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Property Damage Caused by Defective Products: What Losses Are Recoverable?

David E. Bland

Robert M. Wattson

PROPERTY DAMAGE CAUSED BY DEFECTIVE PRODUCTS: WHAT LOSSES ARE RECOVERABLE?*

DAVID E. BLAND†
&
ROBERT M. WATTSON‡

Courts across the country have had difficulty applying tort principles to cases involving allegedly defective products that cause property damage without resulting personal injury. The difficulty results from the distinction that the courts draw between property damage recoverable in tort and "economic loss" recoverable only in warranty. The authors provide the practitioner with the framework within which to analyze property damage claims seeking recovery of damages for: (1) injury to the product itself, (2) injury to property other than the product itself, and (3) loss of use, lost profits, and interruption of business. They discuss the definitive decisions and policy reasons supporting the majority and minority views in each category. Finally, the authors discuss special problems that may face commercial plaintiffs seeking recovery for damage to property.

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† David E. Bland is an associate of the Minneapolis law firm of Robins, Zelle, Larson & Kaplan. He is a graduate of the University of Minnesota (B.A. 1975) and William Mitchell College of Law (J.D. 1979).

‡ Robert M. Wattson is a partner in the Minneapolis law firm of Robins, Zelle, Larson & Kaplan. He is a graduate of the University of Minnesota (B.A. 1965, J.D. 1968).

I. INTRODUCTION

Most product liability claims involve an allegedly defective product which causes personal injury. Defective products, however, also cause damage to property without resulting personal injury. A party whose property is damaged should investigate proceeding against the manufacturer or others in the chain of distribution under any of five theories:

1. Breach of express or implied warranty;
2. Misrepresentation;
3. Breach of contract;
4. Negligence; or
5. Strict liability in tort.

An injured plaintiff will seek recovery for property damage falling into one or more of three categories: (1) damages for injury to the product itself, (2) damages for injury to property other than the product itself, and (3) damages for loss of use, lost profits, and interruption of business resulting from the injured party's inability to use the product or other property during the period of replacement or repair. This article will discuss those situations where the law of negligence and strict liability provides an injured plaintiff with a remedy for property damage caused by a product and those situations where no tort remedy is available. Since the courts have adopted different rules governing the recovery of damages for injury to the product itself,[1] for injury to property other than the

1. *See infra* notes 16-114 and accompanying text.

product itself,[2] and for loss of use, lost profits, and interruption of business,[3] each category will be treated separately.

II. DEFINING THE PROBLEM

The development of the theories of negligence and strict liability in tort as applied to cases involving defective products has been well documented,[4] and will not be restated here. It is important to point out, however, that shortly after the now-famous decision by Justice Cardozo in *MacPherson v. Buick Motor Co.*,[5] the *MacPherson* theory was applied to cases involving property damage only.[6] Similarly, the landmark decision by the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*,[7] was applied to cases involving property damage only.[8] Dean Prosser, one of the moving forces behind the development of strict liability theory, advocated its use in cases involving only property damage.[9] The American Law Institute clearly contemplated that strict liability applied to cases involving damage to property when it adopted section 402A of the *Restatement (Second) of Torts*.[10] The rationale behind the application of strict tort liability and negligence theories to product cases involving property damage was succinctly stated by Chief Justice Traynor: "Physical injury to property is so akin to personal injury that there is no reason to distinguish them."[11]

The courts today are in general agreement that damage to property caused by defective products is recoverable under negligence

2. *See infra* notes 115-44 and accompanying text.

3. *See infra* notes 145-79 and accompanying text.

4. *See, e.g.,* Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer),* 69 YALE L.J. 1099 (1960) (hereinafter cited as Prosser, *The Assault*); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (hereinafter cited as Prosser, *The Fall*); Traynor, *The Ways And Meanings Of Defective Products And Strict Liability,* 32 TENN. L. REV. 363 (1965); Wade, *Strict Tort Liability Of Manufacturers,* 19 SW. L.J. 5 (1965).

5. 217 N.Y. 382, 111 N.E. 1050 (1916).

6. *See* Prosser, *The Assault, supra* note 4, at 1100 n.9.

7. 32 N.J. 358, 161 A.2d 69 (1960).

8. *See, e.g.,* Simpson v. Logan Motor Co., 192 A.2d 122 (D.C. 1963); State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 101, at 665 (4th ed. 1971); Prosser, *The Fall, supra* note 4, at 820-23.

10. RESTATEMENT (SECOND) OF TORTS § 402A comment d (1965).

11. Seely v. White Motor Co., 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965).

and strict liablity theories.[12] Not all damage to property, however, is recoverable under negligence or strict liability theory in most jurisdictions. The courts have generally held that damage constituting "economic loss" is not recoverable under these theories.[13] The key question is what types of damage to property are considered "economic," and therefore not recoverable.

The line between non-recoverable economic loss and recoverable property damage is not easy to draw. The courts have had difficulty defining "economic loss" in a manner which preserves the warranty concepts embodied in the Uniform Commercial Code as well as the tort concepts of negligence and strict liability.[14]

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12. Dean Prosser stated:

> There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes, as well as damage to any other property in the vicinity. But where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule, to be encountered later, that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.
>
> . . . With the extension of the strict liability beyond food, and in particular to products likely to cause harm only to property, such as animal food, physical harm to property began to be included; and there is now general agreement that there may be recovery not only for damage to the defective chattel itself, or to other products made from it, but also to other property in the vicinity, as where a building is wrecked by the explosion of a gasoline stove.

W. PROSSER, *supra* note 9, § 101, at 665-66 (footnotes omitted). *See also infra* Appendices A and B.

13. *See, e.g.,* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) (applying Pennsylvania law); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).

14. Dean Prosser has succinctly defined the theoretical difference between tort actions and contract actions as follows:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. They may be owed to all those within the range of harm, or to some considerable class of people. Contract actions are created to protect the interests in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

W. PROSSER, *supra* note 9, § 92, at 613 (footnotes omitted).

The difficulty the courts have had in defining recoverable property damage is highlighted by comparing the majority and concurring opinions in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); the majority and dissenting opinions in Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); the majority and concurring opinions in Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69,

To classify a certain type of loss as "economic," however, is to predetermine its recoverability in negligence or strict liability.

For the purposes of this discussion, "economic losses" are those losses resulting from the product's inability to perform its intended function because of defects within it. "Economic loss" results from defects in the quality of the product which cause damage. Losses caused by non-qualitative defects are "non-economic." These definitions have strong, although not uniform, support in the cases.[15]

III. DAMAGES ARISING FROM AN INJURY TO THE PRODUCT ITSELF

A. Introduction

The *Restatement* is silent on the question of whether damages recoverable for injury to property under section 402A are limited to damage to other property or include damage to the product itself.[16] Two 1965 cases, *Santor v. A & M Karagheusian, Inc.*[17] and *Seely v. White Motor Co.*,[18] analyzed the question of the type of damage to the product that was recoverable in tort and reached opposite conclusions.[19]

In *Santor,* plaintiff purchased carpeting manufactured by de-

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435 N.E.2d 443 (1982); and the majority and dissenting opinions in National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).

In each of these cases, the court struggled to reach a definition of "economic loss" which would allow an injured plaintiff to recover in those situations where the defective product created an unreasonable risk of harm, but to restrict an injured plaintiff's recovery only to those situations, in order to avoid infringing on the legislatively adopted principles embodied in the Uniform Commercial Code.

15. *See, e.g.,* Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61, 68-70 (5th Cir. 1982) (court allowed plaintiff to recover for damage to his peanut crop caused by an allegedly defective combine); Rocky Mountain Helicopters, Inc. v. Bell Helicopter Co., 491 F. Supp. 611, 621-22 (N.D. Tex. 1979) (court refused to allow plaintiff to recover for property damage to a helicopter which crashed because of an alleged defect within it); Wuench v. Ford Motor Co., 104 Ill. App. 3d 317, 321, 432 N.E.2d 969, 972 (1982) (court concluded that plaintiff merely sustained a loss of the benefit of his bargain when the axle in plaintiff's car broke off, causing the car to overturn, damaging it and injuring plaintiff); *see also infra* Appendices A, B and C.

16. Comment d to section 402A mentions property damage, as does section 402A itself, but does not discuss whether recoverable property damage is limited to other property, or includes damage to the product itself. The illustrations given by the Committee deal only with situations involving damage to property other than the product itself.

17. 44 N.J. 52, 207 A.2d 305 (1965).

18. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

19. *See* Apel, *Strict Liability: Recovery Of "Economic" Loss,* 13 IDAHO L. REV. 29 (1976); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases,* 18 STAN. L. REV. 974 (1966); Ribstein, *Guidelines for Deciding Product Economic Loss Cases,* 29 *Mercer L. Rev.* 493 (1978); Note, *Economic Losses and Strict Product Liability: A Record of Judicial*

fendant from a retailer, which was represented to be Grade No. 1 carpeting, but which had an unacceptable line across it due to a manufacturing defect. After plaintiff learned the retailer had gone out of business, plaintiff brought an action against the defendant manufacturer under the theories of breach of implied warranty and strict products liability, seeking recovery of the cost of the carpet. The New Jersey Supreme Court upheld the judgment against defendant on the theory of implied warranty of merchantability notwithstanding the lack of privity between plaintiff and the manufacturer.[20] The court also noted that: "[i]t seems important to observe, however, that the manufacturer's liability may be cast in simpler form," and allowed plaintiff to recover under strict liability.[21] The court defined a "defective" product as one not reasonably fit for the ordinary purpose for which it was sold or used,[22] and allowed plaintiff to recover for the carpet's failure to meet plaintiff's economic expectations, even though the carpeting itself did not pose an "unreasonable risk of harm" to the plaintiff or to his property.[23] Under the theory of *Santor,* as long as a product is not reasonably fit for its intended purpose, recovery can be had under strict liability even though the product is not unreasonably dangerous.

A contrary view was expressed by Chief Justice Traynor in *Seely v. White Motor Co.,*[24] decided four months after *Santor.* Plaintiff purchased a truck manufactured by defendant for use in his heavy-duty, over-the-road hauling business. Upon receipt of the vehicle, plaintiff found that the truck "galloped" because of a defect in its suspension system.[25] In addition, on one occasion the brakes on the truck failed, causing the truck to overturn. After defendant made several unsuccessful attempts to repair the galloping, plaintiff ceased making payments on the truck, and brought an action for the money he had paid, for lost profits because of the galloping, and for damages arising out of the rollover. The trial court entered judgment in plaintiff's favor on its breach of warranty claim, but denied plaintiff recovery for the damages arising

Confusion Between Contract and Tort, 54 NOTRE DAME LAW. 118 (1978); *see also* Speidel, *Products Liability, Economic Loss And The UCC,* 40 TENN. L. REV. 309 (1973).

20. 44 N.J. at 63, 207 A.2d at 310-11.

21. *Id.* at 63, 207 A.2d at 311.

22. *Id.*

23. *Id.* at 67, 207 A.2d at 313.

24. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

25. *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.

out of the accident, finding that plaintiff had failed to meet his burden of proof that a defect caused the accident.[26]

The California Supreme Court affirmed the judgment in favor of plaintiff on the warranty claim. The court went on, however, to reject plaintiff's contention that he could also recover under the theory of strict liability in tort.[27] Justice Traynor pointed out that tort law does not impose a blanket obligation on the seller of a product to warrant the performance of a product to the level expected by the buyer unless the seller so agrees.[28] Tort law does impose an obligation on a seller to design products to a level of safety sufficient to prevent an unreasonable risk of harm to the user or consumer or to his property.[29] Therefore, the California Supreme Court held that tort law will provide a remedy for the user or consumer who is injured by virtue of an unreasonably dangerous defect in a product—a risk tort law intends to prevent—although tort law will not provide a remedy to a buyer who is damaged because the product fails to meet his economic expectations.[30] Had plaintiff been able to prove that a defect in the truck caused the rollover, the court would have allowed recovery for damage to the product itself caused by the unreasonably dangerous defect.[31]

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26. *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.

27. *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

28. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

29. *Id.* As another court noted: "[C]ontract law is largely inapposite to the problem of hazardous defects, because purchasers are not expected to bargain for a safe product—they have a right to such a purchase correlative to the manufacturer's duty to provide safe equipment." Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1175 (3d Cir. 1981).

30. 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. Justice Traynor stated:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. 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. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

Id.

31. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. *See also* Traynor, *supra* note 4, at 373.

Santor and *Seely* are the two most frequently cited cases in any discussion of the right to recover damages for injury to the product itself. *Seely* represents the majority rule, denying recovery for losses caused by the product's failure to meet the buyer's expectations because of qualitative defects, but allowing recovery for injury to the product caused by unreasonably dangerous defects.[32] *Santor* represents the minority view, allowing recovery for all damages caused by a defective product, whether or not the product is unreasonably dangerous.[33]

B. Seely *and its Progeny*

Although the principle set forth in *Seely* is relatively easy to state, the courts have had difficulty distinguishing recoverable damages caused by unreasonably dangerous defects in a product from non-recoverable damages caused by qualitative defects in a product.[34] The courts have generally looked to the circumstances surrounding the claim to determine whether the injury is the result of a defect which poses an unreasonable risk of harm to the user or consumer or to his property.[35] When the damages are caused by such a risk,[36] recovery is allowed. When the damages result from

32. *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][k] (Aug. 1982 & Supp. 1983); 1 R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 4:22-:23 (2d ed. 1974 & Supp. 1982).

33. *See* L. FRUME & M. FRIEDMAN, *supra* note 32.

34. *Compare* Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981) (court expressly adopted the *Santor* theory in a case involving a claim that a carpet pad gave off fumes of formaldehyde and had to be replaced) *with* Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983) (court expressly required that the defective product be unreasonably dangerous to sustain a recovery in strict liability); Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974) (Idaho Supreme Court adopted section 402A of the RESTATEMENT (SECOND) OF TORTS in a case involving a defective pesticide which damaged seed beans, suggesting plaintiff could recover in tort for the damage to the beans) *and* Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 544 P.2d 306 (1975) (court, in dicta, suggested that economic losses were recoverable in tort) *with* Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978) (court adopted the reasoning of *Seely* and rejected plaintiff's claim for economic losses in negligence); *compare also* Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982) *and* Cloud v. Kit Mfg. Co., 563 P.2d 247 (Alaska 1978) *with* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981) *and* Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973), *overruled,* National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).

35. *See, e.g.,* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981). The RESTATEMENT (SECOND) OF TORTS § 402A uses the term "user or consumer" in order to emphasize that privity need not exist between a seller and the injured party.

36. *See* Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977).

deterioration, internal breakage, or other qualitative defects, recovery is denied.[37]

For example, the Alaska Supreme Court denied recovery for defects in a mobile home that made it a "lemon" but were not unreasonably dangerous,[38] but allowed recovery when the polyurethane foam rug padding in a mobile home ignited, destroying the mobile home and its contents.[39] The court distinguished the "lemon" from the unreasonably dangerous defect on the ground that plaintiffs were deprived of more than merely the benefit of their bargain because the unreasonably dangerous defects caused a sudden and calamitous injury to the product itself.[40]

The Alaska Supreme Court further refined the sudden and calamitous test in *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*[41] In denying plaintiff recovery for damage to a Caterpillar tractor containing a defective low oil pressure shut-down system which caused the engine to seize, the court determined that the right to recover under negligence and strict liability ought to be determined by referring to the policies supporting the application of tort law.[42] Because strict liability was intended to allow recovery for damage caused by defective and unreasonably dangerous products, strict liability can only be used in those situations where the loss is the proximate result of a dangerous defect in a product, occurring under circumstances which make the product dangerous. Plaintiffs who cannot meet the unreasonably dangerous test are relegated to a recovery under contract or warranty theory, even though the damage may have been caused by an "accident" in the broad sense.[43]

37. *See* Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324 (Alaska 1981). The distinction between an "accident" and deterioration is based in part on the analysis found in Note, *Economic Loss in Products Liability Jurisprudence,* 66 COLUM. L. REV. 917 (1966).

38. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976). The mobile home contained various defects in the wall paneling, roof, light fixtures, and walls. *Id.* at 282.

39. Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977).

40. *Id.* at 251.

41. 623 P.2d 324 (Alaska 1981).

42. *Id.* at 328-29.

43. In Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983), the Alaska Supreme Court reaffirmed the *Northern Power* dangerousness test, holding that the critical test in determining whether damages for an injury to property are recoverable in tort is (1) whether the product is dangerously defective and (2) whether the dangerous defect caused the property damage. *Id.* at 464. *See* Ribstein, *supra* note 19, at 500-01 for a critique of the dangerous-nondangerous approach to resolving the question of the recoverability of damages for an injury to the product itself.

A similar distinction was drawn in Oregon, where the supreme court denied recovery to a plaintiff whose chickens failed to lay eggs because of an apparent defect in the chicken feed,[44] and where a tractor failed to perform to the level expected by the plaintiff,[45] but allowed recovery for property damage to a truck resulting from a defect in the brakes.[46] The court justified the distinction it drew by relying on the policies supporting the adoption of strict liability, distinguishing the disappointed buyers in the first two cases from the endangered one in the third.[47]

In *Moorman Manufacturing Co. v. National Tank Co.*,[48] Illinois adopted a rule based not on the existence of physical harm, but rather on the nature of the damage viewed from the perspective of the interests to be protected by tort law.[49] The Illinois Supreme Court refused to allow recovery in negligence or strict liability for damage to a grain storage bin which cracked, allowing the grain inside to spill onto the ground. Recognizing that to allow recovery for benefit of the bargain losses under tort theory would essentially emasculate the warranty provisions of the Uniform Commercial Code, the court fashioned a rule that allows recovery for damage to property only when the plaintiff establishes that the product was defective and unreasonably dangerous.[50] Similarly, the court refused to allow recovery in negligence for economic losses resulting from qualitative defects in the product, relegating the consumer to recovery in contract.[51] Although not specifically expressed in the *Moorman* opinion, Illinois will apparently allow recovery for damages resulting from an injury to the product itself under both negligence and strict liability theories.[52]

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44. Brown v. Western Farmers Ass'n, 268 Or. 470, 521 P.2d 537 (1974).

45. Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965).

46. Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).

47. The *Russell* court held:

> The loss must be a consequence of the kind of danger and occur under the kind of circumstances, "accidental" or not, that made the condition of the product a basis for strict liability. This distinguishes such a loss from economic losses due only to the poor performance or the reduced resale value of a defective, even a dangerously defective, product.

281 Or. at 595, 575 P.2d at 1387.

48. 91 Ill. 2d 69, 435 N.E.2d 443 (1982), *rev'g,* 92 Ill. App. 3d 136, 414 N.E.2d 1302 (1980).

49. *Id.* at 95, 435 N.E.2d at 455 (Simon, J., concurring specially).

50. 91 Ill. 2d at 79-80, 435 N.E.2d at 448.

51. *Id.* at 85-86, 435 N.E.2d at 450.

52. The *Moorman* court relies on the Third Circuit's decision in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981), which explicitly allows the recovery of damages for injury to the product itself caused by an unreasonably

The New York Court of Appeals has recently resolved a dispute between two departments of the Appellate Division, and has joined the majority of jurisdictions in adopting the approach taken in *Seely*. In *John R. Dudley Construction, Inc. v. Drott Manufacturing Co.,*[53] the Appellate Division of the New York Supreme Court, Fourth Department, followed the rationale of *Seely* and allowed recovery for damage to a crane which collapsed because bolts in its turntable failed. Noting that plaintiff was not attempting to recover the difference in the value of the crane with and without the defective bolts, but rather was seeking damages caused by an unreasonably dangerous defect, the court found it unnecessary to reach the question of the applicability of the *Santor* theory in New York.[54] In *Schiavone Construction Co. v. Elgood Mayo Corp.,*[55] however, the Appellate Division, First Department, allowed plaintiff to recover damage due to a qualitative defect in a truck hoist which prevented the truck from performing its intended function. Relying on the New York Court of Appeals decision in *Randy Knitwear, Inc. v. American Cyanamid Co.,*[56] which allowed recovery in strict liability for a defect in a resin that allowed the fabric in which it was incorporated to shrink,[57] the court allowed plaintiff to amend its complaint to allege a cause of action in strict liability.[58] The New York Court of Appeals reversed the Appellate Division's decision in *Schiavone,*[59] choosing to adopt the dissenting opinion of Justice Silverman,[60] allowing recovery for damage to the product itself only when the product is unreasonably dangerous to persons or property.[61]

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dangerous defect. 652 F.2d at 1174-75. Although the *Moorman* court discusses the right to recover for damage to other property under negligence and strict liability theories, the court's reliance on *Pennsylvania Glass Sand* supports the proposition that Illinois will allow recovery of damages for injury to the product itself under both negligence and strict liability theories. The Illinois Court of Appeals so held in Vaughn v. General Motors Corp., 118 Ill. App. 3d 201, 454 N.E.2d 740 (1983).

53. 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979).

54. *Id.* at 374, 412 N.Y.S.2d at 514.

55. 81 A.D.2d 221, 439 N.Y.S.2d 933 (1981).

56. 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

57. The *Randy Knitwear* court held: "We perceive no warrant for holding—as [American Cyanamid] urges—that strict liability should not here be imposed because the defect involved, fabric shrinkage, is not likely to cause personal harm or injury." 11 N.Y.2d at 15, 181 N.E.2d at 403-04.

58. 81 A.D.2d at 227, 439 N.Y.S.2d at 937.

59. 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982).

60. 81 A.D.2d at 227, 439 N.Y.S.2d at 937.

61. 56 N.Y.2d at 668, 436 N.E.2d at 1323, 451 N.Y.S.2d at 721; *see also* County of Westchester v. General Motors Corp., 555 F. Supp. 290 (S.D.N.Y. 1983) (court refused to

In *Vulcan Materials Co. v. Driltech, Inc.*,[62] the Georgia Supreme Court clarified two Georgia Court of Appeals decisions[63] involving actions for recovery for damage to the product itself. *Vulcan Materials* came before the Georgia Supreme Court pursuant to an order of certification issued by the Eleventh Circuit Court of Appeals.[64] The facts set forth by the supreme court indicate that a rotary blast hole drilling machine burst into flames and was destroyed because a cast iron bushing in the machine's compressor system fractured and released a spray of hydraulic fluid that ignited. The operator escaped the fire without injury, and there was no damage to property other than the drill.[65] The court reviewed the significant decisions from other jurisdictions[66] in order to establish a definitive rule to be applied in Georgia in actions for damage to a product itself. The court analyzed the policies underlying warranty and tort law, and concluded that a plaintiff could recover for damage to the product itself caused by a defect which poses an unreasonable risk of harm to persons or property.[67]

C. Santor *and its Progeny*

Several states, following the rationale of *Santor,* allow recovery under negligence and strict liability theories for damages resulting from qualitative defects in a product that is not unreasonably dangerous. For example, in *Blagg v. Fred Hunt Co.*,[68] plaintiff sought

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allow recovery of damages in tort when air-conditioning units on several buses manufactured by defendant failed to operate properly, concluding that the defects were not unreasonably dangerous to persons or other property, but simply failed to perform their intended function).

62. 251 Ga. 383, 306 S.E.2d 253 (1983).

63. Long Mfg. N.C. Inc. v. Grady Tractor Co., 140 Ga. App. 320, 231 S.E.2d 105 (1976); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975).

64. 251 Ga. at __, 306 S.E.2d at 254.

65. *Id.* at __, 306 S.E.2d at 254.

66. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977); Seely v. White Motor Co., 64 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

67. The court held:

> Thus, the certified questions are answered as follows: (1) Under Georgia law, there is an accident exception to the general rule that an action in negligence does not lie absent personal injury or damage to property other than to the allegedly defective product. (2) An "accident" should be defined as a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to other persons or property.

251 Ga. at __, 306 S.E.2d at 257.

68. 272 Ark. 185, 612 S.W.2d 321 (1981). *But see* Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983). In *Berkeley Pump,* the court, purporting to clarify *Blagg,* held that a product must be unreasonably dangerous to sustain recovery in

recovery for the cost of replacing a carpet and pad that emitted strong odors and fumes of formaldehyde.[69] The Arkansas Supreme Court, noting that the Arkansas strict liability statute[70] broadened the provisions of section 402A of the *Restatement (Second) of Torts,*[71] chose to adopt the reasoning of *Santor* and refused to dismiss plaintiff's strict liability claim.[72] The court did not discuss whether the defect was unreasonably dangerous. Similarly, in *Thompson v. Nebraska Mobile Homes Corp.,*[73] the Montana Supreme Court reversed the district court's dismissal of plaintiff's claim in strict liability in tort for qualitative defects in a mobile home purchased from defendant.[74] The court adopted the reasoning of *Santor,*[75] and allowed plaintiff to recover for qualitative defects in strict liability.[76]

Ohio allows recovery for qualitative defects in strict liability,[77] but not in negligence.[78] The basis for such a recovery began with *Inglis v. American Motors Corp.,*[79] which rejected plaintiff's right to recover under a negligence theory for the diminution in the value of an automobile due to qualitative defects.[80] Relying on *Santor,* the court fashioned a non-privity express warranty theory which allowed plaintiff to recover the same damages. Subsequently, in *Iacono v. Anderson Concrete Corp.,*[81] plaintiff sought recovery from defendant for damage to a concrete driveway installed by defendant which pitted after installation because defendant used a type of aggregate in the concrete mix not suited for outdoor application. The Ohio Supreme Court allowed plaintiff to recover the cost of replacing the driveway, concluding that the tort theory of breach of implied warranty could be used to recover for damage confined

strict liability. *Id.* at __, 653 S.W.2d at 131. Although the court purported to rely on the theory of *Santor* in *Berkeley Pump,* it actually adopted the theory of *Seely. Id.* at __, 653 S.W.2d at 131. It is clear that Arkansas follows *Seely* not *Santor.*

69. *Id.* at 185-86, 612 S.W.2d at 322.
70. ARK. STAT. ANN. § 85-2-318.2 (Supp. 1981).
71. 272 Ark. at 188, 612 S.W.2d at 323.
72. *Id.* at 190, 612 S.W.2d at 324.
73. __ Mont. __, 647 P.2d 334 (1982).
74. *Id.* at __, 647 P.2d at 337.
75. *Id.*
76. *Id.* at __, 647 P.2d at 338.
77. Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).
78. Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
79. *Id.*
80. *Id.* at 140-41, 209 N.E.2d at 588.
81. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

solely to the product.[82]

In *Mead Corp. v. Allendale Mutual Insurance Co.*,[83] the Federal District Court for the Northern District of Ohio, relying on *Inglis* and *Iacono,* allowed plaintiff to recover in strict liability for damages arising out of the failure of a generator used by plaintiff in its business. The court recognized that the losses sustained were economic in nature because they were caused by a qualitative defect in the generator, but held that Ohio allowed such recovery.[84] The court pointed out, however, that recovery was available in strict liability only, not in negligence.[85]

Both Michigan and Wisconsin have adopted a similar approach. In *Cova v. Harley Davidson Motor Co.*,[86] the Michigan Court of Appeals allowed plaintiff to recover the cost of repairing twelve golf carts containing various defects in their ignition systems, albeit under a tort theory of breach of implied warranty in the absence of privity.[87] Wisconsin allowed a plaintiff to recover the cost of replacing a defective roof caused by a qualitative defect in the *City of LaCrosse v. Schubert, Schroeder & Associates, Inc.*,[88] following the policy argument of *Santor.*[89]

D. Texas and Minnesota

Texas is the only state to expressly refuse to allow recovery of damages for injury to the product itself, even if the injury results from an unreasonably dangerous defect in the product.[90] In *Nobil-*

82. The tort theory of breach of implied warranty adopted by the court is virtually identical to the theory of strict liability in tort. The court, therefore, allowed recovery for damages caused by a qualitative defect in the product without regard to the requirement of unreasonable danger. *Id.* at 93, 326 N.E.2d at 271.

