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Product Defects Resulting in Pure Economic Loss: Under What Theory Can a Consumer Recover

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PRODUCT DEFECTS RESULTING IN PURE ECONOMIC LOSS: UNDER WHAT THEORY CAN A CONSUMER RECOVER?

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I. INTRODUCTION

Once a consumer¹ purchases a particular product, he may suffer a variety of losses resulting from some defect in the product, including personal injury, injury to the product itself or some other property, and pure economic loss.² A consumer can sustain multiple types of harms and his theory of recovery is

1. In this Comment, the term "consumer" refers to both commercial buyers and ordinary consumers. Although a good argument can be made that it is fair to hold commercial buyers to the strict requirements of the Uniform Commercial Code because these types of buyers have equal bargaining power with the seller or manufacturer, the same argument cannot plausibly be made in the case of ordinary consumers. As distinguished from the commercial buyer, the ordinary consumer is that person who is powerless to protect himself "from insidious contractual provisions such as disclaimers, foisted upon him by commercial enterprises whose bargaining power he is seldom able to match." *Seely v. White Motor Co.*, 63 Cal. 2d 9, 27, 403 P.2d 145, 157, 45 Cal. Rptr. 17, 29 (1965) (en banc) (Peters, J., concurring and dissenting). The term "ordinary consumer" encompasses the general consuming public, i.e., the housewife who buys a refrigerator, the student who buys a car, or the homeowner who buys carpeting for his home. This distinction is particularly relevant to a plaintiff's recovery under a strict tort liability theory.

2. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 95, at 678 (5th ed. 1984); G. WALLACH, *THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE* § 11.04(3), at 11-14 to 11-15 (1st ed. 1981); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 981-82 (1966).

dependent upon the category into which a given loss falls. A majority of jurisdictions, including Missouri, recognize three theories of recovery in these cases: breach of warranty under the Uniform Commercial Code (UCC),³ negligence in tort,⁴ or strict liability in tort.⁵ A critical problem arises, however, where the consumer has sustained no personal injury, where there has been no accident, and where there has been no physical injury to other property or violent injury to the product itself. In effect, the consumer has suffered pure economic loss.

Economic losses are those losses directly connected with the product purchased which arise when the product does not conform to its expected level of performance.⁶ A plaintiff may suffer a loss either from the diminution in the value of the product itself or from some other loss resulting from the product's poor performance. The first type of loss is classified as direct and the latter as indirect or consequential. Direct economic losses encompass loss of bargain, out-of-pocket expenses, or cost of replacement or repair.⁷ Loss of bargain is measured by the difference between "the value of the product as received and its value as represented."⁸ Out-of-pocket expenses are measured by "the differ-

3. Express warranties are governed by MO. REV. STAT. § 400.2-313 (1978). An implied warranty of fitness for a particular purpose is governed by MO. REV. STAT. § 400.2-315 (1978), whereas the implied warranty of merchantability provisions are set forth in MO. REV. STAT. § 400.2-314 (1978); see also *Larry Goad & Co. v. Lordstown Rubber Co.*, 560 F. Supp. 583 (E.D. Mo. 1983) (purchaser of defective rubber allowed to recover under an implied warranty of merchantability theory).

4. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916) ("We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is foreseen, a liability will follow."); see also *McLeod v. Linse Air Prod. Co.*, 1 S.W.2d 122, 126 (Mo. 1927) (plaintiff recovered for personal injuries under a negligence theory).

5. See *Greenman v. Yuba Power Prod.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (manufacturer strictly liable in tort for physical harm to persons and tangible property); accord *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969) (Missouri judicially adopts strict liability in tort under the RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

6. Cf. *Crowder v. Vandendeale*, 564 S.W.2d 879, 882 (Mo. 1978) (en banc) ("However, where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of quality."); see also Note, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539, 541 (1966). An example of an economic loss arising because the product did not work for the general purpose for which it was sold can be found in *Larry Goad & Co. v. Lordstown Rubber Co.*, 560 F. Supp. 583, 585 (E.D. Mo. 1983) (rubber purchased for use in lining tanks found to be of questionable quality and later rejected as unacceptable).

7. Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

8. Comment, *The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy*, 4 SETON HALL L. REV. 145, 155 n.39 (1972); see also Note, *Manufacturers' Strict Tort Liability to Consumers for Economic Loss*, 41 ST. JOHN'S L. REV. 401, 405 (1967).

ence in value between the purchase price of the product and its value as received.⁹ Direct economic losses also include any costs incurred for repair and/or replacement of the defective product.¹⁰ By contrast, indirect economic loss is characterized as consequential or an expectation loss.¹¹ Examples of the types of indirect economic losses a plaintiff may suffer include losses from future business opportunities (i.e., lost profits and wages) and losses due to inability to replace the product.¹²

This Comment will focus on the remedies that are available to the consumer who suffers an economic loss. It will explore the three available theories of recovery and explain why a plaintiff may be precluded from recovery under one theory but not another. Moreover, it will discuss policy reasons behind such distinctions. It will address how most jurisdictions have handled this issue and review decisions of those jurisdictions that appear willing to make all three theories available to the economically injured plaintiff. Finally, it will analyze how Missouri courts are applying these theories in economic loss cases.

Generally, the jurisdictions split into two primary contingents. One group, undoubtedly the clear majority, refuses to extend tort recovery principles to a purely economic loss. Consequently, a plaintiff must pursue a cause of action under a warranty theory. Such actions will be referred to as "Seely"-type cases.¹³ A very limited number of courts allow consumers, or any other plaintiffs, to recover under tort principles. These actions will be referred to as

9. Comment, *supra* note 8, at 155 n.39.

10. *Id.* at 155.

11. Under MO. REV. STAT. § 400.2-715(2) (1978), consequential damages include:

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

12. See *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 821 (8th Cir. 1983) (portion of glass panels purchased by commercial buyer could not be replaced since manufacturer stopped producing panels of same color); *Travelers Indemnity Co. v. Evans Pipe Co.*, 432 F.2d 211, 212 (6th Cir. 1970) (loss of profits suffered when purchaser of a plastic pipe for use in an irrigation system on a golf course proved unsatisfactory and required replacement); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 13, 403 P.2d 145, 148, 45 Cal. Rptr. 17, 20 (1965) (en banc) (economic losses suffered by purchaser of truck included lost wages and profits); *Clark v. Int'l Harvester Co.*, 99 Idaho 326, ____, 581 P.2d 784, 788 (1978) (loss of profits when tractor manufactured by defendant produced inadequate horsepower caused by defective clutch); see also *W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, supra* note 2, at 678; Comment, *supra* note 8, at 155; Note, *supra* note 8, at 405.

13. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 15, 403 P.2d 145, 148, 45 Cal. Rptr. 17, 21 (1965) (en banc) (where commercial losses are involved, plaintiff must pursue his cause of action under the Uniform Commercial Code; doctrine of strict liability in tort designed to govern physical injuries only).

"Santor"-type cases.¹⁴

Missouri does not clearly follow either approach. Until 1981, Missouri followed the *Seely* approach. However, a 1981 Missouri case recognized a plaintiff's right to recover for pure economic loss under a negligence theory.¹⁵ Confusion arises because the post-1981 cases have maintained the pure *Seely* view, apparently refusing to follow the intervening case.¹⁶ However, it is undisputed that Missouri has refused to extend recovery under a strict tort liability theory.¹⁷ Thus, Missouri courts have chosen not to follow the *Santor* jurisdictions. On the other hand, if Missouri does in fact recognize a negligence cause of action for pure economic loss, then it may be only a matter of time before the courts allow recovery under a strict tort liability theory.

II. BREACH OF WARRANTY UNDER THE UCC

As early as 1603, courts espoused the notion of *caveat emptor*.¹⁸ In essence, after purchase, the consumer was held to assume any and all risks in the absence of either fraud, intentional deception, or an expressed assumption by the seller. After decades of considerable public outcry, breach of warranty liability was born. The breach of warranty theory originally sounded in tort

14. See *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 66, 207 A.2d 305, 312 (1965) (although strict tort liability is principally applied when dealing with personal injuries, "we reiterate . . . that the responsibility of the maker should be no different where damages to the article sold or to other property of the consumer is involved").

15. See *Groppe Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 59 (Mo. App., E.D. 1981).

16. Three Missouri cases, all decided after *Groppe*, imply that *Groppe* is not authority for the proposition that Missouri will allow a cause of action in negligence where only economic loss has been sustained. Most recently, in *Wilbur Waggoner Equip. and Excavating Co. v. Clark Equip. Co.*, 668 S.W.2d 601 (Mo. App., W.D. 1984), the court, without discussing *Groppe*, held that under Missouri law "recovery in tort is limited to those cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence." *Id.* at 603. In *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983), the court stated that *Groppe* "does not represent the last word in Missouri on the negligence issue." *Id.* at 828. In light of decisions both before and after *Groppe*, the *Murray* court concluded that "recovery in tort is limited to cases in which there has been personal injury or property damage either to property other than the property sold, or to the property sold where it was rendered useless by some violent occurrence . . ." *Id.* Finally, in *Clevenger & Wright Co. v. A.O. Smith Harvestone Prod.*, 625 S.W.2d 906 (Mo. App., W.D. 1981), decided only six months after *Groppe*, the court stated that a plaintiff has no remedy in tort for pure economic loss. *Id.* at 909.

