MANUFACTURER'S RESPONSIBILITY FOR DEFECTIVE PRODUCTS: CONTINUING CONTROVERSY OVER THE LAW TO BE APPLIED

The 1962 decision of the California Supreme Court in *Greenman v. Yuba Power Prods., Inc.*,[1] holding a manufacturer absolutely liable in tort[2] for personal injuries resulting from a defective product, marked a turning point in the arduous task of articulating a workable theory of consumer protection. At about the same time as the court's *Greenman* decision, the California Legislature was rendering, in part, its own products liability decision by enacting the new Uniform Commercial Code, itself a significant redefinition of the rights and responsibilities of all the parties in the distributive chain of consumer products. Paradoxically, the appearance of two refined theories of products liability, while fostering a solution to many of the lingering problems in this area of the law, appears to have raised new problems in the choice of law to be applied. Either theory, tort or the code, may potentially be interpreted to eliminate the necessity of reliance upon the other, and the extent to which tort or the Code ought to be utilized in products liability litigation has been the subject of considerable recent discussion in the literature of the field.[3]

Most products liability cases, including *Greenman*, have arisen within the context of personal injury claims, and one might expect that *Greenman*, in conjunction with section 402A of the new *Restatement (Second)*,

1 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

2 The phrase "strict liability in tort" has become the accepted characterization of the *Greenman v. Yuba* rationale of products liability; however, because liability under warranty law is also "strict" in the sense that the reasonableness of the manufacturer's conduct is not an issue, this Comment will use the term "absolute liability in tort" to describe the *Greenman* theory, and to emphasize the fact that, under *Greenman*, no reference is made by a court to any defenses which the manufacturer might have if the case were tried under a sales law approach.

3 See, *e.g.*, Freedman, *Six Problem Areas of Products Liability Under the Uniform Commercial Code*, 42 CHI.-KENT L. REV. 163 (1965); Kapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communications Barriers*, 17 W. RES. L. REV. 5 (1965); Speidel, *Virginia's "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). The principal cases discussed in this Comment, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) and Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), are also discussed in Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966) and in the following student notes: 79 HARV. L. REV. 1315 (1966); 17 MERCER L. REV. 316 (1965); 44 TEXAS L. REV. 578 (1966); 43 U. DET. L.J. 274 (1965); 114 U. PA. L. REV. 539 (1966).

Torts,[4] will continue to be a most pervasive doctrine in those cases.[5] Of particular interest, therefore, is the extent to which absolute liability in tort will supersede the Uniform Commercial Code in an area traditionally governed by commercial law; that is, where the disappointed buyer complains not of injury to his person, but to his pocketbook. Two of the leading jurisdictions in terms of consumer protection have recently considered the availability of tort law as a remedy for economic loss and have come to opposite conclusions: New Jersey, in *Santor v. A & M Karagheusian, Inc.*,[6] concluded that the *Greenman* doctrine of absolute liability in tort would allow recovery of economic loss absent privity of contract or any sales law warranty; California, on the other hand, in *Seely v. White Motor Co.*,[7] affirmed liability on the part of a manufacturer for breach of an express warranty, but used the case as an opportunity to announce that absolute liability in tort was unavailable as a device for the recovery of economic loss.

The apparent schism between these two jurisdictions promises to be one of considerable debate as other states address themselves to the problem; additionally, the cases represent the first judicial attempts to

[4] § 402A—Special Liability of Seller of Product for Physical Harm to User or Consumer.
(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 relationship with the seller. . . .

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

[5] *Greenman v. Yuba Power Prods., Inc.* has become a central thesis of recovery as other states have reconsidered their own products liability law. See, *e.g.*, Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963); Hardman v. Helene Curtiss Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965); DiPangrazio v. Salamonsen, 64 Wash. 2d 720, 393 P.2d 936 (1964); *cf.* Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965); Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964); Morrow v. Caloric Appliance Co., 372 S.W.2d 41 (Mo. Sup. Ct. 1963); Price v. Gatlin, 405 P.2d 501 (Ore. Sup. Ct. 1965).

[6] 44 N.J. 52, 207 A.2d 305 (1965).

[7] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

deal with the question of whether tort or the Code governs recovery in a given products liability case,[8] and as such provide a useful framework within which to consider whether there is a continuing need for absolute liability in tort. The purpose of this Comment is to examine the *Santor* and *Seely* decisions from two points of view: First, to determine what practical consequences for consumer and manufacturer flow from judicial reliance upon each theory; second, assuming that products liability law ought to reflect a rational system of loss allocation, to determine which theory affords a more equitable distribution of loss. Necessarily, this inquiry begins with a consideration of the problem of recovery for economic loss and the solutions offered by the New Jersey and California courts.

I

PRODUCTS LIABILITY AND ECONOMIC LOSS

The question central to both the *Santor* and *Seely* decisions is whether absolute liability in tort is available as a vehicle for the recovery of economic loss in a products liability case where no personal injury or property damage occurs. Within the context of this discussion, the term economic loss refers only to the loss of bargain damages sustained by a buyer of a product which proves to be defective. It is the diminution in economic value of a defective product, when compared with a similar but undefective product, which the buyer seeks to recover, either by praying for restitution of the amount of the purchase price in excess of the market value of the product, or, in the case of the commercial consumer, by claiming expectation damages due to the product's inability to perform properly in a profit-making endeavor.

Although earlier product liability decisions have permitted the recovery of economic loss,[9] *Santor* and *Seely* are the first significant economic loss opinions rendered after the *Greenman* decision suggested that

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[8] Virginia is one of the few states which has made a clear choice in favor of utilizing the Uniform Commercial Code to decide all product liability cases, the legislature having passed an "anti-privity" statute in place of U.C.C. § 2-318. See Speidel, *supra* note 3.

[9] *E.g.*, Tremeroli v. Austin Trailer Equip. Co., 102 Cal. App. 2d 464, 227 P.2d 923 (1951); Continental Copper & Steel Indus. v. E. C. "Red" Cornelius, Inc., 104 So. 2d 40 (Fla. App. 1958); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). However, all of these cases were decided at a time when most courts were still developing the notion of consumer recovery against manufacturers generally. Since *Greenman* effectively put an end to the question of recovery on warranty for personal injuries, a re-examination of the economic loss cases is in order to see whether the *Greenman* doctrine has equal validity in this area. The *Spence* opinion, for example, is a fine argument against the notion that privity of contract is a prerequisite to recovery in every case involving a defective product, but it spends virtually no time considering whether or not the arguments against privity in personal injury cases are equally valid when applied to economic loss cases.

liability for defective products was imposed by tort rather than warranty law. Thus the two decisions consider the scope of the *Greenman* thesis; does it encompass recovery for any harm proximately caused by a defective product? Since the opinions represent recent developments in the larger historical progression of products liability, it is necessary first to examine this progression in each of the two jurisdictions before turning to the cases themselves.

A. Historical Development

The law of products liability during the last fifty years has been characterized by a growing judicial awareness of the necessity of articulating an adequate rationale of consumer protection to avoid the limitation of *MacPherson v. Buick Motor Co.*,[10] which predicated manufacturer's liability to a non-privity buyer upon negligence. In an era of a complex, highly specialized industrial society, proof of negligence imposes a burden which exceeds the resources of many plaintiffs.[11]

New Jersey is typical of those states which chose the warranty remedy as an alternative to the *MacPherson* negligence rule. The warranty concept, appearing first as an amorphous notion of "public policy" in the early food cases,[12] and later, by analogy, in other areas,[13] was gradually refined to encompass the notion that a seller undertook an obligation to furnish goods of a certain minimum quality. This obligation, particularly in non-food products cases, was frequently conceptualized as an obligation arising out of the contract of sale rather than as an obligation arising from the introduction of the goods into commerce; thus the full development of warranty as a system of consumer protection was often circumscribed by limitations drawn from the traditional law of sales—privity, notice, waiver, or disclaimer.[14] The warranty concept did not remain static; liability in food cases had long been absolute and inroads

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[10] 217 N.Y. 382, 111 N.E. 1050 (1916).

[11] Prosser has suggested that there are few cases in which the negligence of the manufacturer cannot be proven. However, he was writing in 1960, on the eve of strict liability in tort, when broad application of *res ipsa loquitur* virtually assured a plaintiff victory once the jury was permitted to draw the inference of negligence. Prosser, *Assault on the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114-15 (1960). This article covers in detail the entire judicial process of circumventing the *MacPherson* rule. See also, James, *Products Liability*, 34 TEXAS L. REV. 44 (1955); Keeton, *Products Liability—Liability Without Fault and the Requirement of Privity*, 41 TEXAS L. REV. 855 (1963); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[12] The list of such cases is endless; Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942) remains the most clearly articulated decision. See generally, PROSSER, TORTS 672-76 (3d ed. 1964).

[13] See cases collected in PROSSER, *op. cit. supra* note 12, at 676-78.

[14] See, *e.g.*, Sears, Roebuck & Co. v Marhenke, 121 F.2d 598 (9th Cir. 1941); Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952).

were first made in other areas by analogizing the products involved to food.[15] These analogies merely served to underscore a growing judicial awareness that food and drink enjoyed no particular monopoly among products which, if defective, would be dangerous to health; thus the culmination of the warranty theory was the notable New Jersey decision in *Henningsen v. Bloomfield Motors, Inc.*,[16] a case which came close to imposing absolute liability. The court dispensed with any requirement of privity between Chrysler Corporation and the injured consumer and refused to distinguish in terms of liability between a fly in a beverage bottle and a defective steering mechanism. Nevertheless the court expressed a certain hesitancy to divorce warranty from sales law, since it struck down a standard industry disclaimer clause on the basis of a lack of free bargain;[17] arguably this suggests that a disclaimer under less adhesive circumstances might be held to limit liability.[18]

California, on the other hand, dealt with the *MacPherson* limitation in a different manner. While the courts developed some warranty law,[19] products liability was not cast exclusively as a question of sales law; rather, equal attention was given to alleviating the inherent difficulties in the law of negligence. The result was a broad judicial application of *res ipsa loquitur* principles to products liability litigation;[20] indeed, the first espousal of the concept of absolute liability in tort appeared in Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co., Inc.*,[21] which the court's majority decided by applying *res ipsa loquitur*. Thereafter the California debate centered almost exclusively around whether proof of negligence, albeit enhanced by *res ipsa*, ought to remain a prerequisite to recovery.[22] Thus strict liability for defect-caused injuries arrived in the California case of *Greenman v. Yuba Power Prods., Inc.*[23]

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15 See PROSSER, *op. cit. supra* note 12, at 676-77.

