ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SARATOGA FISHING COMPANY, Petitioner v. J. M. MARTINAC & COMPANY AND MARCO SEATTLE, INC.

CASE NO: 95-1764

PLACE: Washington, D.C.

DATE: Tuesday, February 18, 1997

PAGES: 1-50

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

FEB 25 1997

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'97 FEB 25 P12:21

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - X

3 SARATOGA FISHING COMPANY, :

4 Petitioner :

5 v. : No. 95-1764

6 J. M. MARTINAC & COMPANY AND :

7 MARCO SEATTLE, INC. :

8 - X

9 Washington, D.C.

10 Tuesday, February 18, 1997

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:18 a.m.

14 APPEARANCES:

15 KEITH ZAKARIN, ESQ., San Diego, California; on behalf of

16 the Petitioner.

17 DANIEL B. MACLEOD, ESQ., San Diego, California; on behalf

18 of the Respondents.

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 KEITH ZAKARIN, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 DANIEL B. MACLEOD, ESQ.

7 On behalf of the Respondents 29

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 P R O C E E D I N G S

2 (10:18 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in Number 95-1764, Saratoga Fishing Company v. J. M.

5 Martinac & Company.

6 Mr. Zakarin.

7 ORAL ARGUMENT OF KEITH ZAKARIN

8 ON BEHALF OF THE PETITIONER

9 MR. ZAKARIN: Mr. Chief Justice, may it please

10 the Court:

11 The task before the Court in this case is to now

12 make explicit what East River requires but necessarily

13 left implicit, a definition of the product itself which is

14 true to the principles of East River and is capable of

15 uniform application by the Federal courts sitting in

16 admiralty.

17 The product itself is the thing sold by the

18 original seller or manufacturer to the original buyer of

19 that thing. If that product self-destructs, its loss can

20 only be recovered in contract. East River teaches so.

21 Property destroyed by the defect which is not the product

22 itself is recoverable in tort. The Ninth Circuit in its

23 final opinion, the last of three, has damaged that

24 balance, and that balance must now be set aright.

25 QUESTION: Mr. Zakarin, is it not possible in

1 contract suit to recover also damages for property that it
2 is clear would be at risk if the item sold were destroyed?
3 MR. ZAKARIN: Justice O'Connor --
4 QUESTION: I mean, there's some leeway, is there
5 not, under a contract theory?
6 MR. ZAKARIN: Justice O'Connor, that depends, of
7 course, upon the existence both of privity and the scope
8 of the contract at issue. There may or may not be privity
9 and there may or may not be recovery. Nevertheless, the
10 principles which drive the existence of strict liability,
11 the necessity to make manufacturers responsible to produce
12 safe goods put into the stream of commerce, counsel a
13 broader interpretation of recovery.
14 QUESTION: Well, but even in the East River
15 situation where you're dealing with commercial sellers, if
16 you would -- you may not want to concede that, but
17 assuming we're dealing with a commercial seller and a
18 commercial buyer, does East River indicate that a contract
19 recovery, if it were available for these other things,
20 should be applied?
21 MR. ZAKARIN: Ordinarily, the answer is -- the
22 answer is that East River is silent as to the recovery in
23 a particular contract of those items. It may be, under
24 Hadley v. Baxendale and cases in particular State
25 jurisdictions, that a contract could permit broader

1 recovery than for the item itself, governed, of course, by
2 the doctrine of foreseeability.
3 Nevertheless, East River speaks to a limitation
4 and a balance between tort and contract which permit tort
5 recovery for those other items where contract does not
6 permit it.
7 QUESTION: Well, do you think East River meant
8 to not go as far as, say, Hadley v. Baxendale would?
9 MR. ZAKARIN: The standards for recovery of
10 damages are different in tort and in contract, and I do
11 not believe that East River necessarily sets those
12 parameters. East River does say quite correctly that
13 recovery in contract will be governed by foreseeability as
14 to those items governed by contract, the product itself.
15 QUESTION: That's Hadley v. Baxendale, too, is
16 it not?
17 MR. ZAKARIN: Yes, Mr. Chief Justice.
18 QUESTION: That's the rule.
19 MR. ZAKARIN: But that is, of course, the
20 measure of contract recovery and not of tort recovery.
21 Tort recovery is necessarily those things -- those damages
22 proximately caused by the defect. In this case --
23 QUESTION: Which is a more relaxed standard of
24 foreseeability, is it not?
25 MR. ZAKARIN: Yes, Mr. Chief Justice, it is

1 indeed, but that relaxed standard is important in the area
2 of unreasonably dangerous and defective products, since
3 the manufacturer may not always be able to foresee, unlike
4 a contracting party, the scope of damage that its product
5 may cause.
6 QUESTION: Should it matter at all, for purposes
7 of our analysis, that when the ship was sold it was
8 incomplete for the purpose for which it was sold, and
9 which it was understood that everyone was going to use it
10 for, so that the ship was kind of -- in a way, it was sort
11 of a component that really wouldn't be of any use to tuna
12 fishing until it was outfitted with a substantial amount
13 of further equipment. Should that affect our view of the
14 case?
15 MR. ZAKARIN: No, Justice Souter, it should not.
16 The product as it left the Martinac Shipyard with the
17 Marco hydraulic system aboard was a fully complete ship,
18 admittedly not complete for the purpose it had eventually
19 been intended, tuna purse seine fishing, but she was
20 capable of sailing away, and did sail away.
21 Were that distinction of a changing product
22 adopted by the Court, the balance given to us by East
23 River -- that is that the object of the bargain between
24 the original manufacturer and/or seller, as it were, and
25 the original buyer would be disturbed -- the product would

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 change as each went on, and the original focus upon the
2 object of the contract would become diluted over time.
3 QUESTION: Mr. Zakarin, I'm not clear as to
4 whether what East River is saying is that the manufacturer
5 has the opportunity to protect himself against tort
6 liability and, therefore, if he doesn't he should be
7 socked, or rather is saying that the purchaser has an
8 opportunity to protect itself against injury through
9 contract and, therefore, if he doesn't do so the purchaser
10 should not be given the tort recovery.
11 Now, if East River is looking to the purchaser
12 and saying look, the purchaser could have put this in the
13 contract, then logically we ought to look to the second
14 contract and not to the first contract, whereas if East
15 River is looking to the seller, then you're quite correct,
16 we ought to look at the first contract.
17 But why do you say that East River focuses on
18 the seller rather than the purchaser? I mean, each of
19 them can protect themselves. Why shouldn't we say, look,
20 in this last transaction if the purchaser wanted to be
21 able to recover for all of the incidentals besides the
22 tuna, he could have put it in the contract. He didn't do
23 it. Tough luck.
24 MR. ZAKARIN: There are two reasons, Justice
25 Scalia, why that would be the wrong focus. For one thing,