83. 465 F. Supp. 355 (N.D. Ohio 1979).

84. *Id.* at 366.

85. *Id.* at 366-67.

86. 26 Mich. App. 602, 182 N.W.2d 800 (1970).

87. *Id.* at 608-09, 182 N.W.2d at 804. The breach of implied warranty theory adopted by the court is identical to the general principles of strict liability in tort without the requirement of an unreasonably dangerous defect. *See also* Gauthier v. Mayo, 77 Mich. App. 513, 258 N.W.2d 748 (1977).

88. 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

89. *Id.* at 45, 240 N.W.2d at 127. The court relied on Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973), in determining the question under Wisconsin law. In *Air Products,* the Wisconsin court, applying Pennsylvania law, allowed the recovery of damages for qualitative defects in a product. *See* 72 Wis. 2d at 45, 240 N.W.2d at 127.

90. Delaware has refused to allow recovery in strict liability for either personal injury or property damage caused by a defective product, holding that the legislature pre-

ity Homes of Texas, Inc. v. Shivers,[91] plaintiff sought to recover the diminution in value of a mobile home due to qualitative defects under the theories of negligence and strict liability.[92] The Texas Supreme Court followed the rationale of *Seely,* and refused to allow recovery because the jury had determined that no unreasonably dangerous defect existed.[93] In *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.,*[94] plaintiff sought recovery of damages when a defect in the engine of its crop-dusting plane forced the pilot to crash land on a rough country road, seriously damaging the airplane.[95] Plaintiff sought to distinguish this factual circumstance from that in *Nobility Homes,* pointing out the difference between a qualitative defect and an unreasonably dangerous product.[96] After reviewing the authorities on both sides of the question,[97] the Texas Supreme Court adopted the policy argument of Dean Keeton,[98] classified the damage to the plane as the loss of the benefit of the bargain, and denied plaintiff recovery under strict liability theory, notwithstanding the jury's decision that the defect in the engine was unreasonably dangerous.[99]

In *Signal Oil & Gas Co. v. Universal Oil Products,*[100] the Texas Supreme Court allowed recovery of damage to the product itself

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empted the imposition of strict tort liability by adopting the Uniform Commercial Code. Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968 (Del. 1980).

91. 557 S.W.2d 77 (Tex. 1977).

92. *See id.* at 77-78.

93. *Id.* at 79-80. The court's ruling is limited to plaintiff's claim under a theory of strict liability in tort. The trial judge found Nobility's negligence proximately caused Shiver's damages. Nobility attacked that decision in the court of civil appeals without success. Nobility failed to challenge the court of appeals' ruling before the Texas Supreme Court, compelling the supreme court to affirm the judgment in favor of Shivers in negligence. *Id.* at 83.

94. 572 S.W.2d 308 (Tex. 1978).

95. *See id.* at 310.

96. *Id.* at 311.

97. *Id.* at 311-12. As Justice Pope points out in his dissent, the authorities relied on by the majority do not support the position adopted. 572 S.W.2d at 318 (Pope, J., dissenting).

98. 572 S.W.2d at 312. Dean Keeton argued: " 'A damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage limited solely to the property, recovery should be available, if at all, on a contract-warranty theory.' " *Id.* (quoting Keeton, *Annual Survey of Texas Law on Torts,* 32 SW. L.J. 1, 5 (1978)).

99. *Id.* at 310. Justice Pope argued in dissent that, although economic loss is different from the physical harm necessary to sustain an action under a theory of strict liability in tort, this case involved physical harm, not economic loss. *Id.* at 313, 317-19 (Pope, J., dissenting).

100. 572 S.W.2d 320 (Tex. 1978).

when a defect in the product caused a fire in plaintiff's plant, damaging other property in addition to the product itself.[101] In a concurring opinion, Justice Pope, author of the dissent in *Mid Continent,* questioned the distinction the court drew between the defect in *Mid Continent* and that in *Signal Oil,* arguing that the result in each case should be the same because there was no legal or logical rationale for distinguishing the cases.[102]

The law of Minnesota is unclear as to the recoverability of damages for an injury to the product itself. The uncertainty arises from the Minnesota Supreme Court's decision in *Superwood Corp. v. Siempelkamp Corp.*[103] *Superwood* came before the Minnesota Supreme Court pursuant to an order for certification of an unsettled question of state law issued by the United States District Court for the District of Minnesota.[104] The questions certified by the district court dealt with the plaintiff's right to recover damages for an injury to the product itself under negligence and strict liability theories.[105] Plaintiff sought recovery for the cost of repairing a defective press which failed after twenty-one years of use. Plaintiff also sought recovery of lost profits and increased costs resulting from the inability to use the damaged press during repairs.[106]

Noting the absence of controlling Minnesota precedent, the

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101. *See id.* at 325. The court held:

> In the instant case Signal has alleged property damages in the form of damages to the product itself, *as well as to other surrounding property*. . . . Where such collateral property damage exists in addition to damage to the product itself, recovery for such damages are recoverable [sic] under Section 402A of the Restatement (Second) of Torts as damage to property . . . . To the extent that the product itself has become part of the accident risk or the tort by causing collateral property damage, it is properly considered as part of the property damages, rather than as economic loss.

Id. (emphasis in original).

102. Justice Pope argued:

> In *Signal Oil,* the damage to the plant that it bought could be sought in a strict liability suit; in *Mid Continent* the damage to the airplane it sold cannot be sought in a strict liability suit. The holdings are inconsistent and portend problems that could be avoided by adhering to the criteria stated in section 402A.

572 S.W.2d at 332 (Pope, J., concurring).

The Fifth Circuit, attempting to apply the principles of *Mid Continent* and *Signal Oil* in Mercer v. Long Mfg. N.C., Inc., 665 F.2d 61 (5th Cir. 1982), reached the conclusion that a plaintiff could recover for damage to its peanut crop caused by a defect in a combining machine, but could not recover for damage to the combine itself. *Id.* at 70. The court apparently ignored the unreasonably dangerous requirements of *Mid Continent* and *Signal Oil.*

103. 311 N.W.2d 159 (Minn. 1981).

104. *See id.* at 160.

105. *Id.*

106. *Id.*

Minnesota Supreme Court reviewed the authorities on both sides of the question,[107] chose to adopt the approach taken by Chief Justice Traynor in *Seely,*[108] and denied plaintiff recovery in tort for the damages it sustained.[109] In his dissent, Justice Yetka argued that the rule announced in *Superwood* should apply only to plaintiff's action in strict liability, not its negligence claim, because Minnesota had long recognized a plaintiff's right to recover damages for economic loss if negligence was proven.[110]

The uncertainty regarding the scope of the *Superwood* decision results by virtue of the status of the case as decided by the Minnesota Supreme Court. The questions certified by the district court were in response to a motion for summary judgment made by defendant. In deciding a motion for summary judgment, the court is obliged to construe the facts in the light most favorable to the nonmoving party, in this case, the plaintiff. One issue of fact before the trial court was whether the damage which plaintiff sustained resulted from an unreasonably dangerous defect in the product.[111] For the purposes of the summary judgment motion, the court was required to assume that plaintiff could prove the product was unreasonably dangerous. If the Minnesota Supreme Court's decision in *Superwood* is based on the factual assumption that the press was unreasonably dangerous, then Minnesota follows the Texas theory, allowing recovery for damage to the product itself only if other property is damaged or personal injury results.[112] Such a result is contrary to the decision in *Seely,* on which the Minnesota Supreme Court relied. If the Minnesota Supreme Court did not assume that the defect in the press was unreasonably dangerous, the opinion in *Superwood* stands for the proposition that economic loss is not recoverable in tort in Minnesota, leaving open the question of the recoverability of damages caused by an unreasonably dangerous defect.[113]

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107. *Id.* at 161.

108. *Id.* at 161-62.

109. *Id.* at 162.

110. *Id.* at 163 (Yetka, J., dissenting). *See also* Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929); Neiman v. Channellene Oil & Mfg. Co., 112 Minn. 11, 127 N.W. 394 (1910).

111. *See Superwood,* 311 N.W.2d at 160. *But see* States Steamship Co. v. Stone Manganese Marine, Ltd., 371 F. Supp. 500, 506 (D.N.J. 1973) (trial court refused to dismiss plaintiff's complaint in response to defendant's contention that economic loss was involved, holding that the issue of unreasonable danger was a fact issue for the jury).

