PRODUCTS LIABILITY—DAMAGES—COMMERCIAL ENTITY LIMITED TO BREACH OF WARRANTY THEORY FOR RECOVERY OF ECONOMIC LOSSES—*Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985).

In today's complex society, manufacturers are increasingly becoming separated from their ultimate consumers by a myriad of retailers and distributors.[1] Traditionally, consumers injured by defective or dangerous products found it difficult to recover damages from remote producers.[2] Consequently, the law of products liability[3] evolved to delineate the legal responsibility of manufacturers and sellers of dangerous or defective merchandise.[4] Within the past twenty years, New Jersey has emerged into the forefront of states in defining the legal rights and remedies of consumers.[5]

In connection with the issue of plaintiffs' remedies, the liability of a manufacturer varies with the nature and extent of the damage sustained by the ultimate consumer.[6] Generally, individual consumers and commercial entities suffering direct or consequential economic damages[7] have been restricted to the remedial

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[1] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 80 (1960).

[2] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 681 (5th ed. 1984) [hereinafter PROSSER & KEETON].

[3] Products liability is defined as "the law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects in those products." *Id.* § 95, at 677.

[4] *Id.* at 678.

[5] *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)) (eliminating requirement of horizontal privity between manufacturer and ultimate consumer under implied warranty of merchantability theory); Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 156 (1972) (citing Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)) (allowing individual consumers to recover direct economic damages by way of strict liability theory).

[6] Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966). The author notes that manufacturer's liability "has long been imposed with respect to physical harm—personal injury and property damage—courts have only recently begun extensive consideration of the subpurchaser's rights when he has suffered only economic loss." *Id.*

[7] J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-9, at 416-17 (2d ed. 1980) [hereinafter WHITE & SUMMERS].

provisions of the Uniform Commercial Code (U.C.C.).[8] In contrast, consumers suffering property damage or personal injury can seek recourse through the doctrine of strict liability in tort.[9] New Jersey, however, is unique in that it permits individual consumers suffering direct economic damages also to recover through strict liability.[10] The issue whether commercial entities should be allowed to recover for purely economic loss through strict liability was recently resolved. In *Spring Motors Distributors, Inc. v. Ford Motors Co.*,[11] the New Jersey Supreme Court held that a commercial purchaser in a chain of distribution may not recover economic losses under strict liability or negligence but is limited to breach of warranty under the U.C.C.[12] Consequently, the court concluded that the Code's four year statute of limitations period barred the plaintiff's suit.[13]

The circumstances surrounding this decision involved Spring Motors Distributors, Inc. (Spring Motors), a New Jersey corporation engaged in the business of selling and leasing commercial trucks.[14] In November 1976, Spring Motors purchased fourteen new industrial trucks from Turnpike Ford Truck Sales, Inc. (Turnpike), which were manufactured by the Ford Motor

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One can generally classify damages into four categories. *Id.* at 401. These divisions include:

(1) Personal Injury which involves emotional or physical injury to the plaintiff. *Id.*

(2) Property Damage which has been defined as damage to property caused by, but not part of, a defective product. Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. 444, 666 P.2d 544 (1983). Courts have generally allowed recovery for property damage through the theory of strict liability. *See* Comment, *supra* note 5, at 154. The rationale for allowing recovery is that if a situation is dangerous enough that "personal injur[y] could have occurred" then "courts should not hesitate to grant relief to the party suffering the property damage simply because he was fortunate enough to have escaped personal injury." *Id.*

(3) Direct Economic Loss which generally encompasses loss due to insufficient product value, such as qualitative defects. *See* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982). Direct economic loss typically represents either the cost of replacement and repair or the difference in value between that which was bargained for and that which was received. *Id.* at 82, 435 N.E.2d at 449.

(4) Consequential or Indirect Economic Loss which represents loss of profits resulting from the malfunction of the defective product. *See id.*

8 *See* PROSSER & KEETON, *supra* note 2, § 95A, at 680.

9 *See* Comment, *supra* note 5, at 153-54.

10 WHITE & SUMMERS, *supra* note 7, § 11-5, at 408 (citing Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)).

11 98 N.J. 555, 489 A.2d 660 (1985).

12 *Id.* at 561, 489 A.2d at 663.

13 *Id.* The state's general statute of limitations is six years. *Id. See* N.J. STAT. ANN. § 2A:14-1 (West 1952).

14 *Spring Motors*, 98 N.J. at 562, 489 A.2d at 663.

Company (Ford).[15] At Spring Motors' request, the sale contract specified that the trucks be furnished with Clark Equipment Company (Clark) transmissions.[16] This particular stipulation was predicated on Spring Motors' reliance on Clark's advertising and history of reliable performance.[17]

Each truck sold to Spring Motors was accompanied by a form warranty which stated: "[t]o the extent allowed by law, this WARRANTY IS IN PLACE OF all other warranties, express or implied, including ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS."[18] Additionally, the warranty limited Ford's liability to the replacement or repair of defective parts,[19] and, in accordance with statutory criteria,[20] disclaimed any liability for consequential damages.[21] An essentially similar warranty was issued by Clark to Ford.[22]

Subsequent to their delivery to Spring Motors, the trucks were leased to Economic Laboratories, Inc. (Economic), which used them for hauling.[23] The lease agreement provided that Spring Motors was to service the trucks.[24] Within three months of their delivery, Economic began experiencing repeated problems with the Clark transmissions.[25] Due to the persistence of the malfunctions, Spring Motors contacted Clark directly and advised that it " 'had nothing but trouble' with the transmissions."[26] Clark examined the transmissions and confirmed that they were functioning improperly.[27] Clark's representatives as-

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15 *Id.* The total purchase price was $265,029.80. *Id.*

16 *Id.* Clark was a supplier of transmissions to Ford. *Id.*

17 *Id.*

18 *Id.* The warranties were issued by Ford. *Id.*

19 The warranty covered "any part during the first 12 months or 12,000 miles of operation. . . ." *Id.*

20 N.J. STAT. ANN. § 12A:2-719(3) (West 1962) provides that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

21 *Spring Motors*, 98 N.J. at 562, 489 A.2d at 663.

22 *Id.* at 562-63, 489 A.2d 664.

23 *Id.* at 563, 489 A.2d at 664.

24 *Id.*

25 *Id.* The majority of the transmission failures involved the third and fourth gears on the counter shaft. *See* Spring Motors Distrib., Inc. v. Ford Motor Co., 191 N.J. Super. 22, 27, 465 A.2d 530, 532 (App. Div. 1983), *rev'd*, 98 N.J. 555, 489 A.2d 660 (1985).

26 *Spring Motors*, 98 N.J. at 563, 489 A.2d at 664.

27 *Id.* Specifically, Clark attributed the transmission malfunctions to " 'improper angle degree in the way certain gears were cut,' resulting 'in additional strain on the actual gear and the mating gear and related shafts.' " *Id.*

sured Spring Motors that their grievance "could be resolved amicably" and provided Spring Motors with replacement parts.[28] Due to continued malfunctions, however, Spring Motors informed Clark that it would remove the transmissions and take action to hold Clark financially responsible.[29] In light of this situation, Spring Motors and Economic mutually agreed to terminate their lease agreement.[30]

In December 1980, more than four years after the initial delivery of the trucks,[31] Spring Motors filed suit in county court naming Turnpike, Ford, and Clark as co-defendants.[32] Seeking restitution for consequential damages,[33] Spring Motors' complaint alleged breaches of express and implied warranties, a Magnuson-Moss Act violation,[34] and claims based on strict liability in tort and negligence.[35] The prayer for damages consisted of economic losses exclusively, as no allegations of property damage or personal injury were made.[36]

The defendants filed motions for summary judgment on all counts.[37] The trial court granted the defendants' motions and

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28 *Spring Motors*, 191 N.J. Super. at 27, 465 A.2d at 532.

