2007 SOUTHEAST SUBROGATION SEMINAR

THURSDAY, MAY 10, 2007
TURNER FIELD
755 HANK AARON DRIVE
ATLANTA, GA

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2007 SOUTHEAST SUBROGATION SEMINAR

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SPEAKER PROFILES

Atlanta
Charlotte
Cherry Hill
Chicago
Dallas
Denver
Houston
London
Los Angeles
New York Downtown
New York Midtown
Newark
Miami
Philadelphia
San Diego
San Francisco
Santa Fe
Seattle
Trenton
Toronto
Washington, DC
West Conshohocken
Wilmington

These materials are intended to generally educate the participants on current legal issues. They are not intended to provide legal advice. Accordingly, these materials should not be relied upon without seeking specific legal advice on matters discussed herein.

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Member
Charlotte Office
(704) 376-3400
pasmer@cozen.com

AREAS OF EXPERIENCE
- Construction Defect
- Property Subrogation
- Subrogation & Recovery

EDUCATION
- J.D., University of South Carolina, School of Law, 1991
- Research Editor, ABA Real Property, Probate and Trust Journal
- B.A., Wofford College, magna cum laude, 1988
- Phi Beta Kappa

MEMBERSHIPS
- North Carolina Bar Association
- South Carolina Bar Association
- American Bar Association
  - Section of Litigation
- Mecklenburg County Bar Association

Peter F. Asmer, Jr. joined the firm's South Carolina office in May 1991, where he gained significant trial and litigation experience handling a variety of cases including those involving bad faith, medical malpractice defense, casualty and products liability defense, commercial and construction disputes and subrogation and recovery. In June 1996, Peter transferred to the firm's Charlotte, North Carolina office, where he became a full time member of the Subrogation and Recovery Department.

Peter has litigated claims and obtained recoveries for the firm's clients in matters as far ranging as:

- The destruction by fire of two mixed use historic buildings in historic Charleston, South Carolina on behalf of multiple insurance carriers who insured the owners of the buildings, the buildings' commercial tenants and several of the residential tenants
- A severe flood caused by a failure in the building's water supply lines at the production facilities of a major appliance manufacturer
- Fire damage to residential homes caused by product failures or construction defects
- The failure of roofing systems and external envelopes on high-rise condominiums and hotels throughout the Southeast
- The explosion and resulting fire at a manufacturing facility that resulted in the destruction of the subject building and a shutdown of the manufacturing operations

Peter regularly speaks at seminars on issues regarding fire related litigation and subrogation recovery for institutions such as the North Carolina and South Carolina chapters of the International Association of Arson Investigators, the North Carolina Insurance Crime Information Exchange and the South Carolina Bar Association. Peter also conducts training seminars on subrogation and recovery for the firm's insurance clients.
Peter received his bachelor of arts degree, *magna cum laude*, from Wofford College, where he was inducted into Phi Beta Kappa, in 1988. He earned his law degree at the University of South Carolina School of Law in 1991, where he was inducted into the Order of the Coif and the Order of the Wig and Robe. He is admitted to practice law in both North and South Carolina state and federal courts.
Karen Denise Fultz
Member
Atlanta Office
(404) 572-2057
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Karen D. Fultz joined the firm’s Atlanta office in July 2002 and practices with the Insurance Department. She focuses her practice on subrogation and recovery. Prior to joining the firm, Karen was an associate with Lackland and Associates in Atlanta. She also served as a judicial intern for the Hon. Denise Page Hood of the U.S. District Court for the Eastern District of Michigan.

Karen is admitted to practice in Georgia. However, her cases span over the Southeast region of the country. She has been admitted Pro Hac Vice in Federal and State Courts located in Alabama, Florida, Mississippi, and Tennessee. As a member of the subrogation and recovery department she handles product liability cases ranging from $100,000 to over $1,000,000.00 involving product failures which result in fire and/or water losses. Her practice also includes family law matters such as divorce, child custody, family adoptions, and child support. She is the coordinator for the Atlanta office’s pro bono program and provides legal assistance for the underprivileged and unrepresented community in the state of Georgia in partnership with Georgia Legal Services and the Atlanta Volunteer Lawyer Foundation. The pro bono cases extend her practice into defending victims of family violence, landlord/tenant and debt collection matters. She also serves as a member of the firm’s diversity committee.

She is a member of the State Bar of Georgia’s Insurance Law Section, and its Young Lawyers Division. She served as the President of the Gate City Bar Association (2005), and continues to serve as a member. She is also a member of the Atlanta Volunteer Lawyers Foundation, Georgia Association of Black Women Attorneys, the Atlanta Bar Association and a member of the American and National bar associations. Karen was selected for inclusion in the eighth edition of Who’s Who In Black Atlanta.

She is the author of the article “Workers’ Compensation Recovery Issues - Conflicts of Law in Georgia: Can You Intervene to Protect a Foreign State’s Lien?” which was published in the Subrogator (1/11/2006). She has made presentations on topics such as Motor Carrier/Cargo Claims, Taking Your First Deposition, and Workers’ Compensation Subrogation claims.

Karen received her bachelor of arts degree from Michigan State University in 1993 and her law degree in 1998 from Thomas M. Cooley Law School, cum laude, where she served on Moot Court.
Megan A. Lammon
Member
Charlotte Office
(704) 348-3406
mlammon@cozen.com

AREAS OF EXPERIENCE
- Complex Torts & Products Liability
- Construction Defect
- Construction Law & Litigation
- Products Liability
- Property Subrogation
- Subrogation & Recovery

EDUCATION
- J.D., Wake Forest University School of Law, 2000
- B.A., Boston College, 1996

BAR ADMISSIONS
- North Carolina

COURT ADMISSIONS
- U.S. District Court:
  Eastern, Middle and Western Districts of North Carolina

MEMBERSHIPS
- North Carolina Bar Association
- Mecklenburg County Bar Association, Past Co-Chair, Ask A Lawyer Program hosted by Young Lawyers Division

Megan A. Lammon joined the firm in March 2004 and is a Member in the Subrogation & Recovery Department of the Charlotte office. Prior to joining Cozen O'Connor, Megan was an associate at Poyner & Spruill, LLP in Charlotte where she practiced subrogation and premises liability defense.

