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Vaughn v. General Motors Corporation: Limiting Defective Product Tort Loss Recovery, 18 J. Marshall L. Rev. 525 (1985)

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*VAUGHN v. GENERAL MOTORS CORPORATION**: LIMITING DEFECTIVE PRODUCT TORT LOSS RECOVERY

The Illinois Supreme Court has recently resolved the issue of whether a plaintiff can recover in tort for losses incurred from a defective product where damage is limited to the product itself.[1] In *Vaughn v. General Motors Corp.*,[2] the court held that where a product's defect causes damages through a "sudden and calamitous"[3] occurrence, a plaintiff may recover under a tort theory of liability[4] for

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* 102 Ill. 2d 431, 466 N.E.2d 195 (1984).

1. Vaughn v. General Motors Corp., 102 Ill. 2d 431, 466 N.E.2d 195 (1984). In Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965), Illinois adopted the doctrine of strict liability under Sec. 402A of the *Restatement of Torts*, which states:

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

RESTATEMENT (SECOND) OF TORTS § 402A (1965). Some jurisdictions have interpreted this section to exclude damage to the defective product itself. *See infra* note 33 and accompanying text.

2. 102 Ill. 2d 431, 466 N.E.2d 195 (1984).

3. The term "sudden and calamitous" originated in Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958), *rev'd on other grounds*, Sabella v. Wisler, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). In *Fentress*, the court allowed a tort recovery for damages sustained to the plaintiff's auto in an accident resulting from defective brakes. *Id.* The plaintiff's vehicle was the only property damaged. *Id.* at 864, 323 P.2d at 228. The court limited recovery in tort to situations where "some violence or collision with external objects" existed. *Id.* at 866, 323 P.2d at 229. *See* Northern Power & Eng'g Corp. v. Caterpillar Tractor, 623 P.2d 324, 328 n.4 (Alaska 1981) (discussion of the "sudden and calamitous" occurrence requirement).

The term "accident" is sometimes used to refer to a "sudden and calamitous" occurrence. Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 388, 306 S.E.2d 253, 257 (1983).

4. Vaughn v. General Motors Corp., 102 Ill. 2d 431, 436, 466 N.E.2d 195, 197 (1984). The plaintiff brought the action against the manufacturer for both negligence and strict liability. *Id.* at 432-33, 466 N.E.2d at 195-96. Illinois does not make a distinction, however, between negligence and strict liability when deciding whether a plaintiff may recover in tort for economic losses resulting from damage to the defective product itself. *See* Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 86, 435 N.E.2d 443, 450 (1982) (distinction between economic loss and property damage "applies whether the tort theory involved is strict liability or negligence").

Economic loss has been held to be recoverable under the tort theory of intentional misrepresentation. *See* Soules v. General Motors Corp., 79 Ill. 2d 282, 402 N.E.2d 599 (1980) (economic damages recoverable for fraudulent mis-

all losses that result from the occurrence. This is true regardless of whether there is concurrent personal injury or damage to property other than the defective product.[5] Prior controversy in Illinois stemmed from the view that a court's allowance of a tort recovery for damages of an economic nature would infringe on the legislature's decision to adopt the sales provisions of the Uniform Commercial Code.[6] In an effort to avoid such an infringement, the *Vaughn* court made a distinction beween property damage recoverable in tort[7] and economic losses[8] recoverable under contract law.[9]

In *Vaughn*, the plaintiff was involved in an accident when his truck overturned as a result of brake failure.[10] Although the plaintiff did not suffer personal injury, he did sustain various business losses, including damage to the vehicle itself.[11] Vaughn filed a suit in tort against the truck manufacturer and dealer.[12] The trial court dismissed the case holding that, where only the defective product is

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representation). *See also* Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine*, 17 J. MAR. L. REV. 249, 249 (1984) ("economic loss is in fact recoverable under certain circumstances in tort"). The main focus of this casenote, however, is on the doctrine of strict products liability.

5. *Vaughn*, 102 Ill. 2d at 436, 466 N.E.2d at 197.

6. The Illinois legislature adopted the sales provisions of the Uniform Commercial Code in ILL. REV. STAT. ch. 26, §§ 2-101 to 2-725 (1983). *See infra* note 36 and accompanying text.

7. Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

8. There are various definitions of the term "economic loss." The most prevalent definition of economic loss is "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damage to other property." Bertschy, *The Economic Loss Doctrine in Illinois after Moorman*, 71 ILL. B.J. 346, 348 (1983) (quoting Note, *Econoic Loss and Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

9. *Vaughn*, 102 Ill. 2d at 435-36, 466 N.E.2d at 197 (1984).

10. *Id.* at 432-33, 466 N.E.2d at 195. Vaughn first began experiencing brake problems when the vehicle had only been driven 103 miles. *Id.* at 432, 466 N.E.2d at 195. The damage to the vehicle, however, did not occur until some nineteen months after it had been purchased. *Id.* at 432-33, 466 N.E.2d at 195. In the meantime, the plaintiff had had the brakes checked and worked on numerous times. *Id.* at 432, 466 N.E.2d at 195.