1 East River is not a singular focus upon the ability of the
2 manufacturer, as you correctly point out, to protect
3 itself, but it also looks to, as you also correctly point
4 out, the buyer's ability to negotiate for additional
5 warranties and the like, and that balance is respected in
6 East River.
7 However, if that object of the contract is -- if
8 we look to subsequent sales, the object of that contract
9 becomes ignored. Therefore, looking at the downstream
10 sales and looking at what protections the purchasers in
11 those sales made or didn't make is an unrelated
12 proposition to the balance in East River between the
13 original purchaser and the original buyer.
14 But there's another reason, which is that --
15 QUESTION: Well, excuse me. I'm not sure what
16 point you're making. Are you making the point that the
17 immunity that the manufacturer had acquired for itself by
18 the contract could be undone by a later reseller? Is that
19 the point?
20 MR. ZAKARIN: No, Your Honor. Under the --
21 QUESTION: No?
22 MR. ZAKARIN: Well, that is the point -- that is
23 the point I am making. The original purchase provides an
24 immunity for the product sold. If that immunity is
25 expanded, the expansion of that immunity bears no relation

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 to the original object of the contract and is in effect a
2 windfall for that manufacturer for immunity it never
3 bargained for, never was paid for, and never discussed.
4 But looking beyond that, East River is not a
5 singular focus upon contract but also recognizes the
6 important necessities driving the tort system, which is
7 the place of proper encouragement upon manufacturers to
8 foresee, spread, and control the risk. If --
9 QUESTION: Why not upon purchasers? I mean, you
10 know, they're both in this together, and we're only
11 dealing with situations in which they're -- it's arm's
12 length between people of comparable bargaining power.
13 We're not talking about the purchase of a bottle of pop in
14 the grocery store, right?
15 MR. ZAKARIN: That's true.
16 QUESTION: So I mean, why pick on the
17 manufacturer? They're both grown-ups, and they can both
18 protect themselves.
19 MR. ZAKARIN: The proposed rule that we advance
20 is not inconsistent with the manufacturer being able to
21 protect itself in that instance. By respecting the
22 product, tort immunity for the product itself, that
23 particular balance is respected. However, absurd results
24 would obtain if we focus on continuing purchases down the
25 line.

1 QUESTION: Well, can I ask about the
2 circumstances of this sale? Your client, Saratoga, bought
3 the boat with certain things added after the original sale
4 of the boat from the original purchaser of the boat,
5 Madruga, is that correct?
6 MR. ZAKARIN: Yes, Justice O'Connor.
7 QUESTION: And could Saratoga Fishing have asked
8 for certain warranties at the time it bought from Madruga?
9 MR. ZAKARIN: Of course it could have.
10 QUESTION: And apparently it didn't, and made
11 the sale on an as-is basis.
12 MR. ZAKARIN: That is correct.
13 QUESTION: Are there any implied warranties from
14 Madruga in the case of an as-is basis sale?
15 MR. ZAKARIN: I would believe not. No
16 contractual warranties, it is admitted, were extended,
17 granted, or received by Captain Vargas through Saratoga
18 Fishing Company.
19 QUESTION: Does the record tell us whether
20 Saratoga had insurance for loss of the boat?
21 MR. ZAKARIN: Sara -- there are references to
22 insurance in the record. It is uncontested that Saratoga
23 did have insurance, though the subrogation was not total.
24 It was --
25 QUESTION: So conceivably Saratoga paid a lesser

1 price as a result of not requiring warranties and thought
2 it could do so -- protect itself more cheaply by just
3 getting insurance.
4 MR. ZAKARIN: Of course.
5 QUESTION: Yes.
6 MR. ZAKARIN: The existence -- the existence of
7 an as-is sale in a downstream transaction, which is as-
8 is, where-is, is not hostile to the balance struck in East
9 River of holding manufacturers strictly liable for
10 unreasonably dangerous defects.
11 QUESTION: Well, I thought the East River
12 represented, as has been suggested in other questions this
13 morning, a choice that in the commercial context we will
14 focus on a contract remedy because the commercial buyer is
15 able to protect itself by demanding warranties if it sees
16 fit.
17 MR. ZAKARIN: That is only, Justice O'Connor, if
18 we allow the focus of the bargain to shift with each
19 subsequent sale.
20 East River, again, is not a singular --
21 QUESTION: Well --
22 MR. ZAKARIN: -- focus upon contract, but a
23 balance between contract and tort.
24 QUESTION: What is the first -- suppose you have
25 the first sale, a screw. A defective screw is in the

1 engine, and then the engine goes in the boat, and then the
2 boat is resold, all right. Everybody I think agrees that
3 if it's a defective screw that blows up, and it blows up
4 the engine, that you can't recover in tort for the engine
5 because the it is the engine, right? Is that right?
6 That's the defective product.
7 MR. ZAKARIN: I'm not sure I follow the
8 hypothetical. The screw --
9 QUESTION: Well, suppose you have a screw that's
10 defective, and it's in an engine, and the engine blows up
11 because of the screw.
12 MR. ZAKARIN: And the screw is part of the
13 original engine?
14 QUESTION: That's what I'm getting at. What's
15 original?
16 You see, I mean, what you had was a screw that
17 was sold to an engine-builder that was sold to a
18 shipbuilder that was sold to another captain. You talk
19 about the defective product, and then the downstream
20 things from the defective product. I take it what your
21 opponents are arguing is that this resold ship is the
22 defective product.
23 What I'm looking for -- and the line of the
24 defective product is a contract line. That's what I think
25 people -- I mean, at least I think they're driving at

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 that.

2 So what I want to know is, what's the line?

3 What's the English words that would describe a

4 circumstance so that we all agree that engine in my

5 hypothetical case with the screw is the defective product

6 but your resold ship is not the defective product? What

7 words in English, or what line of law clearly defines

8 those two, making the one the defective product but not

9 the other, because I think you have to find that line in

10 order to win the case.

11 MR. ZAKARIN: I quite agree, Justice Breyer,

12 that the -- in English, the rule would be that the

13 completed product as first placed into the stream of

14 commerce in a commercial sale would be the product --

15 QUESTION: Yes, but why isn't it the screw? The

16 screw entered the scream of -- the screw entered the

17 stream of commerce in the defect -- so that doesn't work,

18 so that would then mean that the engine wouldn't be the

19 defective product, but we all agree it is.

20 MR. ZAKARIN: As I understood your hypothetical,

21 the screws as sold to the first buyer was in an engine

22 contained in a ship which all went in a completed product

23 to the first buyer.

