Economic Loss in American Tort Law: The Examples of *J'Aire* and of Products Liability

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Having suggested that the application of tort doctrine to problems of economic loss raises diverse rather than uniform issues, Professor Schwartz explores J'Aire Corp. v. Gregory, *a 1979 California decision establishing a general economic loss tort, and* Seely v. White Motor Corp., *a 1965 California decision refusing to extend tort coverage to economic losses resulting from defective products. According to Professor Schwartz, the key to* J'Aire *lies in clarifying the relationship between the common law of torts and the common law of contracts, while the key to* Seely *lies in defining the boundaries of common law and statutory law. In the end, he criticizes* J'Aire *but commends* Seely.

INTRODUCTION

How should tort doctrine be applied to losses that are solely economic in character? This is a question that traditionally has tended to baffle or elude tort scholars. In recent years, however, a number of scholars have each attempted to develop a general theory to cover

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the problem of tort law and economic loss.[1] Yet as it happens, the theories they have individually introduced are themselves disconcertingly diverse.[2]

I recommend that we abandon any effort to formulate any single general theory: for the economic loss problem, as I understand it, is multiform rather than unitary in character. Unfair competition differs from fraud, which in turn differs from negligent misrepresentation, which in turn differs from the negligent polluting of public fishing waters,[3] which in turn differs from the lawyer's malpractice liability to his client (let alone to a range of third parties), which in turn differs from the destruction of buildings by fire,[4] which in turn differs from compensating plaintiffs for lost income in personal injury suits. In many situations, although not in others, the very concept of intentional infliction of harm may be rendered vacuous or problematic by the values associated with the operation of the marketplace.[5] Often, but not always, affirming a tort cause of action will raise the specter of open-ended liability,[6] or of an inefficient number of lawsuits.[7] In some instances, but not in others, a regime of first-party insurance is already in place in a way that renders a tort strategy less advisable.[8] Some of the time, but not always, there may be a need to distinguish between the actual infliction of economic harm and the mere withholding of economic benefits.[9] On some occasions, but not others, allowing a tort recovery would run the risk of creating unwanted cross-subsidies among the class of potential plaintiffs.[10]

In this Article I wish to review yet another set of reasons for being wary of the extension of general tort principles. As one considers the

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1. *See, e.g.*, Abel, *Should Tort Law Protect Property Against Economic Loss?*, 23 SAN DIEGO L. REV. 79 (1985); Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985); Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281 (1982).

2. Abel's theory, for example, would deny all recoveries for economic loss, by virtue of a combination of reasons, most of which relate to the alleged illegitimacy of the distribution of economic welfare within our society. Abel, *supra* note 1. Rabin's theory, by contrast, would generally approve of recoveries for economic loss, subject to some concern for the imposition of disproportionately extensive aggregate liabilities. Rabin, *supra* note 1.

3. *See* Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

4. *See* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Ryan v. New York Cent. R.R., 35 N.Y. 210 (1866).

5. *See* W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 1012-13 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

6. *See* Rabin, *supra* note 1.

7. *See* Rizzo, *supra* note 1.

8. *See Ryan*, 35 N.Y. at 216.

9. *See infra* text accompanying notes 61-63.

10. *See* Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

territory that economic losses cover in our legal society, one is required to recognize that much of this territory is already inhabited, in substantial ways, by specific legal theories or doctrines. To intrude general tort concepts would hence at least run the risk of improperly ignoring or disparaging the authority and intelligence of these doctrines. To show how the deployment of tort generalizations could interfere with specific tort rules, an introductory illustration can be offered.[11] The traditional torts of malicious prosecution and abuse of process require actual showings of "malice" or "abuse," requirements designed to avoid any undue interference with the ordinary processes of litigation.[12] To affirm, under the influence of abstract negligence principles, a party's right to sue (or countersue) for economic losses resulting from another party's merely negligent initiation of legal proceedings would both undermine the limitations built into the malicious-prosecution and abuse-of-process torts and frustrate the purposes which those limitations are designed to serve.[13]

In *J'Aire Corp. v. Gregory*,[14] the California Supreme Court endeavored to create a generic tort for the negligent infliction of economic harm. Because of the comprehensiveness of its holding, *J'Aire* is an important decision. It is treated as a leading case in the Franklin & Rabin coursebook[15] and as a potentially leading case in the new edition of the Prosser treatise;[16] also, its broad holding has now been largely ratified by the New Jersey Supreme Court.[17] Yet ex-

11. A recent case suggests a second illustration. While tort law has long recognized a cause of action for inducing a contractual breach through the means of making an alternative offer, this tort has traditionally been defined as requiring that the defendant act both intentionally and unjustifiably. Despite the recent emphasis on the negligence concept in California law, one federal court has displayed a reluctance to relax the improper motive element of the inducement cause of action. DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340 (9th Cir. 1980). This is an understandable reluctance: one would need to think long and hard about the purposes and functions of the inducement tort before acceding to the proposed rejection of its motive prerequisite.

12. *See* PROSSER & KEETON, *supra* note 5, at 882-85, 894-95, 897-900.

13. Despite the recent developments in California negligence law that are discussed below, California litigants apparently have so far declined to advance such negligence suits. By virtue, however, of Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (creating a general tort for negligent infliction of emotional distress), counterclaims are now common in which a defendant alleges that negligent initiation of a lawsuit by a plaintiff has subjected the defendant to severe emotional harm.

14. 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979).

15. M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES 263-68 (3d ed. 1983).

16. PROSSER & KEETON, *supra* note 5, at 1008-09.

17. People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985).

actly because of *J'Aire*'s attempt at comprehensiveness, it is an opinion that is ill-advised. The previous paragraph has offered an illustration of how *J'Aire*, if taken at full face value, could override limitations that tort judges have long been eager to defend—judges whose job it is to define those tort obligations that are imposed by law. In other instances, it is the coverage of contract law, with its concern for obligations voluntarily assumed, that *J'Aire* is capable of disturbing. The next section of this Article will show how the factual situation confronting the court in *J'Aire* entailed contract issues that should not be ignored.

The final section of the Article will discuss a second problem: the application of products liability doctrine to cases of economic loss. The practical importance of this problem is documented by the extensiveness of the case law. Here, too, the Article will emphasize the need for tort law to take other legal doctrines into account: in this instance, the law of implied warranty, as codified in the Uniform Commercial Code. Given this need, the Article will endorse the rule of tort non-recovery suggested by the California opinion in *Seely v. White Motor Company*.[18] The Article will then consider—and proceed to reject as interesting but largely mistaken—certain important exceptions that several courts have read into the *Seely* rule.

J'Aire: Tort and Contract

The facts of *J'Aire* can be adequately stated in a somewhat skeletal fashion. The owner of a building leased space to the tenant, which operated a restaurant. A contractor promised the owner that he would renovate a portion of the building that lay wholly within the premises of the restaurant.[19] The contractor was allegedly negligent, however, in completing these renovations, resulting in a loss of business to the tenant. According to the court in *J'Aire*, the tenant, by demonstrating the negligence of the contractor, can secure a recovery in a direct tort action against the contractor.

While Professor Rabin seems strongly sympathetic to the court's pure negligence analysis,[20] I find that analysis somewhat facile. A web of contracts is indicated by the circumstances in *J'Aire*, and it is difficult to think about the role of the negligence doctrine in such a case without first clarifying the implications of those contracts. The first implication is obvious enough. The contractor, by failing to meet his deadline, breached his own agreement with the owner. Under a

18. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

19. That the renovations undertaken by the contractor were exclusively located within the restaurant is not entirely clear from the court's opinion. I have confirmed the point, however, by speaking with the plaintiff's lawyer. Telephone interview with Tim Crawley, Esq., lawyer for J'Aire Corp. (February 8, 1984).

20. Rabin, *supra* note 1.

reasonable version of the principle in *Hadley v. Baxendale*,[21] the contractor is hence liable to the owner for the loss of rental income the owner suffers on account of the contractor's failure.

Second, the court's statement of the facts refers to an ongoing lease between the owner and the tenant,[22] and can be read as suggesting that the contractor's delays resulted in the owner's violations of its obligations under the lease. Indeed, a recent conversation with the lawyer for the plaintiff in *J'Aire* confirms that such a violation did in fact occur (and that he specifically advised the court of this during oral argument).[23] Accordingly, and quite without regard to anything in the law of torts, the tenant had a contract cause of action against the owner for business losses. Moreover, so long as the contractor had some original awareness of the owner's lease obligations, the *Hadley* rule presumably would have permitted the owner to secure reimbursement from the contractor for the liability costs borne by the owner as a result of the tenant's claim against the owner—a claim that itself was a consequence of the contractor's delay. Why, then, was the tenant in *J'Aire* not content to bring a direct and easy breach-of-lease suit against the owner, instead of choosing to assert a legally complex claim against the contractor? Because, as the tenant's lawyer told the court, the tenant did not wish to upset its friendly relations with the building owner and thereby jeopardize the continuation of the lease arrangement.[24]

The tenant's "equities" in this regard hardly seem overwhelming, especially in light of the apparent ability of the owner to transfer liability back to the contractor. Consider, however, the tenant-versus-owner and owner-versus-contractor combination of lawsuits. There is a lack of economy in this combination that could be avoided by allowing the tenant to sue the contractor directly.[25] *J'Aire* does achieve this result—but only by introducing the issue of the contractor's negligence (as discussed below). Notice, furthermore, that the law of contracts possibly may be available as the source of a direct suit by the tenant against the contractor. The American common law recognizes a limited category of "intended" third-party beneficiaries to a contract—beneficiaries who, although not privy to the contract itself, nevertheless are entitled to sue for benefits they are

21. 156 Eng. Rep. 145 (Ex. 1854).
22. 24 Cal. 3d at 802, 598 P.2d at 62, 157 Cal. Rptr. at 409.
23. Crawley interview, *supra* note 19.
24. *Id.*
25. My concern here is for the reduction of system overhead, a concern that cuts across both tort and contract law.

denied because of a contractual breach.[26] *Lucas v. Hamm*[27] is the leading authority for the proposition that a disappointed legatee is entitled to secure a tort recovery from the lawyer guilty of negligence in drafting a client's will. But *Lucas* contains an alternative ruling to the effect that the legatee is an intended third-party beneficiary of the lawyer-client contract, who accordingly is entitled to sue the lawyer on account of the latter's contractual breach.[28]

In *Lucas*, tort and contract theories blend together, since due care is the tort liability standard and since a promise of due care is what a court reads into the lawyer-client contract in the absence of contrary language.[29] The theories can be unblended, however, by considering two hypotheticals. In Hypothetical One, a lawyer explicitly promises a client that he will draft a will that will achieve the client's desired results; subsequently, for whatever reason, that promise goes unfulfilled, notwithstanding an absence of negligence by the lawyer. In such a case I am confident that a court both would and should allow the would-be legatee to recover against the promise-making lawyer. What my confidence obviously signifies is my understanding that contract rather than tort forms the essence of the legatee's claim. Hypothetical Two involves a client from Los Angeles who, in his will, wants to sponsor an annual conference to be held (for the sake of prestige) at the Beverly Wilshire Hotel. Because of negligent note-taking by the lawyer, the will instead ends up specifying the (equally prestigious) Beverly Hills Hotel. For contract purposes, the Beverly Wilshire is only an "incidental" beneficiary of the client-lawyer agreement.[30] Accordingly, I would confidently predict that the hotel would be denied a tort recovery against the lawyer, notwithstanding its status as highly foreseeable victim of the lawyer's negligence.[31] My confidence is supported by recent rulings in California[32] and Maryland,[33] which emphasize the requirement that even a clearly foreseeable malpractice plaintiff be able to show that he was an intended beneficiary of the lawyer-client contract.

