ASSESSING THE ECONOMIC LOSS DOCTRINE IN MICHIGAN: MAKING SENSE OUT OF THE DEVELOPMENT OF LAW

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I. INTRODUCTION

In *Neibarger v. Universal Cooperatives, Inc.*[1] the Michigan Supreme Court effected an important change in this state's law. Embracing what it called the "economic loss doctrine,"[2] the Court eliminated tort remedies for "economic" or "commercial" losses caused by defective goods, and limited any claim for such injuries to the remedies available in the Uniform Commercial Code (U.C.C.).[3]

Fifteen years later, it is clear that *Neibarger* was, and continues to be, a major development in Michigan law.[4] To begin with, the decision in *Neibarger* repudiated what was previously a significant (if problematic) line of authority that allowed tort recovery for losses caused by defective products when the manufacturer could be shown to be negligent or to have breached an "implied" warranty.[5] Just how much *Neibarger* changed the rules for product liability claims was highlighted by the

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1. 486 N.W.2d 612 (Mich. 1992).

2. *Id.* at 616. According to the majority, the doctrine would be better termed the "commercial loss" doctrine, because that phrase more clearly identifies the kind of losses which are at issue. *Id.* at 522 (citing Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990)). But, "economic loss" was the more common phrase before *Neibarger* and since then both Michigan courts and federal courts applying Michigan law have followed the prevailing terminology. *See id.* at 616. In this Article, I shall refer to "the economic loss doctrine" as well as "the doctrine" and "the ELD."

3. *Id.* at 618. It should be clear that the Court meant Article 2 of the Code, since that Article governs sales of goods. *See id.* As I discuss *infra*, I believe that the same conclusion would be warranted under Article 2A for an attempt by a lessee to hold a lessor liable for loss caused by a defective good which has been leased and not purchased.

4. In anticipation of the fifteen year anniversary of the *Neibarger* decision, Wayne State University and the law firm of Miller, Canfield, Paddock and Stone, P.L.C., presented the "Michigan Economic Loss Doctrine Symposium" on November 9, 2006, about Michigan's economic loss doctrine [hereinafter "Symposium"]. In addition to the author, the Symposium featured Judge Gerald Rosen (United States District Judge for the Eastern District of Michigan), Judge Timothy Conners (Washtenaw County Circuit), Prof. James J. White (University of Michigan Law School), Mr. Michael Hartmann (Miller Canfield), Ms. Rivka Sochet (Miller Canfield) and Mr. John Trentacosta (Foley and Lardner, L.L.P.). The participants were given an early version of this paper (which was also summarized for the Symposium's audience) and the opportunity to comment about or respond to it. In many instances, the arguments presented in this Article were revised in response to points made by the Symposium participants, and where pertinent, the Article's footnotes will summarize the participants' comments or observations as they might bear on the argument present here.

5. *See, e.g.*, Spence v. Three Rivers Builders & Masonry Supply, Inc., 90 N.W.2d 873 (Mich. 1958); Cova v. Harley Davidson Motor Co., 182 N.W.2d 800 (Mich. Ct. App. 1970).

decision's consequences for the plaintiffs: after dismissing their tort claims, the majority affirmed that the plaintiffs' contract claims were subject to the four year statute of limitations of Article 2 of the U.C.C., instead of the longer period that would have applied to either the tort or non-Code claims for breach of contract.[6] Measured by the shorter limitation period of Article 2, the plaintiffs' contract claims were time-barred.[7] Thus, the majority's decision meant that those plaintiffs could recover nothing at all.

The significance of *Neibarger* of course goes well beyond the consequences of the decision for the particular parties. Adopting the economic loss doctrine means that any claim for economic injury caused by defective products must be brought within the ambit of Article 2 or not brought at all.[8] So, a large class of tort claims are now foreclosed—no plaintiff within the doctrine's scope can now pursue a tort remedy—and the law of product liability has been reshaped.

One of the most important facets of the decision to adopt the economic loss doctrine is the role undertaken by the Court. In this Article, I contend that the *Neibarger* decision was an exercise of the Supreme Court's traditional powers to shape the common law.[9] Although some would contend that judges in our system of law lack proper authority to change the law[10]—and would deride judicial law-making as illicit 'activism'—the development of the common law of torts and contracts has been a long-recognized, and long-accepted, part of the judiciary's role. As I will discuss later, the opinion of the *Neibarger* majority is less than clear on this point. At times the majority seems reluctant to acknowledge the real character of its decision and seeks to obscure its conclusion behind speculation about the intent of the legislature.[11] But this purported justification seems spurious, for elsewhere the opinion acknowledges that the decision is made "in the

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6. *See Neibarger*, 486 N.W.2d at 619, 621 (discussing possible limitations periods for different claims).

7. *Id.* at 623.

8. *See, e.g., id.*

9. As will be noted at various points in this Article, Michigan's Courts of Appeal had utilized reasoning similar to that expressed in *Neibarger* before the *Neibarger* decision was rendered. *See, e.g.*, Sullivan Indus., Inc. v. Double Seal Glass Co., Inc., 480 N.W.2d 623, 629 (Mich. Ct. App. 1991). For an application of *Neibarger* in federal appellate courts, *see* Detroit Edison Co., v. NABCO, Inc., 35 F.3d 236, 238 (6th Cir. 1994).

10. Justice Young takes a position close to this in his article, *A Judicial Traditionalist Confronts the Common Law*. Justice Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law*, 8 TEX. REV. L. & POL. 299 (2004). I discuss Justice Young's views later in the Article. *See* discussion and accompanying text, *infra* notes 210-228.

11. *Neibarger*, 486 N.W.2d at 618-19.

absence of legislative direction."[12] Moreover, appealing to some purported legislative intent ought to be unnecessary. Within our common law tradition, the Michigan Supreme Court has the power, and responsibility, to develop the common law of torts and contracts, and has used that power often.[13] The development of the economic loss doctrine seems squarely within that tradition.

Important decisions in the common law will often open up new legal territory to be explored, which can reveal, in turn, new problems to be considered and resolved. In my view, adopting the economic loss doctrine is one of those decisions, although its importance has received little comment. This Article reviews *Neibarger* and subsequent decisions that have articulated and applied the economic loss doctrine in Michigan. It also examines some of the problems that have arisen as courts applying Michigan law have struggled to adapt the law of Article 2 to new situations. I contend that because *Neibarger* substituted recovery under Article 2 for any recovery under tort law, it has forced Michigan courts, and other courts applying Michigan law, to adapt the concepts and resources of Article 2 to address a variety of problems that the article on sales was not designed to handle.

Development in the common law seldom takes a smooth or obvious path, and predicting the trajectory of the economic loss doctrine would have been difficult immediately after *Neibarger*.[14] The passage of time

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12. *Id.* at 618.

13. It is axiomatic that the fundamental features of Michigan's law of torts and contracts are the production of judicial decision-making rather than enactments by the legislative. It follows that what the judiciary has created can generally be changed by the judiciary. For the issues which are the subject of this Article's analysis, three cases, in addition to *Neibarger* itself, highlighted the power, and the responsibility of the judiciary to change the common law: Hart v. Ludwig, 79 N.W.2d 895 (Mich. 1956) (establishing Michigan's basic test for the tort-contract boundary); Piercefield v. Remington Arms Co., 133 N.W.2d 129 (Mich. 1965) (extending liability for negligence to the injured innocent bystander); State Bank of Standish v. Curry, 500 N.W.2d 104 (Mich. 1993) (applying Section 90 reliance to pre-contract negotiations).

14. Judge Timothy Connors surprised many at the Symposium by reporting an informal survey of his colleagues in Washtenaw County Circuit Court. Only one of them, he told the Symposium, had decided a case in which the economic loss doctrine played a significant role. For the most part, instead, the doctrine was unknown or insignificant in the docket of that Circuit Court. Judge Connors speculated that geographical issues might have influenced the number of cases involving the doctrine: perhaps other counties were home to the kind of parties that would more likely raise the doctrine as a defense against tort claims. Another question is whether awareness of the doctrine and its potential impact has been slow to arrive in Michigan's bench and bar. To pursue this question, I have done some informal research. Of the approximately twenty decisions between 1992 and 2007 by Michigan appellate courts in which *Neibarger* was cited for some proposition relating to the doctrine, five were decided between 1992 and 1997, six

since that decision allows us a better perspective from which to track the law's development. Predicting post-*Neibarger* law was also made more difficult by the somewhat confusing opinion of the *Neibarger* majority. In Section II, which follows, I analyze the majority's opinion. There are several strands to the opinion's reasoning, but one of those strands, I argue, gives us a reliable and enduring basis for understanding the economic loss doctrine and its ongoing application. In particular, that strand requires that we appreciate the resources, and the limits, of Article 2 of the U.C.C. and accordingly, I review that Article in Section III. Then, in Sections IV. and V, I review several problematic areas of post-*Neibarger* case law, where courts have struggled to apply the doctrine. For each of these problematic areas, I argue that the case law develops most sensibly when it adheres to the central strand of the majority's rationale in *Neibarger*. Finally, in Section VI, I return to the problem of the judicial role and the economic loss doctrine.

II. LOOKING BACK: PRE-*NEIBARGER* LAW AND THE DOCTRINE'S RATIONALE

A. The Law Before Neibarger

For some time before *Neibarger*, the seller of a defective product could face liability for losses caused by the defects according to two broad formulations—contract and tort.[15]

To begin with, the buyer could sue for breach of contract, usually by alleging the breach of some warranty regarding the product's quality or performance. As has often been observed, contract liability is "strict," which is to say that no showing of negligence or intentionality is required to pursue a claim of breach.[16] When claiming breach of warranty, for example, this means that a plaintiff need only show that the product didn't perform the way it was supposed to perform. And, since the law had long implied a warranty of 'merchantability'—that the product

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between 1997 and 2002, and nine between 2002 and 2007. These numbers suggest a trend towards greater citation of the doctrine and, perhaps as a cause of the greater citation, greater awareness of the doctrine and its potential impact amongst lawyers and judges.

15. *See, e.g.*, Ebers v. General Chemical Co., 17 N.W.2d 176 (Mich. 1945) (allowing tort recovery where plaintiff's peach trees were damaged by use of defendant's chemical products). *See also* State Mut. Cyclone Ins. Co. v. O & A Electric, 161 N.W.2d 573, 576 (Mich. 1968) (holding that, for purposes of the limitations rule, "it makes no difference" whether a plaintiff institutes an action based on contract or tort for damage to property).

16. *See* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.1.a 586 (3d ed. 2004).

would be fit for its ordinary uses[17]—anyone who bought from a merchant (i.e., a seller of that kind of goods) wouldn't have to show any special defect of the good, only that the item in question lacked the virtues that goods of that sort were supposed to have.[18] Generally speaking, this kind of liability arose only for the immediate buyer: warranty liability for goods required "privity" between the seller and the injured party.[19] There was one statutory exception: U.C.C. section 2-318 extended the good's warranties to certain specified third parties.[20] Different states chose different versions of this section, and Michigan adopted the narrowest: Michigan's version of section 2-318 extends warranties only to natural persons who are in the family or household of the buyer, and guests who are reasonably expected to use the good.[21] Such statutory third-party beneficiaries could recover only for injuries to their persons.[22]

Suit for beach of warranty under the U.C.C. was only one avenue for those harmed by defective goods: the seller might also face liability in tort for the losses caused by the seller's negligence in designing or manufacturing the product.[23] The set of potential plaintiffs in tort is different from the set of contracts plaintiffs in two ways. A claim of negligence requires, obviously enough, more than the strict liability of a warranty breach, and hence cannot be pursued by some plaintiffs who might press a claim for breach of warranty.[24] On the other hand, tort liability also extends to plaintiffs who could not assert a contract claim because privity is not required for tort claims.[25] As tort law has developed, sellers have been held to owe duties of care to all who might use the product—and not just to those who purchased the product—lest society at large suffer on account of a seller's negligence.[26]

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17. *See* MICH. COMP. LAWS ANN. § 440.2314(2)(c) (West 2001); *Id.* cmt. 2 (discussing Section 15(2) of the Uniform Sales Act).

18. *See id.*

19. *See* MICH. COMP. LAWS ANN. § 440.2318 (West 2001).

20. *Id.* The Official Comment to Section 440.2318 states that its purpose:

> [I]s to give the certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." *It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. Id.* cmt. 2 (2001) (emphasis added).

21. MICH. COMP. LAWS ANN. § 440.2318 (West 2001).

22. *Id.*

23. *See Neibarger*, 486 N.W.2d at 615.

24. *See Ludwig*, 79 N.W.2d at 897 (citing Tuttle v. Gilbert Mfg. Co., 13 N.E. 465, 467 (Mass. 1887)).

25. *See Neibarger*, 486 N.W.2d at 616.

26. *See id.*

This simple overview doesn't account for two troublesome aspects of this area of the law. First, what about those cases where the law overlaps? If a buyer in privity is injured—not in person but in the pocket—by a negligently made or designed good, must she press her claim against the seller only for breach of contract? Only for negligence? Or, can she assert both contract and tort theories? "The distinction between tort and contract becomes problematic when . . . a commercial buyer seeks to recover *in tort* for damages caused by a defective product which was purchased in a commercial setting."[27] Second, as the law on these questions developed over time, the dividing lines began to blur. By the early 1970s, the strict liability of contract and the negligence of tort had come to overlap and ultimately to mingle. In *Piercefield v. Remington Arms Co.*,[28] the Michigan Supreme Court held that an innocent bystander could pursue a claim of breach of implied warranty against the manufacturer, even though there was no privity. And, later, in *Cova v. Harley Davidson Motor Co.*,[29] this liability was expanded to cover economic as well as personal injuries. As a result of this overlap, sellers could face a bewildering array of potential liability. What was true in Michigan was true in other jurisdictions as well, and in 1980 White and Summers wrote:

> At the pleading stage, the buyer's attorney often will be able to plead at least four causes of action: breach of express warranty (2-313), breach of the implied warranty of merchantability (2-314), strict tort liability (Restatement, Second, Torts §402A), and negligence in the manufacturing of the defective product.[30]

The economic loss doctrine has an obvious relation to, and affinity with, another feature of Michigan common law which predated *Neibarger*. In Michigan, as elsewhere, courts have struggled for some time with the task of drawing the boundary between tort and contract.[31] *Hart v. Ludwig*[32] is still the leading case in this state for drawing that boundary, which relegates claims of injury to contract law unless there is a tort duty that would exist independent of the duties created by the parties' agreement. In application, *Hart* is often cited as authority to

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27. *Detroit Edison*, 35 F.3d at 239.

28. *Piercefield*, 133 N.W.2d at 133.

29. *Cova*, 182 N.W.2d at 804.

30. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 325 n.3 (Hornbook Series 2d ed. 1980) [hereinafter WHITE & SUMMERS 1980].

31. *See Ludwig*, 79 N.W.2d at 897.

32. *Id.* at 897-98.

dismiss tort claims if they assert the breach of a duty that, on analysis, is shown to be no different from an obligation that is part of the parties' contract.[33] The most vulnerable such claims will obviously be suits for the "negligent" performance of duties that were part of a contract. If the law forecloses tort claims that repeat parts of the contract, then the injured party will be limited to those theories, and will be opposed by those defenses, that can be raised in suits for breach of contract.[34]

The relationship between the economic loss doctrine and the principle enshrined in *Hart v. Ludwig* is a deep and confusing topic, and I will examine it later in this Article.[35] Suffice it to say, at this point, that prior to *Neibarger*, the authority of *Hart* was not invoked to limit the growth following *Piercefield* and *Cova* of tort remedies for product defects. Instead, the *Neibarger* majority felt the need to adopt the economic loss doctrine as a further tool for regulating the tort-contract boundary.[36]

B. The Scope of the Doctrine and its Purported Rationale

1. The Scope of the Doctrine

As the preceding discussion should indicate, the state of the law before *Neibarger* was unsettled, and had been in flux for some time. To resolve that law, and the problems the majority perceived in that legal development, *Neibarger* held that "[w]here a plaintiff seeks to recover

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33. *See, e.g.*, Corl v. Huron Castings, Inc., 544 N.W.2d 278, 281 (Mich. 1996).

34. Unfortunately, some courts (especially federal courts applying Michigan law) have changed how they apply the rule of *Hart v. Ludwig*. Those courts have imposed a different rule for enforcing the tort-contract boundary: instead of asking if there was an independent tort duty, they ask instead if the situation, or the injury, could have arisen independently of the existence of a contract. *See, e.g.*, QQC, Inc. v.Hewlett Packard, Co., 258 F. Supp. 2d 718, 722-23 (E.D. Mich. 2003) ("The operative allegations in Plaintiffs' fraud claims would not exist in the absence of the contracts between the parties; thus, such allegations cannot be maintained as tort-based claims under Michigan law."). This test—call it a *sine qua non* test—would eliminate tort liability in any case in which the parties' relationship (however complex and contentious) was originally the subject of a contract. Thus, under this formulation, liability would be eliminated for tortuous interference with a contract (although it might survive for tortuous interference with a business expectancy). The Michigan Supreme Court affirmed both the precedential value of *Hart* and the test propounded in *Hart* for drawing the boundary line. *See* Rinaldo's Construction Corp. v. Michigan Bell Telephone Co., 559 N.W.2d 647, 657-58 (Mich. 1997).

35. *See* discussion and accompanying text, *infra* Part IV.B n.87-105.

36. *Neibarger*, 486 N.W.2d at 618-19.

for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC."[37]

The nature of the Court's reasoning is prone to misunderstanding: while the law being applied and developed is statutory in origin, the majority's decision to supplant tort law is better seen as a part of the Court's common law function.[38] This is a complex issue, but the characterization is significant. In fact, the common law nature of the decision-making about the economic loss doctrine is made clear by an examination of the *Neibarger* decision, for the majority expressly acknowledged that the decision to preclude tort remedies was *not* the product of statutory interpretation.[39] Instead, as the majority stated, the conclusion was reached "[i]n the absence of legislative direction."[40]

There is good reason for the majority's disclaimer: *nothing* in the text of the Code asserts that tort remedies should be foreclosed. For that matter, in so far as Article 2 gives any guidance on this question, what can be found indicates instead that the Article's drafters assumed that tort law would continue to develop new applications and remedies concurrent with the Code. Article 2 codified the one exception to requirement of privity—namely section 2-318—and Official Comment 2 to that section states that its purpose "is to give the certain beneficiaries the benefit of the same warranty which the buyer received in the contract for sale, thereby freeing any such beneficiaries from any technical rules as to privity. . . . *[I]t seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence.*"[41] The official comment also states that the statutory section is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to this buyer who resells, extend to other persons in the distributive chain.[42]

There would have been no point to these Comments unless Article 2's drafters assumed that tort law should develop at its own pace and according to its own processes, which assumption would be inconsistent with an ambition to curtail those processes. If anything, it seems that the drafters of Article 2 preferred to leave tort alone, to develop on its own.

The Comments, of course, are not law, and there is no particular reason for courts to abandon what they otherwise regard as a sound decision just because a couple of sentences in the Comments reflect a

37. *Id.*

38. *See* WHITE & SUMMERS 1980, *supra* note 30, at 385 (referring to the economic loss doctrine as a "common law doctrine").

39. *Neibarger*, 486 N.W.2d at 618.

40. *Id.*

41. *See* MICH. COMP. LAWS ANN. § 440.2318 cmt. 3 (West 2001) (emphasis added).

42. *Id.*

contrary expectation on the drafters' part. But the Comment should underscore what the *Neibarger* majority acknowledged.[43] Nothing about the text of Article 2 nor its drafting history compels, or even suggests, that the drafters or the enacting legislature intended, in any meaningful sense of that concept, to foreclose tort remedies. So, neither the text of Article 2 nor any sustained vision of the enacting legislature's intent would require either the economic loss doctrine's adoption, nor its development in any particular manner.

2. The Rationale

Recognizing a sound basis for the majority's holding requires some investigation. A more refined and precise description of the kind of decision-making at issue in *Neibarger* is valuable because it helps us recognize the extensive precedent for this kind of decision-making. As I discuss in greater detail in Section VI,[44] common law courts have frequently justified their decisions by invoking statutes even when they recognize that the statute does not, by its terms, resolve the controversy or even when the statute, by its terms, does not apply.[45]

Several parts of the majority's opinion suggest something like this. There is, for example, a lengthy discussion of the structure of Article 2 and its organizing themes and purposes,[46] even though the majority recognized that the Sales Article did not address directly the issue of tort remedies.[47] On the basis of that discussion, the majority argued that:

> A contrary holding would not only serve to blur the distinction between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. . . . Rejection of the economic loss doctrine would, in effect, create a remedy not contemplated by the Legislature when it adopted the UCC by permitting a potentially large recovery in tort for what may be a minor defect in quality. . . *Adoption of the economic loss doctrine is consistent with the stated purposes of the UCC.*[48]

So, the argument is not that the U.C.C. requires the economic loss doctrine—that would be untenable—but, rather, that adopting the

43. *Neibarger*, 486 N.W.2d at 618 (recognizing "the absence of legislative direction").