24 QUESTION: The whole ship went to -- the

25 completed product to your present client.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 MR. ZAKARIN: That's the Shipco case out of the
2 Fifth Circuit.
3 QUESTION: That would be the case where the
4 engine manufacturer produces his own screws. I guess that
5 is unusual.
6 I think Justice Breyer was giving you the case
7 where there are screws in the engine, but the engine
8 manufacturer gets the screw from, you know --
9 QUESTION: Yes.
10 QUESTION: -- Screws Unlimited or something, the
11 screw manufacturer.
12 (Laughter.)
13 MR. ZAKARIN: That's right. That's right.
14 That, indeed, is both in microcosm and in gross the East
15 River case and the Shipco case out of the Fifth Circuit.
16 QUESTION: But that is East River, is it not?
17 MR. ZAKARIN: East River --
18 QUESTION: That what caused the damage there was
19 a defective component that East River didn't produce but
20 incorporated in the equipment that was sold.
21 MR. ZAKARIN: That's correct.
22 QUESTION: And aren't the cases pretty much
23 uniform in saying you look at the product that was sold
24 the first time, the whole entity, not at the component
25 parts that may have been produced by someone else?

1 MR. ZAKARIN: Absolutely.

2 QUESTION: At least that's the --

3 MR. ZAKARIN: That's --

4 QUESTION: The normal holding of the courts.

5 MR. ZAKARIN: East River necessarily did not

6 address the case that -- the facts that Shipco later out

7 of the Fifth Circuit did address and answered the question

8 put by Justice Breyer.

9 QUESTION: I understand. My problem -- you see

10 my problem? My problem is, what's the defective product?

11 What's the first time?

12 QUESTION: To put it another way --

13 QUESTION: Yes.

14 QUESTION: -- why is a screw a component part of

15 an engine, but an engine is not a component part of a ship

16 under your theory?

17 QUESTION: Or the first --

18 MR. ZAKARIN: The engine --

19 QUESTION: -- isn't the component part of the

20 improved ship.

21 MR. ZAKARIN: The engine under our theory would

22 most certainly be part of the component ship. The ship as

23 delivered into the stream of commerce with every widget,

24 screw, wire, and fastener aboard, is that product

25 originally placed into the stream of commerce.

1 QUESTION: Fine. Then why isn't what your
2 client bought the defective product?
3 MR. ZAKARIN: Because --
4 QUESTION: Because all that happened was that
5 the -- they simply added a few nets and things, just as
6 the engine manufacturer added some metal to the screw,
7 just as the shipbuilder added some wood to the engine, and
8 then, see, we have a line here that works against you if
9 you're going to look at the contract.
10 MR. ZAKARIN: I respectfully --
11 QUESTION: Yes. Yes.
12 MR. ZAKARIN: -- disagree, Justice Breyer.
13 The -- we have to look at the first commercial sale and
14 what fully completed product was delivered out into that
15 commercial sale.
16 In the Saratoga case, as Justice O'Connor
17 focused us upon, the product was the completed product
18 with all the widgets, screws, and wires that came out of
19 the Martinac Shipyard. That was the object of that
20 original bargain.
21 QUESTION: Is one definition of that whether or
22 not the first user added the equipment, as opposed to a
23 manufacturer adding the equipment? Suppose, for instance,
24 leaving apart Saratoga -- we just have as between Martinac
25 and Madruga -- the manufacturer had designed a special

1 place for the skiff, and he designed a special place for
2 the nets, and then Madruga just sailed it off and put the
3 skiff on and the nets. Would the skiff and the nets then
4 be part of the whole product in the case that I put?
5 MR. ZAKARIN: It would not be. If the skiff and
6 the nets were purchased separately by Madruga --
7 QUESTION: And that's because Madruga is the
8 user, and the user added the parts?
9 MR. ZAKARIN: Quite correct. The --
10 QUESTION: No, but why do you characterize it
11 that way? The first buyer -- is it Madruga or Magruda?
12 MR. ZAKARIN: Madruga.
13 QUESTION: Madruga. The first --
14 MR. ZAKARIN: There was some confusion in the
15 record.
16 QUESTION: Okay. The first buyer in effect went
17 to the manufacturer of the ship and said, I want to buy 90
18 percent of a ship to fish for tuna. I will complete it.
19 I will put in whatever it was, the navigation equipment,
20 the skiff, the seines and so on. Why isn't he to be
21 regarded as the manufacturer of the completed product,
22 which is the complete tuna fishing ship?
23 MR. ZAKARIN: Simply put, he's not --
24 QUESTION: Why?
25 MR. ZAKARIN: Simply put, he's not a 402A

1 seller. Strict liability does not apply under 402A, which
2 the Court has given us as the standard in admiralty for
3 product liability between casual sales or occasional
4 sales. It focuses on commercial sales by manufacturer --
5 QUESTION: Suppose it was his business to
6 convert bare boats into tuna boats and he did that in
7 quantity? Here there were about seven boats, was it not
8 the case?
9 QUESTION: Yes, Justice Ginsburg, but that
10 would -- although that might create liability if Madruga
11 turned out to be a 402A seller from running to Saratoga
12 Fishing Company, it would not vitiate liability as against
13 Martinac, another seller in the chain of distribution.
14 The product vis -- in any lawsuit for product
15 liability between parties A and B may involve, indeed, a
16 different product, but the rule -- and it's important to
17 have a uniform rule, is merely to find the product sold by
18 that manufacturer to the ultimate consumer.
19 Let me give you an example. In our case, the
20 product we contend was the complete ship with everything
21 aboard, as the Shipco case teaches us, as it left the
22 Martinac Shipyard.
23 If, later on, a defective heat tape or some
24 other product had been added aboard, a completely
25 different engine, some new machinery had been put aboard

1 and had caught fire, and had destroyed the vessel, that
2 comp -- that additional equipment manufacturer would have
3 tort immunity for that engine, widget, whatever it was
4 that was sold, would not be able to get recovery of that
5 product itself from that manufacturer, but would be liable
6 for the hull and all the rest of the goods.
7 It may be in every instance, because every
8 lawsuit is necessarily between two or more parties, that
9 we focus on a somewhat different product, but it doesn't
10 make the rule difficult to apply, because we look at the
11 bargain between that manufacturer in its original sale and
12 the purchaser in that original sale, assuming that it is a
13 commercial sale, not a casual sale.
14 QUESTION: Well, a commercial -- not just a
15 commercial sale, but a commercial sale to an end user.
16 MR. ZAKARIN: Yes.
17 QUESTION: That is how you decide where to draw
18 the line between the screw and the engine and the ship.
19 MR. ZAKARIN: That's correct.
20 QUESTION: Which sale was a sale to an ultimate
21 user. The screw was not sold to an ultimate user, since
22 it was sold to a manufacturer of an engine.
23 MR. ZAKARIN: You're quite correct, Justice
24 Scalia. In fact, as I referred to the Shipco case, here
25 was an attempt out of the Fifth Circuit which is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 illustrative, an attempt to get the component manufacturer
2 for a part that they had put in the engine, and that was a
3 specific end around, as it were, the East River, and the
4 Fifth Circuit stopped it cold and said no, it is the
5 negotiated, final, complete product that left that
6 particular shipyard which is the product itself, and there
7 was no property in that particular case outside of that.
8 QUESTION: So I guess you're saying in answer to
9 Justice Scalia's first question way back earlier on in the
10 argument -- I think you're saying that the capacity of the
11 end user to contract is basically irrelevant. There's
12 simply got to be a conventional line, and the conventional
13 line which would work as well as any other is the one that
14 we've already given at least some lip service to, and
15 that's the 402A line.
16 So it's not a -- it doesn't turn on the power to
17 contract. It turns on the power of the court in effect to
18 impose a conventional line.
19 MR. ZAKARIN: That is correct, though I assume
20 you don't mean the capacity to contract. I assume you
21 mean, what is the nature of the original contract? Is it
22 a commercial sale into the stream of commerce?
23 QUESTION: No, but one of the -- I think one of
24 the questions that plays around in this case is that when
25 the ultimate end user, who later becomes a plaintiff, buys

