

# AGAINST LIABILITY FOR PRIVATE RISK-EXPOSURE

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“Proof of negligence in the air, so to speak, will not do.”

*Palsgraf v. Long Island Railroad Co.*<sup>1</sup>

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1. 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, C.J.).

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#### INTRODUCTION

In March 2010, *Saturday Night Live* ran a fake television commercial that showed a young couple driving home after a leisurely walk in the woods. All is well until their Toyota Prius suddenly accelerates out of control and the couple screams in terror. The commercial ends with the logo for one of Toyota’s competitors and the words: “Ford. We make hybrids too.”<sup>2</sup> The skit parodied what some have called “The Great Toyota Panic of 2010”<sup>3</sup> concerning allegations that Toyota vehicles had a defect causing sudden unintended acceleration (SUA). Although government agencies later concluded that most SUA incidents were the result of driver error, Toyota owners filed more than 200 SUA cases against Toyota.<sup>4</sup>

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2. See *Saturday Night Live: Weekend Getaway (Prius Commercial)* (NBC television broadcast Mar. 13, 2010), available at <http://www.hulu.com/watch/134733/saturday-night-live-weekend-getaway>.

3. Walter Olson, *Exorcising Toyota’s Demons*, NAT’L REV. ONLINE (Mar. 15, 2010), <http://www.nationalreview.com/articles/229316/exorcising-toyotas-demons/walter-olson>.

4. Amanda Bronstad, *Citing government study, Toyota moves to dismiss class action over economic damages*, NAT’L L.J., Feb. 16, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202482283866>; see also *Toyota now faces 327 state and federal lawsuits*, MSNBC.COM (May 2, 2010), <http://www.msnbc.msn.com/id/36900141/ns/business-autos/t/toyota-now-faces-state-federal-lawsuits/> (noting dozens of cases pending in state courts throughout the country).

Though it is not unusual for high-profile product incidents to result in mass litigation,<sup>5</sup> what is notable about the claims against Toyota is that many of the plaintiff-vehicle owners seeking damages for SUA never actually experienced a SUA problem.<sup>6</sup> Nor did they allege that they suffered emotional harm—distress or anxiety caused by the perceived risk that their Toyota might experience SUA.<sup>7</sup>

To those unfamiliar with this type of litigation, the Toyota cases might prompt an obvious question: Can a plaintiff who has not yet suffered an injury sue based on the risk of future harm? One would think this question is easily settled. As Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit famously stated, “[n]o injury, no tort.”<sup>8</sup> And indeed, many courts have rejected these suits on grounds ranging from lack of constitutional standing<sup>9</sup> to lack of causation.<sup>10</sup> Yet the courts are intractably divided over whether these “no injury” or “unmanifested defect” suits are cognizable. This conflict has created incentives for forum-shopping as plaintiffs search for a jurisdiction

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5. *E.g.*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 385 F.3d 386 (3d Cir. 2004); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV 93-P-11433-S, CV 92-P-10000-S, 1993 WL 795477 (N.D. Ala. June 2, 1993).

6. Amanda Bronstad, *Toyota cleared to appeal ruling on standing*, NAT'L L.J., July 20, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202503873122>.

7. This Article does not address liability based on any alleged fear engendered by an enhanced risk. It is natural that an increased risk could produce a concurrent fear. “No injury” lawsuits, however, typically do not include claims for any emotional harm that the enhanced risk may cause a plaintiff.

8. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

9. *See, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 316 (5th Cir. 2002); *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, at \*4–6 (N.D. Cal. June 18, 2010); *Koronthaly v. L’Oreal USA, Inc.*, No. 07-CV-5588 (DMC), 2008 WL 2938045, at \*4 (D.N.J. July 29, 2008); *Harrison v. Leviton Mfg. Co.*, No. 05-CV-0491-CVE-FHM, 2006 WL 2990524, at \*3–4 (N.D. Okla. Oct. 19, 2006); *Coker v. DaimlerChrysler Corp.*, 617 S.E.2d 306, 313 (N.C. Ct. App. 2005); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 851 (Tex. App. 2005); *see also* discussion *infra* Part II.A.

10. *See, e.g.*, *Martin v. Home Depot U.S.A., Inc.*, 369 F. Supp. 2d 887, 891 (W.D. Tex. 2005); *Martin v. Ford Motor Co.*, 914 F. Supp. 1449, 1456 (S.D. Tex. 1996); *see also* discussion *infra* Part II.B.

friendly to no injury lawsuits and class certification.<sup>11</sup> Numerous manufacturing industries, including automobiles,<sup>12</sup> beds,<sup>13</sup> cosmetics,<sup>14</sup> pharmaceuticals,<sup>15</sup> and medical devices,<sup>16</sup> have faced claims for damages now based on allegations that their products might malfunction in the future.

This Article attempts to clear the confusion surrounding these claims. Stripped to their core, these no injury lawsuits permit plaintiffs to pursue private tort and warranty claims based on mere exposure to risk. As I explain, however, such a fundamental change is not justified by either economic or moral rationales. Rather, I argue that manifested harm is an essential element of tort and warranty claims and thus these no injury cases should be rejected.<sup>17</sup>

Part I of this Article describes the Toyota litigation, the most recent example of the no injury genre. Part II provides a brief history of no injury lawsuits. These cases exist at the "borderland of tort and contract."<sup>18</sup> These suits originated as tort claims in the 1980s but mostly were dismissed for failure to allege injury. In the 1990s, the plaintiffs shifted the legal theory from tort to contract and focused on warranty theo-

11. Without any claim of injury, the economic viability of the lawsuit depends on massing the individual claims of thousands of similarly situated uninjured plaintiffs.

12. *Compare, e.g.,* Am. Suzuki Motor Corp. v. Superior Court, 44 Cal. Rptr. 2d 526 (Ct. App. 1995) (decertifying unmanifested defect class action), *with* Connick v. Suzuki Motor Co., 675 N.E.2d 584 (Ill. 1996) (reversing dismissal of consumer fraud claim in unmanifested defect class action).

13. *E.g.,* Carey v. Select Comfort Corp., No. 27CV 04-015451, 2006 WL 871619 (D. Minn. Jan. 30, 2006) (dismissing unmanifested defect class action).

14. *E.g.,* Frye v. L'Oreal USA, Inc., 583 F. Supp. 2d 954 (N.D. Ill. 2008) (dismissing unmanifested defect class action); *Koronthaly*, 2008 WL 2938045 (same).

15. *Compare, e.g.,* Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002) (holding unmanifested defect class action should be dismissed), *with* Plubell v. Merck & Co., 289 S.W.3d 707 (Mo. Ct. App. 2009) (granting class certification of unmanifested defect case).

16. *E.g.,* Walus v. Pfizer, Inc., 812 F. Supp. 41 (D.N.J. 1993) (granting summary judgment to defendants in unmanifested defect heart valve case).

17. By contrast, government enforcement standards, designed to prevent harm to the public, often do not require any showing of harm or injury. *See generally* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006).

18. WILLIAM LLOYD PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1953).

ries. The current trend combines this focus on warranty claims with statutory and common law fraud theories. Part II also analyzes the success (and lack thereof) of these theories over the past three decades and the wide variety of treatment given by the courts.

Part III explores the risk-exposure liability at the heart of these suits. Here, I explain how courts implicitly or, in a few rare cases, explicitly have adopted a risk-liability standard. It could be that these jurisdictions simply broadened the meaning of actual harm to include risk. If that were true, these cases could fit comfortably within traditional doctrine and theory. But Part IV.A argues that risk is not harm. In this section, I explain the distinction between risk and harm and conclude that risk is merely an estimate of whether some adverse event may happen in the future.

Even though risk is not harm, tort and warranty law could abandon the traditional requirement of harm. Part IV.B examines whether the two dominant theories of private law, consequentialism and morality, support abandoning a harm requirement for private law claims. Ultimately, I conclude that risk-liability is inconsistent with deterrence, compensation, corrective justice, or civil recourse theories. Simply stated, jurisdictions allowing these no injury suits have erred. Mere risk exposure should not be compensable under private law.

### I. "THE GREAT TOYOTA PANIC OF 2010"

Fueled by massive media coverage<sup>19</sup> and political grandstanding,<sup>20</sup> concern about "sudden acceleration" swept the

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19. The media attention began with coverage of a 2009 crash in San Diego, California, that killed four people including a California Highway Patrol Officer. *E.g.*, Ralph Vartabedian & Ken Bensinger, *Toyota's woes may not end at floor mats*, L.A. TIMES, Oct. 18, 2009, at A1. That accident reportedly was caused by a floor mat that trapped the gas pedal. *E.g.*, Mike Ramsey & Kate Linebaugh, *Early Tests Pin Toyota Accidents on Drivers*, WALL ST. J., July 14, 2010, at A1. Even though the wrong floor mat allegedly had been installed by the dealership, Toyota settled with the victims' relatives for \$10 million. Ken Bensinger & Ralph Vartabedian, *Toyota deal may set bar for payouts*, L.A. TIMES, Dec. 24, 2010, at B1.

Following coverage of the San Diego crash, the *Los Angeles Times* launched a series of articles addressing sudden acceleration issues in Toyota vehicles, and the story was then picked up by broadcast media. *E.g.*, Ralph Vartabedian & Ken

nation in 2010.<sup>21</sup> “Stop driving” your Toyota,<sup>22</sup> said the U.S. Secretary of Transportation.<sup>23</sup> Why? It might suddenly accelerate out of control.<sup>24</sup>

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Bensinger, *Runaway Toyota cases ignored*, L.A. TIMES, Nov. 8, 2009, at A1; Ralph Vartabedian & Ken Bensinger, *Pedal maker for Toyota denies fault*, L.A. TIMES, Jan. 30, 2010, at A1 (suggesting “electronic glitch” as cause for sudden acceleration problems); *The Situation Room: Toyota Issues Massive Recall* (CNN television broadcast Nov. 25, 2009) (transcript available at 2009 WLNR 23908898); *World News with Charles Gibson: Giant Recall, Huge Recall* (ABC television broadcast Nov. 25, 2009) (transcript available at 2009 WLNR 24075572).

According to the National Highway Traffic and Safety Administration, the intense media coverage “was the major contributor to the timing and volume of complaints.” U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TECHNICAL ASSESSMENT OF TOYOTA ELECTRONIC THROTTLE CONTROL (ETC) SYSTEMS, at viii (2011) [hereinafter NHTSA ASSESSMENT]. The NHTSA received 3054 reports of sudden acceleration incidents involving Toyota vehicles between January 2000 and March 2010. *Id.* at 15. Of those complaints, “almost half (43%) [were] received in the months of February and March 2010.” *Id.* at 16. This fact, however, is not surprising. “Most . . . personal risk judgments stem primarily from social influences rather than hardwiring.” Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 718 (1999) (discussing formation of availability cascades).

20. Both the House and Senate held multiple hearings inquiring into Toyota’s sudden acceleration problems. *See, e.g., Update on Toyota and NHTSA’s Response to the Problem of Sudden Unintended Acceleration: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 111th Cong. (2010); Examining S. 3302, The Motor Vehicle Safety Act of 2010: Hearing Before the S. Comm. on Commerce, Science, & Transp., 111th Cong. (2010); Dep’t of Transp., & Hous. & Urban Dev., & Related Agencies Appropriations for Fiscal Year 2011: Hearing Before the Subcomm. Featuring Sec’y LaHood, 111th Cong. (2010); Toyota’s Recalls and the Government’s Response: Hearing Before the S. Comm. On Commerce, Sci. & Transp., 111th Cong. (2010); Toyota Gas Pedals: Is the Public At Risk?: Hearing Before the H. Comm. on Oversight & Gov’t Reform, 111th Cong. (2010); Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 111th Cong. (2010); Dep’t of Transp., & Hous. & Urban Dev., & Related Agencies Appropriations for 2011: Hearing Before the Subcomm. on the Dep’t of Transp., & Hous. & Urban Dev. & Related Agencies Appropriations of the H. Comm. on Appropriations, 111th Cong. (2010) [hereinafter *Appropriations Hearing*].*

21. The sudden acceleration panic had all the characteristics of an informational availability cascade error. *See generally* Kuran & Sunstein, *supra* note 19 (discussing formation of availability cascades). Simply stated, “[a]n informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.” *Id.* at 685–86. This “mental shortcut” can create “[m]ass [s]cares [a]bout [m]inor [r]isks.” *Id.* at 703–04. Several characteristics of the Toyota sudden acceleration scare affected public inflation of the risk: (1) the risk appeared uncontrollable, (2) the risk was potentially catastrophic, (3) mechanisms of the risk were poorly understood, (4) media coverage was heavy, (5) low public trust in corporate and government institutions, and (6) adverse

Nearly a year later, an investigation by the National Highway Traffic Safety Administration (NHTSA) and the National Aeronautics and Space Administration (NASA) concluded that driver error<sup>25</sup> was the most common cause of the reported sudden acceleration incidents.<sup>26</sup> “[V]ehicle inspections, which included objec-

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effects were immediate. *See id.* at 709 (summarizing “acceptability effects” or different characteristics of risk that make them more or less tolerable).

22. Toyota was not the only car manufacturer that faced claims of sudden unintended acceleration. NHTSA ASSESSMENT, *supra* note 19, at 15; *see also* Jeff Gelles, *NASA study clears Toyota of electronics failures*, PHILA. INQUIRER, Feb. 9, 2011, at A1. Over the past decade, other manufacturers, such as Chrysler, Ford, and GM, also received the same complaint. SUZANNE M. KIRCHOFF & DAVID RANDALL PETERMAN, CONG. RESEARCH SERV., R41205, UNINTENDED ACCELERATION IN PASSENGER VEHICLES 7 (2010), <http://www.fas.org/sgp/crs/misc/R41205.pdf>. Indeed, other manufacturers have faced unintended acceleration litigation as well. *See, e.g.,* Perona v. Volkswagen of Am., Inc., 684 N.E.2d 859 (Ill. App. Ct. 1997) (permitting no injury claim based on alleged unintended acceleration in Audi 5000 automobiles).

23. *Appropriations Hearing*, *supra* note 20, at 14 (statement of Ray LaHood, Sec’y of Transp.). LaHood subsequently reversed course, stating that “Toyotas are safe to drive.” Gelles, *supra* note 22.

24. *See supra* note 19.

25. The NHTSA termed the error a “pedal misapplication.” NHTSA ASSESSMENT, *supra* note 19, at 31. This conclusion confirmed earlier NHTSA findings. In September 2010, the NHTSA released its analysis of the “black box” data recorders of fifty-eight Toyota vehicles that were involved in accidents allegedly caused by sudden acceleration. Editorial, *Toyota’s acceleration problem could be customer based*, WASH. POST, Sept. 6, 2010, at A14. In thirty-five cases the brake pedal was not depressed at all at the time of the accident, and in another fourteen cases the brake was only partially depressed. *Id.* The data recorders indicated that the brakes were not engaged at the time of the crash and, instead, the throttles were wide open indicating the driver was flooring the accelerator. *E.g.,* Ramsey & Linebaugh, *supra* note 19.

26. NHTSA ASSESSMENT, *supra* note 19, at viii, 31; NASA ENG’G & SAFETY CTR., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. TOYOTA UNINTENDED ACCELERATION INVESTIGATION, TI-10-00618, at 172–73 (2011). Of about 3000 complaints of sudden acceleration in Toyota vehicles, the NHTSA identified only six that appeared to be traceable to a “vehicle-based cause.” NHTSA ASSESSMENT, *supra* note 19, at 15 tbl.2, 29, 38. According to one commentator, only three of these incidents were reported before the media frenzy began in November 2009. Michael Fumento, *In Black and White, the Toyota Hysteria Exemplified*, FORBES (Nov. 16, 2010, 2:44 PM), <http://blogs.forbes.com/michaelfumento/2010/11/16/in-black-and-white-the-toyota-hysteria-exemplified/>. The NHTSA found the same cause, driver error, in the 1989 investigation into sudden acceleration in Audi vehicles. JOHN POLLARD & E. DONALD SUSSMAN, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., AN EXAMINATION OF SUDDEN ACCELERATION, DOT-HS-807-367, at x (1989) (noting that “[p]edal misapplications are the most probable explanation for the vast majority of sudden acceleration incidents in which no vehicle malfunction is evident”); *see also, e.g.,*

tive evidence from event data recorders, indicated that drivers were applying the accelerator and not applying the brake (or not applying it until the last second or so) . . . .”<sup>27</sup> Indeed, consistent with the NHTSA findings, a New York jury recently rejected a Toyota Scion owner’s claim that the vehicle’s floor mats caused him to suddenly accelerate and returned a verdict for Toyota.<sup>28</sup>

The NHTSA and NASA studies did find two mechanical issues that could be connected to the acceleration problems,<sup>29</sup> and Toyota issued multiple recalls to address those issues.<sup>30</sup> As part of those recalls, Toyota fixed over five million vehicles in the United States.<sup>31</sup> In addition, Toyota paid a landmark \$48.8-

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Ralph Vartabedian & Ken Bensinger, *NASA likely to back Toyota*, L.A. TIMES, Feb. 8, 2011, at B1.

27. NHTSA ASSESSMENT, *supra* note 19, at viii. The NHTSA study also indicated that “older drivers were disproportionately involved in alleged [unintended acceleration] incidents.” *Id.* at 30 n.58. Similarly, Megan McArdle, a reporter for *The Atlantic*, studied the drivers involved in alleged sudden acceleration fatalities and found that “[t]he overwhelmingly majority are over 55.” Megan McArdle, *How Real are the Defects in Toyota’s Cars?*, THE ATLANTIC, Mar. 12, 2010, <http://www.theatlantic.com/business/archive/2010/03/how-real-are-the-defects-in-toyotas-cars/37448/>.

