Death by Footnote: The Life and Times of Minnesota's Economic Loss Doctrine

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NOTES

DEATH BY FOOTNOTE:* THE LIFE AND TIMES OF MINNESOTA'S ECONOMIC LOSS DOCTRINE

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Footnote 4 of Carolene Products is perhaps the most famous footnote in American jurisprudence and has an entire line of United States Supreme Court cases concerning the equal protection clause of the Fourteenth Amendment based upon it. GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW 574 (2d ed. 1991). Although the author has sympathy for the position expressed in the articles cited herein, such a discussion is beyond the scope of this note and merely provided the impetus for the title.

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I. INTRODUCTION

The area of law concerned with the recovery of "economic losses" attributable to defective products has been called the most confused area of product liability law. The confusion arises from the extensive overlap of tort and contract based theories of recovery for losses from defective products. In an attempt to alleviate the confusion, courts have created a doctrine commonly referred to as the "economic loss doctrine." The economic loss doctrine generally permits recovery only in contract for "economic losses" arising from defective products, while both contract and tort recovery are available for "noneconomic losses."6

Eleven years after Minnesota adopted the economic loss doctrine, the Minnesota Supreme Court all but eliminated the usefulness of the economic loss doctrine. In 80 South Eighth Street Ltd. Partnership v. Carey-Canada, Inc.,6 the first economic loss case involving asbestos contamination, the Minnesota Supreme Court faced facts where tort
remedies were unavailable under existing law. Nevertheless, the court permitted a suit in tort to continue, declaring that costs associated with maintenance, removal, and replacement of fireproofing materials containing asbestos were not "economic losses." By declaring a loss intuitively economic in nature a "noneconomic loss," the court retreated from its prior decisions that emphasized the importance of maintaining a role for the Uniform Commercial Code in commercial transactions. The 80 South Eighth decision, written with little analysis, left the law unstable.

Four months later, the economic loss doctrine was, for all practical purposes, laid to rest in Lloyd F. Smith Co. v. Den-Tal-Ez, Inc. In footnote five of the decision, the court stated that the determination of whether a loss was economic or noneconomic was merely "short-hand" for determining whether tort or contract law governed. Again, this language signaled a change in the focus of the court's analysis away from the original emphasis on the nature of the underlying transaction rather than the type of recovery the court believed appropriate. As in 80 South Eighth, the court deviated from prior practice and supplied little legal analysis. In fact, this abrupt shift was confined to a single footnote.

This Note examines the Minnesota Supreme Court's decisions in 80 South Eighth and Lloyd F. Smith and argues that the court's revision of the economic loss doctrine was an inevitable result of Minnesota courts' limited use of the economic loss doctrine to expand the area of tort recovery. After discussing the history and development of the economic loss doctrine in Minnesota, this Note analyzes the problems created by the court's decisions in 80 South Eighth and Lloyd F. Smith and concludes that the "abandonment" of the economic loss doctrine in footnote five of Lloyd F. Smith is generally insignificant in terms of future appellate cases and in providing clarification for cases where contract and tort remedies may apply. Finally, this Note provides a suggested framework for the doctrine's analysis and predicts potential results of some Minnesota cases under that framework.

II. THE DEVELOPMENT OF MINNESOTA'S ECONOMIC LOSS DOCTRINE

A. Introduction

In 1981, the Minnesota Supreme Court first addressed situations

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7. The court acknowledged that if the losses incurred by the plaintiff were "economic losses," recovery would be limited to contract remedies. Id. at 396.
8. Id. at 397.
9. 491 N.W.2d 11 (Minn. 1992).
10. Id. at 14 n.5.
11. Id.
where a party may invoke tort theories of negligence and strict products liability to recover economic losses resulting from allegedly defective products. In *Superwood Corp. v. Siempelkamp Corp.*,\(^{12}\) the court held that economic losses arising from commercial transactions are not recoverable in tort, unless the losses involved personal injury or damage to "other property."\(^{13}\) Noneconomic losses, on the other hand, could be recovered under both tort and contract theories. The *Superwood* court recognized that the rights and responsibilities of parties to commercial transactions are governed exclusively by the Uniform Commercial Code.\(^{14}\)

In the years following *Superwood*, the courts struggled to determine what constitutes "other property" as described by *Superwood*. These cases culminated in *Hapka v. Paquin Farms*,\(^{15}\) a case that eliminated the "other property" exception by expressly overruling any prior statement or implication that the Uniform Commercial Code is not the exclusive determinant of recovery for property damage arising from commercial transactions. The Minnesota Legislature responded to *Hapka* by passing a statute that permits tort recovery for damage to "other property" arising from the sale of goods, except where the transaction occurs between parties who are each merchants in goods of the kind sold.\(^{16}\)

The court’s consistent concern with retaining a place for the Uniform Commercial Code played a significant role in determining the court’s approach to the issues presented in *80 South Eighth*. Rather than retreat from the *Hapka* court’s rejection of the "other property" exception or rely upon the statutory provision for an "other property" exception, the court decided that the losses sought by the *80 South Eighth Partnership* were not "economic losses" at all.\(^{17}\) To reach this conclusion, the court redefined the concept of "economic loss" and retreated from its historic emphasis on the nature of the

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12. 311 N.W.2d 159 (Minn. 1981), overruled in part by *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). Shepard’s Citator Service incorrectly states that the *Superwood* case was overruled by *Hapka*. The supreme court’s opinion in *Hapka* states that “[t]o the extent Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981) and its progeny are inconsistent with the decision [in *Hapka*], they are hereby expressly overruled.” *Id.* at 684. But *Hapka*, in effect, only “overruled the dictum in *Superwood* which excepted from the economic loss rule bar those losses involving personal injury or damage to other property arising from commercial transactions.” Luther P. House, Jr. & Hubert J. Bell, Jr., *The Economic Loss Rule: A Fair Balancing of Interests*, CONSTRUCTION LAW., Apr. 1991, at 34.

13. *Superwood*, 311 N.W.2d at 162.

14. *Id.*

15. 458 N.W.2d 683 (Minn. 1990).


underlying transaction. The court's opinion rendered the distinction between economic and noneconomic loss almost indecipherable.

B. The Law Before Superwood

In 1965, two state courts analyzed the economic loss doctrine and established apparently conflicting rules of law.18 The first of these cases, Santor v. A & M Karagheusian, Inc.,19 represents the minority position.20 In Santor, a consumer was allowed to recover the cost of defective carpeting from the manufacturer under a strict products liability theory.21 The New Jersey court noted that a manufacturer represents its product to be suitable and safe for its intended use by placing the product on the market.22 Strict liability for defective products arises from this representation and serves as the basis of recovery for any damage to the property purchased, "other property," or persons.23

A short time later, the California Supreme Court decided Seely v. White Motor Co.24 Seely involved an allegedly defective truck that was

18. See Moore, supra note 4, at 101-03. Moore argues that economic loss case law is uncertain and lacks clarity because courts refer to the two 1965 cases and reject one of them without performing any significant analysis of the policy behind these cases. Id. at 103.
20. The Santor holding represented a minority view at the time Superwood was decided and continues to represent a minority view today. Moore, supra note 4, at 102 n.13.
21. Santor, 207 A.2d at 312. The Santor opinion began by affirming a trial court decision allowing a recovery for breach of warranty without privity of contract in a case where there was property damage only. Id. Previously, recovery against manufacturers who were not in privity with the consumer were allowed only in cases of personal injury. Id. at 307-11 (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (NJ. 1960)). Because the Santor decision was upheld on a breach of warranty basis, the New Jersey Court's decision that the plaintiff could have recovered in tort was unnecessary.
22. Id. at 311.
23. Id. at 312. The Santor court noted that the purpose of strict liability is to ensure that the cost of injury or damage, regardless of the nature of the damage, be borne by the manufacturer rather than by consumers who are generally powerless to protect themselves. Id. The court did not address whether a similar result would have been reached in a case involving a commercial transaction. In fact, in Spring Motors Distrib., Inc. v. Ford Motor Co., 489 A.2d 660 (N.J. 1985), the New Jersey court refused to allow recovery for "economic loss" in a commercial transaction. Id. at 663.
24. 403 P.2d 145 (Cal. 1965). The California Supreme Court noted that strict liability was created to govern problems arising in cases of physical injury, not to undermine the remedies prescribed by the Uniform Commercial Code. Id. at 149. The court stated that strict liability resulted from a recognition that "[t]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." Id. (citations omitted).
purchased for commercial use. An accident occurred when the truck's brakes failed. The owner sued the manufacturer for vehicle repair costs and lost profits. In rejecting Santor's reasoning, the California court noted that the rules of warranty were sufficient to meet the needs of parties to commercial transactions. Seely thus held that a manufacturer could be liable for the "safety" of a product as that term relates to unreasonable risks of harm. Manufacturers, however, may not be held liable for failure to meet the consumer's expectations of performance unless they explicitly accept that responsibility. Ultimately, the court concluded that strict liability should afford protection for damage to property other than the goods purchased because such damage was so similar to personal injury that there was no valid reason for distinguishing between the two types of injury.

