1976

Products Liability in Commercial Trasnactions

Minn. L. Rev. Editorial Board

Note: Products Liability in Commercial Transactions

The doctrine of products liability was developed primarily as a means by which consumers could be compensated for personal injury and property damage caused by defective products.[1] An aggrieved consumer can seek recovery from any seller in the chain of distribution, even absent privity. According to the RESTATEMENT (SECOND) OF TORTS, so long as there is physical damage[2] caused by defective products, the seller is liable regardless of any attempt to disclaim liability or the exercise of all possible care in the preparation and sale of the product.[3]

---

1. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122-23 (1960) [hereinafter cited as Prosser, *Assault*]. *See* Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motor Co., 32 N.J. 358, 161 A.2d 69 (1960).

2. While the distinction between physical damage (personal injury and property damage) and non-physical damage (economic loss) is usually clear, the concepts may overlap in certain situations. *See, e.g.*, Air Products and Chem., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973); Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

3. Most courts that have adopted the doctrine of products liability follow the codification in section 402A of the RESTATEMENT:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Comment (m) to section 402A is particularly significant:

> m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability . . . . The basis of liability is purely one of tort.
>
> A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition

A notable expansion of the doctrine has been attempted in a number of recent cases by commercial buyers[4] who have asserted products liability claims against sellers with whom they were in privity in conjunction with the usual claim that a defective product constituted a breach of warranty or that it was the result of negligent manufacture.[5] Unlike most consumers, commercial buyers can adequately assess the risks of potentially defective products and bargain for contractual remedies.[6] Moreover, commercial buyers are generally in as good a position as commercial sellers to spread the losses caused by defective

---

> of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.
>
> The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

Id., Comment (m). Not all courts, however, have followed comment (m) of 402A. *See* text accompanying notes 79-106 *infra*.

4. For the purpose of this Note, "commercial buyer" will denote a purchaser that is a business association or commercial entity. "Consumer" will denote all non-commercial buyers.

5. *See, e.g.*, Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974); Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974); Monsanto v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (1974); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974). A products liability action is most useful when the buyer is unsure of prevailing in negligence or on the warranty claim.

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 655-56 (4th ed. 1971) [hereinafter cited as PROSSER, HANDBOOK]; Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309, 317 (1973).

products by raising prices to their own customers.[7] Hence, the question arises whether commercial buyers in fact need the extensive protection products liability affords.

At present there are two dominant theories of products liability. Courts that have followed section 402A of the RESTATEMENT (SECOND) OF TORTS have focused on the type of harm caused by the defective product, granting recovery for personal injury and property damage but denying recovery for purely economic losses.[8] With only occasional lapses,[9] these courts have not allowed the commercial nature of the buyer to influence their decisions.[10] Courts that have rejected the type-of-harm approach have granted recovery for any type of damage caused by defective products; however, some of these courts have permitted disclaimers of products liability to be effective in certain situations.[11] Those courts that admit the possibility of disclaiming products liability have been more likely to uphold such disclaimers against commercial buyers than consumers because it is difficult for a commercial buyer to establish that he did not understand a disclaimer or that the disclaimer was unconscionable.[12]

This Note will first describe the two basic remedies available to all purchasers of defective products. It will then examine the application of the two dominant theories of products liability in cases where commercial buyers have sought to recover for damages caused by defective products. Finally, the Note will recommend an approach to products liability that can best

---

7. *See* Prosser, *Assault, supra* note 1, at 1120.

8. *See* text accompanying notes 32-47 and 53-88 *infra.*

9. *See* Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974).

10. *See, e.g.,* Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606 (N.D. Iowa 1974).

11. *See* text accompanying notes 89-106 *infra.* These courts have not required a specific disclaimer of products liability. Rather, they have recognized warranty disclaimers as effective disclaimers of products liability upon a showing that the parties so intended.

12. *See* Monsanto v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (1974); Moreira Constr. Co., Inc. v. Moretrench Corp., 97 N.J. Super. 391, 235 A.2d 211 (1967), *aff'd* 51 N.J. 405, 241 A.2d 236 (1968). Commercial entities also have difficulty proving the unconscionability of other contractual clauses. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UCC 114-15 & n.11 (1972) [hereinafter cited as WHITE & SUMMERS]. *See, e.g., In re* Elkins Dell Mfg. Co., Inc., 253 F. Supp. 864 (E.D. Pa. 1966); Bill Stremmel Motors, Inc. v. IDS Leasing Corp., 89 Nev. 414, 514 P.2d 654 (1973).

accommodate the needs of consumers and commercial buyers alike.

I. ALTERNATIVE REMEDIES

A. SALES LAW

With some limited exceptions, the sales remedies of the Uniform Commercial Code (UCC) afford the buyer as much (or as little) protection as the parties[13] agree to allow.[14] Generally, if the seller breaches a warranty, the buyer can recover all the standard contract damages, including consequential damages.[15] And, while the UCC tends to resolve any ambiguous or potentially misleading contractual provisions in favor of a buyer,[16] under section 2-316 sellers may nevertheless exclude all warranties.[17] Short of excluding all warranties, sellers may, under section 2-719, contractually exclude all consequential damages unless the exclusion would be unconscionable.

Thus, the parties may agree to both the terms of a warranty and the remedies for breach. But not all such agreements will be enforced. Section 2-302[18] affords protection for both parties against overreaching by the other, permitting a court to refuse enforcement of an unconscionable clause or entire contract.[19]

---

13. That the parties must be in privity for one or the other to assert a claim is a basic requirement of general contract law. With the exception of section 2-318, the UCC does not deal with privity requirements. *See* WHITE & SUMMERS, *supra* note 12, at 6.

14. *Id.*

15. *See* A. CORBIN, CORBIN ON CONTRACTS §§ 997, 998, 1006 et seq., 1101 (1964).

16. Under section 2-314 warranty of merchantability is implied by operation of law unless it has been conspicuously excluded or modified. Under 2-316 the most favorable of inconsistent warranties will be given effect.

17. Of course, if a seller has previously given an express warranty under section 2-313, that warranty cannot later be excluded under section 2-316.

18. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

UNIFORM COMMERCIAL CODE § 2-302.