28. Verdict, *Sitafalwalla v. Toyota Motor Sales, U.S.A., Inc.*, (E.D.N.Y. Apr. 1, 2011) (No. CV 08-3001 (ETB)), 2011 WL 1251297, at \*1; Amended Verified Complaint ¶ 16, *Sitafalwalla* (No. 08-CV-3001), 2010 WL 1704901; *see also Business Briefs Toyota wins acceleration suit*, INVESTOR’S BUS. DAILY, Apr. 4, 2011, at A2. The plaintiff, a New York doctor, had alleged that design defects in his 2005 Scion caused him to accelerate unexpectedly and hit a tree. *Id.* Toyota, however, argued that the crash was caused by driver error; the jury agreed that the doctor had mistakenly stepped on the accelerator instead of the brake. *Id.*

29. The NHTSA and NASA studies identified two potential mechanical issues: (1) floor mats that could interfere with the accelerator pedal and (2) “sticky” gas pedals. NHTSA ASSESSMENT, *supra* note 19, at vi–vii.

30. Toyota previously had identified the floor mat problem and issued a floor-mat recall in September 2009. Press Release, Toyota USA, Toyota/Lexus Consumer Safety Advisory: Potential Floor Mat Interference with Accelerator Pedal (Sept. 29, 2009), [http://pressroom.toyota.com/article\\_display.cfm?article\\_id=1761](http://pressroom.toyota.com/article_display.cfm?article_id=1761). In January 2010, Toyota also issued a recall regarding the sticking gas pedal issue. Press Release, Toyota USA, Toyota Files Voluntary Safety Recall on Select Toyota Division Vehicles for Sticking Accelerator Pedal (Jan. 21, 2010), [http://pressroom.toyota.com/article\\_display.cfm?article\\_id=1844](http://pressroom.toyota.com/article_display.cfm?article_id=1844). In February 2011, coinciding with the NHTSA and NASA reports, Toyota issued its final recall regarding the sudden acceleration problems. Ken Bensinger & Ralph Vartabedian, *Toyota’s Recall Pain Returns*, L.A. TIMES, Feb. 25, 2011, at A1. Again, the recall focused on the previously identified floor mat and gas pedal issues. *Id.*

31. Bensinger & Vartabedian, *supra* note 30. Worldwide, Toyota recalled nearly 10 million vehicles due to sudden acceleration problems. *See, e.g.*, Ken Bensinger & Ralph Vartabedian, *Toyota kept Lexus issue from buyers*, L.A. TIMES, May 23, 2010,

million fine to the NHTSA based on its failure to announce the recalls quickly enough.<sup>32</sup>

But that did not stop the lawyers. More than 200 lawsuits have been filed against Toyota.<sup>33</sup> The Judicial Panel on Multi-district Litigation transferred and consolidated the federal cases before Judge James Selna of the United States District Court for the Central District of California.<sup>34</sup> One of these suits is a putative class action that seeks compensation for the alleged diminished value of all makes and models of Toyotas because of an alleged SUA defect in every Toyota.<sup>35</sup> The proposed class includes consumers who did not experience any sudden acceleration problem at all; presumably their Toyotas work just fine.<sup>36</sup> Indeed, more than half of the lead plaintiffs do not allege that they experienced any SUA problem.<sup>37</sup>

How are consumers who did not experience any unintended acceleration nonetheless injured? In short, these suits are premised on risk: The risk that the vehicle *might* suddenly accelerate supposedly decreases the car's value. Although premised on a mere risk of injury,<sup>38</sup> these diminished value cases alone could cost Toyota more than \$3 billion.<sup>39</sup>

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at A1; Margaret Cronin Fisk, *Toyota asks court to dismiss defect lawsuits*, DETROIT FREE PRESS, Nov. 3, 2010, at A8.

32. Press Release, NHTSA, Toyota Motor Corp. Will Pay \$32.425 Million in Civil Penalties as Result of Two Department of Transportation Investigations (Dec. 20, 2010), <http://www.nhtsa.gov/PR/DOT-216-10>.

33. Bronstad, *supra* note 4.

34. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010). In addition to the federal suits consolidated in the multidistrict litigation, dozens of cases also are pending in state courts throughout the country. *Toyota now faces 327 state and federal lawsuits*, *supra* note 4.

35. Second Amended Economic Loss Master Consolidated Complaint at ¶¶ 397, 694, 707, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx) (C.D. Cal. Jan. 11, 2011).

36. *See id.* at ¶ 397 (defining class as all Toyota owners).

37. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 790 F. Supp. 2d 1152, 1163 (C.D. Cal. 2011) (noting that only nineteen out of the thirty-four lead plaintiffs alleged that they experienced a sudden acceleration problem).

38. What is the risk of a fatal accident from driving a Toyota? Robert Wright, at the *New York Times*, did some "back-of-the-envelope calculations." Robert Wright, *Toyotas Are Safe (Enough)*, N.Y. TIMES—OPINIONATOR (Mar. 9, 2010, 8:00 PM), <http://opinionator.blogs.nytimes.com/2010/03/09/toyotas-are-safe-enough/>. For individuals who continued to drive a recalled Toyota, and who did not com-

The federal Toyota multidistrict litigation reflects the divergent approaches courts have taken to this type of litigation.<sup>40</sup> For instance, applying California law, Judge Selna denied Toyota's motion to dismiss based on some plaintiffs' failure to allege sudden acceleration problems in their vehicle.<sup>41</sup> Later, however, when addressing whether California law could apply to a nationwide class,<sup>42</sup> Judge Selna noted that "a number of states, including Alabama, North Dakota, Ohio, Pennsylvania, and Wisconsin, would preclude or would highly likely preclude some or all of the claims asserted by Plaintiffs whose products have manifested no defect."<sup>43</sup> Accordingly, Judge Selna denied the plaintiffs' request to apply California law to all claims.<sup>44</sup> Thus, some Toyota owners who did not experi-

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ply with the recall and accept the manufacturer's fix, the risk of being involved in a "fatal accident over the next two years because of the unfixed problem are a bit worse than one in a million—2.8 in a million, to be more exact." *Id.* By comparison, the "chances of being killed in a car accident during the next two years just by virtue of being an American are one in 5,244." *Id.* Thus, "driving one of these suspect Toyotas raises your chances of dying in a car crash over the next two years from .01907 percent (that's 19 one-thousandths of 1 percent, when rounded off) to .01935 percent (also 19 one-thousandths of one percent)." *Id.* The average American has a higher risk of dying from an on-the-job accident (1 in 48,000), drowning in a bath tub (1 in 840,000), or being murdered (1 in 18,000). See *Risk Quiz*, HARV. CTR. FOR RISK ANALYSIS, <http://www.hcra.harvard.edu/quiz.html> (last visited Feb. 3, 2012). Indeed, an individual has a greater risk of dying in an asteroid strike—1 in 700,000. Phil Plait, *Death by meteorite*, BAD ASTRONOMY, (Oct. 13, 2008, 9:00 PM), <http://blogs.discovermagazine.com/badastronomy/2008/10/13/death-by-meteorite/>.

39. Curt Anderson & Greg Bluestein, *Class-action lawsuits could cost Toyota \$3B-plus*, USA TODAY, Mar. 9, 2010, [http://www.usatoday.com/money/autos/2010-03-09-ownerssuetoyota\\_N.htm](http://www.usatoday.com/money/autos/2010-03-09-ownerssuetoyota_N.htm).

40. See *infra* Parts II & III.

41. *In re Toyota Motor Corp.*, 790 F. Supp. 2d at 1163; *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1161–64 (C.D. Cal. 2010).

42. Judge Selna did not actually resolve the choice-of-law issue and determine which law would apply to the economic loss cases. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 936 (C.D. Cal. 2011). Rather, his decision was limited to whether the plaintiffs could use California substantive law for the entire nationwide class. *Id.* at 927.

43. *Id.* at 932. Indeed, a federal judge in Utah dismissed a putative class action against Toyota for an alleged defect that could cause the car's engine to stall, where the lead plaintiff did not claim that her engine had experienced any problems. *Winzler v. Toyota Motor Sales USA, Inc.*, No. 1:10-cv-00003-TC, 2010 WL 3064364, at \*1 (D. Utah Aug. 3, 2010).

44. *In re Toyota Motor Corp.*, 785 F. Supp. 2d at 935.

ence any sudden acceleration problem may have a claim, but others do not. The result will depend on which state's law applies to the claim.

## II. DECADES OF DIVIDE OVER NO INJURY SUITS

The Toyota cases are just the latest incarnation of the no injury lawsuit. These suits have been around for decades, each wave following the same basic fact pattern: the plaintiffs purchased a product; the product malfunctioned for other consumers; the plaintiffs' products have not yet malfunctioned in any way; and the plaintiffs have not suffered any personal injury or property damage, nor do they claim any emotional harm or fear of injury.<sup>45</sup> Although the fact pattern has remained the same, the legal theories have shifted from an initial focus on tort law to claims based on contract theories to the current focus on fraud and consumer protection based claims. Here, "the fields of tort and contract meet and are interwoven."<sup>46</sup>

The initial wave of no injury cases began in the 1980s and principally involved two products: vehicles<sup>47</sup> and mechanical heart valves.<sup>48</sup> Plaintiffs typically asserted a mix of products liability, negligence, and warranty claims<sup>49</sup> and often sought aggregation as a class action.<sup>50</sup> Under traditional tort principles, a consumer must show an injury to assert a negligence or products liability claim against a manufacturer.<sup>51</sup> This injury

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45. See, e.g., *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 597-99 (S.D.N.Y. 1982).

46. PROSSER, *supra* note 18, at 380; see also *Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 159 (Ark. 2005) (noting that the plaintiff "attempts to merge two separate causes of action," namely benefit of the bargain damages with product defect allegations). For a historical overview tracing the overlap and distinctions between tort and contract, see PROSSER, *supra* note 18, and PERCY H. WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 40-91 (1931) ("Tort and Contract").

47. E.g., *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986); *Feinstein*, 535 F. Supp. at 597.

48. E.g., *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099 (5th Cir. 1991); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 581 (Mo. Ct. App. 1990).

49. The warranty claims typically included both state contractual claims and claims under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (2006).

50. E.g., *Feinstein*, 535 F. Supp. at 599, 608 (denying class certification).

51. Prosser said it succinctly long ago: Strict liability "means that he must prove, first of all, not only that he has been injured, but that he has been injured by the

requirement, however, proved a substantial barrier to aggregating the no injury claims into class actions.<sup>52</sup> Because injury typically involves an individual inquiry into each plaintiff's circumstances, the element of injury precluded class certification under a tort theory.<sup>53</sup> Indeed, most courts dismissed these initial suits as a matter of law.<sup>54</sup>

To avoid the individual issues posed by tort law, in the mid-1990s class action lawyers largely abandoned tort theories and began to frame the cases solely in terms of warranty law.<sup>55</sup> Al-

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product. The mere possibility that this may have occurred is not enough . . . ." William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 840 (1966); accord W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (W. Page Keeton ed., 5th ed. 1984) ("[P]roof of damage was an essential part of the plaintiff's case. . . . The threat of future harm, not yet realized, is not enough."); see also *Gregg v. Scott*, [2005] UKHL 2, [2005] 2 A.C. 176 (H.L.) [193] (appeal taken from Eng.) (opinion of Baroness Hale of Richmond) ("It is now hornbook law that damage is the gist of the action in negligence."); ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 103 (2001) (noting that "liability in torts can only be imposed when the plaintiff has sustained damage that was wrongfully inflicted by the defendant"); Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 177 (1992) ("The idea that tort liability is imposed only when the defendant's actions have caused physical harm to the plaintiff is so obvious that it is almost transparent . . . ."); *id.* at 184 n.38 ("In tort, the dominant compensable event is the occurrence of an injury resulting from the fault of the defendant.").

52. To certify a damages class under Federal Rule of Civil Procedure 23(b)(3), a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In other words, the claims must not involve factual issues unique to each class member. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

53. *E.g.*, *Feinstein*, 535 F. Supp. at 595 (denying class certification of implied warranty of fitness claim where majority of class members did not experience tire defect).

54. See, e.g., *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099 (5th Cir. 1991); *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 581 (Mo. Ct. App. 1990).

55. Unsurprising, given that "the doctrine of strict products liability in tort sprang from the law of warranty . . . ." DAVID G. OWEN, PRODUCTS LIABILITY LAW 336 (2d ed. 2008). That said, several reasons make contract law unappealing to the class action lawyer. First, under contract law, the plaintiff must comply with traditional contract law defenses, such as notice to the manufacturer. *Id.* Second, punitive damages generally are not recoverable on a contract claim. KEETON ET AL., *supra* note 51, § 92, at 665; RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

though the two liability standards are phrased differently,<sup>56</sup> contractual unmerchantability is “properly view[ed]” as the “equivalent of the defectiveness concept in both negligence and strict products liability in tort.”<sup>57</sup> As Maryland’s highest court noted,

to recover on either theory—implied warranty or strict liability—the plaintiff in a products liability case must satisfy three basics from an evidentiary standpoint: (1) the existence of a defect, (2) the attribution of the defect to the seller, and (3) a causal relation between the defect and the injury.<sup>58</sup>

Recognizing this overlap, a majority of courts have rejected this attempt to move these claims to contract law.<sup>59</sup> Nevertheless, a number of jurisdictions—notably California<sup>60</sup> and Massachusetts<sup>61</sup>—allowed the reimagined contract claims to proceed.

The theories, however, continued to evolve. In the current incarnation, exemplified by the Toyota litigation, the plaintiffs typically combine warranty claims with fraud and consumer

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56. A products liability claim requires the plaintiff to show that a defective condition caused the plaintiff’s harm, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1, 5 (1998), while an implied warranty claim requires the plaintiff to show that the product is not “fit for the ordinary purposes for which goods of that description are used,” U.C.C. § 2-314(2)(c) (2005), and a resulting loss. *Id.* § 2-314 cmt. 15.

57. OWEN, *supra* note 55, at 337; *see also* Gary T. Schwartz, *Economic loss in American tort law: the example of J’Aire and products liability*, in THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS 83, 93–99 (Michael Furmston ed., 1986) (discussing substantive similarities between products liability and implied warranty claims). New York is a notable exception. *See* Denny v. Ford Motor Co., 662 N.E.2d 730, 736–39 (N.Y. 1995) (holding that the analysis of a defective product is different in the context of implied warranty claims and torts).

58. *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 286 (Md. 2007) (quoting *Virgil v. Kash N’ Karry Serv. Corp.*, 484 A.2d 652, 656 (Md. Ct. Spec. App. 1984)); *see also* *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1284–85 (Haw. 1992) (“[T]o bring an action in implied warranty for personal injury a plaintiff is required to show product unmerchantability sufficient to avoid summary judgment on the issue of defectiveness in a tort strict products liability suit.”).

59. *E.g.*, *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016–17 (7th Cir. 2002).

60. *E.g.*, *Hicks v. Kaufman & Broad Home Corp.*, 107 Cal. Rptr. 2d 761 (Cal. Ct. App. 2001).

61. *E.g.*, *Holtzman v. Gen. Motors Corp.*, No. 021368, 2002 WL 1923883 (Mass. Super. Ct. July 2, 2002) (allowing breach of warranty claim where product did not manifest defect and no injury suffered).

protection claims.<sup>62</sup> Under this latest approach, the plaintiffs also have reclassified their purported injuries as a lost benefit of the bargain. Today's no injury plaintiffs typically claim that the product's "propensity to fail" renders the product less valuable than represented by the manufacturer. With this new theory, Florida<sup>63</sup> and Missouri<sup>64</sup> joined the list of jurisdictions allowing no injury claims to proceed.

The decisions present a potpourri of reasons for rejecting this type of lawsuit. A few courts have considered whether these suits satisfy threshold standing requirements but have reached inconsistent results.<sup>65</sup> Other courts treat the failure to allege a manifest defect and resulting injury as a failure to plead an essential element, an issue resolvable at the pleading stage.<sup>66</sup> Still other jurisdictions treat the lack of injury as a difficult question of causation.<sup>67</sup> Finally, some courts focus on the claimed damages advanced in the latest wave of no injury suits: the product's diminished value. These courts reason that having received a product that functions properly, the plaintiffs have received the full benefit of their bargain.<sup>68</sup>

#### A. *Starting with Standing*

A handful of courts have rejected these no injury suits for a lack of standing.<sup>69</sup> The leading case, *Rivera v. Wyeth-Ayerst*

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62. Amended Econ. Loss Master Consol. Compl. at ¶ 29, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx) (C.D. Cal. Oct. 27, 2010).

63. *E.g.*, *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988 (Fla. Dist. Ct. App. 2004) (finding that Florida's consumer fraud statute did not require allegation of manifest defect or injury).

64. *E.g.*, *Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. Ct. App. 2009) (granting class certification for alleged violation of Missouri consumer fraud statute under benefit-of-the bargain theory).

65. *Compare, e.g.*, *Gonzalez v. PepsiCo, Inc.*, 489 F. Supp. 2d 1233 (D. Kan. 2007) (finding alleged diminished value of the product satisfied injury requirement for standing), *with Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002) (finding diminished value claim did not satisfy injury requirements for standing); *see also infra* Part II.A.

66. *E.g.*, *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999); *see also infra* Part II.B.

67. *See infra* Part II.B.3.

68. *See infra* Part II.C.

69. *Rivera*, 283 F.3d at 321; *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, at \*6 (N.D. Cal. June 18, 2010); *Koronthaly v. L'Oreal*

*Laboratories*,<sup>70</sup> for example, involved a nationwide class action against Wyeth, the manufacturer of Duract, a non-steroidal anti-inflammatory drug.<sup>71</sup> Following reports of liver failure among long-term users of the drug, Wyeth voluntarily withdrew Duract from the market.<sup>72</sup> Wyeth established a refund program for any unused quantities of the drug.<sup>73</sup> In the class action, however, patients who used Duract sought a refund of the purchase price under a variety of legal theories including statutory consumer fraud, the implied warranty of merchantability, and common law unjust enrichment.<sup>74</sup> The plaintiffs did not allege that the drug failed to work as a painkiller, nor did the class include any patients who sustained any personal injury caused by the drug.<sup>75</sup> Rather, plaintiffs asserted that they were injured by a denial of “the benefit of the bargain” in their purchase of Duract.<sup>76</sup> The Fifth Circuit concluded that plaintiffs’ “artful pleading”<sup>77</sup> did not allege a cognizable injury in fact:

By plaintiffs’ own admission, Rivera paid for an effective pain killer, and she received just that—the benefit of her bargain. . . . Duract worked. Had Wyeth provided additional warnings or made Duract safer, the plaintiffs would be in the same position they occupy now. Accordingly, they cannot have a legally protected contract interest.<sup>78</sup>

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USA, Inc., No. 07-CV-5588 (DMC), 2008 WL 2938045, at \*4 (D.N.J. July 29, 2008); *Harrison v. Leviton Mfg. Co.*, No. 05-CV-0491-CVE-FHM, 2006 WL 2990524, at \*4 (N.D. Okla. Oct. 19, 2006); *Coker v. DaimlerChrysler Corp.*, 617 S.E.2d 306, 314 (N.C. Ct. App. 2005) (dismissing for lack of injury under state standing requirements); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App. 2005) (same). *But see Cole v. Gen. Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007) (concluding unmanifested defect plaintiffs satisfied Article III standing by alleging economic loss such as overpayment and loss in product value).