C. Minnesota Confronts Economic Loss: Superwood Corp. v. Siempelkamp Corp.

In confronting the issues raised by the Superwood Corporation, the Minnesota Supreme Court reviewed both Santor and Seely. The supreme court rejected the reasoning of Santor and instead chose to follow the Seely court's interpretation of the competing goals of tort and contract liability. Citing Seely, the Superwood court noted that the law of sales, enacted through the Uniform Commercial Code, was designed to meet the needs of parties to commercial transactions. In Superwood, the court stated that the goal of the Uniform Commercial Code was to clarify the rights and remedies of parties to commercial transactions. Among these rights and remedies were statutory provisions specifically related to warranties, disclaimers,

25. Id. at 147.
26. Id. at 147-48.
27. Id. at 150-51.
28. Id.
30. Id. at 150.
32. Id. The Superwood decision relied heavily and quoted extensively from Seely and other cases which rely on it. Superwood involved an alleged defect in a hot plate press made in 1954. The press operated without incident until 1975 when a cylinder failed and could not be replaced. Id. at 160. Superwood sued Siempelkamp alleging negligence, strict products liability, breach of warranty, and breach of contract. Id. The case focused on whether a manufacturer is strictly liable to the user of equipment damaged by negligent manufacture, inspection, or installation and, if so, which damages are recoverable. Id.
33. Id. at 161 (citing Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965)).
34. Id. at 162.
and remedies for breach of warranty. To permit tort liability to enter into the arena of commercial transactions would allow one party to get something for which it did not bargain. This analysis led the court to hold that “economic losses” from commercial transactions are not recoverable in tort except where personal injury or damage to “other property” was involved.

The Superwood court focused extensively on preserving a role for the Uniform Commercial Code and on limiting recovery in tort. The Superwood court left open one possibility for plaintiffs seeking recovery for “economic losses” arising out of commercial transactions. A broad definition of “other property” would permit recovery in many cases, and much of the litigation that followed Superwood focused on this exception.

D. Defining “Other Property” and “Economic Loss”

The Minnesota Supreme Court first addressed the “other property” exception in Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc. In Fine Arts, the court decided whether damage to a building caused by deterioration in brick constituted damage to “other property.” The Fine Arts court held that diminution in the

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36. Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990). The Superwood court further stated that “[t]o allow tort liability in commercial transactions would totally emasculate these [warranty] provisions of the U.C.C.”

In dissent, Justice Lawrence Yetka argued that recovery for negligence should be permitted in commercial transactions. Id. (Yetka, J., dissenting). Yetka based his dissent on three arguments. First, he stated that common law had long permitted negligence actions in commercial transactions and that, absent explicit guidance from the legislature, the Uniform Commercial Code should not be construed in derogation of common law. Id. at 162-63. Second, he argued that the remedies provided in the Code merely supplemented rather than replaced tort recoveries. Id. at 163. Third, Yetka believed it was inappropriate to hold only sellers of defective products liable in negligence when someone was injured. Id. Even Yetka, however, would limit recovery for strict liability and not permit it as a basis for recovery of purely economic injury. Id. at 162. See also S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 434 (Minn. 1985), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).

37. Superwood, 311 N.W.2d at 162.
38. Id. The court expressed concern that adopting the view expressed in Santor would result in tort recovery unrestrained by the limitations placed on liability by the legislature when it adopted the Uniform Commercial Code. The court stated, “[c]learly, the legislature did not intend for tort law to circumvent the statutory scheme of the U.C.C.” Id.
39. 354 N.W.2d 816 (Minn. 1984), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).
40. Id. at 817. Fine Arts involved allegations that the manufacturer of glazed brick used in a remodeling project knew or should have known that the bricks were not fit for the use which the purchasers intended. Id. at 818. The suit alleged breach of
value of a building did not constitute damage to "other property" as contemplated by Superwood and therefore was not recoverable in tort. The court noted that "[t]o hold that buildings constitute 'other property' would effectively overrule Superwood as to every seller of basic building materials . . . . The U.C.C. provisions as applicable to component suppliers would be totally emasculated."

The court also rejected the argument that any damage to "other property," however small relative to the total damage, should permit recovery of the entire loss. The Minneapolis Society of Fine Arts argued that damage to the mortar resulting from deterioration in the brick should permit it to recover the full diminution in value of the building even though the cost of the mortar was nominal in comparison to the cost of the brick. The court rejected this argument, noting that to allow a party to sue in tort to recover substantial damages because of minor damages to "other property" "would thwart the policy implications of Superwood."

Although the Fine Arts case focused on the scope of the "other property" exception, the court also engaged in a lengthy discussion of the nature and definition of "economic loss." The court noted that "economic loss" is generally that loss which results from the failure of the product to perform to the level expected by the buyer and commonly has been measured by the cost of repairing or replacing the product and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold.

41. Id. at 817.
42. Id. at 821.
43. Id. at 820. In support of its position, the court cited cases from other jurisdictions where damages to component products resulting in damage to the end product were determined to be "economic losses" but not losses to "other property." See, e.g., R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 829 n.11 (8th Cir. 1983); Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 626 F.2d 280 (3d Cir. 1980); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308 (Tex. 1978). Several law review articles have focused explicitly on strict liability as it applies to the construction industry. See, e.g., Barrett, supra note 5 (criticizing cases which allow recovery for the risk of personal injury); Michael D. Lieder, Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase, 66 WASH. L. REV. 937 (1991) (arguing for creation of a new tort for negligent infliction of economic loss).
45. Id. at 820 n.4.
46. Id. at 820-21 (citing Comment, Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract, 114 U. PA. L. REV. 539, 541 (1966); Note, Economic Loss in Products Liability Jurisprudence, 66 COLUM. L. REV. 917, 918 (1966)).
Thus, where damage results from deterioration, internal breakage, depreciation, or failure to meet the purchaser’s expectations, there is no recovery in tort.47 The court noted that some jurisdictions characterize noneconomic losses as injuries that result from a calamitous event or where a product creates a hazardous condition.48 While not specifically rejecting these arguments, the court noted that they did not apply in the Fine Arts case.49

E. Rejecting Other Exceptions to the Economic Loss Doctrine

Just a year after the Fine Arts case, the Minnesota Supreme Court rejected the “calamitous event” exception to the economic loss doctrine in S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.50 Here, the court emphasized that the plaintiff buyer was a commercial entity possessing bargaining power substantially equal to that of the defendant seller and, as such, was capable of negotiating adequate warranty protection.51 The court reaffirmed its decision in Fine Arts, holding that nominal damage to “other property” was insufficient to permit tort recovery for damages to the product itself.52 The court also noted that there were no policy reasons for allowing the plaintiff, a commercial entity that could have bargained for allocation of the risk of loss from defects, to recover in tort for property damage.

Several recent publications have provided similar definitions. See, e.g., Barrett, supra note 5, at 892 n.1. Barrett also argues that an “economic loss” occurs when a product is of inferior quality or does not work for the purpose intended. Id. at 895.

47. Fine Arts, 354 N.W.2d at 821.
50. 374 N.W.2d 431, 435 (Minn. 1985), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).
51. Id. The Groves plaintiff sought purely “economic losses,” even though personal injuries occurred concurrently with the property damage. Id. at 433.
52. The court reaffirmed its previous holding that damages resulting from the failure of a product to live up to expectations as to suitability, quality, and performance are not recoverable in tort by a commercial party. Id. at 434. See also id. at 434 n.2.
simply because an employee suffered personal injury.53

Two cases decided in 1987 underscored the emphasis the Minnesota Supreme Court placed on preserving the role of the Uniform Commercial Code in determining remedies for losses in commercial transactions.54 In *Valley Farmers' Elevator v. Lindsay Bros.*,55 the court refused to allow recovery of "economic losses" in a commercial transaction that involved the sale of both goods and services. The court applied the "predominant factor" test, which holds that a transaction involving the sale of both goods and services is governed by the Uniform Commercial Code if the sale of goods is the primary reason for the transaction.56

Conversely, in *McCarthy Well Co. v. St. Peter Creamery, Inc.*,57 the court permitted recovery for economic losses where negligent performance of services was involved.58 The effect of these two cases was to apply the *Superwood* rule when the sale of goods was the predominant factor while confining the rule to transactions governed by the Uniform Commercial Code.59

The Minnesota Supreme Court's consistent focus on the nature of the underlying transaction led the Minnesota Court of Appeals to reject the argument that *Superwood* created a "dangerous defect" exception to the economic loss doctrine. In *Thofson v. Redex Industries, Inc.*,60 the court of appeals stated that the loss of grain stored in a grain dryer destroyed by fire was not recoverable in tort even if the defect created an unreasonable danger to persons or "other prop-

53. *Id.* The court emphasized that where commercial entities which can negotiate to protect themselves subsequently seek tort recovery, they are, in effect, seeking to better the bargain they negotiated. The court asserted that Groves could have paid a higher price to obtain the additional warranty protection it was seeking in tort. *Id.* (citing *Purvis v. Consolidated Energy Prods. Co.*, 674 F.2d 217, 221 (4th Cir. 1982)).


