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The Warranty Disclaimer v. Manufacturers' Products Liability--Sterner Aero AB v. Page Airmotive, Inc.: Did the Tenth Circuit Bury the Disclaimer Alive

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THE WARRANTY DISCLAIMER v.
MANUFACTURERS’ PRODUCTS LIABILITY—
STERNER AERO AB v. PAGE AIRMOTIVE, INC.:
DID THE TENTH CIRCUIT BURY
THE DISCLAIMER ALIVE?

Stephen C. Parker

The consumer's cause of action does not depend upon
the validity of his contract with the person from whom he ac-
quires the product, and it is not affected by any disclaimer
or other agreement, whether it be between the seller and
his immediate buyer, or attached to and accompanying the
product into the consumer's hands.

Restatement (Second) of Torts § 402A, comment m.

Since Dean Prosser's creation of this concept and its introduction
into case law in Greenman v. Yuba Power Products, Inc., 1 it has been
frequently assumed or stated 2 that the advent of strict liability in tort
("Manufacturers' Products Liability" in Oklahoma) 3 sounded the death
knell for the contractual liability disclaimer. Oklahoma's Kirkland v.
General Motors Corp. 4 followed this wave of precedent, although in
dicta, 5 and quoted directly from section 402A of Restatement

2. To name a few: "The conclusion is evident that, so far as strict liability of the
manufacturer is concerned, no reliance whatever can be placed upon any disclaimer; that
even as to dealers it is beginning to be rejected . . . .," Prosser, The Fall of the Citadel
(Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 833-34 (1966); "As indicated
by the very term 'strict liability in tort,' proof of negligence is unnecessary, and there
is no room for application of such traditional contract or warranty defenses as . . . dis-
claimer of implied warranties . . . ." R. Hursh, AMERICAN LAW OF PRODUCTS LIABILITY
348-50 (Cum. Supp. 1973); "Moreover, this [strict tort] liability could not be dis-
claimed, for one purpose of strict liability in tort is to prevent a manufacturer from de-
fining the scope of his responsibility for harm caused by his products. . . . .," Seely v.
4. Id.
5. "We recognize that in these areas we embark on judicial innovation and prospec-

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(Second) of Torts, comment m as set out above. 6

Professor McNichols’ recent analysis of the Kirkland decision, however, doubted that Manufacturers’ Products Liability signaled the end of the disclaimer in Oklahoma:

One must wonder whether the Oklahoma court would really allow even a consumer buyer to recover for personal injuries against his own commercial seller in a bargaining context where, with eyes open, he has comparatively shopped and bought Brand X rather than Brand A for a cheaper price where an “as is” type term is expressly a part of the deal. Whether Oklahoma would allow recovery is even more questionable if we posit a commercial buyer or context or, for that matter, property damage rather than personal injury. 7

After the McNichols article, but prior to a determinative ruling in the Oklahoma courts, the Tenth Circuit was called upon to decide the fate of the disclaimer and in Sterner Aero AB v. Page Airmotive, Inc., 8 held that a disclaimer provision, although otherwise valid, was not effective to bar an action based upon Manufacturers’ Products Liability.

Was McNichols hasty in his conclusion that disclaimers, or their equivalents were still healthy, or was the Tenth Circuit premature in its attempted burial? The answer lies in an analysis of the new case law in this area 9 and in resolution of some fundamental policy questions.

The initial starting point is: Should the Uniform Commercial Code ever be applicable in a products liability factual context? Recognition of a potential conflict began in the mid-sixties with the rapid judicial expansion of the new doctrine of strict tort, concurrent with replacement of the old Uniform Sales Act by the Uniform Commercial Code. Currently, the practitioner is presented with three theories of

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6. Id. at 1362.
8. 499 F.2d 709 (10th Cir. 1974).
recovery for the benefit of a product-injured plaintiff: negligence, breach of warranty, and strict tort.

This availability of a wide selection of tools is probably not a bad idea yet it is not illogical to inquire concerning the necessity or value of leaving open parallel theories in products liability suits. Confusion could and, indeed, has arisen over which concept to apply. A brief, non-technical review of the elements of competing strict tort and Code approaches should serve to clarify the situation.

The basic requirements in a strict tort suit are: (1) proof that the product was the cause of the injury; (2) existence of a "defect" in the product; (3) proof that the defect existed at the time that the product left the control of the manufacturer, assembler, or supplier; and (4) proof that the defect made the product "unreasonably dangerous" to the user or his property. The doctrine does not make the producer an absolute insurer as to every injury caused by consumption or use of his product. Also, the producer may avail himself of some defenses similar to contributory negligence and assumption of risk.

The Code alternative is naturally commercial in nature and on its face seems inapplicable to a tort-injured consumer for it requires: (1) a contract with express or implied warranties; (2) privity between plaintiff and defendant (section 2-318); (3) breach of warranty; and (4) notice of breach (section 2-607). Beneath its commercial surface, however, the Code offers benefits which make it attractive to the consumer plaintiff. (1) Privity need not be the bar it once was (see dis-

10. It is not the purpose of this comment to explain in detail the strict tort concept. For a view on the rule according to Kirkland see McNichols, supra note 7, at 354-61. Also instructive is the viewpoint of a reporter for Restatement (Second) of Torts: Wade, On the Nature of Strict Tort Liability For Products, 44 Miss. L.J. 825 (1973). As Wade points out, the difficulty is in devising a short phrase to deal with a multitude of problems. "Unreasonably dangerous" does not demand that the product be ultra-hazardous, but it must include at least two kinds of defect: (1) Those due to an error in the manufacturing process, and (2) Perfectly produced products of inherently dangerous or harmful design. On the other hand, liquor can cause alcoholism, and a knife can cut fingers, yet no one expects to hold a manufacturer liable for those shortcomings. Finally, in any case, the phrase should not indicate that negligence is required since strict tort imposes a duty regardless of all due care. Wade suggests that today he might prefer substitution of the phrase "not duly safe" but that still might not solve the problem of misconstruing a touchstone phrase that must cover so many basic ideas.

11. This is another "snake nest" area into which this comment will not tread. Suffice it to say that these concepts have been renamed in Oklahoma ("misuse of the product" and "voluntary assumption of the risk of a known defect," respectively) and may be somewhat altered from the original common law conception. See McNichols, supra note 7, at 380-99.
cussion *infra* accompanying footnote 54), and requirement of notice within a reasonable time after discovery of breach is specifically flexible for the consumer's benefit. Official comment 4 to section 2-607 notes in part:

A "reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

(2) Sections 2-314 and 2-315 create the implied warranties of merchantability and fitness for a particular purpose that exist even if seller fails to provide them in the contract. (3) The burden of proof upon the plaintiff may be easier since one definition of "unmerchantable"—a charge which will bring the Code into play—is that the product was not "fit for the ordinary purposes for which such goods are used." This in theory ought to be less demanding upon the injured party than attempting to prove that the product had a defect rendering it "unreasonably dangerous."12 (4) The Code provides a more generous statute of limitations.13 (5) And, finally, it permits recovery for more types of injury: section 2-715 expressly permits recovery for "incidental and consequential damages," which include "injury to person or property proximately resulting from any breach of warranty." It is thus clear that the Code can apply to aid the injured consumer in a products liabil-

12. McNichols, *supra* note 7, at 378, discusses whether it is easier to prove "unfit" rather than "unreasonable." See also the case of Cornelius v. Bay Mtrs. Inc., 258 Ore. 564, 484 P.2d 299 (1971), where, in a suit utilizing strict tort, the court found for the defending vendor of a used auto because although the bad brakes on the vehicle were clearly defective they were not held to have rendered the product unreasonably dangerous. In all fairness to strict tort proponents, however, it must be mentioned that two jurisdictions have recently abandoned the "unreasonably dangerous" terminology to fall back upon mere proof of a defect: Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) and Glass v. Ford Mtr. Co., 123 N.J. Super. 599, 304 A.2d 562 (L. Div. 1973). To the extent that this new extension of strict tort is adopted, it should make the burden of proof in tort no more difficult than under the Code.