17. See *Wilbur Waggoner*, 668 S.W.2d 601, 603 (Mo. App., E.D. 1984); *Forrest v. Chrysler Corp.*, 632 S.W.2d 29, 31 (Mo. App., E.D. 1982); *Clevenger & Wright Co.*, 625 S.W.2d 906, 909 (Mo. App., W.D. 1981); *Gibson v. Reliable Chevrolet*, 608 S.W.2d 471, 475 (Mo. App., S.D. 1980).

18. See *Chandelor v. Lopus*, 79 Eng. Rep. 3 (1603). "*Caveat Emptor*" means "Let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

and the action was for one on the case.¹⁹ It was not until 1778 that an action in contract was held to lie.²⁰ Although the tort action was still available, courts gradually began to apply the warranty theory only in contract cases.²¹

This development has been an unfortunate one for the consumer. Since warranty has been so closely associated with the contract action, it has carried all the excess baggage associated with contract law. Under a warranty theory, a plaintiff must overcome potential obstacles including the statutes of limitation under the UCC, notice requirements to the seller, disclaimers and potential parol evidence rule problems, and privity requirements. The Uniform Commercial Code²² has been regarded by most jurisdictions as the exclusive authority governing economic loss cases.²³

The warranty theory takes two forms. Express warranty liability is imposed as a result of representations made by the seller or manufacturer.²⁴ Im-

19. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1126 (1960).

20. *See* *Stuart v. Wilkins*, 1 *Doug.* 18, 99 *Eng. Rep.* 15 (K.B. 1778).

21. Prosser, *supra* note 19, at 1127. Prosser noted:

This may very possibly have been due merely to the accidental fact that cases without contract simply did not arise. Nevertheless, once the contract action was established it came into such universal and almost exclusive use that, in the minds of nearly all courts and lawyers, warranty, whether express or implied, became definitely identified with the contract, and regarded as an integral and inseparable part of it.

22. The Uniform Commercial Code succeeded the Uniform Sales Act. For a list of those sections transformed from the U.S.A. to the U.C.C., *see* UNIF. COMMERCIAL CODE, 1 U.L.A. XXXVII (1976).

23. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *supra* note 2, at § 95A, at 680; *see also* *Wilbur Waggoner Equip. and Excavating Co. v. Clark Equip.*, 668 S.W.2d 601, 602 (Mo. App., E.D. 1984) (pure economic loss damages "are limited to those under the warranty provisions of the Uniform Commercial Code"); *Forrest v. Chrysler Corp.*, 632 S.W.2d 29, 31 (Mo. App., E.D., 1982) (where pure economic loss is involved, the "plaintiff is restricted to the remedies afforded under the Uniform Commercial Code and the general law of sales").

24. MO. REV. STAT. § 400.2-313 (1978) explains express warranties are created as follows:

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

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

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

MO. REV. STAT. §§ 400.2-714.2-2-715 (1978) govern the buyer's monetary remedy for breach of warranty. Under § 400.2-714, the measure of damages is basically "the difference at the time and place of acceptance between the value of the goods accepted

plied warranty liability arises by operation of law.²⁵ An implied warranty can be one of two types—an implied warranty of fitness for a particular purpose²⁶ or an implied warranty of merchantability.²⁷ Pure economic loss cases primarily arise under the implied warranty of merchantability.

A. *Suing Remote Manufacturers Under Express Warranty*

Two leading cases are representative of the majority view which permits recovery for pure economic loss under an express warranty theory. In *Randy Knitwear, Inc. v. American Cyanamid Co.*,²⁸ the court recognized that economic loss claims were actionable in cases involving express warranties.²⁹ The court stated that the difference between personal harm or injury on the one hand and economic loss on the other is irrelevant. "Since the basis of liability turns not upon the character of the product but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or

and the value they would have had if they had been as warranted" Under § 400.2-715, the buyer may also be able to recover incidental and consequential damages resulting from the breach. Section 400.2-715 limits consequential damages that may be recovered in that such damages are recoverable only to the extent that at the time of contracting, the seller had reason to know of their existence and could not reasonably have prevented them by cover or otherwise. This limitation also encompasses the buyer's duty to mitigate his damages.

25. Both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose arise by operation of law "unless excluded or modified by § 400.2-316." See MO. REV. STAT. §§ 400.2-314-.2-315 (1978). MO. REV. STAT. § 400.2-316 (1978) discusses the proper methods of exclusion or modification of warranties.

26. MO. REV. STAT. § 400.2-315 (1978) provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is unless excluded or modified under [§ 400.2-306] an implied warranty that the goods shall be fit for such purpose.

27. MO. REV. STAT. § 400.2-314 (1978) provides in part:

(1) Unless excluded or modified (section 400.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as

(c) are fit for the ordinary purposes for which such goods are used

28. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). In *Randy Knitwear*, the defendant resin manufacturer advertised in trade journals, by direct mail, and on the labels and tags of garments that fabric treated with a special resin was shrinkproof. The plaintiff, a clothes manufacturer, purchased the resin-treated fabric from a textile manufacturer. When the fabric proved not to be shrinkproof, the plaintiff sued the defendant for breach of express warranty. *Id.* at 9, 181 N.E.2d at 400, 226 N.Y.S.2d at 364. In affirming the trial court's denial of defendant's motion for summary judgment, the New York Court of Appeals held that vertical privity was no longer required in a breach of express warranty suit.

29. *Id.* The plaintiff sought pure economic loss damages in excess of \$208,000. *Id.* at 9, 181 N.E.2d at 400, 226 N.Y.S.2d at 365.

the type of article or goods involved.”³⁰

*Seely v. White Motor Co.*³¹ is the second leading case dealing with economic loss under an express warranty theory. *Seely* is significant because the plaintiff in that case was more akin to an “ordinary consumer” than was the plaintiff in *Randy Knitwear*. In *Seely*, the Supreme Court of California affirmed the trial court’s decision permitting the plaintiff to recover certain economic losses including the cost of product repairs and lost profits under a breach of express warranty theory. Moreover, the court ruled that vertical privity as to the remote defendant manufacturer was not required under an express warranty theory.³²

Although the trial court disallowed plaintiff’s claim for repair costs, the *Seely* court noted that had the plaintiff proved that the defect caused the accident, he could have recovered damages for physical injury to the product because “[p]hysical injury to property is so akin to personal injury that there is no reason for distinguishing them.”³³

B. *Suing Remote Manufacturers Under Implied Warranty*

Where no express warranty has been given, a plaintiff may sue for breach of implied warranty of merchantability.³⁴ Missouri is among those jurisdictions recognizing that a plaintiff may recover under an implied warranty the-

30. *Id.* at 15, 181 N.E.2d at 404, 226 N.Y.S.2d at 370.

31. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Plaintiff purchased a truck for use in his business. Subsequently, the truck started to “gallop,” or bounce violently. The retailer of the truck, along with representatives of the manufacturer, tried unsuccessfully to correct the galloping on numerous occasions spanning eleven months. Finally, the brakes failed to operate while plaintiff was driving the truck and it overturned. Although the plaintiff sustained no personal injuries, he did incur substantial repair costs and lost profits.

32. “Since there was an express warranty to plaintiff in the purchase order, no privity of contract was required.” *Id.* at 14, 403 P.2d at 148, 45 Cal. Rptr. at 20.

33. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. The court found the defendant liable “only because of its agreement as defined by its continuing practice over eleven months. Without an agreement, defined by practice or otherwise, defendant should not be liable for these commercial losses.” *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23.