29 *Spring Motors*, 98 N.J. at 563-64, 489 A.2d at 664.

30 *Id.* at 564, 489 A.2d at 664. In settlement of the premature termination of the lease agreement, Spring Motors sold the trucks to Economic for $247,580.97. *Id.*

31 *Id.* Spring Motors contended that Clark's continued written and oral promises to remedy the defective transmissions "led [them] to believe that litigation was unnecessary. . . ." Respondent's Brief in Opposition to Certification, at vi, Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985) (No. 21,746) [hereinafter Respondent's Brief].

32 *Spring Motors*, 191 N.J. Super. at 25, 465 A.2d at 531.

33 Respondent's Brief, *supra* note 31, at vii. Spring Motors' prayer for damages included costs for towing, labor, parts, and replacement truck rentals, in addition to damages sustained as a result of the premature termination of its lease with Economic. *Id.*

34 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss), Pub. L. 93-637, 88 Stat. 2185 (1975) (codified as amended at 15 U.S.C. §§ 2301-2312 (1982)). Spring Motors did not oppose Clark's motion for summary judgment based on the Magnuson-Moss claim. Petition for Certification on Behalf of Ford Motor Company and Turnpike Ford Truck Sales, Inc., at 4, Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985) (No. 21,746) [hereinafter Appellant's Petition for Certification].

35 *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

36 Petition for Certification to the Appellate Division by Clark Equipment Company, at 3, Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985) (No. 21,746) [hereinafter Clark's Petition for Certification].

37 *Id.* The Supreme Court of New Jersey awarded Spring Motors "the benefit of all favorable inferences" because the "matter [was] presented on defendants' motion for summary judgment." *Spring Motors*, 98 N.J. at 561-62, 489 A.2d at 663. Turnpike raised several defenses including the expiration of the statute of limitations and contended that the damages were caused by conditions under which it had no control. Respondent's Brief, *supra* note 31, at iii. Turnpike also relied on

dismissed Spring Motors' complaint against Clark due to a lack of privity between the parties.[38] Additionally, the court found that Spring Motors' complaint was contractual in nature, and thus the six year limitations period pertaining to tort actions[39] was inapplicable.[40] Therefore, the trial court applied the four year limitations period set forth in the U.C.C.[41] and barred the breach of warranty action by Spring Motors against Ford and Turnpike.[42]

The dismissal of Spring Motors' breach of warranty claim was affirmed on appeal.[43] The appellate division, however, reversed the lower court's dismissal of the tort action.[44] Without addressing the negligence aspect of Spring Motors' tort claim,

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several provisions of the U.C.C. in its defense. *Id.* Subsequently, Turnpike filed a cross-claim against Ford and demanded contribution from Clark. *Id.*

In its answer, Ford disclaimed liability and asserted its "written warranty embodie[d] all of its obligations." *Id.* Specifically, Ford contended that a third party or Spring Motors, was negligent in maintaining and/or operating the vehicles. *Id.* at iv. Accordingly, Ford cross-claimed against Clark. *Id.* at iii-iv.

38 *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

39 The applicable statute provides in pertinent part:

> Every action at law . . . for any tortious injury to real or personal property . . . for any tortious injury to the rights of another . . . or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

N.J. STAT. ANN. § 2A:14-1 (West 1952).

40 *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

41 The statute of limitations for sale contracts provides in part that, "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . ." N.J. STAT. ANN. § 12A:2-725 (West 1962).

42 *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

43 *Spring Motors*, 191 N.J. Super. at 48, 465 A.2d at 544. In contesting the expiration of the statute of limitations, Spring Motors relied upon § 12A:2-725(2), which provides in pertinent part:

> A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

N.J. STAT. ANN. § 12A:2-725(2) (West 1962).

Specifically, Spring Motors contended that its cause of action for breach of warranty did not accrue until February 1977 when it discovered the defects. *Spring Motors*, 191 N.J. Super. at 44, 465 A.2d at 542. The appellate division noted, however, that the express warranty did not explicitly state the date of its expiration and, therefore, held that the warranty was not one of future performance. *Id.* at 47, 465 A.2d at 544. Accordingly, the court opined that the delayed accrual provision of N.J. STAT. ANN. 12A:2-725(2) was inapplicable, and thus, Spring Motors' warranty action was time barred. *Id.*

44 *Spring Motors*, 191 N.J. Super. at 48, 465 A.2d at 544.

the appellate division recognized a viable cause of action grounded in strict liability.[45] Thereafter, the New Jersey Supreme Court reversed the appellate division holding that a commercial entity may not recover direct and consequential economic damages resulting from defective products through a strict liability recovery theory.[46] The court recognized, however, that had the action not been time barred, Spring Motors could have maintained an action based upon breach of warranty theory.[47]

At common law, only those in privity with the seller or manufacturer could sue for damages caused by defective goods.[48] The injured consumer could only sue his immediate predecessor in the distributive chain.[49] Throughout the nineteenth century, however, many exceptions to this general rule developed.[50] In 1916, the landmark case of *MacPherson v. Buick Motor Co.*[51] redefined the rules governing the liability of manufacturers to consumers.[52] In *MacPherson*, a consumer was injured when the wheel of his car suddenly collapsed.[53] Notwithstanding the plaintiff's purchase through a dealer, the manufacturer was held directly liable to the consumer for negligently producing goods which proved to be dangerous.[54]

MacPherson represented a major advance in the development of consumer rights against remote suppliers.[55] Despite a lack of privity, manufacturers were held liable to any consumer injured

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45 *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

46 *Id.* at 561, 489 A.2d at 663.

47 *Id.* at 587-88, 489 A.2d at 676-77.

48 *See, e.g.*, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). Among the reasons supporting this rule was the belief that it would be too burdensome on commerce to hold manufacturers of goods liable to people with whom they did not contract. *See* PROSSER & KEETON, *supra* note 2, § 96, at 681-82. Pursuant to the rule, an intervening resale "insulated" the manufacturer from any claim of negligence. *Id.* at 681.

49 *See* Comment, *supra* note 5, at 147. Unfortunately, the party in privity with the consumer "often proved to be both elusive and financially unresponsible." *Id.*

50 PROSSER & KEETON, *supra* note 2, § 96, at 682. Ultimately, a supplier or manufacturer of inherently dangerous articles was held liable to an injured party notwithstanding a lack of privity. *See* Thomas v. Winchester, 6 N.Y. 397 (1852) (remote supplier of medicine held liable for plaintiff's injury notwithstanding fact that plaintiff purchased product from third party).

51 217 N.Y. 382, 111 N.E. 1050 (1916).

52 *See generally* Comment, *supra* note 5, at 145-46; Note, *supra* note 6, at 917.

53 *MacPherson*, 217 N.Y. at 384-85, 111 N.E. at 1051.

54 *Id.* at 389, 111 N.E. at 1053.

55 Justice Cardozo, the author of *MacPherson*, expanded the principle of Thomas v. Winchester, 6 N.Y. 397 (1852), beyond inherently dangerous products to include all objects that would be dangerous if negligently manufactured. *MacPherson*, 217 N.Y. at 389-90, 111 N.E. at 1053.

as a result of the producer's negligence.[56] Nevertheless, the rules governing recovery under negligence still imposed a difficult burden upon the injured plaintiff.[57] The plaintiff was required to show that "the negligently-made product create[d] a foreseeable risk of personal injury and that use by someone other than the first purchaser [was] contemplated by the manufacturer."[58] Notwithstanding the elimination of the privity requirement, the strict burden of proof imposed upon the injured plaintiff acted to circumvent the application of the *MacPherson* doctrine.[59]

Subsequently, the responsibility of manufacturers was extended further by the theory of implied warranty of merchantability.[60] This theory, in essence, made the supplier an insurer that the goods were fit for their ordinary purpose.[61] Initially, the concept of implied warranty of merchantability was applied to food products;[62] however, it was expanded later to encompass all consumer products involved in intimate bodily use.[63] It was not until the New Jersey Supreme Court's 1960 decision in *Henningsen v. Bloomfield Motors, Inc.*[64] that the doctrine of implied warranty was extended to products beyond those intended for intimate bodily use.[65] In that case, Mr. Henningsen bought a new Plymouth automobile for his wife from a dealer.[66] Ten days later, while Mrs. Henningsen was driving the car, it suddenly veered out of control and crashed into a wall.[67] The Hen-

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56 *See Spring Motors*, 98 N.J. at 583, 489 A.2d at 674.

