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Lloyd v. General Motors Corporation: An Unfortunate Detour in Maryland Products Liability Law

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ARTICLE

LLOYD V. GENERAL MOTORS CORPORATION: AN UNFORTUNATE DETOUR IN MARYLAND PRODUCTS LIABILITY LAW

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I. INTRODUCTION

In products liability cases, the injured plaintiff must demonstrate the necessary causal connection between the defective product and the plaintiff's injuries.[1] Nevertheless, in some limited cases, plaintiffs allege an increased risk of harm for the future, rather than any actual present, injury.[2] Often these cases involve asbestos and prescription drugs.[3]

Of particular interest are cases in which the plaintiff claims "purely economic loss."[4] Pure economic loss damages are "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damage to other property."[5] The justification for the economic loss doctrine is that the plaintiff who has received "insufficient product value"[6] should sue in contract,[7] rather than tort.[8]

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1 Lloyd v. Gen. Motors Corp., 397 Md. 108, 132-33, 916 A.2d 257, 271 (2007) (hereinafter "*Lloyd*") (citing Phipps v. Gen. Motors Corp., 278 Md. 337, 341, 363 A.2d 955, 957 (1976)).

2 *See, e.g.*, Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613 (2005).

3 *Id.* at 653-54.

4 *See, e.g.*, Progressive Ins. Co. v. Gen. Motors Corp., 749 N.E.2d 484, 488 (Ind. 2001) ("[E]conomic damages [are defined] under Indiana Law as the diminution in the value of a product and consequent loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold.").

5 Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

6 Oceanside at Pine Point Condo. Owners Ass'n. v. Peachtree Doors, Inc., 659 A.2d 267, 270 (Me. 1995).

7 *See, e.g.*, Reed v. Cent. Soya Co., 621 N.E.2d 1069, 1074-75 (Ind. 1993).

8 *See, e.g.*, Seely v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965); *see also*, Alloway v. Gen. Marine Indus., 695 A.2d 264, 270-71 (N.J. 1997) (reviewing majority cases).

In *Lloyd v. General Motors Corp.*, the Court of Appeals of Maryland rejected the majority rule in American products liability law by holding that unmanifested product defects, defects that have not caused personal injury, can still be actionable.[9] The court reinstated a class action brought by plaintiff buyers against automobile manufacturers who sold cars alleged to contain defective seatbacks.[10] The seatbacks had yet to cause any actual injuries to the plaintiff class members, as the alleged defects had not even manifested themselves.[11] Nevertheless, the Court of Appeals of Maryland reasoned that, since the alleged defects could potentially cause serious injury or death, the cost of repairing the seatbacks was actionable in consumer protection, in contract, and in tort.[12]

In this article, I argue that *Lloyd* is an unfortunate, unwarranted, and unnecessary extension of tort law. Assuming arguendo that the seatbacks were defective, plaintiffs had adequate remedies in consumer protection and contract.[13] By recognizing a products liability tort remedy in this situation, the Court of Appeals of Maryland is in conflict with Maryland precedent,[14] with the majority of American jurisdictions,[15] and with the underlying goals and rationales of products liability law. As such, *Lloyd* is a departure in both theory and practice.

II. THE CASE

The *Lloyd* plaintiffs brought suit against General Motors, Ford Motors, Daimler Chrysler, and Saturn, alleging that the front seats of cars they had purchased would collapse backwards in rear-impact collisions.[16] Plaintiffs alleged that these seat defects could potentially cause serious injury or death.[17] Although the seatbacks had yet to fail, the plaintiffs sued on behalf of themselves and other Maryland

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9 397 Md. 108, 916 A.2d 257 (2007).

10 *Id.* at 171, 916 A.2d at 294.

11 *Id.* at 117-18, 916 A.2d at 262.

12 *Id.* at 171, 916 A.2d at 293-94.

13 *See id.* at 157, 916 A.2d at 285-86. The court itself recognizes these claims under the Maryland Consumer Protection Act. *Lloyd*, 397 Md. at 140-43, 916 A.2d 276-78.

14 *See infra* section IV.

15 *See infra* section III.

16 *Lloyd,* 397 Md. at 117-18, 916 A.2d at 262.

17 *Id.* at 118, 916 A.2d at 262.

resident purchasers of the cars, seeking damages for the cost of repairing or replacing the seatbacks.[18]

The Court of Appeals of Maryland admitted that a plaintiff in a products liability case generally may not recover for pure economic damages.[19] Nevertheless, the court recognized an exception to the economic damage rule when the product defect creates a "substantial and unreasonable risk of death or personal injury."[20] The court found that *Lloyd* fit within the stated exception, given the nature of the potential damage and the probability of its occurrence.[21] Significantly, the court stated, "it is exactly the risk of serious bodily injury involved in this case that the exception to the economic loss rule was intended to remedy, to 'encourage people to correct dangerous conditions before tragedy results.'"[22]

The *Lloyd* opinion is clearly a minority view.[23] Most American courts require plaintiffs in a products liability claim to allege a present injury.[24] For example, the Eighth Circuit has observed that, "purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."[25] "An overwhelming majority of courts have dismissed these unmanifested defect claims and rejected the idea that [plaintiffs] can sue manufacturers for speculative damage."[26]

A major problem with the *Lloyd* analysis is that it gives a tort remedy for a contract claim.[27] Basically, the only injury to the plaintiffs is that they may not have received the benefit of their bargain

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18 *Id.* at 117-18, 916 A.2d at 262 ("None of the petitioners or any putative class members allege . . . personal injury as a result of the mechanical failure that caused the alleged defect. Indeed, persons with such experiences were expressly excluded from this class.") *Id.* at 118, 916 A.2d at 262.

19 *Id.* at 123, 916 A.2d at 265-66.

20 *Id.* at 123, 916 A.2d at 266 (quoting U.S. Gypsum Co. v. Mayor of Balt., 336 Md. 145, 156-57, 647 A.2d 405, 410 (1994)).

21 *Id.* at 130, 916 A.2d at 270.

22 *Id.* at 131, 916 A.2d at 270 (quoting Morris v. Osmose, 340 Md. 519, 534-35, 667 A.2d 624, 632 (1995)).