Megan graduated from Boston College in 1996 with a bachelor of arts degree. While at Boston College, she was a scholarship athlete and member of its Division I Womens Swim Team. She received her law degree from Wake Forest University School of Law in 2000.

Megan is admitted to practice in North Carolina, and the U.S. District Court for the Eastern, Middle and Western Districts of North Carolina.
Mark C. Schultz joined the firm in February 1998 and is resident in the Philadelphia office, where he serves as national director of firm's Workers' Compensation Recovery Programs. In this capacity, he manages national recovery programs for Cozen O'Connor clients, in addition to handling complex product liability, construction and general liability cases.

With more than 10 years of experience in ADR, Mark has mediated all types of civil cases, and he received his training and certification from Pepperdine University and the International Institute for Conflict Prevention and Resolution. During his tenure as president of the Montgomery Bar Association, he also founded the Horace Davenport Dispute Resolution Center, which is dedicated to assisting available individuals, corporations and other parties seeking resolution for disputes without litigation.

Mark is a member of the Montgomery County, Pennsylvania, and American bar associations, as well as the Montgomery County Trial Lawyers Association. He served as the president of the Montgomery County Trial Lawyers Association in 1994. He is a member of the Pennsylvania Trial Lawyers Association and the Association of Trial Lawyers of America. Mark served on the Pennsylvania Supreme Court Disciplinary Board (1997-2003) and currently serves as chairman of the Pennsylvania Judicial Conduct Board. Mark served as past president of the Montgomery Bar Association (2000) and past president of the Montgomery Bar Foundation (2001). He was named a Pennsylvania "Super Lawyer" by Law & Politics.

From 1975-1977, Mark was the assistant district attorney, Montgomery County, PA. He earned his bachelor of arts degree at Clark University in 1971 and his law degree at Villanova University in 1975. He was admitted to practice in Pennsylvania in 1975.
Dr. Michael E. Stevenson, PE
Principal Metallurgical Engineer
Vice-President, Engineering Sciences Division

Biographical Sketch

Dr. Michael E. Stevenson is MME’s Principal Metallurgical Engineer and Vice-President of the Engineering Sciences Division. His areas of expertise include materials science, metallurgy, failure analysis, fracture mechanics, and non-destructive testing. He specializes in the performance and analysis of engineering materials in a variety of industrial applications and complex failure investigations. Dr. Stevenson is experienced with failure analysis of marine, automotive, biomedical, crane, rail, and power generation components. He also has experience with consumer products evaluation, development and implementation of non-destructive testing programs, and general metallurgical and materials consulting. Prior to his association with MME, Dr. Stevenson performed research and failure analysis at the University of Alabama Mechanical Metallurgy Laboratory of the Department of Metallurgical and Materials Engineering and the Terminal Ballistics Laboratory of the Department of Aerospace Engineering and Mechanics. Dr. Stevenson has five years of experience with Ultrasonics and Magnetics Corporation as a Metallurgical/NDT consultant. His technical interests include dynamic mechanical properties of materials, indentation hardness testing, fatigue and fracture mechanics, applied techniques for failure analysis, high strain rate material mechanics, and the performance of copper and copper alloys in extreme mechanical/chemical environments.

Education

University of Alabama, Tuscaloosa, Al, USA

Ph.D., Metallurgical Engineering (2001)

Dissertation: “Grain Size Effects on the High Strain Rate Deformation of OFHC Copper”

M.S., Metallurgical and Materials Engineering (1999)

Thesis: “Microhardness Anisotropy and the Indentation Size Effect in Single Crystal Hematite, Fe₂O₃”

B.S., Metallurgical and Materials Engineering (1998)
Classroom Teaching Experience

*Engineering Materials I: Structure and Properties of Materials*
Served as graduate teaching assistant and lecturer for topics of: basic structure property relationships in engineered materials; mechanical, magnetic, chemical, optical and electronic properties of materials; corrosion of materials; polymers and composites; metals and their alloys; ceramics and glasses.

*Mechanical Behavior of Materials*
Served as lecturer for topics of: plasticity; fracture mechanics; metal fatigue; failure analysis; fractography; non-destructive testing.

Experience And Expertise

Dr. Stevenson has more than eight years of experience in the following technical disciplines:

- Ballistic Testing of Materials
- Contact and Impact Mechanics
- Corrosion Engineering
- Failure Analysis
- Fatigue and Fracture Mechanics
- Forensic Materials Engineering
- Mechanical and Physical Metallurgy
- Mechanics of Materials
- Non-Destructive Testing and Evaluation
- Welding Metallurgy and Weld Failure Analysis

Representative Projects

**Flint Construction Services** (2003): Responsible for the investigation of a mobile truck crane failure, including structural mechanics simulation using finite element analysis.


**Mercedes Benz** (1998): Provided complete failure analysis of a pressure connector, utilizing both optical and electron microscopy.

**Mobil Oil Co.** (1996): Provided metallurgical failure analysis and design support for down hole components in petroleum production operations.
Professional Registration

Registered Professional Engineer (By Examination), Alabama License #26082
Registered Professional Engineer (By Reciprocity), Georgia License # 29920

Professional Associations

American Society for Materials (ASM-I), member since 1996
The Minerals, Materials and Metals Society (TMS), member since 1996
American Welding Society (AWS), member since 1996
National Association of Corrosion Engineers (NACE), member since 2000
American Society for Testing and Materials (ASTM), member since 2000
American Society of Mechanical Engineers (ASME), member since 2001
American Society for Non-destructive Testing (ASNT), member since 1996
The International Metallographic Society (IMS), member since 2001

Professional Activities

Associate Editor, Practical Failure Analysis/Journal of Failure Analysis and Prevention, ASM-I


Failure Analysis Committee, ASM-I

Fatigue and Fracture Committee (E28), ASTM

Forensic Sciences Committee (E30), ASTM

Forensic Engineering Subcommittee (E30.05), ASTM

Secretary, 2002 - Present

Industrial Advisory Board, University of Alabama Department of Aerospace Engineering and Mechanics

ASM-I Liaison/Vice-Chairman – Panel SD7 – Marine Forensics, Society of Naval Architects and Marine Engineers, SNAME

Structural Materials Committee, TMS

Symposium Co-Chair, Failure of Structural Materials, TMS Annual Meeting, Charlotte, NC, February 2004

