Recovery for Damage to the Defective Product Itself: An Analysis of Recent Product Liability Legislation*

I. INTRODUCTION

Defective products may cause various types of harm, including personal injury and property damage. Generally, recovery for harm to property falls within one of the following three categories: 1) damages for injury to property other than the product itself, 2) damages for injury to the product itself, and 3) damages for injury to business expectations, including lost profits and loss of use of the product.[1] Traditionally, plaintiffs seeking recovery for such property loss proceeded under theories of negligence, strict liability in tort, misrepresentation, breach of express or implied warranty, and breach of contract.[2]

Due to the reputed insurance crisis and the current wave of tort reform, state and federal legislatures are now considering legislation to protect manufacturers and suppliers from seemingly excessive tort liability. These legislative proposals supersede state common law dealing with tort product liability cases. The proposed Ohio[3] and federal[4] legislation excludes from product liability actions claims in which the plaintiff seeks recovery for the defective product itself, leaving these claims to be governed by applicable commercial or contract law.[5] This remedy is inadequate and inconsistent with the decisions of a majority of courts that include physical harm to the product itself within the scope of tort products liability.[6]

This Note analyzes the theories of recovery allowed for property damage to the defective product itself under both state and federal legislation, as well as under common law. This author contends that the pending Ohio and federal acts fail to provide an adequate remedy for property loss by limiting the applicable recovery theory to commercial law. By excluding tort remedies, the bills are inconsistent with present law in the majority of jurisdictions, including Ohio, which provide tort recovery for physical harm to the product itself. This Note proposes that the Ohio and

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* Editor's Note: Since the completion of this Note, the Ohio legislation referred to (H.B. 996) has been amended (Am. Sub. H.B. 1) to conform with the positions advocated by the author. Nonetheless, the Note still serves as a useful comment on the issues surrounding this controversy which may arise in other jurisdictions. With regard to the federal bill (S. 666), the positions taken by the author and the arguments supporting them are still pertinent.

At the time of publication of this Note, the current Ohio products liability legislation (Am. Sub. H.B. 1) had been passed by the House of Representatives and the Senate and signed by Governor Richard F. Celeste.

1. Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME L. REV. 118 (1978) [hereinafter Note].

2. Bland & Wattson, *Property Damage Caused by Defective Products: What Losses Are Recoverable?*, 9 WM. MITCHELL L. REV. 1 (1984) [hereinafter Bland & Wattson].

3. H.B. No. 996, 116th Gen. Assembly, Reg. Sess. (1985-86).

4. S. 666, 100th Cong., 1st Sess. (1987).

5. S. 666, 100th Cong., 1st Sess. § 103(a) (1987); H.B. No. 996, 116th Gen. Assembly, Reg. Sess. § 2307.71(B) (1985-86).

6. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) (applying Pennsylvania law); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *See generally* Bland & Wattson, *supra* note 2, at 3–4.

federal legislatures amend the bills to include physical injury to the defective product itself within the scope of the product liability acts.

II. History of Relevant Products Liability Law

A. *Negligence*

Although various theories were available, negligence was the primary method of recovery before the recent emergence of strict liability and is still very viable today.[7] A cause of action founded upon negligence in a products liability case follows the traditional formula. For example, a plaintiff must prove that a person (the product's manufacturer or its seller) breached his legally recognizable duty to conform to a certain standard of conduct (manufacture and sell safe products).[8] In addition, this breach must be the proximate cause of the actual losses suffered.[9]

The majority of products liability law[10] has developed in the twentieth century because, prior to that time, a requirement of contractual privity prevented consumers from suing remote manufacturers.[11] The English case of *Wright v. Winterbottom*[12] originated the privity requirement by establishing that the original seller of goods was not liable for damages caused by their defects (to anyone except his immediate buyer or one in privity with him).[13] Nineteenth and early twentieth century America generally followed *Winterbottom's* privity requirement,[14] but courts gradually carved out exceptions[15] until privity was abrogated entirely in actions based upon negligence.

Products liability law further developed as its theoretical foundation evolved from contract to tort.[16] In the seminal case of *MacPherson v. Buick Motor Co.*,[17] the New York Court of Appeals abolished contractual privity as a factor in negligence cases.[18] In holding an automobile manufacturer liable for injury to the ultimate purchaser caused by the collapse of a defective wheel, the court reasoned that the manufacturer, by placing the car upon the market, assumed a responsibility to the public that rested not upon the contract, but upon the relation arising from the

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7. Comment, *Strict Liability: Recovery of "Economic" Loss*, 13 Idaho L. Rev. 29, 30 (1976) [hereinafter Comment].

8. *See generally* Prosser & Keeton on Torts § 30 (5th ed. 1984) [hereinafter Prosser & Keeton].

9. *Id.*

10. For a brief exposition on the development of products liability law, see D. Noel & J. Phillips, Products Liability 1–4 (1976); Prosser & Keeton, *supra* note 8, at §§ 95-97; Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Products Cases*, 18 Stan. L. Rev. 974, 990-92 (1966).

11. Wright v. Winterbottom, 10 Mess. & W. 109, 152 Eng. Rep. 402 (Exch. 1842).

12. *Id.*

13. *Id.* at 111, 152 Eng. Rep. at 403.

14. *See, e.g.*, Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (1907).

15. The most notable exception was Huset v. J.I. Case Threshing Machine Co., 120 F. 865 (8th Cir. 1903), which held the seller liable to a third person for negligence in the preparation or sale of an "imminently" dangerous article. *Id.* at 872.

16. *See, e.g.*, Note, *supra* note 1, at 118.

17. 217 N.Y. 382, 111 N.E. 1050 (1916). For a narrative story of the case, see D. Peck, Decision at Law, 38-69 (1961).

