The Applicability of Tort Law to Commercial Buyers

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I. INTRODUCTION

In products liability cases it is a common practice for a plaintiff buyer to make several claims against a defendant seller. One common claim arises under Article 2 of the Uniform Commercial Code (the "U.C.C." or the "Code") for breach of either, or both, an express or implied warranty. A second claim often advanced is that the product was delivered in a "defective condition unreasonably dangerous" rendering the defendant strictly liable in tort for the buyer's injury. The final potential claim is that the seller was negligent in the product's manufacture, packaging, or warnings.

Which claim will prove most successful depends on the circumstances of each particular case. For example, if the plaintiff experiences solely economic loss resulting from nonconformity in the goods, the warranty claim would be the most likely to succeed. But if the plaintiff suffers physical injury or damage to property other than the goods in the contract resulting from a dangerous defect in manufac-

1. See infra section II for a discussion of the different types of warranty claims that may arise and how they are treated under the Uniform Commercial Code.
2. W. PAGE KEeton ET AL., PROSSER AND KEeton ON THE LAW OF TORTS § 98, at 695 (5th ed. 1984). There are numerous other theories of liability which may be included in a products liability case depending on the facts. These include misrepresentation, fraud, nuisance, trespass, absolute liability, battery, admiralty, and statutory claims. See SCOTT BALDWIN ET AL., THE PREPARATION OF A PRODUCT LIABILITY CASE § 1.4 (2d ed. 1993).
3. See BALDWIN, supra note 2, § 4.1. A contract claim may also be subject to a longer statute of limitations than tort claims. See id. It is interesting to note that a breach of warranty is sometimes viewed as a form of strict liability. Like the tort doctrine of strict liability, a claim for breach of contract does not require any showing that the seller was negligent. All that is required is to show that the goods did not conform to the terms of the contract. This showing is analogous to the "defective condition unreasonably dangerous" showing that is required to state a strict products liability claim. One commentator has compared the implied warranty of merchantability and strict tort liability stating that:

[T]he implied warranty of merchantability seems to be a hybrid of negligence and strict liability much like section 402A of the Restatement (Second) of Torts. Indeed, both section 402A and U.C.C.'s implied warranty of merchantability appear to require specific proof of deviation or malfunction, the former requiring the product be in a "defective condition" and the latter requiring the product be of "unmerchantable" quality. Perhaps the chief advantage to an injured plaintiff of the implied warranty of merchantability action over a section 402A action is simply that the term "merchantable" is broad enough to encompass a greater array of product malfunctions than section 402A. Of course, these advantages may be offset by the requirement of notice, the possibility of disclaimer, and other restrictions of warranty law.

ture or design, strict liability may be the strongest claim. In the event neither of these claims succeeds, the plaintiff may be required to prove that the manufacturer negligently caused the plaintiff's loss or injury.

A primary purpose of the sales contract is to provide the parties to the contract with certainty regarding their transaction: certainty that the product will be delivered on time, certainty that it will be accepted, and certainty that it will conform to the description and warranties. Sales contracts may also attempt to provide certainty regarding the available remedies if one of the parties fails to perform its end of the bargain. Therefore, it is imperative that disputes arising out of a negotiated sales contract between parties of relatively equal bargaining power be settled by the court in accordance with the terms of the contract.

Many commercial buyers, however, have found a way to recover damages resulting from risks allocated to them by their sales agreement. They do so by stating claims in tort. Although courts are generally opposed to this use of tort law to avoid a sales contract, they have been inconsistent in determining the applicability of tort law to commercial sales transactions.

Section II of this Article summarizes the provisions of the U.C.C., which provide a flexible medium for commercial parties to create economically efficient sales agreements. Section III reviews how tort law has provided a necessary protective function in consumer transactions. Section IV catalogues the various ways courts have navigated the unclear and often unfair intersection between tort law and the U.C.C. Section V concludes this Article by proposing a resolution to the question of which law should govern losses caused by defective products and the extent to which these losses may be disclaimed.

4. Since notice and privity are not required in tort claims, these claims may be the most useful to the plaintiff who is not in a contractual relationship with the defendant. See infra section III.

5. Negligence puts the burden on the plaintiff to show that the defendant did not exercise the appropriate standard of care. See infra section III.

6. See generally Detroit Edison Co. v. Nabco, Inc., 35 F.3d 236, 242 (6th Cir. 1994) (noting that two sophisticated commercial parties "with the warranties provided by the U.C.C. as a baseline, could have considered the costs to each of bearing the risk of a defective product and allocated between them, with certainty, the costs of such risk"); Gates Rubber Co. v. USM Corp., 508 F.2d 603, 614 (7th Cir. 1975) ("In the evaluation of foreseeable commercial risks, Illinois seems to attach greater importance to the commercial interest in certainty than to the policy of deterring negligence.").

7. See infra section IV.

8. See infra notes 12-68 and accompanying text.

9. See infra notes 69-124 and accompanying text.

10. See infra notes 125-233 and accompanying text.

11. See infra notes 234-242 and accompanying text.
II. PRODUCTS LIABILITY UNDER SALES LAW

The warranty provisions of Article 2 allocate the risk of the seller's nonperformance in sales transactions. They also provide buyers and sellers with a means to redistribute this risk according to the wishes of the interested parties. In bringing a warranty action, the buyer must prove that (1) a warranty existed, (2) the warranty was breached, (3) the breach of the warranty proximately caused the loss suffered, and (4) notice of the breach was given to the seller.

First, the Code imposes implied warranties that serve to maintain commercial and industry standards and that maintain a minimum level of product performance. Second, the parties may use express

12. See, e.g., Detroit Edison v. Nabco, Inc., 35 F.3d 236, 240 (6th Cir. 1994) ("The UCC ... establishes a set of unified, coherent standards controlling commercial transactions ... . When a product does not live up to the requirements of the sales contract, the UCC enables a purchaser to recover on the basis of implied warranties of fitness and merchantability, as well as on any express warranties created between the parties."). This section is presented as an overview of the most pertinent Code warranty provisions. For a more complete discussion of Article 2 warranties, consult Debra L. Goetz et al., Article Two Warranties In Commercial Transactions: An Update, 72 CORNELL L. REV. 1159 (1987).

For a number of years, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, the two organizations jointly responsible for drafting, updating, and promulgating the Uniform Commercial Code, worked on a revision of Articles 2 and 2A. In a press release on August 18, 1999, they announced the formation of a new Drafting Committee to continue the effort to revise Articles 2 and 2A of the U.C.C. The press release stated:

In May of this year the ALI approved revised versions of both Articles 2 and 2A that were the result of many years of collaborative effort by the two organizations. At the annual meeting of NCCUSL in July, opposition to certain sections of Article 2, which regulates the sale of goods to consumers and to merchants, led the leadership of NCCUSL, which has sole responsibility for seeking enactment of UCC revisions in the state legislatures, to conclude that the prospects for uniform adoption throughout the country required additional review of some provisions. Accordingly, the NCCUSL annual meeting took no action with respect to either Article 2 or Article 2A.


14. See U.C.C. § 2-314(3) (providing that warranties may be implied from course of dealing or usage of trade); Goetz, supra note 12, at 1191 (noting that implied warranty was designed to uphold commercial standards). The implied warranty of merchantability, for instance, warrants not the highest or lowest quality in the trade, but rather for fungible goods, it warrants that the goods will be of "fair average quality" within the contract description. See U.C.C. § 2-314(2)(b). For other goods, it warrants that they will "pass without objection in the trade under the contract description." U.C.C. § 2-314(2)(a).
warranties to impose a higher level of quality than imposed by the implied warranties.15 The Code also allows the parties to contractually limit or eliminate remedies available for breach of warranties.16 Finally, the Code provides for a disclaimer of warranties.17 The selective creation and disclaimer of warranties permit commercial parties to treat the risk of defective goods as a commodity: the commercial buyer, in return for a lower sales price, can choose to assume some or all of that risk. This decision for economically sophisticated purchasers should depend on whether it is able to insure against the risk at a lower cost than the seller.18 These provisions also permit sellers to shift some or all of the risk of defective goods to buyers. However, law outside of the U.C.C. has developed to protect consumers from some transfers of this risk.19

A. Creating Liability in the Seller

1. Implied Warranty

If the parties fail to address risk of nonperformance by the seller, the Code imposes liability on the seller when it is commercially reasonable to do so. The Code contains two implied warranties relating to the quality or suitability of goods. Where the seller is a merchant,20 the Code imposes an implied warranty of merchantability.21 Merchantability in this context means that the goods must be "fit for the ordinary purposes for which such goods are used."22 The Code

