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The Ohio Products Liability Code: The Mechanical Problems Involved in Applying Strict Tort Remedies to Economic Loss in Commercial Cases

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THE OHIO PRODUCTS LIABILITY CODE: THE MECHANICAL PROBLEMS INVOLVED IN APPLYING STRICT TORT REMEDIES TO ECONOMIC LOSS IN COMMERCIAL CASES

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I. BACKGROUND

Under the Ohio Product Liability Code, any claimant entitled to recover compensatory damages for harm[1] may invoke the Code remedy to recover any economic loss proximately resulting from the defective aspect of the product producing the harm.[2] This contingent ability of product liability claimants to redirect their physical injury strict tort remedy toward the recovery of economic loss is a variant of tort's physical injury rule under which plaintiffs may recover all the loss caused by the defendant's tortious conduct.[3] Because of the Code's sweeping coverage of the kinds of products subject to its strict tort standards, it has become an ubiquitous instrument for the ambitious extension of the physical injury concept into all facets of commercial law.

A previous article analyzes, from a policy perspective, the wisdom of a wholesale expansion of the physical injury rule into commercial

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1. As defined in the Ohio Revised Code, "harm" is physical injury to a person or to property other than the product in question. OHIO REV. CODE ANN. § 2307.71(G) (Anderson 1991). "Economic loss" is any direct, incidental or consequential pecuniary loss, including, but not limited to, damage to the product itself, and non-physical damage to other property. *Id.* § 2307.71(B).

2. The Ohio Product Liability Code refers to the product liability provisions in the Ohio Civil Justice Reform Act. Am. Sub. H.B. 1, 117th Gen. Assembly, 1st Reg. Sess. (1987) (eff. Jan. 5, 1988). These provisions are codified in the Ohio Revised Code. OHIO REV. CODE ANN. §§ 2307.71-.80, 2315.20-.21 (Anderson 1991). In order to differentiate the Ohio Product Liabilty Code from the rest of the Ohio Revised Code, this article will use the term "the Code" when referring to the Ohio Product Liability Code. The provisions of the Code should not be confused with the provisions of the Uniform Commercial Code (U.C.C.) which were adopted in Ohio. OHIO REV. CODE ANN. §§ 1301-09 (Anderson 1979 & Supp. 1991). These product liability statutes are not a true Code. They do not wholly displace existing law and require the courts to construe product liability matters anew, irrespective of prior decisions. They are like the provisions of the U.C.C. in the sense that they are a collection of statutes providing a comprehensive set of guidelines for a particular problem area. *See* John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 5 (1983).

3. For an explanation of the theory of tort's physical injury rule, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 997 (5th ed. 1984 & Supp. 1988) (describing the process by which the physical injury rule is extended from negligence to strict liability in tort).

products cases.[4] The article concluded that, on policy grounds, the Code goes too far. Among the arguments supporting this conclusion were the corrosive effects the Code would have on the ability to keep tort and contract in separate spheres, and the general unsuitability of the physical injury technique for apportioning liability for commercial economic loss.[5]

This article carries on the argument against the use of the physical injury approach to liability for economic loss in commercial cases. It demonstrates that the principles of strict tort liability, fashioned to deal with the risk of physical endangerment, do not provide logical and sensible standards for the bargain and expectation dimensions of commercial disputes. The use of strict tort in these circumstances raises five major mechanical problems: (a) an awkwardness inherent in evaluating quality and performance shortcomings with safety-oriented standards; (b) deficiencies in tort damage and causation concepts for redressing expectancy losses; (c) inadequate tort guidelines for defining and regulating relationships among sellers in the marketing chain; (d) inadequate seller defenses related to user conduct; and (e) uncertainties in the rules and standards controlling statute of limitation issues.

Making tort remedies dependent on the occurrence of physical injury does not erase these problems. Once the contingency occurs, the Code's remedy comes into play as if it had been directly assigned to the economic loss aspects of the case. The Code's competence in these matters should be measured from this perspective.

II. THE MECHANICAL CONCERNS

A. Safety Gauges for Performance Problems

When applied to economic loss cases, the Code provides apple solutions for orange problems. It contrives formulas for determining unacceptable risks of physical injury, not standards for assessing value and economic usefulness. This asymmetry is particularly apparent in its provisions dealing with design deficiencies and warning inadequacies.[6]

The risk of physical injury standards set forth in the Code stand in

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4. *See generally* Ronald D. Raitt, *The Preemption and Economic Loss Provisions of the Ohio Product Liability Code*, 16 U. DAYTON L. REV. 583 (1991).

5. *Id.*

6. The Code's standard for defectiveness in design cases is a product with a design whose foreseeable risks exceed its benefits or a product which, because of its design, is more dangerous than an ordinary consumer would expect when the product is used in an intended or foreseeable manner. OHIO REV. CODE ANN. § 2307.75(A)(1), (2) (Anderson 1991). The risk/benefit analysis is determined according to such factors as the nature and magnitude of the harm, the product user's awareness of the harm, and the likelihood that the product will cause harm. *Id.* § 2307.75(B). The Code provisions dealing with warnings and instructions are similarly framed in terms of risks that caused harm and the foreseeability of such risks. *Id.* § 2307.76. In short, the

contrast to the quality and performance guidelines posited in the U.C.C. The essence of the U.C.C.'s merchantability warranty is that the goods "pass without objection in the trade" and be "fit for the ordinary purposes" for which they are intended.[7] The touchstone of the U.C.C.'s fitness warranty is that the goods be fit for any particular purposes communicated by the buyer to the seller.[8]

Products reveal their nonconforming character in a variety of ways. They can fail to perform at the appropriate level,[9] to produce proper results,[10] or to be of the requisite quality.[11] They also can fail to possess the useful life associated with the product line.[12] Problems within these categories are good subjects for the performance and comparative value guidelines articulated in the U.C.C., particularly where economic loss is the focus of the dispute. Safety standards, on the other hand, often will miss the mark. The deflection is the greatest where quality expectations must be matched with price concessions.[13] The law quite properly refuses to soften safety standards for products at the lower end of the quality scale.[14] The Code, however, stands this rule on its head by requiring that quality considerations measure up to safety

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Code provides rules addressed to physical endangerment and not performance or quality expectations.

7. U.C.C. § 2-314 (1989).

8. *Id.* § 2-315.

9. *See, e.g.*, Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980) (failure of roof to perform properly); Fredonia Broadcasting Co. v. R.C.A. Corp. 481 F.2d 781 (5th Cir. 1973) (failure of television broadcasting equipment to function effectively); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir. 1970) (loss from plant slowdowns and shutdowns allegedly caused by defects in electrical power turbine generator); Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983) (insulation gave off noxious and malodorous fumes); Hunt v. Perkins Mach. Co., 226 N.E.2d 288 (Mass. 1967) (marine engine emitted heavy black smoke soiling boat inside and out and rendering vessel unpleasant place to work).

10. *See, e.g.*, Singer Co. v. E.I. duPont de Nemours, 579 F.2d 433 (8th Cir. 1978) (inadequacy of paint for use in manufacture of air conditioners and furnaces); Plainwell Paper Co. v. Pram Inc., 430 F. Supp. 1386 (W.D. Pa. 1977) (electro base stock paper unfit for photocopying because of odor problems); Whittington v. Eli Lilly & Co., 333 F. Supp. 98 (S.D. W.Va. 1971) (failure of oral contraceptive to prevent pregnancy); Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp., 514 N.E.2d 1299 (Ind. 1987) (failure of pesticide to control pests).

11. *See, e.g.*, Dixie-Portland Flour Mills, Inc. v. Nation Enter., Inc., 613 F. Supp. 985 (N.D. Ill. 1985) (contamination of flour with sand); Regina Grape Prod. Co. v. Supreme Wine Co., 260 N.E.2d 219 (Mass. 1970) (nonconfirmity in wine due to water content and absence of uniformity of color and body); Wilson Trading Corp. v. David Ferguson, Ltd., 244 N.E.2d 685 (N.Y. 1968) (yarn defect rendered sweaters unsaleable because of color variations).

12. *See infra* note 19.

13. *See* Sylvia Coal Co. v. Mercury Coal & Coke Co., 156 S.E.2d 1 (W. Va. 1967) (selling price highly relevant in determining nature and scope of implied warranty of merchantability).

14. *See, e.g.*, Kassab v. Central Soya, 246 A.2d 848 (Pa. 1968) (cattle feed which causes sterility in bulls is not merchantable even though it was otherwise nutritious).

standards. The door is thus opened to the commercial claimant to recover all the loss, including consequential damages, caused by products which arguably fulfilled his economic expectations.[15] This windfall exists even though sound arguments can be made that as respects the items of consequential economic loss, the gravamen of the plaintiff's action involves expectation interests, as articulated and protected by contract law, and not damage to property interests protected by tort.[16]

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15. The difficulties created by attempts to treat quality concerns and safety considerations as fungible concepts can be illustrated by examining some of the practical commercial problems confronting the courts. In *Bethlehem Steel Corp. v. Chicago Eastern Corp.*, the issue was whether certain sheet steel of a designated type was unmerchantable because it had been submitted to a renitrogenization process which made it stronger but more brittle. 863 F.2d 508 (7th Cir. 1988). The brittleness had caused cracks in storage tanks and bins, which were manufactured from the steel by the Chicago Eastern Corporation. *Id.* at 510. Chicago Eastern incurred substantial costs in replacing the defective steel. *Id.*

The court in *Bethlehem Steel* observed that merchantability is to be determined by analyzing the buyer's particular purpose and the seller's perspective of the transaction. *Id.* at 514. The subject seller was in the business of selling unfinished steel products including the type involved in the subject case. *Id.* The court reasoned that different uses of steel possibly could require a different balancing of strength and brittleness. *Id.* at 515. It sustained a motion for a directed verdict for lack of evidence that the brittleness of the steel, regardless of the improved strength, made the steel unmerchantable. *Id.* In other words, the failure of the product for the plaintiff's uses did not inevitably render the product unmerchantable.

