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The Solution to the Economic Loss Doctrine Confusion: The Disappointed Expectations Test

MacKenzie Mayes Walter

I. INTRODUCTION: THE ECONOMIC LOSS DOCTRINE AND ITS APPLICATION

Imagine driving down a curvy road when the brakes of your brand new car suddenly fail. You try to pull your emergency brake to no avail, and as you approach a sharp curve, you realize that your only option is to jump out of the car. You swing open the driver's side door and leap out of the moving vehicle with just enough time to look up and see your car fly over an embankment and smash into a tree. You stand up, dust yourself off, and can only think about suing the car manufacturer for this defective car that almost killed you.

The good news is that you are still alive. The bad news is that because you have no physical injuries or damage to property other than the car, you have incurred nothing more than economic loss. As such, the economic loss doctrine will bar recovery in tort for the loss of the value of your new car. Traditionally, "[e]conomic loss is the loss in a product's value which occurs because the product 'is inferior in quality and does not work for the general purposes for which it was manufactured and sold.'"2 In other words, "economic loss is damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other property."3

Because the economic loss doctrine precludes recovery of purely economic loss in tort law, a purchaser of a defective product cannot pursue a cause of action in tort under negligence or strict liability theories for such loss.4 Economic loss is categorized as either direct or indirect economic loss. Direct economic losses include damage to the product itself result-
ing in "loss of the value of the bargain" and repair or replacement costs.\footnote{Richard C. Ausness, \textit{Tort Liability for Asbestos Removal Costs}, 73 OR. L. REV. 505, 511–12 (1994).}

"Indirect economic losses include lost profits and loss of future business opportunities."\footnote{Id. at 512.}

Although this doctrine may appear absurd by positioning itself on a tightrope between tort law and contract law,\footnote{See \textit{Restatement (Third) of Torts: Prod. Liab.} § 21 cmt. a (1998).} the application of and policies supporting the economic loss doctrine are extremely valuable in American jurisprudence. While damages such as personal injury or damage to other property are actionable in tort or contract, in most jurisdictions, consumers who suffer solely economic harm are limited to relying exclusively on contract remedies.\footnote{See Ausness, supra note 5, at 512.} Such a line provides an appropriate division between two distinct areas of law, prohibiting actions better suited for contract law from entering into the world of tort.

Plaintiffs attempt to pursue tort claims for economic losses for a variety of reasons. Although purchasers may receive the broad protection of an express or implied warranty, other Uniform Commercial Code\footnote{Hereinafter "UCC."} provisions allow sellers to limit the scope of the warranty by notice requirements\footnote{U.C.C. § 2-607(3)(a) (1998).} or privity requirements.\footnote{U.C.C. § 2-318 (1998).} Often, buyers are required to provide reasonable notice when goods are defective, giving the seller an opportunity to inspect, correct, and negotiate regarding the non-conforming goods.\footnote{See Ausness, supra note 5, at 515.} In addition, horizontal\footnote{See \textit{id.} at 515 ("Horizontal privity describes the relationship between the seller and ultimate user. If strict horizontal privity is required, the seller is liable only to the buyer and not to others who may use or consume the product."); see also Elizabeth A. Heiner, Note, \textit{Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.: What Recovery for Economic Loss–Tort or Contract?}, 1990 Wis. L. REV. 1337, 1339 (1990).} and vertical privity\footnote{See id. at 515 ("Vertical privity describes the relationship between parties in the marketing chain. If vertical privity is required, only the immediate buyer can recover against a seller for breach of warranty."); see also Edward H. Rabin & Jill Herman Grossman, \textit{Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery}, 12 SW. U. L. REV. 4, 15–16 (1981).} requirements traditionally served as difficult hurdles for purchasers to recover in contract. However, the UCC is now more liberal in allowing horizontal privity, providing states with three alternatives.\footnote{Alternative A extends a seller’s warranty to “any natural person who is in the family or household of his buyer or who is a guest in his home” if...} Further, although most states do not require vertical privity...
for breach of an express warranty, "it is less clear whether vertical privity is required to sue for breach of an implied warranty." Because tort law generally offers a "broader array" of damages than contract law, many product liability plaintiffs prefer suing in tort.

In addition, disclaimers and exclusions of remedies are challenges for purchasers who pursue a cause of action in contract. Some sellers incorporate disclaimers in the contract, preventing a warranty from arising or limiting its normal scope. Although most courts hold that a seller cannot disclaim an express warranty, sellers may disclaim an implied warranty of merchantability or an implied warranty of fitness for a particular purpose if certain criteria are met. Also, limitations or exclusions serve to restrict the remedies available. "[I]mplied warranties may be excluded or modified by course of dealing or performance, or trade usage." Finally, the applicable statute of limitations for contract causes of action can be a substantial barrier in products liability claims. A cause of action accrues in contract law when the contract breach occurs. Unfortunately for consumers, courts consider the breach to occur at the time the seller tenders the goods for delivery. Thus, in most states, a four-year statute of limitations begins to run the day the purchaser receives the product. Therefore,

See Ausness, supra note 5, at 515.


See Ausness, supra note 5, at 516.

See Ausness, supra note 5, at 516.

See Ausness, supra note 5, at 516.

See id. at 517 (“In contrast [to a disclaimer], a limitation or exclusion does not prevent a warranty from arising, but restricts the remedies available to the injured party if a breach occurs.”).

See id. at 516. 

Id.; see, e.g., N. States Power Co. v. ITT Meyer Indus., 777 F.2d 405, 412 (8th Cir. 1985).

See U.C.C. § 2-316(2) (1998); Ausness, supra note 5, at 516–17.

See Ausness, supra note 5, at 517.

See id. at 517–18.
the purchaser "will have no cause of action if an injury occurs more than four years after the date of delivery." In contrast, "[t]ort law principles are often more favorable to consumers than contract law." There are no privity requirements in tort. Sellers cannot avoid liability by disclaiming or limiting remedies. Statutes of limitations are also more favorable in tort law. Although usually one to six years, the statute of limitations for tort causes of action incorporates a "discovery rule," which tolls the running of the statute until the victim discovers or should have discovered the injury. Finally, punitive damages, which are precluded under contract law, are available in tort. Therefore, in cases where tort law is the only available remedy, due to the challenging barriers in contract causes of action, the applicability of the economic loss doctrine becomes a critical question. The economic loss doctrine reaches into many areas of the law, including products liability law. Where it reaches, it cuts deep, acting as a complete bar to recovery.