11. *Id.* at 433, 466 N.E.2d at 195. Plaintiff's prayer for relief was in the amount of $43,966.25, which sum represented the loss of the truck, expenditures for renting another truck, overtime, expenses incurred for brake repair prior to the incident, repair costs of a bulk fuel tank attached to the truck at the time of the overturn, and cleanup of spilled fuel. *Id.*

12. *Id.* at 432, 466 N.E.2d at 195. Count I of the plaintiff's complaint was for strict products liability against General Motors, alleging that the vehicle was defective when it left the manufacturer's possession and failed to perform when used in the manner ordinarily expected. *Id.* Count II of the plaintiff's complaint alleged that General Motors negligently manufactured the truck. *Id.* at 433, 466 N.E.2d at 195.

In Illinois, the doctrine of strict liability applies to "manufacturers, sellers, contractors, those who hold themselves out to be manufacturers, assemblers of parts and suppliers and manufacturers of component parts." Sipari v. Villa Olivia Country Club, 63 Ill. App. 3d 985, 992, 380 N.E.2d 819, 825 (1978).

damaged, economic losses resulting from qualitative defects[13] should be recovered under a contract theory of recovery, rather than under a tort theory.[14] The appellate court reversed the lower court's judgment holding that, damage to the defective product itself is considered property damage and recoverable in tort if the product is dangerous and if the damage results from a "sudden and calamitous" occurrence.[15]

The Illinois Supreme Court affirmed the appellate court judgment.[16] The issue before the court was whether a plaintiff has a tort action when an unreasonably dangerous defect in a product causes damage through a "sudden and calamitous" occurrence and that damage is limited to the product itself.[17] The court agreed with the appellate court's reasoning and held that where the damage to the product results from a "sudden and calamitous" occurrence, the plaintiff has suffered property damage recoverable in tort, rather than purely economic losses for which there is no tort recovery basis.[18]

In its analysis, the *Vaughn* court focused primarily on how the damage to the truck occurred. Relying on its decision in *Moorman Mfg. Co. v. National Tank Co.*,[19] the court held that where the product fails due to deterioration or causes not of an accidental nature, resulting damages are treated as economic losses, recoverable under

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13. A product is considered to have a qualitative defect when it is unfit for its intended purpose. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1169 (3d Cir. 1981).

14. *Vaughn*, 102 Ill. 2d at 435, 466 N.E.2d at 196. *See* Vaughn v. General Motors Corp., No. 79-L-40 (C.C. Fulton Cty. 1981).

15. Vaughn v. General Motors Corp., 118 Ill. App. 3d 201, 204, 454 N.E.2d 740, 742 (1983), *aff'd*, 102 Ill. 2d 431, 433, 466 N.E.2d 195, 196 (1984).

16. *Vaughn*, 102 Ill. 2d at 437, 466 N.E.2d at 198. Justice Goldenhersh delivered the opinion of the court. No concurring or dissenting opinions were filed.

17. *Id.* at 433-34, 466 N.E.2d at 196. The defendant also argued that since Vaughn was aware of the defect in the brakes and continued to use the automobile for nineteen months, he should be barred from recovering. *Id.* at 434, 466 N.E.2d at 196. The court dismissed this argument as being relevant only to the doctrines of assumption of risk and comparative fault, neither of which was at issue before the court. *Id.* at 436-37, 466 N.E.2d at 197.

The court also rejected defendant's argument that manufacturers should not bear the burden of passing the costs of defective products on to the purchasers of its products. *Id.* at 434, 466 N.E.2d at 196. Defendants argued instead, that the purchasers should bargain with the manufacturer and retailer for warranties under the Uniform Commercial Code, thereby insuring themselves against potential liability resulting from defective products. *Id.* at 434, 466 N.E.2d at 197. The court found this reasoning to be contrary to the underlying policy of strict products liability, as adopted in Suvada v. White Motor Co., 32 Ill. 2d 612, 618-21, 210 N.E.2d 182, 186-87 (1965). *See infra* note 43 and accompanying text.

18. *Vaughn*, 102 Ill. 2d at 436, 466 N.E.2d at 197. The court found that Vaughn's complaint stated a cause of action for strict liability. *Id.* The negligence count was not addressed. *Id. See supra* notes 4 and 12.

19. 91 Ill. 2d 69, 435 N.E.2d 443 (1982). *See infra* notes 37-41 and accompanying text.

a contract theory of liability.[20] If the defective product, however, causes damages that result from a sudden or dangerous occurrence, they are considered property damage and are recoverable under a tort theory.[21]

The court cited its reasoning in *Moorman* for making such a distinction. When a defective product causes physical injury to property through a sudden and dangerous occurrence, the essence of a product liability suit is present.[22] Recovery should be allowed not because the plaintiff failed to receive the quality of product he expected, but because the defective product has exposed the plaintiff to an unreasonable risk of injury to his person or property.[23] Contract law, on the other hand, protects expectation interests and provides the proper theory of recovery when a product contains a qualitative defect which results in damages from a non-accidental occurrence.[24] Because the brake failure in *Vaughn* caused the vehicle to suddenly overturn, Vaughn's losses were due to a "sudden and calamitous" occurrence.[25] Therefore, the damage did not constitute solely economic loss, but was also property damage recoverable in tort.[26]

The court was correct in finding that the damage to the truck itself was property damage and recoverable in tort.[27] The court wisely did not extend this theory to allow a tort recovery for solely economic losses which result from the product's mere failure to meet a buyer's expectations.[28] The court drew an arbitrary line of distinction between property damage and economic loss, however, when it required that the damage result from a "sudden and calamitous" occurrence.[29] The court should have made its distinction between property damage and economic loss by relying on a strict products liability analysis of examining whether the truck was defective when it left the control of the manufacturer, and whether the defect was unreasonably dangerous to Vaughn's person or property.[30]

There are two major theories of tort recovery for economic damages in this country. A minority of jurisdictions allow a tort

20. *Vaughn*, 102 Ill. 2d at 435-36, 466 N.E.2d at 197 (quoting Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 81-83, 435 N.E.2d 443, 448-49 (1982)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Vaughn*, 102 Ill. 2d at 436, 466 N.E.2d at 197.