19. Section 2-719(3), quoted in note 103 *infra*, providing that limitation of consequential damages for injury to the person in the case of

While neither the official comments to the section nor the cases in which it has been interpreted contain a precise definition of unconscionability,[20] the comments state that a clause or contract must be "so one-sided as to be unconscionable," and that "[t]he principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."[21] Significantly, in the cases decided under 2-302 most parties asserting unconscionability have been consumers, many of them with low incomes.[22] The overall policy of the UCC, then, is to provide for freedom of contract with exceptions to guard against misleading statements, surprise, and oppression.[23]

B. Negligence

Manufacturers are under a duty to all foreseeably affected parties to use due care to sell products that will not cause physical[24] harm.[25] The requirement that a buyer had to be in privity with the manufacturer before he could sue the manufacturer for negligence was first abolished in *MacPherson v. Buick Motor Co.*,[26] so that now a buyer may sue anyone in the chain of distribution whose negligence caused damage to his person or property. But where the business from which the aggrieved buyer seeks compensation is not the manufacturer, negligence claims have remained difficult to prove and thus a less favored remedy than claims for breach of warranty.[27] Moreover, some courts have allowed recovery in negligence actions only for physical damage, denying relief for purely economic loss.[28]

A seller may, of course, attempt to contractually exculpate himself from negligence liability. Not only is such an approach

---

consumer goods is prima facie unconscionable, is a specific manifestation of the policy expressed in section 2-302.

20. *See* White & Summers, *supra* note 12, at 116-17.

21. Uniform Commercial Code § 2-302, Comment 1.

22. Commercial entities have had occasional success, especially when asserting the unconscionability of warranty disclaimers and remedy limitations. *See* White & Summers, *supra* note 12, at 114-15 & n.11.

23. *See* White & Summers, *supra* note 12, at 6; UCC §§ 2-302, 2-314, & 2-316.

24. *See* note 2 *supra*.

25. Prosser, Handbook, *supra* note 6, at 643.

26. 217 N.Y. 382, 111 N.E. 1050 (1916).

27. *See* G. Peters, Products Liability and Safety 3-4 (1971); Prosser, *Assault*, *supra* note 1, at 1116-18.

28. *See* Anthony v. Kelsey-Hayes Co., 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972). *See also* Note, *supra* note 2, at 929.

fraught with practical difficulties—the disclaimer would have to somehow extend beyond the buyer with whom the seller is in privity—but under all circumstances the disclaimer would have to withstand stringent judicial scrutiny when asserted as a defense to a negligence action.[29] At the very least, an exculpatory clause must be so explicit that it is clearly comprehensible to a buyer.[30] Beyond that, courts have invalidated disclaimers where the respective bargaining power of the parties was grossly disparate, holding that such clauses were void as against public policy.[31]

II. PRODUCTS LIABILITY IN COMMERCIAL TRANSACTIONS

A. Background

Products liability doctrine developed as a response to the inadequacy of sales law and negligence law as remedies for consumers attempting to recover for damages caused by defective products.[32] Now, according to section 402A of the RESTATEMENT (SECOND), which many courts accept as a statement of the doctrine, a person who sells any product in a defective condition unreasonably dangerous to the user or to his property is liable for any resulting physical harm, regardless of lack of privity, lack of negligent conduct by the seller, or any contractual disclaimers of

29. Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970); Poorvu v. United States, 420 F.2d 993 (Ct. Cl. 1970).

30. Tyler v. Dowell, Inc., 274 F.2d 890 (10th Cir.), *cert. denied*, 363 U.S. 812 (1960); Fedor v. Mauwehu Council, Boy Scouts of America, Inc., 21 Conn. Sup. 38, 143 A.2d 466 (1958).

31. Precisionware, Inc. v. Madison County Tobacco Warehouse, Inc., 411 F.2d 42 (5th Cir. 1969); Hardware Mutual Ins. Co. of Minn. v. C.A. Snyder, Inc., 242 F.2d 64 (3d Cir. 1957). Commercial buyers, however, have rarely prevailed with public policy arguments. *See* Delta Air Lines v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967); Jackson v. First Nat'l Bank of Lake Forest, 415 Ill. 453, 114 N.E.2d 721 (1953).

32. *See* notes 1-3 *supra* and accompanying text. As it developed, the doctrine was labeled at successive stages as implied warranty and strict liability in tort. One reason the warranty terminology was abandoned was confusion with the UCC version of implied warranty. *See* Prosser, *Assault*, *supra* note 1, at 1124-34; UCC §§ 2-314 through 2-318. This Note uses the phrase "products liability" rather than "strict liability in tort" because the latter term also has an historical antecedent with which it might be confused. *See* PROSSER, HANDBOOK, *supra* note 6, at §§ 75-81. Also, the words "strict" and "tort" may in themselves suggest outcomes that may not necessarily be consistent with the underlying purpose of the doctrine.

liability. Some of the most important purposes underlying the doctrine are peculiar to the interests of noncommercial consumers, including compensation of the injured, who often are unable to recover under a warranty or negligence theory;[33] provision by the seller of a form of social insurance by spreading its losses among all its buyers;[34] and protection of consumers who, through ignorance, lack of bargaining power, or lack of choice, could not protect themselves by obtaining contractual remedies.[35] Other purposes are of a more general nature, such as encouraging safety by deterring sellers from placing defective products on the market[36] and avoiding multiple litigation caused by the sale of defective products through chains of distributors.[37]

Although products liability doctrine focused initially on personal injuries caused by defective products,[38] it was soon applied to property damage as well.[39] And while some courts (and the RESTATEMENT)[40] have retained the requirement of physical damage of some sort as a prerequisite to a products liability action,[41] other courts have extended recovery to purely eco-

33. Prosser, *Assault, supra* note 1, at 1120. *See* Seely v. White Motor Co., 63 Cal. 2d 9, 19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

34. *Id.*

35. Greenman v. Yuba Power Products, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962). This reason might also apply to some commercial buyers. *See* text accompanying note 94 *infra.*

36. Prosser, *Assault, supra* note 1, at 1119. Even Prosser, however, does not place much reliance on the effectiveness of this deterrent. The desire of a seller to maintain a good business reputation is probably a stronger deterrent than products liability. *See generally* I. GRAY, PRODUCTS LIABILITY 151-57 (1975). Also, because some percentage of all products sold will unavoidably be defective, completely effective deterrence could never result. *See id.* at 8-10, 151; G. PETERS, PRODUCTS LIABILITY AND SAFETY 3-4 (1971).

