TEMPLATE

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When Can a Breach of Contract Be a Tort and What Difference Does It Make?

When Can a Breach of Contract Be a Tort and What Difference Does It Make?

Moderator:

Beatty O'Donnell,
Duane Morris
Philadelphia, PA

Presenters:

Andrew Shipley
AGC, Northrup Grumman

Todd Sorensen[1]
Counsel, Capella University
Minneapolis, MN

Amy Stewart
Cox Smith
Dallas, TX

[1] Written materials prepared by Todd Sorensen, along with Mark Davidson and Michael White of Williams Kastner, Seattle, WA.

INTRODUCTION

In its simplest form, the economic loss rule dictates that a plaintiff's ability to recover "economic" losses is restricted to the law of contract, rather than the law of tort.[i] While the rule originated in the context of product liability law to prevent contract law from drowning "in a sea of tort,"[ii] its application has expanded so dramatically that, if left unchecked, it could eviscerate certain fundamental business torts. What was once a life preserver for the law of contract has become a substantial island in the sea of tort. This article reviews the development of the rule from its infancy and the theories by which courts have frequently expanded and occasionally circumscribed the rule's impact in an effort to arrive at a satisfactory allocation of risk.

Creation of the Economic Loss Rule

Most courts and scholars trace the economic loss rule back to Justice Traynor's 1965 opinion for the California Supreme Court in *Seely v. White Motor Co.*[iii] In denying the purchaser of an automobile damages from the manufacturer for an injury to the vehicle itself, Justice Traynor observed that the product liability doctrine of strict liability was borne of a public policy concern that the law of warranty did not adequately protect consumers from injuries to person and property.[iv] However, as Justice Traynor explained, that policy concern does not exist where the consumer's damages are limited to those arising from an injury to the product itself:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.[v]

Twenty years later, the United States Supreme Court adopted Justice Traynor's "economic loss rule" in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, restating it succinctly as, "A manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself."[vi]

Not All Economically Quantifiable Losses are "Economic" Losses

Before examining the expansion of the rule to general business torts, we pause to consider two lessons learned from *Seely* and *East River Steamship* that are often overlooked in practice. First and foremost, the term "economic loss" is a term of art.[vii] Not every monetary injury constitutes an economic loss. Rather, the economic loss rule bars recovery in tort for injuries other than those sustained by person or other property. For that reason, several courts have criticized the name "economic loss rule," most prominently the Seventh Circuit in an opinion by Judge Posner, who suggested:

> It would be better to call it a 'commercial loss,' not only because personal and especially property losses are economic losses, too—they destroy values which can be and are monetized—but also, and more important, because tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law.[viii]

Seeley and *East River Steamship* also teach us the primary concern underlying the rule: the preservation of the distinction between the law of contract and the law of tort. Contract obligations arise from promises the parties have made to each other, while tort obligations arise from duties imposed by law to protect citizens from risk of physical harm.[ix] In other words, tort remedies provide a "safety-insurance policy," while contract remedies provide an "expectation-bargain protection policy."[x]

The distinction between tort and contract remedies has significant practical effect. Unlike contract claims, which generally restrict a defendant's liability to those damages reasonably foreseeable as a result of the breach of the contractual obligation, tort claims expose defendants to liability for all harm proximately caused by the defendant's conduct.[xi] As a result, "plaintiffs' lawyers. . . strive to persuade courts that borderline cases should be classified as tort in order to avoid the contract limitation on damages."[xii] For example, in *Young v. Abalene Pest Control Services, Inc.*,[xiii] the plaintiffs contracted with the defendant for the extermination of insects in their home. Nevertheless, pests remained, allegedly causing the plaintiffs to become so nervous and depressed that they required medical treatment. The plaintiffs brought action against the exterminator, seeking damages not only for breach of contract, but also for negligent infliction of emotional distress. Classifying the action as one sounding in contract, rather than tort, the court refused to grant damages for emotional distress.[xiv] Had the court failed to respect the boundary between contract and tort, it would have improperly allocated risks to the defendant far beyond what it bargained for.

