Recovery of Direct Economic Loss: The Unanswered Questions of Ohio Products Liability Law

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Notes

RECOVERY OF DIRECT ECONOMIC LOSS:
THE UNANSWERED QUESTIONS OF
OHIO PRODUCTS LIABILITY LAW

Increasingly, courts are allowing recovery of economic loss in products liability cases. This recovery is generally premised on one of two doctrines—strict tort liability or contract recovery under the UCC. The courts of Ohio, however, appear to be deciding these cases upon a hybrid of the two theories; if the parties are in privity, recovery is based upon the Code, but if recovery is sought from a remote manufacturer, tort theory is invoked. This Note explores the various theories, their rationales, and their ramifications by examining a recent Ohio Supreme Court case, Iacono v. Anderson Concrete Corp.

I. INTRODUCTION

When buyers purchase products that prove to be defective, they often seek recovery in the courts. Initially they may turn to the retailer from whom they purchased the product, but buyers may also seek recompense from the remote manufacturer of the defective product.1 The manufacturer’s liability for defective products that cause personal injury2 is unquestioned today, but the extent of a remote manufacturer’s liability for economic loss3 continues to be uncertain.4 When courts allow recovery of

1. A defectively manufactured product is one which is not fit for the ordinary purposes for which such articles are sold and used because of a flaw in the design or manufacture of the product. Compare Farr v. Armstrong Rubber Co., 288 Minn. 83, 89–90, 179 N.W.2d 64, 69 (1970), with Comment, Manufacturers’ Liability to Remote Purchasers for “Economic Loss” Damages—Tort or Contract?, 114 U. Pa. L. Rev. 539 (1966).

2. As used throughout this Note, the term personal injury includes: (1) time losses, for which the plaintiff can recover lost earnings; (2) medical expenses incurred because of the injury; and (3) loss caused by pain and suffering.

3. In this context, economic loss refers only to purely pecuniary damage as opposed to physical injury to property or persons. Where a manufacturer and purchaser are in contractual privity, economic loss is recoverable on the contract. See, e.g., Boylston Hous. Corp. v. O’Toole, 321 Mass. 538, 74 N.E.2d 288 (1947). Economic loss is more precisely defined in text accompanying notes 23–28 infra.

The Uniform Commercial Code [hereinafter UCC] section 2–714 (3) also provides for recovery of economic loss between parties in privity for breach of warranty: “In a proper case any incidental and consequential damages . . . may . . . be recovered.” Incidental and consequential damages are defined in UCC section 2–715. See notes 23–28 infra and accompanying text.

4. Generally, courts have not awarded economic loss damages to purchasers who are not in privity with the manufacturer of a negligently constructed product. See, e.g., Gherna v. Ford
economic loss damages, they premise the recovery upon either contractual warranty provisions of the Uniform Commercial Code or the judicially developed theory of strict tort liability, but which theory is preferable remains an unanswered question. Although economic loss arises from the same product defects for which the strict tort liability theory for personal injury was developed, economic loss also arises in the commercial context for which the UCC was designed to provide uniformity—the amount of economic loss sustained depends upon the provisions of the particular purchase agreement that controls the sale.

It is the societal and economic ramifications of liability for direct economic loss that should determine which theory courts will apply. In order to make these determinations, it is necessary to examine the origins of strict liability and the substance of the alternative theories of recovery. Specifically, this Note will show that as a result of *Iacono v. Anderson Concrete Corp.*—the first Ohio Supreme Court decision allowing recovery from a remote manufacturer for economic loss on an "implied tort warranty"—and other products liability cases, Ohio courts use the concept of privity to determine whether product-caused damages are recoverable under strict tort or under the UCC.

The facts of *Iacono* are simple. During the spring of 1969, Thomas Iacono entered into an oral agreement with the Padovan Construction Com-

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7. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).

8. The Ohio Supreme Court mistakenly labeled Iacono's damage as property damage rather than economic loss. See text accompanying notes 36-38 infra.

pany for the installation of a driveway, a patio, and a sidewalk at Iacono's residence. The project was completed by Padovan's employees with concrete obtained by Padovan from the Anderson Concrete Corporation. Imperfections in the concrete resulted in "pop-outs" and considerable surface scaling in the concrete when the weather changed. Because these problems were not corrected, Iacono brought an action against both Padovan (the intermediary) and Anderson (the remote manufacturer) for breach of express and implied warranties that the "finished driveway would be fit for its customary and normal use." In the court of common pleas, the jury returned a verdict against both Padovan and Anderson in the amount of $13,000. The court of appeals affirmed the judgment against Padovan, but, because of the absence of privity of contract, reversed the judgment against Anderson. The Supreme Court of Ohio, however, allowed recovery from Anderson in tort for breach of an implied warranty.

Even after the Iacono decision, it is unknown whether economic loss may be recovered solely in tort in Ohio because the court failed to address certain key issues. First, the court failed to recognize that the plaintiff in Iacono was seeking compensation for economic loss, not property damage, as that measure of recovery has traditionally been applied in tort. Second, the Iacono court ignored specific provisions of the Uniform Commercial Code, as enacted by the Ohio legislature, which should govern commercial transactions in which economic loss arises. Because of the Iacono decision, a reevaluation of the present status of products liability law in Ohio must be undertaken.

A. Iacono's Loss Was Economic

Although it has not always been true, current law permits the retail

11. Id.
12. Id. The Ohio Supreme Court described the pop-outs as "small round holes." These imperfections created hollow areas in the concrete which weakened the structure of the driveway.
13. Id. at 90, 326 N.E.2d at 269.
14. Id. at 89, 326 N.E.2d at 268.
15. The Court of Appeals of Franklin County originally reversed the judgment against the Anderson Concrete Corporation because the plaintiff's complaint "sounded primarily in contract and failed to allege a tortious act which caused damages." Id. at 89, 326 N.E.2d at 268. Upon a motion for reconsideration by Iacono, the court of appeals affirmed the judgment against Padovan and, stressing a lack of privity between Iacono and the remote manufacturer Anderson, adhered to its judgment in favor of Anderson.
16. Id. at 93, 326 N.E.2d at 271.
17. See text accompanying notes 36-38 infra.
18. OHIO REV. CODE ANN. §§ 1301.01 through 1309.50 (Page 1962).
19. Historically, liability for a defectively manufactured product was premised upon the relationship between the manufacturer and the injured party. When the manufacturer and the
purchaser of a defective product to maintain a cause of action against the manufacturer with whom he is not in privity. Compensation is recoverable from remote manufacturers for product-caused damage to the purchaser's property,20 for his personal injuries,21 and for economic losses.22

When economic loss is caused by a defective product, it may be termed either direct or consequential. Direct economic loss—the central focus of this Note—results from a product's decreased value due to a defect.23 One measure of direct economic loss is the "loss of the value of the bargain" or the difference between the actual value of the defective product and the value it would have if it were fit for its intended use.24 For example, if the purchaser of an automobile sticker-priced at $5,000 pays the dealer $3,700 for the car, but it is only worth $2,200 with the defect, the loss on the bargain is $2,800. "Out-of-pocket expense" is the other measure of direct economic loss. The difference between the purchase price of the product and the value of the product with the defect represents the out-of-pocket expense.25 For example, the difference between the purchase price ($3,700) and the value of the car with the defect ($2,200) indicates the out-of-pocket expense in the above example is $1,500. Costs that are incurred to repair a defective product and expenditures which must be absorbed to replace a product that cannot be repaired are also direct out-of-pocket economic losses.26

Indirect, as opposed to direct, economic losses arise as a consequence of the defect rather than from diminution of the value of the product purchased. Such consequential economic losses include the value of production

claimant were in contractual privity, the claimant, as a direct purchaser, could recover compensation for personal injury, property damage, and economic loss. However, if the claimant purchased the product from a retailer, or some other intermediary, the claimant was unable to recover for his or her damages because of the common law rule which barred recovery when there was no privity between the manufacturer and the claimant. Because strict adherence to the doctrine of privity led to inequitable results, numerous exceptions developed which qualified the privity requirement in products liability suits. See note 73 infra.

22. See, e.g., Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). See also notes 42-45 infra and accompanying text.
26. See Products Liability Jurisprudence, supra note 4, at 918.
ECONOMIC LOSS RECOVERY

When a defective product causes personal injury to the purchaser, the remote manufacturer may be held liable under either the UCC or under a theory of strict liability in tort. Historically, however, the remote manufacturer has not always been held liable under tort theories for damage occurring to the defective product itself. Property damage, which occurs if a defective product causes a violent "catastrophic" accident, is recoverable in tort. Accidental damage to the purchased article itself is includable within this tort concept of property damage. On the other hand, if the defect is manifested by deterioration of the product or a similar nonviolent occurrence, the damage to the product is economic loss. Nonviolent damage to

27. Otis Elevator Co. v. Standard Constr. Co., 92 F. Supp. 603 (D. Minn. 1950) (cost of heat, light, and power for unused hospital rooms, the additional cost of labor for hospital operations, and the additional cost of construction which resulted from alleged delay by defendant in installing elevators were consequential damages).


29. 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. A seller may not exclude or limit the operation of this section.

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


34. Products Liability Jurisprudence, supra note 4, at 918.
the property that was purchased is not includable within the tort concept of property damage. Recovery for such economic damage has traditionally been limited to contractual remedies.35

In Iacono the Ohio Supreme Court upheld the decision of the jury that the concrete sold by Anderson was defective because it should not have contained the "soft shale aggregates" that caused the damage to the concrete driveway.36 Consequently, Iacono was compensated for damage to the concrete which was the object of the bargain with the remote manufacturer. The supreme court concluded that "a defective product . . . caused [the plaintiff] to suffer property damage rather than personal injury."37 This conclusion is inconsistent with the commonly accepted definition of property damage. Since there was no accident or catastrophic occurrence, Iacono's loss would have been properly described as direct economic loss rather than property damage. Thus, although direct economic loss has not traditionally been recoverable in tort, the court in Iacono, in effect, used a tort theory to award economic loss compensation. This departure from traditional law was not addressed in the opinion because the damage was mislabeled as "property damage."38

The traditional limitations upon recovery of economic loss in tort indicate the uniqueness of the Iacono holding. Where the purchaser of a defective product is not in privity with the manufacturer, many courts have said that the threat of personal injury will not afford recovery in tort of economic loss. See, e.g., Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958) (the need to prove negligence and the requirement that the damage be the result of an "accident" would prevent such an action from intruding upon a field traditionally treated in warranty law). See also W. PROSSER, supra note 4, at 665 n.38.

35. See, e.g., 42 Ohio St. 2d at 92-93, 326 N.E.2d at 270.

36. Id. at 93, 326 N.E.2d at 270.

37. Id. at 93, 326 N.E.2d at 270.


The distinction between property damage and economic loss originated from the tort concepts governing personal injury recovery. A manufacturer's liability to a purchaser with whom he was not in privity was traditionally limited in tort to situations in which product defects caused personal injury. For example, in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), Justice Cardozo limited a remote manufacturer's product liability to situations in which a defective product created an unreasonable danger of personal injury. Id. Even when courts began to further extend tort liability of a remote manufacturer to liability for property damage, the initial extension was limited to defects which threatened personal injury in conjunction with damage to the product. See, e.g., Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc., 263 N.Y. 463, 189 N.E. 551 (1934); Marsh Wood Prods. Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

Consistency necessitated this extension because the same unreasonable dangers that had justified recovery of personal injuries caused the property damage in many of these cases. Economic loss, however, was not usually the result of the same unreasonable dangers which led to personal injury or property damage. Consequently, recovery of economic loss continued to be limited to contractual remedies.
losses unless an accident actually occurs. For example, defects in an airplane engine create the danger of a crash resulting in personal injury to the passengers. Yet in Trans World Airlines v. Curtiss-Wright Corp., a New York supreme court held that economic loss, arising from the breach of a remote manufacturer's duty to a subpurchaser, could not be recovered because the engine defects were discovered in time to prevent an accident.