15. See U.C.C. § 2-313 (1989). All warranties are construed as consistent with each other and cumulative, unless such a construction is unreasonable. See U.C.C. § 2-317 (1989).
18. In the case of a commercial transaction, unlike the consumer transaction, both parties are able to assess the risk of loss in the event the product is defective and to insure against such loss. This ability allows the parties to allocate risks of loss in the most efficient manner possible. See William K. Jones, Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort, 44 U. Miami L. Rev. 731, 763-68 (1990) (noting that the buyer is often in the best position to insure against the risk of business interruption).
19. See the Consumer Product Warranties (Magnuson-Moss) Act, 15 U.S.C. § 2303 (1975), which limits the ability to disclaim implied warranties in consumer transactions which include written warranties, discussed infra at notes 33-38. See also RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1977) (discouraging enforcement of strict liability disclaimers).
20. A merchant is one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." U.C.C. § 2-104(1) (1989).
22. U.C.C. § 2-314(2)(c). Section 2-314(2) sets minimum standards for merchantability which require that goods:
   (a) pass without objection in the trade under the contract description; and
also imposes an implied warranty of fitness for a particular purpose where the seller has reason to know that the buyer intends a specific use for the goods and that the buyer is relying on the seller's knowledge or expertise in determining the suitability of the goods for that use. Thus, the warranties of fitness and merchantability implied by the Code create a default allocation of risk of the seller's nonperformance, which applies in certain situations unless the parties alter this allocation.

2. **Express Warranties**

The seller may, by making express warranties, assume performance obligations beyond those imposed by the Code's implied warranties. An express warranty is an explicit undertaking by the seller with respect to the quality, description, condition, or performability of the goods. The undertaking may consist of an affirmation of fact or a promise that relates to the goods, a description of the goods, or a sample or model of the goods. In each of these instances, the undertaking must become or be made part of the basis of the bargain in order for an express warranty to be created. In recognition that the reasonable buyer does not and should not rely on everything that a seller says, the Code provides that some statements by the seller do not create express warranties. The seller may make affirmations about the value of goods ("puffing") without creating an express warranty that the goods will actually have that value. Also, the seller may praise

(b) in the case of fungible goods, re of fair average quality within the description; and . . .

d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. 2-314(2).


24. See infra section II.B.

25. See U.C.C. § 2-313(1); see also Goetz, supra note 12, at 1171-72 (noting that the affirmations and descriptions may be made in a number of ways, including "advertisement, brochure, written sales contract, owner's manual, repairs logbook, or oral representation").

26. See U.C.C. § 2-313(1).

27. See U.C.C. § 2-313(2); see also Carpenter v. Alberto Culver Co., 184 N.W.2d 547, 549 (Mich. App. 1970) ("Representations which merely express the seller's opinion, belief, judgment, or estimate do not constitute a warranty."). The creation of an express warranty by a seller's statement may turn on the specificity of the statement. See Downie v. Abex Corp., 741 F.2d 1235, 1240 (10th Cir. 1984) ("The line between puffing and warranting is often difficult to draw, but the more specific the statement the more likely it constitutes a warranty.").
the goods without creating an express warranty. However, it is not
the case that the seller must intend for an express warranty to be cre-
ated. It is only necessary that, from an objective point of view, an
affirmation, description, or sample becomes part of the "basis of the
bargain." While "basis of the bargain" has not been well defined, it
relates to whether a reasonable person would believe and rely upon
the seller's statement and whether the statement was expressed
merely as opinion. Where a buyer can show that affirmations other-
wise within the scope of the Code's express warranty provision were
made and were reasonably believable, such affirmations are rebut-
tably presumed to be part of the basis of the bargain.

B. Removing Liability from the Seller: Disclaimers

The seller's performance obligations may be limited by the use of
disclaimers. For the buyer's protection, however, the Code imposes
some restrictions on the seller's ability to disclaim warranties in a
sales contract. The Code severely constrains the seller's ability to dis-
claim express warranties. Furthermore, the Code seeks to ensure
that the buyer is aware of disclaimers affecting implied warranties.
To this end, a disclaimer of the implied warranty of merchantability
must use the term "merchantability and in case of a writing must be
conspicuous." Additionally, the implied warranty of fitness for a
particular purpose may only be disclaimed by a conspicuous
writing. Moreover, if the seller wishes to disclaim all implied warranties, it
must use "language which in common understanding calls the buyer's
attention to the exclusion of warranties and makes plain that there is
no implied warranty." The Code directs that the language "as is" or
"with all faults" will have this effect. Finally, course of dealing or
usage of trade may exclude an implied warranty.

28. See Carpenter, 184 N.W.2d at 549.
29. See U.C.C. § 2-313(2).
31. See id. § 2-313:3. The official comment to the U.C.C. § 2-313 mentions that, in
practice, no particular reliance is required to be shown in order to make affirma-
tions of fact part of the agreement because such affirmations become part of the
description of the goods. See U.C.C. § 2-313 cmt. 3; see also Goetz, supra note 12,
at 1173-84 (discussing the various judicial approaches to the basis of the bargain
element of express warranty creation).
32. See HAWKLAND, supra note 30, § 2-313:5.
33. See U.C.C. § 2-316(1). This section is a rule of interpretation that gives priority
to language creating an express warranty over language tending to negate that
warranty.
34. U.C.C. § 2-316(2).
35. See id.
36. U.C.C. § 2-316(3)(a).
37. Id.
38. See U.C.C. § 2-316(3)(c).
In addition, under the Magnuson-Moss Warranty Act, in the sale of consumer goods a seller who makes a written warranty cannot disclaim any implied warranty. The Act defines consumer goods as "tangible personal property . . . normally used for personal, family, or household purposes."

C. Procedural Limitations on Seller Liability

In addition to contractual disclaimers, the Code places a number of procedural limitations on warranty liability. First, if the buyer refuses the seller's demand to inspect the goods, then defects that should have been discovered by such inspection are outside of any implied warranty. Second, the buyer must notify the seller within "a reasonable time after he discovers or should have discovered any breach . . . ." Third, the buyer must be in privity with the seller. Where goods are purchased through an intermediary, the buyer's privity with the seller comes into question. Section 2-318 gives the states three options in determining who will be a third party beneficiary of the seller's warranties to the original buyer. In addition, some courts have extended the protection of express warranties to parties not in privity.

In addition to these requirements to state a cause of action for breach of warranty, the U.C.C. contains a four-year period of limitations after the cause of action has accrued. However, "the parties

40. See id. at § 2308 (permitting an implied warranty to be limited to the duration of a written warranty, provided that such limitation is reasonable, conscionable, and conspicuously displayed).
41. Id. at § 2301.
42. See U.C.C. § 2-316(3)(b).
43. U.C.C. § 2-607(3)(a).
44. See U.C.C. § 2-318.
45. See id. There are three alternative privity provisions available to the states. Alternative A is the most restricted and limits the benefit of seller's warranties to natural persons in the buyer's household who may reasonably be expected to use, consume or be affected by the goods, provided that such natural person suffers personal injury. See id. Alternative B removes the requirement that the person be in the buyer's household. See id. Alternative C broadly extends protection "to any person who may reasonably be expected to use, consume or be affected by the goods." Id. For a more complete discussion of the three alternative provisions of U.C.C. § 2-318 see William L. Stalworth, An Analysis of Warranty Claims Instituted by Non-Privity Plaintiffs in Jurisdictions That Have Adopted Uniform Commercial Code Section 2-318 (Alternative A), 20 PEPP. L. REV. 1215, 1228-33 (1993).
47. See U.C.C. § 2-725(1) (1989). Where necessary to protect consumers, some courts have held that the statute of limitations applicable to an action for breach of implied warranty is that applicable to tort actions. See Hanson v. American Motors
may reduce the period of limitation to a period of not less than one year . . . "48 Under normal circumstances, the cause of action accrues at the time of delivery. Where a contract warrants future performance, however, the period of limitation begins to run at the time "the breach is or should have been discovered."49 Thus, the Code's provision for limitations of actions also allows the allocation of risk to be based on time of discovery. In the absence of contractual modification, the buyer assumes the risk of a defect that is not discovered within four years of delivery. If the parties desire a shorter period of limitation, they may expressly shorten the period—but cannot shorten it to less than one year. Although the period may not be expressly lengthened, the buyer can negotiate for a longer period by asking for warranty language that addresses future performance.50

D. Remedies for Breach of Warranty

If the goods do not conform to the warranties provided under a sales contract, the Code allows the buyer to recover compensatory damages resulting "in the ordinary course of events from the seller's breach."51 Unless special circumstances show proximate damages of a different amount, the measure of damages for breach of warranty is the difference between the value of the non-conforming goods and the value they would have had if they had conformed to the warranty.52 Where appropriate, incidental and consequential damages also may be recovered.53 Incidental damages include reasonable expenses resulting from the breach of warranty, such as those incurred in inspection, transportation and custody of rejected goods and in effecting cover for the defective goods.54

Consequential damages may be recovered for "(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty"

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48. U.C.C. § 2-725(1).
49. U.C.C. § 2-725(2).
50. See Jones, supra note 18, at 745.
52. See U.C.C. § 2-714(2).
53. See U.C.C. § 2-714(3).
ranty." The first category of consequential damages refers to pure economic loss, such as lost profits and spoilage of work-in-progress. Recovery in this category is restricted to losses that are both unavoidable and foreseeable. The second category of consequential damage permits recovery for personal injury and damage to property other than the product itself.