18. 217 N.Y. 382, 390–91, 111 N.E. 1050, 1053 (1916).

consumer's purchase.[19] In Dean Prosser's words, the rule that emerged from *MacPherson* is that, "[T]he seller is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of inflicting substantial harm if it is defective."[20] This decision found immediate acceptance and is now universal law in every state.[21]

B. *Warranty*

Historically, courts also have applied the theory of warranty to product liability actions.[22] Express warranties arise when the seller makes an affirmation of fact or promise, describing the goods, or exhibiting samples or models that become part of the basis of the bargain that the goods sold will so conform.[23] Implied warranties, however, do not require any express representations. Unless modified or excluded, a warranty that the goods are fit for the ordinary purposes for which such goods are used is implied if the seller is a merchant in goods of that kind.[24] For a plaintiff to prevail under an express or implied warranty theory, he must prove that such a warranty was created, that the warranty was breached (the product sold failed to conform to the seller's express or implied representations), and that the plaintiff suffered resulting economic loss.[25]

Because of the difficulty in proving that an express warranty was created, courts gradually extended implied warranties of safety, initially applied to food and drink for human consumption, to other products.[26] For example, courts progressively extended implied warranties to such products as animal foods,[27] cosmetics,[28] and automobiles.[29] The leading case of *Henningsen v. Bloomfield Motors, Inc.*,[30] especially noted for eliminating the necessity of establishing privity between buyer and seller,

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19. *Id.*

20. PROSSER & KEETON, *supra* note 8, at § 96.

21. *Id.*

22. *See generally id.* at § 97.

23. Uniform Commercial Code [hereinafter U.C.C.] § 2-313 (1) (1985) provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

24. U.C.C. § 2-314 (1985) provides in relevant part:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . .(2) Goods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used . . . .

25. PROSSER & KEETON, *supra* note 8, at § 97. *See also* Comment, *supra* note 7, at 30–31.

26. Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913), the first case to discard the privity of contract requirement, allowed a restaurant owner to recover damages for loss of reputation and profits against a remote supplier when the restaurant owner sold spoiled meat to his customers. *Id.* at 624-26, 135 P. at 635-37.

27. *See, e.g.*, McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954)(dog food).

28. *See, e.g.*, Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (permanent wave hair solution).

29. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

30. *Id.*

held both the remote automobile manufacturer and seller liable for injuries sustained by the purchaser's wife on an implied warranty theory.[31] With privity requirements eliminated, implied warranties soon reached virtually every type of defective product from which tort law sought to protect the public.[32]

Warranty theory, however, has had some difficulty in adapting to product liability causes of actions.[33] Since the very term warranty has long been closely associated with contract principles, courts have assumed that contract rules applied and have barred recovery on contractual grounds including lack of privity,[34] failure to give reasonable notice of breach,[35] and disclaimers of warranty.[36] Since plaintiffs must overcome such contract defenses in a breach of warranty case, warranty theory is not their most advantageous remedy. Tort remedies are easier to prove and lack the contractual obstacles that plague commercial remedies.

Many courts,[37] however, have recognized that implied warranty is essentially a tort, not a contract, and therefore have abandoned privity and notice of breach requirements,[38] deemphasized disclaimers,[39] and have applied the tort statute of limitations[40] and rule of damages.[41] Nonetheless, it gradually became apparant that product liability actions based upon warranty principles were unnecessarily burdensome.[42] Thus, the concept of strict liability emerged.

C. *Strict Liability*

In *Escola v. Coca-Cola Bottling Co. of Fresno*,[43] Chief Justice Traynor foreshadowed the future development of strict liability by stating that:

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31. *Id.* at 414–15, 161 A.2d at 100.

32. *See, e.g.*, Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962) (hula skirt); B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (tire); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder building blocks).

33. For a detailed discussion of the problems associated with warranties, see Prosser, *The Assault Upon The Citadel "Strict Liability To The Consumer,"* 69 YALE L.J. 1099, 1127–34 (1960).

34. *See, e.g.*, Harris v. Hampton Roads Tractor & Equip. Co., 202 Va. 958, 121 S.E.2d 471 (1961) (expressly rejecting *Henningsen*).

35. Nekuda v. Allis-Chalmers Mfg. Co., 175 Neb. 396, 121 N.W.2d 819 (1963); Wojcuik v. U.S. Rubber Co., 19 Wis. 2d 224, 120 N.W.2d 47 (1963). *Contra* Bonker v. Ingersoll Products Co., 132 F. Supp. 5 (D.C. Mass. 1955) (long delay held reasonable); Wright-Bachman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E.2d 713 (1956) (notice of breach held not to apply to personal injuries); LaHue v. Coca-Cola Bottling Co., Inc., 50 Wash. 2d 645, 314 P.2d 421 (1957) (notice of breach requirements inapplicable between parties who had contracted).

36. Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Ryan v. Ald, Inc., 149 Mont. 367, 427 P.2d 53 (1967). *See also* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 157–67 (1943).

37. *See* Comment, *supra* note 7, at 32.

38. *See, e.g.*, Crystal Coca-Cola Bott. Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Ruderman v. Warner-Lambert Pharmaceutical Co., 23 Conn. Supp. 416, 184 A.2d 63 (1962); Chandler v. Anchor Serum Co., 198 Kan. 571, 426 P.2d 82 (1967).

39. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

40. *See, e.g.*, Zellmer v. Acme Brewing Co., 184 F.2d 940 (9th Cir. 1950); Page v. Cameron Iron Works, Inc., 155 F. Supp. 283 (S.D. Tex. 1957); Smith v. Continental Ins. Co., 326 So. 2d 189 (Fla. App. 1976).

41. *See, e.g.*, Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App. 2d 464, 227 P.2d 923 (1951); Robinson v. Williamsen Idaho Equip. Co., 94 Idaho 819, 498 P.2d 1292 (1972); Cambern v. Hubbling, 307 Minn. 168, 238 N.W.2d 622 (1976).

42. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Brewer v. Oriard Powder Co., 66 Wash. 2d 187, 401 P.2d 844 (1965).

43. 24 Cal. 2d 453, 150 P.2d 436 (1944).

> [P]ublic policy demands that responsibility be fixed wherever it will most effectively 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. . . . It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.[44]

Approximately twenty years later, the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*[45] specifically adopted the strict liability theory encouraged in *Escola*, which is defined in section 402A of the *Second Restatement of Torts*[46] as a plaintiff's proper remedy for harm suffered from the defendant's unsafe product.[47] Strict liability is the simplest remedy for plaintiffs, essentially requiring only that the product be defective, that the defect exist at the time the product leaves the defendant's hands, and that the defect be the cause of the plaintiff's harm.[48] Today, an overwhelming majority of jurisdictions have accepted strict liability in tort,[49] thus contributing greatly to the expansion of modern products liability law.

D. *Applicable Theories When the Defective Product Is Damaged*

Negligence and strict liability theories, first adapted to personal injuries, also have been applied when only property is damaged.[50] For example, courts have extended the reasoning of *MacPherson*[51] and *Henningsen*,[52] which abolished contractual privity in cases involving personal injury, to cases involving only property damage.[53] In addition, the American Law Institute clearly contemplated that strict liability should be used in cases involving damage to property when it adopted section 402A of the *Second Restatement of Torts* which states that, "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer

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44. *Id.* at 462-63, 150 P.2d at 440-41 (Traynor, C.J., concurring).

45. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Justice Traynor noted 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." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

46. RESTATEMENT (SECOND) OF TORTS § 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.

47. 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

48. *See generally* PROSSER & KEETON, *supra* note 8, at § 75.

49. *Id.* at § 98. *See also* 2 HURSH & BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 3:12, 10:43 (2d ed. 1974).

50. *See, e.g.*, Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile, 131 Ariz. 289, 640 P.2d 851 (1982); Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983); Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).

51. *See supra* notes 17–28 and accompanying text.

52. *See supra* notes 30–31 and accompanying text.

53. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 n.9 (1960). *See, e.g.*, Simpson v. Logan Motor Co., 192 A.2d 122 (D.C. 1963); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).

or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or *to his property*."[54] Chief Justice Traynor aptly stated the rationale for applying strict liability to product cases: "Physical injury to property is so akin to personal injury that there is no reason for distinguishing them."[55]

The majority of courts today generally agree that harm to property caused by defective products, including injury to the product itself, is recoverable under negligence and strict liability theories.[56] Most courts also have held, however, that harm constituting economic loss is not recoverable under these theories, and must be pursued under warranty concepts in the Uniform Commercial Code.[57] Generally, tort recovery is preferred over commercial remedies because tort theories avoid problems inherent in commercial law, such as disclaimers,[58] privity requirements,[59] notice of breach requirements,[60] restrictive damages,[61] and shorter statutes of limitation.[62]

The fine line between property damage and economic loss is difficult to draw. Several courts have stated that the line drawn depends on the nature of the defect, the type of risk it creates, and the manner in which the injury arose.[63] One court, representative of this view, concluded that if an unreasonably dangerous product causes a "sudden and calamitous" event[64] that threatens bodily harm and also happens to damage the product, the loss generally is found to be property loss recoverable in tort actions.[65] Conversely, many courts hold that harm to property due to mere deterioration, internal breakage, or other nonaccidental causes constitutes an

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54. RESTATEMENT (SECOND) OF TORTS § 402A (1) (1965) (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS § 402A comment d (1965).

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

56. *See, e.g.*, Vulcan Materials Co., Inc. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983); National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983); Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).

57. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981); Schiavone Constr. Co. v. Elgood Mayo Corp., 56 N.Y.2d 667, 436 N.E.2d 1322, 451 N.Y.S.2d 720 (1982). *But see* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (allowing recovery under strict liability theory for economic loss).

58. U.C.C. § 2-316 (1985).

59. U.C.C. § 2-318 (1985). For a detailed discussion of the privity defense, see WHITE & SUMMERS, UNIFORM COMMERCIAL CODE §§ 11-1, -7 (2d ed. 1980) [hereinafter WHITE & SUMMERS].

60. U.C.C. § 2-607 (3)(a) provides:

> (3) Where a tender has been accepted (a) the buyer must within a reasonable time after he discovered any breach notify the seller of breach or be barred from any remedy . . . .

61. U.C.C. §§ 2-714, 715 (1985). Generally, damages recovered under tort theories are greater than those recovered under contract theories. *See, e.g.*, Medieros v. Coca-Cola Bott. Co., 57 Cal. App. 2d 707, 135 P.2d 676 (1943); Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461 (1965).

62. U.C.C. § 2-725(1) (1985) provides:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.

63. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977).

64. Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977).

65. *Id. See also* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966) [hereinafter Economic Loss in Products Liability]; *c.f.* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

economic loss, recoverable solely in a warranty action.[66] Some courts, however, allow strict liability tort recovery for purely economic loss.[67]

Economic loss has been further subdivided into direct economic loss—the cost of repair or replacement, and consequential economic loss—the denial of profits while the product is not functioning properly.[68] One court noted that the essence "of a product liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property."[69] Certainly, a difference exists between a disappointed buyer and an endangered one.[70]

E. *Theories Applied Under Ohio Common Law*

Presently, Ohio law allows recovery for purely economic loss to the defective product itself under both strict liability[71] and implied warranty in tort,[72] but not under a negligence theory.[73] The Ohio Supreme Court first addressed the issue of whether direct economic losses are recoverable under tort theories in *Inglis v. American Motors Corp.*[74] Although holding that direct economic loss cannot be recovered under a negligence theory, the court concluded it was recoverable under a uniquely fashioned express warranty theory.[75] Despite their use of the arguably contractual remedy of warranty, the court made it clear that the express warranty theory employed sounded in tort, rather than in contract.[76] It is important to note that this case did not involve property damage caused by a violent occurrence that also threatened bodily harm. Rather, it concerned the economic loss caused by a defectively manufactured automobile.[77]

Five years later, in *United States Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co.*,[78] the Ohio Supreme Court held that direct economic losses could be

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66. *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976); Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901 (Mo. 1986) (Higgins, C.J., dissenting); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966); Economic Loss in Products Liability, *supra* note 65, at 918.

