South Carolina Law Review

Volume 57
Issue 3 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 12

Spring 2006

Tort Recovery for Defective Products Posing a Threat of Bodily Harm: An Exception to the Economic Loss Rule

Matthew W. Gissendanner

TORT RECOVERY FOR DEFECTIVE PRODUCTS POSING A THREAT OF BODILY HARM: AN EXCEPTION TO THE ECONOMIC LOSS RULE?

I. INTRODUCTION

Though the economic loss rule helps courts determine whether principles of contract or tort apply in a particular case, courts do not agree on the precise boundary line between the two doctrinal areas. Courts generally agree there is no recovery in tort for a disappointed user of a defective product but recovery is allowed for a user who suffers injury—personal injury or injury to property other than the product itself.[1] However, courts take three positions in cases when only the product itself is injured. First, some courts categorically reject tort remedies in those cases.[2] Second, some courts hold "that a manufacturer's duty to make nondefective products encompass[es] injury to the product itself, whether or not the defect created an unreasonable risk of harm."[3] Third, some courts "differentiate between 'the disappointed users . . . and the endangered ones'" and permit endangered users to sue in tort even when only the product itself is injured.[4]

Recently, in *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*,[5] the United States District Court for the District of South Carolina, sitting in diversity,[6] rejected the third view[7] but later certified to the South Carolina Supreme Court the question of whether a plaintiff may maintain a negligence action for economic loss when injury to only the product itself is accompanied by a threat of economic harm.[8] This Comment disagrees with *Colleton* and argues that South Carolina case law indicates problems with the economic loss rule generally and suggests the state courts' willingness to carve out exceptions to the rule. These cases, considered along with case law from other jurisdictions and with relevant policy considerations, indicate that the South Carolina Supreme Court would likely hold that the economic loss rule does not bar recovery for injury only to the product itself if the defect involves a threat of bodily injury. Part II of this Comment

---

1. *See, e.g.*, Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989) (stating "tort liability only lies where the damage done is to other property or is personal injury").

2. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986) (holding "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself").

3. *Id.* at 868–69.

4. *Id.* at 869–70 (quoting Russell v. Ford Motor Co., 575 P.2d 1383, 1387 (Or. 1978)).

5. C.A. No. 2:04-531-18 (D.S.C. Sept. 6, 2005). See *infra* notes 44–49 and accompanying text for further discussion of *Colleton*.

6. A federal district court sitting in diversity "'must determine issues of state law as it believes the highest court in the state would determine them.'" Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574, 578 n.7 (D.S.C. 2003) (quoting Bettius & Sanderson, P.C. v. Nat'l Union Fire Ins. Co., 839 F.2d 1009, 1019 (4th Cir. 1988)).

7. Colleton Preparatory Acad., Inc., v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 11 (D.S.C. Sept. 6, 2005).

8. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 8 (D.S.C. Jan. 31, 2006). The district court certified the question on the plaintiff's motion for reconsideration of the court's original order. *See id.* at 1.

discusses relevant South Carolina state and federal court decisions regarding whether the economic loss rule bars recovery for injury to the product if a threat of bodily harm accompanies this injury. Part III analyzes other state and federal court decisions, and Part IV analyzes other factors to consider in determining whether an exception to the economic loss rule should be recognized. The conclusion summarizes the likely South Carolina scheme for allowing recovery for threat of personal injury and the reasons behind this scheme.

II. SOUTH CAROLINA JURISPRUDENCE

A. The Early Federal Court View

The United States District Court for the District of South Carolina first hinted at the possibility that the economic loss rule would not bar recovery for injury only to the product itself if there was also a threat of bodily injury in *City of Greenville v. W.R. Grace & Co.*[9] In that case, the city filed suit to recover the cost of removing and replacing asbestos fireproofing that was installed in the city hall.[10] While the city suffered an economic loss, the district court saw "no indication that the South Carolina Supreme Court would reject the view that asbestos contamination in buildings is actionable in tort."[11] In reaching its conclusion, the district court focused on the fact that the asbestos fireproofing had "contaminated the building, damaging property and posing a continual hazard to building occupants and workmen."[12] On appeal, the Fourth Circuit upheld the district court's ruling, determining the threat to life and health caused by asbestos contamination is "not the type of risk that is normally allocated between the parties to a contract by agreement."[13] The Fourth Circuit considered the risk of harm caused by the asbestos contamination and eventually concluded:

> [T]he South Carolina courts would be willing to extend tort liability to the manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment, thereby causing damage to the property owner who has installed the harmful product in his building. . . . We think that a plaintiff such as Greenville should not be required to wait until asbestos-related diseases manifest themselves before maintaining an action for negligence against a manufacturer whose product threatens a substantial and unreasonable risk of harm by releasing toxic substances into the environment.[14]

---

9. 640 F. Supp. 559 (D.S.C. 1986).
10. *Id.* at 562.
11. *Id.* at 564.
12. *Id.*
13. *City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987).*
14. *Id.*

B. *The South Carolina Court of Appeals' Rejection of a Threat Exception*

A year after the Fourth Circuit's ruling in *Grace*, the South Carolina Court of Appeals held in *Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc.*[15] that the economic loss rule prevents the imposition of tort liability on a builder for alleged cracking in the exterior facial brick walls of a condominium building.[16] In the only South Carolina state court decision to discuss recovery for a defective product with a threat of bodily injury, the court rejected the idea that "a negligence action may be maintained against a builder where the risk of personal injury exists, but personal injury has not in fact resulted."[17] The *Carolina Winds* court gave two basic reasons for its holding. First, reasoning that a "buyer does *not* have to wait until a personal injury occurs" because "he may recover damages to remedy the defect by suing the seller forthwith for breach of the warranty of fitness arising from the initial sale," the *Carolina Winds* court rejected the idea that it was unfair for a buyer to have to wait for injury to occur before recovering damages in tort.[18] The second reason was based on their disagreement with the suggestion that the distinction between recovery in tort and recovery in warranty rested upon the "'fortuitous circumstance of the nature of the resultant damage'"[19] and on several important reasons for limiting the buyer to contract remedies.

The court stated that "[t]he gravamen of a negligence action is the existence of actual damage to the person of the plaintiff" and that "damage is uncertain until actual injury results."[20] Therefore, the "quantum of damage" is uncertain without actual injury; damages would be based on speculation and would not bear a reasonable relation to the plaintiff's actual loss.[21] The court also emphasized that "[t]he law of negligence does not make an actor an insurer against all possible harm he may cause" and that to prevent the defendant from becoming the insurer for every "mere risk of harm . . . , some limiting principle is required."[22]

---

15. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988), *overruled by* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989).

16. *Id.* at 89, 374 S.E.2d at 906.

17. *Id.* at 85, 89, 374 S.E.2d at 904, 906.

18. *Id.* at 86, 374 S.E.2d at 904.

19. *Id.* at 86, 374 S.E.2d at 904 (quoting Council of Co-Owners Atlantis Condo. Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 345 (Md. 1986)).

20. *Id.* at 86–87, 374 S.E.2d at 904–05.

21. Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 87, 374 S.E.2d 897, 905 (Ct. App. 1988), *overruled by* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989).

22. *Id.* at 87–88, 374 S.E.2d at 905 (citing Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct. App. 1988)). The lack of any "principled way to categorize types or degrees of risk for the purpose of establishing liability" troubled the *Carolina Winds* court because the "calculation of risk is a complex, fact intensive, infinitely varied, and inevitably imprecise process . . . far beyond the competence of judges or juries." *Id.* at 88, 374 S.E.2d at 905. However, if Judge Bell's statement is correct, then presumably, trying a negligence action is impossible—as judges and juries routinely employ the Hand formula to perform this type of risk calculation in negligence actions. *See* United States v. Carroll Towing Co., 160 F.2d 482 (1947).

C. *Criticism of the* Carolina Winds *Decision*

The *Carolina Winds* court's reasoning is questionable on several grounds. First, the implied warranty claims favored in *Carolina Winds* were essentially negligence claims. Despite its problems with a negligence action, the court noted that the builder could "be held responsible for defective workmanship without blurring the distinction between contract and tort" because the home builder gave "an implied warranty that the work undertaken will be performed in a careful, diligent, workmanlike manner."[23] The implied warranty of workmanlike quality may involve a "negligence-type standard of reasonable care"[24] and "may overlap with negligence in that the standard for breach may be similar, even though statute of limitations or recoverable damages may vary."[25] Furthermore, *Kennedy v. Columbia Lumber & Manufacturing Co.*[26] makes it clear that privity between the home builder and the buyer is irrelevant in an action for implied warranty of workmanlike quality. The court has been "steadfast in holding that privity of contract as a defense to an implied warranty action is abolished in this State."[27]

Second, allowing recovery for a defective product that threatens bodily harm solely under warranty law increases the likelihood that some parties, who should be entitled to a remedy, may be left without a claim. If no tort liability exists, a plaintiff may have no method for recovering the costs of repairing a defect where the statute of limitations on a warranty claim has expired before the defect's discovery, or where the product is covered by only a limited warranty or no warranty at all. In addition, the *Carolina Winds* court recognized that although "warranty gives the injured party, i.e., the person who contracted to have construction work done, a claim for damages for loss of his expectancy," the parties also have the "opportunity to adjust the allocation of risk by agreement, if they so desire."[28] Thus, the ability to adjust risk allocation strengthens the argument for allowing a negligence claim because, if only warranty liability exists, more sophisticated parties may take advantage of less sophisticated parties and contract around the warranty to avoid liability—leaving the injured party with no remedy. Furthermore, though allocation of the risk of personal injury between parties of equal sophistication and bargaining power may be desirable,[29] such allocation is

---

23. *Id.* at 84, 374 S.E.2d at 903 (citing Hill v. Polar Pantries, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951)).

24. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 274 (3d ed. 2004). It is unclear whether the warranty demonstrates a concern for how the work is done, which would indicate "a negligence-type standard of reasonable care," or only a concern for the result of the work, which would indicate a contract-type standard of "whether the work done produced a result that was adequate for the purpose involved." *Id.*

25. *Id.* at 292.

26. 299 S.C. 335, 384 S.E.2d 730 (1989).

27. *Id.* at 344, 384 S.E.2d at 736 (citing Terlinde v. Neely, 275 S.C. 395, 398, 271 S.E.2d 768, 769–70 (1980)).

28. *Carolina Winds*, 297 S.C. at 84, 374 S.E.2d at 903.

29. *See* Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126, 129–30 (4th Cir. 2000); Laurens Elec. Coop. v. Altec Indus., Inc., 889 F.2d 1323, 1324 (4th Cir. 1989); Purvis v. Consol. Energy Prods. Co., 674 F.2d 217 (4th Cir. 1982); S.C. Elec. & Gas Co. v. Westinghouse Elec. Corp.,

questionable when the parties are not equal.[30] Whether only warranty liability is sufficient for situations where equality in sophistication and bargaining power exists between the parties is a question to be resolved at a later time.[31]

Finally, contrary to the *Carolina Winds* court's suggestion, allowing a negligence claim where a threat of bodily harm exists does not make a person an insurer against every risk of harm—rather the person is responsible only for those risks of harm created by his own negligence. Moreover, the liability amount is for actual harm, not the potential harm resulting from some risk. While the damage and quantum of damage are uncertain until actual harm occurs, the measure of damages in these cases is not speculative: the damages sought are the costs to remove or repair the dangerous condition, and these costs can be easily calculated.

D. The South Carolina Supreme Court's View of the Economic Loss Rule

In any event, *Carolina Winds* cannot be viewed as determinate on the economic loss rule because in *Kennedy v. Columbia Lumber & Manufacturing Co.*,[32] the South Carolina Supreme Court stated: "To the degree herein indicated, we express our disapproval and rejection of [*Carolina Winds*]."[33] The "degree" of the court's rejection of *Carolina Winds* is unclear because *Kennedy* focuses on the duty of home builders. In "join[ing] those states which strive to protect the modern new home buyer,"[34] the *Kennedy* court explained its difficulty with the following example: "Builder 'A' and Builder 'B' can be equally blameworthy, and build equally shoddy housing, but because Builder 'A's' negligence happened to be discovered early enough, no one was harmed. It hardly seems fair that Builder 'A' should profit from a diligent buyer's discovery, or because he was fortunate."[35]

---

826 F. Supp. 1549, 1557 (D.S.C. 1993); Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 530, 455 S.E.2d 189, 183 (Ct. App. 1995). *But see* City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987) (noting that the risk of serious physical harm "is not the type of risk that is normally allocated between the parties to a contract"); *Purvis*, 674 F.2d at 222 (noting that "[i]t is the nature of the risk that caused injury, rather than the nature of the parties, which is finally determinative").

30. The rules concerning allocation of risk in negligence through express assumption of risk are more strict than the contract rules for allocation of risk. *Cf.* Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 441–42 (Cal. 1963) (concluding that "a release from liability for future negligence imposed as a condition for admission to a charitable research hospital" affected the public interest and had to be declared invalid under a state statute).

31. For a brief discussion of whether the South Carolina Supreme Court might consider the nature of the parties in applying an exception to the economic loss rule for threat of bodily harm, see *infra* Part IV.B.

32. Interestingly, the *Kennedy* court discussed liability in tort even though the plaintiff amended his complaint to delete the negligence cause of action. *Kennedy*, 299 S.C. at 338, 345–47, 384 S.E.2d at 733, 736–37.

33. *Id.* at 341, 384 S.E.2d at 734. In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, Justice Toal, the author of the *Kennedy* opinion, wrote that "*any* reliance on *Carolina Winds* by the trial judge was an error of law." 320 S.C. 49, 52, 463 S.E.2d 85, 87 (1995) (emphasis added).

34. *Kennedy*, 299 S.C. at 346, 384 S.E.2d at 737.

35. *Id.* at 345, 384 S.E.2d at 737.