70. 283 F.3d at 315.

71. *Id.* at 316.

72. *Id.* at 317.

73. *Id.*

74. *Id.*

75. *Id.* Nor did the plaintiffs allege that they suffered any emotional distress caused by worrying about the drug’s effects. *Id.* at 317 n.1.

76. *Id.* at 320.

77. *Id.* at 321.

78. *Id.* at 320–21.

As the court explained, “[i]t is not enough that Wyeth may have violated a legal duty owed to some other patients; the plaintiffs must show that Wyeth violated a legal duty owed to them.”<sup>79</sup>

Similarly, in *Harrison v. Leviton Manufacturing Co.*, the federal district court explained that “vague allegations related to an increased risk of injury are insufficient to meet the injury-in-fact requirement for standing under Article III.”<sup>80</sup> In *Harrison*, the plaintiffs alleged that the defendant’s wall outlets were unsafe and increased the risk of electrical fires.<sup>81</sup> As is typical in these cases, the plaintiffs attempted to fit these allegations under a broad umbrella of legal theories, including statutory consumer protection, the implied warranty of merchantability, negligence, and strict products liability.<sup>82</sup> The court, however, concluded that future economic harm and “an increased risk of personal harm” did not create a present injury sufficient for Article III standing.<sup>83</sup>

But the federal courts have not been consistent in their standing analysis. Five years after its decision in *Rivera*, the Fifth Circuit found that allegations of diminished value satisfied the injury requirement for standing.<sup>84</sup> In *Cole v. General Motors Corp.*, class representatives<sup>85</sup> brought claims for breach of the implied warranty of merchantability and breach of the express warranty against a car manufacturer based on alleged defects in the car’s air bag system.<sup>86</sup> The proposed nationwide class specifically excluded any consumer whose air bag had manifested the

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79. *Id.* at 320.

80. No. 05-CV-0491-CVE-FHM, 2006 WL 2990524, at \*4 (N.D. Okla. Oct. 19, 2006).

81. *Id.* at \*1.

82. *Id.*

83. *Id.* at \*2, 4.

84. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 722–23 (5th Cir. 2007); accord *Gonzalez v. PepsiCo, Inc.*, 489 F. Supp. 2d 1233, 1240 (D. Kan. 2007) (holding that alleged diminished value satisfied injury requirement for breach of implied warranty of merchantability claim even though plaintiffs did not allege products purchased actually contained alleged defect or that they suffered any physical harm).

85. One of the class representatives worked as a paralegal for the plaintiffs’ counsel, a second representative was the paralegal’s cousin, and the final class representative was the mother of one of plaintiffs’ counsel. 484 F.3d at 719.

86. *Cole v. Gen. Motors Corp.*, No. Civ. A. 01-123, 2005 WL 1861960, at \*1 (W.D. La. Aug. 4, 2005).

defect and caused physical injury.<sup>87</sup> This time, however, the Fifth Circuit found the plaintiffs had established a sufficient injury-in-fact.<sup>88</sup> The court strained to distinguish its decision in *Rivera*; it characterized *Rivera* as involving only “economic harm emanating from . . . potential physical harm,”<sup>89</sup> whereas it found that *Cole* involved “actual economic harm . . . emanating from the loss of their benefit of the bargain.”<sup>90</sup>

Relying on *Cole*, Judge Selna has found Article III standing satisfied in the Toyota diminished value cases even though the plaintiffs’ Toyotas had not experienced SUA.<sup>91</sup> Judge Selna reasoned that “every Toyota vehicle . . . has a statistically significant propensity for SUA.”<sup>92</sup> This risk, in turn, created an alleged drop in value, which he found satisfied Article III’s injury requirement.<sup>93</sup>

*Rivera* and *Cole* cannot be reconciled. Both cases involved consumer goods. Both involved an alleged breach of the implied warranty of merchantability. Both claimed a lost benefit of the bargain. Both asserted diminished value as the plaintiffs’ injury. One case, however, allowed the suit to proceed, while the other suit was dismissed.

#### B. *Damages or Defect Manifestation as an Essential Element*

The existence of a defect and an injury are essential elements of a product liability claim as well as a claim for breach of the implied warranty of merchantability.<sup>94</sup> Applying these principles, courts have dismissed unmanifested defect suits or de-

87. See *id.* at \*11 (defining class as “[a]ll persons and legal entities who have acquired . . . anywhere in the United States . . . 1998 or 1999 Cadillac Devilles” and excluding, among others, anyone “who sustained bodily injury or death as a result of the unexpected or premature deployment of a side impact air bag”).

88. *Cole*, 484 F.3d at 723.

89. *Id.* Yet *Rivera* itself stated that the plaintiff there did not “claim Duract . . . has any future health consequences to users.” *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

90. *Cole*, 484 F.3d at 723. But, the plaintiffs in *Rivera* similarly sought damages of “benefit of the bargain.” *Rivera*, 283 F.3d at 320. See discussion *infra* Part II.C.

91. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1162 (C.D. Cal. 2010).

92. *Id.*

93. *Id.*

94. See *supra* text accompanying notes 55–57.

nied class certification. Courts have applied these bedrock principles to tort and warranty claims<sup>95</sup> as well as statutory consumer protection claims.<sup>96</sup> Thus, although the sale of a defective product creates a potential for liability, the law typically provides “no cause of action for inchoate wrongs.”<sup>97</sup>

### 1. Damages or Injury as Essential Element

Many courts have dismissed unmanifested defect claims on the ground that plaintiffs alleged no “damages” or “injury.”<sup>98</sup> As

95. E.g., *In re Gen. Motors Type III Door Latch Litig.*, Nos. 98 C 5836, MDL 1266, 2001 WL 103434 (N.D. Ill. Jan. 31, 2001); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998).

96. E.g., *Rule v. Fort Dodge Animal Health, Inc.*, 604 F. Supp. 2d 288, 304 (D. Mass. 2009), *aff'd* 607 F.3d 250 (1st Cir. 2010); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 559 (N.D. 2002).

97. *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d at 805 (quoting *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985)).

98. E.g., *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628–29 (8th Cir. 1999) (dismissing putative class action because plaintiffs did not allege that their brakes actually malfunctioned or failed and therefore failed to plead damages); *Winzler v. Toyota Motor Sales USA, Inc.*, No. 1:10-cv-00003-TC, 2010 WL 3064364 (D. Utah Aug. 3, 2010) (dismissing putative class action based on allegedly defective engine where plaintiff did not allege that she suffered any engine trouble); *Rule*, 604 F. Supp. 2d at 296; *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 959 (N.D. Ill. 2008); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1334–36 (S.D. Fla. 2007); *Harrison v. Leviton Mfg. Co.*, No. 05-CV-0491-CVE-FHM, 2006 WL 2990524 (N.D. Okla. Oct. 19, 2006); *Carey v. Select Comfort Corp.*, No. 27CV 04-015451, 2006 WL 871619, at \*1–2 (D. Minn. Jan. 30, 2006) (dismissing claims by purchasers of beds where it was “undisputed” that plaintiff’s bed had not suffered any defect or experienced any mold); *Martin v. Home Depot U.S.A., Inc.*, 369 F. Supp. 2d 887, 890–91 (W.D. Tex. 2005); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (“Mere suspicion of a lost bargain . . . will not support an award of damages.”); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99–100 (S.D.N.Y. 1997) (dismissing putative class action by car owners for allegedly defective child safety seats where named plaintiff did not allege actual product malfunction); *Hubbard v. Gen. Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at \*4 (S.D.N.Y. May 22, 1996) (dismissing complaint without prejudice for “failure to plead damages”); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656 (D.N.J. 1986); *Yu v. IBM Corp.*, 732 N.E.2d 1173, 1177 (Ill. App. Ct. 2000) (finding allegations of “potential harm” failed to state cognizable present injury or damages); *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1295–96 (Ill. App. Ct. 1996) (affirming dismissal of putative class action by cell phone users alleging that cell phone might cause cancer at a future date for lack of cognizable injury or damages); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 12 (N.Y. App. Div. 2002) (affirming dismissal of tort and contract theories of liability for failure to plead injury or damages); *Ziegelmann*, 649 N.W.2d at 559, 565 (dismissing claims by car owners who failed to allege damages or injury); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 239–41 (Wis. 2004); *see also Wallis v.*

the Supreme Court of Wisconsin explained, “[a]ctual damage[s]” means “harm that has already occurred or is ‘reasonably certain’ to occur in the future,” not “the mere possibility of future harm.”<sup>99</sup> For example, in an ancestor of the recent Toyota litigation,<sup>100</sup> a group of Firestone tire owners brought a class action against the manufacturer based on the 1978 recall of Firestone steel belted radial tires.<sup>101</sup> Although Firestone faced numerous personal injury suits based on the allegedly defective tires,<sup>102</sup> the class action was limited to economic damages such as repair or replacement of the tires.<sup>103</sup> The suit brought claims for breach of the implied warranty of merchantability as well as violations of the Magnuson-Moss Warranty Act.<sup>104</sup> The court concluded that the plaintiffs did not allege a cognizable claim.<sup>105</sup> The court rejected the plaintiffs’ argument that “the purchase of a defective tire, *ipso facto*, caused economic loss.”<sup>106</sup> In an oft-quoted

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Ford Motor Co., 208 S.W.3d 153, 161 (Ark. 2005) (dismissing statutory consumer fraud claim where state statute required “actual damage or injury” where sport utility vehicle owners alleged that vehicles had rollover risk but did not allege any malfunction); *Porter v. Merck & Co.*, No. 04-CV-586, 2005 WL 3719630, at \*2–3 (Kan. Dist. Ct. Aug. 19, 2005) (dismissing statutory consumer fraud claim where state statute required loss or injury).

99. *Tietsworth*, 677 N.W.2d at 239 (quoting *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 785 (Wis. 1995)).

100. *See supra* Part I. In a further example of history repeating itself, the 1978 tire recall also was the subject of an investigation by the National Highway Traffic Safety Administration as well as the Committee on Interstate and Foreign Commerce of the United States House of Representatives. *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 597 (S.D.N.Y. 1982); *see also* Larry Kramer, *Firestone Recall Urged*, WASH. POST, Sept. 1, 1978, at E1.

101. *Feinstein*, 535 F. Supp. at 597.

102. *Id.*

103. *Id.* at 599–600. The court pointed out that separating the economic damages from any personal injury damages presented preclusion issues. *Id.* at 606–07. The court noted that this claim-splitting created an additional hurdle for class certification, namely an adequacy of representation problem. *Id.* at 606.

104. *Id.* at 598–600. The court’s decision actually addressed three separate class actions. In the *Feinstein* action, the plaintiffs proposed a class of all owners of Firestone 500 steel belted radial tires and brought a breach of implied warranty claim. *Id.* at 598. In the *Kanter* action, the plaintiffs limited the class of tire owners to New York residents; in addition to the implied warranty of merchantability claim, the *Kanter* plaintiffs also brought claims for strict liability, negligence, fraud and deceit. *Id.* at 599. Finally, the *Jacks* action was brought on behalf of all Firestone radial tire owners and asserted claims under the Magnuson-Moss Warranty Act as well as common law fraud. *Id.* at 600.

105. *Id.* at 602–03.

106. *Id.* at 602.

phrase,<sup>107</sup> the court reasoned that “[l]iability does not exist in a vacuum; there must be a showing of *some* damage, which then may lead to further issues of *quantum*.”<sup>108</sup> Because the plaintiffs had not alleged that their tires experienced the alleged defect, the court concluded that the tires were, “by demonstration and definition,” fit for their ordinary purposes of use and therefore merchantable.<sup>109</sup> The court reasoned that “a ‘defect’ is of legal significance only if it renders a tire unfit for its ordinary purpose . . . .”<sup>110</sup> Accordingly, even assuming that plaintiffs could prove “common defects” in the Firestone tires, damages and causation still would need to be decided with respect to each Firestone tire purchaser.<sup>111</sup> Based on these individual issues, the court denied class certification.<sup>112</sup>

The same reasoning has been applied to statutory consumer protection claims. In *Williams v. Purdue Pharma Co.*,<sup>113</sup> for example, the United States District Court for the District of Columbia dismissed a class action under the District of Columbia’s consumer protection statute<sup>114</sup> for lack of injury.<sup>115</sup> In *Williams*, doctors prescribed the plaintiffs a pain killer manufactured by

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107. See, e.g., *Briehl v. Gen. Motors Corp.*, 17 F.3d 623, 628 (8th Cir. 1999); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 13 (N.Y. App. Div. 2002) (quoting *Feinstein*, 535 F. Supp. at 602).

108. *Feinstein*, 535 F. Supp. at 602.

109. *Id.*

110. *Id.* at 603–04.

111. *Id.* at 604–05.

112. *Id.* at 608; accord *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 528, 532 (Cal. Ct. App. 1995) (denying class certification for breach of implied warranty of merchantability based on “unacceptable risk of a deadly roll-over accident”).

113. 297 F. Supp. 2d 171 (D.D.C. 2003).

114. D.C. CODE §§ 28-3901 to 28-3913 (2010). The District of Columbia’s consumer protection statute is one of the broadest in the nation. As originally enacted, the District of Columbia Consumer Protection Procedures Act created a private right of action for “[a]ny consumer who suffers any damages as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia . . . .” D.C. CODE § 28-3905(k)(1) (1998). On October 19, 2000, the private right of action provision was amended and now reads: “A person, whether acting for the interests of itself, its members, or the general public, may bring an action . . . .” D.C. CODE § 28-3905(k)(1). The October amendment, however, is not applied retroactively. *Williams*, 297 F. Supp. 2d at 174. Therefore, the original language requiring “damages” applied to claims by patients who purchased the drug before October 19, 2000. *Id.* at 176.

115. 297 F. Supp. 2d at 172.

the defendant to treat chronic pain.<sup>116</sup> The plaintiffs alleged that the manufacturer's advertising was misleading because the drug purportedly failed to provide pain relief for a full twelve hours for some users, and further that the drug presented the same addiction risk as morphine.<sup>117</sup> The proposed class included all persons who purchased the drug in the District of Columbia but excluded patients who actually failed to receive pain relief or who suffered addiction or ill effects from the drug.<sup>118</sup> The plaintiffs brought a consumer fraud claim and sought a refund of the drug's purchase price.<sup>119</sup> The court characterized the plaintiffs' theory as a "fraud on the market" theory, which was not cognizable under District of Columbia law.<sup>120</sup> The court reasoned that the plaintiffs who obtained effective pain relief received the benefit of their bargain, and those who did not could seek compensation through tort law.<sup>121</sup> The court further noted that "[t]he invasion of a purely legal right without harm to the consumer . . . can be addressed through the administrative process of the Government of the District of Columbia."<sup>122</sup> Accordingly, the court dismissed the plaintiffs' complaint.<sup>123</sup>

## 2. *Malfunction as an Essential Element*

Some courts have reasoned that product malfunction or failure is an essential element of a products defect claim.<sup>124</sup> In

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116. *Id.* at 173.

117. *Id.* at 175.

118. *Id.* at 173.

119. *Id.* at 172.

120. *Id.* at 177.

121. *Id.* at 176.

122. *Id.* at 178.

123. *Id.*

124. *E.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999); *In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) (dismissing statutory consumer fraud claim for failure to allege proof of malfunction); *Jarman v. United Indus. Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (holding that "unless there is actually a failure in product performance, there is no basis at all for claiming that the plaintiff has been damaged in any way"); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 802 (E.D. La. 1998) (noting that "absence of a manifested defect precludes" a cognizable claim); *Walus v. Pfizer, Inc.*, 812 F. Supp. 41, 43-44 (D.N.J. 1993) (finding plaintiff could not state a claim under New Jersey Products Liability Act where

*Pfizer, Inc. v. Farsian*,<sup>125</sup> for example, the plaintiff sued the manufacturer of his heart valve implant under a variety of fraud theories.<sup>126</sup> The plaintiff alleged that his heart valve had a higher rate of strut fracture and risk of death than had been disclosed to him before the surgery.<sup>127</sup> The plaintiff sought diminution in value damages and also the expenses of explant surgery to have the valve removed and replaced.<sup>128</sup> On a certified question from the United States Court of Appeals for the Eleventh Circuit, the Alabama Supreme Court held that whether “couched in terms of fraud law or in terms of product liability law,” the risk that the plaintiff’s heart valve “may one day fail” was not cognizable under Alabama law.<sup>129</sup>

Two years later, the Alabama Supreme Court expanded this rationale in *Ford Motor Co. v. Rice*.<sup>130</sup> There, the court was presented with a putative class action by owners of Ford sport utility vehicles (SUVs) who alleged that a design defect caused the vehicle to have a rollover propensity “in sudden-avoidance maneuvers.”<sup>131</sup> None of the plaintiffs, however, alleged that his

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product was functioning normally); *Kantner v. Merck & Co.*, No. 49D060411PL002185, 2007 WL 3092779 (Ind. Super. Ct. April 18, 2007) (dismissing statutory consumer fraud claim for failure to allege proof of malfunction); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573 (Mo. Ct. App. 1990); *Nichols v. Gen. Motors Corp.*, No. 99-C-566, 1999 WL 33292839, at \*3 (N.H. Super. Ct. Dec. 13, 1999) (applying manifestation requirement to negligence, strict liability, breach of implied warranty, fraud, negligent misrepresentation and concealment, and statutory consumer protection claims). In *Spuhl*, the plaintiff received a heart valve implant manufactured by the defendant. 795 S.W.2d. at 574–75. He recovered fully from the surgery and resumed normal activities. *Id.* at 575. Three years later, however, the plaintiff watched a television show that indicated that a percentage of the defendant’s heart valves had fractured. *Id.* The plaintiff contacted his surgeon, who stated that he had informed the plaintiff that 0.02% of valves experience fracture at the time of the surgery. *Id.* The surgeon also examined the plaintiff, and found that the plaintiff’s valve was “working satisfactorily . . .” *Id.* The plaintiff subsequently filed suit, bringing a strict liability failure to warn claim and a negligent failure to warn claim. *Id.* at 576. The Court of Appeals affirmed the dismissal of the plaintiff’s complaint, concluding that product malfunction was an “essential element” of both negligent failure to warn and strict liability failure to warn claims. *Id.* at 580–81.