67. *See, e.g.*, Verdon v. Transamerica Ins. Co., 187 Conn. 363, 371 n.6, 446 A.2d 3, 8 n.6 (1982); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).

68. Schwartz, *Economic Loss in American Tort Law*, in THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS 92–93 (M. Furmston ed. 1986).

69. Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 81, 435 N.E.2d 443, 448 (1982), (*citing* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1169 (3d Cir. 1981)).

70. *Contra* Forrest v. Chrysler Corp., 632 S.W.2d 29, 31 (Mo. App. 1982).

71. Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).

72. Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); United States Fidelity & Guaranty Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

73. *See* Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). *But see* Continental Oil Co. v. General Transp. Corp., 409 F. Supp. 288, 296-97 (S.D. Tex. 1976) (incorrectly construing *Iacono* to have allowed recovery in negligence).

74. 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

75. *Id.* at 140, 209 N.E.2d at 588.

76. *Id.* at 136, 209 N.E.2d at 586.

77. *Id.* at 137, 209 N.E.2d at 586.

78. 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970).

recovered under the tort theory of breach of implied warranty.[79] In *United States Fidelity & Guaranty Co.*, a cement mixer fell off of the chassis of the cement truck, resulting in losses of $7000 to the truck.[80] On these facts, the violent occurrence foreseeably could have caused injury to persons as well as property. In addition, economic loss was clearly present. Thus, the court relied on both grounds to correctly determine that the manufacturer was liable in tort.[81]

The Ohio Supreme Court further refined the implied warranty theory in *Iacono v. Anderson Concrete Corp.*[82] In *Iacono* the plaintiff sought recovery for damage to a concrete driveway installed by defendant that "pitted" because defendant used a type of aggregate in the concrete mix not suited for outdoor application.[83] The court allowed plaintiff's recovery, concluding that the tort theory of breach of implied warranty could be used to recover for harm solely to the product.[84] Since the court's implied warranty theory was identical to the theory of strict liability in tort, the court allowed recovery under implied warranty for harm caused by a product's qualitative defect without regard for the unreasonably dangerous requirement of strict liability.[85]

In a significant decision, *Mead Corp. v. Allendale Mut. Ins. Co.*,[86] the District Court for the Northern District of Ohio, relying on *Iacono*[87] and *Inglis*,[88] permitted the plaintiff to recover in strict liability for losses arising out of the failure of a generator used in plaintiff's business.[89] Recognizing that the losses sustained were economic in nature, the court nonetheless held that Ohio allowed such recovery.[90] Thus, it is clear that Ohio's established case law permits tort recovery under various theories when damage is sustained solely to the defective product itself. However, if any of these cases had arisen under the proposed Ohio act, the plaintiffs could only pursue warranty remedies because the statute interprets any damage to the product itself to be economic loss.[91]

F. *Theories Applied Under Common Law from Other Jurisdictions*

The first major case involving strict liability in tort as applied to economic loss was *Santor v. A & M Karagheusian, Inc.*[92] In that case, the consumer purchased a defective and virtually worthless rug that the defendant-manufacturer had produced.[93] The New Jersey Supreme Court held that strict liability in tort is a proper remedy for

79. *Id.* at 251-52, 257 N.E.2d at 384.
80. *Id.* at 245, 257 N.E.2d at 381.
81. *Id.* at 251-52, 257 N.E.2d at 384.
82. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
83. *Id.* at 88, 326 N.E.2d at 268.
84. *Id.* at 93, 326 N.E.2d at 271.
85. *Id.*
86. 465 F. Supp. 355 (N.D. Ohio 1979).
87. *See supra* notes 82–85 and accompanying text.
88. *See supra* notes 74–77 and accompanying text.
89. 465 F. Supp. 355, 366 (N.D. Ohio 1979).
90. *Id.* at 366.
91. H.B. No. 996, 116th Gen. Assembly, Reg. Sess., § 2307.71 (B) (1985-86).
92. 44 N.J. 52, 207 A.2d 305 (1965).
93. *Id.* at 56, 207 A.2d at 307.

products liability cases involving direct economic loss, even though the carpeting itself did not pose an unreasonable risk of harm to the plaintiff or his property.[94] The court based its decision upon *Henningsen*,[95] which assumed that because consumers are inherently unable to bargain with manufacturers, tort remedies are necessary to safeguard their interests.[96]

One post-*Santor* commentator noted that a plaintiff should recover all damages directly resulting from the defective product's condition if the product "causes, *or has reasonable potential for causing*, harm to the plaintiff's person or property other than the product itself. Recovery should turn on the nature of the *product* and not the damages incurred."[97] *Santor* is a significant decision because it treats similarly *all* harm resulting from a defective product. The New Jersey court makes no distinction based on the nature of the harm incurred, rather it focuses on the nature of the product.[98] Such an emphasis furthers an underlying objective of strict liability that deters manufacturers from marketing defective products by holding them liable for all resulting harm caused by their defects. The responsibility of the manufacturer should remain constant, regardless of the nature of the losses incurred.