44. *See* discussion, *infra* Part VI.

45. *See Neibarger*, 486 N.W.2d at 618.

46. *See id.* at 614-15.

47. *Id.* at 618.

48. *Id.* at 618-19 (emphasis added).

doctrine will better harmonize all of the law relating to products liability, of which the U.C.C. is part.

To be sure, the majority offered other rationales as well, and some of these have muddied the waters. One recurring theme was a perceived need to promote uniformity and predictability in this area of the law.[49] The economic loss doctrine, we were told, "hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has been traditionally remedied" by tort law.[50] Further, adopting the doctrine "will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions into the price or terms of the sale."[51]

But now consider four closely related fact situations:

> Case #1: a toaster oven is purchased by a business for use in the employee's lunch room; it malfunctions and burns, causing damage to the lunchroom and costing the company time and money.
>
> Case #2: the same toaster is bought by the same business for use in the same lunchroom, with the same resulting fire; in this case, however, the fire burns one of the employees.
>
> Case #3: the same toaster oven is bought by an individual consumer, who uses it at home where it burns and causes damage to the individual's home.
>
> Case #4: the home-used toaster oven burns the individual consumer.

According to the majority's rationale, it is important to produce different results in cases #1 and #4—the latter is traditionally the province of tort law, but the first is properly the province of contract law because that will take advantage of the Code's "carefully considered approach to governing the 'economic relationship between suppliers and

49. *Id.* at 616.
50. *Id.* at 615 (citing Clark v. Int'l Harvester Co., 581 P.2d 784 (1978)).
51. *Neibarger*, 486 N.W.2d at 619.

consumers of goods.'"[52] But, as announced, the doctrine will also produce a different result in Case #2 from that of Case #1, and another difference between Case #1 and Case #3. It is hard to see how the uniformity[53] or predictability of the law governing all these transactions is promoted by the economic loss doctrine. For that matter, a desire for uniformity or predictability, taken on its own, could well have grounded a decision to treat all four cases in the same way, perhaps by holding the manufacturer liable for its negligence or for breach of some kind of common law warranty idea.

In my view, the stated desire for uniformity or predictability cannot ground the *Neibarger* decision, and the majority's rationale must be identified elsewhere. Return to the crucial distinction between "transactions involving the sale of goods for commercial purposes,"[54] on the one hand, and transactions "involving the sale of defective products to individual consumers," on the other.[55] The "proper approach" to deciding *Neibarger*, says the majority, "requires consideration of the underlying policies of tort and contract law as well as the nature of the damages."[56] As the majority goes on to explain, "[t]his distinction stems from the separate and sometime conflicting purposes of tort and contract law."[57] The Court expanded this line of thought:

> The individual consumer's tort remedy for products liability is not premised upon an agreement between the parties, but derives either from a duty imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer. Such a policy serves to encourage the design and production of safe products. On the other hand, in a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation

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52. *Id.* at 618 (citing Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 447 (Ill. 1982)).

53. The issue of uniformity in these discussions is something of a red herring. As the Court acknowledges at one point, the uniformity sought by the Code is uniformity of "the law among the various jurisdictions." *Id.* at 614 (quoting MICH. COMP. LAWS ANN § 440.1102(2)(c) (West 2001)). The fact that the Michigan version of the economic loss doctrine differs in important ways from the doctrine in other states—as for example as regards the treatment of harm to 'other property"—undermines part of the sought-for uniformity.

54. *Neibarger*, 486 N.W.2d at 615.

55. *Id.*

56. *Id.*

57. *Id.* at 615.

> of remedies. Where a product proves to be faulty after the parties have contracted for sale and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products.[58]

In sum, the decision to adopt the economic loss doctrine was not an interpretation or application of the Sales Article. Nor was it based on a desire to produce some kind of uniformity or predictability among the various cases that might arise with similar facts. It follows therefore that the rationale for adopting doctrine is not just a version of the older idea of the "equity" of the statute. Instead, the rationale derives from weighing the policy considerations that underlie both tort and contract law, and making a decision about how best to balance those considerations.[59]

But the challenge is more complex even than this. As I will elaborate later, the economic loss doctrine is different from the principles of *Hart v. Ludwig*, which would also seem to balance the considerations that underlie tort and contract. There is a third element to the *Neibarger* majority's balancing of values, and that is the policies and purposes which, in the majority's eyes, lie behind the adoption of the U.C.C. in general, and Article 2 in particular. The *Neibarger* court asserted that:

> The Code represents a carefully considered approach to governing the economic relations between suppliers and consumers of goods. If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless.[60]

So, on this view, the judicial challenge is triangular: to decide controversies in a way that will both balance the competing values behind tort and contract law and, in so doing, also fulfill the basic ambitions of the legislature in enacting Article 2. In general, the answer provided will take the following form: the best decision is to ensure that such disputes are resolved by use of the U.C.C.'s resources, even when

58. *Id.* at 616.
59. *See id.*
60. *Id.* at 618.

the U.C.C. itself does not assert that its provisions should be employed in that way.

III. A "CAREFULLY CONSIDERED APPROACH"—AN OVERVIEW OF ARTICLE 2

Although I view the *Neibarger* decision as judicial law-making rather than statutory interpretation, the effect of the decision is to make the U.C.C. dominant in product liability controversies that do not involve personal injury. Recall that, as part of its rationale for the decision to foreclose tort remedies, the majority advanced a strong characterization of both the Sales Article, in particular, and the U.C.C. in general.[61]

It thus appears that foreclosing tort remedies was thought desirable because Article 2 provided a carefully balanced set of legal mechanisms for determining liability and for compensating injured parties.[62] As one post-*Neibarger* decision elaborated, the U.C.C. "presents a unified, coherent set of standards controlling commercial transactions," of which Article 2, addressing the sale of goods, is the crucial part.[63] It must be, then, that part of Article 2's "carefully considered approach" included decisions about which rules should govern disputes involving defective products. The idea, in other words, is that Article 2 was designed to handle this kind of legal problem and it should be allowed to handle those problems without hindrance or compromise. Any other result, the majority indicated, would threaten to undermine to whole of the Sales Article and somehow render it "*meaningless*."[64]

If plaintiffs can have no remedies in tort, then new approaches to these controversies will have to build on the resources of the Code. As a result, for cases within the scope of the doctrine, there will be pressure to find ways within Article 2 to articulate and adjudicate dimensions of the subject controversies that don't match the standard profile of a case involving the sale of goods. Put differently, we can expect that adopting the economic loss doctrine will cause the jurisprudence of the Sales Article to change in response. I will identify various ways in which such changes have already begun, but the changes will be easier to identify, and to understand, if we have a firm grasp on the Sales article and its most important features.

Drafted in the 1940's and 1950's, the Uniform Commercial Code is often viewed as the brainchild of Karl Llewellyn, who was Chief

61. *See id.*
62. *See Neibarger*, 486 N.W.2d at 619.
63. *Detroit Edison*, 35 F.3d at 240.
64. *Neibarger*, 486 N.W.2d at 619.

Reporter of the project to draft and integrate a comprehensive commercial code.[65] Not only was Llewellyn Chief Reporter of the whole U.C.C., he was principle draftsman of Articles 1 and 2.[66] As such, Llewellyn exercised a huge influence on the development of both the Code in general and Article 2 in particular.[67] Although Article 2 had been preceded by the Uniform Sales Act—itself a successful exercise in uniform law-making—the Sales Article, which Llewellyn described as the "heart of the Code,"[68] included a number of salient new approaches to sales law.[69]

A. An Informal Approach to Contract Formation

Llewellyn's underlying goal for the U.C.C. was "to simplify, clarify and modernize the law governing commercial transactions."[70] When it came to the Sales Article, these goals led to a more flexible attitude about matters such as offer and acceptance. Thus, "[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[71] For that matter, "[a]n agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined."[72] This more flexible attitude led to a more relaxed set of rules relating to formation. So, for example, "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."[73] Many of these ideas were ahead of their time, and represented a significant change from the prior common law's more rigid approach to such matters. Since the Code's promulgation, many courts have followed the Sales Article's lead; the Second Restatement of Contracts has consciously copied Article 2's more "modern" approach.[74]

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65. FARNSWORTH, *supra* note 15, §1.9 41-42 (discussing Llewellyn's role).

66. *Id.*

67. Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957).

68. *Id.* at 378.

69. So much so that Williston, who had been the principal drafter of the Uniform Sales Act, found Article 2 "not only iconoclastic but open to criticisms that I regard so fundamental as to preclude the desirability" of enacting that Article. Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 561 (1950).

70. MICH. COMP. LAWS ANN. § 440.1102(2)(a) (West 2001).

71. MICH. COMP. LAWS ANN. § 440.2204(1) (West 2001).

72. MICH. COMP. LAWS ANN. § 440.2204(2) (West 2001).

73. MICH. COMP. LAWS ANN. § 440.2206(1)(a) (West 2001).

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (ALI 1981).

One further instance of this flexible attitude deserves note. Pre-Code law on contract formation had often included a harsh attitude towards what were deemed "incomplete" or "indefinite" contracts, regarding them as unenforceable and, often, a plague on the judiciary.[75] In contrast, Article 2 took a quite relaxed attitude towards the level of detail required to make an enforceable deal: "Even if one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[76] Just how relaxed the Code could be on this point is highlighted by the interaction of this subsection with another provision of the Sales Article. M.C.L. Section 440.2305 ("Open Price Term") allows the parties "if they so intend [to] conclude a contract for sale even if the price is not settled."[77] Indeed, that section would recognize the existence of a contract even though "the price is left to be agreed by the parties and they fail to agree."[78] On this point, as well, the approach of Article 2 has inspired the Restatement and various courts deciding issues of common law.[79]

Finally, Section 440.2305 can be seen as just one example of a facet of Article 2's design that facilitates a flexible attitude toward contract formation. The "open price" section is one of a series of provisions called "gap-fillers." These provisions, found throughout the 440.2300s sections, serve to give content to an agreement that is otherwise undetermined; as noted, if the parties have failed to agree on a price, then section 440.2305 provides one (namely, a "reasonable' price").[80] Similarly, if the parties fail to specify the form of payment;[81] or if they fail to specify a place for delivery;[82] or if they fail to specify a time for shipment or delivery;[83] or even a time for the contract's termination;[84] section 2-305 also gives them a reasonable price.[85] One upshot of these (and other) provisions is that the parties can, if they choose, make an enforceable agreement by agreeing to a very small list of terms; Article 2

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75. *See* Walker v. Keith, 382 S.W.2d 198, 200 (Ky. Ct. App. 1964).

76. MICH. COMP. LAWS ANN. § 440.2204(3) (West 2001).

77. MICH. COMP. LAWS ANN. § 440.2305(1) (West 2001).

78. MICH. COMP. LAWS ANN. § 440.2305(1)(b) (West 2001).

79. *Compare* MICH. COMP. LAWS ANN. § 440.2204(3) (West 2001), *with* RESTATEMENT, *supra* note 74, § 33.

80. MICH. COMP. LAWS ANN. § 400.2305 (West 2001).

81. MICH. COMP. LAWS ANN. § 440.2304 (West 2001) ("Price payable in money, goods, realty or otherwise.").

82. MICH. COMP. LAWS ANN. § 440.2308 (West 2001).

83. MICH. COMP. LAWS ANN. § 440.2309(1) (West 2001).

84. MICH. COMP. LAWS ANN. § 440.2309(2) (West 2001).

85. MICH. COMP. LAWS ANN. § 440.2305 (West 2001).

can fill in the gaps. Another upshot is that Article 2's Statute of Frauds[86] can be satisfied by a writing that non-Code law would regard as impermissibly sketchy: "[o]nly three definite and invariable requirements for the memorandum [are made by this subsection] First, [it] must evidence a contract for the sale of goods; second, [it] must be signed; and third, [it] must have a quantity term or a method to determine the quantity."[87]

B. A Reliance on Commercial Background

Another of Llewellyn's underlying goals for the Code was "to permit the continued expansion of commercial practice through custom, usage and agreement of the parties."[88] These goals as well were given effect in a series of important developments in the Sales Article.

One aspect of this reliance on "custom, usage and agreement of the parties,"[89] is the Code's definition of the very idea of an "agreement." The Code defines a "contract" to mean "the total legal obligation which results from the parties agreement as affected by the Act and any other applicable rules of law.[90] But "agreement" means "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."[91] As the Official Comment observes, the definition of "agreement" was new to commercial law at the time, and was "intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts" of any agreement, the statutory definition of "agreement" was also intended to recognize "any agreement permitted under the provisions of this Act to displace a stated rule of law."[92]

So, for example, Article 2's version of the parol evidence rule makes a significant change from pre-Code law by permitting evidence of course of dealing, usage of trade, or course of performance to "explain or supplement" any written agreement, without needing a prior determination that some part of the agreement is "ambiguous."[93] This follows from the understanding that the parties' agreement includes, by

86. MICH. COMP. LAWS ANN. § 440.2201 (West 2001).
87. MICH. COMP. LAWS ANN. § 440.2201 cmt. 1 (West 2001).
88. MICH. COMP. LAWS ANN. § 440.1102(2)(b) (West 2001).
89. *Id.*
90. MICH. COMP. LAWS ANN. § 440.1201(11) (West 2001).
91. MICH. COMP. LAWS ANN. § 440.1201(3) (West 2001).
92. MICH. COMP. LAWS ANN. § 440.1201 cmt. 3 (West 2001).
93. MICH. COMP. LAWS ANN. § 440.2202(a) (West 2001); *see also* MICH. COMP. LAWS ANN. § 440.2202 cmt. 1(c) (West 2001).

definition, any applicable course of dealing or usage of trade as background which would be necessary to understand the bargain that the parties actually made, and also incorporates the parties' course of performance as potentially telling evidence about what they meant.[94] Michigan common law, by contrast, continues to derogate course of performance as inadmissible unless the court has determined some part of the contract to be ambiguous and in need of extrinsic explanation.[95] Article 2 similarly embraces the parties' conduct in performance of their agreement as "relevant to show a waiver or modification of any term inconsistent with such course of performance,"[96] where recent Michigan decisions seem to preclude the relevance of that conduct unless the decision to modify is expressed in a clear and unambiguous fashion.[97]

Another way in which the Code enshrines the parties' actual understandings of what they expect of themselves and each other lies in a basic commitment to the idea that the parties should, as much as possible, create their own agreement. The Code provides that "[t]he effect of provisions in this Act may be varied by agreement."[98] There is one notable exception: "the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement."[99] Even those obligations which cannot be disclaimed may be structured and limited by the parties' agreement: "the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."[100] In some instances, courts have allowed this 'standard-determination' function to determine the standard out of existence.[101] But using the contract to determine the content of such standards as good faith will require attentions to the details of the contract: if the parties, taking advantage of the Code's flexible approach to contract-making, come to a schematic agreement without fully considering the details, then they will each be bound to those non-disclaimable obligations.[102] This is particularly important for the type of parties identified by the

94. *See also* MICH. COMP. LAWS ANN. § 440.2208 (West 2001).

95. *See* Quality Prod. & Concepts v. Nagel Precision, Inc., 666 N.W.2d 251, 258 (Mich. 2003).

96. MICH. COMP. LAWS ANN. § 440.2208(3) (West 2001).

97. *See Quality Products*, 666 N.W.2d at 258-59.

98. MICH. COMP. LAWS ANN. § 440.1102(3) (West 2001).

99. *Id.*

100. *Id.*

101. *See* MICH. COMP. LAWS ANN. § 440.2309 cmt. 8 (West 2001) (noting that application of good faith normally requires sufficient notice of the termination of a contract, but that parties can agree to dispense of the requirement).

102. *See* MICH. COMP. LAWS ANN. § 440.2204 cmt. 3 (West 2001).

Sales Article as "merchants."[103] Good faith is defined for all the Code as requiring "honesty in fact in the conduct or transaction concerned."[104] But Article 2 imposes a heavier burden of good faith on such parties than is true for non-merchants: "'Good faith' in the case of a merchant means honesty in fact *and the observance of reasonable commercial standards of fair dealing in the trade.*"[105]

C. A Structured Approach to Making, and Avoiding, Warranties and Remedies

In many controversies, and especially those involving the economic loss doctrine, one of the most important facets of Article 2 is its rich structure for dealing with warranties, especially those labeled "implied."[106] These come in two flavors—*merchantability*[107] and *fitness for a particular purpose.*[108] Each of these continues an idea that was found in the pre-Code Uniform Sales Act, but represents a change of at least formulation if not of substance.[109]

Neither implied warranty requires that the seller say anything or do anything specific to bring the warranty into existence. To the contrary, each is "implied" because of facts about the seller. This is most obvious in the case of M.C.L. Secion 440.2314's warranty of merchantability: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."[110] As the Comments emphasize, "the responsibility rest on any merchant-seller."[111] As one treatise has phrased it, "section 2-314 offers a form of 'strict liability.'"[112] The issue is somewhat more complex for U.C.C. 2-315's warranty of fitness, but at bottom much the same: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose."[113] Thus, such a warranty arises just in case the seller has "reason to know,"

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103. MICH. COMP. LAWS ANN. § 440.2401(1) (West 2001).
104. MICH. COMP. LAWS ANN. § 440.1201(19) (West 2001).
105. MICH. COMP. LAWS ANN. § 440.2103(1)(b) (West 2001) (emphasis added).
106. MICH. COMP. LAWS ANN. §§ 440.2314, 440.2315 (2001).
107. MICH. COMP. LAWS ANN. § 440.2314 (West 2001).
108. MICH. COMP. LAWS ANN. § 440.2315 (West 2001).
109. *See* MICH. COMP. LAWS ANN. § 440.2315 cmt. 4 (West 2001).
110. MICH. COMP. LAWS ANN. § 440.2314(1) (West 2001).
111. MICH. COMP. LAWS ANN. § 440.2315 cmt. 2 (West 2001).
112. WHITE & SUMMERS 1980, *supra* note 30, at 343.
113. MICH. COMP. LAWS ANN. § 440.2315 (West 2001).

and there is no requirement that the buyer "bring home" to the seller any actual knowledge of the buyer's purpose; nor is there any requirement that the seller act in some way to affirm the warranty of fitness nor otherwise "accept" this liability. Instead, the warranty under section 2-315 attaches to the contract if those facts are true, unless the seller takes affirmative steps to exclude or modify the warranty.[114]

Looking at Article 2's provisions about implied warranties might easily suggest that the Code emphasizes implied warranties. After all, they are "implied" by simple facts about the seller and its relationship with the buyer.[115] Even when other provisions might threaten to displace terms of a contract the Code seems to indicate that, once in, implied warranties are hard to take out of an agreement.[116] The story about implied warranties is, however, importantly more complex than that easy suggestion: what Article 2 gives, it also takes away. Thus, warranties of merchantability and fitness are "implied" by the Code into a contract for sale *"unless excluded or modified"* pursuant to section 2-316, but that section makes it easy to get rid of a warranty that would otherwise be implied.[117] As it turns out, a seller can exclude or modify either of the implied warranties by saying, in a conspicuous manner, that the warranty isn't there (or means less than it might seem). For example, a clause in a written contract can exclude or modify the implied warranty of merchantability if the clause "mentions merchantability" and is conspicuous.[118] Similarly, a clause can exclude or modify the warranty of fitness if it is conspicuous;[119] no particular language is required for this latter purpose; a disclaimer is "sufficient if it states, for example, that '[t]here are no warranties that extend beyond the description on the face hereof.'"[120] For that matter, there are a couple of pat phrases that, according to the same section, can easily dispose of both implied warranties: "[u]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults,' or other language that in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."[121]

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114. *See* MICH. COMP. LAWS ANN. § 440.2316 (West 2001).

115. MICH. COMP. LAWS ANN. § 440.2315 (West 2001).

116. *See* MICH. COMP. LAWS ANN. § 440.2315 cmt. 1 (West 2001).

117. *See* MICH. COMP. LAWS ANN. § 440.2316 (West 2001).

118. *See* MICH. COMP. LAWS ANN. §§ 400.2207(2), 440.2316 (West 2001) (emphasis added).

119. *See* MICH. COMP. LAWS ANN. § 440.2316(3) (West 2001).

120. MICH. COMP. LAWS ANN. § 440.2316(2) (West 2001).

121. *See* MICH. COMP. LAWS ANN. § 440.2316 cmt. 3 (West 2001).