55. 398 N.W.2d 553 (Minn. 1987), overruled in part by *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990).


57. 410 N.W.2d 312 (Minn. 1987).

58. *Id.* at 315.

59. See Cashman, *supra* note 54, at 230. The authors note that the court maintained the integrity of the *Superwood* decision by applying it only to cases evolving from transactions governed by the Uniform Commercial Code. *Id.* Any other result, they imply, would have severely undermined the *Superwood* doctrine. *Id.*

60. 433 N.W.2d 901 (Minn. Ct. App. 1988).
Moreover, the court noted that damages are only recoverable in tort when they are not the type that would ordinarily be contemplated by the parties to the transaction. The court reasoned that damage to grain would be expected if a grain dryer malfunctioned, and therefore the grain was not "other property."

Fine Arts, S.J. Groves & Sons, Thofson, and other cases decided in the first decade after Superwood resulted in a serious limitation on the availability of tort remedies for property damages arising from products purchased in commercial transactions. Courts rejected a proposed exception to the general rule proscribing tort recovery for "economic losses" for those damages arising from a "sudden and calamitous event." In addition, the term "other property" was construed to include only those items not within the contemplation of the parties to the sale transaction, and that "other property" must be a significant portion of the damages sought in order to rely on the "other property" exception. The court of appeals went even further, rejecting an exception for products that are "unreasonably dangerous." The overriding consideration in these limitations was a strong desire to preserve an important role for traditional contract and Uniform Commercial Code remedies.

F. Overruling the "Other Property" Exception

By 1990, Minnesota courts had interpreted the Superwood's implied "other property" exception so narrowly that the Minnesota Supreme Court's explicit rejection of the exception in Hapka v. Paquin Farms

- Thofson, 343 N.W.2d at 903-04 (citing Holstad v. Southwestern Porcelain, Inc., 421 N.W.2d 371, 375 (Minn. Ct. App. 1988), review denied (Minn. Apr. 28, 1988)).
- Thofson, 343 N.W.2d at 904.
- See Minneapolis Soc'y of Fine Arts v. Parker-Klein Assoc's, Inc., 354 N.W.2d 816, 820 (Minn. 1984), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990); see also Thofson v. Redex Indus., Inc, 433 N.W.2d 901, 904 (Minn. Ct. App. 1988).
- See, e.g., S.J. Groves & Sons, 374 N.W.2d at 434 n.2; Fine Arts, 354 N.W.2d at 820 n.4.
- 458 N.W.2d 683 (Minn. 1990). The plaintiffs sued for losses suffered from the purchase of diseased seed potatoes from Paquin Farms. Id. at 685. The diseased potatoes allegedly infected other crops processed on the same potato cutting machine. Id. As a result, the plaintiffs' potatoes could not receive state certification as disease-free seed potatoes. The plaintiffs sought to recover for the lower profits on the uncertified potatoes, the losses associated with destruction of one field of potatoes, and the costs of cleaning and disinfecting the machinery and warehouses. Id.
was anticlimactic. Although the Superwood court implied that tort recovery would be available for damages to "other property" and subsequent cases assumed such recovery was available, the supreme court had never directly confronted the issue in a commercial transaction before Hapka. In pre-Hapka cases, the court found other grounds for denying recovery. In Hapka, the court stated that "the Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involves property damage only, and any statement or implication to the contrary in Superwood and its progeny is hereby expressly overruled."

The court noted that it would permit some deviation from the rule in cases where personal injury occurred in commercial and consumer transactions. However, where commercial transactions resulted in property damage, the court refused to supplement the Uniform Commercial Code remedies with negligence and strict liability.

The Hapka decision represented a retreat from prior law by explicitly overruling any exceptions to the economic loss doctrine in commercial transactions other than those based on personal injury. The Hapka court characterized the Superwood language that recognized the "other property" exception as unnecessary to the Superwood holding. The Hapka court further noted that the discussion leading up to the holding in Superwood contemplated an exception for consumer transactions based on unequal bargaining power, yet the holding was the first place that the Superwood court explicitly mentioned the "other property" exception. Accordingly, the Hapka court believed that Superwood's recognition of an "exception applicable to personal injury or damage to other property arising out

69. See S.J. Groves & Sons, 374 N.W.2d at 434 n.2; Fine Arts, 354 N.W.2d at 820 n.4.
70. Hapka, 458 N.W.2d at 688. The court had previously noted that the Uniform Commercial Code covered all commercial transactions and that the language of the code indicates that it is intended to displace tort recovery. Id. at 687. The court pointed to MINN. STAT. § 336.2-719(3) (1992) which states that the exclusion of personal injury from warranties in the sale of consumer goods is unconscionable. Hapka, 458 N.W.2d at 688. As in Superwood, Justice Yetka dissented and argued that the Uniform Commercial Code does not displace the entire field of tort law. Id. at 690 (Yetka, J., dissenting).
71. Hapka, 458 N.W.2d at 688.
72. Id.
73. Id. at 687. The court stated that [Superwood] simply does not comport with excepting economic losses arising out of personal injury or damage to other property when the setting in which the sale occurred was a commercial transaction. Indeed, making tort theories of recovery available in commercial transactions flies in the face of the court's recognition of the intended purview of the U.C.C.
75. Hapka, 458 N.W.2d at 688.
of commercial transactions [was] a non sequitur.”

G. The Legislature Reacts

_Hapka_ resulted in the elimination of tort recovery for economic loss in any commercial transaction, even if the loss was to property not involved in the original transaction. The _Hapka_ court noted that commercial parties are expected to identify risks and negotiate a price based on the allocation of risk agreed upon at the time of contract formation. In 1991, the Minnesota Legislature codified this judicial result in Minnesota Statutes section 604.10.

The statute incorporates the pre-_Hapka_ “other property” exception to all transactions except those between merchants in goods of the kind. The statute provides:

(a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.

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76. _Id._ at 687. The court’s assertion is a slight overstatement. Throughout the _Superwood_ decision, the court referred to the need for strict liability and negligence theories to protect consumers. Strict liability was developed to “fill gaps in the law of sales with respect to consumer purchasers.” _Superwood Corp. v. Siempelkamp Corp._, 311 N.W.2d 159, 162 (Minn. 1981), _overruled in part by_ _Hapka v. Paquin Farms_, 458 N.W.2d 683 (Minn. 1990) (citations omitted). The Uniform Commercial Code, on the other hand, was said to “[clarify] the rights and remedies of parties to commercial transactions.” _Id._ The sentence before the holding in _Superwood_ stated: “[I]miting the application of strict products liability to consumers’ actions or actions involving personal injury will allow the U.C.C. to satisfy the needs of the commercial sector and still protect the legitimate expectations of consumers.” _Id._ (emphasis added). The holding, which begins a new paragraph, states “[f]or these reasons, we hold that economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability.” _Id._ (emphasis added). While the court’s statement in _Hapka_ that the exception for “other property” is a non sequitur is accurate, the _Superwood_ court did contemplate an exception for personal injury in commercial transactions. How such a suit would be brought, given the holding in _S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp._, 374 N.W.2d 431 (Minn. 1985), _overruled in part by_ _Hapka v. Paquin Farms_, 458 N.W.2d 683 (Minn. 1990), is at best uncertain.

77. _Hapka_, 458 N.W.2d at 688.


80. _Id._ The remainder of the statute provides:

(b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.

(c) The economic loss recoverable in tort under this section does not include economic loss due to damage to the goods themselves. _Minn. Stat._ § 604.10(b), (c) (1992).

To date there has been no case law interpreting the statute. The Minnesota
III. 80 SOUTH EIGHTH and LLOYD F. SMITH

Against this historical and legal backdrop, the Minnesota Supreme Court decided 80 South Eighth and acknowledged that the existing paradigm required the court to find tort remedies unavailable. Instead the court chose to redefine "economic loss" and, in so doing, declared a type of loss—intuitively economic—to be noneconomic.