26. *Id.*

27. *See infra* notes 42-49 and accompanying text.

28. *See infra* notes 51-63 and accompanying text.

29. *See infra* notes 67-78 and accompanying text.

30. *See infra* notes 79-82 and accompanying text.

recovery of all losses where the product is proven to be defective, regardless of whether the product is considered dangerous.[31] The majority of jurisdictions, however, hold that the defective product must be unreasonably dangerous to persons or property in order to recover economic damages in tort.[32] Some of the courts that follow

31. This theory was first advanced by the Supreme Court of New Jersey in Santor v. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). In *Santor*, the plaintiff was allowed recovery in strict liability for defective carpeting that developed unusual lines. *Id.* The court held that a manufacturer is liable in tort to a purchaser for injuries or damages sustained from a defective product, even when the damage is only to the defective product itself. *Id.* at 60-61, 207 A.2d at 312. *See also* Cosmopolitan Homes, Inc. v. Weller, 44 Colo. App. 470, 663 P.2d 1041 (1983) (plaintiff allowed recovery in negligence for latent defects in new home); Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970) (plaintiff allowed recovery in strict liability for defective golf carts); Thompson v. Nebraska Mobile Homes Corp., 647 P.2d 334 (Mont. 1982) (plaintiff allowed recovery in strict liability for a defective mobile home); Iacono v. Anderson Concrete Corp., 42 Ohio St. 2d 88, 326 N.E.2d 267 (1975) (plaintiff allowed recovery for the negligent installation of a driveway); City of LaCrosse v. Schubert, Schroeder & Assocs., 72 Wis. 2d 38, 240 N.W.2d 124 (1976) (plaintiff allowed recovery in strict liability for a defective roof). *See generally* Edmeades, *The Citadel Stands: The Recovery of Economic Loss in American Products Liability*, 27 CASE W. RES. L. REV. 647 (1977) (manufacturers should be liable for losses resulting from merely defective products); Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 MERCER L. REV. 493, 499-501 (1977) (rejection of the dangerous—non-dangerous distinction between economic loss and property damage); Comment, *Applying the No-Privity Exception to Express Warranties—Another Step Toward Extending Strict Liability to Recover Solely Economic Losses*, 24 S. TEX. L.J. 243 (1983) (recovery in strict liability should be allowed for harm resulting from defective products, regardless of dangerousness of product).

32. This position was first advanced by the Supreme Court of California in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). In *Seely*, the plaintiff was denied recovery in tort for lost profits and the purchase price of a truck when the vehicle overturned due to defective brakes. *Id.* The court rejected the adoption of strict liability as a legitimate theory to recover economic losses, holding that the doctrine of strict liability was designed not to undermine the warranty provisions of the Uniform Commercial Code, but to govern the distinct problem of physical injuries. *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21. The court found that, although the damage to the truck was "property damage," recovery in strict liability was not warranted because the plaintiff failed to prove that the product's defect caused the loss. *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. *See also* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981) (damage to a dangerously defective front-end loader considered property damage and recoverable in tort); Largoza v. General Elec. Co., 538 F. Supp. 1164 (E.D. Pa. 1982) (recovery in tort allowed for dangerously defective refrigerator); Hardley Able Coal Co. v. International Harvester Co., 494 F. Supp. 249 (N.D. Ill. 1980) (recovery in strict liability allowed for dangerously defective bulldozer which damaged itself); Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983) (recovery in tort allowed for damage to building resulting from toxic insulation); Rocky Mountain Fire and Casualty Co. v. Biddulph Oldsmobile, 131 Ariz. 289, 640 P.2d 851 (1982) (losses recoverable in strict liability and negligence for unreasonably dangerous defective motor home); Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E 2d 253 (1983) (tort recovery allowed for damage to defective drilling machine which was found to be unreasonably dangerous to its user's person and/or property); Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978) (plaintiff denied recovery in negligence for defective tractor which was not

the majority, however, require damage to property other than the defective product itself.[33]

As *Vaughn* demonstrated, Illinois now follows the view that damage to the defective product itself may be recovered in tort where the defect causes damages from a "sudden and calamitous" occurrence.[34] Earlier decisions of Illinois' lower courts, however, did not allow a tort recovery for economic damages absent personal injury or damage to other property.[35] The basis for denying recov-

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found to be unreasonably dangerous); Mid-Hudson Mack, Inc. v. Dutchess Quarry and Supply Co., 99 A.D.2d 751, 471 N.Y.S.2d 664 (1984) (recovery in tort denied for defective truck); Cayuga Harvester, Inc., v. Allis Chalmers Corp., 95 A.D.2d 5, 465 N.Y.S.2d 606 (1983) (recovery in tort denied for damages resulting from a defective harvesting machine); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982) (recovery in strict liability available for defective clock which caused a fire at plaintiff's place of business).