The *Seely* court specifically rejected a theory of recovery under strict liability in tort, maintaining that this doctrine was developed “to govern the distinct problem of physical injuries.” *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

34. See *supra* note 26 for the quoted provision on implied warranty of fitness for a particular purpose. When a breach occurs in this area, the buyer would bring his cause of action under § 400.2-315 and not under § 400.2-314 dealing with implied warranty of merchantability. This latter theory arises only when the goods are sold for their ordinary purpose and not a particular purpose. See G. WALLACH, *supra* note 2, at 11-40 to 11-47. Although the two theories are separate, both are analyzed similarly. Consequently, the textual discussion addresses only the breach of implied warranty of merchantability. Conclusions drawn in the text under this latter theory are equally applicable to the implied warranty of fitness for a particular purpose.

ory in economic loss cases. For example, in *Larry Goad & Co. v. Lordstown Rubber Co.*,³⁵ the plaintiff recovered damages under a breach of implied warranty of fitness for a particular purpose and a breach of implied warranty of merchantability for economic losses sustained from defective rubber purchased under a contract with the defendant.³⁶ The court stated that "under Missouri law, a buyer may recover for economic loss resulting from the sale of an unmerchantable product if the loss is proximately caused by the breach and the buyer had in good faith mitigated his damages."³⁷

C. Potential Obstacles to Recovery Under Warranty

Statutes of limitation constitute a potential obstacle to recovery of pure economic loss damages under a warranty theory. Depending upon whether a plaintiff sues in tort or under warranty, one of two different statutes of limitation is applicable to the action. The theory of the case determines not only which statute controls but also whether application of that statute will work to the aggrieved party's benefit or detriment. For example, in Missouri, the statute of limitations for tort actions is five years.³⁸ This period begins to run from the time of injury.³⁹ Comparatively, under a warranty theory, the action must be brought within four years after tender of delivery, regardless of whether the plaintiff is aware that a breach has in fact occurred.⁴⁰ The Code makes an exception to this four year rule only when the warranty explicitly extends to future performance, and discovery of the breach is not possible until such future performance occurs.⁴¹

35. 560 F. Supp. 583 (E.D. Mo. 1983). The plaintiff, a subcontractor, purchased rubber from the defendant manufacturer. The defendant knew that the rubber was to be used by plaintiff to line tanks for a general contractor. Because the rubber was of poor quality, substantial delays occurred. Eventually, the general contractor cancelled its contract with the plaintiff. *Id.* at 587.

36. *Id.* at 587.

37. *Id.* In accordance with Missouri law, which requires a buyer to mitigate his damages in good faith, the court reduced the amount of plaintiff's judgment by an amount equal to what the plaintiff would have saved had he mitigated his damages. *Id.* at 588.

38. MO. REV. STAT. § 516.120(4) (1978) provides that the following actions must be brought within five years: "An action for taking, detaining or injuring goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not therein otherwise enumerated."

39. *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. 1980) (statute of limitations begins to run when cause of action has accrued to person asserting it or such wrong has been sustained, as will give right to bring and sustain suit).

40. MO. REV. STAT. § 400.2-725(1) (1978). Not all states have adopted the four year limitations period. For example, the New Jersey period of limitations is six years from the time the buyer suffers property damage and two years from the date of personal injury. N.J. STAT. ANN. §§ 2A:14-1, 14-2 (West 1952); see also MINN. STAT. ANN. §§ 541.05, 541.07 (West 1947).

41. MO. REV. STAT. § 400.2-725(2) (1978) states in part:

Thus, in most product defect cases, a plaintiff who does not sustain harm until four years after purchase will be barred from bringing any action for recovery. If, however, a plaintiff has the option of bringing suit under a tort theory as well, a plaintiff would still have five years from the time of injury to file suit although the injury occurred well beyond four years from tender of delivery.⁴²

Another potential obstacle to recovery under a warranty theory is the notice requirement. As a condition precedent to bringing suit under this theory, the buyer⁴³ must give the seller⁴⁴ notice of breach within a reasonable time

A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

42. Whether one statute of limitations is preferable to another depends upon the state law controlling the case. For example, once personal injury is sustained, Missouri's five year statute of limitations begins to run. This period is longer than the four year period applicable to warranty actions. *Compare* MO. REV. STAT. § 516.120(4) (1978) *with* MO. REV. STAT. § 400.2-725(1) (1978). But in some states the tort statute of limitations is shorter than the warranty statute of limitations. If a plaintiff's injury occurs shortly after purchase, then the tort statute of limitation will expire before the warranty statute. Even though the tort limitations period has run, a plaintiff may still sue under a warranty theory and thus take advantage of the longer warranty statute. *See, e.g.,* Redfield v. Mead, Johnson & Co., 266 Or. 273, 277, 512 P.2d 776, 777 (1973) (contraceptive purchased in 1966, personal injury sustained in 1968, action commenced in 1971; although state's two year tort limitation period expired, plaintiff allowed to maintain action under breach of implied warranty of merchantability theory). Not all states give plaintiffs this option. Some states maintain that in personal injury cases, the plaintiff is limited to a single statute of limitations. *See, e.g.,* Reid v. Volkswagen of Am., 575 F.2d 1175, 1176 (6th Cir. 1978) (under Michigan law, where personal injuries involved in a products liability case, the three year tort statute and not the four year warranty statute of limitations is applicable); Heaver v. UniRoyal, Inc., 63 N.J. 130, 156, 305 A.2d 412, 427 (1973) (when a plaintiff sues for personal injury under a products liability theory, the general two year statute and not the four year statute of limitations for warranty actions applies).

43. The word "buyer" is not to be read literally to mean the person who purchased the product. MO. ANN. STAT. § 400.2-607 comment 5 (Vernon 1965). Consequently, the notice requirement extends to the third party beneficiaries given standing to sue under the statute as well. There are cases that ignore the notice requirement where personal injury is involved. *See, e.g.,* McKneely v. Sperry Corp., 642 F.2d 1101, 1107 (8th Cir. 1981) (applying Iowa law; an injured employee of a buyer need not give notice); Mattos, Inc. v. Hash, 279 Md. 371, 378, 368 A.2d 993, 996 (Md. Ct. App. 1977) (non-purchaser third party beneficiary who suffers personal injury is not required to notify the seller of a breach of warranty); Maybank v. S.S. Kresge, Co., 302 N.C. 129, 136, 273 S.E.2d 681, 685 (1981) (although notice is required in personal injury cases, commencement of lawsuit serves as such notice where, as here, a lay consumer is involved and the policies behind the notification requirement have been fulfilled).

44. In terms of who is a seller within the meaning of the statute, a majority of jurisdictions apparently hold that each potential defendant, whether the manufacturer, the distributor, or the wholesaler, must receive notice. Notice to one is not notice to all. *See, e.g.,* Leeper v. Banks, 487 S.W.2d 58, 59 (Ky. 1972) (although injured plaintiff timely notified manufacturer of defective product, failure to notify seller in action

after the breach has been or should have been discovered.⁴⁵ Tort actions do not require such notice. The language of the statute appears mandatory; thus, failure to give notice may bar recovery completely. Of course, the courts will determine what a reasonable period entails.⁴⁶ As a policy matter, the purpose of the notice requirement is to "defeat commercial bad faith, not to deprive a good faith consumer of his remedy."⁴⁷

Disclaimers constitute a third obstacle to recovery under a warranty theory. If a seller makes an express warranty to the buyer, it may be difficult later for him to disclaim his statements or acts because such disclaimer may be inconsistent with the express warranty. Subject to the parol evidence rule,⁴⁸

solely against seller barred plaintiff's suit for damages). The notice requirement serves three basic functions: "First, notice provides the seller a chance to correct any defect. . . . Second, notice affords the seller an opportunity to prepare for negotiation and litigation. Third, notice provides the seller a safeguard against stale claims being asserted after it is too late for the manufacturer or seller to investigate them." *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661 (Colo 1980) (en banc). Thus, direct notice to remote manufacturers is not always necessary. In *Prutch*, the plaintiff met the notice requirement by giving timely notice to the seller, who in turn, promptly notified the manufacturer. The court held that the notice fulfilled the three basic functions of the notice requirement. *Id.* at 661. Other jurisdictions have held that it is unfair to require a plaintiff to give notice to anyone other than his immediate seller. See *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 116, 452 A.2d 192, 197 (1982) ("given the complex marketing chains" of today, plaintiffs are not only unaware of the notice requirement but in most cases, "even with legal advice" they have difficulty in locating all potential remote sellers within a reasonable period of time); see also *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 56, 207 A.2d 305, 307 (1965) (after immediate seller went out of business, plaintiff spent almost twelve months relocating the seller and contacting the manufacturer).

45. MO. REV. STAT. § 400.2-607(3)(a) (1978).

46. Because the comments to the Code section dealing with notice are silent on this, the courts have been left with the responsibility of interpreting what constitutes a reasonable period. See G. WALLACH, *supra* note 2, at § 11.68, at 11-14(1).