13. Unfortunately, for the Code proponents, McNichols' article suggests that in Oklahoma the five year limitations period may never be extended to a product-injured plaintiff. McNichols, *supra* note 7, at 374-75 and n. 120. In addition to *Kirkland*, three other recent products liability cases have dealt with the statute of limitations question: *Moss; O'Neal;* and Nichols v. Eli Lilly & Co., 501 F.2d 392 (10th Cir. 1974). So far, however, the five year period has been consistently denied. A recent New Jersey case, Heavner v. Uniroyal Inc., 63 N.J. 130, 305 A.2d 412 (1973), followed a view that McNichols had suggested was possible in Oklahoma. The New Jersey court decided that since the statute of limitations question was based upon type of injury and not cause of action, then the two year tort period would apply to all products liability cases regardless of the theory of recovery used in the pleadings. The Oklahoma cases seem to be pointing in this direction.
ity factual situation and, further, it is arguable that in some cases the Code might be the better approach.

The Code, does, however, offer one extraordinary advantage to the defending seller: the disclaimer. If a seller follows closely the formula of section 2-316 permitting disclaimer of warranties he can escape liability. It is at this point that a possible tension between the two theories becomes a full fledged conflict. Will the carefully-wrought, Code-perfect disclaimer protect the seller against a cause of action in strict tort? And, if not, what good is it? Comment m to the Restatement, supra, and judicial language such as that found in Justice Traynor’s concurring opinion in Escola v. Coca-Cola Bottling Co.,14 or the majority opinion of Henningsen v. Bloomfield Motors, Inc.,15 make clear that, at best, the disclaimer is not favored in tort cases. It is seen as being contrary to public policy, antithetical to proper allocation of the risk of product injuries on the producer, and therefore not available as a defense against an action in strict tort.

Of course, under the rules of alternative pleading all the plaintiff need do is make out a case under one concept. A defense that is peculiar to one theory will not bar recovery under an alternative. The problem is: Should all plaintiffs be permitted to so short-circuit the Code? Or should strict tort protection be reserved for particular plaintiffs? It is the thesis of this comment that in at least some products liability cases disclaimers should be valid. The difficult problem then becomes developing judicial tests for selecting those cases where a disclaimer should be conclusive, even against a tort suit.

IN DEFENSE OF DISCLAIMERS

Even Dean Prosser, godfather to section 402A of the Restatement (Second) of Torts, early recognized the utility of the disclaimer:

Commercially a disclaimer may not be at all an unreasonable thing, particularly where the seller is not sure of the quality of what he is selling and unwilling to assume the responsibility for it, and the buyer is willing to take his chances. Many goods are quite reasonably sold “as is.”

Prosser, however, predicted the ultimate downfall of the disclaimer.17

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17. Id. at 833. See quote in note 2 supra.
Professor Shanker, a strong Code proponent, created the classic case of Hypothetical Scooter Co. v. Nosuch Mfg. Co. which illustrated a prime example of the disclaimer’s utility when the circumstances entail the introduction of a new product with unknown qualities and particularly unknown risks.¹⁸

This imaginary case decided in the court of fiction provides a fine vehicle for a general discussion of the area. Nosuch Manufacturing Company had developed an innovative new product in the form of a plastic, industrial grinding wheel. Due to its recent development, complete testing had not yet been completed and the wheel’s capabilities were as yet undetermined. One critical point was certain, however: the plastic wheel would cost less to manufacture than the existing stone wheels. It was this chance to better their competitive market position that first attracted Hypothetical Scooter. If they could purchase grinding wheels (used to produce the component scooter parts) at a reduced cost, this saving could be passed along to the ultimate consuming public with a predictable increase in Hypothetical Scooter’s sales.

The Scooter company expressed interest to the wheel producer, but Nosuch immediately pointed out that it had sparse experience with the new plastic wheels in general testing and had done no specific testing of the wheel’s utility for grinding scooter parts. One can imagine the bargaining that took place between these two industrial firms before a final contract for sale was completely drafted and executed. Much of it must have centered over the problem area of risk. Hypothetical Scooter might well have been willing to assume some risk that the product would somehow fail to live up to its expectations. They, after all, stood to benefit greatly if the plastic grinding wheel proved suitable. Nosuch, on the other hand, probably leaned in the other direction: while willing to pass their reduced costs on to any purchaser they were unwilling to assume the full risks of introduction of their new product. Admittedly, those risks could be awesome. They might include personal injury (e.g., what if an employee were injured by flying chips off the plastic wheel or, worse, what if it were later proved that the plastic dust when inhaled proximately contributed to lung cancer?) It might involve property damage (e.g., the plastic dust produced from grinding metal scooter parts might be highly flammable, and replace-

¹⁸ Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers, 17 W. Rs. L. Rev. 5, 31-34 (1965) [hereinafter cited as Shanker]. His analysis includes the conflicting opinions of judges “Alpha” and “Zede” and does a good quick job of summing basic policy arguments for and against the disclaimer.
ment of a large plant could bankrupt Nosuch). Finally, there might be economic loss (e.g., what about lost profits if the dust exploded and the ensuing fire stopped all scooter production for several months?).

For companies engaged in the daily task of bargaining for risk allocation this is no topic of idle academic interest; their very existence may well depend upon the ability to disclaim liability. Additionally, in the new products area, it is no solution to suggest that the participants proceed with more caution and market new products only after adequate testing. That alternative simply takes too long and the competitive edge that newness provides evaporates. Or, the marketplace proves more ingenious than the testing laboratory, and the product is stressed and fails in some way that was never anticipated by lab technicians.

Both of Shanker's imaginary companies understood the stakes of the game well. And, they thought they knew the rules. So they entered into a contract that properly excluded all express and implied warranties in a form acceptable to the Code's stringent rules. Fortunately, the ensuing imagined damage was not too great. The new grinding wheels shattered after only a few minutes of service and the flying particles of plastic slightly injured an employee and damaged a number of the component scooter parts.

According to the prior bargaining rules which honored disclaimers, the predictable course of events after the failure would probably have followed an established pattern: Nosuch would go back to the drawing board to eventually modify or drop the plastic wheels; Hypothetical Scooter would be off to see its insurer to recover for the damaged parts; and the injured employee would be filing a claim under workmen's compensation.

But this all supposes that the courts will also follow the rules that the players chose to use. What happens if the court does not but instead creates a new tort-based doctrine called Manufacturers' Products Liability? Essentially, Nosuch will be unfairly surprised and forced to bear the cost of damages that it previously shifted to its vendee in an open, mutually agreed upon fashion. This seems particularly objectionable since the risks were clear to both parties and the purchaser has already had the benefit of accepting that risk in terms of a lower price on the goods that it has purchased. Now, with the aid of the courts, the purchaser receives the second benefit or not having to bear the risk.
Additional considerations are perhaps more far reaching. Future parties on notice from prior court rulings may not be unfairly surprised, but will they continue to operate as before? Or, will the unavailability of a disclaimer “chill” the introduction and flow of new products to the marketplace? A final point concerns insurance. Perhaps this can be used to relieve the manufacturer of his burden, but it is not immediately clear why it is better for his insurer to bear the risk than the insurer of his commercial customer. It seems hard to argue against the efficacy of the disclaimer in the commercial marketplace.

It should not be concluded, however, that the disclaimer is necessarily of less value when the purchaser is an individual consumer. Imagine, for instance, John Public Consumer’s search for a used auto for his wife. She sells Avon products and needs transportation for short trips around town. The car need not be in excellent mechanical condition since it will never be used for long trips or high-speed driving. Low price is John’s main objective and this leads him to Cheaper Charlie’s, a well-known local entrepreneur who always sells at a bargain rate. Charlie explains his economics to John as they walk through the lot: most competitors inspect, repair, and warrant their used cars. But that is expensive so Charlie appeals to that sector of the consuming public more interested in price than safety or reliability. He sells “as is”; faults, frustrations, and Excedrin headaches included, but for a significantly lower price. It is immaterial that John fails to inspect the auto, since the latent defect (a grease and mud covered crack in the steering linkage) is undetectable.

A short time later the inevitable defect-caused accident introduces Mrs. Consumer to a neighborhood tree. She suffers personal injury, all her Avon products (a trunk full of rather expensive perfumes) are broken and she loses considerable business owing to the combined effects of lack of transportation (the car was hauled off to improve the aroma of the local junkyard shortly after the accident) and the time-lag involved in reordering all of the destroyed merchandise.

