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Economic Damages in a Products Liability Action: Where Do We Go From Here?

This comment will provide an overview of the current Pennsylvania law with regard to recovering economic damages in a products liability action. It will examine the appropriateness of allowing recovery in tort where a product malfunctions because of a defect in the product and the only injury is to the product itself. The issue, presented here, is whether damages such as repair and replacement costs and lost profits may be recovered. These are commonly referred to as economic damages.[1] The answer to this issue is not entirely clear and has become a source of legal controversy. Section 402A of the Restatement (Second) of Torts[2] makes it clear that recovery of economic damages is permitted where a defective product causes injury to a person or other property.[3]

The question of whether one may recover economic damages has not yet been decided by the Pennsylvania Supreme Court. The only reference to the issue of economic damages in a products liability action made by the Supreme Court was in an early decision, *Kassab v. Central Soya*[4].[5] *Kassab* involved a breach of warranty action, but the Court by way of dicta suggested that there was no reason to exclude the recovery of damages to a product itself in a

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1. AMERICAN LAW OF PRODUCTS LIABILITY § 60:19 (T. Travers 3d ed. 1987).

2. RESTATEMENT (SECOND) OF TORTS § 402A. (1965). This section is titled "Special Liability of Seller of Product to User or Consumer" and states:

> 1.One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property if
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> a)the seller is engaged in the business of selling such a product, and
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> b)it is expected to and does reach the user and consumer without substantial change in the condition in which it is sold
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> 2.The rule stated in subsection (1) applies although
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> a)the seller has exercised all possible care in the preparation and sale of his product, and
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> b)the user or consumer has not bought the product from or entered into a contractual relation with the seller.

Id.

3. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

4. 432 Pa. 217, 231, 246 A.2d 848, 854 n.7 (1968) (hereinafter *Kassab*).

5. REM Coal Co., Inc. v. Clark Equipment Co., 386 Pa. Super 401, 563 A.2d 128, 129 n.2 (1989) (hereinafter *REM*).

strict liability action.[6] The Court arrived at this conclusion by posing a hypothetical situation wherein the purchaser of a gas range was injured when the range exploded.[7] The range itself and the consumer's kitchen were damaged.[8] The Court stated that under section 402A of the Restatement of Torts,[9] the range was as much property as any other possession of the plaintiff which was damaged as a result of a manufacturing flaw.[10]

Recently the Pennsylvania Superior Court in *REM Coal Co., Inc. v. Clark Equipment Co.*[11] held that strict liability theories did not apply in an action between commercial enterprises where the only resulting damage was to the product itself.[12] The Superior Court followed the reasoning of the United States Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[13] where it was held that damages to the product itself were most naturally recoverable under contract or warranty theories.[14]

Although *REM* is the most recent, comprehensive decision in Pennsylvania dealing with the issue of economic damages in a products liability action, there are a few cases which preceded it by a few years which held differently.[15] The alternative theories discussed by the courts in those cases preceding *REM* will be presented herein. This will allow the reader to fully comprehend the complexities of the issue which the Pennsylvania Supreme Court will have to face, should the Court decide to address the issue of whether or not to allow economic damages in a products liability action.

The public policy rational which led to tort recoveries in the area of products liability was a desire to provide protection to the public from unsafe products in addition to that provided by con-

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6. *Kassab*, 246 A.2d at 854 n.7.
7. *Id.*
8. *Id.*
9. *Id. See supra*, note 3.
10. *Kassab*, 246 A.2d at 855 n.7.
11. *REM*, 563 A.2d at 128.
12. *Id.* 563 A.2d at 134. This holding applies as well to an action based on a theory of negligence. *Id.*
13. 476 U.S. 858, 872-73 (1986) (hereinafter *East River*). Charterers of supertankers brought an action against a turbine manufacturer seeking damages resulting from design and manufacturing defects which caused the supertankers to malfunction in the ocean. *Id.* at 2296-97. There was no damage to any other part of the tankers or to any persons. *Id.* The plaintiffs were seeking damages for the cost of repairing the ships and for income lost while they were out of service. *Id.* at 2295.
14. *REM*, 563 A.2d at 133.
15. *See infra*, notes 43, 48.