So, Article 2 begins with an assumption that implied warranties will arise, which makes it likely that such liability will attach, but also makes it easy for the seller to avoid such liability by inserting one of those pat phrases into the final contract. There's a similar give-and-take structure at work in another, related aspect of the Code—namely, its provisions relating to damages. Another of Article 2's innovations was a comprehensive approach to the parties' damages. Where the common law usually focuses on a single, general, idea of damages to be calculated in terms of the "expectation" or "benefit of the bargain,"[122] the Code separates its treatment of damages available to the buyer from those available to the seller and then further sub-divides each of those ideas. So, the injured buyer can sue for damages based on the cost of cover,[123] the contract-market differential[124] or breach of warranty,[125] together with such incidental and consequential damages as may be appropriate for each of those measures.[126] Likewise, an injured seller can seek damages based on the resale of the goods,[127] the contract-market differential,[128] or, in the case of the famous lost volume seller, the lost profits that would have been expected from another unit of volume,[129] together with incidental damages as appropriate.[130] But, again, what the Code gives, the Code also takes away: section 2-719 also allows, by use of a relatively simple mechanism, the limitation of most forms of damages.[131] Most saliently, consequential damages may often be limited or even excluded altogether by including a phrase to that effect in the contract, unless the consequential damages in question are for "injury to the person in the case of consumer goods."[132] Or, the agreement may limit "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."[133]

Finally, it is important to appreciate a "basic policy" of the Sales Article regarding warranties—namely, that "no warranty is created except by some conduct (either affirmative action or failure to disclose)

122. *See, e.g.*, RESTATEMENT OF CONTRACTS § 347.
123. MICH. COMP. LAWS ANN. § 440.2712 (West 2001).
124. MICH. COMP. LAWS ANN. § 440.2713 (West 2001).
125. MICH. COMP. LAWS ANN. § 440.2714 (West 2001).
126. MICH. COMP. LAWS ANN. § 440.2715 (West 2001).
127. MICH. COMP. LAWS ANN. § 440.2706 (West 2001).
128. MICH. COMP. LAWS ANN. § 440.2708(1) (West 2001).
129. MICH. COMP. LAWS ANN. § 440.2708(2) (West 2001).
130. MICH. COMP. LAWS ANN. § 440.2710 (West 2001).
131. *See* MICH. COMP. LAWS ANN. § 440.2719 (West 2001).
132. MICH. COMP. LAWS ANN. § 440.2719(3) (West 2001).
133. MICH. COMP. LAWS ANN. § 440.2719(1)(a) (West 2001).

on the part of the seller."[134] The policy identified by this comment rests on a foundation that goes to the heart of the Article. A "seller" is not the same thing as a manufacturer, or distributor, or supplier. "'Seller' means a person who sells or contracts to sell goods"[135] and a "'sale' consist in the passing of title from the seller to the buyer for a price."[136] What this foundation implies is that warranties in Article 2 are creatures of the relationship between the particular buyer and the particular seller; put differently, they are the product of the individual sales transaction. Thus, for example, section 2-314 holds that "a warranty that the goods shall be merchantable is *implied in a contract for their sale.*"[137] So, where goods travel "downstream" in chain of distribution[138]—from manufacturer to distributor to wholesaler to retailer to ultimate consumer—warranties won't necessarily travel with the goods to remote purchasers, but rather must be re-created in each new sales transaction. The warranties to be enjoyed by the ultimate consumer are instead the product of his or her sales transaction with the retailer; it doesn't matter to the consumer, for example, that warranties were created, or excluded, in the sales transaction between the manufacturer and the distributor if the consumer bought them from a seller who disclaimed all implied warranties in a manner sanctioned by section 2-316.[139] Nor should it matter what was disclaimed between the manufacturer and distributor if the immediate seller was either a merchant with respect to goods of that kind or helped a relying buyer choose suitable goods; in such a case the purchaser can assert the seller's liability regardless of anything the manufacturer might say.

There is one exception to this feature of the Article that limits warranties and their disclaimer to the particular sales transaction. In section 2-318, the Article does hold that some warranties extend beyond the sales relationship, through the form of certain recognized third party beneficiaries.[140] Thus, in Michigan, "A seller's warranty whether express or implied extends to any natural person who is in the family or the

134. MICH. COMP. LAWS ANN. § 440.2317 cmt. 1 (West 2001).

135. MICH. COMP. LAWS ANN. § 440.2103(1)(d) (West 2001). A comparable provision defines "buyer" to mean "a person who buys or contracts to buy goods." MICH. COMP. LAWS ANN. § 440.2103(1)(a) (West 2001).

136. MICH. COMP. LAWS ANN. § 440.2106(1) (West 2001).

137. MICH. COMP. LAWS ANN. § 440.2314(1) (West 2001) (emphasis added).

138. To the best of my knowledge, the image of liability, or warranties, traveling "up" or "down" the chain of distribution was first used in a Michigan case in Justice Boyle's dissent in Comp-U-Aid, Ic., v.Berk-Tek, Inc., 547 N.W.2d 640, 641 (Mich. 1995) (Boyle, J., dissenting)

139. MICH. COMP. LAWS ANN. § 440.2316 (West 2001).

140. *See* MICH. COMP. LAWS ANN. § 440.2318 (West 2001).

household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."[141] The extension of warranties through the third-party beneficiary concept is salient, but what in many ways is more important is the rather significant bar to any further extension. Michigan's Section 440.2318 operates to cut off any extension of warranties beyond such natural persons. Other third parties are not in a position to hold the seller liable for a breach of warranty under this provision.[142]

The point here can be expressed by use of the traditional notion of *privity*. In general, Article 2's approach to warranties requires privity between the breaching seller and the injured buyer before the injured party can hold the seller liable.[143] Section 2-318 goes beyond the privity requirement, but only to a very limited extent. There is no other provision of Article 2 that would abandon the privity requirement. It is to be assumed that, depending on the facts of a particular case, a party can argue that it is a third-party beneficiary of some promise or commitment, including a warranty, of the seller, based on the common law rules and principles governing such third-party relationships.[144] But, such an argument would indeed depend on those common law rules and principles. Section 440.2318 is a statutory exception to those rules, and it is the only one that is authorized by Article 2. In all other respects, the Article assumes privity between the buyer and the seller for the understanding, and operation, of its provisions.

IV. UNDERSTANDING MICHIGAN'S ECONOMIC LOSS DOCTRINE AND ITS APPLICATION

A. Understanding the Scope of the Doctrine

1. The Predominant Factor Test at Work

One problem about applying the economic loss doctrine has been uncertainty about the scope of the doctrine's application. In *Neibarger*, the Court held that the buyer must use only those remedies which are

141. *See* MICH. COMP. LAWS ANN. § 440.2318 (West 2001).

142. *Id.*

143. *See Neibarger*, 486 N.W.2d at 616

144. See MICH. COMP. LAWS ANN. § 440.1103 (West 2001). In addressing these alternatives, Comment 3 to section 2-318 states that the section is "not intended to enlarge or restrict the developed or developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." MICH. COMP. LAWS ANN. § 440.2318 cmt. 2 (West 2001).

available to an injured buyer under Article 2 of the Code.[145] But, as the majority observed, the Article is famous for not defining its own scope.[146] Article 2 is titled "Sales,"[147] but Section 440.2102 asserts unhelpfully that unless the context otherwise requires, this article applies to "*transactions* in goods."[148]

Many jurisdictions have struggled with this question because so many transactions have dual or "hybrid" natures: some aspects that involve goods, but others that involve services. Buying a bowl of soup at a restaurant, for example; having a hairdresser apply a bottled treatment; or ordering a computer to be delivered to your home. One of the most controversial contexts of application has concerned the acquisition of computer software. It is now less common, but not so many years ago software was acquired by buying a box on a shelf which, when opened, provided the consumer with a disk (or diskette) to load onto one's computer. Several courts struggled with the proper characterization of that transaction because the box, and the disk, were sold but the software designer and manufacturer abhorred the notion that the software itself was "bought" by the purchaser.[149]

Recognizing the problem of scope, and some of the antecedent case developments, *Neibarger* held that the applicability of Article 2 is to be decided in Michigan by use of the "predominant factor" test.[150] According to this test, a transaction is governed by Article 2 if the predominant factor, or thrust, of the contract is the sale of goods.[151]

Presumably, if the predominant factor is not the sale of goods, then Article 2 does not govern and the economic loss doctrine does not apply. But this question has been compromised by the unfortunate decision in *Huron Tool and Engin. Co. v. Precisions Consulting Service, Inc.*[152] At issue in that case was the "sale of a computer software system,"[153] and the central question was the viability of the plaintiff's claim for fraud in the inducement.[154] Nothing in the opinion discusses the question, but it is highly unlikely that the defendant was actually selling the software; in all likelihood, instead, the defendant was licensing it for the plaintiff's use.

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145. *See Hart*, 79 N.W.2d at 896.

146. *Neibarger*, 486 N.W.2d at 618.

147. *Id.* at 618. *See also* MICH. COMP. LAWS ANN. § 440.2101 (West 2001).

148. MICH. COMP. LAWS ANN. § 440.2102 (West 2001) (emphasis added).

149. *See* E. ALLEN FARNSWORTH, 2 FARNSWORTH ON CONTRACTS 567-70 (3d ed. 2004) (discussing 'shrink-wrap' and 'click-wrap' agreements for computer software).

150. *Neibarger*, 486 N.W.2d at 621.

151. *Id.*

152. 532 N.W.2d 541 (Mich. Ct. App. 1995).

153. *Id.* at 542.

154. *Id.* at 543.

Not the less, *Huron Tool* came to stand for the idea that the economic loss doctrine extends beyond transactions in goods to contracts for services as well.[155]

The idea that the economic loss doctrine should be understood to apply to contracts for services runs plainly in the face of *Neibarger*. That decision predicated the doctrine's application on the applicability of the U.C.C. and, moreover, adopted the predominant factor test to determine whether the U.C.C. applies. In *Quest Disagnostics*,[156] and then again in *Farm Bureau Mut. v. Combustion Research Corp.*,[157] the Court of Appeals has clarified that the doctrine does not apply when there is no transaction in goods.[158] It has taken some time, but Michigan appellate courts seem finally to have corrected for the mistake of *Huron Tool*.

2. The Strange Status of Distributorships in Michigan

Unfortunately, knowing when to apply Article 2's provisions in accordance with the economic loss doctrine is made more complicated by the Michigan Supreme Court's holding in *Lorenz Supply Co. v. American Standard, Inc.*,[159] where the Court held that distributorship agreements are not "contracts for the sale of goods" unless the agreement is evidenced by a writing that specifically states a quantity term.[160] The plaintiff had entered into a distributorship agreement, but the "only written evidence of this agreement was a letter from American Standard that "'welcome[d] Lorenz to the numbers of American Standard distributors across the country."[161] Since no writing embodied a specific quantity term, the majority reasoned, the alleged contract could not meet the requirements of Article 2's statute of frauds.[162] The majority noted that a different result would follow for any distributorship that is also a requirements or outputs contract, but refused to extend that reasoning to distributorships more generally.[163]

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155. *See id.* at 543 ("The agreements provided that the defendant . . . would provide plaintiff . . . with 'system's design, programming, training, and installation services.'").

156. Quest Diagnostics Inc. v. MCI Worldcom, 656 N.W.2d 858 (Mich. Ct. App. 1995).

157. 662 N.W.2d 439 (Mich. Ct. App. 2003).

158. *Quest*, 656 N.W.2d at 864; *Farm Bureau Mut.*, 662 N.W.2d at 442.

159. 358 N.W.2d 845 (Mich. 1984).

160. *Id.* at 847.

161. *Id.*

162. *Id.* at 846-48 (quoting MICH. COMP. LAWS ANN. § 440.2201 (West 2001)).

163. *Id.* at 847. Other Court of Appeals decisions have refined this point. *See* In re Frost Estate, 344 N.W.2d 331, 335 (Mich. Ct. App. 1983) (in a contract that called for the purchaser to take "all sawable wood" the word "all" should be construed as a quantity term); Great Northern Packaging, Inc. v. General Tire and Rubber Co., 399 N.W.2d 408,

While the majority concluded in *Lorenz* that the distributorship in that case was not a contract for the sale of goods, it apparently also held that the distributorship agreement was an enforceable contract of some kind, for it upheld the jury's award of damages for breach of that agreement.[164] As a result, distributorships appear to occupy in Michigan the same confused kind of status as the infamous duck-billed platypus, which lays eggs but nurses its young and hence meets the standard criteria for both mammalian and non-mammalian classification. Distributorship agreements that do not state a specific quantity are apparently contracts of some kind, but not contracts for sale of goods.[165] It should follow that the Code's provisions—including warranties, damages, and limitations—would not apply to such distributorships.

If a distributorship agreement is not subject to Article 2, then it should follow that the agreement, and the relationship between the parties, is not subject to the economic loss doctrine. If the Code's "carefully considered approach" cannot govern, and a plaintiff can have no remedy, then *Neibarger's* justification for eliminating tort recovery could have not application.[166]

It should be recognized that the *Lorenz* holding is anomalous. Other jurisdictions have concluded that a distributorship just is a contract for sale of goods and hence is governed by the Sales Article.[167] Still more jurisdictions take each distributorship on its own, and ask in a case-by-case fashion whether the distributorship's predominant factor is the sale of goods; if it is, then Article 2 applies.[168] It appears that the *Lorenz* majority was itself concerned about its holding, even in advance of the economic loss doctrine, for the majority opinion hedges its bets. While the distributorship agreement is not an enforceable sale of goods, the Court chose not to decide the more fundamental question whether the distributorship was not the less a "transaction in goods."[169] This question

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413 (Mich. Ct. App. 1987) (holding that 'blanket order' contracts express a quantity term "albeit an imprecise one"). *But see* Acemco, Inc v. Olympic Steel Lafayette, Inc., No. 256638, 2005 WL 2810716, at *4 (Mich. Ct. App. Oct. 27, 2005) (holding that "blanket" is not a quantity term).

164. *Lorenz*, 385 N.W.2d at 848 ("This Court would exceed its role if it were to decide as a matter of law that Lorenz's failure to pay a portion of the amount admittedly owed by Lorenz to American Standard was a material failure justifying American Standard in terminating the distributorship agreement that the jury found was entered into.").

165. *Id.* at 847-48.

166. *See Neibarger*, 486 N.W.2d at 618-20.

167. *See Lorenz*, 358 N.W.2d at 852 (Brinkley, J., concurring).

168. *See id.* at 853.

169. *See Neibarger*, 486 N.W.2d at 847 n.8 ("We express no opinion on the question whether a distributorship agreement may fall within the broader category of 'transaction in goods' within the meaning of §2-102 of the UCC."). This issue was recently flagged in

remains unresolved, but the development of the economic loss doctrine would seem likely to bring the point to high relief and, ultimately, to require a resolution.

3. A Code on Leases

The *Neibarger* opinion refers to "the Code" and sometimes to Article 2 as the governing law.[170] But, there are transactions in which one party has use of, and is injured by, a good but where Article 2 cannot apply—namely, when the user leased and not purchased the goods, then the lease agreement is governed by Article 2A instead. On the reasoning of the *Neibarger* majority, it should follow that the economic loss doctrine would apply as well in cases involving leases of goods, so that commercial losses suffered by the lessee would be remedied only by means of the provisions of Article 2A and not by means of tort law.[171]

On almost all points of concern, the situation for leases is closely comparable to that for sales. Article 2A became effective in Michigan in 1992, before the *Neibarger* decision, and has not been the subject of much litigation.[172] But its structure and themes are reasonably clear. It continues most of the policies of the Code as a whole, as articulated in section 1-102.[173] And, most of the important provisions of the Sales article have been carried forward. So, for example, Article 2A's warranty provisions replicate the warranties (express and implied) of the Sales article.[174] The article on lease also replicates the provision for exclusion or modification of implied warranties,[175] including the easy mechanisms by which a seller can address the warranties in order to exclude them[176] or use blanket disclaimers like "as is."[177] Similarly, Article 2A's provisions on formation and damages replicate those of Article 2. There

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General Motors Corp. v. Alumi-Bunk, Inc., No. 270430, 2007 WL 2118796, at *3 (Mich. Ct. App. July 24, 2007).

170. *Neibarger*, 486 N.W.2d at 612.

171. In Imaging Financial Services, Inc. v. Lettergraphics/Detroit, Inc., 178 F.3d 1294 (6th Cir. 1999) (unpublished opinion), the Sixth Circuit decided a case involving a lease of goods that had arisen before the effective date of Michigan's adoption of Article 2A. *Id.* Noting that the Leases Article was not yet effective, the appellate panel applied the economic loss doctrine as an extension of Article 2. *Id.*

172. *See* MICH. COMP. LAWS ANN § 440.2801 (West 2001).

173. *See* MICH. COMP. LAWS ANN. § 440.1102 (West 2001).

174. *See* MICH. COMP. LAWS ANN. § 440.2862 (West 2001) (discussing implied warranty of merchantability); MICH. COMP. LAWS ANN. § 440.2863 (West 2001) (discussing implied warranty of fitness for particular purpose).

175. *See* MICH. COMP. LAWS ANN. § 440.2864 (West 2001).

176. *See* MICH. COMP. LAWS ANN. § 440.2864(2) (West 2001).

177. See MICH. COMP. LAWS ANN. § 440.2804(3) (West 2001).

are some important differences: Article 2A did not adopt the Sales Article's infamous provision regarding the "battle of the forms,"[178] nor did it replicate Article 2's "gap filler" terms.[179] But, those differences notwithstanding, the article on leases looks to present, just as much as the Sales Article, "a carefully considered approach to governing the economic relations between" lessors and lessees of goods.[180] As a result, the rationale for adopting the economic loss doctrine with regards to contracts in which the sale of goods is the predominant focus should apply with equal force to leases of goods and hence should bar tort remedies for anyone injured by a breach of such a contract.

B. The Doctrine and the Tort-Contract Boundary

As I noted earlier, there is an affinity between the economic loss doctrine and the principle of *Hart v. Ludwig*. In consequence, following the rule of *Hart* can appear, at first glance, to be the same thing as applying the economic loss doctrine: both will foreclose tort claims and leave the injured party to such recovery as might be available through contract law.[181] One might therefore be tempted to subsume both ideas under one label, or to assume that the two ideas are really flip sides of the same coin. But this would be a mistake.

White and Summers have commented that they "accept the economic loss doctrine as a crude proxy for the dividing line between what is tort and what is not."[182] At least in Michigan, it would be a mistake to think of the doctrine as anything other than a very crude proxy. There are some basic, and important differences between the economic loss doctrine, as articulated and applied in Michigan, and the tort contract boundary as articulated in *Hart*.

To begin with the obvious, if the economic loss doctrine were just the same as the rule of *Hart v. Ludwig*, then *Neibarger* would have been unnecessary. But, the Supreme Court's decision in *Rinaldo's Construction Corp v. Michigan Bell Telephone*[183] re-affirmed both *Hart v. Ludwig* and the distinctiveness of the economic loss doctrine.[184] So, conflating the two ideas would be an important mistake in reading the law.

178. *See* MICH. COMP. LAWS ANN. § 440.2207 (West 2001).
179. *See* MICH. COMP. LAWS ANN. § 440.2305 (West 2001).
180. *Neibarger*, 486 N.W.2d at 618.
181. *Hart*, 79 N.W.2d at 897-98.
182. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 386 (Hornbook Series 4th ed. 1995) [hereinafter WHITE & SUMMERS 1995].
183. 558 N.W.2d 647 (Mich. 1997).
184. *Id.* at 657-58.

Even more significantly, conflating *Hart* with *Neibarger* would undermine two points of central concern in the *Neibarger* majority's opinion. First, as was already noted, the *Neibarger* decision is explicitly addressed to cases involving the sale of goods and, in particular, where the sale was the predominant factor of the parties' contractual relationship.[185] *Hart*, on the other hand, applies to contracts of every stripe, both goods and services.[186] Second, the *Neibarger* rule is explicitly limited to cases where the loss alleged is commercial in nature.[187] *Hart* on the other hand applies regardless of the nature of the loss.[188]

To illustrate the second point, consider the case of *Sherman v. Sea Ray Boats, Inc.*[189] The plaintiff purchased a boat from the defendant in 1985 and then in 1999 filed suit complaining about decaying wood on the vessel.[190] While it is clear that the purchase at issue was governed by Article 2, it appears that this was a pleasure craft purchased for individual use.[191] Accordingly, the plaintiff argued that the economic loss doctrine did not apply because the transaction was not "commercial."[192] But the appellate panel would have none of it and applied what it called the economic loss doctrine to dismiss the plaintiff's tort claims.[193]

It is surprising, and disturbing, that the appellate panel rejected so summarily the plaintiff's attempt to distinguish the doctrine.[194] After all, the *Neibarger* decision specifically, and repeatedly, emphasized the commercial dimension of the doctrine it adopted: "we hold that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes" the only remedy is through Article 2.[195] Indeed, at one point, the *Neibarger* majority speculated about the

185. *Neibarger*, 486 N.W.2d at 621.
186. *Hart*, 79 N.W.2d at 898-99.
187. *Neibarger*, 486 N.W.2d at 620.
188. *Hart*, 79 N.W.2d at 898-99.
189. 649 N.W.2d 783 (Mich. Ct. App. 2002).
190. *Id.* at 784
191. *Id.*
192. *Id.* at 788.
193. *Id.* at 790
194. For a more insightful application of *Neibarger* on this point, see Republic Ins. Co. v. Broan Mfg. Co., Inc., 960 F. Supp. 1247, 1249-50 (E.D. Mich. 1997).
195. *Neibarger*, 486 N.W. 2d at 612, 615, 618 ("the claims arise from a commercial transaction."); *id.* ("[the doctrine] hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes" and those "involving the sale of defective products to individual consumers."); *id.* at 616 ("On the other hand, in a commercial transaction . . . ."); *id.* at 618. ("If a commercial purchaser were allowed to sue in tort, the [relevant] UCC provisions . . . could be entirely avoided."); *id.* at 620 ("a

wisdom of changing the doctrine's name: "It would be better," they wrote, to refer to "a commercial loss."[196] On these grounds, the plaintiff's argument about the non-commercial nature of the transaction should count for something; I return to this point in Section V. below.