Like the contract at issue in *Young*, contracts generally place a value on the allocation of risk, which is reflected in the price and/or other terms. Presumably, the contract price would have been considerably higher if the risk of plaintiffs' emotional distress for the exterminator's failure to completely eliminate all insects had been allocated to the pest control service.

To the extent tort law overlaps with contract law, it subverts the parties' intent, and does so in the context of a body of law in which the fact finder sits unconfined by the evidentiary rules of contract disputes, such as the statute of frauds, the parol evidence rule, and the "four corners" doctrine.[xv] The resulting uncertainty in commercial transactions may cause a chilling effect on commercial enterprise, as businesses "fearful of unfathomable tort exposure might lose the ability to respond flexibly to changing economic conditions or hesitate to enter into contracts at all in fast-moving aspects of commercial enterprise."[xvi] The Rule, when properly applied, helps to maintain the essential distinction between contract and tort.

The Expansion of the Rule Beyond Product Liability Law

Since *Seely* and *East River Steamship*, most jurisdictions have expanded the application of the economic loss rule beyond the context of product liability law.[xvii] The expansion has been neither uniform nor disciplined, and it has "produced difficulty and confusion."[xviii] "The rule has been stated with ease but applied with great difficulty."[xix] Confusion may have been inevitable. Application of the rule is complicated enough when restricted to product liability, as courts often struggle to determine whether the injury is confined to the product itself, and thus uncompensable in tort as economic damages.[xx] When the rule is applied more generally to business transactions in which the "product" is more nebulous, as in consulting contracts, investment programs, and construction project administration,[xxi] its parameters are even less easily defined.

This confusion has not prevented courts from adopting the rule as a tool to "mark the boundary" between the law of contract and the law of tort.[xxii] The most common use of the economic loss rule as a defense in business litigation occurs where the alleged failure of one party to perform in contract prompts the non-breaching party to bring causes of action in both contract and tort, with both claims based upon the same operative facts. For example, in *Grynberg v. Agri Tech, Inc.*, the Grynbergs entrusted Agri Tech with the

task of feeding and maintaining their investment cattle under a "Custom Feeding Agreement."[xxiii] Displeased with their returns on their cattle investment, the Grynbergs brought action against Agri Tech on a variety of claims, including breach of contract and negligence.[xxiv] After the jury awarded the Grynbergs $600,000 on the negligence claim, but found for Agri Tech on the contract claim, the Colorado Court of Appeals reversed the trial court's judgment, holding that the economic loss rule barred the negligence claim. On appeal, the Colorado Supreme Court agreed, primarily because it could easily trace the source of the duty underlying the negligence claim back to the contract:

> The duty of care is created by, and completely contained in, the contractual provisions. . . . This is a classic example of a case where the plaintiffs are seeking to recover damages for the loss of their bargain with defendants--these are pure economic loss damages based on disappointed expectations. An action to recover for the loss of a bargain is the exclusive province of contract law.[xxv]

Courts from a variety of jurisdictions have followed suit, denying plaintiffs the opportunity to recover in tort where the duties underlying the tort are identical to those set forth in the contract.[xxvi] Disputes regarding real estate construction and sales, in particular, have emerged as a hotbed for the expansion of the economic loss rule, perhaps because such transactions are "characterized by detailed and comprehensive contracts."[xxvii]

No Contract Required?

There is a certain intuitive appeal to the idea that the rule should apply only where a party attempts to enforce in tort those duties expressly set forth in an existing contract. However, the rule is not so limited. Taking the first step away from the requirement of a contract, several courts have concluded that contracting parties need not have expressly allocated the loss at issue for the economic loss rule to apply.[xxviii] These courts reason that by refusing to expressly allocate the risk, the contracting parties impliedly did so, silently and indirectly.[xxix] The courts theorize that applying tort law to parties in a contractual relationship interferes with the parties' freedom to contract, regardless of whether the parties affirmatively allocated the risk.[xxx]