37. Multiple litigation is avoided because privity is not required in products liability actions, and thus sub-purchasers can sue manufacturers directly. Also, because of the availability of a direct action, the risk of bankruptcy of the intermediate seller is placed on those sellers further back in the chain instead of on the ultimate buyer. *See* PROSSER, HANDBOOK, *supra* note 6, at 651.

38. *See, e.g.*, Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Henningsen v. Bloomfield Motor Co., 32 N.J. 358, 161 A.2d 69 (1960). Of course, when these cases were decided the doctrine was not yet called products liability. *See* note 32 *supra.*

39. One court has recently held, however, that products liability is available only when a defect causes personal injury. Hawkins Constr. Co. v. Matthew Co., Inc., 190 Neb. 546, 209 N.W.2d 643 (1973).

40. *See* note 3 *supra.*

41. *See* text accompanying notes 43-47 and 64-78 *infra.* Even among courts for which physical damage has been a prerequisite to re-

nomic losses.[42]

In *Seely v. White Motor Co.*,[43] the Supreme Court of California approved a distinction based on the type of harm caused by the defective product, emphasizing the difference between concerns for safety and for product quality unrelated to safety. According to the court, only the former concerns were properly dealt with under products liability doctrine; the latter concerns were adequately covered by the UCC. It also suggested that the duty to avoid physical harm was absolute, stating that "[t]his liability could not be disclaimed, for one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of responsibility for harm caused by his products."[44] The opinion in *Greenman v. Yuba Power Products*,[45] a California case in which the products liability cause of action was established in that state, and which was cited throughout *Seely*, was based on the assumption of a one-sided seller-buyer relationship:

> The purpose [of such liability] is . . . to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.[46]

Consistent with the *Greenman* position, the *Seely* court maintained that "[a] consumer should not be charged *at the will of the manufacturer* with bearing the risk of physical injury when he buys a product on the market."[47] Its view of products liability theory thus appeared to be based on an across-the-board assumption of gross disparities in bargaining power between sellers and buyers.

In contrast to the courts that have conditioned recovery on the type of harm caused by the defective product, there are courts that have sustained products liability actions where the defective product did not actually cause physical damage. For these courts, the definition of a defective product has been the

---

covery, it is uncertain whether non-physical losses caused by the same defect are recoverable. *Compare* Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974) *with* Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965).

42. *See* text accompanying notes 48-51 and 89-106 *infra*.

43. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

44. *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 22.

45. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

46. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (1962).

47. 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23 (1965) (emphasis added).

same as the definition of an unmerchantable product under the UCC.[48] In *Santor v. A & M Karagheusian, Inc.*,[49] for example, a carpet developed an aesthetically displeasing defect, but one that caused no personal injuries or property damage. The Supreme Court of New Jersey allowed the plaintiff to recover the loss of his bargain, namely the difference between the price he paid and the actual market value of the carpet. In so deciding, the court emphasized two factors: the generally unequal bargaining position between manufacturers and consumers, and reliance of consumers on manufacturer representations made by simply placing the product on the market. Observed the court:

> [The] doctrine [of products liability] stems from the reality of the relationship between the manufacturers of products and the consuming public to whom the products are offered for sale. As we indicated in *Henningsen*, the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely on the skill, care and reputation of the seller.[50]

Although the *Santor* court framed its theory in terms of the reliance of a buyer on a seller's implicit representations, the result of the case was to impose on sellers a duty to avoid distributing defective products that would result in harm to subsequent buyers.[51] Notably, however, courts following the *Santor* approach in not insisting on actual physical damage as a prerequisite to a products liability action have been less certain than the *Seely* court that products liability is not disclaimable.[52]

---

48. Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

UCC § 2-314(2).

49. 44 N.J. 52, 207 A.2d 305 (1965).

50. *Id.* at 64, 207 A.2d at 311.

51. *See* Note, *supra* note 2, at 937-38. Because the sales contract in *Santor* included no disclaimer, the court did not have to resolve whether a products liability disclaimer was enforceable.

52. *See* text accompanying notes 89-106 *infra*.

B. TYPE-OF-HARM APPROACH IN COMMERCIAL TRANSACTIONS

Under the type-of-harm approach to products liability, the commercial nature of the buyer usually has not affected the court's decision.[53] Section 402A of the RESTATEMENT, heavily relied on by the type-of-harm courts, conditions recovery on a number of factors: the product must be defective; it must be unreasonably dangerous; it must cause damage to person or property; it must be expected to reach the buyer without substantial change in the condition in which it is sold and actually do so; and it must be sold by a person engaged in the business of selling the particular product.[54]

1. *Recovery for physical damage*

Where a commercial buyer seeks recovery for damage to its property, the type-of-harm approach to products liability will support a cause of action.[55] In *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*[56] large electric motors used to drive compressors failed to function properly, and the buyer sought to recover repair and alteration costs and lost profits.[57] The Supreme Court of Wisconsin decided that if the buyer's allegations that the motors were physically damaged as a result of defective components were sustained, the trial court must then conclude that the motors were "unreasonably dangerous" to the plaintiff's property and that the buyer had stated a valid cause of action under section 402A.[58] The court rejected the defendant's contentions that in this commercial context the damage to the motors was actually an economic loss and that therefore a products liability action would not lie.

53. *See, e.g.*, Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F.2d 781 (5th Cir. 1973); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974); Air Products and Chem., Inc., v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973). *But see* Delta Air Lines, Inc., v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974).

54. *See* note 3 *supra*.

55. *See* text accompanying notes 53-54 *supra*.

56. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

57. Since the appeal was from an order sustaining the defendant's claim that the facts alleged did not constitute a cause of action in products liability, the court did not specifically decide whether the lost profits were recoverable under products liability. It merely decided that the damages alleged were sufficient to state a cause of action. *See also* note 60 *infra* and accompanying text.

58. *See* note 3 and text accompanying note 54 *supra*.