In order to recover for breach of warranty, the buyer must prove the extent of its losses; however, the degree of certainty to which losses must be shown is deliberately left open by the Code. The drafters of the Code intended that damages could be proven by any means reasonable under the circumstances.

### E. Contractual Limitation of Remedies for Breach of Warranty

Just as the Code allows the parties to a contract to allocate the costs caused by defective goods, the Code also permits the parties to determine what remedies should be available for a breach of the warranties provided. The Code permits the parties to create by explicit agreement remedies in addition to or instead of those provided in the Code and may limit or change the measure of damages recoverable in the event of breach. However, if the court determines that an exclusive remedy provision fails its essential purpose, the court may grant other Code remedies as appropriate. Moreover, any limitation or exclusion of consequential damages that is unconscionable will not be enforceable.

Under section 2-718, "[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy." While the provision expressly invalidates unreasonably large liquidated damages as a

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55. U.C.C. § 2-715(2).
56. See U.C.C. § 2-715(2)(a). Professor Jones observes that foreseeability has been of very little "decisional significance" since it is not required that the seller could have anticipated the particular losses incurred if the product was used for its intended purpose. See Jones, supra note 18, at 744.
57. See U.C.C. § 2-715(2)(b).
58. See U.C.C. § 2-715 cmt. 4.
59. See id.
60. See U.C.C. § 2-719(1) (1989). This power is subject to the provisions of section 2-718 on liquidation of damages. Where the agreement does not explicitly refer to the contractual remedy as exclusive, then it merely creates an optional remedy, which may be sought as an alternative to other Code remedies.
61. See U.C.C. § 2-719(2).
62. See U.C.C. § 2-719(3).
63. U.C.C. § 2-718(1).
penalty for breach, it is conspicuously silent on the matter of unreasonably small liquidated damages provisions.64

The Official Comment to section 2-718 notes that unreasonably small amounts of liquidated damages may be attacked as “unconscionable.”65 In the event that the buyer raises such a claim, however, the seller must be given a reasonable opportunity to rebut the claim by offering evidence as to the purpose, effect, and commercial setting of the limitation clause.66 These Code provisions direct the court to examine contract provisions limiting or eliminating remedies for breach of warranty in the context of the entire sales contract.67 Because it is very difficult to show unconscionability in a commercial setting,68 the Code, in effect, sanctions knowledgeable parties to use freely the limitation or exclusion of remedies as additional dimensions in their bargaining process.

III. TORT LAW AND CONSUMERS

In 1960, the New Jersey Supreme Court decided the case of Henningsen v. Bloomfield Motors69 and Dean Prosser wrote his landmark article urging an “assault on the citadel” of products liability law.70 Since that time, the law of products liability has undergone rapid and significant evolution.71 Products liability has indeed become one of

64. See id.
65. U.C.C. § 2-718 cmt. 1.
66. See U.C.C. § 2-302(2) (1969); see, e.g., Dow Corning Corp. v. Capitol Aviation, Inc., 411 F.2d 622, 627 (7th Cir. 1969) (holding that a provision excluding airplane manufacturer’s liability for late delivery of a new type of airplane was not unconscionable).
67. Commentators have noted that the factors considered in determining unconscionability fall into procedural and substantive categories. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 132-159 (4th ed. 1995). Procedural factors involve the relative bargaining power of the parties and include age, education, intelligence, business acumen and experience, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, and whether there were alternate sources of supply for the goods in question. The substantive category examines the contractual terms and requires a determination of whether they were commercially reasonable. Usually courts balance these factors, requiring a certain level of both substantive and procedural unconscionability to reach a determination that the contractual provision is unconscionable. See id. at 150.
68. The general rule is that unconscionability is exceptional in commercial settings. This rule “applies to the unconscionability of any contract provision, including limitations of general damages.” Tharalson Co. v. Pfizer Genetics, Inc., 728 F.2d 1108, 1111 (8th Cir. 1984).
69. 161 A.2d 69 (N.J. 1960). Henningsen is regarded as the leading case imposing strict products liability. See KEETON, supra note 2, § 97.
the most significant areas of commercial law. Section 402A of the Restatement (Second) of Torts, holds the sellers of defective products strictly liable, allowing "consumers" and "users" to receive compensation for injuries caused by these products. An examination of the origins of the strict liability doctrine, however, reveals that it was not designed to be applied in certain commercial settings.

The doctrine of strict products liability contained in section 402A of the Restatement (Second) of Torts is more practical for the protection of consumers who are injured by a defective product than is the contractual law of warranty. This is because consumers are usually not in a position to bargain with a manufacturer for adequate protection from dangerous defects in products or remedies for injuries caused by them. Also, the contractual requirements of privity between the parties and notice to the manufacturer of the defectiveness of the product essentially bar many consumer causes of action from being based on a warranty theory. Section 402A eliminates these problems, holding a manufacturer strictly liable when a defective product it places in the stream of commerce injures a consumer.

Historically, a consumer who was injured by a defective product could only look to the law of warranty and negligence as a remedy for injuries sustained. Privity of contract was a required element in a products liability action. If there was no privity of contract between the parties, the injured party might be without a remedy. Even if a defendant was guilty of affirmative negligence in performing a contract, a third party who was not in privity of contract with the defendant could not seek a judgment against him. This doctrine was followed for many years. It was even applied in cases where a manufacturer negligently manufactured a product that foreseeably caused


72. Restatement (Second) of Torts § 402(A) 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
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

75. See id.
harm to a citizen with whom the manufacturer had no privity of contract.76

The other available remedy was based on a contract warranty theory. If the seller gave the purchaser an express warranty that the product failed to achieve, the purchaser had a remedy. If there was no express warranty from the retailer, the purchaser could sometimes recover on the basis of an implied warranty, because goods were required to meet a minimal expectation of quality and safety. In earlier periods, the courts followed a motto of caveat emptor; let the buyer beware. Courts eventually rejected this idea and held that a warranty was implicit in a sale of goods. This concept has been codified in the Uniform Commercial Code, which states that goods must be “fit for the ordinary purposes for which such goods are used.”77 This standard applies to the seller of any goods.

Because implied warranty was a contract theory, it had all of the advantages and disadvantages of a contract. While the seller was subject to strict liability if a product did not meet the standard of fitness for ordinary purposes, the seller was only liable to the purchaser who was in privity of contract with him. Thus, the manufacturer was not liable unless he sold the product directly to the purchaser. Third persons who did not purchase the product, but were injured by it, could only recover under negligence theory.

Eventually, exceptions to the privity requirement began to develop. One court held that the privity rule did not bar recovery in cases involving imminent danger to consumers.78 Imminent danger occurred when death or great bodily harm would be “the natural and almost inevitable consequence” of the negligence of the manufacturer.79 This exception was further developed in MacPherson v. Buick Motor Co.80 Judge Cardozo wrote the majority opinion, which held:

[T]he principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger . . . . If [the manufacturer] is negligent where danger is to be foreseen, a liability will follow.81

This opinion changed the “imminent danger” test into a test of whether the danger was foreseeable.82 Liability under this exception

76. See Losee v. Clute, 51 N.Y. 494 (1873).
77. U.C.C. § 2-314(2)(c).
78. See Thomas v. Winchester, 6 N.Y. 397 (1852).
79. Id. at 408.
80. 111 N.E. 1050 (N.Y. 1916).
81. Id. at 1053.
82. See id.
was not limited to buyers of products, but applied to all persons who could reasonably be foreseen to use the product. 83

In 1960, the Supreme Court of New Jersey decided Henningsen v. Bloomfield Motors, Inc., 84 a landmark decision that changed the existing law applied to defective products. The case involved a defective automobile that crashed and caused property damage to the car and personal injuries to the driver, the owner's wife. The court held that when a manufacturer puts a product into the stream of trade and promotes its purchase to the public, "an implied warranty that it is reasonably suitable for use . . . accompanies it into the hands of the ultimate purchaser." 85 By extending a warranty of safety to consumers of all products in this way, the court removed the obstacle of privity from all cases involving a defective product that causes physical injury. 86