Venturing one step further, despite the lack of privity, at least one court applies the rule to third party beneficiaries.[xxxi] In *The Ocean Ritz of Daytona v. GGV Associates*, the Florida Court of Appeals affirmed dismissal of a condominium association's negligence claim against the development's subcontractor, an architectural consultant.[xxxii] Reasoning that a third party beneficiary enjoys sufficient protection by virtue of the express and implied warranties in the contract between the subcontractor and the contractor, the court rejected the plaintiff's argument that plaintiff as third party beneficiary of that contract should not be bound by the Rule even though it played no role in the negotiation of the contractual allocation of loss.[xxxiii] On similar grounds, the Washington Court of Appeals has recognized that assignees of claims are subject to the economic loss rule by virtue of their assignor's contract with the defendant.[xxxiv]

One court even applies the economic loss rule where there was no contract at all. In *Anderson Electric Inc. v. Ledbetter Erection Corporation*,[xxxv] Anderson contracted with Ledbetter for the installation "precipitator units" manufactured by Walther, Inc. Under a separate contract between Ledbetter and Walther, Walther agreed to inspect the units after Ledbetter's installation to ensure the installation complied with the terms of the Walther product manual. When Walther improperly required reinstallation of units which had been properly installed, Anderson brought suit to recover the additional costs expended as a result, filing a breach of contract claim against Ledbetter and a negligence claim against Walther. Notably, it was undisputed that Walther had no contractual duty to Anderson. Nevertheless, the Illinois Supreme Court held that the economic loss rule barred Anderson's negligence claim against Walther.[xxxvi] The fact that Anderson could not maintain a contract action against Walther

did not influence the court, which held that, "A plaintiff seeking to recover purely economic losses due to defeated expectations of a commercial bargain cannot recover in tort, regardless of the plaintiff's inability to recover under an action in contract."[xxxvii]

This approach, which eliminates contractual privity as a prerequisite, appears consistent with the original policy underlying the rule. As the Ninth Circuit recently explained:

> [In product liability cases,] [i]f a plaintiff is in a contractual relationship with the manufacturer of a product, the plaintiff can sue in contract for the normal panoply of contract damages, including foreseeable lost profits and other economic losses. *Whether or not the plaintiff is in a contractual relationship with the manufacturer*, the plaintiff can sue the manufacturer in tort only for damages resulting from physical injury to persons or to property other than the product itself.[xxxviii]

Since the rule is based upon the premise that commercial losses are most properly the province of contract law, application of the rule should not depend on whether the commercial parties actually had a contract. In other words, the distinction between tort law and contract law should not hinge upon whether the particular party has a contract. This sentiment echoes through Justice Traynor's seminal opinion in *Seely*, where he wrote, "the distinction that the law has drawn between tort. . . and warranty [or contract]. . . is not arbitrary."[xxxix]

Preserving the Sea of Tort: A Movement towards an Independent Duty Doctrine?

While the economic loss rule itself was created to prevent contract law from drowning in a "sea of tort," the expansion of the rule beyond the field of product liability has given rise to concern that over-application of the rule will bring about the converse evil, the death of staple business tort law claims. The Florida Supreme Court, among others, has expressed concern over the "unprincipled extension of the rule."[xl] Indeed, as many courts begin to apply the economic loss rule to bar such standard business torts as negligent misrepresentation, one must wonder whether that tort will survive at all, as it is difficult to envision a negligent misrepresentation claim that does not arise out of some form of commercial relationship between the parties.

Recognizing that the rule was not designed to destroy tort law, but to maintain its distinction from contract law, courts have carved out exceptions to its application. In some cases, the exceptions are created on a claim-by-claim basis, such as negligent misrepresentation and/or fraud.[xli] Such exceptions apparently rely upon the tenuous distinction between fraud or misrepresentation and breach of the contract itself.[xlii] To the extent the fraud or misrepresentation is based upon "some additional conduct that amounts to an independent tort,"[xliii] some courts will allow the tort action to proceed on the theory that "[n]o rational party would enter into a contract anticipating that they are or will be lied to."[xliv] In *Carlile v. Harbour Homes, Inc.*, foe example, the Washington Court of Appeals refused to recognize an exception for intentional misrepresentation, holding that Washington's "fraud" exception for purposes of the economic loss rule is restricted to the distinct tort of fraudulent concealment.[xlv]