But a careful reading of *Sea Ray* shows that the panel was more confused about the label of the rule it applied than in error about the proper scope of the economic loss doctrine. The great bulk of the *Sea Ray* opinion is a discussion and analysis of *Hart v. Ludwig* and its legacy, and the working part of the appellate court's decision arises with one crucial sentence: "Having concluded that the *Hart* principles apply to this type of transaction, the issue becomes whether plaintiff's negligence action, alleging failure to instruct, caution and warn is based on misfeasance or nonfeasance."[197] (The misfeasance-nonfeasance distinction, it should be clear, is important to the rule of *Hart*[198] but plays no role at all in applying the economic loss doctrine.) Once the panel reached this point in its analysis, the result in *Sea Ray* was easy: "plaintiff's claim based on failure to warn, caution, and instruct, is a claim of nonfeasance *for which there is no duty alleged that is separate from a claim of breach of contract.*"[199] So, the *Sea Ray* decision was really an application of the rule of *Hart v. Ludwig* rather than the economic loss doctrine—regardless of the court's own characterization of its reasoning—and the decision should remind the rest of us of the need to be careful in distinguishing the two labels.

The most important reason for distinguishing the economic loss doctrine from the rule of *Hart* is that conflating the two ideas would overlook an important consequence of the economic loss doctrine. As the *Neibarger* decision made clear, the economic loss doctrine bars tort recovery in cases to which the doctrine applies, even when the tort claim could be premised on a duty independent of the parties' contract.[200] The rule of *Hart* does not reach so far, for it allows the tort claim if there is an independent duty.[201] *Neibarger* forecloses tort recoveries without regard to the details of the particular contract in question, so long as the predominant factor is goods. To be sure, the Code "represents a carefully considered approach to governing the economic relations between

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review of the pleadings and depositions reveals that the damages sought by the plaintiffs are commercial losses which can be remedied only under . . . the U.C.C.").

196. *Id.* at 616 (quoting Miller v. United States Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990).

197. *Id.* at 789.

198. *See Hart*, 79 N.W.2d at 896-99; *Rinaldo's Construction*, 559 N.W.2d at 656-58.

199. *Sea Ray*, 649 N.W.2d at 790 (emphasis added).

200. *Neibarger*, 486 N.W.2d at 620.

201. *Hart*, 79 N.W.2d at 897.

suppliers and consumers of goods."[202] But on this point *Neibarger* goes much further: it is as if the *Neibarger* majority was holding that *as a matter of law* an agreement for the sale of goods is necessarily so complete and comprehensive that there could not possibly be any independent tort obligations; all of the parties' obligations, of whatever kind, were necessarily included in their contract.[203] Unfortunately, as will be seen later, there are many aspects to a commercial relationship for the purchase and delivery of goods that can go far beyond the Code's "carefully considered approach."[204]

This distinction has been obscured by the line of cases that began with the decision in *Huron Tool*,[205] which is now commonly cited for the proposition that "fraud in the inducement" is "an exception" to the economic loss doctrine.[206] It can be seen that *Huron Tool* is another instance of mistaken terminology. Understanding fraud in the inducement and its appropriate treatment does not involve the economic loss doctrine at all; instead, the status of such fraud claims is another product of *Hart v. Ludwig*.

In *Huron Tool*, the defendants sought summary judgment on the comprehensive grounds that "the economic loss doctrine bars *any* action in tort, including fraud, where plaintiff suffers only economic damages and has a cause of action in contract under the U.C.C."[207] The Appellate Panel rejected the defendant's sweeping statement of law to conclude that the plaintiff could pursue the fraud claim notwithstanding the economic loss doctrine—on the grounds that fraud in the inducement stands as a kind of "exception" to the economic loss doctrine—although it also concluded that, on the facts of the case, the plaintiff "had failed to plead such fraud and, therefore, is restricted to its contractual remedies under the U.C.C."[208]

This analysis has engendered two confusions. First, the *Huron Tool* opinion grossly overstates the holding of *Neibarger*. The Michigan Supreme Court did not hold that economic loss doctrine precludes all tort *claims*; rather, it held that the doctrine precludes tort *remedies*.[209] The

202. *Neibarger*, 486 N.W.2d at 618.

203. *Id.* at 616-19.

204. *Id.* at 618.

205. *Huron Tool*, 532 N.W.2d at 546. *See also* Dinsmore Instrument Co. v. Bombardier Inc., 199 F.3d 318, 320-21 (6th Cir. 1999) (holding that the exception does not apply if the claim arises out of the existence of the contract).

206. *Huron Tool*, 532 N.W.2d 541 at 543 ("We conclude that fraud in the inducement is an exception to the [economic loss] doctrine.").

207. 532 N.W.2d at 543 (emphasis added).

208. *Id.*

209. *Neibarger*, 486 N.W.2d at 618.

majority's own statement of its decisions confirms that the latter description is more accurate: "we hold that where a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, *the exclusive remedy is provided by the UCC.*"[210] As will be discussed, Article 2 specifically provides for recovery for fraud.[211]

The second confusion of *Huron Tool* is the label it used for the legal issue at hand. The opinion characterized fraud in the inducement as the situation where "parties to a contract appear to negotiate freely . . . but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior."[212] Based on this characterization, the opinion concluded:

> The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction . . . between fraud extraneous to the contract and fraud interwoven with the breach of contract. . . . With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.[213]

Relying on this distinction, the panel barred plaintiff's particular claim of fraud because the alleged fraudulent representations concerned only the quality and characteristics of the subject matter of the sale.[214]

But, just as was true of *Sea Ray*, this conclusion has nothing to do with the economic loss doctrine and everything to do with the rule of *Hart v. Ludwig*. The basic distinction drawn by the *Huron Tool* opinion—between "fraud extraneous to the contract and fraud interwoven with the breach of contract"[215]—is just an application of the distinction between actions to enforce the contract, on the one hand, and actions to enforce some tort duty which exists independent from the contract, on the other. And, as if to underscore the point, the *Huron Tool* decision went on to say, "the misrepresentations relate to the breaching

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210. *Id.* (emphasis added).

211. *See* MICH. COMP. LAWS ANN. § 440.2721 (West 2001).

212. *Huron Tool*, 532 N.W.2d at 545.

213. *Id.*

214. *Id.* at 544-46. *See also* Rembrandt Constr., Inc v. Butler Manr. Co., No. 270577, 2006 WL 3375249, at *3 (Mich. Ct. App. Nov. 21, 2006) (upholding trial court's dismissal of fraud claims because the alleged representations "related to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort").

215. *Huron Tool*, 532 N.W.2d at 545.

party's performance of the contract and do not give rise to an independent cause of action in tort."[216] Then, on that basis, it dismissed the claim.[217]

Huron Tool's alleged "exception" now seems to be deeply entrenched in the lexicon of Michigan law, but it should be recognized as fundamentally mistaken because it confused the rule of *Hart* with the economic loss doctrine. This point can be confirmed by considering the possible role of fraud claims and the proper handling of such claims under the respective rules. Allegations of fraud can be most problematic when the parties have negotiated and signed a contract, and a number of the standard points to be made about the limitations on fraud claims make sense only when they are viewed as defending the tort-contract boundary.[218] To choose one salient example, it is commonly asserted that fraud lies only for deceptive assertions of fact, but not for unfulfilled promises.[219] Taken at face value, this assertion is demonstrably false, and is most prominently belied by the species of fraud that goes by names like "promissory fraud" or "bad faith promising."[220] This kind of fraud lies when one party has made a promise without intending to keep it, and so makes the "false" promisor liable.[221] Promissory fraud requires a special proof—facts true at or around the time when the allegedly false promise was made that can show that the promisor lacked the requisite intent.[222] As a result, the dividing line between tortious fraud and the kind of claim for breach of a promise that must be pursued in contract is maintained by recognizing that the mere failure to perform a promise is not enough to show fraud.[223] *Hart v. Ludwig* teaches that the mere failure to perform must be alleged as part of an action for breach of contract instead, because it does not establish the breach of a duty independent of the contract.[224]

This involves some theorizing, however, and the one indisputable fact about fraud is that Article 2 specifically recognizes it. More specifically, section 2-721 states:

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216. *Id.* at 545.

217. *Id.* at 547.

218. *See Huron Tool*, 532 N.W.2d at 545.

219. *See* Hi-Way Motor Co. v. Intern'l Harvester Co., 247 N.W.2d 813, 816 (Mich. 1976).

220. *Id.* at 816-17. The phenomenon of bad faith promising is the subject of an extensive recent investigation. *See* IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT (2005).

221. AYRES & KLASS, *supra* note 222, at 4.

222. *Id.*

223. *See Hart*, 79 N.W.2d at 897-98.

224. *Id.*

> Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.[225]

The point is this: *if* applying the economic loss doctrine means that the plaintiff's "exclusive remedy is provided by the U.C.C."[226] and *if* the U.C.C. explicitly allows for remedies for material misrepresentation or fraud, then it is a mistake to dismiss claims for fraud on the grounds of the economic loss doctrine. Unless the judiciary has the power to amend the U.C.C., section 2-721 is still part of the Sales Article, and absent some other grounds for dismissing the fraud claim, the deceived party should be entitled to pursue the remedies provided by the U.C.C., including those explicitly provided for fraud.

The distinction between *Hart* and the economic loss doctrine is thus important, even if it is not often observed, because the actual holding of *Neibarger* is consistent with section 2-721, where the more aggressive statement of the *Huron Tool* panel would construe the *Neibarger* court to have overruled that section of the U.C.C.[227] Such a construction is also inconsistent with the *Neibarger* majority's rationale. Since the majority viewed Article 2 as representing "a carefully considered approach to governing the economic relations between suppliers and consumers of goods,"[228] it should follow that courts are not free to pick and choose which features of the Code to follow, and which to ignore.

There is one last observation to be made about the difference between *Hart* and the economic loss doctrine. The rule of *Hart* requires an analysis of the actual provisions of the contract at issue before a court can properly dismiss the tort claims.[229] For, one can determine that the alleged tort duty is independent from the parties' contract only by examining that contract's provisions: a duty of, say, disclosure might be subsumed by the representations and warranties found in one contract but might be independent of another agreement's terms. The increasing use of merger and integration clauses to assert that a given instrument is the complete and final agreement of the parties will, in Michigan, make it harder for a party to argue that the contract extends beyond its face. As a consequence, applicable tort duties should be easier to establish as

225. MICH. COMP. LAWS ANN. § 440.2721 (West 2001).
226. *Neibarger*, 486 N.W.2d at 618.
227. *Huron Tool*, 532 N.W.2d at 545-46.
228. *Neibarger*, 486 N.W.2d at 618.
229. *See Hart*, 79 N.W.2d at 898-99.

independent from the contract. That is, if the writing must be deemed complete (because its merger and integration clause says so),[230] and the complete agreement does not include any obligations of disclosure, then properly alleged duties to disclose could well be independent of that contract. But, if the writing isn't "complete," then there would be more room to argue that the agreement goes beyond the writing; in such case, there would also be more room to argue that the contract included a duty to disclose even if the writing didn't and hence more room to argue that any allegation of a failure to disclose could be asserted only as part of a breach of contract.

The core problem with this approach to sales contracts is that it runs counter to some of the fundamental assumptions of Article 2. As I discussed in the preceding section, the Code allows for an easy, even cavalier, approach to contract-making, and this means that contracts for sale can be made that fall way short of the assumed completeness.[231]

To summarize, the stated reasoning of both *Sea-Ray* and *Huron Tool* was misguided in so far as those cases conflated the economic loss doctrine with the principles that underlie *Hart v. Ludwig*. What grounds the *Neibarger* majority's decision, I argue, is the claim that those cases which are within the proper scope of Article 2 of the U.C.C. (and which do not involve injury to a person) should be analyzed and resolved according to the provisions of that law alone, and not any other. But that is because the majority deemed the law of Article 2 to represent "a carefully considered approach to governing the economic relations between suppliers and consumers of goods."[232] On that rationale, cases that are within the economic loss doctrine can be appropriately resolved according to that law. Conversely, however, no comparable argument can be made for cases that are not properly within that doctrine, and the distinction between the doctrine and *Hart v. Ludwig* needs to be respected.

C. The Doctrine and the "Commercial Purchaser"

The decision to adopt the economic loss doctrine effected a major change in Michigan product liability law and accordingly should not have been undertaken lightly: any judicial decision so significant requires an equally weighty justification. The argument in this Article is that the justification for adopting the doctrine is to be found in the

230. *See* UAW-GM Human Resource Ctr. V. KSL Recreation Corp., 579 N.W.2d 411, 418 (Mich. Ct. App. 1998).

231. *See* MICH. COMP. LAWS ANN. § 440.2204 (West 2001).

232. *Neibarger*, 486 N.W.2d at 618.

rationale offered by the *Neibarger* majority: eliminating tort remedies for commercial losses caused by defective goods is justified, the opinion teaches, because the relationship between commercial purchasers and their suppliers can be appropriately regulated by the resources of Article 2 of the U.C.C. That is, tort remedies are foreclosed because other remedies are available through Article 2's "carefully considered approach" to the relationships between suppliers and commercial purchasers and because the law will be better, all things considered, if such cases are decided by using the law of Article 2 rather than tort law.[233] It follows that the majority's justification is sound if, but only if, the resources of Article 2 are equal to the task of regulating that set of supplier-purchaser relationships.

But such relationships are not all the same. To the contrary, they can vary along a variety of dimensions and as a result can present a slew of different legal challenges. To fulfill the rationale advanced by the majority in *Neibarger*—substituting remedies under Article 2 for other remedies that would have been available in tort—will require subtlety in the use of Article 2. Some important dimensions of the purchaser-supplier relationship do not readily fit the concepts and methods of Article 2; as a result, that Article's resources will need to be adapted to supply the remedies needed to substitute adequately for the tort remedies that were foreclosed.

But how should Article 2's resources be adapted to handle the various dimensions of supplier-purchaser relationships? I argue here that the majority's opinion gives several guidelines to follow, and that following that guidance can give structure to the development of Michigan product liability law in applying the economic loss doctrine.

One dimension of the economic loss doctrine, as articulated by the *Neibarger* majority, can illustrate this thesis. The doctrine, the Court states:

> [h]inges on a distinction between transactions involving the sale of goods *for commercial purposes* where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.[234]

233. *Id.* at 618-19.

234. *Neibarger*, 486 N.W.2d at 615.

And, quoting Judge Posner, the majority states that "[i]t would be better to call it a *commercial loss*," rather than an "economic" loss.[235] And, then, in stating their own decision, "we hold that where a plaintiff seeks to recover for economic loss caused by a defective product purchased *for commercial purposes*, the exclusive remedy is provided by the UCC."[236]

While other courts have also underscored the commercial purpose of the purchase in question, *Neibarger* goes further in relying on the commercial aspect of the transaction. As the majority notes, other courts that had adopted the economic loss doctrine drew a distinction between injury to the goods that were purchased in the subject transaction, on the one hand, and injury to "other goods," on the other, and accordingly limited the doctrine's application to the purchased goods.[237] There was support, the majority acknowledged, "for the view that the U.C.C. does not bar a tort claim where the plaintiffs are seeking to recover for property other than the product itself."[238] Indeed, the *Neibarger* plaintiffs pressed the point, arguing that their losses went beyond the defective milking machines to inflict injury on their milking herds. But the majority rejected the argument, on the grounds that since the milking machines were purchased for commercial purposes, the damages to plaintiffs' dairy herds could be adequately compensated as a species of consequential damages as allowed for injured buyers by Article 2:

> [T]he U.C.C. provides remedies sufficient to compensate the buyer of a defective product for direct, incidental and consequential losses, including property damages. . . . Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damages could have been the subject of negotiations between the parties.[239]

So, the majority has emphasized, and re-emphasized, that the economic loss doctrine applies only where the allegedly defective goods were purchased for commercial purposes.[240] But nothing about Article 2

235. *Id.* at 616 (quoting Miller v.US Steel Corp, 902 F.2d 573, 574 (7th Cir. 1990) (emphasis added)).

236. *Id.* at 618 (emphasis added).

237. *Neibarger*, 486 N.W.2d at 619-20.

238. *Id.* at 619.

239. *Id.* at 620.

240. *Id.*

addresses the distinction between commercial purchases and consumer purchases.[241] So, drawing this distinction requires the courts to go beyond the Code.

The majority's opinion in *Niebarger* grounds the commercial-consumer distinction by emphasizing the assumption that the commercial purchaser will have the opportunity to negotiate regarding warranties and remedies for their breach:

> Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, *the occurrence of such damages could have been the subject of negotiations between the parties.*[242]

This feature of the majority's rationale has played a significant role in other opinions applying the economic loss doctrine. Thus, for example, in *Quest Diagnostics, Inc. v. MCI Worldcom, Inc.*,[243] the Court of Appeals wrote that:

> On the basis of *Neibarger* and its progeny, we conclude that parties to a transaction for goods are precluded recovery in tort for economic loss caused by inferior products where: (1) the parties or others closely related to them had the opportunity to negotiate the terms of the sale of the good or product causing the injury, and (2) their economic expectations can be satisfied by contractual remedies.[244]

On that basis, the *Quest* panel concluded that the doctrine did not apply to the suit for damages alleged to have arisen from defendant's sub contractor's rupturing the water main.[245]

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241. Article 2A, on leases of goods, draws a distinction between 'consumer leases' and others. *See* MICH. COMP. LAWS ANN. § 440.2803(1)(e) (West 2001) ("'consumer lease' means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed $25,000."). Neither the *Neibarger* majority, nor any subsequent Michigan appellate decision has referred to this definition in addressing the commercial-consumer distinction for the applicability of the doctrine.

242. *Neibarger*, 486 N.W.2d at 620 (emphasis added).

243. 656 N.W.2d at 858.

244. *Id.* at 836 (citing *Neibarger*, 486 N.W.2d at 612).

245. *Id.*

> In the present case, there was not a contract, commercial transaction, or any other kind of relationship between the parties. And, without such a contract or transaction, plaintiffs could not have bargained for any terms of the service or anticipated any risks . . . Thus, this case does not involve a situation where the parties' economic expectations have been bargained for and established by agreement.[246]

In consequence, "[u]tilizing the broadest interpretation of Michigan's economic loss doctrine, plaintiffs are not limited to remedies in contract or the U.C.C., but have a proper remedy in tort."[247]

V. RESOLVING QUESTIONS ABOUT THE ECONOMIC LOSS DOCTRINE AND ITS APPLICATION

A. Understanding Michigan's Economic Loss Doctrine: Some Guidelines

I have contended thus far that lawyers and courts should regard the *Neibarger* as setting the boundaries for Michigan's economic loss doctrine. This resolves into four important propositions.

> 1. The doctrine only applies when the predominant factor of the transaction is the sale (or lease) of goods; in consequence, contracts predominantly for services are not within its scope.[248]
>
> 2. The doctrine precludes tort remedies because such issues must be handled according to the law of Article 2 (or 2A) of the U.C.C. In consequence, it is mistake to confuse the economic loss doctrine with the related but distinct ideas found in *Hart v. Ludwig* and its legacy: *Hart* applies to all contracts, and not just those relating to goods, and *Hart* bars tort claims if, but only if, the tort claims could not stand independent of the contract at issue.[249]
>
> 3. The doctrine precludes tort remedies but not tort claims. In particular, claims for fraud should be unaffected by the doctrine because Article 2 specifically provides remedies for such

246. *Id.*
247. *Id.*
248. *See Neibarger*, 486 N.W. 2d at 621.
249. *See Hart*, 79 N.W.2d at 898.

claims.[250] Fraud claims might however otherwise be barred by *Hart v. Ludwig* when the agreement itself provides remedies for non-disclosure and misrepresentation.[251]

4. The doctrine applies only to claims for economic or commercial loss caused by defective products.[252] In particular, it does not apply to claims for losses suffered by consumers, except perhaps in the limited set of situations where those consumers had an adequate opportunity to negotiate the terms of the sale and their economic expectations could be satisfied by contractual remedies.[253]

My argument on each of these points has been simple: where courts have diverged from *Neibarger's* central rationale, they have erred. Many of these mistakes have, over time, been corrected and it is to be hoped that, with the passage of more time, the rest of the errors will be corrected as well.

In what remains, I will follow the same line of argument. Where application of the economic loss doctrine requires the courts to go beyond the language of Article 2 to decide whether, and how, to use that Article's resources, a sound guide for how to extend the Sales Article can be found in the rationale of the *Neibarger* majority and its emphasis that commercial parties and their relationships for sale of goods should be expected to be regulated according to the law of Article 2. To develop this argument, I examine at length two situations where the language of the Sales Article does not directly apply, and courts must be prepared to adapt the Article's rules and insights to apply it to unanticipated situations.