Symposium Chair, Metallurgical Failure Analysis: Present and Future, IMS Annual Meeting, Savannah, GA, August 2004
Technical Reports

Dr. Stevenson has authored over 200 technical reports addressing various topics, including:

- Component Failures Relating to Fires and Explosions
- Corrosion Failure Analysis and Life Prediction
- Dynamic Behavior of Materials
- Environmentally Assisted Cracking of Materials
- Fatigue and Fracture Mechanics
- Failure of Aircraft, Automotive, and Crane Systems and Components
- Marine Structural Evaluation
- Metallurgical Failure Analysis
- Mechanical Integrity of Pressure and Piping Components
- Performance of Bolts and Bolted Connections

Archival Publications


**Presentations, Seminars And Invited Lectures**

"Failure Analysis in Vehicle Accident Reconstruction", ASM International Fall Meeting, Columbus, OH, October 2004.


"Advanced Engineering Failure Analysis", ASM International Atlanta Chapter, Atlanta, GA, January 2004. **(Invited)**
"Defect and Damage Assessment Using Ground Penetrating RADAR", ASM International Materials Solutions Conference, Pittsburgh, PA, October 2003.


"Engineering Forensics and Failure Analysis", ASM International Birmingham Chapter, Birmingham, AL, October 2002. (Invited)

"Macro Scale Imaging For Failure Analysis", ASM International Annual Meeting, Columbus, OH, October 2002.

"Forensic Materials Engineering", Georgia Bar Association, Continuing Legal Education Seminar, December 2001. (Invited)


Jurisdictions Comparative Chart:
Economic Loss Doctrine

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Revised June 2006.
### Jurisdictions Comparative Chart: Economic Loss Doctrine

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**Revised June 2006**

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<th>STATE</th>
<th>STATEMENT OF THE DOCTRINE</th>
<th>EXCEPTIONS TO THE DOCTRINE</th>
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| **Alabama** | Bars tort claim for purely economic losses from product defect that does not damage other property, but exceptions include fraudulent inducement resulting in "purely economic loss to a product itself based upon value that is indicated by a seller's representations but not actually received, even where the product was in fact working properly." Ford Motor Co. v. Rice, 726 So. 2d 626 (Ala. 1998) (denying recovery to plaintiffs claim for unknown future risk that their vehicle might one day roll over). See also Vesta Fire Insurance Corp. v. Milam & Co. Construction, Inc., 2004 WL 1909458 (Ala. 2004); Lloyd Wood Coal Co. v. Clark Equipment Co., 543 So. 2d 671 (Ala. 1989) (stating that the rule applies to products liability cases involving manufacturers). | - Other property. Ford Motor Co. v. Rice, 726 So. 2d 626 (Ala. 1998)  
| **Alaska** | Implicitly recognizes the doctrine with the statement in Northern Power and Engineering Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981), that Alaska allows recovery of economic loss under a strict products liability theory if "the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger." | -- Other Property  
See Northern Power  
-- Dangerous Situation  
See Northern Power |

**Note:** This document is intended to provide a general overview of the laws enacted in each state. Many of the statutes listed are complex, and do not lend themselves to a concise summary. Also, while we have made every effort to verify the accuracy of the materials summarized as of the date indicated, these statutes and cases are subject to revision, amendment and modification, as well as to differing court interpretations. It therefore is intended that this document should serve only as a guideline, for purposes of general reference, and is not a substitute for legal advice from a qualified attorney. Please feel free to contact any Cozen O'Connor attorney for additional information and assistance.
<table>
<thead>
<tr>
<th>State</th>
<th>Information</th>
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<tbody>
<tr>
<td>Arizona</td>
<td>Where economic loss, in the form of repair costs, diminished value, or lost profits, is the plaintiff's only loss, the policy of the law generally would be best served by leaving the parties to their commercial remedies. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984). Trial courts examine three factors to determine whether damage caused by a defective product may be recoverable in tort: (1) the nature of the product defect, (2) the manner in which the loss occurred, and (3) the type(s) of the loss or damage that resulted. Id. If the court determines that tort principles are appropriate under the circumstances, the plaintiff may rely on strict liability under section 402A of the Restatement, negligence or other applicable tort theories. If the court determines that tort principles are not appropriate, the plaintiff is limited to contractual remedies. Id. -- Other Property Nuances Where economic loss is accompanied by physical damage to personal or other property, the parties' interests generally will be realized best by the imposition of strict tort liability. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984). -- Accidental Loss If the only loss is non-accidental and to the product itself, or is of a consequential nature, the remedies available under the UCC will govern and strict liability and other tort theories will be unavailable. Salt River Project Agr. v. Westinghouse Elec., 694 P.2d 198 at 210, 211 (Ariz. 1984).</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Arkansas follows the minority doctrine allowing tort recovery even when the damages are purely economic or are to the product itself. Farm Bureau Ins. Co. v. Case Corp., 317 Ark. 467, 878 S.W.2d 741 (1994); Alaskan Oil, Inc. v. Central Flying Serv., Inc., 975 F.2d 553 (8th Cir. 1992).</td>
</tr>
<tr>
<td>California</td>
<td>California is considered the birthplace of the economic loss rule. In Seeley v. White Motor Co., 403 P.2d 145 (Cal. 1965), the California Supreme Court distinguished between tort recovery for physical injury and warranty recovery for economic loss. The court held that a buyer should not bear the risk that a product will cause physical injury, but the buyer should bear the risk that the &quot;product will not match his economic expectations.&quot; Id. at 151. The case involved a consumer transaction, the -- Other Property -- Special Relationship Allows limited exception where there is a &quot;special relationship&quot; between the plaintiff and the defendant. Biakanja v. Irvine, 49 Cal. 2d 647, 650 (1958); P'Aire v. Gregory, 24 Cal. 3d 799, 804 (1979). A &quot;special relationship&quot; exists between the plaintiff and the defendant where: (1) the plaintiff was an intended beneficiary of the defendant's obligations under a contract; (2) the plaintiff's loss was foreseeable; (3)</td>
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<td>Location</td>
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<tr>
<td><strong>Colorado</strong></td>
<td>In Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256 (Colo. 2002), the Colorado Supreme Court expressly adopted the economic loss rule. A party suffering only economic loss from a breach of express or implied contractual duties may not assert a tort claim for such breach absent an independent duty under tort law. Colorado looks to the source of the duty not the nature of the damages, because different legal theories are designed to enforce and protect different risks.</td>
</tr>
<tr>
<td><strong>Connecticut</strong></td>
<td>Term “harm” does not include the product itself and that claims for damages to the product itself are governed by the Uniform Commercial Code. Connecticut Products Liability Act, CPLA §52-572. See also Connecticut General Life Insurance Co. v. Grodsky Service, Inc., 781 F.Supp. 897 (D. Conn. 1991) (phrase “commercial loss” in the CPLA includes all economic loss either direct or consequential such that commercial tenant could not recover for economic losses arising out of a water pipe rupture and subsequent flooding of the premises, including employee salaries and fringe benefits, taxes, rent, and the cost of expedited computer work). See also McKernan v. United Technologies.</td>
</tr>
<tr>
<td>Corp., 717 F. Supp. 60 (D. Conn. 1989) (The district court held that the buyer of a helicopter could not recover in tort against the seller for economic damages arising out of the recall of the helicopter when no injury to persons or property other than to the helicopter itself were alleged); Bosek v. Valley Transit District, No. CV92039674 (Conn. Super. Dec. 10, 1993), (The Superior Court of Connecticut held that the plaintiff’s claims for damages under the Connecticut Products Liability Act were barred. The action involved commercial parties, and alleged loss of profits, interruption of business and damage to business arising out of damage to machinery and a building); Flagg Energy Dev’t Corp. v. General Motors Corp., 244 Conn. 126, 709 A.2d 1075 (1988) (The Connecticut Supreme Court upheld the trial court’s order granting the defendant’s motion to strike misrepresentation and unfair trade practices claims. The plaintiff alleged that gas turbine engines manufactured by the defendant were defective, and defendant failed to cure the defects. The court held that these claims between commercial parties were inconsistent with and precluded by breach of warranty claims).</td>
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| Delaware |
| The economic loss doctrine “prohibits recovery in tort where a product has damaged only itself (i.e., has not caused personal injury or damage to other property) and, the only losses suffered are economic in nature.” Danforth v. Acorn Structures, Inc., 608 A.2d 1194, 1195 (Del. 1990) (emphasis in original). In Danforth, the Delaware Supreme Court identified “economic loss” as “damages for inadequate value, cost of repair and replacement of the defective product, or consequent loss of |
| -- Other Property |
| -- Misrepresentation |
profits -- without any claim of personal injury or damage to other property." Id. at 1201 n.3 (emphasis in original). The Danforth case applied the economic loss doctrine to preclude an action by a homeowner against the seller of building kits. In response to the decision in Danforth, the Delaware General Assembly passed the Home Owners Protection Act. See Del. Code Ann. tit. 6, § 3651-52 (1999). This act states:

"No action based in tort to recover damages resulting from negligence in the construction or manner of construction of an improvement to residential real property and/or in the designing, planning, supervision and/or observation of any such construction or manner of construction shall be barred solely on the ground that the only losses suffered are economic in nature." Del. Code Ann. tit. 6, § 3652.

Both parties argue that public policy supports their positions. This court has stated some of the general policies that support the application of the economic loss doctrine as follows: "(a) It encourages the party best situated to assess the risk of economic loss to insure against it; (b) it maintains a distinction between tort and contract law; and (c) it protects a party's freedom to allocate economic risks by contract."

| Florida | Plaintiff cannot sue in tort for purely economic damages in the absence of personal injury or damage to "other property," regardless whether the injury was from a sudden or calamitous event. Casa Clara Condominium Assn. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993). The doctrine applies to service contracts but not to professional services or to situations where the plaintiff is not in privity of -- Other Property, i.e., non-integral property
| | -- Lack of privity if it is a service transaction as opposed to a product liability claim. Indemnity Insurance Co. of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004).
| | -- Torts Independent of Contractual Duties. HTP v. Lineas Aereas Cosarricenses, S.A., 685 So. 2d 1238 |
contract with the service provider, i.e., the doctrine applies to non-professional services so long as the plaintiff is in privity of contract with the defendant but does not require privity if the claim is for a product defect. **Indemnity Insurance Co. of North America v. American Aviation, Inc., 891 So. 2d 532 (Fla. 2004)** ("We conclude that the 'economic loss doctrine' or 'economic loss rule' bars a negligence action to recover solely economic damage only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies.")

(Fla. 1996) (allowing claim of fraud in the inducement to a contract, but barring claim of fraud in the performance of contract: "Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."). See also **Alex Hofrichter, P.A. v. Zuckerman & Vendetti, P.A., 710 So. 2d 127 (Fla. 3d DCA 1998)** (barring conversion, civil theft, and constructive fraud claims, but allowing claims of lawyer's alleged wrongful retention of certain fees as tantamount to "intentional misconduct"); **Bankers Risk Management Services, Inc. v. Av-Med Managed Care, 697 So. 2d 158 (Fla. 2d DCA 1997)** (allowing claim of tortious interference with contract as being independent of a contractual breach, but barring claim for fraudulent misrepresentation as not independent from a breach of contract claim).

