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Economics Loss in Products Liability: Strict Liability or the Uniform Commercial Code? Spring Motors Distributors, Inc. v. Ford Motor Co.

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CASENOTES

Economic Loss in Products Liability: Strict Liability or the Uniform Commercial Code? *Spring Motors Distributors, Inc. v. Ford Motor Co.*[1] — Within the last twenty years there has been great controversy as to what remedy is appropriate in actions concerning economic loss[2] caused by a defective product. The debate has focused on whether a buyer of defective goods should be restricted to a cause of action under the Uniform Commercial Code (U.C.C. or Code)[3] or should be allowed to pursue a cause of action predicated on strict liability.[4] Two lines of reasoning have emerged. The majority of

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[1] 98 N.J. 555, 489 A.2d 660 (1985).

[2] Purely economic loss falls into two categories: direct economic loss and indirect or consequential economic loss. 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, 155 (1972) [hereinafter Comment, *The Vexing Problem*]. Direct economic loss includes loss of the bargain, measured by the difference between the value of the product as represented and the value of the product in its defective condition, repair costs, and direct incidental expenditures incurred in replacing a defective product which cannot be repaired. *Id.* In contrast, indirect or consequential economic loss includes commercial losses such as loss of future business profits and opportunities and any indirect loss resulting from an inability to replace a defective product. *Id.*

[3] The provisions of the Uniform Commercial Code relevant to products liability are §§ 2-313, 2-314, and 2-315. Under these provisions, a cause of action arises when a seller expressly or impliedly warrants that a product shall conform to a certain standard of quality and the product fails to meet this standard. These warranty provisions pose a series of hurdles, however, that a buyer must overcome before recovering for a breach of warranty. For instance, under § 2-314, the seller must be a "merchant with respect to goods of that kind" and not merely a seller. Under § 2-315, a warranty for a particular purpose arises only if the buyer relies upon the seller's skill or judgment in making his or her purchase. In addition, a buyer also must confront the obstacles to recovery of the privity and notice requirements, imposed by § 2-318 and § 2-607, and the availability to the seller of disclaimers and a limitation of damages, under § 2-316 and § 2-719. For discussion of products liability and the U.C.C., see Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1 (1983); Speidel, *Products Liability, Economic Loss and the U.C.C.*, 40 TENN. L. REV. 309 (1973); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965).

[4] In light of the obstacles to recovery which warranty law imposes, the drafters of the Second Restatement of Torts provided § 402A, Special Liability of Seller of Product for Physical Harm to User or Consumer, which extended the theory of strict liability, already in use with regard to animals and abnormally dangerous activities, to manufacturers of defective products. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 956–57 (4th ed. 1971).

§ 402A provides:

> (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 or 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 any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965). While § 402A imposes its own obstacles to recovery, requiring a defective condition unreasonably dangerous, a seller who is in the business of selling the product, and a defective condition that existed when it left the manufacturer, it does away with

jurisdictions deny recovery in strict liability for purely economic harm,[5] reasoning that the doctrine of strict liability grew out of a need to compensate consumers for personal injury, a need often frustrated by the Uniform Commercial Code.[6] Because the Code appropriately provides a remedy for economic loss, however, the majority contends the doctrine of strict liability is therefore inapplicable.[7] Therefore, the majority employs a type-of-harm approach in considering the availability of the doctrine and denies recovery in strict liability for solely economic harm.[8] On the other hand, a minority of jurisdictions allow recovery in strict liability for economic harm,[9] reasoning that the purpose of strict liability is to shift the risk of loss to the makers of defective products, rather than to injured consumers who are powerless to protect themselves.[10] The minority thus looks to the relationship between the manufacturer and the consumer,[11] or a type-of-consumer approach, to permit recovery for economic loss under the doctrine of strict liability.

In the 1985 case of *Spring Motors Distributors, Inc. v. Ford Motor Co.*,[12] the New Jersey Supreme Court, the originator of the minority approach, considered whether the policy reasons for allowing recovery for economic loss in strict liability are as pressing when the plaintiff suffering the loss is not a powerless, ordinary consumer, but rather, a commercial purchaser.[13] The court held that the commercial consumer could not recover and instead must seek damages for economic loss under the U.C.C.[14] The plaintiff, Spring Motors Distributors, Inc. (Spring Motors), was in the business of selling and leasing a fleet of 300 trucks. Spring Motors entered into an agreement to purchase from the defendant, Turnpike Ford Truck Sales, Inc. (Turnpike), fourteen trucks made by the defendant, Ford Motor Co. (Ford).[15] In the agreement, Spring Motors specified that Ford should equip the trucks with transmissions made by Clark Equipment Company

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the contractual defenses of notice and disclaimer that pose such problems for consumers seeking to recover for breach of warranty. *See* W. PROSSER, *supra*, at 658.

[5] See *infra* note 99 for a partial list of jurisdictions denying recovery in strict liability for purely economic harm.

[6] *See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 15, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965).

[7] *See id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

[8] *See, e.g., id.* at 15–19, 403 P.2d at 149–52, 45 Cal. Rptr. at 21–24.

[9] *See*, Santor v. A. & M. Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970); LaCrosse v. Schubert, Schroeder & Assoc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); Mead Corp. v. Allendale Mutual Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).

[10] *See, e.g., Santor*, 44 N.J. at 65, 207 A.2d at 312.

[11] For purposes of this casenote, a consumer is either an "ordinary consumer" or a "commercial consumer." Neither the U.C.C. nor case law has clearly defined these terms. *See* U.C.C. § 2-719 (1978) (unconscionability regarding limitation of damages in case of consumer goods and case of commercial loss, neither "consumer" nor "commercial loss" defined); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 994 (1966). One commentator has noted that Justice Peters' concurring and dissenting opinion in *Seely*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), leaves courts no alternative in drawing the line between commercial and non-commercial consumers other than to examine the bargaining power of the plaintiff in each case. Note, *Manufacturers' Liability To Remote Purchasers For "Economic Loss" Damages — Tort or Contract?*, 114 U. PA. L. REV. 539, 549 n.55 (1966).

[12] 98 N.J. 555, 489 A.2d 660 (1985).

[13] *Id.* at 575, 489 A.2d at 670.

[14] *Id.* at 578, 489 A.2d at 672.

[15] *Id.* at 562, 489 A.2d at 663. Turnpike is a Ford dealer. Throughout the proceeding, the two defendants were treated as a single entity. *Id.*

(Clark), a supplier to Ford. At the time of the sale to Spring Motors, Ford issued a warranty with each truck to repair or replace specific parts. The warranty disclaimed any other warranties and restricted recovery to repair or replacement of parts.[16] The warranty that Clark extended to Ford similarly disclaimed all other warranties and, at Clark's option, limited recovery to repairs or replacement.[17]

Spring Motors took delivery of the trucks in November, 1976.[18] Spring Motors then leased the trucks to Economic Laboratories, Inc., which used the trucks for their intended purpose of hauling. During the period of the lease, Spring Motors serviced the trucks. As early as February, 1977, Spring Motors began experiencing problems with the performance of the Clark transmissions. Correspondence between Spring Motors and Clark, dated January, 1978, confirmed that Clark had analyzed the transmissions and found that the failure was a result of improper angle degree in the way the gears were cut. Clark provided Spring Motors with replacement parts, but the transmission failures continued.[19] On July 11, 1978, Spring Motors wrote to Clark that in the absence of a satisfactory response, it would remove and replace the Clark transmissions and take action to hold Clark financially responsible.[20]

Spring Motors brought an action in the New Jersey Superior Court, Law Division, against Ford, Turnpike, and Clark, alleging that the defendants had breached implied and express warranties. The plaintiff also alleged that the defendants were strictly liable in tort. Spring Motors sought to recover the expenses of towing, repairs, replacement of parts, the decrease in the market value of the trucks, and lost profits.[21] Perceiving the matter as sounding in contract, the trial court found that a lack of privity barred the action between Spring Motors and Clark and that the four-year period of limitations under the U.C.C.[22] barred any warranty action against Ford and Turnpike.[23] The court granted summary judgment for the defendants.[24]

The Appellate Division affirmed the dismissal of the breach of warranty claim, but reversed the dismissal of the tort claims.[25] Concluding that the action was characterized as one in strict liability in tort, not contract, the Appellate Division held that Spring

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[16] *Id.* The warranty stated: "To 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 .... Under this warranty, repair or replacement of parts is the only remedy, and loss of use of the vehicle, loss of time, inconvenience, commercial loss or consequential damages are not covered." *Id.* (emphasis in original).

[17] *Id.* at 562–63, 489 A.2d at 664. Clark's warranty provided in pertinent part:

> Warranty. Clark Equipment Company ("Clark") warrants to Buyer that each new Clark ... transmission ... and components thereof, shall be free from defects in material and workmanship under normal use and maintenance ... THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES (EXCEPT OF TITLE), EXPRESSED OR IMPLIED, AND THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL CLARK BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES.

Id. (emphasis in original).

[18] *Id.* at 563, 489 A.2d at 664.

[19] *Id.*

[20] *Id.* at 563–64, 489 A.2d at 664.

[21] *Id.* at 564, 489 A.2d at 664.

[22] U.C.C. § 2-725(1) (1978) provides in pertinent part: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued ...."

[23] *Spring Motors*, 98 N.J. at 564, 489 A.2d at 664.

[24] *Id.* at 561, 489 A.2d at 663.

[25] *Id.* at 564, 489 A.2d at 663.

Motors could maintain its strict liability claim against all defendants and that the action was timely under the six-year limitation applicable to tort actions under state law.[26] The Supreme Court of New Jersey granted the defendants' petition for certification to review that part of the Appellate Division judgment reversing the dismissal of the tort claims.[27]

On review, the New Jersey Supreme Court held that a commercial consumer seeking damages for economic loss resulting from the purchase of defective goods may not recover from an immediate seller and a remote supplier in a distributive chain in strict liability or negligence.[28] A commercial consumer, the court ruled, must seek damages for economic loss in an action for breach of warranty under the U.C.C.[29] The court distinguished prior case law by explaining that the policy reasons for allowing recovery for strict liability are not as pressing in a case brought by a commercial consumer as they are in a case brought by an ordinary consumer.[30] The court further ruled that a buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties.[31] The court stated that because the Code provides the proper remedy, the appropriate limitation period is the four years allowed under the Code.[32] Because the four year period had run, the court held the action time barred.[33]

The New Jersey Supreme Court's decision in *Spring Motors* is significant for four reasons. First, the court uses a type-of-consumer test as the standard for allowing recovery for economic loss in strict liability.[34] Second, the decision clarifies that *Santor v. A. & M. Karagheusian*,[35] a 1965 New Jersey Supreme Court decision, originated and advocated this test.[36] Third, the case unifies the minority of jurisdictions that follow *Santor* in allowing recovery for economic loss in strict liability by application of the type-of-consumer test.[37] Finally, *Spring Motors* reduces the conflict between the majority of jurisdictions, which deny recovery for economic loss in strict liability, and the minority

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[26] *Id.* at 564, 489 A.2d at 664–65 (citing Spring Motors Distrib. v. Ford Motor Co., 191 N.J. Super. 22, 465 A.2d 530 (1983)). *See* N.J. STAT. ANN. 2A:14-1, which provides:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, 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.
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> This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

[27] *Spring Motors*, 98 N.J. at 564, 489 A.2d at 665.

[28] *Id.* at 578, 489 A.2d at 672.

[29] *Id.*

[30] *Id.* at 576–78, 489 A.2d at 670–72.

[31] *Id.* at 582, 489 A.2d at 674.

[32] *Id.*

[33] *Id.*

[34] See *infra* notes 267–81 and accompanying text for discussion of the *Spring Motors* court's use of the type-of-consumer test.

[35] 44 N.J. 52, 207 A.2d 305 (1965).

[36] *See Spring Motors*, 98 N.J. at 568, 489 A.2d at 666–67. See *also infra* notes 282–84 and accompanying text for discussion of *Santor*'s use of the type-of-consumer test.

[37] See *infra* notes 285–300 and accompanying text for discussion on the unification of the jurisdictions following *Santor*.

of jurisdictions, which allow such recovery. After *Spring Motors*, the majority and minority views disagree only regarding recovery by ordinary consumers; the majority and minority now agree that a commercial consumer cannot recover for economic loss in strict liability.[38]

This casenote will begin by discussing the conflicting theories concerning economic loss recovery in strict liability. Section I then will examine the current status of the minority of jurisdictions allowing recovery in strict liability. Next, Section I will review current New Jersey case law. Section II will discuss the New Jersey Supreme Court's holding in *Spring Motors*. In Section III, this casenote will conclude that the court reached the proper result and correctly used the type-of-consumer test as the standard for determining when a consumer will be allowed to recover for economic loss in strict liability. Finally, the casenote will scrutinize and apply this test to the decisions of the minority of jurisdictions allowing strict liability recovery for economic loss to show that *Spring Motors* unifies the minority result.

