Saratoga Fishing Co. v. J.M. Martinac & Co.: Bailing out the Lazy Commercial Purchaser from the Murky Waters of Resale

Meredith J. Ringler

Follow this and additional works at: http://lawecommuns.luc.edu/luclj

Part of the Law Commons

Recommended Citation
Available at: http://lawecommuns.luc.edu/luclj/vol30/iss1/5
Saratoga Fishing Co. v. J.M. Martinac & Co.: Bailing Out the Lazy Commercial Purchaser from the Murky Waters of Resale

I. INTRODUCTION

"Tort law should not be bent so far out of its traditional progressive path and discipline by allowing tort lawsuits where the claims at issue are, fundamentally and in all relevant respects, essentially contractual, product-failure controversies. Tort law is not the answer for this kind of loss of commercial bargain."

The New York Court of Appeals decision noted above illustrates the dominant interpretation of tort law in products liability. Specifically, in the commercial context, courts typically allow tort recovery only when warranty-contract law is infeasible; however, courts in some instances allow tort recovery even when recovery in warranty-contract is allowed. Thus, although no longer the only outlet for recovery in product liability actions, warranty-contract law still primarily restricts the scope of recovery in commercial bargains.

The increase in the amount of controversies and conflicts before the courts stems from the growth in products liability law. In part, pending suits focus on the circumstances surrounding the loss of the

1. Bocre Leasing Corp. v. General Motors Corp., 645 N.E.2d 1195, 1199 (N.Y. 1995) (stating in a New York Court of Appeals decision that the focus of economic loss is on the plaintiff's bargain).
2. "Products liability is the name currently given to the area of tort law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds" that result from alleged product defects. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 95, at 677 (5th ed. 1984).
3. The law of contracts includes the assignment of contract rights, debts, rights to performance, and rights to damages or restitution for breaches of contract. See 4 Arthur L. Corbin, Corbin on Contracts § 857, at 411 (1st ed. 1951); see also Kenneth Ross et al., Product Liability of Manufacturers: Prevention and Defense 215-17 (1985) (discussing a manufacturer's duty to recall or warn consumers).
4. See infra Part IV.B. (discussing a purchaser's windfall and recovery in tort where contract was possible).
5. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871 (1986). "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." Id.
6. See infra notes 20-67 and accompanying text discussing warranty recovery and the introduction of tort law in products liability law.
product and the scope of a manufacturer's liability as the product moves through the market chain of distribution. In Saratoga Fishing Co. v. J.M. Martinac & Co.,\(^7\) the Supreme Court defined the scope of recovery for a second user in the chain of distribution when a defect in the original product caused damage to additional equipment attached to the product by an earlier user in the chain of distribution.\(^8\) The Court held that "other property"\(^9\) in the market chain of distribution includes additional equipment subsequently added to the product by the initial user.\(^10\) Therefore, subsequent users who purchase the product from the initial buyer-user in the chain of distribution may seek tort relief from the manufacturer for damage caused to "other property" by the product.\(^11\) In Saratoga, as an issue of first impression, the Supreme Court addressed whether a second user in the market chain of distribution can recover in tort for damage caused to additional equipment.\(^12\) In so doing, the Court disregarded earlier state and lower federal court interpretations that piloted contract remedies as the means of reimbursement for economic loss.\(^13\)

This Note first summarizes the evolution of privity, contract-warranty, and tort law recovery within the area of products liability.\(^14\) It next addresses the historical battles between the application of contract and tort law and the underlying theories dictating recovery in tort law for loss or damage of products.\(^15\) Further, this Note addresses judicial restrictions upon the form of recovery depending upon the nature of the loss and traces the subsequent court decisions

---

8. See id. at 1786-88.
9. See East River, 476 U.S. at 867-68 (requiring "other property," not simply the product itself, to be damaged when the plaintiff pursues a property damage tort claim). The meaning of "other property" is frequently the center of dispute in products liability actions. See infra Part II.D.4 for a discussion on how to define the product. Prior to Saratoga, the Third Circuit defined "other property" as the product plaintiff purchased rather than what the defendant sold. See King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir. 1988).
10. See Saratoga, 117 S. Ct. at 1786 (stating that "other property" includes "the equipment added by the Initial User before he sold the ship to the Subsequent User").
11. See id. at 1788-89. Prior to Saratoga, "the product" was "the finished product bargained for by the buyer" instead of the individual components that comprise the entire product. Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925, 930 (5th Cir. 1987).
13. See id. at 1789 (Scalia, J., dissenting) (noting that the issue in Saratoga has been discussed only by the very court now on review).
14. See infra Part II.A.
15. See infra Part II.B-C.
that have grappled with the meaning of these restrictions. In addition, this Note discusses the majority and dissenting opinions in Saratoga and the Court’s attempt to distinguish among lower federal and state court opinions as well as its own prior ruling on an analogous issue. It then criticizes the Saratoga decision for upsetting the balance between tort and contract law and for disregarding the well-settled preference for contract law within the context of products liability. Finally, this Note predicts the impact of the decision in Saratoga upon the liability of product manufacturers and anticipates future judicial interpretations of the proper form of recovery.

II. BACKGROUND

The avenue of recovery available to those injured by products has evolved during the last several decades. Accordingly, the amount and type of recovery available to injured purchasers, users, and bystanders are inconsistent. Throughout this period, courts have grappled with the prevalent policy choices that dictate the type of recovery for a certain type of loss.

A. Theories Of Recovery: Products Liability

Products liability actions vary depending upon the loss suffered and the persons suffering such loss. Typically, five categories of loss determine the applicability of either tort or contract remedies. Prosser and Keeton on the Law of Torts defines these five losses as the following:

16. See infra Part II.D.
17. See infra Part III.
18. See infra Part IV.
19. See infra Part V.
20. See KEETON ET AL., supra note 2, § 95, at 677.
21. See id. § 95, at 678. A breakdown of these five losses illuminates that losses may occur to either the purchaser or others in contact with the product who are not purchasers. See id. A proper evaluation of the kind of loss and the person suffering such loss dictates the proper form of recovery and answers, what Prosser calls, the resolution of major issues in products liability claims. See id. § 95, at 678-79. This means that loss premised upon either tort or contract laws will resolve some of the following issues: whether the supplier is subject to strict liability; whether a “contract of sale or other bargaining transaction” is effective to reduce, limit, or shield the seller’s or supplier’s liability; whether defenses are available based on the conduct or misconduct of the purchaser, user, or victim; whether a person, who is not a purchaser, may bring suit against the manufacturer or seller; and what constitutes the “existence” of the cause of action and the appropriate statute of limitations. Id. § 95, at 679.
(1) personal injuries,\(^{22}\) (2) physical harm to tangible things, other than the assembled product . . . ,\(^{23}\) (3) physical harm to or destruction of the assembled product purchased by the first purchaser for use,\(^{24}\) (4) physical harm to or destruction of a product that was constructed with or repaired with the use of the target seller's component part,\(^{25}\) and (5) direct economic loss resulting from the purchase of an inferior product, and indirect consequential loss, such as loss of profits . . . . \(^{26}\)

In addition, persons suffering losses as a result of the product's failure generally are purchasers of the product,\(^{27}\) users who did not purchase the product,\(^{28}\) or non-users who were merely present at the time of the

---


23. Typically, loss to tangible things other than the assembled product is "other property," separate from the product causing the harm, and is recoverable in theories of tort law under negligence or strict liability. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 867-68 (1986) ("[T]he manufacturer's duty of care [is] broadened to include protection against property damage . . . [s]uch damage is considered so akin to personal injury that the two are treated alike.").

24. According to the "economic loss doctrine," contract law determines recovery for destruction of the product itself, as it is purchased by the buyer. See id. at 868. Specifically, in *East River*, the Court held that "failure of the product to function properly—is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." See id.

25. Component parts and repairs to the product are part of the assembled product, and injury thereto is subject to contract law. See id. at 867. The Court in *East River* held that because "all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty and strict products liability." Id. (alteration in original) (quoting Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 330 (Alaska 1981)).

26. KEETON ET AL., supra note 2, § 95, at 678. The Supreme Court in *East River* held that "lost profits [are] essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law." *East River*, 858 U.S. at 870. Consequently, lost profits are a form of economic loss that are bound to the economic loss doctrine set forth in *East River*. See id.

27. See KEETON ET AL., *supra* note 2, § 95, at 678. As noted previously, recovery among purchasers of the product varies depending upon the character of loss suffered. See id. § 95, at 678-79. Plaintiffs are bound to recover in contract or warranty for loss that results in a product's failure to perform or lost profits—purely economic loss. See id. § 95-95A, at 678-81. Economic loss arises out of express or implied obligations made at the time of the product's sale pursuant to the parties' intent to independently allocate losses among themselves. See id. In contrast, tort recovery is applicable where loss occurs to the individual purchaser or other property used in conjunction with the product. See id. Personal injury is subject to greater judicial interference because of the pain and anguish that frequently accompany the loss. See id.

28. See id. § 95, at 678. When the plaintiff is not a purchaser of the product,
product’s failure.29

Multiple forms of loss prohibit the adoption of one type of remedy30 in products liability cases.31 Rather, alternative theories of recovery apply depending on the nature, kind, and severity of the loss.32 Application of the appropriate remedy, however, is often unclear and inconsistent depending upon judicial and political preferences.33 Moreover, despite recent federal interference, products liability is almost exclusively subject to state application and interpretation without federal preemption.34 Therefore, general remedies available in products liability cases are subject to slight variation among jurisdictions.35

B. Historical Battles Between Tort And Contract Remedies

Conflicts surrounding the application of either tort or contract law in the products liability area are neither unique nor easily identifiable. Early nineteenth century courts perceived privity36 as the primary recovery has been described as difficult to justify. See Comment, Manufacturers’ Liability to Remote Purchasers for “Economic Loss” Damages—Tort or Contract? 114 U. PA. L. REV. 539, 540-43 (1966) [hereinafter Manufacturers’ Liability]. However, with the increased use of tort law in products liability, courts permit implied warranty actions by nonpurchasers who either have a close relationship to the purchaser or are sufficiently foreseeable plaintiffs. See id. This recovery represents the extension of protection to classes of non-purchasers. See id.

29. See KEETON ET AL., supra note 2, § 95, at 678. Non-users who did not purchase the product are not parties to the warranty or contract between sellers and purchasers of the product. See id. § 95-95A, at 678-81. Consequently, non-users sustaining personal or property loss are unable to sufficiently protect against such loss and generally seek relief in tort law. See id. § 95-95A, at 678-81.

30. See supra Part II.A.

31. See KEETON ET AL., supra note 2, § 95, at 678-79.

32. See id. Generally, the following theories represent the alternative forms of recovery: “(1) strict liability in contract for breach of a warranty . . . . , (2) negligence liability in contract for breach of an express or implied warranty . . . . , (3) negligence liability in tort largely for physical harm to persons and tangible things, and (4) strict liability in tort largely for physical harm to persons and tangible things.” Id.

33. See Leebron, supra note 22, at 454-55 (discussing the emergence of tort reform legislation in a number of states in response to expansion of strict products liability law).

34. See id. at 452-54 (providing a brief overview of the complexities surrounding federal and state product liability law resulting from federal regulation of product manufacturing, marketing, distribution, warning, and testing).

35. See, e.g., 63B. AM. JUR. 2D Products Liability § 1912, at 458 n.25 (1997) (citing Danforth v. Acorn Structures, Inc., 608 A.2d 1194 (Del. 1992) (noting that under Delaware law, the economic loss doctrine acts as a complete bar to recovery even if unequal bargaining power between consumers and commercial sellers exists)).

36. Privity is a “[d]erivative interest founded on, or growing out of, contract,
determination of liability in products liability cases. Consequently, privity limited the recovery of injured consumers, users of products, and third parties. Persons without privity could not obtain relief for losses that resulted from a product’s failure to perform or a manufacturer’s negligence. However, industrialization increased the number of hazardous products, which in turn increased the number of injured consumers. This increase in personal injuries and property damage heightened judicial awareness of the need for tort liability and consequently eroded away the privity defense.

Specifically, in MacPherson v. Buick Motor Co., Judge Cardozo expressed a preference for remedies in tort law over contract law, explicitly renouncing contract and privity as the only safeguards against injury to “life and limb." This concern for “life and limb” illustrated a preference for people rather than paper agreements. In this pivotal ruling, Judge Cardozo held that when the “consequences of negligence may be foreseen,” contract remedies no longer serve as the only outlet for relief. Judge Cardozo stated, “[w]e have put aside the notion that the duty to safeguard . . . grows out of contract and nothing else.”

connection, or bond of union between parties . . . connection or relationship which exists between two or more contracting parties.” BLACK’S LAW DICTIONARY 1199 (6th ed. 1990).

37. See Michael D. Lieder, Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase, 66 WASH. L. REV. 937, 943 (1991). Early U.C.C. interpretations extended the warranty “from the seller of goods to the buyer, members of the buyer's family and household and the buyer's guests.” Id. at 951.

38. See Robert L. Rabin, Restating the Law: The Dilemmas of Products Liability, 30 U. MICH. J.L. REFORM 197, 198 (1997); see also Leebron, supra note 22, at 396 (discussing how the nineteenth century interpretation of privity limited recovery in tort, negligence, and warranty to only direct purchasers of the product); Winterbottom v. Wright, 152 Eng. Rep. 402, 402 (Ex. 1842) (holding that the privity defense did not make remote suppliers and manufacturers liable to injured users or consumers).

39. See Rabin, supra note 38, at 198. During this era, tort actions were unlikely due to the natural application of already present warranty and contract provisions between the manufacturer and the buyer that resulted from the sale of the goods. See id. Contract and buyer-seller obligations dominated tort and negligence principles. See id.

40. See Lieder, supra note 37, at 942-44 (discussing the erosion of the privity defense beginning with MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)).

41. 111 N.E. 1050 (N.Y. 1916).

42. See id. at 1053 (holding that liability for product defects arises out of products that are “reasonably certain to place persons in peril when negligently made”).