tract law.[16] "Tort product liability theories impose liability on the supplier of a defective product which causes either personal injury or injury to other property because this is the best way to allocate risk and to encourage safer manufacture and design."[17] The question confronting many courts, including Pennsylvania courts, is whether the public policy behind tort recoveries should be extended to include damages to only the product?[18] A great majority of American courts take the position that economic damages, as that term is generally defined, cannot be recovered in a strict liability action.[19]

Traditionally, damages of this sort are specifically recoverable under contract theories such as breach of warranty.[20] Thus a purchaser of a defective product who has not received the benefit of his or her bargain may recover based on a breach of warranty theory.[21] One way to look at current public policy on this issue is to say that a distinction now exists between tort recovery and contract recovery which rests on the luck of one plaintiff having an accident causing physical injuries to himself or other property.[22] Another way to look at this distinction is to say that if we allow such a policy to progress too far, contract law will "drown in a sea of tort."[23]

There are three general approaches to deciding the question of whether injury to a product itself may be remedied through a products liability tort action.[24] One of these approaches is illustrated by *Seely v. White Motor Co.*[25] which classified cases in this area as falling within the realm of contract law.[26] According to this view, it is unfair to charge a manufacturer with the responsibility of seeing to it that his product matches the economic expectations of his consumer.[27] To allow this type of action would subject man-

16. *REM*, 563 A.2d at 129., Pennsylvania Glass Sand v. Caterpillar Tractor Co., 652 F.2d 1165, 1168 (3rd Cir. 1981) (hereinafter *Pennsylvania Glass Sand*).

17. *REM*, 563 A.2d at 129.

18. *Id.*

19. AMERICAN LAW OF PRODUCTS LIABILITY § 60:20 (T. Travers 3d ed. 1987).

20. *REM*, 563 A.2d at 129.

21. *Id.* The same is true if the purchaser's expectation interest has not been fulfilled.

22. *Id.* at 130.

23. *East River*, 476 U.S. at 866.

24. *East River*, 476 U.S. at 868-69. *REM*, 563 A.2d at 129-31.

25. 63 Cal. 2d 9, 403 P.2d 145 (1965) (hereinafter *Seely*).

26. *East River*, 476 U.S. at 868.

27. *Seely*, 403 P.2d at 151. However ". . . a consumer should not be charged with bearing the risk of physical injury when he buys a product on the market." *Id.*

In this case, the Plaintiff purchased a truck for his business which did not perform the

ufacturers to liability for damages of unknown and unlimited scope.[28] "A contract action, on the other hand, is perfectly suited to providing an adequate remedy for such losses and recognizes the parties' ability to structure their relative liabilities and expectations regarding the product's performance by setting the terms of the contractual bargain."[29] This view is clearly against allowing recovery of economic damages under a tort theory where the only damages are to the defective product.

A second approach can be seen in *Santor v. A and M Karagheusian, Inc.*,[30] where the Supreme Court of New Jersey held that strict liability recovery was permissible even in a case involving only economic loss to the defective product.[31] In *Santor* the plaintiff purchased some carpeting from the defendant manufacturer which was defective.[32] The plaintiff sued based on an implied warranty of merchantability theory.[33] The trial court found for the plaintiff even though there was a lack of privity.[34] The New Jersey Supreme Court reversed the decision of the appellate court in a unanimous opinion, agreeing with the decision of the Trial Court.[35] The Supreme Court, speaking through Justice Francis, stated that even though there was no privity of contract between the plaintiff and defendant an action may still be brought based on strict liabil-

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way he wanted it to. *Id.* at 150. The Plaintiff wanted to recover his commercial losses, lost profits and a refund of the money he paid on the truck. *Id.*

The Plaintiff recovered his commercial losses but he did so based on a breach of an express warranty. *Id.* at 148.

28. *Seely*, 403 P.2d at 150-51. "Application of [the law] on warranties prevents this result." *Id.* at 151.

29. *REM*, 563 A.2d at 129. The failure of the product itself is the ". . . essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." East River Steamship Corp. v. Transamerican Delaval, Inc., 476 U.S. 858, 868 (1986). Cases from other jurisdictions have held the same way. *See* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp. 626 F.2d 208 (3d. Cir. 1980); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978), National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983), Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (1981), Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (1977).

30. 44 N.J. 52, 207 A.2d 305 (1965) (hereinafter *Santor*).

31. *Santor*, 207 A.2d at 313.

32. 207 A.2d at 307.