57 *See* Comment, *supra* note 5, at 147.

58 Note, *supra* note 6, at 919.

59 *See id.* at 920. The author notes that "[t]he existence of substantial injuries in cases in which proof of negligence would be difficult led to the establishment of alternate theories of recovery." *Id.*

60 *See* PROSSER & KEETON, *supra* note 2, § 97, at 690.

61 *Id.* § 95A, at 680.

62 *Id.* § 97, at 690. As far back as 1266, rules governing sellers of " 'corrupt' food and drink" have existed. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment b (1986). In this century, however, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913), was one of the first cases allowing non-privity consumers to sue for damages caused by tainted food. *See also* PROSSER & KEETON, *supra* note 2, § 97, at 690.

63 *See, e.g.*, Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954) (applying warranty theory to impose liability upon hair dye distributor); Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (applying warranty theory to impose liability upon manufacturer of dish detergent); Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (1951) (exploding beverage bottle).

64 32 N.J. 358, 161 A.2d 69 (1960).

65 *See* Prosser, *supra* note 5, at 791.

66 *Henningsen*, 32 N.J. at 365, 161 A.2d at 73.

67 *Id.* at 368-69, 161 A.2d at 75.

ningsens sued the dealer, Bloomfield Motors, and the manufacturer, Chrysler, under the theory of implied warranty of merchantability.[68] Chrysler claimed that its liability terminated when it sold the car to the dealer since it had not contracted directly with the purchaser or his wife.[69] Bloomfield Motors, in turn, contended that there was no implied warranty between it and Mrs. Henningsen since they were in privity only with Mr. Henningsen.[70]

Justice Francis, writing for a unanimous court, held that, by placing a product in the stream of commerce and promoting its purchase, the manufacturer created an implied warranty to the ultimate purchaser that the product is "reasonably suitable" for its intended purpose.[71] Thus, in the interest of society, the court reasoned that any product deemed to be dangerous due to defective manufacturing mandated the elimination of the requirement of direct privity between the manufacturer and the ultimate consumer.[72] Justice Francis concluded that Mrs. Henningsen as well as anyone occupying or using the car with the owner's consent[73]

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68 *Id.* at 364-65, 161 A.2d at 73. The complaint also contained a negligence count which was dismissed by the trial court due to the plaintiff's failure to state a *prima facie* cause of action against the dealer or manufacturer. *Id.* at 369, 161 A.2d at 75.

69 *Id.* at 378, 161 A.2d at 80.

70 *See id.* at 406, 161 A.2d at 96. Mr. Henningsen had purchased the car as a gift for his wife. *Id.* at 365, 161 A.2d at 73. Only Mr. Henningsen signed the purchase order. *Id.*

71 *Id.* at 384, 161 A.2d at 84. Specifically, Justice Francis stated:

> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

Id.

72 *Id.* at 379, 161 A.2d at 81. Crucial to Justice Francis' holding was his recognition of the great disparity of bargaining power between the manufacturer and the consumer, in addition to an inability of the consumer to understand and modify the provisions of the sales contract. *Id.* at 390-91, 161 A.2d at 86-87. This ruling has been described as "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." Prosser, *supra* note 5, at 793-94. Courts throughout the nation began to apply the doctrine of implied warranty of merchantability to a wide variety of products. *See, e.g.*, McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960) (plaintiff injured by insecticide permitted to maintain action under implied warranty theory); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963) (recovery for wrongful death caused by defective aircraft under implied warranty theory).

73 *Henningsen*, 32 N.J. at 414-15, 161 A.2d at 100-01. Mrs. Henningsen would be considered to be a " 'horizontal' non-privity plaintiff." *See* WHITE & SUMMERS, *supra* note 7, § 11-2, at 399. This term is used to denote a plaintiff who, although not

would have a cause of action regardless of a lack of privity with the manufacturer.[74] As a result, the risk of harm caused by a defective product is borne by those most capable of eliminating the danger and absorbing the cost of the risk.[75]

One year after the *Henningsen* decision, the U.C.C. was adopted in New Jersey.[76] Its stated purpose was "to simplify, clarify and modernize the law governing commercial transactions."[77] With regard to privity, the U.C.C. provides that a seller's express and implied warranties extend to all family members and household guests of the buyer whose injuries are a proximate result of the seller's breach of warranty.[78] Additionally, the U.C.C. provides that a "buyer must within a reasonable time . . . notify the seller of breach or be barred from any remedy."[79] In contrast, liability in tort "extends to all foreseeably affected parties."[80]

Mindful that the doctrines of negligence and implied warranty of merchantability were limited vehicles through which an injured consumer could seek recovery, courts resorted to the doctrine of strict liability in tort.[81] Under this theory, a plaintiff need only show that while using the product in its intended man-

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within the direct distributive chain, does use or come in contact with the product. *Id.* In contrast, a " 'vertical' non-privity plaintiff is a buyer" that is within the distributive chain but did not purchase the goods directly from the manufacturer. *Id.*

74 *Henningsen*, 32 N.J. at 414-15, 161 A.2d at 100. In support of its holding, the court relied on Faber v. Creswick, 31 N.J. 234, 456 A.2d 252 (1959), in which a landlord was held liable for personal damages suffered by a tenant's wife although the lease was signed only by her husband.

75 *Henningsen*, 32 N.J. at 379, 161 A.2d at 81.

76 *Spring Motors*, 98 N.J. at 566, 489 A.2d at 666.

77 N.J. STAT. ANN. § 12A:1-102(2)(a) (West 1962). Formulated primarily to govern dealings between merchants, the U.C.C. is neutral on issues pertaining to consumer protection and proved to be restricted in its applicability to the consumer-merchant relationship. Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 310 (1973).

78 *See* N.J. STAT. ANN. § 12A:2-318 (West 1962).

79 N.J. STAT. ANN. § 12A:2-607(3) (West 1962). This provision gives the seller an opportunity to remedy the breach and protects him from unduly delayed claims. Note, *supra* note 6, at 925. Additionally, the U.C.C. provides that a seller may disclaim any implied warranties. *See* N.J. STAT. ANN. § 12A:2-316 (West 1962). Notice requirements and disclaimers are useful to commercial entities dealing with each other on essentially equal bargaining terms. *See* PROSSER & KEETON, *supra* note 2, § 97, at 691. Barring a consumer from recovery of personal damages by virtue of disclaimers not bargained for, however, defeats the consumer's protection at law. *Id.* Such provisions of the U.C.C., when applied to personal injuries, act as "a booby-trap for the unwary." *Id.*

80 Note, *supra* note 6, at 947.

81 *Id.* at 926. As with implied warranties and negligence, strict liability was initially utilized in situations involving inherently dangerous activities. *See, e.g., id.*

ner, an injury occurred.[82] The seminal case applying strict liability is the California Supreme Court's 1963 decision in *Greenman v. Yuba Power Products, Inc.*[83] In *Greenman*, the plaintiff was injured by a defective power tool which was purchased for him by his wife.[84] The plaintiff sought recovery from the manufacturer under both negligence and breach of warranty theory.[85] In defense, the manufacturer averred that any cause of action under breach of warranty was barred because the plaintiff did not comply with the notification provisions of the U.C.C.[86]

