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Products Liability: Expanding the Property Damage Exception in Pure Economic Loss Cases

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PRODUCTS LIABILITY: EXPANDING THE PROPERTY DAMAGE EXCEPTION IN PURE ECONOMIC LOSS CASES

The term economic loss permeates the law of damages.[1] It is a broad term which includes lost wages in personal injury cases and lost profits in breach of contract cases.[2] Economic loss has also been identified with a narrow class of products liability cases. In these cases there has been no personal injury and no damage to property other than the defective product, but only a pecuniary loss resulting from the purchase of a defective product. These so-called "pure economic loss" cases encompass those situations where a product defect causes damage to the product itself, thereby rendering the product useless.[3] For example, a consumer purchases a large air conditioner to cool his factory. Soon after installation the unit fails to operate correctly. Attempts at repairing the air conditioner fail forcing the consumer to purchase a new unit.[4] In this situation the pecuniary loss sustained by the consumer has been characterized as economic loss or "damages for inadequate value, costs of repair and replacement of the defective product,

1. Damages may be defined as "pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another." BLACK'S LAW DICTIONARY 466 (4th ed. 1968). "Damages," as defined above, is to be distinguished from "property damage," which will be discussed throughout this note.

2. Economic loss is a term which has been loosely applied by the courts in various situations.

It has been used as a measure for damages in wrongful death cases. For instance, in Lengel v. New Haven Gas Light Co., 142 Conn. 70, 111 A.2d 547 (1955), the court held, "As we have frequently said in the past, damages for death are awarded to meet the *economic loss* sustained by the decedent's estate, although some allowance may be made for the death itself." *Id.* at 77, 111 A.2d at 551 (emphasis added). *See also* S. SPEISER, RECOVERY FOR WRONGFUL DEATH, ECONOMIC HANDBOOK (1970).

Economic loss has also been employed in a recent case to describe generally the purchaser's or user's loss in strict liablility cases. Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 14, 374 N.E.2d 437, 443 (1978).

In some instances economic loss describes what constitutes consideration in a contract. Where there has been economic loss there is usually detriment that has value in the market and can be measured with money. A. CORBIN, CONTRACTS § 122 (1963).

3. Note, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 154-55 (1973). The author further explains that pure economic loss cases can be subdivided into direct economic loss and indirect economic loss cases. "A direct loss includes a diminution in the value of the product as measured by the difference between the purchase price or value of the product as represented to the purchaser and the value of the product after discovery of the defect." *Id.* Indirect loss includes losses of future business profits and business opportunities.

4. Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977). *See* text accompanying notes 25-27 *infra*.

or consequent loss of profits—without any claim of damage to other property."[5] When a consumer incurs economic loss as a result of a defective product, a majority of courts hold that the loss is not recoverable under the tort theories of negligence[6] or strict liability[7] in tort.[8] Rather, the courts will deem the express[9] and implied warranty[10] theories of the law of sales to be an adequate vehicle for recovery. The rationale behind this theory is that the law of sales, rather than the law of torts, was intended to protect the economic interests of consumers.[11] It is feared that if tort-based theories of recovery are employed in pure economic loss cases, the resulting increase in litigation will impose an onerous burden on manufacturers.[12]

There is, however, one exception to the general rule prohibiting recovery of economic loss under negligence or strict liability theories.

5. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966). In Pioneer Hi Bred Int'l, Inc. v. Talley, 493 S.W.2d 602 (Tex. Civ. App. 1973), the court similarly defined economic loss. The court stated, "When the loss does not involve harm or damage by the product to the property or person of the user, the loss is deemed as economic only." *Id.* at 607.

6. Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958); Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956), *disapproved on other grounds*, Sabella v. Wisler, 59 Cal. 2d 21, 30-31, 27 Cal. Rptr. 689, 694, 377 P.2d 889, 894 (1963); Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc., 312 A.2d 322 (Del. Super. Ct. 1973), *aff'd and remanded on other grounds*, 336 A.2d 211 (Del. 1975); Crowell Corp. v. Topkis Constr. Co., 280 A.2d 730 (Del. Super. Ct. 1971); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977); TWA v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), *aff'd mem.*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

7. Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alas. 1977); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976); Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Seely v. White Motor, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977); Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); Eli Lilly & Co. v. Casey, 472 S.W.2d 598 (Tex. Civ. App. 1971); Thermal Supply of Texas, Inc. v. Asel, 468 S.W.2d 927 (Tex. Civ. App. 1971).