-- Statutory Violations. **Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999)** (commercial tenant can sue building owner in negligence for violation of Fla.Stat. § 553.84, which provides for a statutory civil remedy for violation of the State Minimum Building Codes). Note, however, that after Comptech, the legislature amended section 553.84 to create an "escape clause," stating: "[H]owever, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the
<p>| --- | -- Other Property -- Sudden and Calamitous Event Plaintiff can recover in tort when there is a sudden and calamitous event that not only causes damage to the product but poses an unreasonable risk of injury to persons and other property. <em>Vulcan Materials Co. v. Driltech</em>, 251 Ga. 383, 306 S.E.2d 253 (1983). See also <em>Squish La Fish, Inc. v. Thomco Specialty Products, Inc.</em>, 149 F.3d 1288 (11th Cir. 1998). |
|  | -- Misrepresentation Exception “[O]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited to a class of person for whom the information was intended, either directly or indirectly.” <em>Robert &amp; Co. Assoc. v. Rhodes-Haverty Partnership</em>, 250 Ga. 680, 681-82, 300 So.2d 503 (1983); See also <em>Squish La Fish, Inc. v. Thomco Specialty Products, Inc.</em>, 149 F.3d 1288 (11th Cir. 1998). Under this exception, “false information must be |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
<th>Other Property</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hawaii</strong></td>
<td>The economic loss rule bars claims based in negligence or strict liability for economic losses when the product damages only itself. <em>State ex rel. Bronster v. U.S. Steel Corp.</em>, 919 P.2d 294, 302 (Hawaii 1996) (adopting the rule “insofar as it applies to claims for relief based on a product liability or negligent design and/or manufacture theory”)</td>
<td>-- <strong>Other Property</strong></td>
</tr>
</tbody>
</table>
Either personal injury or damage to “other property” damage [in addition to a “sudden and calamitous occurrence”] are required. *Trans States Airlines v. Pratt & Whitney Can.*, 682 N.E.2d 45, 55 (Ill. 1997) Under Illinois law, a product and one of its component constitute two separate products only if the purchaser bargained for each separately. If the components were purchased as a fully integrated product they cannot constitute “other property” for the |

purpose of the economic loss doctrine. Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 55-59 (Ill. 1997). Damage to the product itself is exempted from the broad category of "property damage." Id. at 53. Therefore, even if damaged through a sudden and calamitous occurrence, damage to the product itself exempted from the category of injury that is recoverable in tort. Id. at 48, overruling Vaughn v. General Motors Corp., 454 N.E.2d 740 (Ill. 1983).


-- Lack of Privity of Contract The Economic Loss Doctrine barred recovery of economic loss damages by one party involved in a construction project from another party involved in that project where the claimant had no privity of contract with the alleged wrongdoer. Fence Rail Dev. Corp. v. Nelson & Assoc., Ltd., 528 N.E.2d 344, 348 (Ill. App. 1988).
--Applicability to Service Contracts

"Just as a seller's duties are defined by his contract with a buyer, the duties of a provider of services may be defined by the contract he enters into with his client. When this is the case, the economic loss doctrine applies to prevent the recovery of purely economic loss in tort." Fireman's Fund Ins. Co. v. SEC Donohue, 679 N.E.2d 1197, 1200 (Ill. 1997), citing Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503 (Ill. 1994). However, an important distinction must be made: the economic loss doctrine bars recovery in tort only when the duty breached was created by the service contract; violation of duties arising independently of the service contract remain recoverable in tort. Id.; see also Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177, 194 (Ill. 2002).

--Applicability to Consumers

"We recognize that some jurisdictions make a distinction between commercial transactions and consumer transactions, allowing tort recovery for consumer transactions. Although we are not now persuaded that the consumer/commercial transaction distinction makes any difference when the product damages only itself, we express no opinion in that regard."


--Fraud and Misrepresentation Exceptions

Under Illinois law, recovery of economic losses in tort is permitted: (1) where plaintiff's damages are proximately caused by defendant's intentional, false representation, i.e., fraud; or (2) where the plaintiff's
Indiana

| “Economic loss is defined as the loss of profits because the product is inferior in quality and does not work for the general purposes for which it was manufactured and sold, and includes such incidental and consequential losses as lost profits, rental expense and lost time.” Bamberger & Feibleman v. Indianapolis Power & Light Co., 665 N.E.2d 933, 938 (Ind. App. 1996), citing Martin Rispens & Son v. Hall Farms, Inc., 621 N.E.2d 1078, 1091 (Ind. 1993); Neibarger v. Universal | damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions. Mormon Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452-53 (1982); In re Illinois Bell Switching Station Litigation, 641 N.E.2d 440 (1994). Note, however, that the negligent misrepresentation exception does not apply when the information supplied is merely ancillary to the sale of a product or service in connection with the sale, as the information provider is not deemed to be in the business of providing information. Fox Assocs. v. Robert Half Int'l, Inc., 777 N.E.2d 603, 606-7 (Ill.App. 2002).

-- The Public Safety Exception

Although Illinois has not adopted an explicit “public safety exception” to the economic loss doctrine, in Board of Education v. A. C & S, Inc., 546 N.E.2d 580, 590-91 (Ill. 1989) the Illinois Supreme Court made an exception to the typical rule that damage to other property be caused by a “sudden or calamitous” event, requiring only a showing that asbestos contamination spread throughout different parts of the building, thus constituting damage to other property.

-- Other Property

Under Indiana law, when a manufacturer places an item into the stream of commerce, that item, together with its component parts, constitutes “the product” for purposes of the economic loss doctrine. Hitachi Constr. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 464 (Ind.App. 2000). If one component damages the whole, or another component thereof, no damage to “other property” has occurred. Id. Items added to “the
Coops., Inc., 486 N.W.2d 612, 615 (Mich. 1992) (applying the rule to “transactions involving the sale of goods for commercial purpose where economic expectations are protected by commercial and contract law”). A manufacturer does not owe a tort duty to avoid causing purely economic damage to the product itself. Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1305 (Ind.App. 1987). Lost profits flowing from the failure of a product to perform as expected, i.e., economic loss, do not form the basis for a tort action; instead, the buyer’s remedy lies in contract. Martin Rispens & Son v. Hall Farms, 621 N.E.2d 1078, 1089-90 (Ind. 1993). product” after it is placed into the stream of commerce, however, do constitute other property. Id. Damage to those items caused by “the product” or any of its components does constitute damage to other property recoverable in tort. Id. "Economic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself." Interstate Cold Storage, Inc. v. G.M.C., 720 N.E.2d 727, 731 (Ind. App. 1999). "Other property" is that which is "wholly outside and apart from the product itself." J/N Tek v. Hitachi, Ltd., 734 N.E.2d 584, 588 (Ind.App. 2000). Accordingly, a person may not recover in tort when only the product itself has been destroyed. Hitachi Constr. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 463-4 (Ind.App. 2000). “Personal injury and damage to other property from a defective product are actionable...but their presence does not create a claim under the Act for damage to the product itself.” Fleetwood Enters. v. Progressive Northern Ins. Co., 749 N.E.2d 492, 493 (Ind. 2001). In Gunkel v. Renovations Inc., Ind., No. 76S01-0403-CV-133, 2/01/05, the Indiana Supreme Court held that property acquired separately from the defective product or service is "other property" whose damage is recoverable in tort. The case involved the negligent installation of a stone façade to a new home. The plaintiffs hired a separate company to install the façade. The court stated, “If a component is sold to the first user as a part of the finished product, the consequences of its failure are fully within the rationale
of the economic loss doctrine. It therefore is not ‘other property.’ But property acquired separately from the defective good or service is ‘other property’ whether or not it is, or is intended to be, incorporated into the same physical object.” In short, the product is that which is purchased by the plaintiff, not the product furnished by the defendant.