125. 682 So. 2d 405 (Ala. 1996).

126. *Id.* at 406–07.

127. *Id.*

128. *Id.* at 407.

129. *Id.* at 407–08.

130. 726 So. 2d 626 (Ala. 1998).

131. *Id.* at 627.

SUV had actually rolled over.<sup>132</sup> Rather, the plaintiffs alleged damages based on a diminution in value theory.<sup>133</sup> The court rejected the plaintiffs' argument that the defect was manifest because it was present in the design:

Courts generally do not recognize a distinction between a defect that is "unmanifest" in the sense that it cannot be discerned to exist in a product and a defect that is "unmanifest" in the sense that, although perhaps impacting upon a product's present capacity for safety, it has never actually caused the adverse consequences feared by the user. Rather, courts have generally concluded that claims based upon allegations of inherent product "defects" that have not caused any tangible injury are not viable, even though the alleged defects could be considered "manifest" in the sense argued by the plaintiffs, i.e., that a product's present condition might have rendered it "unreasonably dangerous" in a products-liability context.<sup>134</sup>

The court pointed out that "the remedy that will best promote consumer safety and address the parties' concern for their own safety is to petition the National Highway Traffic Safety Administration for a defect investigation."<sup>135</sup>

Courts likewise have rejected warranty-based claims where the product defect is unmanifested.<sup>136</sup> In *American Suzuki Motor Corp. v. Superior Court*,<sup>137</sup> for example, the trial court certified a statewide class of 45,000 purchasers of the Samurai, a sports utility vehicle manufactured by Suzuki.<sup>138</sup> Plaintiffs alleged that

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132. *Id.*

133. *Id.* The plaintiffs alleged that their SUVs were worth less than if the vehicles did not have the alleged design defect. *Id.*

134. *Id.* at 629.

135. *Id.* at 631; accord *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 17 (N.Y. App. Div. 2002); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 565 (N.D. 2002); see also *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 178 (D.D.C. 2003) (suggesting recourse for no-injury plaintiffs lies with government).

136. *E.g.*, *Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, No. MDL 05-01699 CRB, 2007 WL 2028408, at \*8 (N.D. Cal. July 10, 2007); *Barbarin v. Gen. Motors Corp.*, Civ. A. No. 84-0888 (TPJ.), 1993 WL 765821 (D.D.C. Sept. 22, 1993); *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526 (Cal. Ct. App. 1995).

137. 44 Cal. Rptr. 2d at 526.

138. *Id.* at 527-28. Specifically, the trial court certified a class of "all persons who purchased a [1986-1994 model year] Suzuki Samurai motor vehicle in California on or after September 5, 1985." *Id.* at 527. The trial court designated two sub-

the Samurai was unfit for its ordinary purpose<sup>139</sup> because the vehicle had an “unacceptable risk of a deadly roll-over accident . . . .”<sup>140</sup> The plaintiff class argued that the implied warranty of merchantability<sup>141</sup> required the manufacturer to ensure that the product was “free of all speculative risks.”<sup>142</sup> In deciding whether an ascertainable class existed, the court of appeals examined whether plaintiffs stated a claim against the defendant. The court noted that “the vast majority of the Samurais sold to the putative class ‘did what they were supposed to do for as long as they were supposed to do it . . . .’”<sup>143</sup> Accordingly, the court concluded that the cars remained fit for their ordinary purpose, and plaintiffs failed to state a breach of implied warranty claim.<sup>144</sup> The court reasoned that “[t]o hold otherwise would, in effect, contemplate indemnity for a potential injury that never, in fact, materialized. And, compensation would have to be paid for a product ‘defect’ that was never made manifest, in a product that for the life of any warranty actually performed as Suzuki guaranteed . . . .”<sup>145</sup> The court acknowledged that the manufacturer of a defective product should be required to repair the product, regardless of consumer injury.<sup>146</sup>

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classes: (1) original purchasers who still owned their vehicles and (2) original purchasers who had sold their vehicles. *Id.* at 532.

139. Section 2-314 of the Uniform Commercial Code requires that merchantable goods “must be at least such as . . . are fit for the ordinary purposes for which goods of that description are used . . . .” U.C.C. § 2-314(2)(c) (2005).

140. *Am. Suzuki*, 44 Cal. Rptr. 2d at 528.

141. The plaintiff class brought three counts: (1) breach of the implied warranty of merchantability under the California Uniform Commercial Code, (2) breach of the implied warranty of fitness under the California Uniform Commercial Code, and (3) breach of the implied warranty provisions of the Song-Beverly Consumer Warranty Act. *Id.* at 527.

142. *Id.* at 530.

143. *Id.* at 531 (quoting *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982)).

144. *Id.*; see also *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297–98 (4th Cir. 1989) (finding vehicle fit for ordinary purpose of an automobile and dismissing breach of implied warranty claim where plaintiff did not claim that the alleged defect caused mechanical problems or an accident); *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 623–24 (M.D.N.C. 2006) (same).

145. *Am. Suzuki*, 44 Cal. Rptr. at 531; accord *Barbarin v. Gen. Motors Corp.*, Civ. A. No. 84-0888, 1993 WL 765821, at \*2 (D.D.C. Sept. 22, 1993) (rejecting implied breach of warranty claim where majority of class members did not experience any braking problems).

146. 44 Cal. Rptr. at 531.

The court, however, suggested that any remedy should lie not with the courts but rather with administrative agencies.<sup>147</sup>

### 3. *Maybe There is a Lack of Causation?*

Other courts have taken an approach focused on causation.<sup>148</sup> *Khan v. Shiley Inc.*<sup>149</sup> is one of several artificial heart valve cases.<sup>150</sup> Judy Khan received a Shiley artificial valve in 1983, and it worked well.<sup>151</sup> Although she had experienced fatigue, double vision, shortness of breath, and exhaustion before the surgery, two months later, her symptoms were gone.<sup>152</sup> Two years later, she learned that the implanted valve was part of a recall<sup>153</sup> due to a statistical fracture rate of 11 per 1000.<sup>154</sup>

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147. *Id.* In the case of automobiles, the federal government can sue a manufacturer under the National Traffic and Motor Vehicle Safety Act of 1966, and require the manufacturer to recall defective cars and remedy the alleged defect. 49 U.S.C. §§ 30120, 30163 (2000).

148. *E.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321 (5th Cir. 2002); *Martin v. Ford Motor Co.*, 914 F. Supp. 1449, 1456 (S.D. Tex. 1996); *Khan v. Shiley Inc.*, 266 Cal. Rptr. 106, 110 (Cal. Ct. App. 1990).

149. 266 Cal. Rptr. 106.

150. *See also* *Walus v. Pfizer, Inc.*, 812 F. Supp. 41, 44 (D.N.J. 1993) (holding that New Jersey law does not authorize “a cause of action based on a claim that a normally functioning product might fail at some unknown time”); *Pfizer, Inc. v. Farsian*, 682 So. 2d 405, 407 (Ala. 1996) (rejecting fraud claim where plaintiff’s heart valve “which is presently functioning normally, could later malfunction”); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. Ct. App. 1990) (holding product malfunction is necessary to show “defective condition” for strict products liability claim). *But see In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2007 WL 1725289, at \*14–15 (D. Minn. June 12, 2007) (finding genuine issue of material fact regarding whether defect was manifest where plaintiff underwent explant surgery to have allegedly defective product removed and allowing tort and contract claims to proceed past summary judgment).

151. *Khan*, 266 Cal. Rptr. at 107.

152. *Id.*

153. As Professor White ironically notes, “[t]he term ‘recall’ may be too generous since one’s risk of death from a second operation to implant a new heart valve was greater than the risk of failure in keeping the original valve implanted.” James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. REV. 1067, 1080 (2002).

154. *Khan*, 266 Cal. Rptr. at 107 n.1.

Khan sued Shiley for both compensatory and punitive damages under a variety of tort and warranty theories.<sup>155</sup> Khan acknowledged that her valve had not malfunctioned but alleged that it was “defective and likely to malfunction.”<sup>156</sup> With respect to the negligence and warranty claims, the court of appeals rejected the plaintiffs’ argument that “the owner of a product, functioning as intended but containing an inherent defect which may cause the product to fail in the future, has an action against the manufacturer.”<sup>157</sup> The court focused on the absence of causation between the alleged injury and defect: “No matter which theory is utilized, however, where a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*. . . . This essential element of causation is missing here.”<sup>158</sup>

C. *No Lost Benefit of the Bargain, Therefore  
No Diminished Value*

Finally, courts have rejected no injury suits on the ground that the plaintiffs received the benefit of the bargain.<sup>159</sup> These courts reason that if the product has so far worked as promised, then consumers have received the benefit of their bargain.<sup>160</sup> As with the other rationales, this logic has been applied to a variety of legal theories. In *Heindel v. Pfizer, Inc.*,<sup>161</sup> for example, the United States District Court for the District of New Jersey used this reasoning to reject a breach of implied warranty claim.<sup>162</sup> The court reasoned that “breach of implied warranty claims are not in-

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155. *Id.* at 108. The claims included negligence, fraud and misrepresentation, breach of warranty (express and implied), strict liability, and intentional infliction of emotional distress. *Id.* See *infra* Part III.A for a discussion of the fraud claim.

156. *Khan*, 266 Cal. Rptr. at 108.

157. *Id.* at 110.

158. *Id.*

159. *E.g.*, *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 379 (D.N.J. 2004).

160. *E.g.*, *O’Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009); *Rule v. Fort Dodge Animal Health, Inc.*, 604 F. Supp. 2d 288, 294–96 (D. Mass. 2009); *In re Canon Cameras Litig.*, 237 F.R.D. 357, 359–60 (S.D.N.Y. 2006); *Bussian v. Daimler-Chrysler Corp.*, 411 F. Supp. 2d 614, 623–24 (M.D.N.C. 2006); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 379–80 (D.N.J. 2004); *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 176 (D.D.C. 2003).

161. 381 F. Supp. 2d at 364.

162. *Id.* at 379–80.

tended to address hypothetical economic loss . . . .”<sup>163</sup> Because the defendants’ drug had provided pain relief as promised, the court concluded that “[t]hese plaintiffs would be hard pressed to claim that they did not get what they paid for.”<sup>164</sup>

Courts similarly applied this reasoning to common law fraud claims. In *Wallis v. Ford Motor Co.*, owners of Ford sports utility vehicles brought a class action against Ford based on the alleged propensity of class vehicles to roll over.<sup>165</sup> The named plaintiff did not allege any personal injury or property damage, nor did he allege that his SUV had malfunctioned in any way.<sup>166</sup> Attempting to position their claim between tort and contract law, the plaintiffs alleged that the “inherent design problems” diminished the value of the SUVs.<sup>167</sup> The court concluded that this “diminution in value” injury was not sufficient to sustain a common law fraud claim.<sup>168</sup> The court explained:

[I]n a misrepresentation or a fraud case . . . the cause of action rests solely on the premise that a party *did not* receive the benefit of his or her bargain. In order to prove the later claim, a party must show that the product delivered was not in fact what was promised.<sup>169</sup>

Because the plaintiffs did not allege that their SUVs malfunctioned or that the alleged defect had manifested, the court dismissed the common law fraud claim.<sup>170</sup>

### III. ALLOWING NO INJURY CLAIMS: RISK-LIABILITY

Given the myriad rationales for rejecting no injury suits, how have jurisdictions allowed these cases to proceed? In permitting these claims, courts have adopted one of two basic theories: (1) fraud claims are different, or (2) the product may yet fail during its useful life. Implicit in each theory is the recognition of risk-exposure liability: an expansion of both tort and warranty law to

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163. *Id.* at 379.

164. *Id.*

165. 208 S.W.3d 153, 154 (Ark. 2005).

166. *Id.*

167. *Id.*

168. *Id.* at 159.

169. *Id.*

170. *Id.*

allow claims based on the mere exposure to risk. Only a few courts have taken this final step and expressly recognized the risk of harm as the basis of liability. Once freed from individual issues of defect and injury, these cases can more easily be certified as a class action, thus “aggregating the claims of tens of thousands, even millions, of consumers . . . .”<sup>171</sup>

A. *Fraud Claims—“A Class By Themselves”*<sup>172</sup>

A handful of jurisdictions have found that fraud claims are actionable even though no injury has resulted.<sup>173</sup> *Khan v. Shiley Inc.* was one of the first decisions to permit a no injury case to proceed. As discussed earlier, *Khan* involved a Shiley heart valve that remained functional for the plaintiff, but was recalled by the manufacturer due to a statistical fracture rate.<sup>174</sup> While rejecting the plaintiff’s tort and warranty theories based on a lack of causation,<sup>175</sup> the *Khan* Court allowed the plaintiff to proceed with a misrepresentation claim.<sup>176</sup> The court concluded that “[a] cause of action does not presently exist under any theory premised on the risk that the valve may malfunction in the future. This includes negligence, i.e., failure to warn, and breach of warranty.”<sup>177</sup> But the court refused to apply the same logic to the plaintiff’s fraud claim, reasoning that “[a]llegations

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171. LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 184 (2011); see also Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 797 (1985) (arguing risk-exposure claims are “ideally suited” for class action treatment); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996) [hereinafter Rosenberg, *Individual Justice*] (arguing for compulsory class treatment of risk-based claims); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 908–16 (1984) [hereinafter Rosenberg, *Causal Connection*] (same). But see E. Donald Elliott, *Why Courts? Comment on Robinson*, 14 J. LEGAL STUD. 799, 803 (1985) (noting courts properly deny class action status to risk-based claims based on failure to satisfy predominance).

172. *Khan v. Shiley Inc.*, 266 Cal. Rptr. 106, 112 (Cal. Ct. App. 1990). *Contra* *Pfizer, Inc. v. Farsian*, 682 So. 2d 405, 407 (Ala. 1996).

173. See *Khan*, 266 Cal. Rptr. 106; *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, No. MDL 05-01699 CRB, 2007 WL 2028408 (N.D. Cal. July 10, 2007).

174. See *supra* Part I.B.3.

175. See *id.*

176. 266 Cal. Rptr. at 112.

177. *Id.*

of fraud . . . are in a class by themselves.”<sup>178</sup> The court provided little explanation for this distinction.<sup>179</sup> Despite acknowledging that fraud required “resulting damage[s],”<sup>180</sup> the court nevertheless allowed the alleged “risk the valve may malfunction in the future” to support the fraud claim.<sup>181</sup>

### B. *Timing Is Everything*

Under an alternative approach, some courts reason that manifestation of the defect and injury is merely a matter of time.<sup>182</sup> What started out as a stringent exception about a product that would, in theory, last forever, has slowly withered away to cover products that might last only a few years.

This temporal exception began in a software case, *Microsoft Corp. v. Manning*.<sup>183</sup> In *Manning*, the trial court certified a nationwide class action against Microsoft for various warranty claims.<sup>184</sup> The class alleged that the disk compression software included in Microsoft’s operating system “could in some cases destroy their data”<sup>185</sup> and sought to recover the cost of a soft-

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178. *Id.* *Khan* arguably could be interpreted as accepting the emotional distress allegedly caused by the risk of malfunction as sufficient harm to establish a fraud claim. *See id.* at 108 (noting the plaintiff alleged “anxiety, fear and emotional distress” as damages); *see also* *Hicks v. Kaufman & Broad Home Corp.*, 107 Cal. Rptr. 2d 761, 771 (Cal. Ct. App. 2001) (distinguishing *Khan* as involving the plaintiff’s claim of a “right to be free from emotional distress caused by worry that the defect would result in physical injury”).

179. The court’s primary distinction was that negligence, breach of warranty, and fraud involve “the safety and efficacy of the product,” whereas fraud claims are permitted on the defendant’s conduct. *Khan*, 266 Cal. Rptr. at 112.

180. *Id.* at 112.

181. *Id.* (emphasis omitted).

182. *E.g.*, *Quality Air Servs., L.L.C. v. Milwaukee Valve Co.*, 671 F. Supp. 2d 36, 45 (D.D.C. 2009); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138 (N.D. Cal. 2005); *Hicks*, 107 Cal. Rptr. 2d at 761; *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex. App. 1995), *abrogated on other grounds by* *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430 (Tex. 2007).

183. 914 S.W.2d at 602.

184. *Id.* at 605. The complaint included both express and implied warranty claims, though the court’s opinion does not further identify the exact nature of implied warranty claim. *Id.* In addition, the suit included a statutory consumer protection act claim as well as a federal warranty claim under the Magnuson-Moss Act. *Id.*

185. *Id.* The court also appeared to rely on emotional damages, though none were sought, by noting that “[t]hese purchasers may have paid for a data compression feature that they were afraid to use.” *Id.*

ware upgrade.<sup>186</sup> In response, Microsoft argued that only 0.3% of users lost data after using the compression software, and thus the vast majority of the proposed class was composed of purchasers whose software was functioning properly.<sup>187</sup> In other words, the “only injury was purchasing the software . . .”<sup>188</sup> Nevertheless, the Texas Court of Appeals upheld class certification by creating the “indefinite” useful life exception.<sup>189</sup> The court distinguished software from “tires or cars” because software has an “indefinite” useful life, and therefore the defect, though “not manifest today . . . may manifest itself tomorrow.”<sup>190</sup> Thus, the court transformed a mere risk of defect into a certainty by assuming that the present risk would inevitably materialize because the product’s useful life was endless.<sup>191</sup>

Courts soon expanded this relatively narrow exception to cover defects that were “substantially certain” to manifest.<sup>192</sup> In *Hicks v. Kaufman & Broad Home Corp.*,<sup>193</sup> the California Court of Appeals expanded this exception to express and implied warranty claims<sup>194</sup> for alleged home construction defects.<sup>195</sup> *Hicks* involved a class of homeowners in developments constructed by the defendant.<sup>196</sup> The plaintiffs alleged that the concrete slab foundations in these homes could crack and allow moisture, dirt, and insects to enter the home.<sup>197</sup> The plaintiffs conceded

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186. *Id.* at 606.