Four months later, in footnote five of the Lloyd F. Smith decision, the court noted that "economic loss" is merely a "shorthand phrase" for indicating that a loss is recoverable in contract. By changing the focus of the court’s analysis from a determination of the nature of a loss to a determination of the preferred theory of recovery, the court severely modified the economic loss doctrine.

A. 80 South Eighth—The Beginning of the End


In 1986 and 1987, 80 South Eighth learned that fireproofing materials containing asbestos were on the beams and columns of all...
floors of the IDS Tower, all floors of the IDS annex, and both floors of the Woolworth building. The partnership conducted tests that showed the fireproofing made by Grace released substantial numbers of asbestos fibers even when undisturbed. 80 South Eighth then instituted costly maintenance procedures to keep the ceiling tiles and light fixtures free from asbestos fibers.

In 1988, the partnership brought suit seeking compensatory damages for maintenance, removal, and replacement of the asbestos, punitive damages, and litigation costs. Despite the expiration of the statute of limitations, the suit was allowed pursuant to a 1987 statute which revived actions against manufacturers or suppliers of asbestos and asbestos containing materials.

The suit alleged that the parties responsible for constructing the building were unaware that the fireproofing materials used contained asbestos. There were no direct claims for personal injury, nor were there any allegations that any personal injuries had resulted from the presence of the asbestos.

Three questions were certified to the Minnesota Supreme Court on the issue of liability in negligence and tort. The court held that

88. 80 South Eighth, 486 N.W.2d at 395.
89. Id.
90. Id.
92. MINN. STAT. § 541.22 (1992). The revival statute provides:
  Subdivision 1. Findings and purpose. The legislature finds that it is in the interest of the general public, particularly those persons who may bring claims regarding materials containing asbestos and those against whom the claims may be brought, to set a specific date by which building owners must bring a cause of action for removal or other abatement costs associated with the presence of asbestos in their building. By enactment of this statute of limitations the legislature does not imply that suits would otherwise be barred by an existing limitations period.
  Subdivision 2. Limitation on certain asbestos actions. Notwithstanding any other law to the contrary, an action to recover for (1) removal of asbestos or materials containing asbestos from a building, (2) other measures taken to locate, correct, or ameliorate any problem related to asbestos in a building, or (3) reimbursement for removal, correction, or amelioration of an asbestos problem that would otherwise be barred before July 1, 1990, as a result of expiration of the applicable period of limitations, is revived or extended. An asbestos action revived or extended under this subdivision may be begun before July 1, 1990.
93. 80 South Eighth, 486 N.W.2d at 395.
94. Id.
95. The three questions certified to the court were (1) whether Minnesota's economic loss doctrine prevents the owner of a building with asbestos-containing fireproofing from suing the manufacturers of the fireproofing in tort; (2) if so, whether Chapter 352 of the 1991 Minnesota Sessions Laws (codified at MINN. STAT. § 604.10 (1992)), which reinstated the "other property" exception for nonmerchant parties,
the costs of maintaining, repairing, and replacing the fireproofing were not economic losses under *Hapka* and therefore were recoverable in tort.97

Based on the holding in *Superwood* as modified by *Hapka*, the *80 South Eighth* court concluded that, if the loss suffered by the 80 South Eighth partnership were an "economic loss," the court would be required to hold that it was not recoverable under Minnesota decisional law.98 The *80 South Eighth* court noted that the damages sought by 80 South Eighth closely resembled those sought by the Minneapolis Society of Fine Arts in the 1984 case.99 In *Fine Arts*, the court held that the diminution in value of a building due to a defect in one of its components and the cost of repairing and replacing the defect, were "economic losses" and that damage to the building could not be considered "other property."100

The court distinguished *80 South Eighth* from *Fine Arts* by finding that "economic loss" is limited to loss related to a product's failure to perform as promised.101 Noting that commercial parties are presumed to bring experience and expectations to the contract formation process,102 the *80 South Eighth* court relied on language from *S.J. Groves & Sons* to limit the types of expectations arising from a contract to those concerning suitability, quality, and performance.103 The court stated that the distinguishing factor in *80 South Eighth* was

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97. *Id.* at 399.

98. *Id.* at 396.


100. *Fine Arts*, 354 N.W.2d at 820-21.


102. The *80 South Eighth* court noted that the underlying assumption in all its economic loss cases is that commercial parties bring their experiences in the marketplace to the negotiations; that their reasonable contemplation is embodied in the transaction; that at the time of the contract formation they have defined the product, identified the risks, and negotiated a price of the goods that reflects the relative benefits and risks to each party. *Id.* at 396 (citing *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990)).

103. *80 South Eighth*, 486 N.W.2d at 397 (citing *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431, 434 (Minn. 1985), *overruled in part* by *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990)).
that the fireproofing had not failed to perform as fireproofing.104 Had the claim been for failure to protect against fire, only contract damages would be available because such a claim would arise from "failure to meet expectations of suitability, quality, and performance."105 But, reasoned the 80 South Eighth court, the damages sought by the plaintiffs were related to efforts to eliminate the risk of injury and make the building safe for those using the property; therefore the damages were not "economic losses."106

In 80 South Eighth, the court began the process of discrediting "economic loss" as a meaningful tool in analyzing future cases where tort and contract theories of recovery collided. While previous economic loss cases focused on the contrast between commercial and consumer transactions,107 80 South Eighth ignored this distinction. Instead, the court focused on the product involved to determine the appropriate remedy without explicitly recognizing an exception to the economic loss rule.

B. Lloyd F. Smith—Death by Footnote

Only four months later, in Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., the Minnesota Supreme Court attempted to clarify the language of 80 South Eighth and to reconcile that holding with its previous economic loss decisions.108 On January 15, 1988, a fire in the office of Dr. Thomas Vukodinovich caused substantial damage to a building owned by the Lloyd F. Smith Company. The fire also damaged the property of Dr. Vukodinovich and the property of three other tenants in the building.109 The fire was allegedly caused by a defect in the motor of a dental chair purchased third-hand by Dr. Vukodi-

104. Id.
105. Id.
106. 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 397 (Minn. 1992). The 80 South Eighth court provided two policy justifications for its decision. First, the court stated that, while a manufacturer should not be liable in tort for failure of its product to meet the performance expectations of its customer's business, it could and should be held liable for producing a product that creates an unreasonable risk of harm. Id. at 398 (citing Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965)). Tort law, stated the court, has as one of its objectives the deterrence of such risks. Id. at 398. Accordingly, the court's decision will encourage building owners to take steps to protect the public by eliminating asbestos contamination. Id. Second, the court justified its decision on the basis of the revival statute. Id. at 398-99. The revival statute, the court contended, was an express direction of legislative intent that "asbestos removal claims be treated differently from claims of economic loss which fall under the Uniform Commercial Code." Id. at 399.
108. 491 N.W.2d 11 (Minn. 1992).
After the fire, the owner of the building, Dr. Vukodinovich, the other tenants, and a dentist for whom Dr. Vukodinovich was storing property, brought tort and breach of warranty claims against the manufacturer of the chair, Den-Tal-Ez, Inc. and the manufacturer of the motor, Emerson Electric, Inc.

The trial court concluded that the damages being sought were for "other property" arising from a commercial transaction so that the Uniform Commercial Code provided the exclusive remedy. The trial court granted the defendants' motion for summary judgment.

The Minnesota Court of Appeals affirmed because the Code's four-year statute of limitations had run on the breach of warranty claim.

The Minnesota Supreme Court reversed, holding that because Dr. Vukodinovich was not a merchant with respect to dental chairs and because the other plaintiffs were not parties to a commercial transaction related to the chair, recovery in tort was appropriate. The court noted that the definition of a commercial transaction, for purposes of determining whether the appropriate recovery lies in tort or in contract, is narrow, including only those transactions that involve merchants in goods of the kind sold.

The Lloyd F. Smith case offered the court an opportunity to clarify the type of damages recoverable in tort. The court noted that the damages sought by the plaintiffs were clearly "other property" damages recoverable under Superwood but apparently not recoverable since the modification of the "other property" exception in Hapka. Rather, the case turned on the nature of the underlying sale transaction.