33. *See* Cooley v. Salopian Indus., 383 F. Supp. 1114 (D.S.C. 1974) (doctrine of strict liability does not apply to the defective product itself); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981) (recovery in negligence or strict liability not allowed without concurring personal injury or damage to other property); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., 572 S.W.2d 308 (Tex. 1978) (recovery in tort denied where a defectively manufactured plane crashed, causing damage only to the plane itself). *See also* Signal Oil and Gas Co. v. Universal Oil Prods., 572 S.W.2d 320 (Tex. 1978). In *Signal Oil*, the plaintiff was allowed to recover in strict products liability against a heater manufacturer, installer, and component part assembler for damages caused by a defective reactor which resulted in an explosion and fire at its refinery. *Id.* Recovery was allowed on the basis that the defective product caused damage to other property. *Id.* at 325. *But see* Cline v. Prowler Indus. of Maryland, 418 A.2d 968 (Del. 1980). A recovery in tort is not available where the defective product causes property damage or personal injury. *Cline*, 418 A.2d at 974. An injured plaintiff must resort to recovery under the provisions of the Uniform Commercial Code, which the court held, preempts the doctrine of strict liability. *Id. See generally* Bland & Wattson, *Property Damage Caused by Defective Products: What Losses are Recoverable?*, 9 WM. MITCHELL L. REV. 1, 14-18 (1983) (general discussion of jurisdictions allowing tort recovery for damage to defective product itself); Comment, *Strict Liability: Recovery of "Economic" Loss*, 13 IDAHO L. REV. 29 (1976) (damages solely to product itself should not be recoverable in tort).

Some plaintiffs, in an effort to avoid the "damage to other property" requirement, have argued that the defective part of the product was a component part which damaged other component parts of the product, thus resulting in "damage to other property." Arrow Leasing Corp. v. Cummins Arizona Diesel, 136 Ariz. 444, 447, 666 P.2d 544, 548-49 (1983). Most courts have rejected this theory of recovery because of its potential for unfair and unlimited application. *Id.* at 448, 666 P.2d at 549. *See* Northern Power and Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324 (Alaska 1981). In *Northern Power*, the court rejected the component part argument, reasoning that "[s]ince all but the very simplest of machines have component parts, such a broad holding would require a finding of 'property damage' in virtually every case where a product damages itself." *Northern Power*, 623 P.2d at 330. *See generally* Bertschy, *supra* note 8, at 352 (losses should be examined as a whole and recovery in tort denied or allowed as a whole).

34. *Vaughn*, 102 Ill. 2d at 436, 466 N.E.2d at 197.

35. In 1977, the Illinois appellate court held that economic losses were not recoverable in tort. Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977). In *Koplin*, the plaintiff was denied recovery for dam-

ery was a fear that tort law and contract law would become indistinguishable.[36]

The Illinois Supreme Court first addressed the issue of whether economic losses alone are recoverable in tort in *Moorman Mfg. Co. v. National Tank Co.*[37] In *Moorman*, the court recognized the need to extend a tort theory of recovery to plaintiffs who incur economic damages resulting from defective products that expose the users to an unreasonable risk of injury to their property.[38] The court denied recovery to the plaintiff for losses he sustained due to a defective grain storage tank because it found, based on the manner in which the losses occurred, that the damages were a result of the tank's deterioration.[39] The court did note, however, that the line between tort law and contract law should be drawn using interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose.[40] The *Moorman* court implied, but never expressly stated, that it would allow tort recovery for damages to only the defective product itself.[41]

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ages resulting from defective air conditioning units. *Id.* at 194-95, 364 N.E.2d at 100-01. The court found that the case fell "within the narrow range of situations dividing tort theory from contract theory." *Id.* at 199, 364 N.E.2d at 103. The court held that absent property damage or personal injury, purely economic losses were not recoverable under a tort theory of liability. *Id.* at 203, 364 N.E.2d at 107.

36. Jones and Laughlin Steel Corp. v. Johns-Manville Sales, 626 F.2d 280 (3d Cir. 1980). The court, predicting Illinois law, held that a seller of a defective roof was not liable in tort for economic losses incurred by the buyer. *Id.* The court defined "economic loss" as a loss resulting from the failure of the product to meet the expectations of the buyer and seller. *Id.* at 288. The court feared that holding a seller strictly liable for economic losses would conflict with the Illinois legislature's decision to enact the sales provisions of the Uniform Commercial Code. *Id.* at 289.

This fear that tort law and contract law would become indistinguishable in the event that the courts allowed tort recovery for solely economic losses was further demonstrated in Wuench v. Ford Motor Co., 104 Ill. App. 3d 317, 432 N.E.2d 969 (1982) (tort recovery denied for losses resulting from defective axle on automobile); Fireman's Fund Am. Ins. Co. v. Burns Elec. Security Serv., 93 Ill. App. 3d 298, 417 N.E.2d 131 (1981) (tort recovery denied for losses resulting from defective security system); Album Graphics, Inc. v. Beatrice Foods, 87 Ill. App. 3d 338, 408 N.E.2d 1041 (1980) (tort recovery denied for losses resulting from defective glue). In *Fireman's Fund*, however, the court stated that "[e]conomic loss should be contrasted with loss which the parties could not reasonably be expected to have in mind such as hazards peripheral to what the product's function is." *Fireman's Fund*, 93 Ill. App. 3d at 300, 417 N.E.2d at 133. The court rejected *Koplin*'s distinction between physical harm and economic loss as the factor determining whether losses are recoverable in tort law. *Id.*

37. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

38. *Id.* at 81, 435 N.E.2d at 448.