16 32 N.J. 358, 161 A.2d 69 (1960).

17 See generally, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1942).

18 See Dusenburg, *The Manufacturer's Last Stand: The Disclaimer*, 20 BUS. LAW. 171 (1964); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

19 *E.g.*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1960); Klein v. Dutchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

20 See, *e.g.*, Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 203 P.2d 522 (1949); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944).

21 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944) (concurring opinion).

22 Good accounts of this gradual shift of judicial empbasis are found in Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 201-06 (1965); and Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 SO. CAL. L. REV. 30 (1964).

23 See also, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), which, on facts very similar to *MacPherson*, held both manufacturer

as absolute liability in tort, not as an offshoot of the law of sales. This result was described by one commentator as follows:

> It seems clear that the Supreme Court, instead of fretting any further with qualifications, exceptions, special-circumstances rules, and similar creatures of the law merchant, simply decided to rid the warranty action of impedimentia, retaining, thus clarified, the already strict liability for marketing defective products.[24]

The appearance of the *Greenman* theory of absolute liability in tort coincided with the enactment of the Uniform Commercial Code in California. Division Two of the Uniform Commercial Code codifies much of what might be termed the enlightened warranty approach by specifying the circumstances wherein express and implied warranties arise,[25] introducing flexibility into the notice requirement,[26] requiring that disclaimers follow a prescribed pattern,[27] abrogating the requirement of privity of contract,[28] and establishing some outer limits to consensuality by circumscribing the parties' freedom to limit consequential damages.[29] Nevertheless the Code remains essentially a sales law approach to the problem of recovery for injuries caused by defective products and continues to allow the parties, within limits, to shape the terms of their own bargain.

The basic difference, therefore, between products liability recovery under the *Greenman* doctrine, as opposed to recovery under the Uniform Commercial Code is that the former requires only proof of causation, while the latter approach necessitates obviating whatever defenses the seller or manufacturer has available under the Code as a result of the particular character of the sales transaction. Since both the warranty approach and the doctrine of absolute liability were developed in personal injury cases, the question before the New Jersey and California courts in the *Santor* and *Seely* cases was whether the manufacturer or seller had any sales law defenses available when the buyer sought only recovery of economic loss.

B. Two Solutions

1. Absolute Liability in Tort—Santor v. A & M Karagheusian, Inc.[30]

In February of 1965 the New Jersey Supreme Court summarily destroyed any notion that the concept of absolute liability in tort would be

and dealer absolutely liable in tort for injuries sustained as a result of a defective braking system in a new automobile.

[24] Lascher, *supra* note 22, at 50.

[25] UNIFORM COMMERCIAL CODE §§ 2-313 to 2-315.

[26] UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[27] UNIFORM COMMERCIAL CODE § 2-316.

[28] UNIFORM COMMERCIAL CODE § 2-318. This section, however, has not been enacted in California. See note 70 *infra*.

[29] UNIFORM COMMERCIAL CODE § 2-719.

[30] 44 N.J. 52, 207 A.2d 305 (1965).

limited to accident type injuries by holding a carpet manufacturer liable to a consumer for the amount by which the purchase price of a defective carpet exceeded its actual market value. The manufacturer admitted that the flaw in the weaving was due to a defect in the manufacturing process but, when plaintiff offered no proof of negligence or misrepresentation, nor showed the existence of contractual privity or any U.C.C. warranty, the produced attempted to distinguish the *Henningsen*[31] decision by arguing that the requirement of privity or warranty was abrogated only in those cases where a defective product caused personal injury. The court prefaced its rejection of the manufacturer's argument by substituting the *Greenman* rationale for that used in *Henningsen.* The majority noted that while there was very little difference in result between the two decisions, *Greenman* more convincingly articulated the correct foundation of a manufacturer's responsibility for defective products.[32] The court then proceeded to apply the *Greenman* theory one step beyond its facts by holding the manufacturer absolutely liable for the economic loss occasioned by the defective product,[33] reasoning that there was no rational basis for distinguishing between personal injury and economic loss. In attempting to articulate a theory to match its holding, the court, relying in part upon *Goldberg v. Kollsman Instruments Corp.*[34] and *Randy Knitwear, Inc. v. American Cyanamid Co.*,[35] created virtually out of whole cloth a theory of enterprise liability which went beyond any previously offered: When a manufacturer offers his goods for sale he undertakes an absolute obligation to furnish goods which not only are safe, but also are suitable for the intended use of the consumer. This result was said to follow from the *Greenman* case, since the same considerations which lead to recovery in a personal injury action are present when the claim is for economic loss; apparently these same considerations are the realities of the relationship between consumer and manufacturer, in which the former has neither adequate knowledge nor sufficient opportunity to determine if the goods

31 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

32 This was explicitly noted by the court in an opinion delivered a short time after *Santor:* "We noted [in *Santor*] that the manufacturer's responsibility to the ultimate consumer presents an ever growing problem which is properly being dealt with 'step by step' and approved, in lieu of warranty terminology, the strict liability in tort terminology voiced in *Greenman* . . . ." Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

33 44 N.J. at 69, 207 A.2d at 314.

34 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963) which held an aircraft manufacturer liable for the loss of plaintiff's freight due to an air freighter crash. The case is probably better known as an instance where a court refused to extend liability to the manufacturer whose defective component part allegedly precipitated the crash. *Contra,* Suvada v. White Motor Co., 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964). For a criticism of, among other things, the *Goldberg* case, see Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1080-84 (1965).

35 11 N.Y.2d 25, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962).

are defective.[36] In effect the court created an exact parallel in tort to the protection which the law of sales[37] provides, by expediently substituting the manufacturer for the dealer. However, the Uniform Commercial Code describes the circumstances under which implied warranties arise in terms of the behavior of buyer and seller, while the *Santor* opinion imposes the obligation whenever the goods are put on the market.

Limited to the specific fact situation involved, the *Santor* opinion ought not to lead even the most ardent defender of *caveat emptor* to mutter about "absurd and outrageous consequences,"[38] since the case dealt with the most difficult area in which to give any credence to a manufacturer's plea for a limit to his responsibility. The carpet maker furnished to an ordinary householder a rug which was rather clearly unmerchantable; had the buyer bought low-priced carpet for use in a heavily-trafficked area such as a hotel lobby or a theatre aisle and the carpet failed to do the job, quite different problems of balancing the expectations of manufacturer and consumer would arise.

The theory of enterprise liability posited by the *Santor* opinion does not really rest on an analysis that the goods were clearly unmerchantable, rather it takes the position that a manufacturer is absolutely liable for economic losses caused by defective products. The California court, at least, seemed to be of the opinion that *Santor*, if applied, would have allowed recovery in the *Seely* situation, where expectation damages were sought.[39]

Having extended the *Greenman* theory of absolute liability to cover all damages caused by defective products, the New Jersey opinion required only the stamp of approval by *Greenman's* proponents in order to become the definitive opinion in products liability cases. Unfortunately,

36 See Cowan, *supra* note 34, at 1086-87: "This policy [of giving the consumer more protection] tries to equalize the position of injured consumers vis-a-vis the mass producers and advertisers. To put the matter bluntly, a large proportion of mass products are consciously made as inferior as the traffic will bear and are advertised by conscious misrepresentation as far superior to their known quality. The combination of low quality production and high-quality lying makes it impossible for those using the products of mass manufacture to distinguish good merchandise from bad without the services of a general testing laboratory."

37 § 2-314: Implied Warranty of Merchantability; Usage of Trade. (1) Unless excluded or modified (sec. 2-316) a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

§ 2-315: Implied Warranty; Fituess for Particular Purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [2-316] an implied warranty that the goods shall be fit for such purpose.

38 Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

39 Seely v. White Motor Co., 63 Cal. 2d 9, 17, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965).

four months later,[40] the California Supreme Court pulled the rug out from under the *Santor* decision.

2. Sales Law Reaffirmed—Seely v. White Motor Co.[41]

In *Seely* the court was confronted with the claim of a buyer of a heavy-duty truck which had developed an occupational disease known as "galloping."[42] After eleven months of unsuccessful attempts by the dealer and manufacturer's representatives to cure the condition, plaintiff refused to perform further on his conditional sales contract, whereupon the truck was repossessed and resold to another trucker who experienced no difficulty in utilizing the rig. Alleging that the "galloping" condition was the result of defective manufacture, the buyer sought to recover his purchase price paid and lost profits during the period; the claim was neither for

[40] *Santor* was decided on February 17, 1965; *Seely* on June 23, 1965.

[41] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[42] The facts, as they appear in counsels' briefs and the Supreme Court's opinion were as follows: Seely was a small, independent trucker apparently engaged primarily in hauling sand and gravel, who purchased a new, heavy-duty diesel truck manufactured by defendant White Motor Co. from an independent truck dealer. Seely made a down payment and financed the balance with the usual conditional sales contract, and received the standard automotive warranty directly from White: "The White Motor Co. hereby warrants each new motor vehicle sold by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good at its factory any part or parts thereof . . . ." [63 Cal. 2d at 13, 403 P.2d at 148, 45 Cal. Rptr. at 20.]

Soon after taking delivery plaintiff returned to the dealer complaining that the truck "galloped;" the dealer and White's service representatives spent the next eleven months trying without success to alleviate the condition. During the period the truck also overturned as a result of this same condition, the plaintiff claimed. After eleven months plaintiff, having paid some $11,000 toward a total price of $22,000 refused to pay further. The truck was repossessed and sold to another operator who experienced no difficulty with it. In his suit, plaintiff sought refund of his purchase price, cost of repairs due to the accident, and lost profits due to his inability to make "normal" use of the truck.

The defect alleged—galloping—is the trucker's vernacular for a condition of severe bouncing and shimmying of the truck; while it can occur as a result of defects in the component parts themselves, the more usual cause is defective design. Surprisingly a heavy duty diesel "tractor," *i.e.*, one designed to pull a semi-trailer, is a rather delicately balanced piece of equipment. Because the tractor generally supports about half the weight of the trailer, the distribution of this weight over the truck frame is crucial so that, for example, the capacity of the front or rear axle is not exceeded. Poor weight distribution is usually the cause of galloping and, since almost every major component part of the truck bears some relationship to proper weight distribution, the cause of the galloping is not easily isolated or rectified. As a result the following steps were taken by White in an attempt to remedy the condition existing in Seely's vehicle: Replacement of front springs and replacement of driveline (five times each), alteration of rear springs, replacement of front shock absorbers, reinforcement of frame, replacement of clutch brake, reinforcement of existing crossmembers and installation of an additional crossmember, replacement of clutch pilot bearing, replacement of two auxiliary transmissions, installation of new front wheel bearings, re-alignment of front end (six times), re-alignment of truck and trailer, and relocation of fifth wheel (trailer hitch device).

personal injury nor property damage,[43] but only for economic loss resulting from the inability of the vehicle to perform properly in the buyer's enterprise. Therefore, the court had an opportunity to follow New Jersey's lead in *Santor*; instead, while affirming liability on the basis of an express warranty,[44] the majority opinion, written by Chief Justice Traynor, rejected any notion that absolute liability in tort would be available to redress economic loss.