Assume that in *Bethlehem Steel* the cracks in the bins precipitated circumstances culminating in damage to other property and ensuing consequential loss, and also that the need to balance strength and brittleness made the steel merchantable. The absence of a breach of warranty would preclude recovery of any of the loss under the U.C.C.. U.C.C. §§ 2-710 to -716 (1989). The fact of physical injury to other property, however, would open up the possibility of the full recovery in tort for all the claimants' loss. The fact that the steel was merchantable would not prevent a finding that it was defective under strict product liability standards. Stated another way, merchantability may abide conditions that safety will not allow.

16. Dean John W. Wade of Vanderbilt University has prompted the question of whether the U.C.C. should be seen as preempting tort remedies in products cases. Wade, *supra* note 2, at 6. Dean Wade argues against preemption. *Id.* at 6-28. In his analysis of whether tort and contract can be viewed as companion doctrines, he makes the following points:

> The other line of distinction is that between tort and contract. I cannot contend that this is always a clear, bright line that raises no difficulties in its application. There may sometimes be overlap and not all courts agree on whether the line applies for some types of situations.
>
> But it is a traditional distinction that is well established and used for many purposes. It is customary to look to the gravamen of the cause of action. Contract law protects the expectation interest. It seeks to place the plaintiff in the position he would have been in if the defendant had not broken the contract. Tort law has as its gravamen the restoring of the plaintiff to the position he had been in before the defendant's wrongful conduct injured him. The details and ramifications of the two sets of laws were developed in the light of the primary purpose of each.
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> When the courts talk about the gravamen of a cause of action, even though the defendant's acts grew out of a contract between the parties, they almost always find the gravamen to be in tort if the harm is physical injury to person or property. In the personal services cases—involving doctors, for example—they almost always hold that the action must be in tort and should not be brought for breach of contract.

Moreover, the intercession of tort tends to render meaningless the property damage remedies crafted in the U.C.C.[17]

Illustrations are provided through the illogical results possible where rules directed at the risk of physical endangerment are asked to broker expectation losses in commercial cases. These show that under the physical injury approach to liability, commercial sellers can be held liable for consequential economic loss for product conditions satisfying value and expectation requirements.[18]

> In cases involving a contract for the sale of a dangerous product, however, the action can be brought on the contract for breach of an implied warranty. This is because the Code [U.C.C.] provides as much, in language that leaves no doubt about its effect. The question here is not whether an action for breach of implied warranty can be brought. Instead, it is whether implied warranty is the only action, except possibly negligence, that can be brought.
>
> The distinction between contract and tort is thus to be used only to determine what other actions are available in addition to the contract action for breach of implied warranty. Both negligence and strict tort action should be available. The gravamen for both is the same.

Id. at 24-25.

Dean Wade's gravamen analysis recommending the co-availability of tort and contract remedies may be appropriate where the product condition violates both tort and contract standards. It assumes such a circumstance. It, however, does not address conditions in which the product does not offend the contract standard. Where the claim actually arises from the sale of goods but does not involve the transgression of warranty requirements, the courts must determine the gravamen dominating the action. Dean Wade contends that many suits between commercial parties are best managed by the application of contract principles. *Id.* at 25. Such management is particularly appropriate for items of loss essentially implicating expectation considerations in commercial cases. *Id.*

17. Property damage is an item of loss recoverable under the U.C.C. as a consequential loss. U.C.C. § 2-715 (1989).

18. In *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, the Tenth Circuit Court of Appeals held that pipe manufactured according to particular industry standards was not unmerchantable under a state standard defined as involving goods "of a quality such as is generally sold in the market and suitable for the purpose of which they are intended, although not of best quality." 516 F.2d 33, 39 (10th Cir. 1975) (quoting Wallace v. L. D. Clark & Son, 174 P. 557, 558 (Okla. 1918)). The damages sought in *Mustang Fuel* involved: (1) indemnification for an amount paid by the plaintiff to third-parties for death and injury caused by an explosion connected with ruptured pipe and (2) the cost of replacing the buried pipe. *Id.* at 36. *Mustang Fuel* thus represents an instance in which tort remedies, if pertinent, would possibly allow recovery for consequential economic loss connected with quality requirements which the plaintiff had not sought and for which it had not paid. In other words, particular items of loss should be submitted to the remedies designed for that loss. The fact that multiple forms of loss have occurred does not, as a matter of logic, inevitably require that all the loss be committed to one theory of recovery. The gravaman approach to liability does not conceptually require such a result.

Blockhead, Inc. v. Plastic Forming Co., presents yet another instance in which the use of torts physical injury rule could, in a damage to other property context, provide buyers with a quality windfall. 402 F. Supp. 1017 (D. Conn. 1975). The parties had agreed on a blow-molding process in the manufacture of wiglet carrying cases. *Id.* at 1020. The process resulted in thin-walled housing. *Id.* at 1021. The court found no breach of the U.C.C.'s merchantability warranty. *Id.* at 1025-27. It reasoned that a product can be merchantable even if it causes injury. The critical inquiry is whether, despite such potential, the product would pass without objection in the trade and conform to other like products on the market. *Id.* at 1026 n.2.

The submission of economic loss problems to risk standards raises a variety of problems. Paramount is the time-frame during which the product must function free of faults. When a product fails before the expiration of its useful safe life and causes personal injury, the manufacturer is and should be liable for that loss. The product's useful safe life, however, may not be the same as its useful efficient or productive life. A product's safe life reasonably might expire before its useful life interval reasonably may have expired. Yet, under the Code, the manufacturer is liable for all the economic loss flowing from the failure producing harm. The Code thus subtly extends useful productive life to the more extreme limits fashioned for useful safe life.[19]

The unbargained-for quality windfalls made possible by the displacement in damage to other property situations of contract standards by those sounding in tort is particularly apparent in industrial goods cases. In these cases, the absence of safety devices may not render the product unmerchantable. It may, however, make the product defective in tort. *See, e.g.*, Pike v. Frank G. Hough Co., 467 P.2d 719 (Cal. 1970); Knitz v. Minster Mach. Co., No. 78-1633, slip op. (Ohio Ct. App. 1987).

All that would be required to give the buyer the ability to trade on gratuitously acquired quality standards would be the occurrence of an event in which the absence of safety equipment resulted in damage to other of the purchaser's property. The safety of used goods also has this potential. *See, e.g.*, Dickerson v. Mountain View Equip. Co., 710 P.2d 621 (Idaho App. 1985) (U.C.C.'s implied warranty of merchantability applies to both new and used goods but such warranty is not intended in either instance to guarantee that the goods be of the best or highest quality but only of a generally accepted quality under the description used in the contract). The windfall potential is made all the more problematic by restrictions placed on the affirmative defenses available to product sellers in strict tort actions. *See infra* notes 63-86 and accompanying text.

19. Useful safe life is a disarmingly complex concept. Even the best of products will deteriorate, and it is generally agreed that a manufacturer has no duty to furnish a machine that will not wear out. *See* Auld v. Sears, Roebuck & Co., 41 N.E.2d 927 (N.Y. 1942). The rub lies in the implementation of this notion. For example, does the concept apply to ticking time bombs which fortuitously fail to go off only after well made products would have failed, or is it merely the basis for an inference that the product failed, not because of conditions existing at the time the product left the seller's control, but because of events occurring thereafter? How does the nature of the alleged flaw, design defect, improper manufacture, inadequate warnings, or misrepresentation affect the concept? Does useful safe life relate to the particular product in question, to all like products made by the manufacturer, or to some industry norm? Finally, what is the role of the user in determining the product's useful safe life? *See, e.g.*, Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988) (raising questions about the role of the product's user in determining the product's useful life).

To illustrate the problems possible where expectancy considerations are allowed to ride in the wake of concepts crafted to deal with safety concerns, assume that a weld at the foot of one of the legs of an oil drilling rig failed after fifteen years of good service. In such a case, it has been held that extended safe use would not bar a negligence claim, and presumably not a products liability claim, but would be probative that the failure was not the consequence of negligent manufacture. Pryor v. Lee C. Moore Corp., 262 F.2d 673, 675 (10th Cir. 1958). Recovery under the expectancy driven provisions of the U.C.C. would fail in such a circumstance because, absent a warranty explicitly extended to future performance, the plaintiff's cause of action would have accrued at the time of tender of delivery and the four years allowed for commencing an action would have expired. *See* U.C.C. § 2-715 (1989).

Assume, however, that when the derrick collapsed, it damaged other property belonging to the plaintiff, leading to lost production and extra expenses. Under the Code, and assuming the

Warning defects provide yet another concern. A product may be actionable because of the manufacturer's failure to provide the warnings or instructions needed for safe use.[20] The effective avoidance of the risk of physical injury logically will require a more elaborate, detailed and specialized form of warnings and instructions than required for the less imperiling danger of substandard economic performance. Since the Code extends to industrial products, claims can arise where a considerable amount of economic loss liability will be allowed to ride on the back of legal standards crafted for other risks.[21] The extent of the

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fulfillment of the other requirements of a product liability claim, the plaintiff would have a claim for harm. OHIO REV. CODE ANN. § 2307.72(A) (Anderson 1991). This plaintiff would be able to recover under these tort standards all the economic loss resulting from the product defect. *Id.* §§ 2307.72(C), 2307.79. The one factor which could intercept this result would be a determination that the economic loss claim is subject to a different limitations statute than the claim for harm. *See infra* notes 87-119 and accompanying text. Barring such a determination, the recited Code provisions have the clear practical effect of extending significantly the time-frame during which a product must deliver on original expectation as it relates to the more important constituents of economic loss. *See* OHIO REV. CODE ANN. §§ 2307.72(A), (C), 2307.79 (Anderson 1991).