More often, courts recognize exceptions based upon some form of "independent duty." Under the independent duty exceptions, courts hold that if the tort claim arises from a duty extraneous to the contract, then the tort claim for economic losses may proceed, even where the parties entered into a contract.[xlvi] For example, based upon the concept of an independent duty, many jurisdictions recognize an exception to the rule for professional malpractice claims.[xlvii] The basis for this exception is again rooted in the purpose of the economic loss rule, the preservation of the laws of both tort and contract. If the law has gone so far as to create a standard of care independent of the parties' contractual duties, then it

follows that society has made a default determination as to which party should bear the burden as to that particular loss.

Washington State provides a good example of this shift, with its Supreme Court going so far as to rename the "economic loss rule" the "independent duty doctrine":

> "An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. Because the term 'economic loss rule' inadequately captures this principle, we adopt the more apt term 'independent duty doctrine.' The existence of an independent duty is a question of law for courts to decide. [xlviii]

Applying this newly named rule, the Court concluded that sufficient evidence supported the trial court's findings that an independent duty to not cause waste existed outside of the terms of a lease covenant between the parties. [xlix] Subsequent cases in Washington have interpreted the new "independent duty doctrine" to find that such an independent duty arises in a number of contexts, such as a tort duty of reasonable care owed by professional engineers to their clients despite the existence of a contract. [l]

Not so Fast: How About Some Predictability?

Demonstrating the lack of uniformity in application of the doctrine, a Western District of Virginia Court refused to apply the rule (without consideration of whether there was an independent duty) because the plaintiff had alleged "substantial consequential damages" to his property. [li] A lightning strike had created a hole in piping designed, manufactured and supplied by the defendant. Gas escaped, ignited, and caused a fire and significant property damage. Plaintiffs sought to recover consequential damages under product defect theories. In denying the defendant's motion to dismiss, the court refused to apply the economic loss doctrine because the plaintiffs were not merely complaining about a defect in the product (although arguably, it was the defect in the product that allowed the hole to be created, leading to the leakage of gas and subsequent fire).

Compare that result to *Giddings & Lewis, Inc. v. Industrial Risk Insurers* [lii] where the Kentucky Supreme Court returned to the roots of the doctrine as a product liability defense and specifically adopted it. The case presented the question whether an insurer of a diffuser cell system could recover tort damages (e.g., economic loss for lost profits, costs for repair and replacement of the defective commercial product) for a product sold pursuant to a contract. The Court held that the doctrine applied to bar tort claims, including negligence, strict liability, and negligent misrepresentation claims, arising from the sale of a defective product in a commercial transaction (perhaps because there was no allegation of significant consequential damages).

The Arizona Court of Appeals, as yet another example, recently demonstrated the newer, more expansive application of the doctrine. In *Cook v. Orkin Exterminating Company, Inc.*, the court considered available theories of recovery for decade long termite damage. Until *Cook*, Arizona courts stayed close to the doctrine's origins, applying it primarily in construction defect and product liability cases. However, in *Cook*, the court expanded its application, preventing homeowners from pursuing claims for breach of fiduciary duty, negligence, fraud and misrepresentation against the company they had contracted with for pest control. After the trial court dismissed the breach of fiduciary duty claim for failure to pled sufficient facts and dismissed the tort claims under the economic loss rule, the Court of Appeals specifically held that the doctrine barred the homeowners' fraud and misrepresentation claims.

Conclusion

As courts refine their application of the economic loss rule, the waters of the "sea of tort" continue to ebb and flow. Depending upon your particular jurisdiction, the rule may be overpowering, as the vitality of common business tort claims such as negligent misrepresentation recedes, or the rule may be restricted by exceptions to such an extent that the line between contract and tort begins to blur. Regardless of where you practice, the rule must remain close at hand in your litigation toolbelt, as it will play a critical role in your ability to prosecute or defend tort claims for commercial losses.