112. *See supra* notes 90 to 99 and accompanying text.

113. *See* Northern States Power Co. v. International Tel. & Tel. Corp., 550 F. Supp.

E. Summary

The majority of jurisdictions allow recovery of damages for injury to the product itself under negligence and strict liability theories when the injury is one arising in a factual context which promotes the policies behind the adoption of negligence and strict liability, but deny recovery for qualitative defects. A minority of jurisdictions allow recovery for all types of damages arising from an injury to a product itself, whether the defects causing the injury are qualitative or unreasonably dangerous.[114] Texas refuses to allow recovery when the only damage is to the product itself, whether the damage results from an unreasonably dangerous defect or a qualitative one. Minnesota's law is unclear as to the recoverability of damages for injury to the product itself, even when the damage is caused by an unreasonably dangerous product.

IV. Damages Arising from Injury to other Property

A. Introduction

Virtually every jurisdiction that has decided the question of the recoverability of damages resulting from an injury to property other than the product itself under negligence and strict liability theories, allows such recovery. The justification supporting recovery, as stated by Justice Traynor in *Seely,* is that there is no difference between property damage resulting from an unreasonably dangerous defect and personal injury resulting from the same unreasonably dangerous defect.[115] Therefore, there is no reason to allow recovery in one case but not in the other.

B. Seely *Applied*

In *Star Furniture v. Pulaski Furniture Co.,*[116] the West Virginia Supreme Court allowed a plaintiff to recover when a clock malfunctioned and burned plaintiff's building down.[117] In *Bombardi v. Pochel's Appliance & TV Co.,*[118] the Washington Court of Appeals allowed plaintiff to recover damage to real and personal property

108 (D. Minn. 1982). The court suggested that *Superwood's* "import and precedential value are a topic of debate." *Id.* at 111.

114. *See infra* Appendix A.

115. *See Seely,* 63 Cal. App. 2d at 19, 45 Cal. Rptr. at 24, 403 P.2d at 152.

116. 297 S.E.2d 854 (W. Va. 1982).

117. *See id.* at 863.

118. 9 Wash. App. 797, 515 P.2d 540 (1973).

caused by a defect in a television set which ignited and damaged the premises.[119] In *Hales v. Green Colonial, Inc.*,[120] the Eighth Circuit Court of Appeals, applying Missouri law, allowed plaintiff to recover damage to his real property resulting from a fire caused by a defect in a heater.[121]

The mere existence of damage to other property is not, in and of itself, sufficient to sustain recovery under negligence and strict liability theories. Several courts have distinguished damage to other property caused by an unreasonably dangerous defect from damage to other property caused by a qualitative one, allowing recovery in the former case but denying it in the latter.[122] For example, in *Monsanto Agricultural Products Co. v. Edenfield*,[123] the court refused to allow a plaintiff to recover in negligence for damage to plaintiff's crop caused by the failure of a herbicide to effectively control weeds, noting that the damage was caused by the herbicide's ineffectiveness, rather than by a defect in the herbicide.[124] In *Purvis v. Consolidated Energy Products Co.*,[125] the court refused to allow plain-

119. *See id.* at 799, 515 P.2d at 542.

120. 490 F.2d 1015 (8th Cir. 1974).

121. *Id.* at 1022. *See also* LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342 (8th Cir. 1981), *cert. denied,* 455 U.S. 1019 (1982) (interpreting Minnesota law). *But see* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981). The result in *LeSueur Creamery* may be consistent with the decision in *Superwood* because the defect caused damage to other property.

In Gates Rubber Co. v. Irathane Systems, Inc., 710 F.2d 501 (8th Cir. 1983), the United States Court of Appeals for the Eighth Circuit, deciding Minnesota law, reversed the trial court's dismissal of a claim for damage to other property, holding that *Superwood* did not bar an action for damage to property other than the product itself. The court did not decide whether plaintiff could also recover for damage to the product itself when other property was damaged.

122. *Compare* State v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975), *cert. denied,* 430 U.S. 915 (1977) (court held defendants not liable where polyurethane foam installed in plaintiffs' buildings proved flammable and had to be removed, concluding that plaintiffs simply lost the benefit of their bargain) *with* Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile, 131 Ariz. 289, 640 P.2d 851 (1982) (court allowed recovery in strict liability when a mobile home burst into flames within six months of its purchase due to a defect in its heater). *But see* Board of Educ. v. United States Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982) (following the theory of *Santor,* plaintiff could recover in tort for the cost of removing asbestos ceiling tiles from several school buildings, because the asbestos tiles posed an unreasonable risk of harm to persons); Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983) (court, following *Seely,* reversed a summary judgment in favor of defendant and allowed plaintiff to maintain his strict liability and negligence claims for the cost of removing urea formaldehyde insulation that emitted noxious and hazardous fumes, holding that the insulation was unreasonably dangerous).

123. 426 So. 2d 574 (Fla. Dist. Ct. App. 1982).

124. *Id.* at 576.

125. 674 F.2d 217 (4th Cir. 1982).

tiff to recover for damage to his tobacco crop caused by a defect in the ventilating system of a curing barn, pointing out that the defect did not create an unreasonable risk of danger.[126] The barn simply failed to perform as plaintiff expected. Similarly, in *State v. Cook Paint & Varnish Co.*,[127] the court refused to allow a class of plaintiffs to recover damages caused by the installation of polyurethane foam insulation in their buildings, pointing out that plaintiffs simply failed to obtain the benefit of their bargain in that the urethane foam failed to meet expected standards of performance.[128]

The difference between recoverable and non-recoverable damage to other property was clearly set forth in *Fireman's Fund American Insurance Co. v. Burns Electronic Security Services, Inc.*[129] A subrogated insurer sought to recover approxmately $800,000 it paid as a result of a burglary of its insured's premises, which were protected by a burglar alarm system installed and maintained by defendant. The contract between the insured and the defendant contained a limitation of liability. In an effort to circumvent the contractual limitation, plaintiff sued under the theory of strict liability in tort. The court denied recovery, concluding that the loss was economic and therefore not recoverable.[130] The court defined economic loss as the loss of the benefit of the bargain and contrasted that loss with a loss that the parties could not reasonably have contemplated, such as hazards peripheral to the product's intended function.[131] The court distinguished the situation where a fire alarm fails to work allowing a building to burn down from the

126. *Id.* at 223. The court stated:

> Plaintiff's evidence may have demonstrated that the barns performed their intended task poorly, but it did not establish that they posed a safety hazard. A showing that the barns caused physical injury to tobacco by failing to cure it does not establish that the barns were unreasonably dangerous to property. . . . Giving the plaintiff the benefit of all favorable inferences, we conclude that it was an ordinary commercial risk of product ineffectiveness which caused this loss.

Id.

The court's decision in *Purvis* is clouded by the court's reliance on a disclaimer of liability in the contract for sale as an additional basis for denying plaintiff recovery. 674 F.2d at 220-23. See *infra* notes 184-96 and accompanying text for a further discussion of the effectiveness of a disclaimer of liability in a contract for the sale of a product.

127. 391 F. Supp. 962 (D. Ariz. 1975).

128. *Id.* at 971-72.

129. 93 Ill. App. 3d 298, 417 N.E.2d 131 (1980).

130. *Id.* at 301, 417 N.E.2d at 134. *Accord* Lobianco v. Property Protection, Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981).

131. *See* 93 Ill. App. 3d at 300, 417 N.E.2d at 133.

situation where the fire alarm malfunctions and starts the fire.[132] The court concluded that the failure of the fire alarm to detect the fire—its intended function—would not serve as a basis for recovery in strict liability.[133] If the fire alarm caused the fire, recovery would be allowed.

On March 25, 1983, the Nebraska Supreme Court joined the majority of jurisdictions in allowing recovery for damage to property in strict liability,[134] by overruling a prior decision[135] which held that strict liability was inapplicable in cases involving damage to property only.[136] The plaintiff in *National Crane Corp. v. Ohio Steel Tube Co.* purchased steel tubing from defendant which plaintiff incorporated into a variety of cranes it manufactured.[137] Plaintiff sold its cranes to customers who reported a variety of failures due to a defect in the original manufacture of the tubes. Plaintiff conducted a retrofit program, replacing all the steel tubing sold to plaintiff by defendant, and commenced an action against defendant for the cost of the retrofit program under the theories of warranty, negligence, and strict liability.[138] The district court dismissed plaintiff's tort claims, and plaintiff appealed.[139]

The Nebraska Supreme Court analyzed the law of strict liability as it related to claims for property damage and decided that a plaintiff injured by an unreasonably dangerous defect in a product ought to be allowed to recover in tort whether the defect caused personal injury or property damage.[140] Plaintiffs who suffer economic loss without actual physical harm to person or property are relegated to recovery in contract or warranty.[141] The court concluded, however, that the damages plaintiff sought—the cost of replacing defective tubing supplied by the defendant—constituted economic loss for which no recovery was available under a tort theory.[142] In his dissent, Justice Boslaugh argued that plaintiff's loss was not economic but recoverable property damage resulting

132. *Id.*
133. *See id.* at 301, 417 N.E.2d at 133.
134. National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).
135. Hawkins Constr. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973).
136. 213 Neb. at 789-90, 332 N.W.2d at 43-44.
137. *Id.* at 783, 332 N.W.2d at 41.
138. *Id.* at 785, 332 N.W.2d at 42.
139. *Id.* at 785-86, 332 N.W.2d at 42.
140. *Id.* at 786-91, 332 N.W.2d at 42-44.
141. *Id.* at 790, 332 N.W.2d at 44.
142. *Id.*

from an unreasonably dangerous defect in the tubing manufactured by defendant.[143]

C. Summary

The majority of the courts have drawn the same distinction in connection with the injury to other property as they have with regard to injury to the product itself.[144] The courts allow recovery when the damage to other property results from an unreasonably dangerous defect in the product, but deny recovery when that damage results from a qualitative defect in the product not rising to the unreasonably dangerous standard.