Focusing on the act of negligent construction rather than its consequences, the court concluded a "builder may be liable to a home buyer in tort despite the fact that the buyer suffered only 'economic losses' where . . . the builder has constructed housing that he knows or should know will pose serious risks of physical harm."[36] In shifting the focus from consequence to activity and the nature of risk, the South Carolina Supreme Court shifted the focus of the economic loss rule.[37] Under *Carolina Winds*, recovery in tort rested upon the fortuity of the nature of the actual resulting personal injury, while *Kennedy* indicates luck should not play an all-or-nothing role in determining whether a plaintiff may bring a claim for recovery in tort or only in contract. Specifically, the *Kennedy* court stated that "[a] builder is no less blameworthy in such a case where lady luck has smiled upon him and no physical harm has yet occurred."[38]

While federal courts have viewed *Kennedy* as limited to the residential home building context,[39] in *Kershaw County Board of Education v. United States Gypsum Co.*,[40] the South Carolina Supreme Court indicated its willingness to extend *Kennedy*'s reach. In *Kershaw*, the court upheld a jury verdict against an asbestos manufacturer for the cost of removing asbestos contaminated materials from several schools.[41] Without addressing any exception for threat of bodily injury, the court, following *Grace* and *Kennedy*, determined the economic loss rule did not apply because the plaintiff had "alleged and offered proof of other property damage."[42] In discussing its decision in *Kennedy*, the *Kershaw* court stated:

> We also noted our difficulty with the economic loss rule generally, and we partially rejected the rule in the residential home building context. We have not yet been presented with the question of whether the rule should be so rejected in all contexts,

36. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989).

37. Benjamin Edward Nicholson V, *Unanswered Questions: The Economic Loss Rule in South Carolina*, S.C. LAW., Nov.–Dec. 1996, at 25, 28. The South Carolina Supreme Court has reaffirmed *Kennedy* on several occasions. In *Beachwalk Villas Condominium Ass'n v. Martin*, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991), the court stated that an "extension of the holding in *Kennedy* to architects is a logical expansion of our law to provide protection for homebuyers." Then, in *Tommy L. Griffin Plumbing & Heating Co.*, the court saw "no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties." 320 S.C. at 55, 463 S.E.2d at 89.

38. *Kennedy*, 299 S.C. at 346, 384 S.E.2d at 737.

39. *See* Brendle's Stores, Inc. v. OTR, 978 F.2d 150, 156 (4th Cir. 1992); Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1050 (D.S.C. 1993), *aff'd*, 46 F.3d 1125 (4th Cir. 1995); S.C. Elec. & Gas v. Westinghouse Elec. Corp., 826 F. Supp. 1549, 1556 (D.S.C. 1993) (unpublished table decision).

40. 302 S.C. 390, 396 S.E.2d 369 (1990).

41. *Id.* at 392, 399, 396 S.E.2d at 370–71, 374.

42. *Id.* at 394, 396 S.E.2d at 371.

> including the commercial arena, and we need not address that issue here, as this case may be disposed of on narrower grounds.[43]

Kershaw does not indicate that *Kennedy's* rejection of the economic loss rule should only apply in the home building context. Rather, *Kershaw* indicates the court dislikes the economic loss rule and, if presented with the question in other situations, might similarly limit the rule's application.

E. A Federal District Court's Recent Rejection of a Threat Exception

In *Colleton*, the district court initially determined the economic loss rule barred recovery for threat of bodily injury when the only actual injury was to the product itself.[44] The court denied the plaintiff's negligence claim against a fire retardant manufacturer for costs of temporary repairs and complete replacement of the roofing and roof framing system in which the manufacturer's product was used to treat plywood and structural lumber.[45] However, on the plaintiff's motion for reconsideration, the district court certified the following question to the South Carolina Supreme Court: "May a user of a defective product maintain a negligence action against the manufacturer when the resulting damage is limited to the defective product, if the product poses a serious risk of physical harm?"[46] In both the original order and the certification order, the district court rejected the plaintiff's reliance on *Grace*.[47] The *Colleton* court reasoned that the South Carolina Supreme Court "could have included 'threat of personal injury' as an additional instance in which tort liability lies" if the exception actually existed in South Carolina.[48] There are two flaws with this reasoning. First, any statement in *Kennedy* or *Kershaw* on this issue would have been dicta because in both cases the court did not have to reach the issue of whether a threat of bodily harm exception existed. In short, because the South Carolina Supreme Court has never addressed the "threat" exception, it has neither recognized nor rejected the exception. Therefore, the *Colleton* court's reliance on the South Carolina Supreme Court's omission of

---

43. *Id.* at 393, 396 S.E.2d at 371 (footnote and citation omitted.) The court used the "narrower grounds" of "other property damage" to dispose of the case. See *infra* notes 50– 53 and accompanying text for an argument that the asbestos contamination in *Kershaw* constituted other property damage because it caused a threat of cancer.

44. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 11 (D.S.C. Sept. 6, 2005)

45. *Id.* at 3, 7–14. The court did, however, allow the plaintiff to recover on other grounds. *Id.* at 16.

46. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 8 (D.S.C. Jan. 31, 2006).

47. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 9–10 (D.S.C. Sept. 6, 2005); Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 7 (D.S.C. Jan. 31, 2006).

48. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 10 (D.S.C. Sept. 6, 2005).

recognizing an exception is misplaced.[49] Second, nothing in *Kershaw* or *Grace* indicates that the holdings only apply to asbestos.

Kershaw's facts indicate at least an acceptance of some version of the threat exception. *Kershaw* focused on "other property damage,"[50] but exactly what constitutes "other property" is unclear.[51] The court apparently viewed the asbestos as having damaged other property by contamination. This view is consistent with a comment in the *Restatement (Third) of Torts: Products Liability*, which provides:

> One category of claims stands apart. In the case of asbestos contamination in buildings, most courts have taken the position that the contamination constitutes harm to the building as other property. The serious health threat caused by asbestos contamination has led the courts to this conclusion. Thus, actions seeking recovery for the costs of asbestos removal have been held to be within the purview of products liability law rather than commercial law.[52]

However, asbestos contamination damages other property because of the threat of bodily harm, i.e., the potential exposure of a building's inhabitants to the carcinogenic asbestos fibers. Asbestos contamination does not otherwise cause the destruction of property or the inability to use property for its intended purpose. Therefore, in the asbestos context, the other property damage is the threat of cancer. If the threat of harm constitutes other property damage, then the *Colleton* threat of truss failures, possible roof collapse, and resulting injury or death[53] may meet *Kershaw*'s other property damage test.

---

49. Even if a threat of bodily injury exception exists in South Carolina, the district court's ultimate decision to deny the plaintiff's negligence claim *may* have been correct as the deteriorating flame retardant treated lumber may not have created a sufficient threat of bodily injury under a risk of harm analysis. *See infra* notes 91 and 148.

50. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990).

