

# APPLYING ECONOMIC LOSS DOCTRINE TO ARTICLE 2 TRANSACTIONS: A DOCTRINE AT A LOSS

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## INTRODUCTION

Modern application of the judicially-created economic loss doctrine redirects some purchasers of defective goods away from actions in tort for negligence or strict liability against a product manufacturer. The Uniform Commercial Code's (the "Code") premise of liberal supplementation necessitates harmonization of the Code's Article 2 remedy provisions with the common law economic loss doctrine when it comes to remedies for breach for sales of goods in these kinds of cases.<sup>1</sup> In most sale of goods cases, though, we view Article 2's remedies as the optimal system for compensation. The Article 2 framework allows for both limitations of remedies by the parties under section 2-719,<sup>2</sup> and for default remedies for a simple breach of warranty, which under section 2-714<sup>3</sup> would entitle the purchaser to the difference in value between the faulty goods and the value of the goods as promised without the defects.<sup>4</sup>

Modern application of the economic loss doctrine has proven esoteric at times, as fittingly illustrated by the case of *In re Chinese Manufactured Drywall Products Liability Litigation* (the "*Chinese Drywall Litigation*"),<sup>5</sup> involving installation of defective Chinese drywall in certain homes built

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1. See U.C.C. § 2-102 (2011) ("Article [2] applies to transactions in goods . . ."). Neither Article 2 nor Article 1 define a "transaction," but it is commonly understood to include sales of goods. *Id.* Citations to Article 2 in this Essay are to the version of Article 2 without reference to the amendments promulgated in 2003.

2. *Id.* § 2-719.

3. *Id.* § 2-714.

4. *Id.*

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, unless special circumstances show proximate damages of a different amount[,] [along with incidental and consequential damages].

*Id.*

5. *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780 (E.D. La. 2010).

after Hurricanes Katrina and Rita.<sup>6</sup> The purchasers of the drywall fell into two categories, creating the potential for different treatment of similar claims involving the same defective drywall; the categories, depending on the type of purchase, were by: (1) those who purchased the Chinese drywall directly from the manufacturer and then installed it in their homes; and (2) those who purchased a home, which had been built (or rebuilt) with Chinese drywall.<sup>7</sup> Plaintiffs' claims included the defective drywall itself, along with damages to the home components and appliances as a result, and, in some cases, also the plaintiffs' health.<sup>8</sup>

The distributor defendants moved for dismissal of the plaintiffs' claims based on the economic loss doctrine under the laws of Florida, Mississippi, Alabama, and Louisiana.<sup>9</sup> Focusing on the specific product purchased by the buyer, rather than the products put into the marketplace by the seller, the defendants attempted to distinguish application of the economic loss doctrine on that basis.<sup>10</sup> As such, the defendants conceded that the doctrine did not act to bar the first category buyers' tort claims related to the home because the product purchased was the drywall, and not the home.<sup>11</sup> The court agreed that as to these first category claimants, the tort allegations related to other property and personal injury were allowable and not barred by the doctrine.<sup>12</sup>

The court, focusing on the economic loss doctrine as developed in Florida, also denied the defendants' motion to dismiss the claims brought by buyers in the second category — who purchased the homes that already contained the drywall.<sup>13</sup> The court did not determine whether the “product” purchased by each individual was the home, or the drywall, but nevertheless concluded that the economic loss rule does not preclude tort claims where a component functions appropriately, but there is a “showing of harm above and beyond disappointed economic expectations.”<sup>14</sup> The

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6. *Id.* at 782.

7. *Id.* at 791.

8. *Id.* at 782.

9. *Id.*

10. *Id.* at 783–84; *see also id.* at 791–92 (citing and relying on the determination of “product” set forth in *Casa Clara Condo. Ass’n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993)).

11. *Chinese Drywall Litigation*, 680 F. Supp. 2d at 791 (citing *Casa Clara Condo Ass’n Inc.*, 620 So. 2d at 1247).

12. *Id.* at 791–92.

13. *Id.* at 792. Much of the court's opinion travails the doctrine and its exceptions in Florida and ultimately concludes, in a cursory style, that Alabama law would yield the same conclusion. *Id.* The doctrine is little used in Mississippi and not at all in Louisiana to bar tort claims. *Id.* at 792–96.

14. *Id.* at 793 (quoting *Casa Clara Condo Ass’n Inc.*, 620 So. 2d at 1246).

court observed that the economic loss rule did not apply because the plaintiffs who purchased homes: (1) were not in privity of contract with the sellers of the drywall, and (2) the defective drywall created a “hazard to health and property.”<sup>15</sup> Therefore, the tort claims of the buyers in both categories were allowed to proceed.<sup>16</sup>

The purpose of this Essay is to analyze the treatment and the types of tort and strict liability claims that courts are likely to redirect toward the Code’s Article 2 remedies.<sup>17</sup> Part I of this Essay examines the typical application of the economic loss doctrine.<sup>18</sup> Part II considers the bargain policy underlying the Code that supports imposition of the economic loss doctrine in a variety of claims touching Article 2 matters.<sup>19</sup> Part III outlines how the principles of the economic loss doctrine are a limited vehicle for resolution of claims that lie at the outer edges of the bargain as envisioned by the parties.<sup>20</sup> Finally, Part IV conducts an exercise using the *Chinese Drywall Litigation* to demonstrate how characterizing claims made by aggrieved buyers is a more disciplined approach toward application of the economic loss doctrine.<sup>21</sup> Part IV further evaluates the application of the doctrine to other property claims, including the extent to which the parties may either actually or impliedly take into account certain claims when entering into the sale of goods.<sup>22</sup> This Essay concludes that modern application of the economic loss doctrine preserves the boundary between tort and contract, but should be subject to a less obscure approach that lends greater surety to parties and does not require judicial intervention in most cases.<sup>23</sup>

## I. LIMITING ARTICLE 2 CLAIMANTS TO CONTRACTUAL REMEDIES

I begin by defining the “economic loss rule” and explaining its application in typical cases. The economic loss rule limits the recovery of an owner of a product who suffers purely monetary harm to the product itself to Article 2 (contract) damages, but the rule does allow the product owner to assert tort claims against a manufacturer for personal injuries

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15. *See id.* at 793.

16. *Id.* at 799.

17. *See* discussion *infra* Parts I–IV.

18. *See* discussion *infra* Part I.

19. *See* discussion *infra* Part II.

20. *See* discussion *infra* Part III.

21. *See* discussion *infra* Part IV.

22. *See* discussion *infra* Part IV.