20. OHIO REV. CODE ANN. § 2307.76 (Anderson 1991). Under the Code, putative defendants subject to product liability claims have both a marketing and a post-marketing duty to provide the warnings or instructions that a person exercising reasonable care would have provided concerning a risk, associated with the use of the product, of which the manufacturers knew, or in the exercise of reasonable care, should have known. *Id.*

21. U.C.C. § 2-314(2)(e), (f) (1989). Among the minimum standards controlling whether goods are merchantable under the provisions of the U.C.C. are the requirements that they: "(e) are adequately contained, packaged and labelled as the agreement may require, and (f) conform to the promises or affirmations of fact made on the container or label if any." *Id.*

A product can be defective for strict tort purposes if it lacks adequate warnings or instructions. OHIO REV. CODE ANN. §§ 2307.72(A), 2307.76 (Anderson 1991). Warnings and instructions present yet another instance in which contract's merchantability standards may be less demanding than the ones required in strict tort. Where this occurs, commercial buyers may have an opportunity through the medium of tort's physical rule to trade on standards unavailable to them under commercial law principles. *See id.* To the extent that their loss is dominated by damages smacking of commercial expectation, they will have received a significant windfall. *See id.*

The possibility that U.C.C. standards, as they relate to warnings and instructions may be less demanding than their tort counterparts stems initially from the proposition that merchantability, the warranty standard most analogous to strict tort, "is not a synonym for perfect." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9.8, at 417 (3d ed. 1988). The possibility is enhanced by the uncertainty existing over the range of seller conduct covered by the labelling requirements set forth in U.C.C. section 2-314. U.C.C. § 2-314 (1989). In *Reddick v. White Consol. Indus., Inc.*, a court held that labels do not equate with instructions and that a manufacturer's manual of instructions for the installation of a gas heater was not a "label" within the meaning of section 2-314 of the U.C.C. 295 F. Supp. 243, 249-50 (S.D. Ga. 1969). In *Reid v. Eckert Drugs, Inc.*, however, a court held that the merchantability warranty was breached by the failure of a deodorant manufacturer to provide specific instructions about the use and formulation on a can of aerosol deodorant. 253 S.E.2d 341, 349-50 (N.C. App. 1979). Warnings on the can regarding heat and flame were properly understood to refer to the can and its use and not to the use of the deodorant itself. *Id.* at 349.

Even if it can be assumed that the U.C.C.'s merchantability requirement reaches the same marketing activities as strict tort, it remains possible that marketing information adequate for commercial purposes under merchantability standards would be viewed as deficient for physical

seller's exposure to economic loss liability may be difficult to foresee.[22]

It is thus apparent that making manufacturers of commercial products liable for the economic loss resulting from the failure of their products to pass safety standards raises a variety of problems. Difficulties begin with high standards aimed at risks basically unrelated to economic expectations and extend to potential liability for economic losses deep in the shadows of what manufacturers reasonably should have foreseen. The position of sellers is made even more precarious by the limited range of strict tort affirmative defenses available to them.[23] The ability of the courts to use causation tools to narrow the practical sweep of the Code's economic loss provision does not save that provision from being an imprudent application of strict tort doctrine.[24]

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injury risks. For example, assume the situation confronted by the court in *West v. Broderick Bascom Rope.* 197 N.W.2d 202 (Iowa 1972). In *West*, a worker participating in the moving of several tire manufacturing presses, each one weighing 54-½ tons, was injured when one of the wire ropes being used in the transfer as part of a sling parted suddenly and violently. *Id.* at 208. Among the issues raised in *West* was whether the manufacturer of the sling was negligent for failing to attach to the sling itself the rated capacities of the wire rope. *Id.* at 210. The evidence clearly established that this information was provided to the plaintiff's employer in other materials. *Id.* at 210-11. The court held that according to such values as the likelihood of the harm, the severity of the potential harm and the likelihood that the information would get to the endangered party, the evidence in the case made out a jury question. *Id.* at 211-12. Providing the rated capacity of the wire to the plaintiff's employer could not be regarded as adequate warnings and instructions as a matter of law. *Id.*

Little imagination is required to convert the facts in *West* into a circumstance in which the claim involved damage to other property with ensuing consequential loss. Because of the considerable information actually provided to the purchaser in *West*, it could be argued with considerable force and merit that the seller of the wire rope had not breached its merchantability warranty in its labelling dimensions. For such a breach to have occurred, it would have to be shown that the manufacturers information delivery methods would not "pass without objection in the trade under the contract description." U.C.C. § 2-314(2)(a) (1989).

The absence of a breach of warranty would prevent recovery in contract whatever the circumstances of the loss. However, the occurrence of damage to other property opens the door to the recovery of not only the cost of the physical damage to the other property, but also all the consequential loss. In hindsight, the absence of personal injury probably encourages something of a relaxed view of the conduct warnings required of the seller. However, the law fixes the seller's obligation according to what reasonably could have been foreseen. If the threat of personal injury was in that picture, the seller will be held to conduct adequate for that risk, irrespective of what actually occurred. It is thus apparent that the categorical extension of strict tort product liability remedies to commercial cases has the effect of providing product purchases with a form of warranty protection considerably in excess of what they may have bargained and paid for. To the extent that these remedies reach losses more closely associated with expectation concerns than with physical risks, they work unwisely to undermine commercial law concepts and systems.

22. Where commercial sellers are confronted with products liability, strict tort obligations, and obligations under the U.C.C., they must endeavor to predict not only the property damage risks associated with the use of their products in their diverse commercial settings, but also the consequential loss possible from such events.

23. *See infra* notes 63-86 and accompanying text.

24. One who tortiously harms the person or property of another is liable for damages resulting from that harm if the conduct was the legal cause of the damages. RESTATEMENT (SECOND)

B. *Tort Concepts of Damage for Economic Loss*

This section addresses the question of whether in the products liability area, tort damage principles provide appropriate guidelines for the recovery of economic loss, particularly in those instances where the expectation losses of business organization are at stake. From a damage perspective, the law of torts endeavors to put an injured party in a position equivalent to the one existing before the tort.[25] The law of contract seeks, on the other hand, to give a party damages equal to the benefit that he would have received had the contract been performed.[26]

Where damages for personal injury are sought, the difference in perspective is not critical. The personally injured plaintiff is entitled to full compensation whatever the theory urged.[27] Where the problem is the recovery of economic loss by business organizations, the principles controlling damages become more complex. If the object of the remedy is to put the injured party into the position that he would have enjoyed had no wrong occurred under the tort perspective, the only issue logically open to inquiry would be whether the wrongdoing actually caused the harm. If it did, liability is required. Otherwise, equivalency has not been achieved.[28]

Contract, however, has a different objective. Where consequential damages, other than personal injury or damage to property, are sought, contract imposes a requirement of foreseeability.[29] The courts generally have interpreted the contract test as one involving the reasonable foreseeability of probable consequences.[30] The test is an objective one.[31] Objectivity means that in appropriate circumstances a defendant will be liable because he reasonably should have foreseen certain losses.[32] In instances of unusual loss, the seller must have had some reason to know of the buyer's special requirements.[33]

OF TORTS § 917 (1977). Absent a contractual relationship, contract's rule respecting the foreseeability of the consequential loss is not a part of the tort equation. *Id.* § 917 cmt. d.

25. *Id.* § 901 cmt. a.

26. RESTATEMENT (SECOND) OF CONTRACTS §§ 358-59 (1979).

27. For example, the U.C.C. treats an injury to the person as an item of consequential damage. U.C.C. § 2-715(2)(b) (1989). Moreover, such damage is not subject to the requirement that the seller at the time of contracting had reason to know of the need. *Id.* § 2-715(2)(a). The personal injury, however, must be the proximate result of any breach of warranty. *Id.* § 2-715(2)(b).

28. Recovery in tort is, however, limited by the requirement that a tortfeasor who harms the person or property of another is subject to liability for damages in accordance with the rules on whether its conduct was the legal cause of such damages. RESTATEMENT (SECOND) OF TORTS § 917 (1977).

29. U.C.C. § 2-715(2)(a) (1978).

30. WHITE & SUMMERS, *supra* note 21, § 10-4, at 445.

32. *Id.*

33. U.C.C. § 2-715 cmt. 3 (1989).

The U.C.C.'s foreseeability requirement actually surfaces in two contexts. The first is in its provision extending warranty protection to remote parties. The requirement there is that "it is reasonable to expect that such person may use, consume or be affected by the goods . . . ."[34] The second is in its sense of consequential damages. These include "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 . . . ."[35]

Contract's rule of conditioning a seller's consequential loss liability with a specific foreseeability requirement is philosophically at odds with one using actual cause as its baseline requirement. To bring the two into equilibrium would require an irrebuttable presumption that a seller foresaw all the harm actually caused by his errant product. The gulf between these positions is not inevitably closed by adding a proximate or legal cause component to the tort scheme. Proximate or legal cause is a "combination of logic, common sense, justice, policy and precedent."[36] None of these directly focus on the quality, content, or damage potential communicated to the seller at the time of bargaining. These dimensions of foreseeability will be taken into account in the proximate cause calculus only by courts inclined to infuse contract principles into tort remedies. Tort's specific injunction that contract's foreseeability requirements are not, except in narrow circumstances, a part of the tort scheme, clearly instructs the courts to eschew this approach.[37] Even if the courts were to ignore this instruction, tort's perception of foreseeability is too broad to be the determinant of liability for many aspects of economic loss.

In *East River Steamship Corp. v. Transamerica Delaval*,[38] the Supreme Court addressed the question of which damage principles are best-suited to economic loss problems in products cases involving self-inflicted damage. It concluded that where the duty is to the public generally, foreseeability is an inadequate standard for determining liability

34. *Id.* § 2-318 Alternative A; *see id.* Alternative B & C.

35. U.C.C. § 2-715(2)(a) (1989).

36. People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 116 (N.J. 1985).

37. The schism between the tort and contract view on the extent of a defendant's liability is illustrated in the *Restatement (Second) of Torts*, which posits that the wrongdoers lack of knowledge or reason to know of a particular loss potential is not a basis for escaping liability for it. RESTATEMENT (SECOND) OF TORTS § 917 cmt. d (1977).