Writing for a unanimous court, Justice Traynor drew from *Henningsen* to rule that the manufacturer was liable to all ultimate consumers by virtue of placing a defective article in the stream of commerce.[87] Justice Traynor reasoned, however, that rules designed to govern transactions between commercial entities were inappropriate for purposes of determining a manufacturer's liability to injured individuals.[88] The justice opined that, since consumers were not versed with the business acumen governing the U.C.C., "[t]he remedies of injured consumers ought not to be made to depend on the intricacies of the law of sales."[89] Accordingly, Justice Traynor concluded that the plaintiff's action was governed by strict liability in tort rather than by the implied warranty of merchantability.[90]

The *Greenman* decision had an immediate and dramatic effect upon the law of products liability. Courts throughout the nation abandoned the doctrine of implied warranty and applied strict liability to a wide spectrum of cases.[91] In 1965, the American

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82 *See* Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

83 *Id.*

84 *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

85 *Id.*

86 *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

87 *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

88 *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

89 *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

90 *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701. In rendering his opinion, Justice Traynor alluded to his concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), in which he stated that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." *Id.* at 461, 150 P.2d at 440 (Traynor, J., concurring).

91 Prosser, *supra* note 5, at 804. *See also* Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (wheelchair manufacturer held strictly liable for plaintiff's injuries when wheel fell off); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (strict liability applied to manufacturer of defective brake system).

Law Institute (ALI) added section 402A to the *Restatement (Second) of Torts*.[92] This section set out the parameters of strict liability between manufacturers and injured consumers.[93] In contrast to the U.C.C., section 402A was based primarily on consumer protection.[94] Under this provision, there are only two requirements for the maintenance of a cause of action. First, the product must be unreasonably dangerous,[95] and second, the defects of either design or manufacture must be a proximate cause of the plaintiff's injuries.[96] Thus, strict liability offers a relatively congenial course of recovery without the various constraints and disclaimers of contract law.[97]

Whether one may maintain a cause of action under the theories of strict liability, negligence, or warranty depends largely on the relationship between the parties and the nature of the injury suffered.[98] Generally, parties suffering personal injury or property damage may seek recovery regardless of privity.[99] In contrast, a claim for purely economic losses would not be entertained under strict liability or negligence theories.[100] Courts have been reluctant to resolve claims for economic damages under these theories due to the fear of restricting freedom of contract.[101] Thus, when confronted with claims for economic damages, courts allow recovery through the U.C.C. which requires the plaintiff to establish privity with the defendant.[102]

In 1965, in *Santor v. A & M Karagheusian, Inc.*,[103] Justice Francis once again expanded the frontiers of products liability by allowing an ordinary consumer to recover through strict liability

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92 *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

93 *Id.* at § 402A(1) and (2). *See also* Note, *supra* note 6, at 951-52.

94 The term "ordinary consumer" has been defined as one who buys goods for personal use. *See* Comment, *supra* note 5, at 156 n.43. A "commercial consumer," in contrast, is one who uses the product for business purposes. *See id.*

95 RESTATEMENT, *supra* note 92, § 402A comment i. *See also* Comment, *supra* note 5, at 151. Specifically excluded from § 402A are the requirements of privity and notice. *Id.* at 154-56. Section 402A maintains that neither the U.C.C. nor negligence have any theoretical basis on a seller's liability. *Id.* at 155.

96 RESTATEMENT, *supra* note 92, § 402A comment *l.*

97 *Spring Motors*, 98 N.J. at 570, 489 A.2d at 668.

98 *See supra* note 7 (classification of damages).

99 Tort obligations are generally imposed by law and are designed primarily to avoid injury to all foreseeably affected parties. *See* PROSSER & KEETON, *supra* note 2, § 91, at 655.

100 *See id.*

101 *See, e.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); *see also infra* notes 102-13 (discussion of *Santor*).

102 *See, e.g.*, *Santor*, 44 N.J. at 64-66, 207 A.2d at 311-12.

103 *Id.* at 52, 207 A.2d at 305.

for direct economic damages.[104] In *Santor*, the plaintiff noticed unsightly flaws in a quantity of carpet he purchased for his home.[105] Direct action against the retailer was precluded by the fact that it went out of business shortly after making the sale.[106] The plaintiff, therefore, sought recovery of the purchase price directly from the manufacturer, basing his claim on the theory of implied warranty of merchantability.[107] In its defense, the manufacturer contended that the absence of privity barred the plaintiff's recovery because the flaw in the carpet was not inherently dangerous.[108]

In awarding the plaintiff full recovery of the purchase price, Justice Francis refuted the notion that his decision in *Henningsen* required the existence of some danger of personal injury in order to recover damages under the implied warranty theory.[109] Applying *Greenman*, however, the *Santor* court ruled that the proper theory of recovery was strict liability.[110] Justice Francis viewed the removal of the requirement of privity as a response to modern marketing practices.[111] The justice opined that the manufacturer, as "father of the transaction," used the dealer as a mere "conduit" to reach consumers lacking the skill to determine the true condition and nature of the product.[112] Thus, the *Santor* court held the manufacturer liable by virtue of placing the goods in the stream of commerce.[113] Unlike his opinion in *Henningsen*, Justice Francis' holding in *Santor* did not herald a revolution in products liability.[114]

Although the doctrine of strict liability was expanded by the *Greenman* court to include dangerous consumer products, the doctrine's concomitant limitations were not defined until 1965 in

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104 *Id.* at 66-67, 207 A.2d at 312-13.

105 *Id.* at 56, 207 A.2d at 307.

106 *Id.*

107 *Id.* at 57, 207 A.2d at 307.

108 *Id.* at 57-58, 207 A.2d at 307-08.

109 *Id.* at 60, 207 A.2d at 309. In permitting the recovery of economic damages from the remote manufacturer, Justice Francis cited Continental Copper & Steel Indus., Inc. v. E.C. "Red" Cornelius, Inc., 104 So.2d 40 (Fla. Dist. Ct. App. 1958), which was one of the few cases to allow recovery for economic losses against a remote manufacturer under breach of implied warranty. *Santor*, 44 N.J. at 61, 207 A.2d at 309.

110 *Santor*, 44 N.J. at 64-65, 207 A.2d at 311-12.

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

112 *Id.* at 59-60, 207 A.2d at 309.

113 *Id.* at 65, 207 A.2d at 312.

114 *See Spring Motors*, 98 N.J. at 573-74, 489 A.2d at 669-70.

Seely v. White Motor Co.[115] In *Seely*, a commercial hauler purchased a truck which was warranted "to be free from defects in material and workmanship."[116] Due to defective manufacturing, however, the truck malfunctioned and ultimately overturned.[117] Although no personal injuries resulted, the plaintiff sought recovery for direct and consequential economic damages on the basis of strict liability and breach of warranty theories.[118]

Chief Justice Traynor, again writing for the California Supreme Court, found that the manufacturer in fact had made and breached an express warranty of fitness.[119] Thus, the *Seely* court allowed rescission of the sales contract and recovery of lost profits.[120] In addition, the court delivered a lengthy dictum stating that the manufacturer would not be held liable under strict liability for direct and consequential economic loss.[121] Justice Traynor reasoned that strict liability in tort was designed "to govern the distinct problem of physical injuries" and, therefore, he opined that its application to economic relationships between commercial entities would succeed only in undermining the U.C.C.[122]

In arriving at its decision, the *Seely* court distinguished the purpose and nature of tort liability from that of contract liability.[123] Acknowledging that physical injury is an overwhelming misfortune to the consumer, the *Seely* court noted that a manufacturer may be deemed an insurer of his products safe performance.[124] In contrast, the court stated, the chance that a product will not perform economically in a consumer's business is a reasonable risk that should be borne by the individual consumer.[125] Justice Traynor reasoned that holding a manufacturer liable for a non-disclaimable risk that his product would not perform profitably for remote consumers presented too broad a spectrum of liability for the manufacturer.[126] Justice Traynor concluded that