47. MO. ANN. STAT. § 400.2-607 comment 4 (Vernon 1965).

48. The parol evidence rule presents a major problem for the buyer-plaintiff where the seller expressly represents one thing in oral negotiations but the final contract between the parties makes no mention of the earlier representation. If the contract is or appears to be the final and complete understanding between the parties, the parol evidence rule operates to prohibit the introduction of evidence that would contradict the written contract. MO. REV. STAT. § 400.2-202 (1978). For examples of how the parol evidence rule operates to a buyer's detriment, see *Hill v. BSAF Wyandotte Corp.*, 696 F.2d 287, 291 (4th Cir. 1982) (commercial farmer could not introduce evidence of oral representations made to him when, after receiving herbicide purchased from defendant, he read label which properly disclaimed warranties other than those expressly stated in the contract and, after reading, used the product); *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39, 45 (D.S.C. 1974) (purchaser of computer equipment barred from introducing extrinsic evidence under parol evidence rule where contract contained a very conspicuous clause stating that there were no other representations or understandings between the parties not presently contained in contract). In theory, the rule could also work against a seller. Where, for example, the contract is silent as to a seller's disclaimer of all liability, the seller will be precluded under the rule from introducing extrinsic evidence to contradict the writing. As one can imagine,

the Code deals with disclaimers by making them inoperative unless they are somehow consistent with the express warranty.⁴⁹

In cases of implied warranty, a seller has several options available to disclaim liability. Under the implied warranty of fitness for a particular purpose theory, a disclaimer must be in writing and be conspicuously displayed on the document.⁵⁰ The implied warranty of merchantability permits oral disclaimers, but if the disclaimer is in writing, it must conspicuously mention the word "merchantability."⁵¹

Courts have found various ways to circumvent the disclaimer defense. Some courts have held the seller to the literal requirements of the UCC,⁵² while others have held that the disclaimer was not sufficiently "brought home" to the buyer.⁵³ Some courts approach the disclaimer problem under the unconscionability provisions of the UCC.⁵⁴ If the seller properly and completely dis-

cases arising under this fact situation are virtually non-existent. Sellers today are too sophisticated to 'forget' to include the disclaimer in the final contract.

49. MO. REV. STAT. § 400.2-316(1) provides:

[w]ords or conduct relevant to the creation of an express warranty and words or conduct leading to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 400.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The comments to § 400.2-316(1) suggest that the purpose of the rule is to protect a buyer, who has expressly been told or led to believe one thing, from a seller, who later attempts to avoid these representations by imposing inconsistent, unexpected, or unbar-gained for language in the disclaimer. MO. ANN. STAT. § 400.2-316(2) comment 1 (Vernon 1965).

50. MO. REV. STAT. § 400.2-316(2) (1978).

51. *Id.*

52. *E.g.*, Oldham's Farm Sausage Co. v. Salco, Inc. 633 S.W.2d 177, 181 (Mo. App., W.D. 1982) (although commercial buyer involved, defendant's attempt to disclaim implied warranty found to be invalid because disclaimer did not mention word "merchantability").

53. *Id.* (twenty-eight page contract failed to meet the conspicuous requirement where fine print disclaimer appeared on reverse side of contract); *see also* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 831 (1966); Note, *supra* note 8, at 410.

54. *See, e.g.*, Funding Systems Leasing Corp. v. King Louie Int'l., Inc., 597 S.W.2d 624, 634 n.11 (Mo. App., W.D. 1979) ("A disclaimer of implied warranty could hardly be unconscionable in and of itself, without more, in view of § 2-316 which specifically authorizes such disclaimer if done in an appropriate way.").

Under the proper circumstances, a plaintiff may be able to utilize the unconscionability provision of the Code for purposes of declaring the contract or parts thereof unenforceable. MO. REV. STAT. § 400.2-302 (1978). The policy behind granting courts the power to deny enforcement of unconscionable contracts is to prevent "oppression and unfair surprise," and not to disturb allocations of risks because of superior bargaining power.

On the other hand, if a seller attempts to limit a buyer's remedy when a warranty has been given, other problems arise. In such situations, the Code states that a seller's attempt to limit consequential damages for personal injuries is *prima facie* unconscionable. MO. REV. STAT. § 400.2-719(3) (1978); Ford Motor Co. v. Tritt, 244 Ark. 883,

claims warranties, he has conformed with the requirements of the Code. Thus, it becomes almost impossible for a court to invalidate the disclaimer.

The privity requirement is another obstacle to recovery of economic loss under a warranty theory. Basic to contract law and warranty is the notion that privity of contract must exist for one to sue or be sued.⁵⁵ Privity has both horizontal and vertical aspects. Horizontal privity focuses on who can be a proper plaintiff and thus have standing to bring the suit. Vertical privity, on the other hand, involves a determination of which persons can be sued.⁵⁶ Naturally, the buyer has standing to maintain an action, and in the event that he sues his seller, there is no privity problem.⁵⁷ The Code specifically enumerates those parties, other than a buyer, who may bring suit as well. Under the third party beneficiary provision, anyone in the buyer's family, household, or even a guest, if it is reasonable to expect such person to use, consume, or be affected by the product, is granted standing to sue, provided that they have sustained personal injuries.⁵⁸ Horizontal privity extends to both express and implied warranties and the seller is barred from contracting otherwise.⁵⁹

There is no explicit vertical privity provision in the UCC. However, it is clear that a person with standing under the horizontal privity provision of the UCC can sue the immediate seller.⁶⁰ Application of vertical privity becomes

889, 430 S.W.2d 778, 781 (1968). By the same token, the UCC does not label the attempt to limit damages resulting in economic loss as prima facie unconscionable. MO. REV. STAT. § 400.2-719(3) (1978); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (D.C. Mich. 1976).

55. G. WALLACH, *supra* note 2, at § 11-15, at 11-70.

56. Prosser, *supra* note 43, at 799-800.

57. G. WALLACH, *supra* note 2, at § 11-15, at 11-71.

58. MO. REV. STAT. § 400.2-318 (1978) provides in part:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. . . .

The comments indicate that the purpose of this third party beneficiary rule is to free members of this class from the technical rules of privity. MO. ANN. STAT. § 400.2-318 comment 2 (Vernon 1965). This section is strictly construed in Missouri. *See Teel v. American Steel Foundries*, 529 F. Supp. 337, 345 (E.D. Mo. 1981) (provisions of § 400.2-318 extended only to a limited group of people; thus, where there is no privity and the injured employee does not fall within the enumerated class, a breach of warranty action cannot be maintained).

59. MO. REV. STAT. § 400.2-318 (1978) states that "A seller may not exclude or limit the operation of this section." The comments state that this sentence does not inhibit the seller from excluding or disclaiming warranties otherwise permitted under § 400.2-316. Nor does this provision interfere with the seller's right to limit remedies as provided in § 400.2-718 and § 400.2-719. Rather, the provision is designed to forbid the "exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section." MO. ANN. STAT. § 400.2-318 comment 1 (Vernon 1965).

60. *See* MO. ANN. STAT. § 400.2-318 comment 2 (Vernon 1965) which provides: "Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him."

problematical when the consumer attempts to sue a remote seller or manufacturer. The leading case of *Henningsen v. Bloomfield Motors, Inc.*⁶¹ addressed this problem and held that where personal injuries are involved, a remote seller could not assert lack of vertical privity as a valid defense to a breach of implied warranty of merchantability claim.⁶²

Following *Henningsen's* lead, many jurisdictions abandoned the vertical privity requirement in personal injury actions.⁶³ Several jurisdictions, however, still retain this requirement.⁶⁴ Likewise, a few courts have abandoned the vertical privity requirement in economic loss actions,⁶⁵ while others continue to maintain the distinction between personal injury and economic injury and require privity in the latter situation.⁶⁶

61. 32 N.J. 358, 161 A.2d 69 (1960).

62. *Id.* at 413, 161 A.2d at 99-100.

63. *See, e.g., Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688, 691 (S.D. Tex. 1977) (absence of vertical privity between personally-injured plaintiff and remote manufacturer did not bar plaintiff from maintaining breach of implied warranty action); *Fredricks v. General Motors Corp.*, 278 Md. 304, 309, 363 A.2d 460, 463 (1976) (injured automobile guest has standing to sue manufacturer of vehicle under third party beneficiary provisions of the UCC despite lack of privity); *Barker v. Allied Supermarket*, 596 P.2d 870, 875-76 (Okla. 1979) (lack of vertical privity not a bar to breach of warranty theory where plaintiff lost 90 % of vision in right eye when soda bottle exploded in his face); *see also Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 53 (Mo. 1963) (en banc) (did not involve personal injury). In *Morrow*, the plaintiffs recovered against a remote seller under the implied warranty of merchantability theory. The plaintiffs purchased a gas range which proved defective and caused extensive fire damage to the range and other property. The court stated that the requirement of privity will not be strictly enforced where to do so would shock the court's sense of justice. The court continued:

Research also shows that over the years the courts of many of the states have considered and, with varying degrees of forthrightness, applied the rule of implied warranty without privity of contract (in effect, strict liability to the manufacturers of products which have caused injury to persons and property by reason of defects in construction or assemblage, which rendered such products imminently dangerous when used for the purpose for which they were manufactured and sold on the market to the "consumer" or user).

Id. at 53.

64. *See, e.g., Chance v. Richards Mfg. Co.*, 499 F. Supp. 102, 105 (E.D. Wash. 1980) (personal injury action) ("[i]n light of the admitted absence of privity, plaintiff is precluded from recovery for breach of an implied warranty").

65. *See, e.g., Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 291 (Alaska 1976) ("[a] manufacturer can be held liable for direct economic loss attributable to a breach of his implied warranties, without regard to privity of contract between the manufacturer and the ultimate purchaser"); *Cova v. Harley-Davidson Motor Co.*, 26 Mich. App. 602, 609, 182 N.W.2d 800, 804 (1970) (consumer allowed to sue manufacturer directly for economic losses under implied warranty theory); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 59, 207 A.2d 305, 309 (1965) (no just reason exists for maintaining vertical privity requirement in a pure economic loss case "simply because loss of value of the article sold is the only damage resulting from the breach").