B. Services Mixed with Goods: Questions about Hybrid Contracts

In *Bailey Farms, Inc. v. NOR-AM Chemicals, Co.*,[254] a farmer sued a chemical manufacturer for the loss of his watermelon crop.[255] According to his complaint, he relied on advice given by the manufacturer's representative about how to apply a pesticide, but the representative's advice was flawed and caused his crop to fail.[256] Similarly, in *Michigan*

250. *See* MICH. COMP. LAWS ANN. § 440.2721 (West 2001).
251. *Id.*
252. *See Neibarger*, 486 N.W. 2d at 618.
253. *See* accompanying text, *supra* note 249.
254. 27 F.3d 188, 190 (6th Cir 1994).
255. *Id.*
256. *Id.*

Dessert Co. v. A. E. Staley, Inc.,[257] a producer of commercial food products purchased a specialty starch from the defendant, a manufacturer of such things.[258] Claiming to have relied on advice from the manufacturer's customer service department, the plaintiff prepared, packaged and stored a strawberry pie glaze using the defendant's starch.[259] But, the pie glaze didn't hold up after it was packaged and stored, and the plaintiff had to remake, and re-ship, the glaze to meet its customer's needs.[260]

The plaintiffs in these cases sought to avoid application of the economic loss doctrine by arguing that the transaction was really about services rather than goods. Each was unsuccessful: the trial court held each time that predominant factor of the parties' transaction was the sale of goods and that the loss was commercial, and accordingly that the plaintiffs could claim only their proper remedies under Article 2.[261]

But, to a very great extent, the respective plaintiffs were challenging the advice that was given them by the representatives of the manufacturers, and not the goods themselves. Unfortunately, there is little, or nothing, in the Code to govern a dispute about defective service. In some jurisdictions, the plaintiffs would have been spared this difficulty, for some states have adopted the *gravamen* test for differentiating between cases that are governed by the Code and those that aren't. According to that test, the relevant law to apply to a dispute is determined by the nature of the legal theories advanced by the plaintiff. If the gravamen of the complaint is that the plaintiff was harmed by defective goods, then Article 2 would apply. Alternatively, if the gravamen is instead that the harm resulted from deficient services, then the complaint would be governed by common law instead.

Michigan however is not one of those jurisdictions; as previously noted, the *Neibarger* decision embraced the predominant factor test under which Article 2 (and only that Article) applies to all transactions in which the sale of goods is the predominant factor of the transaction.[262] Moreover, once goods are deemed to be the predominant factor of the contractual relationship, then Article 2 governs every aspect of the controversy.[263] Accordingly, once the courts in *Bailey Farms* and *Michigan Dessert* determined that the predominant factors in those cases

257. No. 00-1436, 2001 WL 1356231 (6th Cir. Oct. 24, 2001).
258. *Id.*
259. *Id.*
260. *Id.*
261. The plaintiffs' failures in these cases replicate the failed arguments advanced by plaintiffs in *Neibarger*. *See Neibarger*, 486 N.W.2d at 620-21.
262. *Neibarger*, 486 N.W.2d at 618.
263. *Id.*

were the sale of pesticide and starch respectively, then every aspect of the two controversies was governed by the Sales Article, even when the plaintiff's main contention was that it was ill-served by the manufacturer's advice.[264]

However, if every aspect of such controversies is to be resolved according to the Code, what resolution can be gleaned from the statute? Almost nothing in the Sales Article addresses the issues raised by defective services. The Code's warranty provisions, previously discussed, make the seller liable for defects in the goods. So, for example, "An affirmation of fact or promise . . . created an express warranty that *the goods* shall conform to the affirmation or promise."[265] Similarly, a "warranty that *the goods shall be merchantable* is implied . . . if the seller is a merchant with respect to goods of that kind."[266] Additionally, where "the seller has reason to know any particular purpose for which the goods are required . . . there is . . . an implied warranty that *the goods shall be fit* for such purpose."[267]

This focus on the attributes or deficiencies of the goods is confirmed by other facets of Article 2 as well. The seller's fundamental obligation is to tender and deliver conforming goods,[268] and such a tender is the condition precedent to the buyer's duties to accept and pay for the goods.[269] The buyer may reject the goods if they, or the manner of their tender, is somehow non-conforming.[270] And, the buyer may recover damages for non-conforming goods[271] or for deficient or incomplete delivery of the goods that are supposed to be provided.[272] Conversely, if the goods are conforming and the buyer wrongfully rejects them, then the seller may resell them (and collect the difference between the contract price and the resale price)[273] or sue for damages.[274]

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264. It appears that an exception of sorts to this point was acknowledged by a majority of the Michigan Supreme Court in Williams v. JAMA, Inc., 602 N.W.2d 364 (Mich. 1999). There, the majority seems to have accepted the idea that the plaintiff could sue in tort for economic losses allegedly caused by negligent servicing of milking equipment, on the grounds that the servicing was the subject of an oral side agreement, and hence separate from the sale of the goods. *See id.* at 364-69 (Markman, J., dissenting).

265. MICH. COMP. LAWS ANN. § 440.2313(1)(a) (West 2001) (emphasis added).

266. MICH. COMP. LAWS ANN. § 440.2314 (West 2001) (emphasis added).

267. MICH. COMP. LAWS ANN. § 440.2315 (West 2001) (emphasis added).

268. MICH. COMP. LAWS ANN. § 440.2601 (West 2001).

269. MICH. COMP. LAWS ANN. § 440.2507 (West 2001).

270. MICH. COMP. LAWS ANN. § 440.2601 (West 2001).

271. MICH. COMP. LAWS ANN. § 440.2714(2) (West 2001).

272. MICH. COMP. LAWS ANN. § 440.2713 (1) (West 2001).

273. MICH. COMP. LAWS ANN. § 440.2706 (West 2001).

274. *See* MICH. COMP. LAWS ANN. § 440.2708 (West 2001).

None of this would remotely help analyze or resolve the problems in *Bailey Farms* and *Michigan Dessert*. Neither plaintiff presented facts to establish that there were deficiencies in the *goods* which were sold.[275] The fertilizer and the food starch, respectively, were well made and performed as they were made to perform.[276] In each case, the problem was the advice which was given by the seller, and followed by the buyer, about how to use the goods.

In short, Article 2 is replete with provisions addressing, and defining, the parties' obligations with respect to the goods at issue, but its fundamental focus is on the performance, or lack thereof, of the goods or their delivery. There is nothing that speaks directly to the issues of liability that can emerge with regard to services that might be offered in connection with the goods. As a result, any attempt to resolve a controversy about allegedly deficient services must go beyond the text of the provisions and, more generally, the resources of the Article and its provisions.

The problem goes deeper than just the Article's silence about the services component of those contracts. When the farmer bought the pesticide in *Bailey Farms*, the manufacturer's services were central to the transaction, and not tangential. As the Sixth Circuit noted, "advice and instruction were [in the plaintiff's mind] an expected aspect of the purchase . . . a basis of the commercial expectations of the parties."[277] For that matter, as the *Neibarger* majority said, "It is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture. If a purchaser were able to avoid the UCC by pleading negligent execution of one or more services required to produce the product, Article 2 could be easily and effectively negated."[278]

Conversely, however, if the purchase was made on the expectation of competent and reliable service, and such was not provided, then the contract would be effectively negated if the purchaser could find not remedy within the applicable law. In other words, where the plaintiff purchased the defendant's product on the expectation (and the expectation was encouraged by the defendant) that the defendant would provide reliable advice and instruction about how to use the defendant's products, it would be grievously unfair to deny the plaintiff a recovery just because the Code does not address the issue of defective service that

275. *See Bailey*, 27 F.3d at 188; *Michigan Dessert*, 2001 WL 1356231, at *1.
276. *Id.*
277. *See* 27 F.3d at 192.
278. *Neibarger*, 486 N.W.2d at 618.

goes along the goods. In *Lake & Peipkow Farms v.Purina Mills, Inc.*,[279] it was similarly alleged that the defendant wrongly mixed the custom feed that the defendant had promised to provide for the plaintiff.[280] "Incidental to the sale of the feed, Defendant had to assess the needs of Plaintiff's dairy cattle and design a custom blend of feed."[281] The defendants sought, and received, dismissal of the tort claims, but they were denied dismissal of the contract claims: "under the Uniform Commercial Code Plaintiff may recover for breach of contract for any failure of Defendant to perform according to its obligations under the contract."[282]

But now we have identified three propositions which, it seems, cannot be simultaneously satisfied:

> (i) An injured plaintiff should be allowed to present its claims for adjudication and, upon a proper showing, for recompense;
>
> (ii) the economic loss doctrine means that plaintiff's claims can be remedied only through a suit under the law of the UCC; and
>
> (iii) the Uniform Commercial Code's provisions do not match liability claims of this kind of claim.[283]

So, if the economic loss doctrine will compel the plaintiff who alleges defective service to seek remedy through the U.C.C., then the Code must somehow be employed, or developed, so as to provide a remedy for those services. What form could such remedy take?

The natural supposition under the Code is that what should be enforceable against the seller is some kind of warranty, but what kind? As previously noted, the text of the Code's provisions proves a stumbling block. Express warranties under Section 440.2313 can take a variety of forms, but the language of that section addressing those various forms repeats in each case the idea that the warranty created is one making the

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279. 955 F. Supp. 791, 792 (W.D. Mich. 1997).

280. *Id.*

281. *Id.* at 794.

282. *Id.* at 795.

283. It should be noted that the *Purina Mills* Court was not completely faithful in its statement of the law. Section 440.2714(1) allows for damages for any nonconformity of tender, and Section 440.2714(2) allows for damages for breach of warranty based on the difference "between the value of the goods accepted and the value they would have had if they had been as warranted." MICH. COMP. LAWS ANN. § 440.2714(2) (West 2001). Nothing about Section 440.2714 expressly provides for damages for "any breach" of the contract. *See Purina Mills*, 955 F.Supp. at 792.

seller liable "that *the goods* shall conform" to the affirmation or promise,[284] to the description,[285] or to the sample or model.[286] Nothing about the text of Section 440.2313 seems to address the idea that the services should conform to a manufacturer's express affirmations or promises about the services. However, on this point Article 2 provides a mechanism for addressing the manufacturer's promises and representations about its services. Section 440.1103 allows for the use of "supplementary" principles of law and equity, including the concepts relating to estoppel.[287] In a variety of cases, this provision for supplementary principles has been read to allow incorporating the doctrine of promissory estoppel, or detrimental reliance, into the law governing a sales transaction.[288] As usually formulated in Michigan and elsewhere, promissory estoppel encompasses the kind of commitments that a manufacturer might make regarding its services. More specifically, promissory estoppel makes enforceable a promise "which the promisor should reasonably expect to induce action or forebearance on the part of the promise or a third person and which does induce such action or forebearance."[289] If a manufacturer has made promises regarding its technical advice or support, which were relied on by the purchaser, the manufacturer can be held liable under a theory of detrimental reliance.

In analyzing a case like *Bailey Farms*, it is difficult enough to consider how to use the Code's provisions for express warranties. The problem grows more complex in thinking about the prospect of *implied* warranties regarding the associated services. In *Bailey Farms*, there was nothing in the text of the opinion to indicate just how the manufacturer did, or did not, present its support services, but it is easy to imagine a manufacturer presenting its capacity to advise and consult in ways that would ground something like an implied warranty of merchantability and/or an implied warranty of fitness regarding the services. So, for example, if the manufacturer is in the business of providing such technical support—by maintaining a group of field representatives or a telephone hotline to answer questions—then something like the merchantability idea could well apply: the manufacturer should be prepared to stand behind those services as fit for the ordinary purposes for such services. And, if the services are sought, and provided, under

284. MICH. COMP. LAWS ANN. § 440.2313(1)(a) (West 2001).
285. MICH. COMP. LAWS ANN. § 440.2313(1)(b) (West 2001).
286. MICH. COMP. LAWS ANN. § 440.2313(1)(c) (West 2001).
287. MICH. COMP. LAWS ANN. § 440.1103 (West 2001).
288. *See, e.g.*, FARNSWORTH, *supra* note 16, § 612 (discussing reliance on Article 2).
289. RESTATEMENT, *supra* note 74, § 90. This definition of promissory estoppel was adopted for Michigan law by the Supreme Court in *State Bank of Standish*, 500 N.W.2d 104 (Mich. 1993).

circumstances where the manufacturer knows that the purchaser has particular purposes and that the purchaser is relying on the manufacturer to provide services that are appropriate for those special purposes, then it seems appropriate for the manufacturer to be held accountable for something akin to Section 440.2315, only for the services provided rather than for the goods.

On this point, there is one Code provision that could ground the kind of implied warranties for services that seem to be at issue in cases like *Bailey Farms*. Section 440.2314(3) asserts cryptically that "other implied warranties may arise from course of dealing or usage of trade."[290] Neither the Comments nor the case law are much help in fleshing out this idea, but Comment 14 to Section 440.2314 asserts that a "typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of pedigreed dog or bull."[291] Since the "typical"example seems to involve services to be provided by the seller, and not just goods, it seems plausible that a manufacturer could be held liable if its services do not conform to the buyer's justifiable expectations based on either the common standards of the industry ("usage of trade")[292] or on the parties' previous contractual dealings ("course of dealing").[293]

This provision has been almost completely ignored in Michigan, and it is unclear whether courts would be prepared to expand its reach. And, beyond this particular subsection, the text of the Code's implied warranty provisions presents a hurdle. Section 440.2314 asserts that, under its provisions, the "goods shall be merchantable."[294] And, the fitness warranty under Section 440.2315 provides only that "the goods shall be fit for such purpose."[295] Of course, the common law has a long tradition of recognizing various implied warranties in appropriate circumstances, ranging from the implied warranty of habitability in dwellings to an implied warranty or workmanlike construction in building.[296] Generalizations are unreliable, but one common thread seems to be that such warranties are implied when the purveyor of services is operating within a reasonably well-recognized trade or industry, and can sensibly be held accountable to the general expectation that the services will meet ordinary expectations. In this respect, such common law warranties

290. MICH. COMP. LAWS ANN. § 440.2314(3) (West 2001).
291. MICH. COMP. LAWS ANN. § 440.2314 cmt. 14 (West 2001).
292. *See* MICH. COMP. LAWS ANN. § 440.1205(2) (West 2001).
293. MICH. COMP. LAWS ANN. § 440.1205(3) (West 2001).
294. MICH. COMP. LAWS ANN. § 440.2314(1) (West 2001).
295. MICH. COMP. LAWS ANN. § 440.2315 (West 2001).
296. *See, e.g.*, FARNSWORTH, *supra* note 16, § 9.15.

resemble the basic parameters of the implied warranty of merchantability. Further, common law methodology has famously included the idea of reasoning by analogy. Both of these devices could serve to describe and justify warranties relating to services even if the Code's provisions do not answer the call.

Finally, as I emphasized when reviewing the Code's important features, any discussion of implied warranties must address not only how the warranty can be created but also how it can be disclaimed. Section 440.2314(3)[297] by its terms allows that this special implied warranty can be "excluded or modified" pursuant to Section 440.2316.[298] That clause should indicate that, pursuant to Section 440.2316(3)(a), the manufacturer can make use of "expressions like 'as is', 'with all faults,' or other language that in common understanding calls the buyers attention to the exclusion of warranties and makes plain that there is no implied warranty."[299] Such language is awkward, at best, in discussing the manufacturer's services, but the Code's provisions with regards to usage of trade and course of dealing can give similar assistance to the seller who wants to limit its liability for its technical support. "The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade."[300] In other words, the same manufacturer that faces potential liability for its technical support services can also limit or avoid such liability by making it plain through its express communications that the services cannot be expected to answer all possible questions or to guarantee results in all potential circumstances.

With one exception, a similar monomania infects the Code's sections relating to damages: those provisions address only issues relating to the goods. Thus, the Code's general blueprint for remedies available to injured purchasers states that a buyer may "cover" and collect damages "as to all the goods affected,"[301] or "recover damages for non-delivery."[302] Indeed, the most common provision for measuring the loss caused by defective goods—section 2-714(2)—provides that "[t]he measure of damages for breach of warranty is the difference . . . between

297. MICH. COMP. LAWS ANN. § 440.2314(3) (West 2001).
298. *Id.*
299. MICH. COMP. LAWS ANN. § 440.2316(3)(a) (West 2001).
300. *Id.*
301. MICH. COMP. LAWS ANN. § 440.2711(1)(a) (West 2001).
302. MICH. COMP. LAWS ANN. § 440.2711(1)(b) (West 2001).

the value of the goods accepted and the value they would have had if they had been as warranted."[303]

In this connection, however, the exception is significant. Section 2-714(1) provides that, "[w]here the buyer has accepted goods and given notification [of the breach] he may recover damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."[304] The drafters seem to have anticipated the problem at hand, for the Official Comments observe, "[t]he 'non-conformity' referred to in subsection (1) includes not only breaches of warranties *but also any failure of the seller to perform according to his obligations under the contract.*"[305]

C. Upstream and Downstream: Problems about Privity

1. The Doctrine and the Limits of Privity

As I have noted, many facets of Article 2 and, in particular, its treatment of warranties seem to apply only to the contracting parties themselves, with some possible exceptions for third party beneficiaries. This has been a fundamental feature of Anglo-American contract law and has been particularly true of the Sales Article.

Beginning with *Sullivan Industries, Inc. v.Double Seal Glass Co., Inc,*[306] (decided before the Supreme Court's decision in *Neibarger*) courts applying Michigan law have extended the doctrine's reach to relationships that lack privity. In *Sullivan.* the manufacturer of glass doors and windows brought suit against both its supplier of insulated glass units and the supplier's supplier of a sealant that was used to assemble the glass units.[307] Alleging that defective sealant caused several thousand units to fail, the plaintiff sought recovery under "theories of negligence, breach of implied warranty of fitness pursuant to [2-315], breach of implied warranty of merchantability pursuant to [2-314], breach of implied warranty sounding in products liability, and breach of express warranty."[308] Trial resulted in a judgment for plaintiff against each defendant, but after trial, both defendants moved for, and received, involuntary dismissal of Sullivan's claims of negligence and breach of

303. MICH. COMP. LAWS ANN. § 440.2714(2) (West 2001).
304. MICH. COMP. LAWS ANN. § 440.2714(1) (West 2001).
305. MICH. COMP. LAWS ANN. § 440.2714 cmt. 2 (West 2001) (emphasis added).
306. 480 N.W.2d 623 (Mich. Ct. App.1992).
307. *Id.*
308. *Id.* at 338.

implied warranty.[309] The trial court granted the motion for the supplier, finding that the claims were barred by the economic loss doctrine. "The court also granted the motion with regard to Sullivan's contractual claim against [the supplier's supplier] based on the provisions of the Uniform Commercial Code, finding that the claim was barred by lack of privity."[310]

This holding, dismissing the negligence claim on grounds of the economic loss doctrine, was enshrined in the *Neibarger* decision. Two of the plaintiffs there had sued both the seller and the manufacturer of milking machines, alleging that the machines' failure had damaged their herds.[311] The appellate court had dismissed the claims against both the seller and the manufacturer, and the Supreme Court affirmed.[312] The record discloses no grounds on which to assume privity between plaintiffs and the manufacturer, and the majority did not address the issue at all in its opinion.

The difficulty should be clear. If there is no privity between the buyer and the manufacturer, then the Code's provisions do not seem to fit the situation. But, if the Code does not apply, how can the economic loss doctrine apply? It should also be clear that nothing about Article 2, or the U.C.C. more generally, dictates this result. As was discussed earlier, the Sales Article assumes privity, and (as will be discussed in more detail below) the text of its sections is drafted to address relationships between buyers and sellers but not buyers and remote suppliers.

Conversely, if the economic loss doctrine applies, does that mean that the Code should, in some fashion, be applicable? As the *Sullivan* opinion summarized:

> We conclude that the [trial] court clearly erred in finding that Sullivan's tort-based claims against [the supplier's supplier] were not barred by the economic-loss doctrine and, hence in refusing to grant [the] motion for involuntary dismissal with regard to those tort-based claims. *We also conclude, as a logical corollary, that the court clearly erred in granting [the supplier's supplier's] motion for involuntary dismissal with regard to*

309. *Id.*
310. *Id.*
311. *Neibarger*, 486 N.W.2d at 620
312. *Id.*

Sullivan's claim of breach of implied warranty' pursuant to 2-314.[313]

At first blush, the comment about the "logical corollary"of the economic loss doctrine seems vaguely metaphysical, and hence disreputable.[314] Nothing about Article 2 requires this "corollary." To the contrary, the Article's treatment of warranties seems consistently to depend on privity between the injured party and the defendant. The only place where a related issue might have been addressed—the Comments to Section 440.2318, creating an exception to the privity requirement—begs off deciding the issue, and opts instead for a position of neutrality.[315]

This is not some trivial detail. Consider, for example, any case involving a "chain"of distribution from manufacturer to the ultimate consumer, with one or more distribution intermediaries (distributors, wholesalers as retailers) between those two. In the usual scenario, the ultimate consumer would be in privity with the retailer but not the manufacturer; so, there would be a "sale"relationship with the retailer but not the "remote"manufacturer. Similarly, the manufacturer would be in privity with its distributor, but not with the ultimate user. As a result, there would be a sale transaction between the manufacturer and the intermediary, but not between the manufacturer and the user. Conversely, any disclaimers or limitations governing the sale between the manufacturer and an intermediary wouldn't necessarily extend to the consumer. As a result, we would expect that this "chain" would be analyzed legally as a series of discrete two-party transactions—manufacturer to distributor, for example, and then distributor to retailer, and finally retailer to customer. Put differently, the "chain" of distribution would be composed of legally distinct links, and in each such link the warranties enjoyed by the purchaser and the liability sustained by the seller are the product of that links particular transaction. The warranties created, or disclaimed by the manufacturer would be legally irrelevant, on this model, to the warranties enjoyed by the ultimate customer. (Separating the various links may be particularly important in Michigan for any chain of distribution that involves a distributorship agreement: because *Lorenz v. American Standard*[316] indicates that such agreements are not contracts for the sale of goods, some of the links of

313. *Id.* at 339 (emphasis added).