1 whatever he buys, he can contract in a way that will
2 protect him. No warranty, extended warranty, warranty
3 plus or minus insurance, and so on.
4 And you're saying that the capacity of that end
5 user who later becomes a plaintiff to contract for
6 protection when he buys whatever the thing is he buys is
7 essentially irrelevant.
8 MR. ZAKARIN: It is indeed irrelevant for this
9 purpose, because strict liability in its balance in
10 contract as given by East River takes account of both. It
11 looks at the original purchaser's ability to contract with
12 the manufacturer, what warranties might exist. In other
13 words, recovery for the product itself might be permitted
14 in warranty. A warranty might be assignable, transferable
15 and the like.
16 But it also takes account quite correctly of the
17 purposes of product liability to impose a duty upon
18 manufacturers --
19 QUESTION: Well, that's --
20 MR. ZAKARIN: -- to design and produce safe
21 products.
22 QUESTION: That's nifty for the original
23 purchaser. He can protect himself. But the original
24 seller is really left without a way to protect himself. I
25 guess he can interrogate the original purchaser and say,

1 are you going to be the last end user, or are you going to
2 sell to somebody else?
3 MR. ZAKARIN: The original purchaser can protect
4 itself under warranty, obviously, by putting restrictions
5 as to the original purchaser, but cannot protect itself
6 against tort liability for damage to other property,
7 damage downstream, except by designing safe, reliable, and
8 not unreasonably damaged goods.
9 QUESTION: I guess you could write a contractual
10 provision that says, if you resell the ship, or whatever
11 I'm selling you, you will be liable for any damaged goods
12 that I'm held liable for in tort. You could assume that
13 contractually, couldn't you, or would that violate public
14 policy?
15 MR. ZAKARIN: I suspect that would violate
16 public policy, Justice Scalia, but it certainly is
17 possible in the hands of the first purchaser, vis-a-vis a
18 red letter clause or some other device, to limit tort
19 liability to the original buyer, and that's done fairly
20 conventionally. The --
21 QUESTION: Do I understand your position to be
22 that whatever Madruga -- was other property in Madruga's
23 hands stays other property vis-a-vis the manufacturer no
24 matter how many subsequent sales there are?
25 MR. ZAKARIN: That's correct, Justice Ginsburg.

1 QUESTION: So as long as -- Madruga could have
2 recovered had there been -- for the additional things, and
3 anyone forthwith, no matter how much is added onto the
4 boat. The original product is what the manufacturer is
5 insulated for and nothing that anyone else adds to it?
6 MR. ZAKARIN: I would suggest that the best
7 focus would be what did the manufacturer sell as a
8 completed product? Anything beyond that in the hands of
9 the ultimate consumer, when a product --
10 QUESTION: Yes, but how does that -- how does
11 that --
12 MR. ZAKARIN: -- shows up in other property.
13 QUESTION: How does that work, because what is
14 the -- I mean, suppose the screw blows up while the
15 manufacturer's turning it into an engine?
16 MR. ZAKARIN: That's East River.
17 QUESTION: Fine -- no, in the engine shop, the
18 screw blows up, okay. So I guess the manufacturer could
19 sue the screw-making for damage to the engine, couldn't
20 he?
21 MR. ZAKARIN: Assuming it was an admiralty case,
22 and assuming --
23 QUESTION: Yes. Yes. You're right. I'm
24 just --
25 MR. ZAKARIN: Right.

1 QUESTION: He could.

2 MR. ZAKARIN: So --

3 QUESTION: But that doesn't mean that your
4 client can sue for damage to the engine. Of course, he
5 can't. In other words, this line, ultimate consumer, is
6 just as flaky as the other one. What's an ultimate
7 consumer in a commercial context where a person uses a
8 screw to make an engine to make a ship, to sail in the
9 water to get fish to sell to the ultimate consumer who
10 eats the fish?

11 I mean, how does it work?

12 MR. ZAKARIN: I respectfully disagree, Justice
13 Breyer. It is not a flaky line at all.

14 If we have an -- if I am an ultimate consumer,
15 whatever I bought from the manufacturer is the thing
16 itself.

17 QUESTION: Well, fine. Whatever you bought from
18 the manufacturer, then, after all, the maker of the engine
19 could sue the screw-maker for damage to the engine, but we
20 know he can't, so Madruga vis-a-vis the ship they're
21 saying is in the same position as the engine-maker vis-a-
22 vis the screw-maker.

23 MR. ZAKARIN: In your hypothetical the screw
24 which was defective came with the engine?

25 QUESTION: Yes, just as the engine --

1 MR. ZAKARIN: Then that's correct.

2 QUESTION: Do you see the -- I'm looking for a

3 line.

4 MR. ZAKARIN: If I'm understanding your

5 question --

6 QUESTION: Is your answer to Justice Breyer's

7 question that Madruga is not in the business of making

8 engines and machines, and he's not even in the business of

9 reselling boats. He happened to sell this one boat. Is

10 that the answer?

11 MR. ZAKARIN: It is certainly part of the

12 answer. The -- whether Madruga could have liability to

13 Vargas is a separate question, of course, from whether

14 Martinac may have liability to the downstream consumer.

15 The product itself in Madruga's hands was the

16 ship as it left the Martinac Shipyard with all the screws

17 and widgets aboard. There's -- that's an easy line to

18 determine. It's easy in theory, anyway. The trial of

19 such a case is necessarily complicated, as I can

20 personally vouch for, because one has to have lists of all

21 the things that were aboard, but in a sophisticated

22 commercial transaction, that's done.

23 QUESTION: Mr. Zakarin, what is magic about the

24 end user? I mean, I can understand what's magic about the

25 end user when you're talking about transactions that may

1 involve unsophisticated end users -- the pop bottle
2 example.
3 But once you've limited the rule that you're
4 concerned with to sophisticated buyers and sellers,
5 merchants, people in commerce, why should the engine
6 manufacturer not be able to get the cost of his engine
7 from the screw manufacturer, but the fisherman who buys
8 the whole boat, a sophisticated fisherman who has seven of
9 them, who sells some of them for resale later on, he can
10 get the value of his seines and other equipment added on?
11 What's so magic about the end user?
12 MR. ZAKARIN: The end user is sought to be
13 protected by the law of product liability, the ultimate
14 consumer. That is the intent --
15 QUESTION: Why? I understand you say that, but
16 why?
17 MR. ZAKARIN: Well, I suppose that the
18 distinction might be that a sophisticated consumer was
19 capable of a greater level of inspection to detect
20 manufacturing or design defects, and therefore perhaps
21 could enjoy a lesser protection, but that standard would
22 be very difficult to draw in reality. It would be hard to
23 determine whether any particular user was so sophisticated
24 that they would not get the benefit of 402A's focus upon
25 the ultimate consumer.