I. The Evolution of the Type-of-Harm/Type-of-Consumer Tests

A. *The Beginnings of Strict Liability*

The doctrine of strict liability is often referred to as a hybrid between tort and contract law.[39] The doctrine could just as well be referred to as a hybrid between New Jersey and California case law. In the 1960 decision, *Henningsen v. Bloomfield Motors, Inc.*,[40] the Supreme Court of New Jersey allowed a consumer who suffered personal injury as a result of a defective automobile to recover from an automobile dealer and the manufacturer under a theory of implied warranty, even in the absence of privity between the consumer and the manufacturer.[41] The *Henningsen* court noted that the transcendent value of such warranties rests in the fact that strict liability is imposed upon the manufacturer and recovery of damages does not depend upon proof of negligence.[42]

Following the New Jersey court's lead and drawing on the *Henningsen* opinion, the California Supreme Court adopted strict liability in *Greenman v. Yuba Power Products*.[43] In *Greenman*, the plaintiff sued the manufacturer and retailer of a combination power tool for personal injury suffered when a piece of wood flew out of the machine because of the tool's defective design.[44] The machine manufacturer contended that the plaintiff's breach of warranty action was barred because the plaintiff did not give sufficient notice of the breach as required by section 1769 of the Civil Code.[45] The court's opinion, however, written by Justice Traynor, rejected the manufacturer's argument, holding that the notice requirement is not appropriate in actions by injured consumers against man-

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[38] *See Seely*, 63 Cal. 2d at 15–19, 403 P.2d at 149–52, 45 Cal. Rptr. at 21–24; *Spring Motors*, 98 N.J. at 578, 489 A.2d at 672.

[39] W. Prosser, *supra* note 4, at 634.

[40] 32 N.J. 358, 161 A.2d 69 (1960).

[41] *Id.* at 384, 161 A.2d at 84.

[42] *Id.* at 372, 161 A.2d at 77.

[43] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[44] *Id.* at 59–60, 377 P.2d at 898–99, 27 Cal. Rptr. at 698–99.

[45] *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699. Section 1769 provided in part: "If, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." Uniform Sales Act, Civil Code, §§ 1721–1800.

ufacturers with whom they have not dealt,[46] reasoning that "the injured consumer is seldom 'steeped in the business practice which justifies the rule.'"[47] The court added that the liability imposed is one governed not by the law of contracts, but by the law of strict liability in tort.[48] Moreover, the court stated that the purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products in the stream of commerce rather than by the injured persons who are powerless to protect themselves.[49] In conclusion, the court pointed out that sales warranties alone serve this purpose fitfully at best.[50]

B. Santor *and* Seely

Up to this point, the case law of the two jurisdictions concurred that the doctrine of strict liability should be available to plaintiffs who had suffered physical injury[51] as a result of a defective product. In the 1965 decisions, *Santor v. A. & M. Karagheusian*[52] and *Seely v. White Motor Co.*,[53] however, New Jersey and California case law split over the troublesome question of whether economic loss should be recoverable in strict liability.

In *Santor v. A. & M. Karagheusian*,[54] the leading case allowing recovery for economic loss in strict liability, the plaintiff purchased carpeting for his home from a retailer of the defendant-manufacturer, Karagheusian.[55] Almost immediately, the carpeting developed a number of lines. Although the retailer assured the plaintiff that the lines would walk out, they grew worse.[56] Because the retailer had gone out of business and moved out of state, Santor sued the manufacturer for a breach of an implied warranty of merchantability to recover the purchase price of the carpet.[57] Conceding that it had manufactured the carpet defectively, Karagheusian nevertheless contended that the plaintiff was not in privity to the contract between the manufacturer and the retailer and therefore could not recover for a breach of that contract.[58] The defendant maintained that courts had abrogated the privity rule only in cases where the consumer suffered personal injury as a result of the defective product,[59] and that where the defective product results only in a reduction of value of the product, the privity rule endures.[60]

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[46] *Greenman*, 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[47] *Id.* (quoting James, *Products Liability*, 34 TEXAS L. REV. 44, 192, 197 (1955)).

[48] *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[49] *Id.*

[50] *Id.* at 63–64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[51] "Physical injury" includes both personal injury and property damage. *See* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966) [hereinafter Note, *Economic Loss*]. Because of the doctrine's origins in defective food cases, the resulting injury of which was always personal injury, such injury dominated early strict liability cases. W. PROSSER, *supra* note 4, at 666. As the doctrine extended beyond food and drink to products likely to cause property damage, physical harm to property became recoverable under strict liability. *Id.*

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

[53] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[54] 44 N.J. 52, 207 A.2d 305 (1965).

[55] *Id.* at 56, 207 A.2d at 307.

[56] *Id.*

[57] *Id.* at 56–57, 207 A.2d at 307.

[58] *Id.* at 57, 207 A.2d at 307.

[59] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (eliminating requirement of privity when consumer suffers personal injury as a result of defective product).

[60] *Santor*, 44 N.J. at 57–58, 207 A.2d at 307–08.

The New Jersey Supreme Court rejected the defendant's privity argument and held unanimously for the plaintiff.[61] The *Santor* court explained that although the great mass of warranty cases allowing recovery regardless of privity were personal injury cases, the field of operation of implied warranty "should not be fenced in by such a factor."[62] Rather, the court stated, it could see no reason for recognition of a right to recovery in the case of personal injury and the exclusion of recovery when inadequate manufacturing produces a worthless article. In both instances, the court reasoned, "the manufacturer is the father of the transaction."[63] Accordingly, the court concluded that the plaintiff, as the ultimate purchaser of the defective product, could maintain his action directly against the defendant-manufacturer for loss of the value of the carpeting.[64]

Although the holding was grounded in implied warranty, the *Santor* court went on to conclude that the manufacturer's liability could be cast in the simpler form of strict liability.[65] In the court's view, because the majority of the purchasing public lacks adequate knowledge and sufficient opportunity to determine if a product is defective, it must rely on the maker's skill.[66] Therefore, the court held, when a manufacturer presents its goods to the public, there is a representation implicit in the goods' presence on the market that they are suitable and safe for intended use.[67] Defining the obligation of the manufacturer as "what in justice it ought to be — an enterprise liability, and one which should not depend upon the intricacies of the law of sales,"[68] the court stated that the purpose of such liability is to insure that the cost of injuries or damages resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured persons who ordinarily are powerless to protect themselves.[69] Therefore, the *Santor* court reasoned, if the manufacturer breaches its duty to avoid producing products that are "defective, that is, not reasonably fit for the ordinary purposes for which such articles are sold and used,"[70] it must be responsible for the consequent damage or injury.[71] Furthermore, the court continued, although courts have applied the responsibility principally in connection with personal injury, it should be no

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[61] *Id.* at 69, 207 A.2d at 314.

[62] *Id.* at 59–60, 207 A.2d at 308–09.

[63] *Id.* at 59, 207 A.2d at 309.

[64] *Id.* at 63, 207 A.2d at 310.

[65] *Id.* at 63–64, 207 A.2d at 311.

[66] *Id.* at 64, 207 A.2d at 311 (citing *Henningsen*, 32 N.J. at 384, 161 A.2d at 83).

[67] *Id.* at 64–65, 207 A.2d at 311 (citing *Greenman*, 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701).

[68] *Id.* at 65, 207 A.2d at 311–12. The *Santor* decision involved facts that occurred before the adoption of the U.C.C. in New Jersey. *See Spring Motors*, 98 N.J. at 568, 489 A.2d at 666. The New Jersey legislature adopted the U.C.C. in 1961, effective January 1, 1963. *Santor*, 44 N.J. at 65, 207 A.2d at 311–12.

[69] *Santor*, 44 N.J. at 65, 207 A.2d at 312.

[70] *Id.* at 67, 207 A.2d at 313. This definition of "defective" is in keeping with the definition of "merchantable" under U.C.C. § 2-314(2)(c) (1978) which states: "Goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used." *Santor*, 44 N.J. at 67, 207 A.2d at 313. The *Santor* court refused to define the outer limits of the term "defect," but stated that the concept is a broad one. Additionally, "defectiveness" causing economic loss may be dependent upon "the price at which the manufacturer reasonably contemplated that the article might be sold." *Id.* This foundation for defectiveness implies that a product departing from average quality might not be defective if the price at which it is sold reflects its quality. *See* Comment, *The Vexing Problem*, *supra* note 2, at 157; Note, *Economic Loss*, *supra* note 51, at 938.

[71] 44 N.J. at 67, 207 A.2d at 313.

different where damage to the article sold or to other property of the consumer is involved.[72]

While *Santor* saw no reason to make a distinction between recovery for personal injury and economic loss, the Supreme Court of California made just that distinction in refusing to extend the doctrine of strict liability to permit recovery for a purely economic loss in *Seely v. White Motor Co.*[73] Decided shortly after *Santor*, the *Seely* decision involved a conditional sales contract between the plaintiff and a dealer for the purchase of a truck manufactured by the defendant, White Motor Co., for use in the plaintiff's business of heavy-duty hauling.[74] The defendant expressly warranted the truck to be "free from defects in material and workmanship under normal use and service . . . ."[75] Upon taking possession of the truck, the plaintiff found that it bounced violently.[76] He then sued the defendant-manufacturer for repair of the truck, loss of the benefit of the bargain, and profits lost in his business because he was unable to make normal use of the truck.[77] The trial court awarded damages for the plaintiff for payments on the purchase price and for lost profits.[78]

The California Supreme Court held that the award was proper on the basis of a breach of express warranty.[79] More importantly, the court stated in dictum that the defendant was not strictly liable in tort.[80] The *Seely* court reasoned that the doctrine of strict liability developed in response to the distinct problem of personal injury and a recognition that the warranty doctrine of the U.C.C. was an incomplete solution to the problem.[81] The court stated that although warranty theory is not suited to the field of liability for personal injury, it functions well in a commercial setting such as that between the plaintiff and dealer.[82] Moreover, the court noted that to hold the defendant strictly liable for the commercial loss suffered by the consumer would be to open the defendant to liability for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses and to damages of unknown and unlimited scope.[83]

Explaining the rationale for applying strict liability in cases of physical injury, but not economic loss, the *Seely* court stated that the distinction is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. Rather, the court explained, the distinction rests on the nature of the responsibility of the manufacturer.[84] The court concluded that while a manufacturer can be held liable for physical injuries caused by defects by requiring its goods to match a standard of safety, it cannot be held liable for the level of performance of its products in the consumer's business unless it agrees that the product will meet the consumer's demands.[85] Moreover,

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[72] *Id.* at 66, 207 A.2d at 312.
[73] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
[74] *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.
[75] *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
[76] *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.
[77] *Id.* at 12–13, 403 P.2d at 147–48, 45 Cal. Rptr. at 19–20.
[78] *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
[79] *Id.*
[80] *Id.* at 15–19, 403 P.2d at 149–52, 45 Cal. Rptr. at 21–24.
[81] *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.
[82] *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.
[83] *Id.* at 17, 403 P.2d at 150–51, 45 Cal. Rptr. at 22–23.
[84] *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
[85] *Id.*

the court stated, the rationale in applying strict liability does not rest on an analysis of the bargaining power of the parties to a particular action, but rather, on the manufacturer's ability to insure against the risk of injury and to distribute the cost of insurance among the public as a cost of doing business.[86] The *Seely* court concluded that there is no justification for requiring the consenting public to pay more for their products so that a manufacturer can insure against the possibility that its products will not meet the business needs of its customers.[87]

While the *Seely* majority opinion rejected *Santor*, Justice Peters' concurring and dissenting opinion embraced it. Justice Peters concurred only in the affirmance of the judgment.[88] Justice Peters' dissent distinguished a type-of-consumer approach from a type-of-harm approach to considering the availability of the strict liability doctrine. He noted that the nature of the damage is immaterial; rather, the relative roles played by the parties to the contract and the nature of their transaction warrants analysis.[89] Because, as the majority recognized, the rules governing warranty were developed to meet the needs of commercial transactions, Justice Peters reasoned that it is necessary to look to the transaction to determine whether the transaction was commercial, rather than a sale to an ordinary consumer at the end of the marketing chain. Justice Peters questioned how the nature of the damages which occur *later*, long after the transaction has been completed, can control the characterization of the transaction and concluded that the line determining the appropriate remedy should be drawn at the time of sale.[90]

Justice Peters reasoned that the rationale for the development of strict liability was to protect people who, because of their unequal bargaining power, were unable to protect themselves.[91] Therefore, the dissent continued, when the plaintiff is an ordinary consumer, the doctrine of strict liability should control his or her right to recover.[92] Conversely, Justice Peters stated that the warranty sections of the U.C.C. should apply within the world of commerce where parties generally bargain on an equal plane and are familiar with the requirements imposed by warranty law.[93]

Addressing the fears expressed by the majority in *Seely*, Justice Peters concluded that a manufacturer's liability would not be of an unknown and unlimited scope if the term "defective" in strict liability is viewed as coextensive with the concept of "unmerchantable" in the implied warranty field.[94] Under this view, a manufacturer only would be liable for economic loss resulting from defects which would frustrate the consumer's

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[86] *Id.* at 18–19, 403 P.2d at 151, 45 Cal. Rptr. at 23 (citing Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring)).