39. *Id.* at 85-86, 435 N.E.2d at 450. The storage tank developed a crack, which caused the plaintiff to suffer losses representing repair costs and lost profits due to the loss of use of the tank. *Id.* at 73-74, 435 N.E.2d at 444.

40. *Id.* at 85, 435 N.E.2d at 450.

41. *See* Bland & Wattson, *supra* note 33, at 10-11. Subsequent to *Moorman*, the Illinois appellate court allowed recovery against a tank manufacturer for

Denying tort recovery for damage to the defective product has been criticized as being an arbitrary line of distinction between property damage and economic loss.[42] The doctrine of strict liability for personal injury and property damage was based on the theory that the manufacturer, not the user or the consumer, should bear the losses incurred from unreasonably dangerous products.[43] This policy puts the risk of loss on the party best able to bear it.[44] It also deters[45] the manufacturer from producing defective products

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economic damages resulting from the sudden and violent rupture of a tank. Bi-Petro Refining v. Hartness Painting, 120 Ill. App. 3d 556, 458 N.E.2d 209 (1983). The court interpreted *Moorman* to allow recovery of economic damages where the defective product fails to fulfill the expectation of the parties, if the failure results in a sudden violent occurrence. *Id.* at 558-59, 458 N.E.2d at 212. The court justified this decision on the basis that in *Bi-Petro Refining* there was a risk of destruction as a result of the tank's rupture, whereas in *Moorman*, the only risk was that the contents of the tank might slowly leak out. *Id.* at 560, 458 N.E.2d at 212. In another Illinois case, recovery of economic damages was denied when a defective storm and surface removal system caused a flood and damages consisting of clean up and restoration of plaintiff's property. Palatine Nat'l. Bank v. Charles W. Greengard Assocs., 119 Ill. App. 3d 376, 456 N.E.2d 635 (1983). The court held that the damages related to a "natural accumulation of water on the premises and not to the 'type of sudden and dangerous occurrence best served by policy of tort law.' " *Id.* at 380, 456 N.E.2d at 638-39 (quoting *Moorman*, 91 Ill. 2d at 85, 435 N.E.2d at 450 (1982)).

42. Fordyce Concrete, Inc. v. Mack Trucks, Inc., 535 F. Supp. 118 (D. Kan. 1982) (damage to cab of truck resulting from a defective chassis recoverable in tort); Arrow Leasing Corp. v. Cummins Ariz. Diesel, 136 Ariz. 444, 666 P.2d 544 (1983). In *Arrow Leasing*, the court examined other jurisdictions' attempts to distinguish property damage from economic loss. *Id.* at 448, 666 P.2d at 547-49. The court concluded that such distinctions should not be broadly applied. *Id.* Instead, courts should examine each case "on its own facts bearing in mind the purposes of tort law as contrasted with contract law." *Id.* at 448, 666 P.2d at 548. *See supra* note 32 and cases cited therein.

43. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965). *See also* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). "[T]he invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present . . . in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user. . . ." *Id.* at 619, 210 N.E.2d at 186.

44. *See* Comment, *Manufacturers' Liability to Remote Purchasers For "Economic Loss" Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966). This theory, sometimes referred to as the "enterprise theory of liability," was first introduced by Chief Justice Traynor of the California Supreme Court, who stated:

> [t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 441 (1944) (Traynor, J., concurring). *See also* Seely v. White Motor Co., 63 Cal. 2d 9, 18-19, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

45. *See* Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30, 59 (1965) (a manufacturer's "complete defense" against a strict products liability suit is a "product free from defects"). *See also* Zammit, *Manufacturers' Responsibility for Economic Loss*

unreasonably dangerous to their users.[46] These policies strongly support the court's extension of tort recovery in *Vaughn*, where the damage was limited to the defective truck. Imposing strict liability for personal injury and property damage applies equally to situations where the unreasonably dangerous defective product damages itself, thus causing the plaintiff to incur economic damages.[47] There is no reason to distinguish between the plaintiff's other property and the property which was damaged as a result of its own defect[48] because the defective product is just as much property as is his other property.[49] Therefore, the *Vaughn* court was correct in finding that the plaintiff's losses, although limited to the defective truck itself, were property damage and recoverable in tort.

The court wisely did not extend its holding and follow the minority jurisdictions' position of allowing a tort recovery for all losses resulting from a defective product, regardless of whether the prod-

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Damages in Products Liability Cases: What Result in New York?, 20 N.Y.L.F. 81, 84 (1974) (stating that "imposing liability on a manufacturer for the cost of repair where a truck's brakes are discovered to be defective incidentally promotes the policy of deterring the production of trucks with unsafe brakes. . . .").