Although the opinion suggests that in a normal commercial transaction there may be elements of financial strength and bargaining power which are not present when the ordinary consumer seeks redress for personal injuries, the court reached its conclusion primarily by interpreting *Greenman* to stand for the proposition that:

> The cost of an injury and the loss of time and health may be an overwhelming misfortune . . . and a needless one, for the risk of [personal] injury can be insured by the manufacturer and distributed among the public as a part of the cost of doing business.[45]

Implicit in this interpretation of *Greenman* is the notion that absolute liability in tort was not designed to supersede the law of sales and the U.C.C., but was only to apply in personal injury cases where sales law was felt to be inadequate as a means of consumer protection.[46] Thus Justice Traynor, like Professor Kessler,[47] takes the position that the adequacy of sales law controls the use of tort law, since the need to resort to tort law depends upon the extent to which sales law does or does

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[43] Seely also sought an accounting for the cost of repairs made to the vehicle after an accident allegedly resulting from the defect. This count was dismissed by the supreme court, which upheld the trial court's finding that no causal connection between defect and accident had been proven. 63 Cal. 2d at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24.

[44] It was a relatively simple matter to find a breach of an express warranty because White had failed even to carry out its limited promise to make good the defect. The award encompassed both a return of the portion of the price paid plus lost profits, less the reasonable rental value of the truck during the period, or about $20,000. This award has been criticized, however, as failing to take into account the limited character of the warranty made by White, in which the agreement to replace defective parts was made in lieu of all other warranties. See Comment, 114 U. PA. L. REV. 539, 546 n.44 (1966).

[45] 63 Cal. 2d at 18-19, 405 P.2d at 151, 45 Cal. Rptr. at 23. This interpretation of *Greenman* would leave the *Santor* decision denuded of any support, since *Goldberg v. Kollsman* involved an accident involving property damage, while *Randy Knitwear* is probably best explained in terms of an express warranty arising from advertising claims, similar to Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118 (1932).

[46] See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[47] Kessler, *The Protection of the Consumer under Modern Sales Law; Part 1, A Comparative Study*, 74 YALE L.J. 262 (1964). Kessler argues that implied warranties of merchantability and fitness are adequate, in most circumstances, to afford the buyer adequate protection for commercial loss. See also RESTATEMENT (SECOND), TORTS § 402(A); UNIFORM COMMERCIAL CODE § 2-607, comment 5.

not afford protection to a disappointed buyer. The majority's reluctance to employ the theory of absolute liability in tort was based upon a refusal to underwrite the notion that when a manufacturer markets a product he thereafter assumes an absolute obligation that the goods will be suitable for any use in which the consumer chooses to employ them. In effect, this is a recognition that where, in Code terms, the claim is for breach of an implied warranty of fitness for a particular purpose, some knowledge on the part of the manufacturer of the buyer's intended use ought to be a prerequisite to liability.[48] The court seemed most concerned with the

[48] Communication between buyer, seller, and manufacturer play no small role in determining whether or not a product is being supplied which will meet the particular economic needs of the commercial consumer. For example, in a typical *Seely* situation of the purchase of a heavy-duty diesel truck, most manufacturers offer dozens of different combinations of vehicle wheelbase, engines, transmissions, axles, suspension systems, air brakes, fifth wheel devices, and other component parts, all of which play a vital role in determining the capacity of a truck to meet various hauling requirements of the purchaser. Normally, the experienced trucker comes to the dealer with a good idea of the purpose for which he will use the truck, and often, based on his previous experience with similar vehicles in similar applications, with a fairly specific notion of the type of major component parts he will require. Dealer and customer go over in detail these needs, correlating them with the particular options which the manufacturer offers, and in effect arrive at some preliminary conclusions about the "design" of the particular vehicle. Even at this stage the manufacturer may be involved, since a phone call to the factory by the dealer may answer a question like: "Will an *X* diesel engine, coupled with a *Y* transmission and a *Z* rear axle enable our customer to achieve a road speed of *S* miles per hour under normal conditions?" Beyond this, the manufacturer becomes involved in the selection process when he receives the sales order from the dealer and submits it for review to his engineering department; the engineers may suggest several changes to be incorporated. Ultimately, the customer receives a heavy-duty truck which is reasonably tailored to his specific needs.

Another method of merchandising commonly used in the trucking industry is for a manufacturer to build a certain number of what are called "stock" trucks, which are then sold or consigned to the dealer. These are built with no particular customer in mind, or perhaps it should be said with the average customer in mind; these are analogous to an automobile dealer's "showroom" models in that they incorporate most of the standard, *i.e.*, most popular, combinations of running gear. While not tailored to the specific needs of the customer, they of course do have the advantage of being available for immediate delivery. Normally, when a dealer recognizes that a customer's needs can be reasonably satisfied with a "stock" truck, he will attempt to locate one within the dealer network which will serve the purpose, perhaps with a modification of a few component parts. Here, too, the manufacturer may become involved in the selling process through conferences concerning the ability of a particular "stock" truck to meet the customer's needs.

Thus the customer plays an important role in the selection process which is altogether different than that of the average new-car buyer who "selects" such items as whitewall tires, radio, and heater. The component parts of a truck chosen by buyer, dealer, and/or manufacturer play an important role in determining whether or not the vehicle will be "fit for a particular purpose," (witness, for example, the component part changes which were made in the *Seely* case in an attempt to rectify the problem; see note 42 *supra*) and the customer's communication of these economic needs is vital. While no spectacular case can be made out for the use of sales law where a manufacturer sells a truck which is so defective as to be virtually unsuited for any purpose, the requirement that the buyer's needs be communicated to the manufacturer before an implied warranty of fitness for a inability of a manufacturer, under the *Santor* rationale, to market goods "as is," thus leaving the buyer to determine whether they are suitable for his own needs.

> The distinction [between tort recovery for personal injuries and warranty recovery for economic loss] rests . . . on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety . . . . He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. . . . [The *Greenman* rationale of absolute liability in tort] in no way justifies requiring the consuming public to pay more for 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.[49]

The opinion suggests that the commercial consumer has a greater ability to "shop around" for protection from economic loss than does the buyer who might seek to avoid personal injury loss. This is a recognition of two basic differences between personal injury and economic loss situations. First, to the extent that a commercial consumer is in a better bargaining position than the individual, this strength may enable him to exact guarantees from the manufacturer which the ordinary consumer could not obtain;[50] second, the term "shopping around" refers to the fact

particular purpose can arise (UNIFORM COMMERCIAL CODE § 2-315) would certainly seem to serve the useful purpose of enabling a court to determine whether or not the product was "defective" in relation to the reasonable expectations of the buyer.

[The foregoing discussion is not presented as a representation of the "facts" underlying the *Seely* case, since the reports do not mention any communications between Seely, the dealer, and the White Motor Co. Rather, it is presented as an illustration of the commercial transactions within a particular industry, to suggest that where the question concerns commercial loss due to defective products, the question of whether a product is defective is considerably more complex than in the situations where the defective product causes personal injury. The materials presented are based solely on the author's association with the Motor Truck Division of International Harvester Co.]

49 63 Cal. 2d at 18-19, 403 P.2d at 151, 45 Cal. Rptr. at 23. Traynor outlined his views in somewhat more detail in a recent article: "The law of contracts and sales can nevertheless still play a vital role in the delineation of manufacturer's liability for purely economic loss . . . Warranty law carefully spelled out in the Uniform Sales Act and the Uniform Commercial Code, is designed to govern such commercial questions between the parties. In the commercial setting the rules of warranty and of notice and disclaimer function well. A warranty affords a ready basis for determining whether a product is defective in relation to what the consumer has been led to expect. Only if the manufacturer agreed to supply a product meeting the consumer's needs could the consumer hold him liable for the economic loss when the product failed to meet those needs." Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

50 For example, a retailer may be able to exact certain guarantees from a manufacturer; likewise a large commercial consumer may be able to exact guarantees, express or implied

that both ordinary and commercial consumers are probably in a better position to determine whether a given product will meet their functional needs, whereas a determination that the product is safe cannot be as easily made,[51] if it can be made at all.

In effect the *Seely* opinion recognizes that where a product is claimed to be unsuitable for an intended use, the product is not, *a fortiori*, defective, unless reference is made to the represented ability of the product to do a particular job. Since the truck in *Seely* was put to a legitimate use by a second owner, arguably it was not unmerchantable, and Uniform Commercial Code section 2-315[52] provides the courts with a tool for measuring the legitimate expectations of the buyer. It is questionable that a determination of whether the product is defective, even in a state which subscribes to the theory of absolute liability in tort, could be made without reference to a test similar to that embodied in section 2-315.

The *Santor* approach ignores this distinction and casts all products liability cases in terms of absolute liability in tort; in effect the case decided a question of unmerchantable goods in terms which would allow recovery where the goods were merchantable, but unfit for an undisclosed purpose. The California approach is no less broad, since the *Seely* court decided a "fitness for a particular purpose" case in terms which imply that cases dealing with unmerchantable goods must likewise be decided within the confines of the Code. However persuasive the arguments of the *Seely* opinion are with respect to cases dealing with the particular

by the U.C.C., from the retailer. Even though the sales law requirement of privity may lead to circuity of action, it does serve the useful purpose of enabling the manufacturer to avoid casting his fate to the wind, by absolving him from any responsibility of the failure of his goods to serve a purpose for which the retailer suggested to the consumer. Speidel, *supra* note 3, at 815, suggests another alternative, arguing that under the Virginia anti-privity statute, *supra* note 8, a consumer could sue on a warranty given by a component-part maker to the assembler, whereas under the RESTATEMENT (SECOND), TORTS § 402A, note 4 *supra*, the consumer probably cannot go beyond the assembler in his search for a liable party. Arguably, the same result might be reached in California under the case law which is to be utilized in lieu of UNIFORM COMMERCIAL CODE § 2-318 (see note 59 *infra*). To put this in concrete terms, MacPherson might, under the Code, be able to sue the wheel-maker for breach of the warranty made to Buick. While undoubtedly Buick's warranty to a MacPherson in 1966 would contain all sorts of limiting language, it is just as likely that Buick would not purchase unwarranted wheels from a supplier. Thus, Buick's advantageous position would inure to the benefit of our MacPherson. See also Comment, 114 U. PA. L. REV. 539, 545 n.37 (1966).