This Note focuses on the application of the economic loss doctrine in products liability cases. Part II of this Note will address the three main approaches courts use to apply the economic loss doctrine—the Santor rule, the "type of consumer" rule, and the "physical injury" rule. Because the "physical injury" rule best represents the historical policies supporting the fundamental distinction between contract law and tort law, Part III concludes that this majority approach is superior. Part III will also examine the nuances that courts use in applying this majority rule, concluding that the "disappointed expectations" interpretation provides the most satisfactory outcomes and should be incorporated into the "integrated systems"

26 See id. at 518. Furthermore, the statute of limitations in contract causes of action "begins to run at the time of sale, regardless of the aggrieved party's lack of knowledge of the product defect." Id. at 518; see also U.C.C. § 2-725(1) (1998) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.").

27 See Ausness, supra note 5, at 518.

28 Id.

29 Id.

30 Id.

31 See David G. Owen, Special Defenses in Modern Products Liability Law, 70 Mo. L. Rev. 1, 28 (2005) ("Every jurisdiction has a statute of limitations governing claims for personal injury or tortiously caused harm, with time periods ranging from 1 year (in California, Kentucky, Louisiana, and Tennessee) to 6 years (in Maine and North Dakota). The most common periods are 2 and 3 years.").

32 See Ausness, supra note 5, at 518.

33 John J. Laubmeier, Comment, Demystifying Wisconsin's Economic Loss Doctrine, 2005 Wis. L. Rev. 225, 228.

34 Id. at 227.

35 Id.

approach when "prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product." 37

II. APPROACHES TO AND POLICIES BEHIND THE ECONOMIC LOSS DOCTRINE

Although all American jurisdictions permit tort recovery for injured consumers for personal injuries and damage to other property, many jurisdictions differ with respect to whether recovery is available in tort for purely economic loss.38 While "[a] few courts allow [tort] recovery in any situation,"39 some limit recovery in tort to ordinary consumers under the "type of consumer" approach.40 Most courts, however, apply a "physical injury" approach, limiting recovery in tort to physical injury,41 which includes personal injury and damage to one's property, as opposed to solely economic harm.42

A. The Santor Rule

In Santor v. A&M Karagheusian, Inc., the plaintiff sought recovery against a manufacturer for defective carpeting.43 Almost immediately after purchase, the plaintiff noticed an unusual line in the carpet that continued to worsen.44 Of course, this defect did not cause any personal injuries or any damage to the plaintiff's other property. Nonetheless, in addition to having a warranty claim, the court permitted the plaintiff to sue for the economic loss of the rug under the doctrine of strict liability in tort.45 The court noted that "when the manufacturer presents his goods to the public for sale he accompanies them with a representation that they are suitable and safe for the intended use."46 In addition, the court continued,

38 See Ausness, supra note 5, at 522.
39 See id.; see, e.g., Sharon Steel Corp. v. Lakeshore, Inc., 753 F.2d 851, 855–56 (10th Cir. 1985) (allowing recovery for economic loss when unreasonable risk of injury involved); Cova v. Harley Davidson Motor Co., 182 N.W.2d 800, 804 (Mich. Ct. App. 1970) (allowing recovery in tort for economic loss resulting from defective golf carts); see also Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 17 (Minn. 1992) (holding that tort remedies are available for economic loss although the UCC provides the exclusive remedy in commercial transactions).
40 See Ausness, supra note 5, at 522; see also Marc A. Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases, 18 STAN. L. REV. 974, 989 (1966) (recognizing the concern of judges for the interests of ordinary consumers).
41 See Ausness, supra note 5, at 522.
42 Id. at 523.
44 Id.
45 Id. at 311.
46 Id.
The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.  

Thus, the "restrictive notions of privity of contract... must be put aside and the realistic view of strict tort liability [be] adopted" for economic loss resulting from the defective products sold, personal injury, or damage to the consumer's other property.

Since Santor, the New Jersey Supreme Court has shifted away from permitting recovery in tort for purely economic loss. In fact, only a handful of jurisdictions have followed the Santor rule.

B. The "Type of Consumer" Rule

The second approach that courts use to determine whether purely economic loss is recoverable in tort law is the "type of consumer" rule. This rule focuses on the sophistication of the consumer involved in the dispute. Under this theory, ordinary consumers may recover for economic harm in tort and contract because they "do not have the expertise to accurately assess economic risks, and... they do not have sufficient economic strength to protect themselves against economic loss through the bargaining process." However, commercial purchasers are limited solely to recovery in contract law because they have relatively equal bargaining power and are more equipped to contractually bargain. These policy considerations convinced the Supreme Court of New Jersey to apply the "type of consumer" approach in Spring Motors Distributors, Inc. v. Ford Motor Co. In this case, because the purchaser of the Ford truck was a commercial buyer, recovery for economic loss was restricted solely to contract law. Unfortunately, the four-year statute of limitations for contract claims had already expired, precluding any recovery for the commercial buyer.

47 Id. at 312 (emphasis added).
48 Id.
50 Id. at 271.
51 See Ausness, supra note 5, at 522.
52 Id. at 522-23.
53 Id. at 523.
54 Id.
56 Id.
57 Id. at 674.
Justice Peters's dissenting opinion in *Seely v. White Motor Co.* also endorsed the "type of consumer" principles and identified the policies behind this approach. In determining whether to provide recovery in tort, the *Seely* majority drew a line based on the type of damage involved, placing damage resulting from economic harm as actionable only in contract and placing economic damage resulting from physical harm to self or other property on the other side of the line, providing a claim in tort or contract. In his dissent, Justice Peters called this distinction "arbitrary." Instead, he argued, "What is important is not the nature of the damage but the relative roles played by the parties to the purchase contract and the nature of their transaction." Recognizing that it is "well established that [recovery for personal injury damages] may include compensation for [economic losses such as] past loss of time and earnings due to the injury," Justice Peters noted:

There is no logical distinction between these losses and the losses suffered by the plaintiff here. All involve economic loss, and all proximately arise out of the purchase of a defective product. I find it hard to understand how one might, for example, award a traveling salesman lost earnings if a defect in his car causes his leg to break in an accident but deny that salesman his lost earnings if the defect instead disables only his car before any accident occurs. The losses are exactly the same . . . . Yet the majority would allow recovery under strict liability in the first situation but not in the second.