23 *See id.* at 123, 916 A.2d at 266; *see also* DAVID G. OWEN, PRODUCTS LIABILITY LAW 272 & n.82 (West 2005). Ohio and Florida are also in the minority. *See* LaPuma v. Collinwood Concrete, 661 N.E.2d 714 (Ohio 1996); Collins v. Daimler Chrysler Corp., 894 So. 2d 988 (Fla. Dist. Ct. App. 2004).

24 *See, e.g.*, Briehl v. Gen. Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999) (citations omitted).

25 *Id.*

26 *Id.* at 630.

27 *Lloyd*, 397 Md. at 123, 916 A.2d at 265.

if they did not receive the car seats for which they paid.[28] However, "benefit of the bargain" is the essence of a contract claim.[29] To maintain a products liability claim, plaintiffs must prove that they were injured by a product defect *that was* unreasonably dangerous to the ultimate product user.[30]

Lloyd seems willing to recognize an exception for buyers who are merely disappointed in a contractual sense.[31] The Court of Appeals of Maryland considered the plaintiffs in *Lloyd* to be in danger of suffering potential harm which required immediate tort compensation.[32] Therefore, Maryland becomes one of the few states to permit an exception to the economic loss doctrine based on distinguishing the disappointed product buyer from the potentially endangered product user.[33]

III. THE ECONOMIC LOSS DOCTRINE

The widely-accepted economic loss doctrine generally prohibits recovery in tort for purely economic losses which arise independent from damage to persons or property.[34] The rule is so generally accepted that comprehensive products liability reform efforts usually exclude recovery for economic loss and property damage.[35] Moreover, section 21 of the Products Liability Restatement permits recovery for economic loss only "if caused by harm to: (a) the

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28 *Id.* at 149, 916 A.2d at 281.

29 RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1979).

30 *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* Phipps v. Gen. Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).

31 *See Lloyd*, 397 Md. at 131, 916 A.2d at 270.

32 *See id.* at 134, 916 A.2d at 272.

33 Other states that adopted the minority view are Alaska, Georgia, and Iowa. *See* N. Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981); Vulcan Materials Co. v. Driltech, Inc., 306 S.E.2d 253, 257 (Ga. 1983); Am. Fire and Cas. Co. v. Ford Motor Co., 588 N.W.2d 437, 438 (Iowa 1999).

34 *See, e.g.*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 9A, 681 (5th ed. 1984) (noting that parties who have bargained should not be permitted to circumvent their bargain after loss occurs to the property that was the subject of their bargain); *see generally* David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. (SUPPLEMENT) 187 (2006); J. WHITE & R. SUMMERS, U.C.C. § 10-5 (5th ed. 2000) (generally endorsing the idea that pure economic losses should not be recovered in tort).

35 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-687 (2007); CONN. GEN. STAT. § 52-572m (2005); N.J. STAT. ANN. § 2A:58C-1 (West 2000); OHIO REV. CODE ANN. § 2307.71 (LexisNexis 2006).

plaintiff's person; or (b) the person of another ... or (c) the plaintiff's property other than the defective product itself."[36]

The controlling law in this area is an admiralty case decided by the United States Supreme Court: *East River Steamship Corp. v. Transamerica Delaval, Inc.*[37] *East River* is a strict liability and negligence case brought by the charterers of four ships against the manufacturer of turbines installed in those ships.[38] Plaintiffs alleged that the turbines were defectively designed, causing damage to the turbines themselves.[39] Plaintiffs sought damages for the cost of repairing the turbines, as well as lost income while the ships were not in service.[40] Applying products liability concepts, the Court unanimously held "that 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."[41]

The Court considered three approaches for determining whether an action can be brought in tort for damage only to the product itself. Significantly, the Court rejected the intermediate view, noting that a distinction which rests on the manner in which the product is damaged is not persuasive.[42] Whether the product itself is damaged by gradual deterioration, internal breakage, or by a calamitous event should not be dispositive.[43] By definition, no other property or person is damaged.[44] Economic loss resulting from a calamitous event simply means that the buyer failed to receive the benefit of the bargain, a matter traditionally within the province of contract law, rather than tort law.[45]

Moreover, the Court rejected the minority approach for failing to maintain contract and tort law in separate spheres.[46] Such separation results in more appropriate, realistic damages.[47] In adopting the majority approach to pure economic loss, the Court stressed a number of doctrinal concepts.

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36 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 (1998).

37 476 U.S. 858 (1986) (holding that admiralty law incorporates principles of products liability law.)

38 *Id.* at 861.

39 *Id.*

40 *Id.*

41 *Id.* at 871.

42 *Id.* at 870.

43 *E. River Steamship Corp.* (hereinafter "*E. River*"), 476 U.S. at 870.

44 *Id.*

45 *Id.*

46 *See id.* at 871.

47 *See id.* at 872.

First, appropriate tort safety concerns are minimized where the defective product damages only itself. Therefore, a defective product that does not damage any person or other property simply fails to meet the buyer's reasonable expectations, which constitutes a warranty claim.[48] In the main, warranty doctrine is suited to commercial disputes not involving significant disparities in bargaining power.[49] Warranty law has inherent limitations on liability, while tort law recognizes a duty to the general public, permitting recovery for foreseeable losses.[50] As a result, tort recovery could subject product manufacturers to indefinite economic losses to a buyer's customers.[51] Therefore, warranty law provides a bright line for damages to the product itself, avoiding the needless uncertainty inherent in any attempt to limit pure economic losses in negligence and strict liability.

Clearly, the United States Supreme Court recognized the differing legitimate interests protected by contract law as opposed to tort law. Contractual liability stems from society's interest in performing promises so that contracting parties' reasonable expectations are protected.[52] By contrast, tort doctrine protects the product user's interest in being free from product harm, regardless of the existence of a contract between the ultimate user and the product manufacturer or seller.[53] Products liability law recognizes that users and sellers of products, especially consumer products, enjoy unequal bargaining positions.[54] As a result, the law must provide protection to the public from unsafe products.[55] Products liability tort law places responsibility on the manufacturers of defective products because they are in the best position to design, manufacture, and market safe products, as well as to allocate losses for injuries resulting from unsafe products.[56] On the other hand, repair costs are based on the buyer's loss of the benefit of the contractual bargain -- a loss which should be

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48 *Id.* at 871-72.