23. *See infra* Conclusion.

caused by a defect in the product.<sup>24</sup> Justice Traynor explained the rationale for this rule in the renowned case of *Seely v. White Motor Company*:<sup>25</sup>

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 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.<sup>26</sup>

Fundamentally, the economic loss doctrine recognizes that parties to a sales transaction have made a voluntary bargain where the parties themselves either expressly allocated the risk of losses from defective products, or impliedly did so through the gap-filling provisions of Article 2.<sup>27</sup> The doctrine, in its simplest iteration, requires that the Code resolve

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24. *See, e.g.*, *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174, 187 (N.D.N.Y. 2009) (dismissing tort claims related to a defective recreational vehicle on grounds of the economic loss rule).

25. *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

26. *Id.* at 151.

27. *See* John D. Finerty, Jr. & Charles J. Crueger, *A Commentary on the Economic Loss Doctrine Under the Rule of Cease Electric and Cascade Stone*, 89 MARQ. L. REV. 137, 151 (2005) (explaining that “tort law . . . allocates liability and damages less efficiently [than contract law] because it ignores the terms of the parties’ voluntary interaction”); *see also* *Travelers Indem. Co. v. Dammann & Co., Inc.*, 594 F.3d 238, 253 (3d Cir. 2010) (holding that the economic loss rule barred purely economic claims brought against seller of vanilla beans, which contained mercury); *Integrity Carpet Cleaning, Inc. v. Bullen Cos.*, No. 08-4127, 2011 U.S. Dist. LEXIS 806, at \*9–10 (E.D. Pa. Jan. 5, 2011) (finding that economic loss rule precludes tort action in cases for purely economic losses in regards to the sale of leather products). *See generally* Steven W. Feldman, *The Economic Loss Doctrine: Rescuing Contract from Drowning in a ‘Sea of Tort’*, TENN. B.J., Apr. 2008, at 24, 25.

Contract law, and the law of warranty in particular, is better suited than tort law to resolve claims of economic loss, because contracting parties have the freedom to set the terms of their agreement and to assume, allocate, or insure against risk. The economic loss doctrine thereby prevents parties from extricating themselves from their bargains and recovering in tort what they could not obtain under their contract.

Feldman, *supra*.

cases involving “economic loss,” and that tort law resolve claims for “non-economic loss.”<sup>28</sup>

The economic loss doctrine attempts to segregate claims from defective goods by characterizing those claims as arising under Article 2.<sup>29</sup> The three variables that are present in these troubled sales are typically damage to the product itself, personal injury, and damage to other property.<sup>30</sup> A claimant with economic damages, which arose solely from a defective product, is limited to Article 2 remedies (“economic loss case”).<sup>31</sup> A claimant with economic damages from the defective product plus personal injury is limited to Article 2 claims for the former losses, but may potentially have tort claims for the latter (“economic loss case coupled with personal injury”).<sup>32</sup> A claimant with economic damages that arise from the defective product plus injury to other property is limited to only Article 2 claims for the former losses, but may potentially have economic and tort claims for the latter (“economic loss case coupled with other property losses”).<sup>33</sup> There is also the potential for combination of all three variables in any given case.

Although this rubric has a formalistic tone akin to a concrete tool for ready categorization of all claims presented in all cases, categorization has

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28. See Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1116 (2008).

29. See generally *Travelers Indem. Co.*, 594 F.3d at 253 (holding that the economic loss rule barred tort recovery for purely economic claims brought against seller of vanilla beans, which contained mercury); *Integrity Carpet Cleaning, Inc.*, 2011 U.S. Dist. LEXIS 806, at \*11–12, \*15 (finding that the economic loss rule precludes tort action in cases for purely economic losses in regards to the sale of leather products).

30. See, e.g., *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1335 (S.D. Fla. 2011) (damage to the product itself and personal injury); *Onebeacon Ins. Co. v. Deere & Co.*, 778 F. Supp. 2d 1005, 1006–07 (E.D. Mo. 2011) (damage to the product itself and damage to other property); *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 782 (E.D. La. 2010) (damage to the product itself, personal injury and damage to other property); *O’Neil v. Crane Co.*, 266 P.3d 987, 993 (Cal. 2012) (damage to the product itself and personal injury); *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1218–19 (Fla. 2010) (damage to the product itself and other property); *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 534 (Fla. 2004) (damage to the product itself); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628, 629 (Fla. 1995) (damage to the product itself); *Casa Clara Condo. Ass’n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1245 (Fla. 1993) (damage to the product itself and other property); *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 900 (Fla. 1987) (damage to the product itself); *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1036 (Fla. Dist. Ct. App. 2010) (damage to the product itself).

31. See *Am. Aviation, Inc.*, 891 So. 2d at 533; *Prevost Car, Inc.*, 660 So. 2d at 629; *Westinghouse Elec. Corp.*, 510 So. 2d at 899; *Witt*, 35 So. 3d at 1038–39.

32. See *Jovine*, 795 F. Supp. 2d at 1331; *O’Neil*, 266 P.3d at 987.

33. See *Onebeacon Ins. Co.*, 778 F. Supp. 2d at 1007; *Curd*, 39 So. 3d at 1228; *Casa Clara Condo. Ass’n, Inc.*, 620 So. 2d at 1245.

value where appropriate benchmarks are describable and accompanied by other factors. The economic loss case represents the classic situation whereby the claimant is traditionally compensated by any warranty on the product.<sup>34</sup> The economic loss case coupled with personal injury represents the situation whereby the public policy favors protection of consumers from dangerous products.<sup>35</sup> The economic loss case coupled with other property loss represents the situation whereby the damage is not restricted to only the product, indicating a claim involving more than just the customer's disappointed expectations.<sup>36</sup> The varying public policies underlying these categories, and whether tort claims are permitted, ultimately depend upon the connection to the precise bargain entered into by the parties. Accordingly, these classifications present limitations in their application in some cases. Yet, the basic categories surely carry value in a variety of traditional applications, allowing courts to readily determine whether tort claims are present or whether a claimant is limited to Article 2 remedies.

The *Chinese Drywall Litigation* presents a useful illustration of some of the elements of the rubric in application.<sup>37</sup> An individual's claims related solely to the failure of the defective drywall would, in the simplest iteration, constitute an economic loss case properly resolvable by Article 2. An individual with claims related to the failure of the defective drywall and who also, as an example, complained of physical afflictions such as headaches, nosebleeds, and difficulty breathing would have an economic loss case coupled with personal injury, with the latter claims sounding in tort. Finally, an individual with claims related both to the failure of the defective drywall and who also, as an example, had a corroded refrigerator would *seem* at first to have an economic loss case coupled with other property losses.

Of the attributes that determine which category of case is presented, the economic loss case coupled with other property losses presents the greatest potential of variation in treatment amongst claimants relative to the type of purchase made. The circumstance where a product purchased did

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34. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (discussing and recognizing products liability as part of general maritime law).

35. See *id.* (incorporating into maritime law that strict liability should be imposed on the party best able to protect persons from hazardous materials).

36. See *id.* at 867 (evaluating case law supporting that the manufacturer's duty of care was broadened to include protection against property damage).