Justice Peters continued his "type of consumer" argument, stating that because the majority acknowledges that "the rules governing warranties were developed to meet the needs of 'commercial transactions,'" the majority should have determined whether the ultimate purchaser was an ordinary consumer or a commercial purchaser. He argued that the majority's focus on the nature of the damages resulting from the defect (i.e., personal injury or mere destruction of the product) at a time "long after the transaction had been completed" was inappropriate.

Justice Peters's separate opinion also contrasted a society in which everyone has equal bargaining power to our modern-day commercial reality in which "'standardized mass contract has appeared.'"

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59 *Id.* at 151–52 (majority opinion).
60 *Id.* at 154 (Peters, J., concurring in part and dissenting in part).
61 *Id.* at 153.
62 *Id.*
63 *Id.* at 153–54.
64 *Id.* at 156.
65 *Id.*
66 *Id.* at 156–57 (quoting Henningsen v. Bloomfield Motors, 161 A.2d 69, 86 (N.J. 2006–2007])
feared the lack of bargaining power of the ordinary consumer in the modern era, where such consumers are "frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors have the same clauses."67 In such situations, Justice Peters noted that the ordinary consumer's contractual intention merely becomes "a subjection . . . to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all."68

Therefore, the "type of consumer" rule focuses on the principle adopted in Greenman v. Yuba Power Products, which states that strict product liability should protect "injured persons who are powerless to protect themselves."69 By permitting economic loss recovery in tort for less sophisticated, ordinary consumers, this goal is arguably accomplished.

C. The "Physical Injury" Rule

Rather than concentrating on the type of consumer involved in the dispute, the "physical injury" interpretation of the economic loss doctrine focuses on the type of injury claimed. "The economic loss doctrine has been traced to a landmark decision by the California Supreme Court, Seely v. White Motor Co.,"70 in which Justice Traynor carefully explored the boundary between tort and contract in products liability litigation. In Seely, the plaintiff had purchased a heavy-duty truck with an express warranty by the manufacturer, guaranteeing the vehicle to be free from defects in material and workmanship and limiting its obligation under the warranty for replacement of parts.71 The truck had serious problems, and for eleven months, with guidance from the manufacturer, the dealer unsuccessfully attempted to fix the vehicle.72 Ultimately, the plaintiff was driving the vehicle around a curve when the brakes failed, and the truck overturned.73 The plaintiff suffered no physical injuries but subsequently sought recovery for repairs to the truck, for the amount paid on the price of the truck, and for the profits his business lost as a result of his inability make normal use of the truck.74 Relying on an express warranty theory, the trial judge ruled for the plaintiff on the counts of lost profits and the amount paid on the purchase price.75

67 Id. at 157 (quoting Henningsen, 161 A.2d at 86).
68 Id. (quoting Henningsen, 161 A.2d at 86).
70 Grams v. Milk Prods., Inc., 699 N.W.2d 167, 172 (Wis. 2005).
71 Seely, 403 P.2d at 147-48.
72 Id. at 147.
73 Id.
74 Id. at 147-48.
75 Id. at 148.
Although the contention had been made that statutory recovery under breach of warranty had been “superseded by the doctrine of strict liability in tort set forth in Greenman v. Yuba Power Prods., Inc.” the Seely court disagreed. Justice Traynor held, “[t]he history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.” Thus, the court recognized that contract law and strict liability in tort may coexist, leaving contract law as the best suited to deal with economic losses. Therefore, the plaintiff was entitled to recover in contract law for his commercial losses, loss of profits, and refund of money he paid on the truck because the manufacturer warranted the truck to be free from defects. In other words, “[h]ad defendant not warranted the truck, but sold it ‘as is,’ it should not be liable for the failure of the truck to serve plaintiff’s business needs.”

Further, Justice Traynor recognized that if the court allowed the plaintiff to get this economic loss recovery under strict liability rather than contract, “[t]he manufacturer would be liable for damages of unknown and unlimited scope.” Instead, the court said, “Application of the rules of warranty prevents this result.” Without an agreement which represents the quality of the product, such as a warranty, the defendant should not be liable for commercial losses. Therefore, the court adopted the so-called economic loss doctrine, recognizing that although negligence and strict liability actions allow recovery for physical injury to a plaintiff’s property and for personal injury, a plaintiff may not recover for purely economic loss in tort.

In 1986, the economic loss doctrine gained widespread acceptance after the U.S. Supreme Court adopted this “physical injury” approach to the doctrine in the seminal case of East River Steamship Corp. v. Transamerica...
Delava/Inc. Y. In this case, defective turbines, each costing $1.4 million and powering four supertankers, destroyed themselves. Applying admiralty law, the Court held that the economic loss doctrine barred tort recovery in negligence or strict liability. Because the defective product caused damage only to itself, the plaintiff could not recover. In other words, a plaintiff may not recover in tort for physical damage the defective product causes to the "product itself," but may recover for physical damage the product causes to "other property." Thus, in East River, the Supreme Court not only "embraced the economic loss doctrine but expanded it, indicating that physical damage to the product itself was covered by the doctrine." Evidently, the Court was very concerned about preserving the distinction between contract and tort, warning that if product liability were expanded too far, "contract law would drown in a sea of tort."
The Restatement (Third) of Torts section 21 restated the East River majority view in 1998:

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to: (a) the plaintiff's person; or (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff's property other than the defective product itself.9

Basically, the Restatement recognizes, and the comments confirm, that economic loss resulting from harm to the plaintiff's person, including loss of earnings and reductions in earning capacity, would be permissible under tort law. In addition, "[w]hen tort law recognizes the right of a plaintiff to recover for economic loss arising from harm to another's person, that right

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85 Id. at 859-60.
86 Id. at 871.
87 Grams v. Milk Prods., Inc., 699 N.W.2d 167, 173 (Wis. 2005); see also E. River, 476 U.S. at 870.
88 E. River, 476 U.S. at 866.
90 Id; see also id. cmt. b.
is included within the rules of this Restatement . . ."91 In such cases, this would allow recovery for loss of consortium or wrongful death.92 Next, the Restatement acknowledges that "[a] defective product that causes harm to property other than the defective product itself" is actionable in tort.93 Finally, the comments to section 21 clarify that when the harm is to the defective product itself, losses flowing therefrom are not recoverable in

91 Id. cmt. c.
92 Thus, for example, actions under local common law and statutes for loss of consortium or wrongful death on behalf of next of kin, although not direct harms to the plaintiff's person, are included in Subsection (b). Other examples of such rights may be recognized under local law, but the categories included in Subsection (b) have traditionally been limited in number.