Hypotheticals of this sort hatch a swarm of unanswered questions ranging from proximate cause to assumption of risk. Resolution of such problems will certainly affect the outcome of any lawsuit. The point of immediate interest, however, need not sink into the morass of factual analysis. At issue is the viability of the warranty disclaimer. In the proposed situation, John P. Consumer bargained freely for exactly what he got. No element of adhesion was present because he really did have viable alternative choices which, for an affordable in-
crease in cost, would have provided the protection he now seeks in a
strict tort cause of action. He has not been surprised or taken advan-
tage of. Further, it is hard to argue that he cannot assess the risks and
cost of this type of occurrence or that it would be less efficient for him
to obtain insurance than for Cheaper Charlie to do so.19

Thus, it is submitted that even in this non-commercial situation,
there are valid reasons for retaining the disclaimer. Perhaps Cheaper
Charlie ought to be held liable for Mrs. Consumer’s lacerations, etc.,
but it is much harder to argue that he must bear her economic loss of
business profits. Professor Miller gets to the heart of the issue as he
queries:

[S]hall we be satisfied with giving the consumer the ammuni-
tion to protect himself [the Code with its implied warranties
of merchantability and fitness], or will we protect the con-
sumer from himself?20

With a pro-disclaimer bias now established and the case law anal-
ysis yet to come, it seems appropriate to introduce the villain of the
hour in some factual detail. Sterner Aero AB v. Page Airmotive,
Inc.,21 in addition to being the first federal application of Kirkland,
involving the presence of a contractual warranty disclaimer in what is
arguably a products liability case. It presents the perfect opportunity for
the notorious comment m of the Restatement (Second) of Torts to full-
fill its prophecy.

The reason that Sterner is only arguably a “products liability” case
(using that term from a tort standpoint) has to do with the identity of
the two parties. Both were business entities engaging in normal com-

19. Actually one could argue that this analysis is not completely correct to the ex-
tent that many consumers probably do not have job disability insurance that would cover
something like Mrs. Consumer’s lost earnings while recovering from the accident or her
consequential loss of customers and profit while waiting for a reorder of perfume to
come in.

L. REV. 411, 463 (1968) [hereinafter cited as Miller]. At least one writer, Twerski,
Old Wine in A New Flask—Restructuring Assumption of Risk In The Products Liabil-
ity Era, 60 IOWA L. REV. 1 (1974), casts his lot to positively protect the consumer. Bas-
ing his analysis on the question of the defendant’s duty he urges that although the plain-
tiff may voluntarily and unreasonably assume a known risk, this should still not preclude
recovery in those situations where the defendant had no right to offer the fateful choice
in the first place. “That all this ultimately reflects back on the duty question is clear.
Given the nature of the product and its foreseeable use, is it the desire of the law of
torts to protect the plaintiff from himself—from his own reasonable choice? Section
402A, comment m has answered the question in the affirmative.” Id. at 26. “The real
question in each instance is the character of the defendant’s act and the scope of liability
we wish to impose on him.” Id. at 27.

21. 499 F.2d 709 (10th Cir. 1974).
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mmercial dealings rather than the off-balance combination of individual consumer v. large manufacturer usually found in such cases. The plaintiff was a Swedish firm that had contracted to purchase a rebuilt aircraft engine for one of its planes from the Oklahoma-based manufacturing firm of Page Airmotive, Inc.

The contract for purchase had been carefully drawn during the month preceding execution of the agreement, and it included a standard disclaimer of "all other warranties or representations express or implied." Furthermore, the evidence indicated that the complaining purchaser had successfully negotiated an extension of the express warranty coverage from 90 days to a period of six months, a fact tending to negate any possible charges of disparate bargaining power or classification of the document as an adhesion contract.

Certainly there seems nothing unconscionable about the disclaimer in the Sterner situation: arguments about spreading risk or protecting the weak and innocent would seem to have very little force. But the Tenth Circuit listened to them anyway. The lower court had rendered summary judgment for the defendants. The appellate court reversed and remanded, with instructions that, while the disclaimer barred recovery on a theory of implied warranty, it did not vitiate plaintiff's cause of action in Manufacturers' Products Liability.

Professor Miller in his article written in the pre-Kirkland era understood the implications of a Sterner-type holding: "[T]he courts which have sanctioned strict liability are by indirection undercutting a legislative policy which allows disclaimers, in proper form." Since those words, the Oklahoma court has proceeded with a foot raised in dicta to step off in the direction against both the Code and disclaimers. And the Tenth Circuit in Sterner has already disappeared around the first bend in the indicated path.

BACKGROUND

In the past the courts have not ignored this difficulty, but neither have they clearly articulated a theory for permitting disclaimers to live

22. Miller, supra note 20, at 462.
23. Recognition of the tension between the two competing doctrines has been building since the sixties and a ponderous amount of material has been written on the subject. Note, Products Liability: Extension of Warranty Disclaimer to the Non-Purchaser, 27 OKLA. L. REV. 284 (1974); Note, Products Liability—Strict Tort Liability v. the UCC—Nebraska Considers the Application of Strict Liability to Property Damage—Hawkins Construction Co. v. Matthews Co., 7 CREIGHTON L. REV. 396 (1974); Timms, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 STAN. L. REV. 713 (1970); Miller, The Crossroads The Case for the Code in Products Liability,
in the world of strict liability. Rather, they have reached the result indirectly, permitting defendants with disclaimers to escape liability by finding that the plaintiff really had no cause of action in strict liability in the first place. This approach, permitting disclaimers by limiting remedies, has been called (disparagingly) "pigeonholing." In practice, it works to deny strict liability actions to plaintiffs who have suffered some injury other than personal injury or property damage.

This approach was most fully developed by Justice Traynor in *Seely v. White Motor Co.* A number of courts have followed Traynor's lead in using this technique. Oklahoma implicitly recognized this approach in *Kirkland* when the court noted the language of the *Restatement*:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . . (Emphasis supplied).

*Kirkland*, however, did not deal in depth with this problem but rather issued a computer-like "go to" instruction in favor of *Moss v. Polyco, Inc.*, and "citations and arguments therein contained."


25. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

26. In view of this paper's bias in favor of the disclaimer, it is instructive to note that the reason that Chief Justice Traynor refused to follow Santor v. A & M Karaghuesian, Inc., 44 N.J. 52, 207 A.2d 305 (1965), in its allowing strict tort to aid a consumer in recovering economic loss was that Traynor favored retention of the disclaimer in certain situations. Noting first that strict tort was non-disclaimable Traynor then urged, "[a] consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will." 63 Cal. 2d at 15, 403 P.2d at 151, 45 Cal. Rptr. at 23. Thus the pigeonholing served the dual purpose of protecting the consumer while still retaining the benefits of the warranty disclaimer in applicable situations.

27. *RESTATEMENT (SECOND) OF TORTS* § 402A(1) (1965); discussed in *Kirkland* in 521 P.2d at 1358.


29. 321 P.2d at 1365.
Moss, which will be discussed in detail below, did not explicitly adopt the Seely classification by damages concept. It did, however, refer to a number of cases from other jurisdictions which did deal with or adopt the Seely technique for pigeonholing by type of injury. Thus, while the views adopted in Seely are probably not the law in Oklahoma, they are persuasive and potentially open to adoption by some future Oklahoma decision.

In Beauchamp v. Wilson30 (one of the cases cited in Moss) an Arizona court found the type of injury determinative in foreclosing the plaintiff's cause of action in tort. There, the dissatisfied purchaser of a diesel truck was in direct contract and privity with his vendor, the retailer, and his contract for sale contained an express warranty. Although Mr. Beauchamp was not in contract with the manufacturer, International Harvester, that company had mailed Mr. Beauchamp a warranty. The vehicle, a "tractor" used to pull semi-trailers, was purchased for business purposes and used by the plaintiff for commercial long-distance hauling. No personal injury resulted, but rather, a series of annoying breakdowns that finally convinced Mr. Beauchamp that the vehicle was not suitable for his intended purposes. When the engine finally "froze," resulting in damage to the product itself, Mr. Beauchamp brought suit under a variety of theories: fraud; innocent misrepresentation; breach of express and implied warranty; and strict tort. The remedies requested included recission of the sale and return of the purchase price and recovery of lost profits.