37. See *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780 (E.D. La. 2010) (citing several cases barring tort claims under the economic loss doctrine where the only damage is to the product caused by the product itself).

not cause damage to other property owned by a buyer surely reflects some baseline of understanding in the majority of sales cases. These other property claims are least likely to have been taken into consideration by the parties in striking their bargain. As such, it is suitable that claimants be permitted to make tort claims related to other property. Yet, the *Chinese Drywall Litigation* demonstrates that the potential for variation in how parties purchase the defective product could lead to differing categorizations when the defective product is a component of a larger product, such as a home.<sup>38</sup>

The Code generally, and Article 2 particularly, of course surely contributes to the ultimate treatment of all three variables: economic loss, personal injury, and other property losses. In an attempt to adequately compensate the economic losses of aggrieved buyers of defective products, Article 2's remedies are consistent with the directive that the Code's remedies "must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."<sup>39</sup> Other provisions demonstrate a commitment to allowing claims of personal injury under Article 2 through the extension of warranties to a variety of third party non-buyers and restrictions on the ability of the seller to limit consequential damages in cases of personal injury.<sup>40</sup> The liberal provisions relative to consequential damages anticipate the potential for recovery under Article 2 of a variety of losses suffered due to defective products.<sup>41</sup>

It is the function of Article 2 to fulfill its gap-filling role in the sale of goods by providing remedies in cases where the parties have not otherwise contracted out of the Code's default rules, or where limitations on such contracting out is preferable. While Article 2's perspective, generally, is a discourse in classic contract expectation theory,<sup>42</sup> the Code, however,

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38. *See id.* at 788–91 (discussing different approaches taken by courts regarding products liability and the economic loss doctrine).

39. U.C.C. § 1-305(a) (2011); *see also id.* § 2-714 (stating the difference between the value of the goods accepted and the value they would have had if they had been as warranted is the damages for breach of warranty).

40. *See id.* § 2-318 (finding a seller's warranty extends to third parties such as a guest in the home, any member of the household, or any "natural person" if it may be reasonable to expect the person will use, consume, or be affected by the goods); *id.* § 2-719(3) (declaring a limitation on a seller's consequential damages for injury to the person in a case of consumer goods is prima facie unconscionable).

41. *See id.* § 2-715(2) (stating losses resulting in injury to person or property which are caused by a breach of warranty are consequential damages for the buyer).

42. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1981) (stating the ordinary course a court will take in a breach of contract scenario is to enforce the promise by protecting the expectation of the injured party).

embraces liberal supplementation by directing that “[u]nless displaced by the particular provisions of [this Act], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause [shall] supplement its provisions.”<sup>43</sup> Though it might seem obvious, supplementation through “law and equity” would include judicially created doctrines, such as the economic loss rule. By extension, this supplementation permits the categorization described here as a method to delineate cases appropriate to tort and commercial law remedies, as well as other doctrines that might supplement the Code’s provisions.

The approach of categorizing the nature of claims presented in defective goods cases as a whole allows us to draw a boundary so that “contract law would [not] drown in a sea of tort.”<sup>44</sup> I recognize this boundary is necessary, or at least advisable, to allow parties to, where appropriate, allocate risk to one party or another where such risk might be appreciated by the parties and so allocated. In order to instill a measure of confidence in my approach to categorization of claims, I will now turn to a short discussion of the rationale underlying imposition of the economic loss rule.

## II. SUITABILITY OF ARTICLE 2 PRINCIPLES TO RESOLVE CLAIMS

The Code’s expectation approach to remedies offers a well-defined approach to compensation through a “semi-permanent” framework that is flexible, liberally administered, and takes into account changes in commercial practices.<sup>45</sup> That does not mean that Article 2’s remedies framework is removed from critique. Article 2’s compensation mechanisms have drawn routine criticism, particularly for the failure of the leadership to successfully amend Article 2’s remedy provisions to keep pace with modern transactions, the strict application of the statute of limitations that can block warranty claims even before a buyer knows of their accrual, and the lack of clarity at times when a buyer can even bring a cause of action for damages.<sup>46</sup> These critiques are valid and constrain the

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43. U.C.C. § 1-103(b).

44. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (reasoning that products liability grew out of public policy rationale that people required more protection from dangerous products than the law of warranty afforded).

45. See U.C.C. § 1-103 cmt. 1; see also *id.* § 1-305.

46. See, e.g., Roy Ryden Anderson, *Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference’s Breach of Promise . . . Regarding Article 2 Damage Remedies*, 54

effectiveness of Article 2's remedies provisions, not because buyers simply may not know when they have an Article 2 cause of action. Worse still, might be the triumph of the status quo, accomplished through the defeat of the attempted revision to Article 2 that leaves open the prospect for non-uniform interpretations of Code provisions by courts left by commercial parties with the job of keeping the Code's application consistent with modern practices.<sup>47</sup> These criticisms notwithstanding, I shall nevertheless borrow the theory underlying the Code's remedy provisions as a basis for evaluating the application of the economic loss doctrine to Article 2 transactions.

The Code broadly presumes that courts will liberally administer remedies to aggrieved parties, but only to compensate the aggrieved party.<sup>48</sup> Given any two similar sales transactions, commercial parties would prefer that the remedies be roughly equivalent. Through its provisions allowing parties (typically the seller) to limit the remedy for breach (often through standardized terms and conditions)<sup>49</sup> and others compensating an aggrieved buyer for the difference between the goods as promised and as delivered,<sup>50</sup> Article 2 contemplates a system of equivalence in remedy across transactions. Where not limited by the parties, Article 2's provisions permitting aggrieved buyers to claim consequential damages can undermine this uniformity across sales

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SMU L. REV. 795, 847 (2001) (favoring amendment to the remedy provisions); David Frisch, *Amended U.C.C. Article 2 as Code Commentary*, 11 DUQ. BUS. L.J. 175, 192 (2009) (discussing repair or replace warranties and the application of the statute of limitations' accrual of a cause of action under Article 2); Margaret E. Garlikov, *Jurisdictional Inconsistency in the Interpretation of Original § 2-725 Statute of Limitations and Amended § 2-725's Selective Solutions*, 59 ALA. L. REV. 1685, 1686 (2008) (critiquing the limitations accrual); Fred H. Miller, *Uniform Commercial Code Article 2 on Sales of Goods and the Uniform Law Process: A True Story of Good v. ?*, 11 DUQ. BUS. L.J. 143, 143-44 (2009) (discussing the need for revision to Article 2); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1683-87, 1711-15 (1999) (discussing the difficulties of amendments).

47. Donald J. Smythe, *Commercial Law in the Cracks of Judicial Federalism*, 56 CATH. U. L. REV. 451, 451-52, 469-70 (2007) (arguing that the failure to revise Article 2 has left the job to federal courts).

48. See U.C.C. § 1-305(a).

49. See *id.* § 2-719(1)(a).

[T]he agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts[.]