38. 476 U.S. 874 (1986).

for purely economic loss.[39] Liability based on this standard would make manufacturers liable for vast sums deriving from sources difficult to anticipate.[40] Although foreseeability is not an adequate brake on economic loss liability arising from duties owed to the public generally, it is not irrelevant. The concept is, in fact, an indispensable element in any liability calculus.[41] It is the centerpiece of the U.C.C.'s requirements relating to the recovery of consequential economic loss.[42]

The damage containment problem troubling the court in *East River* is not solved fully by linking consequential loss liability to a physical injury requirement. Manufacturers, unprotected by a privity requirement, remain confronted with the impossible task of identifying and quantifying the economic expectations of multiple downstream users. They also must confront the prospect that minor physical effects can produce major consequential loss. Moreover, this vulnerability radiates from a system which, because of its preoccupation with the risk of physical peril, is largely indifferent to the economic loss information available to sellers.

Tort's illogical method for distributing liability for consequential loss is just one of the arguments for withholding the doctrine from the economic loss area. The damage area involves a variety of ancillary problems. One concerns the role of private bargaining on damage issues

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39. *Id.* at 874. The Court stated:

> A warranty action also has a built-in limitations on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount. The limitations in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. In a warranty action where the loss is purely economic, the limitations derives from the requirement of foreseeability and of privity, which is still generally enforced for such claims in a commercial setting.
>
> In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its products.

Id. (citations omitted).

40. *Id.*

41. As to the concept of forseeability, the Second Circuit Court of Appeals stated:

> Numerous principles have been suggested to determine the point at which a defendant should no longer be held legally responsible for damage caused 'in fact' by his negligence. Such limiting principles must exist in any system of jurisprudence for cause and effect succeed one another with the same certainty that night follows day and the consequences of the simplest act may be traced over an ever-widening canvass with the passage of time. In Anglo-American law, as Edgerton has noted, '[e]xcept only the defendant's intention to produce the given result, no other consideration so affects our feeling that it is or is not just to hold him for the result so much as its foreseeability.'

Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 824 (2d Cir. 1968). (citations omitted).

42. *See supra* notes 29-33 and accompanying text.

and the relationship of private agreements to the damage principles that would otherwise apply. The U.C.C. directly and comprehensively addresses these problems.[43] The tort rules are less complete.[44]

Tort's lack of comprehensive guidelines for controlling consensual agreements and limitations on damages probably could be cured by borrowing from the U.C.C. or by refining rules from the raw material provided by the tort concept of express assumption of the risk. Whether it would be wise and efficient to layer a ragged and commercially incomplete set of tort rules on the system provided by the U.C.C. raises some obvious problems. Such replication clearly would work against the maintenance of tort and contract within their separate spheres.

C. Inadequate Guidelines and Standards for the Transfer of the Risk of Economic Loss

The sale of a product creates two layers of risk transfer problems. The first involves the seller's liability relationship with his immediate buyer and includes not only possible claims for the buyer's own loss but also those for indemnification.[45] The second concerns the seller's liability to remote parties. The two layers can become entangled either by the presence of an indemnification obligation or by the existence of an effort by the seller to use his buyer, and perhaps others, as a conduit or agent for the transmission of risk transfer undertakings to remote buyers.[46]

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43. *See* U.C.C. § 2-715 (1989). The requirements in this section can be summarized as follows: (1) an agreement may provide for remedies in addition to or in substitution for those provided in the U.C.C. and may limit the damages recoverable under it; (2) resort to private remedies is optional unless the private remedy is expressly agreed to be exclusive; (3) privately established remedies may be set aside in favor of those provided in the U.C.C. where circumstances cause the private remedies to fail their essential purpose; and (4) private agreements respecting limitations on remedies may be set aside on conscionability grounds. *Id.*

44. The express assumption of the risk defense is conceptually aimed, at least initially, more at establishing liability than at shaping remedies. Section 496B of the *Restatement (Second) of Torts* sets forth the the principle of assumption of risk by stating: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." RESTATEMENT (SECOND) OF TORTS § 496B (1977). Comment h of section 496B stretches the consensual aspects of assumption of risk into the damage area to the limited extent of allowing common carriers and other public servants to limit their liability to a valuation or amount of damages agreed in advance. *Id.* § 496B cmt. h. This ability to liquidate damages would have to be more fully developed if tort were to take a more active role in the governance of commercial sales agreements.

45. Indemnification claims would involve the seller's duty, whether the creature of law or consensual arrangement, to reimburse his buyer for any claims the buyer has been required to pay to third-parties. *See* E. ALLAN FARNSWORTH, CONTRACTS § 6.3, at 379 n.5 (1982).

46. Professor Robert E. Keeton makes the point that since the general abrogation of the privity requirement, one risk transfer technique favored by manufacturers and middlemen is to attempt to close the privity gap by making their disclaimers of responsibility a part of the retail

The U.C.C. uses a variety of terms to label the risk transfer process. These include: negation or limitation of express warranties,[47] the exclusion or modification of implied warranties,[48] and the modification or limitation of remedies.[49] Despite some unfortunate connotations, the word "disclaimer" often is used to describe tort's approach to risk transfer principles.[50] The disclaimer concept thus can become confused with the requirements bound up with the tort doctrine of express assumption of the risk.[51] To the extent possible, this article seeks to avoid the terminology morass and to focus on the theoretical and practical problems which can arise when sellers undertake to exempt themselves from liability which the law would otherwise impose. A successful avoidance of liability obviously involves a transfer of liability. Risk transfer, therefore, seems to capture the essence of the process which has been so variously described.

Liability systems which seek to provide a basis of recovery for all types of products and all forms of loss in all kinds of relationships require some versatile and comprehensive risk transfer components. Since the Code is possessed of all this ambition, it must be asked whether it has been given adequate risk transfer tools, particularly in commercial cases involving a combination of physical and economic injury. Some background on the transfer or disclaimer of strict tort liability generally will provide a benchmark for a survey of this question.

The drafters of the *Restatement (Second) of Torts*, section 402A, apparently intended to make their strict tort remedy immune from disclaimer.[52] The scope of this immunity is open to debate.[53] However,

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transaction. Robert E. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 134 (1961). The means used are the appointment of the retailer as the remote seller's agent for the transmission of disclaimers and/or the publication of the disclaimers on the product itself. *Id.* at 134-35.

47. U.C.C. § 2-316(1) (1989).

48. *Id.* § 2-316(2).

49. *Id.* § 2-719.

50. Measured literally, disclaimer is a word more appropriate for the renunciation of rights and powers than for the avoidance of liability. *See* BLACK'S LAW DICTIONARY 417 (6th ed. 1991). Even in its avoidance dimension, it suggests unilateral conduct and not mutual assent. Despite these characteristics, the word often is used to describe the rules and conduct pertinent to the avoidance of tort liability. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, § 402A cmt. m (1977) (stating that "the consumer's cause of action . . . is not affected by any disclaimer or other agreement . . . ."); *see also* William J. McNichols, *Who Says that Strict Tort Disclaimers Can Never Be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494, 499-504 (1975) (discussing disclaimers and limitations of remedies under the U.C.C.).

51. Keeton, *supra* note 46, at 136.

52. RESTATEMENT (SECOND) OF TORTS § 402A (1977). The immunity argument rests on two points. The first point is found in comment m of section 402A of the *Restatement (Second) of Torts*:

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by

discourse on that matter is not required because the Code specifically extends the affirmative defense of express assumption of the risk to all product liability claims brought under its authority.[54] This logically creates a measure of risk transfer ability.

The Code does not elaborate the essentials of express assumption of the risk. It simply authorizes its use. *Anderson v. Ceccardi*[55] defines the defense as an express agreement not to sue for any injuries caused by negligence.[56] Presumably, in a product liability context, the defense would involve an express agreement not to sue for any injuries caused by a defective product. From this conceptual nucleus must come rules adequate to deal with all the dimensions of risk transfer in both privity and non-privity circumstances.

Reference to the U.C.C. provisions dealing with this issue shows the breadth of the matters which must be addressed. Among these are the language and conduct adequate to effect the risk transfer or the remedy limitation,[57] guidelines for unravelling inconsistencies within

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limitations on the scope and content of warranties, or by limitation to 'buyer' and 'seller' in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. 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.

Id. § 402A cmt. m.

The second is the combination of comment m's assertion that the consumer's cause of action is "not affected by disclaimer or other agreement," and section 496B of the *Restatement (Second) of Torts* specific limitation of express assumption of the risk to "negligent or reckless conduct." *Id.* § 496B.

53. Professor William J. McNichols states that the phrase "cause of action," as used in comment m of section 402A in *Restatement (Second) of Torts* is ambiguous. McNichols, *supra* note 50, at 517-18. Arguments can be made that this section is not the source of the consumer's cause of action in privity situations, particularly where commercial parties are involved. *Id.* at 517-20. Professor McNichols argues that a rule absolutely forbidding the disclaimer of section 402A liability should not be adopted in cases involving parties in privity and commercial property damage for the reasons that (1) an absolute rule would encourage the courts to apply only U.C.C. remedies to such a circumstance, and that (2) the U.C.C.'s rules on the disclaimer of liability are insufficient because they ignore the parties' bargaining position and the buyer's knowledge of the risk. *Id.* at 499. The instant article contends that the rights and responsibilities of commercial parties in privity should be governed exclusively by the U.C.C. If U.C.C. "disclaimer" provisions are inadequate for failure to take all relevant factors into account, they should be revised. Deficiencies in the U.C.C. should not encourage the courts to look to commercially incomplete strict tort remedies.

54. OHIO REV. CODE ANN. § 2315.20 (Anderson 1991). Section 2315.20 of the Code permits the assertion of express assumption of the risk as an affirmative defense to a product liability claim under sections 2307.71 to 2307.80 of the Code. *Id.*

55. 451 N.E.2d 780 (Ohio 1983).

56. *Id.* at 783.