In *J'Aire* the tenant had originally pleaded a contract third-party-

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26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).
27. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961).
28. *Id.* at 589-91, 364 P.2d at 688-89, 15 Cal. Rptr. at 824-25.
29. *Id.* at 591, 364 P.2d at 689, 15 Cal. Rptr. at 825.
30. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302(2) & illustration 17 (1981).
31. Professor Rabin might well approve of the recovery by the hotel, since he seems to regard the intent-to-benefit concept as no more than one factor among many bearing on the ultimate issue of the foreseeability of harm. Rabin, *supra* note 1. For the contract logic behind my prediction, see note 60 and accompanying text.
32. Goodman v. Kennedy, 18 Cal. 3d 335, 344, 556 P.2d 737, 743, 134 Cal. Rptr. 375, 381 (1976).
33. Flaherty v. Weinberg, 303 Md. 115, 492 A.2d 618 (1985).

beneficiary claim as well as a negligence claim against the contractor.[34] However, after the trial court dismissed the entire suit, the tenant chose to appeal its negligence claim alone.[35] Why was the tenant's contract argument dropped? The explanation provided me by the tenant's lawyer is that he regarded the contract claim as a probable loser; the lawyer went on to volunteer, however, that "contracts were never my strong point in law school."[36] In my view, the lawyer's abandonment of his contract argument was unfortunate. Given the way in which the contractor's breach required the owner to violate his own continuing legal obligations to the tenant, the tenant may possibly have been classified as an "intended beneficiary" or even a "creditor beneficiary" of the contract between the owner and the contractor.[37] To be sure, the Second Restatement of Contracts contains both general language[38] and a particular illustration[39] that seem unsympathetic to the tenant's third-party-beneficiary argument. But even if affirming a contract claim in *J'Aire* would have required a change in the law, it is hardly clear that this change would have been less momentous than the change effected by the actual *J'Aire* holding, given the generalized significance it attaches to the fact of a defendant's negligence. A ruling by the Idaho Supreme Court is in line with my evaluation. In appraising somewhat *J'Aire*-like facts, that court refused to recognize a negligence cause of action, yet permitted a tenant to sue a contractor under an expanded intended beneficiary theory.[40]

The contract analysis relating to *J'Aire* can be clarified by amend-

34. 24 Cal. 3d at 801-03, 598 P.2d at 62, 157 Cal. Rptr. at 409.
35. *Id.* at 803, 598 P.2d at 62, 157 Cal. Rptr. at 409.
36. *See* Crawley interview, *supra* note 19.
37. Third-party creditor beneficiaries are, under the Restatement, a special category of intended beneficiaries. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(a) (1981).
38. The Restatement requires that the debtor be under an obligation to "pay money" to the creditor's beneficiary. *Id.*
39. *See id.* at illustration 19.
40. Just's, Inc. v. Arrington Const. Co., 99 Idaho 462, 583 P.2d 997 (1978). In *Just's*, the defendant construction company entered into a contract with a city to renovate a downtown business area. The delay of the defendant resulted in losses for the plaintiff, a retail business that leased premises within the business area. The change in facts from *J'Aire* to *Just's* both weakens and strengthens the intended beneficiary claim of the tenant. On the one hand, only in *J'Aire* did the delay of the construction company result in a breach of an actual contract running between the tenant and the entity employing the contractor. On the other hand, the construction project in *Just's* was financed by a special assessment on properties within the area; also, the construction contract included a clause expressing an intent to minimize the disruption of downtown business operations.

ing the facts in that case so as to generate Hypothetical Three. The original agreement between the owner and the contractor contains a fixed completion date and the tenant is protected by a lease for a term; events then unfold that result in the contractor's failure to comply, even though there is an absence of negligence on the part of the contractor. My own assessment of this hypothetical is that despite the lack of negligence, the tenant should be entitled to recover from the contractor for the latter's contractual breach. As far as the owner is concerned, what it loses by way of a higher ex ante contract payment it regains by way of its relief from its own liability under its lease.[41] Moreover, since a chief advantage of a direct suit by the tenant is that it would simplify litigation by avoiding a cumbersome chain reaction, there is little reason for complicating that direct suit by bringing in the always contentious issue of negligence. And since that chain reaction would guarantee the tenant's recovery, no purpose is served by conditioning the tenant's recovery on the tenant's ability to establish the contractor's negligence. Indeed, in *J'Aire* itself, the tenant won the tort theoretician's war but lost the crucial battle: At the trial on remand after the supreme court's decision, the tenant was unable to establish that the contractor had proceeded unreasonably, and hence went home without a penny.[42]

Now consider, however, Hypothetical Four, in which the contractor, without negligence, is unable to complete the renovations by the date fixed in the agreement with the owner, and in which the relationship between the owner and the tenant is a tenancy-at-will rather than a tenancy for a fixed term. Moreover, the owner in all its dealings with the tenant and the contractor has emphasized the at-will quality of the tenancy; still, the owner's past renewal of this tenancy makes it highly likely that the owner would have extended it further in the absence of the contractor's breach. In such a case, the common law is clear that the tenant cannot recover: for the lack of negligence precludes any tort claim, while contract law would readily classify the tenant as a mere incidental beneficiary.[43] Yet even though the result of no liability is doctrinally uncontroversial, the tenant does incur a clear reduction in welfare because of the contractor's breach. Hence the justification for the firm common law result should at least be considered. In negotiating the agreement, the contractor and the owner can be expected to appreciate that circumstances might intervene that would prevent the contractor from meeting the completion date. The contract price will thus include a

41. This point responds to the concern voiced *infra* at the text accompanying note 53.

42. *See* Crawley interview, *supra* note 19.

43. *See* McDonald Const. Co. v. Murray, 5 Wash. App. 68, 485 P.2d 626 (1971) (prospective tenant not third-party beneficiary).

mark-up to cover the prospect of the contractor's liability to the owner. If a failure to complete would render the contractor liable to the tenant-at-will as well, an additional mark-up will be required. If the owner's demand for renovations is price inelastic, the owner will bear, by way of that mark-up, the entire cost of the contractor's potential liability to the tenant. If there is price elasticity between the owner and the contractor, the cost of that potential liability will be partly passed on to the owner and partly absorbed by the contractor. Indeed, by driving a wedge between what the contractor supplies and what the owner receives, that liability will prevent some owners and contractors from reaching agreement on renovation projects.

Recognizing the claims of tenants-at-will would therefore burden both owners and contractors. Conversely, that recognition would of course benefit tenants. The easiest way to find out whether a particular tenant's benefits outweigh the owner's and the contractor's burdens, while at the same time preserving everyone's freedom of choice, is to rely on each party's expressions of value, as manifested in private contracts.[44] Since it is the owner in *J'Aire* who already stands in a bargaining relationship with *both* the tenant *and* the contractor, a market analysis, keen on reducing the complexity of negotiations, can focus its attention on the owner.[45] If protecting the tenant is on balance advantageous, one would expect the owner and the tenant to agree on a lease for a term rather than on a mere tenancy-at-will.[46] Alternatively, one would expect them to agree, somewhat more selectively, that the owner will explicitly identify the tenant as an intended beneficiary in the owner's contract with the contractor. Should the facts of an individual case reveal the absence of such a lease or such an identification, then the common law probably behaves properly if it ignores the tenant's interests.

In *J'Aire*, of course, the court's holding rests on the premise of the contractor's negligence. But how does the claim of negligence contribute to our understanding of the situation in *J'Aire*? I would be among the first to agree—indeed, to assert—that the concept of neg-

44. In *J'Aire* there is no indication of any market blockages of the sort that would render unattractive the market approach that the text here recommends. Both the tenant and the contractor seem to be small businesses; the owner is a California county.

45. It would be too complex—too costly—to expect the tenant to open up negotiations with the contractor in order to work out their own agreement.

46. So long as the contractor is given the advance notice of this lease that *Hadley* requires, the contractor will then be responsible to the owner if the contractor's default results in the owner's liability to the tenant. *See supra* text accompanying note 21.

ligence resonates deep in the structure of our intuitions.[47] In the specific environment of *J'Aire*, however, the negligence notion seems disconcertingly subordinate to the basic contract between the owner and the contractor. Only that contract makes comprehensible the contractor's physical intrusion into the owner's building; it alone sets the goal towards which the contractor must non-negligently strive. If, for example, the contract requires merely that all work be completed within three years, and if the contractor meets that deadline, then the contractor cannot be charged with negligence, even if the tenant has evidence tending to show that the contractor could easily have made faster progress or could "reasonably" have completed the project more rapidly. By a similar token, if the contract sets a three-month deadline, the *J'Aire* court would turn to the contract in asserting the existence of the contractor's three-month tort "duty." Not ordinary negligence but rather negligent breach of contract is what *J'Aire* is all about.[48]

To be sure, the previous paragraph has assumed a typical construction contract that fixes the date of completion. But note that in *J'Aire*, as the lower court reported, "[t]he contract contained a provision that time was of the essence and for completion on a fixed date . . . . However, the space for insertion of the completion date was left blank."[49] Faced with this omission, the supreme court assumed it could read into the contract an obligation that the work be completed "within a reasonable time as defined by custom and usage."[50] How does this circumstance affect our analysis? To conclude for contract purposes that the contractor must complete the project within a "reasonable time" seems tantamount to asserting that the contractor must pursue the project in a reasonable, non-negligent way. On *J'Aire*'s facts, therefore, the tenant's negligence claim

47. *See* Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

48. To suggest that contract is a central problem in *J'Aire* is by no means to endorse a "privity" limitation in tort law generally. If, for example, a manufacturer introduces into this world a dangerous product, the negligence of the manufacturer can be evaluated, in most cases, without worrying about the preferences of the manufacturer's original buyer. Another example: assume that *A* agrees with *B* that *B*, driving *A*'s car, will deliver for *A* a package to a distant location; assume further that *B*, in performing this contract, drives *A*'s car at a negligent speed, damaging the car but also wounding *C*, a pedestrian. Undeniably, *C* can sue *B* in tort; the contract is in no way needed in order to evaluate the tortiousness of *B*'s conduct. If anything, that contract might expand tort liabilities: if *A* and *B* had agreed (for the sake of rapid delivery) that *B* would drive quite fast, then the contract would convert *B*'s speeding into a joint venture for which *A* is liable as well as *B*.

49. 150 Cal. Rptr. 329, 330 n.1, *vacated*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). Before depublication, the appellate court case was reported at 86 Cal. App. 3d 492. *See* CAL. R. CT. 976-978 (rules for publication of appellate decisions).

50. *J'Aire*, 24 Cal. 3d at 802, 598 P.2d at 62, 157 Cal. Rptr. at 409. Construction contracts are frequently silent as to the completion date; a judicially declared or statutorily created "reasonable time" obligation is hence common.

against the contractor is almost identical to the tenant's contract third-party-beneficiary claim.

The entire problem of third-party-beneficiary can be highlighted by considering Hypothetical Five, which is presented here in a highly abstract form. *A* makes a promise to *B*, the performance of which will foreseeably provide benefits to both *B* and *C*. Intervening circumstances then make the promise expensive for *A* fully to perform. Given those circumstances, the cost of compliance is now $10,000; the benefit that *B* will derive from full performance is $8000, while the benefit to *C* is $4000. Contract law is generally interpreted as permitting and indeed encouraging a party to commit an "efficient breach."[51] Yet whether a breach by *A* is "efficient" on these facts depends precisely on whether *C*'s interest should be regarded as material. A first impression, which relies on obvious tort-like ethical and economic notions, is that the welfare of *all* persons should be of concern to the law. But, as the previous discussion of Hypothetical Four suggests, one must recognize that affirming the rights of *C* will impose a burden on the contractual opportunities between *A* and *B*.[52] It is *B* who evidently has established a relationship with *C*. The real question, therefore, is whether that relationship is of such a character that *B* should be understood as willing to finance the potential liability of *A* to *C*. And this is essentially the question that the existing law of intended third-party beneficiary can be viewed as addressing and attempting to answer.[53]

Given this background, we can now return to *J'Aire*. Notice, first of all, a possible ambiguity in the *J'Aire* negligence concept. Consider Hypothetical Six, which is merely an expansion of *J'Aire*. The contractor realizes that he can complete the project by a particular date at a cost of $10,000; should the project not be completed by that date, the owner will suffer losses of $8000 while the losses of the tenant will be $4000.[54] Moreover, a feature in the lease arrangement prevents the tenant from transferring its losses to the owner.

51. *See* Pearlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI L. REV. 61, 79-82 (1982).

52. *See supra* text accompanying notes 43-46.

53. *See* W. FARNSWORTH, CONTRACTS 722 (1982). Note that the extent to which the cost of liability is passed backward from *A* to *B* depends on the extent of the elasticity in the demand and supply curves which are involved in the contract between *A* and *B*. Only if *B's* demand for *A*'s services is completely inelastic will the entire cost of *A*'s potential liability get passed on by *A* to *B*. The more elastic *B*'s demand, the greater the extent to which that liability will remain with *A*.

54. What the owner loses is rental income; what the tenant suffers is a loss of its consumer surplus under the lease.

Whether the contractor would here be negligent for a failure to complete would evidently depend on whether the contractor is obligated to take the tenant's interests significantly into account in calculating his own behavior. And this, of course, essentially restates the third-party-beneficiary problem. The effort to conceptualize the case in terms of tort rather than contract may therefore result in failure. In order to decide the tort issue, the court may need to decide the basic contract issue as well.

Now subject the facts in *J'Aire* to another shift, leading to Hypothetical Seven. The contractor has agreed to complete the renovations by a certain date. Nevertheless, the contractor defaults on his promise in circumstances manifesting the negligence of the contractor. However, the relationship between the tenant and the owner is a mere tenancy-at-will, of the emphatic sort described in Hypothetical Four.[55] As in Hypothetical Four, the tenant hardly classifies as an intended beneficiary,[56] and therefore lacks any contract claim. Yet if the facts support a prediction that the owner would have extended the tenancy in the absence of the contractor's negligent breach, the general holding in *J'Aire* can be read as supporting the recovery of the tenant.