-- Sudden or Dangerous Event
Where recovery for property damage is sought under the Act, such damage “must have happened quickly, unexpectedly and be of a calamitous nature.” Martin Rispens & Son v. Hall Farms, 621 N.E.2d 1078, 1088-89 (Ind. 1993), citing Reed v. Central Soya Co., 621 N.E.2d 1069, 1074-75 (Ind. 1993).

-- Lack of Privity of Contract

| Iowa | Where damages alleged are limited to the object of the contract, as opposed to personal injury or damage to other property, the harm alleged is pure economic loss. Flom v. Stahly, 569 N.W.2d 135, 141 (Iowa Sup. 1997). A plaintiff cannot maintain a claim for purely economic damages arising out of a defendant's alleged negligence. Determan v. Johnson, 613 N.W.2d 259, 261-62 (Iowa 2000), citing Nebraska Innkeepers, Inc. v. Pittsburgh-Des

| Other Property | The economic loss doctrine bars tort claims for damage to the defective product itself. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 652-3 (Iowa App. 1996). “We have required at a minimum that the damage for which recovery is sought must extend beyond the product itself.” Determan v. Johnson, 613 N.W.2d 259, 262 (Iowa 2000). Where the damaged product was "an integral part
Moines Corp., 345 N.W.2d 124 (Iowa 1984). Claims based on strict liability in tort are barred where a product sold by the defendant to the plaintiff failed to perform as it was expected, but caused no physical injury to person or property. Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988). of the finished product" bargained for by the plaintiff – concrete or bricks used to build a house the buyers had purchased, for example – the other property exception does not apply. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 651 (Iowa App. 1996), citing Pulte Home Corp. v. Osmose Wood Preserving, 60 F.3d 734, 741 (11th Cir. 1995), citing Casa Clara Condominium Ass'n, v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993).

-- Sudden or Dangerous Event
The common thread running through our cases rejecting recovery is the lack of danger created by the defective product. American Fire & Cas. Co. v. Ford Motor Co., 588 N.W.2d 437, 439-440 (Iowa 1999). These cases "emphasized that hazard and danger distinguished tort liability from contract law. They distinguished the disappointed consumers from the endangered ones." Id. When "the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract. Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect." Determan v. Johnson, 613 N.W.2d 259, 261-62 (Iowa 2000).

-- Lack of Privity of Contract
Purchasers who lack privity of contract with the manufacturer of a defective product cannot recover solely consequential economic loss for breach of express warranty or the implied warranties of merchantability and fitness for a particular purpose. Tomka
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<td>Kansas</td>
<td>The economic loss doctrine prohibits a buyer of defective goods from recovering in tort where the only damage is to the defective goods themselves. <strong>Prendiville v. Contemporary Homes, Inc.,</strong> 83 P.3d 1257, 1259-1260 (Kan. App. 2004).</td>
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<tr>
<td>Kentucky</td>
<td>Kentucky state courts have not discussed the applicability of the economic loss rule, but three federal decisions, predicting how the Kentucky Supreme Court would rule, have adopted the economic loss rule to commercial transactions. <strong>Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.,</strong> 2002 Fed App 0015P (6th Cir. 2002); <strong>Gooch v. E.I. Du Pont De Nemours &amp; Company,</strong> 40 F.Supp.2d 863 (W.E.Ky Feb. 8, 1999) and <strong>Bowling Green Municipal Utilities</strong></td>
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v. Hoechst Celanese Corp., 528 N.W.2d 103, 107-8 (Iowa Sup. 1995). However, non-privity buyers may recover for direct economic loss damages if the remote seller has breached an express warranty. **Beyond the Garden Gate v. Northstar Freeze-Dry Mfg.,** 526 N.W.2d 305, 310 (Iowa Sup. 1995).

-- Applicability to Consumers

Iowa courts have recognized, but not yet adopted or rejected the consumer transaction exception to the economic loss doctrine. “Some courts have pointed out the economic loss rule applies only in a commercial context, not to a consumer who purchases goods for personal, residential use. The plaintiff in this case does not argue the doctrine is inapplicable because the sale of the bricks was not a commercial transaction.” **Richards v. Midland Brick Sales Co.,** 551 N.W.2d 649, 651-62 (Iowa App. 1996).

-- Other Property

v. Thomasson Lumber Co., 902 F.Supp. 134 (W.D.Ky Oct. 11, 1995). All three decisions distinguished the case of Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921 (Ky.1994) on the basis that Franz did not involve a commercial transaction. In Franz, the Kentucky Supreme Court stated that "[w]e do not go so far as ... [to limit] recovery under products liability theory to damage or destruction of property 'other' than the product itself," by holding that the case "does not involve a transaction between a commercial buyer and seller." see Thomasson, 902 F.Supp. at 138 n. 2. The federal courts predict that although the Kentucky Supreme Court would not apply the ELR to non-commercial home purchases, it would apply it to commercial transactions.

### Louisiana

No Louisiana court appears to have addressed the economic loss doctrine. However, under Louisiana's Product Liability Act ("LPLA"), the term "damage" that is recoverable in a products liability claim "includes damages to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that [the Civil Code articles on redhibition] do [] not allow recovery of such damage or economic loss." La. Rev. Stat. Ann. §§ 9:2800.53(5). The court in R-Square Investments, Inc. v. Teledyne Industries, Inc., 1997 WL 436425 (E.D. La) held that the most plausible reading of that language would allow tort recovery where redhibition remedies (implied warranty remedies) are foreclosed.