The California Supreme Court took this idea one step further in Greenman v. Yuba Power Products, Inc. 87 by severing strict products liability from the restrictions of warranty theory and completely eliminating the privity problem. It held that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 88 The court recognized that in cases of dangerous products, courts applying strict liability had, in the past, circumvented the privity requirement by basing recovery on the theory of express or implied warranty running from the manufacturer to the plaintiff. 89 The court reasoned that it no longer made sense for such liability to be governed by the law of contract warranties, but should instead be controlled by the law of strict liability in tort. 90 Citing Henningsen, the court reached this conclusion based on the abandonment of the requirement of privity between the parties, the recognition that the liability is not assumed by agreement but imposed by law and the unwillingness to permit manufacturers to define the scope of their own responsibility for defective products. 91 This rule has since been broadly accepted. 92

83. See also Champlin v. Oklahoma Furniture Mfg. Co., 269 F.2d 918, 922 (10th Cir. 1959) (extending the same reasoning).
84. 161 A.2d 69 (N.J. 1960).
85. Id. at 84.
86. See id.; see also Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985) (holding the same).
87. 377 P.2d 897 (Cal. 1963).
88. Id. at 900.
89. See id. at 901.
90. See id.
91. See id.
Shortly after the *Greenman* decision, the American Law Institute included a new section, 402A, captioned "Special Liability of Seller of Product for Physical Harm to User or Consumer," in the *Restatement (Second) of Torts.* Section 402A imposes strict liability on sellers of defective products that cause injury to consumers and eliminates priv-

ity requirements. The comments to that section make clear that it is not governed by the warranty provisions of the U.C.C. The section limits claims to those involving physical harm, either personal injury or property damage. This limitation is based on sound policy reasons. The law of sales has been carefully articulated to govern economic relations between buyers and sellers. While warranty rules may make it difficult to be compensated for physical injury, they function well in a commercial setting. They determine the "quality of the product the manufacturer promises and thereby determine the quality he must deliver."

In addition, strict products liability has often been applauded as advancing several public policy goals. Indeed, Justice Roger Traynor, in the first significant opinion suggesting strict liability for product defects, argued:

> public policy demands that responsibility be fixed wherever it will most effec-

tively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot . . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."

Justice Traynor also advanced the proposition that strict liability is justified because the injured person is in a poor position to identify negligence on the manufacturer's part. These two reasons became the recognized rationales for imposition of strict liability in *Greenman v. Yuba Power:*

> "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." As
these concepts have evolved, they have been further parsed out into "loss spreading or compensation, risk shifting, incentives to safety, and cost internalization." These reasons rest on the desirability of safer products and the protection of unwary consumers. The concept of business liability has fully shifted from negligence to strict liability under the auspices of providing better distribution of risk and loss between the manufacturer and the unwary consumer.

Such analysis has not been without its detractors. Criticisms of Justice Traynor's rationale have ranged from an empirical study suggesting little safety improvement from strict liability to a proposition that this expanded liability actually decreases safety. For the purposes of this article, however, we will assume the legitimacy of Justice Traynor's justifications for strict products liability. Although these grounds for strict liability are all firmly rooted in the consumer sphere, we must evaluate those claims in a commercial setting to see what result, if any, would occur if strict liability was abandoned between entities of roughly equal bargaining power.

The justifications for imposition of strict liability revolve around the safety of the product. But is "safety" a concept that can be readily defined in a strict liability regime? Safety is not an absolute, i.e., products do not fit neatly into either "safe" or "unsafe." Such propositions create "mischief," assuming that "perfect safety is both technologically feasible and normatively desirable." Principles of negligence thus become the proper measuring stick of safety. Judge Learned Hand's decision in United States v. Carroll Towing Co. exemplifies how a court may apply risk-utility analysis to find an optimal level of care based on the situation. One commentator has identified negligence as "the ideal standard for product design responsibility." Additionally, the Restatement (Third) of Torts endorses use of the negligence concept in determining safe product design, even though its application is through the eyes of "strict liability." If safety is already be-

104. See id.
108. Traynor's views on the benefits of strict liability continue to be recognized, notwithstanding the harsh criticism from all sides.
110. 159 F.2d 169 (2d Cir. 1947).
111. See Owen, supra note 109, at 754.
112. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a.
ing evaluated in terms of negligence, the impact of the removal of strict liability in a commercial setting should have no effect.

Strict liability principles are appropriate when the parties in the transaction are not familiar with each other or lack the knowledge necessary to bargain adequately. They may be inefficient, however, when the parties are knowledgeable and can bargain for the appropriate remedy. In situations where the buyer has sufficient knowledge and bargaining power, warranties become the most efficient way to allocate loss and provide safety. This is because the parties to a particular transaction are in the best position to evaluate the costs and benefits of the items being purchased. Warranties allow the parties to set their own equation in the risk-utility analysis, creating less need for judicial intervention in the event of a breach. Parties will find themselves in a better position to allocate risks and spread losses because they will know the result of the risk-utility formula without worrying over what level would have been judicially set.

Safety will not diminish either. Both parties will be more aware of their responsibilities in the area of safety because they will have allocated those duties without later intervention, judicial or otherwise, being necessary. The guessing game behind the optimal level of duty becomes resolved as each party is aware of their responsibility as it is allocated by the warranty provision.

Of course, these proposals do have limitations. For example, they are only applicable to cases involving two commercial entities of roughly equal bargaining power. The bargaining power requirement, as expanded below, prevents a powerful seller from forcing an unsafe (or "less safe," given the discussion above) product on a weak buyer. Warranties between two equal powers should allow for the proper allocation of risk between the two. In addition, these proposals do not address third parties that are not privy to the contract. Such parties injured by the product would still be free to sue the manufacturer under negligence and strict liability theories. This provides at least a certain minimum degree of safety, regardless of the persuasiveness of the above arguments. Abandoning strict liability would only have a meaningful effect on allocation of loss due to damage to the property itself, damage to other property, and pure economic loss.

Another concern of the courts has been preserving the ability of consumers to bring actions against manufacturers. The U.C.C. "explicitly relates to actions 'for breach of any contract for sale' and presumably was not intended to apply to tort actions between consumers and manufacturers who were never in any commercial relationship or setting." The U.C.C. includes some requirements that may pose

113. See supra notes 25-32 and accompanying text.
considerable obstacles to a buyer's recovery. For example, the buyer may not be able to recover under contract law because of a lack of privity with the manufacturer.115 Also, the requirement of notice to a seller of a breach of warranty may bar recovery.116 The second arises from the seller's ability to limit or disclaim liability to an innocent purchaser. "A buyer who does not deal directly with a manufacturer cannot negotiate over the terms of a disclaimer and might find it impossible to give the manufacturer notice of the breach of warranty following an injury."117

It has been held that strict liability cannot be contractually disclaimed in the consumer context.118 Allowing manufacturers to disclaim strict liability to consumers would allow them to define the scope of responsibility for harm caused by their products.119 Strict liability circumvents these technical requirements of privity, notice, and limitation of damages.120 Avoiding these requirements is especially important for the injured party who is outside the distribution chain for the product.121

The Restatement (Third) of Torts: Products Liability provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."122 A major change in the Restatement (Third) from 402A in the Restatement (Second) is the separation of rules covering manufacturing defects from defective designs and inadequate warnings or instructions. These changes are not relevant to the issues discussed herein.

The concept of strict products liability was created "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."123 This cost-shifting rationale protects individual consumers in two ways. It not only provides a fair distribution of the costs of the injuries caused by defective products; it also provides a strong incentive for companies to insure the safety of their products before the products are placed on

117. Spring Motors, 489 A.2d at 668.
119. See id.
120. See id. at 148-49.
121. See id. at 149.
the market. But how should courts apply strict liability outside of the consumer sphere it was designed to protect? Section IV examines the paths courts have taken in applying strict liability to commercial transactions.

IV. CONFLICTS BETWEEN SALES AND TORT LAW REGARDING LIABILITY FOR DEFECTIVE PRODUCTS

As previously discussed, two distinct bodies of law have evolved both of which apply to defective products. The first, sales law, is statutorily created and contractually based. The second is judicially created and tort-based. Because both bodies of law can apply to the same transaction, conflicts between the two causes of actions have inevitably arisen. Given that the purposes and historical antecedents of each differ in a number of respects, the conflicting approaches have not proven readily reconcilable.