*Id.*

50. See *id.* § 2-714(2).

transactions.<sup>51</sup>

Permitting the parties to autonomously determine the parameters of remedies applicable to their own sales transaction is strongly manifested in the Code's language in section 2-719.<sup>52</sup> While sellers are permitted to disclaim all warranties, commercial practices often include the provision of a repair or replace limited remedy in standard terms and conditions.<sup>53</sup> In these cases, Article 2 permits the parties' autonomous "reasonable agreements" as to remedies as a proxy for the Code's standard remedies, subject to certain limitations on party behavior.<sup>54</sup> Recognizing that one party might not engage in fair play, a minimal remedy must always be available and is, thus, an essential counterpart to the provisions permitting the remedies limitations. In other cases, sellers desiring to limit liability by providing a limited remedy that they do not honor, either intentionally or through circumstance, meet with a reversal of the intended limitations in favor of the Code's standard remedies.<sup>55</sup>

Limitations of remedies plays a pivotal role in our modern consumer sales transactions that oft provide for a simple repair or replacement in the event the goods are not as promised. The remedial Article 2 system is designed to put the aggrieved party in the place they would have occupied had the goods not been defective. In the typical repair or replacement, the buyer receives the benefit of having a functional good. The seller, in the better position to repair the goods in most cases due to expertise, must repair the goods as promised, but receives the benefit of reducing unknown risks related to consequential damages. Thus, the goals of the Code are typically accomplished with the application of the limited remedies of section 2-719 or even standard damages under section 2-714, which gives the aggrieved buyer the benefit of the bargain and further includes consequential damages.<sup>56</sup>

The functionality of the relationship between Article 2's remedies provisions and section 1-103(b)'s supplementation bears closer examination. Article 2 is not independent of other law, but is, rather, "drafted against the backdrop of existing bodies of law, including the

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51. *See id.* § 2-714(3).

52. *See id.* § 2-719(1); *see also* 1-66 CORBIN ON CONTRACTS DESK EDITION § 66.05 (2011) (stating that parties can shape their own remedies so long as minimal remedies are still available).

53. *See* U.C.C. § 2-316; *see also* Anderson, *supra* note 46, at 835.

54. *See* U.C.C. § 2-719 cmt. 1.

55. *See id.* § 2-719(2). "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." *Id.*

56. *See id.* § 2-714 (summarizing what the Code provides to buyers who have been injured due to breach by seller); *id.* § 2-719.

common law and equity, and relies on those bodies of law to supplement it[s] provisions in many important ways.”<sup>57</sup> Yet, Article 2’s very functionality depends on the acknowledgement that it consists of primary, dependable rules of law in areas of coverage.<sup>58</sup> Recall that the Code is a semi-permanent piece of legislation.<sup>59</sup> Article 2, with the advent of the failure of attempts to revise the text, is arguably more permanent in its current form than other parts of the Code. Any revision or reinterpretation of Article 2 in particular is then left to courts faced with the changing face of commercial transactions, which limit remedies of consumers, coupled with a dearth of specific consumer protections in Article 2.<sup>60</sup> The nature of the Code indicates the need for the very type of supplementation that the Code expressly adopts.

In an extreme characterization, Article 2’s framework provides virtually unfettered autonomy to parties setting the terms of their transactions, typically sellers in the consumer context that seek to avoid liability for defective products.<sup>61</sup> Buyers, on the other hand, seek any mechanism available inside or beyond Article 2 to shift their losses by using exceptions embedded in the remedies provisions themselves, the agreement of the parties, or supplementation from other law.<sup>62</sup> The complete separation of goals by two parties with divergent positions who cannot both possibly prevail in all instances presupposes a background whereby losses allocated to the sellers are passed onto buyers through price adjustments.<sup>63</sup> Conversely, buyers enjoy lower prices where they bear the risk of loss from failed sales transactions.<sup>64</sup> In practical terms, the policy

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57. *Id.* § 1-103(b) cmt. 2.

58. *Id.*

59. *See id.* § 1-103; *see also* Mark D. Rosen, *What Has Happened to the Common Law? -- Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119, 1187 (1994).

This [Code] is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

Rosen, *supra* (quoting U.C.C. § 1-103 cmt. 1).

60. *See* Smythe, *supra* note 47, at 452 (explaining that the reinterpretation and revision of American sales law is now being done through the federal court system and not a uniform lawmaking process).

61. Linda J. Rusch, *Products Liability Trapped by History: Our Choice of Rules Rules Our Choices*, 76 TEMP. L. REV. 739, 760 (2003) (arguing that sellers will use whatever theory available to avoid liability).

62. *Id.* at 760–62.

63. *See* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 678 (2009).

64. *See id.*

underlying Article 2 demands prevention of some forms of overreaching through judicial intervention such that neither buyer nor seller is always assured to prevail in any given transaction. Assuming equal bargaining power, one or both parties must abandon some adherence to full risk shifting in all cases, approaching the transaction with the likely understanding that each bears some losses, at least with respect to those economic losses arising from the transaction.

In its most extreme characterization, the Code's expectation model of remedies provides only moderate practical guidance to commercial parties who insist on negotiating a shifting of all potential losses, let alone to courts that attempt to apply its parameters in defective product cases. What Article 2 remedies do well, however, is provide the foundations for allocating losses and responsibility in a variety of common commercial transactions, including responsibility in consumer sales transactions involving defective goods with pure economic losses. In assessing the performance of the Code as a set of legal rules in defective goods cases, we can draw no fewer than three basic observations that become useful to economic loss doctrine: (1) the Code anticipates supplementation as a core component of its operation; (2) the Code anticipates that buyers have a "fair quantum of remedy" in the event of breach; and (3) parties desire to shift loss whenever possible. With these understandings, I now turn to the central task of the economic loss doctrine: evaluating the primacy of Article 2 remedies, including limited repair or replace remedies, in the context of economic loss coupled with personal injury and economic loss coupled with other property losses.

### III. APPLICATION OF ECONOMIC LOSS DOCTRINE

Combining the definition of the economic loss doctrine and my own rubric for categorizing claims from defective goods with the doctrine of Article 2 remedies, yields two basic perspectives toward evaluating cases involving economic loss coupled with other property losses. I shall begin by examining the primary arguments for and against allowing recovery of damages in tort in these cases.<sup>65</sup> From this discussion, I shall then extrapolate a broader rationale for allowing some claims in tort, yet barring others under the economic loss doctrine. I shall then apply these concepts to other property claims arising from failed sales of goods transactions attempting to strike an optimal balance between compensating buyers for

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65. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 542-43 (2009) (describing the policy for having an economic loss rule at all).

losses *ex post* and allowing sellers to allocate losses *ex ante*.