51. In *City of Manchester v. National Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986), another case involving asbestos, the district court notes that it is "somewhat artificial to try to characterize the damage . . . as either physical damage to . . . property or economic damage." *Id.* at 649. In cases involving asbestos or other hazardous or toxic chemicals, courts have characterized the damage as economic damage, property damage, or a "hybrid of the two." *Id.* at 650. In this case, the city sued "for damages associated with the placement, removal and replacement of asbestos" from schools and other public buildings. *Id.* at 647. The plaintiff claimed that the complaint "implicitly alleges physical harm to property because it claims the contamination of plaintiff's schools and public buildings with 'unreasonably dangerous' asbestos products, which made the buildings unsafe, thereby damaging the buildings and requiring the costly removal of the asbestos so as to restore the structures to their prior safe condition." *Id.* at 649. The district court found that the city "made a sufficient allegation of physical harm to its property so as to state claims for negligence and strict liability." *Id.* at 652.

52. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. e (1998).

53. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 8 (D.S.C. Sept. 6, 2005)

III. OTHER JURISDICTIONS

A. The United States Supreme Court's View

Jurisdictions rejecting a threat of bodily injury exception have given great weight to the United States Supreme Court's decision in *East River Steamship Corp. v. Transamerica Delaval Inc.*[54] In that case, the Court answered in the negative the question of "whether [in an admiralty case] a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss."[55] The Court determined the decrease in a product's value because of malfunction, the unhappiness of customers who find the product does not meet their needs, and the increased costs in performing services are "[l]osses . . . [that] can be insured."[56] Determining that "[d]amage to a product itself is most naturally understood as a warranty claim,"[57] the Court held "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."[58]

Importantly, *East River* only dealt with commercial transactions and did not address the situation of ordinary consumer purchases where there may be disparity in the parties' relative bargaining power. Also, because *East River* was in admiralty,[59]that case is only persuasive authority in a diversity case or a decision by the South Carolina Supreme Court.

B. Courts Rejecting a Threat Exception

The analysis employed by courts that reject a threat exception to the economic loss rule has generally been less thoughtful than the analysis employed by courts that recognize the exception. Most courts rejecting the exception have not wrestled with policy issues for or against the exception and have relied heavily on higher courts' failure to explicitly recognize an exception. The *Colleton* court cited *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*[60] and *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*[61] in support of its denial of the school's claim.[62] In *Mt. Lebanon*, flame retardant chemicals in wood trusses of a nursing home cafeteria caused structural failure.[63] The Sixth Circuit noted the economic loss rule should apply in Kentucky commercial transactions because "(1) it maintains

---

54. 476 U.S. 858 (1986).
55. *Id.* at 859, 870.
56. *Id.* at 871–72.
57. *Id.* at 872.
58. *Id.* at 871.
59. *Id.* at 859.
60. 276 F.3d 845 (6th Cir. 2002).
61. 60 F.3d 734 (11th Cir. 1995).
62. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., C.A. No. 2:04-531-18, slip op. at 11 n.2 (D.S.C. Sept. 6, 2005).
63. *Mt. Lebanon*, 276 F.3d at 847.

the historical distinction between tort and contract law; (2) it protects parties' freedom to allocate economic risk by contract; and (3) it encourages the party best situated to assess the risk of economic loss, usually the purchaser, to assume, allocate, or insure against that risk."[64] The court rejected the nursing home's argument that the "Kentucky Supreme Court would adopt an exception to the economic loss doctrine where the injury to the product created a serious risk of injury to a person or property . . . , predict[ing] that the Kentucky Supreme Court would reject a serious risk of injury exception to the economic loss rule."[65] The Sixth Circuit's only support for its prediction that the Kentucky Supreme Court would reject the exception was the United States Supreme Court's *East River* decision and the exception's rejection by the *Restatement (Third) of Torts: Products Liability*.[66]

In *Pulte Home Corp.*, chemicals caused plywood used in townhouses to deteriorate.[67] The Eleventh Circuit specifically found only two exceptions to Florida's economic loss rule—physical injury and damage to other property.[68] In rejecting the negligence claim, the court noted that the Florida Supreme Court had "refus[ed] to create additional exceptions to the [economic loss] rule."[69]

In both *Mt. Lebanon* and *Pulte Home Corp.*, the federal courts sitting in diversity merely rejected the arguments for the threat exception without examining the possibility that state courts would support policy arguments in favor of recognizing such an exception.

Other federal district courts have similarly rejected the threat exception because the state courts have not explicitly recognized the exception. In *Adams-Arapahoe School District No. 28-J v. GAF Corp.*,[70] another asbestos case, the Tenth Circuit stated:

> The School District's claim of injury in the mere presence of VAT [vinyl asbestos floor tile] appears to be little more than an invitation to recognize some fictional property damage as a vehicle upon which to carry an economic loss action into the province of tort law. While the presence of asbestos in VAT may well impose increased renovation costs, any additional expense is best characterized as economic loss—consequential damages resulting from the failure of VAT to meet the School District's economic expectations in terms of performance.[71]

---

64. *Id.* at 848 (quoting 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 13.07[1] (2000)).

65. *Id.* at 852–53.

66. *Id.* at 853.

67. Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 736 (11th Cir. 1995).

68. *Id.* at 741.

69. *Id.* at 740 (citing Casa Clara Condo. Ass'n v. Charley Toppino & Sons, 620 So. 2d 1244, 1247–48 (Fla. 1993)).

70. 959 F.2d 868 (10th Cir. 1992).

71. *Id.* at 872.

The court found nothing in any Colorado decision to support the idea that "tort liability may be premised on the mere risk of harm" and noted that in "asbestos in buildings" cases, "[t]ort actions can be maintained only where plaintiffs explicitly allege and subsequent evidence demonstrates contamination of the building or other property as a result of fibers released from asbestos products. In other words, only asbestos contamination constitutes a physical injury compensable under tort law."[72] Interestingly, even courts recognizing the exception and applying a risk of harm analysis may have reached a similar result in this case because they too believe that mere risk of harm is not sufficient to impose tort liability.

Similarly, in *Drieblatt v. Osmose, Inc.*,[73] the plaintiffs sued because defective fire retardant-treated plywood sheets caused the roofs of various condominium buildings to deteriorate.[74] The defendants relied on the Eleventh Circuit's conclusion in *Pulte* that "'[h]aving failed to avail itself of the opportunity to mitigate the risks of potential disappointment at the time of contract negotiation, Pulte cannot now resort to the courts to save it from a bargain improvidently made.'"[75] The plaintiffs relied on the reasoning in *Trustees of Columbia University v. Mitchell/Giurgola Associates*[76] in which the First Department of New York State's Appellate Division "decreed an exception to the economic loss rule for 'unduly dangerous product[s] for which damages under a strict liability theory may be maintained.'"[77] However, the district court rejected this reasoning, finding that "[n]o Massachusetts court has suggested or held that in Massachusetts there is an exception to the economic loss rule for collapse cases."[78] Because federal court decisions have not yet reached the merits of the exception, they provide little support for its rejection.