[87] *Id.* at 19, 403 P.2d at 151, 45 Cal. Rptr. at 23. In an effort to distinguish *Santor*, the *Seely* court stated that the only justification for the *Santor* holding was that the defendant-manufacturer expressly represented the rug as "Grade #1." *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23. Although it is not entirely clear in *Santor*, however, it appears that the dealer, not the manufacturer, made this representation. *See Santor*, 44 N.J. at 56–57, 207 A.2d at 307. Nevertheless, the point is immaterial because the *Santor* decision was grounded in implied warranty, not express warranty.

[88] *Seely*, 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24 (Peters, J., concurring and dissenting).

[89] *Id.* at 21, 403 P.2d at 153, 45 Cal. Rptr. at 25 (Peters, J., concurring and dissenting).

[90] *Id.* at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28 (Peters, J., concurring and dissenting).

[91] *Id.* at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).

[92] *Id.* at 28, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., concurring and dissenting).

[93] *Id.* at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).

[94] *Id.* at 25, 403 P.2d at 156, 45 Cal. Rptr. at 28 (Peters, J., concurring and dissenting). This view comports with the *Santor* definition. *See supra* note 70.

use of the product for the general purposes for which it was manufactured and not for any particular requirement of the purchaser outside of the intended purposes.[95]

Justice Peters concluded that, although *Seely* was a close case, he would have allowed Seely to recover for economic loss in strict liability because he was an ordinary consumer.[96] Even though the truck was to be used in his business, Justice Peters found it persuasive that the plaintiff was the owner of a single truck and not a fleet-owner who bought trucks regularly in the course of his business. He concluded that as the final link in the marketing chain, Seely had no more bargaining power than an individual purchasing a car on the retail level.[97] Accordingly, he would affirm the judgment but allow Seely to recover for his direct and consequential economic loss on the basis of the strict liability doctrine.[98]

In summary, the *Santor* court's minority position would allow recovery for economic loss in strict liability without regard to the type of harm incurred. In contrast, the *Seely* majority employs a type-of-harm test in determining the applicability of the doctrine of strict liability. If the harm is physical injury to property, the majority position will allow recovery in strict liability. If the harm is merely economic loss, the majority position will not allow the plaintiff to recover in strict liability and will limit the plaintiff to recovery under the U.C.C. Disagreeing with the *Seely* majority type-of-harm approach, Justice Peters in his concurring and dissenting opinion advocates a type-of-consumer test. Under this test, if the plaintiff is an ordinary consumer with little bargaining power, he or she will be allowed to recover his or her economic loss in strict liability. If, however, the plaintiff is a commercial consumer, he or she will be denied recovery in strict liability and will be restricted to recovery under the U.C.C.

C. *The Minority Following* Santor

While the *Seely* decision denying recovery for economic loss in strict liability has emerged as the majority view,[99] the *Santor* decision allowing such recovery has attracted the support of Michigan, Wisconsin, and Ohio. A review of the cases decided by the minority of jurisdictions following *Santor* reveals these courts' general acceptance of recovery for economic loss in strict liability and definite refusal of the type-of-harm approach set forth by *Seely*. Because the fact patterns of these cases vary as to the type of consumer complaining and the type of harm claimed, they present a far more complicated situation than do cases involving an ordinary consumer seeking to recover

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[95] *See* Comment, *The Vexing Problem*, *supra* note 2, at 160.

[96] *Seely*, 63 Cal. 2d at 27–28, 403 P.2d at 157–58, 45 Cal. Rptr. at 29–30 (Peters, J., concurring and dissenting).

[97] *Id.* at 28, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., concurring and dissenting).

[98] *Id.* at 29, 403 P.2d at 158, 45 Cal. Rptr. at 30 (Peters, J., concurring and dissenting).

[99] *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976) (U.C.C., not strict liability, applies to suit for defective mobile home); Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. 44, 666 P.2d 544 (1983) (economic loss not recoverable under products liability law); Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975) (commercial loss not recoverable in strict liability); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977) (loss of benefit of the bargain not recoverable in strict liability); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 61 Ill. Dec. 746, 435 N.E.2d 443 (1982) (economic loss not recoverable under strict liability); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977) (economic loss not recoverable in strict liability).

for direct economic loss as found in *Santor*. Nevertheless, these cases hold unanimously for recovery in strict liability.

For example, in a 1970 Michigan Appeals Court decision, *Cova v. Harley Davidson Motor Co.*,[100] a small commercial consumer recovered for direct economic loss under what the court termed a "product liability" theory.[101] In *Cova*, the plaintiffs, doing business as the Bob-o-Link Golf Course, purchased golf carts manufactured by the defendant.[102] The complaint alleged that the golf carts, purchased from a dealer for rental purposes on the plaintiff's golf course, were defective and repeatedly required repairs. The damages claimed were for the cost of repairs and rentals lost while the carts were under repair.[103] The trial court dismissed the complaint on the ground that where the damages claimed are for economic loss, not personal injury, a consumer may not maintain an action against the manufacturer for breach of warranty unless there is privity of contract.[104]

Rejecting the trial court's reasoning, the Michigan Appeals Court reinstated the complaint,[105] holding that a consumer can sue a manufacturer directly for economic loss resulting from a defect in a product attributable to the manufacturer.[106] The court reasoned that a manufacturer should be required to stand behind its defectively-manufactured product even though the product has caused neither accident nor personal injury. The court further stated that a remote seller should not be insulated from direct liability where he or she has merely mulcted the consumer.[107]

The *Cova* court conceded that the manufacturer's liability is a "strict liability or something akin to it."[108] The court refused to adopt, however, the strict liability label.[109] The court suggested that it might be more helpful to abandon the misleading tort and contract terminology and simply refer to the manufacturer's liability as "product liability."[110] This terminology, the court noted, would acknowledge not only that the liability is an amalgam of tort and contract concepts, but also that it is sufficiently dissimilar to those concepts that emphasis on the tort or contract origin is misleading.[111]

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[100] 26 Mich. App. 602, 182 N.W.2d 800 (1970).

[101] *Id.* at 614–15, 182 N.W.2d at 807.

[102] *Id.* at 603, 182 N.W.2d at 801.

[103] *Id.* at 604 n.1, 182 N.W.2d at 801 n.1.

[104] *Id.* at 603–04, 182 N.W.2d at 801.

[105] *Id.* at 604, 182 N.W.2d at 801.

[106] *Id.* at 609, 182 N.W.2d at 804.

[107] *Id.*

[108] *Id.* at 612, 182 N.W.2d at 806. The appeals court defined the doctrine in terms of three concepts:

> 1) the manufacturer's liability does not depend on proof of negligence; it is the same kind of liability as arises from a breach of warranty, express or implied, or a false representation, express or implied; 2) although traceable conceptually to warranty as well as tort, this liability, imposed by law, is a tort liability, not dependent on the existence of a contract or contract principles, and, thus, it arises independently of the Uniform Sales Act and the Uniform Commercial Code; and 3) while it is not necessary to prove negligence, the manufacturer is not absolutely liable. He is liable only if the product is defective.

Id. at 611–12, 182 N.W.2d at 805–06.

[109] *Id.* at 612, 182 N.W.2d at 806.

[110] *Id.* at 614, 182 N.W.2d at 807.

[111] *Id.* at 614–15, 182 N.W.2d at 807.

Regardless of the terminology, the *Cova* court would allow a consumer, in this case, a small commercial consumer, to recover for direct economic loss.[112] While the *Cova* plaintiffs also sought to recover lost profits, a consequential economic loss, the court noted that the issue was not briefed and thus declined to address it. It noted however, that the issue probably would require consideration whether there should be limitations on the kinds of plaintiffs who will be permitted to recover consequential damages.[113]

Basing its decision on *Santor* and *Cova*, the Supreme Court of Wisconsin in its 1976 decision *LaCrosse v. Schubert, Schroeder & Assoc.*[114] held that a claim for pure economic loss involving the cost of repair and replacement of the product itself, absent an allegation of personal injury, is recoverable in strict liability.[115] In *LaCrosse*, the plaintiff city alleged a cause of action against a general contractor, an architect, an installer, and a manufacturer arising out of the replacement of a school roof. The replacement roof leaked, partly blew off, and eventually had to be replaced.[116] The *LaCrosse* court, quoting *Santor*, could find no sound reason for allowing recovery for personal injury but not for economic loss.[117] The court reasoned that it should apply the principles of strict liability on the basis of whether the manufacturer was "the father of the transaction," and not on the basis of whether the plaintiff had incurred personal injury or economic loss.[118] Although the case involved direct economic loss, the court implied that it also would allow consequential loss of profits.[119]

As are the Michigan *Cova* case and Wisconsin *LaCrosse* case, the 1975 Ohio decision *Iacono v. Anderson Concrete Corp.*[120] is based on *Santor*. In *Iacono*, the plaintiff entered into an oral contract for the installation of a driveway at the plaintiff's home. Soon after completion, the plaintiff noticed round holes forming in the concrete.[121] The Ohio Supreme Court determined that the plaintiff's complaint alleged an action in tort based upon the breach of an implied warranty.[122] The court decided that it could see no rational basis for distinguishing between personal injury and property damage.[123] The *Iacono* court quoted *Santor* and noted the logic of not distinguishing a defective product causing personal injury and a defective product that is merely worthless.[124] Accordingly, the court held that a plaintiff may maintain an action in tort, based on a theory of implied breach of warranty, to recover for damages to property.[125]

A United States District Court, applying Ohio law, explained and expanded the *Iacono* case in *Mead Corp. v. Allendale Mutual Insurance Co.*[126] The court held that a

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[112] *Id.* at 609, 182 N.W.2d at 804.

[113] *Id.* at 620, 182 N.W.2d at 811.

[114] 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

[115] *Id.* at 44, 240 N.W.2d at 127.

[116] *Id.* at 40, 240 N.W.2d at 125.

[117] *Id.* at 45, 240 N.W.2d at 127 (quoting *Santor*, 44 N.J. at 60, 207 A.2d at 309).

[118] *Id.* at 45, 240 N.W.2d at 128.

[119] *Id.* at 44, 240 N.W.2d at 127. The court stated: "We are also of the opinion that a strict liability claim for pure economic loss involving only the cost of repair or replacement of the product itself and loss of profits is likewise not demurrable." *Id.*

[120] 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

[121] *Id.* at 88, 326 N.E.2d at 268.

[122] *Id.* at 91, 326 N.E.2d at 269.

[123] *Id.* at 93, 326 N.E.2d at 270.

[124] *Id.* at 93, 326 N.E.2d at 270–71 (quoting *Santor*, 44 N.J. at 60, 207 A.2d at 309).

[125] *Id.* at 93, 326 N.E.2d at 271.