46. Justice Peters of the California Supreme Court questioned whether the imposition of strict liability does in fact deter a manufacturer from producing unsafe products:

> A skeptic may well question whether the callous manufacturer, who is unmoved by the prospect of negligence liability, plus *res ipsa loquitur*, and by the effect of any injury whatever upon the reputation of his goods, will really be stimulated by the relatively slight increase in possible liability to take additional precautions against defects which cannot be prevented by only reasonable care.

Seely v. White Motor Co., 63 Cal. 2d 9, 23-24, 403 P.2d 145, 154-55, 45 Cal. Rptr. 17, 26-27 (1965) (Peters, J., dissenting in part, concurring in part) (footnote omitted) (quoting Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1119 (1960)).

47. Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981). *See also* Fallon, *Physical Injury and Economic Loss—The Fine Line of Distinction Made Clearer*, 27 VILL. L. REV. 483, 489 (1982) ("a product is no less defective if it injures only itself, and, accordingly, its manufacturer is no less culpable under such circumstances.").

48. *Pennsylvania Glass Sand Corp.*, 652 F.2d at 1172-73. The court stated that "[t]ort law imposes a duty on manufacturers to produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself." *Id.*

49. *See* National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983) (court reversed its prior holding that the doctrine of strict liability could not be used to recover for damages to product itself); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 858 (W. Va. 1982) ("damage to the defective product should be treated as is damage to other property"); Air Prods. and Chems., Inc. v. Fairbanks Morse, Inc. 58 Wis. 2d 193, 219, 206 N.W.2d 414, 427 (1973) (damages sustained to electric motors as a result of the motor's own defect states a cause of action in strict liability). *See also* O'Brien, *Products Liability: Should Illinois Allow Recovery for Property Damage Absent Personal Injury?*, 1 N.I.U. L. REV. 57 (1981) (recovery in strict liability and negligence should be allowed for damage to product itself where product is dangerously defective).

uct is considered dangerous.[50] Many courts[51] and commentators[52] have criticized this minority view because of its total disregard for the law of sales, as provided in the Uniform Commercial Code.[53] The *Vaughn* court made it clear that it would not allow recovery in tort for losses resulting from a defective product which merely wears out or does not meet the expectations of the parties.[54] The court termed such damages "economic losses"[55] and limited their recovery to contract law and the sales provisions of the Uniform Commercial Code.[56]

This view seems most appropriate considering the commercial sales setting. To allow a tort recovery for economic losses would be unfair to a seller or manufacturer, especially where the parties have negotiated a limitation on liability[57] or an "as is"[58] sale.[59] Because

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50. *See supra* note 31 and accompanying text.

51. Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983) (recovery in tort denied for defective copy machines); A. C. Hoyle Co. v. Sperry Rand Corp., 128 Mich. App. 577, 340 N.W.2d 326 (1983) (recovery in tort denied for nonconforming hydraulic motors); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981) (recovery in tort denied for defective hot plate press); Gibson v. Reliable Chevrolet, Inc., 608 S.W.2d 471 (Mo. App. 1980) (recovery in tort denied for damage to defective automobile which was not result of violent occurrence).

52. Keeton, *Private Law-Torts*, 25 S.W. L.J. 1 (1971) (losses resulting from inferiority of products should be recovered in contract); Speidel, *Products Liability, Economic Loss and the U.C.C.*, 40 TENN. L. REV. 309 (1973) (recovery for losses should be limited to contract law where the product's defect is not dangerous to user's person or property); Comment, *Strict Liability—Will it be Expanded to Allow Recovery for Commercial Loss*, 16 S. TEX. L.J. 341 (1975) (policies behind strict liability do not apply to economic loss).

53. U.C.C. §§ 2-101 - 2-725. *See* Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1, 24-26 (1983). Professor Wade quoted Chief Justice Traynor of the California Supreme Court, who wrote:

> The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or the sales provisions of the Uniform Commercial Code, but rather to govern the distinct problem of physical injuries.

Id. at 24-25 n.84 (quoting Seely v. White Motor Co., 63 Cal. 2d 9, 13, 403 P.2d, 145, 149, 45 Cal. Rptr. 17, 21 (1965)).

54. *Vaughn*, 102 Ill. 2d at 435-36, 466 N.E.2d at 196-97.

55. *Id.*

56. *Id.*

57. *See* U.C.C. § 2-316 (1977) (Exclusion or Modification of Warranties).

58. "[A]ll 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. . . ." *Id.* § 2-316(3)(a).

59. *See* Gocker & Yesawich, *Recovery of Economic Loss Based Upon Strict Products Liability*, 54 N.Y. ST. B.J. 519, 521-22 (1982). *See generally* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966) (exploration of the ramifications resulting from the convergence of tort and contract law).

the doctrine of strict liability does not allow a seller or a manufacturer to limit its liability through disclaimers,[60] the seller or manufacturer would be liable for the product's performance even though it did not agree that the product would meet the buyer's expectations.[61] Therefore, permitting a tort recovery for damages incurred from a product which simply fails to meet the party's expectations would have the effect of superseding the sales provisions of the Uniform Commercial Code,[62] and thus would make the manufacturer an insurer of its products.[63]

In *Vaughn* the truck did not merely fail to meet Vaughn's expectations and cause him to lose the benefit of his bargain. It is reasonable for a consumer to expect to repair or replace brakes or other mechanical parts after a period of use. It is unreasonable, however, to expect that a product's defect will result in the product's total destruction and cause the user to incur additional economic losses.[64] The vehicle was not only unfit for its intended

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60. The *Restatement (Second) of Torts* provides:

> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties. . . . The consumer's cause of action . . . is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands.