8. Products liability is an area of tort law pertaining to the liability of sellers of defective products to third party purchasers with whom they are not in privity of contract. PROSSER, LAW OF TORTS § 96 (4th ed. 1971) [hereinafter referred to as PROSSER]. The sellers' liability encompasses physical harm caused by the defective product such as personal injuries and damage to property other than the defective product. Recovery is generally grounded in negligence and strict liability. PROSSER § 101. However, where there has been no personal injury and no damage to property other than the defective product but only a pecuniary loss resulting from the purchase of a defective product, the courts have traditionally refused to permit recovery under negligence or strict liability theories. This note will consider this latter area of cases.

9. U.C.C. § 2-313 (1972 version).

10. U.C.C. §§ 2-314, 2-315 (1972 version).

11. Seely v. White Motor, 63 Cal. 2d 9, 15, 45 Cal. Rptr. 17, 21, 403 P.2d 145, 149 (1965).

12. TWA v. Curtiss-Wright Corp., 1 Misc. 2d 477, 482, 148 N.Y.S. 2d 284, 290 (1955), *aff'd mem.*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956).

This exception may be referred to as the property damage exception. The term "property damage" is a subcategory under the generic term "pure economic loss," in that the consumer in property damage cases sustains economic loss from the purchase of the defective product as does the consumer in other pure economic loss cases. The distinguishing feature of the two theories is that the product defect in property damage cases causes the product to sustain physical harm in a violent or sudden manner,[13] while in the typical pure economic loss case, the product defect causes the product to sustain physical harm in a gradual manner or simply renders the product useless. For example, a consumer purchases a trailer home. As a result of certain defects within the home, a fire starts and the entire home is destroyed.[14] The consumer has incurred economic loss by way of "property damage." Under these circumstances the courts will allow the consumer to recover the replacement value of the home under the tort theories of negligence or strict liability. If, however, the trailer home deteriorates over a period of time due to poor workmanship or negligent design, the only remedy available to the purchaser will be through express or implied warranty theories.[15] The rationale for the property damage exception is that "in situations where personal injuries could have occurred, courts should not hesitate to grant relief to the party suffering [the economic loss] damage simply because he was fortunate enough to have escaped personal injury."[16]

The purpose of this note is to critically examine the property damage exception in pure economic loss cases. In order to analyze the problems associated with the exception, as it exists in a majority of jurisdictions today, the rationale of those courts which follow the view that tort recovery should not be allowed in pure economic loss cases unless property damage is proven will be set forth. The reasoning of these jurisdictions will be contrasted with that of jurisdictions which have broadened the concept of property damage to include situations where the defective product has sustained physical harm in a gradual manner, notwithstanding normal deterioration. Finally, it will be sub-

13. *See* Annot., 16 A.L.R.3d 683 (1967).

14. Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alas. 1977); *see* text accompanying notes 38-39 *infra*.

15. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976); *see* text accompanying notes 36-37 *infra*.

16. Note, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 154 (1973). *See also* Seely v. White Motor, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). In that case the court held, "Physical injury to property is so akin to personal injury that there is no reason for distinguishing them." *Id.* at 19, 45 Cal. Rptr. at 24, 403 P.2d at 152.

mitted that the property damage exception should be expanded to include all cases where the product has incurred any type of harm as a result of a defect in the product itself.

PURE ECONOMIC LOSS: THE GENERAL RULE

The leading case espousing the view that tort recovery should not be allowed in pure economic loss cases was the California Supreme Court decision of *Seely v. White Motor.*[17] In *Seely*, plaintiff entered into a conditional sales contract for the purchase of a truck manufactured by defendant for use in his business of heavy-duty hauling. The truck developed a defect known as galloping which caused it to bounce violently. Attempts at repairing the truck failed. Later, while the plaintiff was driving the truck, it suddenly went out of control and overturned. The uninjured plaintiff had the physical damage sustained by the truck repaired. When the plaintiff notified the dealer that he would not continue to make payments on the truck, it was repossessed. The plaintiff brought an action seeking damages related to the accident for the truck, damages unrelated to the accident for the galloping problem and lost profits in his business because he was unable to make normal use of the truck.