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115 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
116 *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
117 *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.
118 *See id.* at 12-13, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.
119 *Id.* at 15-18, 403 P.2d at 149-50, 45 Cal. Rptr. at 21-22.
120 *Id.* at 13-14, 403 P.2d at 148, 45 Cal. Rptr. at 20. The *Seely* court refused to award damages to the plaintiff because of the absence of proof that the accident was caused by the defect in the truck. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.
121 *Id.* at 15-19, 403 P.2d at 149-52, 45 Cal. Rptr. at 21-24.
122 *See id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.
123 *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
124 *Id.*
125 *See id.* at 16-17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23.
126 *See id.*, 403 P.2d at 150, 45 Cal. Rptr. at 22. Justice Traynor disagreed with the

the consuming public should not have "to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers."[127]

Following the *Seely* decision, courts faced with the issue of recovery of economic damages under strict liability have been divided between those which follow *Santor* and those which follow *Seely*.[128] Over the years, *Seely* has emerged as the most widely accepted approach to strict liability, especially when the consumer

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holding in *Santor* and opined that the private consumer should not be allowed to recover damages under strict liability. *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23. The justice averred that a more appropriate means of recovery would have been based on a breach of express warranty in that the carpet was not "Grade #1" as advertised. *See id.*

127 *Id.* In his concurrence, Justice Peters disagreed with the majority's ruling that the nature of the damage—economic as opposed to personal—is determinative in a consumer's cause of action. *Id.* at 21, 403 P.2d at 153, 45 Cal. Rptr. at 25 (Peters, J., concurring). Viewing this distinction as artificial and inaccurate, Justice Peters noted that economic loss is often as overwhelming a misfortune as personal loss. *Id.* at 22, 403 P.2d at 153-54, 45 Cal. Rptr. at 25-26 (Peters, J., concurring). Additionally, since compensation for damages is ultimately economic, Justice Peters determined that it would be inconsistent to foreclose any award for purely pecuniary losses while awarding money damages for personal harm. *Id.* Thus, Justice Peters recognized that "the relative roles played by the parties to the purchase contract and the nature of [the] transaction" should be determinative rather than the nature of the damage. *Id.* at 21, 403 P.2d at 153, 45 Cal. Rptr. at 25 (Peters, J., concurring). To hold otherwise, Justice Peters opined, would have the anomalous result of allowing an event which occurred long after the transaction to control the cause of action available to the injured consumer. *See id.* at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28 (Peters, J., concurring).

Justice Peters believed that ordinary consumers should be allowed to recover economic loss through strict liability. *Id.* at 27-28, 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30 (Peters, J., concurring). Further, Justice Peters reasoned that commercial consumers should be allowed to recover economic losses through strict liability if their relationship with the defendant was a consequence of unequal bargaining positions. *See id.* Thus, Justice Peters concluded that the plaintiff in *Seely*, as a proprietor of a one man enterprise, would qualify as an "ordinary consumer" who could recover economic damages through strict liability. *Id.*

128 One of the few states that followed *Santor* is Michigan. *See* Comment, *supra* note 5, at 166. In Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970), the plaintiff, a golf course owner, purchased several golf carts from the defendant which proved to be defective. *Id.* at 603, 182 N.W.2d at 801. The plaintiff brought an action to recover economic damages alleging a breach of implied warranty of merchantability. *Id.* at 606, 182 N.W.2d at 802-03. Citing *Santor*, the *Cova* court held that a manufacturer's liability should not depend on whether the product caused personal injury. *Id.* at 609, 182 N.W.2d at 804. Rather, the court predicated liability on the existence of a defect attributable to manufacturer. *Id.* Departing from *Santor*, however, the *Cova* court was reluctant to permit recovery through strict liability fearing that it would lead to the imposition of absolute liability without careful analysis. *See id.* at 612-15, 182 N.W.2d at 806-08. Alternatively, the court preferred the term " 'product liability' " through which

is a commercial entity.[129] Twenty years after the *Santor* and *Seely* decisions, however, the extension of the strict liability theory of recovery to ordinary consumers beyond physical and property damage remains limited.[130] Most states continue to adhere to the premise that a consumer may not recover for direct economic loss through strict liability.[131] New Jersey, however, has established that strict liability is a viable cause of action for ordinary consumers suffering direct economic loss[132] and for commercial consumers experiencing property losses.[133] In *Spring Motors*, the plaintiff, a commercial entity, sought to expand New Jersey's application of strict liability by seeking recovery of direct and consequential economic losses.[134]

The *Spring Motors* court began its analysis by addressing the exclusiveness of the U.C.C. as a source of recovery.[135] Justice Pollock, writing for a unanimous court, initially recognized a dis-

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to impose liability, reasoning that it would be applied with more restraint. *Id.* at 614-15, 182 N.W.2d at 807.

Conversely, the Illinois Supreme Court in Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E. 2d 443 (1982), ruled that a commercial entity could not recover direct and consequential economic losses from a manufacturer of defective grain storage tanks under strict liability. *Id.* at 85-86, 435 N.E.2d at 450. Following *Seely*, the majority refused to impose the strict liability ruling of *Santor*, expressing concern for encroachment on the U.C.C. which was designed to protect expectation interests. *Id.* at 78-80, 435 N.E.2d at 447-48. The court interpreted strict liability as applying only to situations in which personal or property damage was caused by "unreasonably dangerous defects." *Id.* at 78, 435 N.E.2d at 447. The court distinguished between "unreasonably dangerous defects," which involve " 'sudden and calamitous damage,' " and mere qualitative defects, which entail "deterioration and other defects of poor quality." *See id.* at 83-85, 435 N.E.2d at 449-50. Thus, the *Moorman* court held that damages arising from products that are merely unfit for their intended use are best handled through the warranty provisions of the U.C.C. *Id.* at 79-80, 435 N.E.2d at 448. A contrary ruling, the court concluded, would make the remote manufacturer an insurer that its products would perform profitably even though it never warranted such. *Id.* at 79-80, 435 N.E.2d at 447-48.

129 *See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980) (plaintiff cannot recover through strict liability for economic damages caused by defective roof); Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25 (S.D. Iowa 1973) (equality of bargaining position precluded recovery through strict liability for economic damages caused by defective transformer); Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965) (purchaser cannot recover economic losses caused by defective tractor through strict liability).

130 *See supra* note 128 and accompanying text.

131 *See Spring Motors*, 98 N.J. at 573, 489 A.2d at 669 (collecting cases).

132 *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

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

134 *Spring Motors*, 98 N.J. at 560, 489 A.2d at 662.

135 *Id.* at 565, 489 A.2d at 665.

tinction between the history and purpose of both the U.C.C. and the theory of strict liability.[136] The court observed that, although there was an inherent overlap between the two doctrines, they were promulgated to address different situations.[137] The U.C.C., the justice asserted, was premised on the notions of freedom of contract and society's interest in assuring the fulfillment of agreements.[138] Drawing from *Henningsen* and *Greenman*, the court noted that a fundamental objective of strict liability is the protection of consumers who, due to unequal bargaining power, cannot contractually protect their interests.[139] Thus, the court held that because the U.C.C. was drafted to satisfy the needs of commerce it would be a "more appropriate vehicle for resolving commercial disputes. . . ."[140]

The court ruled that Spring Motors, as a commercial consumer, could not maintain an action for damages under strict liability.[141] Qualifying its position, however, the court noted that "[it] need not reconsider the *Santor* rule that an ultimate consumer may recover in strict liability for direct economic loss."[142] The court recognized that compensation for inequality of bargaining power—a basic premise of strict liability—is inapplicable to situations involving commercial entities "with comparable bargaining power."[143] The court noted that Spring Motors was in a

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136 *Id.* at 565-66, 489 A.2d at 665.