43. See Rabin, supra note 38, at 198-99 (quoting MacPherson, 111 N.E. at 1053).

44. MacPherson, 111 N.E. at 1053.

45. See id. Judge Cardozo alluded to the principle that the law evolves and adapts to changes in societal conditions and needs. See id. The needs and requirements of one time are not necessarily the needs and requirements of future generations. See id.
C. The Emergence of Tort Remedies as a Primary Form of Relief

Although Judge Cardozo’s ruling in MacPherson represents one of the earliest clashes between contract and tort law remedies in the area of products liability, tort remedies did not surface as the primary form of relief until several decades later. In Escola v. Coca Cola Bottling Co., Justice Traynor of the California Supreme Court, in a concurring opinion, recommended extending tort liability to include imposing absolute liability upon manufacturers. Specifically, Justice Traynor reasoned that public policy correctly places liability upon those best able to absorb the costs and guard against recurrence of the hazard. Thus, Justice Traynor’s concurring opinion in Escola helped to make the privity defense a creature of the past.

Compared to purchasers, manufacturers were better suited to handle liability because of their ability to distribute costs as a natural consequence of doing business and to insure against potential risk of loss. Moreover, two decades after Escola, in 1963, a landmark decision made recovery in tort for defective products the rule rather than the exception. In Greenman v. Yuba Power Products, Inc.,

---

46. See Rabin, supra note 38, at 199.
47. See id. at 198. Courts slowly suppressed the privity defense and imposed implied warranty and strict liability against manufacturers of harmful products. See id.
48. 150 P.2d 436 (Cal. 1944). The California Supreme Court held that in the case of a waitress injured by a shattering soda bottle, res ipsa loquitur applied if the plaintiff had control of the product at the time of the injury. See id. at 440. More importantly, in a concurring opinion, Justice Traynor stated that strict liability, even in the absence of negligence, provided the most reasonable means of relief. See id. at 440-442 (Traynor, J., concurring).
49. See Rabin, supra note 38, at 199-200 (citing Escola, 150 P.2d at 440-41 (Traynor, J., concurring)). Specifically, Justice Traynor, in his concurring opinion, stated that a manufacturer is liable whether or not it is negligent because “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.” Escola, 150 P.2d at 440 (Traynor, J., concurring).
50. See Escola, 150 P.2d at 440-41 (Traynor, J., concurring).
51. See Rabin, supra note 38, at 198-99. But see Lieder, supra note 37, at 944 (stating that in certain limited causes of action, privity remains a viable defense in five jurisdictions).
52. See Escola, 150 P.2d at 440-41 (Traynor, J., concurring); see also Leebron, supra note 22, at 397-98 (discussing Justice Traynor’s decision in Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963), as the first state decision to adopt strict liability in tort for defective products).
53. See Rabin, supra note 38, at 200-01; see generally Greenman v. Yuba Power Prods., Inc., 377 P.2d at 900-01 (holding that the manufacturer of a power tool was strictly liable in tort for personal injury resulting from the product’s malfunction).
54. 377 P.2d 897 (Cal. 1963).
the California Supreme Court adopted strict liability in tort for
defective products and denied defenses in warranty or contract.\footnote{55}{See id. at 899-901.}
The court unanimously held that future product defect injuries required
decisions based upon strict liability in tort without reliance upon
warranty.\footnote{56}{See id. at 901; see also Rabin, supra note 38, at 200-02 (stating that Greenman
and the creation of Section 402A of the Restatement (Second) of Torts provided the
foundation for future products liability actions).}

State court decisions were not the only battlegrounds for the debate
over the application of tort or contract law in the area of products
liability.\footnote{57}{See supra notes 50-56 and accompanying text; see also Greenman, 377 P.2d at
901 (identifying state court cases).}

In 1965, the American Law Institute adopted section 402A
of the Restatement (Second) of Torts, which imposed strict liability
upon the seller "engaged in the business of selling a product" when
harm occurred to the ultimate user, consumer, or his property.\footnote{58}{RESTATEMENT (SECOND)
OF TORTS § 402A (1965).}

Under Restatement section 402A, a manufacturer's liability attaches to
a product sold "in a defective condition unreasonably dangerous to the
user or consumer."\footnote{59}{RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965); accord Rabin, supra note
38, at 200-02.}

Despite the Restatement's extension of strict liability in tort, however, a closer reading of the provision also exhibits
acknowledgment of contract and warranty theories.\footnote{60}{But see William L. Prosser, The Fall of The Citadel, 50 MINN. L. REV. 791, 803
(1966) ("[I]t must be understood that [section 402A] is a very different thing [,] . . . it is
not subject to the various contract rules which have grown up to surround such sales.").}

For example, the comments to section 402A define a "defective condition" as a
"condition not contemplated by the ultimate consumer."\footnote{61}{See Rabin, supra note 38, at 201-02.}

Consequently, some commentators have noted that the Restatement
may be interpreted to govern to defects or conditions outside those
"contemplated" \footnote{62}{See Rabin, supra note 38, at 201-02. The author uses "contemplated" to refer to
consumer expectations and foreseeable losses arising through use of the product. See id.}
by the consumer, thus allowing warranty to remain
as the basis for recovery when the defect or condition could be within
the contemplation of the parties.\footnote{63}{See id.}
“unreasonably dangerous,” comments to the Restatement provide that the product “must be dangerous . . . beyond that which would be contemplated by the ordinary consumer who purchases it.” Thus, the Restatement language again makes reference to consumer expectations and bargaining, which are at the very heart of warranty and contract ideologies. This language illuminates the historical and continuous struggle of whether to apply tort or contract law in products liability actions that arise from a faulty product. Although Section 402A makes strict liability the governing rule in products liability, it does not entirely eliminate the presence of contract and warranty remedies.

D. Intangible and Economic Loss

Characterizations of economic loss are critical to the course of a plaintiff’s cause of action. Specifically, classifying loss as either economic or “other property” loss determines the scope of recovery and the underlying theory of the plaintiff’s cause of action. Generally, a plaintiff attempts to characterize loss as “other property” in order to heighten the opportunity for recovery through tort law, either in strict liability or negligence. Economic loss, defined as loss that is a “diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold,” restricts a plaintiff’s recovery to contract

---

64. Restatement (Second) of Torts § 402A cmt. i (1965).
65. See Rabin, supra note 38, at 201-02.
66. See id.
67. See id.
68. See Reeder R. Fox & Patrick J. Loftus, Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later, 64 DEF. COUNS. J. 260, 260 (1997). The parameters of recovery vary between tort law and contract law. See id. Specifically, a plaintiff recovering under tort law theories may recover greater financial compensation for his loss than merely the amount previously stipulated in the warranty or contract. See id. Therefore, plaintiffs who suffer serious financial losses generally attempt to recover under tort law. See id.
69. See Keeton et al., supra note 2, § 95, at 678-79. When the phrase “underlying theory” is used, this Note refers to recovery in either tort or contract and the rationale employed by the court to permit recovery under either area of the law.
70. See Fox & Loftus, supra note 68, at 263 (stating that “[p]laintiffs often attempt to circumvent the economic loss rule by characterizing their damages as ‘property damages’ rather than ‘economic loss’”).
71. Id. at 263-64 (footnote omitted). Economic loss has also been defined as the cost of “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.” Casa Clara Condominium Ass’n v. Charley Toppinio and Sons, Inc.,
law. Consequently, the nature of the loss is a bedrock issue, fundamental to determining the basis and amount of recovery.  

1. The Problem of the “Disappointed Purchaser”

Historically, manufacturers simply placed warranty or contract provisions on products to place the consumer or user on notice of potential risk of loss. However, society soon demanded greater protection, beyond mere notice, against certain losses. Thus, in products liability actions, tort law primarily arose out of policy choices aimed at protecting persons and property from “dangerous and defective products that cause ‘the loss of time or health.’” Public policy considerations dictated that the consequential costs arising from such loss were too great a financial burden for any individual user or consumer to bear. Furthermore, in contrast to consumers or users, manufacturers were regarded as better able to bear the burden of the costs associated with personal injury and property destruction because of their ability to distribute such losses in their products’ sale prices. Society’s expectations of what a manufacturer’s liability should be when producing a defective product have changed because product defects causing injury or loss of property threaten fundamental rights, freedom of person and property, and exceed the scope of damages that the individual consumer or user is able to contemplate at the time of

---

620 So. 2d 1244, 1246 (Fla. 1993) (quoting Note, Economic Loss in Products Liability Jurisprudence, 66 COLUM. L. REV. 917, 918 (1966)).

72. See Fox & Loftus, supra note 68, at 260.

73. See Keeton ET AL., supra note 2, § 95, at 678-79.

74. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 866 (1986) (citing Seely v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965)). “Certain losses” refers to personal injury resulting in “the loss of time or health.” Id. at 871 (citing Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).


76. See East River, 476 U.S. at 871; accord D’Angelo, supra note 75, at 594. In East River, the Court extracted this analysis from California Supreme Court Justice Traynor’s concurring opinion in Escola, 150 P.2d at 441 (Traynor, J., concurring). See East River, 476 U.S. at 871. In his Escola analysis Traynor described losses to persons and property as an “overwhelming misfortune” for which consumers are both unable and unprepared to compensate. Escola, 150 P.2d at 441 (Traynor, J., concurring). Thus, persons and their property have priority over the financial burdens of the manufacturer or seller. See East River, 476 U.S. at 871-72.

77. See D’Angelo, supra note 75, at 594 (footnote omitted). Specifically, manufacturers make products that potentially have greater liability more expensive to the individual users or consumers. See id.
In contrast, under contract law, purchasers are barred from recovery for any product failure that is outside the scope of the warranty or contract. Specifically, the boundaries of the contract or warranty impose limitations as to what remedies the “disappointed purchaser” may seek following the product’s failure to perform properly. Risk of loss arising from a product’s insufficient quality or failure to perform its intended function is an appropriate subject of negotiation at the time of purchase between the user-purchaser and seller. Such loss may be provided for individually within provisions of the warranty or contract. Public policy concerns prompted the courts to extend the application of tort remedies to cover socially unacceptable injury to persons or property. However, economic loss neither results in socially unacceptable loss nor demands heightened protection because individuals may adequately protect themselves at the time of purchase through a contract or warranty.

Most importantly, however, supporters of the economic loss doctrine advocate the stability and predictability inherent in

78. See id. at 593-94.
79. See East River, 476 U.S. at 872-73.
80. See Keeton et al., supra note 2, § 101(1), at 708. The disappointed purchaser is defined as a person “suffering intangible commercial loss.” Id. Essentially, the product defect does not “endanger others,” but merely fails to perform to the purchaser’s expectations. See id.
81. See id.
82. See id. Although privity was championed as the source of a purchaser’s recovery for defects in a product, Prosser noted that where the user-purchaser is an ordinary consumer instead of a commercial purchaser the same rationale is questionable. See id. Consequently, Prosser suggested that privity can be disregarded and the “intent of each seller would usually be controlling as regards [to] the scope of any guarantees related to the condition of the goods sold.” Id.
83. See East River, 476 U.S. at 872-73.
84. See, e.g., Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963) (stating that strict liability in tort served as the basis for defective product actions despite the existence of valid contracts or warranties); Escola v. Coca Cola Botting Co., 150 P.2d 436, 438-39 (Cal. 1944) (relaxing the requirements of res ipsa loquitur and extending liability where the defendant lacked exclusive control over the instrument causing harm); Henningse v. Bloomfield Motors, Inc., 161 A.2d 69, 99-100 (N.J. 1960) (holding that a non-purchaser could recover in tort law for a defective steering mechanism that caused injury to the non-purchaser of the vehicle); MacPherson v. Buick Motor Co., 111 N.E. 1050; 1053 (N.Y. 1916) (providing that personal injury must occur to create negligent liability).
85. The author notes “unacceptable loss” as the loss to persons in contrast to losses to property. Essentially, injury to the body outweighs financial losses. See Keeton et al., supra note 2, § 95, at 678-79.
86. See Fox & Loftus, supra note 68, at 261 (discussing East River).
manufacturer liability predicated upon contracts or warranties.\textsuperscript{87} Contract and warranty provisions provide manufacturers advance notice of their obligations and the extent of their liability associated with potential losses if the product fails to perform its intended function.\textsuperscript{88} Essentially, the economic loss doctrine serves as the manufacturer's "guard dog" against unlimited liability while preserving the manufacturer's responsibility through independent contract bargaining.\textsuperscript{89}

2. The Warranty

Bargain transactions traditionally have involved little judicial intervention.\textsuperscript{90} Bargaining parties desire the freedom to define the boundaries of their obligations.\textsuperscript{91} Thus, early courts refused to hold manufacturers liable for a defective product based upon the theory of \textit{caveat emptor}, more popularly known as "let the buyer beware."\textsuperscript{92} Protection for intangible economic loss through warranty recovery developed as a result of purchasers' frustrated expectations, even when a product's failure did not result in injury to either persons or property other than the product itself.\textsuperscript{93} Thus, either express

\textsuperscript{87} See id. ("[T]he economic loss doctrine promotes efficiency and predictability in the commercial setting by establishing the boundaries of liability solely by reference to the contract.").

\textsuperscript{88} See id. (discussing the limitless liability that would arise without the economic loss doctrine). Without contract or warranty limitations, the manufacturer/seller would be unable to determine its potential liability and subsequently account for future losses in the price of its goods or services. See id. The manufacturer/seller would be forced to blindly estimate future liabilities and base the cost of its goods upon this unfair and uncertain estimation. See id.

\textsuperscript{89} See id. Commercial parties are able to define the terms of their own obligations within the accepted limits of contract law. See id.

\textsuperscript{90} See Keeton \textit{et al.}, supra note 2, § 95A, at 679. Prosser states that "[t]he courts in early America adopted the notion of 	extit{caveat emptor} so that there was initially no liability of a seller of a product on any theory—tort or contract." \textit{Id}.

\textsuperscript{91} See \textsc{John D. Calamari & Joseph M. Perillo, The Law of Contracts} § 1-3, at 5-6 (3d ed. 1987).

\textsuperscript{92} \textit{Black's Law Dictionary} 222 (6th ed. 1990). The term is applicable to "sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer." \textit{Id}. Specifically, the buyer must examine and determine independently the merits of the sale and the reliability of the product purchased. See \textit{id}; see also Leebron, supra note 22, at 395-96 (noting the rule that parties enjoyed freedom to determine their contractual obligations).