#### A. THE FUNCTIONALITY OF ECONOMIC LOSS DOCTRINE

Reconsider the relationship between Article 2 remedies and section 1-103: common law and equity supplement Article 2 provisions, but do not displace them.<sup>66</sup> Bear in mind that the supplementation principles necessitate harmonization of Article 2's remedy provisions and the common law and general principles of equity. Recall also that this must obviously include the judicially made equitable doctrine of the economic loss rule, which creates a bar to tort claims arising from purely monetary harm to the product itself.<sup>67</sup> The validity of the economic loss doctrine should be recognizable. Both functionality of the Code as a semi-permanent piece of legislation and the principles of supplementation rely upon determining the agreement of the parties through the lens of equity.

Consideration of the economic loss doctrine begins with an appreciation of the sanctity of contract. Article 2 provides for the making and limitation of warranties thereby allocating the risk of loss even where the parties have not done so expressly.<sup>68</sup> Any approach to economic loss doctrine must recognize the primacy of the parties' bargain in the allocation of losses. The basis for this understanding is that,

the U.C.C. sets forth the rights and remedies that govern a transaction between two commercial parties of relatively equal bargaining power [to a contract]. It provides a comprehensive system for compensating consumers for economic loss arising from the purchase of defective products [therefore rendering a recovery in tort, superfluous].<sup>69</sup>

My rubric for claims arising from defective sales transactions guides application of the economic loss doctrine. The components respect the relationship between the economic loss doctrine and the sanctity of contract. Yet, the components break down the bargain in a manner which permits contrast of claims that naturally arise from the parties' bargain with the balancing of bargaining power, minimal remedies, and expectations of the parties underlying the Code's policies regarding remedies. The relationship between the parameters of the bargain and the Code's policies

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66. U.C.C. § 1-103 (2011).

67. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004); *see* U.C.C. § 1-103(b) (“[T]he principles of law and equity . . . [shall] supplement its provisions.”).

68. *See* U.C.C. §§ 2-313 to -316, 2-719.

69. *Ins. Co. of N. Am. v. Cease Elec. Inc.*, 688 N.W.2d 462, 468 (Wis. 2004) (internal quotations and citation omitted); *see* *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201, 216 (Wis. 1999); *see also* Johnson, *supra* note 65, at 528 (discussing the economic loss rule's broad extent of recognition, generally barring strict liability and negligence claims).

are fundamental to the allocation of responsibility of losses among contracting parties.

Segregating cases involving the economic loss rule in this manner gives courts (and perhaps commercial parties) distinct categories by which they can establish firm lines which prevent tort law, with more liberal remedies and statute of limitations rules, from overshadowing the contract doctrine of Article 2.<sup>70</sup> Under the rubric provided, aggrieved buyers may enhance their position through tort remedies in cases where there is either personal injury or other property losses. In pure economic loss cases, aggrieved buyers already possess Article 2's comprehensive damages mechanism.<sup>71</sup> Therefore, it is not necessary for these claimants to also have access to tort recovery. Permitting Article 2 claimants to have parallel access to tort recovery would undermine the effectiveness and usefulness of Article 2 remedy provisions, which would be rendered superfluous if claimants could circumvent them in favor of more liberal tort remedies. Essentially, there could be a lower status given to Article 2 remedies for sales disputes in the absence of limitations on the scope of tort recovery that would be inconsistent with the drafters' intention that the Code "is the primary source of commercial law rules in areas that it governs."<sup>72</sup> Accordingly, the component view adopted by this rubric for economic loss cases serves the important role of "preserv[ing] the distinction between contract and tort."<sup>73</sup>

With its rules for evaluating the nature of the bargain made by the parties, Article 2 policy and the contract theory underlying it provide tenets that the economic loss doctrine must, as a supplementary doctrine, take into account. Commercial transactions necessarily include choices to accept certain risks associated with the sales transaction in order to market a good at a certain price point. We have chosen, in effect, to permit allocation of some risks, but not others,<sup>74</sup> related to products expressly under the norms of Article 2. The common risk of failed products, which is at the heart of a repair or replacement warranty, collides with the uncommon risks related to

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70. *See supra* notes 30–33.

71. *See supra* notes 30–31.

72. U.C.C. § 1-103(b) cmt. 2.

73. *Cease Elec. Inc.*, 688 N.W.2d at 466.

74. *See* U.C.C. § 2-719(3). "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." *Id.*

other property and personal injury that produce losses. The evaluation of the components of economic loss doctrine must take place against these reflections.

#### B. CLASSIFICATION DEPENDENT UPON POLICY ALIGNMENT

Part II of this Essay demonstrated the suitability of Article 2 to determine claims involving basic sales transactions.<sup>75</sup> Potential manipulation by one party or another over the characterization of the claim as tort or Article 2 underscores the importance of the gate-keeping function of the economic loss doctrine.<sup>76</sup> Indeed, the functionality of Article 2 is dependent upon an evaluation of the substance of the transaction and the policy in favor of “minim[al] adequate remedies” that directs the proper claims to resolution by its provisions.<sup>77</sup> The characterization of a claim as an economic loss case is tantamount to affirming the adequacy of Article 2 provisions governing remedies in those cases. Similarly, characterization of a claim as being an economic loss case coupled with personal injury is tantamount to an acknowledgement that Article 2 provisions may not be sufficient in all cases. The characterization of a claim as an economic case, coupled with other property losses, is also tantamount to an acknowledgement that Article 2 provisions may not be sufficient and that the more liberal remedies available in tort should be permissible as supplementary to the Code.

Ultimately, the policy underlying Article 2 supports the application of the economic loss rule; through supplementation, the economic loss rule directs claimants back to Article 2 remedies in economic loss cases. This policy also permits us to derive a broader rationale for allowing some claims in tort and not others. The characterization of certain claims as economic loss, economic loss coupled with injury, or economic loss coupled with other property loss can be expressed as an exercise in determining whether claims are more closely aligned with the remedial purpose of the Code (i.e., protecting the expectation of the parties arising from the sales transaction) or more closely aligned with the policy favoring products liability in tort (i.e., protecting against injury to person or other property irrespective of negligence).<sup>78</sup> The greater the alignment with products liability policy, the greater the likelihood is that no claim

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75. See discussion *supra* Part II.

76. See Rusch, *supra* note 61, at 760.

77. U.C.C. § 2-719 cmt. 1.

78. *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 789 (E.D. La. 2010).

preclusion exists under the economic loss doctrine. Conversely, the greater the alignment of the claim with “insufficient product value,”<sup>79</sup> the greater the likelihood is that the remedies provided under Article 2 govern the claim. Ultimately, the gravamen of the claim arising from the sales transaction must relate more readily to one end of the continuum or another.