Unfortunately for the purchaser, the contract warranties were only for defects in materials or workmanship and it contained a valid disclaimer of all warranties of merchantability or fitness for a particular purpose.31 The jury failed to find sufficient evidence of fraud or misrepresentation, and, in a final blow to Mr. Beauchamp, the trial court refused to instruct on strict liability in tort. This position was sustained as follows:

We find no error . . . in the court's refusal to instruct on strict liability in tort. Mr. Beauchamp purchased a truck

31. "This warranty is in lieu of all other warranties, expressed or implied, including, without limitation, warranties of MERCHANTABILITY and FITNESS FOR PARTICULAR PURPOSE, all other representations to the original purchaser, and all other obligations or liabilities, including liability or incidental and consequential damages, on the part of the Company or seller." Id. at —, 515 P.2d at 45. Although this suit did not actually fall under the Code, the purchase having been negotiated in 1967 and the Code becoming effective in 1968, this language would seem to be a valid disclaimer even under the Code's stringent rules in section 2-316.
which he claimed did not function properly and therefore he sought to recover his commercial losses, namely lost profits and a refund of the money he paid. The "defects" did not cause physical harm to persons or property. Under these circumstances, the doctrine of strict liability in tort is not applicable.\(^{32}\)

For support of its analysis, the Arizona court quoted from Justice Traynor in *Seely* who again stressed the personal injury aspects in carving out a place in the law for disclaimers:

The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.\(^{33}\)

The view of the majority in *Seely* placed the distinction on the nature of the responsibility a manufacturer undertakes in distributing his products. For physical injury caused by product defects he is held to a very high standard and is subject to suits under strict tort doctrines; however, no manufacturer is to be charged with any risk that the product will fail to match the vendee's economic expectations absent a specific agreement to that effect. It becomes apparent that type of injury is the new and vital element in the *Beauchamp* analysis. Although the Arizona court did notice the contractual privity and intended commercial use to which the product was ultimately put, these elements were secondary to the fact that the suit was not for recovery of damages for personal injury.

A similar result was reached by the Nebraska Supreme Court in *Hawkins Construction Co. v. Matthews Co., Inc.*\(^{34}\) There, a contractor, as lessee of scaffolding equipment, sought to recover from the lessor and the manufacturer when the scaffolding collapsed. His injuries were limited to the cost of replacing the damaged structure and the cost of replacing the allegedly defective scaffolding. The court held that it was error to submit the case to the jury on a theory of strict tort liability since no personal injuries were involved.

An instructive sidelight on the difficulty in classifying types of injury was provided in *Hawkeye Security Insurance Co. v. Ford Motor Co.*\(^{35}\) The facts were complex. Ford had sold a vehicle to the plain-

\(^{32}\) *Id.* at --, 515 P.2d at 44.

\(^{33}\) 63 Cal. 2d 9, 13, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21 (1965): quoted in 515 P.2d at 44.

\(^{34}\) 190 Neb. 546, 209 N.W.2d 643 (1973).

\(^{35}\) 199 N.W.2d 373 (Iowa 1972).
tiff's insured, a private individual. The vehicle's braking system failed, causing an accident in which the insured was at fault and resulting in a successful claim against the plaintiff, Hawkeye Insurance Company. Hawkeye successfully sued Ford for indemnification, and Ford cross-petitioned against the Kelsey-Hayes Company, supplier of the defective brake. Ford pleaded several alternative theories of recovery including a warranty theory and a cause of action in strict tort products liability. The lower court refused to allow consideration of the warranty theory and Ford, after losing in strict tort, appealed once again. The Iowa Supreme Court appeared to rely upon general policy considerations in its determination that both strict tort and warranty theories should have been allowed in the case:

Recovery under a theory of strict liability in tort results from a public policy decision that protects the consumer from the inevitable risks of damage or harm brought about by mass production and complex marketing conditions. Thus, strict liability in tort serves a necessary purpose. [Citation omitted].

The cross-petition here . . . is between two corporations in a commercial setting, involving a contract, and is essentially a commercial transaction. As stated in Farr [citation omitted], “The laws of warranty still meet the needs of commercial transactions and function well in a commercial setting.”

How should one characterize the type of damages sought by Ford in its cross-petition for indemnity? In Iowa, it may not matter since the Iowa court did not choose to adopt Seely's classification and categorization by type of injury, but if such a system is applied, it would seem that Ford was seeking indemnification for “economic loss.” If this view is taken, Hawkeye is inconsistent with Seely, Beauchamp, and Hawkins, cases which refused recovery in strict liability for “economic loss.” However, at least one court has managed to arrive at a view of the indemnity payment that would permit reconciliation between the cases. The federal district court in Iowa Electric Light & Power Co. v. Allis-Chalmers Manufacturing Co. was of the following opinion:

The Court believes that in the Hawkeye series fact situation, where indemnity is being sought by intermediate tortfeasors [Ford] against the party ultimately responsible [Kelsey-Hayes], the damages must be characterized as they would be if being sought by the original injured party [citation omitted]. Thus, the damages in the Hawkeye cases would be character-

36. Id. at 382.
ized as damages for physical injury to the person and to other property—as they would be characterized in the original action by the tractor driver.38

The problem of loss classification culminates with the distinct possibility of multiple types of losses flowing from one defective product incident. Must the pleadings be severed and tried under separate legal theories? Or will the predominant damage serve to characterize the entire loss? These difficulties in classifying injuries inspired a fresh analysis by Professor Franklin.39 He breaks the possibilities down into five groups: (1) personal injury, (2) physical property damage (to property other than the product), (3) “repair loss” (to the product itself), (4) “expectation loss” (loss from product’s failure to perform in addition to the costs of repairs), and (5) “fitness loss” (a non-defective product loss caused by failure of item to match purchasers’ special expectations—see Code section 2-315).40

This classification system is preferable in that it permits a more rational treatment of property damage. Most courts allow a plaintiff to recover in strict liability for “property damage” without distinguishing between the two types of possible losses. It would seem that damage to “other property” (e.g., the defective auto brakes cause damage to plaintiff’s rear garage wall) is perhaps within the ambit of risk which a defendant should be forced to bear, whether he agrees to or not. Damage to the product itself, however, more nearly approaches a commercial situation and is the kind of risk which should be subject to bargain.

Another advantage to Professor Franklin’s system is that it avoids classifying loss of wages due to personal injury as an “economic loss.” A lost job due to a product-caused injury could be inadvertently grouped into the “economic loss” category along with other types of economic loss such as rental cost of a replacement product or lost business profits. In other words, to avoid difficulty, the courts would have to classify all economic loss arising out of personal injury as a personal injury loss. Professor Franklin achieves this result more simply, by creating the category of “expectation loss,” and defining it as “loss from the product’s failure to perform.”

This discussion suggests the difficulties in “pigeonholing.” First

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38. Id. at 30.
40. Id. at 980-81.
the plaintiff's injuries must be classified; then his remedies must be defined; then if the court decides that recovery in strict liability is not available, the defendant's disclaimers are good. Complicating the situation further is the reluctance of courts to admit that that type of injury is the true determinant. Courts gratuitously discuss the "commercialness" of the transaction or stress the corporate character of the plaintiff, but it all boils down to type of injury.

The real difficulty with this approach to sustaining disclaimers, however, is not that it is difficult to apply—which it is—but that it does not necessarily guarantee that those disclaimers most deserving of protection will be upheld. The result depends on the nature of the plaintiff's injury rather than on the situation in which or for which the disclaimer was negotiated.

The Sterner court had this background before it when it made its decision. It also had five Oklahoma cases on products liability, none of which, however, dealt with disclaimers; indeed, only three concerned the Code at all. In Kirkland v. General Motors Corp. the plaintiff lacked privity and breach of warranty was not even raised. Privity was also lacking in Seay v. General Elevator Co.41 The plaintiff in Atkins v. Arlan's Department Store42 tried both Manufacturers' Products Liability and an implied warranty cause of action although the latter was apparently not under the Code. Though non-contractual in nature, the case might possibly have met the privity requirements of UCC section 2-318(A) since the ten year old plaintiff was a friend of the son of the purchaser of the "Lawndart" game and apparently playing as a guest (and arguably as a reasonably foreseeable user) at the time the dart with its 13-inch metal shaft struck him in the eye. Unfortunately, this aspect had no chance for consideration due to the court's ruling that the dart did not have a defect in design, was—like numerous other products—dangerous only if improperly used, and hence left the plaintiff subject to a demurrer for failing to state a cause of action against the defendants in either warranty or strict liability.

In O'Neal v. Black and Decker Manufacturing Co.,44 the plaintiff—employee was injured while using a product manufactured by the defendant and sold to plaintiff's employer.44 The court indicated that a suit under the Code would have been appropriate:

41. 522 P.2d 1022 (Okla. 1974).
42. 522 P.2d 1020 (Okla. 1974).
43. 523 P.2d 614 (Okla. 1974).
44. The case report itself does not make clear the relationship between the injured
The only possible recovery based upon "implied warranty" is under a Uniform Commercial Code violation when the same has been properly pleaded. . . . Since in the instant case no attempt was made by the Plaintiff to plead facts which would bring the UCC into play, his cause of action has been defeated.