[126] 465 F. Supp. 355 (N.D. Ohio 1979).

commercial consumer could recover for direct and consequential economic loss resulting from the breakdown of a steam turbine manufactured by one of the defendants.[127] After negotiations between the manufacturer of the turbine, the manufacturer of the generator used in the turbine, and the plaintiff's technicians, the plaintiff entered into an agreement to purchase the turbine.[128] A contract provision limited liability to repair or replacement of defective parts and specifically excluded liability for consequential damages.[129] Subsequently, the turbine suffered a breakdown.[130] Because the warranty had long since elapsed, the plaintiff repaired the turbine, but filed an action against the manufacturers, the distributor, and the plaintiff's insurance company claiming direct economic loss and consequential damages.[131] The question before the court was whether the defendant-manufacturers could be granted summary judgment on the tort claims for economic loss.[132]

Denying the defendant's motion, the *Mead* court declared that Ohio law clearly allows recovery of economic loss under a strict liability theory.[133] The court stated that *Iacono* left no doubt about the recovery of economic loss in Ohio.[134] The *Mead* court reasoned that while the *Iacono* court labelled the recovery in *Iacono* as "property damage," the recovery was really direct economic loss because Iacono was seeking to recover the difference between the value of what he had paid and the value of what he had received. Accordingly, the court held that the plaintiff could bring an action under strict liability in tort for the recovery of economic loss.[135] Without discussion, the *Mead* court added that it could see no logic to limiting a claimant's recovery to direct economic loss when the plaintiff also had suffered indirect economic loss.[136]

In summary, prior to *Spring Motors Distributors, Inc. v. Ford Motor Co.*,[137] the minority of jurisdictions following *Santor* allowed recovery in strict liability for direct economic loss. The *Mead* decision, expanding the *Santor* holding, allowed recovery for direct and indirect economic loss. The types of consumer in these cases ranged from the ordinary consumer in *Iacono* to the small commercial consumer in *Cova* to the large corporate commercial consumer in *Mead*. None of these jurisdictions, however, set forth a test to apply strict liability to cases of economic loss. Rather, based on the types of consumers allowed to recover and the types of harm addressed, apparently these jurisdictions broadly have accepted a general rule that consumers can recover for economic loss in products liability. In doing so, these courts have flatly rejected a type-of-harm approach. It is not as evident that they accept a type-of-consumer approach. These cases, however, are not irreconcilable with a type-of-consumer test.

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[127] *Id.* at 367.

[128] *Id.* at 357–59.

[129] *Id.* at 358.

[130] *Id.*

[131] *Id.* at 359.

[132] *Id.*

[133] *Id.* at 366. The Ohio Supreme Court adopted the § 402A Restatement version of strict liability in Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977). There, the court indicated that there are virtually no distinctions between implied warranty in tort and strict liability. *Mead*, 465 F. Supp. at 363 n.11 (citing *Temple*, 50 Ohio St. 2d at 322, 364 N.E.2d at 271).

[134] *Mead*, 465 F. Supp. at 365.

[135] *Id.* at 366.

[136] *Id.*

[137] 98 N.J. 555, 489 A.2d 660 (1985).

D. *New Jersey Case Law Since* Santor

Between *Santor*, decided in 1965, and *Spring Motors*, decided in 1985, the New Jersey courts dealt sporadically with the issue of economic loss recovery. In two cases, *Rosenau v. City of New Brunswick and Gamon Meter Co.*[138] and *Heavner v. Uniroyal, Inc.*,[139] the issue arose under a statute of limitations question in which the New Jersey Supreme Court held that the U.C.C. statute of limitations did not govern either products liability action. In addition, in *Monsanto Co. v. Alden Leeds, Inc.*[140] and *ICI Australia Ltd. v. Elliott Overseas Co.*,[141] the New Jersey Superior Court and a federal district court applying New Jersey law held that commercial plaintiffs could recover their property losses under the doctrine of strict liability. These cases indicate a willingness to restrict a U.C.C. recovery to a commercial setting. Conversely, these cases can be seen as standing for the proposition that recovery under the strict liability doctrine should be limited to a non-commercial setting.

In *Rosenau*, the City of New Brunswick purchased sixty water meters from the manufacturer, Worthington, in 1942. The city installed one of these meters in the plaintiff's home in 1950, and in 1964 the meter broke, causing damage to the plaintiff's property. The plaintiffs filed a complaint against Worthington alleging negligence and strict liability,[142] but the trial court granted summary judgment for Worthington on the ground that the statute of limitations barred the plaintiff's claim.[143] The plaintiffs appealed to the Appellate Division, which held that the statute of limitations did not bar the plaintiff's claim insofar as it was grounded on negligence, but barred it insofar as it was based on an allegation of a defect in manufacture without an accompanying allegation of negligence.[144]

On review, the New Jersey Supreme Court, addressing whether the plaintiffs were entitled to maintain an action in strict liability, cited *Santor* for the rule that where a manufacturer makes and distributes defective products, it may justly be held accountable for injury proximately resulting to persons or property, despite absence of privity or a showing of negligence.[145] The *Rosenau* court continued, however, that the *Rosenau* plaintiffs — unlike the *Santor* plaintiffs — were not asserting any claim for economic loss, but only for physical injury to their property which even *Seely* acknowledged is recoverable under strict liability. Therefore, the court stated, for purposes of the present case, the court need not revisit *Santor*.[146]

The *Rosenau* court proceeded to define the action as one in strict liability, stating that the limitation period of the U.C.C. was not intended to apply to tort actions between consumers and manufacturers who were never in any commercial relationship or setting.[147] Accordingly, the court held that a claim grounded on strict liability in tort is

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[138] 51 N.J. 130, 238 A.2d 169 (1968).

[139] 63 N.J. 130, 305 A.2d 412 (1973).

[140] 130 N.J. Super. 245, 326 A.2d 90 (Law Div. 1974).

[141] 551 F. Supp. 265 (1982).

[142] *Rosenau*, 51 N.J. at 134, 238 A.2d at 171.

[143] *Id.* at 135, 238 A.2d at 171.

[144] *Id.*

[145] *Id.* (citing *Santor*, 44 N.J. 52, 207 A.2d 305).

[146] *Id.* at 142, 238 A.2d at 175 (citing *Seely*, 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24).

[147] *Id.* at 143, 238 A.2d at 176.

governed by the six-year limitation for injury to property.[148] Because the cause of action accrued in 1964, when the meter broke, the court found that the plaintiff's action, instituted shortly thereafter, was timely.[149] Although the judgment may result in a hardship to Worthington, the court continued, one should not lose sight of the crucial fact that Worthington originally placed the defective product in the stream of trade. The *Rosenau* court reasoned that Worthington, as the manufacturer, was best situated to protect against damage, whereas the injured parties were innocent and largely incapable of protecting themselves.[150]

Five years later, in the 1973 case of *Heavner v. Uniroyal, Inc.*,[151] the New Jersey Supreme Court again addressed the issue of the appropriate statute of limitations to be applied in a products liability action and held that the U.C.C. limitation provision did not apply. As in *Rosenau*, *Heavner* did not involve claims for economic loss. The plaintiff in *Heavner* sought recovery in strict liability for personal injury and contemporaneous damage to his vehicle alleged to have resulted from a defect in the tire, manufactured by the defendant, which blew out and caused an accident.[152] The trial court granted the defendant's motion to dismiss the personal injury count on the ground that the two-year personal injury statute of limitations applied,[153] rather than the U.C.C. four-year provision.[154]

On review, the Supreme Court of New Jersey held that the general statute of limitations — two years for personal injury and six years for property damage — controlled the plaintiffs action and consequently, the lower court was correct in dismissing the personal injury claim.[155] The court reasoned that the U.C.C. is commercially and contractually oriented and its framework contemplates contracting parties in a conventional commercial setting and claims based on economic loss.[156] Thus, the *Heavner* court stated, the U.C.C. cannot apply to a consumer action against a manufacturer for consequential personal injury and property damage.[157]

The court stated that it would not reach the question whether the U.C.C. provision applies to actions "merely for loss-of-the-bargain or economic damage in the commercial sense."[158] The court noted, however, Justice Peters' suggestion in his concurring and dissenting opinion in *Seely* that the Code should never apply to situations involving the ordinary consumer, but should be restricted to dealings between businesspeople and merchants. The court suggested that under Justice Peters' reasoning, the plaintiff in *Heavner* would be considered an ordinary consumer.[159]

Two decisions in the New Jersey lower courts allowed commercial plaintiffs to recover their property losses in strict liability. In the first of these, the 1974 case of

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[148] *Id.* *See* N.J. STAT. ANN. 2A:14-1.

[149] *Rosenau*, 51 N.J. at 144, 238 A.2d at 176.

[150] *Id.* at 145, 238 A.2d at 176.

[151] 63 N.J. 130, 305 A.2d 412 (1973).

[152] *Id.* at 133, 305 A.2d at 413.

[153] *See* N.J. STAT. ANN. 2A:14-2.

[154] 63 N.J. at 133, 305 A.2d at 413. *See* U.C.C. § 2-725 (1978). The suit began more than three years after the accident, but less than four years from the delivery of the tires. *Heavner*, 63 N.J. at 134, 305 A.2d at 414.

[155] *Heavner*, 63 N.J. at 156, 305 A.2d at 426.

[156] *Id.* at 152–53, 305 A.2d at 424.

[157] *Id.* at 155, 305 A.2d at 426.

[158] *Id.* at 157 n.16, 305 A.2d at 427 n.16.

[159] *Id.*

Monsanto Co. v. Alden Leeds, Inc.,[160] the defendant, counterclaiming on the plaintiff's claim for recovery for the price of goods sold and delivered, alleged that a portion of the chemicals purchased developed moisture problems and that chlorine gas escaped, causing the chemicals to ignite spontaneously. A series of small fires and three larger fires resulted in severe damage to buildings, equipment, electrical installations, raw materials, and inventory.[161] The plaintiff moved for summary judgment, but the court stated that the real issue was contained in the defendant's counterclaim, namely, whether a commecial user may maintain a claim for strict liability.[162]

Citing *Santor*, the *Monsanto* court stated that the New Jersey Supreme Court had shown itself willing to expand the field of strict liability in order to fulfill the public's expectation of responsibility for products placed in the stream of commerce.[163] Although the courts of New Jersey had never applied the strict liability theory to a commercial claimant,[164] the *Monsanto* court noted, *Santor* easily would be applied as extending strict liability to a commercial consumer's loss.[165] The court reasoned that injuries to an individual's business can be as detrimental to society and as devastating to the individual as injuries to his or her person. Therefore, the court stated, the liability for economic as well as personal injury belongs with the manufacturer who can in turn, through insurance, spread the cost of injury due to defective products throughout the distributive chain.[166] In conclusion, the *Monsanto* court stated that the extent to which strict liability will be applied to a consequential loss is ultimately up to the parties, for they still have bargaining positions from which they may allocate the loss.[167] Therefore, the *Monsanto* court held, defective products should give rise to liability to be borne by the enterprise which created the products, unless there is a valid allocation of the risk of loss between the contracting parties.[168]

Relying on *Santor* and *Monsanto*, a United States district court of New Jersey held that strict liability was available to commercial consumers under New Jersey law in *ICI Australia Ltd. v. Elliott Overseas Co.*[169] The *ICI Australia* plaintiff, a company engaged in the manufacture of ethylene used in the production of plastics and vinyl, entered into an agreement with the defendant to update a certain assemblage of equipment at the plaintiff's plant. When a defective coupling failed, the plaintiff brought an action against the defendant in strict liability.[170] The trial court stated that the law in New Jersey, as laid down in *Santor*, provides that a strict liability claim is available in a case involving solely economic loss. Noting that *Monsanto* came down on the side of applying strict liability to a commercial consumer, the *ICI Australia* court stated that there is a strong indication that strict liability actions are available to commercial consumers in New Jersey. The court continued, however, that the primary consideration in determining if strict liability is available is whether the alleged defect rendered the product unreasonably

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[160] 130 N.J. Super. 245, 326 A.2d 90 (Law Div. 1974).
[161] *Id.* at 249, 326 A.2d at 92.
[162] *Id.* at 250, 326 A.2d at 92.
[163] *Id.* at 256, 326 A.2d at 96.
[164] *Id.* at 257, 326 A.2d at 96.
[165] *Id.* at 259, 326 A.2d at 97.
[166] *Id.*
[167] *Id.* at 259, 326 A.2d at 98.
[168] *Id.* at 260, 326 A.2d at 98.
[169] 551 F. Supp. 265 (D.N.J. 1982).
[170] *Id.* at 266.

dangerous.[171] Using the nature of the defect and the type of risk imposed as the guiding factors, the *ICI Australia* court held that the plaintiff produced sufficient evidence to demonstrate that the damage to its property was of a sudden and severe nature.[172] The court found that although no one was physically injured, the risk and damage which did occur were sufficient to give rise to a strict liability claim in New Jersey.[173]

In summary, prior to *Spring Motors*, New Jersey case law stemming from *Santor* has allowed commercial consumers to recover in strict liability, as seen in *Monsanto* and *ICI Australia*. These plaintiffs suffered property damage, however, not pure economic loss. It is well settled that property damage is recoverable in strict liability.[174] Although the plaintiffs in *Monsanto* and *ICI Australia* were commercial consumers, because they did not claim economic loss their recovery in strict liability has not expanded the *Santor* holding to include recovery in strict liability for economic loss suffered by commercial consumers.