66. *See, e.g., Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, _____, 544 P.2d 306, 312 (1975) (privity of contract still required in cases of pure economic loss); *Candlelight Homes, Inc. v. Zornes*, 414 N.E.2d 980, 982 (Ind. Ct.

III. RECOVERY UNDER A TORT THEORY FOR NEGLIGENCE

A. General Discussion

Unlike warranty actions, the court decisions are not uniform when a plaintiff sues under a negligence theory. While several jurisdictions allow economic loss recovery under a negligence theory,⁶⁷ the majority apparently do not. In these latter jurisdictions, plaintiffs are directed to sue in warranty.⁶⁸

In those jurisdictions recognizing a plaintiff's right to bring a cause of action in negligence, the underlying principle is that, the manufacturer as father of the transaction, is liable for damages, whether personal, property, or purely economic,⁶⁹ where his negligence is the cause of the plaintiff's injuries.⁷⁰ Further, if it is "reasonably foreseeable to an ordinarily prudent person that injury will reasonably and probably result from his failure to exercise ordinary care"⁷¹ the manufacturer can be found liable in negligence for failure

App. 1981) (privity must be shown in breach of implied warranty action to recover for loss of bargain); *Hole v. General Motors Corp.*, 83 A.D.2d 715, 716, 442 N.Y.S.2d 638, 640 (App. Div. 1981) ("While the citadel of privity has been shaken, it has not been altogether razed . . .") (where no personal injuries involved, privity is still required).

67. See *Berwind Corp. v. Litton Indus.*, 532 F.2d 1 (7th Cir. 1976); *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975); *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Russell v. Ford Motor Co.*, 281 Or. 587, 575 P.2d 1383 (1978); *W.R.H., Inc. v. Economy Builders Supply*, 633 P.2d 42 (Utah 1981).

68. See *LeSueur Creamery v. Haskon, Inc.*, 660 F.2d 342 (8th Cir. 1981), cert. denied, 455 U.S. 1019 (1982); *Jones & Laughlin Steel Corp. v. Johns-Manville Corp.*, 626 F.2d 280 (3d Cir. 1980); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1980); *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981); *Trans World Airlines v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y.S.2d 284 (1955).

69. See *State ex rel. Western Seed Prod. Seed Corp. v. Campbell*, 250 Or. 262, 269-70, 442 P.2d 215, 218 (1968) (en banc) (citing *Franklin*, *supra* note 2, at 989), wherein the court noted:

[W]e see no reason why the availability of a tort remedy should depend upon whether the harm was traumatic. The manufacturer should have a duty of exercising due care to avoid foreseeable harm to the users of his product. As stated by one writer, economic loss from defective products is "within the range of reasonable manufacturer foresight . . . (and this foreseeability) should raise at least a duty of due care unless some compelling economic or social or administrative reason dictates otherwise.

Id.

70. *Cova v. Harley-Davidson Motor Co.*, 26 Mich. App. 602, 605, 182 N.W.2d 800, 802 (1970). The *Cova* court also noted that since recovery under a strict liability theory is available, there is really no need for a plaintiff to use the negligence theory. *Id.* at 609, 182 N.W.2d at 804; see also *W.R.H., Inc. v. Economy Builders Supply*, 633 P.2d 42, 46 (Utah 1981).

71. *Berwind Corp. v. Litton Indus.*, 532 F.2d 1, 8 (7th Cir. 1976) (economic losses recoverable due to manufacturer's negligent design of equipment).

to so exercise that degree of care required under the circumstances. Thus, it is not necessary that the manufacturer "foresee either the precise injury that results therefrom or the manner in which it occurs."⁷²

The belief that the UCC provisions are the exclusive source of authority in pure economic loss cases is the major rationale for denial of recovery in negligence. Imposing tort theories of recovery would, thus, "totally emasculate these provisions of the UCC. Clearly, the legislature did not intend for tort law to circumvent the statutory scheme of the UCC."⁷³ The agreement and applicable UCC provisions should control since the parties have dealt at arm's length and agreed to be bound by the terms of the contract. Contract law would become indistinguishable from tort law if tort liabilities were imposed.⁷⁴ "In effect, contract law would become a branch of tort law. The law of contract would be used merely to define the duties that one owes to another but the law of tort would determine the remedy for violation of those duties."⁷⁵

B. *Uncertain Application in Missouri*

Missouri courts denied recovery for economic loss under a negligence theory in these cases until 1981, when the Missouri Court of Appeals for the Eastern District, in *Groppel Co. v. United States Gypsum Co.*,⁷⁶ recognized a tort cause of action where the plaintiff alleged purely economic losses.⁷⁷ However, every case decided since 1981 has reverted to the pre-1981 view without adequately rationalizing the retreat from *Groppel*.⁷⁸

Prior to the *Groppel* decision, the Missouri Supreme Court expressly refused to recognize a negligence theory of recovery in *Crowder v. Vandendeale*.⁷⁹ This has been the last word on the subject from the Missouri Supreme Court.⁸⁰ In *Crowder*, plaintiffs purchased a house built by defendant

72. *Id.*

73. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981).

74. *Album Graphics v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 350, 408 N.E.2d 1041, 1050 (1980).

75. *Id.*

76. 616 S.W.2d 49, 52 (Mo. App., E.D. 1981).

77. *Id.* at 52.

78. *See R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983); *Wilbur Waggoner Equip. and Excavating Co. v. Clark Equip. Co.*, 668 S.W.2d 601 (Mo. App., E.D. 1984); *Forrest v. Chrysler Corp.*, 632 S.W.2d 29 (Mo. App., E.D. 1982); *Clevenger & Wright Co. v. A.O. Smith Harvestore Prod.*, 625 S.W.2d 906 (Mo. App., W.D. 1981).

79. 564 S.W.2d 879 (Mo. 1978) (en banc).

80. *But see Aronson's Men's Stores v. Potter Elec. Signal Co.*, 632 S.W.2d 472 (Mo. 1982) (en banc). In *Aronson*, the court denied a store owner recovery under a strict liability theory when he failed to establish that the burglar alarm purchased for use in his business was unreasonably dangerous. In the final paragraph of the opinion the court states that "Appellant's proper submission was under negligence or warranty concepts." *Id.* at 474. This sentence seemingly permits a plaintiff to maintain an action

contractor. As settling occurred, the walls and front porch cracked. Plaintiffs sued to recover all expenses incurred in repairing the defects. Their theory was grounded in negligence for failure to construct the house in a workmanlike manner.⁸¹ The court concluded that the "implied warranty recovery provides an adequate and appropriate remedy . . . and that a second theory of recovery based on failure to use ordinary care should not be authorized."⁸² Accordingly, the court affirmed the dismissal of plaintiffs' suit for failure to state a claim upon which relief could be granted.⁸³

Three years later, *Groppe v. United States Gypsum Co.*⁸⁴ authorized recovery under a negligence theory. Plaintiff-subcontractor purchased fireproofing materials required to be of a specific density for adequate insulation. The material was to be spray-applied to the inside steel structure of a thirty-five story building. In the event of fire, the insulation would minimize and delay heat conduction to the steel.⁸⁵ After the substance was applied to most of the building, spot checks by plaintiff revealed that the product was not maintaining the required density. A meeting between plaintiff, the developer of the product, the inspector of the product, and other parties resulted in a decision that plaintiff should respray the area to an extra thickness. This measure would compensate for the lack of density upon the first spraying. In respraying, plaintiff expended substantial time and money with the ensuing losses forcing plaintiff out of business.⁸⁶ The plaintiff brought suit against the manufacturer of the product and recovered judgment under a negligence theory.⁸⁷

The court rejected the defendant's claim that *Crowder* should control the case and distinguished *Crowder* on several grounds. First, *Groppe* involved the sale of goods governed by the UCC whereas *Crowder* involved the sale of real estate which is not governed by the UCC.⁸⁸ Second, *Groppe* involved goods unfit for their intended purpose from the time of manufacture. By contrast, *Crowder* involved deterioration of a house.⁸⁹

The third distinction apparently is the most important one. *Groppe* involved product distribution. The manufacturer sold the product to a seller who

in negligence for pure economic loss but has never been cited for such a proposition. In light of the conflicting interpretations involved in these economic loss cases, it is imperative that the Missouri Supreme Court give definite guidance to the lower courts.

81. *Crowder*, 564 S.W.2d at 880.

82. *Id.* at 884.

83. *Id.*

84. 616 S.W.2d 49 (Mo. App., E.D. 1981).

85. *Id.* at 52.

86. *Id.* at 53-54.

