his concern that minor complaints may constitute notice of breach.<sup>156</sup> In this situation, however, *B*'s letter was necessary to encourage settlement because of *S*'s policy of litigating whenever a buyer threatened suit. Section 2-607(3)(a) gives high priority to the goal of encouraging settlement and a court should not discourage such attempts by mechanically applying a standard for determining the adequacy of notification. Here *B* in good faith

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<sup>153</sup> See *supra* sections II.C.-E.

<sup>154</sup> See generally U.C.C. § 2-607(3)(a) (1977).

<sup>155</sup> See *supra* notes 119-25 and accompanying text.

<sup>156</sup> See *supra* sections II.D.-E.

took the only course available to encourage an out of court settlement. By so doing, he complied with section 2-607(3)(a).

#### 4. *Summary*

The hypotheticals illustrate three important concepts. -First, section 2-607(3)(a) cases exist in a continuum of more or less satisfactory examples of notification. To place a case on this continuum, courts must analyze the facts in terms of section 2-607(3)(a)'s goals. They should not mechanically apply the strict or lenient standard. Second, the goals are analytically distinct and the results of conduct evaluations may conflict. If a conflict arises, a court must make value judgments concerning the relative importance of these goals. Finally, the hypotheticals illustrate the importance of examining the parties' entire relationship closely. A court concentrating on only isolated incidents of communication may not be able to determine the true nature of the transaction.

With these three points in mind, courts should approach issues arising under section 2-607(3)(a) from a policy perspective.<sup>157</sup> In doing so they will resolve the present disagreement in this area of the commercial law and increase the chances of arriving at a just result.

## IV CONCLUSION

At present courts disagree as to the standard of notice required by section 2-607(3)(a) of the Uniform Commercial Code. Some courts, relying on language in official comment four to section 2-607(3)(a), merely require a buyer to give the seller notice "that the transaction is still troublesome and must be watched",<sup>158</sup> in order to preserve the buyer's right to bring an action after acceptance of goods under section 2-607. Other courts require the buyer to specifically notify the seller that the buyer considers the seller to be in breach of the contract, in order to preserve the buyer's remedies. Because neither standard is clearly superior in furthering the policies underlying section 2-607(3)(a)'s notice requirement, courts should not mechanically apply either the lenient or strict standard.

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<sup>157</sup> For a decision seeming to follow the spirit of this prescription, see *United Cal. Bank v. Eastern Mountain Sports*, 546 F. Supp. 945, 959 (D. Mass. 1982) ("The advancement of good faith in commercial dealings is best served by following a course of action designed to elicit reasonable discussion aimed at working out a mutually acceptable solution between the parties."). See also *Speakman Co. v. Harper Buffing Mach. Co.*, 583 F. Supp. 273, 277 & n.4 (D. Del. 1984) ("So long as notice is sufficient to satisfy these policies [underlying § 2-607(3)(a)], a claim for breach of contract or warranty should not be barred under section 2-607.")

<sup>158</sup> U.C.C. § 2-607(3)(a) official comment 4 (1977) (citations omitted).



Rather, courts should evaluate the facts of each case in light of the goals behind the notice requirement to determine whether the buyer has given adequate notice of breach.

*George Frank Hammond*