Perhaps, however, that holding should be more narrowly interpreted. In explaining the precedent of the malpractice cases, the court relied on the legatees' status as "intended beneficiaries"[57] of the lawyer-client contracts; in evaluating the *J'Aire* facts, the court emphasized that the contractor-owner agreement was "intended to . . . affect" the tenant.[58] Both the precedent of intended benefit and the finding of intended effect would be considerably weakened if the plaintiff were merely a tenant-at-will. Moreover, the final paragraph of the *J'Aire* opinion insists that its new tort does not extend to situations of "ordinary business risk;"[59] the disadvantage suffered by a mere tenant-at-will might well be placed within this classification. The *J'Aire* rule thus might decline to provide protection to the tenant-at-will. But if so, then that rule, though largely explained by the court in pure tort terms, would turn out to include important contractual components.

My view is, moreover, that denying a tort recovery to the tenant-at-will is probably the right result. Subjecting the contractor to tort liability to that tenant would impose significant costs on the contractual opportunities of the owner and the contractor; and if the owner does not recognize the tenant as an intended beneficiary of its agree-

55. *See supra* text accompanying note 43.
56. *See supra* note 43.
57. 24 Cal. 3d at 804, 598 P.2d at 63, 157 Cal. Rptr. at 410.
58. *Id.*
59. *Id.* at 808, 598 P.2d at 65, 157 Cal. Rptr. at 412.

ment with the contractor, the infliction of these costs seems unintelligent, as my discussions of Hypotheticals Four and Five indicate.[60]

Possibly, however, my analysis thus far has been too severe, insofar as it has tended to treat tort and contract as dichotomous—as wholly alternative modes of analyses. One can imagine, instead, a methodology under which one begins by separately identifying "tort ideas" and "contract ideas" and then proceeds to ponder various ways in which these ideas might interact or intersect.[61] Yet I refer here to the possibility of a tort-contract coalition without any clear idea as to its actual structure. Still, my recommendation is hardly without precedent. After all, there are familiar personal injury situations—mainly involving affirmative duties—in which a certain combination of contract and tort is already required before a plaintiff is entitled to sue. Consider, via Hypothetical Eight, an auto mechanic, hired to fix the clutch of a car, who realizes that the brakes are also in a dangerous condition and clearly need repair. Even so, only if the

60. If my notion is that the contractor's potential liability to the tenant-at-will imposes burdens on the contractor and the owner, this notion deserves some amplification. The contractor's agreement with the owner obliges the contractor to act "reasonably;" the contractor can be expected to comply with this obligation, since it is less costly to do so than to incur liability to the owner; and by thus avoiding unreasonableness/negligence, the contractor effectively discharges his obligation to the tenant. It can be argued, therefore, that this latter obligation, as an independent matter, is essentially cost-free.

This argument, however, would be flawed. First of all, if *J'Aire*'s negligence doctrine signifies that the contractor must now balance his own interests against the interests of the owner and the tenant *in combination*, then that doctrine requires of the contractor a more expensive effort than would be mandated by the contractor's reasonableness obligation that runs to the owner alone. In addition, the unreasonable conduct that is actionable in an individual case may well be due to the contractor's employee; since the contractor is liable for such negligence only because of the strict liability doctrine of respondeat superior, it cannot be said that this negligence will be necessarily prevented by the incentive effects of the contractor's liability to the owner. Moreover, so long as there is a foreseeable risk of judicial error in the identification of negligence, to recognize the tenant's negligence law rights would subject even the non-negligent contractor to an extra measure of liability exposure. Finally (and notwithstanding the economists' models), in many instances the negligence of the contractor may consist of goof-ups and inadvertent errors that the contractor, in a psychologically realistic sense, is unable to prevent. *See* Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 713-19 (1978). Once again, then, to affirm the claim of the tenant serves to expand the potential liability of the contractor.

Similarly, the lawyer's mistranscription in Hypothetical Two is in one sense a stupid mistake; yet in another sense it is the kind of mistake that will predictably happen in some instances. Hence, the lawyer's liability exposure in Hypothetical Two cannot really be eliminated by the lawyer's sincere willingness to exercise care.

61. See the discussion of a "general theory" of civil liability in Cane, *Contract, Tort, and Professional Negligence*, in TORT LAW AND ECONOMIC LOSS (M. Furmston ed. 1986).

mechanic has contractual authority from the owner to work on the brakes can he be held liable to anyone, either the owner or a third party, for failing to do so.[62] Consider next, in Hypothetical Nine, the mechanic who not only receives this authority but who provides the car owner with a flat-out promise that the brakes will perform safely during the succeeding month. Two weeks later, despite the absence of any negligence by the mechanic, the brakes manage to fail. If a collision results involving the car owner and a third-party pedestrian, the mechanic evidently would be liable to the former but not to the latter.[63] In order to secure a recovery from the mechanic, the pedestrian must demonstrate *both* a contractual undertaking *and* the mechanic's negligent performance.

But even this final pro-liability result should be carefully interpreted, since I remain opposed to the negligence claim of the Beverly Wilshire Hotel in Hypothetical Two and doubtful about the claim of the tenant-at-will in the *J'Aire* variation in Hypothetical Seven. The distinguishing feature is basically this: The law of torts imposes upon the owner of a car a firm and proper common-law obligation to avoid causing negligent injury to a pedestrian; yet the owner of the building neither is nor should be obliged by the common law to continue to provide the benefits of housing to a tenant-at-will. Given this distinction, it makes strong sense to impose on the car owner, through his contract with the mechanic, a portion of the ex ante cost of the mechanic's potential liability to the pedestrian in the event of the mechanic's negligence, even while sparing the building owner of the cost of any liability that might run from the contractor to the tenant-at-will.

In any event, whether or not I have reached the proper conclusions, I am confident that my collection of hypotheticals is on the right track, in the sense of raising the right issues for present and future discussion. They likewise encourage a particular two-part appraisal of the *J'Aire* opinion. First, the *J'Aire* facts provided the California Supreme Court with a splendid opportunity to investigate the relationships between tort and contract in an economic loss setting. Second, this was an opportunity that the court chose largely to squander.

Fourteen years earlier, the same court had been presented with a quite separate problem relating to the common law treatment of economic loss. What that problem was, and how the court responded to it, will be described below, after a brief introduction.

62. The mechanic may, however, be under an implied obligation to notify the car owner of the brake problem.

63. For an early holding that contractual liability of a repairman does not run to a third party, see Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 P. 939 (1927). There is no indication in this case that the plaintiff advanced any claim of negligence.

PRODUCTS LIABILITY: COMMON LAW AND STATUTE

The dimensions of the modern products liability doctrine can briefly be sketched.[64] First, a products liability claim depends on the plaintiff's proof of a "defect" in the product. Second, the plaintiff can include the ultimate product consumer, other actual product users (such as employees), and even bystanders, as long as the plaintiff is a foreseeable victim of the defective product. Third, the primary defendant is the product manufacturer, but there are other permissible defendants, including the retailer of the defective product. Fourth, at least according to the Second Restatement of Torts, products liability rights cannot be disclaimed.[65]

Finally, in the typical products liability action, the harm complained of is a personal injury. What if, however, the defective product results in damage to property owned by the plaintiff—particularly damage to property other than the defective product itself? It was Justice Traynor of the California Supreme Court who (in a 1944 concurrence) first recommended the strict liability theory[66] and who then (in a 1963 opinion for the full court) was able to give effect to his own recommendation.[67] In 1965, in *Seely v. White Motor Company*,[68] Justice Traynor, speaking for the California court, ruled that damage to property comes within the protection of the products liability doctrine.[69] Notice in this regard the form of Traynor's argument. His position might have been that protecting against property damage is a strong and basic tort law tradition. Consider, for example, *Rylands v. Fletcher*,[70] the problem

64. *See, e.g.*, Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796 (1983) [hereinafter cited as Schwartz, *New Products*]; Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435 (1979).

65. RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965).

66. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

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

68. 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965).

69. This is a conclusion that other courts have generally followed. *See, e.g.*, Newman v. A.E. Staley Mfg. Co., 648 F.2d 330 (5th Cir. 1981); Grey v. Bradford-White Corp., 581 F. Supp. 725, 728 (D. Kan. 1984); County of Johnson v. United States Gypsum Co., 580 F. Supp. 284, 292 (E.D. Tenn. 1984); Beauchamp v. Yazoo Valley Oil & Milling Co., 403 So. 2d 554 (Fla. Dist. Ct. App. 1981); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981). Note that in several of these cases the defective product at no point posed any threat of personal injury. For one property damage case denying recovery under products liability because of the lack of such a threat, see Brown v. Western Farmers Ass'n, 268 Or. 470, 521 P.2d 537 (1974).

70. L.R. 3 H.L. 330 (1868).

of trespassing cattle,[71] and the American blasting cases;[72] notice, moreover, that even before the 1960's, manufacturers had frequently been held liable under the negligence doctrine when their defective products resulted in damage to property.[73] Perhaps unwisely, Traynor declined to emphasize this point about tradition. Instead, his position was that "[p]hysical injury to property is so akin to personal injury that there is no reason for distinguishing them."[74] It was thus the physical similarity of property damage and personal injury, and also perhaps of the events leading up to them, that led Traynor to the view that it would be improperly arbitrary to withhold a products liability recovery.

What, however, should the products liability result be if the defect in the product occasions merely economic loss: either "direct" loss (such as the costs of repair or replacement) or "consequential" loss (such as the denial of profits while the product is not functioning properly)? In *Santor v. A. & M. Karagheusian, Inc.*,[75] the New Jersey Supreme Court, also a pioneer in the development of modern doctrine, had ruled that products liability extends even to economic losses, at least of the direct type. In Justice Traynor's view, however, *Santor* went too far; accordingly, in the course of his *Seely* opinion Traynor announced his conclusion that economic loss was beyond the reach of the products liability doctrine.[76]

In the twenty years between *Seely* and early 1985, the vast majority of courts that confronted the choice between *Santor* and *Seely* proceeded to embrace *Seely*.[77] A limited number of jurisdictions, including Michigan[78] and Wisconsin,[79] adopted *Santor*, and in doing so applied *Santor* to a considerable range of product purchasers[80] and to economic losses both direct and consequential.[81] Recently, federal courts have addressed the *Santor-Seely* issue in the context of federal admiralty law: in their rulings these courts have divided

71. *See* PROSSER & KEETON, *supra* note 5, at 539-41.
72. *See id.* at 553-54.
73. *See* W. PROSSER, LAW OF TORTS 501-02 (2d ed. 1955).
74. *Seely*, 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.
75. 44 N.J. 52, 207 A.2d 305 (1965).
76. 63 Cal. 2d at 15-19, 403 P.2d at 149-52, 45 Cal. Rptr. at 21-24.
77. The cases are collected in Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 287 n.13 (3d Cir. 1980).
78. Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970).
79. City of La Crosse v. Schubert, Schroder & Assocs., Inc., 72 Wis. 2d 38, 240 N.W.2d 124 (1976). *See also* Iacano v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 71 Ohio Op. 2d 66, 326 N.E.2d 267 (1975).
80. The plaintiff in *Cova* was a commercial buyer. *See supra* note 78 and accompanying text.
81. *See, e.g.*, Mead Corp. v. Allendale Mutual Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979) (*Santor* applied to consequential losses).

between *Santor*[82] and *Seely*.[83] At the end of 1985, the United States Supreme Court granted certiorari in one of these admiralty cases,[84] evidently in order to resolve the inter-circuit conflict.

Several months prior to this grant of certiorari, however, the New Jersey Supreme Court had reconsidered its own position. In *Spring Motors Distributors, Inc. v. Ford Motor Co.*, that court, acknowledging the generally negative response to *Santor*, ruled that a "commercial buyer" should *not* be allowed to sue in products liability for its economic losses.[85] Left open by *Spring Motors* is the question whether a non-commercial ordinary consumer remains able to bring such a claim.[86] Of course, the New Jersey *Spring Motors* decision in no way requires a state such as Michigan to withdraw from its own pro-*Santor* position, nor does *Spring Motors* bar other courts (including the United States Supreme Court) which have not yet taken any position from opting for the doctrine that *Santor* has historically represented. Accordingly, what is here referred to as the "*Santor-Seely* debate" clearly survives *Spring Motors*' partial rejection of *Santor*.