33. 207 A.2d at 307.

34. 207 A.2d at 310. The court recognized that basing a manufacturers liability to ultimate consumers on implied warranties is simply using a convenient legal device or formalism to accomplish a purpose. *Id.* This conception is somewhat illusory because warranty law originated from contract law. *Id.* Ordinarily there is not a contract between a manufacturer and an ultimate user. *Id.*

35. *Id.*

ity.[36] A manufacturer must bear all risks associated with placing defective products on the market, including the risk that the only injury will be to the product itself.[37] Thus, even though the plaintiff was able to recover, based on an implied warranty of merchantability, the Supreme Court of New Jersey stated that there was another basis of recovery for damages to the product: strict products liability.[38]

The *Santor* Court rejected the *Seely* approach because "it is too arbitrary that economic losses are recoverable where personal injuries are involved or property damage, but not if the product injures only itself."[39] Allowing recovery for economic loss would not lead to unlimited liability because a manufacturer could plan and take steps to prevent product failure.[40] The *Santor* approach is not that uncommon. A majority of United States Courts of Appeal, sitting in admiralty, have adopted this approach.[41]

The third approach comprises cases which would allow a products liability action under certain circumstances where a product injures only itself. Until recently Pennsylvania court decisions (both state and federal) fell within this third approach.[42] One of the first state court decisions which adhered to this stance was *Industrial Uniform Rental Co., Inc. v. International Harvester Co.*[43] The appellant in this case brought a strict liability action to recover economic losses suffered as a result of a deterioration of the product.[44] The Superior Court denied recovery to the plaintiff because the defect resulted in only progressive deterioration of the product.[45] However, the Court stated that recovery may be had if the action was between commercial enterprises and the condition

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36. *Id.* at 66, 207 A.2d at 312.

37. *Id.*

38. 207 A.2d at 310. Other courts follow this same approach. *See eg.* City of LaCrosse v. Schubert, etc., 72 Wis. 2d 38, 44-45, 240 N.W.2d 124, 128 (1976), Emerson G. M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468 (9th Cir. 1984).

39. *East River*, 476 U.S. at 869.

40. *Santor*, 207 A.2d at 311-12.

41. *East River*, 476 U.S. at 869.

42. *See infra*, notes 45, 46, 51, 61.

43. 317 Pa. Super. 65, 463 A.2d 1085 (1983) (hereinafter *Industrial*).

44. 463 A.2d at 1086-87. The plaintiff purchased several trucks from the defendant which, three years later, began to break down. *Id.* at 1095. Inspections of the trucks disclosed broken welds for front spring brackets, fractured frame rails, broken spring cross members, fractured mounting plates for gasoline tank support straps, broken shock absorber mounts, and twisted support posts. *Id.*

45. 463 A.2d at 1093. The buyer's cause of action for the economic losses is in breach of warranty under the U.C.C. *Id.* Specifically, the remedy lies at 13 PA. CONS. STAT. ANN. § 2714 (Purdon 1984). *Id.* at 1087.

of the property was one which was potentially dangerous to persons or property.[46] In *Industrial Uniform* there was no evidence that the defective condition of the product presented any danger to persons or other property.[47]

The Superior Court was confronted with the same issue in *Johnson v. General Motors Corp.*[48] and applied its holding in *Industrial* to come to the same result.[49] The plaintiff in *Johnson* alleged that the transmission in her car was defective and as a result subjected her to "unreasonably dangerous and hazardous conditions and a high risk of danger."[50] The court rejected the plaintiff's claim stating that there was no real detriment to persons or property.[51] This was a case where the transmission prematurely wore out due to progressive deterioration and not to an unexpected, sudden occurrence.[52] In order to bring an action in tort law alleging damage to the product itself there must be potential for the product to be unreasonably dangerous to persons or other property.[53] The Superior Court's holding in *Johnson* is in line with the public policy rational regarding tort recovery in products liability actions: if there is a potential for harm to the public, tort law will provide protection.

An early Third Circuit case, *Pennsylvania Glass Sand v. Caterpillar Tractor Co.*,[54] predicted that the Pennsylvania Supreme Court would permit recovery of economic damages in a products liability action where the only injury was to the defective product.[55] The plaintiff in *Pennsylvania Glass Sand* was seeking recovery for damages to a front end loader which was purchased from

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46. 463 A.2d at 1093. The Court borrowed an analysis used by the Alaska Supreme Court in Northern Power & Engineering Corp. v. Caterpillar Tractor, 623 P.2d 324, 330 (1981). *Id.* at 1092.