In an opinion delivered by Justice Traynor, the California Supreme Court held that the damages unrelated to the accident constituted economic loss and, therefore, were not recoverable in strict liability.[18] Traynor stated: "The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods."[19] Traynor emphasized that manufacturers should not be held liable under tort theory in pure economic loss cases:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery . . . rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products . . . . He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.[20]

A number of other jurisdictions have adopted this rationale and have denied recovery for repair and replacement costs in pure economic loss cases where the cause of action had been predicated on neg-

17. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).
18. *Id.* at 17, 45 Cal. Rptr. at 23, 403 P.2d at 151.
19. *Id.* at 15, 45 Cal. Rptr. at 21, 403 P.2d at 149.
20. *Id.* at 18, 45 Cal. Rptr. at 23, 403 P.2d at 151.

ligence or strict liability.[21] Two recent decisions in Georgia and Illinois have followed the rationale promulgated by Justice Traynor in *Seely*.

In *Chrysler Corp. v. Taylor*,[22] plaintiff bought a new car that had been manufactured by defendant. The car had numerous operating defects which were never repaired adequately. Plaintiff filed an action grounded in negligence and strict liability seeking damages for loss of the benefit of the bargain, the replacement of the defective Dodge, wages lost while attending to the vehicle and attorney's fees. The Georgia appellate court held that the economic loss sustained by the consumer was not recoverable under tort theories stating, "If a consumer wishes to recover for a loss of bargain through its purchasing of defective goods in the absence of fraud, it should pursue recovery under warranty laws."[23] The court further pointed out why the doctrine of strict liability in tort did not apply to the case. The court said, "We hold that an 'injury' . . . does not include damages stemming from loss of the benefit of one's bargain. The history of the doctrine of strict liability in tort indicates that it was designed . . . to govern the distinct problem of physical injuries."[24]

The Illinois appellate court was confronted with similar issues in *Alfred N. Koplin & Co. v. Chrysler Corp.*[25] The plaintiff in *Koplin* purchased an air conditioner which failed within two years of the installation date. A second unit was purchased and installed in August, 1971; it failed in June, 1973. Plaintiff brought an action in negligence to recover for damages resulting from the breakdown and failure of the two units. The damages sustained included repair and replacement costs. Resolving an issue of first impression, the Illinois appellate court denied recovery in both negligence and strict liability for the economic loss resulting from the product defect.[26] In adopting the *Seely* rule the court held that recovery for damages resulting from the air conditioners should have been limited to a warranty theory under the law of sales.[27]

21. *See* notes 6-7 *supra*.
22. 141 Ga. App. 671, 234 S.E.2d 123 (1977).
23. *Id.* at 672, 234 S.E.2d at 124.
24. *Id.* (citation omitted).
25. 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977).
26. *Id.* at 204, 364 N.E.2d at 107. It was unnecessary for the court to rule on the strict liability issue since plaintiff's action was predicated solely on negligence.
27. *Id.* at 204, 364 N.E.2d at 107.

PURE ECONOMIC LOSS: THE PROPERTY DAMAGE EXCEPTION

The majority of courts which follow the *Seely* decision permit recovery of economic loss in negligence or strict liability where a product defect causes a product to incur physical harm in a sudden or violent manner.[28] In these limited fact patterns the consumer is not forced to rely solely upon warranty theories of the law of sales[29] as a basis for recovery. To qualify for the property damage exception, "the accident must be a casualty involving some violence . . . not a mere marked deterioration, or even a complete ruin brought about by internal defect."[30] This exception to the general rule of no recovery is recognized because the fact patterns involved in these cases usually give rise to personal injuries for which damages are recoverable under tort theories. The courts reason that the fact that the party suffering the economic loss was fortunate enough to have escaped personal injury should have no bearing on whether tort theories may be employed as a basis of recovery.[31]

The majority of courts have been strict in their application of the property damage exception's sudden harm requirement. Illustrative of this is the New York case of *TWA v. Curtiss-Wright Corp.*[32] In *TWA*, plaintiff sued for repair and replacement costs sustained as a result of defects which had developed in certain airplane engines. Parts of the engines had been worn away while in flight as a result of latent defects.

28. Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alas. 1977); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alas. 1976); Seely v. White Motor, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958); Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956), *disapproved on other grounds*, Sabella v. Wisler, 59 Cal. 2d 21, 30-31, 27 Cal. Rptr. 689, 694, 377 P.2d 889, 894 (1963); Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc., 312 A.2d 322 (Del. Super. Ct. 1973), *aff'd and remanded on other grounds*, 336 A.2d 211 (Del. 1975); Crowell v. Topkis Constr. Co., 280 A.2d 730 (Del. Super. Ct. 1971); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977); TWA v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), *aff'd mem.*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956); *cf.* Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973); Eli Lilly & Co. v. Casey, 472 S.W.2d 598 (Tex. Civ. App. 1971); Thermal Supply of Texas, Inc. v. Asel, 468 S.W.2d 927 (Tex. Civ. App. 1971) (these cases adopted the general rule prohibiting tort recovery in pure economic loss cases but expressed no opinion on whether the property damage exception was also adopted). *But see* Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973).