While the New Jersey decisions have not produced any guidelines for the applicability of strict liability, the courts consistently have held that the availability of a U.C.C. remedy is reserved for commercial settings.[175] Therefore, the courts in *Rosenau* and *Heavner*, applying this rule, held that the plaintiffs, who were ordinary consumers, were not subject to the U.C.C. statute of limitations.[176] Moreover, the availability of a strict liability remedy could be seen as dependent upon a non-commercial setting, although the courts have not so held expressly. Thus, a commercial consumer seeking recovery for economic loss in strict liability will be denied such recovery and be restricted to a U.C.C. remedy.

II. The New Jersy Supreme Court's Reasoning in *Spring Motors*

A. *The Majority Opinion*

In a unanimous decision, the Supreme Court of New Jersey in the 1985 case of *Spring Motors Distributors, Inc. v. Ford Motor Co.* held that a commercial consumer seeking damages for economic loss resulting from the purchase of a defective product may not recover under the doctrine of strict liability and is restricted to a cause of action under the U.C.C.[177] The opinion of the court, delivered by Justice Pollack, began its discussion of the validity of an exclusive U.C.C. remedy by recognizing the comprehensive structure of the Code. The court noted that within its comprehensive scheme, the Code provides not only for the existence of warranties running to the consumer, but also for the remedy available for a breach of those warranties.[178] The court observed that in a proper case, the buyer may recover the difference between the value of the defective goods and the

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[171] *Id.* at 268.

[172] *Id.* See *infra* note 228 for a similar holding by the Alaska Supreme Court.

[173] *ICI Australia*, 551 F.Supp. at 268.

[174] *See, e.g., Seely*, 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. *See also* W. Prosser, *supra* note 4, at 666.

[175] *Rosenau*, 51 N.J. at 143, 238 A.2d at 176; *Heavner*, 63 N.J. at 152–53, 305 A.2d at 424.

[176] *Rosenau*, 51 N.J. at 143, 238 A.2d at 176; *Heavner*, 63 N.J. at 152–53, 305 A.2d at 424.

[177] 98 N.J. 555, 578, 489 A.2d 660, 672 (1985). The court also held that the plaintiff could not recover in negligence. *Id.* at 581, 489 A.2d at 673. This casenote will not discuss the plaintiff's negligence claim.

[178] *Id.* at 565–66, 489 A.2d at 665. *See* U.C.C. § 2-313 (1978) (express warranty); § 2-314 (implied warranty of merchantability); § 2-315 (fitness for a particular purpose).

value they would have had if they had been as warranted,[179] incidental damages, which include reasonable expenses incidental to the breach,[180] and consequential damages, including losses resulting from the buyer's need of which the seller had knowledge[181] and injury to property.[182] Defining the types of economic loss recoverable for warranty under the Code, the *Spring Motors* court stated that economic loss can take the form of either direct or consequential damages. While direct economic loss includes the first of the enumerated damages, the loss of the benefit of the bargain, consequential economic loss includes such indirect losses as loss of profits, the court noted.[183] While recognizing that a claim for economic loss is not normally recoverable in tort, the court stated that this case probed the boundary between the U.C.C. and strict liability and, thus, required a delineation of that boundary.[184]

Turning to a brief history of the doctrine of strict liability in New Jersey, the *Spring Motors* court first noted the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*[185] In *Henningsen*, the New Jersey Supreme Court allowed a plaintiff to recover damages for injuries sustained when the car driven by the plaintiff lost its steering and crashed into a wall.[186] The court based its holding on a theory of implied warranty of merchantability even though the plaintiff was not in privity with the manufacturer.[187] The *Spring Motors* court stated that underlying the *Henningsen* decision was the recognition that consumers are not always in an equal bargaining position with manufacturers and dealers.[188] Secondly, the court observed, *Henningsen* declared that one of the main purposes of strict liability is the allocation of the risk and distribution of the loss to the better risk-bearer.[189] The *Spring Motors* court pointed out that the manufacturer is better able to eliminate defects from its products and spread the cost of the risk among its customers; the consumer, on the other hand, because of his or her unequal bargaining power, cannot protect himself or herself.[190] Thus, the *Spring Motors* court noted, strict liability achieves its objective of allocating the risk of loss to the better risk bearer, the manufacturer, thereby protecting the consumer.[191]

The *Spring Motors* court stated that five years after the *Henningsen* decision, the court decided *Santor v. A. & M. Karagheusian*,[192] in which the court acknowledged that although the action was couched in terms of a breach of implied warranty, it could be described

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[179] U.C.C. § 2-714 (1978).

[180] U.C.C. § 2-715 (1978).

[181] U.C.C. § 2-715(2)(a) (1978).

[182] U.C.C. § 2-715(2)(b) (1978); *Spring Motors*, 98 N.J. at 566, 489 A.2d at 665.

[183] 98 N.J. at 566, 489 A.2d at 665. (citing J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 11-4 to 11-6 at 405–10 (2d ed. 1980)).

[184] *Id.* at 566, 489 A.2d at 665–66.

[185] *Id.* at 566, 489 A.2d at 666 (citing *Henningsen*, 32 N.J. 358, 161 A.2d 69 (1960)).

[186] *Henningsen*, 32 N.J. at 384, 161 A.2d at 84.

[187] *Id.*

[188] *Spring Motors*, 98 N.J. at 567, 489 A.2d at 666. This point was particularly relevant in *Henningsen* where the car dealer required the consumer to sign a standard contract used by the entire automobile industry. *See Henningsen*, 32 N.J. at 374–75, 161 A.2d at 78.

[189] *Spring Motors*, 98 N.J. at 567, 489 A.2d at 666 (citing *Henningsen*, 32 N.J. at 379, 161 A.2d at 81).

[190] *Id.* at 567–68, 489 A.2d at 666.

[191] *Id.* at 568, 489 A.2d at 666.

[192] 44 N.J. 52, 207 A.2d 305 (1965). See *supra* notes 54–72 and accompanying text for a discussion of *Santor*.

better as one in strict liability.[193] The *Spring Motors* court noted that, in *Santor*, Justice Francis made it clear that personal injury to the consumer was not essential to the invocation of strict liability.[194] The court further noted, however, that the plaintiff in *Santor*, as in *Henningsen*, was an individual consumer and the action was for direct economic loss.[195]

The *Spring Motors* court next distinguished two cases in which the court held that strict liability, not the U.C.C., should apply to an action between a consumer and a manufacturer who were not in privity.[196] The court observed that in the first of these cases, *Rosenau v. City of New Brunswick & Gamon Meter Co.*,[197] the plaintiff's action was for physical harm to property, not for economic loss.[198] In *Rosenau*, a homeowner brought an action in negligence and strict liability against the manufacturer of water meters sold to a municipality for its water system, when one of the meters broke and caused property damage to the plaintiff's home.[199] Quoting from Justice Jacob's opinion in *Rosenau*, the *Spring Motors* court stated that the U.C.C. presumably was not intended to apply to actions between consumers and manufacturers who never were in a commercial relationship.[200]

In the second case, *Heavner v. Uniroyal, Inc.*,[201] the *Spring Motors* court found that the two-year statute of limitations applicable to personal injury actions in tort[202] and not the four-year period provided by the U.C.C.[203] was the proper time period to apply in an action against a manufacturer for damages to a truck and personal injuries to its driver caused by a tire blow-out.[204] The *Spring Motors* court was careful to point out that although the U.C.C. statute of limitations does not apply to actions in strict liability for personal injury and property damage, the *Heavner* court did not reach the question whether it applied to actions for economic loss.[205] In conclusion, the court stated that neither *Rosenau* nor *Heavner* involved a claim for economic loss between commercial parties.[206]

From the injured consumer's perspective, the *Spring Motors* court explained, strict liability provides a more congenial environment for recovery than do contract principles.[207] According to the court, the Code poses three obstacles to a buyer: the requirements of privity with the manufacturer and notice to the seller for a breach of warranty,[208]

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[193] *Spring Motors*, 98 N.J. at 568, 489 A.2d at 666.

[194] *Id.*

[195] *Id.* at 568, 489 A.2d at 667.

[196] *Id.* at 569, 489 A.2d at 667.

[197] 51 N.J. 130, 238 A.2d 169 (1968).

[198] *Spring Motors*, 98 N.J. at 569, 489 A.2d at 667.

[199] *Id.* (citing *Rosenau*, 51 N.J. at 143, 238 A.2d at 176). See *supra* text accompanying notes 140–50 for a discussion of *Rosenau*.

[200] *Spring Motors*, 98 N.J. at 569, 489 A.2d at 667 (quoting *Rosenau*, 51 N.J. at 143, 238 A.2d at 176).

[201] 63 N.J. 130, 305 A.2d 412 (1973). See *supra* text accompanying notes 152–59 for a discussion of *Heavner*.

[202] *See* N.J. STAT. ANN. 2A:14-2.

[203] *See* N.J. STAT. ANN. 12A:2-725.

[204] *Spring Motors*, 98 N.J. at 569, 489 A.2d at 667 (citing *Heavner*, 63 N.J. at 156–57, 305 A.2d at 426–27).

[205] *Id.* at 570, 489 A.2d at 667 (citing *Heavner*, 63 N.J. at 157 n.16, 305 A.2d at 427 n.16).

[206] *Id.*

[207] *Id.* at 570, 489 A.2d at 668.

[208] *See* U.C.C. § 2-607(3) (1978).

and the availability of disclaimers of liability made by the seller.[209] The court explained that a buyer who does not deal directly with a manufacturer cannot negotiate over the terms of the disclaimer and might find it impossible to give the manufacturer notice.[210] On the other hand, the court explained, the principle that parties should be free to make contracts of their choice, including contracts disclaiming liability, underlies the Code. Moreover, the court noted, once an agreement is reached, society has an interest in seeing that it is fulfilled. Consequently, in the court's view, the U.C.C. is the more appropriate vehicle for resolving commercial disputes between persons within the distributive chain.[211]

Attempting to ascertain where on the spectrum to place a cause of action for purely economic loss brought by a commercial entity, the *Spring Motors* court turned to a discussion of *Santor* and *Seely*.[212] The court concluded, however, that it need not reconsider the *Santor* rule that an ordinary consumer may recover in strict liability for direct economic loss, because *Spring Motors* involved an action by a commercial consumer. The court emphasized that instead, it must reconsider the policies underlying the U.C.C. and strict liability and specifically, the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer.[213]

Evaluating the policy of relative bargaining power, the *Spring Motors* court stated that the considerations that give rise to strict liability are not relevant in an action between commercial parties with comparable bargaining power.[214] Furthermore, according to the court, perfect parity is not necessary to a determination that parties have comparable bargaining power. Without determining the relevant circumstances for determining bargaining power, the court found it persuasive that Spring Motors had sufficient bargaining power to persuade Ford to install Clark transmissions in the trucks.[215]

The court then examined risk allocation and concluded that Spring Motors was at least as well-situated as the defendants to assess the impact of economic loss. Indeed, the court noted that a commercial buyer such as Spring Motors may be better situated than the manufacturer to factor into its price the risk of economic loss.[216] Observing that the price paid by Spring Motors for the trucks reflected the fact that Ford was liable for repair or replacement of parts only, the court stated that by seeking to impose the risk of loss on Ford, Spring Motors sought to obtain a better bargain than it originally had made. Accordingly, the court concluded that as between commercial parties, the allocation of risks in accordance with the agreement better serves the public interest.[217]

The court then noted that it is necessary to look not only at the policy considerations behind the U.C.C., but also at the role of the legislature in enacting the U.C.C. The court stated that allowing Spring Motors to recover from Ford under tort principles

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[209] *See* U.C.C. § 2-316 (1978); *Spring Motors*, 98 N.J. at 570, 489 A.2d at 668.

[210] *Spring Motors*, 98 N.J. at 570, 489 A.2d at 668.

[211] *Id.* at 571, 489 A.2d at 668.

[212] *Id.* at 571–75, 489 A.2d at 668–70. See *supra* notes 54–98 and accompanying text for a discussion of *Santor* and *Seely*.

[213] *Spring Motors*, 98 N.J. at 575, 489 A.2d at 670.