\textsuperscript{93} See Keeton \textit{et al.}, supra note 2, § 95A, at 679-80 (stating that "pressure developed for the protection of the intangible economic interest of those making bargaining transactions . . . result[ing] in the development of the warranty theory of recovery").
warranties, arising from statements made by the seller at the time of the transaction, or implied warranties, arising from the nature of the transaction itself, governed recovery. Warranties manifest a manufacturer's confidence in the reliability of his or her product and expose potential risks that accompany the use of the product. Generally, statutory laws govern the required provisions and terms applicable to these warranties. Consequently, parties independently agree upon the terms of their warranty obligations, with the exception of some limitations mandated by governing commercial statutes.

3. Defining the "Boundaries"—The Creation of the East River Doctrine

Determination of both economic loss and the amounts recoverable from this loss depend upon the actual loss caused by the defective product. Modern courts define economic loss in two forms: (1) loss to the actual product, and (2) loss to property subsequently attached to the product. The type of recovery and recognition of this loss

94. See William K. Jones, Product Defects Causing Commercial Loss: The Ascendancy Of Contract Over Tort, 44 U. MIAMI L. REV. 731, 733-34 (1990) (citing U.C.C. § 2-313(1)(a) (1987)). Express warranties are an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Id. Moreover, the Uniform Commercial Code provides that "any sample or model which is . . . made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." Id. § 2-313(1)(b).

95. See Jones, supra note 94, at 733-34 (citing U.C.C. § 2-314(1) (1987)). The Uniform Commercial Code provides that a "warranty that goods shall be merchantable is implied . . . if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314(1) (1987). Furthermore, "[i]f a seller 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 . . . an implied warranty that the goods shall be fit for such purpose." Id. (citing U.C.C. § 2-315).

96. See Jones, supra note 94, at 733.


99. See id. The Uniform Commercial Code, which has been adopted in most states, governs the obligations and limitations between commercial contracting parties. See id.

100. See East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 867 (1986) (stating no products liability claim lies when a commercial party alleges injury only to the product itself that results only in economic loss); Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173-74 (3d Cir. 1981) (allowing recovery for hazardous defect in truck as the sort of physical injury to property compensable under tort law); Seely v. White Motor Co., 403 P.2d 145, 150-51 (Cal. 1965) (finding in an action for negligence that manufacturer's liability is limited to damages for physical injuries and there is no recovery for only economic loss); REM
developed slowly.

a. Setting the Stage—*Seely v. White Motor Co.*

Although persons who suffer intangible economic losses can recover damages under express or implied warranties, such recovery is limited to the economic loss and generally does not include recovery for tort claims. This premise was illustrated as early as 1965 in *Seely v. White Motor Co.*, where the California Supreme Court denied recovery to the plaintiffs against a truck manufacturer when the only damage arose out of the product's failure to perform up to the buyer's expectations. In this pivotal ruling, the California Supreme Court distinguished economic loss from physical injury or loss to property other than the product itself. Thus, in California, prior to a sale, consumers must bargain for the allowance of recovery in the event that the product fails to perform to the customer's expectations. The approach adopted by the California Supreme Court in *Seely* governed products liability claims involving economic loss until the United States Supreme Court expanded the rule in *East River Steamship Corp. v. Transamerica Delaval Inc.*

---

101. *See Keeton et al.,* supra note 2, §§ 96-98, 681-694. Tortious liability includes theories predicated upon strict liability or negligence. *See id.*

102. 403 P.2d 145 (Cal. 1965).

103. *Id.* at 150-51. Chief Justice Traynor, writing for the majority, concluded 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.* Moreover, in negligence actions, “a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.” *Id.; see also D’Angelo, supra note 75,* at 593 (discussing *Seely* and the historical distinction between economic loss and physical injury in product liability claims).

104. *See Seely,* 403 P.2d at 151. The majority opinion describes economic loss as the failure of the product to match the consumer’s “economic expectations,” less for which manufacturers are not liable, outside of the warranty. *See id.* However, manufacturers are liable for physical injury involving safety and risk of harm to users. *See id.* (citing *Restatement (Second) of Torts* § 402A); *see also Manufacturers’ Liability,* supra note 28, at 542-549 (discussing *Seely* and its impact upon economic loss and manufacturer liability).

105. *See Seely,* 403 P.2d at 151 (stating that a consumer “can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will”). Chief Justice Traynor notes that inequality in the parties’ bargaining power does not bar limitations of liability between the manufacturer and purchaser. *See id.*

106. *See D’Angelo, supra* note 75, at 593 (discussing the wide acceptance among
b. The East River Doctrine—*East River Steamship Corp. v. Transamerica Delaval Inc.*

The United States Supreme Court's *East River* decision addressed the issue of denying recovery for economic loss not covered by a contract. Justice Blackmun, writing for the Court, noted that "the failure of the product to function properly . . . is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." In this admiralty decision, the Court evaluated "land-based" interpretations defining economic loss and held that economic loss is "purely economic" since neither the person nor "other property" is damaged. Further, the opinion in *East River* criticized the minority view, as described in *Santor v. A&M Karaghesian*, as too "indeterminate" because it failed to provide manufacturers with certainty regarding their liability for loss caused by defective products. Moreover, the *East River* holding criticized *Santor* for failing to entirely bar recovery for purely economic loss.

jurisdictions of the Seely approach until the Court's *East River* opinion); see, e.g., Sanco, Inc. v. Ford Motor Co., 771 F.2d 1081, 1086 (7th Cir. 1985) (denying, under Indiana law, an action in tort for recovery of purely economic losses); Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247-48 (Fla. 1993) (providing that, in the case of homeowners, the economic loss rule bars recovery in tort law for purely economic losses in the absence of personal or property damage). But see Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981) (stating that in products strict liability actions, plaintiffs may recover for injury to the product itself if the loss is a "proximate result of a dangerous defect"). 107. See generally East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871-75 (1986). In *East River*, the Court denied the plaintiffs recovery in both negligence and strict liability for the cost of lost profits and repairs to ship turbines that were defectively installed by the defendants. See id. at 875-76. The Court held that in the absence of personal injury or damage to other property, tort laws were inapplicable regardless of whether the defect arose suddenly or gradually. See id. at 870. 108. Id. at 868.

109. See id. at 868-70. The Court uses the term "land-based" to non-admiralty decisions. See id. at 870. Currently, however, admiralty law generally adheres to "land-based" products liability law. See id. at 865.

110. See id. at 870 (stating that "since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain . . . ").

111. See id. at 870-71; see also Lieder, supra note 37, at 952-53. Santor exposed manufacturers to indefinite ranges and amounts of liability. See Lieder, supra note 37, at 953-54; Santor v. A&M Karaghesian, 207 A.2d 305, 312-13 (N.J. 1965) (holding that a manufacturer's duty to make non-defective products includes injury to the product itself, whether or not the defect created an unreasonable risk of harm).

112. See *East River*, 476 U.S. at 870-71. The court in *East River* rejected the *Santor*
Consequently, the Court adhered to traditional notions of judicial restraint regarding commercial transactions and concluded that manufacturers are not liable in either negligence or strict liability for a product that injures only itself. The Court pointed out that such a loss is "essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law." The Court further reasoned that expanding a manufacturer's liability to include both contract and tort remedies, where the loss is purely economic, would result in excessive and unreasonable liability. Accordingly, the Court found that confining the buyer to the "full benefit" of the bargain is a reasonable limitation upon liability where the loss is only economic.

c. Subsequent Interpretations of the East River Doctrine

The Pennsylvania Superior Court in REM Coal Co. v. Clark Equipment Co. paralleled the reasoning in East River to distinguish among circumstances that require either contract or tort remedies in the non-admiralty context. Following East River, the Pennsylvania

---

113. See id. at 858; see also supra notes 107-12 and accompanying text.

114. East River, 476 U.S. at 873 (citations omitted). Generally, commercial parties do not have disparities in bargaining power that bias or taint the allocation of the risk of loss. See id. (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (1960)). For a discussion of the underlying reasons why tort law is predominant in products liability compared to contract law, see supra notes 48-68 and accompanying text. See also supra notes 82-99 and accompanying text (discussing the loss that is traditionally a core concern of contract law).

115. See East River, 476 U.S. at 871. Justice Blackmun concluded that warranty actions inherently limit liability based upon the scope of the warranty between the parties. See id. In contrast, tort actions "could subject the manufacturer to damages of an indefinite amount." Id. Specifically, manufacturer-sellers cannot foresee persons later in the chain of distribution and provide for liability in the case of loss. See id.; see also Jones, supra note 94, at 752 (discussing the East River doctrine in the context of strict liability and negligence).

116. See East River, 476 U.S. at 873.


118. Id. at 129; see also Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 831 (1996) (discussing recovery for injury caused by the user's fault); Trans States Airlines v. Pratt & Whitney Canada, Inc., 86 F.3d 725, 729 (7th Cir. 1996) (interpreting Illinois law as embracing conflicting approaches to the economic loss doctrine); Sea-Land Serv., Inc. v. Gen. Elec. Co., 134 F.3d 149, 153 (3d Cir. 1998) (providing an admiralty case noting East River and citing to King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir. 1988), for the doctrine that the "object of the bargain" is the object bargained for by the plaintiff.
Superior Court concluded that tort law applies to losses caused by unsafe products when the buyer is unable to contract for this loss at the time of the sale.119 However, warranties are specific remedies for losses that can be contemplated at the time of the bargain, such as economic loss or lost profits.120 Specifically, the Court held that public policy does not demand interference in the bargain when there is an opportunity to guard against losses that result from “disappointed expectations.”121 Consumers may separately provide for remedies within sales contracts to shield themselves from damage resulting from the products failure to perform as desired.122 However, the distinction drawn in East River between the product and “other property” was equally as elusive as “disappointed expectations.”123 As a result, subsequent federal appellate courts were left to grapple with the meaning of “the product” and what this term includes.124

4. Defining “The Product”

The economic loss doctrine bars tort recovery for loss arising out of the product’s failure to perform its intended function.125 Economic loss frequently arises out of either complete destruction of the product to determine other property); Dakota Gasification Co. v. Pascoe Bldg. Sys., 91 F.3d 1094, 1099 (8th Cir. 1996) (predicting that North Dakota would apply economic loss doctrine so as to preclude tort liability when, at the time of contracting, commercial purchasers could have foreseen damage to nearby property); 2-J Corp. v. Tice, 126 F.3d 539, 543 (3d Cir. 1997) (noting the “other property” determination in East River and Saratoga and the “other property” extension to inventory stored inside the property when the property collapses).
119. See REM Coal Co., 563 A.2d at 133 (stating agreement with the East River rationale).
120. See id. at 129 (providing that “the goals of tort theories of recovery are not implicated in a product malfunction case involving only economic losses. A contract action, on the other hand, is perfectly suited to providing an adequate remedy for such losses”).
121. See id. (citing East River, 476 U.S. at 873).
122. See id. at 133.
123. See infra note 128 (providing cases that interpret the meaning of “other property” following the East River decision).
124. See, e.g., Nicor Supply Ships Assocs. v. General Motors Corp., 876 F.2d 501, 506 (5th Cir. 1989) (reversing summary judgment order of district court and allowing plaintiff to proceed in tort under the theory that property added one year after purchase was “other property”); King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir. 1988) (holding that recovery in tort is denied for injury to the product itself); Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925, 928 (5th Cir. 1987) (stating that the product is the object of the bargain between the parties).
125. See supra notes 69-73 and accompanying text for a discussion of the economic loss doctrine.
or product failure that renders the product "worthless."\textsuperscript{126} However, the doctrine of economic loss does not proscribe tort recovery when "other property" is damaged because "other property" is considered distinct from the product and recoverable in tort law.\textsuperscript{127} Yet, the determination of whether injury has occurred solely to the product itself is a source of confusion.\textsuperscript{128} For this reason, litigation arises out of disputes over the scope of "the product" and whether the product or "other property" sustained the injury.\textsuperscript{129}

Determining the form of relief in products liability actions requires an examination of the character of the loss.\textsuperscript{130} The Third Circuit Court of Appeals in \textit{King v. Hilton-Davis} held that, in determining the nature of the loss, courts must look to the "product purchased by the plaintiff"—what the plaintiff bargained for and expected through the sale, in contrast to the product sold by the defendant.\textsuperscript{131} In reaching its conclusion, the Third Circuit highlighted the importance of evaluating the contracted product and whether the product was a "single

\textsuperscript{126} See Jones, supra note 94, at 734 ("A breach of warranty may result in product failure so complete as to render the product worthless.").

\textsuperscript{127} See Fox & Loftus, supra note 68, at 264 (discussing "other property" in light of \textit{East River} and noting the confusion among courts attempting to distinguish what constitutes "other property").

\textsuperscript{128} See id.; see, e.g., Hininger v. Case Corp., 23 F.3d 124, 127 (5th Cir. 1994) (holding that a combine purchaser could not recover in tort for lost profits and repair costs against the component part manufacturer according to the economic loss doctrine); American Home Assurance Co. v. Major Tool and Machine, Inc., 767 F.2d 446, 446-47 (8th Cir. 1985) (providing that insurance carriers could not maintain action in strict liability or negligence against component part suppliers for economic loss); Bowling Green Mun. Utils. v. Thomasson Lumber Co., 902 F. Supp. 134, 136 (W.D. Ky. 1995) (holding that "tort and contract law occupy two separate and distinct fields"); Exxon Shipping Co. v. Pacific Resources, Inc., 835 F. Supp 1195, 1201 (D. Haw. 1993) (asserting that tort recovery is permissible for injury to the existing product where injury is caused by component acquired later and added to existing product); Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993) (stating that a homeowner could not recover in tort for economic loss); Utah Int’l, Inc. v. Caterpillar Tractor Co., 775 F.2d 741, 744 (N.M. Ct. App. 1989) (stating that damage for economic loss in commercial setting is only recoverable in contract actions); Bocre Leasing Corp. v. General Motors Corp., 645 N.E. 2d 1195, 1199 (N.Y. 1995) (providing that a downstream commercial purchaser could not recover in tort from the original manufacturer for damages to the product itself because the buyer had opportunities to allocate loss through warranty).

\textsuperscript{129} See supra note 9 for a definition of "other property."