Much like federal court opinions, state court opinions that reject the threat of bodily injury exception provide little insight into the rationale for rejecting the exception. In *L.L. Bean, Inc. v. United States Mineral Products Co.*,[79] plaintiffs argued for a contamination exception "where a product has made its surroundings dangerous."[80] Like the federal courts that rejected the exception because the highest state court had not yet recognized one, the Superior Court of Maine rejected the plaintiff's argument and noted that courts recognizing an exception limited its application to asbestos or formaldehyde contamination cases or to cases involving collapsing walls.[81] The court further noted the state's highest court had not

72. *Id.* (citing City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 976–78 (4th Cir. 1987); Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 371 (1990)).

73. No. 00-CV-11392-MEL, 2001 U.S. Dist. LEXIS 2326 (D. Mass. Feb. 12, 2001).

74. *Id.* at *1.

75. *Id.* at *4–5 (quoting Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995)).

76. 492 N.Y.S.2d 371 (App. Div. 1985).

77. *Drieblatt*, 2001 U.S. Dist. LEXIS 2326, at *5 (quoting *Trs. of Columbia Univ.*, 492 N.Y.S.2d at 376).

78. *Id.* at *7.

79. No. CV-98-632, 1999 Me. Super. LEXIS 323 (Super. Ct. Me. Dec. 3, 1999).

80. *Id.* at *10.

81. *Id.*

indicated that it would recognize an exception to the economic loss rule in the case of mold spore contamination.[82]

Interestingly, some state courts recognized strong arguments for a threat exception even though they ultimately rejected this exception to the economic loss rule. In *KB Home v. Superior Court*,[83] the plaintiff urged the adoption of a "life-safety-defect exception to the economic loss rule," arguing that "the defective furnaces . . . created an undisputed, active fire hazard, which resulted in a number of homes actually being destroyed (although not the homes at issue in this proceeding) and that, if left unrepaired, there was a substantial risk of significant personal injury to the occupants of the homes."[84] Despite finding the plaintiff's policy arguments for the exception "compelling," the court held that the California Supreme Court had "unequivocally rejected such a life-safety exception."[85]

C. *Jurisdictions Recognizing a Threat Exception*

1. *Maryland's Two-Part Approach*

Perhaps the most compelling argument in favor of recognizing an exception for threat of bodily harm is the argument employed by the Maryland Court of Appeals in *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*,[86] a case involving allegations that a condominium builder installed a defective electrical system, which created a fire hazard to the building's occupants.[87] In *Atlantis Condominium*, the Maryland court concluded:

> [W]hether a duty will be imposed . . . should depend upon the risk generated by the negligent conduct, rather than upon the fortuitous circumstance of the nature of the resultant damage. Where the risk is of death or personal injury the action will lie for recovery of the reasonable cost of correcting the dangerous condition.[88]

---

82. *Id.* at *11.

83. 5 Cal. Rptr. 3d 587 (Ct. App. 2003), *reh'g denied*, 2003 Cal. App. LEXIS 1715 (Ct. App. Nov. 19, 2003).

84. *Id.* at 597.

85. *Id.* (citing Aas v. Superior Court, 12 P.3d 1125, 1140 (Cal. 2000)).

86. 517 A.2d 336 (Md. 1986). In *Carolina Winds*, the plaintiffs, even though they did not allege a risk of death or serious personal injury to themselves, unsuccessfully argued for the court to recognize a threat exception and to adopt the reasoning of the Maryland Court of Appeals. Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 85–88, 88 n.11, 374 S.E.2d 897, 903–06, 906 n.11 (Ct. App. 1988).

87. *Atlantis Condo.*, 517 A.2d at 338.

88. *Id.* at 345 (footnote omitted). Interestingly, as the South Carolina Supreme Court would do three years later in *Kennedy*, the *Atlantis Condominium* court shifted the focus of the economic loss rule from consequence to activity. *See* Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989).

Recognizing a need for a limitation on liability to prevent the defendant from becoming the insurer for every "mere risk of harm without the occurrence of harm,"[89] the *Atlantis Condominium* court stated:

> It is the serious nature of the risk that persuades us to recognize the cause of action in the absence of actual injury. Accordingly, conditions that present a risk to general health, welfare, or comfort but fall short of presenting a clear danger of death or personal injury will not suffice. A claim that defective design or construction has produced a drafty condition that may lead to a cold or pneumonia would not be sufficient.[90]

The *Morris v. Osmose Wood Preserving*[91] court clarified the method of determining the degree of risk required to circumvent the economic loss rule. In that case, the Maryland Supreme Court articulated a two-part approach:

> We examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury. Thus, if the possible injury is extraordinarily severe, i.e., multiple deaths, we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe, i.e. a broken leg or damage to property. Likewise, if the probability of the injury occurring is extraordinarily high, we do not require the injury to be as severe as we would if the probability of injury were lower.[92]

While this approach would probably not satisfy the *Carolina Winds* court, the Maryland Supreme Court's statement indicates the type of balancing approach courts regularly undertake.[93] Furthermore, as the *Morris* court noted, this two-part

---

89. *Carolina Winds*, 297 S.C. at 87, 374 S.E.2d at 905.

90. *Atlantis Condo.*, 517 A.2d at 345 n.5.

91. 667 A.2d 624 (Md. 1994) (4-3 decision). This case, like *Colleton*, involved defective fire retardant treated (FRT) plywood. *Id.* at 628. While the justices essentially agreed on the basic test, they disagreed on its application. Under facts similar to *Colleton*, the *Morris* majority dismissed the plaintiffs' tort claims, reasoning that "the alleged defects do not present a substantial risk of death or serious physical injury." *Id.* at 633. The dissent by Justice Eldridge argued that "[t]he danger that someone will be injured when a roof is constructed with defective materials is more of a probability than a possibility." *Id.* at 640 (Eldridge, J., dissenting). Justice Eldridge further argued that "if a defective and deteriorating roof that is unable to withstand weight does not present an 'extreme' risk, the cause of action recognized in . . . [*Atlantis Condominium*] may be illusory." *Id.* at 641.

92. *Id.* at 631–32 (majority opinion).