[214] *Id.* at 576, 489 A.2d at 670 (citing Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 32 (S.D. Iowa 1973)).

[215] *Id.* at 576, 489 A.2d at 671.

[216] *Id.* (citing Note, *Economic Loss*, *supra* note 51, at 952–58). *See infra* notes 260–62 and accompanying text.

[217] *Spring Motors*, 98 N.J. at 576, 489 A.2d at 670.

would abrogate the Code's requirement that the buyer give notice of the breach and would deprive the seller of its statutory ability to limit his liability. Summarizing, the *Spring Motors* court observed that the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce and that courts should pause before displacing that legislative scheme.[218]

Turning to the Appellate Division's opinion which allowed the case to proceed under strict liability principles, the *Spring Motors* court stated that the lower court erred in several respects.[219] First, the court noted, the Appellate Division relied too heavily on *Santor*, which did not consider the effect of the U.C.C. on a commercial transaction.[220] Second, the court stated, the Appellate Division misplaced its reliance on three New Jersey cases.[221] The first of these cases, *H. Rosenblum Inc. v. Adler*,[222] involved the liability of a public accountant for the negligent auditing of financial statements. The *Spring Motors* court pointed out that *Rosenblum* turned on principles of negligent misrepresentation, not on strict liability, and therefore the case did not implicate the policy considerations that underlie strict liability.[223] The court then distinguished the second case, *Monsanto Co. v. Alden Leeds*,[224] because it involved property damage, which is recoverable in strict liability for both commercial and ordinary consumers.[225] The court also distinguished *ICI Australia Ltd. v. Elliott Overseas Co.*[226] because it involved both an accident and property damage, neither of which were present in *Spring Motors*.[227] The court further stated that cases allowing recovery in strict liability involving claims for potential personal injury — claims that Spring Motors does not assert — are distinguishable.[228] Consequently, the court held that a commercial buyer seeking damages for economic loss may only proceed under the U.C.C. against parties in a chain of distribution and reversed the part of the judgment of the Appellate Division that permitted Spring Motors to maintain an action in strict liability.[229]

Finally, the *Spring Motors* court stated that it need not determine the outer limits of a suit by an ultimate purchaser against a remote supplier for economic loss. Therefore, the court reserved determination of the effect of a remote manufacturer's disclaimer or limitation on warranties to a purchaser who did not have the opportunity to negotiate the terms of the agreement.[230] The court also left unreviewed the Code requirement of

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[218] *Id.* at 577, 489 A.2d at 671.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 577–78, 489 A.2d at 671–72.

[222] 93 N.J. 324, 461 A.2d 138 (1983).

[223] *Spring Motors*, 98 N.J. at 577, 489 A.2d at 671.

[224] 130 N.J. Super. 245, 326 A.2d 90 (Law Div. 1974). See *supra* text accompanying notes 160–168 for a discussion of *Monsanto*.

[225] *Spring Motors*, 98 N.J. at 578, 489 A.2d at 672. *See supra* notes 160–68 and accompanying text.

[226] 551 F. Supp. 265 (D.N.J. 1982). See *supra* notes 169–73 and accompanying text for a discussion of *ICI Australia*.

[227] *Spring Motors*, 98 N.J. at 578, 489 A.2d at 672.

[228] *Id.* (Citing Kodiak Elec. Ass'n v. DeLaval Turbine, Inc., 694 P.2d 150, 153–54 (Alaska 1984) (denying summary judgment seeking dismissal of strict liability claim brought by commercial consumer for failure of electric generator where there was serious danger to persons, although no actual injury)).

[229] *Id.* at 578–79, 489 A.2d at 672.

[230] *Id.* at 588, 489 A.2d at 677.

notice and whether a warranty of fitness for a particular purpose extends only to parties in privity.[231] Concluding that a commercial buyer may maintain an action for purely economic loss only under the U.C.C., and not in strict liability, the court held that the appropriate period of limitation is that provided by the Code.[232] Because this period had expired, the court reversed the judgment of the Appellate Division and reinstated the dismissal of the complaint as to all defendants.[233]

B. *The Concurring Opinion*

Justice Handler's concurring opinion agreed with the majority's conclusion under the particular circumstances of the case.[234] Justice Handler observed that there was nothing in the facts to suggest that the transaction between these experienced parties was other than a common commercial event for them. Furthermore, Justice Handler noted, the contract specification that Ford equip the trucks with Clark transmissions made it apparent that Spring Motors had commercial experience, economic status, and bargaining power.[235]

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[231] *Id.* at 589, 489 A.2d at 677.

[232] *Id.* at 582, 489 A.2d at 674.

[233] *Id.* at 589, 489 A.2d at 677. The court noted that the trial court dismissed Spring Motors' claim against Clark because of a lack of privity. *Id.* at 582, 489 A.2d at 674. Although Spring Motors did not pursue the issue, the court concluded that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer. *Id.* The court stated that it reached that conclusion even though the U.C.C. generally applies to parties in privity. *Id.* The court pointed out that the drafters of the Code specifically stated that the section relating to privity, U.C.C. § 2-318, is "'neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extends to other persons in the distributive chain.'" *Spring Motors*, 98 N.J. at 584, 489 A.2d at 675 (quoting U.C.C. § 2-318, comment 3).

The court reasoned that it is consistent with the principles underlying *Santor* and with the intent of the Code's drafters to recognize a claim under the U.C.C. for economic loss in a breach of warranty action without regard to vertical privity — the relationship that exists between parties in a distributive chain, that is, between a manufacturer, wholesaler, retailer, and ultimate buyer. *Id.* at 586, 489 A.2d at 676. The court added that to the extent that a plaintiff in a suit for breach of warranty against a remote seller need not establish privity, the court's recognition of a warranty action for economic loss by a commercial buyer parallels the recognition in *Santor* of a similar claim by a consumer. *Id.* Furthermore, the court observed, eliminating the requirement of vertical privity is particularly appropriate where Spring Motors read advertisements published by Clark, specifically requested a Clark transmission, and contracted with Ford only. *Id.* at 587, 489 A.2d at 676–77. The court explained that given the nature of the transaction and the expectations of the parties, the absence of a direct contractual relationship should not preclude Spring Motors from asserting a cause of action for breach of express warranty against Clark. *Id.* at 587, 489 A.2d at 677.

[234] *Id.* at 589, 489 A.2d at 678 (Handler, J., concurring). While Justice Handler agreed with the majority's result, however, he disagreed with the majority's elimination of a requirement of privity. *Id.* at 591, 489 A.2d at 678–79 (Handler, J., concurring). Stating that he did not denigrate the jurisprudential significance of the elimination of direct privity as a basis for an action under the U.C.C., he nevertheless felt that under the circumstances of this case, the majority may have exaggerated the potential bar to the action of the privity requirement. *Id.* He reasoned that although Spring Motors and Clark did not contract directly with each other, Clark was a party to the transaction acting through Ford at the direction of Spring Motors, thus satisfying a nexus required by the privity rule. *Id.*

[235] *Id.* at 590, 489 A.2d at 678 (Handler, J., concurring).

Justice Handler emphasized that the *Spring Motors* court's selection of a remedy did not turn on a label. Therefore, he noted, it would be incorrect to consider the U.C.C. remedy to be applicable exclusively to a purchaser's claim simply because the transaction could be viewed as commercial or because the ultimate purchaser is a commercial entity. Rather, Justice Handler argued, the analysis should turn on whether a purchase made in that kind of setting, even if for a business or commercial purpose, is sufficiently distinguishable from a purchase for personal use by an ordinary private consumer to justify a difference in remedial treatment.[236]

Justice Handler then turned to a discussion of Justice Peters' concurring and dissenting opinion in *Seely*, and observed that Justice Peters' reasoning is parallel to that of *Spring Motors*. Justice Handler noted that reasons given as justification for limiting commercial purchasers to U.C.C. remedies suggest conversely that the U.C.C. may be inapplicable in cases involving purchasers different from those in *Spring Motors*.[237] Specifically, he continued, a court should consider not only whether the transaction is commercial, but also whether the parties are commercially experienced and have comparatively equal bargaining power.[238] Bargaining power, Justice Handler noted, is especially significant in light of the seller's ability to disclaim its liability in warranty. Often, the concurrence observed, the ultimate purchaser will not have had the opportunity to negotiate with the remote supplier and often will be unaware of warranty exclusions in the contract between the remote supplier and the distributor.[239] In conclusion, Justice Handler stated that the use of such asserted disclaimers may militate against the use of U.C.C. remedies entirely.[240] The concurrence also noted that special problems may occur with respect to warranties of fitness for a particular purpose, which require that a seller must know at the time of contract the purpose for which the goods are required and, in addition, that the purchaser must rely on the seller's judgment in making its selection. Justice Handler stated that a remote purchaser often will not be in such a relation with the seller.[241]

Justice Handler next discussed risk allocation. Where the parties do not bargain with comparable economic strength, Justice Handler stated, the inferior risk-bearing position of the aggrieved party may militate in favor of continuing common-law avenues of relief.[242] In conclusion, Justice Handler explained that one can foresee situations in which a defective product will cause economic harm to a purchaser who should not be denied access to strict liability in light of the inadequacy of the U.C.C. relief. Justice Handler pointed out that his analysis is not inconsistent with the court's opinion, which focuses on the factors of equal bargaining power and ability to allocate risks in applying the U.C.C. If those factors are not present in a given case, Justice Handler reasoned, alternative modes of recovery, such as strict liability, should be available. Therefore, Justice Handler concluded, consumers who are not in a position to protect themselves against economic loss should not be denied the ameliorative reach of the law simply because they are also commercial consumers.[243]

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[236] *Id.* at 592, 489 A.2d at 679 (Handler, J., concurring).
[237] *Id.* at 593, 489 A.2d at 679 (Handler, J., concurring).
[238] *Id.* at 593, 489 A.2d at 680 (Handler, J., concurring).
[239] *Id.* at 594, 489 A.2d at 680 (Handler, J., concurring).
[240] *Id.* at 595, 489 A.2d at 680 (Handler, J., concurring).
[241] *Id.*
[242] *Id.* at 595–96, 489 A.2d at 681 (Handler, J., concurring).
[243] *Id.* at 596, 489 A.2d at 681 (Handler, J., concurring).

III. Type-of-Harm/Type-of-Consumer Tests

A. *Policy Reasons Underlying the Application of Strict Liability*

In *Spring Motors*, the New Jersey Supreme Court held that a commercial consumer seeking damages for economic loss resulting from the purchase of a defective product may not recover under the doctrine of strict liability.[244] In reaching this conclusion, the court reconsidered the policy reasons underlying the doctrine of strict liability, specifically the bargaining power of the parties and the allocation of loss to the better risk-bearer.[245] The *Spring Motors* court consequently found that these policy reasons, in the context of a transaction involving a commercial consumer, argue against allowing recovery in strict liability.[246]

The next section of this casenote will analyze the reasoning of the *Spring Motors* court. In effect, *Spring Motors* used a "type-of-consumer test" as the standard for determining whether a plaintiff should be allowed to recover in strict liability for economic loss. Significantly, *Spring Motors* clarifies that courts should define a type of consumer based on his or her ability to bargain and bear risks. This section will evaluate the court's conclusion that the policy reasons underlying the doctrine of strict liability do not obtain for a commercial consumer. Finally, the section will apply the type-of-consumer test employed by *Spring Motors* to the minority of jurisdictions that allow recovery in strict liability for economic loss. In conclusion, application of the type-of-consumer test unifies the minority holdings.