1 The simpler rule, and simplicity in application
2 given the uniformity of admiralty, is important, is to
3 pick a line, the ultimate consumer, the user, and a user
4 could be a user of a machine, for example, in a machine
5 shop.
6 QUESTION: It could be General Motors.
7 MR. ZAKARIN: General Motors could be an
8 ultimate consumer, but the chances are in a relationship
9 of that type we wouldn't be talking about a single screw.
10 We'd be talking about a fairly sophisticated transaction
11 with tort remedies and the like.
12 We're talking about downstream purchasers here.
13 Saratoga was certainly not a sophisticated fishing entity,
14 as the contributory negligence findings of the district
15 court show us. This was --
16 QUESTION: But isn't -- as far as the condition
17 of the boat, Captain Vargas probably knew more about that
18 boat than -- and he probably knew about the defective
19 hydraulic system --
20 MR. ZAKARIN: He certainly did.
21 QUESTION: -- when he bought it.
22 MR. ZAKARIN: That is correct. That is correct,
23 but the -- we do not place in product liability law the
24 burden upon the ultimate consumer to redesign or inspect
25 products for design defect, which is what we have here.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 QUESTION: May I ask a quick question? You're
2 almost out of time, but I'm curious. If this Court were
3 to apply the contract theory rather than your product
4 liability theory to a successive purchase, what is other
5 property? Would it include the tuna catch? Would it
6 include the fuel? Would it include the replacement skiff?
7 MR. ZAKARIN: It certainly would include the
8 fish. I believe it would include the fuel, unless you say
9 fuel is a fungible item and therefore is the same no
10 matter what. That would be the recovery under those
11 circumstances, but again, employing a contract --
12 QUESTION: And the replacement skiff?
13 MR. ZAKARIN: The replacement skiff was a
14 different skiff than Madruga got, but I believe --
15 QUESTION: Right.
16 MR. ZAKARIN: I believe it was replaced in the
17 hands of Vargas, and that's correct, but to conclude on
18 that, using a contract analysis to determine the product
19 itself is not hostile to the application of strict
20 products liability for property not sold by that
21 manufacturer.
22 Under the balance given to us by East River,
23 they live in harmony with one another, assuming a line can
24 be given to determine what is the product, and that
25 product is that sold into the stream of commerce.

1 QUESTION: Yes, well, East River says other
2 property may still be recoverable in tort, right?
3 MR. ZAKARIN: Yes, Justice O'Connor.
4 Thank you.
5 QUESTION: Thank you, Mr. Zakarin.
6 Mr. Macleod, we'll hear from you.
7 ORAL ARGUMENT OF DANIEL B. MACLEOD
8 ON BEHALF OF THE RESPONDENTS
9 MR. MACLEOD: Mr. Chief Justice, and may it
10 please the Court:
11 In this situation, a commercial business entity
12 bargained with another commercial business corporation for
13 the purchase of a fully outfitted, totally functional
14 purse seiner. That's exactly what it acquired. It
15 operated it for 12 years, and that's exactly what it lost.
16 It lost the benefit of its own bargain, nothing more and
17 nothing less.
18 QUESTION: May I ask you two questions, just to
19 be sure I understand part of the case?
20 If the injury to the additional equipment had
21 occurred while the original purchaser still owned it,
22 Madruga, would you have been liable for that?
23 MR. MACLEOD: Probably. I would suggest to Your
24 Honor that the approach would be exactly the same, that
25 the examination would be of the bargain made by --

1 QUESTION: Assume the bargain included
2 warranties on the ship itself but nothing more, and then
3 you add the -- Madruga added the additional equipment,
4 which was lost in the -- for tortious reasons. Would your
5 client be liable?
6 MR. MACLEOD: Yes, I think so.
7 QUESTION: All right. Now, supposing instead of
8 Madruga selling it on an as-is basis, supposing Madruga
9 had given a warranty to Saratoga covering both the
10 additional equipment and the original ship, so that
11 Saratoga then recovered on the warranty for the additional
12 equipment. Would Madruga then have been able to recover
13 over against you for precisely the same loss that would
14 have occurred if they'd still owned the ship?
15 MR. MACLEOD: I think not, Your Honor. I think
16 that the analysis in the hands of Mr. Madruga would be the
17 analysis under the contract between Madruga's business
18 corporation and J. M. Martinac, and I think that the
19 warranties would have expired.
20 QUESTION: But Madruga then would be the person
21 who suffered the loss, but it would have been by paying
22 its customer. Why would that -- why should that loss be
23 different than if it occurs while he still owns the ship?
24 MR. MACLEOD: I think the proper focus is on the
25 benefits and the responsibilities of the bargaining of the

1 commercial contracting parties, and if Mr. Madruga chose
2 for one reason or another to extend a warranty on the
3 equipment that he put aboard, or extend the original
4 manufacturer's warranty, I think that's Mr. Madruga's
5 problem, and I think undoubtedly he would be compensated
6 for it in the purchase price.
7 QUESTION: It seems to me that Madruga -- let's
8 assume that Madruga just sold one vessel. He didn't sell
9 seven of them.
10 If he's talking to Saratoga and Saratoga says,
11 well, I want a warranty, Madruga would say, you know, I
12 don't know anything about engines and boats. I'm a
13 fisherman. I don't know how to draw a warranty.
14 It seems to me somewhat artificial for us to
15 suggest that Madruga and Saratoga were well-positioned to
16 design and to negotiate a warranty. Madruga doesn't know
17 anything about ships insofar as their technical
18 manufacture, as is shown by the fact that he added a
19 turbocharger unit that caused the ship to sink.
20 MR. MACLEOD: Actually that was the second
21 purchaser, Your Honor. That was Captain Vargas.
22 QUESTION: Vargas.
23 MR. MACLEOD: That turbocharger uncovered.
24 QUESTION: It seems to me that this just goes to
25 show that Madruga is not in the business of selling

1 vessels, and that, it seems to me, may cut against you.

2 MR. MACLEOD: Well, there is evidence in the

3 record here that Madruga purchased a total of seven

4 vessels from J. M. Martinac which were ultimately sold.

5 There is also substantial trial testimony concerning the

6 fact that Madruga had a full-time engineer at the shipyard

7 during the entire course of construction.

8 QUESTION: But Madruga had a case here in the

9 fifties. He's not an unknown person in maritime

10 transactions.