57. U.C.C. § 2-316(2), (3) (1988).

and among warranty obligations,[58] standards for adjusting unfair agreements[59] and principles for determining the status of strangers to the express agreement.[60] The lack of specificity in these areas could particularly complicate the relationship between component part suppliers and product assemblers. Since both are subject to Code liability, they logically will want to include within their agreements provisions addressing both tort and contract obligations.[61] Their transaction may implicate commercial considerations difficult to resolve within the boundaries of express assumption of the risk.

To be sure the courts have given some substance and content to the defense of express assumption of the risk. It is thus apparent that, compared to the U.C.C., the incompleteness of the doctrine, is a more dominant problem than its conceptual inadequacy.[62] Considerable common law elaboration will be required to give commercial parties a blueprint of the tort conduct required to transfer risk. The courts also must remain mindful of the need for harmony and well-marked boundaries. The presence of competing doctrines creates a risk of rules which work at cross purposes and create confusion. The job of blending doctrines often antagonistic in their perceptions and goals may prove formidable. The ideological conflict will be particularly sharp in cases involving commercial parties confronted primarily with the risk of consequential economic loss.

Making the Code's economic loss provision contingent upon the occurrence of property damage does not diminish the need for rank-and-file rules. Once this provision is engaged, the risk transfer questions are the ones which would attend any direct application of the Code to claims for economic loss.

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58. *Id.* §§ 2-316(1), 2-317.

59. *Id.* §§ 2-302, 2-719.

60. *Id.* § 2-318.

61. *See* OHIO REV. CODE ANN. §§ 2307.71(I), (L)(1)(a), (M), 2307.72 (Anderson 1991).

62. Express assumption of the risk simply involves an express agreement not to sue for any injuries resulting from certain circumstances. Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983). In practice, courts have required considerable precision and specificity in seller efforts to exempt themselves from liability, even in commercial cases. *See, e.g.*, Salt River Project Agric. Improvement and Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198, 212 (Ariz. 1984) (stating that "the interpretation of such limitations requires that the limiting language be construed most strictly against the party relying on it."). If the law is to require such exactitude, it should provide adequate substantive and procedural guidelines to assure compliance. In this respect, tort is considerably less instructive than contract. *Compare* RESTATEMENT (SECOND) TORTS § 496B (1977) (only significant limitation on an agreement to assume the risk is a clear showing of plaintiff's assent) *with* U.C.C. §§ 2-316, 2-317, 2-719 (1989) (numerous conditions on limiting remedies).

D. *Inadequate Seller Defenses Implicating User Conduct*

Under the Code, the only general affirmative defenses available to product liability defendants are misuse and assumption of the risk.[63] The latter has two branches, express and implied.[64] Express assumption of the risk involves negotiated agreements and comes into play in circumstances in which the parties acted on an opportunity to bargain.[65] Implied assumption of the risk involves the conduct of the product user as it pertains to a particular risk.[66] It is that form of contributory negligence which consists of "voluntarily and unreasonably proceeding to encounter a known danger."[67] Each defense is effective to bar recovery.[68] The Code adopts an all-or-nothing approach. Conduct falling short of these defenses cannot be used to diminish recovery.[69]

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63. The affirmative defenses of express and implied assumption of the risk are expressly authorized in the Code. OHIO REV. CODE ANN. § 2315.20(B)(1) (Anderson 1991). While it can be argued that misuse is an aspect of whether a product was defective for its intended purpose and thus should be raised as a negative defense (denial) to the plaintiff's assertions of defectiveness, the propensity of the courts in common law strict tort is to treat the misuse issue as an affirmative defense. *E.g.*, Onderko v. Richmond Mfg. Co., 511 N.E.2d 388 (Ohio 1987); Bowling v. Heil Co., 511 N.E.2d 373 (Ohio 1987). For a discussion of the misuse defense, see *infra* notes 74-78 and accompanying text. The assumption of risk defenses act as a bar to recovery under any product liability claim against manufacturers or suppliers laid under the Ohio Revised Code. OHIO REV. CODE ANN. § 2315.20(B)(2) (Anderson 1991). With respect to negligence claims against suppliers under section 2307.78(A)(1) of the Code, the defense of implied assumption of the risk is subject to treatment under the comparative negligence provisions of the Ohio Revised Code. *Id.* § 2315.19.

The Code also sets out certain affirmative defenses cognizable only against particular product defects. Claims of defective design are subject to the affirmative defenses of unavoidably unsafe product, inherent characteristics, and state of the art. *Id.* § 2307.75(D)-(F). Claims of ineffectiveness for inadequate warnings and instructions are subject to the affirmative defenses of open and obvious risks and delivery of warning to a learned intermediary. *Id.* § 2307.78(B)-(C).

64. OHIO REV. CODE ANN. § 2315.20(B)(1) (Anderson 1991).

65. Express assumption of the risk arises "where a person expressly contracts with another not to sue for any future injuries which may be caused by that person's negligence." Anderson v. Ceccardi, 451 N.E.2d 781, 783 (Ohio 1983).

66. Bowling v. Heil Co., 511 N.E.2d 373, 378 (Ohio 1987).

67. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1977)). Comment n of the *Restatement (Second) of Torts* expands on the relationship of contributory negligence to the doctrine of assumption of the risk:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1977).

68. OHIO REV. CODE ANN. § 2315.20(B)(2) (Anderson 1991).

69. *Id.* In *Bowling v. Heil Co.*, the Ohio Supreme Court held that user conduct which could be regarded as affirmative misuse or passive misuse is ineffective to bar strict tort recovery unless the conduct satisfies the requirement of implied assumption of the risk. *Bowling*, 511 N.E.2d at 378.

The Code's treatment of the conduct-related affirmative defenses effective to bar recovery accords with the common law scheme generally prevailing in physical injury product liability cases.[70] Where physical injury is the risk, the policies underlying strict tort, particularly the policy that defective products should be dismantled at the factory and not encountered in the home or workplace, limit the types of user conduct capable of defeating recovery.[71] It does not follow that such a narrow view is required or even appropriate in suits seeking economic loss.

Implied assumption of the risk requires an awareness of a particular risk and ensuing voluntary conduct that is unreasonable in light of that risk.[72] These conditions put many forms of possibly imprudent behavior beyond the boundaries of the rule. The failure to observe an apparent defective condition and even the careless use of a defective product typically will not rise to the level of implied assumption of the risk.[73]

Relieving commercial users of the economic consequence of their careless conduct promotes a variety of undesirable results. It increases the possibility of loss by releasing users from the incentive to use products carefully.[74] It leads to inefficiency by discouraging the marketing of second-line products offering opportunities for price/risk trade-offs[75] and by stimulating conditions increasing producer costs.[76] In effect, the

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70. *Id.* at 373; Onderko v. Richmond Mfg. Co., 511 N.E.2d 388 (Ohio 1987).

71. *See Bowling*, 511 N.E.2d at 379.

72. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1977) *cited with approval in Bowling*, 511 N.E.2d at 378-79.

73. *See* MODEL UNIFORM PRODUCT LIABILITY ACT § 112 (1979) (failure to observe an apparent defective condition); McCown v. Int'l Harvester Co., 342 A.2d 381 (Pa. 1975) (negligent use of a defective product).

74. While reviewing products liability literature and the economic implications of the apportionment of liability, Professor Roland N. McKean noted that one of the economic principles pertinent to apportionment of liability is the sloping demand curve. Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 42 (1970). Under this basic theorem, "the more expensive a careless action is made, the less of that action will be taken; and the less expensive the careless action is made, the more of the action one should expect." *Id.* Plainly, making certain forms of user conduct irrelevant for affirmative defense purposes reduces to the user the cost of such conduct. The reduced cost stimulates an increase in careless behavior. Moreover, in commercial cases the purchaser will be the user and the one who will suffer the economic loss from incidents involving the product. He will thus be in a good position to acquire the information required to help avoid product failures. *See id.* at 46.

75. *Id.* It has been argued that rules requiring the compensation of users may ultimately rebound to the detriment of the poor if the imposition of such rules reduces the range of choice open to consumers. *Id.* at 58. Such reduction may deny to them the option to buy a lower quality item or the ability to exchange risk for a lower price. *Id.*

76. *Id.* at 50. Inefficiency is used here in the sense of the consequences of implementing a liability system inclined toward producer liability. *Id.* It has been argued that moving further towards producer liability increases court cases and court cost, greater difficulties in enticing purchasers to be careful, results in more effort to publish warnings and instructions, increases the

Code gives users a double dip by assuring them quality for which they may not have paid and by excusing them from conduct which may have contributed to their economic loss.

The misuse defense provided to sellers in the Code is not adequate in commercial cases to patch the holes in its affirmative defense system. Under the common law, the essence of the misuse defense is that a product cannot be defective in design unless it is being used in an intended and reasonably foreseeable manner.[77] Under this standard, the manufacturer is not required to anticipate all uses to which a product may be put nor does he guarantee that the product is incapable of causing injury in all its possible uses.[78]

In a society in which the product standards required of a seller were designed to deal with performance or expectation goals and the affirmative defenses set to that wavelength, defendants could adequately employ the misuse concept to deal with seller liability if the product was used or abused in unforeseeable ways. The Code, however, is completely wrapped up in the risk of physical injury. Even its approach to misuse is structured around that theme. For example, under the Code a product is defective in design when, according to the formula posited there, the foreseeable risks associated with the design exceed the design's benefits.[79] Risks, however, are tied to harm,[80] and

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tendency to make safer products, produces a smaller range of product choice for less prosperous purchasers and creates a partially offsetting tendency to neglect safety because of greater use of liability insurance. *Id.* To the extent that increasing producer liability works to create more products liability claims or assigns producers problems which can be solved more easily and less expensively at other levels, the process is inefficient. Moreover, protecting and compensating particular groups is a form of wealth redistribution which may effect total costs and net output. *Id.* at 57.