Id.
93 A defective product that causes harm to property other than the defective product itself is governed by the rules of this Restatement. What constitutes harm to other property rather than harm to the product itself may be difficult to determine. A product that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the product or system is deemed to be an integrated whole, courts treat such damage as harm to the product itself. When so characterized, the damage is excluded from the coverage of this Restatement. A contrary holding would require a finding of property damage in virtually every case in which a product harms itself and would prevent contractual rules from serving their legitimate function in governing commercial transactions.

The characterization of a claim as harm to other property may trigger liability not only for the harm to physical property but also for incidental economic loss. The extent to which incidental economic loss is recoverable in tort is governed by general principles of legal cause. See Restatement, Second, Torts §§ 430-461.

One category of claims stands apart. In the case of asbestos contamination in buildings, most courts have taken the position that the contamination constitutes harm to the building as other property. The serious health threat caused by asbestos contamination has led the courts to this conclusion. Thus, actions seeking recovery for the costs of asbestos removal have been held to be within the purview of products liability law rather than commercial law.

Id. cmt. e.
tort under the rules of the Restatement.\footnote{94}{When a product defect results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller. Harm to the product itself takes two forms. A product defect may render the product ineffective so that repair or replacement is necessary. Such a defect may also result in consequential loss to the buyer. For example, a machine that becomes inoperative may cause the assembly line in which it is being used to break down and may lead to a wide range of consequential economic losses to the business that owns the machine. These losses are not recoverable in tort under the rules of this Restatement. A somewhat more difficult question is presented when the defect in the product renders it unreasonably dangerous, but the product does not cause harm to persons or property. In these situations the danger either (1) never eventuates in harm because the product defect is discovered before it causes harm, or (2) eventuates in harm to the product itself but not in harm to persons or other property. A plausible argument can be made that products that are dangerous, rather than merely ineffectual, should be governed by the rules governing products liability law. However, a majority of courts have concluded that the remedies provided under the Uniform Commercial Code—repair and replacement costs and, in appropriate circumstances, consequential economic loss—are sufficient. Thus, the rules of this Restatement do not apply in such situations.} A second category of economic loss excluded from the coverage of this Restatement includes losses suffered by a plaintiff but not as a direct result of harm to the plaintiff's person or property. For example, a defective product may destroy a commercial business establishment, whose employees patronize a particular restaurant, resulting in economic loss to the restaurant. The loss suffered by the restaurant generally is not recoverable in tort and in any event is not cognizable under products liability law.}

\footnote{95}{A.J. Decoster Co. v. Westinghouse Elec. Corp., 634 A.2d 1330 (Md. 1994).}
\footnote{96}{Id. at 1331.}
\footnote{97}{Id.}
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for Westinghouse on those warranty claims. In addition, the trial court dismissed the plaintiff's tort allegations, asserting the economic loss doctrine.

On appeal, Maryland's high court disagreed, holding that the plaintiff adequately stated a cause of action in tort because the death of the chickens was “a loss of physical property, rather than an economic loss.” The court said, “[a] manufacturer may be held liable for physical injuries, including harm to property, caused by defects in its products because it is charged with the responsibility to ensure that its products meet a standard of safety creating no unreasonable risk of harm.” Here, the entirety of the plaintiff's claim was the loss of 140,000 chickens and was thus solely a claim for loss of property. The court distinguished this scenario from a situation where the loss is purely economic, such as seeking recovery for the loss of value of the switch, its replacement, repair costs, or lost profits.

By drawing the line and permitting recovery in tort for physical harm to a consumer or his or her property, the court prevented the manufacturer from escaping liability “simply because the dangerous nature of the [defective] product was undiscovered until after the warranties had expired.” In other words, in situations like this, “[t]he purchaser is not simply losing the benefit of his bargain” by purchasing a defective product. This would be best addressed by contract law. Rather, “the purchaser . . . is sustaining damage to other property because that defect is so dangerous in nature.” The Maryland Supreme Court declared it “profoundly unfair” to force the purchaser to bear the burden for the destruction of his chickens. Instead, the court held that the trial court erred in dismissing the plaintiff's negligence and strict liability claims. As such, the loss of the chickens was recoverable in tort.

The "physical injury" test has continued to gain ground and is now considered the majority approach. In 2005, Isla Nena Air Services, Inc. v. Cessna Aircraft Co. applied the "physical injury" rule, "limiting tort recovery to damage to the plaintiff's property other than the defective product

\[98\] Id.
\[99\] Id.
\[100\] Id. at 1333.
\[101\] Id. at 1332.
\[102\] Id. at 1333.
\[103\] Id. at 1337.
\[104\] Id.
\[105\] Id.
\[106\] Id.
\[107\] Id. at 1334, 1337 (stating that the loss of the chickens was a property loss, rather than a purely economic loss, and that plaintiff's complaint contained allegations that supported a claim of strict liability).
The court indicated that only four states have declined to follow this approach, namely Oregon, Tennessee, West Virginia, and Washington, whereas an “overwhelming majority of forty-six states have adopted it.”

Although the “physical injury” test has prevailed over both the Santor approach and “type of consumer” approach, courts continue to disagree over the proper real-world application of what constitutes harm to “other property” versus harm to the product itself. Therefore, several significant interpretations of “other property” have evolved.

1. “Integrated Systems” Test.—East River and the Restatement (Third) of Torts section 21 endorse the so-called “integrated systems” approach for determining what distinguishes harm to “other property” from harm to the product itself. According to section 21 comment e, “[a] product that non-dangerously fails to function due to a product defect has clearly caused harm only to itself,” precluding recovery in tort. On the other hand, “[a] product that fails to function and causes harm to surrounding property has clearly caused harm to other property,” permitting recovery in tort. Unfortunately, this distinction becomes more difficult when dealing with a defective component part that destroys the rest of the machine or system. Section 21 comment e states, “When the product or system is deemed to be an integrated whole, courts treat such damage as harm to the product itself,” and as such, the damage is precluded from recovery in tort, leaving available solely contract remedies.

In other words, “[t]he integrated systems test looks at the system of which the defective product is a part, and bars recovery if the plaintiff is alleging damage to any part of the system under an other property theory.”
Although the purchaser in *East River* argued that the defective turbines damaged "other property," (i.e., the supertankers powered by the turbines) the Court chose the "integrated systems" approach. The Court stated that no "other' property" was damaged by the malfunctioning turbines. The Court reasoned that because the manufacturer supplied "each turbine...as an integrated package,... each is properly regarded as a single unit. 'Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of [other] ‘property damage' in virtually every case where the product damages itself." Such a result "would prevent contractual rules from serving their legitimate function in governing commercial transactions." Further, *East River* concluded that "a manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."