In *Sterner Aero AB v. Page Airmotive, Inc.*[59] the purchaser of a rebuilt aircraft engine sought recovery for damages to his airplane that crashed when the engine failed on takeoff. There were no personal injuries. The warranty for repairs during the first six months or 100 hours of operation was ineffective, since the crash occurred more than one year and 583 operating hours after the sale.[60] The Tenth Circuit Court of Appeals betrayed its concern over the commercial nature of the buyer by holding that the term "consumer" as used in section 402A[61] served as a substantive condition to a cause of action for products liability. It concluded, however, that the term could be interpreted to include the plaintiff, a corporate entity that had negotiated the contract with the defendant. In setting forth its broad definition of "consumer," the court stated that

> although plaintiff may be considered an expert in the field of aviation generally, there is no evidence to establish plaintiff's specific expertise in the manufacture of airplaine engines or to preclude it from being classified as a consumer in the purchase of the engine in question.[62]

While upholding the plaintiff's claim in this particular case, the court left open the possibility that some types of buyers would not be entitled to bring an action for products liability.[63]

Yet another court sought to clarify the significance of the nature of the buyer in products liability cases in *Boone Valley Cooperative Processing Association v. French Oil Mill Machinery*

---

59. 499 F.2d 709 (10th Cir. 1974).

60. The court stated that the exclusion of all other warranties did not appear to abrogate the plaintiff's cause of action for products liability, since the exclusion did not specifically mention any waiver of strict liability. 499 F.2d at 712. The court did not expressly decide whether a specific disclaimer of strict liability would have been effective. *See* McNichols, *Who Says that Strict Tort Disclaimers Can Never be Effective? The Courts Cannot Agree*, 28 OKLA. L. REV. 494, 520-23 (1975); note 88 *infra.*

61. The court indicated that the evidence concerning the status of the buyer as a consumer under section 402A would be heard and the issue decided on remand. It is not clear if the court was referring to the words "consumer or user" in the main body of 402A, or to the word "consumer" in comment (m) to 402A, which states that the cause of action is not affected by any disclaimer.

62. 499 F.2d at 713 (10th Cir. 1974).

63. In grounding its decision on the buyer's expertise, the court relied on a rationale similar to that emphasized by the courts that have upheld products liability disclaimers. *See* text accompanying notes 87 & 104 *infra.*

Co.[64] But in doing so, the United States District Court for the Northern District of Iowa appeared to disapprove the position taken earlier by the court for the southern district of Iowa. In *Iowa Electric Light & Power Co. v. Allis-Chalmers Manufacturing Co.*,[65] the earlier southern district case, the plaintiff sought to recover profits lost due to the breakdown of a transformer. The sales contract had excluded liability for consequential damages. Denying recovery, the court said:

> The loss plaintiff is seeking to recover is a commercial loss. The plaintiff is a large corporation, fully cognizant of commercial law. The doctrine of strict liability in tort, designed to aid the consumer in an unequal bargaining position who is physically injured, loses all meaning when a large public utility or other large company is the plaintiff and is suing solely for commercial loss.[66]

Apparently the court believed that both the nature of the damage and the nature of the buyer were important to its decision.[67] But the court demonstrated lingering uncertainty over the relative weight of the two factors by specifically refusing to opine whether a consumer with little bargaining power would be allowed to recover purely economic loss in a products liability action.

In *Boone Valley*, however, the court for the northern district held that a products liability action would lie with a commercial buyer. In that case, a machine used to process soybeans had exploded, damaging the plaintiff's plant and causing it to be closed down temporarily. Here, too, the seller had excluded liability for consequential damages in the contract. The court rejected the suggestion in *Iowa Light* that the availability of products liability actions should be conditioned on the unequal bargaining positions of the parties to a contract. More critically, it doubted whether such an inquiry could legitimately be made, stating that "[t]his Court fails to see how a line could be drawn based on a party's size which would control that party's ability to assert a theory of recovery."[68]

The *Boone Valley* court went on, however, to reveal some concern for limiting liability for economic losses in a products

64. 383 F. Supp. 606 (N.D. Iowa 1974).
65. 360 F. Supp. 25 (S.D. Iowa 1973).
66. *Id.* at 32.
67. Another court has interpreted *Iowa Light* as standing for the proposition that products liability doctrine may not be invoked in any case where the parties are in equal bargaining positions. States Steamship Co. v. Stone Manganese Marine, Ltd., 371 F. Supp. 500, 507 (D.N.J. 1973).
68. 383 F. Supp. at 614 n.6 (N.D. Iowa 1974).

liability case. It declared that profits that were lost because of the explosion might be recoverable, but that profits lost without accompanying physical damage would not be.[69] And while additional recovery for economic loss is not altogether unknown under the type-of-harm approach,[70] the court nevertheless tried to limit the amount of the award by calculating lost profits not by a tort measure, but by a more restrictive contract measure.[71] It required not only that the lost profits be proximately caused by the original physical damage, but also that the parties be in privity and that the loss of profits have been foreseeable.[72] This result is consistent with the focus of the type-of-harm courts on physical damage as the gravamen of the products liability action.[73] It is understandable that the no-fault nature of products liability may foster a judicial reluctance to adopt the analogy to economic loss recovery under a pure negligence theory.

2. *Recovery for purely economic loss*

Economic loss, absent accompanying physical damage, has not been a basis for a cause of action under the type-of-harm approach reflected in section 402A of the RESTATEMENT. In *Fredonia Broadcasting Corp. v. RCA Corp.*[74] a television station

---

69. *Id.* at 614-15. A state court has expressed uncertainty as to the appropriateness of recovery of lost profits in a products liability case. In Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970), the owners of a golf course sought recovery from a remote seller for losses incurred as a result of defective golf carts, including bargain losses, repair costs, and lost profits. The court followed the reasoning of *Santor*, refusing to require physical damage in order to sustain a products liability action. While the court granted recovery of the bargain losses and repair costs, it remanded the question of lost profits for a new trial. If the lost profits were proven, the court said, then it would decide whether it should limit this recovery in any way.

In Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974), however, a type-of-harm court indicated in dictum that once liability was established, any damage resulting from the defect should be recoverable. *Id.* at 159 n.8, 324 N.E.2d at 589 n.8.

70. Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974).

71. 383 F. Supp. at 615 (N.D. Iowa 1974).

72. *Id.*

73. Note that some courts have traditionally allowed recovery of economic losses in negligence actions on the theory that once the duty to use due care has been breached, the wrongdoer should be held liable for all the harm caused by his negligence. For a decision that employed this theory to allow recovery of lost profits in a products liability action, see Hales v. Green Colonial, Inc., 490 F.2d 1015 (8th Cir. 1974).

74. 481 F.2d 781 (5th Cir. 1973).

sought to recover losses that it had incurred as a result of a defective transmitter. The station allegedly had lost advertising revenue due to both the delay of its initial broadcasting date and later interruptions of service. RCA had excluded all liability for consequential damages in the sales contract. The Fifth Circuit Court of Appeals, without mentioning the commercial context of the transaction, held simply that since the defective product had not physically harmed Fredonia's property, a cause of action for products liability would not lie.

Other courts denying recovery for purely economic loss have indicated that the commercial context was important to their decisions. For instance, in *Southwest Forest Industries v. Westinghouse Electric Corp.*[75] the buyer of a turbine generator sought to recover damages for lost time, labor, materials, and loss of business resulting from slowdowns and shutdowns of the generator. The seller had limited the warranty in the sales contract to the repair and replacement of defective parts and had excluded consequential damages. In denying recovery, the Ninth Circuit quoted the opinion of the district court: "The circumstances of this case do not bring the plaintiff within that class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort."[76]

A similar factual situation was presented in *Avenell v. Westinghouse Electric Corp.*[77] In that case the plaintiff sought to recover damages resulting from a defective turbine generator, including both lost revenues and the additional costs of obtaining alternate sources of power. The seller had given a warranty only for repair and replacement of defective parts and had excluded consequential damages. Refusing to ignore the commercial context of the transaction, the Supreme Court of Ohio denied recovery for these purely economic losses. The court asserted that products liability was designed to ensure that "the costs of injuries resulting from defective products [should be] borne by the manufacturers, rather than the injured person *powerless* to protect himself."[78] It emphasized that the parties were in privity and had actually negotiated the terms of the contract, thus implying that the buyer was not "powerless" and could have bargained for an adequate contractual remedy.

75. 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970).
76. *Id.* at 1020.
77. 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).
78. *Id.* at 158, 324 N.E.2d at 589 (emphasis added).

3. *Possibility of effective disclaimers of products liability in the type-of-harm approach*

Notwithstanding the history of products liability doctrine[79] and comment (m) to section 402A of the RESTATEMENT,[80] two type-of-harm courts have held that disclaimers of products liability may be effective in some situations.[81] In *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*[82] a contract for the sale of a commercial airplane included a clause purporting to exculpate the seller for any liability that might arise from gyration of the airplane. When the nose gear of the airplane collapsed, the plane was damaged, but no one was injured. Relying on an early California decision,[83] the Fifth Circuit Court of Appeals held that the products liability claim was barred by the sales contract that exculpated the seller from negligence liability. The court appeared unconcerned that the clause did not disclaim products liability specifically.

In *Keystone Aeronautics Corp. v. R. J. Enstrom Corp.*[84] the Third Circuit Court of Appeals also refused to absolutely disallow products liability disclaimers, but it provided a more thorough analysis for its decision than did the court in *Delta*. In *Keystone*, the buyer of a used helicopter sought to recover for damage to the helicopter caused by a crash-landing. No persons were injured in the crash. The aircraft had been sold "as is," and hence all warranties had been disclaimed.[85] The contract also provided that the seller "[would] be held harmless of any liability in connection with [the] sale."[86] The court decided that validating disclaimers of products liability, at least in certain

79. *See* notes 32-37 and 43-47 *supra* and accompanying text.

80. *See* note 3 *supra*.

81. Note that the non-disclaimability of products liability is one of its most powerful features, along with the absence of the privity requirement. Thus, to hold products liability disclaimable in some situations is very near to holding that no products liability action is available in those situations. *See* text accompanying notes 97-98 *infra*.

82. 503 F.2d 239 (5th Cir. 1974).

83. Delta Air Lines, Inc. v. Douglas Aircraft Co., 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965). The two cases involved entirely separate causes of action. The 1975 case arose in the Fifth Circuit Court of Appeals as a diversity action. The court followed the conflict of laws rule of Georgia, which provided that the law of the state where a contract was made (California in this case) would govern the interpretation of the contract unless the result would be contrary to the public policy of Georgia. 503 F.2d at 243.

84. 499 F.2d 146 (3d Cir. 1974).

85. *See* UCC § 2-316(3)(a).

86. 499 F.2d at 148.

limited situations, was necessary to avoid the judicial "overkill" that would otherwise result from extending a valid legal principle to situations where it did not properly apply. Disclaimers would be effective, it said, when "the sale was a pure commercial transaction between two knowledgeable corporations which have consciously negotiated terms and price, and only property damage is at issue."[87] Comparing the disclaimability of products liability with the disclaimability of negligence liability generally, the court found no reason to ban the former while permitting the latter. It concluded, however, that the attempted disclaimer by Keystone was not sufficiently explicit. Apparently, it subjected the disclaimer of products liability to the same critical judicial scrutiny that has traditionally been applied to disclaimers of negligence liability.[88]

C. The New Jersey Approach to Products Liability

The Supreme Court of New Jersey in *Santor v. A & M Karagheusian, Inc.*[89] broadened the scope of products liability doctrine by allowing purely economic loss to form the basis of a valid claim.[90] In later cases, however, lower New Jersey courts have considerably narrowed the scope of products liability where certain kinds of plaintiffs have been involved, even when the loss was the result of physical damage. They have indicated that they will enforce disclaimers in some situations against buyers who have contracted to accept them. If not unconscionable, the agreement between the parties is to be regarded as determinative.

In *Moreira Construction Co., Inc. v. Moretrench Corp.*[91] the plaintiff sought recovery for damages resulting from construction delays that had been caused by malfunctioning rented pumps.[92] In the rental contract, the defendant had limited the

87. *Id.* at 148-49.