Conversely, the California Supreme Court in *Seely v. White Motor Co.*[99] rejected this bargaining power analysis and concluded that contract principles govern all economic loss cases.[100] In that case, the plaintiff, a small businessman, demanded lost profits when a defective truck he had purchased from the defendant overturned.[101] Although the court ultimately awarded consequential damages on an express warranty theory,[102] Chief Justice Traynor's opinion refused to extend strict liability in tort to cover economic losses.[103] Believing that the *Santor* decision unreasonably burdened manufacturers with unlimited and unforeseeable liability, the court held that such losses, given their commercial nature, were only recoverable under the express warranty provisions of the Uniform Commercial Code.[104] The California Supreme Court's conclusion that a manufacturer "cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands"[105] ignores policy considerations that favor holding manufacturers liable for defectively manufactured products.[106] Purchasers should not have to secure express warranties from manufacturers that their products are not defective or unreasonably dangerous before the law will hold them liable.

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94. *Id.* at 66-67, 207 A.2d at 312-13.
95. 32 N.J. 358, 161 A.2d 69 (1960).
96. 44 N.J. 52, 64-65, 207 A.2d 305, 311-12 (1965).
97. Comment, *supra* note 7, at 41 (emphasis in original).
98. 44 N.J. 52, 66-7, 207 A.2d 305, 312-13 (1965).
99. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
100. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
101. *Id.* at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.
102. *Id.* at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
103. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
104. *Id.* at 15-19, 403 P.2d at 149-52, 45 Cal. Rptr. at 21-24.
105. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
106. *See infra* notes 143-51 and accompanying text.

Chief Justice Traynor, however, did note that strict liability in tort covered harm to property on the theory that it was very similar to personal injury.[107] On this issue, the court held that tort law will provide a remedy for the consumer whose property is damaged by virtue of an unreasonably dangerous defect in a product, although tort law will not provide a remedy to a buyer who is harmed because the product fails to meet his economic expectations.[108] Therefore, it is significant that had the plaintiff in *Seely* been able to prove that a defect in the truck actually caused the rollover, the court would have allowed recovery in strict liability for harm to the product itself caused by the unreasonably dangerous defect.[109] Under this reasoning, *Seely* comports with the dictates of *Santor* by conceding that strict liability is appropriate when a defective product causes harm to either persons or property.[110]

Santor and *Seely* represent the boundaries between the conflicting tort and contract theories. *Seely* exemplifies the majority view that denies recovery in strict liability for losses caused by a product's qualitative defects and the product's resultant failure to meet the buyer's expectations.[111] *Santor* represents the minority view, allowing recovery for all losses caused by a defective product, whether or not the product is unreasonably dangerous.[112]

To distinguish between recoverable (in tort) damages caused by unreasonably dangerous product defects and nonrecoverable damages caused by a product's qualitative defects, the courts generally have looked to the circumstances surrounding the plaintiff's claim to determine whether the damage is a result of a defect that poses an unreasonable risk of harm to the consumer or his property.[113] The Alaska Supreme Court, for example, denied recovery for defects in a mobile home that made it a "lemon" but were not unreasonably dangerous.[114] In this case, although "[the] trailer was not suited for the purpose for which it was purchased, . . . the defects in it were not such that they resulted in sudden, violent or calamitous harm."[115] Thus, the court's decision reflects the policy of not allowing recovery when the plaintiffs were merely deprived of the value of their bargain. In a subsequent case, the same court permitted recovery when the rug padding in a mobile home caught fire, causing a sudden and calamitous occurrence which destroyed the home and its contents.[116] Therefore, in those two cases, the Alaska Supreme Court distinguished between plaintiffs deprived of the benefit of their bargain, and plaintiffs exposed to an unreasonable risk of harm through defective products that happened to cause a sudden and calamitous injury solely to the product itself.[117]

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107. 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965).

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

109. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.

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

111. *See generally* L. FRUMER & M. FRIEDMAN, 5 PRODS. LIAB. app. H at § 16A [4][k] (1982) [hereinafter FRUMER & FRIEDMAN]; Bland & Wattson, *supra* note 2, at 32.

112. *See, e.g.*, Bland & Wattson, *supra* note 2, at 32.

113. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981).

114. Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976).

115. Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977) (discussing the facts of *Morrow*).

116. *Id.*

117. *Id.*

III. Legislative Reforms of Products Liability Law

A. *Ohio House Bill 996*

In an attempt to reduce the mounting costs of product liability insurance, Ohio has introduced a comprehensive products liability reform bill.[118] Essentially, the legislation substitutes a product liability act for all Ohio common law dealing with tort product liability cases. House Bill 996 twice excludes tort recovery for damage to a product injured or destroyed by its own defect. First, the proposed act explicitly states that it does not extend to any civil action for injury or loss caused to a product itself or for commercial loss caused by a product.[119] Applicable Ohio commercial or contract law would govern these actions. Specifically, the bill provides that "[a] civil action for injury or loss caused to a product itself or for commercial loss caused by a product is not a product liability action . . . and shall be governed by the applicable commercial or contract law of this state."[120] Second, the proposed act further excludes tort liability by defining harm as "injury or loss to property other than a product itself."[121]

Read in conjunction, these two statements indicate that tort theories are not available to a plaintiff seeking recovery for the loss of his defective products. The bill intentionally preempts all product liability case law sounding in tort and substitutes this product liability act.[122] Since the proposed act clearly excludes from its coverage losses to the product itself, such losses would be recoverable only under commercial or contract law.[123]

The bill's proponents might argue that the legislation only preempts current case law to the extent that an action falls within the scope of the proposed act. Since claims for loss to the product itself are not covered by the bill, plaintiffs can still recover under tort theories for such damage. However, this interpretation would contravene clear legislative intent to substitute a product liability act for all Ohio case law concerning tort product liability cases.

In addition, proponents might argue that the bill would not change existing law even if the act were interpreted to preempt tort product liability cases. The legislation provides that damage to the product itself is covered not under the act, but under commercial law. Since some Ohio courts[124] have interpreted warranty theories to be essentially torts, proponents can argue that the act's limitation of remedies to solely commercial law would not change current case law that construes commercial theories (warranty) as tort theories. Such an interpretation, however, would nullify the explicit legislative intention to substitute a comprehensive act for Ohio common law product liability actions that are construed as torts. The fact that the theory was

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118. H.B. No. 996, 116th Gen. Assembly, Reg. Sess. (1985–86).