47. 463 A.2d at 1093.

48. 349 Pa. Super. 147, 502 A.2d 1317 (1986) (hereinafter *Johnson*).

49. 502 A.2d at 1323-24. The trial court had cited *Industrial* for the proposition that the law in Pennsylvania does not recognize a claim in tort for the recovery of economic loss alone. *Id.* at 1320 (*quoting* the lower court opinion at 5). The Superior Court disagreed with the trial court's reading of *Industrial* but agreed with the finding that appellant had failed to state a cause of action in tort. *Id.*

50. 502 A.2d at 1322.

51. 502 A.2d at 1323.

52. *Id.* The Court concluded that the plaintiff "received a transmission which failed to perform as expected or was of an unexpected quality." *Id.*

53. 502 A.2d at 1324.

54. 652 F.2d 1165 (3d Cir. 1981).

55. *Pennsylvania Glass Sand*, 652 F.2d at 1175. The Court predicted that the Pennsylvania Supreme Court would allow an action regardless of whether the plaintiff is an ordinary consumer or a commercial consumer. *Id.*

defendant.[56] The front end loader suddenly caught fire which caused extensive damage to the product but no one was injured.[57]

Judge Adams, writing for the Court, took an interesting approach in deciding this issue.[58] In order to determine if damages should be awarded for items such as repair costs, the court must identify whether a particular injury amounted to physical damage or economic loss.[59] The line of demarcation separating economic loss and property damage was found by referring to the policies underlying The Uniform Commercial Code's warranty provisions.[60] "Deterioration and other defects of poor quality is considered economic loss but sudden and calamitous damage generally results in property damage recoverable in tort."[61] In other words, merely claiming damages which sound economic in nature is not determinative of whether recovery for economic losses will be allowed. The important consideration is how the damages came about. Judge Adams found an answer in tort law which traditionally redressed injuries that were classified as a physical harm.[62]

The property damage to the front end loader constituted such a safety risk and posed a serious risk of harm to people and property that it was a type of harm which tort law was meant to protect.[63] The holding in *Pennsylvania Glass Sand* basically proposed "a case by case analysis focusing on the nature of the defect, the type of risk posed by the defect, and the manner in which the damages occurred."[64]

One of the most recent Pennsylvania Superior Court decisions,

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56. *Id.* at 1166.

57. *Id.*

58. *Id* at 1165. The other judges deciding this case were Circuit Judges Rosenn and Hunter. *Id.*

59. *Id.* at 1173. "Economic loss has been defined as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' " *Id.* at 1169, citing Manufacturers' Liability to Remote Purchasers for Economic Loss Damages - Tort or Contract? 114 U. PA. L. REV. 539, 541 (1966).

60. *Pennsylvania Glass Sand* at 1172 citing Cloud v. Kit Manufacturing Co., 563 P.2d 248 (Alaska 1977).

61. *Id.*

62. *Pennsylvania Glass Sand* at 1170, *citing* W. PROSSER, LAW OF TORTS § 101, at 655 (4th ed. 1971).

63. *Pennsylvania Glass Sand* at 1174. Other Pennsylvania Superior Court decisions have held the same way: that is where a defective product poses a serious risk of harm then recovery is permitted in tort. Cornell Drilling Co. v. Ford Motor Co., 241 Pa. Super. 129, 359 A.2d 822 (1976), MacDougall v. Ford Motor Co., 214 Pa. Super. 384, 257 A.2d 676 (1969).

64. *REM*, 563 A.2d at 131.