29. *See* notes 9-10 *supra.*

30. Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 863, 323 P.2d 227, 229 (1958); *see also* PROSSER, *supra* note 8, § 101 ("[W]here there is no accident, and no physical damage. . . purely economic interests are not entitled to protection against mere negligence, and so [courts] have denied the recovery."). *Id.*

31. *See* note 16 *supra.*

32. 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955), *aff'd mem.*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956).

The engines had developed the foreseeable potential to cause catastrophic disaster. Yet, the court denied recovery under a negligence theory because the physical harm had not been sustained in a catastrophic or violent manner. The court stated, "It is only when the danger inherent in a defectively made article causes an accident that a cause of action against the manufacturer also arises."[33]

The reasoning of the New York court in *TWA* was adopted by the Delaware Superior Court in *Crowell Corp. v. Topkis Construction Co.*[34] In that case the plaintiff-owner sued a subcontractor in negligence for damages sustained as a result of defects which created a dangerous condition in newly constructed walls. Costs were incurred in the repairing of the walls. The court, in denying recovery of the economic loss, held, "The great weight of authority does not yet permit tort recovery under the circumstances here present in the absence of . . . [a] dramatic incident such as accident, collapse or explosion."[35]

The Alaska Supreme Court also has strictly applied the property damage exception in cases predicated upon strict liability in tort. In *Morrow v. New Moon Homes, Inc.*,[36] plaintiff purchased a mobile home manufactured by defendant. Within six months defects developed causing the roof to leak, the wall paneling to buckle, the door frames on the bedroom door to fall off, and the closet doors to slide improperly. Plaintiff sought recovery of repair and replacement costs under a strict liability theory. The Alaska Supreme Court refused to extend the property damage exception to include a situation where the physical harm to the product was incurred in a gradual manner.[37] The court ignored the fact that the pecuniary loss sustained by the plaintiff was substantial.

One year later the same court permitted recovery in strict liability in a case where the sudden harm requirement of the property damage exception had been satisfied. In *Cloud v. Kit Manufacturing Co.*,[38] plaintiff purchased a mobile home in October, 1973, that was manufactured by defendant. In early January, 1974, plaintiff stored a roll of polyurethane foam padding in a crawl space beneath the mobile home. The roll was not placed in close proximity to the electric heating unit, yet, on January 23, 1974, the rug pad ignited, causing the mobile home to catch fire, destroying the home. Plaintiff sought recovery in strict

33. *Id.* at 482, 148 N.Y.S.2d at 290.
34. 280 A.2d 730 (Del. Super. Ct. 1971).
35. *Id.* at 732.
36. 548 P.2d 279 (Alas. 1976).
37. *Id.* at 286.
38. 563 P.2d 248 (Alas. 1977).

liability for damages based on the replacement cost of the home. Recovery was permitted because the consumer had sustained property damage. The court stated:

> We recognize that the line between economic loss and direct property damage is not always easy to discern, particularly when the plaintiff is seeking compensation for loss of the product itself. We cannot lay down an all inclusive rule to distinguish between the two categories; however, we note that sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss.[39]

The language of the *Cloud* court is somewhat misleading. Indeed, the fire causing the destruction of the trailer home constituted physical harm and that physical harm was incurred in a sudden and calamitous manner. However, the ultimate loss to the plaintiff was economic loss, *i.e.*, the replacement cost of the home. Similarly, in *Morrow*, the plaintiff sustained economic loss, measured by the replacement cost of the home. Yet, the Alaska Supreme Court in *Cloud* stated that economic loss was not involved. *Cloud* may be better understood as a case involving economic loss where the property damage exception was applied in order to allow recovery in strict liability. The property damage exception was applicable since the sudden harm requirement was met. The strict application of the property damage exception by the Alaska Supreme Court is consistent with the view of the majority of jurisdictions.

EXPANDING THE PROPERTY DAMAGE EXCEPTION: GRADUAL PHYSICAL HARM

A number of jurisdictions have impliedly expanded the concept of property damage to include situations where the product defect causes the product to incur physical harm in a gradual manner.[40] In these cases the physical harm sustained by the product was not related to the normal and expected deterioration incurred by the product. These jurisdictions have permitted recovery of damages for economic loss under tort theories of negligence and strict liability in cases where the sudden harm requirement has not been satisfied.