### Maine

The economic loss doctrine bars tort recovery for a defective product's damage to itself. Oceanside at Pine Point Condo, Owners Ass'n v. -- Other Property

Maine applies the "integrated product rule" to distinguish the product from other property such that "the product"
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<th>State</th>
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<tr>
<td>Massachusetts</td>
<td>The Supreme Judicial Court follows the majority rule, holding that “purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage.” FMR Corp. v. Boston Edison Co., 613 N.E.2d 902, 903 (Mass. 1993) (rejecting claim that negligent repair of electric lines caused power outages which caused loss of profits); accord Garweth Corp. v. Boston Edison Co., 613 N.E.2d 92, 93-94 (Mass. 1993) (rejecting claim that negligent oil spill caused damages for delay in ability to</td>
<td>-- Other Property</td>
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| Michigan | “Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses.” Niebarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 615 (Mich. 1992), quoting Kennedy v. Columbia Lumber & Mfg Co., 384 S.E.2d 730, 736 (1989). See also Huron Tool & Eng’g Co. v. Precision Consulting Servs., 532 N.W.2d 541, 543-44 (Mich.App. 1995). | -- Other Property
Michigan law prohibits recovery of damages to “other property” where that damage was foreseeable to the parties at the time when the contract for sale was entered into. Affiliated F.M. Ins. Co. v. Abolite Lighting, Inc., 1998 Mich.App. LEXIS 2558 (Mich.App. 1988), citing Niebarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 620 (Mich. 1992). As such, the distinction between the defendant’s product and “other property” is significantly less important in Michigan than in most other jurisdictions. If the potential for damage to other property was within the contemplation of the parties when the ultimately defective product was purchased, and the parties had an opportunity to negotiate an allocation of risk to address damage to that other property in the event that the product proved to be defective, then the economic loss doctrine would bar tort claims for “other property” damage. Niebarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 620 (Mich. 1992).

-- Lack of Privity of Contract

-- Applicability to Service Contracts
Michigan does not apply the economic loss doctrine to preclude tort recovery of economic loss where the claim emanates from a contract for services. Quest Diagnostics, Inc. v. MCI WorldCom, Inc., 656 N.W.2d 858, 863 |
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<td>A buyer may not bring a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property. In any claim brought under this subdivision, the buyer may recover only for: (1) loss of, damage to, or diminution in value of the other tangible personal property or real property, including, where appropriate, reasonable costs of repair, replacement, rebuilding, and restoration; (2) business interruption losses, excluding loss of good will and harm to business reputation, that actually occur during the period of restoration; and</td>
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<td>Minnesota</td>
<td>- Other Property. See 2002 Minnesota Statutes §§ 604.101. Minnesota Statute Section 604.101 does not define the concept of “other property.” The legislative working group concluded that in Minnesota, as elsewhere around the nation, the concept is best developed through case law. S.J. Groves &amp; Sons v. Aerospatiale Helicopter, Corp., 374 N.W.2d 431, 434 (Minn. 1985).</td>
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<td>- Lack of Privity of Contract See Minn. Stat. §§ 604.101 (consumers may recover against other persons or entities in the chain of distribution even if they do not have a direct contractual relationship. TCF Bank &amp; Sav. v. Marshall Truss Sys., Inc., 266 N.W.2d 49, 54 (Minn.App. 1991)</td>
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(Mich.App. 2002), *quoting Higgins v Lauritzen*, 530 N.W.2d 171 (1995). -- Applicability to Consumers Michigan has not adopted an exception to economic loss doctrine for consumer transactions. Like sophisticated commercial purchasers, consumers will not be permitted to recover economic loss in tort. *Sherman v. Sea Ray Boats, Inc.*, 649 N.W.2d 783, 786-88 (Mich.App. 2002). Consumers are limited to whatever contractual remedies they negotiate at the time of purchase without regard to whether the seller was an entity of greater knowledge or bargaining power. Id. -- Fraud and Misrepresentation Michigan recognizes an exception to the economic loss doctrine for fraud in the inducement. *Huron Tool & Eng’g Co. v. Precision Consulting Servs.*, 532 N.W.2d 541, 544-45 (Mich.App. 1995). When one party was tricked into contracting, it will not be limited to its contractual remedies when seeking recovery of economic losses. Id..
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<tr>
<td>Missouri</td>
<td>&quot;Economic loss is distinguished from harm to person or damage to property: Economic loss includes cost of repair and replacement of defective property which is the subject of the transaction,</td>
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(3) additional family, personal, or household expenses that are actually incurred during the period of restoration. Section 604.101.  

("Minnesota has adopted the most liberal privity position available in the U.C.C."); *Nelson v. International Harvester, Corp.*, 394 N.W.2d 578, 581 (Minn. App. 1986). "A sellers warranty, whether expressed or implied, extends to any person who may be reasonably expected to use, consume or be affected by the goods and who is injured by breach of the warranty." Minn. Stat. § 336.2-318 (1998).  

-- Fraud and Misrepresentation  
See Minn. Stat. § 604.101(4)  
(permitting recovery and tort for intentional or reckless misrepresentation claims relating to goods sold or leased.)  


-- Other Property  

-- Other Property  
"Recovery in tort for purely economic damages limited to those cases whether it is personal injury, damage to property other than that sold, or..."
as well as commercial loss for inadequate value and consequent loss of profits or use."


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-- Sudden and Calamitous Event

"The line between economic loss and direct property damage is not always easy to discern, particularly when the plaintiff is seeking compensation for loss of the product itself. We cannot lay down an all-inclusive rule to distinguish between the two categories; however, we note that sudden and calamitous damage will almost always result in direct property damage and that deterioration, internal breakage and depreciation will be considered economic loss." *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471, 474 (Mo.App. 1980).