187. *See id.*

188. *Id.* at 607.

189. *Id.* at 609.

190. *Id.*

191. *See id.*

192. *Hicks v. Kaufman & Broad Home Corp.*, 107 Cal. Rptr. 2d 761 (Cal. Ct. App. 2001); *see also, e.g.*, cases cited *supra* note 182.

193. 107 Cal. Rptr. 2d at 761.

194. The implied warranty claim involved both the implied warranty of merchantability as well as the implied warranty of fitness for a particular purpose. *See Hicks v. Superior Court*, 8 Cal. Rptr. 3d 703, 706–07 (Cal. Ct. App. 2004). Although the complaint also included tort claims for negligence and strict liability, the court denied class certification for these claims because the elements of liability and causation required individualized proof. *Hicks*, 107 Cal. Rptr. 2d at 764.

195. 107 Cal. Rptr. 2d at 770.

196. *Id.* at 763–64.

197. *Id.* at 764. Specifically, the plaintiffs alleged that the use of “Fibermesh” (a polypropylene product) instead of welded wire mesh in the concrete slab was a defect. *Id.* The plaintiffs conceded that Fibermesh would not cause the concrete to

that outside factors, such as loss of moisture, soil erosion, and seismic activity, caused the actual fractures in the concrete.<sup>198</sup> Notably, the class did not seek compensation for any personal injury or property damage, but rather sought the costs of repair or replacement.<sup>199</sup> The original class proposed by the plaintiffs defined the class as homeowners whose home foundations had “manifested damage or defect . . . .”<sup>200</sup> Understanding this phrase to incorporate an element of liability into the class definition, the Court of Appeals rewrote the definition and defined the class as all homeowners, regardless of whether the homeowner’s foundation showed signs of cracking.<sup>201</sup> The court reasoned that a breach of warranty claim<sup>202</sup> “does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product.”<sup>203</sup> Like *Manning*, the court distinguished cars and tires as having a “limited useful life,” whereas a foundation, like software, had an indefinite useful life.<sup>204</sup> The court explained the rationale for this distinction between limited useful life and indefinitely useful life:

Foundations, however, are not like cars or tires. Cars and tires have a limited useful life. At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested itself in that time span, the buyer has received what he bargained for. A foundation’s useful life, however, is indefinite. Some houses continue to provide shelter for centuries.<sup>205</sup>

The court thus lowered *Manning*’s inevitable failure standard to a “substantially certain” standard.<sup>206</sup> The court left open the meaning of “substantially certain” but rejected the defendant’s

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crack, nor would wire mesh prevent cracks. *Id.* Rather, the plaintiffs alleged that welded wire mesh would have restricted the cracks to a hairline fracture. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 766.

201. *Id.* at 767.

202. The court did not separately distinguish its express warranty analysis from its analysis of the implied warranties of merchantability and fitness. *See id.* at 767–70.

203. *Id.* at 768.

204. *Id.* at 772–73.

205. *Id.* at 772.

206. *Id.* at 773.

argument that this standard required 100% certainty of failure.<sup>207</sup> The court noted that the plaintiffs presented expert testimony that the foundations “[would] someday most likely crack badly”<sup>208</sup> and affirmed the class certification.<sup>209</sup>

It was only a matter of time before the second element— indefinite useful life—was broadened.<sup>210</sup> Indeed, the exception eventually reached the automobile, the very product disclaimed by *Manning*.<sup>211</sup> In *Quality Air Services v. Milwaukee Valve Co.*, for example, the United States District Court for the District of Columbia lowered the standard to the mere expected useful life of a product.<sup>212</sup> There, the plaintiff purchased 13,320 valves manufactured by the defendant.<sup>213</sup> Of these valves, sixteen broke, resulting in leaks and flooding of the buildings.<sup>214</sup> Despite this 0.1% failure rate, the plaintiff alleged that all of the 13,320 valves were defective and brought both an express warranty claim and an implied warranty of merchantability claim.<sup>215</sup> The court denied the defendant’s motion for summary judgment, reasoning that the valves could have “at least another thirty, and possibly fifty, years of ‘useful life.’”<sup>216</sup> Thus, the court found that the plaintiff could state an implied warranty of merchantability claim for the 13,304 functioning valves by establishing that, though still-functioning, the valves were nevertheless defective.<sup>217</sup> In reaching this conclusion, the court relied on testimony by the plaintiff’s expert, who stated that the

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207. *Id.* at 773 & n.54. At the same time, the court continued to use loose language noting the “inevitable injuries” that could occur. *Id.* at 773.

208. *Id.*

209. *Id.* at 775–76.

210. See *supra* note 190 and accompanying text (noting that original creation of exception suggested cars did not have an indefinite useful life).

211. See *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1147 (N.D. Cal. 2009) (extending *Manning* rationale to a car because it has a “limited but long useful life”); *Trew v. Volvo Cars of N. Am., L.L.C.*, No. CIV-S-051379DFLPAN, 2006 WL 306904, at \*6 (E.D. Cal. Feb. 8, 2006) (permitting no injury claim where plaintiff argued vehicles “will almost certainly fail”).

212. 671 F. Supp. 2d 36, 45–46 (D.D.C. 2009); accord *Cartwright v. Viking Indus., Inc.*, No. 2:07-CV-02159-FCD-EFB, 2009 WL 2982887, at \*11 (E.D. Cal. Sept. 14, 2009).

213. *Quality Air Servs., L.L.C.*, 671 F. Supp. 2d at 39.

214. *Id.*

215. *Id.*

216. *Id.* at 45.

217. *Id.*

valves contained a “manufacturing defect,” and therefore “there remains the finite possibility that conditions could arise that would result in their failure as well.”<sup>218</sup>

### C. *Express Recognition of Risk-Liability*

The fraud and temporal theories used to permit no injury suits reflect an implicit judicial recognition of risk as the basis for liability. Some courts, however, have done so explicitly. In *Lloyd v. General Motors Corp.*, for example, automobile owners brought a class action against various car manufacturers.<sup>219</sup> The plaintiffs alleged that the front seats in their vehicles were “unsafe because they collapse rearward in moderate and severe rear-impact collisions.”<sup>220</sup> The plaintiffs’ complaint relied on the statistical chance that “a certain percentage of occupants of [c]lass [v]ehicles will be killed or seriously injured in rear-impact motor vehicle collisions each year . . . .”<sup>221</sup> Notably, however, not one of the class representatives or the putative class members alleged that he or she had been injured as a result of a seat malfunction,<sup>222</sup> and indeed, the class definition specifically excluded “persons who have suffered personal injury as a result of the rearward collapse of a [s]eat . . . .”<sup>223</sup> Rather than asserting personal injury damages, the plaintiff class sought the expected replacement costs of replacing the front seats,<sup>224</sup> even though they had not yet repaired the defective seats.<sup>225</sup>

The court recognized that “[o]rdinarily . . . damages for economic loss are not available in a tort action and are recoverable, if at all, in contract causes of action.”<sup>226</sup> The court explained:

The distinction between tort recovery for physical injury and warranty recovery for economic loss derives from policy considerations which allocate the risks related to a defective product between seller and the purchaser. A manufacturer

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218. *Id.* at 46.

219. 916 A.2d 257 (Md. 2007).

220. *Id.* at 262.

221. *Id.* at 263.

222. *Id.* at 262.

223. *Id.* at 262 n.1.

224. *Id.* at 262.

225. *Id.* at 281 n.17.

226. *Id.* at 265.

may be held liable for physical injuries, including harm to property, caused by defects in its products because it is charged with the responsibility to ensure that its products meet a standard of safety creating no unreasonable risk of harm. However, where the loss is purely economic, the manufacturer cannot be charged with the responsibility of ensuring that the product meet[s] the particular expectations of the consumer unless it is aware of those expectations and has agreed that the product will meet them.<sup>227</sup>

Nevertheless, the court created an exception where the alleged defect “creates a substantial and unreasonable risk of death or personal injury.”<sup>228</sup> This inquiry requires the court to consider the nature of the alleged harm and the probability of harm occurring.<sup>229</sup> These two factors are inversely related; if the possible injury is severe, such as death, the sufficient probability of injury may be low.<sup>230</sup> Conversely, if the probability of injury is “extraordinarily high,” the severity of the injury may be less.<sup>231</sup> The court reasoned that this exception was justified because it would encourage manufacturers “to correct dangerous conditions before tragedy results.”<sup>232</sup> Under this reasoning, the court explained, “the manufacturer . . . should absorb the cost when a product defect creates a serious risk of severe bodily injury or death, even though actual injury has not yet occurred.”<sup>233</sup> The court seemed to assume that a tort suit was the only available theory to address this risk: “The alternative would be to require plaintiffs aware of the risk to run the risk and perhaps suffer serious bodily injury, debilitation, or even death, thus incurring damages far in excess, in both human and economic terms, of the costs of remedying the defect.”<sup>234</sup> Ap-

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227. *Id.* (quoting *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 634 A.2d 1330, 1332 (Md. 1994)).

228. *Id.* at 266 (quoting *U.S. Gypsum Co. v. Mayor of Balt.*, 647 A.2d 405, 410 (Md. 1994)). Alternatively, the court characterized the standard as “a dangerous condition, one that gives rise to a clear danger of death or personal injury.” *Id.* (emphasis omitted).

229. *Id.* at 268.

230. *Id.* at 269 (quoting *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 632 (Md. 1995)).

231. *Id.*

232. *Id.*

233. *Id.* at 272.

234. *Id.*

plying the exception to the plaintiffs' complaint, the court found that the class satisfied both factors.<sup>235</sup> The court reasoned that the plaintiffs' allegations of paraplegia or death sufficiently alleged a severe potential injury,<sup>236</sup> and the plaintiffs further sufficiently alleged thousands of injuries resulting from the alleged seat defect, satisfying the second factor.<sup>237</sup>

Similarly, in *Holtzman v. General Motors Corp.*, the court explicitly allowed risk-exposure as the basis for warranty liability.<sup>238</sup> *Holtzman* involved a class action by automobile owners who alleged that their vehicles' tire jacks were "subject to failure during normal use, and as such . . . unreasonably dangerous."<sup>239</sup> None of the plaintiffs alleged that his or her tire jack had actually failed; indeed, none of the plaintiffs even alleged that he or she had used the tire jack.<sup>240</sup> Nevertheless, the court allowed the implied breach of warranty claim because the plaintiffs alleged that the tire jack was "incapable of raising the car without unreasonably placing those nearby in danger of serious bodily injury . . . ."<sup>241</sup> In reaching this conclusion, the court relied on various Massachusetts cases where the alleged defect had, in fact, manifested.<sup>242</sup> The court, however, did not address this distinc-

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235. *Id.*

236. *Id.* at 270.

237. *Id.*

238. 15 Mass. L. Rptr. 15 (Ma. Super. Ct. 2002).

239. *Id.* at 15.

240. *Id.*

241. *Id.* at 16.

242. *Id.* (citing *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323, 1331 (Mass. 1997) (finding defect, and corresponding breach of warranty, where the defendant failed to provide adequate warnings as to the dangers of asbestos); *Jacobs v. Yamaha Motor Corp., U.S.A.*, 649 N.E.2d 758, 760 (Mass. 1995) (finding defect where plaintiff sought repair of his motorcycle on fifteen separate occasions); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 640 N.E.2d 1101, 1102-03 (Mass. 1994) (finding defect where the defendant's shoes malfunctioned by having the soles detach); *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 533 N.E.2d 1350, 1351 (Mass. 1989) (finding defect where ship engine malfunctioned); *Deerskin Trading Post, Inc. v. Spencer Press, Inc.*, 495 N.E.2d 303, 305 (Mass. 1986) (noting "undisputed" defect existed where undetected glue on order forms caused forms to stick to catalog); *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1068-69 (Mass. 1985) (finding defect where defendant's wine was moldy).

tion, but instead simply focused on the allegation that the “defect [was] capable of causing injury or death.”<sup>243</sup>

#### IV. AGAINST LIABILITY FOR PRIVATE RISK-EXPOSURE

Courts obviously have struggled with no injury cases. The majority of courts have rejected such claims but labor to articulate the reason for doing so.<sup>244</sup> Other courts have crafted exceptions to the majority approaches, often using strained reasoning.<sup>245</sup> Whether implicit or explicit, these latter cases permitting unmanifested defect claims allow a plaintiff to recover even where all the plaintiff could show was that the defendant’s conduct increased the risk of a future outcome (such as valve failure, seat collapse, or foundation cracks). In essence, these courts have abandoned the traditional concept of outcome-liability, and instead have permitted risk as the basis for liability in tort and warranty as well as for Article III standing.

One could view these cases in two different ways. Under one view, considered in Part A, these courts may merely be accepting risk-exposure as a type of harm. These courts simply may have determined that in our ever-changing society, our understanding of what constitutes “harm” has shifted and includes exposure to risk. Under this view, these decisions do not challenge the fundamental requirement of harm in standing jurisprudence, tort, or warranty law.

On the other hand, these decisions might have eliminated the requirement of harm from private tort and warranty causes of action. Perhaps these decisions concluded, as deterrence theorists have urged for a long time now, that the private law is a means of addressing the distribution of risk; thus, tort and warranty should be expanded to accommodate claims premised on mere risk exposure, absent any accompanying harm. Part B considers whether risk should be compensable under either consequentialist or morality-based theories.

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243. *Holtzman*, 15 Mass. L. Rptr. at 16.

244. *See supra* Part II.

245. *See supra* Part III.

A. *Risk Is Not Harm*

The starting point then is whether risk,<sup>246</sup> standing alone, constitutes harm.<sup>247</sup> Harm connotes a setback of an interest, being “worse off” in some sense.<sup>248</sup> Unpacking this concept re-

246. Although there are numerous accounts of risk, this Article uses an objective frequentist understanding of the term “risk” meaning the probability of an adverse event. See Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 973 (2003); Stephen R. Perry, *Risk, Harm, and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321, 322–29, 330 n.18 (David G. Owen ed., 1995) [hereinafter Perry, *Risk, Harm, and Responsibility*]; see also DEBORAH LUPTON, RISK 17–18 (1999) (noting cognitive science approach defines risk as “the product of the probability and consequences (magnitude and severity) of an adverse event [i.e., a hazard]”). This understanding corresponds with the typical use of individual risk assessments in case law. See Matthew D. Adler, *Risk, Death, and Harm: Normative Foundations of Risk*, 87 MINN. L. REV. 1293, 1404–08, 1439–40 (2003).

Of course, public perception of risk differs from an expert’s perception of risk. See LUPTON, *supra*, at 19–26 (describing both cognitive science views on differences in risk perception between industrial organizations and members of the public, as well as sociocultural perspectives on risk); CASS R. SUNSTEIN, RISK AND REASON 53–98 (2002) (same); Paul Slovic, *Perception of Risk*, 236 SCI., Apr. 1987, at 280–81 (discussing how lay people characterize and evaluate risk); see generally Kuran & Sunstein, *supra* note 19 (discussing cognitive process by which individuals develop risk beliefs that contradict scientific evidence). For example, media amplification of a risk can affect the public’s perception of the risk. Kuran & Sunstein, *supra* note 19, at 735–36; see also *supra* notes 20–22 (discussing impact of media on public perception of SUA risk). Indeed, when experts change their opinion seemingly every day—Should I eat butter? Should I eat margarine?—it is not surprising that the public is skeptical of expert risk judgments. See LUPTON, *supra*, at 75–81, 109–13 (describing how people respond to expert judgments on risk). For a very accessible overview of the history of risk and probability, see PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK (1996). The public’s different perspective on risk does not necessarily mean that Joe Public does not understand the objective probability of an adverse event. Rather, the public’s risk evaluation may reflect different values being placed on the same situation. That said, this Article nevertheless uses the objective frequentist understanding of risk because it is the dominant approach in legal discourse.

This tension between reliance on expert judgment about risk and reliance on subjective degrees of belief is part of a larger discourse about how to evaluate risk which is beyond the scope of this Article. See ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 12–13 (2007) (succinctly describing the “dichotomy between expertise and democracy”); LUPTON, *supra*, at 28–33 (describing sociocultural criticisms of reliance on “expert” judgments of risk).

247. A full exploration of the philosophical nature of harm is beyond the scope of this Article.

248. As Joel Feinberg notes, the term “harm” is “both vague and ambiguous . . .” JOEL FEINBERG, HARM TO OTHERS 31 (1984). Many scholars, however, have adopted Feinberg’s definition of harm as an invasion or thwarting of one’s interests. *Id.* at 34; see also Finkelstein, *supra* note 246, at 971 (using Feinberg’s definition of harm); Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 322

quires us to understand two things: (1) what constitutes an “interest” and (2) the meaning of “setback.”

Although individual welfare interests have been variously defined,<sup>249</sup> it is not controversial to assert that all individuals possess an interest in maintaining a minimum level of physical health (including one’s life itself).<sup>250</sup> Indeed, most decisions allowing no injury cases seem to reflect this physical security interest. In *Holtzman*, for example, the court relied on the “danger of serious bodily injury,”<sup>251</sup> while the court in *Lloyd* justified its decision on a desire to provide a “remedy before the significant loss of life or limb.”<sup>252</sup> Similarly, this physical security interest can be seen in the Toyota litigation, where plaintiffs base their diminished value claims on a risk of “death or serious bodily injury.”<sup>253</sup>

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(same); Adler, *supra* note 246, at 1322 (same). This Article likewise adopts Feinberg’s definition.