[51] The average consumer is probably in no better position to determine whether a latent defect will render a product unmerchantable than he is to determine that the same defect will render the product dangerous to his bodily security. However, the consumer is in a better position to select goods fairly designed to meet his specific economic needs. Section 2-315 of the U.C.C. merely imposes the duty of communicating particular desires of the consumer to retailer or manufacturer.

[52] *Supra* note 37.

purpose for which goods are utilized, they seem less compelling in situations where goods are clearly unmerchantable. However, one cannot criticize the utilization of the U.C.C. in adjudicating claims surrounding unmerchantable goods without first considering the supposed limitations of the U.C.C.

C. *The Effect—Application of the U.C.C. to Products Liability*

The choice between the *Santor* and *Seely* approaches to the problem of economic loss recovery in products liability cases will depend upon whether limiting a consumer to his commercial law remedies will result in the defeat of legitimate claims by the "trappings of sales law," which was one of the principal reasons for the institution of absolute liability in the *Greenman* case.[53]

1. *Specific Limitations of Sales Law*

It has been suggested that a consumer's best protection lies not in the remedies which the law may afford him, but in the commercial necessity that a reputable manufacturer stand behind his goods.[54] To the extent that a manufacturer is unwilling to undertake a voluntary assumption of the risk of loss caused by defective products, the consumer must still look to the law to provide him with a remedy. Whether the courts will extend to the consumer the remedy of absolute liability in tort, or will require the consumer to bring an action within the framework of the Uniform Commercial Code, will depend upon whether the limitations of the Code prevent the development of a rational system of consumer protection.

(a) *Privity of Contract.*—The concept of products liability was ordained as a means by which a non-privity buyer might recover against a manufacturer—classically this occurs where the law imposes absolute liability in tort on the manufacturer. However, because the Uniform Com-

[53] Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 61-62, 377 P.2d 797, 800, 27 Cal. Rptr. 697, 700 (1963).

[54] See Plant, *Strict Liability of Manufacturers for Injuries by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957); *but see* Cowan, *supra* note 37. *Quaere* whether the following represents a reputable manufacturer standing behind his goods, or an otherwise unwilling manufacturer forced to do so by the courts:

Dear Customer:

> The Chevrolet Motor Division has released a special splash shield which must be installed on your Chevrolet.
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> This shield will prevent the build-up of slush or mud at the throttle linkage location on the transmission. This build-up can cause the throttle to stay on or stick under severe weather operation.
>
> We would like to install this shield on your vehicle (no charge, of course). . . .

Form letter signed by R. J. Eelsing, Service Manager of Central Chevrolet Co., Fremont, California; on file in the offices of the *California Law Review*.

mercial Code reflects much of the more enlightened sales law of the period prior to *Greenman* relegating a buyer seeking economic loss to his sales law remedies does not have the effect of returning to *Winterbottom v. Wright*.[55] The warranty provisions of the U.C.C.[56] speak in terms of buyer and seller, but this language appears to be only nominal, since section 2-318[57] rather clearly indicates that the general law of the jurisdiction will provide the basis for determining how far along the distributive chain a particular warranty will extend. In California, privity of contract had ceased to be an issue long before *Greenman* or the U.C.C.[58] The legislature had actually refused to enact section 2-318: The committee report suggested that although the section would represent a step forward in most jurisdictions, it would amount to a retreat from the liberal position taken in the California case law.[59]

Arguably, privity of contract might be useful to insulate a manufacturer from economic loss occasioned by a purchaser's reliance upon representations made by an independent middleman in the distributive chain. However, in such cases it is apparent that any representations which amount to warranties are not made by the manufacturer; therefore, careful attention by courts to the questions of *what* warranty was breached and *who* made the warranty, should alleviate any problem. In sum, a court's concern with the scope of privity of contract should not,

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55 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

56 UNIFORM COMMERCIAL CODE §§ 2-313 to 2-315.

57 "[T]he section 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." UNIFORM COMMERCIAL CODE § 2-318, comment 3.

58 See, *e.g.*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960) (employee of purchaser may sue on warranty); Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) (manufacturer of Salk poliomeytis vaccine liable to ultimate consumer without privity).

59 "This section of the Code wipes out the distinction between food and drugs and other goods, but it does not go as far in abolishing the privity requirement in terms of the parties eligible to sue as the wording of the California cases does. The wording of the *Klein* [Klein v. Dutchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939)] decision would allow any ultimate consumer injured by food to sue, whether or not he had any connection with the buyer's family. The *Peterson* case [Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1960)] allows one clearly not connected with the buyer's family—his employee—to recover in a non food case . . . . Enactment of this Section in its present form threatens to limit the *Klein* decision and to overturn in its entirety the *Peterson* holding. Nor is this objection removed by the statement in the Official Comment to the effect that this Section is 'neutral and is not intended to enlarge or restrict the developing case law' on the extent of the warrantor's liability, for *Klein* and *Peterson* are present realities, and not future developments." Fact-Finding Committee on the Judiciary, Senate of the State of California, *Sixth Progress Report to the Legislature, Part I: The Uniform Commercial Code*, contained in 1 APPENDIX TO THE JOURNAL OF THE SENATE, REGULAR SESSION 1961, at 457-58.

in economic loss cases, be decisive as to whether tort or the U.C.C. should govern the outcome.

(*b*) *Notice of Breach.*—In the *Greenman* case the plaintiff was relieved of his obligation to comply with the notice requirement of the Uniform Sales Act[60] by the court's holding that the provision had no applicability to claims founded on tort, rather than sales law.[61] Notice is, under section 2-607 of the Uniform Commercial Code, a prerequisite to recovery; thus the *Seely* approach to economic loss must be taken as tacit approval of the Code's requirement in this respect.[62] That notice need only be given within a reasonable time, read in conjunction with the drafters' reference to commercial bad faith,[63] ought to give courts enough flexibility to avoid depriving a good faith consumer of his remedy.

In addition, prompt notice may be of utility in an economic loss case to afford a seller or manufacturer an opportunity to rectify the defect.[64] Where the claim is for expectation damages, familiar principles of mitigation may in fact require that notice be given to enable the seller or manufacturer to minimize the buyer's loss by providing a substitute product. Contrast these situations with those involving personal injury, where, since the maximum damage is already done, notice affords the manufacturer little beyond advising him to see his insurance carrier.

Further, the problem of notice assumes different proportions in situations of economic loss. Commercial consumers seeking expectation damages are probably sufficiently involved in business transactions to be fairly chargeable with knowledge of the rules of the game. Arguably, ordinary consumers are more likely to return to the seller when the goods prove defective to the point where utility is significantly diminished; where an accident occurs, however, it may be some time before the consumer realizes that the accident was due to a defect, rather than carelessness.[65] Regardless of the likelihood of a consumer returning to the immediate seller, courts will still have to recognize that few consumers are likely to notify the manufacturer. Two theories might be available to deal with this situation: (1) declare that the notice requirement applies

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60 Formerly CAL. CIV. CODE § 1769.

61 Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

62 See, *e.g.*, Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964). The case involved a suit for rescission of a sales contract involving a power shovel which was allegedly defective. The court accepted the *Greenman* proposition of strict liability in tort, but denied recovery on the basis that notice of the defect was not given within a reasonable time.

63 UNIFORM COMMERCIAL CODE § 2-607, comment 4.

64 Witness, for example, the costly efforts of White to rectify the trouble in *Seely*, *supra* note 42.

65 See note 52 *supra*.

only if action is brought against the immediate seller;[66] or (2) develop a doctrine of "constructive notice" to the manufacturer based upon notice to the seller. Under the latter method, notice to the seller might be held to satisfy the Code by assuming either (a) that any seller so notified will attempt to protect himself by notifying the manufacturer; or (b) by construing the seller as an "agent" for notification. The latter course might be especially palatable where a manufacturer directly or indirectly represents that a local seller is a "franchised representative" or "authorized dealer."[67]

It certainly appears that there is enough flexibility in the Uniform Commercial Code's notice provisions to enable a court to strike a balance between the commercial utility of prompt notice and the probability that few home consumers are likely to be aware that notice is required.

(c) *Disclaimers and Limitations of Liability.*—It is in this area that the *Santor* and *Seely* opinions may yield the most diametrical results. Absolute liability in tort has the advantage of preventing a manufacturer from defining the scope of his obligation. *Greenman* held that a sales law disclaimer had no effect in avoiding an absolute obligation in tort, and the *Santor* incorporation of *Greenman* would indicate that the same result follows where a claim is for economic loss. Similarly, section 2-719 of the U.C.C. declares that limitations of liability in personal injury situations are prima facie unconscionable.[68] However, it was this inability of a manufacturer to define the scope of his obligation in the non-personal injury situation which worried the majority in *Seely*, since it not only prevents any real loss allocation through insurance but also places the manufacturer in a position of having no real means of controlling the persons to whom and purposes for which a product is sold. Additionally, the *Seely* majority felt that the application of absolute liability in tort might prevent a manufacturer from selling goods "as is," and unless the

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66 A variation on this theme was used by the *Seely* court; by holding that CAL. CIV. CODE § 1789 (election of remedies) was applicable only to actions against the immediate seller, the court circumvented defendant's argument that plaintiff had not elected between rescission and expectation damages. However, the court stated that it was doing so largely because the election rule had not been preserved in the newly-promulgated U.C.C. 63 Cal. 2d at 14, 403 P.2d at 149, 45 Cal. Rptr. at 21. Whether the same result will occur under the notice provisions is open to question.

67 *E.g.*, the following warranty given with a home appliance: "Your Arvin radio or phonograph is warranted to be free from defects in materials and workmanship for a period of 90 days from date of purchase. If you experience any difficulty with the unit during the warranty period, it will be repaired at the nearest authorized Arvin Service Center." (There follows a state-by-state list of some 600 radio repair centers.) Arvin Industries, Inc., warranty; on file in offices of the *California Law Review*. It would appear that a manufacturer under the above circumstances would have a difficult time arguing that notice to the local dealer did not satisfy the Code requirements.