Direct economic loss is, by definition, not caused by an accident; thus, compensation for catastrophic accidental damage to the defective product itself would sound in tort as property damage, but never as direct economic loss. Therefore, the requirement of a defect-caused accident effectively prevents direct economic loss from being recovered in tort from a remote manufacturer.

Significantly, the holding of the Ohio Supreme Court in Inglis v. American Motors Corp. had the same effect as the Trans World Airlines decision. In Inglis, the plaintiff-purchaser sought compensation for direct economic loss from the remote manufacturer of a defective automobile; the defect had not, however, caused an accident. Inglis based his claim on three causes of action: (1) breach of express warranties created by the manufacturer through national advertising; (2) breach of implied warranties of fitness; and (3) negligent manufacture. The Ohio Supreme Court allowed economic loss recovery on the basis of a breach of the express warranty. However, in the absence of a defect-caused accident, the court considered


A few cases have taken the view that the remote manufacturer or seller could be held liable to the ultimate purchaser on the negligence theory even though there had been no violent accident and only economic loss was claimed. Significantly, in these cases consequential damages were claimed in addition to the mere difference in value between the property as it should have been and its value in its defective condition. Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Spence v. Three Rivers Bldg. & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

The Restatement takes a similar position. Section 395 recognizes liability for negligent manufacture only when a product threatens or in fact causes harm. Restatement (Second) of Torts § 395 (1965).


41. Id. at 481, 148 N.Y.S.2d at 290. The plaintiff and the defendant were not in privity because the defendant-manufacturer had sold the defective parts to the firm from which the plaintiff purchased the assembled engine.

42. 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

43. Id. at 133-34, 209 N.E.2d at 584.

44. Id. at 141, 209 N.E.2d at 588-89.
stated that direct economic losses would not be recoverable under the negligence cause of action.\textsuperscript{45}

The \textit{Inglis} decision, which effectively prohibits recovery of direct economic loss under tort theory, seems, at first glance, to be inconsistent with \textit{Iacono}. Yet, the \textit{Iacono} opinion cannot accurately be construed as an intentional repudiation of \textit{Inglis}. As has been mentioned, the court in \textit{Iacono} never addressed the economic loss issue, having erroneously labeled the damage as "property damage."\textsuperscript{46} Moreover, the court cited \textit{Inglis} with approval.\textsuperscript{47} Therefore, it appears that the court in \textit{Iacono} did not intend to relax the prohibition against recovery of economic loss in tort.

B. The Court Overlooked the UCC

There are different policy justifications for applying strict tort theory than for applying UCC contract theories. The UCC embodies a legislative judgment that transactions which occur in a commercial context, including those which result in direct economic loss, should be decided according to the Code.\textsuperscript{48} However, if a manufacturer is held strictly liable under tort theory for frustrated expectations, such as direct economic loss, liability would ensue regardless of the terms of the negotiated sale. Strict tort theory would, in effect, deprive the parties of the freedom to negotiate because recovery in tort is not governed, and consequently not limited, by the agreed-upon terms of the sales contract.\textsuperscript{49} In contrast, the UCC seeks to encourage bargaining by upholding disclaimers of liability or limitation of remedy, both of which may affect price. Consequently, by applying the contractual theory, the courts are merely fulfilling the expectations of the parties, whereas tort theory ignores these expectations. The most significant difference between the strict tort and the UCC theories, however, is the

\begin{itemize}
\item \textsuperscript{45} Id. at 140–41, 209 N.E.2d at 588.
\item \textsuperscript{46} See text accompanying notes 37–38 supra. The notion that the Ohio Supreme Court was mistaken in its classification of Iacono’s losses as property damage is reinforced by its opinion in \textit{Inglis} where the court distinguished between property damage and pecuniary loss: “In the case at bar there was not any personal injury or property damage—the loss being that of a pecuniary nature.” 3 Ohio St. 2d 132, 137, 209 N.E.2d 583, 586 (1965). This statement indicates that Ohio does distinguish property damage from economic damage and that the failure to make that distinction in \textit{Iacono} was an oversight rather than a deliberate attempt to include direct economic loss as property damage.
\item \textsuperscript{47} 42 Ohio St. 2d 88, 93, 326 N.E.2d 257, 270 (1975).
\item \textsuperscript{48} Article 2 of the UCC is applicable to sales. The UCC has been adopted by every state except Louisiana.
\item \textsuperscript{49} The major difference between strict tort liability and the UCC treatment of economic loss is that strict liability is not limited by disclaimers, limitations of liability, and privity of contract. See notes 119–26 infra and accompanying text.
\end{itemize}
warranty provisions of the sales law.50 The UCC also subjects purchasers to such contractual limitations as notice requirements.51

Strict tort liability imposes responsibility for defective products without proof of negligence and without proof of a contractual relationship.52 The term "strict liability" evolved, in the context of products liability, to describe the liability of the remote manufacturer for personal injury caused by his defective product.53 Strict liability in tort is substantively identical to the predecessor tort action for breach of implied warranty.54 However, the latter cause of action may be maintained against a remote manufacturer only to receive compensation for personal injuries caused by a defective product.55 The use of the term "implied warranty" has been curtailed to avoid association with contractual limitations and the subsequent frustration of compensation for personal injuries.56

Strict tort liability of manufacturers for injury-causing defective products is supported by the policy of assuring human safety.57 In addition, the cor-

51. See notes 119–26 infra and accompanying text.
57. Another public policy purpose which strict liability is thought to fulfill is the deterrence of the sale and manufacture of defective products. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

However, Dean Prosser argued that strict liability is not necessary:
One may well ask at the outset, why is not liability for negligence enough? Why do the plaintiffs want strict liability; and have they any valid claim to it?
Where 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
porate producer is often in the best position to absorb and redistribute the cost of safety. Economic loss, however, is rarely so debilitating or so overwhelming as physical impairment. Thus, the same public purpose is not served by holding manufacturers strictly liable for economic loss. Furthermore, there is little policy reason for redistributing the risk of one consumer's unfulfilled expectations among other consumers. Consequently, the policy considerations which support strict tort liability for personal injury and property loss do not warrant its expansion to direct economic loss.

Nonetheless, a consumer who is deprived of his bargain should be compensated, and often the manufacturer is the only solvent party with enough "fault" in the transaction. A consideration of the two major theories of recovery and the impact of the Iacono decision on these theories will provide insight into how a well-defined theory of enterprise liability should handle direct economic loss.

would result in recovery where negligence does not. When a negligence action is brought against a manufacturer, the plaintiff is faced with two initial tasks. One is to prove that his injury has been caused by a defect in the product. The other is to prove that the defect existed when the product left the hands of the defendant. For neither of these is strict liability of any aid to him whatever. It cannot prove causation; and it cannot trace that cause to the defendant. Once over these two hurdles, the plaintiff has a third task, to prove that the defect was there because of the defendant's negligence. This is by far the easiest of the three, and it is one in which the plaintiff almost never fails.

It is true that he has the burden of proof on the issue of negligence. It is true also that he seldom, if ever, has any direct evidence of what went on in the defendant's plant. But in every jurisdiction, he is aided by the doctrine of res ipso loquitur, or by its practical equivalent. In all jurisdictions this at least gives rise to a permissible inference of the defendant's negligence, which gets the plaintiff to the jury. And in cases against manufacturers, once the cause of the harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown.


However, this assumption has been criticized; see Comment, Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract? 114 U. PA. L. REV. 539 n.6 (1966).

59. But see Seely v. White Motor Co., 63 Cal. 2d 9, 19, 403 P.2d 145, 152, 45 Cal. Rptr. 17, 24 (1965) (dissenting opinion). Judge Peters argues in his dissent that economic loss is as overwhelming as physical debilitation.

60. See Products Liability Jurisprudence, supra note 4, at 939-40, quoting Seely v. White Motor Co., 63 Cal. 2d 9, 19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965):

"Placing the burden of physical injury on the manufacturer who can distribute it among the consuming public, rather than upon the individual to whom it may be an "overwhelming misfortune," in no way "justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers."
II. THE GENESIS OF STRICT TORT LIABILITY FOR ECONOMIC LOSS

A manufacturer's liability for product-caused personal injury to the product's consumer was traditionally based upon either of two theories: (1) the negligence of the manufacturer, or (2) a breach of a sales warranty in the contract between the parties.\(^6\) Strict liability in tort for personal injury, without negligence and without privity, eventually developed as a means of avoiding the obstacles which frustrated recovery for personal injuries under warranty and negligence theories.

Historically, the distinction between the two theories was based upon privity of contract. If the parties were in privity, an action for breach of warranty could be maintained; if privity were not present, an action in tort for negligent manufacture was appropriate. The two theories served different functions. Negligence actions afforded recovery for direct physical injury to a person or his property which resulted from a latent defect in the product.\(^6\) Consequential damages, such as direct and indirect economic loss, were not of "the character of harm contemplated by the rule which [rendered] a manufacturer liable in negligence."\(^6\) Breach of warranty theory, on the other hand, afforded recovery for damage to the product purchased and for economic loss without the necessity of proving fault.\(^6\)

There were, however, serious obstacles which precluded recovery for physical injuries caused by defective products under the negligence and breach of warranty theories. Since breach of warranty was based upon contract, recovery for personal injury might be precluded if the plaintiff was not in privity with the defendant, if the plaintiff had not relied upon the warranty, if the plaintiff had not complied with notice requirements, or if the defendant had expressly disclaimed liability for such injuries or damages as those for which the plaintiff was seeking recovery.\(^6\) Comparable obstacles faced the plaintiff in a negligence action. The plaintiff had to show that the particular defendant was responsible for the defect, that proper inspection by the defendant would have revealed the defect, and that a specific negligent act or omission caused the defect.\(^6\)

Strict tort liability theory developed as a more workable alternative to these two theories. Of great impact upon its formation was an increasingly unfavorable view toward privity in negligence actions. The development of the tort theory of breach of implied warranty for personal injury caused by

\(^{62}\) See text accompanying notes 67-79 infra.
\(^{63}\) W. PROSSER, supra note 56, at 665.
\(^{64}\) 63 AM. Jur. 2d Products Liability § 25 (1972).
\(^{65}\) See Annot., 74 A.L.R.2d 1111 (1960).
\(^{66}\) Id.
food products, without privity and without negligence, served as the basis from which strict liability grew. Subsequent inclusion of products other than food and damages for economic loss, as well as personal injury within the strict liability framework, has also been based upon the implied warranty in tort action.

A. The Debilitation of Privity

Products liability suits based upon the manufacturer's faulty design or construction were typically negligence actions. Such suits were usually initiated by a plaintiff seeking compensation for personal injury or damage to property from an accident allegedly caused by the defective product. The requirement of privity of contract in negligence actions against manufacturers derived from the holding of Winterbottom v. Wright. However, in 1842, when Winterbottom was decided, industrialization was in its infancy. Consumers generally purchased goods directly from the local manufacturer. Since that time, technological change and economies of scale have effected substantial increases in profit margins. Greater pay to a larger work force and current distribution methods have vastly expanded the concept of a market by making goods more available. Within the specialized economic system which developed, middlemen frequently intervene between the producer and the ultimate consumer. Limiting recovery to those in contractual privity with the manufacturer has become inadequate and unjust.