Negligence

For example, in *Spence v. Three Rivers Builders & Masonry Supply,*

39. *Id.* at 251.
40. *See* cases cited in notes 42, 43, 46 and 48 *infra*.

Inc.,[41] the Michigan Supreme Court held that the plaintiff was entitled to recover repair costs where cinder blocks used in the construction of a building pitted and deteriorated over a period of months. The court, in dicta, suggested that in the future such complaints should be framed in tort.[42] The court then concluded that recovery should have been permitted on a theory of either negligence or implied warranty.

The Superior Court of Delaware, in *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*,[43] was faced with a factual situation similar to that in *Spence*. In *Cannon*, plaintiff sought to recover, in negligence, the payment made for the relining of certain chemical tanks. The tanks had been painted in December, 1969, and by May, 1970, the linings had peeled and the tanks had begun to rust. The court held that plaintiff's claim was recoverable because the physical harm sustained by the chemical tanks was of a sudden and immediate nature.[44] It is clear, however, that the deterioration actually occurred over a six-month period.[45] Hence, the *Cannon* court held *sub silentio* that it was unnecessary for the physical harm to have been sustained in a sudden or violent manner in order to invoke the property damage exception in pure economic loss cases. This represents a clear expansion of the property damage exception in negligence cases.

Strict Liability

The Colorado and Wisconsin Supreme Courts have allowed recovery in strict liability when the product defect causes the product itself to incur physical harm in a gradual manner. In *Hiigel v. General Motors Corp.*,[46] the Colorado Supreme Court was confronted with an action for damages caused by the defective rear chassis of a motor home. Plaintiff was forced to make numerous repairs to the home and suffered business losses because he was unable to use the vehicle at all times. Plaintiff sought recovery of damages based on the replacement cost of the rear chassis, repair expenses, and loss of business. Despite the fact that there was no violent accident and plaintiff suffered no personal injuries, the court allowed recovery under the theory of strict lia-

41. 353 Mich. 120, 90 N.W.2d 873 (1958).

42. *Id.* at 131, 90 N.W.2d at 878-79; *accord*, Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 440 P.2d 798 (1968); Temple Sinai-Suburban Reform Temple v. Richmond, 112 R.I. 234, 308 A.2d 508 (1973); Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

43. 312 A.2d 322 (Del. Super. Ct. 1973).

44. *Id.* at 329. The court stated, "It can be reasonably argued that there has been an accident in the basic sense that there was in fact *immediate* physical injury to the storage tanks not caused by normal wear and tear." (emphasis supplied).

45. *Id.* at 324.

46. 544 P.2d 983 (Colo. 1975).

bility in tort.[47]

Recovery of damages was also allowed by the Wisconsin Supreme Court in a case factually similar to *Hiigel*. In *City of LaCrosse v. Schubert, Schroeder & Associates, Inc.*,[48] plaintiff, a municipality, entered into an agreement with a contractor to install a roof on an elementary school. The first roof, installed in 1968, began to leak soon after installation. A replacement roof, installed in September, 1968, also leaked. Finally, in November, 1970, a portion of the roof blew off, necessitating the complete replacement of the roof in 1971. Plaintiff sued in strict liability to recover the costs of repair and replacement of the defective roof. The court held that plaintiff was entitled to recover damages under a strict liability theory.[49] The fact that the property damage was not incurred in a sudden or violent manner did not prevent the court from allowing recovery. Moreover, the court recognized that the repair and replacement costs sustained in this pure economic loss case were clearly recoverable, stating, "We are also of the opinion that a strict-liability claim for pure economic loss involving only the cost of repair or replacement of the product itself and loss of profits is likewise not demurrable."[50] Thus, *Hiigel* and *LaCrosse* clearly illustrate a minority position which adopts the view that the property damage exception should be expanded in strict liability cases to include situations where the product sustains physical harm in a gradual manner.

PRODUCT MALFUNCTIONS

A minority of courts have recognized that recovery of economic loss should be allowed in negligence and strict liability in all cases where the product defect causes the product to become useless.[51] In these cases it is irrelevant how the product incurred the harm; it is only significant that the product is defective.