\textsuperscript{130} See generally King v. Hilton-Davis, 855 F.2d 1047, 1051-52 (3d Cir. 1988) (noting that recovery against a component part supplier under tort law negligence or strict liability is barred where the product merely injures itself).

\textsuperscript{131} Id. at 1051 (interpreting \textit{East River} to mean that "it is the character of the plaintiff’s loss that determines the nature of the available remedies").
integrated unit” at the time of the transaction. Consequently, when a purchaser demands relief against a manufacturer for damage to the product, the content of the product is determined by what was bargained for by the plaintiff as shown by the provisions of the contract or warranty.

Additionally, the King Court interpreted decisions involving the classification of component parts of the product installed before the product’s sale. These holdings unequivocally defined component parts of the product as part of the product itself and thus permitted recovery only in contract law. In defining the product and its component parts, these courts held that the product was the “object of the contract,” meaning the “finished product bargained for by the buyer.” Therefore, a component part that damages the product damages the entire product merely because both the product and the component part are characterized as a “single integrated product.” Thus, the completed product defines the purchaser’s scope of relief in that only by examining the bargain sought by the plaintiff can the

132. See id. at 1052. The court focused upon the “bargained-for expectations” of the plaintiffs to determine the scope of what the “plaintiffs contracted to buy” and subsequently concluded that the purchase included a “single integrated unit.” Id.; see also supra notes 136-37 and accompanying text.

133. See id.; see also East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 866-69 (1986).

134. See King, 855 F.2d at 1052 (citing Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925, 928 (5th Cir 1987) (providing that damage to component parts was not damage to “other property”); American Home Assurance Co. v. Major Tool & Mach., Inc., 767 F.2d 446, 447-48 (8th Cir. 1985) (stating that tort law does not apply to economic loss); Airlift Int’l, Inc. v. McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982) (“[S]trict liability in tort does not apply between large commercial entities who have bargained-for allocation of risk.”). The King court noted several federal appellate decisions that barred recovery against a component part supplier for purely economic loss. See King, 855 F.2d at 1052. The court concurred with those opinions that held that component parts are part of the bargained for product. See id. In other words, purchasers do not individually bargain for each component of the product in light of the many parts inherent to purchased products. See id.

135. See id. The Fifth Circuit, in Shipco, considered the holding in East River that denied tort recovery for economic loss caused from damage to the product itself and stated that it “raises the question—what is the product. In attempting to identify the product, our analysis leads us to ask what is the object of the contract or bargain that governs the rights of the parties? The completed vessels were obviously the objects of the contract.” Shipco, 825 F.2d at 928.

136. King, 855 F.2d at 1052 (citing Shipco, 825 F.2d at 925). The Shipco court held that the product is the “finished product bargained for by the buyer.” This interpretation has become widely recognized as the “object of the bargain rule.” See Shipco, 825 F.2d at 928, 930.

137. See King, 855 F.2d at 1052.
E. The Nature of the Transaction: Commercial Transactions and Section 402A

Tort law in products liability cases exists because society insists on protecting the susceptible consumer. These societal pressures promote the shifting of loss to the manufacturer of products through theories of strict liability, regardless of the plaintiff’s causal contribution to the injury. Some critics of the shift, however, argue that the nature of the consumer, commercial or individual, demands different theories of liability. For example, early case law held that commercial consumers require less loss-shifting because of the parties’ equal economic strength in bargaining, ability to bargain specifications, and ability to negotiate risk of loss from defects. In spite of such conclusions, current state and federal laws fail to provide definitive answers regarding the theory of recovery for the commercial consumer.

As a result of this ambiguity, several interpretations premise recovery upon the Restatement (Second) of Torts, section 402A which governs liability of commercial sellers. Section 402A of the Restatement imposes strict liability upon sellers who sell “product[s] in a defective condition unreasonably dangerous to the user or consumer or to his [or her] property . . . .” if “the seller is engaged in the business of selling such a product, and it is expected to and does reach

---

138. See id.
139. See supra notes 36-67 and accompanying text for a discussion of the creation of tort law in products liability and the erosion of contract based recovery.
141. See Saratoga, 117 S. Ct. at 1791 (Scalia, J., dissenting) (“I doubt, however, whether leaving the market chain of distribution ought to be so momentous an event for the purpose at hand . . . [s]o long as the plaintiff is a commercial entity. . . .”)
142. See Kaiser Steel Corp. v. Westinghouse Elec. Corp., 127 Cal. Rptr. 838, 845 (Cal. Ct. App. 1976). “[P]roducts liability does not apply as between parties who: (1) deal in a commercial setting; (2) from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning the risk of loss from defects in it.” Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1020 (9th Cir. 1970).
143. See Saratoga, 117 S. Ct. at 1789 (Scalia, J., dissenting).
144. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (providing a strict liability rule for sellers of products).
the user or consumer without substantial change in the condition in which it is sold." Critics of section 402A point out the section's failure to address several poignant issues, such as the type of product, defense issues, contributory fault, or economic loss. Moreover, judicial interpretations of section 402A restrict its application to solutions where "the purposes it seeks to serve dictate its application."

The "purpose it seeks to serve" generally means cases of apparent inequalities in bargaining power that make contract-warranty recovery infeasible. For example, the Ninth Circuit Court concurred with the restriction of strict liability in the commercial context in East River, when it denied tort recovery against a commercial manufacturer for purely economic losses. Consequently, where only economic loss results from the defective nature of the product and the seller is commercial, courts must decipher the appropriate form of relief without explicit guidance from section 402A. The Supreme Court has not resolved the issue of whether similar reasoning is applicable to the commercial consumer who is presumably knowledgeable and able to guard against risk of loss when bargaining for the product.

III. DISCUSSION

In Saratoga Fishing Co. v. J.M. Martinac & Co., the United States Supreme Court determined whether a second user may recover
in tort for additional equipment added to the original product by the
initial user when such additional equipment is destroyed because of a
defect in the original product. More specifically, the Court
determined whether this additional property is "other property" and
thus distinctly separate from the original product, or rather, part of the
original product as a consequence of the sale. The Supreme Court’s
classification of the additional equipment as either "other property" or
the original product was important to determine the applicability of the
economic loss rule and the availability of tort remedies to second
users.

A. Facts Of The Case

In Saratoga, the owner of a steel-hull fishing ship sought relief in
tort against the original manufacturer of the ship, J.M. Martinac &
Co., and the designer of the hydraulic system, Marco Seattle Inc. The
fishing ship, originally outfitted and supplied by J.M. Martinac
Co., was sold to Joseph Madruga ("Madruga"), the initial user. The
original ship, placed in the line of distribution by J.M. Martinac
Co., included a hydraulic system designed by Marco Seattle, Inc. Upon
purchasing the ship, the initial user, Madruga, installed
additional equipment, consisting of a skiff, net, and communications
and navigational electronics, to the ship for its specific use as a tuna
seiner. The initial user, Madruga, used the ship for approximately
three years prior to selling the ship to Plaintiff, Saratoga Fishing

---

153. See id. at 1785.
154. See id. at 1789 (concluding that the additional property was "other property"); see also supra notes 69-73 and accompanying text. "Other property" refers to property loss other than the purchased product. See supra note 10.
155. See Saratoga, 117 S. Ct. at 1785. At issue before the Court was under what circumstances the term "other property" includes property added to the defective product by some earlier buyer in the chain of distribution, not by the plaintiff-purchaser. See id.
156. See id.
157. See id. J.M. Martinac & Co., a small custom builder of steel hull tuna seiners, built the fishing vessel and installed the hydraulic system that subsequently malfunctioned. See Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1435 (9th Cir. 1995), rev'd sub nom. Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S. Ct. 1783 (1997). Marco Seattle Inc. designed the hydraulic system at the request of the initial user and oversaw the integration of the system into the ship prior to its sale to the initial purchaser-user. See id.
158. See Saratoga, 117 S. Ct. at 1785. Joseph Madruga, the initial purchaser and seller to the plaintiff, purchased seven like steel hull tuna seiners. See id. at 1790 (Scalia, J., dissenting).
159. See id. at 1785.
160. See id. This property at issue was the "other property." See id.
Company. During Saratoga's ownership, the ship's engine room caught fire and the ship sank, resulting in total destruction of the ship and its contents. Accordingly, Saratoga Fishing Company filed an admiralty tort action against both the manufacturers of the ship and the designer of the hydraulic system, J.M. Martinac & Co. and Marco Seattle Inc., respectively, for damages to the additional equipment added by the initial user, Madruga.

**B. The Lower Court Opinions**

The district court held that the defective design of the hydraulic system primarily caused the damage to the ship and awarded recovery to Saratoga Fishing Company for the loss of the "other property" added by the initial user after the first purchase of the ship. The district court concluded that Defendants were strictly liable for the defective hydraulic system despite their adherence to marine standards and practices in their manufacturing. The district court, however, did not include within Saratoga Fishing Company's damages the cost of replacement parts installed by Saratoga after its purchase of the ship. Additionally, the district court reduced the damages, finding that Saratoga Fishing Company's actions were a contributing cause of the fire; the ship was damaged as a result of Saratoga's poor maintenance, misuse, and independent modifications to the ship's hydraulic system after its purchase of the ship.

---

161. See Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1435 (9th Cir. 1995), rev'd sub nom. Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S. Ct. 1783 (1997). Saratoga purchased the ship "'as is'... with no warranty other than that 'said vessel and her appurtenances will be in operable condition upon delivery of the Bill of Sale.'" Respondents' Brief at 9, Saratoga, (No. 95-1764) (quoting exhibit to trial transcript).

162. See Saratoga, 69 F.3d at 1436.

163. See id.

164. See id. at 1437 (explaining the district court's holding). The recovery was reduced by two-thirds due to Saratoga Fishing Company's comparative fault. See id. The district court determined that the additional equipment added by the initial user was "other property," and not part of the original ship. See id. Included as losses were the following: the tuna catch, seine, skiff, fuel, equipment, payments by Saratoga to the crew for their personal property losses, the cost of the rescue and certain cash carried on board. See id.

165. See id. at 1437.

166. See id. at 1437. Additionally, the district court denied damages for the cost of the ship's hull. See id. The Ninth Circuit agreed that damages to the ship's hull were part of the original product between the initial user and seller and recoverable only under warranty-contract law. See id. at 1446.

167. See id. at 1442. At trial, the district court concluded that the ship's engineer
Reversing the holding of the district court, the Ninth Circuit held that the additional equipment was part of the product when it was resold to Saratoga, the second user.\textsuperscript{168} Therefore, the added equipment destroyed by the fire was not “other property” but was rather “part of the defective product that itself caused the harm.”\textsuperscript{169} In its holding, the court relied upon the \textit{East River} decision, which drew distinctions between the damage caused to the “‘product itself’ and damage to a ‘person or other property.’”\textsuperscript{170} Specifically, the Ninth Circuit concluded that the second user possessed the opportunity to demand a warranty from the initial user; therefore, the failure to obtain protection through a warranty was Saratoga Fishing Company’s “must have been aware” that the hydraulic system needed replacing and that the system should not have been operated on the day of the incident. See \textit{id.} at 1443 n.10. Accordingly, the district court found that Saratoga Fishing Company’s alterations or independent modifications of the ship’s hydraulic system led in part to the fire that ignited in the engine room and led to the ship’s destruction. See \textit{id.} at 1442-43.

\textsuperscript{168} See \textit{id.} at 1445. In the opinion, two members of the panel voted in favor of Defendants, J.M. Martinac Co. and Marco Seattle Inc., while the third member of the panel, Judge Noonan, dissented and stated that the decision conflicted with both prior Fifth Circuit decisions and the \textit{East River} doctrine. See \textit{id.} at 1447 (Noonan, J., dissenting). Specifically, Judge Noonan concluded that the additional equipment was “other property,” recoverable in tort law and that defendants’ liability should not decrease with resale of a product when it would have been liable for the same damages without the resale of the product. See \textit{id.} (Noonan, J., dissenting).

\textsuperscript{169} See \textit{Saratoga Fishing Co. v. J.M. Martinac & Co.}, 117 S. Ct. 1783, 1785 (1997), rev’g, \textit{Saratoga Fishing Co. v. Marco Seattle Inc.}, 69 F.3d 1432 (9th Cir. 1995) (explaining the Ninth Circuit’s holding). In determining that the additional equipment added by the initial user was “other property,” the Ninth Circuit relied upon the Supreme Court’s reasoning in \textit{East River}. See \textit{id.} at 1444-45. The Ninth Circuit concluded that to determine the bounds of “other property,” the Supreme Court in \textit{East River} focused upon the agreement between the parties to the suit, the charterers and the owners. See \textit{id.} The Ninth Circuit determined that because the charterers in \textit{East River} were treated as “equivalent to a second buyer,” the Supreme Court focused on the contract between the first buyer and the second buyer to determine the confines of “other property” and the original product. See \textit{id}. This reasoning flowed from the fact that the Supreme Court did not evaluate the contract between the original seller and the first buyer to interpret the charterers’ agreement. See \textit{id}. Therefore, because the Supreme Court in \textit{East River} would not “extricate the parties from their bargain,” the Ninth Circuit decided not to provide tort remedies to this second buyer, Saratoga, when the agreement between the first buyer, the initial user, and Saratoga could determine the remedies for loss. \textit{id.} (citing \textit{East River S.S. Corp. v. Transamerica Delaval Inc.}, 476 U.S. 858, 875 (1986)).