In 2003, a federal district court applied the "integrated systems" approach in *Isla Nena Air Services, Inc. v. Cessna Aircraft Co.*, in which a single-engine plane had to make an emergency landing after suffering engine failure. *Isla Nena* alleged the engine failure resulted from Cessna’s installation of defective rivets in the air intake or from other defects in the aircraft or its components for which Cessna was liable. Although none of the nine passengers were injured, the aircraft suffered "major damage to all of its components and the engine was destroyed." Because the complaint "allege[d] that damage to the product (the aircraft) was caused by a defect in the product itself or in a component of the product (one or more allegedly defective rivets)" and failed to seek recovery for personal injuries or damage to other property, the court held that the plaintiff's claims were the subject of warranty and dismissed all claims.

This approach has received criticism because over time, "the parameters of this 'other property' exception have proved elusive." According to *Grams*, the well-established "integrated systems" test for distinguishing between damage to the product itself and damage to other property "does

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121 Id.
122 Id. (quoting N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 330 (Alaska 1981)) (first alteration in original).
124 E. River, 476 U.S. at 871.
126 Id. at 75-76.
127 Id. at 76.
128 Id. at 76.
129 Id. at 82.
130 Id. at 81-82.
131 Grams v. Milk Prods., Inc., 669 N.W.2d 167, 169 (Wis. 2005).
not translate well to all situations involving property damage to which the economic loss doctrine logically applies.\textsuperscript{132} Thus, application of such an approach creates uncertainty in the court systems. For example, the "integrated systems" approach to the economic loss doctrine was at issue in the Wisconsin Court of Appeals and the Wisconsin Supreme Court a total of forty-seven times from 2000 to 2004.\textsuperscript{133} "The frequency of the economic loss doctrine's appearance in the courts of Wisconsin reveals that the application of the doctrine is a constantly developing area of law, which may not be fully understood by judges, lawyers, or the public at large."\textsuperscript{134}

2. Recent Trends That Reshape or Replace the "Integrated Systems" Test.—Although the U.S. Supreme Court has not overturned the "integrated systems" approach set out in \textit{East River}, the Court and several state courts have recognized imperfections in this approach. For example, in \textit{Saratoga Fishing Co. v. J.M. Martinac & Co.},\textsuperscript{135} the U.S. Supreme Court, applying admiralty law, carved out a situation in which the "integrated systems" approach does not apply. The Court held that equipment and parts added to the original product after the product enters the stream of commerce is "other property" and is thus excluded from the economic loss doctrine.\textsuperscript{136} In this case, the manufacturer sold a fishing vessel to an initial purchaser who later added extra equipment including a skiff, a fishing net, and spare parts.\textsuperscript{137} The initial purchaser resold the fishing vessel, leaving the added equipment on the ship.\textsuperscript{138} When the allegedly defective hydraulic system, which had been installed by the manufacturer, caused the ship to catch fire and sink, the second purchaser sued in tort to recoup its loss, including the loss of the equipment that the first purchaser had added.\textsuperscript{139}

Although the district court awarded damages to the owner for the loss of this additional equipment,\textsuperscript{140} the Ninth Circuit reversed.\textsuperscript{141} Applying \textit{East River}'s distinction between a product that itself causes the harm and "other property," the Ninth Circuit held that the economic loss doctrine also barred recovery for the added equipment because pursuant to \textit{East River}, it was an integrated part of the ship when the initial purchaser sold it to the second purchaser.\textsuperscript{142} However, the U.S. Supreme Court disagreed, noting,

\begin{thebibliography}{142}
\bibitem{132} \textit{Id. at} 175.
\bibitem{133} \textit{See Laubmeier, supra} note 33, at 225.
\bibitem{134} \textit{Id. at} 225-26
\bibitem{136} \textit{Id. at} 877.
\bibitem{137} \textit{Id.}
\bibitem{138} \textit{Id.}
\bibitem{139} \textit{Id. at} 877-78.
\bibitem{140} \textit{Id.}
\bibitem{141} \textit{See Saratoga Fishing Co. v. Marco Seattle, Inc.}, 69 F.3d 1432, 1445 (9th Cir. 1995).
\bibitem{142} \textit{Id. at} 1444-45.
\end{thebibliography}
When a Manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under *East River*. Items added to the product by the Initial User are therefore "other property," and the Initial User's sale of the product to a Subsequent User does not change these characterizations.\(^\text{143}\)

Thus, the Court stated that "the case law does suggest a distinction between the components added to a product by a manufacturer before the product's sale to a user . . . and those items added by a user to the manufactured product . . ., and we would maintain that distinction."\(^\text{144}\)

In addition to clarifications by the U.S. Supreme Court, many jurisdictions have attempted to perfect the real-world application of the economic loss doctrine by modifying the analysis. In *Theuerkauf v. United Vaccines Div. of Harlan Sprague Dawley, Inc.*,\(^\text{145}\) the plaintiff sought recovery in tort for the loss of 1,970 breed stock mink after the mink were injected with an allegedly defective vaccine.\(^\text{146}\) Although the mink were clearly "other property" compared to the vaccine, the court's analysis went further. Because there are many instances in which the damage to "other property" is actually within the contemplation of the parties, the court concluded that "[d]amage to property, where it is the result of a commercial transaction otherwise within the ambit of the UCC, should not preclude application of the economic loss doctrine where such property damage necessarily results from the delivery of a product of poor quality."\(^\text{147}\)

Therefore, an action must arise independently of the contract to maintain a tort claim, requiring the defendant to owe a duty to the plaintiff "separate and distinct" from the duty under the contract.\(^\text{148}\) A contrary approach "would swallow the Economic Loss Doctrine because these torts could be claimed anytime that a product did not work as it was supposed to work."\(^\text{149}\) In addition, the *Theuerkauf* court held that "the only remedy for claims relating to the performance of the product, such as a claim that the product did not work as it was supposed to work, may be brought under contract law."\(^\text{150}\) Thus, *Theuerkauf* applied the economic loss doctrine "even though the damage claimed by the plaintiff occurred to property other than

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\(^{143}\) *Saratoga Fishing Co.*, 520 U.S. at 879.