93. In *Atlantis Condominium*, plaintiffs alleged the defendant's "failure to construct ten vertical utility shafts with materials having a fire resistance rating of two hours" put all of the condominium's residents at risk of death or personal injury should a fire occur in one of the shafts. *Atlantis Condo.*, 517 A.2d at 338. In discussing the *Atlantis Condominium* opinion, the *Morris* Court noted that although the probability that a fire would result from the construction defect was not high, it would "allow[] the plaintiffs to maintain a tort action because the nature of the possible damage," i.e., multiple deaths and

approach "recognizes the negative effects that could occur if the economic loss rule was abandoned . . . [but] balances these considerations . . . against the public policy of encouraging people to correct dangerous conditions before a tragedy results."[94]

In *East River*, the United States Supreme Court characterized this degree of risk approach as "too indeterminate to enable manufacturers easily to structure their business behavior."[95] The *Morris* court responded to this criticism by stating its two-part approach "withstands the criticism of the United States Supreme Court" because the risk of harm analysis "does not cause major disruptions" in either the "actual manufacturing and marketing of the product" or in "allocation of funds to cover potential tort liability"—the two areas that "manufacturers' exposure to tort liability requires them to modify their business behavior."[96] The *Morris* court reasoned that "manufacturers, regardless of the extent of tort liability, should always attempt to mitigate risks of death or personal injury" and that the "rule, because of the extreme nature of the risk required to trigger it, limits liability to, predominately, those situations in which either liability would inevitably be created by actual physical injury or the manufacturer's exposure to liability is so great that it cannot be ignored."[97]

2. *The Washington Reasoning for a Risk of Harm Analysis*

The Washington Supreme Court also adopted a risk of harm analysis,[98] which "appropriately accommodates the safety and risk-spreading policies that underlie the law of product liability[] and 'provides a workable and accurate distinction between accidents that should be actionable in tort and losses that should remain

---

personal injuries was extremely serious. Morris v. Osmose Wood Preserving, 667 A.2d 624, 632 (Md. 1994) (4-3 decision). *Morris* also cited *United States Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405 (Md. 1994), in which the court allowed a tort claim where the "possible injury—inhalation of asbestos fibers causing serious diseases—was coupled with a high probability that personal injuries thereby would result because everyone who used the building could have been exposed to asbestos fibers." *Morris*, 667 A.2d at 632.

94. *Morris*, 667 A.2d at 632. The Maryland court argued the exception is necessary to encourage people to fix hazards when discovered rather than waiting for an injury to occur. *Id.* This argument is somewhat flawed because if the plaintiffs had actual knowledge of a hazard and declined to fix the problem, they would probably find themselves liable for negligence. However, it is conceivable that the statute of limitations on a warranty claim could have expired before discovery of the defect or that a product's warranty coverage may be limited or nonexistent. In these cases, a tort action would be the only available means of recovering the cost of repairing the defects. Thus, the possibility of tort liability would act as an additional incentive to encourage people to correct dangerous conditions before a tragedy results.

95. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986).

96. *Morris*, 667 A.2d at 632–33.

97. *Id.*

98. Wash. Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1207 (Wash. 1989). This analysis, adopted from *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981), requires the court to consider the particular circumstances of a given case and "'analyz[e] interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose.'" *Graybar*, 774 P.2d at 1207 (quoting *Pa. Glass Sand Corp.*, 652 F.2d at 1173).

in the domain of warranty law.'"[99] Like the Maryland Court of Appeals, the Washington Supreme Court believed that the fact that only the product itself was injured as a result of the hazardous product defect was a result of fortuitous circumstances.[100] The court noted the *East River* approach of restricting product injury claims to contract theories gives manufacturers a way "to limit their liabilities to predictable plaintiffs and manageable sums" and "reduces uncertainty in judicial decisionmaking" by providing a bright-line rule—both essential goals of Washington tort reform.[101] However, the court reasoned that "this increased certainty comes at too high a price. If manufacturers can contract successfully around liabilities for product injuries, a principal deterrent to unsafe practices—the threat of legal liability—will be lost."[102]

3. *Distinguishing Between Disappointed and Endangered Users*

Some jurisdictions recognizing a threat of bodily injury exception have recognized a distinction between disappointed users and endangered users.[103] In *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*,[104] the court noted:

> [A]lmost all courts have adopted the view that the benefit-of-the-bargain approach of warranty law is ill-suited to correct problems of hazardous products that cause physical injury. Manufacturers are better able to bear the risk or to take action to correct flaws that pose a danger. Accordingly, tort law imposes a duty on manufacturers to produce safe items, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself.
>
> In cases such as the present one where only the defective product is damaged, the majority approach is to identify whether a particular injury amounts to economic loss or physical damage. In drawing this distinction, the items for which damages are sought, such as repair costs, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated

---

99. *Graybar*, 774 P.2d at 1210 (quoting Lindley J. Brenza, Comment, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277, 300 (1987)).

100. *Id.* at 1210.

101. *Id.* at 1209.

102. *Id.*

103. In *American Fire & Casualty Co. v. Ford Motor Co.*, the Iowa Supreme Court held that recovery under a tort theory was possible in the case where a "truck caught fire causing property damage to the truck and its contents." 588 N.W.2d 437, 438 (Iowa 1999). The court noted that other Iowa cases "distinguished the disappointed consumers from the endangered ones." *Id.* at 440.

104. 652 F.2d 1165 (3d Cir. 1981). In *Aloe Coal Co. v. Clark Equipment Co.*, the Third Circuit receded from *Pennsylvania Glass Sand* and "predict[ed] that Pennsylvania courts, although not bound to do so, would nevertheless adopt as state law the Supreme Court's reasoning in *East River*," which "specifically rejected [their] *Pennsylvania Glass Sand* position." 816 F.2d 110, 111 (3d Cir. 1987). However, other jurisdictions have continued to utilize the *Pennsylvania Glass Sand* analysis. *See supra* note 98.

> factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.[105]

Applying the *Pennsylvania Glass Sand* reasoning, the Eastern District of Pennsylvania concluded the plaintiffs stated a valid tort claim by claiming "the installation of urea formaldehyde insulation in their residences . . . resulted in property damages and a diminution in the fair market value of their homes."[106] The plaintiffs argued the use of a cancer-causing agent resulted in a decline in the property's value.[107] The court found it significant that the plaintiffs were "neither seek[ing] to protect their expectation interests nor secure the benefit of the bargain. Rather, plaintiffs complain that the insulation contains a hazardous defect."[108]

In *Philadelphia National Bank v. Dow Chemical Co.*,[109] the same court heard a case in which the plaintiff contended the defendant's use of Sarabond "caused corrosion of metals embedded in the mortar and brick panels of its building and [caused] cracking of the masonry on the exterior of the building."[110] This court determined "Pennsylvania would permit recovery in tort where an allegedly defective construction product causes injury to other components used in construction and creates a real, unspeculative risk of harm to passers-by on the street below."[111] Interestingly, the district court noted the Third Circuit in *East River Steamship Corp. v. Delaval Turbine, Inc.*[112] applied the *Pennsylvania Glass Sand* factors but still denied recovery under a tort theory.[113] The court also noted that other cases involving the use of asbestos products "concluded that the risk of injury to persons and/or property implicated the safety concerns of strict liability as opposed to the expectation-bargain policies of contract law."[114] These cases "relied upon the fact that asbestos presents a real, unspeculative health hazard and that additional property had been damaged inasmuch as repair necessitated removal of more than the defective asbestos product alone."[115] The court also noted that in asbestos cases, "the product itself is inherently dangerous to people. No outside intervention is required to make the defect hazardous."[116]

In *Pratt & Whitney Canada, Inc. v. Sheehan*,[117] the Alaska Supreme Court reaffirmed that "a litigant may recover economic loss in strict products liability if