68 UNIFORM COMMERCIAL CODE § 2-719.

law is prepared to take the position that the manufacturer insures the ability of his products to meet the economic expectations of his customers, the rules of disclaimer and limitation of liability may have some continuing vitality. It is now clear, under the *Greenman* theory, that a consumer has a right to expect that the product will be safe when used in its intended manner, but where the complaint is that the goods failed to live up to the economic expectations of the buyer, it is reasonable to examine what the manufacturer agreed to supply.

> He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his product in the consumer's business unless he agrees that the product was designed to meet the customer's demands.[69]

Reliance upon the Uniform Commercial Code is not tantamount to *carte blanche* permission to manufacturers to impose disclaimers or limitations of liability. Even though section 2-719 does not hold that limitations of liability in non-personal injury cases are prima facie unconscionable, the overall validity of a clause limiting liability is subject to section 2-302, which allows a court to strike any clause if "in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[70] The majority in *Seely* recognized this fact by distinguishing between a situation wherein the consumer can "shop around" for greater protection, and a situation similar to that in *Henningsen*, where the consumer either takes the product with the disclaimer or goes without it altogether because the entire industry imposes a standard disclaimer.[71]

In addition to the validity, under the Code, of some clauses limiting liability, there is a further problem that if a product is sold without any warranties whatsoever, a disclaimer as such is unnecessary, since no warranty is breached by the failure of the goods due to a defect. However, this situation probably evokes the least amount of sympathy for the consumer, since where no warranties have arisen, the consumer's claim is reduced to the argument that he has made a bad choice in the selection of goods, uninfluenced by any representations on the part of the manufacturer.

As a practical matter, however, courts which follow the *Seely* ra-

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[69] Seely v. White Motor Co., 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

[70] UNIFORM COMMERCIAL CODE § 2-302, comment 1. This section was not, however, enacted in California, probably because it may give too much freedom to courts to examine the bargaining position of parties in every contract.

[71] 63 Cal. 2d at 19, 403 P.2d at 151-2, 45 Cal. Rptr. at 23-4.

tionale must recognize that a disclaimer or limitation of liability is standard boiler-plate in many form contracts for the sale of goods. Warranties of one sort or another have become a popular sales inducement in at least two important areas of consumer products, automobiles and home appliances,[72] but typically these agreements are limited to repairing defects in materials and workmanship for a limited period of time. However, even when such a limited obligation is undertaken by the manufacturer, the right of the consumer to have the goods repaired would seem to eliminate much of the economic loss incident to a defect. When a commercial consumer seeks additional compensation for expectation damages during the time necessary for a manufacturer to rectify the defect, such loss might be fairly chargeable to the manufacturer, as was done in *Seely*, as an incident to his agreement to furnish the goods free from any defects in materials and workmanship.[73] Of course, a refusal or inability of a manufacturer to comply with this limited obligation would allow the buyer to recover as he did in the *Seely* case.

Courts have several means of dealing with capricious disclaimers of all warranties. In addition to the availability, in most Code states, of section 2-302 to strike unconscionable clauses, disclaimers have previously been limited by (1) finding that the buyer had no notice of the disclaimer;[74] (2) construing the disclaimer clause strictly;[75] or (3) finding the disclaimer clause inconsistent with an express warranty in the same transaction.[76] The latter approach is specifically authorized in Code section 2-316,[77] which holds disclaimers ineffective insofar as they are in-

[72] *E.g.*, "Chrysler's Simca has a longer warranty than all these put together—VW, Renault, MG-Sedan, Opel—Check out the fine print in the footnote and you learn that Simca is backed by Chrysler Motors Corporation with a 5 year/50,000-mile . . . warranty . . . ." Advertisement for Simca Division of Chrysler Motors Corporation, Saturday Evening Post, March 12, 1966, p. 74.

[73] This approach has been criticized as failing to recognize the limited character of White's obligation. See Comment, 114 U. PA. L. REV. 539, 546 n.44 (1966). In other words, the court upheld the limited warranty but did not read it. Perhaps this opinion is the harbinger of yet another judicial approach to this perplexing problem.

[74] See Note 8, U.C.L.A.L. REV. 658 (1961).

[75] *E.g.*, Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954). Exculpatory clauses in contracts negotiated by agents have similarly been construed narrowly when used by principals to defend against liability. *Compare* Harnischfeger Sales Corp. v. Coats, 4 Cal. 2d 319, 48 P.2d 662 (1935), *with* Hertzog v. Capital Co., 27 Cal. 2d 349, 164 P.2d 8 (1945).

[76] *E.g.*, Fairbanks Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951).

[77] UNIFORM COMMERCIAL CODE § 2-316: (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever possible as consistent with each other; but, subject to the provisions of this division on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

consistent with express warranties arising in the same transaction. A sophisticated approach to this section might read section 2-313 (express warranty creation) to include the concept of "advertising warranties" found in the leading cases of *Baxter v. Ford Motor Co.*,[78] and *Randy Knitwear v. American Cyanamid Co.*[79] If an express warranty were found to have been created as a result of an advertising claim, the availability of *general* words of disclaimer as a device to exclude liability based on a *particular* affirmation would be significantly circumscribed. The utility of this approach might, however, be somewhat hampered by the inclusion in section 2-316 of the parol evidence rule contained in section 2-202,[80] especially in light of the drafters' comment that the parol evidence rule was designed to protect the seller against false allegations of oral warranties.[81] Although the parol rule of section 2-202 rejects the presumption of complete integration,[82] admission of extrinsic evidence is limited to that which is not inconsistent with the terms of the writing; in the case of a contract which contained a disclaimer of "all warranties, express or implied," it would be difficult, given a literal reading of the parol rule, to countenance the admission of extrinsic evidence of an advertising claim. This limitation might be avoided by emphasizing that the Code drafters considered the import of section 2-316 to be one of protecting the buyer from unexpected and unbargained for language of disclaimer,[83] citing particularly exculpatory clauses seeking to exclude "all warranties, express or implied."[84] A court might therefore require that any disclaimer of express warranties be framed with some specificity, particularly mentioning, for example, advertising claims, representations of agents, or similar words or conduct. This approach does not strain the Code beyond limits, since subsections 2-316(2) and (3), dealing with the exclusion of implied warranties of merchantability and fitness, require a more par-

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[78] 168 Wash. 456, 12 P.2d 409 (1932).

[79] 11 N.Y. 2d 25, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

[80] UNIFORM COMMERCIAL CODE § 2-202: Final Written Expression: Parol or Extrinsic Evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade . . . or by course of performance . . .; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[81] UNIFORM COMMERCIAL CODE § 2-316, comment 2.

[82] UNIFORM COMMERCIAL CODE § 2-202, comment 1(a).

[83] UNIFORM COMMERCIAL CODE § 2-316, comment 1.

[84] *Ibid.*

ticular statement than "implied warranties," and an analogy taken in the case of express warranties does not seem impermissible.[85]

Whether or not Code sections 2-313 and 2-316 are interpreted as encompassing the *Baxter-Randy Knitwear* concept of "advertising misrepresentation,"[86] the remaining portions of section 2-316, requiring express words of disclaimer in the case of implied warranties, and establishing only three situations in which the buyer has notice that there is no warranty,[87] will probably receive rigid adherence. Since disclaimers have always elicited considerable judicial disfavor, it seems safe to assert that

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[85] With the results possibly obtainable under the Uniform Commercial Code *compare* the following section of the RESTATEMENT (SECOND), TORTS § 402B:

Misrepresentation by Seller of Chattels to Consumer

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of the chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not bought the chattel from or entered into any contractual relationship with the seller.

This *Restatement* section is largely based upon the decision in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118 (1932), which held an automobile manufacturer liable for personal injuries sustained when a windshield, advertised as shatterproof, shattered as a result of having been struck by a rock. Assuming, *arguendo*, that the manufacturer's advertisement was sufficiently an affirmation of fact, a promise, or a description of the goods to give rise to an express warranty under UNIFORM COMMERCIAL CODE § 2-313, the only difference in result would occur if parol evidence of the advertisement were excluded.

[86] For this approach to be meaningful, however, courts must deal discriminatingly with advertising claims, separating permissible "puffing" from claims which may fairly be said to be affirmatious of fact. Consider, in this context, the sophistication demonstrated by the United States Supreme Court in FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), upholding an FTC ban on the "Rapid Shave shaves sandpaper" television commercial.

[87] UNIFORM COMMERCIAL CODE § 2-316: . . . (2) Subject to subdivision (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subdivision (2)

(a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

in most states which follow the Uniform Commercial Code—*Seely* rationale in products liability cases, absolute compliance with section 2-316 will be a condition precedent to the validity of any disclaimer.[88]

The specific limitations of sales law—privity of contract, notice of breach, or limitation of damages—are not so inflexible as to frustrate the attempt of a consumer to recover for a bona fide claim of economic loss resulting from a defective product. The Code approach should not be retained simply because its limitations do not prevent recovery. The advantage which accrues from utilizing the Uniform Commercial Code in economic loss cases lies in the fact that the express and implied warranties which the Code creates are a more suitable protection of the expectation interests of producer and consumer.

2. *Implied Warranties: Merchantability and Fitness for a Particular Purpose*

The *Seely* approach to economic loss resulting from defective products is most persuasive in a situation where a product fails to perform in a manner which meets the expectations of the buyer, but falls short of being so defective as to be unmerchantable. The truck involved in *Seely* was merchantable, but was not suitable for the intended use of the plaintiff. Such a defect does not fall into the traditional concepts of defective chattels; MacPherson's collapsing Buick, the poisonous sausages, and the exploding cola bottles were all instances in which the particular products would clearly come within the definition of unmerchantable goods. The thesis of the *Seely* opinion may be that so long as a manufacturer's responsibility to the consumer is defined in terms of the defectiveness of a given product, this defectiveness cannot be assessed without reference to what the manufacturer agreed to furnish in terms of goods suitable for a particular purpose. Since assumption of risk appears to be a legitimate defense even under the *Greenman* theory of absolute liability in tort,[89] were the *Seely* case to be tried on a tort theory, it is difficult to see how a court could avoid investigating what a manufacturer agreed to supply, in order to assess whether the buyer's failure to communicate his economic expectations amounted to an assumption of the risk that the product would not exceed the manufacturer's representations. In short, reliance upon the Code in this situation answers the threshold question, "was the product defective?"