87. *Id.* at 52. The court noted that the decision reached recognizes economic loss as "potentially devastating to the buyer of an unmerchantable product and that it is unjust to preclude any recovery from the manufacturer for such loss because of lack of privity, when the slightest physical injury can give rise to strict liability under the same circumstances." *Id.* at 59.

88. *Id.* at 60.

89. *Id.*

was not expected to use the product but only hold it for resale. Consequently, the product might change hands several times before it ultimately reached the final user or consumer.⁹⁰ This chain of distribution scenario is unlike the sale of the house in *Crowder*. In the latter case, the builder sold the house to the first purchaser who actually lived in and used the property. Risks were already allocated in the contract of sale between those parties. In *Crowder*, a second purchaser sought to hold the builder liable.⁹¹ When a builder sells a home, he sells directly to the ultimate consumer. When the sale of goods is involved, the manufacturer typically sells them to a middleman whose sole purpose is to resell the goods at a profit to the ultimate consumer. Thus, the court concluded that the policy considerations behind these cases differed considerably.⁹²

Groppe, however, has not been persuasive in subsequent Missouri decisions. In essence, the courts have ignored *Groppe* and continue to apply a *Crowder*-type analysis in pure economic loss cases. For example, in *Clevenger & Wright Co. v. A.O. Smith Harvestone Products, Inc.*,⁹³ decided eleven months after *Groppe*, the plaintiff purchased a grain storage silo manufactured by defendant. When a tornado ripped the silo from its concrete foundation, plaintiff claimed damages for economic losses caused by the silo's destruction. In essence, plaintiff maintained that defendant had a duty to use ordinary care in producing a tornado-proof silo.⁹⁴ The court rejected this argument and specifically relied on *Crowder* to deny recovery on the negligence claim, with no mention of *Groppe*.⁹⁵

In *R.W. Murray Co. v. Shatterproof Glass Corp.*,⁹⁶ the United States Court of Appeals for the Eighth Circuit discussed both the *Crowder* and *Groppe* decisions. Plaintiff-contractor claimed that defendant-supplier breached express and implied warranties⁹⁷ and was negligent in supplying defective vision and spandel panels. Replacement with matching panels was impossible since defendant-supplier discontinued manufacture of the color of tint used in the original panels and refused the contractor's demands to manufacture additional panels of the same tint. The plaintiff alleged that its economic

90. *Id.*

91. *Crowder*, 564 S.W.2d at 880.

92. *Groppe* at 60.

93. 625 S.W.2d 906 (Mo. App., W.D. 1981).

94. *Id.* at 908.

95. *Id.* at 909. The plaintiff sought recovery under breach of express warranty, negligence, and strict tort liability. As to plaintiff's warranty claim, the court found that even if the disclaimers were invalid, the plaintiff would still be barred since he failed to bring suit within four years after tender as required by the statute of limitations. *Id.* at 908.

96. 697 F.2d 818 (8th Cir. 1983).

97. The express warranty claims were dismissed due to the expiration of the four-year statute of limitations. The court found no warranty extending to future performance. *Id.* at 821-24.

losses exceeded \$3,000,000.⁹⁸

Regarding the contractor's negligence theory, the court stated that both before and after *Groppel*, the general view in Missouri was that "recovery in tort is limited to cases in which there has been personal injury, or property damage either to property other than the property sold, or to the property sold when it was rendered useless by some violent occurrence."⁹⁹ In discussing the *Groppel* decision, the court stated:

We recognize that the Missouri Court of Appeals decision in *Groppel* . . . appears to support appellant's cause of action in negligence seeking recovery for economic loss rising from the failure of a manufacturer to supply a merchantable product. However, we believe that *Crowder, Clevenger & Wright, Gibson, and Forrest*, provide "other persuasive data that the highest court of the state would decide otherwise."¹⁰⁰

Thus, the court held that the plaintiff was barred from suing in negligence to recover for economic losses.¹⁰¹

Finally, *Wilbur Waggoner Equipment & Excavating Co. v. Clark Equipment Co.*,¹⁰² a recent Missouri case dealing with recovery for economic loss, reinforces the *Crowder* view. After purchasing a crane manufactured by defendant, plaintiff discovered design and manufacturing defects in the machinery.¹⁰³ In a somewhat brief opinion, the court stated that the law in Missouri is "that recovery in tort for purely economic damages is limited to those cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence."¹⁰⁴

Curiously, both *Groppel* and *Wilbur* were decided by the Court of Appeals for the Eastern District. *Groppel* was decided by Division Two of the court¹⁰⁵ whereas *Wilbur* was decided by Division Three.¹⁰⁶ The *Wilbur* decision failed even to cite *Groppel*. Apparently even within the Eastern District the law in Missouri is uncertain in this area. It is questionable whether, in fact, one can reconcile or distinguish these two cases. In *Wilbur*, the court apparently chose to follow cases subsequent to *Groppel* and ignore *Groppel* insofar as it stood for the proposition that one could recover for pure economic loss under a negligence theory.

98. This three million dollar figure represented damages incurred by replacement of defective panels and diminution in the value of the building because of unavailable matching panels. *Id.* at 821.

99. *Id.* at 828.

100. *Id.* at 829.

101. *Id.*

102. 668 S.W.2d 601 (Mo. App., E.D. 1984).

103. *Id.* at 601.

104. *Id.* at 603. The plaintiff's warranty claims were barred by the four year statute of limitations, and the facts did not support an action under tort principles. *Id.*

105. 616 S.W.2d at 49.

106. 668 S.W.2d at 601.

IV. RECOVERY UNDER A STRICT LIABILITY THEORY

A. *General Discussion*

Strict tort liability allows a plaintiff to recover from a manufacturer without the obstacles imposed by warranty and without the burden of proving negligence.¹⁰⁷ In this respect, it is the more favored theory of the three for plaintiffs. The *Restatement (Second) of Torts* sets forth the doctrine of strict liability in section 402A.¹⁰⁸ Missouri adopted the *Restatement* approach in 1969.¹⁰⁹ In spite of the impact that strict liability has had on tort law, most jurisdictions, including Missouri, have refused to allow recovery for pure economic loss under this theory.¹¹⁰ On the other hand, as courts allow a cause of action for economic loss under a negligence theory, it may only be a matter of time before they extend recovery for such a claim to strict liability in tort.¹¹¹

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

108. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- a) the seller is engaged in the business of selling such a product, and
- b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

2) The rule stated in subsection (1) applies although

- a) the seller has exercised all possible care in the preparation and sale of his product, and
- b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

109. See *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

110. See, e.g., *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 285 (3d Cir. 1980) (applying Illinois law, the court refused to extend strict tort liability theory for pure economic loss); *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 81, 435 N.E.2d 443, 448-49 (1982) (economic losses sustained as a result of cracks in grain storage tank not recoverable under strict tort liability) (opinion analyzes various cases from other jurisdictions); *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 56 N.Y.2d 667, 451 N.Y.S.2d 720, 436 N.E.2d 667 (1982) (lack of any representations made to plaintiff, lack of privity, and solely economic losses precluded plaintiff's recovery under strict tort liability); *Industrial Uniform Rental Co. v. International Harvester Co.*, 463 A.2d 1085, 1093 (Pa. Super. 1983) (commercial buyer of trucks denied recovery under a strict tort liability theory against manufacturer for economic losses suffered when trucks developed cracks and failures in the frames) (opinion also analyzes various cases from other jurisdictions). Missouri is clear in its position that recovery under strict tort theory liability will be denied where only economic losses are involved. See *Wilbur Waggoner Equip. and Excavating Co. v. Clark Equip.*, 668 S.W.2d 601, 603 (Mo. App., E.D. 1984); *Forrest v. Chrysler Corp.* 632 S.W.2d 29, 31 (Mo. App., E.D. 1982); *Clevenger & Wright Co. v. A.O. Smith Harvester Prod.*, 625 S.W.2d 906, 909 (Mo. App., W.D. 1981); *Gibson v. Reliable Chevrolet*, 608 S.W.2d 471, 475 (Mo. App., S.D. 1980).

111. The difference between negligence and strict liability in the majority of cases is minimal. Prosser reasoned that "[w]here the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."