119. H.B. No. 996, 116th Gen. Assembly, Reg. Sess., § 2307.71(B) (1985-86).

120. *Id.*

121. H.B. No. 996, 116th Gen. Assembly, Reg. Sess., § 2307.70(E) (1985-86).

122. H.B. No. 996, 116th Gen. Assembly, Reg. Sess., § 2307.81(A) (1985-86).

123. H.B. No. 996, 116th Gen. Assembly, Reg. Sess., § 2307.71(B) (1985-86).

124. *See, e.g.*, Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

pleaded originally in warranty is irrelevant if the court ultimately interpreted the action to be a tort.

The Ohio bill abolishes valid tort remedies without providing adequate substitutes. By restricting recovery to commercial and contract law theories, the bill's drafters construe all harm to the product itself to be economic loss recoverable only under warranty theories. The proposed act, however, disregards situations in which an unreasonably dangerous product causes "sudden and calamitous" damage that threatens personal injury as well as damage to the product[125]—situations in which, as previously noted, the damage to the product may be classified as a property loss rather than as an economic loss.

Under the pending act, plaintiffs could only recover through warranty principles regardless of how the injury occurred. This result would reward manufacturers, which are fortunate enough to have the defect only injure the product by allowing him to escape strict liability in tort, thus circumventing the ultimate policy that manufacturers are liable for unreasonably dangerous products.[126]

The pending legislation is unsatisfactory for yet another reason. By allowing harm to persons caused by a defective product to fall within the bill's scope, but not harm to the defective product itself, a plaintiff suffering both personal harm and loss to the defective product is forced to pursue two separate causes of action. Requiring such a plaintiff to bring a tort action under the proposed act for personal injuries and a warranty action under commercial common law for harm to the defective product is ineffective. Most importantly, this will confuse the jury. As noted earlier,[127] a typical warranty action involves many elements and potential defenses. The bill demands too much from jurors by requiring them to separate and understand causes of action based upon statutory and common law. Since the average juror is likely to be confused by such a situation, the proposed act risks incorrect and inconsistent jury verdicts.

B. *United States Senate Bill 100*

Congress also is currently considering a uniform product liability law.[128] Since the proposed Ohio act is modeled after the federal bill, the acts' implications are very similar. For example, in defining "harm," Senate Bill 666 does not include "loss or damage caused to a product itself."[129] In addition, the bill states that "[a] civil action for loss or damage to a product itself or for commercial loss is not subject to this Act and shall be governed by applicable commercial or contract law."[130]

Consistent with the proposed Ohio act, the federal bill also replaces tort remedies with remedies in commercial or contract law. As noted above, all product injuries cannot be categorized as economic loss. Thus, when an unreasonably dangerous product causes harm to itself, the bill rescinds currently applicable tort

125. Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977).

126. *See* PROSSER & KEETON, *supra* note 8, at § 98. For additional policy justifictions, see RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

127. *See supra* notes 22–42 and accompanying text.

128. S. 666, 100th Cong., 1st Sess. (1987).

129. S. 666, 100th Cong., 1st Sess. § 102 (a)(9) (1987).

130. S. 666, 100th Cong., 1st Sess. § 103 (a) (1987).

remedies without an adequate replacement. One recent commentator opposing the bill noted that these changes in existing law would be "unnecessarily obtrusive into traditional areas of states' rights, and unsupported by any discernible public policy. For example, physical injury to the product itself is excepted from products litigation under the proposed Act, although the clear trend is to include such injury within the scope of products liability."[131]

C. *Legislation in Other States*

Most states have some legislation that addresses product liability law,[132] yet most of these states have not enacted statutes as broadly restrictive as the Ohio and federal bills.[133]

For example, the majority of statutes provide recovery in tort for personal injury, death, or property damage without specifically excluding damage to the product itself.[134] One representative statute provides that:

> a product liability action shall include any action brought for or on account of personal injury, death or *property damage* caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.[135]

Thus, statutes of this type leave open the question of what constitutes economic loss, allowing the individual facts of each case to determine the answer. Such a result is consistent with established common law recoveries, unlike the Ohio and federal bills.

Connecticut's product liability act,[136] for example, specifically includes damage to the product itself within the scope of the law by including it in the definition of "harm."[137] The statute further specifies that between commercial parties, harm does not include economic loss; therefore, an action for economic loss caused by a product may only be brought under the Uniform Commercial Code.[138] By allowing recovery in tort for damage to defective products without overgeneralizing that all such damage constitutes economic loss, Connecticut has enacted a model product liability statute that accurately reflects current common law. In addition, Connecticut's statute is exemplary because it does not *require* commercial remedies that have been shown to

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131. Phillips, *The Proposed Federal Liability Statute From The Toxic Tort Plaintiff's Perspective*, 28 VILL. L. REV. 1156, 1159-60 (1982-83).

132. For a compilation of product liability statutes that have been enacted by various states, see 2 PRODS. LIAB. REP. (CCH) 69, 110 *et seq.* (1981); FRUMER & FRIEDMAN, *supra* note 111, at app. H.

133. *But see* KAN. STAT. ANN. § 60-3302 (1981); WASH. REV. CODE § 7.72.010 (1981).