137 *See id.* at 570, 489 A.2d at 667-68. The majority theorized that the overlap between strict liability and the U.C.C. resulted from the fact that strict liability "evolved from implied warranties of fitness and merchantability under the U.C.C." *Id.* at 570, 489 A.2d at 667. Additionally, the court stated that neither the editors of the U.C.C. nor those of the *Restatement* attempted to resolve the overlap between their respective doctrines. *Id.*, 489 A.2d at 667-68.

138 *Id.* at 571, 489 A.2d at 668.

139 *Id.* at 570-71, 489 A.2d at 668.

140 *Id.* at 571, 489 A.2d at 668.

141 *Id.* at 578-79, 489 A.2d at 672. Reviewing *Greenman*, *Santor*, and *Seely*, the court distinguished cases which are tortious in nature from those which are primarily contractual disputes. *See id.* at 571-72, 489 A.2d at 668. Justice Pollock noted that most courts and commentators outside New Jersey follow the California position restricting strict liability to cases involving physical or property damage. *Id.* at 573-75, 489 A.2d at 669-70.

142 *Id.* at 575, 489 A.2d at 670. The court reasoned that, while the *Santor* ruling permitted an ordinary consumer to recover direct economic damages, it would not be appropriate to allow a commercial consumer to recover for these losses. *Id.* at 578-79, 489 A.2d at 672. To hold otherwise, the court opined, would serve to "dislocate major provisions of the Code." *Id.* at 577, 489 A.2d at 671.

143 *Id.* at 576, 489 A.2d at 670 (citing Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25 (S.D. Iowa 1973)). Specifically, the *Allis-Chalmers* court stated that "[t]he doctrine of strict liability in tort, designed to aid the consumer in an unequal bargaining position who is physically injured, loses all

position to negotiate a lower price for the trucks in exchange for assuming a greater risk of economic loss through Ford's limited warranty.[144] The court asserted, therefore, that in attempting to impose the risk of economic loss on the manufacturer, Spring Motors sought "to obtain a better bargain than it made."[145] Applying *Seely*, the court surmised that such practices would be detrimental to ordinary consumers in that manufacturers would have to raise prices to cover risks they had not contractually assumed.[146]

The *Spring Motors* court next distinguished several cases relied upon by the appellate division.[147] Foremost, the *Spring Motors* court stated that the appellate division "misread" the decision in *Rosenblum v. Adler*,[148] which held that public accountants are liable to parties other than their direct clients for negligent misrepresentation of corporate financial statements.[149] The *Spring Motors* court opined that "the [*Rosenblum*] decision turned on the principle of negligent misrepresentation" and, therefore, had no bearing on whether a manufacturer was to be held strictly liable for defective goods.[150] Additionally, the *Spring Motors* court stated that the plaintiff erred in relying on *Monsanto Co. v. Alden Leeds, Inc.*[151] and *ICI Australia Ltd. v. Elliott Overseas Co.*[152] In those cases, the plaintiffs, as commercial consumers, were able to recover damages under strict liability.[153] The *Spring Motors* court distinguished these cases noting that they involved property damage which, as opposed to economic damage, is recoverable under strict liability.[154] Accordingly, the *Spring Motors* court held

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meaning when a large public utility or other large company is the plaintiff and is suing solely for commercial loss." *Allis-Chalmers*, 360 F. Supp. at 32. Additionally, the *Spring Motors* court stressed that "perfect parity" between the contracting parties was not necessary. *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.

144 *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.

145 *Id.*

146 *Id.*

147 *See id.* at 577, 489 A.2d at 671.

148 93 N.J. 324, 461 A.2d 138 (1983).

149 *See Spring Motors*, 98 N.J. at 577, 489 A.2d at 671.

150 *Id.*

151 130 N.J. Super. 245, 326 A.2d 90 (Law Div. 1974). In *Monsanto*, a seller of chlorine was able to recover under strict liability for property losses sustained by defective chemicals shipped by his supplier. *Id.* at 263-64, 326 A.2d at 100.

152 551 F. Supp. 265 (D.N.J. 1982). In *ICI Australia*, a commercial consumer was able to recover through strict liability for damages to factory machines caused by defective machine parts. *Id.* at 268-69.

153 *See Spring Motors*, 98 N.J. at 578, 489 A.2d at 672.

154 *Id.* The *Spring Motors* court reasserted that the U.C.C. offered the most comprehensive approach to the needs of commerce and that it therefore represented

that a commercial consumer could not recover economic damages through strict liability.[155]

The court next addressed the issue of Spring Motors' claim for economic damages in negligence.[156] As it had approached the strict liability issue, the court began its analysis by comparing the histories and purposes of tort and commercial law.[157] The court found that the general purpose of tort law is the protection of "society's interest in freedom from harm" through unanticipated injury.[158] In contrast, the court stated that contract principles are applicable to situations involving qualitative defects causing economic harm "that the parties have, or could have, addressed in their agreement."[159] In determining the applicability of tort or contract law, the court held that such interrelated factors as "the status, relationship and expectations of the parties," as well as "the manner in which the loss occurred" must be evaluated.[160] The court noted that some jurisdictions do not distinguish between physical and economic harm in allowing recovery for economic harm through negligence;[161] however, it recog-

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the best means of recovery for commercial consumers seeking economic damages. *Id.*

155 *Id.* at 578-79, 489 A.2d at 672.

156 *Id.* at 579, 489 A.2d at 672.

157 *Id.* at 579-80, 489 A.2d at 672.

158 *Id.* at 579, 489 A.2d at 672.

159 *Id.*, 489 A.2d at 672.

160 *Id.*, 489 A.2d at 673 (citing Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977)). In *Nobility*, a purchaser of a mobile home was permitted to recover economic losses from a remote manufacturer through breach of implied warranty and negligence. *Nobility*, 557 S.W.2d at 81. The court asserted "[t]he fact that a product injures a consumer economically and not physically should not bar the consumer's recovery." *Id. See also* Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976). In *Berg*, a commercial fisherman was allowed to recover consequential economic losses caused by a defective marine engine through negligence theory. *Id.* at 596-97, 555 P.2d at 825. The court held that a manufacturer who foresees that its products will be used in commercial ventures owes its consumers a duty not to impair their business with defective products. *Id.* at 592-94, 555 P.2d at 822-23.

161 *Spring Motors*, 98 N.J. at 581, 489 A.2d at 673. Representative of this majority view are Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. App. 444, 666 P.2d 544 (1983), and Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978). In *Arrow Leasing*, the court held that a commercial consumer could not recover economic losses caused by a faulty turbo charger through either strict liability or negligence. *Arrow Leasing*, 136 Ariz. App. at 449-50, 666 P.2d at 549. Rather, the court held that the more appropriate means of recovery was through the law of contracts. *Id.* Additionally, the court noted that the fact that the defective part was a component which caused damage to the rest of the product would not enable the plaintiff to claim the loss as property damage. *Id.* at 449-50, 666 P.2d at 548-49.