49 *E. River*, 476 U.S. at 872-73.

50 *Id.* at 874.

51 *Id.* at 872 ("[T]he increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified."). *Id.*

52 *See id.* at 872-74.

53 *See id.*

54 *See id.*

55 *E. River*, 476 U.S. at 872-74.

56 *Id.* at 871.

compensated in contract rather than tort.[57] In *East River*, the Court explained the doctrines as follows: "Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'"[58]

Some courts have found an exception for actions against manufacturers of asbestos products, permitting tort claims for the costs of removing asbestos insulation.[59] Asbestos' characteristic flexibility, strength, and heat resistance led to its use in insulation and related products until the 1970s.[60] Its pervasive use led to millions of individuals' exposure to asbestos dust.[61] Inhalation of asbestos causes major diseases, including lung cancer, mesothelioma and asbestosis.[62] The asbestos cases present a situation in which the very exposure to the product causes physical harm, although the extent of the harm may not become apparent for decades.[63] Maryland asbestos cases have required the plaintiff to suffer "functional impairment" to maintain a strict liability action.[64] Such "functional impairment" requires the plaintiff to experience symptoms, such as shortness of breath, which curtail normal activities.[65] The rationale in these cases is that the

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57 *Id.* at 872; *see also* U.C.C. § 2-313 (2004) (express warranty); U.C.C. § 2-314 (2004) (implied warranty of merchantability); U.C.C. § 2-315 (2004) (implied warranty of fitness for particular purpose).

58 *E. River*, 476 U.S. at 872.

59 *See, e.g.*, Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co., 984 F.2d 915, 919-20 (8th Cir. 1993); 80 South Eighth St. Ltd. P'ship v. Carey-Canada, Inc., 486 N.W.2d 393, 397 (Minn. 1992). The Restatement (Third) of Torts, section 21 comment e, provides that: "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." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. e (1998).

60 *See, e.g.*, Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 323 (E.D.N.Y. 2000).

61 *Id.* at 323-24.

62 *Id.* at 324.

63 *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973).

64 *See generally* Owens-Illinois, Inc. v. Armstrong, 326 Md. 107, 121-22, 604 A.2d 47, 54 (1992).

65 *Cf.* ACandS v. Abate, 121 Md. App. 590, 693, 710 A.2d 944, 995 (1998) (discussing shortness of breath related to asbestos related injuries).

property owners were *not* suing for the contractual benefit of their bargain. Instead, the property owners were seeking to recover the cost of removing asbestos since asbestos exposure itself risks the health of those exposed to it.[66] As a result, these courts conclude that the economic loss doctrine should not bar tort recovery in such limited circumstances.[67]

Courts justify recovery for damage to property other than the product itself.[68] The prevailing view permits recovery for such damage in both warranty and in tort.[69] For example, the United States Supreme Court held that the owner of a fishing vessel could recover damages for the loss of equipment added by the previous owner of the vessel after purchase from the manufacturer.[70] In that case, the vessel caught fire and sank, causing the owner to bring a products liability action against the manufacturer of the vessel and against the designer of the hydraulic system, alleging defective design.[71] The Court found that the added equipment constituted "other property" rather than harm to the "product itself."[72]

Maryland law is in accord with these general principles. For example, in a case decided before the *Saratoga Fishing Co.* opinion, the Court of Appeals of Maryland permitted recovery for the loss of 140,000 chickens that died as a result of a power outage that caused the ventilation system in the chicken house to shut down.[73] The defendant's transfer switch caused the power outage, by failing to activate the backup power supply.[74]

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66 *See generally* Richard C. Ausness, *Tort Liability for Asbestos Removal Costs*, 73 OR. L. REV. 505 (1994). The Restatement adopts the *East River* approach, but recognizes that products that are dangerous to users are generally governed by products liability tort rules rather than contract. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. d (1998).

67 *See, e.g.,* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. d.

68 *Id.* § 21 cmt. e.

69 *Id.*; *see also* U.C.C. § 2-715 (2003).

70 Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875, 877 (1997).

71 *Id.* at 877.

72 *Id.*

73 A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 634 A.2d 1330 (1994). As a result, the "other property requirement" was met in that the chickens were lost, causing the plaintiff economic loss to property other than the defective equipment. Simply put, the defective product caused the plaintiff to lose more than his contractual bargain -- it also harmed other property.

74 *Id.* at 247, 634 A.2d at 1331.

Thus, the significant question is the definition of "other property." For example, in a 2005 Indiana case, *Gunkel v. Renovations, Inc.*, homeowners brought a negligence claim against a masonry contractor who installed a stone façade on their home, seeking to recover damages for repair costs and lost use of the home due to severe moisture damage.[75] The court permitted tort recovery on the theory that the homeowner had purchased the masonry façade, not the house.[76] As a result, tort recovery for damage to the home was not limited by the economic loss doctrine.[77]

Moreover, most courts disagree with the *Lloyd* court's conclusion that a mere possibility that a product defect may cause physical harm is sufficient justification for abrogating the economic loss rule.[78] Rejecting the economic loss doctrine completely ignores the basic principle that injury must occur before a tort action may be brought.[79] If an injury has not occurred, causation and victim identity remain completely speculative. As a result, potential manufacturer liability is indeterminate, with no possibility that damages will be reasonably related to risk, and with no possibility that the product manufacturer can plan to protect against that risk.[80]

As previously discussed, in *East River* and *Saratoga Fishing Co.*, the United States Supreme Court embraced the economic loss rule, making it more difficult for parties to move from contract to tort in products liability cases.[81] Simply put, the United States Supreme Court has recognized, along with the majority of courts and the Products Liability Restatement, that pure economic loss to the product itself should be governed by contract law.[82]

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75 822 N.E.2d 150, 151 (Ind. 2005).

76 *Id.* at 156.

77 *Id.* at 156-57.

78 *See, e.g.*, Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993).

79 *Id; see also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1101 (2001) (noting reluctance to impose liability on fairness grounds when it cannot be proved that injurer caused harm to victim).