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[i] *Giles v. General Motors Acceptance Corp.*, Nos. 05-15189, 05-17251, 2007 U.S. App. LEXIS 19006, at *17-18 (9th Cir. Aug. 10, 2007).

[ii] *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986).

[iii] *Congregation of the Passion v. Touche Ross & Co.*, 159 Ill. 2d 137, 157, 636 N.E. 2d 503 (1994) (tracing rule's origins to Seely v. White Motor Co., 63 Cal. 2d 9, 403 P. 2d 145 (1965) (Traynor, J.)); *see also Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn. 2d 406, 418-19, 745 P. 2d 1284 (1987).

[iv] *Seely*, 63 Cal. 2d at 15.

[v] *Id.* at 18.

[vi] *East River S.S.*, 476 U.S. at 867.

[vii] *Giles v. General Motors Acceptance Corp.*, Nos. 05-15189, 05-17251, 2007 U.S. App. LEXIS 19006, at *28 (9th Cir. Aug. 10, 2007) (citing *Calloway v. City of Reno*, 116 Nev. 250, 993 P. 2d 1259 (2000)); *See also Nat'l Union Fire Ins. Co. v. Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 815 P. 2d 601 (1991).

[viii] *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990); *see also Alejandre v. Bull*, 159 Wn. 2d 674, 692, 153 P.3d 864 (2007) (Chambers, J., concurring).

[ix] *A.C. Excavating v. Yacht Club II Homeowners Ass., Inc.*, 114 P.3d 862, 866 (Colo. 2005) (citing *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.2d 66, 71 (Colo. 2004)); *see also Alejandre*, 159 Wn. 2d at 682 (citing *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994); *Casa Clara Condo Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla. 1993)); *Mt. Lebanon Personal Care Home Inc., v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002).

[x] *Alejandre*, 159 Wn. 2d at 682 (quoting *Stuart*, 109 Wn. 2d at 420); *see also Detroit Edison Co.*, 35 F.3d at 239; *Casa Clara Condo. Ass'n,*, 620 So. 2d at 1246-47.

[xi] Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RES. L. REV. 286, 287-88 (1985/86).

[xii] *Id.*

[xiii] *Young v. Abalene Pest Control Servs.*, 122 N.H. 287, 288-89 (1982).

[xiv] *Id.* at 289.

[xv] *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865-66 (7th Cir. 1999) (Posner, J.).

[xvi] *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 996, 102 P.3d 268 (2004) (Wedegar, J., dissenting) (quoting *Applied Equip. Corp. v. Linton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 516, 869 P. 2d 454 (1994)).

[xvii] The single exception the authors have been able to positively identify is Mississippi. *Lyndon Props. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 274 (5th Cir. 2007) (Mississippi law). However, other jurisdictions share the sentiment that the Rule should be limited in application, at least in some regard. *See, e.g, Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999) ("[T]he rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts. . . .").

[xviii] *Giles v. General Motors Acceptance Corp.*, Nos. 05-15189, 05-17251, 2007 U.S. App. LEXIS 19006, at *18 (9th Cir. Aug. 10, 2007).

[xix] *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So.2d 532, 544 (Fla. 2004) (Cantero, J., concurring) (quoting *Sandarac Ass'n v. W.R. Frizzel Architects, Inc.*, 609 So.2d 1349, 1352 (Fla. Ct. App. 1992)).

[xx] *See, e.g., Winters Performance Prods, Inc. v. Grupos Diferenciales S.A.*, Civil Action No. 1:06-CV-2033, 2007 U.S. Dist LEXIS 61301, at *12-13 (M.D. Pa. Aug. 21, 2007) (determining that the final assembly, rather than the component purchased, constitutes the product, rendering damages to the final assembly resulting from the component's defect "economic" and unrecoverable in tort); *Mt. Lebanon Personal Care Home Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 851 (6th Cir. 2002) (same).