---

105. *Pa. Glass Sand*, 652 F.2d at 1172–73. (footnote omitted)
106. Pearl v. Allied Corp., 566 F. Supp. 400, 400–02 (E.D. Pa. 1983).
107. *Id.* at 402.
108. *Id.* at 403.
109. 605 F. Supp. 60 (E.D. Pa. 1985).
110. *Id.* at 61.
111. *Id.* at 64.
112. 752 F.2d 903, 909–10 (3d Cir. 1985).
113. *Phila. Nat'l Bank*, 605 F. Supp. at 63.
114. *Id.* at 64.
115. *Id.*
116. Phila. Nat'l Bank v. Dow Chem. Co., 605 F. Supp. 60, 64 n.5 (E.D. Pa. 1985).
117. 852 P.2d 1173 (Alaska 1993).

the 'defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger.'"[118] The court declined to follow the United States Supreme Court's *East River* opinion because "*East River* 'unjustifiably dismisses the safety concerns attendant to product injuries caused by hazardous defects'"[119] and because "any gain in certainty from a per se rule against economic loss is bought at too high a price: decreased safety and consumer protection."[120] Further, the Alaska court determined that, under *East River*, "many consumers . . . not only would be denied a remedy in tort, but many also would be deprived of a remedy in contract since a product may not be covered by a warranty or the warranty may be limited."[121] In other words, *East River* "fails to protect consumers who lack equal bargaining power and who, thus, are inadequately protected under warranty or contract law."[122] Lastly, the court noted:

> [T]he intermediate approach, not the rule of *East River*: "[Reflects] not only the developing direction of case law but socially appropriate engineered philosophy directed toward better product and a safer environment. Neither the pure *East River* idiom nor its half of a loaf commercial transaction offspring as a minority posture deserve adaptation for either consumer or commercial purchasers in this jurisdiction. Confining recovery to contractual remedies makes no real sense . . . . Sometimes by fortuity, other property or personal injury will not result but, unfortunately, fortuity is not continuity and with faulty and dangerous products, there will inevitably be injury and other property damage in time."[123]

A final example of a court recognizing the exception comes from *Trustees of Columbia University v. Mitchell/Giurgola Associates*.[124] In that case, the plaintiffs brought an action based on "defects in the exterior 'curtain wall' of . . . [a] building and the tiles attached to that wall."[125] After a tile fell from the wall, the university "took emergency safety measures and ordered an inspection of the building which revealed not only that the tiles were not properly attached to the wall," but also "that the entire wall was in imminent danger of collapse."[126] The New York Supreme Court, Appellate Division, held:

---

118. *Id.* at 1175 (quoting N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981)).

119. *Id.* at 1179 (quoting Wash. Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1209 (Wash. 1989)).

120. *Id.* at 1180.

121. *Id.*

122. *Id.*

123. Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1180–81 (Alaska 1993) (quoting Cont'l Ins. v. Page Eng'g Co., 783 P.2d 641, 684–85 (Wyo. 1989) (Urbigkit, J., dissenting) (footnote omitted)).

124. 492 N.Y.S.2d 371 (App. Div. 1985).

125. *Id.* at 373.

126. *Id.*

> "[P]laintiff's claim . . . set forth a viable cause of action for property damage to its building arising from the allegedly defective materials . . . , which materials were to be installed as part of a building wall located on a crowded university campus and thus constituted an unduly dangerous product for which damages under a strict liability theory may be maintained."[127]

By focusing on endangered users of defective products rather than merely disappointed users, courts have maintained a distinction between tort and contract law and have also prevented contract law from drowning in "a sea of tort."[128]

IV. OTHER CONSIDERATIONS

The *Restatement (Third) of Torts: Products Liability*, also recognizes the dilemma at issue:

> A somewhat more difficult question is presented when the defect in the product renders it unreasonably dangerous, but the product does not cause harm to persons or property. . . . A plausible argument can be made that products that are dangerous, rather than merely ineffectual, should be governed by the rules governing products liability law.[129]

However, the *Restatement* does not support the threat of bodily injury exception to the economic loss rule, stating "a majority of courts have concluded that the remedies provided under the Uniform Commercial Code . . . are sufficient."[130] The majority of jurisdictions, which apply the economic loss rule in the absence of property damage or personal injury, have relied on Chief Justice Traynor's statement in *Seely v. White Motor Co.*:[131]

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He

---

127. *Id.* at 376.

128. E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 866 (1986).

129. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 cmt. d (1998).

130. *Id.*

131. 403 P.2d 145 (Cal. 1965). For cases relying on this language, see *East River*, 476 U.S. at 871; 2000 Watermark Ass'n v. Celotex Corp, 784 F.2d 1183, 1186 (4th Cir. 1986); Purvis v. Consol. Energy Prods. Co., 674 F.2d 217, 220 (4th Cir. 1982).

> cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. 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. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone. . . .
>
> The law of warranty is not limited to parties in a somewhat equal bargaining position. . . . The rationale of [*Greenman v. Yuba Power Products, Inc.*[132]] . . . does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather, on the proposition that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." That rationale in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers.[133]

A. Allocation of Risks

Allowing recovery in tort for pure economic loss where there is the threat of bodily injury but none has yet occurred is perfectly consistent with Chief Justice Traynor's analysis in *Seely*. Contract law permits parties to negotiate the allocation of risks. However, in *W.R. Grace*, the Fourth Circuit determined:

> [C]ontamination . . . with asbestos fibers, which endanger the lives and health of the building's occupants . . . is not the type of risk that is normally allocated between the parties to a contract by agreement, unlike the risk of malfunctioning turbines at issue in *East River* or the risk of faulty roofing shingles involved in *Watermark*.[134]

---

132. 377 P.2d 897 (Cal. 1963).

133. *Seely*, 403 P.2d at 151 (citation omitted) (quoting Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

134. City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987). The *East River* turbines' failure to function properly was correctly deemed a breach of warranty claim for expectancy damages, while the blistering of shingles in *Watermark* "shortened the life expectancy of the roof and destroyed its aesthetic appeal" but did not present a threat of bodily harm. *Id.* at 977. *See* E. River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986); 2000 Watermark Ass'n v. Celotex Corp., 784 F.2d 1183 (4th Cir. 1986).

In many situations, parties cannot anticipate or bargain over potential hazards at the time of the defective products' sale. Therefore, the risk of death or serious physical injury resulting from a product defect is not the type of risk allocated to one party by negotiation. Presumably, if a purchaser thought a risk of injury existed, he would not purchase the product in the first place. Consistent with the *Seely* language, in the case of a threat of bodily injury, the manufacturer should be held liable in tort because the goods failed to "match a standard of safety," not because the product failed to meet an expected "level of performance." This reasoning is especially persuasive in ordinary consumer transactions where there may be a greater disparity in knowledge and bargaining power than in commercial transactions.