11 MR. MACLEOD: That's correct, Your Honor,

12 Madruga v. Superior Court was here in the fifties, and he

13 was one of the parties to that partition of a vessel, if I

14 remember correctly.

15 QUESTION: Under the East River theory, what do

16 we really look to first and foremost in applying a

17 contract theory of recovery?

18 MR. MACLEOD: I --

19 QUESTION: To the commercial nature of the

20 purchaser, or to the commercial nature of the seller?

21 Would the real focus be on whether the purchaser is in a

22 commercial business of acquiring products like this?

23 MR. MACLEOD: I think the focus should be on the

24 transaction as a whole, this being clearly a commercial

25 transaction, whereas a business corporation transferring

1 assets to another business corporation, and as I read East
2 River and understand it, the public policy choice to be
3 made is the choice between contract and tort, and --
4 QUESTION: In making that choice, should we be
5 more concerned with what the purchaser might suffer, and
6 therefore look to whether the purchaser is, indeed, a
7 commercial entity?
8 MR. MACLEOD: Yes, Your Honor. I would suggest
9 that the test is the benefit of the bargain, and in order
10 to define the benefit of the bargain one has to look at
11 what the purchaser purchased, which it was the ultimate
12 decision in the Ninth Circuit.
13 QUESTION: What about the 402 -- is the 402A
14 seller Madruga? Because I think one possible --
15 MR. MACLEOD: There is --
16 QUESTION: -- line -- what about a possible line
17 that says where there are a series of suppliers, each one
18 of them supplies an ingredient to a product that ends up
19 eventually in somebody's hands, the it, the defective
20 thing as compared to the other property, is whatever was
21 that thing in its form when it last left the hands of the
22 last 402A seller. That would work. That's very generous
23 in your direction, but if that were the line, I don't see
24 any reason for drawing a line beyond that.
25 MR. MACLEOD: Well, Your Honor, that seems to

1 assume that there's a sort of an essential platonic
2 product that we can --
3 QUESTION: Well, there is. There is the
4 defective product, and what we're trying to do is get a
5 definition for the defective product compared to other
6 property that surrounds the defective product, and I'm
7 suggesting the most liberal possible definition in your
8 favor would be the defective product is that product in
9 its form when it left the hands of the last 402A seller.
10 MR. MACLEOD: The application of that rule would
11 result in a rather con -- substantial amount of confusion,
12 I believe, because the vessel -- a vessel, complex
13 products in the normal course of events, undergo
14 modifications, additions, et cetera, and if the vessel is
15 modified and added to in the hands of subsequent
16 purchasers on down the line, the liability of the
17 manufacturer of that product increases as the
18 manufacturer's involvement becomes more remote in time.
19 QUESTION: Yes, limited by foreseeability
20 principles, which is a normal tort limitation.
21 MR. MACLEOD: Well, yes. I think the public
22 policy choice there was made in East River in favor of
23 contract, and I would suggest that --
24 QUESTION: I don't understand your suggestion in
25 favor of contract. As I understand your position, the

1 manufacturer is protected from liability as soon as the
2 product is resold regardless of the terms of the
3 reseller's bargain with his customer.
4 MR. MACLEOD: Well, the manufacturer --
5 QUESTION: Isn't that correct?
6 MR. MACLEOD: The manufacturer's not protected
7 from liability for personal injuries, for damages to other
8 property, et cetera. He's simply --
9 QUESTION: Well, talk about other property.
10 This is other property, isn't it?
11 MR. MACLEOD: I suggest the manufacturer is
12 insulated from liability for -- for the --
13 QUESTION: For the other property added to the
14 property he sold.
15 MR. MACLEOD: Yes. To do otherwise would
16 increase the manufacturer's liability with the passage of
17 time.
18 QUESTION: But that could happen -- the original
19 purchaser could keep adding things to the ship, but that
20 would still -- each addition to the ship would increase
21 the exposure of the manufacturer for greater liability,
22 wouldn't it?
23 MR. MACLEOD: It could do, yes.
24 QUESTION: Well --
25 QUESTION: But as I understand you, as soon as

1 the ship is resold that exposure is extinguished, isn't
2 that correct?
3 MR. MACLEOD: Yes.
4 QUESTION: Regardless of the terms of the
5 bargain between the first purchaser and the second
6 purchaser.
7 MR. MACLEOD: Yes.
8 QUESTION: But the manufacturer can protect
9 himself against the increasing liability of new components
10 added by the original purchaser. He can protect himself
11 against that by contract, can he not?
12 MR. MACLEOD: He certainly can, Your Honor.
13 QUESTION: Okay, and he cannot protect himself
14 against the addition of new components by someone
15 downstream.
16 MR. MACLEOD: That is absolutely correct. There
17 was also a balancing test suggested in the products
18 liability cases in the consumer context to the extent that
19 a manufacturer can, with very slight price increases,
20 protect himself against that through the purchase of
21 insurance, and I suggest that that's not economically
22 available in the context of a manufacturer of a vessel
23 where, if the price were increased to accommodate
24 additional insurance the shipyard would become --
25 QUESTION: But your --

1 QUESTION: Mr. Macleod, I didn't understand your
2 answer to Justice Scalia, because I didn't understand you
3 to be contesting that if Vargas, the second purchaser,
4 bought all new equipment, a new seine, a new boat, that
5 would be other property, would it not, for which the
6 manufacturer would be liable?
7 MR. MACLEOD: I would -- no, Your Honor.
8 QUESTION: No?
9 MR. MACLEOD: I'm suggesting that replacement
10 property is not recoverable as other property, where parts
11 of the ship wear out and are replaced or -- and modified
12 and repaired in the normal course of operations, for the
13 same reason, that we're constantly going to have additions
14 and modifications and repair with replacement parts being
15 added to a vessel, or any large complex piece of
16 machinery.
17 QUESTION: So there's nothing that -- as part of
18 the boat that Vargas puts on that the manufacturer -- that
19 would constitute other property vis-a-vis the
20 manufacturer, is that what you're saying?
21 MR. MACLEOD: No, I'm not suggesting that.
22 QUESTION: Well, what could -- what would
23 constitute other property vis-a-vis the manufacturer as
24 far as the vessel that Vargas is operating is concerned?
25 MR. MACLEOD: Property of a third party, or

1 property if Mr. Vargas, or Vargas' corporation which was
2 unrelated to the bargain made by Mr. Vargas.
3 QUESTION: Well, anything that wasn't a
4 replacement, I take it. If he had come along and said, I
5 think it would be great to have a second skiff, during the
6 period in which the adder of the second skiff owned the
7 boat, that would be other property under your rule,
8 wouldn't it, and then it would cease to be other property
9 if he sold the boat with the second skiff on it. Isn't
10 that correct on your theory?
11 MR. MACLEOD: Yes. In fact, in the present case
12 the property of other crewmen that was aboard the vessel
13 is other property.
14 QUESTION: But was your answer to my earlier
15 question correct, that the original seller can protect
16 himself by contract against tort liability for other
17 property added by the original purchaser?
18 MR. MACLEOD: Yes, it was. He can protect
19 himself by contract.
20 QUESTION: How does he do that? How does he do
21 that? What does a contract say, there shall be no tort
22 liability for other property?
23 MR. MACLEOD: The builder shan't be responsible
24 for any of the property of the purchaser that's aboard the
25 vessel.

