

Feature Article

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Timeliness of the Notice Requirement Under the UCC Works Both Ways

Section 2-607(3)(a) of the Uniform Commercial Code (UCC), codified in Illinois law as 810 ILCS 5/2-607(3)(a), provides that once a tender of goods 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.” (emphasis added).

The purposes behind a timely pre-suit notice requirement have been described as giving the seller a meaningful opportunity to investigate and resolve the breach (*see, e.g., Oettle v. Walmart, Inc.*, 685 F. Supp. 3d 706 (S.D. Ill. 2023)); to encourage parties to settle their disputes (*see, e.g., Ibarrola v. Kind, LLC*, 83 F. Supp. 3d 751 (N.D. Ill. 2015)); and to avoid litigation (*see e.g., Reyes v. McDonald’s Corp.*, No. 06-cv-2814, 2006 U.S. Dist. LEXIS 81684 (N.D. Ill. 2006)).

Therefore, the timeliness of the notice of a breach, as measured between the actual or implied awareness by the buyer and the rendering of notice of the breach to the seller, is essential to a claim for breach of an express or implied warranty. *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759, 764 (N.D. Ill. 2022); *Hays v. General Elec. Co.*, 151 F. Supp. 2d 1001, 1010 (N.D. Ill. 2001). Timeliness of notice, the cases say, is “generally a question of fact which is determined by looking at all the circumstances of the case.” *Greenwich Indus., L.P. v. Leggitt & Platt, Inc.*, No. 07-cv-6550, 2009 U.S. Dist. LEXIS 49478, at *11 (N.D. Ill. Jun. 11, 2009); *Blommer Chocolate Co. v. Bongards Creameries, Inc.*, 635 F. Supp. 911, 918 (N.D. Ill. 1985). Only when “the sole reasonable inference is the notice was unreasonably tardy” can the determination of the timeliness issue be made as a matter of law. *Quaker Alloy Casting Co. v. Gulfco Industries, Inc.*, 686 F. Supp. 1319, 1337 (N.D. Ill. 1988).

Generally, the timeliness element of the UCC’s notice requirement has been enforced against a plaintiff-buyer who has allowed too much time to elapse between his or her awareness of a breach of warranty and giving notice of the breach to a defendant-seller. *See, e.g., Branden v. Gerbie*, 62 Ill. App. 3d 138 (1st Dist. 1978) (holding that a 15-month delay in providing notice was unreasonable as a matter of law after the buyer was on notice that she had sued the wrong manufacturer); *Wilke Metal Products, Inc. v. David Architectural Metals, Inc.*, 92 Ill. App. 2d 265 (1st Dist. 1968) (notice given six months after non-conforming goods were received was determined untimely as a matter of law when the buyer had failed to inspect the goods to determine whether they complied with the contract specifications).

A recent decision from the United States District Court for the Northern District of Illinois held, however, that the timeliness aspect of the UCC’s notice requirement works both ways and that *too little* time between notice to the seller of the breach and the filing of suit shortly thereafter by the buyer can result in a dismissal of the buyer’s warranty action.

In *Gibson v. Albertsons Co.*, No. 22-cv-642, 2024 U.S. Dist. LEXIS 189025 (N.D. Ill. Oct. 17, 2024), a purported class action involving the ingredient dextromethorphan (“DXM”) as used in certain “non-drowsy” cough and cold medications, plaintiff claimed that a range of over-the-counter products were deceptively labelled, since DXM is known to cause drowsiness. Among the plaintiff’s claims was one for breach of express warranty. The plaintiff-buyer had mailed a written notice of the breach to the defendant-seller’s corporate headquarters but filed a lawsuit a mere four days later. Even assuming that the seller received the notice in the mail as quickly as two days after it was sent, this gave the seller a mere two days to explore a possible settlement with the buyer before litigation ensued.

The seller moved to dismiss the breach of warranty count because the unusually short period of time between notice to the seller and the buyer's lawsuit did not provide the seller with a meaningful opportunity to attempt a resolution of the matter short of litigation. Thus, the seller argued, the approximate two-day period between receipt of the mailed notice of breach and the subsequent lawsuit was not a "reasonable time" within the meaning of section 2-607(3)(a) of the UCC since the parties were deprived of a reasonable opportunity to engage in meaningful settlement discussions.