249. Martha Nussbaum, for example, offers life, physical health, and use of the senses and imagination as among an individual’s welfare interests. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78–79 (2000). John Finnis includes life, knowledge, and play among an individual’s welfare interests. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 86–90 (1980). Admittedly, I am using an objective-good account of welfare because this understanding best reflects the current tort system. I do not take a position on whether other welfare views could be justified.

250. See, e.g., FEINBERG, *supra* note 248, at 37, 62; ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 51 (1999); Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1927 (2002). Indeed, scholars consider one’s interest in physical integrity one of the most “vital” as it allows an individual to pursue higher level goals and interests. FEINBERG, *supra* note 248, at 62; *id.* at 37 (noting interest in health as one of the “basic requisites of a man’s well-being” (quoting NICHOLAS RESCHER, *WELFARE: THE SOCIAL ISSUES IN PHILOSOPHICAL PERSPECTIVE* 6 (1972)); cf. Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 160 (1990) [hereinafter Schroeder, *Risks and Tort Law*] (suggesting risk-exposure constitutes a setback to one’s personal autonomy and such intrusion “may be” a harm itself).

251. *Holtzman v. Gen. Motors Corp.*, 15 Mass. L. Rptr. 15, 15 (Super. Ct. 2002); see *supra* text accompanying notes 238–43.

252. *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 294 (Md. 2007); see *supra* text accompanying notes 219–37. Similarly, in *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988 (Fla. Dist. Ct. App. 2004), the court permitted a statutory consumer fraud claim based on an allegedly defective seatbelt without any allegation of malfunction based, in part, on the “unique” role of seatbelts in “the emergency protection of human life.” *Id.* at 990 n.3.

253. Second Amended Complaint, *supra* note 35, at ¶ 426; see also *id.* at ¶ 8.

Does risk alone set back one's interest in physical health?<sup>254</sup> Risk may be undesirable, but "[a]n undesirable thing is harmful only when its presence is sufficient to impede an interest."<sup>255</sup> What then does it take to set back or impede an interest? In common sense terms, this concept involves a detriment or decline of some kind.<sup>256</sup>

Thus, the relevant question is whether risk exposure places an individual's level of physical health in a worse condition than it would otherwise have been. The answer is "no." Exposure to a risk of physical harm is not itself a form of harm.<sup>257</sup> In reality, things either happen or they do not:

A high "probability" of premature death for *P*, in the frequentist sense, means a high frequency of premature death within some group of persons, {*P*}, that includes *P*. But this "group fact" does not change *P*'s own life—or so it seems. Although a group including *P* may have a high frequency of some harmful attribute, what matters for *P*'s well-being is whether she herself has the attribute. If *P* has the attribute, then she is harmed, and the fact that only a few other members of the group share the attribute does not lessen the harm. Likewise, if *P* lacks the attribute, then she is unharmed, and the fact that many other members of the group have the attribute does not amount to a harm for *P* herself.<sup>258</sup>

In short, the real world does not function in a state of probability. "Risk harm" lacks any corresponding event in the

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254. Some commentators have suggested that individuals have an interest in avoiding risk or a right not to have serious risks of harm imposed upon them by others. See, e.g., JUDITH JARVIS THOMSON, *Imposing Risks, in RIGHTS, RESTITUTION, AND RISK* 173, 173–91 (William Parent ed., 1986); David McCarthy, *Actions, Beliefs, and Consequences*, 90 PHIL. STUD. 57, 64–70 (1998). This view, however, creates substantial liberty and autonomy issues as nearly every action we take presents risks to others.

255. FEINBERG, *supra* note 248, at 47.

256. Feinberg uses the terms "set back," "defeat," "thwart," and "impede" to convey this meaning. FEINBERG, *supra* note 248, at 51–53.

257. See Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 321–46; Adler, *supra* note 246 at 1340–69 (concluding that risk is not a harm under an objective frequentist understanding of risk); see also Toby Handfield & Trevor Pisciotta, *Is the Risk-Liability Theory Compatible with Negligence Law?*, 11 LEGAL THEORY 387, 402 (2005) (agreeing that risk itself is not a harm, but nonetheless supporting risk-liability theory based on the wrongfulness of risk imposition).

258. Adler, *supra* note 246, at 1355–56 (emphasis and internal citation omitted).

physical world.<sup>259</sup> As the Supreme Court noted, “a risk of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world.”<sup>260</sup>

Instead, risk, by definition, is simply an estimate, in light of current knowledge, of the probability that some adverse event is not avoidable.<sup>261</sup> Therein lies the heart of the matter—lack of knowledge. The idea of risk harm is “simply a fiction” used to accommodate our lack of full information regarding causation in the physical world.<sup>262</sup> If knowledge regarding causation is certain and complete,<sup>263</sup> then the victim’s future bodily injury is either inevitable (100% certain to occur) or avoidable (100% certain not to occur). The flaw in the “risk as harm” thesis, according to Stephen Perry, is that it really describes a lack of knowledge about certain empirical matters, namely causation.<sup>264</sup> As

259. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 259 (1992) [hereinafter Perry, *Protected Interests*].

260. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983); see also Sarah Green, Note, *Risk Exposure and Negligence*, 122 L.Q. REV. 386, 387 (2006) (“[I]n auguring the possibility of future harm, [risk] necessarily indicates the current absence of that harm.”).

261. Perry, *Protected Interests*, *supra* note 259, at 259.

262. Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 334.

263. Glen Robinson challenges the notion that events have deterministic causes. Robinson, *supra* note 171, at 780–81. Although that may be true at quantum physics level, I agree with Perry that human physiological events have deterministic causes. See Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 337 (arguing determinism exists at macro-level). In any event, “the law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is.” *Gregg v. Scott*, [2005] UKHL 2, [2005] 2 A.C. 176 (H.L.) [79] (appeal taken from Eng.) (opinion of Lord Hoffman).

264. Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 334; see also Perry, *Protected Interests*, *supra* note 259, at 255–57. Perry distinguishes between deterministic causation and indeterministic causation:

If a particular outcome, such as the final resting place of a billiard ball, is completely determined by the preceding state of the physical universe, then the relevant causal process is deterministic. If a particular outcome, say the time at which a given uranium atom decays, is not so determined, then the causal process is indeterministic. There is no further, perhaps unknown, causal mechanism that lies behind a statement of the probability of decay.

Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 323. In cases of indeterministic causation, Perry posits that “conduct that has the effect of placing someone within the reference class in question might perhaps be characterized as having caused a distinct form of damage.” *Id.* at 336. In other words:

[C]onduct that places someone’s well-being at the mercy of an indeterministic roll of the dice seems distinguishable from... situations... where the

Perry argues, “it is implausible to think that someone could have suffered a distinct kind of loss at the hands of another person because we are in a state of ignorance about whether the latter caused the former another kind of loss, namely, physical harm.”<sup>265</sup> In other words, if we have full knowledge of causation, either the plaintiff suffered a physical harm at the hands of the defendant, or the defendant did not cause the plaintiff *any* damage, whether it is labeled physical harm or risk harm.

The nature of damages for risk harm underscores the lack of any actual harm. What would compensate an individual for bearing an unreasonable risk of bodily injury? Most advocates of risk harm liability suggest a probability measure where damages would be determined by multiplying the probability of the injury by the expected value of the injury should it materialize.<sup>266</sup> Suppose an alleged defect in a vehicle imposes a one in one million probability of a fatal accident,<sup>267</sup> and the potential harm is catastrophic, \$10,000,000.<sup>268</sup> The risk harm damages would be \$10, and all owners of the allegedly defective vehicle would receive \$10 for the risk harm. For the vast majority of car owners, however, the harm never materializes into a fatal car accident. Not only do the majority of car owners not suffer any

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assumption was, in effect, that the risk-imposer would either definitely cause physical harm or would definitely not cause physical harm, but because of imperfect knowledge we would not be in a position to say which of these two states of affairs in fact obtained.

*Id.* at 336–37. Moreover, as Perry points out, the “basic tests of causation in tort law, namely, the but-for test and its more sophisticated variant, the NESS [Necessary Element of a Sufficient Set] test, both appear to presuppose determinism.” *Id.* at 337 n.24.

265. Perry, *Protected Interests*, *supra* note 259, at 258. Perry echoes the thoughts of 18th-century French mathematician, Jules-Henri Poincaré, who stated “[c]hance is only the measure of our ignorance.” BERNSTEIN, *supra* note 246, at 200 (quoting Henri Poincaré, *Chance*, in 2 JAMES R. NEWMAN, *THE WORLD OF MATHEMATICS: A SMALL LIBRARY OF THE LITERATURE OF MATHEMATICS FROM A’H-MOSÉ THE SCRIBE TO ALBERT EINSTEIN 1359, 1359* (1988)).

266. Ariel Porat & Alex Stein, *Liability for Future Harm*, in *PERSPECTIVES ON CAUSATION* 221, 235 (Richard S. Goldberg ed., 2011); Robinson, *supra* note 171, at 786–87; David Rosenberg, *Damage Scheduling in Mass Exposure Cases*, 1 *COURTS HEALTH SCI. & L.* 335, 341–42 (1991); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 461–69 (1990); Schroeder, *Risks and Tort Law*, *supra* note 250, at 155–56.

267. See *supra* note 38 (discussing risk of Toyota sudden acceleration fatality).

268. See *supra* note 19 (noting Toyota settlement of fatal accident).

setback to welfare, these owners would actually benefit—would be better off—from having borne the risk.

Of course, an individual also has a welfare interest in maintaining a basic level of mental health,<sup>269</sup> and scholars advocating risk harm often rely on the accompanying anxiety caused by the uncertainty of risk-exposure.<sup>270</sup> Claire Finkelstein, for example, argues that “a person who has been exposed to a risk of harm has been made worse off than he would have been if he had never been exposed to that risk in the first place.”<sup>271</sup> Finkelstein provides the following example:

Suppose that unbeknownst to you, an airline on which you regularly fly is negligent in maintaining its planes. On one particular trip, one of two engines on the plane on which you are flying quits in midflight, a fact you only learn after you have disembarked. It seems plausible to suppose that flying under these conditions has harmed you, as compared with similarly situated passengers on a flight without engine failure. You have been harmed because you are worse off, from the standpoint of your baseline welfare, than passengers who fly in nondefective planes.<sup>272</sup>

Although Finkelstein disclaims that her argument is “purely psychological,”<sup>273</sup> she fails to explain how the airline passenger,

269. FEINBERG, *supra* note 248, at 37; accord NUSSBAUM, *supra* note 249, at 79.

270. See Adler, *supra* note 246, at 1369–85 (arguing that hybrid of Bayesian view of risk and accompanying psychological distress constitutes a welfare setback); Finkelstein, *supra* note 246, at 968; cf. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1651 (2002) (“[W]e assume that exposure to increased risk can be regarded as in and of itself a loss of welfare to the person(s) placed at heightened risk.”); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1814–16 (1985) (suggesting “risk exposure” should be recognized as a new type of injury, but only where physical injury manifests).

271. Finkelstein, *supra* note 246, at 970; accord Porat & Stein, *supra* note 266, at 236 (concluding, without explanation, that risk exposure is a setback to well-being). Finkelstein analogizes the risk of harm to the opportunity to benefit. Finkelstein, *supra* note 246, at 966. Thus, according to her thesis, an individual who had a lottery ticket to a million-dollar jackpot is “better off” than someone who did not have a lottery ticket, regardless of outcome, simply because “the person exposed to a chance of winning has received an opportunity the other person did not have.” *Id.* at 968; cf. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1981) (arguing that the “loss of a chance . . . of avoiding an adverse consequence should be compensable”).

272. Finkelstein, *supra* note 246, at 970–71.

273. *Id.* at 971.

unaware of the risk and now safely at his destination, has in fact suffered an objective decline in baseline welfare. The airline passenger's welfare interest in physical well-being has not suffered any setback. Furthermore, the risk of physical harm has passed because the plane has landed safely. The only possible setback is an ex post decline in emotional well-being.

This example, however, nicely illustrates the reference class problem of risk harm. Objective risk is defined with respect to a certain reference class of similarly situated persons.<sup>274</sup> A reference class can vary with an infinite number of different factors, some of which remain unknown and perhaps unknowable.<sup>275</sup> Moreover, the nature of the sample can also create validity problems. "Statisticians joke about the man with his feet in the oven and his head in the refrigerator: on the average he feels pretty good."<sup>276</sup> Indeed, some assert that "no event is ever identical to an earlier event—or to an event yet to happen. In any case, life is too short for us to assemble the large samples that such analysis requires."<sup>277</sup> Consider again the airline passenger. Here, the reference class could be described as "all airlines passengers who were unaware that their plane had engine trouble midflight before landing safely." But one cannot say that everyone in the reference class suffered a setback to emotional well-being. Some passengers, in fact, may experience joy and relief—a positive impact on emotional well-being—at having avoided the risk of a crash.

Another of Professor Finkelstein's supporting examples further suggests that "risk harm" is not a setback to a physical security interest, but if anything, a potential setback to one's emotional well-being, even if there is no ex ante perception of the risk:

[I]magine that a friend purchases a lottery ticket on your behalf. It seems reasonable to think the friend has benefited you, even if the ticket turns out not to be the winning ticket. Further, it is likely that you would *feel* this way even if you learned of the existence of the ticket only after the lottery had been won and it was determined that the ticket purchased on

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274. Perry, *Risk, Harm, and Responsibility*, *supra* note 246, at 335.

275. *Id.* at 333–36.

276. BERNSTEIN, *supra* note 246, at 74.

277. *Id.* at 221. For a thorough discussion of the reference class problem, see Adler, *supra* note 246, at 1345–65.

your behalf was not the winning one. If the chance of benefit by itself conferred no benefit, it would presumably be out of place to *feel* grateful to the friend who purchased the ticket. Yet we *feel* gratitude and not indifference under these circumstances, whether or not the ticket turns out to be the winning one, and this emotion seems appropriate.<sup>278</sup>

Similarly, other examples, such as exposure to a risk of developing cancer, make sense only if the victim both perceives the risk and feels a psychological setback.<sup>279</sup> Finkelstein asserts that “to be in the class of persons with a higher chance of developing cancer is to be doing substantially less well in life.”<sup>280</sup> Again, as an objective matter, if the person exposed to a higher risk of cancer never gets cancer, then there is no loss in physical well-being. The only setback would be the potential accompanying anxiety or worry caused by the increased risk, emotions which may not be uniformly experienced throughout the reference class.

Thus, while a setback to one’s emotional well-being could constitute harm, it would need to manifest as an actual setback: an actual claim of fear or anxiety. The typical no injury case does not allege any emotional harm accompanying the risk of injury,<sup>281</sup> likely because any alleged emotional setback would pose individual issues, thereby precluding class certification.<sup>282</sup> Still, some courts appear to rely on a potential emotional setback to justify the suit. *Manning*, for example, justified its temporal exception by reference to a hypothetical purchaser’s fear that using the data compression feature would cause data loss.<sup>283</sup> But the plaintiffs in *Manning* disclaimed consequential emotional damages, and instead sought relief based on the risk of data loss itself.<sup>284</sup> Thus, if risk-exposure alone constitutes a setback to one’s physical security interest, it must exist separate from any emotional setback caused by the risk-exposure.<sup>285</sup> But it does not.

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278. Finkelstein, *supra* note 246, at 968 (emphasis added).

279. *Id.* at 973.

280. *Id.*

281. *See supra* Parts II & III.

282. *See supra* note 52 (discussing requirements for class certification).

283. *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 609 (Tex. App. 1995); *see also* note 178.

284. *Manning*, 914 S.W.2d at 606.

285. For a discussion of how agencies should value fear separate from any physical harm or risk of physical harm, see Matthew D. Adler, *Fear Assessment:*

Apart from physical and emotional security interests, individuals also have an interest in holding property.<sup>286</sup> Several of the cases, such as *Cole* and the Toyota Multidistrict Litigation,<sup>287</sup> appear to reflect a concern with this property interest. Here, the question becomes whether the diminished value of a resalable good, based upon a yet unrealized risk of malfunction, constitutes harm. In other words, does the risk of product malfunction set back one's property interest? Assume Craig is trying to sell his home. Craig receives an offer from Sharon to purchase the home for \$100,000. Unfortunately for Craig, the inspection reveals that the pipe valves used in Craig's house have a 0.1% failure rate. Craig's pipe valves show no sign of failure, and the inspector cannot say when, if ever, Craig's pipes might fail. Rather, the inspector concludes that a possibility exists that the valve might fail at some point in the next fifty years. Still, Sharon lowers the offer price to \$80,000, based on the risk that the pipes might fail. Craig accepts the lower offer and sells his house for \$80,000. Has Craig suffered a harm? Instinctually, the answer appears to be "yes." The risk that the pipes might fail, has, in fact, manifested in harm to Craig. The manifest harm, however, is not the unrealized risk of a leaky pipe but the realized lower resale price.

But the theoretical future possibility of lost resale value, based on an unrealized risk of malfunction, is not a setback to one's property interest. In *Briehl v. General Motors Corp.*,<sup>288</sup> for example, SUV owners brought a variety of claims based on an alleged defect in the vehicle's braking system, though the plaintiffs did not allege that the defect had manifested in their vehicles.<sup>289</sup> The plaintiffs sought damages for lost resale value of the SUVs.<sup>290</sup> The court concluded that the plaintiffs had not suffered any harm, reasoning that the plaintiffs failed to allege

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*Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT. L. REV. 977 (2004).

286. E.g., FINNIS, *supra* note 249, at 83; NUSSBAUM, *supra* note 249, at 80; see also FEINBERG, *supra* note 248, at 37 (positing welfare interest in "financial security").

287. See *supra* text accompanying notes 84-93; see also *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 588 (Ill. 1996) (seeking diminished resale value of vehicle "due to the perceived safety risk").

288. 172 F.3d 623 (8th Cir. 1999).

289. *Id.* at 627.