RESTATEMENT (SECOND) OF TORTS § 402A comment m (1965). *See also* Seely v. White Motor Co., 63 Cal. 2d 9, 16, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965); Thompson v. Nebraska Mobile Homes Corp., 647 P.2d 334 (Mont. 1982). In *Thompson*, the following clause, inserted in a contract for the purchase of a mobile home, was found to be inoperable under a strict liability theory:

> It is mutually agreed that the buyer takes the new mobile home, trailer or other described unit, 'as is' and that there are no warranties, either express or implied, made by the dealer. The seller specifically makes no warranty as to its merchantability or of its fitness for any purpose.

Id. at 334-35.

61. *See* Jones and Laughlin Steel Corp. v. Johns-Manville Sales, 626 F.2d 280, 289 (3d Cir. 1980); Gocker & Yesawich, *supra* note 59, at 521-22. *See also* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), where Justice Traynor stated that a manufacturer should not 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." *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. *See generally* Bland & Wattson, *supra* note 33, at 7 (discussion of *Seely*'s rejection of tort recovery for qualitative defects).

62. Gocker & Yesawich, *supra* note 59, at 521. *See also* Jones and Laughlin Steel Corp. v. Johns-Manville Sales, 626 F.2d 280, 289 (3d Cir. 1980) (strict liability for economic loss would supersede § 2-316 of the U.C.C.); Morrow v. New Homes, Inc., 548 P.2d 279, 286 (Alaska 1976) (tort recovery not allowed for defective mobile home).

63. Jones and Laughlin Steel Corp. v. Johns-Manville Sales, 626 F.2d 280, 289 (3d Cir. 1980).

64. *See* O'Brien, *Re: Tort Recovery Absent Personal Injury—A "Concurring Rebuttal,"* 68 ILL. B.J. 368 (1980), where the author stated:

> It is one thing to charge the manufacturer with the expectation of the new car purchaser, that the car will last for 'x' miles; travel at 'x' miles an hour; or dependably start in 'x' weather. It is entirely another thing to charge the

purpose, but it was a dangerously, defective product which exposed Vaughn to an unreasonable risk of physical and financial harm.[65] Therefore, the court was justified in classifying the damages as property damage, rather than economic losses, and allowing a recovery in tort.

In determining whether Vaughn's losses were property damage or economic losses, the court primarily focused on how the damage to the truck occurred.[66] The court's requirement that a loss result from a "sudden and calamitous" occurrence[67] is as arbitrary a line of distinction between economic loss and property damage as is a distinction based on the type of property damage.[68] In effect, what the court held is that only those plaintiffs fortunate enough to have incurred losses through a dramatic event may recover in tort. Yet, there is no justifiable reason for a court to allow or disallow a plaintiff recovery in tort based on the manner in which his losses occurred.[69]

It is not difficult to demonstrate how making a distinction between economic loss and property damage on such a basis leads to unjustifiable results. For example, it would be unjust to allow recovery in tort to one plaintiff for the loss of contents in a defective

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manufacturer with the new car purchaser's expectation that the auto, while maybe not being mechanically indestructible, is at least not going to self-destruct as a result of a defect. The distinction is that in one case the product simply 'wears out' from use or overuse; in the other case it is damaged or destroyed as a result of its own defective manufacture.

Id. at 368.

65. *See* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165 (3d Cir. 1981). "The law does not require purchasers to bargain for a safe product, because the manufacturer has a legally imposed duty to provide such an item." *Id.* at 1175.

66. *See supra* text accompanying notes 25-26.

67. *Vaughn*, 102 Ill. 2d at 436 466 N.E.2d at 197.

68. *See infra* notes 69, 72, 74, 77-78.

69. Justice Peters stated:

I cannot rationally hold that the plaintiff whose vehicle is destroyed in an accident caused by a defective part may recover his property damage under a given theory while another plaintiff who is astute or lucky enough to discover the defect and thereby avoid such an accident cannot recover for other damages proximately caused by an identical defective part. The strict liability rule should apply to both plaintiffs or to neither. They cannot be validly distinguished.

Seely v. White Motor Co., 63 Cal. 2d 9, 22 n.2, 403 P.2d 145, 154 n.2, 45 Cal. Rptr. 17, 26 n.2 (1965) (Peters, J., dissenting and concurring). Chief Justice Traynor stated in the majority opinion of *Seely*, that "[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury." *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23. *See also* Fallon, *supra* note 47, at 501 (author questions whether a plaintiff forced to repair or replace a dangerously defective product needs to suffer "sudden and calamitous damage" to recover in tort).

tank that ruptured,[70] and to deny recovery to another because the loss resulted from a leak through a crack in the tank.[71] Both plaintiffs suffered the same harm from a defective product that was unreasonably dangerous to his property. Therefore, both plaintiffs should be afforded the same avenues of recovery.[72]

Some jurisdictions, which previously adopted the "sudden and calamitous" requirement for the distinction between economic loss and property damage,[73] have since questioned its applicability.[74] The Supreme Court of Alaska recently allowed a plaintiff recovery in strict products liability against an insulation manufacturer for economic damages sustained to the plaintiff's building that resulted from the insulation's emission of dangerous toxic fumes.[75] The court rejected the defendant's argument that Alaska's prior strict liability decisions required a "sudden and calamitous" occurrence test[76] and stated that there was nothing "magical" about the phrase "sudden and calamitous."[77] The court reasoned that damages re-

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70. *See supra* note 41.