This is probably the strongest indication available that the UCC does have some applicability left in products liability cases in Oklahoma. It should be noted, however, that in O'Neal the plaintiff lacked privity and so would not have been able to sue for breach of warranty in any case despite the court's encouraging dicta to the contrary.

The Oklahoma case with the most to offer in the way of guidance was Moss v. Polyco, Inc. Skimpy as it was, the Moss opinion included Oklahoma's most thorough discussion of the place of UCC warranty actions in a strict liability scheme. More important, Moss cited most of the disclaimer cases discussed above—a fact which should have guided the Sterner court.

The plaintiff in Moss was a restaurant patron injured in a fluke accident in the restroom. A plastic bottle of drain cleaner somehow dislodged from a shelf and the cap came off allowing the corrosive contents to spill onto her person. In her suit for personal injury (and her husband's suit for loss of consortium) Mrs. Moss alleged that the defendants (manufacturer and supplier of thearticle) had constructed a defective product and were hence liable for breach of an implied warranty that the container and cap were proper for the use for which they were intended. The crux of the case was a statute of limitations problem. In Oklahoma the statute of limitations for tort injuries is two years; five years for UCC actions; and 3 years for contract actions. The Mosses instituted suit twenty-eight months after the injury-causing event, so the question was whether the Mosses had a cause of action under the Code so as to be entitled to the longer statute of limitations. The supreme court reversed the appellate court's ruling for the plaintiff and held that the cause sounded in tort, not in contract or UCC.

In support of its holding the court spent a page discussing the in-
terplay between Manufacturers' Products Liability and UCC breach of warranty. The first and most significant rule in *Moss* was to severely limit the applicability of UCC warranty theories by restricting recovery only to plaintiffs in near-perfect privity.

Section 2-318 of the Code deals with the disfavored subject of privity. The official comment explains:

The purpose . . . is to give [certain beneficiaries] the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." 50

To facilitate legislative determination as regards privity, three alternative sections are provided, and, in the notes, an express caveat of drafter's neutrality allows for unfettered development of local case law. Despite these expressions of drafter's intent, and predictions to the contrary, 51 the Oklahoma courts flatly refused to extend privity beyond alternative A (the most limiting) as selected by the legislature. That version extends sellers' warranties to natural persons in the family or household of the buyer, or guests of the household if it is reasonable to expect that such person will use or consume the goods. Alternatives B (any natural person) and C (any person) successively extend the remedy to wider classes, ultimately embracing plaintiffs, including corporations, who have no relation to the seller whatsoever.

The support offered in *Moss* for this restrictive interpretation is not necessarily persuasive. Initially the court points out that the legislature did have the three alternative choices, and this, the court suggests, indicates that the selection of the narrowest view was a de facto expression of intent. In fact, the legislature did not have this variety at the time it acted. The UCC was adopted in 1961 in Oklahoma, but alternatives B and C to section 2-318 were not introduced until 1966. 52

To the extent that the possibility of amendment is always open, the legislature's failure to extend section 2-318 to either of the new alternatives may evince some sort of intent. However, the argument is not quite as convincing as if the three really had been available initially.

Finally, as the McNichols article points out, there is surprising in-

consistency in this deference to legislative intent about privity when the judiciary had previously chosen to ignore the Code in creating its new tort doctrine.53

These criticisms notwithstanding, for the time being,54 Oklahoma will have to live with alternative A. No plaintiff can benefit from the UCC unless he is in contractual privity with the defendant or fits the household-family-guest test which that alternative demands.55

Despite Moss' limitation of Code applicability by restricting privity, the court was at pains to point out that there are cases where both UCC and Manufacturers' Products Liability can be pleaded, and in these cases Code disclaimers are valid, at least against the Code cause of action. The court in Moss said:

Should a contract, valid under the UCC limiting plaintiff's right to recover damages for certain items of damage exist however, we know of no reason why such a contract could not be given consideration in the same action in which plaintiff seeks recovery under the doctrine of Manufacturers' Product [sic] Liability when the two matters are clearly distinguished by proper instructions.56

The Sterner court appears not to have considered this aspect of Moss.

The Moss court also stressed the commercial nature of warranty actions. The court asserted, "[t]he UCC has to do with commercial transactions [citations omitted] and presupposes a buyer in privity with a seller . . . ."57 Later in the same paragraph the court noted

53. 27 OKLA. L. REV. 347, 372.
54. Oklahoma in its stand is still in the slim majority of some 29 states that have adopted alternative A. The remaining jurisdictions, however, have extended coverage to alternatives B, C, or their equivalents, or completely dropped the section. See Reitz and Seabolt, supra note 52, at 535. Further, of those 29 states, at least three (Ala., Fla., and N.J.) have recent case law indicating that the need for privity will be loosely construed. See the cases cited at 552-53 of the 1970-74 cumulative supplement to R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, (2d ed. 1974). See also Cochran, Emerging Products Liability under Section 2-318 of the Uniform Commercial Code: A Survey, 29 BUS. LAW. 925 (1974), which has an up-to-date appendix on each state to include judicial modification by case law.
55. One effect of this decision to stick with alternative A was to require the overruling of a previous Tenth Circuit case that had supported an extension of section 2-318. Speed Fasteners, Inc., v. Newson, 382 F.2d 395 (10th Cir. 1967) was noted in the Oklahoma statutes (1971 construction to section 2-318 of title 12A) as follows, "This section [2-318] does not have the effect of excluding all those not within the mentioned categories." The Oklahoma court dealt with that unauthorized extension at 627 of the Moss case. "[T]he employee would have an action based on the principle of Manufacturers' Products Liability. In our view, the UCC provisions adopted by the Legislature do not extend coverage to him."
56. 522 P.2d at 626.
57. Id. at 625 (emphasis supplied).
that “[w]arranty recovery applies to loss flowing from the commercial transaction.” Is the concept of commercial transaction to be a test for the availability of Code actions and Code defenses? Moss does not define “commercial transaction.” Arguably, one isolated sale by a manufacturer to an individual could meet the test. On the other hand, perhaps what was meant was a continuing course of dealing, or a large transaction, or a commercial plaintiff.

While the actual holding in Moss limited the UCC only by requiring strict privity, these repeated references to “commercial transactions” raise the question whether the commercialness of the situation will be of importance in Oklahoma. At the very least it suggests that the Sterner court should not so cavalierly have assumed that Oklahoma courts would permit a strict liability action for an industrial plaintiff like Sterner Aero.

**STERNER—THE TENTH CIRCUIT’S EXTRAPOLATION**

It must be conceded at the outset that Sterner put the Tenth Circuit in an unpleasant situation. Judge Doyle was being asked to apply a body of state law that had not yet been fleshed out into a coherent framework. Specifically, in none of the five Oklahoma cases had the use of a warranty approach actually been allowed, nor had the plaintiffs been anything other than individuals, and finally, only personal injuries had arisen from use of the defective products. Nevertheless, Moss, as has been discussed in detail, did establish some guidelines.

The complaining Swedish firm had purchased the allegedly defective product, a rebuilt aircraft engine, from an Oklahoma manufacturing firm. A deliberately drawn contract for sale included express warranties for the first 100 hours or six months of operation. It also included a disclaimer of all other express or implied warranties. Not until a year after purchase and very near the end of the engine’s useful life did a problem arise: the engine failed during take-off and the plane made a forced landing in a lake. Injuries were specifically stated as not personal. However, the case does not make clear whether the suit for $50,000 was strictly for damage to the engine itself (repair damage) or damage to other property, such as the plane.

The original suit was brought upon dual theories: breach of implied warranty and negligence, in which the doctrine of res ipsa loquitur was invoked. At the trial level, Judge Bohanon granted sum-

58. *Id.* (emphasis supplied).
mary judgment for the defendants based upon the existence of the warranty disclaimer, and his determination that section 402A of the Restatement (Second) of Torts did not apply:

The Court knows of no law which prohibits knowledgeable parties from agreeing upon the terms of a warranty of merchandise or materials sold. This is not a case between an ordinary purchaser of consumer goods who relies upon the expertise and knowledge of the seller or manufacturer. The parties to this had an equal bargaining position, and could contract upon such terms and conditions as they saw fit.60

But Kirkland had just been decided and Circuit Judge Doyle immediately turned to its doctrine of Manufacturers' Products Liability as an alternative remedy for the plaintiff.60 The pertinent parts of the Tenth Circuit's decision were divided into three sections, one dealing with each possible theory. Turning first to warranty, the court found the plaintiff's recovery barred by the contractual disclaimer, "which, being clearly expressed and entered through negotiation between parties of relatively equal bargaining power, would be legally permissible in Oklahoma."61 In fact this conclusion was probably incorrect in Oklahoma. The contract in question was executed in 1968, after Oklahoma had adopted the UCC but it would appear that the wording actually used in the contract was insufficient to meet the strict requirements for disclaimers enumerated in section 2-316.62 Thus, the Code, if properly applied, could possibly have yielded the same plaintiff's verdict that a suit in strict tort offered.