[xxi] *Harman v. Adjoined Consulting*, LLC, 2007 U.S. Dist. LEXIS 60050 (S.D. Fla. August 16, 2007) (consulting contract); *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267 (Colo. 2000) (cattle investment program); *Nat'l Steel Erection Inc. v. J.A. Jones Constr. Co.*, 899 F. Supp. 268 (N.D. W.Va. 1995) (construction project administration).

[xxii] *Hermansen v. Tasulis*, 48 P.3d 235, 239 (Utah 2002) ("The economic loss rule is a judicially created doctrine that marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care"); *Alejandre v. Bull*, 159 Wn.2d 674, 696 (2007) (Chambers, J., concurring) (describing the Rule as an "analytical tool we use to determine whether a dispute implicates tort or contract in those cases that could potentially sound in either").

[xxiii] *Grynberg*, 10 P.3d 1268.

[xxiv] *Id.* at 1269.

[xxv] *Id.* at 1270.

[xxvi] *Plourde Sand & Gravel Co. v. JGI Eastern, Inc.*, 917 A.2d 1250, 1253 (N.H. 2007); *Alejandre*, 159 Wn. 2d at 683; *Krueger Int'l, Inc. v. Royal Indem, Co.*, 481 F.3d 993, 997 (7th Cir. 2007) (Posner, J.) ("[I]n some states the [economic loss] doctrine precludes a tort suit for purely economic loss against someone with whom you have a contract, even if it is a suit for misrepresentation") (citing *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 987-88 (7th Cir. 2005); *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 963-64 (7th Cir. 2000); *All-Tech Telecom, Inc.*, 174 F.3d at 866-67 (7th Cir. 1999)); *Tietsworth v. Harley Davidson, Inc.*, 270 Wis. 2d 146, 162, 677 N.W. 2d 233 (2004).

[xxvii] *Hermansen*, 48 P.3d at 239; *Alejandre*, 159 Wn. 2d at 685 (citing *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987)); *Stieneke v. Russi*, 145 Wn. App. 544, 559, 190 P.3d 60 (2008) (applying economic loss rule to reject negligent misrepresentation claim for seller's representations regarding roof, and refusing buyer's argument that damage to other property by leaking roof negated application of the rule: "a defective building creates purely economic loss if it further injures itself. This is true even if the particular defect, such as a defective roof, causes damage to other parts of the building's structure")

[xxviii] *Rich Prods. Corp. v. Kemutec*, 66 F. Supp. 2d 937, 973 (E.D. Wisc. 1999), *aff'd* 241 F.3d 915 (7th Cir. 2001); *Alejandre*, 159 Wn. 2d at 687; *See also Maersk Line Ltd. v. Care & ADM, Inc.*, 271 F. Supp. 2d 818, 822 (E.D.Va. 2003) (court applying Rule before considering whether there were grounds for recovery in contract); *Trinity Lutheran v. Dorschner Excavating*, 289 Wis. 2d 252, 263, 710 N.W.2d 680 (2006).

[xxix] *Alejandre*, 159 Wn.2d at 687.

[xxx] *Id.*

[xxxi] *Ocean Ritz Condo v. GGV Assoc.*, 710 So. 2d 702, 705 (Fla. Ct. App. 1998).

[xxxii] *Id.* at 702.

[xxxiii] *Id.* at 705.

[xxxiv] *See Carlile v. Harbour Homes, Inc.*, 2008 WL 4648423, at *5 (Wn. App. 2008).

[xxxv] *Anderson Elec. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 153, 503 N.E. 2d 246 (1986).

[xxxvi] *Id.* at 148-53.

[xxxvii] *Id.; Accord Plourde Sand & Gravel Co. v. JGI Eastern, Inc.* , 917 A.2d 1250, 1256-57 (N.H. 2007) ("Many courts . . . have expanded the economic loss doctrine to bar economic recovery in tort cases where there is no contract and thus no privity"). Notably, in both *Anderson* and *Plourde*, the courts justified the result, in part, by pointing out that the plaintiffs had the ability to recover in contract from another party in the litigation.

[xxxviii] *Giles v. General Motors Acceptance Corp.*, Nos. 05-15189, 05-17251, 2007 U.S. App. LEXIS 19006, at *18.