\textsuperscript{170} See \textit{id.} (quoting \textit{East River}, 476 U.S. at 870). The Ninth Circuit relied upon the \textit{East River} doctrine to determine that economic loss, such as repairs, lost value, or decreased profits, is traditionally a concern for warranty-contract law. See \textit{id}. Additionally, the Ninth Circuit concluded that the \textit{East River} doctrine was specifically particular to purchasers in a commercial context who seek recovery for things that should be “sought . . . through a contract or warranty claim.” \textit{id}. 
independent loss.\textsuperscript{171} The object of the bargain between Saratoga Fishing Company and the Defendants provided the basis of determining the product itself and "other property" recoverable in tort law.\textsuperscript{172} The Ninth Circuit reasoned that, in commercial bargains, characterizing additional equipment added after the original sale as "other property" would increase the manufacturer's liability beyond the scope intended by the Supreme Court in \textit{East River}.\textsuperscript{173}

\textbf{C. The United States Supreme Court Opinion}

The United States Supreme Court granted certiorari to resolve uncertainty surrounding the application of tort or contract remedies to a second plaintiff-user who suffers damage to additional equipment supplied by the initial user-purchaser. Additionally, the Court sought to properly characterize the added equipment as either part of the original product or "other property."\textsuperscript{174} In a 6-3 opinion authored by Justice Breyer, the Court held that additional equipment added by the initial user-purchaser is "other property" and not part of the original product in the context of a second plaintiff-user, and consequently is recoverable in tort.\textsuperscript{175} Justice Scalia, joined by Justices Thomas and O'Connor, dissented and stated that the economic loss rule barred recovery to the second plaintiff-user because the loss was essentially to the product itself.\textsuperscript{176} However, Justice O'Connor concurred with the Court's decision to grant certiorari, thereby disagreeing with Justices Scalia's and Thomas' shared opinion that the Court should have denied certiorari because the issue was neither adequately developed in the state courts nor a suitable subject within the Supreme Court's realm

\begin{itemize}
\item \textsuperscript{171} See id. (stating specifically that "[t]he parties chose not to include a seller's warranty, and we will not second guess their choice"); see also supra Part II.D. and accompanying text discussing independent loss.
\item \textsuperscript{172} See \textit{Saratoga}, 69 F.3d at 1445. The Ninth Circuit, in addition to relying on \textit{East River}, relied upon Nicor Supply Ships Assoc. v. General Motors Corp., 876 F.2d 501 (5th Cir. 1989), to determine that the object of the bargain is the subject of the sale between the buyer and the seller. See id. at 1444.
\item \textsuperscript{173} See id. at 1445 (stating that "[i]t would indeed be anomalous for the shipbuilder's liability to increase every time the vessel was modified and resold").
\item \textsuperscript{174} See \textit{generally Saratoga}, 117 S. Ct. 1783 (1997) (discussing the limitations upon tort damages a plaintiff-second user may recover for physical damage to property caused by a defective product where the property damaged is additional equipment added by an initial user in the chain of distribution).
\item \textsuperscript{175} See id. at 1789. Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg joined the majority opinion delivered by Justice Breyer. See id. at 1785.
\item \textsuperscript{176} See id. at 1792 (Scalia, J., dissenting).
\end{itemize}
of expertise.\textsuperscript{177}

1. The Majority Opinion

The United States Supreme Court reversed the Ninth Circuit’s ruling and allowed Saratoga Fishing Company to recover for damages caused to the skiff, net, and communications and navigational equipment.\textsuperscript{178} The Court held that equipment added by the initial user, Madruga, before the sale to the second user, was “other property” and distinct from the product that itself caused the harm.\textsuperscript{179} Essentially, the Court determined that resale maintains the manufacturer’s liability for damage to equipment added after the initial sale in spite of the product’s movement through chains of ownership.\textsuperscript{180}

The Court distinguished its prior holding in \textit{East River}.\textsuperscript{181} by finding

\begin{itemize}
\item \textsuperscript{177} See \textit{id.} at 1789 (O’Connor, J., dissenting). Justice O’Connor stated “I do not disagree with our decision to grant certiorari in this case, but I agree with Justice Scalia—and for the reasons he states—that we should affirm the judgment of the Court of Appeals.” \textit{Id.} (O’Connor, J., dissenting). In contrast, Justice Scalia concluded that it would have been “[b]etter to have followed some state-court pilots than to proceed on our own—and even, perhaps, to lead state courts aground.” \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{178} See \textit{id.}
\item \textsuperscript{179} See \textit{id.} (holding that the “equipment at issue here, added to the ship by a user after an initial sale to that Initial User, [is] not part of the product . . . that itself caused the harm”).
\item \textsuperscript{180} See \textit{id.} at 1787. The majority reasoned that the loss occurred when the product with the added equipment remained in the initial buyer-user’s hands, the “loss of the added equipment could have been recovered in tort.” \textit{Id.} Moreover, the Court “found no suggestion in state (or in federal law) that these results would change with a subsequent sale.” \textit{Id.}
\item \textsuperscript{181} See \textit{East River S.S. Corp. v. Transamerica Delaval Inc.}, 476 U.S. 858 (1986). Specifically, the Saratoga majority did not overrule the opinion in \textit{East River} but merely granted certiorari to resolve “uncertainty about the proper application of \textit{East River}.” \textit{Saratoga}, 117 S. Ct. at 1786. In \textit{East River}, the Court held that an admiralty tort plaintiff, a commercial party, cannot “recover for the physical damage the defective product causes to the ‘product itself’; but the plaintiff can recover for physical damage the product causes to ‘other property.’” \textit{Id.} at 1785 (citing the holding in \textit{East River}). The Supreme Court in \textit{Saratoga} discussed the creation of the \textit{East River} doctrine as a product of conflicting principles of recovery in products liability law: \textit{East River} arose at the intersection of two principles that govern recovery in many commercial cases involving defective products. The first principle is that tort law in this area ordinarily . . . permits recovery from a manufacturer and others in the initial chain of distribution for foreseeable \textit{physical} harm to property caused by product defects . . . . The second principle is that tort law in this area ordinarily . . . does \textit{not} permit recovery for purely economic losses, say, lost profits. \textit{Id.} at 1786 (citations omitted).
\end{itemize}

The Supreme Court in \textit{East River} intended the first principle to permit recovery where the product caused physical harm. See \textit{id.} In contrast, the second principle envelopes
that the Plaintiff’s recoverable damages did not arise from the failure of the product to perform its originally intended function.\textsuperscript{182} The product’s intended function attached at the time of the initial sale between the manufacturer and the initial user.\textsuperscript{183} Additional equipment supplied to the product by the initial user neither altered the product’s intended function nor changed the characterization of the additional equipment as “other property.”\textsuperscript{184}

The Court held that application of the Ninth Circuit’s ruling expanded tort immunity beyond its intended scope.\textsuperscript{185} Distinctions between the product and additional items used with the product permit recovery for damage to the additional items resulting from the defective product to either the initial user or to subsequent users.\textsuperscript{186} Essentially, had the ship sunk while in Madruga’s ownership, the additional equipment undeniably would have been recoverable in tort.\textsuperscript{187} In making this determination, the Supreme Court relied upon multiple state court holdings that permit tort recovery for harm to items used

\begin{itemize}
\item that the Plaintiffs recoverable damages did not arise from the failure of the product to perform its originally intended function.\textsuperscript{182} The product’s intended function attached at the time of the initial sale between the manufacturer and the initial user.\textsuperscript{183} Additional equipment supplied to the product by the initial user neither altered the product’s intended function nor changed the characterization of the additional equipment as “other property.”\textsuperscript{184}

The Court held that application of the Ninth Circuit’s ruling expanded tort immunity beyond its intended scope.\textsuperscript{185} Distinctions between the product and additional items used with the product permit recovery for damage to the additional items resulting from the defective product to either the initial user or to subsequent users.\textsuperscript{186} Essentially, had the ship sunk while in Madruga’s ownership, the additional equipment undeniably would have been recoverable in tort.\textsuperscript{187} In making this determination, the Supreme Court relied upon multiple state court holdings that permit tort recovery for harm to items used

\begin{itemize}
\item injury to the product itself because it was a kind of economic loss. See id. Essentially, a product that destroys itself is equivalent to “a product that does not work properly or does not work at all.” Id.

\textsuperscript{182} See id. at 1786-87. The product’s intended function is determined when the property is “placed [into] ... the stream of commerce by selling it to an Initial User.” Id. at 1786. Because the additional equipment was not part of the sale between the initial buyer and Defendants, it was not part of the product that determines the product’s intended function. See id. at 1786-87.

\textsuperscript{183} See id. In the case of Saratoga, at the time of the ship’s construction the manufacturer and original user-buyer outfitted the ship to operate as a tuna seiner. See Respondents’ Brief at 5, Saratoga (No. 95-1764). However, the ship was delivered as an “incomplete fishing vessel” that required additions such as a net, skiff, and other navigational and communications electronics to complete its assembly as an operational fishing vessel. See id. at 5-6. Consequently, it was not until the initial user-buyer outfitted the ship with these items that the ship was put to sea and operated as a tuna seine. See id.

\textsuperscript{184} See Saratoga, 117 S. Ct. at 1786.

\textsuperscript{185} See id. at 1786-87. The Supreme Court concluded that the Ninth Circuit relied upon East River to hold that the plaintiff could have “asked the seller to warrant” the product at the time of the second sale. Id. at 1786. The Ninth Circuit, therefore, reasoned that because the second user could have asked for a warranty from the initial user-buyer, the product was determined by what was purchased by the plaintiff. See id. Moreover, what was purchased by Saratoga, including the additional equipment not part of the product at the time of the first sale, “stands outside the reach of the tort recovery.” Id. at 1786-87.

\textsuperscript{186} See id. at 1787. The Supreme Court held, and Respondents conceded, that if the damage occurred prior to the product’s resale the loss of the additional equipment, or “other property,” would have been recoverable in tort law. See id. The Supreme Court reasoned that nothing dictated a change in the status of “other property” in the case of subsequent users. See id.

\textsuperscript{187} See id.

\end{itemize}
with the defective item purchased.\textsuperscript{188}

Therefore, the Court concluded that denying tort recovery to a second user for the same loss recoverable to the initial user diminishes the manufacturers' incentive to provide safer products, erodes safety incentives, and strikes at the fundamental objective of product liability law.\textsuperscript{189} Additionally, barring recovery to a second user unfairly immunizes the manufacturer from liability to persons later in the chain of distribution who are unable to sufficiently contract for protection.\textsuperscript{190} Specifically, initial users are inherently less knowledgeable about the intricacies of the product and its inherent risks\textsuperscript{191} and thus are less able to provide appropriate warranties comparable to those offered by the manufacturer.\textsuperscript{192}

In addition, the majority distinguished additional equipment from component parts and affirmed its conclusion in East River\textsuperscript{193} that users are unable to recover in tort for damages caused by the component

\begin{footnotesize}
\textsuperscript{188} See id. (discussing Nicor Supply Ships Assocs. v. General Motors Corp., 876 F.2d 501, 506 (5th Cir. 1989) (holding that owner and ship charterer could recover in tort law against the ship's manufacturer for seismic equipment added to the ship after its sale, for the equipment's loss in a fire caused by the defective ship); United Air Lines, Inc. v. CEI Indus. of Illinois, Inc., 499 N.E.2d 558, 562-63 (Ill. App. Ct. 1986) (holding that a warehouse owner could recover in tort law for damage caused by a defective roof when a sudden dangerous event occurred that resulted in either personal or property damage because of the defective product); A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330, 1334-37 (Md. 1994) (holding that a farmer could recover under strict liability for chickens killed as a result of a defective ventilation system, even in the absence of death or personal injury, because a purchaser should neither be obligated to bargain for destruction to property nor protection for physical injury to himself/herself or to others).

\textsuperscript{189} See Saratoga, 117 S. Ct. at 1787. Specifically, Justice Breyer stated that:

One important purpose of defective-product tort law is to encourage the manufacture of safer products. The various tort rules that determine which foreseeable losses are recoverable aim, in part, to provide appropriate safe-product incentives. And a liability rule that diminishes liability simply because of some such resale is a rule that, other things being equal, diminishes that basic incentive.

\textit{Id.}

\textsuperscript{190} See id. Parties who are unable to "sufficiently contract" are those with unequal bargaining power or misinformation. See id. However, this generally does not include a consumer who contracts with a commercial party. See generally U.C.C. Art. 2.

\textsuperscript{191} See Saratoga, 117 S. Ct. at 1787.

\textsuperscript{192} See id. ("[T]he user/reseller did not make (or initially distribute) the product and, to that extent, he normally would know less about the risks that such a warranty would involve").

\textsuperscript{193} See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986); \textit{See also supra} notes 107-117 and accompanying text.
\end{footnotesize}
parts.\textsuperscript{194} The Court reasoned that the extension of recovery to second users for additional equipment is not analogous to a user’s recovery for damage caused by the component part to the original product.\textsuperscript{195} Rather, \textit{East River} affirmatively bars recovery for damage caused by component parts to the original product.\textsuperscript{196} The Court reasoned that because most machines contain component parts, extending relief for such damage would effectively permit recovery in virtually every products liability property loss action.\textsuperscript{197} The majority reasoned that manufacturers possess the ability to contract with component part suppliers for liability of risk and loss or destruction, and these contract negotiations provide incentive to manufacture reliable component parts.\textsuperscript{198}

In contrast, initial users cannot equivalently allocate risk of loss for their added equipment.\textsuperscript{199} The Court further noted that case law makes a specific distinction between items added before the product enters the stream of commerce and items added after its initial sale.\textsuperscript{200} This distinction is regarded as evidence that a warranty serves to allocate loss for additional equipment before the initial sale rather than after the

\begin{flushright}
\textsuperscript{194} See Saratoga, 117 S. Ct. at 1788 ("Our holding here, however, does not affect [the East River] rule, for the relevant relations among initial users, manufacturers, and component suppliers are typically different from those at issue here.").
\end{flushright}

\begin{flushright}
\textsuperscript{195} See \textit{id.}
\end{flushright}

\begin{flushright}
\textsuperscript{196} See \textit{id.} (holding that component parts are part of the product "that itself caused the harm").
\end{flushright}

\begin{flushright}
\textsuperscript{197} See \textit{id.} (citing East River, 476 U.S. at 867). The Court noted that "all but the very simplest of machines have component parts." \textit{Id.} (citing East River, 476 U.S. at 867).
\end{flushright}

\begin{flushright}
\textsuperscript{198} See \textit{id.} (explaining that liability for the entire product where component defects destroy the product itself heighten the desirability to manufacture safe component parts that will not destroy the product, thus creating liability for the entire product and not merely the component part); see also supra notes 82-101 and accompanying text discussing buyer’s ability to contract against loss.
\end{flushright}

\begin{flushright}
\textsuperscript{199} See \textit{id.} (reasoning that the initial users have less knowledge of the product and cannot make effective contracts with the subsequent users, nor do they have resources akin to manufacturers who are able to distribute losses among various component suppliers of the product).
\end{flushright}

\begin{flushright}
\textsuperscript{200} See \textit{id.} (citing King \textit{v.} Hilton-Davis, 855 F.2d 1047, 1054 (3d Cir. 1988) (providing that Pennsylvania law bars recovery from component part suppliers in negligence or tort law for economic loss such as the defective product damaging itself); Shipco 2295, Inc. \textit{v.} Avondale Shipyards, Inc., 825 F.2d 925, 928 (5th Cir. 1987) (holding that damage to component parts is neither damage to "other property" nor recoverable in tort law from the manufacturer or seller of the product because purchasers/buyers do not "bargain separately for individual components of each vessel"); Airlift Int'l, Inc. \textit{v.} McDonnell Douglas Corp., 685 F.2d 267, 269 (9th Cir. 1982) (stating that strict liability in tort is not applicable in the context of large commercial entities who bargain for the obligation of loss).
\end{flushright}
sale.\textsuperscript{201}