Still, the popularity of the *Seely* rule requires that emphasis be placed on the distinction between damaged property and mere economic loss that is asserted in *Seely* and accepted in *Spring Motors*.[87] That distinction can be easily illustrated. If a defective television set catches fire and burns down the plaintiff's house, the damage to the house is fully compensable in products liability. If, however, the ex-

82. *See* Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468 (9th Cir. 1984) (rejecting *Seely* and allowing recovery even for consequential losses).

83. *See* East River Steamship Corp. v. Delaval Turbine, Inc., 752 F.2d 903 (3d Cir.), *cert. granted*, 106 S. Ct. 56 (1985).

84. *Id.* The Supreme Court might decide *East River* by relying on the idea that the admiralty plaintiff is a unique federal-court favorite. *See Emerson G.M. Diesel*, 732 F.2d at 1472. If the Court does this, then the Court's opinion might not fully consider the *Seely* issue. *East River* also presents difficult questions of federal admiralty jurisdiction. The Court heard oral arguments on January 21, 1986.

85. 98 N.J. 555, 561, 489 A.2d 660, 663 (1985). As *Spring Motors* pointed out in somewhat distinguishing *Santor*, *Santor* on its facts involved an ordinary consumer. *Id.* at 575, 489 A.2d at 670. Yet the *Santor* holding was written broadly, applying to all "ultimate purchasers;" and the opinion approved a prior case in which the plaintiff had been a commercial buyer. *See* 44 N.J. at 66, 67, 207 A.2d 305, 309 (citing Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962)).

86. One federal court, in dictum, has already interpreted *Spring Motors* as preserving the *Santor* rights of the ordinary consumer. Henry Heide, Inc. v. WRH Products Co., 766 F.2d 105, 109 (3d Cir. 1985).

87. *Spring Motors* agrees that the commercial buyer who suffers property damage can bring a products liability suit. 98 N.J. at 578, 489 A.2d at 672.

pensive television set merely goes "poof" and thereafter projects no picture, the loss of the owner is only economic and hence is beyond the reach of products liability.[88]

To assert, however, that the owner is unprotected by products liability need not imply that the owner is deprived of all rights. Quite to the contrary, the owner's opportunity to recover is clearly and significantly recognized by the sales law doctrine of implied warranty. The idea of implied warranty has deep roots in both American and English law.[89] At times, implied warranty has been defended in tort-like terms of public policy. As a South Carolina court stated in 1793, "in every contract all imaginable fairness ought to be observed . . . . Selling for a sound price, raises, in laws, a warranty of the goodness of the thing sold . . . . This warranty extends to all faults, *known* and *unknown* to the seller."[90] On other occasions, the doctrine of implied warranty has been defended by resort to contractual logic, as an explication of an implied provision in the parties' agreement: as an English court stated in 1877, a product "must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out."[91]

The doctrine of implied warranty presently can be found in the Uniform Commercial Code.[92] Conceived of in the 1940's, drafted mainly in the 1950's, and adopted in the 1960's by almost every

88. In particular cases the distinction between economic loss and damage to the "other" property of the plaintiff can become exceedingly elusive. Consider the situation, for example, in which the supplier provides a manufacturer with a defective component part; after the entire assembled product is sold to the consumer, the defective component malfunctions in a way that results in damage to the remainder of the product. If the plaintiff brings suit exclusively against the supplier, is he allowed to argue that the final product is his "other" property that has been damaged by the defendant's defective component? Or is that defective component necessarily no more than an aspect of a unified product, even though that component has been manufactured by a separate entity? *See* James v. Bell Helicopter Co., 715 F.2d 166, 174 n.8 (5th Cir. 1983).

For a further indication of the difficulties involved in line-drawing, one can consult Two Rivers Company v. Curtiss Breeding Serv., 624 F.2d 1242 (5th Cir. 1980), in which bull semen, sold by the defendant to a rancher for the purpose of artificially inseminating the rancher's cattle, turned out to contain impurities, thereby producing defects in the calves who were the offspring of the artificial insemination process. If the calves are regarded as property separate from the original semen, then the rancher can secure a products liability recovery under the first half of the *Seely* compromise. If, however, the calves are best understood as basically a "continuation" of the original bull-semen products, the *Seely* rule of non-recovery for economic loss is called into play.

89. For one account of the Anglo-American history of implied warranty, see Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. 647, 654-59 (1977).

90. Timrod v. Shoolbred, 1 S.C.L. (1 Bay) 324 (S.C. 1793). Implied warranty was, however, a minority position in the United States during the nineteenth century. *See, e.g.*, McFarland v. Newman, 9 Watts 55 (Pa. 1839) (rejecting the doctrine).

91. Randall v. Newson, 2 Q.B.D. 102, 109 (C.A. 1877).

92. U.C.C. § 2-314 (1977).

American state legislature, the UCC's objective is "to simplify, clarify, and modernize the law governing commercial transactions."[93] The UCC is not one of those statutes, like workers' compensation or the Wagner Act, whose goal is to establish a wholly new regime; indeed, most of the UCC's major ideas, including implied warranty, are drawn from common law sources.[94] When matched against the common law doctrine of products liability, however, there are certain limitations in the implied warranty doctrine as ramified by the UCC. It is precisely when, for one reason or another, the UCC declines to affirm the plaintiff's claim that the status of that claim under products liability law becomes a meaningful question. Since this is the case, two points stand out. One is that both *Santor* and *Seely* turn out, on their facts, to be largely meaningless, since in each case the court was able to affirm that the disappointed product owner could secure a full recovery under regular warranty principles.[95]

A second point is that any evaluation of the *Seely* rule requires a comparison of the common law doctrine of products liability and the implied warranty doctrine of the UCC. According to many observers, this comparison should be undertaken at a high level of abstraction: for frequently it is stated, as in *Spring Motors*, that products liability is the essence of tort while implied warranty lies at the heart of contract.[96] Under this assumption, the *Santor-Seely* debate[97] concerns whether tort or contract principles are the best solution to the economic loss problem. True enough, it is common usage to describe

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93. *Id.* § 1-102(2).

94. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980).

95. *Seely* invoked the doctrine of express warranty. 63 Cal. 2d at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20. *Santor* relied on implied warranty. The *Santor* opinion tended to discuss implied warranty in the abstract, although finally acknowledging the Uniform Sales Act, which was in effect at the time of the *Santor* retail sale. 44 N.J. at 68, 207 A.2d at 313. In fact, by the time that *Santor* was decided, the New Jersey legislature had adopted the Uniform Commercial Code. *See Spring Motors*, 98 N.J. at 568, 489 A.2d at 666. But since the UCC did not apply retroactively, it was not directly at issue in *Santor*. Still, it is notable that the *Santor* opinion did not even mention the UCC. Clearly, the court did not appreciate that the adoption of the UCC might limit the significance of its holding.

96. *See* 98 N.J. at 571, 578, 489 A.2d at 666, 672; Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 81-82, 435 N.E.2d 443, 448 (1982). *See also* Note, *Economic Losses and Strict Product Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAW. 118 (1978).

97. Since the UCC was not in issue in *Santor*, *see supra* note 95, there is an analytic awkwardness in treating *Santor* as the leading case; *Spring Motors* of course adds to the awkwardness. But my text employs *Santor* in the way that the case is generally (if imperfectly) understood within the American legal community. At this stage of the debate, it would not be helpful to replace "*Santor* rule" language with "*Cova* rule" language. *See supra* note 78.

products liability as a branch of "tort." Nevertheless, the equation of products liability with tort and of implied warranty with contract may well be misleading. Many contract ideas can be identified within products liability doctrine: for example, the frequent emphasis on "ordinary consumer expectations" as a test of liability.[98] Moreover, the very notion of an automatic implied warranty in every sales transaction may rest, as previously noted,[99] on a tort conception of obligation. In any event, the extent to which it is correct to insist on a tort/contract characterization of the debate about *Seely* can be considered more fully below, as attention is given to the actual differences between products liability and implied warranty in the economic loss setting.

At least at first, no great difference is apparent in the basic standard of liability. While products liability is "strict," so is implied warranty, as the 1793 South Carolina opinion excerpted above makes clear.[100] In products liability a plaintiff needs to show a product "defect," while in implied warranty the consumer must show that the product was "unmerchantable;"[101] and these terms seem for most purposes to be synonymous or interchangable.[102] If, for example, the offending product contains a "manufacturing defect"—an assembly-line flaw that differentiates it from the normal product of the manufacturer—then the product can easily be classified as "unmerchantable," given its failure to conform to the "fair average quality set by manufacturer."[103]

As far as product design is concerned, implied warranty is satisfied so long as the product is "fit for ordinary purposes."[104] This seems equivalent to one of the design tests under products liability: that the product comply with ordinary consumer expectations.[105] Products liability also allows the plaintiff to rely on a risk-benefit analysis in an effort to prove that the product could have been better designed.[106] Everyone will agree that the price of a product should be a strong factor in assessing the adequacy of its design in any claim for economic loss. But under each of the standards described

98. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 426-27, 573 P.2d 443, 452, 143 Cal. Rptr. 225, 234 (1978).

99. *See supra* text accompanying note 90.

100. *See id.*

101. U.C.C. § 2-314(1) (1977).

102. *See* J. WHITE & R. SUMMERS, *supra* note 94, at 353. One problem with the *Seely* opinion is that Justice Traynor seemed to believe that the truck in controversy was rendered unsatisfactory only because of the buyer's idiosyncratic needs. 63 Cal. 2d at 16-17, 403 P.2d at 150-51, 45 Cal. Rptr. at 22-23. If this was so, then a products liability claim, even if allowed, would have failed because of the lack of any demonstrable defect.

103. U.C.C. § 2-314(2)(b) (1977).

104. *Id.* § 2-314(2)(c).

105. *See supra* text accompanying note 98.

106. *See Barker*, 20 Cal. 3d at 427, 573 P.2d at 452, 143 Cal. Rptr. at 234.

above, price can be taken quite significantly into account. As for the UCC, one of its official comments states that "in cases of doubt as to what quality is intended, the price [of the product] is an excellent index of the nature and scope of [the seller's] obligation."[107] As far as products liability doctrine is concerned, a low price would reduce the consumer's expectations, and would also provide a benefit to the consumer that would tend to justify the product's less impressive performance.

As indicated, implied warranty is concerned with the "ordinary purposes" of the product, and is evidently satisfied if the product is basically of average quality.[108] Notably, products liability doctrine can become more ambitious, extending to "foreseeable misuses" of the product[109] and allowing the plaintiff to complain about the design of the product, even if that design conforms to industry custom.[110] This is, at least, the practice that products liability adopts in personal injury cases. If, however, courts were to extend products liability to problems of economic loss, one can predict that they would endorse a more warranty-like conception of what counts as a defective design. This prediction stems not so much from any disparagement of economic loss as from a concern for the manageability of litigation. In a personal injury case, a court can concentrate on the particular design feature that caused the plaintiff's injury. There may be, however, a huge number of design features that cause a product to be less valuable (rather than more valuable) to its owner; and courts will and should be wary of accepting the responsibility for reviewing, in any given case, whichever design elements an owner chooses to complain about.[111]

In any event, even if the the warranty and products liability approaches may potentially diverge, this potential has not been realized in the case law. To better ascertain what the real-world differences

107. U.C.C. § 2-314 official comment 7 (1977). Note that price is an "excellent" rather than an "absolute" index, and serves as an index only in otherwise doubtful cases.

108. *See supra* text accompanying notes 103-04.

109. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

110. In California, proof of compliance with custom is not even admissible on behalf of the manufacturer in a products liability action. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

111. When economic loss is brought about, however, by a clearly defined breakdown of the product, this concern is held to a minimum. Observe that, 20 years after adoption of the UCC, its concept of unmerchantability still is waiting for authoritative judicial clarification: the lawyer continues to encounter the "challenging job" of explaining the concept to judge and jury. J. WHITE & R. SUMMERS, *supra* note 94, at 356.

may be between products liability and warranty, I have read through something like 100 cases in which the plaintiff, having suffered an economic loss, has attempted to invoke the products liability doctrine; in studying each case, I have attempted to figure out what feature of implied warranty law rendered that cause of action unavailable or unattractive.[112] My research did not locate a single case in which the plaintiff was prevented from resorting to implied warranty because of its "average" quality and "ordinary purposes" limitations.[113]

One official limitation on the implied warranty right that frequently has been alluded to in the literature concerning the economic loss problem is the UCC's requirement that the plaintiff provide the defendant with notice of an impending claim within a "reasonable time" after the plaintiff detects the warranty violation.[114] No such notice requirement is imposed on a products liability claim.[115] Here, however, there is much less than meets the eye: for the notice requirement is a paper tiger. My study found no case in which the plaintiff's products liability claim for economic loss is explainable by the plaintiff's failure to give notice under the UCC;[116] furthermore, the commentators agree that the UCC requirement is porous and flexible.[117] Indeed, a UCC Official Comment makes clear that the requirement should be applied forgivingly to the situation of the ordinary consumer at retail: "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith

112. My methodology is, of course, inadequate in one inevitable way: it gives me no data on how many economic loss claimants are basically satisfied with their implied warranty rights. Another inadequacy is that in many cases the explanation for the unavailability of implied warranty is not made clear.