V. Damages Arising from Loss of Use or Interruption of Business

The majority of jurisdictions hold that damages for loss of use, lost profits, and interruption of business caused by a qualitative defect in a product are not recoverable in negligence or strict liability, following the rationale of *Seely.*[145] Many courts that allow recovery of damages for injury to the product itself or to other property refuse to allow recovery of damages for interruption of business or loss of use, holding that such losses are "economic," and therefore, not recoverable under *Seely.*[146] Those states which follow the *Santor* theory generally allow recovery for interruption of business or loss of use damages, even though caused by a qualitative defect.[147]

Those states which follow the theory of *Seely* uniformly deny recovery of damages for loss of use or interruption of business resulting from a qualitative defect in a product. *Clark v. International Harvester Co.*[148] exemplifies the reasoning of the majority position. In *Clark,* plaintiff sought recovery of damages in negligence,[149] when a tractor plaintiff purchased from defendant broke down, rendering it unusable to plaintiff.[150] In a court trial plaintiff was

143. *Id.* at 794, 332 N.W.2d at 46 (Boslaugh, J., dissenting).

144. *See infra* Appendix B.

145. *See infra* Appendix C.

146. *See, e.g.,* Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

147. The states which follow *Santor* are Connecticut, Michigan, Montana, New Jersey, Ohio, and Wisconsin.

148. 99 Idaho 326, 581 P.2d 784 (1978).

149. *Id.* at 329, 581 P.2d at 787.

150. *Id.* at 330-31, 581 P.2d at 788-89.

awarded damages for loss of profits from which defendant appealed.[151] The Idaho Supreme Court reversed[152] concluding that the law of torts does not protect the economic expectations of a party whose only damage results from a defect in the quality of the product,[153] but the law of warranty does.[154] Similarly, in *Beauchamp v. Wilson,*[155] the Arizona Court of Appeals denied plaintiff recovery for lost profits resulting from a series of qualitative defects in a truck purchased from defendant.[156]

The major problem the courts that follow *Seely* have faced is whether damages for lost profits and interruption of business caused by an unreasonably dangerous defect in a product are "economic" or "non-economic." In *Hales v. Green Colonial, Inc.,*[157] the Eighth Circuit Court of Appeals, applying Missouri law, followed the theory of *Seely* and allowed plaintiffs to recover the lost profits they sustained when a defective heater in their retail store caught fire and burst into flames, seriously damaging the store.[158] Similarly, in *Boone Valley Cooperative Processing Association v. French Oil Mill Machinery Co.,*[159] the United States District Court for the Northern District of Iowa allowed plaintiff to recover for lost profits,[160] resulting from an explosion in a soybean processing plant caused by a defect in the plant.[161]

Several states which follow the *Seely* theory involving damage to the product itself or damage to other property do not allow recovery of damages for lost profits, ostensibly relying on *Seely's* definition of "economic loss," when those damages result from an unreasonably dangerous defect in a product. In *Star Furniture Co. v. Pulaski Furniture Co.,*[162] a clock malfunctioned and started a fire that severely damaged plaintiff's furniture store. Plaintiff sought recovery of damages for injury to the clock itself, for injury to other property, and for the interruption of business due to the fire.

151. *Id.* at 331, 581 P.2d at 789.
152. *Id.* at 336, 581 P.2d at 794.
153. *Id.* at 335, 581 P.2d at 793.
154. *Id.* at 335-36, 581 P.2d at 793-94.
155. 21 Ariz. App. 14, 515 P.2d 41 (1973).
156. *Id.* at 17-18, 515 P.2d at 44-45.
157. 410 F.2d 1015 (8th Cir. 1974).
158. *Id.* at 1022. The court stated: "Loss of profits by reason of the tortious destruction of the plaintiffs' business was a foreseeable damage ordinarily cognizable in tort liability and therefore we find it to be compensable under Missouri law." *Id.*
159. 383 F. Supp. 606 (N.D. Iowa 1974).
160. *Id.* at 615.
161. *Id.* at 607-08.
162. 297 S.E.2d 854 (W. Va. 1982).

After reviewing the law of other jurisdictions, the court allowed recovery of damages for injury to plaintiff's other property[163] and, in dicta, said that damages for injury to the product itself caused by an unreasonably dangerous defect were also recoverable.[164] The court refused to allow plaintiff to recover damages for the interruption of its business, equating those damages with a mere loss of value of the product due to a qualitative defect not actionable under negligence or strict liability theory.[165]

In *Hiigel v. General Motors Corp.*,[166] plaintiff sought recovery of damages when the lug bolt on wheels of a motor home sheared off, causing the dual rear wheels to part from the vehicle.[167] Plaintiff sought the cost of repairing the damage to the vehicle as well as loss of business use of the vehicle during the time of repairs.[168] In *Hiigel,* the Colorado Supreme Court adopted section 402A of the *Restatement (Second) of Torts,* and allowed plaintiff to recover damages for the injury to the product itself.[169] The court declined to extend the doctrine of section 402A to plaintiff's loss of use claim,[170] limiting plaintiff's recovery to the physical harm suffered.

There does not seem to be a justifiable reason for denying a plaintiff the right to recover lost profits where the loss results from an unreasonably dangerous defect as opposed to a qualitative one. Those courts which justify such a result in reliance on *Seely* misinterpret the *Seely* court's position. *Seely* clearly precludes recovery of lost profits resulting from qualitative defects in products, relegating an injured plaintiff to recovery in warranty. The policy analysis set forth by Justice Traynor in *Seely* does not justify denying a plaintiff the right to recover lost profits caused by an unreasonably dangerous defect. An injury to one's business or livelihood can

163. *Id.* at 857.

164. *Id.* at 858.

165. *See id.* at 859.

166. 190 Colo. 57, 544 P.2d 983 (1975).

167. *Id.* at 60-61, 544 P.2d at 985.

168. *Id.* at 60, 544 P.2d at 985.

169. *Id.* at 63, 544 P.2d at 989.

170. *Id.* The *Hiigel* theory does not apply to cases involving claims based on negligence. In Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983), the Colorado Supreme Court allowed plaintiff to recover in negligence when the foundation of a home he bought from a third party cracked. The court allowed plaintiff to recover from the builder, notwithstanding that the defects in the home were qualitative. The court held that the builder owed all purchasers of the house a duty to build the house free from defects in materials and workmanship, and breach of that duty would result in liability for any such defect. *Id.* at 1045.

have as great an impact on society as an injury to one's person.[171] By refusing to allow recovery of lost profits, the courts distinguish between defects causing personal injury and those causing property damage—a distinction Justice Traynor was not willing to make.

In those states that follow the theory of *Santor,* damages for lost profits and interruption of business are recoverable. For example, in *Mead Corp. v. Allendale Mutual Insurance Co.*[172] the United States District Court for the Northern District of Ohio allowed plaintiff to recover for the business losses attributable to a qualitative defect in an electric turbine.[173] In *Cova v. Harley Davidson Motor Co.,*[174] the Michigan Court of Appeals reversed a summary judgment in favor of defendant and allowed plaintiff to return to the trial court to prove whether it sustained damages for lost rentals of golf carts[175] which resulted when several carts purchased from defendant broke down as a result of qualitative defects within them.[176] In *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.,*[177] the Wisconsin Supreme Court, applying Pennsylvania law, allowed plaintiff to recover damages for lost profits[178] resulting from the breakdown of several large electric motors purchased from defendant.[179]

VI. Additional Problems Facing a Commercial Plaintiff

Two potential problems face commercial plaintiffs who attempt to recover damages for an injury to the product itself in either negligence or strict liability. The first is set forth in *Southwest Forest Industries, Inc. v. Westinghouse Electric Corp.,*[180] which holds that strict

171. As the New Jersey Superior Court stated:

> Even in these days of consumerism, economic interests are not out of favor. Injuries to a man's business can be as detrimental to our society as injuries to his person. Severe injuries to a family's economic life can be devastating. Corporations are, in the last analysis, owned by people who rely upon them for income, and thus commercial losses often are reflected in personal sorrow.

Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 259, 326 A.2d 90, 97 (Law. Div. 1974).