In this article we are concerned with a significant subset of these conflicts. First, should strict liability in tort apply to commercial transactions involving two business entities? Second, if the answer to the first question is yes, in such a transaction should a seller's disclaimer of liability for defective products be effective? Third, what types of damages caused by defective products should be recoverable under strict liability in torts? Courts have struggled with these three issues and, more generally, with the role of strict liability in purely commercial transactions where a defective product has caused a loss to a merchant-buyer. We will now examine their varied and inconsistent approaches.

A. Does Strict Liability Apply to Commercial Transactions?

The great majority of courts apply strict liability in tort to commercial transactions. The California courts, however, have held that strict liability is not applicable to commercial transactions between parties of equal bargaining power who can fairly allocate any risk of loss between them. In Kaiser Steel Corp. v. Westinghouse Electric

126. One court noted that “[t]he rule of strict liability for defective products is an example of necessary paternalism judicially shifting risk of loss ... Judicial paternalism is to loss shifting what garlic is to a stew—sometimes necessary to give full flavor to statutory law, always distinctly noticeable in its result, overwhelmingly counterproductive if excessive, and never an end in itself.” Kaiser Steel Corp. v. Westinghouse Elec. Corp., 127 Cal. Rptr. 836, 845 (Ct. App. 1976).
127. See, e.g., cases cited infra notes 149-183.
the California Court of Appeals adopted a four-prong test to determine if a party could recover under strict liability. The court held "that the doctrine of products liability does not apply as between parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it." The court reasoned that the principles and rules governing warranties were developed to meet the needs of commercial transactions, while products liability law was designed to address situations in which the principles of sales warranties serve their purpose "fitfully at best." Wherever the U.C.C. and contract law sufficiently serve their purpose to protect a party's rights, there is no need to resort to tort law. For transactions meeting all four factors enunciated by the court, the U.C.C. is deemed to provide the exclusive remedy.

The next California case dealing with this issue was Scandinavian Airlines System v. United Aircraft Corp., in which the Ninth Circuit fully deferred to the opinion in Kaiser Steel. The court held that the doctrine of strict liability in tort was not available to the plaintiff, stating:

Interpreting these four requirements as the court did in Kaiser leads us to the conclusion that SAS does not have a claim in strict tort liability against United. SAS, United and McDonnell Douglas dealt in a commercial setting from positions of relatively equal economic strength. The specifications of the engines were negotiated by the parties. Finally, McDonnell Douglas, United and SAS all negotiated the risk of loss for defects in the engines.

The United States Court of Appeals affirmed the district court, quoting its holding that the doctrine of strict liability is not applicable because of the "lack of public policy for such a position." Strict liability is based on a policy "designed to protect the small consumer and to allocate the risk of loss [from a defective product] to the person most able to bear it . . . the manufacturer." There is no policy reason for a manufacturer to be subject to strict liability when the buyer is also a large commercial entity.

129. See id. at 845; see also Aris Helicopters Ltd. v. Allison Gas Turbine, 932 F.2d 825 (9th Cir. 1991) (following the California approach).
130. Kaiser Steel, 127 Cal. Rptr. at 845.
131. Id. at 844.
132. See id.
133. 601 F.2d 425 (9th Cir. 1979).
134. See id. at 429.
135. Id.
136. Id. at 428.
137. Id.
138. See id.
Subsequent decisions have slightly modified the four *Kaiser Steel* requirements. In *S.A. Empresa, etc. v. Boeing Co.*, the United States Court of Appeals for the Ninth Circuit eliminated the third requirement—bargaining for the product's specifications. The court stated that a reading of the previous line of cases applying the test "indicates that bargaining the specifications of the product is not crucial to the conclusion that strict liability does not apply." The court went on to echo the trial court in *Scandinavian*, which emphasized that the primary policy behind strict liability in tort is to protect the individual buyer and is not applicable to situations in which the parties can negotiate the risk of loss with equal force. The court held that so long as the other three requirements of the *Kaiser* test are met, strict liability does not apply, even if the parties did not actually negotiate the specifications of the product.

In *International Knights of Wine v. Nave Pierson Winery Inc.*, the California Court of Appeals further refined the *Kaiser* test. The court placed the greatest emphasis on a party's bargaining power and reversed a lower court's ruling that section 402A was inappropriate to the cause of action. The court stated that strict liability is "intended to operate in favor of any person or entity, corporate or otherwise, having no significant bargaining power respecting the manufacturing process and which is thereby best calculated to be its victim." The court further stated that the fourth *Kaiser* requirement — negotiating the risk of loss — could be satisfied if a party had the "ability to negotiate respecting risk of loss from a defective product." It concluded that it should be necessary to show only that the party seeking to recover under strict liability could have negotiated the risk of loss, rather than requiring proof of actual negotiation.

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140. 641 F.2d 746 (9th Cir. 1981).
141. Id. at 754.
142. See id.
143. See id.
144. 168 Cal. Rptr. 301 (Ct. App. 1980).
145. See id. at 304.
146. Id. at 303.
147. Id. at 304.
148. See id. at 304 n.1.
B. Are Disclaimers of Liability in Commercial Transactions Effective Under Strict Liability in Tort?

A number of courts as well as several commentators have reacted to this issue by holding that section 402A liability can be disclaimed in commercial transactions. Other courts have rejected this approach. Two 1974 cases define the general positions courts take with respect to disclaimers. In Sterner Aero AB v. Page Airmotive, Inc., the United States Court of Appeals for the Tenth Circuit held that a party could not disclaim strict tort liability in a commercial transaction. Shortly thereafter, in Keystone Aeronautics Corp. v. R.J. Enstrom Corp., the United States Court of Appeals for the Third Circuit held that such a disclaimer may be effective if it is negotiated between parties of relatively equal bargaining strength and is clearly expressed in the contract.

In Sterner, the Tenth Circuit reasoned that since strict products liability is based in tort law, not contract, contractual disclaimers are ineffective in removing manufacturers' liability. The Tenth Circuit observed that one of the reasons for abandoning the concept of implied warranty in sales law in favor of strict liability in tort was that contractual defenses, such as disclaimers, caused "complexity as well as injustice." The Tenth Circuit also noted that "[t]he Oklahoma Supreme Court [had previously] decided that traditional concepts of contract law are inapplicable in Manufacturers' Products Liability cases.

149. See, e.g., Idaho Power Co. v. Westinghouse Electric Corp., 596 F.2d 924, 927-28 (9th Cir. 1979) (predicting that the Idaho Supreme Court would follow the majority rule allowing disclaimers of strict products liability in commercial transactions); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 149-51 (3d Cir. 1974) (remanding for a determination of whether a waiver of strict liability was clearly expressed and therefore effective); Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974) (following Delta Air Lines, Inc. v. Douglas Aircraft Co., 47 Cal. Rptr. 518 (Ct. App. 1965) and holding that strict liability disclaimers between aircraft manufacturers and airlines can be effective).


151. These authorities have reached this conclusion despite the drafters' comment that the "consumer's cause of action . . . is not affected by any disclaimer or other agreement." RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1977).

152. 499 F.2d 709 (10th Cir. 1974) (applying Oklahoma law).


154. See Sterner, 499 F.2d at 713.

155. Id. at 712.
We construe this as precluding the defendants from asserting the existence of a contractual disclaimer provision as a valid defense to liability."156 For further support of its holding, the Tenth Circuit quoted the Restatement (Second) of Torts, which states:

The basis of liability . . . is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties . . . . The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands.157

At least one federal district court has taken the Tenth Circuit's position. In Florida Steel Corp. v. Whiting Corp.,158 the court held that contractual disclaimers cannot be enforced in strict liability tort actions regardless of the parties' bargaining power. The district court noted that the cases supporting enforcement of disclaimers were based on the rationale that large commercial entities can "protect themselves from getting a 'bad bargain', and that only individual consumers need protections against contractual defenses such as disclaimers."159 The district court stated that the Florida Supreme Court, in adopting 402A, emphasized that more was at stake than the benefit of the bargain,160 recognizing that "as a matter of public policy, rather than of contractual understanding, a duty should be placed on manufacturers to 'warrant' the safety of their products."161 Because this duty is based on public policy, the district court held that it cannot be disclaimed even in commercial transactions.162

The strong position against disclaimers adopted in Sterner is not universally accepted. Some courts have endeavored to forge tests based on bargaining power to determine whether a disclaimer of strict liability between commercial parties is valid. For example, in Keystone Aeronautics Corp. v. R.J. Enstrom Corp.,163 the Third Circuit focused on the nature of the parties' bargaining process in determining whether Pennsylvania law allowed a contractual disclaimer of strict tort liability. The court noted that "[a] social policy aimed at protecting the average consumer" need not apply to business dealings.164 In the court's opinion, transactions between business entities marked by fair and effective bargaining should be influenced more by the Uniform Commercial Code, which allows disclaimers, than by the