80 *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 874 (1986).

81 *See supra* section III.

82 "[T]ort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law. Products liability law has evolved into a specialized branch of tort law for use in cases in which a defective product caused, not the usual commercial loss, but a personal injury to a consumer or bystander." Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990).

Tort and contract law treat damages for defective goods which have not yet caused physical injury differently. Physical injury is not required for warranty damage recovery – economic damages for disappointment in the product's performance are sufficient.[83] However, physical harm is required for recovery of tort damages.[84] Ignoring the difference between tort and contract theory creates confusion and hinders the development of coherent policy.

Lloyd seems inconsistent with previous Maryland case law. In addition, this view is supported by the Fourth Circuit's interpretations of Maryland law. For example, in *Hagepanos v. Shiley, Inc.*,[85] the plaintiff received a heart valve implant in 1982, a date when the manufacturer stated the failure rate to be one in ten thousand.[86] Six years later, the failure rate estimates became between one in one hundred and one in ten.[87] The Fourth Circuit affirmed the lower court's dismissal, because to recover "future damages" in Maryland, a plaintiff must demonstrate that the occurrence of the damages is more probable than not, meaning more than fifty of one hundred valves would fail.[88] Significantly, the Fourth Circuit rejected the plaintiff's argument that he should recover "present" damages for his "present fear."[89] Furthermore, the Fourth Circuit stated that recovery for "present fear" would frustrate Maryland law since many plaintiffs could claim distress about the future.[90]

IV. MARYLAND ECONOMIC LOSS DOCTRINE

Maryland law specifically requires that, "compensatory damages are not to be awarded in negligence or strict liability actions absent

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83 U.C.C. § 2-714(2) (2004) ("The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted ....").

84 RESTATEMENT (SECOND) OF TORTS § 402A (1965) ("Physical harm thereby caused...."); *see also id.* § 402A cmt. c.

85 No. 87-314, 1988 WL 35752 (4th Cir. Apr. 18, 1988) (unpublished table decision).

86 *Id.* at *1.

87 *Id.*

88 *Id.* (citing Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 666, 464 A.2d 1020, 1026 (1983); Davidson v. Miller, 276 Md. 54, 62, 344 A.2d 422, 427-28 (1975)).

89 *Id.*

90 *Id.*

evidence that the plaintiff suffered a loss or detriment."[91] Generally, Maryland does not permit recovery in tort for pure economic loss resulting from a product defect unless that defect causes a condition which creates a significant risk of death or personal injury.[92] To circumvent this rule, thereby allowing recovery in tort for pure economic losses, Maryland cases consider both the nature of the threatened damage and the probability that the damage will occur.[93] Ultimately, Maryland cases permit recovery for pure economic loss in tort only when the defective product exhibits clear, serious, and unreasonable risk of death or personal injury.[94]

As a result, if the potential injury is extremely severe, such as *the occurrence of* multiple deaths, the probability of injury is not required to be as significant as when the potential injury is less dangerous.[95] Absent such a significantly dangerous condition, a buyer is limited to contractual recovery, including recovery for breach of express and implied warranties.[96] Generally, contractual remedies offer more limited damages than tort money damages.[97] In an appropriate tort case, punitive damages are also available.[98]

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91 Owens-Illinois v. Armstrong, 87 Md. App. 699, 735, 591 A.2d 544, 561 (1991).

92 *See, e.g.*, Morris v. Osmose Wood Preserving, 340 Md. 519, 536, 667 A.2d 624, 633 (1995) (holding that because plaintiff homeowners failed to prove that defects in plywood used to construct roofs on their homes caused any injury or created a serious, unreasonable risk of death or personal injury, the plaintiffs were barred from recovery in tort by economic loss doctrine).

93 *See infra* note 94 and accompanying text.

94 *See, e.g.*, A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 251, 634 A.2d 1330, 1332 (1994); Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 308 Md. 18, 40-41, 517 A.2d 336, 348 (1986).

95 *See supra* note 65.

96 *See, e.g.*, U.S. Gypsum Co. v. Mayor of Balt., 336 Md. 145, 156, 647 A.2d 405, 410 (1994); *A.J. Decoster Co.*, 333 Md. at 250, 634 A.2d at 1332.

97 Tort damages may include punitive damages and recovery of attorneys fees generally not recoverable in contract. RESTATEMENT (SECOND) OF TORTS § 908 (1978); *see, e.g.*, DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 759 (West 1997).

98 ACandS, Inc. v. Asner, 344 Md. 155, 186, 686 A.2d 250, 265 (1996); Owens Corning v. Bauman, 125 Md. App. 454, 532-33, 726 A.2d 745, 784 (1999) (holding that a plaintiff must prove two elements: actual knowledge of the defect and deliberate disregard of the consequences of the defect).

V. HIDDEN AGENDAS

A. The Punitive Damages Threat

Punitive damages may be the hidden agenda or threat lurking in *Lloyd.* Generally, such damages are unavailable in contract actions, but are allowed for tort claims.[99] Punitive damages are awarded infrequently – usually in response to outrageous or wanton conduct.[100] Moreover, they are subject to post-trial reduction.[101] Nevertheless, defense lawyers claim that the availability of punitive damages has a "shadow effect" on litigation and settlement.[102] Clearly, no lawyer wants to be in the unenviable position of explaining to the client that the unexpected has happened: an award of significant, even financially ruinous, punitive damages.[103]

In Maryland, a jury may properly award punitive damages only if the defendant's conduct exhibits "actual malice."[104] In other words,

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[99] RESTATEMENT (SECOND) OF TORTS § 908 (1979); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1978) (makes punitive damages available in contracts cases only if the breach of contract conduct is also a tort permitting punitive damages.)

[100] *See* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 159 (2002) ("Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to outrageous conduct, and often reduced post-trial."); *see also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 31 (1990) (punitive damages awarded in 8.8 percent of all cases won by plaintiff); Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990's*, 79 JUDICATURE 233, 238-39 (1996) (punitive damages awarded in 4 percent of all cases won by plaintiff).