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110. Id. at 13. The chair was originally purchased from Den-Tal-Ez prior to 1975. At least 13 years had elapsed between manufacture of the chair and the fire. Id.
111. Id.
112. Id. at 13.
114. Id. at 16-17.
115. Id.
116. Id. at 13.
118. Id. (citing Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990)). The plaintiffs did not seek recovery under MINN. STAT. § 604.10 (1992), which allows tort recovery for damage to other property provided the plaintiff is not a merchant in goods of the kind sold, because the statute was passed while the case was on appeal. Lloyd F. Smith, 491 N.W.2d at 17 n.7. The court did not address whether the statute applied retroactively in Lloyd F. Smith after it found an alternate basis for recovery. Id.
119. Lloyd F. Smith, 491 N.W.2d at 11. The defendants argued that the original sale of the chair was a commercial transaction because the sellers were manufacturing...
The *Lloyd F. Smith* court began its analysis by referring to three methods used by courts throughout the country to analyze whether the Uniform Commercial Code warranty provisions are the exclusive remedy. The first method focuses on the status of the parties. In these cases, warranty remedies apply when the parties are sophisticated commercial entities or merchants. The second set of cases focuses on the nature of the risk. Tort recovery is allowed when the defective product is “unreasonably dangerous from a safety standpoint, not just defective from a performance or quality standpoint.” The final set of cases focuses on the injury-producing event. Under this reasoning, tort recovery is permitted where the damage results from a “sudden and calamitous occurrence.”

While the court found these approaches useful in determining whether only tort or contract remedies are available, they were of limited use in determining whether contract remedies should be exclusive when both tort and contract remedies may be appropriate. In these circumstances, courts must ask whether the loss sought is an “economic loss” or a loss arising from a commercial transaction to determine whether allowing concurrent tort and warranty recovery would undermine the Uniform Commercial Code.

concerns and the buyer purchased the chair for use in his business. *Id.* at 13. They further argued that, because the liberal privity standards adopted by the legislature in Minnesota’s version of the Uniform Commercial Code afford warranty protection to subpurchasers, recovery should be limited to losses based on breach of warranty. *Id.* See Minn. Stat. § 336.2-318 (1992) (providing that warranty protection extends to any person injured due to breach of warranty if that person is reasonably expected to be affected by the goods). Finally, the defendants noted that the court of appeals had twice held that other property damages resulting from defects in products purchased secondhand were not recoverable in tort. *Lloyd F. Smith*, 491 N.W.2d at 13 (citing Nelson v. International Harvester Corp., 394 N.W.2d 578, 581 (Minn. Ct. App. 1986); TCF Bank & Savings, F.A., v. Marshall Truss Sys., Inc., 466 N.W.2d 49 (Minn. Ct. App. 1991)). Dr. Vukodinovich argued that he was only a “casual buyer” of the chair, acquired when he purchased the practice of another dentist. The other plaintiffs noted that they had no connection with the chair other than being in the same office building. *Lloyd F. Smith*, 491 N.W.2d at 14.

120. *Lloyd F. Smith*, 491 N.W.2d at 14.
121. *Id.*
122. *Lloyd F. Smith* Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 14 (Minn. 1992) (citing Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990); S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 434 (Minn. 1985)).
123. *Id.* at 14 (citing 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393 (Minn. 1992)).
125. *Id.* at 14.
126. *Id.* (citing S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 435 (Minn. 1985) (rejecting the “sudden and calamitous occurrence” exception)).
128. *Id.*
five, the court noted that, when damages resulting from a defective product "are recoverable in a breach of warranty action, they are called an 'economic loss' but when recovered in a tort action they are said to be non-economic damages. Thus the term 'economic loss' is a useful shorthand phrase in the law of sales for contract damages . . . ."129

Further, the court stated that, in reviewing cases where tort and contract overlap, the issue becomes not whether a particular loss is economic but rather under what theory the loss should be recoverable.130 The court then proceeded to set forth the analysis to be applied in future cases where tort and contract overlap.131 The court noted that where the injury results from damage to the property purchased, warranty law governs all recovery, including costs of repairing the product and lost profits due to the inability to use the product.132 When the injury is damage to "other property", however, the focus is on the status of the buyer relative to the seller.133 For third parties injured by a defective product, tort remedies are appropriate.134 The court concluded that the Uniform Commercial Code provided exclusive remedies for "other property" only when the damage arose out of a sale that fit "Hapka's narrow definition of a 'commercial transaction.' "135

IV. Analysis

A. 80 South Eighth—Narrow Precedents Make Bad Law

The 80 South Eighth decision is inconsistent with prior Minnesota cases discussing the economic loss doctrine. The economic loss doctrine, as it evolved in Minnesota since its inception in Superwood Corp.

129. Id. at 14 n.5. Footnote five states:

The term "economic loss," we might add, can be somewhat confusing, if not understood in context. Damages for loss of property and for consequential damages caused by a defective product are generally recoverable, at least in this state, either by a breach of warranty action or a tort action. . . . When these damages are recoverable in a breach of warranty action, they are called an "economic loss" but when recovered in a tort action they are said to be noneconomic damages. Thus the term "economic loss" is a useful shorthand phrase in the law of sales for contract damages, but it is no help in determining whether a contract or tort remedy should apply to a particular set of facts.

Id. (citations omitted).

130. Id.

131. Id. at 15-17.


133. Id. at 16-17.

134. Id. at 17.

135. Id.
ECONOMIC LOSS DOCTRINE

v. Siempelkamp Corp., was simply not meant to apply to cases involving products, such as asbestos, that are widely used but also highly dangerous. In the past, the court consistently emphasized that the role of the economic loss doctrine was to preserve the integrity of the Uniform Commercial Code. Accordingly, the court focused primarily on the nature of the underlying transaction. In those cases involving a transaction between a commercial buyer and seller, there was no recovery in tort, regardless of the type of injury or the nature of the property damaged.

In 80 South Eighth, the court presumably compromised its original intent of preserving the distinction between tort and contract and permitted recovery. The decision in 80 South Eighth contains numerous citations to cases involving asbestos removal from schools and other publicly owned buildings. Perhaps the court was compelled to permit tort recovery in 80 South Eighth because of a concern for a public entity's ability to recover the costs associated with asbestos abatement.

In addition, narrowly tailored precedent limited the court's options in 80 South Eighth. Therefore the court was forced to adopt a new definition of "economic loss" because the common law "other property" exception had been modified by Hapka. Reliance on the statutory "other property" exception was not an alternative be-

136. 311 N.W.2d 159 (Minn. 1981), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).
137. Although W.R. Grace disputed the danger of asbestos in fireproofing, the 80 S. Eighth court appears to have accepted that the fireproofing material was dangerous. 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 398 (Minn. 1992). This position is interesting in light of the disputed nature of the claim and the procedural posture of the case. The case arose from a summary judgment motion by Grace. Accordingly, the court was required to construe the facts in the light most favorable to the nonmoving party (here, the 80 South Eighth Street partnership). Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981) (quoting Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955)). The court never mentioned this requirement in the opinion. Rather, it presented the case as though findings of fact had been made. Grace's petition for rehearing was based in part on the court's presentation of the facts in the published decision. Grace pointed out that the court's decision presented as fact many issues which were in serious dispute and had not been decided by a finder of fact. Appellant's Petition for Rehearing at 6-11, 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393 (Minn. 1992) (No. C1-91-1427).
139. See supra note 76.
140. 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 397 (Minn. 1992).
141. The 80 South Eighth court acknowledged that if the loss was "economic," tort
cause it conflicted with the holding in *Fine Arts* that damage to a building from its components is not damage to "other property." 142 Likewise, the court could not rely on the statutory "other property" exception because the 80 South Eighth partnership was a merchant with respect to real estate. If the court were to allow the partnership recovery under the common law, the focus of the analysis would have to change. 143 The result was a decision that is inconsistent with previous Minnesota decisions.

1. Erosion of the Role of the Uniform Commercial Code

Most significantly, the treatment of the Uniform Commercial Code in the *80 South Eighth* decision represented a marked departure from prior Minnesota economic loss doctrine cases. 144 Despite the court's attempt to reconcile the decision with precedent, the tort recovery permitted in *80 South Eighth* was clearly inconsistent with the rationale underlying the doctrine's limits on tort recovery. 145 The *Superwood* court noted that the purpose of tort law is to "fill gaps in

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143. See James E. Moore, supra note 4. Moore notes that one of the most significant problems with the economic loss doctrine is that courts recite a definition of "economic loss" or "other property" then fail to apply the definitions to the facts of the case. Rather, Moore claims, the courts tend to be results oriented, with holdings based on an unarticulated policy rather than on the definition of "economic loss" or "other property." Moore, supra note 4, at 121. *80 South Eighth* appears to be such a case.