77. *See, e.g.,* Menifee v. Ohio Welding Prod., Inc., 472 N.E.2d 707, 711 (Ohio 1984) (foreseeability is neccessary, however, the manufacturer need not anticipate all the uses of the product). Considerable intellectual confusion exists whether misuse is actually an aspect of the plaintiff's case in chief or a true affirmative defense. *See* AMERICAN LAW OF PRODUCTS LIABILITY 3RD § 30.8, at 14 (1987); MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY § 21.12 (1987). The issue is critical because it typically controls the assignment of the burden of pleading and burden of proof. In *Menifee*, the court held that a product cannot be defective in design unless it is being used in an intended and foreseeable manner. *Menifee*, 472 N.E.2d at 711. This formulation would seem clearly to suggest that foreseeable misuse is part of the defectiveness calculus which the plaintiff must plead and prove. *See* Gallee v. Sears, Roebuck & Co., 374 N.E.2d 831, 834 (Ill. 1978). The elements of a plaintiff's claim are then put in issue through the medium of well-pleaded denials (negative defenses). In *Bowling v. Heil Co.*, however, the Ohio Supreme Court held squarely that in products liability cases two defenses based on the plaintiff's conduct are available to defendants: assumption of the risk and misuse. 511 N.E.2d 373, 377 (Ohio 1987).

78. *Menifee*, 472 N.E.2d at 711.

79. OHIO REV. CODE ANN. § 2307.75 (Anderson 1991).

80. *Id.* § 2307.75(B)(1)-(3). A product also is defective in design when it is more dangerous than an ordinary consumer would expect when used in an ordinary or reasonably foreseeable manner. *Id.* § 2307.75(A)(2).

harm basically is physical injury.[81] Matters typically implicated in misuse issues are integrated into the Code in the calculus for determining whether a design's risks exceed its benefits.[82] In warning cases, misuse issues are logically implicated in the question of the range of harm producing risks which a manufacturer exercising reasonable care would include within his warnings and instructions.[83]

The Code's configurations, addressed as they are to the risk of physical injury or damage (harm), can produce some curious results when the Code's remedies are employed to recover economic loss connected with the harm. For example, in personal injury cases, an industrial or farm machine may be defective if it was foreseeable that the safety equipment would be removed.[84] The removal of the safety equipment may have been motivated in fact to increase the machine's productivity. Under the Code, the modification (misuse) would not be effective to bar recovery because the economic loss ultimately caused by the resulting product defect did not involve harm. The manufacturer thus is paradoxically exposed to liability for economic loss flowing from user conduct intended to increase the product's economic usefulness. Doctrines designed to deal primarily with economic loss have not, in fact, adopted a narrow view of the user conduct effective to bar recovery. Under the U.C.C., for example, plaintiff conduct falling far short of implied assumption of the risk can be taken into account in determining whether the plaintiff is entitled to recovery for breach of warranty.[85]

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81. *Id.* § 2307.71(G).

82. For example, the nature and magnitude of the risk of harm is measured in light of the intended and reasonably foreseeable uses, modifications or alterations of the product. *Id.* § 2307.75(B)(1). The likelihood that a design will cause harm is considered against the intended or reasonably foreseeable modification or alterations of the product. *Id.* § 2307.71(B)(3).

83. Under section 2307.76 of the Code, the product liability defendant must, in both pre- and post-marketing contexts, provide the warnings or instructions that a manufacturer exercising reasonable care would have provided. *Id.* §§ 2307.76(A)(1)(b), (2)(b). The reasonable care standard is subject to what the manufacturer knew or, in the exercise of reasonable care, should have known, and the likelihood that the product would cause harm of the type for which the plaintiff seeks relief. *Id.* § 2307.76(A)(1)-(2).

84. *See, e.g.*, Cepeda v. Cumberland Eng'g. Co., 386 A.2d 816, 821 (N.J. 1978) (foreseeable that worker will remove machine's safety guard). *But see* Hines v. Joy Mfg. Co., 850 F.2d 1146, 1151 (6th Cir. 1988) (holding that the common law concept of foreseeabilty will not be read into product liability).

85. The U.C.C. is ambiguous whether careless user conduct is an aspect of proximate cause and thus a part of the plaintiff's prima facie case or an affirmative defense to be pleaded and proved by the defendant. *See, e.g.*, Erdman v. Johnson Bros. Radio & Television Co., 271 A.2d 744 (Md. 1970). However, actions by a buyer after an examination of the goods which ought to have indicated the defect can be shown as bearing on whether the breach of warranty was the cause of the injury. U.C.C. § 2-314 cmt. 13 (1989). Moreover, there is no breach of warranty as to seasonably discoverable defects if the buyer has examined the goods to his satisfaction or refuses to examine the goods. *Id.* § 2-316(3)(b). Injuries may be found to proximately result from

In its present form, the Code not only distributes economic loss liability improperly, but it also works collaterally to undercut competing doctrines. Even though pre-emption is not officially a part of the Code's economic loss plan, plaintiffs logically will not press theories of recovery holding them to higher standards of user conduct. Inevitably, the Code remedy will drive other remedies from use. The affirmative defense problem cannot be cured by judicial tinkering. The Code's direct and express instructions on the matter prevent the modifications required for sensible user rules apportioning responsibility for economic loss.[86]

E. Statute of Limitations Uncertainties

For purposes of the analysis of statute of limitations issues, the Code creates three claims: one for personal injury and wrongful death;[87] one for the physical damage to property other than the product

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the buyer's own conduct rather than a breach of warranty where the buyer discovers the defect and uses the goods anyway, or unreasonably fails to examine the goods. *Id.* § 2-316 cmt. 8. Finally, an injury is not the proximate result of a breach of warranty if it was unreasonable for the buyer to make an inspection that would have revealed the defect, or his use was with knowledge of that defect. *Id.* § 2-715 cmt. 5.

86. Another and equally significant problem arising from the Code's handling of user conduct defenses involves the treatment to be applied to cases involving multiple defendants, some of whom are claimed to be liable under the product liability provisions of the Code and some under negligence. Except as to claims against suppliers asserting negligence, contributory negligence is not available to product liability defendants. OHIO REV. CODE ANN. § 2315.20(C) (Anderson 1991). Express and implied assumption of the risk are the only affirmative defenses available to product liability defendants. *Id.* § 2315.20(B)(1). They are a complete bar to recovery. *Id.* § 2315.20(B)(2). Being a complete bar, these defenses do not provide a basis for the application of the apportioning process charted in section 2315.19 of the Ohio Revised Code. *Id.* § 2315.19.

The claims against defendants alleged to be liable in negligence are subject to the defenses of implied assumption of the risk and contributory negligence, and the liability of these defendants must be submitted to the comparative process set forth in section 2315.19 of the Revised Code. *Id.* This difference in the defenses available to defendants who may be liable to a plaintiff on a claim implicating a product raises a variety of questions involving both the defendant's individual and collective liability to the plaintiff and their contribution liability to one another. For example, what is the percentage of wrongdoing to be assigned to the strict tort defendants and is the wrongdoing of the strict tort defendants to be taken into account in determining the percentage of negligence to be assigned to the negligent defendants? Moreover, is there a common liability among the defendants so that one is entitled to contribution from the others should he pay more than his fair share of that liability? Except as to joinder, the present arrangement appears to treat claims against strict tort defendants and those against negligence defendants as separate matters. In other words, the plaintiff's claims against the strict tort defendants play no role in determining the fact or extent of his claims against the negligent defendants and vice versa.

However, the Ohio Revised Code's provision concerning contribution among tortfeasors, which provides that the proportionate shares of tortfeasors in the common liability should be based upon that relative degrees of "legal responsibility," suggests that liability on different theories of recovery does not preclude a right to combination. *Id.* § 2307.31(F). Of course, such liability would have to be determined to be a common liability, and the disparate treatment accorded to defendants under the substantive law may preclude such a determination.

87. *Id.* §§ 2307.71, 2307.72.

itself;[88] and, one for economic loss, including the physical and non-physical damage related to the product itself and the non-physical damage related to other property.[89] The dominant concern here is with claims for economic loss.

Statute of limitations issues create a problem because the Code is barren of its own limitations provision and because the Ohio Revised Code includes several limitations provisions which are plausibly applicable to products claims anchored in the Code.[90] The list of arguable alternatives includes the limitations provisions relating to the following: actions for bodily injury or damage to personal property;[91] actions upon a statute;[92] actions for breach of contract for the sale of goods as provided in the U.C.C.;[93] actions upon a contract not in writing;[94] actions for breach of contract in writing;[95] actions upon certain torts;[96] and several catchall provisions.[97]

The courts have fashioned guidelines for unravelling limitations problems. The baseline proposition is that a limitations provision which specifically relates to the subject matter of the action controls over general limitation provisions which might otherwise apply.[98] Accordingly, it has been held that all actions brought for the purpose of recovering damages to the person are controlled by the limitations requirements posited in the statute dealing with bodily injury.[99] It makes no difference whether the action is based on contract or tort; the limitation is imposed on the cause of action, not on the form in which the action is brought.[100]

Another limitations guideline relevant to Code actions is the rule that incorporation of a common law remedy into a statute does not

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88. *Id.*

89. *Id.* § 2307.79. The Code does not create a claim for these losses if they occur independently of the harm. If harm has occurred and the economic loss is the proximate result of the defective aspect of the product in question, the standards in the Code thus provide the basis for the recovery of economic loss. Separating Code claims according to the damages sought is essential because the statute of limitations will be different for each claim.

90. *Id.* §§ 1302.98, 2305.06, -.07, -.09, -.10, -.14, -.17.

91. *Id.* § 2305.10. (claims for bodily injury and damage to property).

92. *Id.* § 2305.17.

93. *Id.* § 1302.98.

94. *Id.* § 2305.07.

95. *Id.* § 2305.06.

96. *Id.* § 2305.09.

97. *Id.* §§ 2305.09, 2305.14.