156. Id. at 713.
157. Id. at 713 n.2 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1977)).
159. Id. at 1144.
160. See id.
161. Id.
162. See id.
163. 499 F.2d 146 (3d Cir. 1974).
164. Id. at 149.
consumer-oriented 402A.\textsuperscript{165} The court concluded that despite Comment m and Pennsylvania’s tendency to adopt comments to the Restatement, “Pennsylvania law does permit a freely negotiated and clearly expressed waiver of sec. 402A between business entities of relatively equal bargaining strength”\textsuperscript{166} where the four prerequisites of Pennsylvania exculpatory clauses law are met: “(1) Such clauses must be strictly construed; (2) With every intendment against the party who seeks immunity from liability; (3) The contract must spell out the intention of the parties with the greatest of particularity; and (4) The burden [of proof] is upon the party asserting the immunity.”\textsuperscript{167}

Using this analysis, the Keystone court found that the disclaimer at issue was not sufficiently explicit to disclaim 402A liability.\textsuperscript{168} Subsequent federal cases applying Pennsylvania law are in accord with Keystone, holding that 402A liability may be disclaimed as long as the disclaimer is (1) freely negotiated between parties of equal bargaining power and (2) clearly expressed.\textsuperscript{169}

Other courts, while adopting the Keystone result that strict liability in tort may be disclaimed, have significantly modified its requirements. The Supreme Court of Oregon diluted both the “negotiated” and “equal bargaining power” elements of the first Keystone requirement in K-Lines Inc. v. Roberts Motor Co.\textsuperscript{170} This case involved a defective truck and a disclaimer of liability signed by the purchaser. The purchaser argued that the contractual limitation of liability was invalid because the parties had not negotiated it and the parties did not have equal bargaining power.\textsuperscript{171} The court held that actual negotiation between parties is not essential to the validity of a limitation of

\textsuperscript{165} See id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 150 (citing Employers Liability Assurance Corp. v. Greenville Bus. Men’s Ass’n, 224 A.2d 620, 623 (Pa. 1966)).
\textsuperscript{168} See Keystone, 499 F.2d at 150. Keystone involved the purchase of two used helicopters by Keystone from R.J. Enstrom Corporation. The agreement for the sale of the first helicopter stated that the warranty expressed therein, which provided that the manufacturer’s obligation would be limited to replacement of defective parts, was “in lieu of all other warranties and ‘all other obligations and liability, direct or consequential.’” Id. at 147-48 (quoting the Warranty).

The second purchase agreement contained the following two provisions: (1) “[c]ustomer takes as is without warranty of any kind except Enstrom will convey good title” and (2) “Warranty Exclusions. The R.J. Enstrom Corporation will be held harmless of any liability in connection with this sale. Sale of these helicopters is unconditional and no warranty of any kind is made or implied.” Id. at 148 (quoting the Purchase Agreement).

\textsuperscript{170} 541 P.2d 1378 (Or. 1975).
\textsuperscript{171} See id. at 1380.
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402A liability. The court stated that "[t]he plaintiff apparently believes that there must be explicit evidence that there were offers and counter-offers on the limitation terms or comparable evidence of 'haggling'. We do not believe such evidence is necessary." The court went on to hold that the true standard by which limitation of liability clauses should be judged is whether they were "a part of the parties' bargain in fact." The court stated:

If [the limitation of liability] is contained in a printed clause which was not conspicuous or brought to the buyer's attention, the seller had no reasonable expectation that the buyer understood that his remedies were being restricted to repair and replacement. As such, the clause cannot be said to be a part of the bargain (or agreement) of the parties.

Conversely, if the buyer was made aware of the clause, then it would seem to pass the court's test for "negotiated."

The court also held that it had not been established that the parties did not have equal bargaining power, stating:

As to unequal bargaining power between the parties, we are of the opinion also that as a matter of law that has not been shown. Disparity in bargaining power does not exist when the only evidence is that the buyer is a truck line purchasing five trucks for $93,000 and the other contracting parties are a truck manufacturer and a truck distributor. That one party may possess greater financial resources than the other is not proof that such a disparity of bargaining power exists that a limitation of liability provisions [sic] should be voided.

This approach places the burden of proof on the party adversely affected by the disclaimer to demonstrate that there was not equal bargaining power between the parties; otherwise the clause is valid. This modification, although subtle, gives the disclaiming party a significant advantage. The Keystone approach takes the opposite position by invalidating an exculpatory clause unless the disclaiming party shows that it was freely entered into between parties of equal bargaining power.

Courts have also differed in their interpretations of Keystone's clear language requirement. In Keystone, the disclaimer was disallowed as ambiguous, and the case was remanded for more evidence regarding the parties' intent. Other courts, however, have upheld

172. Id. at 1384.
173. Id. (quoting ROBERT J. NORDSTROM, HANDBOOK ON THE LAW OF SALES § 89 at 207 (1970)).
175. Id.
176. See supra notes 166-167 and accompanying text.
177. See Keystone, 499 F.2d at 149-51. One disclaimer read that the given warranty was "in lieu of all other warranties and 'all other obligations and liability, direct or consequential.'" Id. at 147-48 (quoting the Warranty). The other disclaimer, relevant to the helicopter that crashed, stated that the buyer took "as is," and that "[t]he R.J. Enstrom Corporation will be held harmless of any liability in connection with this sale. Sale . . . is unconditional and no warranty of any kind
disclaimers using very similar language, holding that the party's intention to exculpate itself was clearly expressed. For example, in *Thermo King Corp. v. Strick Corp.* a disclaimer using language very similar to the disclaimer in *Keystone* was allowed. The court found the following language to be sufficiently different to distinguish it from the *Keystone* disclaimer: "The Manufacturer is not responsible, and will not be held liable, for special, indirect, or consequential damages, including injury or damage caused to trailers, contents, product cargo or persons, by reason of the installation of any Thermo King product or its mechanical failure."

On the other hand, a clause very similar to that in *Thermo King* was disallowed by the court in *Mead Corp. v. Allendale Mutual Insurance Co.* as void for vagueness. The clause in *Mead* stated:

“Our liability is in all cases limited as provided in these Conditions and does not extend to consequential damages, either direct or indirect, nor to expenses for repairs or replacements or otherwise, paid or incurred without our authority. We accept no liability for defects or depreciation caused by damage in transit, faulty erection, wear and tear, accidents, lightning, dampness, neglect, misuse or other abnormal conditions, due directly or indirectly to circumstances beyond our control.”

Thus, courts differ considerably in allowing disclaimers of strict liability in tort. Some disallow them in all circumstances. Others allow them under varying requirements dealing with the nature of the parties and the clarity of the disclaimer itself. Even among courts permitting disclaimers, there is considerable conflict in how they apply the clear language requirement.

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178. Examples of language that has been considered sufficient include: "[t]he foregoing shall be Buyer's sole and exclusive remedy whether in contract, tort or otherwise, and Kenworth shall not be liable for injuries to persons or property." *K-Lines*, 541 F.2d at 1380 (quoting the Warranty and Owners Service Policy). Similar language was used in a provision which stated that Westinghouse's liability "whether in contract, in tort, under any warranty, or otherwise, ... shall not exceed the price of the product or part on which such liability is based." *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924, 925 (9th Cir. 1979) (quoting a price quotation).


180. The disclaimer negated all U.C.C. warranties and then stated that the warranty given was to supplant "all other liabilities and obligations on the manufacturer's part." *Id.* at 78 (quoting the Warranty Card).

181. *Id.* at 79 (quoting Thermo King's express warranty).


183. *Id.* at 362 (quoting the limitations of liability clause).
C. What Damages are Recoverable Under Strict Liability in Torts?

The resolution of the third issue can avoid the need to resolve the first two issues. Many courts have resolved the issue of 402A liability in commercial transactions by denying recovery for economic loss. The possible categories of recoverable damages for defective products were well elaborated in Sioux City Community School District v. International Telephone and Telegraph Corp. where the federal district court stated:

Courts and commentators have delineated at least four distinct categories of harm which could be held recoverable under the theory of strict liability in tort for defective products: (1) physical injury to persons; (2) physical damage to tangible things other than the product itself; (3) physical damage to the product itself; and (4) commercial or economic losses which involve no physical harm but which are occasioned by the unfitness of the product.

Courts generally hold that the first two categories may be recovered under strict liability in tort. A strong majority of courts do not allow any recovery under strict liability in tort for the third category. All but a handful of courts deny recovery in strict liability in torts for the fourth category.