In discussing a possible suit in warranty, the Sterner court repeated the now familiar litany that:

59. 499 F.2d at 711.
60. At the trial level, Manufacturers' Products Liability was not used as a cause of action since it was not then available. This required the Sterner court to also decide that, "[t]he products liability law established by it [Kirkland] operates prospectively as to all cases set for trial after April 23, 1974 and must therefore apply to the present action upon remand." 715.
61. Id. at 712.
62. The exact wording of the disclaimer was: "This warranty is expressly in lieu of any and all other warranties or representations express or implied." 711. The other implied warranties being disclaimed would have been those of fitness and merchantability but section 2-316 demands a specific formula to be effective. Unless the disclaimer uses expressions such as "as is" or "with faults" or otherwise effectively puts the buyer upon notice of his loss of implied warranty, then there is no valid exclusion of the warranty of fitness. And to exclude the warranty of merchantability, the disclaimer must mention that word itself in a clear and conspicuous fashion. From this vantage point, then the actual disclaimer, since it did not mention the magic words, probably would have been deemed ineffective under the Code.
Breach of implied warranty is no longer an appropriate remedy for recovery in products liability cases, except as provided in the Uniform Commercial Code. The implied warranty theory is now merged... into the theory... of Manufacturers' Products Liability.63

The “merger” language merely refers to the historical fact that as products liability doctrine developed, recovery was often predicated upon an implied warranty (often created by the manufacturer's advertising and representations) said to be running with the product into the hands of the ultimate consumer. It was this implied warranty theory that Traynor finally mutated into a pure tort doctrine no longer requiring express representation for reliance thereon. Thus courts, including Oklahoma, have felt the need to clarify the semantic problem and distinguish between the old superseded concept of (tort) implied warranty and the still valid concept of implied warranty under Code sections 2-314 and 2-315. More significant than Sterner's reference to Kirkland is its omission: the next sentence of Kirkland directed the reader to Moss and its pertinent comments on Code applicability.64 Sterner failed to refer to Moss at all.

The court was well aware of the conflict between disclaimers and strict tort. The stated issue was, “whether this exclusion of all other warranties, express or implied, effectively barred the present action, even though a tort...”65 The answer concluded that a contractual disclaimer was no bar to the liability created by strict tort doctrine: “The Oklahoma Supreme Court decided that traditional concepts of contract law are inapplicable in Manufacturers’ Products Liability cases.”66 And for conclusive support, an accompanying footnote quoted the pertinent portions of section 402A Restatement (Second) Torts comment m even as the Kirkland decision had done.67

The third section of the Sterner decision dealt with the effect of the disclaimer upon a negligence theory of recovery. Although the instant disclaimer was held to have failed “for lack of explicit language evidencing intent to exclude a negligence action,”68 the rule adopted was that by a sufficiently clear intention, one party could exculpate himself from the consequences of his own negligence. The only additional

63. 499 F.2d at 712-13.
64. See text accompanying note 29 supra.
65. 499 F.2d at 711.
66. Id. at 713.
67. Id. at 713 n.2.
68. Id. at 714.
requirement was that the parties be on a parity as to bargaining position. Since the two tort approaches were still open and unfettered by the warranty disclaimer, the case was remanded for development of facts to support each theory, the court concluding that material issues of fact still existed and that the trial court's action in granting summary judgment had been premature.

Given that the facts were new and that no Oklahoma precedent exactly in point existed, it is not possible to tag the Sterner decision as absolutely incorrect. However, the decision did not give full attention to the information available in Moss nor did it examine all the distinctions between Sterner and the five available state strict tort cases.

The most important distinction was that Sterner was the first Oklahoma case where a UCC remedy was available. The privity requirements of restrictive alternative A (Code section 2-318) were met. The parties to the lawsuit were in direct written contract and clearly a suit could be brought under the Code. Also, the situation must have met the "commercial transaction" language so prevalent in Moss regardless of the precise definition of that term. Both vendor and vendee were engaged in a continuing course of business dealings, and the contract for the allegedly faulty engine was simply a normal part of their respective operations.

Clearly, a Code remedy was available to the plaintiff. The question is whether a strict liability remedy, free of the defense of disclaimer, should also have been provided. Here, too, Sterner was different from prior Oklahoma cases, but here the difference militated against recovery.

Could the court really say, as Oklahoma had done in Moss, that, [t]he plaintiffs' causes of action are logically related to the policies and the purposes which caused us to recognize in Kirkland ... the existence of strict liability in tort ... the policy ... of spreading the loss which occurs from defectively manufactured goods to the manufacturer, and from him to the public generally who purchase [the] goods ... ?

One expects the commercial firm to be able to bear the risk of disappointment in some of the contracts it enters into and the value of reallocating the risk from one insurer or corporate income statement to another is questionable.

As to characterization of the plaintiff, Sterner Aero was not an individual but a business entity, and although it could be considered a

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69. 522 P.2d at 625.
consumer of products, it was also a party to a bargained-for contract for sale. Emphatically, Sterner Aero was not a helpless consumer at the mercy of the whims of mass production and the market place.

The Tenth Circuit did deal briefly with this last point and concluded that status as a corporate entity would not foreclose its use of the strict tort doctrine. Particular attention was paid to Sterner's status as a mere consumer of aircraft engines and its possible lack of expertise in this area. Even admitting both contentions, however, the court still missed the point: strict tort was developed to aid the normal individual consumer not business entities.\(^7\)

The final distinction between Sterner and the Oklahoma precedents was injury classification. All five of the state cases dealt exclusively with personal injury. Admittedly, section 402A does envision allowing recovery for personal and property damages. But as noted previously, type of damage is not a sole determinative factor, and when combined with the additional aspects such as commerciality, a strong case exists for exclusive applicability of the Code. Consider the previously discussed Arizona case of Beauchamp (unsuitable diesel tractor) where recovery in strict tort was denied. On material points, the Beauchamp and Sterner cases are similar: in both, the dealing was commercial (Mr. Beauchamp purchased the truck for commercial long-distance hauling); a written contract and direct privity existed in both cases; neither involved personal injury (Beauchamp is properly cited as an “expectation”—economic—loss case while Sterner apparently is “repair” loss and that is a significant distinction). Yet in Beauchamp the disclaimer survived as the court refused to apply strict tort to such a situation.

*Delta Air Lines, Inc. v. Douglas Aircraft Co., Inc.*\(^7\) which was decided by the California Appellate Court almost concurrently with Seely, provides an exact parallel to Sterner. California, however, de-

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70. E.g.: “The rationale for such a rule (strict tort) is founded upon public interest in human safety. . . .” Kirkland v. General Mtrs. Corp., 521 P.2d 1353, 1362; or “The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves,” Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901; or the language used by the California court in Seely, see text accompanying note 33 supra. This is not to say that a corporation may never properly use strict tort. For instance, a firm in the position of a bystander which had received “other” property damage due to the failure of a defective product of another business entity might well need strict tort since it would have no cause of action in warranty. But such were not the facts in Sterner.

71. 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965).
terminated that strict tort would not apply. More important, the Delta case has been variously interpreted as pointing toward a new solution to the strict tort-disclaimer controversy, a subject to be dealt with shortly.

In Delta as in Sterner, the subject matter was aircraft equipment, specifically, a new DC-7 plane worth over two million dollars. Naturally, Delta and the manufacturer (Douglas) were in direct contractual privity. And, as is common to many commercial situations, the contract contained an “exculpatory” clause purporting to waive liability for all express or implied warranties (other than those in the contract) and for liability due to negligence on the seller's part.

In a test flight shortly after delivery, the front nose wheel failed to function properly during a landing, and the plane veered off the runway and was damaged. No personal injury resulted so suit was brought for cost of repair only.

California adopted the same rule of law as did the Tenth Circuit concerning disclaimers of negligence. However, the contract in Delta, by mentioning “negligence” specifically, was held clear and unambiguous: “Even though disclaimer clauses are to be strictly construed, still we find that this clause covers not only contractual warranty liability but also tort liability.”