88. *See* text accompanying notes 29-31 *supra*. At least two other courts, implicitly agreeing with the reasoning in *Keystone*, have indicated that they, too, might be willing to hold an explicit disclaimer of products liability effective. In Arrow Transportation Co. v. Fruehauf Corp., 289 F. Supp. 170 (D. Ore. 1968), the court, holding that a *warranty* disclaimer did not affect a products liability action, volunteered that it was not reaching the issue of the effect of an explicit disclaimer of products liability on an action in products liability, thus leaving the question open. *Id.* at 173. *See also* Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (Ct. App. 1973); note 60 *supra*.

89. 44 N.J. 52, 207 A.2d 305 (1965).

90. *See* text accompanying notes 49-50 *supra*.

91. 97 N.J. Super. 391, 235 A.2d 211 (1967).

92. New Jersey courts previously had allowed recovery based on

plaintiff's remedies for breach of warranty to the replacement of defective parts, excluding recovery of consequential damages. The court held that the limitation of damages in the contract was effective as against a products liability claim, even though the limitation did not expressly refer to products liability. The court distinguished *Henningsen v. Bloomfield Motors, Inc.*,[93] in which a warranty disclaimer was declared void as against public policy, as involving a consumer in a weak bargaining position compared to that of the sellers in the automobile industry. Moreover, the disclaimer in *Henningsen* was standardized throughout the industry, and was thus viewed as a contract of adhesion. In *Moreira* the court concluded that there was "no showing that plaintiff was precluded from negotiating a contract on more favorable terms."[94]

In another case involving a contractual disclaimer of liability, *Monsanto Co. v. Alden Leeds, Inc.*,[95] the defendant had purchased dry organic chemicals from the plaintiff. From time to time the chemicals had spontaneously ignited, causing extensive damage to at least three buildings, including two owned by Alden Leeds and one by a landlord of Alden Leeds. When Monsanto sued for the price of the goods, Alden Leeds counterclaimed to recover for its property damage and introduced the third party claim of its landlord. Monsanto, however, had disclaimed all warranties and limited the buyer's remedies to recovery of the price of the goods. In order to determine the effect of the disclaimer, the court faced two issues: whether the disclaimer was intended to include products liability claims and whether the disclaimer was unconscionable. Although it concluded that further testimony was necessary concerning the commercial context, purpose, and effect of the contract, the court indicated that the disclaimer would in any event be unconscionable if it was impossible to purchase the chemicals anywhere without having to accept a similar type of disclaimer.

Reasoning from the decision in *Santor v. A & M Karagheusian, Inc.*, the court further decided that recovery might be had under products liability doctrine for what it labeled "commercial

products liability for defective products that were simply leased. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

93. 32 N.J. 358, 161 A.2d 69 (1960).

94. 97 N.J. Super. 391, 395, 235 A.2d 211, 213 (1967).

95. 130 N.J. Super. 245, 326 A.2d 90 (1974).

loss."[96] Although the court apparently was referring to the type of buyer and not to the type of harm, since the loss in *Monsanto* was due to physical damage caused by a fire, it was clear that commercial buyers *per se* were not to be deprived of a cause of action in products liability. The court simply stated that "the extent to which the strict liability in tort doctrine will be applied to a commercial loss is up to the parties."[97]

In New Jersey, then, the effect of allowing disclaimers of products liability where the parties are in privity appears to be virtually the same as the result dictated by the UCC provisions governing warranties.[98] Unlike warranty theory, however, the right of action that arises under products liability doctrine extends to nonprivity as well as privity buyers, and for the former, a disclaimer is ineffective.[99] In *Monsanto*, for instance, if further evidence demonstrated that the disclaimer covered products liability claims and was not unconscionable, only Alden Leeds's landlord would have a cause of action, because the disclaimer would only bind buyers in privity with Monsanto.[100] Thus, under New Jersey law,[101] while buyers of defective products causing only economic loss are in an unusually favorable position, buyers in general would be well advised never to deal directly with a manufacturer.

And while the *Monsanto* court viewed the disclaimer at issue there in terms of unconscionability under the UCC, the court in a subsequent case seemed to apply a more stringent standard. In *Turner v. International Harvester Co.*[102] a used truck was sold "as is" and subsequently collapsed on the buyer, fatally injuring him. The truck was purchased for use in the decedent's

96. Said the court: "Corporations are, in the last analysis, owned by people who rely upon them for income, and thus commercial losses are often reflected in personal sorrow." 130 N.J. Super. at 259, 326 A.2d at 98.

97. *Id.*

98. *See* text accompanying notes 14-18 *supra.*

99. Manufacturers can, however, attempt to require that their immediate buyers also disclaim products liability when they resell the product, enforcing the requirement with a "hold-harmless" clause.

100. If the disclaimer was unconscionable, Alden Leeds would have had an action for products liability and on the warranty, while the landlord would have had an action only for products liability. The landlord was not a privy party under UCC section 2-318.

101. Apparently only the Court of Appeals of Michigan has also allowed recovery for products liability absent physical damage. Thus far Michigan courts have not decided whether disclaimers of products liability can ever be effective. *See* note 69 *supra.*

102. 133 N.J. Super. 277, 336 A.2d 62 (1975).

small business. The court decided that in order for the disclaimer to be effective, the buyer must have been both aware that the "as is" disclaimer covered safety defects and as knowledgeable about the product and in as good a position as the seller to guard against all the risks of the product. It probably employed these additional criteria because personal injury was involved,[103] because the buyer was not clearly a commercial entity, and because the product involved had been previously used.[104]

III. A RECOMMENDATION

Products liability doctrine continues to evolve under the challenge of new factual situations. While section 402A of the RESTATEMENT is a useful summary of many aspects of the doctrine, it should not be treated as the final statement of its evolution. Where such an important element of the usual products liability claim as the consumer status of the buyer is absent, the law should be flexible enough to accommodate the different considerations of each new situation. From the start, the purposes underlying products liability remedies were the desire to provide social insurance through risk-spreading by sellers and the desire to protect buyers against their own bargaining disadvantage.[105]

---

103. *See* UCC § 2-719(3):