The conflict between the *Seely* majority position denying economic loss recovery in strict liability and the *Santor* minority position allowing such a recovery can be explained as a distinction made between a "type-of-harm" and a "type-of-consumer" approach to defining economic loss. The *Seely* "type-of-harm" approach posits that the kind of loss suffered should determine the availability of strict liability.[247] If the loss is physical injury, the *Seely* jurisdictions, employing the type-of-harm test, permit recovery in strict liability.[248] If the loss is economic, the proper remedy under the type-of-harm test is the recovery available under the U.C.C., because the U.C.C. is well-equipped to handle the needs of commercial transactions.[249]

On the other hand, the jurisdictions that employ the *Santor* type-of-consumer approach agree that the U.C.C. was developed to meet the needs of "commercial transactions," but contend that courts should look to the transaction to determine if it is commercial.[250] Under the type-of-consumer approach, the characterization of the transaction is dependent on the type of consumer that is a party to the transaction. Therefore, if the consumer is an ordinary consumer, he or she may recover in strict liability. If the consumer is a commercial consumer, he or she may recover under the U.C.C.[251]

While the type-of-harm and type-of-consumer tests may be easily summarized, an evaluation of not only the validity, but also the fairness of each test, necessitates an

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[244] *Spring Motors*, 98 N.J. 555, 578, 489 A.2d 660, 672 (1985).
[245] *Id.* at 575, 489 A.2d at 670.
[246] *Id.* at 576, 489 A.2d at 670.
[247] See *supra* notes 73–98 and accompanying text for a discussion of *Seely*.
[248] *Seely*, 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr 17, 23 (1965).
[249] *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.
[250] *Id.* at 26, 403 P.2d at 156, 45 Cal. Rptr. at 28 (Peters, J., concurring and dissenting).
[251] *Id.* at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).

understanding of the policies underlying each approach. The type-of-harm test is based on the belief that the doctrine of strict liability is grounded upon a need to compensate victims of personal injury, while the U.C.C. is designed to govern the economic relations between suppliers and consumers of goods.[252] Yet, the U.C.C. provides many obstacles to recovery, including disclaimers of liability[253] and limitations on damages.[254] For example, in *Greenman v. Yuba Power Products*,[255] if the court had relied upon the U.C.C.'s warranty theory of recovery, then the plaintiff, an ordinary consumer suffering personal injury, would have been denied recovery because he did not give sufficient notice of the breach.[256] Thus, an injured consumer may require a strict liability remedy because sales law often bars recovery to one who is not "steeped in business practice."[257] Nevertheless, the policy considerations underlying strict liability mandate that courts apply the doctrine to situations other than personal injury cases. *Greenman* provides two policy reasons for such a result: the doctrine of strict liability will insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market and protect consumers who are powerless to protect themselves.[258]

Certainly, these policy reasons for imposing strict liability are relevant when the type of harm suffered is personal injury. A person not anticipating injury is powerless to protect himself or herself against injury or to insure his or her recovery by entering into a favorable contract. In addition, the better risk-bearer of the cost of personal injury always will be the manufacturer. Risk-bearing is usually defined in terms of the manufacturer's ability to eliminate defects from its product and spread the cost of risk among its customers.[259] As one commentator has pointed out, today, the ability to bear the risk is synonymous with the ability to insure.[260] In the case of personal injury, a manufacturer is better able to insure against the risk of injury than the injured party because the probability that personal injury will result and the probable amount of damages are fairly predictable.[261] On the other hand, from the victim's point of view, the probability of injury is so small as to make it non-insurable and the ability to pass on the cost to the victim's enterprise may be non-existent.[262]

Clearly then, the doctrine of strict liability appropriately fills the need to compensate personally injured plaintiffs. The policy reasons supporting the doctrine are not limited

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[252] *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

[253] U.C.C. § 2-316(3)(c) (1978) provides: "an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

[254] U.C.C. § 2-719(3) (1978) provides: "Consequential 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."

[255] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[256] *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699. The California legislature did not adopt the U.C.C. until 1965. The California court decided *Greenman* under the Uniform Sales Act. The U.C.C. provision for notice, similar to the provision of the Uniform Sales Act to which *Greenman* referred, is found in § 2-607(3), which reads: "Where a tender had been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." U.C.C. § 2-607(3) (1978).

[257] *Greenman* 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[258] *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[259] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 81 (1960).

[260] *See* Note, *Economic Loss*, *supra* note 51, at 952–58.

[261] *Id.* at 955.

[262] *Id.*

to the personal injury situation, however. A plaintiff suffering economic harm may be just as powerless to protect himself or herself and just as powerless to bear the risk of harm. Therefore, if the policy reasons for strict liability are present, courts should apply the doctrine.

In advocating a type-of-consumer test, Justice Peters' concurring and dissenting opinion in *Seely* identified the same policy reasons for allowing an ordinary consumer to recover economic loss in strict liability as did the court in *Greenman* in allowing an ordinary consumer to recover for personal injury in strict liability.[263] In particular, courts impose strict liability to protect people who are "powerless to protect themselves."[264] As Justice Peters wrote, the restrictive provisions of warranty should not apply to ordinary consumers, "who [are] usually unable to protect [themselves] from insidious contractual provisions . . . foisted upon [them] by commercial enterprises whose bargaining power [they are] seldom able to match . . . ."[265] Thus, courts should equate a consumer's inability to protect himself or herself with an inequality of bargaining power. If the consumer is unable to protect himself or herself because of a lack of bargaining power, then the policy reasons for imposing strict liability are present. For example, the court in *Seely* should have classified the plaintiff as an ordinary consumer who should recover in strict liability because, even though he purchased the truck for his business, he was an owner of a single truck and not a fleet-owner who bought trucks regularly in the course of his business.[266]

The size of the business or the number of trucks owned is not the only basis for determining the nature of the consumer. As the operator of a fleet of 300 vehicles in its business of leasing and selling trucks, Spring Motors appears to be a commercial consumer and should be unable to recover economic loss under the doctrine of strict liability. Indeed, this is the conclusion that the *Spring Motors* court reaches, but its conclusion turns not on the size of the business or the number of trucks owned, but on the policy reasons behind the label "commercial consumer." The policy reasons relevant in *Spring Motors* are the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer.[267] While these policy reasons give rise to strict liability in the case of an ordinary consumer, they do not obtain in situations involving agreements between commercial parties.[268] In *Spring Motors*, the court fails to set out a standard for determining when parties have equal bargaining power, finding it sufficient that Spring Motors had enough bargaining power to persuade Ford to install Clark transmissions in the trucks.[269] In other words, Spring Motors had enough bargaining power to negotiate the terms of the contract.

Significantly, while it appears that Spring Motors had the bargaining power to specify its needs, it failed to negotiate some of the same U.C.C. requirements that present such obstacles to recovery to those who do not have the power to negotiate. Specifically, the warranties offered by Ford and Clark disclaim all other warranties, limit recovery to

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[263] *Seely*, 63 Cal. 2d at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring and dissenting).

[264] *Id.*

[265] *Id.*

[266] *Id.* at 28, 403 P.2d at 157–58, 45 Cal. Rptr. at 29–30 (Peters, J., concurring and dissenting).

[267] *Spring Motors*, 98 N.J. 555, 575, 489 A.2d 660, 670 (1985).

[268] *Id.* at 576, 489 A.2d at 670.

[269] *Id.* at 576, 489 A.2d at 671.

repair and replacement, and disclaim consequential damages.[270] Presumably, Spring Motors had the bargaining power to negotiate the Ford warranty. It is not clear that Spring Motors could have negotiated the warranty running from Clark concerning the transmissions because the warranty ran to Ford, not Spring Motors. Yet Spring Motors specified within the contract that Ford should equip the trucks with Clark transmissions because of "'excellent service and parts availability on past models' and because of Clark's advertisements and brochures;" presumably, Spring Motors was aware of the Clark warranty.[271] Nevertheless, it is not the buyer's awareness, but rather the buyer's ability to bargain to which the court should look. Because Spring Motors had sufficient bargaining power and was not powerless to protect itself, the reasons for applying strict liability were not compelling.

In addition to having sufficient bargaining power, Spring Motors was at least as well situated as the defendants to bear the risk of loss. First, the price paid by Spring Motors reflected the fact that Ford was liable for repair or replacement only; by imposing the risk of loss on Ford, Spring Motors would obtain a better bargain than it originally had made. To impose the risk of loss on Ford would lead to price increases for all of its customers, including ordinary consumers, while Spring Motors just as easily could pass on the cost to its own customers.[272]

Second, as a commercial consumer, Spring Motors may be better situated than Ford to insure against the risk of economic loss.[273] In the case of personal injury, while the manufacturer has a definable, insurable interest, its risk of economic loss is less insurable because there is no typical, predictable economic loss; the same defective product may cause varying amounts of loss depending upon the nature of the purchaser.[274] As one commentator has noted, almost by definition, a victim only can suffer consequential economic loss in the course of business, thus the loss can be treated as a cost of the victim's rather than the manufacturer's enterprise and can be distributed among the customers who benefit from that enterprise.[275] Therefore, the commercial purchaser can estimate the effect of a defectively-functioning product on his or her business and insure accordingly.[276] For that reason, a commercial consumer's risk-bearing ability is as great, if not greater, than the manufacturer's and thus does not require a strict liability remedy.

The U.C.C.'s comprehensive scheme is well-suited for commercial transactions. Allowing Spring Motors to recover in strict liability would displace the U.C.C. provisions of notice and limitations or exclusion of liability. While these provisions frustrate an ordinary consumer's ability to recover in warranty, they are part of a commercial con-

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[270] See *supra* notes 16–17 and accompanying text for the facts concerning the Ford and Clark warranties.

[271] *Spring Motors*, 98 N.J. at 562, 489 A.2d at 663.

[272] *Id.* at 576, 489 A.2d at 671.

[273] *Id.*

[274] *See* Note, *Economic Loss*, *supra* note 51, at 952–58.

[275] *Id.* at 956–57.

[276] *Id.* at 957. Who is the better risk-bearer for direct economic loss presents a closer question. Presumably, the cost of replacement or repair is predictable and thus more easily insurable by the manufacturer. *Id.* A commercial consumer, however, would be able not only to predict the extent of the risk of loss, but also to pass this risk along within his or her business. On the other hand, an ordinary consumer is more likely to suffer direct economic loss than consequential loss and such a consumer would not be able to pass on the risk. Therefore, risk-bearing ability is dependent upon the type of consumer. *See id.*

sumer's bargained-for agreement. Because the policy reasons behind strict liability are not present in the case of a commercial consumer and because the U.C.C. is a comprehensive scheme designed to govern commercial transactions, the U.C.C. restricts a commercial consumer to recovery for economic loss against a remote seller regardless of privity. It may appear that the court has deferred to the legislature in one breath and ignored it in the next, but actually the Code is neutral as to vertical privity.[277]

The *Spring Motors* court did not look at the type of harm, determine that it was a consequential loss, and decide that the U.C.C. was the appropriate remedy. Rather, it looked to the type of consumer and analyzed whether he lacked the bargaining power and risk-bearing ability that call for a strict liability remedy. Finding that he did not, the court appropriately determined that it should restrict the consumer to a U.C.C. remedy. This analysis is the pure type-of-consumer approach advocated by Justice Peters in his concurring and dissenting opinion in *Seely*.

Justice Handler, in his concurring opinion in *Spring Motors*, makes it clear that the court's reasoning is parallel to Justice Peters' reasoning.[278] Justice Handler emphasized, however, that the selection of a remedy does not turn on a label. He stated that it would be incorrect to consider U.C.C. remedies to be exclusively applicable to a consumer's claim simply because the transaction can be viewed as "commercial," or having occurred in the course of business. The ultimate purchaser of a vehicle, Justice Handler continued, could be a travelling salesperson, a small-scale trucker, a carpenter, plumber, or landscape gardener, and it would not automatically follow that these consumers would be limited to a U.C.C. remedy if the vehicle proved to be defective.[279]

Justice Handler's warning, however, is needless, for labelling a consumer a "commercial consumer" under the type-of-consumer test requires the court to look at the consumer's bargaining power and risk-bearing ability. As Justice Handler noted, the reasons for limiting commercial consumers to a U.C.C. remedy suggest that the U.C.C. may be inapplicable to cases involving purchasers who are different from those involved in *Spring Motors*.[280] Logically, if equal bargaining power and an ability to allocate risks are not present in a given case, strict liability should be available.[281]

B. *The Unification of the Minority Jurisdictions Following* Santor

The *Spring Motors* delineation of the availability of a strict liability remedy unifies the analytical approach of *Santor* and its progeny. Although *Santor* did not consider whether a distinction should be made on the basis of the type of consumer, it is clear that it rejected a type-of-harm approach.[282] It is also apparent from the *Santor* court's reasoning that the decision is completley reconcilable with the type-of-consumer test. Specifically, the *Santor* court stated that the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine whether an article is defective.[283] In addition, the court reasoned that the purpose of strict liability is to

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[277] See *supra* note 233 for a discussion of privity.
[278] *Spring Motors*, 98 N.J. at 593, 489 A.2d at 679.
[279] *Id.* at 592, 489 A.2d at 679.
[280] *Id.* at 593, 489 A.2d at 679.
[281] *Id.* at 596, 489 A.2d at 681.
[282] *Santor*, 44 N.J. at 66, 207 A.2d at 312.
[283] *Id.* at 64, 207 A.2d at 311.

insure that the cost of injuries resulting from defective products is borne by the makers of the products, who put them in the channels of trade, rather than by the injured persons who ordinarily are powerless to protect themselves.[284] The *Santor* court thus sets out the same policy reasons for applying strict liability as those presented in *Spring Motors*. In light of these policy reasons, Santor was obviously an ordinary consumer because he purchased a rug for his home, lacked bargaining power, and was unable to spread the cost of his loss. The decision is, therefore, consistent with the type of consumer test.