Although the great majority of courts allow recovery for damage to other property, some jurisdictions limit the recovery of damage to "other property." They treat damage to other property as an economic loss where such damage was foreseeable or within the contemplation


186. Id. at 664. The district court proceeded to rule that under Iowa tort law, the first two categories of damages are clearly recoverable, while the latter two are not. See id. at 664-65. The court, however, noted two possible exceptions to this rule: (1) the parties are of unequal economic strength or (2) plaintiff seeks recovery in addition to economic loss. See id. at 665.


188. See cases cited supra note 187.

of the parties. In Neibarger v. Universal Cooperatives, Inc.,190 dairy farmers brought negligence and products liability actions against the designers and sellers of allegedly defective milking machines seeking damages for decreased milk production and medical problems experienced by their cows. The Supreme Court of Michigan affirmed summary judgment for the defendants holding that the farmers sought recovery for just economic loss and thus their only remedy was in warranty under the U.C.C.191 The court reasoned that "[i]n many cases, failure of the product to perform as expected will necessarily cause damage to other property; such damage is often not beyond the contemplation of the parties to the agreement."192 Therefore, parties could negotiate such damage and it is more appropriately called economic loss. The court found that both farmers knew the risk of disease associated with a poorly designed milking machine and so the recovery sought was deemed economic loss.193

Some courts have focused more on the knowledge and experience of the parties. In Hapka v. Paquin Farms,194 the Supreme Court of Minnesota held that where a transaction is "commercial," that is between merchants, the U.C.C. provides the buyer's exclusive remedy for damage to other property. Hapka involved diseased seed potatoes that harmed the rest of the buyer's potatoes.195 The court found that parties were both knowledgeable dealers in the trade of seed potatoes and were of relatively equal bargaining power and therefore the buyer's only remedy was the U.C.C.196

In Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.,197 decided two years later, a defective dental chair allegedly started a fire that destroyed the building in which the buyer maintained his office. The Supreme Court of Minnesota held that, where the buyer was not a merchant dealing in the goods, the economic loss doctrine does not preclude him from suing in tort as well as in contract for damage to other property.198 The reasoning, in short, was that the non-merchant buyer lacked the bargaining status of the buyer in a commercial transaction and therefore "should be allowed a 'panoply' of legal remedies."199

Turning to the third category, East River Steamship Corp. v. Transamerica Delaval, Inc.200 is the leading case holding that damage to a

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191. See id. at 623.
192. Id. at 620.
193. See id. at 620-21.
194. 458 N.W.2d 683 (Minn. 1990).
195. See id.
196. See id. at 688.
197. 491 N.W.2d 11 (Minn. 1992).
198. See id. at 15.
199. Id. (citing Hapka, 458 N.W.2d at 688).
defective product itself, with no personal injury or damage to "other" property, is "purely economic" and cannot be recovered under 402A by a party in a commercial relationship. In this case, the United States Supreme Court noted that no matter how the harm occurs, the resulting repair costs, decreased value, and lost profits interfere only with the benefit of the bargain, and accordingly, these losses are properly redressed under contract law.\textsuperscript{201} The Court reasoned that these losses are all insurable.\textsuperscript{202} Therefore, the Court concluded that since warranty law is sufficient to protect the purchaser in obtaining the benefit of its bargain, the public cost of holding a manufacturer responsible in such cases is not justified.\textsuperscript{203}

The Texas Supreme Court has also held that mere economic loss is not recoverable under a theory of strict liability in tort. In \textit{Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.}\textsuperscript{204} the court cited Dean Keeton to elucidate the rationale behind the economic loss doctrine:

"A distinction should be made between the type of 'dangerous condition' that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage limited solely to the property, recovery should be available, if at all, on a contract-warranty theory."\textsuperscript{205}

The court noted that damage to a defective product is essentially a purchaser's loss of the benefit of the bargain with the seller. All the purchaser really loses is the cost of repairs and use of the product; nothing outside of his transaction with the seller.\textsuperscript{206} It stated that "[i]n transactions between a commercial seller and commercial buyer, when no physical injury has occurred to persons or other property, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code."\textsuperscript{207}

Other courts have taken a different approach to the issue by looking at the manner in which the harm to the defective property occurred. These courts hold that damage to the defective product itself may be recovered if it is caused by an unreasonably dangerous defect.\textsuperscript{208} They reason that the purpose of strict liability is to provide an

\textsuperscript{201.} See \textit{id.} at 870-71.  
\textsuperscript{202.} See \textit{id.} at 871-72.  
\textsuperscript{203.} See \textit{id.} at 872.  
\textsuperscript{204.} \textit{572 S.W.2d} 308 (Tex. 1978).  
\textsuperscript{205.} \textit{Id.} at 312 (quoting W. Page Keeton, \textit{Torts}, 32 SW. L.J. 1, 5 (1978)).  
\textsuperscript{206.} See \textit{Mid Continent}, 572 S.W.2d at 313.  
\textsuperscript{207.} \textit{Id.}  
incentive to design, manufacture, and distribute safe products and, because parties are not expected to bargain for their safety, contract law is not well suited to deal with hazardous defects. The following cases illustrate this line of reasoning.

In *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, the Third Circuit Court of Appeals used the unreasonably dangerous distinction to determine whether tort or contract law applied to the question of recovery for damage to the defective product itself. In *Pennsylvania Glass*, a defective front-end loader caught fire and was destroyed. Although the defect did not cause the fire, it did prevent the fire from being extinguished because the machine was not equipped with a necessary safety device. The court held that damage to a defective product may be recovered under 402A if the defect, as in this case, was unreasonably dangerous. The court distinguished this type of defect from a "qualitative" one which "renders a product inferior or unable adequately to perform its intended function." According to the court, such qualitative defects are best dealt with under the principles of warranty and contract law because they deal with the buyer's disappointed expectations. On the other hand, hazardous defects are best handled through tort law, which imposes a duty on manufacturers to produce safe products, regardless of the defect's ultimate impact. The court stated that:

[T]he line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.

Previously, in *Posttape Associates v. Eastman Kodak Co.*, the same court held that the plaintiff could not recover for damages to the product itself, commercial film that had a scratched surface and thus was useless, because the product was not a threat to person or tangible property. The product was defective and "did not perform as expected," but in no way could it be considered "unreasonably dangerous." The court acknowledged the "superiority" of 402A in protecting the average consumer from personal injury or property damage, but went on to say that it is not as appropriate when there is a commercial setting and the damages are "consequential and arise

210. See id. at 1174-76.
211. Id. at 1172.
212. See id.
213. See id. at 1172-73.
214. Id. at 1173.
215. 537 F.2d 751 (3d Cir. 1976).
216. Id. at 755.
from a non-dangerous impairment of quality of the product."\(^{217}\)
Where a defect affects the quality, but not the safety, of a product, the
U.C.C. is the proper authority for determining liability.\(^{218}\)

The Supreme Court of Arizona used the "unreasonably dangerous" distinction in *Salt River Project Agricultural Improvement & Power District v. Westinghouse Electric Corp.*\(^{219}\) The court held that a three factor test should be used to determine whether tort or contract law should be applied: (1) the nature of the defect (dangerous v. qualitative); (2) the manner in which the loss occurred (sudden accident v. gradual deterioration); and (3) the type of loss (personal injury, damage to "other" property, damage to the defective product, and economic loss).\(^{220}\) The court indicated that the factors need to be weighed together on a case by case basis.\(^{221}\) Damage to the defective product itself is not recoverable under 402A if it occurs due to a slow, non-dangerous deterioration.\(^{222}\) If the damage occurred in a sudden accident caused by a dangerous defect, however, the balance would be tipped "in favor of strict tort liability even though the damage fortuitously was confined to the product itself."\(^{223}\) The court stated that if there is no potential for danger to person or property, there is no need to resort to the safety incentives of tort law.\(^{224}\)

A few courts have taken a minority view that all damages, even economic, can be recovered in strict liability actions.\(^{225}\) The leading case adopting this viewpoint was *Santor v. A & M Karagheusian.*\(^{226}\) In *Santor,* the New Jersey Supreme Court found that a consumer could recover in strict liability against a manufacturer, even though the only damages were economic harm. The court reasoned that the policy underlying strict liability was a cost-shifting one that requires that the manufacturer bear the costs of defective products it places on the market. The court made no distinction between personal injury or property damage and economic loss.\(^{227}\) In the 1997 case of *Alloway v. General Marine Industries, L.P.,*\(^{228}\) however, the New Jersey Supreme

\(^{217}\) Id.

\(^{218}\) See id.


\(^{220}\) See id. at 206.

\(^{221}\) See id.

\(^{222}\) See id. at 209.