For example, a manufactured product purchased at retail may cause...

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68. 152 Eng. Rep. 402 (Ex. 1842). In Winterbottom, the plaintiff was an employee of a mail carrier, who had contracted with the Postmaster General to convey the mail. The Postmaster General had also contracted with the defendant to provide and maintain the mail coaches. Thus, there was no privity of contract between the plaintiff and the defendant. The plaintiff was injured when he was thrown to the ground after the coach he was driving broke down.
70. Transportation of goods by rail, air, and the interstate highway system has expanded the area a seller can reach with his products.
71. Few manufacturers deal directly with consumers. The most obvious example is the automobile industry where the consumer purchases a car from the retailer, not from the manufacturer in Detroit.
72. The doctrine of privity of contract, insofar as that doctrine immunizes a manufacturer or a remote seller from negligence liability for product-caused injuries, is no longer the law in Ohio. In 1935, the Ohio Supreme Court in Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935), extended the protection afforded by negligence per se to persons proximately injured by defective food products who were not in privity with the producer. Id. at 46, 196 N.E. at 635. By imposing liability without proof of negligent preparation, even where the injured plaintiff and the defendant-producer were not in privity, the decision in Canton Provision Co. had the effect of imposing strict liability for personal injuries upon the producers of defective foods.

Sixteen years later an Ohio common pleas court in DiVello v. Gardner Machine Co.,
harm to a member of the retail purchaser's family. Similarly, if a product is lost or conveyed as a gift, product-caused injury may be sustained by one whose identity is, prior to the accident, completely unknown to the manufacturer or the retailer. Thus, exceptions to the general requirement of privity in negligence actions are necessary to protect the general public in an industrialized economy.73

Presently, the general rule in Ohio is that a manufacturer will be held liable for his negligence where the defect causes injury to persons74 or to

46 Ohio Op. 161, 163, 102 N.E.2d 289, 292 (C.P. Cuyahoga County 1951), noted that privity, as a "general rule" of law, had been significantly debilitated by "numerous and . . . important" exceptions. Nevertheless, privity, with the noted exceptions, continued to be a doctrine of law in Ohio until 1966, when the court in Domany v. Otis Elevator Co., 369 F.2d 604 (6th Cir. 1966), cert. denied, 387 U.S. 942 (1967), rejected privity as an element of a negligence action against a remote manufacturer.

73. The first exception to the privity rule was the "inherently dangerous product" rule. In 1852, the New York Court of Appeals in Thomas v. Winchester, 6 N.Y. 397 (1852), dispensed with the privity requirement where a manufacturer was shown to have been guilty of negligence in connection with an injury-causing product which was dangerous by nature. Thereafter, the Thomas rationale was adopted in Ohio in Davis v. Guarnieri, 45 Ohio St. 470, 15 N.E. 350 (1887), and applied to a variety of products in personal injury actions including hair dye, Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938), an electric blanket, Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953), rev'd in part sub nom. Lonzrick v. Republic Steel Corp., 4 Ohio App. 152, 162 N.E. 633 (1927), a grinding wheel, DiVello v. Gardner Mach. Co., 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. Cuyahoga County 1951), and a portable grain elevator, Mobberly v. Sears, Roebuck & Co., 4 Ohio App. 2d 126, 211 N.E.2d 839 (1965). Besides encompassing a variety of products, the theory was extended to cover damage to property. Another Ohio decision noted that the "inherently dangerous product" exception to the rule of privity may be applicable to cases involving product-caused injury to the purchaser's property. Jordon v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949).

the purchaser's property. The courts, however, have shown considerable reluctance to dispense with the requirement of privity where the negligence action is for damage to the item sold, such as a suit in negligence for the cost of repairing latent defects in the product. In 1965, the Ohio Supreme Court in *Inglis v. American Motors Corp.* refused to expand negligence liability to protect against purely economic loss where there was no privity of contract. The plaintiff in *Inglis* claimed that the manufacturer had negligently inspected an automobile before it was delivered. After purchasing the automobile from the retail dealer, the plaintiff discovered that its true value was less than one-half of the purchase price. The court indicated that damages for inferior quality should be left to breach-of-warranty actions (where privity is a requirement), because such damages depend on the terms of the arms-length bargain. However, the court overcame the privity requirement by allowing recovery upon breach of the express warranty, made to the plaintiff by general advertising through mass communications media, that the automobile was trouble-free, economical, and manufactured to high standards.

In addition to using a manufacturer's advertisements to create an express warranty to the consumer, a number of other devices have been employed to hold remote manufacturers liable without privity: (1) a warranty runs with the product; (2) a retailer is the manufacturer's or the consumer's agent; (3) a retailer's cause of action is assigned to the consumer; (4) the consumer is a third-party beneficiary of the manufacturer's contract with the dealer; and (5) notice requirements and disclaimers are inapplicable to products liability actions for breach of implied warranty. In effect, these contrivances have held manufacturers liable despite the presence in the contract of limited warranties or clauses limiting remedies and liability.

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76. 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
77. The failure to properly inspect has been more successfully utilized in personal injury cases. In *Luque v. McLean*, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), the court held that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. See also *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
78. 3 Ohio St. 2d at 134, 209 N.E.2d at 584.
79. See notes 169–78 infra and accompanying text.
80. 3 Ohio St. 2d 132, 136, 209 N.E.2d 583, 585 (1965).
B. Implied Warranty

Strict tort liability, as expressed in section 402A of the Restatement (Second) of Torts, is the offspring of the implied warranty in tort.\footnote{See Restatement (Second) of Torts § 402A, comment b at 349 (1965).} Recovery under the law of warranty for personal injury caused by a remote manufacturer's defective product originated in food cases.\footnote{See generally The Fall, supra note 53.} In 1927, the Supreme Court of Mississippi developed the theory of an implied warranty running with the product to avoid the doctrine of privity.\footnote{Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). This theory is analogous to that of the title of real property running with the land.} Eventually the notion of a warranty running with the goods was dropped, and courts found an implied warranty directly from the remote manufacturer to the consumer.\footnote{See B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959); Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958); The Fall, supra note 53, at 800-05.} Because the implied warranty was imposed regardless of privity, it was construed to be a tort rather than a contract cause of action. Dean Prosser described the implied warranty in tort as follows:

[I]t has been said over and over again that this warranty—if that is the name for it—is not the old sales warranty, it is not the warranty covered by the Uniform Sales Act or the Uniform Commercial Code. It is not a warranty of the seller to the buyer at all, but it is something separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties . . . .\footnote{Prosser, Spectacular Change: Products Liability in General, 36 J. CLEV. B. ASS'N 149, 167-68 (1965).}

Deciding counter to this general theory, the Ohio Supreme Court in 1935 declared that an implied warranty cause of action sounded in contract, not in tort. The court's decision in Canton Provision Co. v. Gauder\footnote{130 Ohio St. 43, 196 N.E. 634 (1935).} had the effect of imposing strict liability upon remote manufacturers by extending the legislative protection of negligence per se to injured people who were not in contractual privity with the food producer; the Ohio legislature had accomplished what was, in effect, strict liability without relying on an implied tort warranty. Nonetheless, the action in tort for breach of implied warranty was accepted in Ohio in 1951.\footnote{Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (C.P. Cuyahoga County 1951).} By allowing an injured plaintiff to join a breach of warranty action and a negligence action against a remote manufacturer, liability without negligence and without privity for personal injuries caused by food products was established. Dean Prosser reported
that by 1962 this “new kind of warranty” had been imposed in tort in most jurisdictions.\textsuperscript{89}

Liability without negligence and without privity was expanded beyond food to include personal injuries caused by other products in 1960, when the New Jersey Supreme Court decided the landmark case of \textit{Henningsen v. Bloomfield Motors, Inc.}\textsuperscript{90} The courts of Ohio had already allowed recovery for personal injury from such articles as soap\textsuperscript{91} and a hair permanent solution.\textsuperscript{92} Thus by 1960, Ohio had expanded the implied warranty in tort to what was essentially strict liability for internal personal injuries to remote producers of articles intended for bodily uses which were external as well as internal.

C. Strict Liability for Product-Caused Injury

Strict liability in tort developed separately from the implied warranty theory, although they have converged in modern tort theory. The genesis of strict liability in tort for personal injury demonstrates the influence individuals may exert on developing legal principles. Justice Traynor’s concurring opinion in \textit{Escola v. Coca Cola Bottling Co.}\textsuperscript{93} was the first suggestion that liability for injuries or damages allegedly caused by a product could be recoverable under strict liability in tort. Dean Prosser, a close associate of Justice Traynor, adopted the strict liability theory in section 84 of his treatise on torts.\textsuperscript{94} Prosser’s argument that strict tort liability would more adequately compensate for personal injury and property damage than the “intricacies of sales law” appears in both of his classic law review articles.\textsuperscript{95} Strict liability in tort for personal injury from defective products was subsequently adopted in the \textit{Restatement (Second) of Torts}, for which Dean Prosser was the chief reporter and Chief Justice Traynor a contributor.\textsuperscript{96} Although section 402A purported to be a restatement of the law, it was reported before most jurisdictions had adopted strict tort liability.\textsuperscript{97}

\textsuperscript{89.} \textit{The Fall}, supra note 53, at 801.
\textsuperscript{90.} 82 N.J. 358, 161 A.2d 69 (1960).
\textsuperscript{91.} See Kruper v. Proctor & Gamble Co., 113 N.E. 2d 605 (Ohio App. 1953), rev’d on other grounds, 160 Ohio St. 489, 117 N.E.2d 7 (1954).
\textsuperscript{93.} 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).
\textsuperscript{94.} W. Prosser, supra note 56, at 510.
\textsuperscript{95.} \textit{The Fall}, supra note 53; \textit{The Assault}, supra note 53.
\textsuperscript{96.} \textit{Restatement (Second) of Torts} § 402A (1965). See generally Dickerson, Was Prosser’s Folly Also Traynor’s? or Should the Judge’s Monument Be Moved to a Firmer Site? 2 Hofstra L. Rev. 469 (1974).
Under section 402A, the plaintiff is relieved of the burden of proving specific acts of negligence. The plaintiff-purchaser is also protected from the defense of notice, disclaimer, and lack of privity. Strict liability, however, is not absolute liability. The plaintiff who invokes section 402A must prove that there was in fact an injury, the defect which made the product unreasonably dangerous proximately caused the injury, and the product became defective when it was in the control of the manufacturer.\textsuperscript{98} Negligent manufacture is not an element of section 402A strict liability; the determination is whether the manufacturer had control over the defective product when it became defective.\textsuperscript{99}

Section 402A of the Restatement (Second) of Torts implied a resolution to the question of whether a manufacturer's liability for defective products properly sounded in contract or tort. Prior to the Escola decision and the advent of section 402A, strict liability had generally been limited to injuries caused by dangerous animals\textsuperscript{100} and ultrahazardous activities.\textsuperscript{101} It was argued that because neither privity nor negligence were elements of the implied warranty tort, strict liability for personal injuries would have the same effect as a tort action for breach of implied warranty.\textsuperscript{102} Furthermore, the problem which prompted Chief Justice Traynor and Dean Prosser to suggest the strict liability terminology—the confusion created by burdening noncontracting parties with the contractual limitations suggested by the term "warranty"\textsuperscript{103}—would be avoided by strict tort liability.