290. *Id.* at 626.

that any class member “ha[d] actually sold a vehicle at a reduced value.”<sup>291</sup> It is rare for plaintiffs to plead realized diminished value in a no injury case likely because diminished value claims for resalable goods cannot be adjudicated in the aggregate. “Resalable” inherently means “used,” which raises individual questions about the product’s age, maintenance, condition, and other possible factors contributing to the lost value, thereby precluding class certification.<sup>292</sup>

In sum, the mere risk of bodily harm or death is not a harm to one’s physical security interests. Although risk of bodily harm could setback an individual’s interest in emotional well-being, this kind of harm is not alleged in no injury cases. Finally, the risk of malfunction alone does not impede one’s property interest, although the realization of the risk into an actual loss in resale value could constitute harm.

### B. Risk Should Not Be Cognizable Harm

At most, the risk of a product malfunction could set back an individual’s property interest in the resale value of a resalable good. Even here, however, a diminished value claim is still premised on risk—the as yet unrealized risk of the product’s

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291. *Id.* at 628–29; *accord* Thiedemann v. Mercedes-Benz USA, L.L.C., 872 A.2d 783, 795 (N.J. 2005) (noting plaintiffs “made no attempt to sell their vehicle”); Ziegelmann v. DaimlerChrysler Corp., 649 N.W.2d 556, 565 (N.D. 2002) (rejecting no injury claim where the plaintiff did not allege he sold vehicle at a diminished value); *see also* Carey v. Select Comfort Corp., No. 27CV 04-015451, 2006 WL 871619, at \*3–4 (D. Minn. Jan. 30, 2006) (rejecting damages based on inflated purchase price and diminished value where product had not failed). Apart from an actual resale of the good, a plaintiff arguably could demonstrate “that the resale market for the specific vehicle had been skewed by the ‘defect.’” *Thiedemann*, 872 A.2d at 795; *accord* *In re* Gen. Motors Type III Door Latch Litig., No. 98 C 5836, MDL 1266, 2001 WL 103434, at \*5 (N.D. Ill. Jan. 31, 2001) (noting evidence could show that “widespread knowledge of the defect decreased its market value”). Still, the plaintiff would have to plead facts plausibly showing the realization of the diminished resale value, not the mere legal conclusion of lost resale value. *Cf.* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009) (dismissing complaint where it failed to plead facts stating a claim for relief).

292. *See* Gen. Motors Corp. v. Garza, 179 S.W.3d 76, 81 (Tex. App. 2005) (reversing class certification based on individual damages issues); *see also* *In re* Gen. Motors Type III Door Latch Litig., 2001 WL 103434, at \*5 (noting “youngest of plaintiff’s vehicles is nearing fifteen years old,” and inferring that “resale value is nil” regardless of alleged defect); Lee v. Gen. Motors Corp., 950 F. Supp. 170, 174 (S.D. Miss. 1996) (dismissing putative class action involving vehicles from five years old to twenty-seven years old).

malfunction.<sup>293</sup> Should this risk be a compensable harm? This idea is not without its supporters. Several noted scholars have urged risk-exposure liability for the creation of public risk under either moral rationales, consequentialist rationales, or both.<sup>294</sup>

Even those who urge risk-liability for public risk have hesitated to allow the theory wide application.<sup>295</sup> Glen Robinson, for example, has noted that the “class of cases for which risk-based

293. See, e.g., *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240 (Wis. 2004) (“Diminished value premised upon a mere possibility of future product failure is too speculative and uncertain to support a fraud claim.”).

294. See, e.g., William M. Landes & Richard A. Posner, *Tort Law as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417 (1984); Porat & Stein, *supra* note 266; see also E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781 (1998); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1029 (1990); King, Jr., *supra* note 271, at 1376–78 (arguing that tort liability should be imposed where the defendant’s conduct reduces the plaintiff’s chance of avoiding physical harm based on deterrence, loss allocation, and fairness principles); Andrew R. Klein, *A Model for Enhanced Risk Recovery in Tort*, 56 WASH. & LEE L. REV. 1173 (1999); Robinson, *supra* note 171, at 789 (“The argument for recognizing risk as a sufficient basis for liability is as strong from corrective justice norms of fairness as from norms of efficiency.”); Rosenberg, *Individual Justice*, *supra* note 171; Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 477–80 (2011) (suggesting approval of risk-exposure liability); Jane Stapleton, *The Gist of Negligence, Part II: The Relationship Between “Damage” and Causation*, 104 L.Q. REV. 389, 407 (1988) (“Observable manifestation of physical changes in the plaintiff’s person or property are not necessary for a claim in negligence.”). *Contra* JENNY STEELE, RISKS AND LEGAL THEORY 60–61 (2004) (noting “[r]isk is not, so far, a form of recoverable damage”); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002) (arguing against public-risk liability).

Admittedly, I draw principally on torts scholarship in this discussion, and a detailed description or analysis of contract theory is beyond the scope of this Article. Broadly speaking, however, the major schools of contract theory reflect the same tension between consequentialism and morality. See, e.g., Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1876 n.1 (2011); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) [hereinafter Oman, *Consent to Retaliation*]; Nathan B. Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1483–84 (2005) (reviewing, STEPHEN A. SMITH, *CONTRACT THEORY* (2004)); see generally STEPHEN A. SMITH, *CONTRACT THEORY* (2004) (summarizing contemporary contract theory); Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 347–66 (2009) (same).

295. Robinson, *supra* note 171, at 796–97. Robinson largely justifies risk-creation liability based on the problems presented by long latency periods. *Id.* at 784; accord Rosenberg, *supra* note 266, at 342; cf. Elliott, *supra* note 171, at 801 (suggesting identification of exposure, not latency, poses the biggest challenge to the creation of a compensation system for toxic harms).

liability would be a useful concept is a limited one.”<sup>296</sup> Indeed, as an example of where risk-liability should *not* be applied, Robinson gives an example that echoes the current Toyota litigation:

So too in the simple product liability case it would be odd, for example, to allow the owner of a defective automobile to bring suit for the risk that it might cause him injury. It is sufficient to permit the owner to bring action for the cost of repairing the defect or replacing the automobile with a safer one.<sup>297</sup>

Within the literature on risk-liability, few have distinguished between public and private risk.<sup>298</sup> This distinction is key. Public risk includes manmade “threats to human health or safety that are centrally or mass-produced, broadly distributed, and largely outside the individual risk bearer’s direct understanding and control.”<sup>299</sup> By contrast, “private risks” are produced discretely with local impact and are generally subject to personal control.<sup>300</sup> Thus, “the hazards of commonplace artifacts like automobiles and wood stoves are manmade private risks.”<sup>301</sup>

Whatever the merit of using private law to regulate public risk, the question here is whether to recognize risk-liability for private risk, such as defective cars. Neither consequentialist theories nor morality-based theories support recognizing risk-liability for private risk.

### 1. Consequentialist Theories

One branch of modern tort theory focuses on the function of the tort system to implement certain goals, such as compensating

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296. Robinson, *supra* note 171, at 796–97.

297. *Id.* at 797.

298. Of course, as Peter Huber notes, risk exists along a continuum. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 278 n.4 (1985). At the most public end of the spectrum exists risks of climate change and nuclear meltdown. *Id.* At the private end of the scale are risks of obesity. *Id.*

299. *Id.* at 277.

300. *Id.* at 278. In terms of control, private risks can be weighed and evaluated by the individual. *Id.* at 278 n.2.

301. Gillette & Krier, *supra* note 294, at 1029. To be sure, Huber points out that “[p]rivately-owned factories” can create public risks. Huber, *supra* note 298, at 278 n.3.

victims or preventing future accidents.<sup>302</sup> Thus, tort law is a means of shifting a loss to the cheapest cost avoider,<sup>303</sup> or a means of deterring wrongful behavior.<sup>304</sup> Under an economic-deterrence theory, the fundamental goal of the tort system is to deter the risk of physical harm in an efficient manner.<sup>305</sup> Similar efficiency and deterrence themes can be found in contract theory.<sup>306</sup>

At first blush, deterrence theory seems to embrace risk-creation liability.<sup>307</sup> After all, the focus of deterrence theory is on the avoidance of unreasonable risks, not just the avoidance of resulting injury. Imposing liability for risk-creation arguably would promote deterrence by fully internalizing the risk of harm on the defendant, and thus creating an incentive for the defendant to reduce the risk by taking efficient precautions. Similarly, with respect to resalable goods, compensation goals<sup>308</sup> arguably appear satisfied because risk-liability remedies the lost resale value of the product.<sup>309</sup>

From a deterrence and compensation perspective, risk-based liability would be redundant at best, and create over-deterrence at worst. Liability for resulting harms already creates sufficient

302. *E.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (4th prtg. 1975) (contending that “the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents”); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (arguing that “the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation”).

303. *See* CALABRESI, *supra* note 302, at 240–50.

304. *See* LANDES & POSNER, *supra* note 302, at 57–58.

305. *See* George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 21 (1987) (“[L]iability should be placed on the party that could have prevented the accident most effectively in order to create incentives to take such actions in the future.”).

306. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1 (7th ed. 2007).

307. *See* Rosenberg, *Individual Justice*, *supra* note 171, at 233–36 (arguing deterrence rationales support risk-based liability); *see also* Geistfeld, *supra* note 250, at 1946 (justifying risk-liability in order to ensure manufacturer is responsible for all resulting physical harms).

308. It is, of course, possible to view compensation as a separate goal of the tort system. *See, e.g.*, Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 138 (1999). *But see* Goldberg & Zipursky, *supra* note 270, at 1646–47 (criticizing compensation rationale). For this Article, it does not matter whether compensation stands as a distinct goal or one subsumed within utilitarian theory.

309. Rosenberg, *Individual Justice*, *supra* note 171, at 236 n.67.

incentives for manufacturers to take reasonable precautions to prevent accidents. Toyota, for example, faces millions of dollars of liability in personal injury suits.<sup>310</sup> Accordingly, risk-liability does not add any deterrence value to the tort system unless one assumes that the current structure systematically under-deters.<sup>311</sup> Indeed, in one of the few opinions to analyze the theoretical justifications for permitting a no injury suit, Judge Easterbrook noted that “[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.”<sup>312</sup> Judge Easterbrook further explained that allowing risk-exposure claims, even those involving claims of diminished value, both over-deterred and over-compensated:

Defendant sells 1,000 widgets for \$10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of \$50,000, then the group will experience 10 failures, and the injured buyers will be entitled to \$500,000 in tort damages. . . . Suppose . . . that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only \$9,500 per widget—for the expected per-widget cost of injury is \$500, and each buyer could have used the difference in price to purchase insurance (or to self-insure, bearing the risk in exchange for the lower price). On this theory the 990 uninjured buyers would collect a total of \$495,000. The manufacturer’s full outlay of \$995,000 (\$500,000 to the 10 injured buyers + \$495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product’s defect. This would both overcompensate

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310. See *supra* notes 4 & 19.

311. See, e.g., Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) (arguing tort claims are underlitigated). In a recent article, Jonathan Cardi has challenged the empirical foundation of the economic-deterrence rationale. W. Jonathan Cardi, Randy Penfield & Albert Yoon, *Does Tort Law Deter?* (Wake Forest Univ., Legal Studies Paper No. 1851383, 2011), available at <http://ssrn.com/abstract=1851383>. In this study, Cardi and his co-authors found that the threat of tort liability did not have a statistically significant effect on the participants’ willingness to engage in risky conduct. *Id.* at 21.

312. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects.<sup>313</sup>

As Judge Easterbrook's widget example illustrates, allowing present recovery for risk exposure presents a windfall to the plaintiff.<sup>314</sup>

Conversely, risk-exposure liability also creates under-compensation problems. If the future harm does materialize, the risk-exposure damages would be insufficient to compensate the plaintiff for actual losses: "Thus, a \$10 ex ante restitution for a ten percent chance of \$100 worth of damage, means the potential victim is undercompensated by \$90 ten percent of the time and overcompensated \$10 ninety percent of the time."<sup>315</sup> Moreover, risk-exposure liability creates the possibility that those injured will not be compensated because imposing risk-exposure liability reduces the funds available to compensate those actually injured.

This, in turn, creates an adverse selection problem. Victims who develop an illness would prefer to wait and seek full compensation from the defendant. But whether the risk will materialize is not known ex ante. The plaintiffs would face a choice between immediate probabilistic compensation for the risk-exposure, or later full compensation for the materialized harm:

If many victims choose to recover the immediate probability-based compensation, the defendant's funds may shrink to a degree that will deny compensation to wait-and-seers. Every victim would anticipate this contingency. The victims, however, would not be able to coordinate their suits because the required coordination is too costly to establish and enforce. Absence of coordination and the diluted-fund prospect would prompt all victims to opt for the instant probability-based recovery.<sup>316</sup>

Consider again the hypothetical sudden acceleration case: An alleged sudden acceleration defect in a vehicle imposes a

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313. *Id.* at 1017 n.1.

314. Some have argued that this windfall is better than allowing a windfall to the wrongful risk-creator who escapes liability for risk that does not materialize into harm. *E.g.*, Robinson, *supra* note 171, at 786.

315. Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193, 206 (1977).

316. Porat & Stein, *supra* note 266, at 223.

one-in-one-million probability of a fatal accident,<sup>317</sup> and the potential harm is catastrophic, \$10 million.<sup>318</sup> Assume one million consumers own this vehicle. Under a risk-liability theory, every vehicle owner would receive \$10 for the risk harm.<sup>319</sup> Assume further that not every consumer seeks risk-liability damages. One victim chooses to wait and see if the risk develops and seek damages-based compensation. This wait-and-see victim subsequently recovers the full \$10 million, which now is in addition to the \$9,999,990 in risk-liability damages already paid to the other consumers.<sup>320</sup> Ariel Porat and Alex Stein, for example, acknowledge this problem but are unable to find a solution within the tort system.<sup>321</sup> Consequently, risk-liability would exist concurrently with damages liability and would produce excessive deterrence.<sup>322</sup>

Moreover, any outcome-loss claim could be recast as a risk-liability claim. Thus, a claimant could recover 100% of his loss if he could show that the defendant's negligence caused the adverse outcome. Absent such a showing, he also has the prospect

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317. See *supra* note 38 (discussing risk of Toyota sudden acceleration fatality).

318. See *supra* note 19 (noting Toyota settlement of fatal accident).

319. Recognizing this problem, some deterrence theorists have argued that small risks of future harm should not be actionable. Porat & Stein, *supra* note 266, at 238. Porat and Stein illustrate this limit with the following example:

Consider a polluter who exposes 1,000,000 residents to a small risk of a serious illness. Damage associated with that illness equals \$1,000,000 and its probability is 1:100,000 for each resident. That means that 10 out of 1,000,000 residents would suffer significant injury at some point in the future. For obvious reasons, allowing each of 1,000,000 residents to sue the polluter for his or her expected harm in the amount of \$10 makes no sense. *Small risks of future illness should not be actionable.*

*Id.* at 237–38. This proposal only creates further problems of distinguishing the threshold for “small inactionable” risk.

320. Porat and Stein's solution is to create an insurance market to allow wrongdoers to insure against the risk of damages-based liability. *Id.* at 235 (manuscript at 15).

321. *Id.* at 238. Like Schroeder, Porat and Stein propose an administrative fund remedy. *Id.*; Schroeder, *supra* note 266, at 473–77. Porat and Stein also suggest a limited fund class action as a solution. Porat & Stein, *supra* note 266, at 238. This idea, however, would appear foreclosed by *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (holding that amounts placed in limited fund class actions under Rule 23(b)(1)(B) can only be determined based on a defendant's limited assets, and not by an agreement between the parties).

322. Robinson, *supra* note 171, at 787–88 (suggesting risk-liability exist along with harm-liability).

of lesser recovery for the risk-liability. In short, as Baroness Hale of Richmond recognized in a House of Lords opinion, “the claimant would almost always get something. It would be a ‘heads you lose everything, tails I win something’ situation.”<sup>323</sup>

A sometimes separate goal considers loss-spreading as central to the tort system. Arguably, “[a] regime that imposes liability for bare risk would introduce a substantial saving in the risk-spreading costs since it spreads the accident risks directly.”<sup>324</sup> In truth, no loss spreading occurs because manufacturers would incorporate these additional costs in the purchase price. In a typical personal injury case, the damages of an injured plaintiff are incorporated in the price of the product and spread over all purchasers. Thus, a small loss is spread over a large group, resulting in a lower price-increase per purchaser. But, using Judge Easterbrook’s widget example, each purchaser ultimately would fund his own risk-exposure recovery (plus the costs of litigation) by paying a higher price for the widget in the first instance.<sup>325</sup> “Because no loss-spreading occurs, the money flows in a circle, from each [purchaser] (in the form of a higher price) to the company back to the same [purchaser] . . . with a substantial portion of the higher price skimmed off for attorneys’ fees.”<sup>326</sup> Every consumer becomes both payee and payor:

Essentially, where the risk itself is a virtual certainty for every insured—as is true under the regime of risk-based tort claims—then everyone in the risk pool becomes a self-insurer, whose contributions, as accumulated by the defendant through higher prices . . . amount merely to a state-mandated savings account. Instead of spreading a concentrated loss over a large group of those at risk of suffering the loss, each plaintiff pays the full cost of compensating the loss—plus the defendant’s costs of litigation—in higher product prices . . . . Because no loss-spreading occurs, the money simply “flows in a circle” from the plaintiff-insured

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323. *Gregg v. Scott*, [2005] UKLH 2, [2005] 2 A.C. 176 (H.L.) [224] (appeal taken from Eng.) (opinion of Baroness Hale of Richmond).

324. PORAT & STEIN, *supra* note 51, at 108.

325. See *Willett v. Baxter Int’l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991) (discussing overcompensation that could result from allowing recovery for fear of risk).