\(^{223}\) Id.

\(^{224}\) See id. at 207.


\(^{226}\) 207 A.2d 305 (N.J. 1965).

\(^{227}\) See id. at 312.

\(^{228}\) 695 A.2d 264 (N.J. 1997).
Court sharply limited Santor. In this case, the court held that a consumer purchaser of a power boat that sunk because of a defect could not recover under strict liability in tort for the economic loss resulting from a defect that caused injury only to the boat itself.\textsuperscript{229} The court noted that in this case it was not required to resolve (1) the issue of whether tort or contract law applies to a product that poses a risk of causing personal injuries or property damage but has caused only economic loss to the product itself nor (2) the issue of whether a strict liability claim is precluded when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages.\textsuperscript{230}

As previously mentioned,\textsuperscript{231} the Restatement (Third) of Torts: Products Liability distinguishes between liability for harm to persons or property from economic loss. Section 1 only applies to the former and not the latter.\textsuperscript{232} In addition, section 18 provides that disclaimers are not effective in reducing "claims against sellers or other distributors of new products for harm to persons."\textsuperscript{233}

\section*{V. A PROPOSAL FOR WHAT LAW GOVERNS LOSS IN SALES CONTRACTS}

As discussed in this Article, courts have taken dramatically different approaches in applying strict liability in tort to the commercial setting. It is the central purpose of this Article to propose a clear and sensible approach to this tort-contract dilemma while protecting justified expectations of the parties and minimizing occasions for disputes. This proposal has been guided by the following principles:

1. Where appropriate, the parties should be permitted to allocate risks.
2. Contract/sales law best addresses risk allocations.
3. Transactions should be subject to either tort law or contract law, but not to both.
4. Where risk allocation is not appropriate, tort law should govern exclusively.
5. Allocation of risk of injury to the person is never appropriate.

The fundamental thrust of the proposal is to extend the protection of tort law to consumer buyers while withholding it from commercial buyers. The proposal also distinguishes between "bargaining commercial buyers" and "non-bargaining commercial buyers" by granting to "bargaining buyers" greater latitude to disclaim warranties. In recog-

\textsuperscript{229} See \textit{id.} at 275.
\textsuperscript{230} See \textit{id.} at 273.
\textsuperscript{231} See supra note 122 and accompanying text.
\textsuperscript{232} See \textit{Restatement (Third) of Torts: Products Liability} § 1.
\textsuperscript{233} \textit{Id.} at § 18 cmt. a.
nition that not all commercial buyers have the ability or the bargain-
ing power to negotiate on an equal footing with manufacturers or
distributors, this proposal affords the non-bargaining commercial
buyer the protection of a more "disclaimer-proof" implied warranty of
merchantability. See Table I at the end of this article.

A. Consumers

A consumer purchaser is a one who buys consumer goods. We
adopt the definition under the Magnuson-Moss Warranty Act of con-
sumer goods: "tangible personal property normally used for personal,
family, or household purposes." Our proposal would make the
U.C.C. inapplicable to consumer purchasers with respect to personal
injury and damage to other property caused by defective products.
The consumer purchaser would have recourse against the seller only
under tort law. The consumer's right of recovery under strict lia-
B. Allocation of Risk

The Interim Draft of the Revised Article 2 similarly defines a "consumer" as "an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes." U.C.C. § 2-102(a)(10) (Interim Draft, November 1999).

236. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18.
237. Id. § 18 cmt. a.
B. Non-Bargaining Commercial Buyers

This Article proposes that the option to resort to tort law should not be granted to commercial buyers238 (non-consumers) for damage to other property and commercial loss. Tort law, however, would govern personal injury caused by defective products, even if sustained by the non-bargaining purchaser himself. Because some commercial buyers do not have sufficient bargaining power to negotiate an agreement that protects their interests, this proposal provides that such non-bargaining commercial buyers be given the protection of a non-disclaimable implied warranty of merchantability with respect to damage to other property caused by the defective product. Our proposal imposes an implied warranty of merchantability with respect to commercial loss that presumptively may not be disclaimed. A court may enforce such a disclaimer if the court finds as a matter of law that the disclaimer meets Article 2's definition of good faith applicable to merchants. This definition provides that “good faith” in the case of merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”239 These limitations on the seller’s ability to disclaim the implied warranty of merchantability should achieve the policy goals of strict liability by providing protection from disclaimers for a relatively weak commercial buyer yet subjecting the transaction to the U.C.C.

The buyer would have the burden of showing unequal bargaining power by proving one of two factors:
(1) that the buyer could not have bargained the specifications of the product; or
(2) that the buyer could not have negotiated the risk of loss from defects.

Each of these factors is a question of fact. To satisfy the first factor the buyer would have to establish that it lacked either the opportunity or the ability to bargain the specifications of the product.

C. Bargaining Commercial Buyers

As in the preceding section, commercial buyers who have the opportunity to bargain over the products would not receive the protection of 402A with respect to damage to other property and commercial loss. The Uniform Commercial Code and its warranty provisions would exclusively govern such losses. Moreover, these warranties would be fully disclaimable to the extent now allowed by law. This

238. This distinction is not the same as the merchant test under the U.C.C. § 2-104. “Commercial buyer” is a broader class than “merchant,” since the heightened knowledge and dealings requirements would not have to be met to show that strict liability was inapplicable.
239. U.C.C. § 2-103(1)(b).
result would preserve the ability of commercial entities to bargain over all aspects of the product, without giving the buyer unfair leverage through 402A. Tort law, however, would govern personal injury caused by defective products, even if sustained by the bargaining purchaser himself. Our proposal would permit the parties to agree to a hold harmless clause requiring the buyer to indemnify the seller for any products liability claims asserted by third parties against the seller.

So what benefits does eliminating strict liability in a commercial setting confer? We have already seen that safety would not be affected.\(^{240}\) And abolishing strict liability may be significant, even in circumstances in which the parties are said to be free to reallocate risks, if in practice courts adopt hostile attitudes towards contractual provisions that seek to achieve just such a reallocation. Business uncertainties could be reduced, and the relevant issues could be more sharply focused, if commercial buyers were compelled to rely exclusively on the contract remedies of the U.C.C.\(^ {241}\)

When two parties are on roughly equal footing, they are in a position to determine which risks to assume and how costs will be allocated. Allowing the contracted terms of the individual agreement to guide the resolution of conflict is "almost certainly superior in terms of both fairness and efficiency" to judicial intervention.\(^ {242}\)

**D. Conclusion**

We believe that our proposal would resolve many of the conflicting issues arising from the overlapping applicability of tort and contract law to liability for defective products. Given that these two legal areas have disparate policy objectives, it is not surprising that they have evolved inconsistent principles. For this reason, we have concluded that only one of them should apply to any single transaction. This approach reduces confusion, thereby protecting the parties' justified expectations, facilitating private ordering, and minimizing occasions for dispute. At the same time, we recognize that the law has an obligation to protect individuals from overreaching and their own improvidence, and to safeguard the interests of third parties to contracts. In determining whether tort or contract law should apply, we balanced freedom of contract against the need to protect parties not fully able to do so themselves. We believe that our proposal represents a reasonable and feasible resolution of these competing values. Moreover, we consider our proposal an improvement over the current state of the law.

\(^{240}\) See supra notes 109-113 and accompanying text.

\(^{241}\) Jones, supra note 18, at 758.

\(^{242}\) Jones, supra note 18, at 798.
### Table I: Proposal for What Law Governs Loss in Sales Contracts

<table>
<thead>
<tr>
<th>Purchaser</th>
<th>Personal Injury</th>
<th>Other Property</th>
<th>Commercial Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer</td>
<td>Tort law applies;</td>
<td>Tort law applies;</td>
<td>UCC applies;</td>
</tr>
<tr>
<td></td>
<td>No disclaimers permitted</td>
<td>No disclaimers permitted</td>
<td>No disclaimers permitted</td>
</tr>
<tr>
<td>Non-bargaining</td>
<td>Tort law applies;</td>
<td>UCC applies;</td>
<td>UCC applies;</td>
</tr>
<tr>
<td>Commercial</td>
<td>No disclaimers permitted</td>
<td>No disclaimer of merchantability permitted</td>
<td>Rebuttable presumption against disclaimer of merchantability</td>
</tr>
<tr>
<td>Bargaining</td>
<td>Tort law applies;</td>
<td>UCC applies;</td>
<td>UCC applies;</td>
</tr>
<tr>
<td>Commercial</td>
<td>No disclaimers permitted; Hold harmless clauses permitted</td>
<td>Disclaimers permitted</td>
<td>Disclaimers permitted</td>
</tr>
</tbody>
</table>