172. 465 F. Supp. 355 (N.D. Ohio 1979).
173. *Id.* at 366.
174. 26 Mich. App. 602, 182 N.W.2d 800 (1970).
175. *Id.* at 620, 182 N.W.2d at 811.
176. *Id.* at 640 n.1, 182 N.W.2d at 801 n.1.
177. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).
178. *Id.* at 219, 206 N.W.2d at 428.
179. *Id.* at 197, 206 N.W.2d at 416.
180. 422 F.2d 1013 (9th Cir.), *cert. denied,* 400 U.S. 902 (1970).

liability is unavailable to certain classes of commercial plaintiffs for recovery of damages flowing from an injury to the product.[181] The second problem is set forth in *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*,[182] which allows a manufacturer to disclaim all liability for damages in negligence and strict liability in the contract for sale.[183]

In *Southwest Forest,* plaintiff sought to recover damages resulting from defects in a large turbine generator. The contract for sale contained a disclaimer of liability for negligence, which the Ninth Circuit Court of Appeals concluded was not unconscionable under Pennsylvania law.[184] Plaintiff also sought recovery under the theory of strict liability in tort in an attempt to circumvent the disclaimer of liability. The court upheld the trial court's decision that plaintiff was not within the class of consumers to be protected by the theory of strict liability in tort.[185]

The *Southwest Forest* theory was followed by the California Court of Appeals in *Kaiser Steel Corp. v. Westinghouse Electric Corp.*[186] After reviewing the history of the development of strict liability theory in California, the court refused to apply strict liability in an action between two commercial entities of relatively equal bargaining power that negotiated the risk of loss from defects in the product, holding that the basic principles supporting the imposition of strict liability in consumer products cases are absent in a commercial setting.[187]

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181. *See* 422 F.2d at 1020. The theory set forth in *Southwest Forest* should be applicable to actions in negligence as well as actions in strict liability.

182. 499 F.2d 146 (3d Cir. 1974).

183. *Id.* at 149.

184. 422 F.2d at 1019.

185. The court, quoting from the district court's opinion, held:

> The circumstances of this case do not bring the plaintiff within that class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved support an extension of the doctrine of strict liability in tort to the present facts.

422 F.2d at 1020.

186. 55 Cal. App. 3d 737, 127 Cal. Rptr. 838 (1976).

187. *Id.* at 748, 127 Cal. Rptr. at 845. The court held: "We thus conclude that the doctrine of products liability does not apply as between parties who (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it." *Id. But see* International Knights of Wine, Inc. v. Ball Corp., 110 Cal. App. 3d 1001, 168 Cal. Rptr. 301 (1980). The *International Knights* court rejected the argument that *Kaiser* precluded the imposition of strict tort liability between two commercial enterprises as a matter of law, choosing rather to allow proof of the actual bargaining power between the two entities. *Id.* at 1006, 168 Cal. Rptr. at 303.

In *General Public Utilities Corp. v. Babcock & Wilcox Co.*,[188] the court was called on to determine whether plaintiff could recover in strict liability under Pennsylvania law for the failure at Three Mile Island. Plaintiff owned and operated the nuclear power plant at Three Mile Island, and sought to recover from defendant for the damages sustained in the March 28, 1979 failure. Relying on *Kaiser,* the court dismissed plaintiff's strict liability claim because plaintiff had equal bargaining strength with defendant, plaintiff participated in drafting the specifications for the Three Mile Island plant, and the power plant manufactured by defendant was not a consumer product furnished off the shelf.[189]

In *Purvis v. Consolidated Energy Products Co.*,[190] the Fourth Circuit Court of Appeals applied the theory of *Southwest Forest* to a claim by a farmer that a tobacco barn manufactured by defendant failed to properly cure his tobacco, thereby damaging it.[191] The trial court directed verdicts in favor of defendant on plaintiff's fraud and breach of warranty counts, but submitted plaintiff's strict liability claim to the jury, which returned a verdict in plaintiff's favor.[192] The court of appeals reversed the verdict in favor of the plaintiff, holding that the theory of *Southwest Forest* and *Kaiser* barred a claim by a commercial buyer in privity with the manufacturer of a defective product.[193] In his dissent, Justice Hall argued that a farmer operating on 600 acres hardly had the economic strength required to invoke the *Southwest Forest* doctrine.[194]

The *Southwest Forest* theory is not universally applied, however. For example, in *Monsanto Co. v. Alden Leeds, Inc.*,[195] the court relied on the broad scope of the *Santor* opinion to hold that any plaintiff, whether an individual or a commercial enterprise, could use the

188. 547 F. Supp. 842 (S.D.N.Y. 1982).

189. *Id.* at 844-45. *Accord* Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425 (9th Cir. 1979); Anglo Eastern Bulkships, Ltd. v. Ameron, Inc., 556 F. Supp. 1198 (S.D.N.Y. 1982); Sioux City Community School Dist. v. International Tel. & Tel. Corp., 461 F. Supp. 662 (N.D. Iowa 1978); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

190. 674 F.2d 217 (4th Cir. 1982).

191. *Id.* at 218.

192. *Id.* at 219.

193. *Id.* at 220-22.

194. *Id.* at 224. Justice Hall stated: "We can hardly say that Purvis, a small-time farmer, operates a large corporate enterprise. To do so yields harsh results, as is evident by the majority's decision, and unduly restricts the doctrine of strict products liability beyond that intended by the 'commercial setting' exception." *Id.*

195. 130 N.J. Super. 245, 326 A.2d 90 (Law Div. 1974).

theory of strict liability if it applied to the circumstances of the loss.[196]

In *Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*,[197] plaintiff sought recovery for damages arising out of the crash of an airplane that caused damage to the aircraft itself but no personal injury. Plaintiff sought recovery under the theories of negligence and strict liability. The contract of sale between plaintiff and defendant contained a disclaimer of all liability because the sale was "as is." The court recognized that the social policies behind the adoption of strict tort liability precluded a manufacturer from disclaiming liability in a sale of consumer products. The court found, however, that those social policies did not preclude business entities of relatively equal bargaining strength from freely negotiating and expressly waiving such liability.[198]

Similarly, in *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*,[199] the Fifth Circuit Court of Appeals, interpreting California law, upheld the dismissal of negligence and strict liability counts against defendant because of a disclaimer of liability in the contract for sale, recognizing the financial equality and equal bargaining power of the parties.[200] In *Sterner Aero AB v. Page Airmotive, Inc.*,[201] the Tenth Circuit Court of Appeals, however, refused to recognize defendant's disclaimer of liability for negligence and strict liability between two entities of equal bargaining power.[202]

The specific language of the contract for sale does not appear to be crucial to a decision regarding whether strict liability and negligence liability can be effectively disclaimed. For example, in *S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.*,[203] the contract

196. *Id.* at 259-60, 326 A.2d at 97-98. The court preferred to allow commercial entities to bargain for the risk of loss in lieu of excluding the class of commercial plaintiffs from the scope of strict liability theory.

197. 499 F.2d 146 (2d Cir. 1974).

198. *Id.* at 149.

199. 503 F.2d 239 (5th Cir. 1974).

200. *Id.* at 244-45. *Accord* Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp., 677 F.2d 771 (9th Cir. 1982); S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Co., 641 F.2d 746 (9th Cir. 1981); Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936 (2d Cir. 1980); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979); Ebasco Serv., Inc. v. Pennsylvania Power & Light Co., 460 F. Supp. 163 (E.D. Pa. 1978); American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D.N.Y. 1976); Delta Air Lines, Inc. v. Douglas Aircraft Co., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1966).

201. 499 F.2d 709 (10th Cir. 1974).

202. 499 F.2d at 713.

203. 641 F.2d 746 (9th Cir. 1981).

for sale of an airplane between plaintiff and Boeing contained a disclaimer of liability in warranty as well as tort, not limiting itself to negligence liability only.[204] The court upheld dismissal of the plaintiff's claim, relying on the decisions in *Delta Aircraft* and *Southwest Forest.*[205] In *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.,*[206] however, the contract for sale disclaimed liability in warranty and negligence, but did not mention strict liability.[207] The court upheld dismissal of plaintiff's claim under a theory of strict liability,[208] notwithstanding the contract which mentioned negligence, but did not include strict liability or other tort liability.

VII. ANALYZING THE PROBLEM

In those jurisdictions that follow the *Seely* theory, property damage caused by an unreasonably dangerous product is recoverable in negligence and strict liability. The policies underlying the application of negligence and strict liability theories to cases involving personal injury are equally applicable to cases involving damage to property. If the policies underlying the adoption of strict liability are to protect society in general from unreasonable risks of harm caused by defective products and to place the burden of such risks on the manufacturer who placed the defective product in the stream of commerce, then the right to recover damages in cases involving injury to property ought not turn on the type of damage sustained, but rather on the type of risk created by the defective product. If the essential elements of negligence or strict liability can be proven, recovery should be had for all damages proximately flowing from the event. To restrict recovery to damages resulting from direct damage to the product or to other property and to exclude recovery for lost profits and business interruption is not supported by any legal or logical rationale.