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88 The ability of a manufacturer to disclaim any express warranty is open to some question; therefore any validity which the Uniform Commercial Code affords to disclaimers or limitations of liability will arise within the context of implied warranties of fitness or merchantability. See text accompanying notes 92-102 *infra*.

89 See PROSSER, TORTS 656-57 (3d ed. 1964).

Whatever might be said in favor of the *Seely* approach, which places upon the buyer the duty of selecting goods which will be suitable for his intended use or communicating to the manufacturer or seller his particular business needs, much of the appeal of the *Seely* rationale is lost where the goods are so defective as to be unmerchantable. The emergence of absolute liability in tort is in part a recognition by the courts that the average consumer is in no position to inspect a particular product for latent defects which may cause him personal injury; arguably the consumer is hardly in a better position to determine whether the goods are free from defects which would render them unmerchantable. This means that the consumer's remedy will be determined by whether or not personal injury occurs. The majority in *Seely* expressly recognized this distinction,[90] and thus the case stands in part for the proposition that the risk of personal injury will automatically be allocated to the manufacturer, while other losses will be allocated between the parties according to their consensual undertakings in the sales transactions, with the U.C.C. being utilized to define completely the extent of the agreement. The second section of this Comment will consider whether this formula of risk distribution is consistent with current theories of loss allocation,[91] but before turning to this question, it would be worthwhile to consider whether there are other grounds besides drawing a distinction between personal injury and economic loss by which the *Santor-Seely* dichotomy may be resolved. Justice Peters' concurring opinion in *Seely*[92] suggests two alternative means of distinction which are worthy of note.

(a) Equating "Defective" with "Unmerchantable."—Each of the two principal cases arguably dealt with situations which would come within different warranty provisions of the U.C.C.; within the Code's definitions, the *Santor* case dealt with unmerchantable goods, whereas the *Seely* decision dealt with goods which were unfit for a particular purpose. Construed broadly, both decisions appear to have dealt with one type of defect at the expense of the other. By equating unmerchantable goods with defective products causing personal injury, the *Santor* approach may have introduced the somewhat rigid standard of absolute liability in tort into commercial transactions. Conversely, the *Seely* opinion retains the flexible standard of section 2-315 of the U.C.C., yet does so in terms which would deny recovery to a consumer whose only expectation is that the goods are merchantable but where the manufacturer had not agreed to supply merchantable goods.

Since the principal virtue of the *Seely* approach is to enable a court

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90 63 Cal. 2d at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

91 See text accompanying notes 103-131 *infra*.

92 63 Cal. 2d at 19-20, 403 P.2d at 152-58, 45 Cal. Rptr. at 24-30.

to utilize the U.C.C. to determine whether a buyer's expectations with regard to the particular utility of a product were reasonable—and this is the principal problem with a broadly-read *Santor* opinion—restricting the *Santor* approach to situations in which the defect renders the goods completely unmerchantable may be a way of accommodating both points of view.[93]

Equating "defective" with "unmerchantable" would enable a court to deal with "particular purpose" claims within the context of the U.C.C., and to decide the case with reference to whether the buyer's particular expectations were communicated to the manufacturer, whether the manufacturer had agreed to supply goods of a particular utility, and whether the representation of the goods' particular suitability were made by middlemen in the distributive chain. In short, the manufacturer would not be assuming an unknown risk by introducing the goods into commerce, and would not be liable for unknown representations made, or particular expectations entertained but uncommunicated. At the same time, the manufacturer would incur an absolute obligation to supply merchantable goods, and if the U.C.C. standard of merchantability were definitive of this obligation the burden imposed would not appear to be unreasonable. Employing the U.C.C. definition the goods would basically have to "(1) Pass without objection in the trade under the contract description; and (2) Be fit for the ordinary purposes for which such goods are sold."[94] The California case law indicates that the standard of quality under this definition need only match that of like goods generally,[95] while the consumer's expectations are limited to those which an average consumer could expect. In other words, the absolute obligation would be only that of a manufacturer to match the quality of competition and, arguably, the price paid for the goods would be an important factor in determining the scope of the competition.

Since privity of contract is not a significant problem under the U.C.C., and because the *Seely* opinion contains dicta[96] to the effect that an adhesive disclaimer would not survive judicial scrutiny, there are only two remaining problems raised by an abandonment of sales law in favor of an

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93 Considerable language in the *Santor* opinion suggests that the court intended to say nothing more than that merchantability was a minimum standard for products on the market. It is open to speculation whether the court will broaden this standard under its theory that liability is imposed to ensure that the maker of the product bears any loss. See 44 N.J. at 67, 207 A.2d at 313.

94 See UNIFORM COMMERCIAL CODE § 2-314(2)(a),(c).

95 See Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954).

96 "Unlike the defendant in *Henningsen* . . . White is not seeking to enforce an industry-wide disclaimer . . . ." 63 Cal. 2d at 19, 403 P.2d at 151-52, 45 Cal. Rptr. at 23.

absolute obligation to supply merchantable goods. First, there is the problem of the non-adhesive disclaimer: Should a manufacturer, in a free bargain, be able to limit or exclude his obligation? The answer to this question is primarily one of loss allocation, involving a consideration of whether or not a manufacturer ought to be an insurer against the possibility that some of his goods will be unmerchantable. The factors which make up such a decision will be discussed below; for present purposes it is enough to recognize that loss allocation is an important factor in choosing between the *Seely* sales law rationale and the *Santor* approach to unmerchantability claims where a disclaimer is present. The second problem is one of notice of breach of warranty. Previously it was argued that the question of notice is not one upon which the choice between sales law and tort law ought to hinge, since the notice requirements of the U.C.C. are flexible enough to avoid inequity. However, abandoning the notice requirement altogether does present the problem of bad faith by either commercial or ordinary consumer. In personal injury litigation, this problem is not particularly important since the short, one-year statute of limitations in California for the commencement of personal injury actions[97] all but rules out the possibility of the grossly protracted claim. In contrast, the three-year statute of limitations on warranties,[98] without the countervailing reasonable time notice requirement of the U.C.C., might lead to unfortunate results. Even the ordinary consumer who delays several years before affording the manufacturer an opportunity to make good might be guilty of bad faith, as would be the commercial consumer who behaved similarly.[99] Perhaps an alternative to casting the merchantable goods requirement as an absolute obligation would be merely to make it unsusceptible to disclaimer, but otherwise controlled by sales law.

(*b*) *Differentiating Between the "Ordinary" and the "Commercial" Consumer.*—Justice Peters' concurring opinion in *Seely* put forward another ground of distinguishing between sales law and tort recovery; that of deciding the theory of recovery with reference to the plaintiff. Since much of the rationale of absolute liability in tort in personal injury cases is based upon a notion of extending more protection to the ordinary consumer,[100] plus the notion that commercial consumers may fairly be chargeable with knowledge of commercial law, this distinction properly

97 CAL. CODE OF CIV. PROC. § 340.

98 CAL. CODE OF CIV. PROC. § 338. Breach of warranty suits are governed by this section, not by § 337 (written instruments). See Mack v. Hugh W. Comstock Associates, Inc., 225 Cal. App. 2d 583, 37 Cal. Rptr. 466 (1964).

99 See Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964).

100 See Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1086-87 (1965).

recognizes some of the underlying policy reasons for strict liability. However, this standard creates more problems than it solves since it fairly requires the courts to decide, in close cases, whether or not the plaintiff is a commercial consumer. Seemingly, whether the consumer was engaged in a profit making activity should determine whether sales law would govern recovery; however, Justice Peters felt that *Seely* was "more like" an ordinary consumer and should therefore have been afforded a tort remedy.[101] As a guideline for litigants, attorneys, and lower courts, this standard would introduce added uncertainty into an area which, because it is premised on non-fault liability, appears better suited to the drawing of clear-cut, albeit somewhat arbitrary, guidelines.

The *Santor* decision extends absolute liability in tort at least to the point of encompassing claims for defect-caused unmerchantability; whether or not its rationale will be extended to encompass claims similar to that in *Seely* is open to speculation.[102] By expressly re-defining *Greenman* to apply only to personal injury cases, the California court has specifically rejected the *Santor* rationale—even as limited solely to claims for unmerchantability—and upheld continued reliance upon the provisions of the Uniform Commercial Code.

While *Santor* is a rejection of Code remedies, it should not be viewed, at least in the area of "fitness for particular purposes" claims, as a rejection of Code standards. A court operating under the *Santor* theory must, of necessity, determine the validity of the plaintiff's claim that the product has not performed as expected. Whether this judicial determination is characterized as one of ascertaining the product's defectiveness, or as a determination that plaintiff's expectations were unreasonable or that he had assumed the risk that the product would not meet his economic expectations, the threshold question of how the plaintiff came to believe that the goods should have performed at a certain level of utility must be answered. The alternative to engrafting the warranty standards onto absolute liability is to take plaintiff's allegation that the goods are defective at its face value; however, this method would seem to open the doors of recovery to those who shop around meticulously for the cheapest price, and then come to court complaining that they got their money's worth.

In addition to the principal cases, there are two alternative methods

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101 63 Cal. 2d at 27, 403 P.2d at 157-58, 45 Cal. Rptr. at 29-30.

102 The *Santor* court may have seen the claim as one for property damage, since it noted in a later opinion: "We pointed out in *Santor* that there is no sensible reason for differentiating here between personal injury and property damage." Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 95, 207 A.2d 314, 325 (1965). In other words, the court in *Santor* may have analogized damage to property caused by a defective product with damage to the product itself, *i.e.* by being defective.

of distinguishing between tort and Code recovery—limiting *Santor* to unmerchantable claims, or distinguishing between commercial and ordinary consumers. All four methods of handling the problem should be considered as background for the following discussion of loss allocation, since it is the consensual power of either party to attempt to shift the risk of loss to the other which basically differentiates tort from Code recovery.

II

ALLOCATING THE RISK OF ECONOMIC LOSS

One of the fundamental purposes of the law of torts, as Professor Fleming has observed,[103] is to allocate the losses incident to modern society in a manner most consistent with the public good. That branch of tort law which is concerned with responsibility for defective products will always be in the debt of Professor Ehrenzweig, whose genius is chronicled elsewhere in this issue of the *California Law Review*. His *Negligence Without Fault* was one of the harbingers of the proposition that in a complex, highly industrialized society certain losses due, among other things, to defective products, are inevitable. Since the losses caused in the conduct of mass enterprises are inevitable, the admonitory function of tort law is irrelevant in determining who shall bear the loss.