#### IV. AN EXERCISE IN ECONOMIC LOSS DOCTRINE: REDIRECTION OF CLAIMS SHOULD NOT DEPEND ON LUCK OR ARBITRARY ACCIDENT OF PURCHASE

I will now conduct an exercise in applying this view of the economic loss doctrine.<sup>80</sup> The *Chinese Drywall Litigation* presents the three categories of potential claims,<sup>81</sup> which allow a case-by-case evaluation and comparison of treatment. I shall evaluate the three claims as presented in this litigation according to the policy and parameters I have set forth in this Essay.<sup>82</sup>

No system of liability and remedy can entirely eliminate the potential that some products will be defective.<sup>83</sup> When a buyer in a sales transaction purchases a product that fails, a court must decide not only whether to compensate the aggrieved buyer, but also how to compensate the buyer for the loss. The usual application of the economic loss doctrine focuses on selection of either tort or contract or some mixture if more than one type of claim is present. The emergence of a standard for claim categorization to fulfill the gate-keeping role of the economic loss doctrine suggests a way of conceptualizing claims arising from the sales transaction along a continuum that evaluates the natural alignment of the claim.

##### A. METHODS FOR CATEGORIZING CLAIMS RELATED TO GOODS

I begin by cataloging the legal means for allocating losses from defective goods. Whether based on Article 2, tort law, or public policy, there should be legal means to compensate aggrieved buyers for their losses to the extent losses are not specifically allocated by agreement. While Article 2 seeks to provide parties the benefit of their expectation in terms of remedies,<sup>84</sup> products liability theory enjoys an enhanced public policy goal

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79. *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986).

80. *See* discussion *infra* Part IV.A–B.

81. *See supra* text accompanying notes 5–8.

82. *See supra* Part I.

83. *See* Rusch, *supra* note 61, at 760.

84. *See* U.C.C. § 1-305 (2011).

of protecting society as a whole by providing greater protection from dangerous products.<sup>85</sup> Ideally, the legal tools should respect the sanctity of the bargain and, thus, preserve the functionality of Article 2, but also respect society's expectations about product safety and quality by providing the appropriate incentives for sellers to make quality products.<sup>86</sup> I hope to show that economic loss doctrine can use these dual policy positions in pursuit of a coherent continuum for categorizing claims under the doctrine, whereby Article 2 does not "drown in a sea of tort."<sup>87</sup>

Consider the sales transactions underlying the *Chinese Drywall Litigation* described at the beginning of this Essay.<sup>88</sup> The drywall at issue in the case allegedly emitted gasses that smelled like rotten-eggs, corroded appliances and electrical and plumbing components of the homes, and caused "headaches, nosebleeds, difficulty breathing and other physical afflictions."<sup>89</sup> The drywall did continue to form the interior walls and ceilings of the homes in the same manner as other drywall.<sup>90</sup> Both parties would be expected to, and did, attempt to characterize the claims in ways to pass the loss onto the other party.<sup>91</sup>

The dual policy considerations permit the ready disposition of two of the claim categories presented by the *Chinese Drywall Litigation*, which each lie on opposite ends of the continuum. First, a failure of a good like drywall would often present a classic economic loss case for harm to the drywall itself. In this event, the claim would be that there was a warranty, express or implied, associated with the sale of the drywall that was breached by a seller or retailer.<sup>92</sup> Claimants could recover in a classic breach of warranty action for this pure economic loss under the full range of remedies provided by Article 2, subject to any hurdles to the claim such as notice,<sup>93</sup> statute of limitations,<sup>94</sup> privity,<sup>95</sup> and limitations of remedies

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

86. See *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 790 (E.D. La. 2010).

87. *Id.* at 789 (quoting *E. River S.S. Corp.*, 476 U.S. at 866).

88. See discussion *supra* Introduction.

89. *Chinese Drywall Litigation*, 680 F. Supp. 2d. at 782, 791.

90. See *id.* at 782 (explaining that, in the aftermath of Hurricanes Katrina and Rita, builders relied on Chinese drywall as a substitute for drywall due to a shortage of building supplies).

91. See *id.* at 783–85 (discussing the claims made by both parties and emphasizing how each party attempted to shift the loss onto the opposing party).

92. See U.C.C. §§ 2-313 to -315 (2011) (describing express and implied warranties).

93. See *id.* § 2-607 (providing that buyer must notify seller of the breach or be barred from remedy).

94. See *id.* § 2-725 (stating that the four-year statute of limitations, which can be further reduced by agreement, begins to run at the time of purchase, not when the buyer becomes aware of the claim).

under section 2-719.<sup>96</sup> Second, complaints of physical afflictions arising from the drywall suggest an economic loss case coupled with personal injury. As such, the claimant could pursue Article 2 remedies, accompanied by the hurdles to bringing a claim for consequential damages mentioned above, but also would have tort claims for negligence and strict products liability with respect to the personal injury portion.<sup>97</sup>

The policy of respecting the sanctity of contract and permitting the Code to have primacy in areas so clearly related to the bargain for the drywall would favor the limitation of claimants in the economic loss case to the parameters of Article 2.<sup>98</sup> In light of the intentional provision of machinery to resolve claims within the scope of the Code, the fact that there are impediments to bringing traditional Article 2 claims does not undermine the application of the doctrine, which would include the limitations that it provides. In this case, though, the drywall continued to form the walls and ceilings of the homes, apparently satisfying the ordinary purpose for drywall.<sup>99</sup> The most obvious of claims arising out of the three categories arising from a sales transaction is the one that was not made in the *Chinese Drywall Litigation*.

Similarly, the policies articulated by the Court in *East River Steamship Corporation*<sup>100</sup> are satisfied by allowing claimants who have physical afflictions (i.e., economic loss case coupled with personal injury), arising from the sale of the drywall, to bring a claim in tort. Restricting these claimants to Article 2 would potentially eliminate recourse due to the limitations built into the Code respecting consequential damages, which are often built into the sales transaction as well through the limitation of remedies provisions of section 2-716.<sup>101</sup> While Article 2's provisions might operate in given cases against the making of these consequential

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95. See *id.* § 2-318 (setting out three alternatives that provide differing standards for when third parties can bring claims and what type of claims can be brought under Article 2).

96. See *id.* § 2-719. See generally Rusch, *supra* note 61, at 742–44 (discussing limitations of remedies). Often sellers will use section 2-719 to exclude recovery for consequential damages, which is permissible excepting personal injury. See Rusch, *supra* note 61, at 744–45, 745 n.15.

97. See Rusch, *supra* note 61, at 745–46 (explaining how one may recover in tort when there is damage to property in addition to the damage to the product sold).

98. See *Sunpoint Sec., Inc. v. Porta*, 192 F.R.D. 716, 720–21 (M.D. Fla. 2000) (discussing the importance of considering the public policies underlying contract formation in cases for breach); *Yamaha Parts Distribs. Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) (weighing the policies behind enforcing the breach against the public policy of maintaining the contract's sanctity).

99. *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 794–95 (E.D. La. 2010).