Negligence

Several courts have adopted the view that the manufacturer owes a duty to the user or consumer to exercise due care to avoid foreseeable harm to the users of his product.[52] Under this view, a manufacturer

47. *Id.* at 989.
48. 72 Wis. 2d 38, 240 N.W.2d 124 (1976).
49. *Id.* at 44, 240 N.W.2d at 127.
50. *Id.*
51. *See* notes 52 and 58 *infra*.
52. Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y.S. 131 (1915); State *ex rel.* Western Seed Prod. Corp. v.

can be liable in negligence for any losses sustained as a result of a product defect.

In *State ex rel. Western Seed Production Corp. v. Campbell*,[53] the plaintiffs, several sugar beet growers, sought recovery in negligence against a seed supplier for crop loss damage resulting from a defect in the seeds purchased from the supplier. The Oregon Supreme Court upheld the negligence action, stating, "Where the other elements of a negligence case are present, we see no reason why the availability of a tort remedy should depend upon whether the harm was traumatic."[54]

The Washington Supreme Court recently applied the negligence theory to a situation where the product failed to operate correctly. In *Berg v. General Motors Corp.*,[55] the plaintiff purchased a diesel engine for his fishing boat. The engine malfunctioned, causing the plaintiff to incur business losses. The court, in allowing the action, reasoned that allowing recovery in negligence would not subject manufacturers to indiscriminate liability.[56] The court was unable to find a substantive basis for denying lost profits against the remote manufacturer under a negligence theory.[57] The court emphasized that the limitation on recovery in negligence cases is the foreseeability of harm, not the manner in which the harm occurred.

Strict Liability

A minority of jurisdictions recognize that the manufacturer of a defective product should be liable in pure economic loss cases under strict liability theory.[58] To these courts, it is irrelevant that the product incurred harm in a violent or gradual manner. It is sufficient that the

Campbell, 250 Or. 262, 442 P.2d 215, *cert. denied*, 393 U.S. 1093 (1968); Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976).

In recognizing that the manufacturer or remote supplier owes a duty to the public to exercise ordinary care in the manufacture of products, one commentator has adopted the position that recovery of damages should not be denied in negligence if the sudden harm requirement of the property damage exception has not been satisfied. In support of this proposition, he notes that "such harm is within the range of reasonable manufacturer foresight, which should raise at least a duty of care unless some compelling economic or social or administrative reason dictates otherwise." Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 984 (1966).

53. 250 Or. 262, 442 P.2d 215 (1968).

54. *Id.* at 269-70, 442 P.2d at 218.

55. 87 Wash. 2d 584, 555 P.2d 818 (1976).

56. *Id.* at 593-94, 555 P.2d at 823.

57. *Id.*

58. Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1975); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

product did not perform adequately and as a result the consumer incurred repair and replacement costs.

The leading case applying the strict liability theory in actions of this kind was the New Jersey Supreme Court decision of *Santor v. A & M Karagheusian, Inc.*[59] In *Santor*, plaintiff purchased carpeting from a retailer of the defendant-manufacturer. The carpeting was sold as Grade One. In January, 1958, the carpeting was laid, and almost immediately plaintiff noticed an unusual line in it. The dealer advised plaintiff that the line would wear away with time. In the span of two months two additional lines appeared in the carpeting. Plaintiff sued under a breach of warranty theory for the purchase price. The New Jersey Supreme Court, adopting a strong consumer protection approach, held that the plaintiff was entitled to recover damages under strict liability theory.[60] The court stated:

> The obligation of the manufacturer thus becomes what in justice it ought to be — an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.[61]

Santor marked a radical departure from those jurisdictions which strictly interpreted the property damage exception in strict liability cases.

Santor was adopted by the Michigan Court of Appeals in *Cova v. Harley Davidson Motor Co.*[62] The plaintiffs, doing business as Bob-O-Link Golf Course, purchased golf carts manufactured by the defendant. The golf carts malfunctioned and plaintiffs sued for damages based on repair costs and lost profits. Recovery of damages based on a strict liability theory was permitted by the court.[63] This position ad-

59. 44 N.J. 52, 207 A.2d 305 (1965).
60. *Id.* at 67, 207 A.2d at 312.
61. *Id.* at 65, 207 A.2d at 311-12.
62. 26 Mich. App. 602, 182 N.W.2d 800 (1970).
63. *Id.* at 603, 182 N.W.2d at 810. However, the precedential value of *Santor* and *Cova* is severely limited because the strict liability theory of Michigan and New Jersey differs significantly from the theory of strict liability embodied in section 402A of the RESTATEMENT (SECOND) OF TORTS (1965). *See* note 66 *infra*, for a discussion of the various theories of strict liability. The New Jersey and Michigan courts have adopted the theory of implied warranty in tort. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965). Consequently these courts have not considered the issue of whether section 402A was intended to encompass economic loss resulting from the simple malfunctioning of a product.