A contract, to the extent that it arises from a relatively free bargain, is in part a consensual loss-allocation device, so the question presented by the *Santor* and *Seely* cases is to what extent should the parties be allowed to allocate the risk of economic loss from defective products according to their own judgment within the framework of the Uniform Commercial Code; or conversely, to what extent is the law prepared to say, as it has in cases involving personal injury, that the risk of loss will devolve automatically on the manufacturer. To arrive at some tentative conclusions it is necessary first to examine the theories which have been advanced in support of the proposition that the risk of loss from defective products should be shifted to the manufacturer, and then to examine the nature of the risk involved.

A. The Case for Enterprise Liability

The most generally accepted argument advanced in support of absolute liability on the part of a manufacturer[104] is nothing more than a

103 FLEMING, TORTS 4 (3d ed. 1965).

104 See, *e.g.*, Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Prosser, *The Assault on the Citadel (Strict Liability to the Con-*

distillation of the theory of risk distribution through the price structure which Professor Ehrenzweig[105] and Justice Traynor[106] were advancing a decade ago.

Conceptually, some of the theories of enterprise liability involve a certain moral judgment of the manufacturer. Ehrenzweig, for example, suggests that the inevitability of harm makes manufacturing a dangerous, yet socially useful activity;[107] it is therefore appropriate that the manufacturer absorb the risk of such inevitable injury as an ordinary cost of doing business.[108] This rationale is not essentially different from that which underlies the *Rylands v. Fletcher*[109] doctrine of strict liability for ultra-hazardous activities: One who creates a situation which, even in the exercise of due care, involves an unreasonable risk of danger to others, ought to bear the risk of such loss if he profits thereby. Similarly, Keeton has suggested that there are certain elements of blameworthiness—termed "conditional fault"—which underlie a part of the law of products liability. Thus the law may impose the loss on a manufacturer who is in an advantageous position to spread the risk because society finds a certain lack of moral responsibility in his failure to accept this obligation voluntarily.[110]

In contrast, the Traynor conceptualization of enterprise liability, and to a large extent that of Ehrenzweig as well, does not rest on an evaluation of the morality of a manufacturer who profits from products, some of which will be defective. Rather it rests on a belief that the manufacturer is in the best position to distribute the risk of loss throughout the general public through the price structure. "The risk of injury can be insured by the manufacturer and distributed among the public as a

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sumer), 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

105 EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

106 Particularly in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion), and Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). See generally Kalven, *Torts: The Quest for Appropriate Standards*, 53 CALIF. L. REV. 189, 201-06 (1965).

107 EHRENZWEIG, *op. cit. supra* note 105, at 61.

108 *Id.* at 54.

109 L. R. 1 Ex. 265 (1866), *aff'd*, L. R. 3 H. L. 330 (1868). See generally FLEMING, TORTS ch. 14 (3d ed. 1965).

110 Keeton, *supra* note 104. Other conceptual bases for the imposition of absolute liability which involve an analysis of the behavior of the manufacturer have been offered. See, *e.g.*, Cowan, *supra* note 104, who suggests in part that manufacturers are guilty of conscious misrepresentation of the known quality of their products. This is in part a denial of the proposition that accidents are either inevitable or without fault on the part of the manufacturer; thus absolute liability in tort is nothing more than the logical extension of *res ipsa loquitur*.

cost of doing business. . . . Against such risk there should be general and constant protection, and the manufacturer is best situated to afford such protection."[111] The assumption is that the manufacturer, by increasing the cost of his product to reflect the unit cost of the premium, spreads the risk evenly among his customers.[112]

Both the *Santor* and *Seely* opinions are based upon the assumption that the manufacturer is the appropriate party to bear certain of the risks of defective products. By refusing to distinguish between personal injury losses and economic losses, the court in *Santor* essentially underwrote the notion that a manufacturer could spread the risk of all losses from defective products among his customers generally. Although the court mentioned the "appropriateness" of a manufacturer bearing the responsibility for his defective products,[113] the majority relied so extensively on the *Greenman* decision as to lead to the inference that it was the "risk distribution-through-price" rationale which was responsible for the outcome.

The *Seely* decision is based upon this same assumption; in fact, the rejection of absolute liability in tort was predicated upon the assumption that the consumer, through higher prices, would bear the cost of increased liability on the part of the manufacturer. "The rationale of *Greenman* 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 needs of some of his customers."[114] Thus the cases proceed on the assumption that the manufacturer, after heady consultations with his corporate counsel and his insurance carrier,

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111 Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion).

112 With the exception of Justice Traynor's *Escola* opinion, insurance was seldom explicitly mentioned in the case law of products liability. See PROSSER & SMITH, CASES ON TORTS 710 (3d ed. 1962). This pattern has changed somewhat, due largely to the influence of Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Even where insurance is not mentioned explicitly, it is often implicit in the decisions, particularly in those cases which impose liability on the assembler for defects in component parts. For example, in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963), the defective product which caused an airplane crash was alleged to be an altimeter manufactured by Kollsman. Under almost any theory of enterprise liability which is based in part on an evaluation of the morality of Kollsman profiting from the sale of altimeters, some of which will be defective, Kollsman should bear at least a part of the consumer's loss. The imposition of liability only on the aircraft manufacturer may well be said to rest, in part, on the implicit notion that it is easier, and less expensive, for the assembler to insure against the aircraft's failure, for whatever reason, than for the maker of a small component part to insure against the likelihood that the failure of that part may result in the crash of an airplane worth several million dollars.

113 44 N.J. at 59-60, 207 A.2d at 309.

114 63 Cal. 2d at 19, 403 P.2d at 151, 45 Cal. Rptr. at 23-24.

funds for the inevitable loss by increasing his insurance to reflect the new risk allocated to him by the courts. This, in turn, increases the entrepreneur's overhead and, inevitably, his cost of goods manufactured.[115] By raising the unit price of his goods, the enterpreneur accomplishes two things: He shifts the loss back to the consumer, rather than absorbing it himself; and, since, taking all manufacturers together, "the consumer" represents virtually the entire consuming public, the loss is spread throughout the whole of society.

This theory of risk distribution through the price structure has been subjected to some amount of criticism;[116] the deficiency most often cited is that the manufacturer does not have such finite control of the price structure. Theoretically, only in a monopoly situation can the entrepreneur pass along every element of cost in the form of immediately increased prices;[117] thus it is argued that assigning the risk to the manufacturer does not necessarily result in a distribution of the loss throughout the economy because the manufacturer cannot exercise such finite control over the price which the public will pay for his products. While this

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[115] The accounting procedures involved vary somewhat from one manufacturer to another and from one industry to another, but probably fall generally into one of the following two systems:

a) Where job-order cost accounting can be used, insurance expenses normally show up as a credit to factory overhead. This and other such indirect costs are normally costed out as a percentage of the direct labor involved in any particular job.

b) Where the product is not susceptible to accurate job-order costing, standard costing is ordinarily employed, whereby a projected standard cost is determined for each unit produced, with favorable or unfavorable variances established from time to time as conditions change. The complex process of standard costing involves the same calculus of determining what portion of each expense should be allocated to the various products produced by the manufacturer.

Insurance, in addition to taking the form of a cash outlay to an insurance carrier, may also appear indirectly as self insurance where the entrepreneur makes a certain yearly allowance for such losses or where the losses are simply generalized at the end of the year and deducted as casualty losses uncompensated by insurance.

Every settlement or judgment paid to an injured consumer results in a credit to cash accounts which must be accounted for. Further, the modern enterprise simply does not "make it up in volume;" rather, every such credit will eventually result in a measurable increase in the unit cost of the product. Thus management can attempt to set a price on the goods whereby a fractional amount of the loss can be recovered on every sale. See generally, NISWONGER & FESS, ACCOUNTING PRINCIPLES 523-72 (9th ed. 1963).

[116] See, *e.g.*, Calabresi, *supra* note 104; Morris, *supra* note 104.

[117] Even under perfect competition, where prices are solely a function of supply and demand, eventually the increased costs are reflected in increased prices. The increased costs of production, represented by increased enterprise liability, will, if borne by the manufacturer, eventually discourage a certain number of producers from continuing in that line of endeavor. This decrease in the supply, given a relatively elastic demand, will result in higher prices directly. If the demand is highly inelastic, the "cost" is passed along indirectly in the form of the society using a cheaper, and theoretically less efficient, substitute, or, alternatively, by doing without. See generally SAMUELSON, ECONOMICS 444-71 (6th ed. 1965).

criticism is well taken, simply because the manufacturer absorbs some or all of the loss does not mean that the risk is not widely distributed. The original purchase of casualty insurance represents an initial step of spreading the risk among all entrepreneurial policyholders, regardless of whether the cost of the premiums is passed on to the consumer. In addition, assuming that the manufacturer absorbs some or all of the loss—whether directly or through unrecovered insurance premiums—ultimately the loss results in a diminution of the corporation's profits. Immediately, forty-eight per cent of this loss is spread throughout the country in the form of a reduction in federal corporate income tax receipts;[118] the remaining fifty-two per cent of the loss is spread among the shareholders of the corporation in the form of reduced dividends. While the *shareholders* may not constitute as large a group among whom to spread the risk as are all the *customers* of a corporation they nevertheless constitute a rather sizeable segment of the population.[119]

While the ability of a manufacturer to spread the risk of loss through the price structure may be imperfect, it goes without saying that the entrepreneur in most cases can still spread the risk rather broadly. The question central to the *Santor-Seely* dichotomy is whether the manufacturer may define the scope of his obligation, or whether the law should impose upon him the duty to allocate the risk as best he can, irrespective of any agreement between consumer and manufacturer. The answer to this question depends to a large extent on an analysis of the risks involved where a defective product may potentially cause economic loss.

B. *The Quantum of Risk Involved*

Economic loss in products liability cases may arise in two somewhat different relationships—that between manufacturer and ordinary consumer, and that between manufacturer and another entrepreneur.