[101] *See, e.g.*, Bullock v. Phillip Morris USA, Inc., 42 Cal. Rptr. 3d 140, *reh'g denied*, 2006 Cal. App. LEXIS 731 (Cal. Ct. App. 2006), *remanded for reconsideration*, 159 P.3d 33 (Cal. 2007) (reducing a twenty-eight billion dollar award to twenty-eight million dollars).

[102] *Id.* Nevertheless, some Justices of the United States Supreme Court raised concerns that punitive damages awards were increasing in number and amount. *See, e.g.,* Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).

[103] *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979); *see also* Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisted After State Farm*, 6 U. PA. J. CONST. L. 423 (2004); Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297 (2005).

[104] *See* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 460, 601 A.2d 633, 652 (1992).

the defendant must be motivated by evil intent or the intent to do harm, knowing that his actions will be harmful.[105] Moreover, a plaintiff must prove "actual malice" by the heightened "clear and convincing" evidentiary standard, rather than the customary civil litigation standard of "preponderance of the evidence."[106] Thus, Maryland permits the jury to award punitive damages only in the rare instance when the jury determines the defendant must be punished for a bad faith decision.[107] In addition to the punishment motive, punitive damages seek to deter potential defendants from engaging in similar conduct.[108] By limiting such disciplinary damages, Maryland achieves the dual goals of punitive damages -- punishing this defendant, and deterring similar conduct by future bad actors.[109]

Prior to 1992, the Court of Appeals of Maryland had permitted the award of punitive damages for conduct demonstrating *implied malice*.[110] However, current Maryland law provides that the plaintiff must prove that the defendant demonstrated *actual malice*.[111] Moreover, defendants in products liability cases must have "actual knowledge" of a particular defect and must demonstrate deliberate or conscious disregard of the foreseeable harm resulting from that product defect.[112] In 1995, the Court of Appeals of Maryland made the "actual malice" requirement applicable to intentional and non-intentional torts.[113] Since 2004, Maryland has held that the clear and convincing standard applies to the burden of production as well as to the burden of persuasion.[114]

B. Class Action Issues

Some commentators have suggested that *Lloyd* will increase the potential for plaintiffs' attorneys to bring more class actions in

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105 *Id.* at 460, 601 A.2d at 652.
106 *Id.* at 469, 601 A.2d at 657.
107 *Id.* at 463, 601 A.2d at 654.
108 *Id.* at 454, 601 A.2d at 650.
109 Montgomery Ward v. Wilson, 339 Md. 701, 733-34, 664 A.2d 916, 932 (1995) (quoting *Zenobia*, 325 Md. at 454, 601 A.2d at 650).
110 Smith v. Gray Concrete Pipe Co., 267 Md. 149, 168, 297 A.2d 721, 731 (1972).
111 *Zenobia*, 325 Md. at 460, 601 A.2d at 652.
112 *Id.* at 463, 601 A.2d at 654.
113 *Wilson*, 339 Md. at 733, 664 A.2d at 932.
114 Darcars Motors of Silver Spring, Inc. v. Borzym, 379 Md. 249, 270, 841 A.2d 828, 840-41 (2004).

Maryland.[115] This may be problematic in that class actions have been the subject of significant controversy.[116] For example, Judge Richard Posner has charged that businesses might settle unmeritorious suits to avoid the possibility of high judgments, stating, "certification of a class action, even one lacking in merit, forces defendants 'to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.'"[117] Moreover, plaintiffs often recover little while their attorneys receive excessive fees.[118]

In response to such criticism, Congress enacted the Class Action Fairness Act of 2005 ("CAFA").[119] CAFA was intended to amend interstate class actions "to assure fairer outcomes for class members and defendants."[120] One of the desired "fairer outcomes" was to keep plaintiffs' attorneys from manipulating the system.[121] In particular, the Senate report found "that one reason for the dramatic explosion of class actions in state courts is that some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions."[122] Nevertheless, opponents of CAFA argue that class actions provide a valuable deterrent for negative business practices.[123] Moreover, CAFA opponents view class action abuses as minor, isolated, and easily remedied.[124]

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115 *See* Brian A. Zemil, *Maryland Expands Products Liability for Unmanifested Defects*, 32 LITIG. NEWS, NO. 5, July 2007, at 5 (quoting John B. Isbister as saying, "plaintiffs' counsel may now believe that Maryland is more favorable for filing class actions based on unmanifested defect claims"). However, Scott L. Nelson argues that, "non-Maryland plaintiffs who try to file a class action in Maryland state court likely will end up in federal court under the Class Action Fairness Act, and the courts would be unlikely to apply Maryland law to claims by out-of-state plaintiffs against out-of-state defendants anyway." *Id.*

116 *See, e.g.*, Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847 (2000).

117 Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 263 (2000) (quoting *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995)).

118 *Id.* at 260; *In re* Rhone-Poulenc Rorer Inc., 51 F.3d at 1293, 1299.

119 *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in 28 U.S.C. § 1711 *et seq.* (2000)).

120 *Id.*

121 S. REP. NO. 109-14, at 5-6 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3.

122 *See id.* at 14, *as reprinted in* 2005 U.S.C.C.A.N., at 14.

123 *Cf. id.* at 83, *as reprinted in* 2005 U.S.C.C.A.N., at 76 (minority views).

124 *Id.* at 83, *as reprinted in* 2005 U.S.C.C.A.N., at 76 (minority views).

Some suggest that CAFA might not eliminate the current perceived problems.[125] For example, plaintiffs will likely limit class actions to state-only classes, rather than one massive national class action, thereby allowing state courts to retain jurisdiction.[126] Additionally, although in many situations bargaining power would shift to the defendant, plaintiffs' lawyers bringing multiple state-by-state class actions will retain significant power in negotiating with potential defendants.[127]

VI. THE COLLISION OF TORT AND CONTRACT

As early as 1966, Marc Franklin predicted that the products liability system would suffer a collision between strict liability in tort and contractual warranty theories -- especially the implied warranty of merchantability.[128] American legal jurisprudence continues to struggle with delineating the proper roles of tort and contract.[129] The economic loss rule is merely one aspect of this struggle.[130] Unfortunately, *Lloyd* fails to improve the situation. Rather, it adds confusion and lack of predictability to Maryland products liability law.