In *Clark*, the Idaho Supreme Court held that a farmer could not recover eco-

nized that the vast majority of jurisdictions hold that the U.C.C. provides the exclusive source of recovery in disputes involving frustrated expectations among commercial entities.[162]

Based on these considerations, the court held that the plaintiff, although "understandably. . . disappointed in its purchase," was limited to recourse under the U.C.C. for its claims against Ford and Clark.[163] Accordingly, the court concluded that Spring Motors' failure to comply with the applicable four year statute of limitations barred its lawsuit.[164] The court disagreed, however, with the appellate division's contention that, regardless of the statute of limitations, Spring Motors would be barred from a warranty action against Clark for lack of privity.[165] Instead, the majority contended that a lack of privity between the purchaser and a remote supplier should not preclude the extension of the supplier's warranties to the purchaser.[166]

The *Spring Motors* court recognized that privity was originally developed as a device to limit relief on warranties.[167] Since the *MacPherson* and *Henningsen* decisions, however, the court noted that the requirement of privity has been eroded by numerous exceptions.[168] By extending a sellers' warranty to any person who can be expected to be affected by the goods, the drafters of the U.C.C. acknowledged the decline of horizontal privity[169] as a defense to products liability suits.[170] The drafters of the U.C.C. stated, however, that section 318 would neither enlarge nor re-

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nomic loss caused by a defective tractor through negligence theory. *Clark*, 99 Idaho at 348, 581 P.2d at 806. In support of its conclusion, the court stated that the doctrine of negligence does not impose a duty on a manufacturer to make a product sufficiently reliable and efficient which will enable a purchaser to make a profit in his business. *Id.* at 336, 581 P.2d at 794.

162 *Spring Motors*, 98 N.J. at 581-82, 489 A.2d at 673-74.

163 *Id.* at 582, 489 A.2d at 673-74.

164 *Id.* Spring Motors' warranty claim against Clark was dismissed by the trial court. The dismissal was affirmed by the appellate division. *See Spring Motors*, 191 N.J. Super. at 48, 465 A.2d at 544. Spring Motors did not pursue this claim on appeal. *Spring Motors*, 98 N.J. at 582, 489 A.2d at 674.

165 *Spring Motors*, 98 N.J. at 582, 489 A.2d at 674. Acknowledging that Spring Motors and Clark were not in privity, the court asserted that it was waiving the privity requirement in spite of the fact "that the [U.C.C.] generally applies to parties in privity." *Id.*

166 *Id.* at 583, 489 A.2d at 674.

167 *See id.*; *see also supra* notes 48-75 and accompanying text (discussing development of privity notions).

168 *Spring Motors*, 98 N.J. at 583, 489 A.2d at 674.

169 WHITE & SUMMERS, *supra* note 7, § 11-2 at 399-400.

170 *Spring Motors*, 98 N.J. at 584, 489 A.2d at 675.

strict the effect of vertical privity.[171] Thus, the court observed that the U.C.C. was neutral on the issue of whether a manufacturer's warranty to a retailer extended to the final consumer.[172]

The majority next noted that many states hold that section 318 is too narrowly written, and accordingly, they have adopted provisions which rely less on privity as a defense.[173] The majority recognized that in response to this situation, the Permanent Editorial Board of the U.C.C. proposed Alternatives B and C to section 318, which further eroded the requirement of privity.[174] Alternative C, in particular, reflects the influence of section 402A of the *Restatement* in that it allows corporations as well as natural persons to maintain an action for breach of warranty without the requirement of vertical or horizontal privity.[175] Based on these considerations, the majority favored applying Alternative C as opposed to broadening the *Santor* holding and the scope of section 402A.[176] The court believed that this ruling was consistent with both *Santor* and the U.C.C. in that, as a parallel to section 402A, their holding allowed recovery for economic damages regardless of privity.[177]

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171 *Id.*; N.J. STAT. ANN. § 12A:2-318 n.3 (West 1962). Section 318 provides in pertinent part:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

Id.

172 *Spring Motors*, 98 N.J. at 584, 489 A.2d at 675.

173 *Id.* at 584-85, 489 A.2d at 675.

174 Alternative B states in part that "[a] seller's warranty whether express or implied extends to any *natural person* who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty." *Id.* at 585, 489 A.2d at 675 (emphasis added). Alternative C states in part that "[a] seller's warranty whether express or implied extends to *any person* who may reasonably be expected to use, consume or be affected by the goods and who is injured by the breach of the warranty." *Id.*, 489 A.2d at 675-76 (emphasis added).

175 *See id.* at 585-86, 489 A.2d at 675-76.

176 *Id.* at 586, 489 A.2d at 676.

177 *Id.* at 586-87, 489 A.2d at 676. The *Spring Motors* court noted that "[its] conclusion also is consistent with the proposition that the Code drafters have left it to the courts to determine whether vertical privity should be required in a warranty action between a seller and a remote buyer." *Id.* at 587, 489 A.2d at 676 (citations omitted). Additionally, the court stated that the elimination of vertical privity was "particularly appropriate" in the present case because Spring Motors had relied on Clark's advertising in specifically requesting the installation of Clark transmissions in the Ford trucks. *Id.*, 489 A.2d at 676-77.

In extending a manufacturer's warranty to a remote supplier, the *Spring Motors* court compared its ruling to that of *Aronsohn v. Mandara*, 98 N.J. 92, 484 A.2d 675

Notwithstanding New Jersey's invocation of strict liability when an ordinary consumer seeks to recover direct economic loss, the *Spring Motors* court held that the U.C.C. provides the most appropriate source of recovery when commercial entities suffer economic loss.[178] In support of this conclusion, the court stressed that its objective was to meet "the combined, if occasionally contending, goals of simplifying the law pertaining to business transactions and providing a system of compensation that responds to the needs of the commercial world."[179]

In his concurring opinion, Justice Handler agreed with the majority's holding that Spring Motors was limited to the U.C.C. as its source of recovery for economic loss.[180] Justice Handler found, however, that privity was not necessarily lacking between Spring Motors and Clark.[181] As Justice Handler noted, although Spring Motors did not directly contract with Clark, it relied on Clark's advertising when it requested that the Ford trucks be equipped with Clark transmissions.[182] Justice Handler opined, therefore, that "Clark thus became a party to the transaction,. . .acting with and through Ford, at the direction of Spring Motors."[183] Accordingly, the justice concluded that the transaction between Spring Motors, Clark, and Ford should be construed "as a tripartite or three-party agreement."[184]

Justice Handler next focused on the definition of a commercial consumer.[185] Fearing that the majority had used too broad a definition of a "commercial consumer," Justice Handler asserted that a purchaser should not be limited to the U.C.C. as a source

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(1984). *Spring Motors*, 98 N.J. at 588, 489 A.2d at 677. In *Aronsohn*, a homeowner claimed that the patio which the defendant had installed for the prior owner prematurely deteriorated because it was improperly constructed. *Aronsohn*, 98 N.J. at 95-96, 484 A.2d at 676-77. The homeowner was permitted to sue the contractor on the basis of implied warranty theory. *Id.* at 107, 484 A.2d at 683. As in *Aronsohn*, the *Spring Motors* court predicated its decision on the parties' contractual agreements and expectations. *Spring Motors*, 98 N.J. at 588, 489 A.2d at 677.

178 *Spring Motors*, 98 N.J. at 583, 489 A.2d at 674.

179 *Id.* at 583-84, 489 A.2d at 674-75.

180 *Id.* at 589, 489 A.2d at 678 (Handler, J., concurring). In support of his opinion, Justice Handler noted that the damages arose out of a commercial transaction between equally experienced parties negotiating with equal bargaining power. *Id.* at 589-90, 489 A.2d at 678 (Handler, J., concurring).

181 *Id.* at 591, 489 A.2d at 678 (Handler, J., concurring).

182 *Id.*

183 *Id.* Justice Handler asserted that the "nexus of close relationship" between the litigants was such that it might satisfy the requirement of privity. *Id.* at 591, 489 A.2d at 678-79 (Handler, J., concurring).

184 *Id.* at 591, 489 A.2d at 678 (Handler, J., concurring).