Thus barred from a cause of action in negligence or warranty, the plaintiff turned hopefully to strict tort. The court, however, was easily able to distinguish the instant case from earlier precedents such as Greenman v. Yuba Power or the New Jersey landmark of Henningson v. Bloomfield Motors. Noting that the case did not involve personal injury, contained none of the elements of inequality of bargaining, and did not arise out of a “contract of adhesion” the court stated, “we do not regard the instant case as within either the letter or the spirit of the authorities relied on.”

The decision was not left without limitations, as the court pointed to a variety of factors which could cause an exculpatory clause to be held invalid. First, the clause might run afoul of the goal of protection of the general public in a business where absolute limitation of liability would contravene public policy. This reference apparently was to a prior California case invalidating exculpatory clauses in connection with...
emergency treatment offered to the public at hospitals.\textsuperscript{74} Note that it is important to distinguish between the desirability and effect of disclaimers when airline and passengers are involved as opposed to when only airline and manufacturer are concerned.

Or, an exculpation clause might fail if it were achieved through inequality of bargaining power or an adhesion contract. But the facts of this case denied such a situation. In particular, Douglas, the defendant, offered the testimony of the head of its legal department. He indicated that discussions of the exculpation clause had taken place, that Douglas had removed such a clause in some past transactions for an appropriate increase in price and finally, that Delta failed to make an offer in this area because, "they wanted it for nothing."\textsuperscript{75}

It is submitted that the California court's parting words could properly have been applied to \textit{Sterner}:

\begin{quote}
In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. . . . We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to Douglas, which had neither agreed to assume it nor been compensated for such assumption.\textsuperscript{76}
\end{quote}

\textbf{ALTERNATIVE SOLUTIONS}

Because it has been virtually the only technique used to reconcile any conflict in products liability cases between strict tort and the disclaimer, categorization or "pigeonholing" has been examined in detail. It can be made to work; however, it suffers from a variety of problems ranging from definition of particular types of injury to selection and weighing of classification criteria. It is bound to be difficult to apply. It walks that wavering line between selection of tests so rigid that inequitable results are bound to flow from its inflexible application, or reservation of so much discretion that the grey area expands into a vast morass wherein case law becomes lost in unpredictability with no guiding precedents to follow.

McNichols, in discussing the disclaimer, suggests a second possi-

\textsuperscript{74} Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
\textsuperscript{75} 238 Cal. App. at —, 47 Cal. Rptr. at 523, n.5.
\textsuperscript{76} \textit{Id.} at —, 47 Cal. Rptr. at 524.
Functionally, the disclaimer is in many ways quite similar to the concept to assumption of risk—a doctrine that will survive the advent of Manufacturers' Products Liability although under the new title of “voluntary assumption of the risk of a known defect.” It would seem that language of the disclaimer variety, slightly modified to be intelligible to the consumer, would put the purchaser on notice that something might be wrong with or harmful about the product, thus providing a basis for the assertion of assumption of risk as a defense.

Although relegating this point to a footnote, a recent federal case reached exactly the conclusion presented by Professor McNichols. The plaintiff had bought a used helicopter with a disclaimer of all warranties except title. Suit against the seller after the aircraft crashed (note that the case involved no personal injury) was dismissed based upon the disclaimer. The pertinent comment by the court was:

There may be still another reason why Keystone may not recover here under either negligence or strict liability theories: assumption of risk.

It is well established that assumption of the risk is a good defense to strict liability as well as negligence [citations omitted]. By purchasing the helicopter “AS IS” Keystone assumed the risk of product defect.

Oklahoma's *Moss v. Polyco, Inc.* perhaps suggests a third alternative. It contains express language that authorizes some sort of liability limitation: “Should a contract, valid under the UCC limiting plaintiff's right to recover damages for certain items of damage exist however, we know of no reason why such a contract could not be given consideration . . . .” (Emphasis supplied). It is not clear, however, that it is a disclaimer which wins the court's approval. Normally, disclaimers act to absolutely eliminate all claims for damages. Instead the wording suggests something more in line with Code section 2-719: Contractual Modification or Limitation of Remedy. It is provided therein that by agreement the parties may "limit or alter the measure of damages re-

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78. 521 P.2d 1353, 1366 (Okla. 1974).
80. *Id.* at 1066, n.6.
81. 522 P.2d at 626. Incidentally, this phrase is just another reason why the Tenth Circuit's *Sterner* decision with its disallowance of a disclaimer in a commercial situation seems to be an unwarranted extension of the Oklahoma Manufacturers' Products Liability doctrine.
coverable,” and this concept is extended to include limitation of consequential damages provided that such would not be unconscionable. And finally limitation of personal injury due to consumer goods is made prima facie unconscionable. Thus, the Moss "solution" is less than ironclad protection for the manufacturer.

Clearly this idea, belonging as it does to the Code, should not be any more viable against liability in strict tort than is the disclaimer—what is a defense to suit in warranty is not necessarily a defense to tort actions. However, if the court were to ignore this point, the limitation of remedy concept could yield results more beneficial to the injured consumer. He would never be cut off from his remedy by any agreement yet such agreement could be honored in commercial situations where the court preferred to promote freedom of contract.

In view of the overwhelming support to the contrary, a final alternative to the tension between disclaimers and strict torts is presented: change the exculpatory clause, expand it, recreate it, but provide some way to let a contracting party disclaim liability for strict tort. Why can’t strict tort liability be disclaimed? The answer apparently is because section 402A of the Restatement (Second) of Torts, comment m says so. And because Dean Prosser, Justice Traynor, and a large body of case law since Greenman in 1962 have concurred. And, basically because it is believed to be against public policy.

Such a radical proposal needs support and surprisingly a few federal courts have recently begun to offer it. Interestingly enough, both sets of cases in one manner or another flow from the intermediate California court’s decision in Delta Air Lines, Inc. v. Douglas Aircraft Co.\(^2\) which has been previously discussed as a case that Sterner ought to have followed.

The liability claim in Keystone Aeronautics Corp. v. R.J. Enstrom Corp.\(^3\) arose out of the crash of a recently transferred demonstration helicopter. Both parties to the contract for sale were corporate entities and the following language was contained in the front page: “Customer takes ‘AS IS’ without warranty of any kind except will convey good title."\(^4\) On the back page a standard warranty provision had been replaced with, “The R. J. Enstrom Corporation will be held harmless of any liability in connection with sale . . . . [N]o warranty of any

\(^2\) 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965).
\(^4\) Id. at 1064.
kind is made or implied." S
suit was for recovery of a variety of nonpersonal injuries, i.e., "repair" costs and "expectation" loss to include both lost profit and cost to cover for leasing replacements for two other sister helicopters grounded during investigation of the crash.

The court found the disclaimer valid and granted the seller's motion for summary judgment. The plaintiff had tried to plead strict tort and specifically pointed out that the notorious comment m did away with disclaimers. Although qualifying their holding to appropriate fact patterns, the court noted that Pennsylvania law allows disclaimer of liability in both contract and tort. Then came the big step:

For purposes of waiver of liability between two corporations we perceive no difference between the tort theories of negligence and strict liability. We see no reason why if, under Pennsylvania law, parties to a contract in some circumstances may waive tort liability for negligence they should not be able to waive tort liability for strict liability as well.

The federal court then turned to the policy question of whether waiver of liability in strict tort should be allowed. It concluded that in "garden-variety" consumer sales the concept of protection of the consumer was still a valid concern and that waiver by disclaimer ought not be allowed. However, such an argument made no sense in commercial sales situations between two corporations and in those cases, the court supported freedom of contract to allow the parties to exercise business judgment as to risk allocation in any way they saw fit.

Basic reliance for this decision was placed on the California logic of Delta. It should be noted, however, that although Delta would support the result in Keystone it reached that result by deciding that strict tort would not be applicable to the facts (pigeonholing again) and not because strict tort liability could be disclaimed.