One court has confronted this factual situation. In Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973), plaintiff purchased ten large electric motors

vanced by the minority recognizes that the concept of strict liability is broad enough to include all harm incurred by a consumer due to a defective product. If the property damage exception is broadened to encompass all types of harm incurred by a product, the general rule which prohibits tort-based recovery in pure economic loss cases will be effectively disregarded by the courts.

ANALYSIS: A PROPOSAL FOR CHANGE

It is submitted that the property damage exception is far too narrow. Its effect has been to limit recovery in tort to a narrow class of cases where a product has sustained physical harm in a violent or sudden manner. The consumer has been left unprotected in many other cases. This is because the consumer's bases for recovery under the warranty theories of sales law have often proved to be inadequate.[64] By adhering to the sudden harm requirement of the property damage exception, the majority of courts have failed to recognize that the amount of damages in pure economic loss cases is not directly related to the manner in which the harm was incurred. A consumer may sustain enormous pecuniary loss when the defective product has not incurred harm in a violent or sudden manner. Yet, under the majority rule the consumer may not sue in tort to recover damages unless there is proof of property damage.

The concept of property damage should be expanded to include all cases where the product has incurred any type of harm as a result of a defect in the product itself. By broadening the property damage exception, the general rule will become inoperative and consumers in pure economic loss cases will be able to sue under the theories of negligence or strict liability as well as under warranty theories. This will, of course, not result in automatic recovery as the consumer will still be

for factory use. Six of these motors failed causing plaintiff substantial damages. The Wisconsin Supreme Court stated significantly that section 402A was broad enough to include "any damage inflicted upon the person or property. . . . [It] cover[s] practically all of the harm that could befall one due to a defective product." 58 Wis. 2d at 218, 206 N.W. 2d at 427 (citation omitted).

64. The consumer is not always protected by the warranties of the U.C.C. *See* notes 9-10 *supra*. Three defenses may be employed by the manufacturer in order to preclude recovery of damages under a warranty theory: 1) Plaintiff did not give timely notice of the breach of warranty to the defendant, *see* 63 AM. JUR. 2d *Products Liability* § 102 (1972). 2) Defendant had expressly and effectively disclaimed liability for damages such as those for which plaintiff was seeking to recover, *see* 63 AM. JUR. 2d *Products Liability* §§ 120, 121 (1972); *but see* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974, 15 U.S.C. §§ 2301-2312 (1976). 3) Plaintiff was not in privity of contract with defendant, *see* 63 AM. JUR. 2D *Products Liability* §§ 163, 164 (1972). *See generally* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 16.02-16.05 (1968).

required to prove a prima facie case in negligence[65] or strict liability.[66]

In an effort to balance the interests of both the consumer and manufacturer, the courts may properly focus upon the bargaining position of the parties in order to limit recovery in tort in pure economic loss cases. It is urged that the courts consider the bargaining positions of the parties as a criterion for determining whether a plaintiff in a pure economic loss case will be given the opportunity to sue under negligence or strict liability theories. This criterion has been referred to as the "consumer" test.[67] The theory behind this test is that the law of sales has developed to regulate "commercial transactions," *i.e.*, situations where the parties are in equal bargaining positions. Hence, if the transaction is commercial, sales law should be sufficient; if, however, there is evidence of bargaining inequality, tort principles should be employed to protect the consumer.[68]

Several courts have implied that recovery of damages in pure economic loss cases would have been allowed in tort if there had been evidence of inequality in the bargaining positions of the parties.[69] In

65. The elements of actionable negligence include: "a breach of duty on the part of the seller toward the person complaining of the defect, and an injury to the person to whom that duty is owed proximately resulting from the breach of duty on the seller's part." 63 AM. JUR. 2d *Products Liability* § 25 (1972). Problems of proof in a products liability suit predicated on negligence are discussed in 63 AM. JUR. 2d *Products Liability* § 125 (1972).