Those states that expand the doctrine of strict liability and negligence to allow recovery for damages from qualitative product defects have ignored or rejected the concept of unreasonable danger embodied in section 402A. Those states have adopted a broad rule allowing recovery under tort theory for all product defects, based

204. *Id.* at 747-48.
205. *Id.* at 753-54.
206. 617 F.2d 936 (2d Cir. 1980). *Accord* Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp., 677 F.2d 771 (9th Cir. 1982).
207. 617 F.2d at 939.
208. *Id.* at 939-40.

on an underlying desire to place all such risks on the manufacturer. From a purely theoretical perspective, the *Santor* theory emasculates the legislatively adopted warranty provisions of the Uniform Commercial Code in favor of a broad rule of tort liability. From a theoretical perspective, Justice Traynor's decision in *Seely* is more persuasive.

The concern addressed by the courts in *Southwest Forest* and *Kaiser* requires comment. Clearly the theory of strict liability in tort developed primarily as a remedy for consumers injured by defective products who were not in privity with the manufacturer of those products. The courts adopted the theory of strict liability in tort as a means of circumventing restrictive privity requirements of warranty law, to allow injured plaintiffs to recover damages caused by unreasonably dangerous products without considering privity questions.

In cases involving transactions between large commercial enterprises, the problems leading to the adoption of the theory of strict liability in tort are not always present. Often the large commercial buyer is in privity with the commercial seller. Both parties to a contract for the sale of commercial goods are often in a position to negotiate the risk of loss. In those situations, applying the warranty concepts of the Uniform Commercial Code rather than the tort concepts of negligence or strict liability may be more appropriate. As long as the question of bargaining power is one of fact and not one of law, the policies underlying the warranty concepts of the Uniform Commercial Code and the tort concepts of negligence and strict liability are advanced. In such cases, however, the contract for sale should clearly specify which remedies are available to the buyer and which are not.

VIII. CONCLUSION

As is evident from the foregoing discussion, to define a certain type of loss as "economic" is to determine whether that loss is recoverable in negligence or strict liability in most jurisdictions. Therefore, the successful prosecution of an action involving damages caused by a defective product hinges primarily on the lawyer's ability to characterize the damages sustained in order to allow their recovery under negligence or strict liability theory.

The key questions to answer in determining whether such damages will be recoverable in the majority of jurisdictions are as follows:

1. Did the damage result from a defect in the product that goes to the product's ability to perform, or was the defect one unrelated to the product's intended function?
2. Did the damage result from an unreasonably dangerous defect that posed a risk of harm to persons or property?
3. Are the damages sought based on a difference between the value of the product in its defective condition and its value in a non-defective condition or are damages sought for the cost of repairing or replacing the defective product or another property?
4. Did the product cause damage to property other than the product itself under circumstances where the defective product simply failed to perform its intended function or under circumstances where the defective product posed an unreasonable risk of harm to persons or other property?
5. Do lost profits proximately flow from an unreasonably dangerous defect in a product that also serves as a basis for recovery of damages for injury to the product itself or other property, or do those damages flow from the failure of the product to perform the function represented by the seller or expected by the buyer?
6. In cases involving commercial plaintiffs, did the plaintiff, in fact, have the financial and economic ability to bargain for a remedy with the seller, or were the terms of the contract of sale imposed on the buyer by the seller?
7. In cases involving commercial plaintiffs, does the contract for sale clearly specify which remedies, if any, are unavailable to the commercial plaintiff, or does the contract simply attempt to limit the seller's liability in broad, general terms?

Resolution of the above issues will determine whether an injured plaintiff can proceed in negligence or strict liability, or must proceed only in contract or warranty.

APPENDIX A
DAMAGE TO PRODUCT ITSELF

Unreasonably Dangerous Defect

Recoverability Allowed:

Alaska:	Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983); Cloud v. Kit Mfg. Co., 563 P.2d 284 (Alaska 1977).
Arizona:	Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile, 131 Ariz. 289, 640 P.2d 851 (1982).
Arkansas:	Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983).
California:	Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966).
Colorado:	Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975).
Georgia:	Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983).
Idaho:	Shields v. Morton Chem. Co., 95 Idaho 674, 518 P.2d 857 (1974).
Kansas:	Fordyce Concrete, Inc. v. Mack Trucks, Inc., 535 F. Supp. 118 (D. Kan. 1982).
Kentucky:	C & S Fuel, Inc. v. Clark Equip. Co., 524 F. Supp. 949 (E.D. Ky. 1981).
Missouri:	Gibson v. Reliable Chevrolet, Inc., 608 S.W.2d 471 (Mo. App. 1980).
Nebraska:	National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).
New Jersey:	ICI Australia Ltd. v. Elliott Overseas Co., 551 F. Supp. 265 (D.N.J. 1982).
New York:	John R. Dudley Constr. v. Drott Mfg. Co., 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979).
Oregon:	Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).
Pennsylvania:	Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981).
Texas:	Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978) (recovery allowed only if damage to other property occurred).
W. Virginia:	Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

Recoverability Denied:

Delaware:	Cline v. Prowler Indus., Inc., 418 A.2d 968 (Del. 1980).
Texas:	Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978).

Qualitative Defect

Recoverability Allowed:

Arkansas:	Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981). *But see* Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 653 S.W.2d 128 (1983) (implicitly overruling *Blagg).*
Colorado:	Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983) (negligence only).
Connecticut:	CONN. GEN. STAT. § 52-572(m) (1983); Verdon v. Transamerica Ins. Co., 187 Conn. 363, 371 n.6, 446 A.2d 3, 8 n.6 (1982).
Michigan:	Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).
Montana:	Thompson v. Nebraska Mobile Homes Corp., — Mont. —, 647 P.2d 334 (1982).
New Jersey:	Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
N. Dakota:	Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965) (negligence only).
Ohio:	Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979) (strict liability); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
Wisconsin:	City of LaCrosse v. Schubert, Schroeder & Assocs., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

Recoverability Denied:

Alaska:	Northern Power & Eng'g Co. v. Caterpillar Tractor Co., 623 P.2d 324 (Alaska 1981); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).
Arizona:	Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973).
California:	Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
Delaware:	Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968 (Del. 1980).

Georgia:	Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975).
Idaho:	Clark v. International Harvester Co., 99 Idaho 326, 518 P.2d 784 (1978).
Illinois:	Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
Iowa:	Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25 (S.D. Iowa 1973).
Minnesota:	Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981).
Missouri:	R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983); Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978); Forrest v. Chrysler Corp., 632 S.W.2d 29 (Mo. App. 1982).
New York:	Schiavone Constr. Co. v. Elgood Mayo Corp., 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982).
Ohio:	Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979) (negligence); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
Pennsylvania:	Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751 (3rd Cir. 1976).
S. Carolina:	Purvis v. Consolidated Energy Prods. Co., 674 F.2d 217 (4th Cir. 1982).
Texas:	Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977).

APPENDIS B
DAMAGE TO OTHER PROPERTY

Recovery Allowed:

Alaska:	Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977).
Iowa:	Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974).
Kentucky:	Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1966).
Massachusetts:	McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974).
Mississippi:	State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied,* 386 U.S. 912 (1967).
Missouri:	Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974).
Nebraska:	National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).
Texas:	Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978).
Washington:	Bombardi v. Pochel's Appliance & TV Co., 9 Wash. App. 797, 515 P.2d 540 (1973).
W. Virginia:	Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

Recovery Denied:

Arizona:	State v. Cook Paint & Varnish Co., 391 F. Supp. 962 (D. Ariz. 1975), *cert. denied,* 430 U.S. 915 (1977).
Delaware:	Cline v. Prowler Indus., Inc., 418 A.2d 968 (Del. 1980).
Florida:	Monsanto Agricultural Prods. Co. v. Edenfield, 426 So. 2d 574 (Fla. Dist. Ct. App. 1982).
Illinois:	Fireman's Fund v. Burns Elec. Sec. Servs., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1981).
Pennsylvania:	Lobianco v. Property Protection, Inc., 292 Pa. Super. 346, 437 A.2d 417 (1981).
S. Carolina:	Purvis v. Consolidated Energy Prods. Co., 674 F.2d 217 (4th Cir. 1982).

APPENDIX C
LOSS OF USE AND LOST PROFITS

Recovery Allowed:

Iowa:	Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974).

Massachusetts:	Omni Flying Club, Inc. v. Cessna Aircraft Co., 366 Mass. 154, 315 N.E.2d 885 (1974).
Michigan:	Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).
Missouri:	Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974).
Ohio:	Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979) (strict liability only).
Washington:	Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976).
Recovery Denied:	
Arizona:	Beauchamp v. Wilson, 21 Ariz. App. 14, 515 P.2d 41 (1973).
California:	Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
Colorado:	Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975).
Delaware:	Cline v. Prowler Indus., Inc., 418 A.2d 968 (Del. 1980).
Georgia:	Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975).
Idaho:	Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978).
Illinois:	Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
Massachusetts:	Karl's Shoe Stores v. United Shoe Mach. Corp., 145 F. Supp. 376 (D. Mass. 1956).
Minnesota:	Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981).
Nevada:	Local Joint Exec. Bd. v. Stern, 651 P.2d 637 (Nev. 1982).
Ohio:	Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1956) (negligence only).
Oregon:	Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965).
Texas:	Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978).
W. Virginia:	Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1983).