The United States Supreme Court considered the appropriate roles of tort and contract in economic loss cases in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[131] As previously discussed, the Court held that, "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."[132] The Court reasoned that, "when a product injures only itself, the reasons for imposing a tort

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125 Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga is Finally Over*, 59 U. MIAMI L. REV. 385, 386 (2005); *see generally* OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 272-73 ("In a new form of class action litigation, courts in recent years have been asked to allow recovery for the reduction in value of a product because it contains a dangerous condition, such as a particular type of tire likely to blow out or SUV likely to roll over. The courts have been singularly unreceptive to these 'no-injury' claims.").

126 Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1608 (2006).

127 *Cf. id.*

128 Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 974, 990-1016 (1966).

129 *See, e.g.*, James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. REV. 1067 (2002).

130 *See id.* at 1067-68.

131 476 U.S. 858 (1986).

132 *Id.* at 871; *see also supra* notes 41-58 and accompanying text.

duty are weak and those for leaving the party to its contractual remedies are strong."[133] Moreover, the Court emphasized the importance of maintaining the distinction between tort and contract.[134] Significantly, the United States Supreme Court stressed that tort doctrine is concerned primarily with safety, while contract law seeks to protect society's interest in enforcing promises.[135] Therefore, if the only damage is to the product itself, societal tort concerns with safety are diminished.[136] Significantly, the Court stressed that, "[t]he increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified."[137] Moreover, the Court underscored that pure economic loss in terms of damage to the product itself is the province of warranty law -- the arena best-suited to protect reasonable buyer expectations. [138] The *East River* Court noted that, "maintenance of product value and quality is precisely the purpose of express and implied warranties."[139] Fundamentally, *East River* demonstrates that cases involving products causing economic harm by failing to meet reasonable buyer expectations simply deny the buyer the benefit of the bargain.[140] Therefore, these cases present a basic contract issue, not a tort concern.[141]

In *East River*, the United States Supreme Court recognized that underlying the economic loss doctrine is the contractual parties' freedom of contract. Specifically, parties must be permitted to allocate economic loss by contract.[142] Since contracting parties can set the terms of their agreements, the economic loss doctrine encourages the party best situated to assume or insure against a particular risk to negotiate an appropriate contract term.[143] Moreover, product sellers can limit their contractual liability by disclaiming warranties or

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133 *E. River*, 476 U.S. at 871.
134 *Id.*
135 *Id.* at 871-72.
136 *Id.* at 871.
137 *Id.* at 872.
138 *Id.*
139 *See E. River*, 476 U.S. at 872-73.
140 *Id.*
141 *See id.* at 873 n.8; *see also* Seely v. White Motor Co., 403 P.2d 145, 152 (Cal. 1965) (holding that the doctrine of strict liability in tort governs the distinct problem of physical injuries and does not undermine warranty law).
142 *E. River*, 476 U.S. at 872-73.
143 *See id.*

limiting damages.[144] Underscoring the core differences between contract and tort, especially as applied to products liability, the Court stressed that, in the products arena, "where there is a duty to the public generally, foreseeability is an inadequate brake."[145] Ultimately, the Court worried that permitting recovery for pure economic loss "could make a manufacturer liable for vast sums."[146] By contrast, the Court recognized that warranty law places legitimate and reasonable limitations on seller liability.[147] At bottom, the economic loss doctrine is required to prevent product sellers from facing unknowable, unlimited damages.

VII. PRODUCTS LIABILITY POLICY

An underlying policy of products liability law is encouraging product safety.[148] However, unlike "product safety" law, which is largely regulatory,[149] products liability law operates after the fact; that is, after product damage has occurred, providing a private litigation response for product accidents.[150] Professor David Owen argues that:

> Products liability law lies at the center of the modern world. To a large extent, persons accomplish their individual and collective objectives, and relate to one another, through the products of technology . . . . Products liability law instead concerns the consequences of modern science and technology gone awry-when products, or the interactions between persons and their products, fail.[151]

Professor Owen maintains that products liability has moral foundations at its core.[152] These moral issues arise because the relationship between product seller and product accident victim

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144 *Id.* at 873 (citing U.C.C. §§ 2-316, 2-719 (1977)).

145 *Id.* at 874.

146 *Id.*

147 *Id.*

148 OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 1; *see also*, FRANK J. VANDALL, STRICT LIABILITY 20-21 (1989).

149 Owen, PRODUCTS LIABILITY LAW, *supra* note 23, at 2.

150 *Id.* at 3.

151 *Id.* at 6-7.

152 *Id.*; *see generally* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 429-30 (1993) (hereinafter "Owen, *Moral Foundations*").

"implicates fundamental issues of moral philosophy."[153] Owen asserts that when manufacturers make product safety decisions, they make choices about safety and personal autonomy, which may rightfully belong to product users.[154] At the same time, by making risky use of products or making claims against product sellers, product users may "appropriate to themselves economic interests that may belong to manufacturers and other consumers."[155]

Significantly, this approach recognizes that the product producer and the product consumer have reciprocal safety obligations.[156] At the very least, the product accident victim must demonstrate that the product defect was the cause-in-fact of his harm.[157] Maryland law generally requires the plaintiff to prove that it is more likely than not that the defendant's conduct was a "substantial factor" in creating the plaintiff's loss.[158] Clearly, Maryland courts have been traditional in their view of causation in products liability law. For example, federal courts have recognized that Maryland courts are unlikely to innovate in this arena by refusing to apply market share liability to products liability cases.[159] They also recognize that tort liability for unmanifested product defects is as radical a departure from products liability as adoption of market share.[160] Moreover, *Lloyd*'s rejection of traditional concepts of proof of product defect is equally problematic. Maryland products liability law has always required the plaintiff to prove: (1) that the product was in a defective condition when it left

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153 OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 7.

154 *Id.*

155 *Id.*

156 *See, e.g.*, Rebecca Korzec, *Dashing Consumer Hopes: Strict Products Liability and the Demise of the Consumer Expectations Test*, 20 B.C. INT'L & COMP. L. REV. 227, 236 (1997); *see generally* David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992).