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

101. See U.C.C. § 2-716 (discussing conditions for specific performance or replevin).

damages claims, Article 2 is not intended to, and does not, in fact, displace other law. Instead, Article 2's "interpretation and application [should] be limited to its reason,"<sup>102</sup> particularly where the Code "was drafted against the backdrop of existing bodies of law."<sup>103</sup> The policies underlying the sanctity of contract do not extend or override that of tort, leaving them on opposite ends of my continuum with different claims potentially available. That is, tort law should not drown in a sea of contract either.

It does not follow that all claims made fall neatly alongside one set of policies or the other. The third category of economic loss case coupled with other property claims is aligned with the policies underlying products liability. Yet, in any given case, the objective of the parties to pass risk onto someone else requires closer evaluation of the nature of this category. The problem then becomes creating a framework for this categorization that rests on a foundation that honestly respects the dual policies. I believe that such a solution—one that can be squared with these policies and contract theory generally—can be obtained by looking further into the nature or gravamen of the particular claim made and the expectations of the parties.

#### B. TREATMENT OF OTHER PROPERTY CLAIMS

Absent a disciplined approach to categorizing claims in cases like the *Chinese Drywall Litigation*, the economic loss doctrine functions like a wildcard when it comes to other property claims.<sup>104</sup> Any claim that involves a good that is commonly attached to another will likely involve arguments that the economic loss doctrine bars tort claims. For instance, an aggrieved buyer's tort claims for damage to a lawnmower by a failed lawnmower blade that is designed for and used only with the particular mower is likely to face arguments that the lawnmower is not other property for purposes of the economic loss doctrine. Similarly, claims that involve goods that are commonly sold together or apart, like the drywall for a home, will likely involve the same contentions. Both parties are likely to use categorization arguments under the economic loss doctrine to shift loss elsewhere. In the end, the categorization should be less a function of the happenstance of purchase (how and when the purchase was made and what other products were purchased at or near the same time), and more carefully oriented toward the policies of both Article 2 and tort law.

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102. *Id.* § 1-103 cmt. 1.

103. *Id.* § 1-103 cmt. 2.

104. *See* Johnson, *supra* note 65, at 584–85.

In order for the application of the economic loss doctrine to other property claims to be meaningful, it should involve an inquiry into both the type of harm at issue and the expectations of the parties to the transaction. Economic loss doctrine surely has the option of precluding tort in all or nearly all other property claims that are not far or obviously removed factually from the sales transaction. This would amount to a presumption that products are an integrated unit for purposes of the economic loss doctrine if they are combined into a larger product at any time.<sup>105</sup> This would result in compensation, if at all, under the provisions and limitations expressed in Article 2.<sup>106</sup> If recovery were unavailable under Article 2 for these types of claims due to the limitations of remedies, buyers then would either self-insure or purchase insurance for these types of losses. Conversely, permitting a tort action to proceed should not be automatic in every case where the alleged other property is not the precise “thing” that failed.<sup>107</sup> There are times when these types of failures might or could be within the contemplations of the parties at the time of contracting.<sup>108</sup> Allowing the tort claim in such cases might undermine the usefulness of Article 2 remedy provisions.

Classification of buyers for purposes of the economic loss rule should not depend upon the happenstance of purchase. That is, its application should not generally treat similar product owners differently. When the product is considered a component of another product, and not a separate product, economic loss doctrine bars the tort claims related to the whole “integrated unit.”<sup>109</sup> This type of approach was argued, albeit unsuccessfully, in the *Chinese Drywall Litigation* where the defendants eventually conceded that the economic loss doctrine did not bar tort claims of homeowners who purchased the Chinese drywall directly from the

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105. See *OneBeacon Ins. Co. v. Deere & Co.*, 778 F. Supp. 2d 1005, 1008–09, 1011 (E.D. Mo. 2011) (finding that combine and cornhead were an integrated product for purposes of economic loss doctrine even though purchased separately and later the combine caught fire and destroyed both units).

106. See *supra* notes 54–58 and accompanying text.

107. See *O’Neil v. Crane Co.*, 266 P.3d 987, 1000 n.10 (Cal. 2012) (discussing rejection of doctrine that only considered products to be integrated if a fungible mass existed).

108. See *Rushing v. Wells Fargo Bank, N.A.*, 752 F. Supp. 2d 1254, 1263 (M.D. Fla. 2010) (finding that where parties had agreed to a tort remedy in the contract, the tort claims were not precluded by the economic loss doctrine); *PNC Bank, N.A. v. Colonial Bank, N.A.*, No. 8:08-cv-610-T-27MSS, 2008 WL 4790122, at \*4 (M.D. Fla. Nov. 3, 2008) (stating that the economic loss rule does not apply when the parties accept tort remedies in their contract).

109. See *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 784–785 (E.D. La. 2010); see *OneBeacon Ins. Co.*, 778 F. Supp. 2d at 1010–11 (finding that the economic loss rule applied even when a combine and cornhead were purchased separately because the cornhead was not “other property” when attached to the combine).

manufacturer and then installed it in their homes.<sup>110</sup> The manufacturer and distributors asserted, though, that economic loss doctrine did bar tort claims of homeowners who purchased a home, which had been built (or rebuilt) with Chinese drywall.<sup>111</sup> While the case involved the same drywall, the manner of purchase would then determine application of the economic loss doctrine.

An alternative method of determining which claims are precluded by the economic loss doctrine is to both examine the attributes of the defective product alleged to be integrated<sup>112</sup> and determine whether the claims are more closely aligned with the policy of products liability or Article 2 (“product attributes plus gravamen”). Where this analysis demonstrates that the alleged other property is truly merely a component of a larger product and the loss sounds in “disappointed economic expectations,”<sup>113</sup> the responsibility for the loss is determined by reference to Article 2. Where this analysis demonstrates that the alleged other property is not necessarily functional only as a component of the larger product (i.e., might be purchased and regularly sold as an independent good, rather than a component), and the loss sounds like a hazard to the alleged other property not arising from the mere combination of the products, the economic loss rule is inapplicable.

A method of characterizing the claim as other property by reference to product attributes plus gravamen dispenses with default positions that prefer claim characterization at either end of the continuum. Recall that parties will typically seek to characterize claims in a manner to shift responsibility for loss using any available theory.<sup>114</sup> Avoiding the trappings of an analysis that is wholly dependent on court intervention to determine whether the policies of products liability are advanced is a reason to take into consideration an additional factor that is oft-times determinable by parties outside of litigation. Yet, considering the attributes of the defective product involved and its relationship to the integrated unit remains true to the gate-keeping role of the economic loss doctrine.<sup>115</sup> This approach, though, still requires an evaluation of the claim made to ensure

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110. *Chinese Drywall Litigation*, 680 F. Supp. 2d at 785.

111. *Id.* at 784–85.

112. *See O’Neil*, 266 P.3d at 1000 n.10 (discussing rejection of doctrine that only considered products to be integrated if a fungible mass existed); *Jimenez v. Superior Court*, 58 P.3d 450, 456–57 (Cal. 2002) (finding the economic loss rule inapplicable to a case involving defective windows installed in a home).