98. Andrianos v. Community Traction Co., 97 N.E.2d 549, 552 (Ohio 1951).

99. *Id.*

100. *Id. But see* Prokasy v. Pearle Vision Ctr., 499 N.E.2d 387 (Ohio Ct. App. 1985). The rule in section 1302.98(A) of the Ohio Revised Code has more specific limitations than section 2305.10 for bodily injury or property damage claims. OHIO REV. CODE ANN. §§ 1302.98(A) (Anderson 1979 & Supp. 1990), 2305.10 (Anderson 1991).

require use of the limitations provision applicable to actions upon a statute.[101] The applicable limitations statute is the one pertinent to the common law action.[102] The rationale for this rule is that in such a circumstance, the substantive statute merely provides a remedy; it does not create a liability.[103] The statute, however, may so modify, alter or condition the common law that it creates a new concept of liability. In such event, actions under it may be subject to the limitations provision pertinent to actions upon a statute.[104]

The proper use of the bodily injury and damage to property limitations provision is dependent on the meaning given to the amorphous concepts of "subject matter of the action," "cause of action," and "form of the action." It is reasonable to conclude, however, that this provision controls Code actions for the recovery of personal injury or damage to property other than the product itself. The "subject matter of the action" works in tandem with the Code's preemption requirements to negate the other statute of limitations possibilities.[105] The limitations rule appropriate for economic loss claims asserted under the authority of the Code's non-preemptive economic loss provision cannot be resolved so cleanly. A variety of problems having limitations implications unsettle the area. For example, where the action is for damage to the property itself, is the "subject matter of the action" property damage or consequential economic loss?[106]

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101. *See* Hartford Accident & Indem. Co. v. Proctor & Gamble Co., 109 N.E.2d 287 (Ohio Ct. App. 1952).

102. *Id.* at 289.

103. *Id.*

104. *See, e.g.*, Bora v. Kerchelich, 443 N.E.2d 509 (Ohio 1983).

105. An action brought under the Code clearly is for the purpose of recovering compensatory damages for harm which basically embraces personal injury and damage to other property. OHIO REV. CODE ANN. §§ 2307.72(A), (G), (M) (Anderson 1991). The relationship between a Code action and the limitations provisions of section 2305.10 of the Revised Code, which provides the limitations rule for actions for bodily injury or injury to personal property, is direct and immediate. *Id.* § 2305.10. The products subject to the Code must constitute "tangible personal property." *Id.* § 2307.71(L)(l). The Code's preemption of other theories of recovery in cases of harm prevents any determination that a limitations rules for some other form of action is more specific than the limitations rule set out in section 2305.10 of the Revised Code. *Id.* § 2305.10. The reasoning followed in *Prokasy v. Pearle Vision Center* cannot be applied to actions under the Code. 499 N.E.2d 387, 389 (Ohio Ct. App. 1985).

106. Whatever the label given to such loss for purposes of determining the form of action to be applied for its recovery, the product itself is still tangible personal property. Under this view, the limitations provisions of section 2305.10 of the Revised Code would seem to apply. OHIO REV. CODE ANN. § 2305.10 (Anderson 1991). However, it also can be argued that damage to the product itself is consequential loss under the U.C.C. If a U.C.C. claim is maintainable and if the statute of limitations for U.C.C. actions in section 1302.08 of the Revised Code is regarded as a more specific limitations statute than the one provided in the section 2305.10 of the Revised Code, the U.C.C. limitations statute would control actions seeking such loss. *See Prokasy*, 499 N.E.2d at 389.

Similar problems cloud the limitations rule appropriate for non-physical injury items of loss. On these matters, the availability of a U.C.C. limitations alternative, an important factor in the statute of limitations puzzle, hinges on privity.[107] The limitations statutes connected with damage to property and with the U.C.C. are not the only limitations candidates requiring consideration. It is plausible that Code claims for economic loss are subject in some circumstances to the limitations rule appropriate for actions upon a statute.[108] This approach immediately encounters the problem of the extent to which common law tort remedies are available for the recovery of a particular item of economic loss in commercial and consumer goods cases.[109]

None of these alternatives provides a perfect fit for all the economic loss scenarios possible under the Code.[110] The slippage may be

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107. Where damage to other property is involved, the Code makes a clear division between physical damage and non-physical damage. OHIO REV. CODE ANN. §§ 2307.71(B), (G) (Anderson 1991). Only the former is harm. *Id.* On the items of loss connected with non-physical loss (lost profits, extraordinary expenses), the Ohio Supreme Court in *Andrianos v. Community Traction Co.* instructs that the word "action" as used in section 2305.10 of the Revised Code refers to the nature or subject matter of the action and not to its form for remedial purposes. 97 N.E.2d 549, 552 (Ohio 1951). This instruction works against the application of section 2305.10 of the Ohio Revised Code, the statute of limitations which would be applied to actions for harm. OHIO REVISED CODE ANN. § 2305.10 (Anderson 1991). Claims for purely non-physical loss are not subject directly to the Code. They do not involve the type of loss that is independently the subject of a Code claim. The Code merely lends its remedial provisions in a non-preemptive manner where harm also has occurred. Items of purely economic loss are of a nature or subject matter which, absent harm, must be pursued under other remedies. The precise nature of such other remedies and thus the limitation possibilities will depend considerably on the facts respecting privity. *See, e.g.*, United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co., 257 N.E.2d 380, 384 (Ohio 1970).

108. Where privity between the parties is present, the argument is that the limitations rule for actions asserting breach of warranty is a specific limitations statute, and thus it controls more general limitations statutes. *Prokasy*, 499 N.E.2d at 389. However, U.C.C. remedies are maintainable only in privity cases. *United States Fidelity*, 257 N.E.2d at 384. In non-privity cases it could be argued that the most specific statute of limitation is section 2307.07 of the Ohio Revised Code, which relates to actions upon contracts not in writing or upon a liability created by statute. OHIO REV. CODE ANN. § 2307.07 (Anderson 1991). In its economic loss provision the Code not only authorizes the joinder of a claim for economic loss, it allows the recovery of such loss under the substantive standards posited in the Code. *Id.* § 2307.79. The difficulty with this line of argument is that the limitations rule for actions upon a statute does not apply if the statute simply incorporates a common law remedy. *See supra* notes 101-04 and accompanying text. Considerable uncertainty exists concerning the extent to which common law remedies can be asserted for purely economic loss in property cases, particularly those implicating commercial parties. *See supra* notes 25-44 and accompanying text.

109. *See supra* 25-44 and accompanying text.

110. The limitations statute for bodily injury and damage to property is arguably inappropriate for economic loss claims because such claims do not involve the damages specified in this statute. OHIO REV. CODE ANN. § 2305.10 (Anderson 1991). The limitations statute for claims involving breach of warranty under the U.C.C. is arguably inappropriate in circumstances in which privity was absent. *Id.* § 1302.98. The limitations rule for actions upon a statute is arguably inappropriate if it is not held that the statute incorporates common law remedies. *Id.* § 2305.07.

so great as to prompt the courts to a fourth course of action — the use of a catchall limitations provision.[111] The isolation of a proper limitations rule for economic loss claims asserted under the Code obviously involves some difficult textual and conceptual problems. The weight of the technical arguments may well favor the use of a limitations rule related to damage to property.[112] However, the choice of a limitations statute is not solely a technical matter. Important policy issues are also involved. Tort and contract use quite different approaches to determine when a cause of action accrues. In tort, accrual typically is tied to the occurrence of the event producing the loss.[113] In contract, absent special circumstances, accrual is connected to the tender of the non-conforming product.[114] This variance produces a considerable difference in the length of time in which the product must function free of an injury producing event.[115]

The courts must decide the accrual policy most appropriate for the truly economic loss portions of claims arising under the Code. In doing so, they will be confronted with a Hobson's choice. The use of a tort-oriented statute of limitations rule leads to two problems. The first, particularly important in commercial cases, concerns the difficulties involved in reconciling a product's useful productive life with its useful safe life.[116] The second involves the unfairness possible in a system that

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The extent to which common law remedies are available for claims of purely economic loss is in a muddle, particularly in commercial cases. *See* Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 537 N.E.2d 624 (Ohio 1989).

111. OHIO REV. CODE ANN. §§ 2305.09, 2305.14 (Anderson 1991).

112. The rationale supporting such a conclusion would be that just as all items of loss in a personal injury case are governed by the limitations rule appropriate to the basic event, so should all items of loss caused by harm, as defined in the Code, be governed by the limitations rule applied to the harm.

113. *See, e.g.*, Prokasy v. Pearle Vision Ctr., 499 N.E.2d 387 (Ohio 1985).

114. *Id.* at 389.

115. Under a breach of warranty claim the plaintiff would have four years from tender of delivery to commence an action. U.C.C. § 2-725 (1989); OHIO REV. CODE ANN. § 1302.98 (Anderson 1979 & Supp. 1991). Under the bodily injury and damage to property statute of limitations the plaintiff typically would have two years from the date of injury to commence the action. The aggregate of the time during which the product was used and the two year time period allowed for bringing a tort action could be more or even less than the four years allowed for commencing a breach of warranty action.

116. The U.C.C.'s limitations approach of tying accrual to tender of delivery would seem to rest on the principle that absent inconsistent express assurances, four years is a reasonable period of warranty protection. *See* OHIO REV. CODE ANN. § 1302.98(A) (Anderson 1979 & Supp. 1991). If a product fails after four years of use from a defect which existed at tender of delivery, the plaintiff still has received four years of trouble-free use. This approach obviously makes the most sense in circumstances in which purely economic loss is involved. Any injustice created by the use of this approach to personal injury cases is avoided by the presence of a more specific limitations statute applicable to personal injury cases. It does not follow that the same kind of avoidance is required in property cases where the non-physical damage items dominate over the physical loss. In these cases, the tort approach may make more sense. Such a conclusion draws support

submits purely economic loss claims to one set of limitations principles and tort connected economic loss claims to another. Such an approach obviously makes the occurrence of physical injury a pivotal event. Whether it warrants this significance, particularly as respects all the consequential loss possible in commercial cases, requires careful examination. It is not a fact generally regarded as important to limitations issues.[117]

Use of a contract approach to limitations could, on the other hand, create a res judicata trap. Under the threat of claim preclusion, litigants practically would be compelled to submit all their claims for loss within the time-frame allowed for the physical injury aspects, even though preemption and statute of limitations considerations would allow them to proceed otherwise.[118] The statute of limitations issues raised by the Code's economic loss provision provide additional evidence of the unsoundness of a tort approach to economic loss liability. The Code leaves to the courts the difficult problem of identifying a limitations rule for economic loss, satisfying both technical and policy requirements. Unhappily, the limitations statute with the best technical credentials produces some undesirable policy-related results in commercial cases.[119]

III. SUMMARY AND RECOMMENDATIONS

A. Summary

Although tort and contract often run along parallel lines, they originate in and express different concerns. Tort deals with physical endangerment. Contract supervises expectation disputes. Each doctrine

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from the fact that use of a tort statute of limitations necessarily extends the useful economic life of a product to the limits required by the concept of useful safe life and raises the performance standard required of the product to the level required to deal with the risk of physical endangerment.