\(^{144}\) *Id.* at 884.


\(^{146}\) *Id.* at 1239.

\(^{147}\) *Id.* at 1241 (quoting Niebarger v. Universal Coops., Inc., 486 N.W.2d 612, 620 (Mich. 1992)).

\(^{148}\) *Id.* (quoting Merchants Publ'g Co. v. Maruka Mach. Corp., 800 F. Supp. 1490, 1493 (W.D. Mich. 1992)).

\(^{149}\) *Id.*

\(^{150}\) *Id.* at 1241–42.
the product itself."151 The "link between the [defective] product and the harm caused [to the mink] does not require one to stretch one's imagination to reach some tangential nexus—it is the exact damage one would expect from a defective vaccine."152 Because "the death of the mink was a 'natural, foreseeable result of the product's defect,'" the parties could have negotiated allocation of this damage.153

The Supreme Court of Illinois took a different approach in Trans State Airlines v. Pratt & Whitney Canada, Inc.,154 concluding that a product and one of its component parts may constitute two separate products if the parties bargained separately for the individual components,155 and thus the purchaser could recover in tort for damage to the product caused by a defective component. However, in Trans State Airlines, the court concluded that the plaintiff bargained for and received a fully integrated aircraft and had thus lost no more than that for which it had bargained.156 In 2005, the Indiana Supreme Court applied a similar approach in Gunkel v. Renovations,157 holding that whether the damaged property qualifies as "other property" "turns on whether it was acquired by the plaintiff as a component of the defective product or was acquired separately."158

In Grams v. Milk Products, Inc., the Wisconsin Supreme Court incorporated a "disappointed expectations" analysis into the "integrated systems" approach.159 Recognizing that "the 'integrated systems'" concept does not translate well to all situations involving property damage to which the economic loss doctrine logically applies[,]" the court shifted its analysis.160 In cases where a defective product causes property damage but such damage is within the scope of the bargaining, the economic loss doctrine will bar recovery in tort.161 In Grams, farmers who fed calves a non-medicated version of milk substitute sued the manufacturer and distributor in contract and tort, alleging that the poor nutritional content in the non-medicated replacer had not damaged the calves' immune systems, resulting in poor growth

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151 Id. at 1242.
152 Id.
155 Id. at 57.
156 Id.
158 Id. at 151.
159 Grams v. Milk Prods., Inc., 699 N.W.2d 150, 178 (Wis. 2005); see also id. at 175 n.8 ("Contrary to the dissent's assertion that we 'fabricate' the disappointed expectations concept, the concept has existed for more than twenty years, and has been adopted by numerous other courts." (citation omitted)).
160 Id. at 175.
161 Id.
and a tripled mortality rate.\footnote{Id. at 170.} Plaintiffs “urge[d the] court to resolve the ‘other property’ conundrum by adopting a ‘new bright line rule,’ that physical damage to anything other than the product itself would be considered damage to ‘other property’ and therefore subject to suit in tort.”\footnote{Id. at 178.} Under such a theory, suits in tort would be permitted for damage to anything “beyond the physical dimensions of the purchased product,”\footnote{Id.} and in Grams, the calves were clearly physically different from the milk replacer.\footnote{Id.}

The Grams court declined to adopt the proposed bright-line rule, recognizing that such a rule would prevent the important inquiry into the scope of the bargain and instead would focus on “an overly formalistic distinction based on the kind of property harmed.”\footnote{Id. at 178.} The court also believed that such a bright-line test “would inevitably cause the erosion of the UCC,” destroying the “fundamental distinction between contract and tort.”\footnote{Id. at 178.} Ultimately, the Grams court incorporated a “disappointed expectations” analysis into the “integrated systems” approach in situations where “prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product.”\footnote{Id. at 179.} In other words, the threshold inquiry for this test is whether, at bottom, the claim involves disappointed performance expectations and whether the product failed to fulfill the purchaser’s contractual expectations.\footnote{Id.} The court carefully warned, “This does not mean that contract principles will envelop all damages foreseeable ‘in a remote or general sense.’”\footnote{Id. at 179.}

In applying this test to the facts, the Grams court first determined the contractual expectations motivating the purchase by considering the substance and purpose of the transaction. The court concluded that the milk replacer was purchased to nourish the calves so that they would grow.\footnote{Id.} Second, the court inquired whether the plaintiffs’ claim involved disappointment with those expectations.\footnote{Id.} The court concluded that the plaintiffs bought the milk replacer to nourish the calves but that the product left them malnourished, which was just the opposite of what the purchasers
expected. In other words, the plaintiffs had disappointed expectations. Although most facts would not be as straightforward as those in Grams, the Grams court warned that “courts undertaking this inquiry should [not only] be mindful to prevent ‘contract from drowning in a sea of tort,’ [but] they should also prevent tort from drowning in a sea of contract.” In striking this balance, the Grams court “believe[d] the disappointed expectations concept will prove useful.”

Recently, in Foremost Farms USA Coop. v. Performance Process, Inc., the Wisconsin Court of Appeals fleshed out the “disappointed expectations” notion adopted in Grams. In Foremost Farms a dairy producer purchased a defective drum of defoamer, which was used to reduce foaming during the production of recon, a product utilized in making dairy products. After two years of successful use of defoamer, the plaintiff discovered that some of its end dairy products were defective. In fact, the end products were unfit for human consumption, resulting in the consequential damages of $587,118.30. Plaintiff determined that the defective defoamer which ultimately yielded the unfit dairy products had originated in a particular fifty-five gallon drum. Testing of this drum’s defoamer revealed that it contained a contaminant, phenol. The plaintiff sought recovery in tort for distributing a defective product. However, the trial court granted the defendant’s motion for summary judgment, concluding that the economic loss doctrine barred recovery in tort. More specifically, the trial court held that the “other property” exception to the economic loss doctrine did not apply because “the allegedly defective defoamer became part of an ‘integrated system.’”