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

104. While the disclaimer-approach courts have not usually employed the "unreasonably dangerous" criterion of section 402A of the RESTATEMENT, the court in *Turner* nevertheless conditioned recovery on the unreasonably dangerous nature of the used product. Type-of-harm courts have employed this same criterion to deny products liability causes of action, even where physical damage is present, in used-product cases such as Cornelius v. Bay Motors Inc., 258 Ore. 564, 484 P.2d 299 (1971). In *Cornelius* the court concluded that since the consumer did not expect his used car to be free of defects, the car was not unreasonably dangerous to him. It could nevertheless be unreasonably dangerous to bystanders, who would still have an action for products liability. The focus of the unreasonably dangerous inquiry thus is on the buyer's expectations and awareness of risks. Since one focus of the disclaimer inquiry should also be on these factors, the effect of relying on the "unreasonably dangerous" criterion in this manner is very similar to upholding disclaimers in some situations. *See* text accompanying notes 87 & 102 *supra*. The *Turner* court discussed both whether the disclaimer was effective and whether the truck was unreasonably dangerous, but without clearly distinguishing the two issues.

105. *See* text accompanying notes 33-35 *supra*. Disclaimers can be

Many courts have noted that commercial buyers do not fit neatly into the mainstream of products liability theory.[106] For example, courts that have denied commercial buyers recovery for purely economic losses have often supported their decisions by reasoning that these buyers do not need the remedies of products liability.[107] Indeed, since commercial buyers are the usual sufferers of economic loss, denial by the type-of-harm courts of recovery for purely economic losses can itself be seen as one indication of a judicial tendency to exempt commercial transactions from products liability law.

The reasoning that commercial buyers do not need the remedies of products liability to recover for economic loss would apply equally well to claims involving property damage and personal injury.[108] It is not necessary that "social insurance" be

effective only where the parties are in privity, so that the multiple litigation rationale does not apply.

106. *See* Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239 (5th Cir. 1974); Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974); Sterner Aero AB v. Page Airmotive, Inc., 499 F.2d 709 (10th Cir. 1974); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

107. *See* Southwest Forest Indus. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir.), *cert. denied*, 400 U.S. 902 (1970); Avenell v. Westinghouse Elec. Corp., 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

108. The court in *Seely v. White Motor Co.* noted that:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code, but rather, to govern the distinct problem of physical injuries.
>
> . . . .
>
> The fact that the warranty theory was not suited to the field of liability for personal injuries, however, does not mean that it has no function at all. In Greenman we recognized only that "rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed." (Greenman v. Yuba Power Products, Inc., supra, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901.) Although the rules governing warranties complicated resolution of the problems of personal injuries, there is no reason to conclude that they do not meet the "needs of commercial transactions." The law of warranty "grew as a branch of the law of commercial transactions." (See James, Products Liability, 34 Tex. L. Rev. 192; Llewellyn, On Warranty of Quality, and Society, 36 Colum. L. Rev. 699, 37 Colum. L. Rev. 341.
>
> Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting.

63 Cal. 2d 9, 15-16, 403 P.2d 145, 149-50, 45 Cal. Rptr. 17, 21-22.

provided to compensate for business losses. Property damage caused by a defective product is merely a type of business loss; so is personal injury to the extent that a business actually pays the claim of an employee or a third party. If courts are prepared to recognize generally the utility and appropriateness of contractual risk allocation in a commercial setting, there is no reason to distinguish one business risk from another. *Keystone* apparently accepted the effectiveness of a products disclaimer when applied to property damage claims, at least where the sale is between "two knowledgeable corporations,"[109] but, by implication, not when applied to personal injury claims. But as long as an injured *individual's* right to a products liability action is preserved, it is difficult to see why at least a large business—a commercial buyer—should be precluded from accepting the risk of having to pay these personal injury claims rather than the seller-manufacturer. A disclaimer of liability for personal injuries would have the same effect as an agreement by a commercial buyer to indemnify a manufacturer for payment of personal injury claims.

Products liability doctrine interferes with freedom of contract for a purpose. If the doctrine is applied to transactions in which that purpose is not being served, however, the flexibility of private bargaining is unnecessarily sacrificed. In the case of commercial buyers, then, who are able to effectively bargain for a contractual remedy, comprehend the risks they are assuming, and spread their losses among their own customers,[110] the courts will have to develop a different theory of products liability before it makes sense to prevent these buyers from choosing to bear the risk of loss from property damage and personal injury caused by defective products.[111]

Restricting or eliminating products liability in commercial transactions could be accomplished by one of two doctrinal devices. First, courts could simply hold that products liability does not run to commercial buyers. Since products liability is, after all, an additional remedy superimposed over an already complex scheme of remedies for defective products, the primary result of removing the products liability remedy would be to re-establish

109. *See* text accompanying note 87 *supra*.

110. *See* Keystone Aeronautics Corp. v. R.J. Enstrom Corp., 499 F.2d 146, 148-49 (3d Cir. 1974).

111. When courts award lost profits resulting from physical injury, the buyer's contractual freedom is infringed even more. *See* note 73 *supra* and accompanying text.

the effect of the UCC warranty provisions governing the sale of goods. In the usual commercial transaction, a product which would be "defective" under 402A would also breach the implied warranty of merchantability. Therefore the ultimate liability for such defects would depend on whether the contract contained an effective disclaimer or limitation of warranty liability.

Second, courts could hold that while a products liability remedy is available to all buyers, commercial buyers may waive the remedy by agreeing to a disclaimer of products liability. To say that products liability is disclaimable is virtually the same as saying that it does not apply at all, but two practical differences might be generated by the different doctrinal devices. First, courts focusing on the concept of "disclaimer" could require a specific kind of disclaimer for products liability—express mention of the term "products liability" or mention of physical and personal injury. In contrast, courts removing products liability altogether and treating the case as a warranty issue would presumably treat the adequacy of a warranty disclaimer only under the UCC. Second, while an effective warranty disclaimer or limitation is effective against all parties in the chain of distribution, a disclaimer of products liability might well be treated like a disclaimer of negligence liability, binding only on the privity buyer who agrees to it. Thus, under the disclaimer approach, commercial buyers not in privity with the seller would not lose their products liability claims. Therefore, where a disclaimer of products liability is effective under the disclaimer approach, the ultimate liability for defects would again depend on whether the contract contained an effective disclaimer or limitation of warranty liability.