REM Coal Co. v. Clark Equipment Co.[65] declined to follow the standard used in *Pennsylvania Glass Sand*,[66] *Industrial Uniform*,[67] and *Johnson*.[68] As was stated earlier, *REM* adopted the reasoning of *East River*.[69] The standard set forth in *East River* bars recovery in tort where the action was between commercial enterprises and the only damage was to the product itself, regardless of whether the defect posed a risk of danger to person, property, or was the result of a sudden occurrence.[70]

East River was an admiralty action which arose due to alleged defects in the pressure turbines in a number of supertankers manufactured by the defendant.[71] The plaintiffs alleged that the defects caused damage to the turbines and nothing else and sought recovery for the cost of repairing the turbines and loss of income.[72] Their basis for recovery was products liability.[73]

Justice Blackmun delivered the opinion for a unanimous Court[74] and adopted an approach similar to *Seely*, holding that a manufacturer in a commercial relationship did not have a duty under products liability or negligence theory of tort law to insure a product against injury to itself.[75] Where an injury is only to a product itself then the reasons for imposing a duty in tort are weak and those for leaving a party to its contractual remedy are strong.[76] The Court was clearly advocating warranty law as the proper method of recovery.[77] One of the main reasons for doing so was to protect manufacturers from spending vast sums, which would surely result, if a

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65. 386 Pa. Super. 401, 563 A.2d 128 (1989).

66. *See supra*, notes 55-63.

67. *See supra*, notes 44-47.

68. *See supra*, notes 49-53.

69. *REM*, 563 A.2d at 132. The most recent decision, New York State Electric and Gas Corp. v. Westinghouse Electric Corp., 387 Pa. Super. 537, 564 A.2d 919 (1989), followed the holding in REM with little explanation.

70. *East River*, 476 U.S. at 866-75, 106 S. Ct. at 2300-2304.

71. *Id.* at 859-60.

72. *Id.* at 859.

73. *Id.*

74. 476 U.S. at 859. Other Supreme Court Justices which decided the case were: Chief Justice Burger and Associate Justices Brennan, White, Marshall, Powell, Rehnquist, Stevens, and O'Connor. *Id.*

75. *East River*, 476 U.S. at 870-71. The United States District Court for the District of New Jersey granted summary judgement for the defendant and the United States Court of Appeals for the Third Circuit affirmed. *Id.* at 862.

76. *Id.* at 871. The safety concerns are lessened when the injury is only to the product. *Id.* An injury to a person often results in burdensome costs such as lost time and medical expenses which can be overwhelming. *Id.* However, "the increased cost to the public of holding a manufacturer liable in tort for injuries to the product itself is not justified." *Id* at 872.

77. *Id.* at 872-73.

theory of recovery was permitted based on economic loss.[78]

The concern by courts over the potential for infinite liability is not new to the law of torts. This concern was voiced when other advances in tort law were made. It came up in the early stages of the creation of the cause of action for ultrahazardous activities and strict products liability.[79]

The facts in *REM*[80] were remarkably similar to those in *Pennsylvania Glass Sand*,[81] yet the outcome was entirely different. In *REM* the plaintiff brought an action in strict products liability against the defendant to recover for damages to a front end loader which suddenly and unexpectedly caught fire.[82] The Superior Court held that Pennsylvania warranty law provided a suitable framework for enforcing and regulating the expectation of the parties as to the product's performance.[83] The court also concurred with the United States Supreme Court in rejecting the standard used in *Industrial Uniform*, *Johnson* and *Pennsylvania Glass Sand*.[84] According to the Superior Court in *REM*, the above cases focused attention on the nature of the risk posed by a product despite the fact that in all cases where injury was to the product itself, the risk never materialized and the only harm was of a type contract law should handle.[85] The proper focus was on the actual harm for which a plaintiff sought recovery and not on the type of risk.[86] To hold otherwise puts courts in the precarious position of having to draw a line between defects which pose an unreasonable risk and those which do not.[87]

It should be noted that the Superior Court in *REM* limited its

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78. *Id.* at 874.

79. People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246, 253-54, 495 A.2d 107, 110-11 (1985).

80. *See supra*, note 82.

81. *See supra*, note 56.

82. *REM*, 563 A.2d at 128. Plaintiff's other causes of action were based on negligence and breach of warranty. *Id.* The trial court granted summary judgement against the plaintiff on the warranty claim based on the expiration of the statute of limitations. *Id.* The trial court denied summary judgement on the negligence and strict liability claims and certified the denial for immediate appeal stating that the denial involved a controlling question of law for which there is substantial ground for a difference of opinion. *Id.* at 129.

83. *REM*, 563 A.2d at 133.

84. *Id. See supra*, notes 66-68.

85. *REM*, 563 A.2d at 133.