The Wisconsin Court of Appeals reversed, reiterating the importance of the two-step Grams analysis for the “other property” exception. The court began this analysis by stating, “Regardless whether property is other property in a literal sense, it may be ‘other property’ in a legal sense for

173 Id.
174 Id. at 180.
175 Id.
177 Id. at 291–92.
178 Id. at 292.
179 Id. at 293 n.3.
180 Id. at 292.
181 Id. at 292 & n.2.
182 Id. at 292–93.
183 Id. at 293.
184 Id.
185 Id. at 298.
purposes of the economic loss doctrine." The court recognized that in determining if the damaged property is “other property” in a legal sense, the two appropriate steps are the “integrated systems” test followed by the “disappointed expectations” test. Under the “integrated systems” test, the inquiry is “whether the allegedly defective product is a component in a larger system.” The court added, “once a part becomes integrated into a completed product or system, the entire product or system ceases to be ‘other property’ for purposes of the economic loss doctrine.” Upon the conclusion of the “integrated systems” analysis, if the damaged property is not “other property,” the inquiry is over and the economic loss doctrine bars recovery in tort. However, according to the court, if the damaged property “appears” to be “other property” under the “integrated systems” test, the court will then apply the “disappointed expectations” test. In Foremost Farms, the court concluded that a factual dispute remained as to whether the defoamer or the phenol were components of the recon or end dairy products under the “integrated systems” test and thus continued its inquiry to step two.

The Foremost Farms court then explained the application of the “disappointed expectations” test:

The test focuses on the expected function of the product and whether, from the purchaser's perspective, it was reasonably foreseeable that the product could cause the damage at issue. The test asks whether a reasonable purchaser in the plaintiff's position should have foreseen the risk. Foreseeable interaction between damaged property and the damage-causing product is insufficient, by itself, to meet the “disappointed expectations” test.

We note that “reasonable foreseeability” should not be equated with “foreseeable interaction” between the purchased product and the damaged property. Foreseeable interaction, by itself, does not show that damage was reasonably foreseeable within the meaning of the “disappointed expectations” test. We broach this topic because a sentence in Grams might be read to suggest otherwise. The Grams court stated: "If a product is expected and intended to interact with other products and property, it naturally follows that the product could adversely affect and even damage that property." Read in isolation, the sentence seemingly suggests that, any time a purchaser knows a product will come into some sort of contact with other property, the purchaser should anticipate that

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186 Id. at 294; see Grams v. Milk Prods., Inc., 699 N.W.2d 167, 174 (Wis. 2005).
187 Foremost Farms, 726 N.W.2d at 294.
188 Id.
189 Id. (quoting Selzer v. Brunsell Bros., 652 N.W.2d 806, 834 (Wis. 2002)) (alteration in original).
190 Id. at 295.
191 Id.
192 Id. at 298–99.
193 Id. at 300.
Ultimately, in applying the disappointed expectations test, the court concluded, "There is no evidence, much less undisputed evidence, showing whether a purchaser in [the plaintiff's] position should reasonably have anticipated that the defoamer would contain a contaminant such as phenol that would render [its] dairy products unfit for human consumption." Thus, the plaintiff's tort claims were reinstated.

III. CRITICISMS OF THE THREE APPROACHES TO THE ECONOMIC LOSS DOCTRINE AND A PROPOSAL TO GOVERN CLAIMS INVOLVING ECONOMIC LOSS MORE EFFECTIVELY.

As the economic loss doctrine has evolved, the courts have identified three important policy considerations supporting this doctrine, and therefore, these policies aid in evaluating the most effective application of the economic loss doctrine. "First, the economic loss doctrine preserves the fundamental distinction between tort law and contract law." Second, applying the economic loss doctrine "protects the parties' freedom to allocate economic risk by contract." Finally, "the doctrine encourages the purchaser, which is the party best situated to assess the risk of economic loss, to assume, allocate, or insure against that risk."

A. The Santor Rule

By allowing recovery in tort for mere economic loss, the Santor approach undermines the fundamental distinction between contract law and tort law. In Daanen & Janssen, Inc. v. Cedarapids, Inc., the Supreme Court of Wisconsin recognized the importance of maintaining this distinction by applying the economic loss doctrine to commercial transactions. Later in Wausau Tile, Inc. v. County Concrete Corp., that court reiterated that "contract law rests on bargained-for obligations, while tort law is based on legal obligations."
The court said, "In contract law, the parties' duties arise from the terms of the particular agreement; the goal is to hold parties to that agreement so that each receives the benefit of his or her bargain." In contrast, the court recognized that tort law is aimed at protecting people from unexpected or overwhelming misfortunes, imposing duties upon manufacturers to protect society from harm resulting from defective products. However, the court noted that "where a product fails in its intended use and injures only itself, thereby causing only economic damages to the purchaser, 'the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.'"

The second important policy undermined by the Santor approach is the need "to protect parties' freedom to allocate economic risks via contract. Allowing purchasers to elect recovery under tort theories instead of requiring them to rely on their contractual remedies 'rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.'" For example, in Wausau Tile, a case in which a manufacturer of concrete paving blocks (Wausau) was disappointed to discover that its product was ruined because of defective cement used in producing the pavers, the court noted that Wausau had the opportunity to negotiate and did negotiate a warranty. The court continued that "[p]resumably, Wausau Tile paid a price commensurate with the warranty it received." Therefore, the court reasoned, "[i]f Wausau Tile were permitted to reap the benefits of a broader warranty by recovering its damages in tort, it would receive more than it bargained for (and paid for) and [the cement seller] would receive less than it bargained for (and was paid for)."

Finally, the third policy for prohibiting recovery for purely economic loss in tort is that the doctrine "encourages the party with the best understanding of the attendant risks of economic loss, the commercial purchaser, to assume, allocate, or insure against the risk of loss caused by a defective product." The Wausau Tile court stated that "[p]urchasers are generally better equipped than sellers to anticipate the economic loss which a defective product could cause their particular businesses." For this reason,
courts force purchasers "to guard against foreseeable economic loss by allocating the risk by contract or by purchasing insurance," creating a "more efficient, more predictable marketplace." The court said, "[i]f tort recovery were permitted, sellers of products would be 'potentially liable for unbargained-for and unexpected risks,' leading eventually to higher prices for consumers." The court recognized that the purchaser of the cement should have reasonably expected receiving defective cement, and because non-defective cement is so critical in making pavers, the purchaser should have foreseen the end result of defective pavers.

B. The "Type of Consumer" Rule

The problem with the "type of consumer" rule, as noted regarding the San- tor rule, is that it blurs the line between contract and tort. By allowing "ordinary consumers" to pursue a remedy in tort, the bargained-for obligations are no longer binding. If ordinary consumers have failed economic expectations, which are in fact a province of contract law, they can seek a remedy in a system created to "impos[e] tort duties upon manufacturers to protect society's interest in safety from physical harm or personal injury which may result from defective products." Allowing recovery in tort for actions involving no actual physical harm destroys the critical distinction between tort law and contract law.