On appeal, the Third Circuit reversed the decision for the helicopter seller in Keystone Aeronautics Corp. v. Enstrom Corp. (hereafter referred to as Keystone II). The reversal, however, hinged upon the higher court's feeling that the language used in the disclaimer may not have been explicit enough to cover liability in strict tort. The case was remanded for specific analysis of the disclaimer. The actual

85. Id.
86. Id. at 1065.
87. The federal court did cite Delta as allowing disclaimer of strict tort liability, 364 F. Supp. at 1066, and to this extent was incorrect. The state court did allow disclaimer of "tort" liability but did not specifically extend this to strict tort.
88. 499 F.2d 146 (3d Cir. 1974).
result notwithstanding, *Keystone II* continued to support the premise that liability in strict tort could be disclaimed between business entities of relatively equal bargaining strength:

A social policy aimed at protecting the average consumer by prohibiting blanket immunization of a manufacturer or seller through the use of standardized disclaimers engenders little resistance. But when the setting is changed and the buyer and seller are both business entities, in a position where there may be effective and fair bargaining, the social policy loses its *raison d'etre*. The transaction then tends to be more influenced by gravitational pull of the Uniform Commercial Code than by the consumer oriented § 402A.

. . . .

Such a limitation on comment *m* [as provided by the continued viability of the disclaimer] would avoid the not unfamiliar result of "overkill" when a legal principle completely valid in its original context is extended so far that the mischief caused may be equal to the original disorder sought to be remedied.89

The second pair of cases appear as a nightmarish (for Delta at least) replay of the California Delta decision. In *Delta Air Lines, Inc. v. McDonnell Douglas Corp.*, (hereafter referred to as *Delta Federal*)90 the facts were almost identical to the earlier state case: the nose gear collapsed during a test flight causing damage to the aircraft and the same warranty disclaimer that had barred the California state suit in 1965 was still included in the contract for sale. Only the newer model of plane, a DC-8 instead of DC-7, and a different airport for the crash serve to distinguish the facts. And, of course, as the lower federal court pointed out, Delta now knew what the judicial system was apt to do with its complaint given the existence of the disclaimer.

Characterizing the parties to the suit as "industrial giants" and noting as California had done in *Delta* that "the contract between the airlines and the manufacturer was not clothed with the kind of public interest that surfaced in a contract between a patient and a hospital,"91 the court, "agree[d] with McDonnell's contention that the exculpatory clause is broad enough to include the concept of strict liability in tort."92

The *Delta Federal* decision did purport to follow California case

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89. *Id.* at 149.
90. 503 F.2d 239 (5th Cir. 1974), which affirmed the lower court's holding in this case cited under the same name at 350 F. Supp. 738 (N.D. Ga. 1972).
91. 503 F.2d at 245. And see text accompanying note 74 *supra*, concerning the public policy question.
92. 503 F.2d at 245.
law. The Court of Appeals for the Fifth Circuit first determined that Delta was a correct statement of the state law and then examined its specific language. Delta, although not mentioning disclaimer of liability in strict tort, had countenanced waiver of "tort liability" for negligence. The federal court then concluded that strict liability was merely one sub-category of "tort liability" and hence was also disclaimable. One could predict that Justice Traynor might disagree but as the court observed, "Any other conclusion would emasculate the basic purpose of the Warranty Article and exculpatory clause."94

The Tenth Circuit in Sterner did not validate the particular disclaimer with which it dealt. Two items in the decision, however, do create a negative pregnant of great potential. First, the decision adopted as law the premise that tort liability for negligence could be disclaimed if done with adequate care, and, secondly, while discussing the effect of the disclaimer on the warranty provision the court commented, "[this] waiver would not appear to abrogate plaintiff's right of action in tort under strict liability, as such a right exists in Oklahoma, for it does not mention any waiver of strict liability."95 It would be premature to dwell upon this at great length particularly since no such implication exists in any of the Oklahoma Manufacturers' Products Liability cases. Still it is interesting to note that the Tenth Circuit would, Oklahoma willing, be apparently ready to follow the Third and Fifth Circuits in their redemption of the disclaimer.

With this final alternative to the disclaimer-strict tort controversy hopefully supported by a modicum of recent case law, the problem now becomes one of convincing the courts that limitation of notorious comment m will not work irreparable harm upon the consumer and wipe out nearly fifteen years of progress.

CONCLUSION—THE RECONCILIATION

The problem, of course, is: if strict liability can be disclaimed, how can it continue to serve the public policies for which it was created? It is believed that it is possible to have both the risk-spreading advantages of strict liability and the economic incentive benefits of disclaimer. Even a "super disclaimer" that is effective to bar liability for strict tort can be controlled.

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93. Delta still has not been distinguished, modified, criticized or reversed.
94. 503 F.2d at 245.
95. 499 F.2d at 712.
A number of techniques probably exist but the following three can serve as useful examples. Basically they require a modification, either by the courts or by the legislatures, of the UCC.

The first possibility looks to classification of the plaintiff for its solution:

One method of reconciling those disclaimers and the Code is to conclude that the Code's disclaimer provisions are inapplicable to consumers. Such a method would be justified because the Code is essentially designed to control commercial transactions, and merchants' disclaimers are not imposed on unknowing purchasers. In other words, allow disclaimers generally, but not when it is a manufacturer's disclaimer covering personal injuries arising from the use of consumer goods.

The immediately preceding suggestion has, for example, been legislatively adopted by Alabama and Massachusetts: the former restricts section 2-316 (authorizing disclaimers) so that disclaimers are ineffective against personal injury caused by consumer goods; while the latter denies use of the disclaimer to the seller or manufacturer of consumer goods or services.

Secondly, the disclaimer section (2-316) could be modified by reading it in conjunction with section 2-302 (unconscionability). The section on unconscionability allows the court great freedom of action including the following possibilities: refuse to enforce the contract; enforce the remainder of the contract after deleting the unconscionable clause; or simply limiting the effect of the objectionable clause so as to avoid an objectionable result. What is suggested is that even a disclaimer that was valid as tested by the demanding formulas of section 2-316 could be ruled "unconscionable" by a court desiring to reach that result. Thus, rather than the judge-made tort law overriding the enacted UCC, the two could be reconciled on the point of disclaimers. And, theoretically, in situations where a disclaimer seemed appropriate, it could be allowed to stand.

This position, though tenable, has been hotly debated and is by no means yet decided. Professor Leff, perhaps its major opponent, comments as follows:

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98. See discussion note 62 supra.
It appears to be a matter of common assumption that section 2-302 is applicable to warranty disclaimers. I find this, frankly, incredible. Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problem at hand. It contains no reference of any kind to section 2-302, although nine other sections of article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as “unconscionable” under 2-302 seems explicable, if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness.99 (Emphasis in the original).

Yet despite this criticism, a number of courts have indicated that an otherwise valid disclaimer could still fall to the axe of unconscionability, and particularly in basically noncommercial situations such a holding is increasingly predictable.100

The final possibility is a joint reading of sections 2-316 and 2-719 (limitation of remedy) of the Code. The latter section provides in part:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation for injury to the person in case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The technique used to effect the needed reconciliation is to note that a warranty is in fact an absolute limitation of damages, hence, any disclaimer (although otherwise valid under 2-316) that limits recovery of personal injury in consumer cases is also prima facie unconscionable. Although seemingly as facile as the previously mentioned combination of 2-302 with 2-316, this latter marriage is generally disfavored. A reading of the official comments following section 2-719 discloses the clear qualifying statement that, “The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.”101 Despite the apparent intent of the drafters, a few courts have permitted mixing of the disclaimer and limitation of remedy sections to the benefit of the consumer.102

101. UNIFORM COMMERCIAL CODE § 2-719, Comment 3.
102. E.g., Ford Mtr. Co. v. Tritt, 244 Ark. 883, 430 S.W.2d 778 (1968).
Professor Shanker's comments on strict tort and the UCC, although ten years old, are still timely:

Surely, the real lesson of history is more than the fact that products liability cases have been bound too long in contract chains forged under the Uniform Sales Act. Rather, is not the real lesson of history found in the folly of assuming that products liability cases must be placed in a particular jurisprudential pigeonhole and then decided entirely within the framework of that theory of law?\textsuperscript{103}

Has not the time come to recognize that the business of law is to determine liability between people and not to place their claims in pigeonholes? In determining liability, is it too much to ask of the courts that they consider all relevant legal theories rather than playing a game of logic with only one?\textsuperscript{104}

This much is certain: the Oklahoma courts have a temporary breathing spell in which to consider the problem. And \textit{Sterner} does present one easy opportunity when the appropriate factual situation does arise; it would be possible merely to cite the Tenth Circuit, shovel a little dirt on the coffin, and let sleeping disclaimers lie. But is this really acceptable—are the “chains” of tort somehow less objectionable than those of contract? And, is it really good public policy to do away with disclaimers entirely in all products liability cases? It is submitted that the best interests of society are served by the more flexible approach.

\textsuperscript{103} Shanker supra, note 18 at 35.
\textsuperscript{104} Id. at 36.