B. Nature of the Parties

While "[t]he economic loss rule is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by a breach of contract,"[135] the South Carolina Supreme Court has not yet determined how the economic loss rule specifically applies in the commercial arena.[136] However, the United States District Court for the District of South Carolina, in predicting whether South Carolina courts would apply the economic loss rule as a bar to recovery for negligent misrepresentation, noted that "[o]ne factor to be considered is that the parties herein are business sophisticates and are more capable of protecting themselves by contractual agreement than an unsophisticated consumer who is party to a sales contract."[137] The United States District Court for the District of South Carolina also determined that, pursuant to the economic loss doctrine, the Uniform Commercial Code, "provides the exclusive rights and remedies" to sophisticated parties in a commercial transaction when "the product injures only itself and not other property belonging to the plaintiff."[138] Despite this determination, the nature of the parties does not appear to be the test for whether the economic loss rule applies when a threat of physical harm is involved. Instead, in applying South Carolina law, the Fourth Circuit stated that "[i]t is the nature of the risk that caused injury, rather than the nature of the parties, which is finally determinative."[139] Given the South Carolina Supreme Court's general dislike for the economic loss rule, it is likely the court would agree with the Fourth Circuit on this issue.

---

135. Laidlaw Envtl. Servs., (TOC), Inc. v. Honeywell, Inc., 966 F. Supp. 1401, 1414 (D.S.C. 1996).

136. Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990).

137. S.C. Elec. & Gas Co. v. Westinghouse Elec. Corp., 826 F. Supp. 1549, 1557 (D.S.C. 1993).

138. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1053 (D.S.C. 1993), aff'd 46 F.3d 1125 (4th Cir. 1995) (unpublished table decision).

139. Purvis v. Consol. Energy Prods. Co., 674 F.2d 217, 222 (4th Cir. 1982). *See*, e.g., City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 978 (4th Cir. 1987) (discussing the risks of serious physical harm from asbestos contamination).

C. *Personal Injury's Place in Tort Law*

In his concurring opinion in *Moorman Manufacturing Co. v. National Tank Co.*,[140] Justice Simon of the Illinois Supreme Court noted that "[h]azards peripheral to the product's function, however, were not in the forefront of the minds of the contracting parties, and it is convenient to have tort rules about them."[141] Justice Simon further noted that "personal injury occupies a special place in the law; risks to the person are less subject to allocation by agreement than other risks, so that a defect that endangers personal safety presents an unusually strong attraction to the tort system."[142] Justice Simon believed the presence or absence of physical harm is of no real legal significance:

> The presence of any physical harm tends to indicate that more is involved than an inferior product; the defect and the hazard were probably such that tort treatment is appropriate. Once we decide to treat the incident as a tort, the losses are recoverable without regard to whether they are physical.[143]

Justice Simon's concurrence shows the fundamental question in any case is whether the claim relates to disappointed expectations alone or to disappointed expectations involving unreasonably dangerous conditions. When the answer is that the claim relates to the dangerous conditions, the court should recognize an exception to the economic loss rule for a serious threat of bodily injury. Recognizing this exception would further the goal of deterring unsafe practices without allowing manufacturers to contract around liabilities.

D. *Legal Duties*

In applying the economic loss rule in the home-buying context, the *Kennedy* court explained that "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The 'economic loss' rule will . . . apply where duties are created *solely* by contract. In that situation, no cause of action in negligence will lie."[144] The *Kennedy* court noted that "public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will

---

140. 435 N.E.2d 443 (Ill. 1982). In *Moorman*, the plaintiff argued that the crack in the grain-storage tank posed an "extreme threat to life and limb, and to property of plaintiff and others, a defect which resulted in a sudden and violent ripping of plaintiff's tank, and which only fortunately did not extend the full height of the tank." *Id.* at 449. The Illinois Supreme Court determined that because the claim related to the purchaser's disappointed expectations due to product deterioration, no tort claim was available. *Id.* at 450.

141. *Id.* at 455–56 (Simon, J., concurring).

142. *Id.* at 456 (citation omitted).

143. *Id.*

144. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989) (footnote omitted).

pose serious risks of physical harm."[145] In a later case, the court determined that "[a] breach of a duty arising independently of any contract duties between the parties, however, may support a tort action"[146] and did not limit *Kennedy* to home builders. Given the court's concern about unsafe practices in the home-building arena and its previous extension of *Kennedy* to other fact patterns, the court would probably also find that manufacturers have a legal duty to refrain from manufacturing and selling defective products that pose serious threats of bodily harm but do not actually cause harm.

V. CONCLUSION

In South Carolina, the economic loss rule prevents tort liability for injury only to the product itself unless a legal duty has been violated. *Colleton* correctly states that the South Carolina Supreme Court has not explicitly recognized a threat of bodily injury exception that would allow recovery where the product defect threatens personal injury. However, the lack of recognition only indicates that the court has not yet reached the question of whether a plaintiff can recover in tort in such a situation. Language in both *Kennedy* and *Kershaw* indicates that the court dislikes the economic loss rule that focuses on consequences. The recognition of a right to recover for injury to the product that threatens personal injury is perfectly consistent with the idea that a manufacturer can be held liable in tort for a failure to match a standard of safety but cannot be held liable in tort for a non-threatening failure of the product to meet consumer expectations. Courts recognizing the "threat" exception have done so because the defective product caused harm to the product and because this harm involved a grave risk of bodily harm, not just a mere risk of harm. Decisions by the Maryland and Washington state courts show that the risk of harm analysis provides a workable method of determining whether recovery is allowed and determining the amount of damage. Furthermore, though restricting product injury claims to contract theories may give manufacturers a way to limit liabilities and reduce uncertainties regarding liability, the increase in flexibility and certainty is too costly in terms of tort goals. To the extent that manufacturers can successfully contract around tort liability, the goal of deterring injury from unreasonable and unsafe conduct is frustrated. Allowing only warranty liability may also result in unfairness because more sophisticated parties may contract around the warranty, avoiding liability and leaving a less sophisticated, injured party with no remedy. Furthermore, without a threat exception, recovering the costs of repairing a defect may be impossible in cases where the statute of limitations on a warranty claim has expired before discovery of the defect or where the product is covered only by a limited warranty or by no warranty at all.

In light of the South Carolina cases and the policies underlying tort law, the South Carolina Supreme Court would likely recognize a tort recovery for injury to

145. *Id.* at 346, 384 S.E.2d at 737.

146. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones, & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citing S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986)).

the product itself if accompanied by a threat of serious bodily harm where such threat presents a "clear, serious, and unreasonable risk of death or personal injury."[147] Under such a scheme, the mere weakening of defective flame retardant treated lumber without the probability of serious harm from a likely failure of a truss would probably not support a tort claim. However, plaintiffs should probably recover in tort where, as in *Colleton*, defective flame retardant treated lumber has deteriorated to the point where roof trusses have failed or are about to fail, thereby placing the building's inhabitants at substantial risk of serious personal injury from an imminent roof collapse.[148]

Matthew W. Gissendanner

147. Morris v. Osmose Wood Preserving, 667 A.2d 624, 631–32 (Md. 1994) (4-3 decision).

148. Note some courts may still dismiss the plaintiff's negligence claim in *Colleton* by finding that the defective lumber does not present a sufficient threat of bodily injury under the risk of harm analysis articulated by the Maryland Court of Appeals and likely to be adopted by the South Carolina Supreme Court. *See supra* note 91.