157 *See e.g.*, Union Pump Co. v. Allbritton, 898 S.W.2d 773, 777, 779 (Tex. 1995) (Cornyn, J., concurring).

158 Pittman v. Atl. Realty Co., 359 Md. 513, 521 n.4, 754 A.2d 1030, 1034 n.4 (2000).

159 *See* McClelland v. Goodyear Tire & Rubber Co., 735 F. Supp. 172, 174 (D. Md. 1990) (noting that Maryland has not adopted the market share theory and therefore rejecting the theory because it failed to satisfy the traditional products liability requirement of proximate causation); *see also* Tidler v. Eli Lilly & Co., 95 F.R.D. 332, 335 (D. D.C. 1982) (noting that federal judges in Maryland have rejected the theory and expressing doubt as to whether D.C. courts would adopt it).

160 *Tidler*, 95 F.R.D. at 335 (calling market share a "radical departure from the traditional concepts of product liability law").

the seller; (2) that the seller caused the defect; and (3) that the product defect proximately caused the plaintiff's loss.[161]

It is all the more puzzling that the Court of Appeals of Maryland would abandon these basic products liability tort principles in a case, such as *Lloyd*, which provides adequate contractual and consumer protection remedies.[162] Simply put, there was absolutely no reason for the court to "innovate," by abandoning basic, established tort principles in a case easily solved by contract law.[163] The court, itself, recognized that the *Lloyd* plaintiffs were adequately protected by warranty and consumer law.[164]

The Court of Appeals of Maryland ignored the issue of moral responsibility.[165] Tort liability should encourage product manufacturers to create safer products.[166] However, these legitimate results are more likely to occur when product sellers pay the *actual* costs of product accident losses -- no more and no less.[167] Admittedly, the injured user must necessarily pay product accident costs that the seller does not pay.[168] Ultimately, consumers as a whole bear the cost of these product accidents in the loss-spreading price increase passed on to them by the sellers.[169] Therefore, the market price of products should reflect the actual cost of those products, including accident costs.[170] Ignoring legitimate torts concerns of proof of defect and causation may, in fact, provide an inefficient and even immoral result.

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161 Loh v. Safeway Stores, Inc., 47 Md. App. 110, 121, 422 A.2d 16, 23 (1980); *see also* Lloyd v. Gen Motors Corp., 397 Md. 108, 134, 916 A.2d 257, 272 (2007) (citing Phipps v. Gen. Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1976)); *see generally* David A. Fischer, *Products Liability -- The Meaning of Defect*, 39 MO. L. REV. 339 (1974).

162 *Lloyd*, 397 Md. at 157-71, 916 A.2d at 285-94.

163 *Id.* at 164-71, 916 A.2d at 289-94.

164 *Id.* at 164-66, 916 A.2d at 289-91.

165 *See generally* Owen, *Moral Foundations*, *supra* note 152 and accompanying text.

166 *See generally* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973) ("[I]f a manufacturer knows he will be held liable for injuries inflicted by his product, that product will be safer."); David G. Owen, *Musings on Modern Products Liability Law: A Foreword*, 17 SETON HALL L. REV. 505 (1987).

167 *See,* Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

168 *See id.* at 376.

169 *Id.* at 365-66.

170 *See, e.g.*, David G. Owen, *Rethinking the Policies of Strict Liability*, 33 VAND. L. REV. 681 (1980).

As previously discussed, most states apply the economic loss rule.[171] Under this rule, tort law refuses to compensate for pure economic or financial losses independent of any physical harm.[172] Both the economic loss rule, and decisions recognizing the significance of the doctrinal distinctions between tort and contract, implicate important policy considerations.[173] One policy encourages loss spreading by placing the loss on the party best able to spread it to the entire consuming public through insurance or product cost adjustments.[174]

Significantly, another policy favoring the economic loss rule comes from the law and economics literature.[175] Basically, this policy distinguishes between the types of tort harm.[176] The first type of harm results in a net social loss, where a physical harm to the plaintiff does not result in an economic benefit to another.[177] As the loss is not balanced by a similar gain, there is a net loss.[178] Therefore, the effect of this tort harm is felt beyond the immediate parties.[179] Recovery in these cases is supported by the fundamental policy of corrective justice: the tortfeasor should pay the loss, not the tort victim.[180]

On the other hand, some harms are different because they simply shift economic activity -- one party's economic loss is another's

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171 *See supra* section III.

172 *See supra* section III.

173 *See supra* notes 37-58; *see also* Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990) ("[T]ort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law. Products liability law has evolved into a specialized branch of tort law for use in cases in which a defective product caused, not the usual commercial loss, but a personal injury to a consumer or bystander.").

174 *See, e.g.*, Page Keeton, *Products Liability -- The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693, 695 ("The principal reason that has now gained undisputed acceptance for shifting losses from users and consumers to manufacturers is the capacity of those engaged in the manufacturing enterprise to distribute the losses of the few to the many who purchase the products.").

175 *See generally* Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249 (1991); W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281 (1982).

176 *See* David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. (SUPPLEMENT) 187, 206-08 (2006).

177 *See id.*

178 *See id.*

179 *See id.*

180 *See id.*

economic gain.[181] As a result, the victim's harm does not result in a net social loss. For example, when a party's business is disrupted by market innovations or new competition, the party will view the disruption as a loss. However, the result for other producers and for commerce is the opposite -- they experience a gain.[182]

Misapplying the economic loss doctrine can add to the problem of inconsistent verdicts in the products liability arena.[183] Most scholars now agree that negligence and strict liability in tort, product design, and warning cases are basically equivalent actions.[184] Nevertheless, for practical reasons, plaintiffs' lawyers may prefer negligence claims.[185] Moreover, empirical evidence suggests that juries are more favorable to negligence than strict liability claims [186]. The closeness of the two theories, however, may result in inconsistent verdicts. For example, if a jury decides for the plaintiff on the negligence claim, but for the defendant on the strict liability claim, the verdicts may be logically inconsistent since both claims require the product be "defective." As a result, the two findings -- the product is not defective, but the defendant was negligent in producing or selling it -- are contradictory. They cannot be reconciled or harmonized in any meaningful way.[187] Therefore, most courts have correctly reasoned

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181 *See id.*

182 *See id.*

183 The Restatement (Third) also takes the position that a plaintiff should not be permitted to present two "factually identical" defect claims to the jury because of the possibility for juror confusion, resulting in "inconsistent verdicts." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. n (1998).