144. Although a comprehensive discussion of the relationship between the Uniform Commercial Code and common law is beyond the scope of this note, several sections of the Code merit discussion. First, section 1-102(1) states that the Code is to be construed and applied liberally to promote its underlying purposes. *Minn. Stat.* § 336.1-102(1) (1992). Second, the primary purpose of the statute is to "simplify, clarify, and modernize the law governing commercial transactions." *Minn. Stat.* § 336.1-102(2)(a) (1992). Finally, it is clear that the Code was intended to displace portions of the common law that relate to provisions covered by it. Section 1-103 notes that the common law is to supplement the Code, unless it is specifically displaced by the provisions thereof. *Minn. Stat.* § 336.1-103 (1992). These provisions make it clear that the warranty provisions are to be liberally applied to supplant tort claims for product defects, at least in commercial transactions.

145. The *80 South Eighth* court cited one of the most often repeated passages from *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) in support of its position that tort recovery is appropriate. The passage from *Seely* noted that the distinction between tort and contract recovery is not based on the presence or absence of personal injury. Rather, the nature of the manufacturer's responsibility is the critical factor. Manufacturers, it was said, are not liable in tort for failure of the product to meet performance expectations. They are liable if the goods create an unreasonable risk of harm, with harm measured from a safety standard. *Seely*, 403 P.2d at 151. The Minnesota Supreme Court then stated that asbestos may create an unreasonable risk of harm, and therefore, tort recovery was appropriate. *80 South Eighth*, 486 N.W.2d at 398.
the law of sales with respect to consumer purchasers."146 Thus, in S.J. Groves & Sons, the court noted that strict liability should be limited to consumer actions.147 The emphasis in strict liability is on protecting consumers who are not equipped to bargain or to protect themselves from unreasonable risks. Another purpose of tort law is deterrence of unreasonable risks of harm.148

Moreover, with the exception of strict liability, tort theories of liability require a showing of fault. The danger of applying strict liability in a commercial setting, especially in the absence of a showing of fault, is that it imposes open-ended liability for an indefinite time, to an indeterminate class and thereby prevents closure on commercial transactions.149 This is particularly true in a case such as 80 South Eighth where there is no realized personal injury.150

Contract and Uniform Commercial Code warranty law, on the other hand, are intended to cover all commercial transactions.151 In Hapka, the court noted that parties to commercial transactions are expected to be knowledgeable and of relatively equal bargaining power. Warranties are, therefore, to be negotiated at the time of contract formation. The price paid should reflect the agreed upon allocation of risk.152 The Hapka court also noted that opening the door to tort recovery at a later date is simply an attempt to defeat the parameters that were established at the time of contract formation.

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147. S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 433 (Minn. 1985), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990). The view that strict liability should be limited to consumer actions is not unique. Indeed, the emphasis in Seely was on protecting consumers from unreasonable risk of harm. See David E. Bland & Robert M. Wattson, Property Damage Caused By Defective Products: What Losses are Recoverable, 9 WM. MITCHELL L. REv. 1, 7 (1983). Bland and Wattson note that several courts have focused on the kind of danger in determining whether to permit tort recovery. Id. at 8-10. This analysis was criticized by the Minnesota Supreme Court in S.J. Groves & Sons, 374 N.W.2d at 434-35.


149. See, e.g., Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

150. The court specifically acknowledged that no personal injuries had occurred at the time the suit was filed. 80 South Eighth, 486 N.W.2d at 398. Rather, the plaintiff was allowed to recover for potential future injuries to parties whose only relationship to the plaintiff was that of a customer or an employee of the plaintiff's tenants.

151. Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990). In Hapka, the court noted that the Uniform Commercial Code indicates that it is intended to displace tort law. The Uniform Commercial Code allows incidental and consequential damages, including damages for injury to persons or property proximately resulting from breach. MINN. STAT. §§ 336.2-714(3), -715(2) (1992). The court also noted that exclusion of personal injury liability from warranty coverage in the purchase of consumer goods is per se unconscionable. Hapka, 458 N.W.2d at 688.

152. Hapka, 458 N.W.2d at 688.
The need for certainty and finality in commercial transactions makes such a result unacceptable. Accordingly, the court noted in *Hapka* that there is no basis "in cases of property damage arising out of commercial transactions to heap tort theories of negligence and strict products liability atop those remedies already provided by the U.C.C."\(^{154}\)

The facts of *80 South Eighth* clearly point to imposing only contract liability. The 80 South Eighth partnership was a commercial entity that purchased the building in a commercial transaction from the prior owner. The prior owner was also a commercial entity,\(^{155}\) and contracting for the construction of the building was certainly a commercial transaction. The general partner undoubtedly had significant experience in purchasing and managing buildings and should not be allowed to profit from its failure to negotiate allocation of the risk that asbestos would be present.

2. *Implied Warranty of Merchantability*

Although the *80 South Eighth* court superficially acknowledged the inconsistency of its decision with prior case law, the court failed to address the role of the implied warranty of merchantability contained in the Uniform Commercial Code.\(^{156}\) The warranty of merchantability requires that goods must be "fit for the ordinary purposes for which [they] are used."\(^{157}\) Intuitively, a product that performs a usually harmless function in a dangerous manner could not be fit for its ordinary purposes. The court's failure to explain why the protection offered by the Uniform Commercial Code's implied warranty of merchantability did not provide adequate protection in a case involving sophisticated commercial parties ignores the spirit of the *Superwood* line of decisions that emphasized the court's desire to preserve a large role for the Uniform Commercial Code.\(^{158}\)

\(^{153}\) *Id.* The California Court of Appeals proposed a four-part test for determining whether strict liability or contract damages should apply. Kaiser Steel Corp. v. Westinghouse Elec. Corp., 127 Cal. Rptr. 838 (Ct. App. 1976). The test noted that contract damages are appropriate in cases where the parties deal in a commercial setting, the parties are of nearly equal bargaining strength, the parties actually bargain, and the parties bargain about the allocation of the risk of loss. *Id.* at 845. Although this approach has merit, it requires the courts to investigate the contract formation process in great detail. Moreover, its fact specific nature sacrifices efficient administration of justice.

\(^{154}\) *Hapka*, 458 N.W.2d at 688.


\(^{156}\) MINN. STAT. § 336.2-314 (1992).


\(^{158}\) See, e.g., *Hapka* v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990); S.J. Groves &
3. Irreconcilable Definitions of Economic Loss

The definition of “economic loss” contained in 80 South Eighth is also inconsistent with the definition set forth in Fine Arts.\textsuperscript{159} Many courts have defined “economic loss” as including diminution in value, the cost of repairing the defect, the cost of replacing the defective product, and damages for loss of use of the product.\textsuperscript{160} In Fine Arts, the court noted that failure to apply this definition in cases where a component of a building has failed would “emasculate the U.C.C. provisions as they apply to component suppliers.”\textsuperscript{161}

In 80 South Eighth, the court acknowledged that the losses sought fell squarely within the definition of “economic loss” set forth in Fine Arts;\textsuperscript{162} nevertheless, it developed a new analysis in the 80 South Eighth. Here, the court declared that “economic loss” would only include loss resulting from a product’s failure to perform as promised.\textsuperscript{163} Because the fireproofing had not failed to protect against fire, but rather had performed in an unsafe manner, the loss was not “economic.”\textsuperscript{164} The court did not address the concerns it expressed in Fine Arts that applying a definition of economic loss that excluded the costs of repairing and replacing defective components to a building situation would emasculate the Uniform Commercial Code as to component suppliers.\textsuperscript{165}

4. The “Unreasonably Dangerous Product” Exception

Creating an exception to the economic loss doctrine for unreason-
ably dangerous products would have required the court to overrule prior decisions.\textsuperscript{166} The \textit{80 South Eighth} court flirted with the idea, noting that asbestos was a dangerous product.\textsuperscript{167} The court also considered another alternative. The court pointed to the revival statute, which altered the statute of limitations for asbestos actions, as evidence that the legislature had considered asbestos unique and worthy of different treatment.\textsuperscript{168} However, the court ultimately grounded its decision in the language of the existing economic loss doctrine, holding that replacement of asbestos is not an “economic loss.”\textsuperscript{169} This holding was based on the court’s conclusion that the risk that a building would be contaminated with asbestos was simply not the type of risk that parties would bargain over in a commercial transaction.\textsuperscript{170}

The court did not address the possibility that when the \textit{80 South Eighth} partnership purchased the building it may have paid a lower price as a result of such risk.\textsuperscript{171} If the price was reduced because of the presence of asbestos, the court’s decision resulted in the plaintiff receiving a better bargain from the courts than it could receive from the prior owner.