113. A "no importance" finding likewise pertains to whatever possible differences there might be between the measure of damages in implied warranty, as compared to products liability. In a UCC warranty action, consequential damages can be recovered under a liberal version of the *Hadley v. Baxendale* rule. *See* J. WHITE & R. SUMMERS, *supra* note 94, at 389-91. Conceivably the eggshell-skull test of tort law might be even more generous to plaintiffs who seek to recover for consequential damages. But the case law simply fails to bear this out: I found no case in which access to the eggshell-skull rule explains why the plaintiff was attempting to sue in products liability rather than in warranty.

114. U.C.C. § 2-607(3)(a) (1977).

115. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 61-62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

116. *Santor* arose under the Uniform Sales Act. The *Santor* consumer notified the dealer promptly, but was frustrated in his efforts to even identify the manufacturer. 44 N.J. at 56, 207 A.2d at 307. In such a situation, it is extremely unlikely that the notice provisions of the UCC would be interpreted so as to defeat the consumer's suit against the manufacturer.

117. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 94, at 421-26; Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the UCC in Cases Involving Economic Loss, Used Goods, and Nondangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347, 1366-68 (1982).

consumer of his remedy."[118]

"Privity" is an issue that has frequently confounded or complicated the law of implied warranty, and the abandonment of privity limitations generally is regarded as one of the chief attributes of the products liability doctrine. Problems of so-called "horizontal" privity will be considered first. The general assumption is that the plaintiff bringing an implied warranty claim is the actual product owner;[119] products liability, by contrast, confers its rights on all foreseeable victims, including the bystander. However, brief reflection confirms that, at least in core cases of economic loss, the UCC limitation is really not very limiting. Given the very nature of economic loss, the party suffering such loss on account of a defective product will typically be the product owner. In general, only the owner is in a position to be burdened by the costs of repair and replacement, and it is the owner who is most likely to suffer some immediate loss of profits on account of a poorly functioning product.[120]

Besides horizontal privity, there is the problem of so-called "vertical" privity. Under products liability, the ultimate consumer can of course sue the retailer; but given the abandonment of any vertical privity limitation, she is free to sue the manufacturer as well, and usually chooses to do so. The UCC in turn identifies the retailer (more precisely, the immediate product seller) as the primary defendant in an implied warranty action.[121] It is not the case, however, that the UCC rules out an implied warranty action against the re-

118. U.C.C. § 2-607 official comment 4 (1977).
119. *See id.* § 2-301.
120. *See* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280, 288 (3d Cir. 1980); Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 316-17 (1973).

To be sure, there may be cases in which the owner has leased the product to another, so that the lessee is the party who incurs both repair costs and profit interruptions. But the lessee problem is one that the UCC simply does not address; whether the lessee is entitled to bring a warranty action is an open question, and one for the courts to decide. Even in these cases, therefore, products liability and implied warranty do not necessarily lead to divergent results.

In a few cases, the party suffering economic loss may be tantamount to a bystander. For example, if the turnover of a defective truck results in blockage of a bridge for several hours, the delays in transportation could induce economic losses among a number of entities who are other than product owners or users. Assume, however, that no tort recoveries would be allowed against the truck driver where negligent operation of the truck brings about a turnover. If so, then the fact that the blockage is occasioned by a defective product should not alter the no liability result. *See* Dundee Cement Co. v. Chemical Laboratories, Inc., 712 F.2d 1166 (7th Cir. 1983); Leadfree Enter. v. United States Steel Corp., 711 F.2d 805 (7th Cir. 1983).
121. U.C.C. § 2-314(1) (1977).

mote manufacturer. Rather, this is a question that the UCC effectively evades, leaving its resolution to the judiciary of each state that adopts the UCC.[122] A recent treatise collects the results of the process of state judicial decisionmaking that the UCC evidently invites.[123] While the slight majority of courts have ruled that without privity a manufacturer is free of implied warranty liability,[124] there is at least a significant minority position endorsing the extension of implied warranty to the manufacturer.[125] Courts are more willing to approve a warranty action against a remote manufacturer if the product owner is seeking recovery for direct economic losses than if she is suing for consequential damages, the vulnerability to which varies widely according to the circumstances of the particular owner.[126]

In a number of economic loss cases, the absence of privity is what evidently has motivated the plaintiff to attempt a products liability claim against the manufacturer.[127] By and large, however, the case law suggests that the vertical privity issue is capable of being overrated. In many economic loss cases, especially those involving large monetary claims, the product owner is a business enterprise that has purchased the product directly from the manufacturer.[128] Since the product owner *is* in privity with the manufacturer, the manufacturer is fully subject to the implied warranty claim of the owner. Other cases involve more ordinary products purchased by the consumer from a retailer. Personal injuries resulting from defective consumer products can lead to staggering losses that are beyond the financial resources of the retailer; yet the purely economic losses associated with those products are likely to be no more than moderate in quantity. Hence in most instances the consumer seeking compensation for economic losses will regard the retailer as a sufficiently acceptable defendant. Only when that retailer has gone out of business is vertical privity likely to be a serious problem.

Having identified that problem, I can briefly offer my own views as to its resolution. I recommend against the recognition of any vertical privity limitation. The concept of a contract running from manufacturer to consumer is no legal fiction concocted by soft-minded tort lawyers in the name of consumerism; to the contrary, that such a contract meaningfully exists has been affirmed by just about all of

122. *See id.* § 2-318 official comment 3 (UCC "neutral" on privity issue).
123. *See* J. White & R. Summers, *supra* note 94, at 405-10.
124. *Id.* at 407 & n.31.
125. *Id.* at 408 & n.32.
126. *See id.* at 409.
127. *See, e.g.*, Flory v. Silvercrest Indus., Inc., 129 Ariz. 574, 633 P.2d 383 (1981).
128. *See* Purvis v. Consolidated Energy Prod. Co., 674 F.2d 217, 221 n.6 (4th Cir. 1982).

the economists writing about problems of manufacturer liability.[129] The average consumer is rarely in a position to suffer consequential losses such as loss of profits;[130] the consumer's economic losses typically consist of the direct costs of repair and replacement—costs whose likelihood and magnitude the manufacturer can easily predict. Moreover, given the recognized warranty actions by consumer against retailer and then retailer against manufacturer, the consumer has a strict liability right to receive compensation for economic losses, a right to be ultimately funded by the original manufacturer. The unavailability of the retailer in an individual case should neither deprive the consumer of his proper recovery nor protect the manufacturer from its proper liability.[131] In short, not only is the liability of the remote manufacturer the right result, but it is a result that can be arrived at by resort to proper contract reasoning.

Apart from privity, the difference between products liability and implied warranty most frequently mentioned by judges in economic loss cases is the attitude towards disclaimers.[132] In many of the reported cases in which the plaintiff seeks a tort recovery for economic loss, a disclaimer is what apparently prevents the plaintiff from proceeding under a warranty theory. Sometimes, a seller, perhaps of used products, disclaims warranty liability altogether.[133] More commonly, the warranty is given but extends only to repair costs, excluding liability for consequential damages;[134] or, all warranty liability is disclaimed after some stated period of time.[135] As noted, the Restatement expresses the view that products liability rights are not subject to disclaimer.[136] By contrast, implied warranty apparently can be disclaimed as long as the contract language in the disclaimer

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129. *See, e.g.*, M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 95-104 (1983).

130. *See* Speidel, *supra* note 120, at 317.

131. What about the limited number of cases in which the ultimate non-privity purchaser does indeed suffer consequential damages? On the one hand, the manufacturer is not in a position to obtain that knowledge of the purchaser's circumstances that is required by the *Hadley* principle. *See id.*

Still, the retailer may well be liable for the consequential damages of the purchaser under implied warranty, and implied warranty may then require the manufacturer to reimburse the retailer. Economy in litigation is achieved, therefore, by rendering the manufacturer liable in the direct suit of the purchaser.

132. *See, e.g.*, *Jones & Laughlin*, 626 F.2d at 288-89.

133. *See, e.g.*, Mid Continent Aircraft Corp. v. Curry City Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978).

134. *See, e.g.*, *Purvis*, 674 F.2d at 217.

135. *See, e.g.*, Gibson v. Reliable Chevrolet, Inc., 608 S.W.2d 471 (Mo. Ct. App. 1980).

136. *See supra* text accompanying note 65.

is clear and conspicuous.[137] This divergence of positions taken on the issue of disclaimers might be thought to provide the strongest evidence supporting the thesis that the choice between products liability and implied warranty is at bottom a choice between contract and tort.[138]

The trouble is that the divergence may be more apparent than actual. It is only in personal injury cases that courts have invalidated products liability disclaimers,[139] and even in these cases the rule against disclaimers is not quite as firm as the Restatement suggests.[140] For that matter, in personal injury cases the UCC (available to the plaintiff as an alternative theory) adopts a similar policy of general, but not absolute, hostility to disclaimers: under the UCC, disclaimer of liability for personal injury is "prima facie unconscionable."[141]

What about products liability claims for damage to property? These are claims that the *Seely* rule explicitly allows;[142] and the claimants in such cases are typically commercial buyers rather than ordinary consumers. When a commercial plaintiff has sued in products liability for property damage, courts have generally proved willing to give effect to liability disclaimers.[143] Moreover, even when the plaintiff in a products liability property damage case is an ordinary consumer, disclaimers have sometimes been upheld. In *Labionco v. Property Protection, Inc.*,[144] a fifty-five year-old divorcee living alone came home one day to find that $35,000 of her jewelry had been burglarized; she had previously purchased a burglar alarm system, but a defect in that system disabled it from interfering with the burglary. The court recognized that her case seemed to qualify under products liability, since her permanent loss of her property in the

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137. *See* U.C.C. § 2-316(2) (1977).

138. *See* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 81-82, 435 N.E.2d 443, 448-49 (1982).

139. For citations, see Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1117-18 nn.31-33 (1983).

140. The New York Court of Appeals has declined to rule that disclaimers are per se invalid. Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973).

141. U.C.C. § 2-719(3) (1977).

142. *See supra* notes 69, 87-88 and accompanying text.

143. *See* Scandinavian Airlines v. United Aircraft Corp., 601 F.2d 425 (9th Cir. 1979); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924 (9th Cir. 1979).

144. 292 Pa. Super. 346, 437 A.2d 417 (1981). Two other burglar alarm cases involving commercial buyers in which limited disclaimers were likewise upheld are: Fireman's Fund Am. Ins. Cos. v. Burns Elec. Sec. Servs., Inc., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1980); Aronson's Men's Stores, Inc. v. Potter Elec. Signal Co. Inc., 632 S.W.2d 472 (Mo. 1982). All three opinions eventually explained that, notwithstanding the plaintiff's exclusion from its property, products liability doctrine does not apply. But this explanation served merely as a rationalization for the courts' conclusion that these are cases in which disclaimers should be regarded as acceptable. *See generally* Annot., 37 A.L.R. 4TH 47 (1985).

burglary was tantamount to the destruction of that property.[145] Nevertheless, the court gave effect to a provision in the sales contract that limited the seller's liability to the direct cost of repairs.[146] Concerned about the consequential loss problem, the court noted that the homeowner best knows the value of her own property and can purchase first-party insurance to cover the threat of its loss;[147] moreover, prohibiting disclaimers would increase the price of alarm systems and effectuate an unfortunate subsidy running from less wealthy to more wealthy burglar alarm households.[148]

Consider now the suit by an ordinary consumer for pure economic loss. This suit is properly covered by the UCC: while the draftsmen of the UCC were primarily concerned with commercial transactions,[149] it is nevertheless clear that the UCC applies to consumer transactions in a very strong way.[150] Of all the sales transactions that presently are governed by the UCC, undoubtedly a large majority are consumer sales; and by now there are hundreds of appellate opinions interpreting the UCC in cases that began with an ordinary consumer transaction.