[xxxix] *Seely v. White Motors Co.*, 63 Cal. 2d 9, 18, 403 P.2d 145 (1965).

[xl] *Moransais v. Heathman*, 744 So.2d 973, 981 (Fla. 1999).

[xli] *Id.* at 982 (exception for fraudulent inducement and negligent misrepresentation); *Alternative Aviation Servs., Inc. v. Meggitt*, 207 Fed. Appx. 506, 513 (6th Cir. 2006) (applying Michigan law and recognizing fraud in the inducement exception); *Robinson Helicopter Co. v. Dana Corp.*,, 34 Cal. 4th 979, 991 (2004); *Alejandre v. Bull*, 159 Wn.2d 674, 689 (2007); (fraud); *See also Stieneke v. Russi*, 145 Wn. App. 544, 560 (2008) (same)

[xlii] *See Moransais*, 744 So.2d at 982; *Alternative Aviation Servs.*, 207 Fed. Appx. at 513; *Robinson Helicopter Co.*, 34 Cal. 4th at 991; *Alejandre*, 159 Wn.2d at 689.

[xliii] *Future Tech Int'l, Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1566 (S.D. Fla. 1996) (quoting *AFM Corp. v. So. Bell Tel. & Tel.*, 515 So.2d 180, 181 (Fla. 1987)).

[xliv] *Robinson Helicopter Co.*, 34 Cal. 4th at 992.

[xlv] *Carlile v. Harbour Homes, Inc.*, 2008 WL 4648423, at *4 (Wn. App. 2008).

[xlvi] *A.C. Excavating v. Yacht Club II Homeowners Assn., Inc.*, 114 P.3d 862, 866 (Colo. 2005) (citing *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000)); *Plourde Sand & Gravel Co.*, 917 A.2d at 1253 (quoting *Farmers Alliance Mut. Ins. Co. v. Naylor*, 452 F. Supp. 2d 1167, 1174 (D.N.M. 2006) ("When an independent duty

exists, the economic loss rule does not bar a tort claim because the claim is based on a recognized independent duty of care and this does not fall within the scope of the rule")).

[xlvii] *Hermansen v. Tasulis*, 48 P.3d 235, 240 (Utah 2002) (exception for real estate agents, who are held to an independent duty of honesty and competence); *Moransais*, 744 So. 2d at 983 (The Rule "should not be invoked to bar well-established causes of action in tort, such as professional malpractice"); *Congregation of the Passion v. Touche Ross & Co.*, , 159 Ill.2d 137, 164 (1994) (accountants); *Vista Fee Assocs. v. Teachers Ins. & Annuity Assoc. of Am.*, 259 A.D. 2d 75, 83, 693 N.Y.S. 2d 554 (N.Y. App. 1999) (citations omitted) ("[I]n claims against professionals, '[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties'"); *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 24 (2d Cir. 2000) ("to hold otherwise would in effect bar recover in many types of malpractice actions"); *Roberts v. Fearey*, 162 Or. App. 546, 549-50, 986 P. 2d 690 (1999) ("to recover purely economic losses, a plaintiff must plead some source of duty outside the common law of negligence. Such a duty arises only in attorney-client, architect-client, agent-principal, and similar relationships where the professional owes a duty of care to further the economic interests of the 'client'").

[xlviii] *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380; 241 P.3d 1256 (2010); *see also Affiliated FM Insurance Company v. LTK Consulting Services*, 170 Wn.2d 442, 243 P.3d 521 (2010) (applying "independent duty doctrine").

[xlix] *Id.*

[l] *Donatelli v. D.R. Strong Eng'rs*, 163 Wn. App. 436, 443, 261 P.3d 664 (2011).

[li] *AIU Insurance Co. v. Omega Flex, Inc.*, Civil Action No. 3:11-CV-00023, 2011 U.S. Dist. LEXIS 61302 (W.D.Va. June 9, 2011).

[lii] *See*, __ S.W. 3d ___, 2011 WL 2436154 (Ky. 2011).