Although the UCC presently controls the law of contractual warranty in forty-nine states,\textsuperscript{104} strict liability and the UCC appeared nearly simultaneously; Ohio adopted the UCC in 1962\textsuperscript{105} and the strict liability theory suggested by the Restatement (Second) of Torts was embraced in Greenman v. Yuba Power Products, Inc.\textsuperscript{106} in 1963. Consequently, the flexibility of the

\textsuperscript{98} See, e.g., Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W.2d 587 (1969); Walton v. Chrysler Motor Corp., 229 So. 2d 569 (Miss. 1969). Another element that the plaintiff must prove is that the product was unreasonably dangerous in its defective condition.


\textsuperscript{101} See Forster v. Rogers, 247 Pa. 54, 93 A. 26 (1915). See also Restatement of Torts §§ 519, 520 (1938).

\textsuperscript{102} The Fall, supra note 53, at 802-03.


\textsuperscript{105} OHIO REV. CODE ANN. §§ 1301.01 through 1309.50 (Page 1962).

\textsuperscript{106} In 1963, the California Supreme Court in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), became the first to expressly hold that a claimant may recover in a nonprivity personal injury case under strict tort liability. In Green-
Code provisions was not widely known when strict liability was adopted. It has been suggested that although the UCC could have handled liability for product-caused personal injuries, contract theory was precluded because of the identification of sales warranty law with the rigid standards of the Uniform Sales Act. 107

Since the Greenman decision, courts throughout the country have come to recognize that there is no substantive difference between an action in tort for breach of an implied warranty and strict liability for personal injury. 108 Thus, a remote manufacturer's strict liability for personal injuries has been established. 109

There are two persuasive arguments for the adoption of strict tort liability over contractual liability for product-caused personal injuries. First, the policies of tort law are better served by strict liability than by the implied warranty theory. Second, the UCC does not adequately compensate for personal injuries caused by defective products. 110

1. Public Policies Justify Strict Liability for Product-Caused Injuries

The public interest in human life demands the maximum protection the law can provide from dangerously defective products. Consumers are often helpless to protect themselves from sophisticated, but defective, equip-

man, the plaintiff, who was injured by a power tool purchased by his wife, brought an action against the remote manufacturer. As one of the causes of action was based on breach of warranty, the manufacturer argued that recovery should be denied, since the plaintiff had failed to comply with the notice provisions of the sales law. Id. at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699. The California Supreme Court, however, found that the plaintiff was not required to give notice since he was not a party to the contract. Id. at 61-62, 377 P.2d at 900, 27 Cal. Rptr. at 700. More importantly, the court held that the manufacturer was not only liable for breach of express warranty, but that he was also liable under strict tort liability. In upholding the strict liability theory, Chief Justice Traynor relied upon the policy of risk distribution: the public interest in human safety requires maximum protection and manufacturers are best able to distribute its cost by price adjustments. Id. at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

In addition, the implied tort warranty cause of action, which has been equated with strict liability, had been accepted in Ohio by 1958. See Markovich v. McKesson & Robbins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).


110. The adoption of strict tort liability over contractual liability may also be justified, to some extent, from a historical perspective. Warranty actions traditionally arose out of tort, not contract, as noted by the Ohio Supreme Court:

A prevalent but mistaken notion is that the term "warranty" has always carried the
Moreover, the modern retailer is no more than the conduit through whom products reach their ultimate user. The consumer receives little protection from his immediate seller, the retailer, because even if the retailer is subject to strict liability, the purchaser must prove the defect arose when the product was in the hands of the defendant. Therefore, holding a manufacturer liable without privity and without negligence may be necessary if the manufacturer is the only person against whom the plaintiff can maintain that difficult burden of proof.

Numerous other policies may also be advanced in support of strict liability: strict liability provides greater protection to the consumer than does contractual liability; a manufacturer can distribute the risk of personal injury by purchasing insurance; the manufacturer who placed the product into commerce should be responsible for the consequences; the deterrent effect of strict liability will result in increased care in the production process; proceeding directly against a remote manufacturer is less wasteful of judicial effort than pursuing a manufacturer with a series of actions. For these reasons, strict liability has been adopted to prevent the absence of implication of a contractual relationship. From a historical standpoint such a notion is without foundation. Some of the cases, and well-known and respected writers on legal subjects point out that originally the consumer or user of an article, which was represented to be in good condition and fit for use, and proved not to be, was accorded redress by an expansion of the action of trespass on the case to include deceit—a fraudulent misrepresentation—which sounds distinctly in tort. Undoubtedly, the recognition of such a right of action rested on the public policy of protecting an innocent buyer from harm rather than to insure any contractual rights.


111. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (the court noted that the average purchaser lacks the expertise to do any more than rely upon advertising claims in selecting a purchase).


113. The insurance premiums may be viewed as a legitimate cost of doing business.

114. Shapo, A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment, 60 VA. L. REV. 1109 (1974). The author suggests a representation theory of products liability. The introduction of a product into the market is a representation by the manufacturer and seller that the product is reasonably safe and adequate for the uses for which it was designed. See W. PROSSER, HANDBOOK OF THE LAW OF Torts § 97, at 651 (4th ed. 1971); Noel, Manufacturers of Products-The Drift Toward Strict Liability, 24 TENN. L. REV. 963, 1012-13 (1957).


116. A multi-action suit involves suing the immediate retailer first, who would then seek indemnification from his seller, and so on up the chain until ultimately suit is brought against the original manufacturer. See Products Liability Jurisprudence, supra note 4, at 926. As examples of this "expensive, time-consuming, and wasteful process," Dean Prosser cites Sheftman v. Balfour Housing Corp., 37 Misc. 2d 468, 234 N.Y.S.2d 791 (Sup. Ct. 1962), and Tri-City Fur Foods v. Ammerman, 7 Wis. 2d 149, 96 N.W.2d 495 (1959). W. PROSSER, supra note 114, § 97 at 651.
privity, or proof of negligent production, from shielding manufacturers from liability for defective products that cause personal injury.\textsuperscript{117}

2. Compensation for Personal Injuries under the UCC

Article 2 of the UCC is designed to assure the mutual satisfaction of the parties to a commercial contract. However, those who favor strict tort liability argue that that purpose does not effectively protect injured individuals because “several limitations imposed by the Code . . . are arbitrary when applied to products liability actions.”\textsuperscript{118} These limitations are the requirement of notice and contractual privity.\textsuperscript{119}

A purchaser who has accepted goods “must within a reasonable time after he discovers or should have discovered any breach [of contract] notify the seller of breach or be barred from any remedy.”\textsuperscript{120} The notice provision was designed to debilitate the common law rule that acceptance of a good constitutes a waiver of any right to recover on a warranty.\textsuperscript{121} In a commercial sale, the notice requirement affords the seller an opportunity to remedy


\textsuperscript{118} Products Liability Jurisprudence, supra note 4, at 925.

\textsuperscript{119} See generally Strict Tort Theory, supra note 97, at 23-39; 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, 167-80 (1972); Products Liability Jurisprudence, supra note 4, at 958-64.

Previously, disclaimers had also been used to escape liability for personal injury. Because private parties cannot be said to have bargained equally, the UCC makes disclaimers of liability for personal injury prima facie unconscionable. However, the Code does permit a manufacturer broad freedom to disclaim or limit liability for economic loss. Section 2-719 reads:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(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.

\textsuperscript{120} U.C.C. § 2-607.

\textsuperscript{121} Strict Tort Theory, supra note 97, at 28.
the defect or to replace the product; it also protects him from stale claims. Yet when a defective product causes personal injury, repair and replacement are not viable remedies. Furthermore, the comparatively short statute of limitations in tort for personal injury lessens the danger of delayed claims. Thus, notice is not properly applicable to personal injury actions and failure to notify should not bar compensation.

In the modern marketplace the buyer of a product deals directly with a retailer, or a similar intermediary dealership. Under the Uniform Sales Act, the requirement of contractual privity in a products liability action prevented purchasers from being compensated by the remote manufacturer for product-caused injuries. Section 2-318 of the UCC, as adopted by the Ohio General Assembly, dispenses with the requirement of privity where natural persons who are family members or guests of the purchaser have been injured. This narrow rejection of privity would, however, frustrate the policy of preventing overwhelming financial and physical impairment to those who are outside the class of people protected from personal injury by section 2-318. Consequently, Restatement (Second) of Torts section 402A, which speaks in terms of protecting ultimate users as well as purchasers, is the preferred position for recovery of personal injury.

Some courts, moreover, have expanded both the class of persons protected by strict liability and the class of manufacturers who can be held strictly liable. Foreseeable users of a defective product may successfully maintain an action against a remote manufacturer for personal injuries. A number of cases have expanded the protection expressed in section 402A to injured individuals who are not users of the product, including bystanders. Retailers, as well as manufacturers, have been held strictly liable.

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122. The tort statute of limitations in Ohio is two years; OHIO REV. CODE ANN. § 2305.10 (Page 1954). The UCC statute of limitations is four years; OHIO REV. CODE ANN. § 1302.98 (Page 1962).
125. UCC section 2-318, as adopted in Ohio, reads:
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. A seller may not exclude or limit the operation of this section.
126. Furthermore, UCC section 1-103 states:
Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud . . . or other validating or invalidating cause shall supplement its provisions.
Therefore, privity of contract is not totally removed from the sales law. Section 2-318 represents the only exception to the otherwise intact doctrine.
liable for personal injuries. Apart from the class of persons coming within the ambit of strict liability, the nature of recovery has expanded as well. The most recent expansion of strict liability has occurred where the damage claimed is economic loss, rather than personal injury.

III. THE ALTERNATIVE THEORIES FOR RECOVERY OF ECONOMIC LOSS

It has been shown that compensation of personal injuries caused by a defective product has been recovered from remote manufacturers under four theories: negligence, strict liability, express warranty, and implied warranty. However, only the last three of these theories may also be applied where the only measure of damage is direct economic loss.

A. Recovery of Direct Economic Loss under Strict Liability

In Santor v. A & M Karagheusian, Inc., the Supreme Court of New Jersey extended section 402A strict tort liability beyond personal injury actions by allowing the purchaser of a defective carpet to recover for direct economic loss from a remote manufacturer. The plaintiff-purchaser in Santor had been induced by the defendant-manufacturer's advertisements to purchase the defendant's carpet from an intermediate retailer. Defects in the carpeting caused unusual lines of wear to develop, a condition which became more apparent with use and considerably lessened the aesthetic value of the product. After eight months the plaintiff attempted to return
the carpeting to the retailer, but that dealer had discontinued his New Jersey business and had moved out of the state. Consequently, the purchaser initiated a cause of action against the remote manufacturer for breach of implied warranty to recover the purchase price of the carpet.

The trial court awarded the plaintiff recovery from the manufacturer for loss of the value of the carpet on the basis of a breach of an implied warranty of merchantability. The Supreme Court of New Jersey, however, held the manufacturer strictly liable in tort for the loss of the bargain.