314. *Accord* O. W HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic, it has been experience.").

315. *See* MICH. COMP. LAWS ANN. § 440.2318 cmt 3 (West 2001).

316. *See Lorenz*, 358 N.W.2d at 852.

such a chain might be governed by Article 2 and some by common law instead).[317]

The discrepancy between the *Sullivan* court's "logical corollary" on the one hand and Article 2's assumption of legally distinct links on the other has produced a spirited disagreement among the federal courts that have addressed the problem. One line of cases has concluded that privity is required, at least for claims of implied warranty.[318] More recently, in *Harnden v. Ford Motor Co.*, the Eastern District of Michigan Court wrote:

> There is, however, no post-UCC Michigan Supreme Court decision that allows a consumer to do what Plaintiff seeks here—obtain purely economic damages from a remote manufacturer under a breach of implied warranty claim where there is no privity of contract. This Court, like the vast majority of other judges [in the cases cited from the Eastern and Western District of Michigan] predicts that the Michigan Supreme Court would limit Plaintiff to his remedies under a breach of express warranty claim where there is no privity of contract with a remote manufacturer and the consumer Plaintiff is seeking solely economic damages.[319]

The certitude of this passage is belied by a conflicting body of decisions[320] which have applied the economic loss doctrine to all of the parties in the chain of distribution, even though they were not parties to

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317. *Id.*

318. *See* discussion, *infra* note 322.

319. 408 F. Supp. 2d 315, 322 (E.D. Mich. 2005). Judge Edmunds cited a number of federal decisions to this effect. *See* Pidcock v. Ewing, 371 F. Supp. 2d 870 (E.D. Mich. 2005); Pitts v. Monaco Coach Corp, 330 F. Supp. 2d 918 (W.D. Mich. 2004); Parsley v. Monaco Coach Corp., 327 F. Supp. 2d 797 (W.D. Mich. 2004); Ducharme v. A & S RV Center, Inc., 321 F. Supp. 843 (E.D. Mich. 2004)); Treadway v. Damon Corp., No. 03-CV-73650-DT, 2004 WL 3372010, at *10 (E.D. Mich. 2004); Gernhardt v. Winnebago Indus., No. 03-73917, 2002 WL 320 59736, at *3-4 (W.D. Mich. 2002); Chiasson v. Winnebago Indus, No. 01-CV-74809, 2002 WL 328 28652, at *5-11 (E.D. Mich. 2002).

320. *See* Michels v. Monaco Coach Corp., 298 F. Supp. 2d 642, 650 (E.D. Mich. 2003); Leyva v. Coachman RV Co., No. CIV.04-4-171, 2005 WL 2246835, at *1-2 (E.D. Mich. 2005). A pair of recent unpublished decisions from the Eastern District have also concluded in favor of *Sullivan's* logical corollary, albeit in dicta. Noting that the plaintiffs were consumers, who bought their mobile homes for personal and not commercial use, the Courts in *Gernhardt*, 2003 WL 23976324, at *4, and *Chiasson*, 2002 WL 32828652, at *5, concluded that privity is required in Michigan for a consumer to enforce a claim of breach of an implied warranty of merchantability. But, the economic loss doctrine only applies to purchases for commercial purposes. *See Neibarger*, 486 N.W.2d at 618-19. And so these conclusions would not hold for cases within the scope of the doctrine. *Id.*

the same transaction. As a result, this alternative analysis appears to sanction warranty claims against remote manufacturers, even without privity.

In fact, neither the majority nor the dissent in *Neibarger* gave any attention to the fact that the plaintiffs were suing remote sellers.[321] Thereafter, the matter was largely unnoticed by Michigan courts[322] until the recent decision of the Court of Appeals in *Davis v. Forest River, Inc.*[323] which reaffirmed the authority of *Sullivan* and concluded that in

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321. The *Neibarger* majority quoted from the Court of Appeals' statement of facts: "Plaintiffs contracted with defendant Charles Brinker, to install a milking system. According to plaintiffs, the milking system was designed by defendants Universal Cooperatives, Inc. and Brinker, and was installed by Brinker to begin milking operations on September 1, 1979." *Id.* at 613. Later, the majority dismissed the significance of this fact: "On appeal in this Court, plaintiffs also attempt to avoid application of the UCC by arguing that there is no privity of contract between plaintiffs and defendants Universal. . . . We note that this issue was not raised [below] and thus is not properly before us. We also note in each case that the plaintiffs allege that the defendant retailer was an 'agent' of the manufacturer." *Id.* at 623.

322. In Citizens Insurance Co v. Osmose Wood Preserving, Inc., 585 N.W.2d 314 (Mich. Ct. App. 1998), a restaurant's roof collapsed and the insurer sued the manufacturer of the chemicals that were used to treat the wood in the roof, alleging both negligence and breach of warranty. *Id.* at 42. Defendant sought to dismiss the negligence claim, on the grounds of the economic loss doctrine and, following the pattern of *Neibarger*, to dismiss the breach of warranty claims as time-barred under the UCC's four-year statute of limitations. *Id.* Plaintiff argued that the doctrine was inapplicable because there was no contractual relationship between the restaurant and the manufacturer, but the majority of the appellate panel derided the argument as a mere factual distinction. *Id.* In previous decisions, the majority stated, the Court of Appeals had expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract. *Id.* We are bound to follow those decisions. . . . Accordingly, because [the restaurant] is a commercial business and the wood treated with defendant's chemicals was purchased for commercial purposes, and because the damage to the restaurant was purely economic, under *Neibarger*, the UCC provides the exclusive remedy. *Id.* at 45. But, if the economic loss doctrine applies to bar tort claims and if the U.C.C. provides the exclusive remedy, it seems hard to avoid the proposition that the purchaser can assert warranty claims against the remote manufacturer, even without privity. *See* 3 LAWRENCE LARRY ANDERSON, ON THE UNIFORM COMMERCIAL CODE: SECTIONS 2-313 TO 2-314, 348 (West Group 2002). "In the minority of states that require privity of contract either generally or in particular cases for actions under the Code, the nonprivity claimant is by definition barred from enforcing a Code remedy and must proceed under another theory of product liability. . . ." *Id.* This was *Sullivan*'s "logical corollary." The *Citizens* majority emphasized that it was bound by Michigan's court rules to follow prior cases, including *Sullivan*, which after all had expressly allowed for implied warranty claims against remote manufacturers. *Id.* None of the federal decisions that rejected warranty claims without privity examined this feature of Michigan case law; for that matter, none of them discussed either *Citizens* or *Sullivan*.

323. 748 N.W.2d 887, 894 (Mich. Ct. App. 2008).

Michigan, privity is "irrelevant to availability of a remedy for breach of warranty."[324]

This development raises a number of tricky issues. *Neibarger* did not consider the question of just how a purchaser might advance a warranty claim in the absence of privity. So, the *Harnden* opinion was correct in observing that this problem has not been addressed by the Michigan Supreme Court.[325] As a result, it is possible that the high court could ultimately hold that warranties cannot be extended without privity. But there is good reason to reject the reasoning that was favored by those federal decisions.

Suppose that the purchaser has otherwise tenable claims of breach of warranty to be raised against a remote manufacturer. In such a situation, it is true, the Michigan high court could decide to limit warranty liability to only the relationship between the purchaser and immediate seller, such that the purchaser would have no recourse beyond the terms of that sales contract. The effect would be draconian, leaving any such purchasers without a remedy against the remote seller, and in some cases without any remedy at all.[326]

One response, of course, would leave the plaintiff to assert warranty claims against the immediate seller, pursuant to Article 2's provision, but then depend on non-U.C.C. claims against the remote manufacturer.

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324. *Id.* at 90.

325. *Harnden*, 408 F. Supp. 2d at 322.

326. There is one example. In *Cameron v. American Dental Technologies, Inc.*, plaintiffs were a collection of dentists who bought or leased dental laser machines. According to their complaint, the defendants marketed a particular machine, knowing that it couldn't do what defendants claimed it could do. *Cameron*, No. 94-CV-70860-DT, 1995 WL 599871, at *1 (E.D. Mich. 1995). The complaint also described the defendants' agreement with a manufacturer of the machine, and sued the manufacturer. *Id.* Plaintiffs alleged that the seller of the machine was liable for breach of express and implied warranties, fraud and misrepresentation. *Id.* They also alleged that the manufacturer was liable for breach of an implied warranty of merchantability, and conspiracy to defraud. *Id.* The District Court relied on the economic loss doctrine to bar the plaintiffs' tort claims, against both defendants, even though, as plaintiffs noted, plaintiffs had no contract with the manufacturer. *Id.* The Court also barred the plaintiffs' claims against the manufacturer for breach of warranty, on the grounds that there was no privity between the manufacturer and the plaintiffs. *Id.* So, in the final analysis, plaintiffs could assert no claim of any kind against the manufacturer: the economic loss doctrine foreclosed any tort claim because there was a sale of goods—although not one involving the purchaser and the remote manufacturer—but the purchaser's warranty claims against the manufacturer were barred because there was no privity. *Id. See also* Mt. Holly Ski Area v. U.S. Elec. Motors, 666 F. Supp. 115, 120 (E.D. Mich. 1987). It should be noted that, while the *Cameron* court cited *Sullivan*, elsewhere in its opinion, the Court did not in any way discuss the feature of the *Sullivan* decision which allowed warranty liability without privity. *Id.*

After all, the fundamental rationale for the economic loss doctrine has been to eliminate tort liability when the parties have had the chance to negotiate about which party should bear what risks: "in a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers and the limitation of remedies."[327] White and Summers seem to concur: "Putting aside injury to third parties that arises out of conventional tortious behavior and ignoring personal injury to the buyer, we see no reason why all other liability arising out of defective goods ought not to be under Article 2. *By hypothesis the parties to these suits negotiate with one another.*"[328] Conversely, however, if there's no chance for the parties to negotiate, then what sense does it make to control the terms of their relationship by limiting them to Article 2 rights and remedies?[329]

But one significant fact about parties not in privity is that they will often lack the chance to negotiate in that way. More precisely, the opportunity for negotiation will depend on the details of a purchaser's relationship with the remote manufacturer, and that can take different forms because the chain of distribution can be based on different business models. On one model, for example, the manufacturer is economically and legally distanced from the "downstream" participants. The manufacturer sells its product to an intermediary of some kind, who in turns sells the goods to a retailer, but these various sales are isolated and are not based on any enduring relationship between the parties. In consequence, the manufacturer would have nothing to say about the way the distributor or retailer portrays the goods, and would have no particular reason to care about the extent of the distributor's liability to the retailer or the retailer's liability to the customer. But there are other business models where the manufacturer is more involved in events downstream. For example, the manufacturer may have selected or even groomed its distributor, and as a result may care about the kind of liabilities that the distributor or retailer would face if the goods are alleged to be defective. In some instances under this model, the manufacturer might be prepared to step in and defend the distributor, even to the point of absorbing as its own cost any liability adjudged

327. *Neibarger*, 486 N.W.2d at 618.

328. WHITE & SUMMERS 1980, *supra* note 30, at 386-87 (quoted in *Quest Diagnostic*, 656 N.W.2d at 861) (emphasis added).

329. It is also conceivable, as has been acknowledged in other states, that the plaintiff could press its claims against the immediate seller and then that seller could seek recompense from a manufacturer or distributor on theories of indemnity or contribution. *See* ANDERSON, *supra* note 322. However, because those are tort theories, it would seem that Michigan's version of the doctrine would bar their application to the sales transaction between manufacturer and dealer (with the possible exception of a distributorship).

against the distributor for the sale of defective products. In other instances, the customer may deal directly with the manufacturer for the selection of suitable goods, or for advice about the goods' use, and it is mostly a legal nicety that the distributor or retailer is denominated as the seller. Looking at the various ways in which the manufacturer might be involved in the chain of distribution underscores that in only some of these is there actual negotiation between the manufacturer and the purchaser; in other situations there is no real opportunity for such negotiations to proceed.

From these observations, it would seem that the application of the economic loss doctrine to relationships that go beyond the bounds of privity should be decided on a case-by-case basis. Recall the *Neibarger* majority's central rationale for holding that tort recovery should be displaced by the remedies available under the Code:

> *the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies.* Where a product proves to be faulty after the parties have contracted the sale and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products.[330]

However, nothing in the case law developments shows any tendency along these lines. The courts that have addressed the matter have preferred to decide this question as a matter of law: either liability can be asserted upstream without privity (without regard for the nature of the relationship between the buyer and the manufacturer) or it cannot (again, without regard for the details of the relationship).

These complexities underscore the *Sullivan* court's claim of a "logical corollary." Nothing about the UC.C. requires that the economic loss doctrine be extended beyond the bounds of privity; instead, what drives that extension seems to be an impetus to limit the scope of tort law, even though tort has traditionally been the source of legal rules to govern transactions where privity is lacking. But, the rationale presented in *Neibarger* for adopting the economic loss doctrine was not to immunize seller's against the losses caused by defective products. To the contrary, *Neibarger*'s rationale was to foreclose tort remedies in favor of the remedies provided by Article 2. It would border on a sham to hold that tort remedies are supplanted by remedies under Article 2 and then to

330. *Id.* at 616 (emphasis added).

hold, in the next breath, that there are no Article 2 remedies to be had. So, *Sullivan*'s logical corollary is this: *if* tort is supplanted by Article 2 where there is no privity, and *if* the injured party is limited to "the remedies available in the Code," then Article 2 must be employed to do the work that previously was done by tort and provide remedies for injuries caused by remote sellers without regard to privity.[331] As a consequence, the Sales article must provide the norms for regulating liability in non-privity situations, whether or not the Article was designed for such transactions.

2. Applying the Economic Loss Doctrine without Privity

All of these complexities underscore what should be a question of some significance. If privity is not decisive to decide how to apply the economic loss doctrine in Michigan, how can that be reconciled with the other features of Article 2 that seem to make privity such a foundation? Article 2 was not designed to handle such claims, and courts must now develop the law in new and unanticipated ways.[332] But, if warranty claims are allowed against remote manufacturers, how should such a claim be advanced and applied?

a. Express Warranties

The text of the Code's provisions regarding such warranties poses some significant hurdles to any extension of warranty claims beyond privity. Section 2-313 acknowledges "express warranties *by the seller*" that are based on any "affirmation of fact or promise."[333] It also acknowledges warranties that are based on any "description of the goods"[334] and any "sample or model"[335] which become "part of the basis of the bargain."[336] By their terms, these provisions do not extend to relationships without privity. First, section 2-313(1)(a)—acknowledging warranties by affirmation or promise—acknowledges only those commitments that are made "by the seller to the buyer."[337] Second, while

331. *Sullivan*, 480 N.W.2d at 623.

332. Another issue where courts have struggled more, with greater awareness that they were doing so, about the implications of a lack of privity is the problem of revocation of acceptance. *See, e.g.*, *David*, 748 N.W.2d at 887. A lurking issue, as yet not recognized, is the cognate problem of notice, especially under 2-607(3)(a). *Id.*

333. MICH. COMP. LAWS ANN. § 440.2313(1)(a) (West 2001) (emphasis added).

334. MICH. COMP. LAWS ANN. § 440.2313(1)(b) (West 2001).

335. MICH. COMP. LAWS ANN. § 440.2313(1)(c) (West 2001).

336. MICH. COMP. LAWS ANN. §§ 440.2313(1)(b)-(c) (West 2001).

337. MICH. COMP. LAWS ANN. § 440.2313(1)(a) (West 2001).

the provisions for express warranties based on descriptions, or samples and models, are not so limited, the requirement that the description, or the sample or model, become "part of the basis of the bargain"[338] is normally understood to limit the reach of these ideas to the immediate buyer-seller relationship. Comment 7 to section 2-313, for example, emphasizes that a description counts to ground a warranty only when it "is given by the seller."[339] Similarly, for samples and models, Comment 8 states that essential questions is "whether the seller has so acted with reference to the samples as to make him responsible that the whole shall have the virtues shown by it."[340]

At one point, it seemed clear that in Michigan a claim for breach of express warranty could not proceed if the parties were not in privity. Thus, for example, in *Auto Owners Ins. Co. v. Chrysler Corp.*,[341] the plaintiff's claim for the manufacturer's breach of an alleged express warranty was dismissed because there was no contractual relationship between the purchaser and the remote manufacturer.[342] A minority of the Michigan Supreme Court sought, at one point, to revisit the issue, but that was a minority and the point has never been revived.[343]

However, a variety of more recent decisions, especially in the context of purchase of vehicles (cars, trucks and RVs) from a dealer, have shown no hesitancy about allowing liability for express warranties made by remote manufacturers.[344] A striking example is provided by *Pack v. Damon Corp.*[345] In that case, plaintiff purchased a recreational vehicle from a Michigan seller.[346] The sales contract included an elaborate discussion of the parties—dealer, purchaser and manufacturer—but stipulated that "the Dealer and the Purchaser are the sole parties to this agreement."[347] The same contract provided that the dealer disclaimed "all warranties, express or implied" and asserted that "any warranty on any new . . . recreational vehicle is provided only by

338. *Id.*

339. MICH. COMP. LAWS ANN. § 440.2313 cmt. 7 (West 2001).

340. MICH. COMP. LAWS ANN. § 440.2313 cmt. 8 (West 2001).

341. 341 N.W.2d 223 (Mich. Ct. App. 1983).

342. *Id.* at 224-25.

343. *See Comp-U-Aid*, 547 N.W.2d at 640.

344. In the Symposium discussion of this point, Rivka Sochet related a decision she had won in which the court disallowed any claim of express warranty against a remote seller. In response, Prof. White expressed surprise at both Sochet's success and the fact that the manufacturer (which had made the express warranty) would want to deny liability for the warranty it had given.

345. 320 F. Supp. 2d 545 (E.D. Mich. 2004).

346. *Id.*

347. *Id.* at 549.

the Manufacturer thereof,"[348] and separately provided that the agreement's references to "the Manufacturer" were only included for "the purpose of explaining generally certain contractual relationships existing between the Dealer and the Manufacturer."[349] As the District Court noted, "[i]t is beyond dispute that [the Manufacturer] extended a 1-year or 12,000 mile express warranty to plaintiff," and the remote manufacturer did not move to dismiss the claims for breach of express warranty.[350] But, the Court dismissed the buyer's claims for breach of implied warranty on the grounds that there was no privity:

> [t]his court holds that an express warranty running directly from a manufacturer to a buyer does not create contractual privity, and that contractual privity is required in Michigan to support a claim of breach of implied warranty. Consequently, in the absence of contractual privity, plaintiff cannot prevail against [the manufacturer] pursuant to his claims of breach of implied warranties under state law.[351]

Both *Harnden* and *Pack* involved statements by manufacturers that were labeled "Warranties" on their face, so in those cases at least the courts were spared the difficulty of deciding whether the affirmations and promises at issue were properly deemed "express warranties." In these cases, the only issue was that the warrantor was not the seller. Moreover, in each case the manufacturers were prepared to stand behind their products as warranted, so the courts were also spared the difficulty of deciding whether a remote manufacturer could be held liable for consequences of a sale when the manufacturer was not a party. But basic contract law would describe a problem. If the manufacturer is not a party, then it is hard to identify consideration for the manufacturer's promises; as a result, it is hard to identify legal grounds for enforcing those promises against the manufacturer.

These problems have haunted states other than Michigan, and the case law reflects a variety of theories that have been used to address these difficulties.[352] What seems to be the most common approach to third party express warranties is to describe the immediate seller—a dealer, for example, or a distributor—as an agent of the remote

348. *Id.* at 550.
349. *Id.* at 549.
350. *Id.* at 558.
351. *Id.* at 561.
352. *See* ANDERSON, *supra* note 322, at 38-43, 180-85, 569-609 (reviewing different approaches adopted by different states).

manufacturer, who on behalf of that manufacturer passes the warranties on to the ultimate purchaser. This theory addresses some, but not all, of the difficulties. To begin with, the attribution of agency will necessarily depend on the facts of the relationship between the remote manufacturer and whatever intermediary party actually sold the goods. Recall, in this connection, the facts of *Pack v. Damon*: the sales contract in that case was adamant that the only contract obtained between the purchaser and the seller, and that the manufacturer was not involved in any way in the sale.[353] It would be hard to square that contract with an agency theory, and the more general point seems to be that an agency theory will always depend on facts about the various relationships at issue, any or all of which might or might not be true in any particular case.