5. \textit{Recovery for Potential Injury to Another}

The \textit{80 South Eighth} decision also failed to discuss why the \textit{80 South Eighth} partnership, rather than the person who eventually suffers injury from asbestos, should be entitled to a tort recovery. The asbestos contained in the IDS Center threatens harm to the customers and tenants as well as the buyer. However, because there is no

\begin{itemize}
  \item \textsuperscript{166} See Thofson v. Redex Indus., Inc., 433 N.W.2d 901 (Minn. Ct. App. 1988).
  \item \textsuperscript{167} \textit{80 South Eighth}, 486 N.W.2d at 398.
  \item \textsuperscript{168} \textit{80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc.}, 486 N.W.2d 393, 398 (Minn. 1992).
  \item \textsuperscript{169} \textit{Id.} at 397.
  \item \textsuperscript{170} \textit{Id.} at 396. The court cited several cases which it claimed supported its conclusion that persons acquiring property do not bargain over the risk associated with asbestos. \textit{Id.} at 397-98. There is, however, a significant distinction between the plaintiffs in the cited cases and the \textit{80 South Eighth} case plaintiff. The position of the court may be valid with respect to the plaintiff who hires a contractor to construct a new building or a school district or municipality with little experience in constructing buildings. However, the \textit{80 South Eighth} partnership is not such a party. The general partner was a sophisticated commercial real estate development company.
  \item \textsuperscript{171} In its brief, W.R. Grace contends that the plaintiff knew that the building’s fireproofing contained asbestos. Appellant’s Brief at 8-11, \textit{80 South Eighth St. Ltd. Partnership v. Carey Canada, Inc.}, 486 N.W.2d 393 (Minn. 1992) (No. C1-91-1427). If this is the case, the court could conclude that either a reduced price was paid based on the risk or the plaintiff paid full price assuming that it would recover the cost of abating and replacing the asbestos in an action such as this. It is not the role of the courts to ensure that the plaintiff’s litigation expectations at the time of contract formation are met.
\end{itemize}
threat of physical harm to the partnership, the only real harm to it is the cost of replacement.

It is not at all clear how the court would distinguish this case from *S.J. Groves & Sons*, where the purchaser of the goods did not suffer personal injury. In *S.J. Groves & Sons*, the court stated that "even if a tort injury arose out of the same occurrence, Groves did not suffer it, rather Groves lost only what it purchased." 172

The *80 South Eighth* court attempted to justify its holding by noting that the long latent period of asbestos related diseases would make it unfair to require a plaintiff to wait until an injury occurs to permit recovery. 173 This assertion, however, does not address the real issue. The logic of *S.J. Groves & Sons* suggests that those at risk should recover, not a purchaser of defective goods who sustains no personal injury. Allowing the partnership to recover merely permits it to profit from a potential future injury to its tenants and their customers. A more equitable solution would be to require the defendant to establish a trust fund to be administered for the benefit of future victims.

Also, allowing tort recovery to a commercial entity based on the risk of a future personal injury to a yet unidentified party, with an unknown relationship to the plaintiff, creates several problems. First, it is inconsistent with the usual requirement that damage occur before negligence is actionable. 174 Second, because the damage has not yet occurred, both the existence and the extent of damage is "wholly speculative." 175 Third, there is no mechanism to ensure that the recovery by the plaintiff bears a reasonable relationship to the risk that exists or the harm that occurs. 176

6. Application of the Statutory "Other Property" Exception

The Minnesota courts have construed the "other property" definition very narrowly. 177 In *80 South Eighth*, the plaintiffs sought to replace the fireproofing—not the damages to the building itself. 178

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174. *See Barrett, supra note 5 at 918-19.*

175. *Id.*

176. *Id.*


The court acknowledged that the damages sought by the plaintiff closely resembled those sought by the plaintiff in Fine Arts, and therefore could not be considered "other property." 179

Even if the property damage were determined to fall within the statutory property exception, the 80 South Eighth partnership could not recover under this exception. In order to preserve a place for the Uniform Commercial Code in sales of goods used in construction, the court would have to determine merchant status relative to the building as a whole rather than simply the component parts. If merchant status were determined on the basis of component parts, only the sellers of components could be considered merchants in any kind of building. Such a result would provide that the many sophisticated individuals and entities who invest in numerous commercial real estate projects would not be considered merchants with respect to the component parts. To characterize such entities as nonmerchants would emasculate the Uniform Commercial Code in the area of commercial real estate development by allowing tort recovery whenever a component of a building failed. Based on the activities of Oxford Development, the general partner in the 80 South Eighth partnership and a large commercial real estate manager and developer, the plaintiff in 80 South Eighth must be considered a merchant in commercial building for purposes of the statute. Failing to do so would create so large a loophole in the definition of "merchant," as to render the definition virtually meaningless.

The facts of 80 South Eighth are easily distinguishable from asbestos cases involving school districts or other public entities because the recovery could be related not to the product but rather to the merchant status of the parties. Thus, the court's departure from precedent was unnecessary. While imposing strict liability may encourage the property owner to remove asbestos, 180 it is more likely to create a windfall for the partnership, which may have paid a lower price for the property than it would have paid for an asbestos-free building. What the 80 South Eighth case did create was an uncertainty as to the focus of future economic loss cases.

B. Lloyd F. Smith Co.—The Court's Framework for the Future of Economic Loss in Minnesota

As a result of the court's redefining "economic loss" in 80 South Eighth, the focus of the analysis in future cases is unclear. The 80 South Eighth decision purported to leave prior case law, all of which

179. Id. at 396.

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had focused on the nature of the sale transaction, intact. At the same time, however, it suggested that courts should focus not only on the nature of the underlying sale transaction but on the product itself.

Some clarification came four months after 80 South Eighth, when the Minnesota Supreme Court decided Lloyd F. Smith Co. v. Den-Tal-Ez, Inc. The Lloyd F. Smith court returned to its previous emphasis on the nature of the underlying transaction as the basis for determining the appropriate remedy and also clarified, in footnote five, that the real issue confronting the courts in economic loss cases was not whether the loss was economic but whether recovery in tort would be consistent with the spirit of the Uniform Commercial Code. By implicitly recognizing that Minnesota has adopted the "unreasonably dangerous product" exception as a basis for finding that recovery lies in tort, the court dispelled the illusion that the cost of replacing asbestos is not an "economic loss."

More importantly, the Lloyd F. Smith court presented a framework for analyzing cases bordering on tort and contract that focuses on the nature of the underlying transaction. The framework and its exceptions are consistent both with the language of the Uniform Commercial Code and the goal of protecting society from unreasonably dangerous products. Nevertheless, the framework is incomplete because it does not explicitly provide a definition of "other property" or address cases where elements of both a commercial and a consumer transaction are present.

The court's new approach involves a three-part analysis. First, if the product is "unreasonably dangerous," full recovery in tort is available. To date, asbestos has been declared an "unreasonably dangerous" product, but the court has not provided any indication of what standards are to be used to determine whether a product is "unreasonably dangerous." The court did not explicitly adopt the "unreasonably dangerous" product characterization as a basis for recovery in either 80 South Eighth or Lloyd F. Smith. However, the inference that this basis for recovery has been adopted in Minnesota

181. Id. at 396.
182. Id. at 397.
183. 491 N.W.2d 11 (Minn. 1992).
184. Id. at 14 n.5.
185. Id. at 14.
186. Id.
187. The court apparently continued to believe that even commercial plaintiffs who suffer only economic injury should recover for "unreasonably dangerous products." Lloyd F. Smith, 491 N.W.2d at 14.
188. Lloyd F. Smith, Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 14 (Minn. 1992) (citing 80 S. Eighth St. Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393 (Minn. 1992)).
is essential if *80 South Eighth* is to be interpreted consistently with the *Lloyd F. Smith* holding.