The New Jersey Supreme Court thus rejected the conclusion of the appellate division that recovery on the implied tort warranty of a remote manufacturer was limited by the rule of Henningsen v. Bloomfield Motors, Inc., to defective products which were "dangerous to life or limb." Instead, the court found that the presence of the product on the market constituted a representation by the manufacturer that the product was suitable for its intended use. The Santor decision thus represented another judicial inroad on the doctrine of privity beyond accident-caused personal and property damage to actions for breach of implied warranty in tort where the defect had caused direct economic loss. Although recovery was structured under an implied warranty theory, the New Jersey Supreme Court recognized that awarding direct economic loss for breach of an implied tort warranty, without privity and without proof of negligent manufacture, was essentially strict tort liability for economic loss. The court in effect held that a remote purchaser could recover direct economic loss under strict tort theory.

B. Recovery of Direct Economic Loss under an Express Warranty Theory

When an express warranty has been breached, direct economic loss has consistently been recoverable. Recovery of economic loss for breach of an
express warranty entails holding a manufacturer to his representations. The difficulty of defining the term "defective" is avoided if an express warranty is made because the manufacturer's representation becomes the standard against which the product he actually delivers is judged. Since the standard of care is strictly limited by the agreement, decisions awarding recovery of economic loss on an express warranty do not expand a manufacturer's duty by imposing a general duty to prevent all defects which would cause economic loss on the bargain. Therefore, the troublesome economic and social ramifications of holding a manufacturer strictly liable do not arise if an express contractual warranty, as opposed to an Inglis-type express advertisement, can be asserted. In addition, the class of persons to whom the manufacturer is liable is not subject to expansion as it has been under strict liability because the class of people protected by the warranty is generally limited by the sales agreement.

The opinion of the California Supreme Court in *Seely v. White Motor Co.* provides a thoughtful consideration of whether economic loss damage should be recoverable under the warranty provisions of the UCC, or whether strict liability is more appropriate. In *Seely* the plaintiff purchased a truck which had been manufactured by the defendant. The plaintiff and defendant were not in privity; the purchaser had entered into a sales contract with an intermediate retailer. After eleven months of unsuccessful attempts by the defendant to correct a bounce in the front end of the truck, the plaintiff stopped making payments and the truck was subsequently repossessed. The plaintiff sued the manufacturer for breach of an express warranty in the purchase agreement that the truck was "free from defects in material and workmanship under normal use and service." The recovery sought by the plaintiff included the amount of the purchase price which had been paid to the dealer, or direct economic loss as measured by "out of pocket" expense, and the loss of profits which occurred because the plaintiff was unable to use the truck in his hauling business, or indirect economic loss. The plaintiff also sought to recover under a strict tort theory for

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147. See generally Products Liability Jurisprudence, supra note 4, at 930-35.
149. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).
150. Id. at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19. The express warranty upon which the plaintiff recovered overcame any problems of privity. Id. at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
151. Id. at 12, 403 P.2d at 147, 45 Cal. Rptr. at 19.
152. Id. at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.
153. Id. at 12-13, 403 P.2d at 147-48, 45 Cal. Rptr. at 19-20.
damage to the truck resulting from an accident allegedly caused by the defect.\textsuperscript{154}

The California Supreme Court's decision permitted recovery of the payments on the purchase price as well as the loss of profits because of the breach of the express warranty.\textsuperscript{155} However, recovery was disallowed for the damage to the truck because the cause of the accident was not sufficiently proven.\textsuperscript{156}

Significantly, Chief Justice Traynor, an originator and proponent of the strict tort cause of action and the author of the earlier \textit{Greenman} opinion adopting the concept of strict liability for personal injury,\textsuperscript{157} wrote the \textit{Seely} decision. In \textit{Seely}, Justice Traynor stated that holding a manufacturer strictly liable for economic losses, such as the lost profits in \textit{Seely}, would expose him to damages of "unknown and unlimited scope."\textsuperscript{158} Because of the difficulty of defining a standard of quality to which the manufacturer should be held strictly liable, UCC warranty representations would provide the most workable measure of enterprise liability for economic loss.\textsuperscript{159} Furthermore, the court held that strict tort is not available for recovery of economic loss in California.

Justice Traynor stated that the policy of risk distribution\textsuperscript{160} does not support holding a remote manufacturer strictly liable for economic losses. Because economic loss is not as debilitating as physical impairment, Justice Traynor concluded that the cost of insuring against pecuniary damage should not be passed on to the consumers in the form of higher prices.\textsuperscript{161} Furthermore, economic loss arises in a commercial setting, and warranty law was originally and specially developed to meet the "needs of commercial transactions."\textsuperscript{162} The decision concludes, therefore, that economic loss such as loss of profits or loss on the bargain is properly governed by the UCC—the embodiment of legislative thinking on commercial transactions—rather than by strict liability theory in tort.

\textbf{C. Recovery of Direct Economic Loss in Tort for Breach of an Implied Warranty}

Compensation for economic loss has not been readily awarded in tort...
if the warranty must be inferred.163 The few courts that have permitted recovery of economic loss for breach of an implied warranty have relied upon the fact that the defective product threatened personal injury or damage to the purchaser's other property as well as economic loss. This distinction arose because recovery in tort had traditionally been limited to actual physical damage to persons or property. The decision of the Ohio court in *Iacono* appears to have placed Ohio among the small minority of jurisdictions that have allowed recovery of economic loss in tort for breach of an implied warranty regardless of whether the defective product caused, or even threatened to cause, personal injury or damage to other property.164

The Ohio Supreme Court had previously recognized that the breach of an implied warranty is a tort. In *Rogers v. Toni Home Permanent Co.*,165 the court reasoned that it was a mistake to construe a warranty only according to contractual limitations because, historically, an action for breach of warranty was in tort.166 Since that decision, courts throughout the country have held that strict tort liability is synonymous with a tort action for breach of implied warranty,167 but most of these decisions entail personal injury or property damage. Although the implied tort warranty has been construed as substantively identical to strict liability in personal injury actions, the policy purposes of strict liability do not support its extension to direct economic loss. The UCC warranty provisions were designed to control commercial transactions such as the one in *Iacono*. Because of the court's imprecise treatment of the damage issue, either strict liability or the UCC may define the *Iacono* tort for "breach of implied warranty." It is necessary to consider the cases relied upon by the Ohio Supreme Court, as well as later decisions, to determine the actual substantive limitations of the *Iacono* tort.

163. See notes 82-92 supra and accompanying text.
165. 167 Ohio St. 244, 147 N.E.2d 612 (1958).
166. Id. at 247–48, 147 N.E.2d at 614–15.
IV. THE OHIO PRIVILITY/NONPRIVILITY APPROACH TO PRODUCTS LIABILITY SUITS

The tort/UCC dichotomy is based upon the presence or absence of privility in Ohio, while other states have relegated the question of privility to a secondary role. Under the New Jersey approach, the doctrine of strict liability controls products liability suits for personal injury as well as economic loss; privility is not considered. Other states follow the California courts, by applying the UCC and its expansion of privility under section 2-318. However, in Ohio if privility is present, the court applies the UCC. Although the court would turn to a tort theory of recovery if there were no privility, the content of the tort warranty is derived from the UCC. As a result the Ohio cause of action for economic loss—implied warranty theory—represents a hybrid of the two major theories that have afforded recovery in other jurisdictions.

A products liability suit involving economic loss may be used to illustrate the three theories. Assume a consumer purchases an automobile from a retail dealership without any representations having been made by the manufacturer. The valves in the automobile engine soon prove defective causing poor performance and considerable oil loss. The consumer then sues the manufacturer for breach of an implied warranty in tort which he claims arose because the mere presence of the auto in the public market indicates it would suitably provide transportation.

In this hypothetical situation, those jurisdictions following the New Jersey/Santor approach would permit recovery. The court would accept the implied tort warranty and, assuming the defect arose when the engine was in the hands of the remote manufacturer and the purchaser can prove the economic loss was caused by the defect, hold the remote manufacturer strictly liable.

A state following the California/Seely theory would apply the UCC. Since there were no express contractual warranties made to the consumer by the manufacturer and since an implied tort warranty is not sufficient grounds upon which to afford recovery under the UCC, the California-type court would determine whether an implied warranty of fitness for intended use or merchantability had arisen. Because neither the plaintiff-buyer nor any member of his immediate family had suffered personal injury, section 2-318 would not afford recovery from the remote manufacturer. 168

An Ohio court would first look to privility. Finding that the purchaser and manufacturer were not in privility, the court would, assuming causation, structure compensation under a tort theory for breach of an implied war-

168. This result assumes that Alternative A of Code section 2-318, the Alternative adopted in Ohio, has been adopted by the legislature of the hypothetical state.
ranty. On the other hand, if the purchaser and manufacturer had been in privity the UCC would be applied.

This tort/UCC dichotomy began with the Inglis decision. The court in Inglis denied recovery of economic loss in tort, but relied heavily upon Santor to sustain the plaintiff’s action for breach of an express sales warranty. First, the court cited Santor as authority for the notion that the absence of privity may not logically be used to deny recovery of economic loss damage on an implied warranty since privity does not have the same determinative effect on similar actions for personal injury:

There is no doubt that the great mass of warranty cases imposing liability on the manufacturer regardless of lack of privity were connected with personal injuries to the ultimate consumer. . . . But we see no just cause for recognition of the existence of an implied warranty of merchantability and a right to recovery for breach thereof regardless of lack of privity of the claimant in the one case and the exclusion of recovery in the other simply because loss of value of the article sold is the only damage resulting from the breach.

The quotation was used in Santor to describe the action for breach of an implied warranty which arose in tort to protect injured purchasers from the remote manufacturer’s defense of lack of privity. However, the Inglis decision relied on the excerpt from Santor to support recovery from a remote manufacturer for breach of an express warranty. Prior to Inglis, recovery on an express warranty had not been granted in tort in Ohio without privity. The development of the Ohio implied warranty in tort had not been paralleled by the development of an express tort warranty. Liability on an express warranty had been limited to contract actions where privity, although relaxed somewhat by UCC section 2–318, remained a requirement. Therefore, the Inglis court inappropriately applied the Santor decision.

In addition, the quotation from Santor is inconsistent with Prosser’s statement, also cited by the Inglis court, that pecuniary loss is not recoverable in tort.

The one kind of damage not included [in tort] is pecuniary loss. In other words, loss of the benefit of the bargain. If somebody sells an

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169. 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
170. Id. at 138–40, 209 N.E.2d at 587.
171. Id. at 139, 209 N.E.2d at 587 (citation omitted).
173. One exception, however, was that an express warranty was created by advertising. See Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).
175. Id. § 1301.03.
automobile to a dealer and the dealer sells it to the plaintiff, and it
turns out that it is just no good as an automobile, so that having
paid let us say $3,000 for the car, the plaintiff has received $1500
worth of car and is out of pocket on a $1500 loss, that kind of
pecuniary loss is still, so far as I can see, limited to contracts be-
tween the parties, and the usual rule that for negligence there is
no liability for mere pecuniary loss of a bargain, that is apparently
carried over into this new tort [implied warranty].

The Santor quotation indicates that direct economic loss may be recovered
in tort for breach of an implied warranty. Nonetheless, Prosser's remarks
cited in the Inglis opinion indicate that the UCC controls direct economic
loss. Furthermore, neither quotation is consistent with the Inglis holding.

The Inglis decision left purchasers in Ohio without a good theory of re-
cover for defective products. The holding suggested, by negative inference,
that a plaintiff "who bought the same make of car and suffered the
same damage as a result of the same defect as the car buyer in Inglis would
be denied recovery if he, in fact, had not read a national advertisement or
other written material . . . about the car." Similarly, if a neighbor of the
plaintiff in Toni had bought the same kit and suffered an identical injury
from an identical defect, the neighbor would be denied recovery if she had
not relied upon an advertisement or other written material. Whether the
plaintiff saw and relied upon an advertisement was not a just theory of en-
terprise liability.