1. *The Ordinary Consumer*

The maximum economic loss which can be suffered by the ordinary consumer, where a product's value is diminished due to a defect, is the value of the product itself. As a practical matter, that imposes a top limit on loss of the value of a new automobile, typically the most expensive consumer item. In contrast, where personal injury results, the consequences may be devastating to the individual concerned: The 65,000

118 I.R.C. §§ 11, 162.

119 With over 1,500 issues listed on the New York Stock Exchange alone, it is altogether unrealistic to proceed on an assumption that the typical consumer-products manufacturer is a sole proprietorship. In addition, with a typical day's activity on the "Big Board" running between four and nine million shares, the group of shareholders to whom the loss can be allocated is far from inconsequential.

dollars recovered by William Greenman certainly is not atypical of the potential losses involved in personal injury situations. To this must be added that manufacturers have traditionally evidenced some willingness to stand behind the quality of their products,[120] at least to the extent of offering to repair or replace defective products. Although it is true that a consumer's potential economic loss is far less significant than that involved in personal injury situations, it is also true that a manufacturer's stakes are not as high: The latter stands to lose only his invested cost in the product. It may not even be worth his while to purchase insurance, since this loss can often be absorbed readily into an already existing sales returns and allowances accounting category.

There are, in addition, several factors which militate against strict liability, particularly where the risk of loss is substantially reduced. First, it is necessary for a consumer to turn to the manufacturer for recompense only where the retailer is no longer available as a defendant. This contrasts with the personal injury situation, where even a solvent retailer may effectively be judgment-proof if he has not insured against the possibility of a large award of damages; where economic loss is involved, again, the retailer is risking essentially only the value of a certain portion of his inventory. Second, the long-arm statutes of many states make it probable that consumer-product manufacturers will have to defend a

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[120] Plant has suggested that commercial reputation is a far more powerful inducement for a manufacturer to stand behind his product than is any threat of legal liability. See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957).

Whether or not the manufacturer consciously responds to the threat of legal responsibility for defective products depends, of course, upon whether he is aware that such liability exists and that it may be a significant element of his cost. The following appeared recently in the business section of a metropolitan newspaper: "Time was when the cry 'Caveat Emptor' ruled the land. That means 'let the buyer beware' and courts held that the customers didn't have much recourse if they got stuck. Now [it's] the seller's turn to beware, as several state courts have ruled in favor of consumers who were harmed, physically or financially, by the goods they bought.

"Attorneys who take personal injury cases on a contingency basis couldn't be happier with some of the recent decisions noted by Commerce Clearing House, which reports on tax and business laws. Among the court decisions:

"The California purchaser of a combination power tool recovered $65,000 because the machine hurled a piece of wood at his head. In Oklahoma, the buyer of a dry cell lantern battery collected when the battery exploded in his hand. A New Jersey man collected damages when the carpet he bought was proven to be faulty." San Francisco Examiner, March 6, 1966, § 3 (Business) p. 10, col. 1.

The California decision referred to was, of course, Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). If this article constituted the first general notice to the business community of the existence of the *Greenman* doctrine, the assumption that the businessman is immediately aware of the enlarged scope of his legal responsibility stands on something less than firm ground.

certain number of suits under conditions of local bias;[121] while no one suggests that a nationwide manufacturer should be free from local accountability, it has been suggested that an over-extension of absolute liability may, by easing the burden of proof problems, generate an inordinate number of nuisance suits.[122]

On the other hand, the anomaly noted by Justice Peters in his concurring opinion[123] weighs in favor of absolute liability. He observed that if a consumer is fortunate enough to avoid personal injury and sustains only economic loss from a defective product which could have caused both types of loss, the consumer must pursue only his sales law remedy. In the situation where a product becomes dangerous but does no harm to any person,[124] it does seem anomalous that a manufacturer might bear no risk for essentially the same defect as would have resulted in absolute liability had someone been injured. The *Santor* decision upholds the position that the difference in the type of loss sustained should not yield a different result. The majority in *Seely* would probably suggest that in the vast majority of defective product cases, the potential personal injury loss is vastly in excess of any potential economic loss;[125] thus the law will insist that the entrepreneur spread the risk of personal injury loss, but will leave to the parties, through sales law, the task of allocating the lesser risks of economic loss. Peters' own solution would be to equate "defective" with "unmerchantable" and apply strict liability whenever the product was found to be defective, regardless of the type of loss sustained. This solution works well where the defective product poses a substantial risk of personal injury; virtually every product so defective is also unmerchantable. But what of those products which are clearly unmerchantable —in a phrase, third-rate merchandise—will a finding that they are unmerchantable be equated with defectiveness? This approach underwrites the view that a manufacturer has an absolute obligation to furnish goods both safe and merchantable.

On balance, then, there do not appear to be compelling reasons why, in the case of an ordinary consumer claiming defect-caused unmerchantability,[126] either *Santor* or *Seely* necessarily represents the far su-

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121 This subject is discussed at greater length in *Note*, 19 VAND. L. REV. 214, 218 (1966).

122 *Ibid.*

123 63 Cal. 2d at 19-29, 403 P.2d at 152-8, 45 Cal. Rptr. at 24-30.

124 See, *e.g.*, Trans-World Airlines v. Curtiss-Wright, 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955); *aff'd without opinion*, 2 App. Div. 2d 666, 153 N.Y.S.2d 546 (1956), and Delta Airlines v. Douglas Aircraft Co., 238 A.C.A. 100, 47 Cal. Rptr. 518 (1965). See also *Note*, 66 COLUM. L. REV. 917, 964 (1966).

125 *Cf.* Justice Traynor's remarks in *Escola* and *Greenman* concerning the "overwhelming misfortune" of personal injury losses.

126 "Fitness for a particular purpose" claims will be considered in connection with

perior point of view with regard to the allocation of this particular type of economic loss.

What may underlie the *Seely* decision, however, is a judicial attempt to restrain the concept of a defective product within traditional definitions. This theory will be explored at length in the following consideration of the quantum of risk surrounding the commercial consumer.

2. The Commercial Consumer

The risk of economic loss in commercial transactions is considerably greater than that in the ordinary consumer transaction because the claim, as in *Seely*, may involve lost profits. However, a commercial transaction differs markedly in terms of loss allocation theory from an ordinary consumer transaction. The entire rationale of consumer protection through loss allocation is premised on the safe assumption that every entrepreneur is in a better position to spread the risk than is the consumer. In the commercial world this premise is untrue often enough so that no real pattern of risk-spreading ability can be forecast. General Motors in its role as a consumer of automotive parts hardly needs absolute liability in tort to pass on the risk of loss to a smaller vendor of component parts. Keeton, for one, suggests that where risk-spreading abilities are at all equal, the law should leave the parties to allocate the risk of loss, consensually, as they see fit.[127]

An additional consideration arises where it is claimed that a product, due to defects, is not fit for the particular purpose for which it was sold. Ehrenzweig has suggested that in order for enterprise liability to apply to a given loss, that loss must be more-or-less typical of the particular industry, for the entrepreneur can only insure against the foreseeable loss.[128] While it may well be argued that the risk that certain goods will be rendered unmerchantable by defects is probably typical of most industries, it would seem that some of the communication between buyer and seller which is envisioned by U.C.C. section 2-315[129] would be necessary to establish whether a particular purpose for which the goods were sold was typical, and thus insurable. Morris has challenged the actuarial logic of Ehrenzweig's "typicality" test;[130] but the concept is more fundamental than merely the basis for mechanically setting the rate of insurance premiums. Rather, the test seeks to protect the expectation interests of

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commercial transactions, since such claims arise more often within that context. See text accompanying notes 127-131 *infra*.

127 Keeton, *supra* note 104, at 438.

128 EHRENZWEIG, *op. cit. supra* note 105, at 59.

129 See note 42 *supra* and accompanying text.

130 Morris, *supra* note 102.

both parties by applying the *Hadley v. Baxendale*[131] test of examining what expectations the parties entertained when they entered the transaction. The impact of *Greenman v. Yuba Power Products, Inc.* was essentially to hold as a matter of law that the consumer was entitled to an absolute expectation of safety in the product and that this expectation was known to the manufacturer. Where, as in *Seely*, the alleged defect renders the product unsuitable for a particular purpose, yet falls short of rendering the product unmerchantable, the imposition of absolute liability in tort holds, in effect, that the expectations of the consumer concerning the utility of the product, however whimsical, capricious, or uncommunicated they may be, are both reasonable and known to the manufacturer. This would seem to argue against the notion of inevitable losses underlying the rationale of absolute liability in tort; losses which result from the unreasonable expectations of either consumer or manufacturer are not "inevitable," and to the extent that the U.C.C. measures the reasonableness of the parties' expectations, one would expect to find courts following the *Seely* lead, at least in cases involving claims of fitness for a particular purpose.

The expectation-interest rationale does not solve the problem of unmerchantable goods—can the expectation of the consumer that the goods be of merchantable quality be deemed to be unreasonable? *Seely's* rejection of absolute liability in tort as a remedy for the recovery of economic loss was essentially a rejection of unmerchantability decided on fitness for a particular purpose facts. What may underlie this rejection is the complex problem of determining whether a product is defective. The California Supreme Court has realized that the equation "defective product—absolute liability" is not a panacea for all of the problems surrounding the mass marketing of consumer products. The term defective product, as it has been developed in the personal injury area, essentially has referred to a latent flaw which renders the product potentially dangerous. Under *Greenman*, the risk of personal injury loss from such danger is assigned to the manufacturer to distribute as best as he can. While every defective product is probably unmerchantable, the converse is not always true. A product may fall far short of the U.C.C. definition of merchantability yet be perfectly free from defects. One suspects that the California Supreme Court wished to establish a clear-cut category—economic loss—into which most claims surrounding just what expectations of quality and utility of a product were entertained by manufacturer and consumer would be placed. This category will be governed by the Uniform Commercial Code, a general plan designed to measure the reasonableness of

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131 9 Ex. 341, 156 Eng. Rep. 145 (1854).

these expectations. The alternative would have been to characterize every complaint about quality as a defect, and to impose liability without regard to whether, in fact, the product, the consumer, or the manufacturer was directly responsible for the disappointed expectations.

CONCLUSION

Most of the older problems of bringing an action against a manufacturer have been or can be alleviated within the framework of the Uniform Commercial Code. The *Santor* approach, which simplifies recovery by characterizing everything as a defective product, was rejected by the California court in *Seely* as an over-simplification of the problems involved in recovery for economic loss. There are no easy answers to the problems of consumer protection in a society which thrives on mass merchandising and cut-rate prices. The Uniform Commercial Code stands as the most likely source of the varieties of law necessary to handle the plethora of problems. Judicial effort would be better spent in building a comprehensive system of consumer protection within the framework of the Code, rather than in developing a few tort generalities to cover a vast number of specific problems involving the representations of the manufacturer, the expectations of the consumer, and the problem of who should bear the loss when the product fails to perform.

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