Moreover, the agency theory fails to address the enforceability issue raised earlier: if the sale is between the purchaser and the dealer, then what consideration would make the warranty enforceable against the manufacturer? As it turns out, Article 2 assumes, and does not address, the criteria that make promises enforceable, and the Article is generally assumed to take for granted the common law's understanding of consideration. In two places—the firm offer section, and the provision addressing modifications[354]—the Sales Article says that consideration isn't necessary to enforce certain special promises, but nothing indicates that consideration has been abandoned across the board.[355]

In short, any theory that establishes the enforceability of warranties made by remote manufacturers will have to go beyond the existing resources of Article 2. I have found no court applying Michigan law that has addressed this problem, so pursuing the issue will require some considerable speculation. Section 1-103 of the Code is famous for embracing "supplementary principles" of law and equity, and any answer to the enforceability of remote warranties may depend on such help from outside the Code's express provisions.[356]

One theory that has been advanced in this context—drawing on third party beneficiary law—can illustrate the point. I noted earlier that section 2-318 provides a statutory extension of certain warranties to injured parties who are not in privity with the seller, and further observed that to go beyond the limits of section 2-318 would require the use of common law principles regarding third party beneficiaries. The warrant for doing so would seem to begin with the authorization provided by 1-103's inclusion of "supplementary" principles.

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353. *Pack*, 320 F. Supp. 2d at 552.

354. MICH. COMP. LAWS ANN §§ 440.2205, 440.2209 (West 2001).

355. *Id.*

356. MICH. COMP. LAWS ANN. § 440.1103 (West 2001).

However, while section 1-103 means that we can use the common law principles relating to third party beneficiaries, it doesn't mean that those common law principles will suffice in any particular case. The idea of a third party beneficiary requires a promise from the promisor to the promisee, extending to another party who is not the promisee. In Michigan, as elsewhere, the extension is limited to "intended" beneficiaries.[357] The facts of *Pack* seem to undermine this approach, for the contract in that case seemed clearly to disclaim any promise by the manufacturer to the dealer, and even more to disclaim any idea that the purchaser was the intended beneficiary of any promise to the dealer. Instead, the dealer was at pains to emphasize that the purchaser's rights were created only by promises made by the manufacturer directly to the purchaser.

A current effort to revise Article 2 includes several proposals that attempt to deal with these issues. The proposed revisions include two new sections that would create "obligations" on the part of sellers to remote purchasers, in ways that would mimic express warranties but without the name. So, for example, proposed section 2-313A is entitled "Obligation to Remote Purchaser Created by Record Packaged With or Accompanying Goods" and, as its name indicates, would make the seller of new goods liable to any remote purchaser for a failure of those goods to conform to an "affirmation of fact, promise or description" of the goods made by the seller "in a record packaged with or accompanying the goods" and furnished to the remote purchaser.[358] Similarly, proposed section 2-313B, "Obligation to Remote Purchaser Created by Communication to the Public," would make the seller of new goods liable for the good's failure to conform to an affirmation of fact, promise or description made by the seller "in an advertisement or similar communication to the public."[359] Preliminary Comment 1 to section 2-313A explains the choice of terminology: "No direct contract exists between the seller and the remote purchaser, and thus the seller's obligation under this section is not referred to as an "express warranty." Use of "obligation" rather than "express warranty" avoids any inference

357. *See* Rieth-Riley Constr. Co. v. Dept. of Treasury, 357 N.W.2d 62 (Mich. Ct. App. 1984).

358. U.C.C. § 2-313A (2003 Code Revisions).

359. *Id.* Prof. White described these two proposed sections to the Symposium audience and opined that proposed 2-313A both made sense and stood some chance of being accepted. On the whole, however, White was skeptical about the prospects for legislative acceptance of any of the proposed revisions to Article 2; the legislative process has been bogged down. *See* Symposium, *supra* note 4.

that the obligation arises as part of the basis of the bargain" as would be required under 2-313.[360]

Unfortunately, denominating the seller's liability in terms of an "obligation" rather than a "warranty" does not by itself answer the question: What legal basis can ground the seller's liability to a party not in privity? Neither the proposed new sections nor their Comments address this problem. In general, Article 2 neither provides nor articulates anything like a theory of enforceability. The only sections that address the enforceability of promises or agreements through consideration do so in the negative. The Code is otherwise silent about what makes warranties or obligations enforceable against an obligor; it appears that we should assume the usual common law criteria for enforceability, such as those defining consideration.

The text of the proposed new sections suggests another—and in this context a potentially more useful—grounds for enforceability. Subsection (3) of 2-313A states that the "seller has an obligation to the remote purchaser that: (a) the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation."[361] Similarly, 2-313B(3) provides that the seller will have an "obligation" toward the remote purchaser that the goods will meet the affirmations and promises made in advertising to the public, if the purchaser "enters into a . . . purchase with knowledge of and with the expectation that goods will conform" to the affirmation or promise made in the ad.[362] These features of the proposed sections recall other facets of contract law where affirmations and promises create liability even without privity or consideration—most saliently, this discussion recalls the doctrine of "promissory estoppel," a form of liability without consideration.[363] As a result, a seller's obligation to a remote purchaser who has received the seller's warranty affirmations or promises in a way that became part of the basis of that purchaser's bargain can be understood along the lines of the Restatement's indelible Section 90. More particularly, the Second Restatement's version of Section 90 extends the promisor's liability in

360. *See also* U.C.C. § 2-313B cmt. 2 (2003 Code Revisions). "This section parallels Section 2-313A in most respects, and the Official Comments to that Section should be consulted [including in] particular Comment 1 (scope and terminology)." *Id.*

361. U.C.C. § 2-313A(3) (2003).

362. U.C.C. § 2-313B(3) (2003).

363. *See* discussion, *supra* note 289.

circumstances where it is foreseeable that the promise will engender reliance by a third party.[364]

In sum, one can understand the idea of holding a warrantor liable for express warranties, or "obligations," to third parties by analogizing the idea to other, better developed parts of contract law.[365] As I emphasized earlier, however, the Code's approach to warranties involves two issues. The first is, how can a warranty be created? But the second is: How can that warranty be limited or avoided? Section 2-316(1) makes it difficult, if not impossible, to disclaim an express warranty, once made:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; *but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.*[366]

And, even though this section accommodates the prospect that some words or warranty will be deemed extrinsic to the agreement through use of the parol evidence rule, it is hard to see how that rule could govern a relationship between a purchaser and remote manufacturer. Section 2-202 necessarily depends on an agreement between the parties, in which some or all of the terms are "a final expression of their agreement" and thus seems inapplicable when the warrantor and purchaser are not in privity.[367] The only way for a remote manufacturer to limit its warranty liability, in this concept, is to be careful about what it says in its warranties. In *Harnden* and *Pack*, the manufacturers' warranties were carefully crafted, and limited.

b. Implied Warranties

In general, the hurdles that arise for implied warranties without privity will parallel the issues that arise for express warranties. The texts of both section 2-314 and section 2-315, like that of section 2-313, are predicated on the assumption that warranties are given by the seller to the buyer.[368] And, even if we bypass the textual issues, there are further

364. *See* RESTATEMENT, *supra* note 74, § 90.

365. White & Summers also suggest that the remote warrantor could be held liable for breach of an express warranty on grounds of misrepresentation. *See* WHITE & SUMMERS 1980, *supra* note 30.

366. MICH. COMP. LAWS ANN. § 440.2316(1) (West 2001) (emphasis added).

367. MICH. COMP. LAWS ANN. § 440.2202(1) (West 2001).

368. *See* MICH. COMP. LAWS ANN. §§ 440.2314, 440.2315 400.2313 (West 2001).

problems regarding the enforceability of such warranties and the prospect of disclaiming them.[369] As I discussed earlier, the case law about implied warranties without privity is sharply divided, but those decisions have only considered whether implied warranties can be asserted upstream against a remote manufacturer, and not how a buyer would go about articulating the claim, or how a manufacturer could try to avoid liability along those lines. This is an unknown frontier.

The language of the Code provisions gives no help to a purchaser who wants to assert implied warranty liability "upstream" against a remote manufacturer. For example, a warranty that the goods shall be merchantable arises according to section 2-314 "if the seller is a merchant with respect to goods of that kind."[370] The requirement of merchanthood could conceivably be met by a remote manufacturer without regard to the manufacturer's downstream connection to the ultimate purchaser and its immediate seller. But that does not address the section's requirement that the warranty proceed from the seller. There is

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369. At the Symposium, the issue of asserting implied warranties against a remote seller triggered more discussion, and more division of opinion, than any other topic. *See* Symposium, *supra* note 4. The draft article that was circulated before the Symposium raised the question of such claims, and referred specifically to the *Sullivan* decision and its "logical corollary." *See id.* At the time of the Symposium, the cited cases in footnotes 321 and 322 had been rendered, but the 2008 *Davis v. Forest River* decision, by the Michigan Court of Appeals, of course had not. *See Davis*, 748 N.W.2d at 887. In the Symposium discussion, Prof. White opined that *Sullivan* was a 'weak reed' on which to ground an argument that an injured buyer could sue a remote manufacturer for breach of an implied warranty, even though his U.C.C. treatise cites *Sullivan* for that same proposition. *See* Symposium, *supra* note 4. In one sense, he was clearly right: the opinions noted in footnotes 321 and 322 almost completely ignore the *Sullivan* opinion, even though it represents binding Court of Appeals precedent under Michigan Court Rule 7.215(j)(1) (2008). The split of authority among the various federal courts that is noted in those footnotes begins from the observation that the Michigan Supreme Court has not addressed this question since *Neibarger*, and for this reason the job of federal courts, in fulfilling their charge under *Erie v. Tompkins*, 304 U.S. 64 (1939), to predict the likely position of the Michigan Supreme Court, is more difficult than it would be if Michigan's high court would decide the question. And, as the text notes, *see* text, *supra* note 322, it would certainly be possible for that Supreme Court to decide in a manner contrary to *Sullivan*. Nonetheless, it is troubling that those decisions were reasoned in such a conclusory fashion—especially in their reliance on the pre-*Neibarger* District Court opinion in *Mt. Holly Ski*—that Michigan law would not include liability against remote manufacturers for implied warranties. As was recognized in the *Gernhardt* and *Chiasson* decisions, applying the economic loss doctrine to consumer transactions—where the purchase was not for commercial purposes—is inconsistent with important features of the majority's reasoning in *Neibarger* and of the explicit text of that opinion. *See supra* notes 321-322. Except for *Gernhardt* and *Chiasson*, the decisions in footnote 322 ignored this feature of the economic loss doctrine as it was articulated in *Neibarger*. *See Davis*, 748 N.W.2d at 894.

370. MICH. COMP. LAWS ANN. § 440.2314 (West 2001).

one exception in the current text of 2-314 that could allow the warranty of merchantability to operate without needing privity: 2-314(2)(f) creates a warranty of that the goods in question must "conform to the promises or affirmations of fact made on the container or label."[371] Since few distributors or retailers are responsible for the packaging of the goods they sell, it seems natural to suppose that liability for such affirmations or promises should ultimately repose with the manufacturer instead.

The privity requirement seems to apply even more powerfully to a warranty of fitness under section 2-315. That warranty is implied only when the "seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select of furnish suitable goods."[372] Thus, the provision's text, like that of section 2-314, indicates that privity is required to satisfy with the warranty's definition. In the case of warranties for fitness, however, the need for privity goes deeper than just the identification of the warrantor as seller: since the core of the fitness warranty is the warrantor's knowledge of the buyer's particular needs, and of the buyer's reliance on the warrantor's skill or judgment, it seems that many remote manufacturers will fail to satisfy the provisions requirements.

But, some reflection shows that this can vary with the situation, and that remote manufacturer will sometimes be quite knowledgeable about the needs and expectations of the purchaser, even without privity. Recall that a chain of distribution can be built on any of several different business models. On some models, the manufacturer is distanced from the ultimate purchase, and hence would likely be ignorant of the seller's needs or reliance. But, there are other ways of doing business, and in some of these the manufacturer can be closely involved in the ultimate sales transaction, even though the sale agreement denominates a dealer or distributor as the seller. In particular, it is common in some industries for manufacturers to offer technical support and advice about the possible uses of their product line, and even to send their own representatives to the purchaser's business to consult and advise. In such cases, the manufacturer could well satisfy Section 2-315's requirements that the warrantor know both of the buyer's particular needs and that the buyer is relying on the warrantor's skill or judgment.

The same theories that can ground a manufacturer's liability downstream for an express warranty can also ground downstream liability for implied warranties, and the same difficulties will arise for

371. MICH. COMP. LAWS ANN. § 440.2314(2)(f) (West 2001).
372. MICH. COMP. LAWS ANN. § 440.2315 (West 2001).

each of those theories. So, for example, if the dealer or distributor is an agent of the manufacturer, then the agent's dealings with the purchaser can imply the warranty of merchantability to any transaction with the purchaser, just in case the principal meets the Code's criteria for merchanthood.[373] As before, this will depend on facts that might, or might not be true, of the relationship between the manufacturer and the dealer. And, if the dealer is the manufacturer's agent, then the agent's appreciation of the purchaser's special needs could, in the appropriate case, be attributed to the principal. Then, the purchaser could assert an implied warranty of fitness; but only in the appropriate case.

The other theories—third party beneficiary and promissory estoppel—encounter difficulties in as much as the warranties at issue are implied and not express. Contract law has long recognized promises which are implied in fact, and not express, and promissory liability can sensibly be grounded on such implied promises. Michigan case law is ambivalent about the idea of predicating promissory estoppel on an implied promise;[374] in particular, the need for a "clear and definite" promise could be interpreted so as to require an express promise. But other cases, and the Second Restatement of Contracts on which they rely, make it clear that Section 90 reliance can be founded on implied as well as express promises.[375] Accordingly, if the buyer relied to its detriment on an implied promise by the manufacturer that the goods would be merchantable, or fit for specific purposes, then that reliance could ground the enforceability of the warranty. Just as we saw in connection with the situation of express warranties, or obligations, by remote purchasers, the reliance idea can make the warranty enforceable even though the warrantor was not, strictly speaking, the seller. Promissory liability could also be asserted against a remote manufacturer who made implied in fact promises to the dealer or distributor, with the purchaser standing as third party beneficiary. But, in the case of an implied promise, it is accordingly more difficult to understand both the content of the promise and, further, the scope of the "intended" beneficiaries of that implied promise.

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373. *See* ANDERSON, *supra* note 322.

374. In *State Bank of Standish*, 500 N.W.2d at 108, the Michigan Supreme Court upheld the idea of promissory estoppel for a promise that was implied and not express, relying in particular on the idea from Restatement Second § 2 that a promise can be any "manifestation of intention . . . so made as to justify a promise in understanding that a commitment has been made." *Id.* But the Court also embraced the requirement that the promise being enforced be "clear and definite." *Id. See also* RESTATEMENT, *supra* note 74, § 2.

375. *Id.*

Finally, as I also emphasized earlier, Article 2's warranty picture cannot be fully appreciated or be properly applied without understanding the Article's mechanisms for disclaiming or modifying such warranties. Suppose that a remote manufacture is deemed to have created an implied warranty of merchantability. Can that manufacturer effectively disclaim the warranty as regards the remote purchaser?

The relevant provisions of section 2-316 indicate that any such attempt by the manufacturer would face great difficulties. For that matter, we should be troubled if it were easy for a remote party to control the terms of any contract between the ultimate purchaser and his seller. In general, it would seem that the terms of that contract should be the result of the actual agreement between those two parties. More specifically, it doesn't seem that the remote manufacturer should be able to disclaim a warranty as between the purchaser and his seller because section 2-316's provisions for modifying or disclaiming a warranty are predicated on some basic notions of notice and fair warning.[376] For example, one can disclaim the implied warranty of merchantability, but the writing must be conspicuous.[377] Or, one can exclude all warranties, so long as one does so using language—such as "as is" or "with all faults"—that "in common understanding calls the buyer's attention to exclusion of warranties and makes plain that there is no implied warranty."[378] If a warranty could be eliminated from the contract made by the ultimate purchaser because the remote manufacturers used such language in its contract with, say, its distributor, then the ultimate purchaser would be denied the kind of notice that the Code's provisions appear to protect.

To be sure, basic contract law would allow the manufacturer to make a contract with its distributor under which the distributor promised that it would include a disclaimer of warranty in any contracts it made with retailers. And, for that matter, the distributor could also promise to demand of its retailers that they include the same disclaimer in their sales contracts. But if the distributor failed to take those steps, the right answer is to allow the manufacturer to recover from the distributor whatever damages were caused by the distributor's breach of its contractual promise. If the distributor breached its agreement with the manufacturer, then nothing in contract law justifies the idea that the manufacturer could somehow enforce the distributor's broken promise against the ultimate purchaser.

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376. *See* MICH. COMP. LAWS ANN. § 440.2316 (West 2001).
377. *Id.*
378. MICH. COMP. LAWS ANN. § 440.2316(2)(a) (West 2001).

VI. THE ECONOMIC LOSS DOCTRINE AND ROLE OF THE JUDICIARY

My review of *Neibarger* and its consequences highlights several challenges for those who hope to understand and apply the economic loss doctrine. The basic fact of the doctrine is well settled: a buyer alleging economic loss caused by defective goods purchased for commercial purposes must seek compensation through the resources of Article 2 and should expect to face dismissal of any claims that seeks a tort remedy.[379] But the more complicated the business situation, the more complex are the legal issues to be sorted out. In particular, when the purchase at issue is the last link of a chain of distribution, the matter grows more complex about the manner and extent to which a remote, "upstream" manufacturer might be involved in that purchase, perhaps in the form of warranties that are directed to the ultimate purchaser or in the form of various kinds of services that the manufacturer offers along with its products.

The issues relating to remote manufacturers and their involvement are only some of the aspects of post-*Neibarger* case law that pose interesting challenges for courts. Since that initial decision to adopt the economic loss doctrine, Michigan appellate courts and federal judges applying Michigan law have struggled to comprehend the doctrine and to apply it in diverse situations. In my view, some of those decisions have gone astray because they have failed to appreciate something that I view as central to understanding *Neibarger*—namely, that the economic loss doctrine is importantly different from the rule of *Hart v. Ludwig* and should only be applied to controversies that involve the purchase of goods for commercial purposes where the defects produce only commercial loss. Similarly, while it seems clear that the doctrine as it has developed would also foreclose torts suits against remote manufacturers unless there is personal injury, courts are confused about whether, and in what way, plaintiffs can properly use the concepts and categories of the Code to advance Article 2 claims against manufacturers where privity is absent. Part of what makes these challenges so interesting is the fact that any decision about these issues (one way or the other) goes beyond what is required by the U.C.C; accordingly, courts must go beyond the Code to ground their decisions.

In examining these post-*Neibarger* developments, I have made a series of arguments about when judges have, and have not, reasoned sensibly about how to apply and extend the economic loss doctrine. These arguments touch on some important considerations about the proper role of judges in our legal system. Writing in 1995, White and

379. *Neibarger*, 486 N.W.2d at 618.

Summers observed that the economic loss doctrine was a crude proxy for the tort-contract boundary, and followed that observation with the challenge: "It awaits the legislatures and courts of the 21st century to make a more refined and careful division" between these two domains.[380] Since Michigan's legislature (as is so often the case) has shown no obvious interest in addressing these issues, it remains to the courts to address the problem, and that in turn requires a statement of when and how courts can properly resolve controversies of this kind.

A. Is the Development of Law a Proper Role for Courts?

In language that is fashionable amongst academics, a discussion about when and how courts can properly resolve questions about the development of the economic loss doctrine implicates questions about the choice of a suitable *theory of adjudication.* Such a theory, as I understand the concept, explains what is involved when courts decide cases correctly.[381] This, in turn, has three components: what is the relevant law that the judiciary should identify and follow; what is the proper role of courts in deciding such cases; and, what kinds of arguments can justify, in light of the relevant law, the results that the courts produce.[382] Rephrased in these terms, White and Summers' challenge[383] becomes the question: What kind of theory of adjudication can explain and illuminate the decisions that courts are making in developing the economic loss doctrine in Michigan?

To raise this issue of judicial role is to venture into largely uncharted waters. In the past, American judges were much given to writing about their role in developing the law,[384] but there is little said these days—apart from polemics—about the nature of a satisfactory theory of adjudication. Recently, however, four of the Justices of the Michigan

380. *See* WHITE & SUMMERS 1995, *supra* note 182.

381. I have addressed some of these ideas in another context. *See* Vincent A. Wellman, *Dworkin and the Legal Process Tradition: the Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413, 417 (1987).