The majority concluded that the fear of excessive manufacturer or distributor liability lacked merit.\textsuperscript{202} It further recognized that fundamental tort principles "such as foreseeability, proximate cause, and the 'economic loss' doctrine" impose adequate protection against excessive liability and impose restrictions upon invalid claims.\textsuperscript{203}

Moreover, the majority concluded that the manufacturer's liability for equipment added by the initial user does not expand the scope of liability; rather, it merely maintains liability as it was intended.\textsuperscript{204}

Specifically, the manufacturer remains liable for added equipment to the second user, just as the manufacturer possessed liability for damages to equipment added by the initial user of the product.\textsuperscript{205}

Accordingly, the United States Supreme Court granted recovery to Saratoga Fishing Company for damage to the "skiff, nets, spare parts, and miscellaneous equipment . . . added to the ship by a user after an initial sale."\textsuperscript{206} Thus, the additional equipment was held to be "other property" despite the product's resale and movement in the chain of distribution.\textsuperscript{207}

2. The Dissenting Opinion

Justice Scalia, joined by Justices O'Connor and Thomas, disagreed with the majority's characterization of additional equipment as "other property" despite its movement in the chain of distribution to a second user.\textsuperscript{208} The dissenters recognized the superiority of two alternative
methods for determining when the product is fixed, thereby providing a basis for distinguishing the product from "other property" following the product's resale.\textsuperscript{209}

Prior to discussing the appropriate characterization of additional equipment, Justice Scalia noted his reluctance to grant certiorari in the case, stating that "the Court sets sail into unchartered seas. . . . I would feel less uncomfortable about our plying these unknown waters if we were skilled navigators."\textsuperscript{210} Additionally, Justice Scalia stated that the determination of whether "other property" can include additional equipment added by the initial user once the product is purchased by a second user later in the chain of distribution is a case of first impression.\textsuperscript{211} Justice Scalia made special reference to the Court's holding in \textit{East River} and the availability of multiple state court rulings on that specific issue prior to this ruling upon which the Court could draw in deciding the issue.\textsuperscript{212} Therefore, Justice Scalia stressed that because there was "[n]ot a single lower-court decision . . . address[ing] the precise question presented," and because the Court lacked experience pertaining to these issues, the Court should not have granted certiorari.\textsuperscript{213}

\hspace{1em} after the product's resale. \textit{See id.} at 1790 (Scalia, J., dissenting).

\textsuperscript{209} \textit{See id.} at 1790-91 (Scalia, J., dissenting). Justice Scalia focused upon two alternative rules to avoid liability based upon "fortuities": the "last 402A-seller rule" and the "object of the bargain rule." \textit{See id.} (Scalia, J., dissenting). Under the "last 402A-seller rule" the product is "fixed when it is sold by the last person in the chain of distribution who is . . . 'engaged in the business of selling such a product.'" \textit{Id.} at 1790 (Scalia, J., dissenting) (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1964)). Alternatively, the "object of the bargain rule" bases "the product" and "other property" upon what was bargained for by the plaintiff and the seller. \textit{See id.} at 1791 (Scalia, J., dissenting). According to this rule, both the object of the bargain between the initial purchaser and the manufacturer and whether the product was used prior to its resale is irrelevant to determine "the product" and "other property. \textit{See id.} at 1791 (Scalia, J., dissenting).

\textsuperscript{210} \textit{Id.} at 1789 (Scalia, J., dissenting) ("It would have been better, in my view, not to grant certiorari in this case.").

\textsuperscript{211} \textit{See id.} (Scalia, J., dissenting) (noting that the only lower court to address this specific issue was the Ninth Circuit, in the present action).

\textsuperscript{212} \textit{See id.} (Scalia, J., dissenting). Justice Scalia contrasted the available case law for the issue in \textit{Saratoga} with that available to the Supreme Court in \textit{East River}. \textit{See id.} (Scalia, J., dissenting). Specifically, Justice Scalia noted that in \textit{East River} the Supreme Court had "a wealth of lower-court development to draw upon" that provided "no less than three distinct positions on the economic-loss rule." \textit{Id.} (Scalia, J., dissenting). Consequently, the East River Doctrine was previously accepted and tested in several jurisdictions prior to the Supreme Court's ruling in that case. \textit{See id.} (Scalia, J., dissenting).

\textsuperscript{213} \textit{Id.} Certiorari was granted by the majority court including Chief Justice Rehnquist and Justices Breyer, Stevens, Kennedy, Souter, and Ginsburg.
Despite Justice Scalia’s reluctance to rule upon the issue, the dissenters proposed the adoption of two rules that do not characterize additional property added by the initial user as “other property.” These rules rebut the majority’s view that a product is fixed at the point of entering the stream of commerce upon its sale to the initial user. First, the “402A-seller rule,” based on section 402A of the Restatement (Second) of Torts, approximates when the product is fixed and what is included as the product in determining the seller’s and manufacturer’s liability. Specifically, the “last-402A-seller rule” provides that the “product” would be fixed when it is sold by the last person in the chain of distribution who is . . . ‘engaged in the business of selling a product.’

The dissent reasoned that premising liability upon the last person in the chain of distribution promotes uniformity in the application of tort law with regard to end-users because it avoids evaluation of whether the distributor used the product prior to its resale. Rather, the “product” is the item as it was last sold by a commercial entity. In addition, the dissent noted that the “last-402A-seller rule” invokes tort law only when contract-warranty law is “infeasible.” Therefore,

---

214. See supra note 206 (discussing the “last-402A-seller rule” and the “object of the bargain rule”).
215. See supra Part II.C.
216. See Saratoga, 117 S. Ct at 1790-91 (Scalia, J., dissenting). In a side note, Justice Scalia commented upon the determination of additions made before and after the product leaves the market chain of distribution where the plaintiff is a commercial party. See id. (Scalia, J., dissenting). Specifically, the dissent noted that even the “last-402A-seller rule” would be unnecessary where the plaintiff is a commercial entity. See id. (Scalia, J., dissenting). Because commercial users are typically knowledgeable and familiar with insurance and other forms of protection against loss, they are not disadvantaged by disparities in bargaining power and can obtain extensive warranty protection. See id. at 1791 (Scalia, J., dissenting). Therefore, Scalia, in his dissent, reasoned that if the plaintiff is commercial, presumably he or she is adequately protected against loss through warranty or contract. See id. (Scalia, J., dissenting). Moreover, relying upon the holding in East River, Scalia noted that where parties can adequately protect against risk of loss, the application of tort law is overreaching and unnecessary judicial intermeddling. See id. (Scalia, J., dissenting).
217. Id. at 1790 (Scalia, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1964)).
218. See id. (Scalia, J., dissenting).
219. See id. at 1790-91 (Scalia, J., dissenting).
220. See id. at 1790 (Scalia, J., dissenting). Specifically, the dissent noted that the “last-402A-seller rule” denies recovery in tort law when the purchaser had the opportunity to provide protection against loss or damage. See id. (Scalia, J., dissenting). Because in commercial settings sellers generally provide warranty or contract terms to cover the use and life of the product, the opportunity to obtain warranty protection is reasonable and requires little judicial interference. See id. (Scalia,
Justice Scalia concluded that the "last-402A-seller rule" is more in line with the Supreme Court's prior judgment in *East River.*\(^{221}\) Essentially, the dissent concluded that the "last-402A-seller rule" equally distinguished variations in the product prior to and after its dissemination in the chain of distribution.\(^{222}\)

Second, the dissent favored the "object of the bargain" rule.\(^{223}\) This rule, arising in both federal and state law,\(^{224}\) bars tort law interference in private bargains where a purchaser claims loss for the purchased product.\(^{225}\) The dissent relied upon the rationale of previous federal and state court decisions to support the "object of the bargain" rule.\(^{226}\)

\(^{221}\) *See id.* (Scalia, J., dissenting) ("The last-402A-seller rule is also more consistent with one of the principal considerations underlying our decision in *East River*; the desirability of invoking tort protection only where contract-warranty protection is infeasible.").

\(^{222}\) *See id.* at 1790-91 (Scalia, J., dissenting) (stating that both the "last-402A-seller rule" and the majority's "initial-user rule . . . essentially attempt to differentiate between additions made before and after the product has left the market chain of distribution").

\(^{223}\) *See id.* at 1791 (Scalia, J., dissenting) (citing *King v. Hilton-Davis*, 855 F.2d 1047, 1051 (3d Cir. 1988)). The "object-of-the-bargain" rule "rest[s] on the premise that one must look to the product purchased or bargained for by the plaintiff in determining whether additions constitute 'other property.'" *Id.* (Scalia, J., dissenting).

\(^{224}\) *See id.* (Scalia, J., dissenting). In support of the "object of the bargain rule" the dissent noted several federal court decisions that denied recovery under various states' tort laws against the manufacturer of a component part for losses to the product when the product was damaged by the component part. *See id.* (Scalia, J., dissenting); *See, e.g.*, *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 741-42 (11th Cir. 1995) (providing that under Florida law, a home builder was barred by the economic loss rule from alleging claims against the manufacturer of chemicals that were applied to plywood who failed to warn that the treated plywood was inappropriate for placement in certain areas of the home); *Transport Corp. of Am., Inc. v. International Bus. Mach. Corp.*, 30 F.3d 953, 957 (8th Cir. 1994) (holding that under Minnesota law, the economic loss doctrine bars recovery in tort law in commercial transactions for loss, excluding loss involving personal injury or "other property" damage); *King*, 855 F.2d at 1054 (denying recovery under Pennsylvania law against the component part supplier under negligence or strict liability law for economic loss in which the product merely injures itself); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 928-929 (5th Cir.) (stating that because purchasers do not bargain separately for each component part of the vessel, recovery in tort is denied under federal maritime law for economic losses that arise to the product itself—including damaged component parts).

\(^{225}\) *See Saratoga*, 117 S. Ct. at 1791 (Scalia, J., dissenting) (noting that *East River* suggested there was "inadequate reason" to permit tort recovery by the purchaser for loss of the product where private parties have the opportunity to independently negotiate for protection against such loss).

\(^{226}\) *See id.* (Scalia, J., dissenting) ("Although the holdings of these cases are not precisely on point . . . the rationale of those decisions is in tension with the Court's holding today, and supports what might be called an 'object-of-the-bargain' rule.").
Specifically, in denying recovery for the loss of the product, including the component parts, these state and federal courts determined that "the product" is what the plaintiff purchased and not what the defendant sold. The dissent explained that although these decisions do not address the issue of a second user as a plaintiff when the plaintiff is the initial user, they provide useful insight into determinations of the product and the characterization of loss. Justice Scalia concluded that the holdings in these state and federal court cases were properly in accord with the Court's earlier ruling in East River.

In addition, the dissent specifically recognized jurisdictional trends favoring broad interpretation of "economic loss" to include items previously characterized as "other property." Losses conceivably contemplated by the parties at the time of the bargain are economic losses that can be protected against by negotiations during bargaining. Therefore, damage to additional property is a foreseeable loss at the time of bargaining between the second user and the initial user. Additional items, because they are contemplated and

227. See id. (Scalia, J., dissenting) (citing King, 855 F.2d at 1051 (holding that "[i]n determining whether a product 'injures only itself' for purposes of applying the East River rule . . . one must look to the product purchased by the plaintiff"); Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc., 620 So.2d 1244, 1247 (Fla. 1993) (stating that "[t]he character of a loss determines the appropriate remedies, and, to determine the character of loss, one must look to the product purchased by the plaintiff, not the part sold by the defendant").

228. See id. (Scalia, J., dissenting). The decisions cited by Justice Scalia distinguished between the ultimate product received by the purchaser and the various components that comprise the product. See supra note 227 for a list of cases. By focusing on the ultimate product received instead of the various parts, "the product" is obviously the final outcome that exchanges hands between a seller and consumer. See supra note 227.

229. See Saratoga, 117 S. Ct. at 1791 (Scalia, J., dissenting). Specifically, East River was the underlying rationale for courts that held that the character of loss is determined by what is bargained for by the plaintiff. See id. (Scalia, J., dissenting). For example, in King, the Third Circuit stated that "[a]s we read East River, it is the character of the plaintiff's loss that determines the nature of available remedies." King, 855 F.2d at 1051. Courts such as King, interpreted East River as favoring contract-warranty remedies above tort law where parties are able to bargain for loss. See Saratoga, 117 S. Ct. at 1791 (Scalia, J., dissenting) (citing King, 855 F.2d at 1051).

230. See id. at 1792 (Scalia, J., dissenting) (stating that "[t]here has been a growing trend in many jurisdictions to interpret 'economic loss' broadly to include damage that formerly was considered 'other property'" (quoting Fox & Loftus, supra note 68, at 264-65)).

231. See id. (Scalia, J., dissenting) (providing that "'[o]ther property' does not include damage to property if those losses are direct and consequential losses that were within the contemplation of the parties and could have been the subject of negotiations between the parties" (quoting Fox & Loftus, supra note 68, at 264-65)).

232. See id. at 1790-91 (Scalia, J., dissenting).
foresightable at the time of bargaining, are integrated into the product at the
time of resale and thus not considered “other property.” Consequently, additional items are themselves part of the product that itself caused the harm. In light of the Supreme Court’s earlier decision in East River, harm caused to items considered part of the product that itself caused the harm are recoverable only by contract and warranty provisions. Consequently, the dissent advocated the application of the economic loss rule to property added by an initial user arising out of foreseeable identification of the additional items at the time of the second user’s purchase.