In Lonzrick v. Republic Steel Corp., the Ohio Supreme Court realized
the potential injustice of basing compensation for personal injuries from a
remote manufacturer upon an advertisement. In Lonzrick, defective steel
roof joists, manufactured by the defendant, injured an employee of a sub-
contractor when they collapsed. The parties to the sales agreement were
the manufacturer and the general contractor of the construction pro-
ject. The subcontractor's relationship to the manufacturer of the defective
steel joists was comparable to the plaintiff-purchaser's relationship to the
remote manufacturer in Inglis, Santor, Seely, and Iacono: the plaintiff-
purchasers were one step removed from the manufacturer and were in priv-
ity with the intermediary with whom the manufacturer had dealt. However,
the injured individual who recovered from the remote manufacturer in

176. 3 Ohio St. 2d at 140, 209 N.E.2d at 588.
177. Strict Tort Theory, supra note 97, at 12-13 n.25.
179. Id.
180. Id. at 229, 218 N.E.2d at 187.
181. There was no contractual relationship between the plaintiff and defendant in Lonzrick.
Id. at 230, 218 N.E.2d at 188.
Lonzrick was yet another step removed from the steel producer; he was the employee of the subcontractor. By allowing the subcontractor's employee to recover, the Ohio Supreme Court appeared to have rejected the doctrine of privity.

The court's effort in Lonzrick to structure a remedy to compensate an individual who had suffered personal injury, regardless of privity or negligent manufacture, suggests the adoption of strict liability in Ohio. The court relied, in part, upon the risk of personal injury created by the defective steel in defining the cause of action under implied tort warranty. Although the decision did not specifically use the term "strict tort," the Lonzrick opinion cited section 402A of the Restatement (Second) of Torts to support its position. Furthermore, the burden of proof that the court applied in Lonzrick is identical to that required by section 402A. Dean Prosser was sufficiently persuaded by the similarities between the Lonzrick tort and 402A strict liability to classify Lonzrick among the decisions that have adopted the strict liability theory.

In Lonzrick the supreme court noted that the breach of a warranty contained in a sales contract is controlled by the UCC. The warranty in tort, on the other hand, arises from the nonstatutory duty of a manufacturer to protect people from injury caused by a defective product. Although the Ohio Supreme Court distinguished the implied tort warranty from UCC contractual warranties the UCC warranties of merchantability and fitness for intended use were used by the court to define the implied tort warranty breached in Lonzrick:

This is an action in tort for breach of an implied warranty. The warranty in this case is the manufacturer's representation . . . that [the products] were of good and merchantable quality, fit and safe for their ordinary intended use.

Although this decision indicated an awareness that the UCC defines contract warranties as well as tort warranties, the court stated that the failure to distinguish between the two types of warranties has caused confusion in the law. The court reasoned that in a "mass-distribution industrial system . . . unjust technical decisions based upon outmoded and irrelevant concepts of privity result when the sales law concept of privity is applied to all war-
ranty actions for personal injury.” Significantly, the decision does not mention the other provisions of the sales law which, in addition to privity, have been condemned in other jurisdictions as equally frustrating to recovery for personal injury. This narrow reasoning suggests that the Ohio tort for breach of an implied warranty can only arise in the absence of privity; if privity is present a UCC theory is maintainable, but if privity is not present, the cause of action is based upon an implied tort warranty. This privity/nonprivity approach would also explain why an express warranty (traditionally a contract action) afforded recovery to a purchaser from a remote manufacturer in Inglis and Toni.

The Ohio Supreme Court’s subsequent decision in United States Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co. confirmed the importance of privity to products liability suits in Ohio. In United States Fidelity the plaintiff-insurer sought recovery as subrogee from the defendant-manufacturer of a concrete truck in the amount of the claim paid by the insurer to the insured-lessee of the truck. The “property damage” occurred when a concrete mixer fell off the truck that the insured had leased. The lessor company had purchased the truck from the defendant. The plaintiff claimed compensation under the UCC for breach of the defendant’s implied warranty of merchantability. Because no contractual relationship existed between the plaintiff and defendant, the supreme court held that the UCC was not applicable. The justices reasoned that in the absence of privity the plaintiff’s only cause of action was for breach of implied warranty in tort.

The court also held that the two-year statute of limitations for tort actions was the appropriate measure of the timeliness of this plaintiff’s cause of action, rather than the four-year UCC limitation. Consequently, the cause of action was dismissed because it had occurred more than two years prior to the filing of the plaintiff’s petition.

190. Id.
191. The provisions to which this sentence refers are the notice, disclaimer, and limitation of liability sections of the UCC.
192. The express warranties in Inglis and Toni are unusual in that they were not made directly to the purchaser nor was reliance upon the warranty created by the advertisement required. See notes 76-79 supra.
193. 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970).
195. 21 Ohio St. 2d at 245-46, 257 N.E.2d at 382.
196. Id. at 245, 257 N.E.2d at 381.
197. Id. at 251, 257 N.E.2d at 384.
198. Id.
200. Id. § 1302.98.
201. 21 Ohio St. 2d at 252, 257 N.E.2d at 384-85.
After United States Fidelity, the holdings of Rogers v. Toni Home Permanent Co., 202 Inglis v. American Motors Corp., 203 and Lonzrick v. Republic Steel Corp., 204 all of which were relied upon by the court in United States Fidelity, can be more readily understood. The division of enterprise liability for defective products into contract or tort causes of action depending upon privity explains why the implied warranty in Lonzrick sounded in tort even though the warranty was defined by the UCC. 205 This privity/nonprivity approach also provides insight into why the express warranty theory of Rogers and Inglis, a theory which has traditionally sounded in contract, afforded recovery for personal injury and economic loss from a remote manufacturer. 206

In Iacono v. Anderson Concrete Corp. 207 the Ohio Supreme Court unwittingly 208 extended the privity/nonprivity approach in warranty actions to direct economic loss. Although the supreme court did not articulate the privity/nonprivity dichotomy, the court did cite Lonzrick, United States Fidelity, and Inglis—the cases from which the interpretation has been extrapolated—with approval. 209 According to this interpretation, the Iacono cause of action is in tort for breach of an implied warranty because no privity

202. 167 Ohio St. 2d 244, 147 N.E.2d 612 (1958).
203. 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).
204. 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).
205. See notes 186–88 supra and accompanying text.
206. See notes 169–78 supra and accompanying text.
207. 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975).
208. The most viable explanation of the Iacono approach may be the court’s misconstruction of the Ohio Rules of Civil Procedure. The essence of the Ohio Rules of Civil Procedure is fact pleading—the plaintiff must plead all the salient facts. The court’s function is to determine if the facts support an award, not whether the “complaint contains language” addressed to the correct theory of law. 42 Ohio St. 2d at 91, 326 N.E.2d at 269–70. Had the supreme court construed the facts, rather than the language of the complaint, it could have granted Iacono recovery on the breach of an express UCC warranty. The confusion of whether the UCC or strict tort applies to loss-of-the-bargain damages would have been avoided.

The Iacono court could have construed the “language of the pleadings” and still awarded recovery under the UCC. The language of the complaint suggested the UCC:

2. Plaintiff further says defendants expressly and impliedly warranted that such work would be performed in a workmanlike manner and that such finished driveway would be fit for its customary and normal use; that plaintiff relied upon said warranties in contracting with said defendants.
3. Plaintiff further says that said materials and work performed by the defendants was defective and unfit for its intended use.
Id. at 90–91, 326 N.E.2d at 269 (emphasis added).
209. Id. at 93, 326 N.E.2d at 270–71.

The Ohio Supreme Court viewed the Inglis cause of action as the economic loss counterpart of the Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (breach of advertisement representations for personal injury). The Inglis opinion relied upon Judge Zimmerman’s Toni opinion to debilitate the doctrine of privity; privity was not important in Toni because of the “modern methods of doing business.” 3 Ohio St. 2d 132, 137–38, 209 N.E.2d 583, 586–87 (1965).

The unanimity of the privity/nonprivity interpretation among Ohio Supreme Court cases is
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existed between Iacono and the Anderson Concrete Corporation. If a contractual relationship had existed between the plaintiff-purchaser and the defendant-manufacturer, the UCC would have provided the appropriate theoretical basis of the cause of action for direct economic loss.

The Ohio Supreme Court in Iacono, Lonzrick, and United States Fidelity defines the tort "warranty" upon which an individual may recover from a remote manufacturer as the implicit representation of merchantability, or fitness for "ordinary" purposes, and the representation of fitness for "intended use." Thus, in all three cases the implied-in-law UCC warranties of merchantability and fitness for intended use appear to define the tort warranty which was breached. Consequently, the Ohio tort for breach of implied warranty is not section 402A strict tort liability because, as comment m of that section insists, strict tort liability is not defined by the provisions of the UCC. Furthermore, the privity/nonprivity interpretation precludes the possibility that a manufacturer is strictly liable for defective products in Ohio because privity is not an element of strict tort liability. Those jurisdictions which have accepted the section 402A approach have held the seller of a defective product liable even in the presence of a contractual relationship.

Strict tort liability entails fiscal responsibility for defective products, without privity and without consideration of negligent manufacture. While other jurisdictions equate the tort action for breach of an implied warranty with strict liability for personal injury, this is not done in Ohio. The implied tort warranty of Lonzrick and Iacono is distinct from strict liability. Because privity is the determinative factor, manufacturers cannot be strictly liable for personal injuries and direct economic loss in Ohio. Therefore, Lonzrick is misplaced among the decisions which have adopted strict tort liability for personal injuries.

The difficulties inherent in the privity/nonprivity approach are demonstrated by an Ohio court of appeals' interpretation of Lonzrick, Inglis, and United States Fidelity. In Avenell v. Westinghouse Electric Corp. the court of appeals declared that: (1) an implied warranty in tort could not be relied upon to afford recovery of economic loss damages, and (2) sophisticated further suggested by the fact that Justice Herbert, who concurred in Lonzrick and United States Fidelity, wrote the Inglis and Iacono opinions.

It is ironic that Ohio has retained the privity doctrine to determine a seller's liability for personal injuries and economic loss. Ohio had been a leader in the repudiation of privity in instances when defective foods or products intended for intimate bodily use caused injury. See note 73 supra.