In addition, the well-established goal of protecting parties' freedom to allocate economic risk via contract would also be diminished by the "type of consumer" rule. By changing the rules and permitting ordinary consumers to seek relief in tort, sellers lose "the ability to protect themselves from foreseeable risks by negotiating sales agreements." If the ordinary consumer is not happy with the product, rather than negotiating a warranty, the ordinary consumer is provided added protection in tort. This would have a tremendous impact on the market, resulting in higher prices. Ultimately, ordinary consumers could actually be prohibited from bargaining with sellers who cannot afford the potential liability.

Finally, the "type of consumer" rule would be difficult to apply. The Seely dissent recognized this problem, saying the "ordinary consumer' test needs judicial definition," suggesting it should be interpreted on a case-by-case basis. The majority in Seely recognized that the plaintiff's purpose for

213 Id.
214 Id. (quoting Daanen & Janssen, Inc. v. Cedarapids, Inc., 573 N.W.2d 842, 849 (Wis. 1998)).
215 Id.
216 See supra note 205 and accompanying text.
217 Wausau Tile, 593 N.W.2d at 452.
218 Id. at 456.
purchasing the defective truck was “for use in his business of heavy-duty hauling,” which suggests that the plaintiff was a commercial purchaser. But Justice Peters’s dissent believed the plaintiff’s status to be an ordinary consumer, “even though he bought the truck for use in his business.” Therefore, the uncertainty in applying the “type of consumer” rule would further undermine the distinction between tort and contract.

C. The “Physical Injury” Rule

Considering the important policies in favor of maintaining a clear distinction between tort law and contract law, the “physical injury” rule is the most appropriate and effective standard. As Justice Traynor explained in *Seely*, “[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.” Instead, Justice Traynor believed that the important distinction rested on an “understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.” In other words, manufacturers can appropriately be held liable for physical injuries caused by defective products that are unreasonably dangerous. This is a traditional strict tort liability claim. However, Justice Traynor declared that the manufacturer cannot be held to the same standard of liability for merely not “meet[ing] the consumer’s demands.” Liability for the manufacturer’s failure to meet the consumer’s economic expectations should be imposed only if the parties contractually agreed that those economic demands would be met. Therefore, this issue is best governed in contract law.

Although the “physical injury” test is the predominant approach for the economic loss doctrine, its application varies widely by jurisdiction. Therefore, depending on the state in which the cause of action is pursued, manufacturers are left with uncertainty as to their potential liability. As *Grams* noted, without a reasonable methodology to go along with the economic loss rule, all manufacturers could potentially be “transformed ‘into insurers with seemingly unlimited tort liability.’” Savvy plaintiffs could

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220 *Id.* at 147 (majority opinion).

221 *Id.* at 157 (Peters, J., concurring in part and dissenting in part).

222 *Id.* at 151 (majority opinion).

223 *Id.*

224 *Id.*

225 *See* Ausness, *supra* note 5, at 525-27 (discussing the “physical injury” rule and specifically factors courts consider in deciding whether damage to the product itself should be recoverable in tort).

226 *Grams v. Milk Prods., Inc.*, 699 N.W.2d 167, 172 (Wis. 2005) (quoting Daanen &
potentially forum shop and select a plaintiff-friendly jurisdiction that would permit recovery for economic loss in tort. As a result, with no ability to share their risk with the purchaser or limit liability to losses that would traditionally be included in the terms of the contract, "manufacturers would understandably be reluctant to produce certain products." This would also prevent manufacturers from providing lower prices to purchasers who are willing to assume the risk of certain losses. This chilling effect could have detrimental repercussions on the marketplace.

Incorporating the "disappointed expectations" test in the "physical injury" approach to the economic loss doctrine is important because it maintains a watchful eye on the contractual agreement at hand. By focusing on the contract itself, this approach takes a critical look at the purpose of the bargain and the expected uses of the product. If a product fails to perform as it should, the loss stems from disappointed expectations. However, in situations similar to Foremost Farms, a manufacturer of a defective product cannot escape tort liability. Although a reasonable purchaser would have foreseen that the Foremost Farms defoamer would be used to make the end dairy product, the appropriate inquiry is "whether a purchaser in [the plaintiff's] position should reasonably have anticipated that the defoamer would contain a contaminant such as phenol that would render [the plaintiff's] dairy products unfit for human consumption."

The "disappointed expectations" approach strikes the appropriate balance not only to prevent "contract from drowning in a sea of tort" but also to prevent "tort from drowning in a sea of contract." When the proper vehicle for resolving a dispute rests in contract law, this distinction prevents a plaintiff from benefiting from the spoils of tort liability. However, this two-step process also prohibits manufacturers from escaping tort liability for damage to "other property" as a result of their unreasonably defective products. Therefore, the "disappointed expectations" approach should be incorporated into the "integrated systems" language in the comments to the Restatement (Third) of Torts: Products Liability section 21 to provide consistency from state to state and to maintain the proper line between contract law and tort law for manufacturers and consumers.

IV. Conclusion

The judicially created economic loss doctrine bars recovery in tort for solely economic losses arising from a contract. Application of this doctrine is a

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227 Id.
228 Id. at 172–73
230 Grams, 699 N.W.2d at 180.
constantly developing area of law in need of an approach which fulfills the fundamental policy considerations at stake. The *East River* "physical injury" approach has evolved into a confusing, difficult doctrine, and judges, lawyers, and the public at large continue to struggle to identify whether or not a particular set of facts apply under this approach.\(^{231}\) This confusion stems from the daunting task of distinguishing the actual defective product from "other property." Without much guidance, courts ultimately have free reign, which results in inconsistent outcomes.\(^{232}\) For this reason, the "disappointed expectations" test is critical to the "other property" exception analysis and should be incorporated into the "integrated systems" approach in the *Restatement (Third) of Torts: Products Liability*. Not only does the "disappointed expectations" test further the fundamental policies supporting the economic loss doctrine, it also provides more consistent outcomes and is a more user-friendly approach for the courts.

\(^{231}\) See Laubmeier, *supra* note 33, at 226.

\(^{232}\) See Ausness, *supra* note 5, at 525–27 (recognizing that some courts permit recovery in tort for product damage in all cases; other courts look at the nature of the defect and manner in which damage occurs, permitting recovery in tort when the consumer is subject to an immediate risk of physical injury; and a majority of courts treat all damage to the defective product as economic loss, barring recovery).