IV. ANALYSIS

The majority in Saratoga “set sail into unchartered” waters and created greater confusion in the area of economic loss in products liability where confusion was already prevalent. The majority labeled property that was part of the product at the time of the second user’s purchase as “other property” and granted recovery for this loss in tort law where the economic loss doctrine provided the more appropriate form of recovery. In this case of first impression, the majority ignored accepted understandings of tort law that permit recovery in tort only where contract law is infeasible. Consequently, the majority has created a windfall for irresponsible purchasers who fail to insure at the time of the transaction against potential loss from the product’s failure to perform, because they may seek recovery in tort where it is normally denied. Furthermore, the

233. See id. (Scalia, J., dissenting).
234. See id. (Scalia, J., dissenting).
235. See id. at 1791 (Scalia, J., dissenting) (“Our decision in East River suggests ... there is inadequate reason to interfere with private ordering. ...” (citing East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 872-873 (1986))).
236. See id. at 1791 (Scalia, J., dissenting).
237. See id. at 1789 (Scalia, J., dissenting) (stating that “the Court sets sail into uncharted seas ...”); See also supra notes 208-36 and accompanying text discussing Justice Scalia’s dissent.
238. See id. at 1786. Contract law provided the more appropriate form of recovery, but not necessarily the more favorable form of recovery to the plaintiff. See id. at 1786 (citing East River, 476 U.S. at 872-73). In this case, because warranty between the parties did not provide recovery for loss, in the plaintiff’s view tort law was the more appropriate form because it compensated for some loss. See id. at 1787-88.
239. See supra Part II.B-C (discussing the integration of tort law in products liability and the underlying rationale for its use).
240. See infra Part IV.B (discussing the purchaser’s windfall); See also Brief Amicus Curiae of National Association of Manufacturers and Raychem Corp. in Support of Respondents at 13, Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S. Ct. 1783
majority's surface discussion of the commercial nature of the transaction and its impact upon the form of recovery for economic loss leaves unanswered the form of recovery when the purchaser is a commercial party. As such, courts will continue to grapple with whether a commercial purchaser with knowledge and expertise of contract and warranty provisions is barred from tort recovery for economic loss based upon his or her commercial character only.

A. The Unchartered Seas—Leading the Courts Aground

The majority's premature decision to grant certiorari, as noted by Justice Scalia's dissent, is the source of the majority opinion's vague conclusions. Justice Scalia notes that in complex areas such as products liability law, earlier state and federal interpretations assist the Court in its ruling. These alternative interpretations provide the Court with various solutions that have withstood time and undergone criticism and change in response to well-monitored outcomes. For example, history illustrates that products liability issues are extensively evaluated by state courts prior to final rulings by the Supreme Court. However, in Saratoga, the issue of a second user and the designation of property added by the original user as other property or the product itself merely arose in the Ninth Circuit and was later appealed to the Court. State courts never addressed at length the best form of recovery permitted in this situation. Thus, the majority relied upon only slightly analogous holdings in federal courts that had interpreted both maritime and various state tort laws to guide its path in


241. See infra Part IV.D (discussing the commercial purchaser).


243. See id. at 1789 (Scalia, J., dissenting).

244. See id. Justice Scalia stated, "I have little confidence in my ability to make the correct policy choice in an area where courts more experienced than we have not yet come to rest. I would have been inclined to let the lower federal courts struggle with this issue somewhat longer . . . [o] develop a common-law consensus . . . ." Id. at 1792 (Scalia, J., dissenting). Note that Justice O'Connor in her dissenting opinion rejected Justice Scalia's hesitance to grant certiorari in the case. See id. at 1789 (O'Connor, J., dissenting).

245. See id. at 1789 (Scalia, J., dissenting).

246. See id. at 1789 (Scalia, J., dissenting) (noting that historically state courts pilot new controversies).

247. See id. at 1785-86.

248. See id. at 1789 (Scalia, J., dissenting). The Ninth Circuit remains the only lower court to rule upon the issue in Saratoga. Justice Scalia in his dissent stated that "not a single lower-court decision (other than the one under review) has addressed the precise question . . . ." Id. (Scalia, J., dissenting).
understanding products liability law on this issue.\textsuperscript{249}

The majority’s conclusion is circular and rebuttable as shown by the argument it advanced to discredit the defendant’s position.\textsuperscript{250} For instance, the majority created the “initial seller” rule to promote stable and reliable definitions of “other property” and the product itself.\textsuperscript{251} The rule the majority heralds, however, hinges liability upon equally weak and “lucky” circumstances.\textsuperscript{252} Specifically, basing the definition “other property” on whether or not the product was used prior to its resale is an arbitrary guideline for tort law liability.\textsuperscript{253}

The dissent appropriately advanced this argument when it stated that because a car dealer uses a car as a demo and adds a stereo system prior to its sale, this does not detract from the fact that a second purchaser bargains for the whole product in its entirety, including the added stereo.\textsuperscript{254} Therefore, recovery in tort for the loss of the stereo hinges only upon whether the car was used for a short time as a demo by the dealer.\textsuperscript{255} This reasoning conflicts with traditional rationale underlying the imposition of tort law in products liability, namely, whether the product is used rarely signifies whether the purchaser

\textsuperscript{249} See supra Part III.C.1. For example, the Court relied upon rulings in component part cases to determine how a product is determined and what encompasses “other property.” See Saratoga, 117 S. Ct. at 1788. For examples of this type of case, see Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734 (11th Cir. 1995) (holding that a homeowner could not recover in tort against the manufacturer for fraudulently including the purchase of chemically treated plywood without adequate knowledge of the product); Transport Corp. of Am., Inc. v. International Bus. Mach. Corp., 30 F.3d 953 (8th Cir. 1994) (stating that the economic loss doctrine bars recovery for economic losses in commercial transactions); King v. Hilton-Davis, 855 F.2d 1047 (3rd Cir. 1988) (barring recovery against component part suppliers in tort for economic loss caused by product defects when product only damages itself); Shipco 2295, Inc. v. Avondale Shipyards, Inc., 825 F.2d 925 (5th Cir. 1987) (providing that a purchaser was denied recovery in tort for damage to components of the product resulting from unrelated component part defects).

\textsuperscript{250} See Saratoga, 117 S. Ct. at 1790 (Scalia, J., dissenting) (providing that the majority rule merely “turn[s] on a different fortuity”).

\textsuperscript{251} See id. at 1788.

\textsuperscript{252} See id. at 1790 (Scalia, J., dissenting).

\textsuperscript{253} See id. (Scalia, J., dissenting). Specifically, Justice Scalia makes reference to the “fortuity” of the majority rule. See id. (Scalia, J., dissenting).

\textsuperscript{254} See id. (Scalia, J., dissenting). Justice Scalia asked:

[why] should the buyer of a car whose engine catches fire and destroys the entire vehicle be able to recover in a tort action against the manufacturer for the value of the dealer-added hi-fi stereo system if the car was a demo, but not if the car was brand new?

Id.

\textsuperscript{255} See id. (Scalia, J., dissenting).
needs judicial protection because of infeasible warranty protection.256

B. The Purchaser's Windfall—Tort Recovery for the Lazy Purchaser

The Supreme Court previously ruled on the issue of “other property” in a commercial transaction where the plaintiff was the initial purchaser from the manufacturer.257 The Court unequivocally barred recovery in tort, either through strict liability or negligence, in products liability actions for purely economic loss.258 The East River doctrine utilized the economic loss theory and barred recovery because warranty law adequately protected the purchaser’s interest in the bargain.259 However, the Supreme Court in Saratoga contradicted this holding and threatened the delicate balance between tort and contract principles within the area of products liability.260

In Saratoga, the Saratoga Fishing Company, although a second purchaser, bought the product from an initial user with full knowledge of its additions and components.261 In fact, at the time of the purchase, Saratoga Fishing Company operated the ship for several years prior to its formal possession by the sale.262 The majority inaccurately assumed that Saratoga Fishing Company was unaware of

---

256. See supra notes 20-35 and 90-99 (discussing the traditional rationale for recovery under warranty instead of tort).

257. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 870 (1986) (holding that a commercial party cannot recover under product liability tort where “no person or other property is damaged” and only when the damages are to the product itself).

258. See id. at 871 (“When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.”).

259. See id. at 873.

260. See Saratoga, 117 S. Ct. at 1788-89 (holding that added component parts fall within the gamut of East River’s “other property,” which is not considered the product itself).

261. See generally Respondents' Brief at 6, Saratoga (No. 76-1917). The Respondents' brief notes that the sale between the plaintiff and the initial purchaser was “the first time that the M/V Saratoga was sold as a completed fishing vessel capable of performing its mission.” Id. As a purchaser interested in a product to perform its intended functions, it would be absurd to presume that the purchaser had no knowledge of the product’s parts or capabilities. See id.

262. See Saratoga, 69 F.3d at 1435. The completed vessel outfitted with the additional equipment was first launched under the ownership of the initial purchaser, Madruga, and captained by Manual Vargas. See id. Captain Vargas operated the ship for two years as a tuna seine. See id. The Saratoga Fishing Company, principally owned and operated by Vargas, purchased the ship from Madruga equipped with the five speedboats, a purse skiff, a seine, and various electronic and navigational equipment. See id.
the additions and bargained for the additions separately from the product. In contrast, Saratoga Fishing Company bargained for the price of the ship as a whole unit, including the additions provided by the initial purchaser, now seller. Essentially, this created the same "as is" purchase examined in East River. Those who purchase the product "as is" accept the product in its current, altered condition after inspection and contractually assume full responsibility for the product, including its maintenance and repair.

Purchasing a product "as is" does not alter the boundaries between contract and tort remedies. Specifically, tort law is not purchasers safety net after failing to contract for economic losses arising from the product's failure to meet their performance expectations. Before purchasing the product, the purchaser is free to insist on additional warranty terms, obtain adequate insurance, or purchase another product. Manufacturers rely upon warranty remedies as the sole avenue for reimbursement because the potential losses are reflected in the product's purchase price. Permitting judicial interference, such as allowing tort claims simply because warranties were not previously procured, creates a windfall for purchasers because recovery is permitted for a loss that was possibly within the parties' contemplation at the time of the bargain but left unsecured.

263. See Respondents' Brief at 6, Saratoga (No. 95-1764) (stating that "Saratoga bought the vessel 'as is, where is,' with no warranty other than that 'said vessel and her appurtenances will be in operable condition upon delivery of the Bill of Sale'").

264. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 875 (1986) (stating that the "charterers took the ships in 'as is' condition, after inspection, and assumed full responsibility for them . . . ."); Respondents' Brief at 11, Saratoga (No. 95-1764) (providing that "[a]lthough the disappointed charterers in East River were without a contract remedy, like Saratoga, they specifically took the ship 'as is'").

265. See East River, 476 U.S. at 875 (stating that an "as is" purchaser "assume[s] full responsibility . . . including responsibility for maintenance and repairs and for obtaining certain forms of insurance"); John R. Trentacosta et al., Commercial Transactions and Contracts, 42 WAYNE L. REV. 433, 470 (1996).

266. See East River, 476 U.S. at 875. The Court in East River held that despite the purchaser's disappointed economic expectations there is "no reason to extricate the parties from their bargain." Id.

267. See supra Part II.D.2 (discussing the warranty and the purchasers ability to foresee loss prior to occurrence of the loss).

268. See CALAMARI AND PERILLO, supra note 91, § 1-3, 915-16; see generally Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995); Respondents' Brief at 16-17, Saratoga (No. 95-1764); Brief Amicus Curiae of National Association of Manufacturers and Raychem Corp. in Support of Respondents at 15-17, Saratoga (95-1764).

269. See KEETON ET AL., supra note 2, § 95, at 680.

270. See, e.g., King v. Hilton-Davis, 855 F.2d 1047, 1054 (3d Cir. 1988). The King
Essentially, “as is” products cost less to the purchaser because manufacturers do not increase costs to compensate for potential warranty losses.\(^7\) However, the windfall arises when purchasers, without the warranty, gain the benefit of purchasing the product at lower cost and still receive reimbursement for their loss under tort remedies.\(^7\) In addition, manufacturers could not recoup the cost of this potential liability by distributing their potential losses among the market prices of their products because tort recovery is unforeseeable and difficult to accurately reflect in the product sale price.\(^3\) Contract and tort law symbolize a delicate balance between foreseen loss and unacceptable loss to persons or property. When independent actions can secure a foreseeable loss, judicial interference is unwarranted and only upsets the balance relied upon by both manufacturers and purchasers.\(^2\)

The majority in Saratoga argued that the defendant’s inability to justify its claim that resales should both restrict tort liability and alter property originally labeled “other property” merits recovery in court stated:

> The economic loss rule is a policy judgment that in a commercial context the possibility of an inadequate recovery occasioned by bankruptcy, a commercial risk that a purchaser assumes in choosing a seller, does not justify permitting a tort recovery that will allow a purchaser to reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising that chain.

\(\text{Id.}\)

\(^271\). See, e.g., Respondents’ Brief at 6-7, Saratoga (No. 95-1764) (“[T]he disclaimer of warranties on the vessel and all of her appurtenances was in exchange for a lower purchase price than would have been changed if Madruga had included extensive warranties.”).

\(^272\). See, e.g., Pulte, 60 F.3d at 742 (“Having failed to avail itself of the opportunity to mitigate the risks of potential disappointment at the time of contract negotiation, [plaintiff] cannot now resort to the courts to save it from a bargain improvidently made.”).

\(^273\). See generally D’Angelo, supra note 75, at 602-03. “[T]he consuming public ultimately suffers when manufacturers are prevented from properly managing and reliably predicting the consequences of their business transactions.” \(\text{Id.}\) at 603 (quoting Bocre Leasing Corp. v. General Motors Corp., 645 N.E.2d 1195, 1198 (N.Y. 1995)).

\(^274\). See Note, Economic Loss in Products Liability Jurisprudence, 66 COLUM. L. REV. 917, 947 (1966). This article reinforces the historical preference for contract law, providing that:

> The broad protection accorded economic interests by contract law is absent from the tort field primarily because the injured party’s interest is viewed as insufficient to support restrictions upon the defendant’s freedom of action. Such protection is justified in contract law because the defendant has voluntarily undertaken a duty by choosing to contract with the plaintiff.