326. *Id.*

to the defendant and back to the plaintiff-insured; when the plaintiff-insureds receive their money back from the tort system, however, it has been substantially reduced by their attorneys' contingency fees and by other litigation costs.<sup>327</sup>

Every purchaser of an allegedly defective product would have a claim for risk-exposure and the plaintiffs essentially would pay the price of their own remedy. In *Frank v. DaimlerChrysler Corp.*,<sup>328</sup> the court expressed alarm at the potential economic effect these risk-exposure suits could have on the market:

Plaintiffs' argument, basically, is that as an accident becomes foreseeably possible, upon the occurrence of certain contingencies, due to a design aspect of a product, the manufacturer must retrofit the product or otherwise make the consumer whole. However, under such a schematic, as soon as it can be demonstrated, or alleged, that a better design exists, a suit can be brought to force the manufacturer to upgrade the product or pay an amount to every purchaser equal to the alteration cost. Such "no injury" or "peace of mind" actions would undoubtedly have a profound effect on the marketplace, as they would increase the cost of manufacturing, and therefore the price of everyday goods to compensate those consumers who claim to have a better design, or a fear certain products might fail.<sup>329</sup>

Accordingly, risk-exposure liability fails to satisfy a loss spreading goal.<sup>330</sup> Indeed, a few courts have recognized that the ultimate costs to consumers posed by these risk-liability suits are "too great."<sup>331</sup>

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327. Rosenberg, *Individual Justice*, *supra* note 171, at 228.

328. 741 N.Y.S.2d 9 (N.Y. App. Div. 2002).

329. *Id.* at 16-17.

330. See Rosenberg, *Individual Justice*, *supra* note 171, at 228.

331. *E.g.*, *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 174 (S.D. Miss. 1996). In *Lee*, the court concluded that the social costs of these no-injury suits outweighed any benefit:

Not every unfortunate incident that occurs in life, not every discomfort, not every unsatisfactory commercial transaction, not every disagreement among people and/or corporations, gives rise to a cause of action. Society cannot afford for the judiciary to permit a cause of action for every disagreement that occurs between citizens of our nation. To do so would result in a society entirely too litigious. We are approaching the saturation point. If Courts were to allow cases such as this to go forward, the costs of doing business would be so burdensome and so expensive that suppliers, manufacturers, and most consumers would suffer greatly.

Finally, pragmatic concerns counsel against risk-exposure liability. First, an injured plaintiff has a greater incentive to sue. Second, realization of the risk lowers information costs.<sup>332</sup> Lack of information about the resulting harm may make it difficult to determine whether the defendant's conduct was careless. In the Toyota litigation, for example, a New York jury found that the vehicle's design was not defective; rather, the collision was the result of driver error.<sup>333</sup> Likewise, informational problems persist with assessing damages.<sup>334</sup>

## 2. *Individual Justice Theories*

Even ardent public-law theorists such as David Rosenberg admit that corrective justice does not support risk-liability.<sup>335</sup> Broadly speaking, corrective justice focuses on the correction of certain losses or wrongs created by an individual's action.<sup>336</sup> Under a traditional view of corrective justice, such as that espoused by Ernest Weinrib, tort liability depends on the tortious infliction of harm.<sup>337</sup> "The doing and the suffering of harm constitute a single unbroken process. . . . A doing that results in no suffering . . . fall[s] beyond the concern of tort law."<sup>338</sup> As Jules

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*Id.* at 175.

332. See Goldberg & Zipursky, *supra* note 270, at 1653.

333. See *supra* note 28 and accompanying text.

334. E.g., Wittman, *supra* note 315, at 206.

335. Rosenberg, *Individual Justice*, *supra* note 171, at 224–33.

336. Admittedly, this broad description of corrective justice theory does not capture the multiple variations of corrective justice different theorists advocate, as corrective justice scholars have disagreed, seemingly from the beginning, on the appropriate frame of reference. See Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–11 (1997). As Richard Wright has noted, corrective justice provides a rationale not only for tort law but also contract law. Richard W. Wright, *Right, Justice and Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 176 n.47 (David G. Owen ed., 1995); see also Gold, *supra* note 294, at 1876 n.1.

337. E.g., Ernest J. Weinrib, *Toward A Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 46–49 (1983); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) [hereinafter Weinrib, *Understanding Tort Law*]. But see Handfield & Pisciotta, *supra* note 257; McCarthy, *supra* note 254; Robinson, *supra* note 171, at 790–91 (criticizing Weinrib's views).

338. Weinrib, *Understanding Tort Law*, *supra* note 337, at 512; accord Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583, 588 (1993) ("The doing of harm is normatively significant only because of the suffering that is correlative to it").

Coleman has explained, the crux of corrective justice focuses on the repair of the “wrongful consequences” of one’s acts.<sup>339</sup> Thus, under corrective justice principles, the suffering of a loss is a central feature of tort law. The consequences of the wrong, not simply the wrong itself, create the duty to repair. Corrective justice, therefore, does not support liability for risk.<sup>340</sup>

As one court recognized, there is no injustice to correct where the plaintiff is exposed to risk, but no injury materializes.<sup>341</sup> Consider two vehicles by different manufacturers, both with a risk of sudden unintended acceleration. Mary’s Toyota experiences SUA and crashes; she can recover from Toyota under both tort and warranty theories. Bill’s Audi has the same defect, but his car never experiences SUA. As a matter of corrective justice, Audi does not have to compensate Bill because there is no wrongful consequence to repair.<sup>342</sup> Where a wrongfully created risk does not materialize into harm, there is no wrongful loss to correct.<sup>343</sup> “Probabilistic measures of harm are excluded virtually by definition.”<sup>344</sup>

Similarly, risk-exposure is not cognizable under civil recourse theory.<sup>345</sup> Civil recourse theory generally focuses on

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339. JULES L. COLEMAN, *RISKS AND WRONGS* 323 (1992).

340. PORAT & STEIN, *supra* note 51, at 101–29.

341. *Harrison v. Leviton Mfg. Co.*, No. 05-CV-0491-CVE-FHM, 2006 WL 2990524, at \*7 (N.D. Okla. Oct. 19, 2006) (“Without an accompanying injury, there is no injustice.”).

342. *See* COLEMAN, *supra* note 339, at 321–23.

343. *E.g.*, Weinrib, *Understanding Tort Law*, *supra* note 337, at 494. Porat and Stein take a less demanding view of corrective justice. PORAT & STEIN, *supra* note 51, at 106. Their view decouples the payment of damages by the wrongdoer from the victim’s harm: “In our opinion, corrective justice would be maintained when the wrongdoer is made liable for the damage he inflicted; the victim is compensated for the wrongful damage she suffered; and the wrongdoer participates in financing the mechanism that facilitates compensation for his victim.” *Id.* Even here, however, risk-creation does not warrant compensation; rather, a victim is compensated only for the “actual infliction of damage.” *Id.* at 106–107.

344. Robinson, *supra* note 171, at 791.

345. For a basic overview of civil recourse theory, see John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010). In a sentence, Goldberg and Zipursky’s theory provides that “a plaintiff in a tort case has a right of action only because the defendant has committed a legal wrong against the plaintiff, that is, only if the plaintiff has suffered a wrong at the hands of the defendant.” Goldberg & Zipursky, *supra* note 270, at 1643; *see also* Oman, *Consent to Retaliation*, *supra* note 294 (applying civil recourse theory to contract law). For a

whether a wrong has been realized.<sup>346</sup> It is the realization of the wrong that entitles the plaintiff to seek recourse from the defendant.<sup>347</sup> A realized wrong is one where “the defendant’s potentially injurious conduct has in fact ripened into an injury.”<sup>348</sup> Thus, risk-liability does not comport with civil recourse theory.

A few justice theorists contend that morality-based rationales support risk-exposure liability.<sup>349</sup> Christopher Schroeder, for example, has argued that risk-creation should be compensable as a matter of corrective justice.<sup>350</sup> Schroeder does not limit risk-exposure liability to public risks but argues that risk-exposure liability should apply to garden variety negligence such as poor driving.<sup>351</sup> Schroeder’s concern is the uncertainty posed by causation requirements—in other words, the “bad luck” problem.<sup>352</sup> A defendant does not know, *ex ante*, the specific causal chain that may connect his actions with a victim’s harm; thus, the defendant might act wrongfully—drive carelessly past a playground—but, with luck, injure no one. Schroeder’s corrective justice approach requires that an individual be able *ex ante* to control and predict whether her actions will subject her to liability.<sup>353</sup> Consider again the SUA incidents. Mary’s Toyota experiences sudden acceleration and crashes; she can recover from

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colorful yet thorough critique of civil recourse theory, including the “Ten Things I Hate About Civil Recourse Theory,” see Rustad, *supra* note 294.

346. Goldberg & Zipursky, *supra* note 270, at 1638 (explaining civil recourse theory).

347. *Id.* at 1644.

348. *Id.* at 1639.

349. Elliott, *supra* note 294, at 789 (arguing “violation of a person’s bodily autonomy, the affront to one’s dignity that occurs when one is assaulted with a potentially hazardous chemical, is also an injury that the law should recognize and compensate”); see also Schroeder, *supra* note 266; Schroeder, *Risks and Tort Law*, *supra* note 256.

350. Schroeder, *supra* note 266; Schroeder, *supra* note 250; see also Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113 (1990) (responding to Schroeder). Simons argues that Schroeder’s argument should be cast as “noninstrumental,” as opposed to “corrective justice.” *Id.* at 127–28.

351. Schroeder, *supra* note 266, at 440. Schroeder provides the following illustration: “A motorist, in a hurry to get from her house to an engagement in the neighboring town, enters the connecting freeway and speeds up to ten miles per hour over the posted speed limit. She arrives at her destination safely, only a few minutes late.” *Id.*

352. *Id.* at 464–65.

353. Schroeder, *supra* note 250, at 154.

Toyota. Bill's Audi has the same defect, but his car never experiences SUA and so Audi is not liable. Basing tort liability on the result depends on circumstances beyond the wrongdoer's control: whether the car experiences SUA and crashes. Thus, Audi, a lucky wrongdoer whose actions fortuitously do not cause harm, escapes liability.<sup>354</sup> Arguably, imposing risk-exposure liability eliminates the element of "luck" or chance in the tort system.<sup>355</sup>

Luck does play a role within the tort system, but that role is not arbitrary.<sup>356</sup> All activity carries a certain level of background risk. The insistence on harm creates room for free action. Actors are free to engage in risky activity up to the point that they cause someone harm.<sup>357</sup> If the risk materializes into harm, it may be considered "bad luck," but it is the actor's bad luck: "[T]hose who have a fair chance to avoid liability are not treated arbitrarily if they are held liable even if they might have had better luck. It is luck all right, but it is *their* bad luck, and as responsible agents, they must accept its consequences . . ."<sup>358</sup> "Those who impose additional risks can be thought of as owning the risks. If those risks ripen into injuries, they own the injuries, and the payment of damages serves to return those inju-

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354. PORAT & STEIN, *supra* note 51, at 104.

355. Schroeder, *supra* note 266, at 465–66. To solve this problem, Schroeder must divorce his concept from the traditional bipolar litigation system. *Id.* at 467–70. Schroeder explicitly rejects the bilateral vision of corrective justice espoused by Weinrib, Wright, and others. *Id.* at 470–71; *cf.* Weinrib, *Understanding Tort Law*, *supra* note 337, at 494 (concluding "bipolar procedure that links plaintiff and defendant" is central to tort law); Wright, *supra* note 336, at 177 ("Corrective justice claims are bilateral."). Instead, Schroeder contemplates an administrative system that collects risk premiums equivalent to expected harm from risk-creators, and then compensates wrongfully injured victims from the fund. Schroeder, *supra* note 266, at 467–68. Notably, Schroeder does not compensate for mere risk-exposure. *Id.*; *see also* McCarthy, *supra* note 254, at 66–74 (proposing compensation for risk only where risk results in harm, but simultaneously proposing compensation for risk-creation alone would be justified in some circumstances); Schroeder, *supra* note 250, at 159–60 (considering possibility of system for compensating for risk-exposure).

356. RIPSTEIN, *supra* note 250, at 72–84.

357. Luck cuts both ways: "[I]f the defendant is lucky and does not cause damage, then potential victims are lucky too and do not suffer any. From this point of view, to create liability for the unintentional, even wrongful, creation of risks would be to create more misfortunes." STEELE, *supra* note 294, at 116 (describing Ripstein's approach to risk).

358. RIPSTEIN, *supra* note 250, at 84.

ries to their rightful owners.”<sup>359</sup> Consequences are thus necessary to evaluate the morality of the event.<sup>360</sup>

Indeed, the central feature of consequences distinguishes tort law from criminal law.<sup>361</sup> In criminal law, conduct does not have to cause harm to be punishable.<sup>362</sup> A person who shoots but misses the victim is as morally culpable as one who succeeds. Thus, unlike tort law, “[a]ttempt liability expresses the idea that those who choose to do wrong open themselves to the consequences of chance.”<sup>363</sup> Likewise, the crime of reckless endangerment punishes an individual for reckless conduct “which places or may place another person in danger of death or serious bodily harm.”<sup>364</sup> Excepting the role of punitive damages, the goal of the private law is not to punish risk-creators; it is to compensate the victim.<sup>365</sup> So although there may be a retributivist sense that the lucky and unlucky wrongdoer should

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359. *Id.* at 46–47. As Jenny Steele notes, Ripstein fails to ground his ownership rationale in an underlying theory of agency, unlike Tony Honoré. STEELE, *supra* note 294, at 104–05; *see also id.* at 87–89 (describing Honoré’s justifications for outcome responsibility).

360. *See generally* G.E. MOORE, ETHICS (1912) (maintaining that whether an action is morally right or wrong depends on its actual consequences); THOMAS NAGEL, MORTAL QUESTIONS 24–34 (1979) (examining morality’s dependence on results of one’s actions).

361. Goldberg & Zipursky, *supra* note 270, at 1637 (noting “[c]riminal law sometimes prohibits and punishes genuinely inchoate wrongs—uncompleted wrongful acts. Tort law does not”); *see also* *Gregg v. Scott*, [2005] UKHL 2, [2005] 2 A.C. 176 (H.L.) [217] (appeal taken from Eng.) (opinion of Baroness Hale of Richmond) (“Tort law is not criminal law. The criminal law is there to punish and deter those who do not behave as they should. Tort law is there to compensate those who have been wronged.”).

362. This is not to say that consequences are irrelevant to criminal law. Completed crimes generally are punished more severely than attempted crimes. *E.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 388 (5th ed. 2009); WAYNE R. LAFAVE, CRIMINAL LAW 646 (5th ed. 2010). Likewise, the felony murder rule reflects a concern with consequences. LAFAVE, *supra*, at 785–88 (discussing origins of felony murder rule). The point is that, unlike tort and warranty, harm (or loss) is not a prerequisite for criminal liability.

363. RIPSTEIN, *supra* note 250, at 137.

364. MODEL PENAL CODE § 211.2 (1985).

365. *Cf.* PORAT & STEIN, *supra* note 51, at 110 (suggesting compensatory damages serve as “proxy for reprehensibility”); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 390 (David G. Owen ed., 1995) (noting retributive justice has some role in assessing tort liability).

be treated the same,<sup>366</sup> it is the victim's loss that tort and warranty law seek to rectify, "not the defendant's wrong."<sup>367</sup> As Kenneth Abraham succinctly stated:

Without an actual-harm requirement, the plaintiff is a mere member of the public toward whom the defendant behaved improperly, and the imposition of liability on the defendant—however measured—begins to resemble criminal punishment for wrongdoing to the public at large rather than the rectification of a wrong to a particular individual.<sup>368</sup>

Excepting Judge Easterbrook's,<sup>369</sup> judicial opinions reveal little consideration of the theoretical concerns underlying risk-liability. Still, most courts instinctively have recognized that neither consequentialist nor justice-based rationales support expanding liability to risk-exposure claims. Those few jurisdictions allowing these claims appear to have adopted a consequentialist approach focused on deterring unreasonable risks. But, as explained, deterrence theory does not justify risk-creation liability. A theoretically sound approach, one that is true to doctrinal and theoretical principles, rejects these suits.

#### CONCLUSION

Courts allowing risk-exposure claims have erred in one of two ways. First, these courts may have misunderstood the distinction between risk and harm. Risk is not harm. As the Supreme Court

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366. See Porat & Stein, *supra* note 266, at 227 (noting retributivist appeal of risk-liability).

367. Waldron, *supra* note 365, at 406; see also RIPSTEIN, *supra* note 250, at 133–71 (discussing distinction between tort and crime). Some commentators view Schroeder's theories as reflecting retributive justice principles. See, e.g., PORAT & STEIN, *supra* note 51, at 106; Simons, *supra* note 350, at 121. But see Schroeder, *supra* note 250, at 153–54 (disclaiming retributive justice notions). Even so, risk-creation liability is not consistent with retributive justice principles. Cf. PORAT & STEIN, *supra* note 51, at 105, 110; Schroeder, *supra* note 250, at 152. As Porat and Stein explain, "there is no necessary relationship between the magnitude of the risk created by a wrongdoer and his moral blameworthiness." PORAT & STEIN, *supra* note 51, at 105. But see Finkelstein, *supra* note 246, at 988 (arguing that criminal law is not based on moral blameworthiness, but rather harm creation and therefore shares with tort law a concern for risk harm).

368. Abraham, *supra* note 51, at 177.

369. See *supra* text accompanying notes 310–11.

has recognized, risk is everywhere.<sup>370</sup> It is in the cars we drive. It is in the food we eat. It is in lipstick and tires, heart valves and prescription drugs. Creation of risk is unavoidable. We habitually create risks to others every day. But we are not harmed by mere risk-creation. Second, these decisions may be viewed as abandoning a harm requirement for private law tort or warranty claims. Allowing liability for private risk-exposure is not justified by any of the dominant rationales for the tort or warranty law. This is not to say that private-risk exposure is of no concern to society. But the solution to encouraging risk reduction by manufacturers, without exposing companies to bankrupting liability, lies with government regulation. As one court noted, “[t]he only persons that would benefit by permitting cases such as this to go forward would be the lawyers handling the case and perhaps the few consumers directly involved in the litigation.”<sup>371</sup> These claims for private risk-exposure are best addressed through the administrative process.

In short, should consumers be allowed to sue for the alleged diminished value of a product that *might* malfunction? The answer is no.

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370. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983).

371. *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 175 (S.D. Miss. 1996). The court further questioned whether even the plaintiffs involved in the litigation would benefit, noting “[i]t might well be that the increased cost of doing business would cost even those consumers directly involved in the litigation more than they could recover from such litigation.” *Id.*