In *Lloyd F. Smith*, the court held that the Uniform Commercial Code provides the exclusive remedy for "other property" damages that arise from a "sale of goods only when that sale fits Hapka's narrow definition of a 'commercial transaction,' i.e. where the parties to the sale are . . . 'merchants in goods of the kind.'"189 The court further explained that actions for damage to the defective product itself are always limited to Uniform Commercial Code remedies.190 As noted previously, the plaintiff in *80 South Eighth* would have to be considered a merchant in commercial building.191 Accordingly, regardless of whether the damage is to "other property" or to the product itself, the partnership could not recover except under an exception to the general rule.192

The second part of this analysis relates to whether recovery is sought for the goods purchased. If so, recovery is limited to contract damages, regardless of whether the original transaction was "commercial" or "consumer" oriented.193 In these cases, the loss results from failure of the product to meet the bargained for expectations.194 The language of the Uniform Commercial Code clearly provides protection to consumer transactions. To permit tort recovery in these circumstances would override the warranty agreement and create excessive risk exposures for sellers.195

Once these exceptions to the general rule are eliminated, the seminal question becomes whether the underlying transaction was a commercial transaction or a consumer transaction.196 If the underlying transaction is a consumer transaction, damage to "other property" is recoverable in tort.197 Alternatively, if the underlying transaction is a commercial transaction, no recovery for damage to "other property" is allowed.198

Consumers are permitted a tort recovery for several reasons. First, the court noted that consumers frequently lack the bargaining experience of merchants and therefore should be allowed a full range of remedies.199 The court noted that consumer losses can be

189. *Lloyd F. Smith*, 491 N.W.2d at 17.
190. Id.
191. See supra note 87.
194. Id.
195. *Lloyd F. Smith*, 491 N.W.2d at 17. The court made it clear that the exclusivity also governs consequential damages. Id.
196. Id. at 15.
198. Id.
199. Id. at 15 (citing Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990)).
substantial and the consumer is both ill-equipped to cope with the loss and to protect against it.\textsuperscript{200} Allowing tort recovery for a consumer in this instance does not conflict with the purposes of the Uniform Commercial Code.\textsuperscript{201}

Another policy reason given for permitting consumers to recover relates to the different statutes of limitations for tort and contract suits.\textsuperscript{202} Although the statute of limitations for tort actions in Minnesota is only two years longer than that for Uniform Commercial Code actions,\textsuperscript{203} the statutes start to run at significantly different times. In Uniform Commercial Code actions for breach of warranty, the statute starts to run at the time the goods are delivered.\textsuperscript{204} In tort actions, the statute does not start until the injury occurs.\textsuperscript{205} The Lloyd F. Smith court noted that the interest in compensating the injured outweighs the need for a short limitation on commercial transactions so that tort recovery is appropriate in consumer transactions.\textsuperscript{206} In addition, consumers may be less likely to detect a latent defect in a product's design during the Uniform Commercial Code warranty period than are sophisticated commercial parties.

In summary, the court's framework provides that if the damages sought are for an "unreasonably dangerous" product, tort recovery is available regardless of the status of the plaintiff. If the recovery sought is for damage to the goods, including damages for repair, replacement, and loss of use of the product, recovery in tort is unavailable. Finally, if the recovery sought is for damage to "other property," consumers are entitled to recover while merchants in goods of the kind are not.

\textbf{C. A Proposal for Improving the Long Term Viability of the New Framework}

The court's framework is incomplete and must be supplemented

\begin{itemize}
\item The court referred in both cases to the example of a defective coffee pot which sets fire to a building, resulting in a significant loss to "other property." In this hypothetical, the court noted, it would be unjust to limit the consumer's recovery to warranty based remedies. \textit{Id.}
\item Lloyd F. Smith, 491 N.W.2d at 15.
\item Id.
\item Id. at 16.
\item Id. The statute of limitations in Minnesota for tort actions is six years. MINN. STAT. § 541.05 (1992). The statute of limitations for U.C.C. claims is four years. MINN. STAT. § 336.2-725(1) (1992).
\item Id.
\item MINN. STAT. § 336.2-725(2) (1992).
\item Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 16 (Minn. 1992).
\item Id. The court discussed this issue with respect to personal injuries and used this language to support its holding in 80 South Eighth. The court also noted that damage to a home or personal property is sufficiently similar to personal injury to permit the extended statute of limitations. \textit{Id.}
\end{itemize}
for long term viability. The Lloyd F. Smith court addressed the appropriate remedy in cases where the purchaser was clearly commercial or clearly consumer. The holding implied that, in certain cases, a person acquiring goods for use in a business may be treated as a consumer. The court did not, however, address how it would determine when such a transaction was a consumer transaction. In addition, the court did not discuss the appropriate definition of “other property” to be applied in future cases. If the new framework is to be useful to practitioners and the court, it must be supplemented with a more detailed discussion of these issues.

1. Supplements to the Court’s Framework

The language of Lloyd F. Smith can be used to derive a test for distinguishing between commercial and consumer transactions in those cases where either position is equally viable. In treating the dentist in Lloyd F. Smith as a consumer, the court suggested that future economic loss cases would apply a “narrow definition of ‘commercial transactions.’”207 Here, the dentist was a “casual buyer”208 of dental chairs. However, the court did not indicate whether the dentist would be treated as a commercial party under other circumstances.

A distinction between occasional purchases for use in a business and regular business purchases is necessary. The dentist or farmer making an occasional purchase resembles a consumer more than a merchant, regardless of whether the product is used in a business. The casual buyer is a small customer who is unlikely to have significant bargaining power relative to the seller. For the same reason, the casual buyer’s knowledge of the product is likely to be substantially less than that of the seller. Accordingly, when making these purchases, the businessperson who is a casual buyer should be treated as a consumer.

Conversely, where a businessperson, such as the dentist in Lloyd F. Smith or the farmer in Thofson,209 is purchasing a product that he or she uses in a business and purchases on a regular basis, the transaction is more commercial in nature and should be treated as such. Here the buyer may have greater bargaining power because of more frequent and higher quantity purchases. Moreover, the purchaser’s

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207. Id. at 17. The court noted that only transactions involving merchants in goods of the kind are considered commercial transactions.

208. For purposes of this discussion, a “casual buyer” is one making a rare rather than a regular purchase. Thus a farmer buying a silo or a grain dryer, presumably a rare occurrence, would be treated as a consumer. That same farmer buying seed, a regular purchase, would be treated as a merchant.

knowledge of the product is likely to more closely approximate that of the seller. In these cases merchant treatment is appropriate.

The result of applying the Lloyd F. Smith framework with the addition of the "casual buyer" distinction is that many parties not formerly allowed to recover for damage to "other property" will be allowed to do so. This expansion of the availability of tort recovery may beillusory, however, because the court has left unaddressed the extent to which it will expand the definition of "other property." Adherence to the current conception of "other property" as outlined in Thofson will severely limit the effectiveness and life span of this new framework.

The Minnesota courts have consistently defined damage to "other property" as that which is not in the contemplation of the parties. Thus, in Thofson, the court of appeals held that grain damaged by a fire in a grain dryer was not recoverable in tort. Yet, the farmer in Thofson had no more bargaining power with the manufacturer than did the original purchasers of the dentist's chair in the Lloyd F. Smith case. Likewise, the destruction of grain from the fire in the grain dryer is not significantly different than the hypothetical home fire started by the defective coffee pot cited as a clearly recoverable in tort in both Lloyd F. Smith and Hapka.

The court's focus on the nature of the transaction to determine whether "other property" is recoverable should be incorporated into the analysis of what constitutes "other property." When purchasing goods, consumers do not generally consider whether the product might damage something commonly used in conjunction with it. Accordingly, the definition of "other property" should include everything except the product actually purchased in the sale transaction. This is consistent with the goals outlined by existing case law and Minnesota statutory law because only parties that are not merchants in goods of the kind may recover "other property" damages.

211. Thofson, 433 N.W.2d at 903.
213. Hapka, 458 N.W.2d at 688.
214. Because recovery in tort would be limited to the damages to the "other property," concerns related to "bootstrapping" a large recovery onto a claim for a nominal damage to "other property," cited by the court in S.J. Groves & Sons Co. v. Aerospatiale Helicopter, Inc., 374 N.W.2d 431, 434 (Minn. 1985), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990) and Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc., 354 N.W.2d 816, 820 (Minn. 1984), overruled in part by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990) would not be warranted. Explicitly limiting recovery to "other property" may actually discourage suits because only nominal damages would be available.
V. Conclusion

The framework that has been gleaned from the language of Lloyd F. Smith and supplemented by this Note, if followed, would provide a reasonable, consistent basis for analyzing cases where both tort and contract remedies are applicable. The framework proposed by the court allows for recovery in tort whenever a product is unreasonably dangerous, in contract only when losses sought are for damage to the good itself, and in tort for damage to "other property" when the plaintiff is a consumer. This Note proposes supplementing the framework to extend the focus on the nature of the party in cases involving mixed commercial and consumer transactions and to the determination of what constitutes "other property."

The framework proposed provides a long term solution for future cases where tort and contract appear to conflict. It is also consistent with the requirements of Minnesota law that permit "other property" damages to be recoverable in tort if the parties are not merchants in goods of the kind. Most importantly, this framework strikes a workable balance between the need to retain the primacy of the Uniform Commercial Code in commercial transactions and the need to protect consumers from defective products.

The principle threat to the framework's longevity is that the court will continue to construe "other property" so narrowly that the new rule will be as unworkable as the old. If the new framework is to survive longer than the economic loss doctrine, a more reasonable definition of "other property" must be developed.