71. *See supra* notes 37-39 and accompanying text.

72. *See supra* note 69. *See also* Ribstein, *Guidelines for Deciding Product Economic Loss Cases*, 29 MERCER L. REV. 493 (1978), where the writer rejected the "sudden and calamitous occurrence" test of tort recovery and stated:

> The Courts have been willing to permit tort recovery where the damage occurs in a sudden 'accident' because of the close analogy to the standard property damage case; but there is no significant difference between cases arguably involving an 'accident,' such as the collapse of a tobacco barn due to bad design, and gradual deterioration of the product due to defect, or simple unsuitability. In all of these cases the claim is that the product was defective when it was sold, and it should not matter whether the defect manifested itself dramatically or remained quietly latent in the product.

Id. at 498-99.

73. Gene Cantrell Drilling Co. v. Ingersoll-Rand Co., 571 F. Supp. 1216 (N.D. Ill. 1983) (defendant denied judgment on the pleadings where plaintiff alleged an explosion of a defective oil rig caused damages through a "violent occurrence"); City of Clayton v. Grumman Emergency Prods., Inc., 576 F. Supp. 1122 (E.D. Mo. 1983) (plaintiff denied recovery in negligence and strict liability for merely defective fire truck); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska, 1977) (damage to mobile home as a result of a fire was deemed property damage and recoverable in tort); Vulcan Materials Co. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983) (tort recovery allowed where damage results from an accident); National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983) (recovery in tort allowed where damage results from a sudden, violent event); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 859 (W. Va. 1982) (strict liability recovery where defective product causes damages through a "sudden calamitous event").

74. Shooshanian v. Wagner, 672 P.2d 455 (Alaska 1983). *See also* Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1171 n.19 (3d Cir. 1981), where the court admitted that "[w]ith some products an accident may not be clearly distinguishable from internal deterioration."

75. *Shooshanian*, 672 P.2d 455 (Alaska 1983).

76. *See* Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977).

77. "A 'sudden and calamitous' event has never been the test of what constitutes 'property damage.'. . . In light of our opinion today, we think the phrase has limited future utility." *Shooshanian*, 672 P.2d 455, 464 (Alaska 1983)

sulting from a "sudden and calamitous" event may demonstrate the dangerousness of the defective product; however, the distinction between economic loss and property damage should not rest on a test of how the damage occurred.[78]

It is proposed that future courts' analyses of this issue focus on whether the product was defective when it left the hands of the manufacturer and whether the defect was unreasonably dangerous to the user's person or property.[79] If both conditions exist, then the damage resulting from the defect should be deemed property damage and recoverable in tort.[80] If, however, the defective product was not unreasonably dangerous to the user's person or property, but merely failed to meet the buyer's expectations, then the resulting damages should be deemed economic loss and should not be recoverable in tort.[81] The plaintiff must then resort to his contract or the sales provisions of the Uniform Commercial Code for recovery.[82] If the Illinois Supreme Court had applied this analysis to the *Vaughn* case, it would have retained the tort and contract law distinction, while still finding that Vaughn's losses were recoverable in tort.

The decision in *Vaughn* left intact Illinois' long standing bar against recovery in tort for economic losses. It broadened, however, the definition of "property damage" to include damage to the defective product itself. In its attempt to separate contract law from tort law, the court drew an arbitrary line of distinction between economic loss and property damage. As a result of this decision, future courts deciding whether a plaintiff's losses are economic or property damage will be forced to examine how the losses occurred. An analysis of this nature must be abandoned due to potential unjustifi-

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(quoting Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 328, n.5 (Alaska 1981)). *See also* Arrow Leasing Corp. v. Cummins Arizona Diesel, Inc., 136 Ariz. 444, 447, 666 P.2d 544, 548 (1983) (rejection of the "sudden and calamitous" occurrence test as the exclusive factor determining whether the loss is recoverable in tort).

78. *See* Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 328 (Alaska 1981). The court stated that its "purpose in using that phrase was merely to illustrate those instances in which 'property damage' is most likely to be found. . . ." *Id.*

79. RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See supra* note 1.

80. *See supra* note 7 and accompanying text.

81. *See supra* notes 51-63 and accompanying text.

82. *See supra* notes 8, 9, 51-63 and accompanying text. *See also* Gocker & Yesawich, *supra* note 59, at 522, where the commentator, realizing that in some instances there is a disparity of bargaining power between the parties, noted that U.C.C. § 2-302 (1977) (Unconscionable Contract or Clause), gives the courts the power to refuse to enforce a contract that it finds as a matter of law to be unconscionable. *Id.* at 522 n.17. Therefore, the "courts need not resort to a strict products liability claim to protect the interest of a consumer bound by an onerous contract term which arose from a disparity in the bargaining power of the parties." *Id.*

able results and the fact that it allows manufacturers to escape liability for their unreasonably dangerous products. Regardless of whether the losses occur through a dramatic event, a plaintiff should be allowed a tort recovery if his losses result from a product's defect which was unreasonably dangerous to his person or property.

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