\(\text{Id.}\) (footnote omitted).
contract. Instead, it is the second user-purchaser who should illustrate the infeasibility of traditional warranty-contract laws. Tort law is the exception to economic loss, not the norm. Manufacturer liability in tort law was created as an incentive to create "safer products." Further, tort law in products liability cases arose to protect persons and property from damage because the purchasers were either unable to fairly receive protection for their loss or because the loss to the persons or property was so severe as to justify additional forms of recovery. However, in Saratoga, the plaintiff, a second purchaser, made a "conscious commercial choice" when purchasing the ship and its components. This "conscious commercial choice" is the bedrock of contract law because purchasers can independently secure reimbursement for loss from a product defect. Moreover, the judiciary may only intrude upon the bargain with recovery in tort law when contract law is infeasible. Therefore, Saratoga's conscious choice to disregard adequate warranty protection is inadequate justification to invoke liability in tort law.

C. Barring Tort Recovery to the Second User—Maintaining the Spirit of the Law

Prohibiting the second user from recovering from the manufacturer for the loss of integrated equipment installed by the initial purchaser before the products resale does not bar recovery under tort law for other items used with the product. The majority correctly argued

275. See Saratoga Fishing Co. v. J. M. Martinac & Co., 117 S. Ct. 1783, 1787 (1997), rev'g Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432 (9th Cir. 1995). The Supreme Court posed the question, "[W]hy should a series of resales, after replacement and additions of ever more physical items, progressively immunize a manufacturer to an ever greater extent from the liability for foreseeable physical damage that would otherwise fall upon it?" Id.

276. See generally D'Angelo, supra note 75, at 593-99; Fox & Loftus, supra note 68, at 261.

277. See Saratoga, 117 S. Ct. at 1787.

278. See supra notes 36-67 and accompanying text (discussing the historical development of products liability and the underlying rationale for the imposition of tort law in products liability cases).

279. See Respondents' Brief at 14, Saratoga (No. 95-1764).

280. See CALAMARI, supra note 91, at 5-6.

281. See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871 (1986); see also Fox & Loftus, supra note 68, at 261.

that if the initial user had maintained possession of the product, the loss was recoverable under tort law as "other property." However, the product did not remain in the hands of the initial user, and for this reason, the majority's reliance on tort law as a means of recovery for the loss of the property was improper. Rather, the additional equipment constituted a critical component of the purchase—that is, it was essential to the success of Saratoga's mission. Therefore, it is likely that even Saratoga Fishing Company regarded the additional equipment as part of the product at the time of the bargain. Just as component parts are considered part of the whole product, property integrated into the product by the initial seller is part of the whole product upon resale to a second purchaser and is subject to contract law recovery.

The majority ignored state and federal court reasoning to conclude that the scope of the product is defined by the initial purchase. In

warehouse owner for damage to part of the warehouse caused by a defective roof); A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330, 1334 (Md. 1994) (holding that a chicken farmer could recover for chickens killed by a defective ventilation system).

283. See Saratoga, 117 S. Ct. at 1787 (stating that "respondents here conceded that, had the ship remained in the hands of the Initial User, the loss of the added equipment could have been recovered in tort").

284. See id.

285. See Respondents' Brief at 24-25, Saratoga (No. 95-1764).

286. Saratoga Fishing Company's owner, Captain Vargas, operated the ship for two years prior to his purchase of the vessel. See Saratoga Fishing Co. v. Marco Seattle Inc., 69 F.3d 1432, 1435 (9th Cir. 1995), rev'd sub nom. Saratoga Fishing Co. v. J.M. Martinac & co., 117 S. Ct. 1983 (1997). Moreover, Captain Vargas operated the ship with the additional equipment intact on the ship during these two years. See id. Therefore, in purchasing the vessel it is likely that Saratoga bargained for the vessel in its entirety as he operated the ship during his two year occupancy as the ship's captain.

287. See generally Saratoga, 117 S. Ct. at 1790-91 (Scalia, J., dissenting).

288. See, e.g., Hininger v. Case Corp., 23 F.3d 124, 127 (5th Cir. 1994) (holding that a combine purchaser could not recover in tort for lost profits and repair costs against the component part manufacturer according to the economic loss doctrine); American Home Assurance Co. v. Major Tool and Mach., Inc., 767 F.2d 446, 447-48 (8th Cir. 1985) (providing that insurance carriers could not maintain action in strict liability or negligence against component part suppliers for economic loss); Bowling Green Mun. Utils. v. Thomasson Lumber Co., 902 F. Supp. 134, 136 (W.D. Ky. 1995) (stating that "[t]ort and contract law occupy two separate and distinct fields"); Exxon Shipping Co. v. Pacific Resources, Inc., 835 F. Supp. 1195, 1201 n.4 (D. Haw. 1993) (holding that "tort recovery" is permissible for injury to the existing product where injury is caused by component acquired later and added to existing product); Casa Clara Condominium Ass'n v. Charley Toppino and Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993) (stating that a homeowner could not recover in tort for economic loss); Utah Int'l Inc. v. Caterpillar Tractor Co., 775 P.2d 741, 744 (N.M. Ct. App. 1989) (stating that damage for economic loss in commercial setting is only recoverable in contract
contrast, the Ninth Circuit’s holding that the product is the item “purchased by the plaintiff” is on point with “carefully reasoned case law” in varying jurisdictions.\textsuperscript{289} Similarly, in the wake of \textit{East River}, courts grappled with the meaning of “the product” and held that the product is the object bargained for by the plaintiff.\textsuperscript{290}

In other cases involving defective component parts, the plaintiff’s bargain determined the scope of the product, regardless of whether the second user had ownership at the time of the conflict.\textsuperscript{291} Conversely, the majority failed to provide a single case to support its adoption of the initial user rule or any historical rationale to support the imposition of tort law.\textsuperscript{292} Therefore, whether it is an initial purchaser who seeks damage caused by a defective component part or a second user-purchaser who seeks damage for the loss of equipment that was part of the purchased product, the transferred product in the transaction should determine the theory of recovery. Essentially, these prior holdings at the state and federal level illustrate that the “plaintiff’s bargain is the appropriate place to start in defining the ‘product’” because the plaintiff is empowered to bargain for his or her own economic expectations.\textsuperscript{293} Although the consequences are sometimes unfavorable to second users who fail to insure against loss, the judicial system cannot compensate for the consequences of losses that are partly the result of the purchaser’s independent fault.\textsuperscript{294}

\section*{D. The Commercial Purchaser and Its Ignored Impact}

“[I]n commercial settings, where it is presumed that all parties have the ability and motivation to bargain for risk allocation, ‘a bargain is a
The majority failed to note a commercial consumer’s impact upon the theory of recovery for economic loss. Rather, the majority merely conceded, without discussion that the “context is purely commercial,” thus eluding to the commercial nature of the manufacturer and not the commercial nature of the consumer-second purchaser. Consequently, even though the majority recognized the impact of East River upon its determination of “other property,” it failed to note East River’s recognition of the distinction between a commercial consumer and a non-commercial consumer. Specifically, East River represented a contract law-based preference for recovery in commercial transactions. Contrary to the majority’s holding, the presumption that all purchasers require judicial protection is unwarranted. The commercial purchaser’s characteristics directly conflict with the theories underlying recovery in tort law.

The commercial purchaser’s sophistication, knowledge, and ability to bargain and protect against risk of loss at the time of the purchase negate the need for recovery in tort law. The creation of tort law in products liability, negligence, and strict liability arose out of a societal need to protect the susceptible consumer, not the experienced and knowledgeable consumer, from the insufficiencies of warranty law. Courts recognized the general consumer’s inability to insure against inequities in bargaining power between the “off the shelf” consumer and the industrial manufacturer. However, similar to manufacturers who compensate for liability through the price of their products, a commercial purchaser can protect and compensate against loss.

295. Respondents’ Brief at 9, Saratoga (No. 95-1764).
296. See Saratoga, 117 S. Ct. at 1786.
297. See id. (stating that “[t]he context is purely commercial . . . [the issue] requires us to interpret the Court’s decision in East River”).
299. See id.
300. See id. at 872 (“Society need not presume that a customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified.”).
301. See Respondents’ Brief at 17, Saratoga (No. 95-1764) (noting that commercial purchasers are regularly insured against loss as a business practice).
302. See D’Angelo, supra note 75, at 599.
303. See generally East River, 476 U.S. at 866; Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965); Leebron, supra note 22, at 396.
304. See Respondents’ Brief at 15, Saratoga (No. 95-1764) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. c).
305. See id. at 17.
example, commercial purchasers may spread either the cost of loss or the price of the product and warranty “through price adjustments for its own goods or services.” Therefore, the commercial purchaser is neither a susceptible nor helpless purchaser who requires tort law recovery.

V. IMPACT

The majority’s decision in Saratoga has created even murkier waters in the already unclear area of products liability. Prior to Saratoga, an impressive line of lower state and federal courts created well thought-out and carefully reasoned circumstances for the imposition of tort law recovery in a predominately contract-based area of law. However, Saratoga’s initial user rule diminishes the importance of these lower court decisions and creates new products liability law in direct conflict with earlier interpretations. Moreover, as a result of Saratoga, the manufacturer faces heightened liability without the ability to fairly bargain with the individual purchaser to protect against or to allocate liability.

Lower state and federal courts, previously forced to grapple with the scope of “the product” in the wake of East River, are now forced to grapple with the identity of the initial seller and the initial buyer. In the case of outfitted products, where the initial buyer outfits the product with additional equipment and changes the function of the product, it is unclear how courts will define the initial seller. In such situations,
does the initial seller or the initial purchaser define the product given
the fact that they changed the product's original function? It seems
irrational to define the product at the time it is originally produced
because subsequent purchasers often will use the product for purposes
other than its original purpose. \(^{312}\) Essentially, “[i]t makes little sense
and certainly depends on fortuity to say that the very modifications to
the vessel that make it what it is are not part of the product because
they happened to occur after a fishing company took title to the
vessel.”\(^{313}\)

In addition, the majority’s holding in *Saratoga* creates the very
outcome it expressed distaste for nearly a decade earlier in *East River*
when it emphasized the need to prevent “contract law [from]
drown[ing] in a sea of tort.”\(^{314}\) As a result, the decision in *Saratoga*
has the potential to heighten manufacturers’ exposure to unlimited
liability in tort for economic loss. \(^{315}\) Essentially, manufacturers cannot
make traditional upstream bargains through warranties or contracts that
allocate liability to structure their business behavior, such as product
price determinations, because plaintiffs can disregard negotiated
warranty agreements and recover in tort law. \(^{316}\) Consequently, the
manufacturers’ burden increases while the purchasers’ unduly
decreases and tort law dominates recovery even in the area of
economic loss. \(^{317}\) *Saratoga* reimplaces the “too intermediate” or
“indeterminate” positions rejected previously in *East River*, forcing
lower state and federal courts to interpret a holding contrary to earlier

\(^{312}\) The vessel as purchased by the initial purchaser was incapable of performing
fishing functions until the initial purchaser supplied the ship with additional equipment.
*See id.* at 5-6. Therefore, the product sold by the manufacturer was merely a steel hull
vessel; yet, the product bargained for by Captain Vargas, Saratoga Fishing Company,
was a vessel capable of performing tuna fishing expeditions. *See id.* at 6.

\(^{313}\) *Amicus Curiae of National Association of Manufacturers and Raychem
Corporation in Support of Respondents* at 24, *Saratoga* (No. 95-1764).

\(^{314}\) *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866 (1986);
*see generally D’Angelo, supra* note 75, at 594 (noting the need to keep the areas of tort
and contract law separate).

\(^{315}\) *See Respondents’ Brief at 38, Saratoga* (No. 95-1764) (“Permitting recovery for
all foreseeable claims . . . could make a manufacturer liable for vast sums.”).

\(^{316}\) *See generally D’Angelo, supra* note 75, at 596-602.

\(^{317}\) Manufacturers must account for unforeseeable increased liability while the
purchaser gains economic benefit through the lower purchase price and the potential
reimbursement for losses where warranty was not bargained.
decisions that clearly preferred contract law remedies.\textsuperscript{318}

VI. CONCLUSION

In \textit{Saratoga Fishing Co. v. J.M. Martinac & Co.}, the Supreme Court ruled on a products liability issue without adequate guidance or sufficient understanding and consequently proposed a ruling directly in conflict with both lower courts and its own previous interpretations. The majority’s ruling in \textit{Saratoga} granted tort recovery to a second user in the market chain of distribution against the original manufacturer for the loss of added equipment integrated by the initial purchaser, even though the added equipment was part of the whole bargained-for product by the second user upon his purchase. In so holding, the Court stated that the added property by the initial purchaser was “other property” and not part of the product itself. As a result, the Court proposed an “initial seller” rule to determine the scope of the product and “other property.” However, the rule proposed by the Court lacks sufficient support in light of lower state and federal courts that clearly delineate the product as that bargained for by the plaintiff according to the “object of the bargain test.” Consequently, \textit{Saratoga} adds confusion to the boundaries of tort and contract law in products liability when tort law clearly should have maintained its role on the sidelines.

\textbf{MEREDITH J. RINGLER}

\textsuperscript{318} See supra notes 107-13 and accompanying text (discussing \textit{East River} and its criticisms of \textit{Seely}'s “intermediate” and “indeterminate” approach to recovery in products liability).
The Illinois Judicial Conference Symposium

Each year, the Loyola University Chicago Law Journal publishes the Illinois Judicial Conference Symposium issue. The Law Journal dedicates this issue to Illinois law and the Illinois judiciary. The Symposium aims to provide Illinois judges, practitioners, and scholars with a valuable source of information about significant legal issues in Illinois. Additionally, the Law Journal strives to publish articles on all sides of the many issues facing Illinois courts.

This year, the Law Journal is pleased to publish articles from prominent Illinois judges and trial lawyers, including articles on tort reform and the use of the implied covenant of good faith and fair dealing in contract situations. Following Loyola’s commitment to child law, this year’s Symposium also includes an essay discussing the need for guardians ad litem in domestic violence court. The Illinois Judicial Conference Symposium issue will continue the Law Journal’s tradition to publish both an academic and practical resource for the Illinois legal community.

Joanne T. Hannaway
Executive Editor
Illinois Judicial Conference Symposium