382. *Id.* at 417.

383. *See* WHITE & SUMMERS 1995, *supra* note 182.

384. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 41 (1977).

My description of American law before the Civil War sounded like a romp through the Garden of Eden. Where ever we went we paused to admire the happy sight of great judges deciding great cases greatly, aware of the lessons of the past but conscious of the needs of the future, striking a sensitive balance between the conflicting claims of local autonomy and national uniformity in an immense, diverse and rapidly growing country, creating a new law for a new land. *Id.*

Supreme Court undertook to discuss some of these issues.[385] Their ideas should be recognized as tentative in nature; none of them advanced anything like what I would term a full-fledged theory of adjudication, and none of them addressed the economic loss doctrine or its path of development. Moreover, most of the ideas advanced in that forum were cautionary: the main thrust of most of the remarks seemed to argue against a particular role for courts—the role often derided as "activist"—in deciding common law cases.[386]

One Justice, in particular, raises hard questions about the kind of judicial activity I have described in the development of Michigan's economic loss doctrine. Calling himself a "disciplined judicial traditionalist,"[387] Justice Robert Young derides common law lawmaking as contrary to the "core principles" of American law:[388]

> This idea that the common law authorizes judicial law making . . . has been regnant in Michigan in fact, if not in self-description, since we entered the Union. Yet this so-called warrant to make law should make any self-confessed judicial traditionalist extremely uncomfortable.[389]

As it is presented in this passage, the view invites caricature. Although Justice Young acknowledges that judicial law making has been a reigning feature of Michigan common law since the state's inception, he nonetheless derides such decision making as incompatible with the position of a "judicial traditionalist." Taken together, these claims seem incongruous, to say the least: in the same breath Justice Young both claims to be a "traditionalist" but repudiates a practice that he recognizes as traditionally, and consistently, practiced by judges for more than a century and a half.[390] Isn't a deeply-entrenched and long practiced judicial role necessarily a part of the judicial tradition?

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385. Their remarks were presented as part of a Federalist Society Symposium. *See* Robert P. Young, Jr., *State Jurisprudence, the Role of the Courts and the Rule of Law*, 8 TEX. REV. L. & POL. 299, 299-371 (2004).

386. *See* YOUNG, *supra* note 10. *See also* Stephen Markman, *Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions*, 8 TEX. REV. L. & POL. 261, 283 (2004).

387. YOUNG, *supra* note 10, at 300.

388. *Id.* at 301.

389. *Id.* at 301-2.

390. GILMORE, *supra* note 383, at 6-7. "As anyone who has the slightest familiarity with late eighteenth-century English case law knows, the judges were quite consciously aware of what they were doing: they were making law, new law, with a sort of joyous frenzy." *Id.*

If we analyze Justice Young's position as a theory of adjudication,[391] the centerpiece is a claim about the role of judges—namely that judges have no proper role to play in the development of law. This claim is accompanied by an equally striking claim about the nature of law—namely, that common law isn't really law at all. "[I]t is hard for me," he writes, "a jurist of the 21st Century, to consider that the common law is 'law' in any conventional sense."[392] Accordingly, it would seem to follow that the economic loss doctrine is not law in any sense that the Justice would recognize.[393] Finally, it follows that Justice Young would contend that there are no arguments that truly justify judicial decisions within the common law: on his view, what we find instead are "dodges" and "sleights of hand"[394] that lead to his conclusion that the common law is an embarrassment.[395]

This view is troubling, and hampered by several salient difficulties. If we denigrate the common law as not really law at all, then that characterization undermines any sense of fidelity to law that could properly be expected of Michigan's courts of appeals.[396] If there is no "law" to common law, then how can intermediate appellate courts hope to follow the law in making their decisions? This problem is particularly acute for Michigan's Courts of Appeals, where the judges are called upon, by court rule, to make binding determinations of law. Michigan's Court Rules require an appellate panel to "follow the rule of law established by a prior published decisions of the Court of Appeals."[397] But this requirement can have no application unless the previous published appellate decision actually established a rule of law. In the same vein, appellate panels are not bound to follow the rules of law

391. *See* YOUNG, *supra* note 10.

392. *Id.* at 303.

393. Justice Young's article does not discuss the economic loss doctrine, or any of the issues related to the development of product liability law in Michigan. Accordingly, there is some risk of reading his views wrongly about this aspect of common law decision-making. But, the criteria he advances for sound reasoning would seem to indicate that he would regard the *Neibarger* decision as improperly taken and incompatible with his vision of the judicial role.

394. YOUNG, *supra* note 10, at 301.

395. *Id.*

396. One problem for Justice Young's account is that he relies on provisions of the United States Constitution for his understanding of judicial "traditionalism." *See* YOUNG, *supra* note 10, at 300, citing Article IV and Article I of the U.S. Constitution for his conception of judicial role. But Justice Young is a judge in the Michigan judiciary, and as such is bound instead by the Michigan Constitution, which frames the relationship between Michigan's judiciary and its legislature in a way that is plausibly different from the way Justice Young finds it framed for federal judges. *Compare* U.S. CONST. art. 1, § 1, *with* MICH. CONST. art 1.

397. MICH. CT. R. § 7.215.

established by decisions of the Michigan Supreme Court: post-*Neibarger* panels would have no obligation to follow the economic loss doctrine, if Justice Young's view of common law decision-making were to be accepted, because that decision could not establish a rule of law to be followed by lower courts.

Justice Young's view of the traditions of Michigan judging would reject as improper the kind of decision making that was so characteristic of great judges of Michigan's past. According to his version of "traditionalism," the activities of earlier Michigan Supreme Courts—like those dominated by Justices Cooley and Christianson[398]—are not properly part of Michigan's judicial tradition. Such a position would be hard to square with the demonstrable history of common law decision making about product liability. In Michigan, for example, the law relating to the tort-contract boundary is purely a judicial creation: neither *Rinaldo's Construction* nor *Hart v. Ludwig* are not anything other than common law decisions by the Michigan Supreme Court. For that matter, if one goes back far enough, it should be clear that both tort law and contract law (and any sense of the boundary that divides them) are the result of judicial decision-making with little or no guidance—or even attention—given by the legislative branch. *Neibarger* looks to be another chapter in the ongoing development of torts and contracts, a development that has been judge-made since its inception.

B. A Rationale for the Neibarger *Decision, and Beyond*

As I have framed it, the challenge posed by White and Summers requires a theory of adjudication that can describe and explain the decisions that extend Article 2 to transactions to which the Article does not apply and exclude tort law from those same transactions. An adequate theory, in this arena, must articulate a role for judges that goes beyond interpreting and applying Article 2 according to its terms. Indeed, for some of the issues I have described—like whether to extend warranties without privity—the proper role for courts must be, to some extent at least, a creative one in that judges must decide how to extend the Article's provisions in ways that will integrate the Code's purposes with other, non-statutory policies.

This is a tall order for any theory of adjudication, and the complexity of the task highlights the fact that most theories of adjudication are too simplistic to explain or illuminate what seems to be at work in the development of Michigan's version of the economic loss doctrine. For

398. *See* Edward M. Wise, *"The Ablest State Court": The Michigan Supreme Court Before 1885*, 33 WAYNE L. REV. 1509 (1987).

example, some theories about judicial role would hold that if no statute governs the matter, that fact should end the discussion.[399] On this view, if neither the text of the U.C.C. nor the intent of the enacting legislature compels the *Neibarger* holding, then it would be illegitimate for the judiciary to extend the statute's reach, especially when that would compromise or eliminate rights that previously had been recognized by the law. If the judiciary cannot act on its own without legislative direction, then the status quo must remain in place until the legislature takes up the issue. In fact, some states have addressed the issue by statute to adopt a version of the economic loss doctrine.[400] By this reasoning, *Neibarger* was wrongly decided, and its judicial adoption of the economic loss doctrine an illegitimate exercise of judicial power.[401]

It would be hard, if not impossible, to square any such restrictive theory of judging with the history of the economic loss doctrine, or of the common law more generally. To confirm this point, consider the following thought experiment. Suppose that, upon confronting what it perceived as a problem of expanding tort law and a corresponding

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399. For an example of this thinking, *see* Reimann v. Monmouth Consol. Water Co., 87 A.2d 325, 334 (N.J.1955) (Heher, J., dissenting).

400. *See, e.g.*, MINN. STAT. ANN. § 604.101 (West 2008).

401. Although Justice Young does not expound the view discussed in the text, it would appear from his remarks about judicial decision making that he would view *Neibarger's* adoption of the economic loss doctrine as illegitimate. He advances four maxims for acceptable common law decision making. Thus, for example, he lauds the Court's decision in Terrien v. Zwit, 648 N.W.2d 602 (2002): "*Terrien* therefore repudiated the notion, seized upon by may common-law jurists, that courts may rely upon free-floating policy considerations as a basis for departing from well-established common-law principles." YOUNG, *supra* note 10, at 307. But *Neibarger* relied on the Court's perception of policy to eliminate well-established common law tort liability. Justice Young also cautions against large-scale changes in the common law: "the judicial traditionalist ought make changes cautiously – and then only in tiny increments." *Id.* at 307-08. But *Neibarger* made a wholesale change in product liability law. And, he inveighs against following "fashionable trends" in the law. *Id.* at 308-09. But the *Neibarger* majority explicitly chose to follow a small number of cases that had adopted the economic loss doctrine, apparently on the perception that such was the coming trend. Only one of Justice Young's maxims could be read to favor the *Neibarger* decision. He writes of the virtue of anchoring the Court's "common law jurisprudence in positive law. Simply put, we have endeavored, when called upon to act in matters of common-law policy, to follow the legislature's lead." *Id.* at 309. Some part of *Neibarger* was a decision to follow the legislature's lead in applying Article 2's ideas and provisions to product liability disputes, but the lesson of *Neibarger* is in fact ambiguous on this point. As was noted in the discussion of this issue, the Official Comment to section 2-318 also states that Article's limited foray into the question of third party beneficiaries for product warranties was chosen by the drafters, and hence by the legislature, to allow for concurrent common law development. MICH. COMP. LAWS ANN. § 440.2318 cmt. 2 (West 2001).

erosion of the tort-contract boundary, Michigan's high court had chosen a different approach to reshaping the law relating to defective products. Instead of adopting the economic loss doctrine, the Supreme Court could have decided to overturn earlier decisions like *Piercefield* and *Cova*. Since these decisions expanded the scope of tort beyond the earlier limits of negligence, and moreover applied "warranty" liability without a contract, it could be argued that these earlier holdings confounded the tort-contract boundary and that a sound development of that boundary would be restored by reversing the earlier decisions. But, if it were within the proper bounds of the judicial role to correct what is deemed an erroneous line of cases, thereby eliminating part of what had earlier developed in tort law, why is not also proper for the judiciary to correct the tort-contract boundary by other extending the reach of Article 2? Both devices seem part of the toolkit available to courts operating in their common law role, and accordingly neither seems more, nor less, legitimate than the other.

The defects of such restrictive theories of judging indicate that what is needed is a more subtle, and sophisticated, theory of adjudication to describe and explain the complex role that judges have played over the years. To my mind, the most sophisticated, and in this context, satisfactory theory of judicial role that can accommodate the kind of decision-making employed by the *Neibarger* majority is the theory articulated by Henry Hart and Albert Sacks in their ambitious and unruly manuscript, *The Legal Process*.[402] Because of its provenance, this theory is most commonly termed the "Legal Process" theory of adjudication. The fundamental tenets of this theory can be presented in a few propositions, although the theory's ramifications are large. On the Legal Process theory, the "law" includes not only the kinds of rules and standards that we normally recognize as law[403]—the parol evidence rule, for example, or section 2-207—it also includes certain values as well, More precisely, the law also includes what are called *principles* and *policies*.[404] Finally, it is essential in understanding this theory of adjudication to appreciate that the rules and standards rest on, and are supported by, the underlying principles and policies.[405] As a result, part of what it means to understand a legal rule is to appreciate the principles and policies that are served by the rule; by extension, sound application of the rule can only be provided when the rule as applied furthers the

402. HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge and Frickey, eds., 1994) (hereinafter TLP).

403. *Id.* at 138-41.

404. *Id.* at 141-43.

405. *Id.* at 146-48.

underlying principles and policies. The fundamental obligation of the judiciary is, on this theory, to apply the law, but because Hart and Sacks advance such a rich and robust picture of the nature of law—not just rules, but also the underlying principles and policies—applying the law can be a complex and even creative task.[406]

The Legal Process theory has several virtues that make it well-suited for describing and understanding the kind of decision-making that is at issue in the development of the economic loss doctrine. First, conception of law that incorporates not only rules but also principles and policies fosters an understanding of legal reasoning that treats common law reasoning and statutory interpretation as parts of an integrated process, rather than two separate and distinct domains. To enact a statute, on this vision, is to change the law, and on the Legal Process theory that means to change the overall body of legal norms. As a result, when courts reason about statutes they can recognize that the same principles and policies that underlie common law rules might also guide their application of the statutes at issue.[407] In particular, a decision to extend a statute in a certain direction, even beyond its terms, can be justified on this theory, because doing so will advance the principles and policies that integrate that area of the law, including the statute. Second, because the Legal Process conception integrates statutes into the body of the law, courts are empowered to point to the fact of the statute in reasoning about the competing principles that underlie common law rules; the legislature, on this theory, has made a change in the law and that means that the judiciary's understanding of the relevant principles and policies might also need to change.

In short, the Legal Process theory of adjudication can describe and illuminate judicial decision-making at the intersection of common law and statutes in ways that few alternative theories would seem to allow. As rough guidelines for working with the theory, Hart and Sacks urged two tests to measure the cogency of any given decision.[408] First, the ruling must be *consistent* with settled areas of law, and second, it must be *coherent* with the underlying principles and policies. These tests would apply both to common law decision making and also to decisions where courts are working with statutes (especially to those where the decisional task goes beyond interpreting and applying the statute's provisions).[409] Employing these tests to examine the development of Michigan's

406. *See* Wellman, *supra* note 381, at 430-34.

407. *See* TLP, *supra* note 402, at 92-94 (discussing issues raised by Riggs v. Palmer, 22 N.E. 188 (N.Y.1889)).

408. *Id.* at 147.

409. *Id.* at 148.

economic loss doctrine indicates that the development of the last fifteen years confirms the Legal Process theory.

To begin with, consider what I have located as the central rationale for the decision in *Neibarger* to adopt the economic loss doctrine. Although recognizing that the decision was taken "in the absence of legislative direction,"[410] the Court nonetheless reasoned that adopting the doctrine would cohere better with two underlying premises of product liability law. First, they wrote, "[a]doption of the economic loss doctrine is consistent with the stated purposes of the UCC."[411] But, in addition, they also reasoned that "[a] contrary holding would . . . serve to blur the distinction between tort and contract"[412] thereby serving the principles and policies already at work in the law that have led to recognizing and maintaining the tort contract boundary.

Similarly, the Legal Process theory's criteria of consistency and coherence are reflected in the development of the economic loss doctrine by appellate courts. For example, once the predominant factor test was adopted in *Neibarger* for determining which transactions were, and were not, within the scope of Article 2, it follows that contracts for services are not within the Article's scope and hence not governed by the economic loss doctrine.[413] As another example, recall that the Court's focus in *Neibarger* on the commercial nature of the loss grew out of the assumption that in commercial cases the parties have the opportunity to bargain with one another and thereby determine the proper allocation of risks. This emphasis on the potential of commercial parties to bargain in turn leads to a rejection of the "other property" distinction that has been favored by other courts, and to a rejection of the doctrine in connection with consumer purchases except when there was an opportunity to negotiate the terms and when the parties' "economic expectations" can be satisfied by the remedies of the Code.[414] Finally, the extension of the doctrine to bar tort remedies where the parties are not in privity also drives the need to apply Article 2's concepts and provisions beyond the strict limit of those provisions; consistency and coherence would accept nothing else.[415]

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410. *Neibarger*, 486 N.W.2d at 618.

411. *Id.* at 619.

412. *Id.*

413. *See supra* notes 152-157. (criticizing *Huron Tool* and subsequent decisions applying the doctrine to contracts for services, and citing *Quest* and *Combustion Research* to re-affirm that the doctrine does not so apply).

414. *See supra* notes 224-229 (discussing the commercial-consumer distinction and the approach of *Quest*).

415. *See supra* note 324 (discussing *Sullivan v. Double Seal* and *Davis* to confirm the "logical corollary" of liability without privity).

Far more would need to be said to establish the Legal Process theory's adequacy in this area, but I can close with this observation. Some reflection on the history of both English and American law reveals that our traditions have been more diverse than those acknowledged in Justice Young's vision of judging[416] and that within those traditions common law judges have undertaken the responsibility of developing the law in ways that parallel statutory developments even when no statute applies. So, for example, there is a long tradition, in England and here, of courts basing their decisions on what is often called the "equity" of a statute.[417] This concept was acknowledged by Blackstone as part of the tradition of English judging and, for that reason, recognized by our Founding Fathers in their constitutional debates about the role of the judiciary.[418]

The doctrine is straightforward in its application. Suppose a statute governs cases of one type, but for some reason does not apply to cases of another, very similar type. In such a situation, courts have responded to the sense that the second type of case should be decided in a manner similar to what the statute requires for the first type of case. The justification isn't that the statute requires it, because the statute doesn't apply. Instead, courts have responded to the "equity" of a situation where similarly situated parties are required, because of the statute, to be treated in significantly different ways. In response, a sense that like cases should be treated alike often leads courts to the conclusion that the second type of case should be decided in a way that is comparable to the first because they are so similar in important ways. Thus, the doctrine enables judges to

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416. *See, e.g.*, Arthur Herman, *How the Scots Invented the Modern World: The True Story of How Western Europe's Poorest Nation Created Our World and Everything In It*, 104-6 (The River Press 2001) (describing James Wilson's contribution to the constitutional convention regarding the role of the judiciary: the proper role of judges was not "to disparage the legislative authority" but rather to add the "power of reflection").

417. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385, 400-04 (1908); James Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936); S.E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 U. ILL. L. REV. 202 (1936); William H Page, *Statutes as Common Law Principles*, 1944 WISC. L. REV. 175, 186-94, 212-13.

418. *See* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 319-24 (M. Kamman, ed. 1986) (November 15, 1787 essay by "Brutus" to the Citizens of New York, discussing the role of equity in the construction of statutes and quoting from Blackstone's Commentaries).

> [D]istill from a statute its basic purpose . . . [and] to slough off the archaisms in their own legal structure. Even general legislation could thus be made to yield a meaning for law beyond its expressed operative effect. The class of situations to which the statutory remedy was expressly made applicable were but illustrative of other analogous cases that deserved to be governed by the same principle. The extension of one remedy beyond its recognized common law area by the statute justified judges in giving another remedy the same expansive effects. [419]

More generally, there is ample precedent for the idea that courts can recognize certain values at work in an enactment and, on that basis, decide cases to which the statute does not apply in ways to parallel the statutory result or to harmonize the common law with the statute's provisions.[420] This basis for judicial decision making confounds simpleminded discussions of judicial role: they tend to balkanize judicial decision-making and draw sharp lines between common law reasoning and statutory interpretation, and assume that the right role for courts in common law decision-making is significantly different from the role they should play in interpreting and applying statutes. Such theories will therefore be hamstrung when describing or explaining issues like the economic loss doctrine, that require sensitivity to both realms of law. As a result, we would expect that these theories would have little to say about the decisions of courts that struggle with issues about the scope of

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419. Landis, *supra* note 417, at 216, 235 n.8 (*quoted in* Thorne, *supra* note 416, at 202.

420. *See* Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. LAW. REV. 401, 403-09 (1968). Although Justice Young did not discuss the doctrine at any length, he suggests in one part of his article that he would repudiate any attempt to reason by reference to the equity of a statute. In commenting on Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999), he dismisses the plaintiff's argument that the court should extend the doctrine of equitable parenthood:

> We acknowledged in *Van* that our state legislature had enacted a "comprehensive statutory scheme" to regulate child custody and parental rights and had abolished common-law marriage. Thus, we concluded that we were required to determine the common-law issue presented by the parties in light of the positive law enacted by the legislative branch. Because our legislature had declined to confer either marital or parental rights upon individuals in the plaintiff's position, we similarly refused to do so through the extension of a judicially created doctrine.

YOUNG, *supra* note 1, at 310 (citations omitted). The same reasoning would seem to require that the court regard the carefully considered approach of Article 2 as limiting the application of the Sales Article's concepts and categories to only those cases that involve sale of goods as the predominant factor. As a result, extending the economic loss doctrine to cases not involving privity of contract must be an unwarranted extension of a law that the legislature had declined to enact.

the doctrine's application, or with issues about how to extend the doctrine to cover transactions without privity. But more sophisticated theories of adjudication can expect to confront, and explain, legal developments such as the economic loss doctrine, thereby illustrating that "legislatures and courts of the 21st century"[421] can find wisdom in the rich traditions of the common law as recognized and respected over the centuries.

421. *See* WHITE & SUMMERS 1980, *supra* note 30.