134. ALA. CODE § 6-5-521 (a) (1979); ARIZ. REV. STAT. ANN. § 12-681 (3) (1978); ARK. STAT. ANN. § 34-2812 (e) (1979); COLO. REV. STAT. § 13-21-401 (1977); CONN. GEN. STAT. § 52-572m (d) (1983); IND. CODE. ANN. § 33-1-1.5-2 (West 1983); KY. REV. STAT. ANN. § 411.300 (1) (Bobbs-Merrill 1978); MICH. COMP. LAWS ANN. § 600.2945 (West 1978); NEB. REV. STAT. § 25-21,180 (1978); N.C. GEN. STAT. § 99B-1 (3) (1979); OR. REV. STAT. § 30.900 (1977); R.I. GEN. LAWS § 9-1-32 (1) (1978); S.C. CODE ANN. § 15-73-10 (Law. Co-op 1974); TENN. CODE ANN. § 29-28-102 (6) (1978); UTAH CODE ANN. § 78-15-6 (1953).

135. KY. REV. STAT. § 411.300 (1979)(emphasis added).

136. CONN. GEN. STAT. § 52-572 m-r (1983).

137. *Id.* at § 52-572m (d).

138. *Id.*

be inadequate[139] for harm to the product. Connecticut's product liability law is especially noteworthy because it embodies the important policy consideration that manufacturers will be liable under a variety of theories for injuries caused by their defective products. Fortunately, Connecticut has not shielded manufacturers from tort liability as the Ohio and federal legislation proposes to do. Rather, Connecticut has retained tort theories to protect consumers from unreasonably dangerous products. Due to the recency of this legislation, however, it has not been tested in the Connecticut courts.

IV. Policy Considerations Support Tort Recovery

Both United States Senate Bill 666 and Ohio House Bill 996, if enacted, will have a significant effect on existing products liability jurisprudence. Today, the majority of courts permit recovery in tort—generally, strict liability—when an unreasonably dangerous defect causes damage to the product itself.[140] Many courts,[141] including those in Ohio,[142] even allow strict liability tort remedies solely for economic loss. Furthermore, by essentially ignoring important policy considerations underlying strict liability in tort, these two pieces of legislation may prove to be a substantial setback for the developing law of strict products liability.

A. *Public Policy Supports Tort Recovery*

Statutory mandates requiring contractual remedies when only the product is harmed subverts the major purpose of strict liability—to deter manufacturers from marketing products that are hazardously defective.[143] Deterrence theory reasons that the manufacturer, rather than the injured consumer, should bear the risk of the unsafe products it places on the market because the consumer has a right to expect that a product will be safe for its intended use.[144] In fact, Chief Justice Traynor noted that "[i]mplicit in the [product's] presence on the market . . . [is the] representation that it [will] safely do the job for which it was built."[145] This risk allocation is equally applicable when only the purchaser's *property* is injured because a purchaser is

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139. *See supra* notes 33–42 and accompanying text and *infra* notes 152–67 and accompanying text.

140. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983); John R. Dudley Constr. v. Drott Mfg. Co., 66 A.D.2d 368, 412 N.Y.S.2d 512 (1979); Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982).

141. *See, e.g.*, Verdon v. Transamerica Ins. Co., 187 Conn. 363, 371 n.6, 446 A.2d 3, 8 n.6 (1982); Cora v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); City of LaCross v. Schubert, Schroeder & Assocs., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976).

142. Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979) (strict liability); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

143. *See* Comment, *supra* note 7, at 42–43. The typical policy justifications for strict liability are criticized by Owen, *Rethinking the Policies of Strict Liability*, 33 Vand. L. Rev. 681 (1980).

144. *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981). As a practical matter, one of the most powerful incentives to produce safe products is to avoid developing a reputation for unsafe and defective products. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 Tenn. L. Rev. 938, 945 (1957).

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

similarly unable to protect itself from the hazardous product. Thus, a manufacturer's responsibility to market safe products should not depend on the fortuity of whether a person escapes injury. Especially in today's increasingly complex world, in which consumers cannot test products for potential defects, the manufacturer's duty to produce safe products must remain of primary importance, regardless of whether the hazard's ultimate impact is on people, other property, or the product itself.

Another major purpose of strict liability in tort is to prevent a manufacturer from contractually limiting the scope of his responsibility for harm caused by his products.[146] Although a common argument is that commercial parties to a contract should be limited to contractual remedies, there is no logical reason for the proposition that a commercial entity, as opposed to a noncommercial consumer, must bargain for a safe product.[147] Commercial purchasers have a right to buy a product free from hazardous defects, and the manufacturer has a duty to provide safe equipment.[148] Thus, the Ohio and federal legislation which require that plaintiffs must resort exclusively to Uniform Commercial Code remedies and may not recover under tort law when the product itself is damaged is inconsistent with policies underlying tort and contract principles. Since purchasers should not be expected to bargain for a safe product, contract law cannot adequately adapt to the problem of hazardous defects.

In addition, other policy justifications have been convincing to courts that have accepted strict liability in tort. For example, the harm caused by defectively damaged products can best be borne by the manufacturers who make and sell these products.[149]

Manufacturers have the unique capacity to distribute the losses of the few among the many who purchase these products by charging higher prices. By marketing his product for use, the seller undertakes a special responsibility toward any purchaser who may be or whose property may be harmed by the product. Likewise, the consuming public has a right to and does expect that reputable sellers will stand behind their goods. Thus, the burden of accidental injuries must be borne by those who market the product as safe to consumers, rather than the unfortunate purchaser who relies on such marketing to his detriment.

Furthermore, accident prevention can be promoted by adopting strict liability and eliminating the need to prove negligence.[150] Given the high costs of litigation, proof of negligence in the sale or manufacture of a defective product should not be required. By reducing impediments to proving a strict liability cause of action, more manufacturers would be held liable on strict liability theories, thus encouraging more careful production methods and hopefully reducing accidents due to defective products.[151]

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

147. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981); Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 95, 96-97, 435 N.E.2d 443, 455-56 (1982) (Simon, J., concurring).

148. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1175 (3d Cir. 1981).

149. Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944)(Traynor, J., concurring); Cloud v. Kit Mfg. Co., 563 P.2d 248, 250 (Alaska 1977). *See also* PROSSER & KEETON, *supra* note 8, at § 98; RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

150. Phillips v. Kimwood Machine Co., 269 Or. 485, 493, 525 P.2d 1033, 1041-42 (1974).

151. However, it has also been argued that strict liability will inhibit the development of new products and may not induce any greater degree of care than liability based on negligence. PROSSER & KEETON, *supra* note 8, at § 98.

B. *Contract Remedies Are Not Adequate Substitutes for Tort Remedies*

The difference between pursuing a claim through tort remedies and pursuing the same claim under contractual remedies is striking. First, the scope of liability under tort principles is much broader than under contract.[152] Since contractual recovery depends upon a breached promise by the defendant, an injured plaintiff must satisfy the Uniform Commercial Code's requirements for express or implied warranties.[153] Tort remedies, however, generally attach as soon as the manufacturer places a defective product into the stream of trade and promotes its sale to the public.[154]

A defendant in a breach of contract action has access to all contractual defenses such as valid disclaimers,[155] misuse,[156] failure of plaintiff to give reasonable notice of breach,[157] expiration of the statute of limitations,[158] and lack of privity.[159] Generally, however, there are fewer tort defenses available than defenses under the Uniform Commercial Code. In addition, tort defenses vary with the jurisdiction. Some states allow defenses such as intervening cause of injury[160] and "state of the art,"[161] which denies strict liability when the product was as safe as current technology permitted it to be.[162] Courts generally decide applicable tort defenses on a case-by-case basis.[163]

The Uniform Commercial Code also requires a plaintiff suing in contract to notify the warrantor of any product nonconformities within a "reasonable time" after tender has been accepted.[164] This notification requirement is not necessary under tort remedies. In addition, applicable statutes of limitation vary with contract and tort actions. Breach of warranty actions must be brought under the Uniform Commercial Code within four years of the transaction.[165] Conversely, tort actions are governed by each jurisdiction's personal injury statute, which frequently lengthen the available time to bring an action by allowing the tolling of statutes of limitation in tort actions until the injury actually is discovered.[166]

Given the striking differences between pursuing an action in contract and tort, it seems evident that legislation that completely abolishes tort remedies is unduly

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152. *Compare, e.g.*, U.C.C. § 2-313 (1985) *with* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). *See also* Note, *supra* note 1, at 122.

153. U.C.C. § 2-313, *supra* note 23.

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

155. WHITE & SUMMERS, *supra* note 59, at §§ 12-1, -5.

156. WHITE & SUMMERS, *supra* note 59, at § 11-8.

157. WHITE & SUMMERS, *supra* note 59, at § 11-10.

158. WHITE & SUMMERS, *supra* note 59, at § 11-9.

159. WHITE & SUMMERS, *supra* note 59, at § 11-2.

160. Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal Rptr. 800 (1973).

161. *See* Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Pontifex v. Sears, Roebuck & Co., 226 F.2d 909 (4th Cir. 1955); Cantu v. John Deere Co., 603 P.2d 839 (Wash. 1979). *But see* Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982) (state of the art defense held impermissable in strict liability actions).

162. *See generally* PROSSER & KEETON, *supra* note 8, at § 99; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Note, *Product Feasibility Reform Proposals: The State of the Art Defense*, 43 ALB. L. REV. 941 (1979).

163. *See, e.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Note, *supra* note 1, at 123.

164. U.C.C. § 2-607(3)(a) (1985), *supra* note 60.

165. U.C.C. § 2-725(1) (1985), *supra* note 62.

166. *See, e.g.*, Rosenau v. City of New Brunswick, 51 N.J. 146, 238 A.2d 177 (1968).

restrictive upon plaintiffs. Generally, contract theories are more difficult to prove and are basically more cumbersome than tort theories.[167] In addition, requiring a plaintiff to pursue a contract theory that necessitates a more onerous burden of proof undermines policy concerns that simplify proof requirements under tort theories to better assist plaintiffs in recovering from manufacturers of defective products. Furthermore, there seems to be no logical reason for abolishing existing tort theories of recovery and substituting inadequate commercial remedies, save a desire to reduce manufacturer's liability. However, such a rationale is unsound because manufacturers must be held liable when their defective products do, in fact, cause injury. Thus, the Ohio and federal legislation should include, by amendment, tort recovery when the defective product itself is damaged.

V. CONCLUSION

The Ohio and federal product liability reform acts, as proposed, abolish valid, existing theories of recovery without providing an adequate substitute when an unreasonably dangerous product causes injury to itself. Both acts incorrectly characterize any loss to the product itself as economic loss. Such a characterization is inconsistent with numerous factual situations that may arise when the defective product threatens personal injury as well as injury to the product. In these cases, strict liability tort policies require that the manufacturer should not escape tort liability because he was lucky that the defective product did not injure any person or collateral property. In addition, many states, including Ohio, allow tort recovery for qualitative defects in a product.

This proposed legislation should not prohibit tort recovery already permitted by existing case law for economic loss. Similarly, legislation should not expressly provide that manufacturers automatically escape tort liability in situations in which recovery is sought only for physical loss to the defective product. The solely commercial remedies enumerated in these proposed bills are inconsistent with existing law that allows tort remedies in such cases and are clearly inadequate when an unreasonably dangerous product injures itself. In essence, the current wave of tort reform should not be allowed to swell to such a level that it drowns out valid plaintiff's rights.

Therefore, the most workable solution is to amend the Ohio and federal bills to include product liability actions seeking recovery for damage to the defective product itself within the scope of the acts. Such an amendment would be consistent with current law in most states, would further the previously articulated policies of strict liability in tort, and would prevent inconsistent and anomalous results.

Julie A. Dunwell

167. *See generally* PROSSER & KEETON, *supra* note 8, at § 98.