184 *See generally* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874 (2002).

185 Paul D. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531-32 (1974).

186 Cupp & Polage, *supra* note 184, at 936-37 (noting that in mock trials, twenty-six percent of jurors hearing strict liability language awarded damages versus thirty-eight percent of jurors hearing negligence language; strict liability juror awards averaged $27,571 in pain and suffering awards versus $49,750 by negligence jurors).

187 *See, e.g.*, Halvorson v. Am. Hoist & Derrick Co., 240 N.W.2d 303, 307 (Minn. 1976) ("If a product is not . . . defective . . . it is not negligence to manufacture it that way."), *abrogated on other grounds by* Holm v. Sponco Mfg., Inc., 324 N.W.2d 207 (Minn. 1982); Hood v. Ryobi N. Am., Inc., 17 F. Supp. 2d 448, 450 (D. Md. 1998), *aff'd*, 181 F.3d 608 n.1 (4th Cir. 1999); Higginbotham v. KCS Int'l, Inc., 85 F. App'x. 911, 917 (4th Cir. 2005) (applying Maryland law) (stating that "the elements of proof are the same whether the claim be for strict liability or negligence" so that plaintiff's failure to establish defect and

that a negligence finding is inconsistent with a finding that a product is not defective.[188]

Similarly, the fundamental identity between the concept of defectiveness under strict liability in tort,[189] and unmerchantability under the Uniform Commercial Code,[190] has also led to inconsistent and unsupportable verdicts.[191] Simply put, the finder of fact should not be permitted to conclude inconsistently that a product is not defective in a strict liability sense, yet breaches the implied warranty of merchantability.[192] The majority of jurisdictions,[193] and the American Law Institute support this view.[194]

For similar policy reasons, the clear majority of courts have supported the economic loss rule, refusing to permit recovery for pure economic loss.[195] These well-considered policies also explain the fact that the majority of courts "have been singularly unreceptive to these 'no-injury' claims."[196] Basically, these *no-injury* cases are identical to the *Lloyd unmanifested defect* claims. Maryland products liability law would have been better served had the *Lloyd* decision honored earlier precedent and the views of the majority of commentators and courts concerning the appropriate roles of tort and contract.

VIII. CONCLUSION: A MODEST PROPOSAL

In cases in which the defective product causes physical harm in the sense of damage for bodily injury or damage to other tangible property, tort law provides significant monetary remedies. The injured party can recover compensatory damages for bodily injury, pain and suffering, property damage, and economic loss caused by the defective product.[197]

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causation caused all their negligence, breach of warranty, and strict liability claims to fail).

188 *See* OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 322-23 & n.33.

189 RESTATEMENT (SECOND) OF TORTS § 402A (1965).

190 U.C.C. § 2-314 (2007).

191 OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 327; *see also* Denny v. Ford Motor Co., 662 N.E.2d 730 (N.Y. 1995).

192 *See, e.g.*, White, *supra* note 129, at 1072-75.

193 *See* Peter J. Ausili, *Ramifications of* Denny v. Ford Motor Co., 15 TOURO. L. REV. 735, 744 & n.49 (1998).

194 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. n (1998); U.C.C. § 2-314 cmt. 7 (amended 2007).

195 *See* OWEN, PRODUCTS LIABILITY LAW, *supra* note 23, at 273 & n.84.

196 *Id.*

197 RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977).

A different rule applies, however, if the product purchaser only suffers economic loss consisting of damage to the product itself with resulting financial loss, such as diminution in product value, reduced profits or repair costs. In the majority of jurisdictions, the product seller sued in tort is not liable for these pure economic damages under the economic loss rule.[198]

In the products liability arena, the economic loss rule has been subject to debate.[199] This debate focuses on the restrictive roles of tort and contract law.[200] As previously noted, the United States Supreme Court views pure economic loss in the products liability arena in contract terms, "essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the core concern of contract law."[201]

To avoid the uncertainty and inconsistency created by *Lloyd*, Maryland should adopt section 21 of the Restatement (Third) of Torts: Products Liability. Adoption of section 21 would clarify two areas: 1) adoption of the economic loss doctrine; and 2) adoption of the rule requiring disappointed consumers who suffer financial loss only to sue in contract, rather than permitting actions in both warranty and tort. Section 21 of the Products Liability Restatement provides for recovery of economic loss only "if caused by harm to: a) the plaintiff's person; or b) the person of another [in whom plaintiff has an interest;] or c) the plaintiff's property other than the defective product itself."[202]

Adopting section 21 would place Maryland with the majority of jurisdictions, prohibiting recovery in tort of pure economic losses, independent of damage to person or other property. Just as significantly, it places Maryland law in the appropriate doctrinal position of separating contract and tort, by insisting that actual physical injury must occur before tort claims exist. Finally, rejecting claims for unmanifested defects ensures basic fairness. Providing tort compensation only after injury occurs ensures that the extent of the injury and the identity of the injured parties is more than speculative.

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198 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. d & reporter's note cmt. d. (1998).

199 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 27.01 (3d ed. 1994).

200 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. d (Proposed Final Draft No. 1, 2005).

201 E. River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986); *see also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. d (1998).

202 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 (1998).

Although the *Lloyd* approach would be rejected, the *A.J. Decoster Co.* case, permitting recovery in tort for damage to property other than the product itself, could be retained.[203] At the same time, adoption of section 21 would place Maryland with the majority of courts, as well as the U.C.C., which include repair and replacement costs under contract law.[204] It would return Maryland to the path first taken in *Phipps*[205] – the path which respects the appropriate differences between contract and tort, the path which best serves Maryland products liability law development.

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[203] A.J. Decoster Co. v. Westinghouse Elec. Corp., 333 Md. 245, 259, 634 A.2d 1330, 1337 (1994).

[204] *See also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21 cmt. d (1998).

[205] *See* Phipps v. Gen. Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).