Yet even conceding the clear application of the UCC, there is some uncertainty as to whether implied warranty can routinely be disclaimed in consumer transactions. To begin with, the UCC invalidates all "unconscionable" clauses in contracts,[151] and some courts may conclude that a complete disclaimer of implied warranty in the course of mass merchandising is unconscionable.[152] Secondly, a number of states, in adopting the UCC, have included provisions prohibiting the disclaimer of implied warranty in ordinary consumer sales.[153] Additionally, even if courts, following the lead of *Labionco*,

145. *Labionco*, 292 Pa. Super. at 355-56, 437 A.2d at 422.
146. *Id.* at 359, 437 A.2d at 424.
147. *Id.* at 360-61, 437 A.2d at 424-25.
148. *Id.* at 361, 437 A.2d at 425.
149. *See* Speidel, *supra* note 120, at 309-10.
150. *See* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 995 (1966).
151. U.C.C. § 2-302 (1977).
152. *See* Martin v. Joseph Harris Co., 767 F.2d 296 (6th Cir. 1985) (disclaimer given by seed distributor to small farmers found unconscionable); *cf.* Berg v. Stromme, 79 Wash. 2d 184, 484 P.2d 380 (1971) (disclaimer found contrary to public policy under general commercial law). *But see* U.C.C. § 2-719(3) (1977) (limitation of liability for "commercial" loss is not "prima facie unconscionable").
153. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 106, § 2-316A (West Supp. 1983). Washington has adopted an interesting intermediate position: a consumer disclaimer must set forth "with particularity the qualities and characteristics which are not being warranted." WASH. REV. CODE § 62A.2-719 (1985).

concur in the manufacturer's disclaimer of liability for consequential losses, the economic losses of concern to ordinary consumers generally entail merely the moderate and predictable costs of repair and replacement. The disclaimer of liability for even these costs might strike a court (or a legislature) as unjustified or objectionable.[154]

In all, then, even though the question of disclaimability is an important one, its answer is by no means fully determined by the classification of the plaintiff's cause of action as either products liability or implied warranty. In particular, even if courts should decide that products liability does extend to claims of economic loss, in suits brought by commercial buyers one can predict that products liability would be held to be disclaimable after all. This prediction is roughly supported, moreover, by the case law in New Jersey during the reign of *Santor*[155] and by a recent ruling in Wisconsin,[156] which is generally classified as a *Santor* jurisdiction.[157]

Having charted the uncertainties of the law on the issue of disclaimability of liability for economic loss, I can provide at least limited evaluation of the merits. I find no reason, first of all, for questioning the disclaimer received by a commercial purchaser; here, conventional contract reasoning is sufficiently persuasive. As for ordinary consumers, one needs to know why courts are offended by personal injury disclaimers in order to figure out whether economic loss disclaimers are offensive as well. The court's objection may be that a disclaimer is a prime example of a "contract of adhesion." This objection would apply to personal injury disclaimers and economic loss disclaimers alike; they would each be lacking in the at-

154. Under the federal Magnuson-Moss Act, approved by Congress in 1975, a manufacturer is prohibited from disclaiming an implied warranty in every consumer transaction in which the manufacturer provides a written express warranty. Magnuson-Moss Warranty-FTC Improvement Act, 15 U.S.C. § 2308(a) (1982). The manufacturer may, however, limit its implied warranty to a "reasonable duration," if the limitation is conscionable and set forth in clear and unmistakable language. *Id.* § 2308(b).

155. Monsanto Co., Inc. v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (1974); Moreira Constr. Co. v. Moretrench Corp., 97 N.J. Super. 391, 235 A.2d 211 (1967), *aff'd*, 51 N.J. 405, 241 A.2d 236 (1968). *See* Note, *Products Liability in Commercial Transactions*, 60 MINN. L. REV. 1061, 1076-79 (1976).

156. Phillips Petroleum Co. v. Bucyrus-Erie Co., 373 N.W.2d 65 (Wis. Ct. App. 1985). See also the reasoning in Kaiser Steel Corp. v. Washington Elec. Corp., 55 Cal. App. 3d 737, 748-49, 127 Cal. Rptr. 838, 845 (1976).

157. *See supra* note 79. In *Seely* jurisdictions, cases arise in which an exception to the *Seely* rule permits a products liability claim for economic loss. Even in such cases, judges have suggested that they will enforce an explicit liability disclaimer accepted by a commercial purchaser. *See, e.g.*, Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813, 817, *reh'g denied*, 738 F.2d 451 (11th Cir. 1984); East River S.S. Corp. v. Delaval Turbine, Inc., 752 F.2d 903, 917 n.8 (3d Cir.), *cert. granted*, 106 S. Ct. 56 (1985) (Becker, J., concurring and dissenting). *See also* Salt River Project Agricultural Imp. & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 385, 694 P.2d 198, 215 (1984) (products liability for economic loss cannot be "disclaimed" by boilerplate language, but it can be contractually "waived").

tributes of a "true" contract or agreement. How valid, however, is this (assumed) judicial perception? In recent years, one article, incorporating an eclectic mix of insights, has advanced the idea that adhesion contracts are nasty, widespread phenomena that should be generally invalidated;[158] but another article, relying on a sophisticated law-and-economics analysis, has concluded that the very notion of adhesion contracts is intellectually shallow and empirically false.[159] I do not attempt, in this Article, to consider or resolve the range of issues implicated in this vivid academic debate.

In any event, there is a second explanation for the judicial opposition to personal injury disclaimers. That explanation suggests that ordinary people, operating under a variety of psychological limitations, may be likely to do a particularly bad job in making decisions about very low probability catastrophes.[160] Here it is noteworthy that even the UCC is generally opposed to liability disclaimers in the personal injury setting.[161] If the fear of consumers' lack of wisdom in the face of personal injury "disasters"[162] is what explains the paternalistic position taken by both the Restatement and the UCC, then in a case involving mere economic loss even a *Santor* advocate might agree that a liability disclaimer is acceptable.

It may well be, therefore, that the literature surrounding the debate about *Seely* has overstated the extent to which the choice between products liability and implied warranty controls the disclaimability issue. In that debate, it may also be that another issue has received insufficient attention: in economic loss cases, what the plaintiff may really need to watch out for is the statute of limitations.

A products liability claim is governed by the jurisdiction's general tort statute, which begins to run from the date of harm and frequently expires after two years.[163] The UCC limitation period for a

158. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

159. *See* Priest, *supra* note 10.

160. *See* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 55-58 (1970).

161. U.C.C. § 2-719(3) (1977).

162. In defending the *Seely* rule, Judge Sneed has observed that "[t]o treat such a breach [of warranty] as an accident is to confuse disappointment with disaster." S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363, 1376 (9th Cir. 1978).

163. The California statute sets a short one year period for personal injury claims, and three years for property damage claims. CAL. CIV. PRO. CODE §§ 340, 338 (West Supp. 1985).

warranty action is four years.[164] Four years, however, from what date? Section 2-725(1) of the UCC stipulates that the buyer's cause of action "accrues," and the statute of limitation hence begins to run, at the time of sale. In addition, section 2-725(2) of the UCC states flatly that this accrual takes place "regardless of the aggrieved party's lack of knowledge" of the product defect.[165]

Notice one irony: If a consumer suffers economic loss shortly after purchasing the product, the limitation period afforded by the UCC, four years from the sale, is more generous than the period applicable to a products liability claim. In many cases, however, the product owner does not begin to suffer economic loss until more than four years have elapsed after the original product sale.[166] In these cases, plaintiffs are required to pursue products liability as a theory of last resort.

It is hard to develop real enthusiasm for the UCC's apparent limitation period policy. While the UCC's choice of a pro-seller accrual rule can quite possibly be justified by various practical arguments, the Official Comment to the UCC makes no serious effort to make such a demonstration; it merely states that four years "is within the normal commercial record keeping period."[167] If the point of limiting a limitation period is to benefit defendants,[168] and if the UCC generally relies on contractual or consensual values, then one would certainly expect that the four-year rule would be subject to modification by an appropriate term in the sales contract itself. As it happens, the relevant section of the UCC does authorize the parties, by an agreement, to "reduce the period of limitation;"[169] however, the same section goes on to stipulate that the parties' agreement cannot "extend" the limitation period.[170] Nothing in the Official Comment in any way explains or defends this language. No doubt, buyer and seller, if represented by shrewd counsel, could devise language that would circumvent this prohibition.[171] Still, its curious presence in the UCC's

164. U.C.C. § 2-725(1) (1977).

165. *Id.* § 2-725(2).

166. *See, e.g.*, Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

Even if the limitation period has not yet expired, the product owner must still demonstrate that a defect existed in the product at the time of sale. For a discussion of the extent to which the "subsequent" malfunction or deterioration of the product is indicative of an "original" defect, see Schwartz, *New Products*, *supra* note 64, at 828-36.

167. U.C.C. § 2-725 official comment (1977).

168. An alternative (but unpersuasive) idea is that the purpose of limitation statutes is to protect the courts from being overly burdened by stale claims.

169. U.C.C. § 2-725(1) (1977) (emphasis added).

170. *Id.*

171. The parties could couch their agreement in terms of an express warranty as to future performance. *See id.* § 2-725(2). Also, even if the limitation period cannot itself be extended by contract, it is conceivable that the definition of accrual can be contractually modified.

limitation-period section makes it all the more difficult to regard that section as *either* praiseworthy *or* as an embodiment of contractual values.

There is, however, an additional and intriguing complication. As summarized by a leading treatise, under the UCC accrual provision "the clock ticks even though the buyer does not know the goods are defective."[172] Yet notice section 2-725(4) of the UCC, which provides that the UCC "does not alter the law of tolling of the statute of limitations." The Official Comment states this point even more emphatically: there is no intent to "alter or modify in any respect the law on tolling of the Statute of Limitations as it now prevails in the various jurisdictions."[173] Now, state law typically recognizes a number of circumstances that justify the "tolling" of limitation statutes.[174] In many jurisdictions, one such circumstance is the plaintiff's lack of opportunity to "discover" the violation of his rights; in these states, the statute is "tolled" until the time of the plaintiff's discovery.[175]

There is, then, an apparent discrepancy between the specific provisions on accrual in section 2-725(1) and (2) and the general language on tolling in section 2-725(4). To be sure, a large number of courts, evidently not noticing section 2-725(4), have simply assumed that the four-year rule is to be applied without qualification in economic loss cases.[176] Moreover, even the judge who recognizes the discrepancy could very plausibly argue that the specific ought to take precedence over the general, and that a "ticking clock" is therefore altogether warranted. This argument is not, however, an automatic winner, given the breadth of the "in any respect" language of the Official Comment, and given the extent to which this language has not been actually confronted by the courts that have applied a flat four-year rule. At the very least, section 2-725(4) confers on courts the de facto discretion as to whether to incorporate the discovery

172. J. WHITE & R. SUMMERS, *supra* note 94, at 418.
173. U.C.C. § 2-725 official comment (1977).
174. *See Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1203-04, 1220-37 (1950).
175. *See* 51 AM. JUR. 2D *Limitation of Actions* § 146 (1970) (citing early cases). The so-called discovery rule has become increasingly popular in recent years. My assumption, which could of course be challenged, is that § 2-725(4), despite the "now prevails" language in its Official Comment, incorporates all of a jurisdiction's tolling rules, even those that the jurisdiction first recognizes subsequent to its adoption of the UCC.
176. *See, e.g.*, County of Johnson v. United States Gypsum Co., 580 F. Supp. 284, 292 (E.D. Tenn. 1984).

idea into the UCC.[177] In exercising this discretion, a Michigan opinion can perhaps be read as rejecting the discovery rule;[178] yet one California court has endorsed the rule,[179] and an Illinois court has left the issue open.[180]

What the right statute of limitations period should be in an economic loss action can be regarded as an open question. An initial and important point is that nothing inherent in the concept of either "tort" or "contract" provides firm guidance in resolving this question. A distinction between personal injury and economic loss is somewhat more promising. Again, personal injury may well entail "disaster" in a way that economic loss does not;[181] accordingly, a short limitation period for economic loss claims is less likely to produce extreme hardship than a short limitation period for cases of personal injury.[182] Additionally, a personal injury generally happens all at one time, and that time is frequently a long time after the original product sale. Economic loss is much more likely to begin early and then continue on, as in *Spring Motors*;[183] this makes a shorter limitation period more acceptable.[184] Also, the generosity of the tort limitation statute in products cases is essentially inadvertent: for the typical statute was undoubtedly drafted with standard tort

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177. Consider UCC § 1-103, which indicates that general legal principles, "unless displaced" by the UCC, can be used to "supplement" the UCC. U.C.C. § 1-103 (1977). In dozens of opinions, courts have behaved aggressively in exercising their § 1-103 authority. *See, e.g.*, Northwest Potato Sales, Inc. v. Beck, 678 P.2d 1138 (Mont. 1984) (doctrine of "estoppel by silence" enables a party to avoid the UCC version of the statute of frauds).

178. Parish v. B.F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (1975).

179. Werber v. Mercedes-Benz of North Am., 152 Cal. App. 3d 1039, 199 Cal. Rptr. 765 (1984) (decertified). On appeal, the supreme court denied a rehearing, but ordered the decertification of the court of appeal opinion. A decertified opinion cannot be cited as judicial precedent in California; decertification typically indicates that there is something in the lower court opinion that the supreme court does not want preserved. But the *Weber* opinion contains an abundance of holdings; hence it is quite difficult to interpret the significance of its decertification.