210. Id. at 88, 326 N.E.2d at 268.
211. RESTATEMENT (SECOND) OF TORTS § 402A, comment m at 356 (1965).
213. See note 185 supra and accompanying text.
215. Id. at 156, 158-59, 324 N.E.2d at 588-89.
cated corporations which dealt at arm's length in the manufacture and sale of specialized equipment with which both parties were familiar could not avail themselves of the implied tort warranty theory.\(^{216}\)

The subrogees of an electric utility company filed suit against the manufacturer of an allegedly defective turbine generator seeking recovery of consequential economic losses.\(^{217}\) The terms of the contract between the purchaser and the manufacturer excluded claims for breach of implied warranty, limited remedies to repair and replacement, and expressly excluded liability for consequential damages.\(^{218}\) The appellate court denied recovery under the UCC, since it found that the language of the disclaimer and limitation of liability clauses was valid under section 2-316 of the Code.\(^{219}\) Because a tort action is not subject to contractual disclaimers and limitations of liability, dictum in the Avenell decision indicated that the court was empowered to allow recovery for breach of an implied warranty.\(^{220}\) The court, however, refused to grant recovery and instead held that economic loss is not recoverable in a tort action for breach of implied warranty.\(^{221}\)

The court summarily concluded that in Ohio the tort action for breach of an implied warranty is actually strict liability.\(^{222}\) To support its conclusion the court relied solely upon a law review article which was published soon after Lonzrick, but before the important United States Fidelity decision.\(^{223}\) The court in Avenell then denied the recovery of economic loss under the Ohio implied tort warranty. As explanation, the court cited Justice Traynor's dictum in Greenman that only personal injury may be compensated under strict tort theory and a quotation from Prosser that economic loss is most appropriately recovered under the UCC.\(^{224}\) The court warned that expansion of the implied warranty cause of action to economic loss would render the UCC useless and impinge upon the freedom to contract.\(^{225}\)

Although the Avenell opinion appeared to equate the Ohio implied tort warranty with strict liability, the court admitted that "implied warranty in tort is ordinarily applied where the purchaser is not in privity with the sel-

\(^{216}\) Id. at 158-59, 324 N.E.2d at 589.
\(^{217}\) Id. at 152, 324 N.E.2d at 585.
\(^{218}\) Id. at 159-53, 324 N.E.2d at 585-86.
\(^{219}\) Id. at 155, 324 N.E.2d at 587. The court's discussion of the UCC, not relied upon in the discussion which follows in the text of this Note, is not entirely correct. First, the court's definition of "conspicuous" is inaccurate, and second, the determination of whether the language in the contract was conspicuous is an issue of law, not fact.
\(^{220}\) Id. at 156, 324 N.E.2d at 587.
\(^{221}\) Id. at 156, 324 N.E.2d at 588.
\(^{222}\) Id.
\(^{224}\) 41 Ohio App. 2d at 157, 324 N.E.2d at 588.
\(^{225}\) Id. at 157-58, 324 N.E.2d at 588.
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This supports the theory that the Ohio tort warranty is not strict tort liability in which privity would play no part. The opinion also contains dictum that strict liability is not available to "sophisticated" consumers who bargain at arm's length for specialized equipment which is "familiar to both buyer and seller." 227 The limitation of implied warranty theory to knowledgeable "buyers and sellers" is essentially a denial of strict tort theory in cases where privity is present, because buyers and sellers are, by definition, in contractual privity.

It is unclear from the Avenell opinion whether recovery on an implied warranty is only denied sophisticated parties where the loss is consequential economic damage, or whether personal injury claimed by a knowledgeable individual from another sophisticated party is also precluded from recovery. If Avenell excludes sophisticated purchasers from implied warranty actions for recoupment of personal injury, the alternative would be recovery for personal injuries under sales law. That result, however, would not be consistent with the strict tort reasoning of Greenman which the Avenell court adopted. 228

In addition, the Avenell case contradicts the holding of Iacono. The court in Avenell expressly refused to grant recovery of consequential economic loss in tort,229 but in Iacono recovery for direct economic loss was granted in tort.230 The contradiction could be explained by noting the difference between the consequential economic loss sought in Avenell and the direct economic loss sought in Iacono. However, because Iacono231 and Avenell232 agree that property damage is recoverable in tort, a more viable explanation is that the Ohio Supreme Court simply mislabeled the damage in Iacono.233 The Iacono court did not intend to rule on the recoverability of direct economic loss in tort; it did not even address economic loss. Nonetheless, this inconsistency and the retention of the privity issue by the court in Iacono have important ramifications for products liability law in Ohio.

V. THE IMPACT OF THE IACONO DECISION

Because the loss suffered by Iacono was direct economic loss, not "property damage," the Iacono decision does not definitively decide whether

226. Id. at 158, 324 N.E.2d at 589 (emphasis original).
227. Id. at 159, 324 N.E.2d at 589.
228. Id. at 157, 324 N.E.2d at 588.
229. Id.
230. 42 Ohio St. 2d 88, 93, 326 N.E.2d 267, 271.
231. Id.
232. 41 Ohio App. 2d at 158–59, 324 N.E.2d at 589.
233. The court of appeals in Avenell states that injury to "persons or property" is recoverable in tort. But in a footnote, the court notes that "[t]he weight of authority from other jurisdictions is to the effect that consequential damages may not be recovered under a strict tort liability
economic loss in Ohio will be exclusively recoverable on tort or under the UCC. Yet, since both purchasers and manufacturers desire to accurately predict their legal rights and obligations, the theory which controls economic loss in Ohio is of particular interest. However, by failing to clearly embrace either of the alternative theories of direct economic loss, *Iacono* has precluded an accurate assessment by Ohio manufacturers and purchasers of their rights and obligations.234

The *Inglis* opinion is not helpful because that cause of action was defined by contractual limitations235 and it was only in dictum that the decision indicated that recovery of economic loss in tort should be prohibited.236 Furthermore, recovery of economic loss on an express warranty theory as in *Inglis* should be distinguished from the *Iacono* tort because under the Ohio court of appeals' reasoning in *Avenell v. Westinghouse Electric Corp.*237 an action for breach of express warranty is controlled by the UCC.

Economic loss is recoverable under article 2 of the UCC.238 Dealers of goods who come within the meaning of the term “merchants” in section 2–104239 sell their wares subject to two implied-in-law warranties: the section 2–314 implied warranty of merchantability,240 and the section 2–315 implied warranty of fitness for a particular purpose.241 Unless the sale is excluded or modified under section 2–316,242 every merchant sells his products with a guarantee of merchantability. The dealer thereby warrants that the item will “pass without objection in the trade” and that it is “fit for the ordinary purposes for which such goods are used.”243 The implied warranty of fitness for a particular purpose arises “[w]here 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.”244 Both warranties may be excluded or modified, but section 2–316 requires disclaimers of warranties to be con-

236. *Id.* at 140–41, 209 N.E.2d at 588.
239. *Id.* § 1302.01.
240. *Id.* § 1302.27.
241. *Id.* § 1302.28.
242. *Id.* § 1302.29.
243. *Id.* § 1302.27.
244. *Id.* § 1302.28.
spicuously written into the sales agreement. Section 2-714 describes the remedies which are available to redress a breach of warranty. Damages which are "incidental" and "consequential" to the breach, as these terms are defined by section 2-715, are recoverable; a buyer's incidental and consequential damages are economic losses.

Because the warranties of merchantability and fitness for a particular purpose arise between the direct parties to the sale, the "buyer" and the "seller," privity appears to be a requirement. However, the privity doctrine has been relaxed by section 2-318. Ohio has adopted Alternative A of section 2-318 which displaces privity if the remote party is a family member or household guest of the immediate purchaser of the defective product. This section would not afford recovery where, as in *Iacono*, an intermediary dealer separates the manufacturer-defendant and the purchaser-plaintiff. However, the scheme of the Code, as expressed by comment 3 to section 2-318, is to allow case law to define the class of people, beyond the immediate purchaser, who may claim the benefit of a sales warranty. Accordingly, the Ohio Supreme Court was empowered by the UCC to grant *Iacono* recovery for direct economic loss from the remote manufacturer, even though he had purchased the defective concrete from a retailer. The plaintiff-purchaser could have been made the beneficiary of the implied and express sales warranties made pursuant to the contract between the manufacturer and the retailer.

In *Iacono*, the plaintiff-purchaser could also have recovered as a third party beneficiary to the sales warranty of fitness for particular use or merchantability on the basis that the Anderson Concrete Corporation had warranted the concrete to Padovan, but it had breached the warranty by selling a product which was not fit for its intended use. Under this theory, the courts would have the power to determine who the beneficiaries of the sales warranties would be, but the beneficiary's rights would be subject to the contractual limitations of the Code, including the requirement of notice and the power to limit or disclaim liability. Although contractual limita-

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245. *Id.* § 1302.88.
246. *Id.* § 1302.89.
247. *Id.* § 1302.31.
248. The purpose of Alternative A of section 2-318 is described as follows in comment 3:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. (emphasis added).
250. 42 Ohio St. 2d at 92, 326 N.E.2d at 270.
251. See note 248 supra and accompanying text.
tions would frustrate recovery for personal injuries, they are deemed necessary in the commercial setting for which the Code was designed to preserve the freedom to contract.

In view of the fact that the UCC controls commercial transactions in Ohio, direct economic loss which arises in a commercial context is properly controlled by the Code. Accordingly, the Ohio Supreme Court would have been bound by the UCC had they recognized that the loss suffered was economic loss rather than property damage. Although it can only be conjectured what the court would have done had it recognized the damage as economic loss, the description in Iacono of the standard which must be met to prove a product is defective persuasively suggests the UCC.

In Lonzrick, United States Fidelity, and Iacono a “defective product” was defined in terms of the UCC provisions on merchantability and fitness for its intended use. In Lonzrick, the Ohio Supreme Court stated that the remote manufacturer “impliedly warranted that [the steel joists] were fit for the ordinary purposes for which such steel roof joists are used.”252 The court defined “defective” in terms of the UCC warranty of merchantability: “Those joists were defective because they were not fit for the ordinary purposes for which such joists are used.”253 The opinion also specifically cited the relevant UCC section of the Ohio Revised Code in defining “merchantability.”254 The court in Iacono cited Lonzrick with approval in defining the Ohio tort for breach of implied warranty.255 Therefore, the UCC definition was used to define “defective” in the Iacono tort for economic loss, just as it was in the Lonzrick tort for personal injury.

The Lonzrick decision has been construed as upholding strict tort liability.256 If Iacono is merely an extension of the Lonzrick tort theory to economic loss, then the Ohio court may have adopted strict liability for economic loss as well as personal injury. In view of the court’s approval of the reasoning in Santor v. A & M Karageusian, Inc.,257 this strict tort interpretation is credible. However, the effect of having two different, but credible, enterprise liability theories for direct economic loss, rather than isolating a single theory, is confusing because of the differences between

252. 6 Ohio St. 2d at 230, 218 N.E.2d at 187.
253. Id.
254. Id. This definition may be found in OHIO REV. CODE ANN. § 1302.27 (Page 1962).
255. 42 Ohio St. 2d at 91, 326 N.E.2d at 269-70.
257. 42 Ohio St. 2d at 93, 326 N.E.2d at 270.
the UCC and strict liability defenses and statutes of limitation. If the *United States Fidelity/Lonzrick* privity interpretation does define enterprise liability in Ohio, the UCC would control economic losses among parties in privity; strict tort, alternatively labeled implied tort warranty, would control liability for economic loss if privity were not present.

A. Defenses

A products liability action for breach of an implied tort warranty is the one "warranty" action where contractual limitations have not been applied.\(^{259}\) Because this warranty sounds in tort rather than in contract, lack of privity, disclaimers, and the failure to satisfy notice requirements are not valid defenses.\(^{260}\) However, the UCC warranty guarantees are subject to contractual defenses that may apply to the Ohio hybrid implied warranty action.

Disclaimers, which previously frustrated compensation for defective-product-caused injury under implied warranty theory, are no longer so formidable. Section 2-719 of the UCC allows a manufacturer to limit his liability for economic loss.\(^{261}\) However, section 2-316 requires that the contract must fairly apprise the purchaser of the risk of limited or disclaimed liability.\(^{262}\) This section also requires that disclaimers be conspicuously written.\(^{263}\) Moreover, the purchaser is protected by section 2-302 which prohibits unconscionable disclaimer or limitation clauses.\(^{264}\) Such statutory flexibility is characteristic of the UCC notice and privity provisions.