86. *Id.*

87. *Id.* Questions would arise as to"How much need a plaintiff plead to establish a sufficiently non-speculative risk to avoid a demurrer?" *Id.* "Must plaintiff establish that an accident-like event occurred in order to recover, or would the imminence of such an event, narrowly avoided, be sufficient?" *Id.*

holding to actions involving two commercial enterprises.[88] The implication which may be drawn from that holding is that an action brought by a non-commercial party may succeed under a tort theory. The likely reason for this difference is the possibility of an unequal bargaining position between an individual consumer and a commercial manufacturer.

Following the decision in *East River*, the Third Circuit had the opportunity to rethink its position regarding this issue. They were confronted with the same issue and similar facts in *Aloe Coal Co. v. Clark Equipment Co.*[89] as they were in *Pennsylvania Glass Sand.*[90] Following the United States Supreme Court's decision in *East River*, the Third Circuit Court of Appeals predicted that the Pennsylvania courts would adopt the reasoning of *East River.*[91] This prediction came despite the holdings in *Industrial Uniform* and *Johnson* which were decided just prior to the *Pennsylvania Glass Sand* decision.[92] The Third Circuit recognized the blatant inconsistency which exists between their prediction in *Pennsylvania Glass Sand* and their decision in *Aloe.*[93] Speaking through Judge Aldisert, the Court said that they were uncomfortable with the inconsistency but nevertheless believed the *East River* decision could be followed in Pennsylvania.[94]

With these most recent decisions, it is safe to say that Pennsylvania courts have moved away from an intermediary position and occupy a stance alongside *Seely.* In the span of three years, the Pennsylvania Superior Court has gone from permitting recovery for economic damages under circumstances where the only injury is to a product,[95] to not permitting such a recovery.[96]

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88. *Id.* at 134, n.4. The limited holding in *REM* is remarkably similar to a holding by a Minnesota Court of Appeals. In Nelson v. International Harvester Corp., 394 N.W.2d 578 (Minn. Ct. App. 1986). The Court in *Nelson* interpreted a Minnesota Supreme Court decision, Superwood v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981), as permitting an action in tort for economic loss by a consumer. *Id.* at 581.

89. 816 F.2d 110, 111 (3rd Cir. 1987) (hereinafter *Aloe*).

90. *See supra*, notes 55-57.

91. *Aloe* at 111. "In attempting to forecast state law, [the court] '. . . must consider relevant state precedents, analogous decisions, dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.' " *Id.* at 117 (*quoting* MeKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 633 (3d Cir.), *Cert. denied*, 449 U.S. 976 (1980)).

92. *Aloe* at 118.

93. *Aloe* at 119. Nonetheless other decisions have followed in line and have applied the *Aloe* holding. *See eg.* Hammermill Paper Co. v. C. T. Main Const. Inc., 662 F. Supp. 816, 818 (W. D. Pa. 1987).

94. *Aloe*, 816 F.2d at 119.

95. *See supra*, note 53.

It should be noted that the holding in *East River* is not binding on Pennsylvania courts, because the Supreme Court's decision was based on an interpretation of federal admiralty law only.[97] "The United States Supreme Court is supreme in matters of federal law; the Pennsylvania Supreme Court is supreme in matters of Pennsylvania law."[98] Therefore, the Pennsylvania Supreme Court is free to take whatever position it wishes on this issue.

The Pennsylvania Supreme Court should adopt the approach of the Superior Court decision in *REM*. The intermediary approach, suggested in the earlier Superior Court cases, would create more problems than allowing recovery under the *Santor* approach. The intermediary position which was outlined in *Industrial Uniform* allows far too much discretion to the courts which in the long run would result in inequitable results. This is a subjective approach because what is potentially dangerous in the eyes of one judge may not be in the eyes of another. No party to a lawsuit benefits where the law is unpredictable.

Contract law has remedies in place to take care of situations where only the product is injured. If a person or commercial entity wishes to protect themselves from injuries of this nature, then they can bargain for more effective warranty provisions. Pennsylvania manufacturers should be able to rely on the rule that they will only be responsible for loss that is bargained for. This will undoubtedly drive up the cost of the product to the purchaser, but that is where the added cost belongs. Under the intermediary and *Santor* approach, the manufacturer is burdened with the added costs of producing a safe product. This cost would ultimately be spread out across the consuming public. In the first instance, the public has the option to pay for added protection; in the second, they do not.

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96. *See supra*, note 12.
97. *Aloe*, 816 F.2d at 117.
98. *Id.*