66. The prima facie case in strict liability differs according to which theory of strict liability is adopted by the particular jurisdiction. At least three different theories of strict liability may be identified: implied warranty in tort, *Restatement*-based theory, and the California view. 1) Under the implied warranty in tort theory, which is to be distinguished from implied warranty under the law of sales, the consumer is under a burden to prove a specific defect in the product which damages the consumer. The product must be proven to be of unmerchantable quality. Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 611, 182 N.W.2d 800, 806 (1970). 2) A number of jurisdictions follow the language of section 402A of the RESTATEMENT (SECOND) OF TORTS (1965). Section 402A requires the plaintiff to prove: a) that he was injured by the product; b) that the product was in an "unreasonably dangerous condition at the time it left the control of the manufacturer;" c) that there was a chain of proximate causal connection between such condition and plaintiff's injuries. This requirement of proof would prohibit plaintiffs in numerous pure economic loss cases from being allowed a means of recovery under strict liability. A consumer who purchases air conditioners which simply fail to operate correctly would be unable to rely on strict liability to obtain recovery. The air conditioners may indeed be in a defective condition, but this defective condition is typically not unreasonably dangerous. 3) A third view of strict products liability focuses neither on merchantability nor on the unreasonably dangerous requirement, but instead looks to whether there was a defect which caused injury to a user or consumer. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 134-35, 104 Cal. Rptr. 433, 443, 501 P.2d 1153, 1163 (1972). The California Supreme Court in *Cronin* rejected the unreasonably dangerous requirement of the *Restatement*. However, by stating that the plaintiff must only prove that the product was defective, it is not altogether certain that "unreasonably dangerous" will be abandoned as a criterion. "In the final analysis the test of defectiveness of a product is whether it is unreasonably dangerous." 2 J. DOOLEY, MODERN TORT LAW § 32.40 (1977).

67. *See* Franklin, *supra* note 52, at 988.

68. *Id.* at 989.

69. Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1020 (9th Cir. 1970), *cert. denied*, 400 U.S. 902 (1970); Midland Forge, Inc. v. Letts Indus., Inc., 395 F. Supp.

Iowa Electric Light & Power Co. v. Allis-Chalmers Manufacturing Co.,[70] a power company sued the manufacturer of faulty transformers in strict liability to recover damages based on repair expenses. In denying recovery of damages in this case, the Iowa federal district court held, "It may be that in a situation where there is inequality of bargaining position between the consumer and the manufacturer, the Iowa Court would allow such recovery."[71]

The New Jersey Supreme Court in *Santor* also relied upon the unequal bargaining power between the parties in justifying the recovery of economic loss under a strict liability theory. The court stated that the purpose behind imposing liability upon the manufacturer is that the injured persons are ordinarily "powerless to protect themselves."[72] The court implied that the ordinary consumer should therefore be protected under tort theory.

The law of products liability has historically responded to the needs of consumers.[73] Consequently, it would certainly be justifiable to allow the consuming public to rely on tort theory in order to recover damages in pure economic loss cases where the parties were in unequal bargaining positions.

CONCLUSION

An expansion of the property damages exception in pure economic loss cases would undoubtedly aid the consuming public. The consumer would no longer be shackled to the warranty theories of the law of sales in attempting to recover damages where he has purchased a defective product. Rather, he could turn to the tort-based theories of negligence and strict liability. The availability of warranty theories should not preclude recovery under tort theory.[74]

There is ample precedent for expanding the property damage exception to include cases where the product defect causes the product to incur physical harm in a gradual manner. These jurisdictions recognize that the law of torts is concerned with the degree of loss to the

506, 515 (N.D. Iowa 1975); Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 32 (S.D. Iowa 1973); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 65, 207 A.2d 305, 312 (1965). *Contra,* Seely v. White Motor, 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).

70. 360 F. Supp. 25 (S.D. Iowa 1973).

71. *Id.* at 32.

72. 44 N.J. 52, 65, 207 A.2d 305, 312 (1965).

73. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

74. Theories of tort and contract, with relation to products liability are not inconsistent with or repugnant to one another. 72 C.J.S. *Products Liability* § 9 (Supp. 1975).

consumer, not the manner in which the harm was incurred. This same judicial attitude has been expressed by those jurisdictions adopting the position that the law of torts should protect the consumer in all cases where the product defect causes the consumer to sustain economic loss.[75]

Realizing that the expansion of the property damage exception represents a radical approach to a majority of jurisdictions, it is suggested that the courts adopt the consumer test in order to determine whether tort theory may be employed in pure economic loss cases. The courts are free to adopt the above suggestions in an effort to provide a rational framework in which to decide the cases within this area of products liability jurisprudence.

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75. "[D]ue care should be encouraged by the law. Carelessness can only lead to waste of both lives and dollars." Franklin, *supra* note 52, at 985.

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