The district court agreed, finding that the abbreviated period between the notice and the lawsuit frustrated the purposes of the notice requirement "such that it did not give the parties time to resolve the dispute short of litigation." *Gibson*, 2024 U.S. Dist. LEXIS 189025, at *36.

As support for its decision the *Gibson* court cited a case from the Minnesota district court which held that a two-day period between receipt by the seller of a pre-suit notice of breach and the filing of suit by the buyer was not a "reasonable time," and therefore, barred the buyer's warranty claim. *Stephens v. Target Corp.*, 694 F. Supp. 3d 1136, 1147 (D. Minn. 2023).

In the *Stephens* case, another decision involving drowsiness from a "non-drowsy" cold and flu remedy purchased from the defendant, the buyers alleged, *inter alia*, a breach of express warranty for which they sought both monetary and injunctive relief. One of the plaintiffs gave only two days' written notice to the defendant-seller before suit was filed. As to that plaintiff, the court held that two days' notice "is not enough time for a large corporation . . . to process a refund to a pre-litigation demand letter sent to the general counsel's office." *Stephens*, 694 F. Supp. 3d at 1147. The short notice resulted in the dismissal of that plaintiff's warranty claim.

Interestingly, another recent case from the Northern District of Illinois, which was cited in the *Gibson* decision, rejected a seller's argument that too short a period of time had expired between the mailing of a written notice of breach to the seller and the filing of suit by the buyer. Again, it was claimed that this abbreviated period—two days—was not a "reasonable time" for notice within the meaning of the UCC and should, therefore, bar the buyer's warranty action.

Colchi v. TopCo Assocs., LLC, decided under a provision of New York law identical to 810 ILCS 5/2-607(3)(a), was another in a series of cases filed against sellers of over-the-counter cold remedies that advertised themselves as "non-drowsy". *Colchi v. TopCo Assocs., LLC*, No. 22-cv-747, 2024 U.S. Dist. LEXIS 177189 (N.D. Ill. Sept. 30, 2024). The plaintiff-buyer claimed an economic injury caused by the label's false representation, *i.e.*, that she would not have spent her money on the product had she known that DXM, the active ingredient in the elixir, caused drowsiness. The plaintiff-buyer provided notice of the breach by means of a letter of complaint to the seller mailed only two days before filing the suit. The seller claimed that two days' notice was not enough time to either "minimize the buyer's loss" or to "reduce the seller's own liability." *Colchi*, 2024 U.S. Dist. LEXIS 177189, at *41-42.

Indeed, the court commented that "[i]n all likelihood, [the plaintiff-buyer] got to the federal courthouse before the U.S. Postal Service got to the [defendant-seller's] mailbox." *Id.* at *42. "Even so, [the court continued], that argument measures time from the wrong vantage point. . . . [T]he question is not whether the seller had enough time to cure (even though that might be the underlying purpose [of the notice requirement]). The question is whether the buyer gave reasonable notice 'after he discovers or should have discovered the breach.'" *Id.* (quoting New York's version of UCC Section 2-607(3)(a) which is identical to Illinois' version of the statute).

Using this timeframe, the court nevertheless dismissed the buyer's express warranty claim since more than six months had elapsed between the buyer's ingestion of the medication, at which time she should have known of the its propensity to cause drowsiness, and her subsequent written notice to the seller a half-year later, which the court declared, as a matter of law, was an unreasonable delay in giving notice.

Thus, there appears to be a difference of opinion within the Northern District of Illinois as to which timeframe can be properly considered in weighing the timeliness of notice. Until this split of opinion is resolved by the Seventh Circuit,



it should be noted by both plaintiffs' and defense counsel that the timeliness aspect of the UCC's notice requirement may work both ways and that too little time or too much time between notice of breach and filing of suit might doom a buyer's warranty claim.

About the Author

William G. Beatty recently retired from the Chicago law firm of *Johnson & Bell, Ltd.* where he practiced for 45 years, primarily in product liability and employment law. Mr. Beatty is a past member of the IDC's Board of Directors and is a past recipient of the IDC's Presidents Award. He was instrumental in the formation of the Employment Law Committee, has chaired the annual meeting and has written frequently for the *IDC Quarterly*.

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