Seely v. White Motor Co.,¹¹² best summarizes the policy considerations that have led courts to reject application of strict liability to economic loss cases. *Seely* involved the purchase of a defective truck. The specific holding of the case allowed recovery under warranty and the extensive dicta denied recovery under strict tort liability. The court distinguished strict tort liability from the law of sales, stating that the former was uniquely designed to govern economic relations.¹¹³ Three distinctions were made. First, when a defective product which creates an unreasonable risk of harm is placed into the stream of commerce and later causes physical or personal injuries, it is appropriate to hold the manufacturer liable for failure to meet a safety standard. By placing the product into the market, the manufacturer represents that the product is safe for its intended use and therefore is responsible for resulting injuries when put to such use. When economic losses are involved, different considerations exist. A plaintiff is seeking to hold a manufacturer liable simply because the product has not measured up to the level of performance expected. Therefore, a plaintiff should be limited to contract theories of recovery.¹¹⁴

Second, the court reasoned that the resulting burden on manufacturers would be excessive and unmanageable if strict liability were the standard. Manufacturers would be liable for business losses in cases where the product did not meet subsequent purchasers' specific needs, even though those needs were communicated only to the dealer.¹¹⁵ Third, strict liability would preclude the manufacturer from disclaiming liability since its very purpose is "to prevent a manufacturer from defining the scope of his responsibility for harm caused by his products."¹¹⁶ The *Seely* court found the defendant liable only because the defendant gave a warranty and numerous efforts by the defendant

Prosser, *supra* note 16, at 1114. Plaintiffs may be aided by *res ipsa loquitur* as an equivalent doctrine, but once the cause of the harm is shown to emanate from the defendant, the plaintiff gets to the jury and "a jury verdict for the defendant on the negligence issue is virtually unknown." *Id.* at 1115.

112. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (en banc).

113. *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

114. *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. The court stated:

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. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

Id.

115. *Id.* at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22. The court stated:

If under these circumstances defendant is strictly liable in tort for the commercial loss suffered by plaintiff, then it would be liable for business losses of other truckers caused by the failure of its trucks to meet the specific needs of their businesses, even though those needs . . . were communicated only to the dealer. . . . The manufacturer would be liable for damages of unknown and unlimited scope.

Id.; see also Note, *Products Liability—Manufacturer Not Liable for Economic Losses of Consumer Under Theory of Strict Liability*, 15 BUFFALO L. REV. 758, 763 (1966).

116. *Seely*, 63 Cal. 2d at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22.

to repair the truck proved fruitless.¹¹⁷ The truck was not unreasonably dangerous within the meaning of section 402A merely because the truck did not rise to the level of performance plaintiff expected.¹¹⁸

Notwithstanding the analysis in *Seely*, a few courts maintain that a claim for economic loss is actionable under a strict tort liability theory.¹¹⁹ *Santor v. A. & M. Karagheusian, Inc.*,¹²⁰ is the leading case. In *Santor*, decided four months prior to *Seely*, the plaintiff purchased carpet for home use. Though represented as first grade quality, the carpet developed unusual lines immediately after being installed. Plaintiff recovered judgment against defendant manufacturer under a breach of implied warranty of merchantability.¹²¹

Significantly, the *Santor* court stated in dicta that the manufacturer's liability could have been cast in a much simpler form—namely, in strict tort liability for pure economic loss.¹²² According to the court, the purchasing public lacks adequate knowledge or opportunity to discover defects and has no choice but to place full reliance on the manufacturer's skill, care and reputation. In placing its product on the market, the manufacturer, in effect, assures the public that the product is suitable and safe for its intended use. The fact that a consumer suffers only economic loss does not relieve the manufacturer of this responsibility. The court reasoned that holding the ultimate consumer or user of the product to the often harsh requirements of warranty ignores the

117. *Id.* at 17, 403 P.2d at 151, 45 Cal. Rptr. at 23.

118. *Id.* at 16, 403 P.2d at 150, 45 Cal. Rptr. at 22; see *supra* text accompanying note 127; see also Note, *Products Liability in Tort Cover?*, 17 HASTINGS L.J. 385, 389 (1965).

119. See, e.g., *Cova v. Harley-Davidson Motor Co.*, 26 Mich. App. 602, 609, 182 N.W.2d 800 (1970); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 66, 207 A.2d 305, 312 (1965); *Spring Motors Distrib. v. Ford Motor Co.*, 191 N.J. Super. 22, —, 465 A.2d 530, 541 (1983) (recovery in strict tort liability for pure economic losses extended to commercial loss).

120. 44 N.J. 52, 207 A.2d 305 (1965).

121. *Id.* at 63, 207 A.2d at 310. The seller continuously reassured plaintiff that the lines would "walk out." When the condition worsened, the plaintiff attempted to contact the seller eight months after delivery. It was at this time that the plaintiff discovered that the seller had gone out of business. It took the plaintiff months to locate the seller, although the exact amount of time taken is not specified in the opinion. Eventually the plaintiff contacted the manufacturer. When communications with the manufacturer failed to produce any results, the plaintiff brought suit for breach of implied warranty of merchantability. *Id.* at 56, 207 A.2d at 307. The court stated that lack of privity would no longer be a defense. "The manufacturer is the father of the transaction. He makes the article and puts it in the channels of trade for sale to the public. . . . The dealer is simply a way station, a conduit on its trip from manufacturer to consumer." *Id.* at 59-60, 207 A.2d at 309. The manufacturer was ultimately held liable for breach of warranty. *Id.* at 63, 207 A.2d at 310.

122. *Id.* at 63, 207 A.2d at 311. The court also noted that "[i]n this era of complex marketing practices and assembly line manufacturing conditions, restrictive notions of privity of contract between manufacturer and consumer must be put aside and the realistic view of strict tort liability adopted." *Id.* at 66, 207 A.2d at 312.

reality of the relationship between this person and the manufacturer.¹²³ The consuming public, powerless to protect itself, should not be made to bear the cost of injuries or damages resulting from defective products.¹²⁴

In *Seely*, Justice Peters wrote a strong concurring opinion supporting strict tort liability.¹²⁵ According to Justice Peters, the restrictive provisions relating to warranty should not apply in cases involving ordinary consumers. Moreover, the focus in economic loss cases should not be on the nature of the damages sustained. As long as the damages proximately resulted from the defect, liability should exist. By contrast, if the parties possess equal bargaining power, warranty rightfully applies. Since one of the major purposes underlying strict tort liability is to protect powerless consumers, strict tort actions rather than warranty actions are best suited to consumers.¹²⁶

Classifying the types of plaintiffs as opposed to the types of harm suffered furthers the policies behind both strict tort liability and the law of sales. Under this distinction, the ordinary consumer, unaware of the intricacies of the law of sales "would receive the protection he needs under the doctrine of strict liability."¹²⁷ By the same token, the merchant, "familiar with the world of commercial transactions and aware of the problems involved when defective goods are sold would remain under the control of the warranty sections of the

123. *Id.* at 64, 207 A.2d at 311. The court reasoned that "[o]rdinarily there is no contract in a real sense between a manufacturer and an expected ultimate consumer of his product." *Id.*

124. *Id.* at 65, 207 A.2d at 311-12. The court did not explicitly distinguish ordinary consumers from commercial buyers but referred only to the "consuming public." In discussing the manufacturer's obligation once it places the product on the market, the court stated:

[The manufacturer's obligation] becomes what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is not borne by the injured or damaged persons who ordinarily are powerless to protect themselves.

Id. Defectiveness of the carpet was conceded by the defendant. Defective articles were defined by the court as those "not reasonably fit for the ordinary purposes for which such articles are sold and used." *Id.* at 67, 207 A.2d at 313. This definition is almost identical to that found under breach of implied warranty of merchantability. *See supra* note 27. Because of the lines that developed in this top quality carpet, it was not reasonably fit for the ordinary purpose for which it was sold and used. Thus, even if defectiveness were not conceded, it appears that the court would have found the defect present anyway. Whether an unreasonable risk of harm was thereby created was not discussed by the court. In New Jersey, strict tort liability exists once the plaintiff proves a defect (as defined above), which arose from design or manufacturer, and this defect proximately caused the plaintiff's injury. *Id.*

125. *Seely* 63 Cal. 2d at 20, 403 P.2d at 152, 45 Cal. Rptr. at 24 (Peters, J., concurring). Unlike the majority, Justice Peters did not find a breach of express warranty for the reason that the plaintiff did not rely on the warranty. He concurred in the judgment because he felt that the plaintiff should prevail under a strict tort theory.

126. *Id.* at 27, 403 P.2d at 157, 45 Cal. Rptr. at 29 (Peters, J., concurring).

127. *Id.* (Peters, J., concurring).

Code."¹²⁸

B. *Strict Liability for Economic Loss in Missouri*

With the exception of the *Goppel* case, Missouri courts have uniformly adopted the *Seely* view.¹²⁹ The policy reasons for justifying the denial of a strict tort liability for economic loss stem from tradition. Safety and freedom from physical harm have traditionally been entitled to protection. Mere economic loss, however, has never been entitled to any more protection than the parties contracted to give it. With economic loss, a plaintiff is concerned primarily with the failure of the product to meet his standard of quality.¹³⁰ "In the absence of some express agreement to the contrary, the standard of quality will be presumed to be that of the implied warranty term—reasonable fitness for use."¹³¹

In *Gibson v. Reliable Chevrolet, Inc.*,¹³² decided prior to *Goppel*, the purchaser of a new automobile brought suit against the defendant seller for economic losses suffered when the heater core of the engine ruptured. The coolant escaped, creating excessive heat and requiring replacement of the motor. Relying on *Crowder*, the *Gibson* court denied recovery under a strict tort liability theory.¹³³ After noting that the claim involved neither personal injury nor damage to property other than the automobile, the court stated that under these circumstances, "it was incumbent upon the plaintiff to establish that the Chevrolet had been rendered useless by some violent occurrence."¹³⁴ Therefore, in the absence of personal injury, damage to other property, or damage resulting from a violent occurrence to the product itself, strict tort liability could not be imposed under Missouri law.¹³⁵

A post-*Goppel* case, *Forrest v. Chrysler Corp.*,¹³⁶ reinforced the approach taken in *Gibson*. In *Forrest*, plaintiff sued the seller and the manufacturer under warranty theories when a truck he purchased proved to be defective. Plaintiff sought to recover damages for the lost market value of the truck, for lost profits, and for repair and replacement costs. Because the case was

128. Note, *supra* note 114, at 766.

129. See *supra* note 123.

130. *Crowder*, 564 S.W.2d at 882.