1 QUESTION: But that shouldn't bind people
2 further downstream. I don't think you can by contract
3 restrict tort liability for people who aren't parties to
4 the contract.
5 MR. MACLEOD: I -- that's not my position, Your
6 Honor. I think your statement is exactly correct, and
7 exactly why we should be looking at the benefit of the
8 bargain to what the purchaser acquired.
9 QUESTION: But I thought you had said in answer
10 to Justice Scalia's question that the purchaser could --
11 the manufacturer could protect himself from liability,
12 tort liability simply by contracting with the purchaser.
13 You don't mean --
14 MR. MACLEOD: In the hands of the first
15 purchaser.
16 QUESTION: Yes.
17 MR. MACLEOD: But not in the hands of the second
18 or subsequent purchasers.
19 QUESTION: So all you're contracting for is no
20 tort liability as between the manufacturer and the first
21 purchaser.
22 MR. MACLEOD: Yes, Your Honor.
23 QUESTION: And then for subsequent sales it is
24 the object sold in the subsequent sales that is the
25 product, and that's what protects him, and the one

1 loophole in that protection, I take it, is in the period
2 between the time -- between sales.
3 Let's say, the period between the sale to the
4 second buyer, who then adds not just replacement equipment
5 but adds equipment to it like the second skiff. During
6 that period the manufacturer has gotten other property
7 liability if the second skiff gets blown up along with the
8 ship, but if you're lucky, and the second skiff and the
9 ship are then sold to a third purchaser, then he's off the
10 hook again.
11 Is that the way your theory works?
12 MR. MACLEOD: Yes, Your Honor, except that in
13 the hands of the second purchaser I think the analysis
14 should be of the bargain made by that purchaser.
15 QUESTION: Well, he bought a ship without a
16 second skiff. Then he adds the second skiff, so the
17 second skiff is not subject to the bargain that he made
18 when he purchased the ship, so I thought on your theory
19 the second skiff is other property during that second
20 owner's ownership, but when the second owner then sells to
21 a third, and the second skiff goes with it, then the
22 second skiff is part of the bargain. The product then
23 includes the second skiff, and there wouldn't be product
24 liability vis-a-vis the original manufacturer.
25 MR. MACLEOD: Yes, Your Honor.

1 QUESTION: Okay.

2 QUESTION: Mr. Macleod, is the response you gave
3 to Justice Stevens before, is that settled law, that if
4 there is a contract running between Madruga and Vargas, a
5 warranty, and Madruga pays, that Madruga could not go back
6 against the manufacturer for the -- what would have been
7 other property in Madruga's ownership period? Is that
8 settled?

9 MR. MACLEOD: I think it is, and I think it's a
10 matter of contract law.

11 QUESTION: It was -- there was a tort
12 liability --

13 QUESTION: I don't think you can give me a case
14 for that proposition.

15 MR. MACLEOD: I don't think I can either.

16 QUESTION: No, I really don't.

17 (Laughter.)

18 QUESTION: The tort liability that Madruga would
19 have had vanishes, even as to Madruga. That's -- that's
20 essentially what you said.

21 MR. MACLEOD: I'm suggesting that the second
22 purchaser purchased a warranty from Mr. Madruga in the
23 initial sale, that Mr. Madruga would have to make good on
24 that warranty.

25 QUESTION: Yes. Now the question is --

1 MR. MACLEOD: As a matter of contract law.
2 QUESTION: -- can he turn around and get back
3 from the manufacturer the extent to which the warranty
4 covered what would have been other property in Madruga's
5 hands?
6 MR. MACLEOD: I believe that the proper analysis
7 of the relationship between Mr. Madruga and the
8 shipbuilder at that point would be made under contract and
9 warranty law with an examination of that particular
10 contract and, if my memory serves me correctly, it would
11 not be recoverable in this case because of a time limit on
12 warranties.
13 QUESTION: Well, it wouldn't have been covered
14 by the warranty anyway, because it's other property.
15 Your -- the manufacturer only warrants the original ship.
16 MR. MACLEOD: Ah.
17 QUESTION: So there'd be no warranty recovery.
18 The only recovery would be the same tort recovery as if
19 they had happened while he still owned the ship. He'd
20 say, well, I have suffered this loss as a result of your
21 delivering me a dangerous product. It's not loss of the
22 original ship. I had to pay out this money to a third
23 party. I don't know why it's any different if it's a
24 purchaser or a passenger.
25 MR. MACLEOD: That would be assigning a tort

1 claim, presumably -- actually creating a tort claim,
2 because no claim existed to be assigned.
3 QUESTION: Well, wait a minute. Under East
4 River it preserved liability in tort, product liability
5 theory for other property loss.
6 MR. MACLEOD: Yes, Your Honor.
7 QUESTION: And so why does that liability
8 disappear in the event the ship is resold and the original
9 purchaser had to pay damages to his purchaser? Why can't
10 he look back to the original manufacturer for those losses
11 for other property under tort liability, assuming the
12 statute hasn't run? It would have been a tort theory all
13 along, and it just stays that way.
14 Let's talk about the tuna catch. That's the
15 most valuable thing in this whole lawsuit, isn't it?
16 MR. MACLEOD: Yes, it is.
17 QUESTION: Yes. Well, let's talk about the tuna
18 catch, because that's other property under anybody's
19 definition, and if the original buyer, Madruga, has to
20 fork over under tort theory to Saratoga for the loss of
21 the tuna, then why can't he in turn look back to the
22 manufacturer for that loss.
23 QUESTION: I think you say he can, don't you,
24 unless there's been an exclusion of that in the original
25 contract. No, he said originally he could not. That's

1 his position, isn't it?

2 MR. MACLEOD: I believe --

3 QUESTION: His position is you look entirely to

4 the intermediate purchaser.

5 QUESTION: Would you care to give us your own

6 version?

7 (Laughter.)

8 MR. MACLEOD: I believe that the proper approach

9 is contractual, and that the complete analysis should be

10 made in contract because of the commercial contract.

11 QUESTION: Well, under East River it is not

12 contractual recovery as to other property. Do you agree

13 with that?

14 MR. MACLEOD: Yes, Your Honor.

15 QUESTION: Okay.

16 MR. MACLEOD: That's what East River says.

17 QUESTION: And tuna is other property. Don't we

18 all agree with that -- the catch?

19 MR. MACLEOD: I don't agree with that

20 proposition.