UCC section 2-607 (3) (a) states that "[w]here a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."\(^{265}\) Comment 4 of this section indicates that the reasonable time standard should be loosely construed because the notice requirement "is designed to defeat commercial bad faith, not deprive a good faith consumer of his remedy."\(^{266}\) Section 2-318 extends the benefit of express or implied warranty beyond the immediate buyer, to remedy personal injuries suffered by foreseeable third parties as a result of the breach of warranty.\(^{267}\) In addition, comment 3 notes that the provision was intended to allow a wide de-


\(^{260}\) *The Fall*, supra note 53, at 829–32.


\(^{262}\) Id. § 1302.29.

\(^{263}\) Id.

\(^{264}\) Id. § 1302.15.

\(^{265}\) Id. § 1302.65 (C) (1).

\(^{266}\) Id. comment 3.

\(^{267}\) Id. § 1302.31.
gree of judicial latitude to determine the scope of the class which could bring suit for breach under section 2-318.

However, manufacturers could not rely upon these provisions of the UCC if strict liability were extended to economic loss in Ohio. The flexibility of the UCC compares favorably to that afforded by strict tort liability. In view of the power granted courts under the UCC to prevent these defenses from denying a good faith purchaser's compensation, there is no reason for Ohio to look beyond its statutory sales law. Although a plaintiff's chance of recovery under the Code is comparable to his chance under strict tort theory, the UCC accomplishes this result without leaving the defendant defenseless. Notice, disclaimer, and privity provide stronger defenses than the available tort defenses—misuse of the product and assumption of risk.

B. Statute of Limitations

The Ohio Supreme Court has not discussed whether future Ohio cases for direct economic loss should apply the Code's four-year statute of limitations or the two-year tort statute of limitations. In United States Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co., the Ohio Supreme Court applied the two-year statute of limitations to determine a remote seller's liability for property damage caused by a defective product. The tort statute was used since the absence of privity caused the court to classify the plaintiff's action as a tort for breach of implied warranty. The decision in United States Fidelity implies that the two-year tort limitation could also be applied to the Iacono-type implied tort warranty for economic loss, but the New Jersey Supreme Court's decision in Santor...
applied the Code's four-year statute of limitations to the tort action for breach of an implied warranty.\textsuperscript{275} The same court in \textit{Rosenau v. New Brunswick},\textsuperscript{276} however, held that strict liability actions for personal injury are subject to the two-year tort statute of limitations. The Santor opinion, when considered in conjunction with \textit{Rosenau}, suggests that the Code's statute of limitations applies to actions for economic loss on a tort warranty as well as on a UCC warranty, but that actions for personal injury sound exclusively in tort. However, since the damage claimed in \textit{United States Fidelity} was personal injury, \textit{United States Fidelity} is not conclusive on whether a two- or four-year limit applies to the Ohio implied tort warranty for recovery of economic loss.\textsuperscript{277}

Because the Iacono opinion mistakenly addressed property damage—a traditional area for recoupment in tort—rather than economic loss, the decision should not be construed as having decided in favor of the two-year tort statute for economic loss recovery. The apparent New Jersey distinction between the tort limitation on personal injury cases and the UCC limitation on economic loss actions may also apply in Ohio.

\textsuperscript{275} “Since plaintiff brought suit more than three years after his cause of action accrued, 44 N.J. 52, 56-57, 207 A.2d 305, 307, presumably the four-year statute of limitations for contracts, N.J. STAT. ANN. § 12A:2-725 (1962), was applied. Although the two-year statute of limitations, N.J. STAT. ANN. § 2A:14-2 (1952), governs actions in strict liability for personal injuries, the four-year statute of limitations apparently governs all actions for purely economic losses, irrespective of the theory of recovery.” Comment, \textit{The Vexing Problem of the Purely Economic Loss in Products Liability: An Injury in Search of a Remedy}, 4 SETON HALL L. REV. 145, 157 n.49 (1972).

\textsuperscript{276} 51 N.J. 130, 238 A.2d 169 (1968) (strict liability tort action accrues two-year statute commences to run when an injury occurs, not when the product is delivered).

\textsuperscript{277} It has been suggested that in Ohio, despite the \textit{United States Fidelity} holding that the two-year statute of limitations is applicable to the implied tort warranty, the manufacturer-seller who originally placed the product into the market will be potentially liable for four years. The irony of the \textit{United States Fidelity} decision is that it overlooked the fact that a plaintiff need not necessarily sue the remote manufacturer-seller who originally placed the defective goods in the stream of commerce. Instead, that plaintiff could typically sue a party in the distributive marketing chain closer to him, such as the retailer, who handled the defective goods. After the retailer pays the judgment to the injured plaintiff, the retailer could then sue to recover his loss over from the wholesaler. In turn, the wholesaler could then sue to recover over from the manufacturer whose original sale of the defective goods actually caused the problem. In this last action between the wholesaler and manufacturer, the suit will be between parties in privity with each other. As such, “contract” will be the appropriate pigeonhole for this suit and the 4-year UCC statute of limitations will apply. Thus,
Another important statute of limitations issue is the date from which the absolute time requirements begin to run. UCC section 2-725 (1) states that the four-year limit begins when the cause of action accrues.\textsuperscript{278} Under the Code, a "cause of action accrues when a breach of warranty occurs, regardless of the aggrieved party's lack of knowledge of the breach."\textsuperscript{279} Recovery for direct economic loss is based on the premise that the loss arose because the product was defectively constructed by the defendant.\textsuperscript{280} Thus, an action under UCC theory would accrue from the date the warranty was breached by the sale of a defective product. However, a two-year tort limit would not begin to run until the defect was manifested.\textsuperscript{281} In an action for personal injury, the application of the two-year statute of limitations from the date of injury rather than the four-year limit from the date of sale is more just; the injury-causing accident may not occur within the first four years that the injured individual owns the defective product. Where the

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despite United States Fidelity's adoption of a 2-year statute of limitations for "tort" cases, the manufacturer-seller who originally placed the defective goods in the stream of commerce typically will, as a result of this series of lawsuits, continue to be responsible for them for the full 4 years contemplated by section 2-725 of the UCC. It, therefore, makes little sense that that same seller should not be equally liable for the same full 4 years in a direct action by the remote (not in privity) plaintiff who actually suffered the injury. Shanker, Pigeonholes, Privity, and Strict Products Liability, 21 CASE W. RES. L. REV. 772, 776-77 (1970) (footnotes omitted).

Thus, the remote manufacturer is liable to his immediate purchaser in the distributive chain for four years. Therefore, allowing the remote purchaser to sue the manufacturer directly would only serve to reduce the number of suits required before recovery is exacted from the party responsible for the defective product. For example, Iacono could have sued the Padovan Construction Company for loss of the bargain, and Padovan could have sued the Anderson Concrete Corporation. Each plaintiff would in turn have recovered under the UCC implied warranty sections. However, the same result could have been accomplished in Iacono under the UCC if the court had construed the section 2-318 privity requirement pursuant to comment 3 to section 2-318. Although the Iacono decision accomplished the same judicial efficiency, it did so in tort, thereby sacrificing the certainty and uniformity provided by the UCC.

\textsuperscript{278} U.C.C. § 2-725 (1) (OHIO REV. CODE ANN. § 1302.98 (A) (Page 1962)).
\textsuperscript{279} Id. § 2-725 (2) (OHIO REV. CODE ANN. § 1302.98 (B) (Page 1962)).
\textsuperscript{280} See generally Traynor, The Ways and Means of Defective Products and Strict Liability, 32 TENN. L. REV. 363 (1965). Although the initial determination of whether the loss arose because of the defect in the product is identical under both the strict tort and the UCC theories, the impact of that threshold determination differs under each theory. For example, in Seely v. White Motor Co., 6 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), the manufacturer warranted that the truck it had manufactured would be "free from defects in material and workmanship under normal use and service." Id. at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20. Thus White Motor was held responsible for the loss that "proximately resulted" (U.C.C. § 2-715 (2)(b)) from the breach of warranty. White would not have been liable if it had not warranted the truck. However, under strict tort theory, once the defective character of the product is established, the manufacturer is liable regardless of whether or not it had actually agreed that the truck would perform as the plaintiff expected. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
\textsuperscript{281} See OHIO REV. CODE ANN. § 2305.10 (Page 1954): "An action for . . . injuring personal property shall be brought within two years after the cause thereof arose."
injury is loss of the bargain or out-of-pocket expense, there is no such objection to applying the Code limit. A lapse of time greater than four years from the purchase date would justify the assumption that the product had not been defectively manufactured.\textsuperscript{282} Also, the burden on the manufacturer would be vastly increased if the tort limit were applied. Even if risk distribution is effected through higher prices, it is questionable whether consumers should have to absorb the cost of damages for loss of the bargain of a ten-year-old product from an action filed within two years of that item’s demise.\textsuperscript{283}

VI. CONCLUSION

The confusion and incongruities which have arisen as a result of the \textit{Iacono} opinion evidence the inappropriateness of overlooking a state statute to construct a remedy. The remote purchaser’s recovery in \textit{Iacono} was not expressly granted according to strict tort liability, nor was it specifically allowed under UCC theory. The Ohio Supreme Court’s decision represents a third theory of recovery of economic loss. The Ohio theory is based upon privity, but the theory is a hybrid of strict tort and UCC warranty provisions. The Ohio Supreme Court decisions which preceded \textit{Iacono} indicate that in the absence of privity an Ohio case for economic loss damages would be decided as if it were a strict tort, but in the presence of privity the UCC would control.

Injury from loss of the bargain arises from an arms-length transaction. The UCC embodies a legislative judgment that transactions which occur in such a commercial context should be decided according to the Code. Furthermore, liability for loss of the bargain is limited to the purchase price of the item. The policy reasons for strict tort liability for personal injury, including risk distribution, are not served by the Ohio tort. A remote manufacturer should not be held liable for having induced consumer expectations since his ability to forecast defects is no greater than that of the purchaser.


\textsuperscript{283} In \textit{Seely}, discussed in text accompanying notes 146–62 supra, the California Supreme Court refused to apply the policy rationale for strict liability in personal injury cases to cases in which the defective product caused economic loss:

The rationale of [strict liability for personal injury] . . . rests . . . on the proposition that “[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” That rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers.

63 Cal. 2d 9, 19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).
The UCC is preferable to the confused tort approach, but it is not ideal. The private consumer should not be held to the same standards as those who truly bargain at arms length. A consumer can and should pick his seller and the warranty terms of his agreement carefully, but his bargaining power is limited. A private individual cannot bargain equally with a large corporate entity for sophisticated equipment of which he has little or no knowledge.

The present UCC standards for loss of the bargain in Ohio should not be disregarded in products liability suits. The legislature should adopt an alternative construction of section 2–318 to broaden the group of individuals who may recover from a remote manufacturer. Such an approach to privity has been particularly attractive in personal injury cases, where the requirement of privity has most blatantly frustrated compensation.

The liability of manufacturers and retailers for defective product-caused damages represents an added business cost. In order to accurately assess operating costs, an enterprise must know what levels of the distribution chain are liable for defective products and to whom these levels are liable. Legal rights and obligations which are sufficiently specific to afford predictability are essential in a dynamic business community. Accordingly, liability for economic loss, even if it is uniformly defined by the UCC, is preferable to the case-by-case, jurisdiction-by-jurisdiction approach of the presently developing theory of strict tort liability.

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