180. Tomes v. Chrysler Corp., 60 Ill. App. 3d 707, 377 N.E.2d 224 (1978).

181. *See supra* note 162.

182. That is, product-produced economic losses are likely to be a function of product owners' pre-existing wealth in a way that product-produced personal injuries are not. Of course, this point is true only as a tendency or generalization: in individual cases, a "small" consumer can easily experience a "large" economic loss. But of course the law often (and properly) proceeds by way of generalizations.

183. Given the timing of its lawsuit, the plaintiff's implied warranty claim in *Spring Motors* was barred by the UCC limitation period. Yet the plaintiff in that case knew the product was defective within four months of its acquisition by the plaintiff, and the plaintiff's economic losses reached their peak three years after product delivery. 98 N.J. at 562-64, 489 A.2d at 663-64. The subsequent delay of the plaintiff in bringing suit seems bizarre; hence the actual application of the UCC limitation period to the *Spring Motors* defendant did not work any real hardship. To this extent, *Spring Motors* was a poor vehicle for the New Jersey court to employ in pondering that limitation period.

184. *See* Parish v. B.F. Goodrich Co., 395 Mich. 271, 278, 235 N.W. 2d 570, 573 (1975).

situations in mind, in which there is no extended duration between the act of the defendant and the injury to the plaintiff.[185] In recently assessing the unusual situation of modern products liability, many state legislatures have enacted so-called "statutes of repose," cutting off the victim's right to a personal injury recovery once a certain number of years have elapsed after the original product sale.[186] None of these repose periods is shorter than six years,[187] however; and courts in several states have ruled that repose provisions are unconstitutionally harsh.[188] In a recent article, I considered such statutes of repose and concluded that their wisdom turned on empirical facts, including the number of valid personal injury claims that they foreclose, the number of weak or dubious claims that manufacturers would otherwise be required to defend against, and the cost to manufacturers of preparing for and engaging in such defensive efforts.[189] Since the relevant data were simply not available, I found myself unable to pass intelligent judgment on the repose statutes.[190] Since comparable data are equally lacking for economic loss claims, I am likewise in a poor position to determine whether to support the UCC's four-year period or how to advise courts on the exercise of their section 2-725 discretion.

In any event, my reference to the statute of limitations completes the inventory of noteworthy potential differences between products liability and implied warranty. What is it about the UCC that has persuaded most courts to follow *Seely* and reject the idea that products liability applies to economic losses? *Seely* courts are inclined to describe the UCC as a solution to the economic loss problem that is based in "sound policy;"[191] in *Seely*, Justice Traynor relied on the observation that UCC rules "function well" in an economic loss setting.[192] Language of this sort implies an intelligence rationale behind *Seely*: the UCC is given priority because of the general intelligence it displays. Notice, however, that the supposed good sense of the UCC is not easily detected in two of the areas where products liability and the UCC may diverge: privity, and the statute of limitations.

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185. *See* Schwartz, *New Products*, *supra* note 64, at 815, 842-43.
186. *See id.* citations at 842-43.
187. *See id.* at 842-43 & nn.283-85.
188. *See, e.g.*, Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981).
189. *See* Schwartz, *New Products*, *supra* note 64, at 842-51, 862.
190. *See id.* at 846.
191. Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 78, 435 N.E.2d 443, 447 (1982). *See* Clark v. International Harvester Co., 99 Idaho 326, 335, 581 P.2d 784, 793 (1978) (UCC "carefully and painstakingly" responds to economic loss problem).
192. 63 Cal. 2d at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22.

On the privity issue, as noted, the UCC simply abdicates: it authorizes state courts to reach any conclusion they please.[193] As for the limitations period, leaving aside its possible ambiguity, one is unable to readily affirm that the "policy" here achieved by the UCC is obviously "sound."

In all, I am not inclined to accept the idea that it is the UCC's superior intelligence that justifies the courts in subordinating products liability to the UCC in economic loss cases. There is, however, a second and more convincing argument on behalf of that subordination. This argument relates to authority rather than intelligence. The UCC has pertinence in the first place precisely because it has been enacted into law by the legislatures of almost every state; and under elemental jurisprudence, legislation takes precedence over the common law. Whether or not the UCC is an intelligent document, it is a legislative document, and that is largely all that matters.[194] The courts' obligation to abide by legislative judgments obviously provides the strongest support for the *Seely* idea that products liability doctrine cannot be applied to problems of economic loss.

In this regard, however, consider again the issue of privity. As noted, the UCC reserves the resolution of that issue for the state judiciary.[195] That legislative decisions are superior to judicial decisions in no way explains, therefore, why implied warranty should take precedence over products liability as far as privity is concerned. Here, however, an alternative explanation is available. Consider a state, such as Alaska, whose highest court is asked, in a case like *Murrow v. New Moon Homes, Inc.*,[196] to rule on whether or not the consumer's implied warranty right runs against a remote manufacturer. If a court, after considering all relevant policy factors, chooses to rule that a remote manufacturer should be free of implied warranty claims, then the court's obvious interest in preventing the effective circumvention of its ruling should lead that court to reject the products liability doctrine in economic loss settings.[197] Also, if the court decides in favor of the implied warranty liability of the manufacturer, then the court has expanded the warranty theory in a way

193. *See supra* text accompanying note 122.

194. An utterly irrational statute is unconstitutional; the UCC is hardly irrational in this sense. Statutes that are somewhat stupid or obsolescent are likely to be circumvented by the courts. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). The UCC plainly does not come within this description.

195. *See supra* text accompanying note 122.

196. 548 P.2d 279 (Alaska 1976).

197. A somewhat similar analysis pertains to the tolling problem in the statute of limitations. If a state court determines that the manufacturer's interest in closing its books renders the discovery rule inadvisable in an implied warranty action, it would be surprising if that same court were willing to frustrate the manufacturer's efforts at book-closing by enabling the product owner to sue for economic loss under a products liability theory.

that reduces the significance of the *Seely-Santor* products liability debate.[198] This, as it happens, aptly describes *Spring Motors*, in which a New Jersey court, though depriving commercial buyers of their products liability claims, also ruled that such a buyer can bring an implied warranty claim against a non-privity remote supplier.[199] The court emphasized that this expanded implied warranty right serves as a substitute for the products liability right previously suggested by *Santor*.[200]

Notice, in addition, that even my general point about legislative superiority requires some amplification.[201] Prior to the enactment of the UCC, implied warranty principles had been applied by the courts to cases of personal injury; moreover, by virtue of late amendments, the final version of the UCC included provisions that specifically addressed the problem of personal injury.[202] There is therefore room for the argument that even in personal injury actions products liability doctrine is preempted by the UCC; several conscientious scholars have indeed found this argument persuasive.[203] However, the UCC's specific provisions on personal injury were added at the last minute, and mainly as an effort to keep up with the recent developments within the law of torts.[204] Additionally, at the time the UCC was drafted, common law principles had already achieved major application in personal injury and property damage cases;[205] and there is no evidence that the UCC's draftsmen entertained any idea that they were abrogating these well-established common law applications. Accordingly, the proper conclusion is that in personal injury cases implied warranty and products liability are available to the consumer as alternative theories. Certainly, this is the conclusion

198. *See* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 161 n.5 (Minn. 1981). In *Murrow*, the court accepted the *Seely* rule of no tort liability, but only after affirming the liability of the manufacturer under implied warranty, at least for the direct economic losses of the consumer.

199. 98 N.J. at 582, 489 A.2d at 674.

200. *Id.* at 586, 489 A.2d at 676 (implied warranty, as extended by *Spring Motors*, "parallels" a *Santor* tort claim).

201. In a few states, the common law doctrine of products liability has been codified. For citations, see Note, *supra* note 117, at 1352 n.46.

202. *See* narrative in Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 Mo. L. REV. 1, 9 (1983).

203. Citations to the literature are collected *id.* at 3-4 n.11.

204. *See* U.C.C. § 2-318 official comment 3 (1977); Wade, *supra* note 202, at 9. *But see* the early UCC history described in Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461 (1985).

205. *See* W. PROSSER, *supra* note 73, at 498-503.

that almost all the American courts have seen fit to accept, if usually implicitly.[206] Economic loss, by contrast, lies at the center of the UCC's intended coverage; and prior to the UCC there was utterly no record of applying tort law to claims of economic loss resulting from defective products.[207] Not surprisingly, then, even those scholars who are keenest on arguing that the UCC does not preempt the common law in personal injury cases have been equally keen on insisting that the UCC does enjoy exclusive jurisdiction in economic loss cases.[208]

At this point, one can appreciate the position that the New Jersey Supreme Court now finds itself in as a result of *Spring Motors*, which left open the question of the *Santor* rights of the ordinary consumer. In refusing to allow commercial buyers to sue in products liability, *Spring Motors* partly relied on what has here been referred to as an intelligence rationale: because commercial buyers have "sufficient bargaining power,"[209] the UCC, which was "carefully-conceived,"[210] provides a "more appropriate vehicle" for resolving economic loss claims, one that satisfies the relevant "policy considerations."[211] Elsewhere in *Spring Motors*, however, the court emphasized an authority rationale for its holding: a court is obliged to recognize "the role of the Legislature" and to honor legislative judgments.[212] What result the New Jersey court will reach in a later ordinary consumer case will depend on how it maneuvers between these two rationales. If, in that later case, the court emphasizes the intelligence rationale, the court could plausibly justify a pro-*Santor* result by stressing that the UCC is *not* sufficiently intelligent in its application to ordinary consumers, since they are in an "unequal bargaining position."[213] Yet as long as the court acknowledges that the authority rationale is what mandates *Spring Motors*, then the extension of *Spring Motors* to ordinary consumers seems equally mandatory, given the strong application of the UCC to consumer transactions.[214]

The *Seely* plaintiff was in fact a private individual, though he was evidently running his own business; in announcing the general *Seely*

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206. For discussion, see Wade, *supra* note 202, at 6. The few explicit holdings are collected in Annot., 15 A.L.R. 4TH 791 (1982).
207. *See* Franklin, *supra* note 150, at 983.
208. *See, e.g.*, Wade, *supra* note 202, at 26 n.87.
209. 98 N.J. at 576, 489 A.2d at 671.
210. *Id.* at 577, 489 A.2d at 671.
211. *Id.* at 586, 489 A.2d at 689.
212. *Id.* at 577, 489 A.2d at 671.
213. *Id.* at 567, 489 A.2d at 666.
214. In the economic loss setting, nothing in the historical record would support any argument that the UCC is less exclusive when applied to ordinary consumer claims than in its application to the claims of commercial buyers. *But see* Justice Peters' *Seely* dissent, 63 Cal. 2d at 27-28, 403 P.2d at 157-58, 48 Cal. Rptr. at 29-30 (Peters, J., dissenting).

rule, Justice Traynor did not regard the precise status of the plaintiff as pertinent.[215] My analysis up until now reveals my assessment that *Seely* basically reaches the right result. Yet even in *Seely* jurisdictions, economic loss claims have occasionally arisen in circumstances that have produced some uncertainty as to whether the *Seely* rule remains appropriate.[216] Almost all of these cases have involved a commercial or institutional product owner.[217] In order to give my treatment of the cases a sufficient basis or anchor, I shall assume that the explanation for the owner's inability to rely on the implied warranty doctrine relates to a disclaimer in the contract of sale, a disclaimer that is clearly valid under implied warranty but whose validity would be questionable under products liability.[218] As noted, the owner has a well-established products liability claim if the defect in the product causes damage to property. This is so, at least, if the property damaged is something other than the purchased product. What should the result be when the property damaged is merely that product itself? In *Seely*, Justice Traynor seemed to affirm, if somewhat inarticulately, that the owner can recover in products liability under these circumstances.[219] Other courts, however, have reached a contrary conclusion,[220] and theirs is the result that appears clearly correct. In terms of its impact on the owner, damage to the product

215. Justice Peters, dissenting in *Seely*, identified the plaintiff as an "ordinary consumer" who was not in "the world of commerce," and relied on this identification in arguing in favor of the plaintiff's products liability recovery for economic loss. *Id.*

216. One court has charged that the *Seely* rule is "riddled with exceptions" in a way that renders it unacceptable. Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1474 (9th Cir. 1984). Since I recommend rejection of most of the exceptions, I can dismiss the charge.

217. This is hardly a coincidence. Such owners tend to purchase products that are sufficiently expensive, and sufficiently involved in income-generating activities, as to make litigation sensible if the product malfunctions.