185 *Id.* at 592-94, 489 A.2d at 679-80 (Handler, J., concurring).

of recovery simply because the transaction was executed "in the course of business."[186] Justice Handler believed that the majority's interpretation of a commercial consumer was overly inclusive in that it encompassed many small businessmen who bargain with essentially the same disadvantages as ordinary consumers.[187] Citing Justice Peter's concurrence in *Seely v. White Motor Co.*,[188] Justice Handler reasoned that such small-scale businessmen are often " 'the final link in the marketing chain, having no more bargaining power than does the usual individual. . . on the retail level.' "[189] Accordingly, Justice Handler averred that such businessmen should be allowed to recover for economic harm through strict liability.[190] Thus, the justice concluded that one must consider the bargaining power and experience of the parties as well as the setting and purpose of the transaction before one can define a purchaser as a commercial consumer.[191]

The majority's ruling in *Spring Motors* is consistent with the position taken by many commentators who believe that privity as a defense is an archaic concept.[192] By eliminating the requirement of vertical privity,[193] New Jersey joins many other states that have similarly eliminated this requirement.[194] In time, the *Spring Motors* ruling may have as much impact upon commerce in New Jersey as the *Henningsen* decision had on consumer rights.

The *Spring Motors* decision, however, leaves several issues unanswered. One aspect of the majority's decision that needs further refinement is the delineation of the difference between property damage and direct economic harm. When damage to the purchased product constitutes direct economic loss, harm to possessions other than the purchased product is regarded as

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186 *Id.* at 592, 489 A.2d at 679 (Handler, J., concurring).

187 *See id.*

188 *See supra* notes 115-27 (discussing *Seely*).

189 *Spring Motors*, 98 N.J. at 593, 489 A.2d at 679 (Handler, J., concurring) (citing *Seely*, 63 Cal.2d at 28, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., concurring)).

190 *Id.*

191 *Spring Motors*, 98 N.J. at 593, 489 A.2d at 680 (Handler, J., concurring). Justice Handler also concluded that strict liability must be made available as an alternative mode of recovery to those who, as commercial consumers in name only, would be denied recovery under the provisions of the U.C.C. *Id.* at 596, 489 A.2d at 681 (Handler, J., concurring). In support of this conclusion, the justice opined that the allocation of risk to the party best capable of absorbing it is an important consideration to be addressed. *Id.*

192 WHITE & SUMMERS, *supra* note 7, § 11-7, at 411. The authors noted that "[i]t is possible that lack of privity as a defense to a cause of action will be only a historic relic in the year 2000. It is a doctrine in hasty retreat. . . ." *Id.*

193 *See Spring Motors*, 98 N.J. at 587, 489 A.2d at 676-77.

194 *See* WHITE & SUMMERS, *supra* note 7, § 11-3, at 404 n.20.

property damage.[195] The *Spring Motors* court recognized that it is well settled that property damage, as opposed to economic damage, is recoverable by commercial entities through strict liability.[196] The *Spring Motors* decision does not, however, conclusively resolve the increasingly common situation involving remote vendors supplying component parts to manufacturers. In this scenario, the issue arises whether a commercial consumer suffering damage caused by a component can recover through strict liability, or is restricted to the remedial measures set forth in the U.C.C. Some jurisdictions would simply abolish this distinction and permit recovery under strict liability.[197] Alternatively, other jurisdictions consider the damage to be property damage only when "the components are sold separately or are provided by different suppliers."[198]

Products liability theory is predicated on the notion that consumers should not be denied a remedy for the physical or property damage they incur.[199] Since the *Henningsen* decision, New Jersey has been at the forefront of developing and expanding the rights of consumers in products liability litigation. Therefore, it is perhaps appropriate to surmise that the New Jersey courts would also delineate the appropriate limitations to these rights.

Since its decision in *Santor*, New Jersey was the first, and remains one of the few states, to extend strict liability to private consumers suffering direct economic loss.[200] The *Spring Motors* court recognized, however, that, due to their bargaining position and expertise, corporate entities as plaintiffs have little in common with the plaintiffs in the *Henningsen* and *Santor* cases.[201] By virtue of this distinction, the *Spring Motors* court was unwilling to extend strict liability to commercial consumers suffering direct or consequential economic losses.[202] Thus, the *Spring Motors* deci-

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195 *See supra* note 7 (discussing classifications of damages).

196 *See Spring Motors*, 98 N.J. at 578, 489 A.2d at 672.

197 *See, e.g.*, Berg v. General Motors Corp., 87 Wash.2d 584, 591-92, 555 P.2d 818, 822 (1976).

198 *See, e.g.*, Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. App. 444, 450, 666 P.2d 544, 549 (1983).

199 *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389, 161 A.2d 69, 86 (1960). The court stated that " '[t]he law is not so primitive that it sanctions every injustice except brute force and downright fraud.' " *Id.* (citation omitted).

200 *See supra* notes 103-14 and accompanying text (discussing *Santor*).

201 *See Spring Motors*, 98 N.J. at 575-76, 489 A.2d at 670-71. Commentators critical of the *Santor* ruling have asserted that a better alternative to strict liability would be to apply § 2-725 of the U.C.C. WHITE & SUMMERS, *supra* note 7, § 11-9, at 418-20.

202 *Spring Motors*, 98 N.J. at 581-82, 489 A.2d at 673-74.

sion has alleviated the overlap between tort and commercial concepts which had, heretofore, been a prevalent aspect of products liability law in New Jersey.

The *Spring Motors* decision represents the desire of the New Jersey Supreme Court to provide broader application of the U.C.C. at the expense of the strict liability provision in section 402A of the *Restatement (Second) of Torts*. Applying the rules of warranty to situations involving economic harm of commercial entities will serve to protect manufacturers from being held strictly liable for business losses suffered by consumers with whom they never negotiated. To hold otherwise would cause manufacturers to raise prices in response to their increased risk of liability, thereby having a deleterious effect on commerce in New Jersey.[203]

Perhaps the most compelling issue left unresolved by the *Spring Motors* decision is the definition of what constitutes a commercial entity. The majority was correct in asserting that Spring Motors was a commercial entity with bargaining leverage relatively equal to that of Ford and Clark. The only guidelines, however, that the majority offered for future litigation was that "perfect parity is not necessary to . . . [determine] that parties have substantially equal bargaining positions."[204] As Justice Handler noted in his concurrence, the definition of a commercial consumer should not turn exclusively on the fact that the consumer made his purchase in the course of business.[205] Small businessmen are in virtually the same position as ordinary consumers. Both of these entities are the final link in the chain of commerce and suffer the disadvantage of being in markedly unequal bargaining positions with their supplier. Any attempt to distinguish a consumer solely on the basis of whether or not it is a commercial entity is therefore artificial and arbitrary.[206]

The U.C.C. is predicated on the notion that contracting parties negotiate with each other in relatively equal bargaining positions.[207] Small businessmen in unequal bargaining positions may not have the leverage to negotiate manufacturer's disclaimers, nor would they have the business and legal acumen to be aware of warranty exclusions between the manufacturer and a remote

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203 *See supra* notes 141-46 and accompanying text.

204 *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.

205 *See supra* note 187 and accompanying text.

206 *See Spring Motors*, 98 N.J. at 592-93, 489 A.2d at 679-80 (Handler, J., concurring).

207 *See id.*

supplier.[208] Forcing small-scale businessmen to accept warranty terms imposed by a large supplier will have the effect of defeating the basic premise of *Henningsen*. Unfortunately, it is not easy to delineate between small and large commercial consumers. This problem is additionally complicated by the fact that some small, closely held corporations can bring a great deal of clout to the bargaining table. Thus, in deciding the applicability of the U.C.C. or tort law to commercial consumers, courts, in the future, will have to analyze such pertinent factors as the nature of the transaction and the relative size and experience of the parties.[209]

Kenneth J. Auslander

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[208] *Id.* at 596, 489 A.2d at 681; Comment, *supra* note 5, at 180.

[209] *See Spring Motors*, 98 N.J. at 593, 489 A.2d at 680 (Handler, J., concurring).