The minority of jurisdictions following *Santor*, with the possible exception of Ohio, employ the same policy reasons articulated in *Santor* and *Spring Motors* for allowing economic loss recovery in strict liability. These decisions, therefore, embrace the type-of-consumer test. In the Michigan decision, *Cova v. Harley Davidson Motor Co.*,[285] as in *Santor*, the court asked whether strict liability should be limited to personal injury cases and did not directly consider whether a distinction should be made on the type of plaintiff. The court relied on the *Santor* reasoning that the manufacturer is the "father of the transaction," however, and ruled that it could not find any sound reason why the transaction should not be actionable when inadequate manufacture had put a worthless article in the hands of an innocent purchaser who had paid the required purchase price.[286]

There is an important difference between the *Santor* and *Cova* fact situations, however. While *Santor* involved an action by an ordinary consumer who suffered direct economic loss,[287] *Cova* involved an action by a small commercial consumer, a husband and wife team operating a golf course, who suffered both direct economic loss and consequential economic loss.[288] Although the *Cova* court declined to decide the issue of consequential damages, it suggested that the recovery for such loss might depend upon the type of plaintiff involved. Specifically, the court stated, if damages for loss of profits are awarded, it will be soon enough to consider whether there should be limitations on the kinds of plaintiffs who will be permitted to recover consequential damages.[289] This hint places *Cova* within Justice Peters' reasoning in his concurring and dissenting opinion in *Seely* that it is not the nature of the damage that warrants attention, but rather the roles played by the parties and the nature of their transaction.

While the *Cova* court did not indicate how a type-of-consumer test would work, under the reasoning of *Spring Motors*, the court would look to the Covas' bargaining power and risk-bearing ability. After weighing these factors, the court could find the Covas to be ordinary consumers and allow recovery in strict liability. Although the defective product in *Cova* was to be used in the course of the plaintiff's business, the plaintiff in fact had no more bargaining power than an individual buying at the retail level. Thus, *Cova* is consistent with the *Spring Motors* type-of-consumer test.

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[284] *Id.* at 65, 207 A.2d at 312.

[285] 26 Mich. App. 602, 182 N.W.2d 800 (1970). See *supra* notes 100–13 and accompanying text for the facts and reasoning of *Cova*.

[286] *Cova*, 26 Mich. App. at 608, 182 N.W.2d at 804 (quoting *Santor*, 44 N.J. at 60, 207 A.2d at 309).

[287] See *supra* notes 54–72 and accompanying text for the facts and reasoning of *Santor*.

[288] See *supra* notes 100–13 and accompanying text for the facts and reasoning of *Cova*.

[289] *Cova*, 26 Mich. App. at 620, 182 N.W.2d at 811.

Similarly, the municipality in the Wisconsin decision, *LaCrosse v. Schubert, Schroeder & Assoc.*,[290] as in *Cova*, is not easily definable as an ordinary consumer. As in *Cova*, the *LaCrosse* court did not specifically permit the recovery based on the type of consumer, but relied instead on the *Santor* reasoning that there was no sound reason to distinguish between personal injury and economic loss in determining recovery in strict liability.[291] While the court does not mention any distinction between the type of plaintiffs, by employing the *Santor* reasoning, the *LaCrosse* court looked to the policy reasons for allowing strict liability. To determine the relevance of these policy reasons to a particular case, the *LaCrosse* court had to consider the type of consumer, not the type of harm.

Arguably, the *LaCrosse* court went too far in allowing the city to recover. First, a city seeking to replace a roof certainly would have more bargaining power than a homeowner seeking to do the same. Second, a city would be better able to allocate the risk of loss and pass it along to its taxpayers. The city in *LaCrosse*, however, apparently did not have sufficient bargaining power to reach one of the defendants. In addition to suing the general contractor, LaCrosse sued the architects, the roofing installation company, and the manufacturer of the aluminum roof.[292] Thus, *LaCrosse* could present the factual problems of which Justice Handler warned in his concurring opinion in *Spring Motors*.[293] Specifically, LaCrosse may not have had the opportunity to negotiate with these remote defendants who may have had disclaimers or limitations of damages within the warranties they provided to each other and of which the plaintiff would not have been aware. Furthermore, unlike *Spring Motors*, there is no indication in *LaCrosse* that the city specified the type of roof to be supplied. In *Spring Motors*, the court gave great weight in evaluating the parties' bargaining power to Spring Motors' specification to Ford requiring Clark transmissions.[294] Therefore, *LaCrosse* would require more facts than the court supplied to determine whether the city of LaCrosse could be considered an ordinary consumer.

Of the minority of jurisdictions following *Santor*, Ohio may be the only jurisdiction not reconcilable with the type-of-consumer test. In *Iacono v. Anderson Concrete Corp.*,[295] the plaintiff, who recovered for direct economic loss, was a homeowner replacing a driveway.[296] Certainly, Iacono was an ordinary consumer with little bargaining power and no risk-bearing ability; thus his recovery in strict liability was proper under a type-of-consumer test. In *Mead Corp. v. Allendale Mutual Ins. Co.*,[297] however, the court relied on the fact that *Iacono* allowed recovery for direct economic loss,[298] ignored the fact that Iacono was an ordinary consumer, and allowed a large corporation to recover its economic loss in strict liability. Neither of the policy reasons for applying strict liability were present. First, Mead's sufficient bargaining power was apparent from the facts. Knowing

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[290] 72 Wis. 2d 38, 240 N.W.2d 124 (1976). See *supra* notes 114–19 and accompanying text for the facts and reasoning of *LaCrosse*.

[291] *LaCrosse*, 72 Wis. 2d at 45, 240 N.W.2d at 127 (citing *Santor*, 44 N.J. at 60, 207 A.2d at 309).

[292] *Id.* at 40, 240 N.W.2d at 125.

[293] *See Spring Motors*, 98 N.J. at 594, 49 A.2d at 680 (Handler, J., concurring). See *supra* notes 239–43 and accompanying text for a discussion of Justice Handler's factual concerns.

[294] *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.

[295] 42 Ohio St. 2d at 88, 326 N.E.2d at 268.

[296] *Id.* at 88, 326 N.E.2d at 267. See *supra* notes 120–25 and accompanying text for the facts and reasoning of *Iacono*.

[297] 465 F. Supp. 355 (D.N.J. 1979).

[298] *Id.* at 366 (citing *Iacono*, 42 Ohio St. 2d at 93, 326 N.E.2d at 271). See *supra* notes 125–36 and accompanying text for the facts and reasoning of *Mead*.

that one of the Swedish defendants would manufacture the turbine it was purchasing and that another would manufacture many of the component parts, Mead sent its technicians to Sweden for a meeting with officials of both defendant companies.[299] Second, Mead's ability to bear the risk of loss likewise was apparent; Mead was a large corporation and thus could pass on its costs to its consumers. In addition, Mead could and did insure. Indeed, Mead sued one of the insurance companies for the $1,260,000 loss it claimed it had forthcoming under the policy.[300] Therefore, Mead was not an ordinary consumer, lacking in bargaining power or an ability to bear risks, but rather, a commercial consumer, well-equipped to bargain for the commercial transaction it had undertaken. Accordingly, Mead should have been denied recovery for its economic loss in strict liability and, like the commercial consumer in *Spring Motors*, should have been limited to a U.C.C. recovery.

Applying the *Spring Motors* type-of-consumer test to the minority case law following *Santor* clearly shows that the type-of-consumer test is not entirely dependent upon the labels of "ordinary" versus "commercial" consumer; the test requires a balancing of policy as well. Given this balancing of policy, the courts will be able to resolve the two fact situations as yet unsettled under the type-of-consumer test. The first of the situations, presented by *Cova*, involves a small commercial consumer seeking to recover economic loss in strict liability. In light of a small commercial consumer's bargaining power and risk-bearing ability, it should be classified as an ordinary consumer for several reasons. First, if a small commercial consumer refuses to accept a manufacturer's terms, which may include disclaimers and limitations on liability, the manufacturer, after weighing the profits against the anticipated risks, probably will refuse to sell to the consumer a product which the consumer may require for his or her business.[301] Second, small commercial consumers may not have the luxury of turning to other manufacturers if the disclaimer or limitation on liability is an industry-wide phenomenon.[302] Third, if small commercial consumers do not accept the manufacturer's terms, then their losses resulting from the defective product could render them insolvent.[303] This quandary is indicative of the small commercial consumer's lack of bargaining power.

Nor is a small commercial consumer able to allocate its risks. Passing its cost on to the customer can lead to loss of business because the customer can obtain the product or service elsewhere for a lower price. If the manufacturer's terms create a higher-priced business industry-wide, the manufacturer's business, with a wider distribution will better pass along the price.[304] Likewise, a small commercial consumer is not in a good position to insure against risks, because, as one commentator reasons, even if insurance is obtainable, the small commercial consumer can not afford the expense of the premiums.[305] In conclusion, a small commercial consumer is in no better situation to bargain or bear the risk than an ordinary consumer. Under the type-of-consumer test, therefore, small commercial consumers should be allowed to recover damages in strict liability.

The second situation as yet unsettled under the type-of-consumer test involves an ordinary consumer seeking to recover consequential economic loss. While *Cova* presented

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[299] *Mead*, 465 F. Supp. at 357.
[300] *Id.* at 359.
[301] Comment, *The Vexing Problem*, *supra* note 2, at 180.
[302] *Id.*
[303] *Id.*
[304] *Spring Motors*, 98 N.J. at 576, 489 A.2d at 671.
[305] Comment, *The Vexing Problem*, *supra* note 2, at 180.

the closest situation to an ordinary consumer seeking consequential, as opposed to direct, economic loss, the issue has not been squarely presented in the *Santor* minority jurisdictions — New Jersey, Michigan, Wisconsin, or Ohio. An ordinary consumer, by definition, is not likely to suffer consequential damages.[306] Justice Peters in his concurring and dissenting opinion in *Seely*, however, classified Seely as an ordinary consumer, although engaged in the business of heavy-duty hauling, and would have allowed him to recover for the indirect economic loss, the lost profits which he suffered as a result of the truck's defectiveness.[307] Therefore, under the type-of-consumer approach, courts would label small commercial consumers, like Seely or Cova, as ordinary consumers provided they lacked the bargaining power and risk-bearing ability found in such consumers. As ordinary consumers, they would be allowed to recover for all of their damages, including consequential economic loss, in strict liability.

In summary, *Spring Motors* advocates a type-of-consumer test to be employed in determining whether a consumer can recover for economic loss in strict liability. This test requires that courts consider the type-of-consumer seeking to recover. If the consumers lack bargaining power and risk-bearing ability, they should be labelled ordinary consumers. As ordinary consumers, they should be allowed to recover all of their damages in strict liability. Conversely, if their bargaining power and risk-bearing ability are sufficiently comparable to the manufacturer's, they should be labelled commercial consumers. As commercial consumers, they should be restricted to recovery under the Uniform Commercial Code.

Conclusion

In holding that a commercial consumer cannot recover economic loss in strict liability and implying that an ordinary consumer can, *Spring Motors* will have significant impact on future economic loss cases. Prior to *Spring Motors*, the courts following the lead of *Santor* allowed economic loss recovery in strict liability based upon the policy of placing the cost of a defective product on the manufacturer who placed the product on the market, not on the consumers who were powerless to protect themselves. *Spring Motors* clarified that this approach is in essence a type-of-consumer test, requiring the courts to define the types of consumers based on their ability to bargain and bear risks.

Spring Motors has not only clarified the test, but also has unified the minority of jurisdictions that allow a consumer to recover economic loss in strict liability. In the future, these jurisdictions will have a clear indication of what type of consumer will be allowed such recovery. Furthermore, *Spring Motors* brings the minority into conformity with the majority in denying economic loss to commercial consumers, although by a different approach. In so doing, *Spring Motors* leaves only recovery for economic loss by ordinary consumers as the issue differentiating the majority approach from the minority.

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[306] Note, *Economic Loss*, *supra* note 51, at 952–57.

[307] See *supra* notes 96–98 and accompanying text for Justice Peters' reasoning in *Seely*.