131. *Id.* at 882. The *Crowder* court specifically held that a cause of action in negligence would not lie. Although the court did not explicitly discuss recovery under a strict liability theory, all cases subsequent to *Crowder* and *Goppel* have held that a cause of action for economic loss, whether in negligence or strict liability, will not be permitted for the same policy reasons as those enunciated by the *Crowder* court. See *supra* note 110 and cases cited.

Prosser also agreed that strict tort liability should be unavailable as a theory of recovery in this area. See Prosser, *supra* note 43, at 823.

132. 608 S.W.2d 471 (Mo. App., S.D. 1980).

133. *Id.* at 472-73.

134. *Id.*

135. *Id.* at 474.

136. 632 S.W.2d 29 (Mo. App., E.D. 1982).

submitted to the jury under a strict tort liability instruction, part of the judgment was reversed and remanded for a new trial as against the manufacturer.¹³⁷ No personal injuries were involved in this case. Under these circumstances, "*Crowder and Gibson* place Missouri into the *Seely* group of courts which reject strict liability for defective products where the loss sustained is economic only. In that posture plaintiff is restricted to the remedies afforded under the Uniform Commercial Code and the general law of sales."¹³⁸ *Gropel* was not discussed in the opinion.

C. Harsh Results of Excluding Tort Recovery

Limiting plaintiffs to warranty theories will in many instances produce harsh results. *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*¹³⁹ typically illustrates the harshness of the rule. In *Jones*, the defendant, a manufacturer and installer of roofing products, advised the plaintiff, a commercial buyer, regarding the type of roofing materials plaintiff needed in constructing a steel finishing plant. Because the roof was to be extraordinarily large (1.3 million square feet) and because the plant would be located in an area with severe temperature fluctuations as well as high wind velocities, the building required a roof that could withstand severe wear and tear.¹⁴⁰

The defendant recommended materials that it represented as durable, easy to repair, virtually waterproof, and capable of withstanding uplift caused by winds in excess of 120 miles per hour. The plaintiff included these recommendations in its plans. Upon completion, the roof began to blister, wrinkle, and crack. Rain-water, entering through the roof, damaged plaintiff's steel products and caused electrical outages. Eighty miles per hour winds blew away 93,800 square feet of the roof.¹⁴¹

The plaintiff sued the defendant under strict tort liability and breach of warranty theories. Applying Illinois law, the United States Court of Appeals for the Third Circuit held that claims in strict liability and negligence were not actionable "[i]nasmuch as Illinois law does not permit a claim for economic loss to be premised on tort theories."¹⁴² Furthermore, the plaintiff was

137. *Id.* at 30-31. The court found that the plaintiff's first amended petition stated a cause of action in warranty; therefore, it was reversible error to instruct the jury under strict tort liability. *Id.* at 32.

138. *Id.* at 31.

139. 626 F.2d 280 (3d Cir. 1980).

140. *Id.* at 281.

141. *Id.* at 282.

142. *Id.* at 289. The *Jones* court relied on *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966), and *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977), as authority for rejecting claims in strict liability. 626 F.2d at 284. In *Rhodes*, plaintiff purchased aerosol cans from defendant-manufacturer to package his products. The cans leaked. Although the court recognized that plaintiff had a cause of action for breach of implied warranty, it specifically denied plaintiff's claim for strict tort liability, stating simply that it was not

also barred from recovery under a warranty theory. First, the court held that the UCC was inapplicable. The contract provided that the defendant would not only supply materials but also assist and supervise the plaintiff. Since the UCC deals exclusively with transactions in goods, the relationship was not addressed by the UCC.¹⁴³ The court stated that even if the UCC were applicable, plaintiff would be barred because delivery occurred over four years prior to plaintiff's suit.¹⁴⁴ In addition, the running time under the warranty was not explicitly extended under the limited future performance exception of the UCC.¹⁴⁵ As a result, plaintiff could not recover under any theory.

The warranty theory limitation has produced similar unjust results in Missouri. For example, if *Groppel* were decided under the *Seely* rationale, the plaintiff would have been forced to bear the losses which subsequently put him out of business.

V. CONCLUSION

In Missouri, it appears that the warranty theory is the only route of recovery available to the plaintiff with purely economic losses. Even if a cause of action in negligence were recognized, numerous obstacles would still hamper a court's recognizing actionable claims in strict liability. Even if Justice Peters' distinction between types of plaintiffs is adopted or the *Santor* definition of defect is adopted, plaintiff's would still have a potential problem with the unreasonably dangerous requirement of section 402A.

In *Santor*, it is difficult to imagine how unsightly lines could cause an unreasonable risk of harm. On the other hand, the violent bouncing of the truck in *Seely* did create such an unreasonable risk. Unfortunately, the plaintiff in *Seely* was unable to trace this defect to the failure of the brakes and resulting overturning of the truck.

Another obstacle arises where the product itself is damaged. In Missouri, a plaintiff is denied recovery in strict liability unless there is a violent occur-

"persuaded that the doctrine of 'strict tort liability' should be applied here." *Rhodes*, 72 Ill. App. 2d at 368, 219 N.E.2d at 730. In *Koplin*, plaintiff purchased two air-conditioning units from defendant that failed to work properly. Plaintiff sought to recover costs of replacement and repair. The court held that plaintiff could not recover under a warranty theory because the defendant had expressly disclaimed any warranties. Plaintiff was also barred from recovering under a tort theory: "We conclude, as did the court, without analysis, in *Rhodes*, that tort theory (there strict liability, here negligence) does not extend to permit recovery against a manufacturer for solely 'economic losses' absent property damage or personal injury from the use of the product." *Koplin*, 49 Ill. App. 3d at 203, 364 N.E.2d at 107.

143. 626 F.2d at 290.

144. Under Mo. REV. STAT. § 400.2-725, the four year statute of limitations begins to run when delivery is made. See *supra* note 40 and accompanying text.

145. 626 F.2d at 291. For the provision on future performance under the Code see *supra* note 41.

rence.¹⁴⁶ This term has been defined as “a calamitous event that is likely to threaten traditional tort injuries of bodily harm or damage to other nearby property—such as occurs in a case involving unreasonably dangerous products.”¹⁴⁷ Examples would be fire, explosion, vehicular collision and the like. No such violent occurrence was present in *Santor* and it is arguable whether this requirement was met in *Seely*.

Despite these obstacles, policy considerations for granting the consumer a cause of action in tort for pure economic loss outweigh those advanced for denying such recovery. As pointed out earlier, there are stronger arguments for denying tort recovery when the plaintiff is a commercial buyer.¹⁴⁸ Basing recovery on the type of plaintiffs involved as opposed to the types of loss involved is the better alternative. Being a commercial buyer alone should not automatically preclude one from recovery. The determinative factor should be whether such a plaintiff possesses equal bargaining power with the defendant. If the positions of the parties are relatively equal, then it may be fair to require the plaintiff to sue under a warranty theory. However, if the defendant is in a superior bargaining position, it is unfair to limit the weaker party to contract principles of recovery.

The manufacturer is the father of the transaction. Moreover, the manufacturer produces the defective product. In light of the consumer's inferior bargaining position, the manufacturer is the one who can best spread the losses. Extending liability to the manufacturer under these circumstances does not create or impose an undue burden upon him. In many cases, economic damages are not as extensive as personal injury damages.¹⁴⁹ “Even where economic loss is large and uninsured, it usually will not involve the kind of secondary costs such as those resulting from inability to rehabilitate, that may be caused by personal injury.”¹⁵⁰ Finally, the injured consumer who suffers any kind of loss as a result of a defect in the product typically cannot prevent the loss. The defect itself is normally undiscovered until the loss occurs. Thus, losses sustained due to product defects should rightfully be borne by the manufacturer.

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146. *Gibson v. Reliable Chevrolet*, 608 S.W.2d 471, 473 (Mo. App., E.D. 1981).

147. *City of Clayton v. Grumman Emergency Prod.*, 576 F. Supp. 1122, 1126 (E.D. Mo. 1983).

148. See *supra* text accompanying notes 126-28.

149. Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 *MERCER L. REV.* 493, 510 (1978).

150. *Id.*