21 QUESTION: Oh, you don't?

22 MR. MACLEOD: No, Your Honor.

23 QUESTION: Well, that wasn't sold originally.

24 MR. MACLEOD: I think -- no, it was not sold --

25 QUESTION: By the manufacturer.

1 MR. MACLEOD: But I believe --
2 QUESTION: That was something that was caught --
3 MR. MACLEOD: That's correct.
4 QUESTION: -- by the original buyer, and I
5 would have thought surely that was other property.
6 MR. MACLEOD: The approach that was taken to the
7 analysis of the tuna was a lost profit analysis, and I
8 think that lost profits are derived from the benefit of
9 the bargain, and that what was actually lost here was an
10 expectancy, which is the equivalent of lost products, a
11 simple consequential economic loss flowing from the --
12 QUESTION: The fish had been caught and put in
13 the hold. That's other property. It's not an expectancy.
14 They caught the fish, and they're worth something.
15 MR. MACLEOD: It was still necessary that that
16 catch be delivered, and the catch -- the catch represents
17 an expectancy of money.
18 QUESTION: Did you petition --
19 QUESTION: Yes, but if the boat hadn't broken
20 down they would have been delivered.
21 MR. MACLEOD: True.
22 QUESTION: Did you petition on that question and
23 we didn't -- we didn't grant it, right, on the fish?
24 MR. MACLEOD: We did. We petitioned on the --
25 several liability issues, Your Honor, as well as that.

1 QUESTION: But if -- I wondered if -- what's
2 bothering me basically is, I thought East River's like
3 this: there's a glass on the table in the galley, and
4 it's defective, and it cracks and breaks and people are
5 cut, and there's a good claim that of course all these cut
6 people can recover in tort, and then somebody says I also
7 want tort recovery for the glass itself.
8 You say, wait a minute. When you have a
9 defective glass you don't get the value of the glass in
10 tort. I mean, it's the glass that was defective. Recover
11 in contract or warranty for the defective glass.
12 And now that principle, which seems right in
13 that case, seems to have gotten way out of control. I
14 mean, now suddenly we're talking about they have to
15 recover in contract. They can't get a tort recovery for
16 the fish that are hurt, and they -- all these other
17 things.
18 It doesn't seem right that it's so far out of
19 control, but I'm having trouble thinking of what the
20 limiting principle is.
21 It doesn't seem right to me when you buy a ship,
22 under all these other appurtenance things there's a little
23 bit of a glass or something somewhere that breaks. You
24 say you can't get recovery in tort for all these other
25 things that have nothing to do with the glass.

1 What's the line you draw?

2 MR. MACLEOD: The line that I would draw would

3 be the object of the plaintiff's bargain, what the

4 plaintiff bargained for and got, together with the

5 economic loss that flows from the loss of that bargain.

6 QUESTION: But we've rejected that. I mean, we

7 have accepted that even out of a contract context there

8 can arise tort recovery. I mean, we've gone beyond what

9 you've said. That's already been held.

10 What you want to do is simply eliminate the

11 basic rule that a tort recovery can be had on the basis of

12 a transaction that was a contract. Isn't that what you're

13 arguing? Your sole remedy has to be through the contract.

14 I mean, that's not even -- that's not even up for debate.

15 We've held that.

16 QUESTION: And not only that, your point as I

17 understand it is the sole remedy has to be against the

18 person from whom you made the purchase, so that if a big

19 company sells the ship to a small person who sells it to a

20 third party, the third party can only sue the small person

21 who may not be able to pay the judgment, but the person

22 who manufactured the dangerous item is scott-free, under

23 your theory.

24 MR. MACLEOD: Under my theory, but only as to

25 the loss of the product and the economic losses that flow

1 from the loss of the product. They are not scott-free as
2 to personal injuries or damages to property of a third
3 party, or --
4 QUESTION: Well, why should there be a different
5 rule for damages to property in a case like this and
6 damage -- personal injuries?
7 MR. MACLEOD: The commercial purchaser in the
8 commercial context can protect themselves, whereas the
9 injured person is probably suffering a personal disaster
10 in their life and has no method of protecting themselves
11 against the dangerous product, or a defective product, or
12 likely any knowledge about the dangerous --
13 QUESTION: Ah, but if it was a personal injury
14 of the buyer, then you'd say, tough luck, because you
15 could have protected yourself. So it's not --
16 MR. MACLEOD: Oh, no, Your Honor.
17 QUESTION: -- all personal injuries. It's just
18 personal injuries of third persons.
19 MR. MACLEOD: No, Your Honor. If the buyer was
20 personally injured -- the human being buyer --
21 QUESTION: The only thing you're saying that
22 contract controls I think is, the value of the -- the
23 identity of the product for the plaintiff's purpose when
24 the plaintiff sues. That's the only -- that is the only
25 point at which contract law is controlling on your theory,

1 isn't it?

2 MR. MACLEOD: Contract law -- yes, Your Honor.

3 QUESTION: All right, and that's why, as I

4 understand it, you don't have a category -- you don't make

5 any categorical distinction between property loss and

6 personal injury because in the case that I was giving you

7 before you said, well, if the second skiff is injured as a

8 result of the products defect while the product is owned

9 by the person who bought the second skiff, the second

10 skiff would be other property and would be recoverable.

11 Isn't that right?

12 MR. MACLEOD: Yes.

13 QUESTION: And by the same token, if the second

14 owner were injured personally, those personal injuries

15 would be recoverable.

16 MR. MACLEOD: Absolutely.

17 QUESTION: So the only categorical distinction

18 you're making is the categorical distinction that involves

19 saying, you define what product is for the plaintiff's

20 purpose by looking to the contract by which the plaintiff

21 bought whatever it was the plaintiff bought. Is that

22 correct?

23 MR. MACLEOD: That's correct.

24 QUESTION: Yes, okay.

25 MR. MACLEOD: And I would foreclose recovery for

1 the loss of that thing, whatever it is, that's the object
2 of the bargain and the economic losses that flow from the
3 loss of the benefit of the bargain or the destruction of
4 that thing.

5 QUESTION: And you acknowledge that the recovery
6 for the skiff and the recovery for the personal injury in
7 the hypothetical that Justice Souter just gave you would
8 be tort recovery and not contract recovery.

9 MR. MACLEOD: Yes, Your Honor.

10 QUESTION: Well, that contradicts what you said
11 earlier. That's why I don't really understand your
12 argument. I thought that this was what you were saying
13 much earlier in the argument, but then in your quite
14 recent exchange with the Chief Justice you said the
15 exclusive recovery is under the contract. You don't
16 really believe that. There is tort recovery in some
17 instances.

18 MR. MACLEOD: Yes. There are tort recoveries in
19 some instances, personal injuries being the prime example.

20 Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: Thank you,
22 Mr. Macleod. The case is submitted.

23 (Whereupon, at 11:15 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

SARATOGA FISHING COMPANY, Petitioner v. J. M. MARTINAC & COMPANY AND MARCO SEATTLE, INC.
CASE NO. 95-1764

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)