117. This conclusion is based on the principle enunciated in *Andrianos v. Community Traction Co.* that the word action, as used in limitation statutes, refers to the nature or subject matter of the action and not the form of the action as such relates to choice of remedies. 97 N.E.2d 549, 552 (Ohio 1951). In cases where the non-physical loss preponderates over the physical loss, it reasonably can be argued that with respect to such items of loss the nature of the action is not the same as the claim or portion of the action seeking recovery for the physical damage. This would seem to be particularly the case in remedial schemes, such as the Code, which have gone to considerable lengths to make a clear distinction between the two forms of loss.

118. The existence of a separate and different statute of limitations for the non-physical damage portion of the loss could suggest to plaintiffs that separate actions for such loss could be maintained. It seems reasonable to assume that defendants sued first for the physical damage and then again for the non-physical damage will, in the second action, raise the defense of claim splitting (res judicata) and will argue that the non-physical loss is either merged into the first judgment or barred by the first action.

119. See supra note 118.

has been given a substantive content reflecting its fundamental mission. The pervasive ability of defective products to inflict both tortious and contractual misery has propelled the doctrines into continuing conflict in the product liability area. The courts have endeavored to shape these disciplines to avoid these collisions. One of the important rules to emerge from this effort is that purely economic loss is recoverable only in contract and that damage to the product itself and its incidents are economic loss.

The courts, however, continue uncritically to follow the rule that the occurrence of physical injury to other property warrants the use of tort remedies, including the products concept of strict liability in tort, to recover all the loss caused by the physical damage. The apparent justification for the rule is the predicate it provides for full compensation for an injured party. The Code has adopted this scheme.

This and the previous article challenge the blanket use of the physical injury rule in products cases. Each contends that, in commercial cases, significant portions of the economic loss connected with physical injury to property should be subject to contract rules of decision. Overall, five arguments were advanced in support of this position: (1) the absence of meaningful policy differences between commercial cases involving purely economic loss and those involving economic loss connected with physical injury to other property; (2) the substantive superiority of contract principles for allocating liability for economic loss, whatever the circumstances of the loss; (3) conceptual deficiencies in the physical injury rule in cases in which liability is not related to a single event; (4) theoretical and practical difficulties in resolving expectation disputes with physical injury standards; and (5) the absence of practical differences between the economic loss resulting from products which damage only themselves and that resulting from products which damage other property.

B. Recommendations and Comments

The criticisms of the Code's economic loss provision lead logically to the following recommendations to be implemented as described:

1. Recommendation 1

Product liability claimants who have suffered death, personal injury or serious emotional distress should be allowed to recover under a Code cause of action all the economic and non-economic loss resulting from the underlying event. The items of damage recoverable as economic and non-economic loss would be defined in the Code according

to the guidelines set forth elsewhere in the Ohio Revised Code.[120] This recommendation would be implemented by adjustments to the Code's definition of "harm."[121] The definition of "product liability claim" would be simplified by stating that it is a claim for "harm" arising from the enumerated circumstances.[122]

Comment:

This recommendation does not alter the personal injury damages presently recoverable under the Code. It simply assures that personal injury claimants will be entitled to recover all the items of loss ordinarily recoverable in personal injury cases. The specific amendments are required because of other recommendations involving the Code's treatment of physical damage to property and economic loss (the non-physical damage connected with such events).

2. Recommendation 2

The Code's cause of action should be extended to the physical damage sustained by consumer products which damage only themselves and to any consequential loss resulting from such event. This recommendation would be implemented by amending the Code's definition of "harm." The amendment would specify that physical damage to consumer products resulting from defects in the product itself is harm but that physical damage to commercial products from this source is economic loss. Implementation would also require a new provision defining "consumer products."[123]

The Code's economic loss provision would be revised to provide that the owners of defective consumer products which have damaged themselves may recover under their Code claim any consequential economic loss proximately resulting from the damage to the consumer product itself.[124] Physical damage to other property, whether it be consumer or commercial property, would continue to be defined and treated as harm under the Code.[125]

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120. OHIO REV. CODE ANN. § 2315.19(E)(1)(a), (b) (Anderson 1991).

121. As it relates to personal injury and wrongful death cases, harm would be defined as all the economic loss recoverable in such events under sections 2315.19(E)(1)(a), (b), (c) of the Revised Code and all the non-economic loss recoverable in such events under section 2315.19(E)(3) of the Ohio Revised Code. *Id.* §§ 2315.19(E)(1)(a), (b), (c), 2315.19(E)(3).

122. *Id.* § 2307.71(M).

123. Guidelines for such a definition are available in the United States Code, 15 U.S.C. §§ 2052, 2301(1) (1988).

124. The amendment would be to section 2307.79 of the Code. OHIO REV. CODE ANN. § 2307.79 (Anderson 1991).

125. *Id.* § 2307.71(G).

Comment

The U.C.C. does not provide adequate protection for consumers, whether or not in privity with the manufacturer. This recommendation gives consumers, whether or not personally injured, a strict tort remedy for the physical damage suffered by consumer products as a consequence of a defect in the product itself. The owner of a defective automobile used for non-commercial purposes would thus, for example, have a Code claim against a product liability defendant for both his personal injuries and the damage to the automobile itself. Such a claimant would be able to invoke the Code's economic loss provision to recover any consequential economic loss proximately resulting from the physical damage to the automobile. As a practical matter, consumer products cases typically should not generate substantial consequential economic loss.

3. Recommendation 3

In addition to the amendments dealing with consumer products, the Code's economic loss provision should be amended to permit recovery of consequential economic loss if: (a) the claimant was not a purchaser of the product, (b) the claimant is entitled to compensatory damages for harm, and (c) the consequential economic loss connected with such harm was particularly foreseeable to the defendant at the time the product left the defendant's control. This recommendation would be implemented by substantial revisions of the Code's economic loss provision[126] and by the addition of a new provision defining the conditions required for a claim to be particularly foreseeable.

Comment

The recommendation would allow non-purchaser claimants, whose claim for harm involves either consumer or commercial products to use a Code claim to recover consequential economic loss if that loss was particularly foreseeable, as that requirement is delineated in *People Express Airlines v. Consolidated Rail*.[127] This recommendation does not provide a Code claim for consequential economic loss to purchasers of commercial products. Such parties must look to the U.C.C. for the recovery of this loss. Their only Code remedy would be for harm which would continue to be physical damage to property other than the product itself.

The retention for the purchasers of commercial products of a Code claim for the physical injury to property other than the product itself is

126. The amendment would be to section 2307.79 of the Code. *Id.* § 2307.79.

a retreat from the position taken in several of the arguments made in the article. This retreat is a concession to tort's long history of providing a remedy for the actual physical injury caused by tortious conduct. The harm requirement makes the recommendation more restrictive than the particular foreseeability rule applied in *People Express*.[128] The particular foreseeability requirement makes the recommendation more restrictive than the conventional applications of the physical injury rule.

The Code is not the place to define the circumstances in which non-purchasers should have a tort claim for purely economic loss. These several limitations are essential to contain within sensible bounds the consequential economic loss liability of product manufacturers and other product liability defendants to third-parties. The recommendation would be implemented by modifications of the Code's economic loss provision and by provisions spelling out the items of loss recoverable as damage to other property and those to be regarded as consequential economic loss.[129]

An alternative to attempting to address economic loss in the Code would be to limit its remedy to: (1) personal injury cases, whatever the nature of the product; (2) physical damage to property, including the product itself in consumer products as well as all proximately resulting consumer consequential loss; and (3) physical damage to property other than the product itself in commercial products as well as any proximately resulting consequential loss particularly foreseeable to the product liability defendant, if the commercial product liability claimant was a non-purchaser of the product in question. This recommendation follows more closely the substance of the arguments presented in the article in that it would require the purchasers of commercial goods to look to the U.C.C. on all claims implicating damage to property, including the product itself. Only consumers and non-purchaser commercial parties would be able to invoke a Code remedy for the physical damage caused by the defective product and the only proximately resulting consequential loss recoverable in such event would be that which was particularly foreseeable to the product liability defendant. Under this alternative, the rights of commercial purchasers of commercial products

128. *Id.* The particular foreseeability rule fashioned and followed in *People Express* would apply to instances of purely economic loss.

129. Section 2307.71(G) of the Code would be amended to provide that physical damage to other property is to be measured by repair or replacement cost. OHIO REV. CODE ANN. § 2307.71(G) (Anderson 1991). Section 2307.71(B) would be retained in tort. *Id.* § 2307.71(B). Section 2307.79 would be amended to provide that the provision relates to economic loss claims by non-purchasers of consumer and commercial products. *Id.* § 2307.79.

for damage to any property would be subject to the U.C.C. This alternative would make some significant changes in the reach of the strict tort concept in commercial cases. These changes would be based on the principle that commercial products cases are unique and that all non-personal injury aspects of such cases (personal injury cases would be controlled exclusively by the Code) should be controlled exclusively by the U.C.C.