218. Disclaimers do, in fact, provide the explanation for the products liability claims in many of the cases under review here. Often, however, judicial opinions deal with the *Seely* issue in the abstract; they do not emphasize or regard as legally relevant the actual reason for the apparent unavailability of implied warranty. The *Spring Motors* opinion, for example, carefully discussed the UCC provisions concerning privity, notice, and disclaimers. 98 N.J. at 565-66, 489 A.2d at 665. From this discussion one would hardly guess that it was the UCC's statute of limitations that actually blocked the plaintiff's claim.

219. In *Seely*, a defect in the plaintiff's truck allegedly damaged that truck. The truck was the product that the defendant-manufacturer had previously sold to the plaintiff, via a retailer. The court indicated that if the plaintiff could prove his allegation, a products liability claim would be in order for the truck damage. 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.

220. *See, e.g.*, Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978).

purchased seems functionally equivalent to product breakdown or the mere failure of the product to perform; furthermore, the line-drawing involved in separating out damage to the product from mere internal breakdown or deterioration seems clearly unsatisfactory. There is no reason not to honor the (hypothesized) disclaimer.

In many situations, however, the malfunction that damages the product itself will likewise result either in a personal injury or in damage to the plaintiff's other property. Since products liability doctrine plainly applies to that personal injury or property damage, the question is whether it remains sensible to apply warranty doctrine to the economic loss portion of the plaintiff's claim. The Oregon Supreme Court has concluded that it "seems [unacceptably] artificial" to apply products liability doctrine to most of the plaintiff's loss but not to the remainder;[221] however, Texas law evidently requires the segregation of the product owner's products liability claim for property damage and his implied warranty claim for economic loss.[222] In appraising cases of this sort, one should be concerned about both the relative and the absolute magnitude of the plaintiff's losses.[223] Consider, first of all, an expensive combine purchased by a peanut farmer which, in the course of breaking down completely, manages to mangle a limited number of the farmer's peanuts;[224] it would be absurd to hold that the sad fate of those peanuts enables the farmer to escape the UCC (and the disclaimer) in his suit complaining about the ill-performing combine. Ponder, secondly, a defective new roof which needs to be replaced at a cost of $50,000, but which also damages the pre-existing eaves of the structure, necessitating repairs that cost $985. In assessing these facts, a Wisconsin court concluded that the "association" of property damage with economic loss entitles the plaintiff to sue for all of his losses under a products liability theory.[225] Yet while $985 is more than a trivial sum, it forms only a small part of the plaintiff's overall claim; the Wisconsin opinion thus unintelligently allows the tail to wag the dog.

Consider next the situation in which the product is defective in a way that creates a risk of serious personal injury. This defect meets the standard set by the Restatement of "unreasonably dangerous."[226] Should the product defect be itself regarded as the fundamental ju-

221. Russell v. Ford Motor Co., 281 Or. 587, 593, 575 P.2d 1383, 1386 (1978).

222. Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1247, *reh'g denied*, 629 F.2d 1350 (5th Cir.), *cert. denied*, 450 U.S. 920 (1980) (discussing Texas law).

223. Such an analysis is suggested by Salt River Project Agricultural Imp. & Power Dist. v. Westinghouse Elec. Corp., 143 Ariz. 368, 380, 694 P.2d 198, 210 (1984).

224. *See* Mercer v. Long Mfg. Co., 665 F.2d 61, *reh'g denied*, 671 F.2d 946 (5th Cir. 1982).

225. *See* City of La Crosse v. Schubert, Schroder & Assocs., Inc., 72 Wis. 2d 38, 44, 240 N.W.2d 124, 127 (1976).

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

ridical fact, thereby entitling the product owner who happens to suffer economic loss on account of the defect to invoke products liability doctrine? No opinion adopts such a position, although several opinions can be interpreted as at least flirting with it.[227]

Now add in, however, the further fact that the economic losses of the owner actually consist of the costs of repairing or replacing the product so as to eliminate its safety hazard.[228] Though the costs the owner bears obviously do not amount to a "disaster," in a number of ways the products liability claim of the owner is worthy of interest. Not only is the product "unreasonably dangerous," but the safety repairs are in a sense the factual substitute for the accident that otherwise would have happened and that would have subjected the manufacturer to a full products liability burden. In England, Lord Denning has expressed his view that a negligent manufacturer should be liable in tort for the cost of safety repairs.[229] In America, the case law has been slow in developing, although a recent Alaska opinion can be read as adopting a Denning-like position.[230] In these situations, it is arguable that nullifying the disclaimer will encourage the owner to undertake repairs, thereby advancing the strong products liability interest in safety. Yet the product owner who neglects needed repairs knows that he subjects himself *either* to a disabling personal injury *or* to huge personal liability in the event of a third-party injury. Given the incentives afforded by these prospects, it is far from obvious that any concern for safety justifies the invalidation of the disclaimer.[231]

In one category of cases, however, American courts have been eager to recognize an exception to the *Seely* rule. In these cases, not only is the product unreasonably dangerous and not only does the

227. For example, in Industrial Uniform Rental Co. v. International Harvester Co., 317 Pa. Super. 65, 463 A.2d 1085 (1983), the *absence* of an "unreasonable danger" in a product was found to be the key preventing the plaintiff from invoking products liability.

228. This is the situation in many pending cases in which public authorities are suing asbestos companies because of the great expenses they have incurred in removing asbestos from the walls and ceilings of public buildings. *See* Flaherty, *Second Wave of Litigation Hits Asbestos*, Nat'l L. J., Oct. 29, 1984, at 1, col. 1. In these cases, the plaintiffs are typically arguing that the UCC limitation period has been tolled by the companies' fraudulent concealments of the defendants.

229. Dutton v. Bognor Regis, Urban Dist. Council, 1 Q.B. 373, 396 (C.A. 1972). The English cases, many involving buildings rather than products, are discussed in Cane, *Physical Loss, Economic Loss, and Products Liability*, 95 LAW Q. REV. 117, 129-37 (1979).

230. Shooshanian v. Wagner, 672 P.2d 455, 463-64 (Alaska 1983).

231. See my discussion in Schwartz, *supra* note 60, at 710-12.

product itself suffer damage, but it does so because of a "sudden and calamitous occurrence,"[232] an occurrence that easily could have resulted in a serious personal injury (though in fact such an injury is fortunately avoided). Faced with such an "occurrence," almost every American jurisdiction that has considered the question has permitted the product owner to secure a products liability recovery.[233] These courts evidently have concluded that the *event* should be regarded as the primary juridical fact; the nature of the plaintiff's loss has hence been disregarded as a mere fortuity. What these courts are effectively saying is that "it looks like a tort, it sounds like a tort, it must be a tort." If my tone here sounds satiric, it is intended to be so. In these suits it can (and should) be observed that the product buyer is a corporate buyer that is not even *capable* of itself suffering personal injury. Hence the fact that the corporation is suing for economic loss rather than for personal injury should be regarded as essential rather than fortuitous. If, in the corporation's suit against the manufacturer the issue is a disclaimer that the corporation has seen fit to accept, the corporation should not be relieved of the burden of that disclaimer merely because some independent person enjoyed a fortunate escape from injury.

Finally, what happens if the plaintiff does not rely on the strict liability doctrine, but rather alleges negligence on the part of the manufacturer? Most courts, conceiving of *Seely* as expressing a general tort rule, have concluded that an allegation of manufacturer negligence does not entitle the plaintiff to an economic loss recovery.[234] The New Jersey Supreme Court, in *Spring Motors*, has now joined this judicial majority.[235] However, the Washington Supreme Court relying on the general jurisprudence of negligence liability, has found no "compelling reasons" to deny a plaintiff an economic loss recovery against a negligent manufacturer.[236] In *Seely*, Justice Traynor, in discussing the strict liability issue, explicitly assumed that negligence law would furnish no basis for an economic loss recovery.[237] But the California Supreme Court's recent *J'Aire* opinion, creating a generic tort for the negligent infliction of economic harm, has called into question Justice Traynor's assumption. Quite re-

232. The phrase was first used in Cloud v. Kit Mfg. Co., 563 P.2d 248, 251 (Alaska 1977).

233. The cases as of 1981 are discussed in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981). Later cases include Vaughn v. General Motors Corp., 102 Ill. 2d 431, 466 N.E.2d 195 (1984). This new rule is referred to sympathetically in *Spring Motors*, 98 N.J. at 580, 489 A.2d at 673.

234. *See, e.g.*, Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

235. 98 N.J. at 579-82, 489 A.2d at 672-74.

236. Berg v. General Motors Corp., 87 Wash. 2d 584, 588, 555 P.2d 818, 822 (1976).

237. 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

cently, two California courts of appeal have interpreted *J'Aire* as permitting the consumer to recover for economic losses by proving the negligence of the manufacturer.[238] In light of the direction of the original *Santor-Seely* debate, one should observe the irony: at present, a commercial plaintiff can secure a tort recovery *more* easily in California than it can in New Jersey.

In ascertaining the significance of negligence, everything depends on how one characterizes what the strict products liability rule is all about. Products liability is regarded by many as a revolutionary doctrine, resting on innovative policies.[239] In the minds of others, however, one key to the strict liability doctrine lies in the generally high correlation between defective products and manufacturer negligence, a correlation that makes it not worth the time and trouble to justify a full-blown case-by-case inquiry into the negligence issue.[240] Under the latter view, for *Seely* purposes the willingness or ability of the plaintiff to prove some negligence on the part of the manufacturer should not make much of a difference. Indeed, given the correlation between defect and negligence, to endorse a negligence exception to *Seely* would be to authorize the circumvention of the *Seely* doctrine in most instances. Additionally, if the purpose of the *Seely* rule is, as it certainly seems to be, to give proper recognition to the legislative adoption of the UCC, then again the circumstance of manufacturer negligence is lacking in relevance.[241]

This suggests the overall moral of the story. If products liability were the only game in town, if it were the product owner's exclusive opportunity for recovery, then the *Seely*-related issue would be richly significant in terms of such ultimate epistemological questions as "What is tort?;" in particular, I could consider with great sympathy the "sudden and calamitous occurrence" test that has been described above. But the basic point of the *Seely* rule is that products liability does not operate in a vacuum, for warranty law confers on product owners broad statutory rights respecting their economic losses. If the American legal community wishes to debate the issues of privity, disclaimability, and the proper limitation period in economic loss cases, there is no reason why that debate cannot and should not be under-

238. Ales-Peratis Foods Int'l, Inc. v. American Can Co., 164 Cal. App. 3d 277, 209 Cal. Rptr. 917, *modified*, 164 Cal. App. 3d 126 (1985). Pisano v. American Leasing, 146 Cal. App. 3d 194, 194 Cal. Rptr. 77 (1983).

239. *See, e.g.*, Priest, *supra* note 204.

240. *See, e.g.*, Schwartz, *New Products*, *supra* note 64, at 810.

241. For an expression of a contrary view, see Franklin, *supra* note 150, at 984-85, 1019.

taken under the auspices of the UCC, insofar as the UCC is capable of judicial interpretation (and likewise of state legislative amendment).

CONCLUSION

In *J'Aire*, the problem before the California Supreme Court was one of accommodating tort and contract. In *Seely*, the problem facing the court was essentially one of properly subordinating common law to statutory law. In *Seely*, the court acknowledged its problem and withheld the common law accordingly. In *J'Aire*, the court ignored the problem and consequently issued an unsatisfying opinion. Of course, the court has the right to its own opinion, and from a descriptive standpoint *J'Aire* is important in revealing the vitality of the negligence principle in American law.[242] Yet from a normative standpoint *J'Aire* likewise suggests the potential for vacuity in the negligence principle.

In evaluating *J'Aire*, one can wonder about the possibilities for creative collaboration between contract and tort. The common law lacks the authority to engage in any equivalent collaboration with statutory law. But statutes in their implementation generally call for judicial interpretation, and this is particularly true of the UCC, which was drafted with the common law in mind, and whose relevant provisions may be surprisingly ambivalent or indecisive. Moreover, even if courts were to hold that the products liability theory somehow applies in economic loss cases, they might see fit, in so applying the doctrine, to modify some of its usual accoutrements. Accordingly, the extent to which implied warranty and products liability actually diverge in economic loss cases remains ultimately a matter for judicial choice. In all, we have misallocated our scholarly energies; rather than agonizing about the abstract and somewhat glamorous *Santor-Seely* debate, we should have been working more constructively with such particular questions as what the most intelligent limitation period is for cases in which defective products occasion economic loss.

In sum, *J'Aire* and *Seely* each permits an interesting case study in the application of tort doctrine to elements of economic loss. What the two case studies together suggest is that the propriety of this application frequently depends on the relationship between tort rules and the doctrines at work in other areas of the law. The tort tunnel vision that characterizes both *J'Aire* and *Santor* (the pre-1985 New Jersey alternative to *Seely*) is not to be recommended.

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242. *See* Schwartz, *supra* note 47.