Regardless of the functional similarity of the two methods, and although disclaimability of products liability is a seeming anomaly, courts seem to find comfort in limiting the disclaimability exception to buyers who have actually agreed to a products liability disclaimer. They have had difficulty implementing a commercial exception that simply denies a products liability cause of action to a particular group of plaintiffs. The *Sterner* court indicated that it would limit recovery to "consumers," but it left little content to that concept by defining it so broadly.[112] The court in *Boone* refused to create a theory that would condition recovery for products liability on the buyer's status as either a consumer or a commercial entity, stating: "This Court fails

112. *See* text accompanying notes 61-63 *supra.*

to see how a line could be drawn based on a party's size which would control a party's ability to assert a theory of recovery."[113] The *Boone* court appeared concerned not only by the line-drawing problem, but also by the idea of limiting a plaintiff's right to invoke an established legal theory.

In contrast to this reluctance to approve a wholesale exception for commercial buyers, the New Jersey courts and two federal appeals courts employing the type-of-harm approach have departed from the theory of section 402A by validating disclaimers of products liability in commercial transactions.[114] Because specific disclaimers of products liability have until recently been rare or non-existent,[115] it is not surprising that few type-of-harm courts have adjudicated their effectiveness. Even some courts that have not faced that issue, however, have suggested that specific disclaimers of products liability might be upheld.[116] It may be that these courts regard validation of products liability disclaimers as a less drastic step than exempting an entire class of buyers from products liability protection. Also, because of their familiarity with the use of disclaimers by sellers, and their arsenal of devices to challenge the validity of disclaimers, the courts are able to retain some final control over attempts by sellers to exculpate themselves. Moreover, that a commercial buyer has knowingly agreed to a disclaimer expressly covering products liability may make it easier for a court to justify setting aside the new but already venerable section 402A, whereas reliance on a general exemption would leave proponents to argue on broad public policy grounds rather than on the compelling facts of the case at hand.

Should disclaimers of products liability be held enforceable, important questions would arise as to the form of the disclaimer and the type of buyer who will be allowed to agree to a disclaimer. The type-of-harm courts have consistently held that a warranty disclaimer is ineffective against a products liability claim;[117] at the very least, then, these courts will require a

113. 383 F. Supp. at 615 n.6. *See* text accompanying note 68 *supra*.
114. *See* text accompanying notes 82-88 and 91-101 *supra*.
115. Type-of-harm courts have always held that warranty disclaimers alone are not effective against products liability claims. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
116. *See* note 88 *supra*.
117. *See* note 115 *supra*.

disclaimer that specifically mentions products liability.[118] The court in *Keystone* went even further and demanded that products liability disclaimers be clear and explicit, fulfilling the more stringent requirements of negligence disclaimers.[119] New Jersey courts, on the other hand, have required only that the disclaimer be intended to include products liability claims—products liability need not have been specifically mentioned.[120] In any event, the question of required form probably will not loom large in commercial transactions, for once the form is established, sellers will employ whatever words are necessary.

The question of which buyers will be allowed to agree to disclaimers is more problematic. *Keystone*, a decision under the type-of-harm approach, indicated that one group of buyers against whom disclaimers clearly should be effective are large businesses able to spread risks, to assess and comprehend the risks of a product, and to knowingly consent to the risks.[121] The type-of-harm courts have already dealt with a major aspect of the applicability of products liability doctrine to commercial transactions by means of the exception for purely economic losses. Since the only liability at issue is the more serious personal injury and property damage, it might be expected that the class of buyers allowed to agree to disclaimers would be fairly restrictive.[122]

In contrast, the New Jersey courts seem to have approached the question of disclaimers on the assumption that the primary purpose of products liability is to protect against the buyer's inferior bargaining position and that the risk-spreading effect is only an incidental benefit. These courts have relied primarily on the unconscionability provisions of the UCC[123] to protect buyers and have allowed all conscionable disclaimers of products liability to be effective. Even in *Turner*, where the court did not expressly use an unconscionability standard to judge the disclaimer, the inquiry into the nature of the deceased's business related to his capacity to appreciate the risks and to understand the contract—not to his ability to function as a risk-spreader. Unlike courts that would require risk-spreading capability of the buyer as a prerequisite to validating a disclaimer, the New Jersey

118. *See* note 88 *supra.*
119. *See* text accompanying notes 29-31 and 88 *supra.*
120. *See* text accompanying notes 92-93 *supra.*
121. 499 F.2d at 148-49.
122. *See* note 115 *supra.*
123. *See* note 18 *supra.*

courts are concerned with the ability of the buyer to protect himself by obtaining a contractual warranty. The court in *Moreira* apparently concluded that if the buyer could show that no seller offered a warranty for the product, the products liability disclaimer would be invalid.[124] In effect, then, a disclaimer of products liability is limited to those buyers who the courts believe do not need the protection of the doctrine.

The New Jersey approach thus expands the category of potentially exempted buyers to include small businesses and, under the proper circumstances, perhaps even consumers. That the New Jersey courts permit recovery in products liability for purely economic losses may explain the greater impetus to allow sellers to limit their liability. The result, however, of a complete extension of disclaimability would be the merger of products liability law into warranty law, at least between parties in privity.[125] And unless disclaimers are held to be *per se* unconscionable as to noncommercial consumers, many of the original problems products liability was meant to prevent might be resurrected.

IV. CONCLUSION

If courts refuse to recognize disclaimers of products liability under all circumstances, sellers must always bear the cost of remedying personal and property damage caused by their defective products. Absent the possibility of limiting the liability of the seller, commercial buyers and sellers are denied the opportunity to create a contractual arrangement suitable to their specific needs. In situations where buyers are capable of judging the risk and can themselves spread the risk of loss, an ironclad rule of seller liability is unnecessary. The courts that adhere to the two major approaches to products liability have essentially recognized that the consumer-oriented doctrine of products liability is not uniformly suited to commercial transactions. Whatever may be the precise concept that eventually prevails, it seems clear that it will not be section 402A.

124. *See* text accompanying 94 *supra.*
125. *See* text accompanying notes 96-99 *supra.*