113. *Indem. Ins. Co. of N. Am. v. Am. Aviation Inc.*, 891 So. 2d 532, 536 n.1 (Fla. 2004).

114. *See supra* notes 61–62 and accompanying text.

115. *See Johnson, supra* note 65, at 584–85 (arguing that single dimensional analysis could lead to undesirable policy outcomes).

that the product attributes themselves do not lead to under-application of the economic loss doctrine due to the nature of the claim being more aligned with “disappointed economic expectations” than a need for protection from dangerous products.<sup>116</sup>

Because there is not an exhaustive list of circumstances in which the economic loss doctrine operates, a seller would not be able to determine whether it has exposure for other property claims beyond what might be permissible under Article 2. Adding the inquiry concerning product attributes should give more certainty to commercial parties by reducing the number of claims that require judicial intervention on policy grounds. Unfortunately, where categorization of other property claims is not apparent, which might be the case for large classes of products that tend to be integrated into others, a policy driven approach may be fraught with uncertainty for commercial parties. Despite the possibility that product failure itself might be foreseeable to parties, and perhaps some attendant other property losses,<sup>117</sup> there is a greater likelihood in many commercial transactions that the parties may not have considered the consequences of particular product failures on surrounding property, leaving application of the economic loss doctrine in doubt without more transparent benchmarks.

I will now return to the *Chinese Drywall Litigation* one last time to evaluate the claims regarding the other household components, such as plumbing and electrical, under this proposed approach. The court focused on the policies that favor permitting the tort claims of homeowners who received the drywall as part of a home purchase or remodel, finding that these policies were satisfied where the claims did not sound of “foiled expectations.”<sup>118</sup> To support its conclusion, the court noted that there was actual injury to property in the home and the drywall itself had not actually failed in that it was serving its “intended structural purpose.”<sup>119</sup>

An evaluation of the attributes of the alleged other property typically

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116. See, e.g., *Indem. Ins. Co. of N. Am.*, 891 So. 2d at 540 (discussing the difference between tort recovery where a physical injury has occurred and warranty recovery for economic loss and why the economic loss doctrine should not apply to the latter). The Florida Supreme Court has focused purely on the policies that indicate an economic loss is present including: “disappointed economic expectations”; “diminution in the value of the product because it is inferior in quality”; “[it] does not work for the general purposes for which it was manufactured or sold”; and, “the loss of the benefit of [the] bargain.” *Id.* at 536 n.1.

117. See *Dakota Gasification Co. v. Pascoe Bldg. Sys.*, 91 F.3d 1094, 1101 (8th Cir. 1996) (utilizing the foreseeability test to bar claims under the economic loss doctrine made by parties who could foresee the possibility of physical damage to nearby other property).

118. *In re Chinese Manufactured Drywall Prods. Liab. Litig. (Chinese Drywall Litigation)*, 680 F. Supp. 2d 780, 795 (E.D. La. 2010).

119. *Id.*

reveals the nature of the product in a manner that may assist commercial parties. The *Chinese Drywall Litigation* court focused solely on the policy issues, rather than directly answering the manufacturer and distributor's assertion that the drywall was not other property at all, such that the economic loss rule precluded claims in tort.<sup>120</sup> The proposed approach has the added benefit of directly answering this issue by allowing the court to find that the drywall itself is an independent product, not merely a component of a larger integrated unit. It is not sufficient to state that the happenstance of purchasing replacement drywall is different than purchasing a home that contains drywall or is remodeled with it. Unlike specialty parts that are designed for use only with one or a limited number of products,<sup>121</sup> drywall is not specially designed to operate as an integrated product along with the home's other components, for instance, the home's plumbing and electrical.<sup>122</sup> As such, the economic loss rule is, as the court found, inapplicable to bar the other property claims of the homeowners, irrespective of how they acquired the drywall.

Under the proposed approach, a seller facing claims involving a failed product may claim that the economic loss rule precludes tort claims by showing both that the product attributes indicate an integrated unit that operates together, rather than other property, and that the gravamen of the claims arises from the disappointed expectations of a failed product. To not include both considerations would suggest that one policy supplants the other in certain cases. At the same time, the sanctity of the bargain is respected when the economic loss rule is applied to cases of goods that truly are components and not other property. The overreaching of claim characterization should be limited by retaining the requirement of policy alignment.

## CONCLUSION

If the economic loss doctrine is to consist of a set of legal rules that give direction to commercial parties in the arrangement of their transactions and claims then the approach must consist of criteria that evaluate the attributes of the goods at issue and the dual policies at work. Evaluating both the product attributes and the gravamen of the claim yields a basic tool that is more principled in application than an approach

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120. *Id.* at 783–85.

121. *See OneBeacon Ins. Co. v. Deere & Co.*, 778 F. Supp. 2d 1005 (E.D. Mo. 2011) (finding that the cornhusker that was destroyed in the combine fire was purchased at a different time than the combine but was made to only work with the Deere combine).

122. *See Chinese Drywall Litigation*, 680 F. Supp. 2d at 790–91 (discussing how the Chinese drywall affected other components of the home).

dependent on only one portion of the analysis. The first step toward this approach, which I have identified in this Essay, is examining the rationale for limiting Article 2 claimants to statutory remedies and being satisfied that, in true bargain cases, this is sufficient.<sup>123</sup> Without an acceptance that the statutory remedies provided in the Code are ordinarily sufficient, it is difficult to acknowledge that the economic loss rule should have any effect. My discussion of the economic loss doctrine's application demonstrates that the doctrine is consistent with the policies for which it was judicially created and with the systems in which it is applied.<sup>124</sup>

Throughout this Essay, I have emphasized the importance of policy and its limitation in providing certainty without judicial intervention.<sup>125</sup> In particular, I have made no serious effort to catalog all the failures of differing approaches to economic loss doctrine that led up to the court's discourse on the subject in the *Chinese Drywall Litigation*, wherever determined and by whomever considered. Nor have I attempted to account for the behavioral decisions of sellers and buyers alike that influence the many ways in which products are made, used, and sometimes fail. The quest for a rationale approach to economic loss doctrine must leave some of the past behind in search for a more disciplined approach. While the judicially made doctrine should retain its flexibility as a supplementary adjunct to the Code, I nonetheless believe that flexibility does not require a lack of benchmarks that are many times calculable by commercial parties. The gate-keeping and redirecting role of the economic loss doctrine deserves a more principled methodology that is in keeping with the Code's position as a primary source of law that coexists with existing tort law.

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123. See discussion *supra* Part I.

124. See discussion *supra* Parts I, II.

125. See *supra* notes 46, 69, 105, 122. See generally discussion *supra* Part III.A (examining the policies articulated by various courts and cataloging the legal means for allocating losses from defective goods).