-- Lack of Privity of Contract

"Where the only damage complained of is an economic loss resulting from defects in an item sold (or built) pursuant to contract, a contract action affords the plaintiff complete relief, in a coterminal negligence action does not lie." *Korte Constr. Co. v. Deconess Manor Ass’n*, 927 S.W.2d 395 (Mo. App. 1996); but see *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 59 (Mo.App. 1981)

("economic loss is potentially devastating to the buyer of an unmerchantable product. It is unjust to preclude recovery for a consumer economic loss from the manufacturer..."
for such loss because of a lack of privity”).
-- Fraud and Misrepresentation Exceptions
Under Missouri law, a cause of action exists “for the recovery of pecuniary loss caused to persons who justifiably rely on information supplied for their guidance in a business transaction by one who provides the information in the course of his business, profession or other transaction in which he is interested, if the information is false and the supplier of the information failed to exercise reasonable care or competence in obtaining or communicating the information.” Huttegger v. Davis, 599 S.W.2d 506, 515 (Mo. 1980)

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<th>Montana</th>
<th>In Jim’s Excavating Service, Inc. v. HKM Associates, 265 Mont. 494, 878 P.2d 248 (Mont. 1994), the Court addressed whether the economic loss doctrine should apply to a claim against a design professional despite lack of privity with the professional. The court began by noting the following: “Although this Court has not addressed this specific question, the majority of jurisdictions have done so and have rejected the economic loss doctrine.” (citing Annotation, Tort Liability of Project Architect for Economic Damages Suffered by Contractor, 65 A.L.R.3d 249 (1975)). The court concluded that the doctrine does not bar such a professional negligence claim: “Thus, we hold that a third party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs were at risk in relying on the information supplied. Jim’s Excavating Service v HKM Associates, 265 Mont. 494, 878 P.2d 248 (1994).</th>
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<td>---</td>
<td>-- Other Property</td>
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<td>---</td>
<td>-- Professional Negligence</td>
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<tr>
<td>A third party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs were at risk in relying on the information supplied. Jim’s Excavating Service v HKM Associates, 265 Mont. 494, 878 P.2d 248 (1994).</td>
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supplied." Although no cases have been uncovered explicitly refining the economic loss doctrine in the product liability context subsequent to this decision, Montana has held that a strict liability action can lie when the only damage suffered is to the defective product itself. *Thompson v Nebraska Mobile Homes Corp.*, 198 Mont. 461, 647 P.2d 334 (1982).

**Nebraska**

The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product. *Hilt Truck Line, Inc. v. Pullman, Inc.*, 382 N.W.2d 310, 222 Neb. 65 (Neb. 1986).

**Nevada**


**New Hampshire**

Co., 617 Supp. 1276 (D.N.H. 1984), which allowed recovery in tort for purely economic loss, noting, "A Federal Court's interpretation of New Hampshire law has no value as precedent in New Hampshire State Courts. Furthermore, Town of Hooksett predates the above cited New Hampshire cases which have held that economic loss is not recoverable in tort in New Hampshire."

**New Jersey**

The New Jersey Supreme court first adopted the economic loss rule in Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985), where a commercial restorer of vehicles sought to recover repair cost, lost profits and decreased market value of trucks due to difficulties with the vehicles' transmissions. The court decided that neither negligence nor strict products remedies were available between commercial parties for these economic losses.

The New Jersey Legislature also approved the economic loss rule by adopting the Product Liability Act in 1987. The statute provides, in pertinent part, that, with respect to products liability actions in New Jersey, "harm" means physical damage to property, other than to the product itself," N.J.S.A. § 2A:58C-1.

In Easley v. Glen-Gery Corp., 804 F. Supp. 585 (D.N.J. 1992), the purchasers of a large apartment complex sued the manufacturer of allegedly defective bricks used in the apartment construction for strict products liability. The federal district court dismissed the claim, holding that the plaintiffs, as commercial purchasers, could not recover in tort without more than economic loss. The plaintiffs had -- Other Property

In Naporano Iron & Metal Co. v. American Crane Corp., 1999 WL 1276733 (D.N.J. Dec. 30, 1999), the federal district court, while recognizing the "other property" exception, limited its application where the other property is not owned by the plaintiff but was owned by third parties. The case involved a claim for product liability damages stemming from three collapses of a crane that the defendants had manufactured. In each instance, the crane itself and property belonging to the plaintiff's customers sustained damage, but no person or other property of the plaintiff had been injured. The district court held that the plaintiff failed to state a claim with respect to the property of third parties, which the court found did not fall within the "other property" exception to the economic loss doctrine. The court reasoned that a third party injured by a defective product is able to recover under tort law from the manufacturers of defective products, but the fact that the plaintiff, a party to a commercial agreement, had reimbursed its customers for the harm did not preclude application of the economic loss doctrine.

-- Fraud and Misrepresentation
alleged that the bricks were 

deteriorating, caused substantial 
damage to the apartment and also 
presented a hazard to apartment 
residents. The court reasoned that it 
should look to the product purchased by 
the plaintiff, and accepted the argument 
that the “product” purchased was the 
apartment complex rather than the 
bricks.

In Alloway v. General Marine 
Industries, L.P., 149 N.J. 620, 695 A.2d 
264 (1997), the New Jersey Supreme 
Court held that the subrogated insurer 
of the purchaser of a luxury boat that 
sank while docked, but caused no 
personal injury or damage to other 
property was limited in a suit against 
the manufacturer to breach of warranty 
remedies under the UCC. The plaintiff-
buyer was not a commercial party, but, 
according to the court, the parties’ 
relative bargaining power was not 
greatly disproportionate. Therefore, the 
court held that the parties’ contractual 
allocation of risk would decide 
recovery of economic losses, including 
cost of repair and lost trade-in value of 
the boat.

New Mexico 

In commercial transactions without 
great disparity in bargaining power, 
economic loss may only be recovered 
in contract, not in tort actions for 
negligence or strict liability. Utah 
International, Inc. v. Caterpillar Tractor 
Co., 108 N.M. 539, 775 P.2d 741 
(N.M.App. 1989), cert denied., 108 
N.M. 354, 772 P.2d 884 (N.M. 1989).

New York 

In Bocere Leasing Corp. v. General 
Motors Corp., 84 N.Y.2d 685, 645 
N.E.2d 1195, 621 N.Y.S.2d 497, 
(1993), the Court of Appeals of New 
York adopted the economic loss rule set 
forth in East River v. Transamerica

In Coastal Group, Inc. v. Dryvit 
Systems, Inc., 274 N.J. 171, 643 A.2d 
649 (1994), the court held that the 
economic loss rule did not preclude a 
commercial buyer’s claim for fraud 
and misrepresentation. A 
condominium project owner and 
developer filed a breach of contract 
action against the contractor who 
installed a well system and the 
materials supplier alleging negligence, 
breach of contract and fraud. The 
Appellate Division held that the 
negligence claim had been properly 
dismissed, but that the plaintiff could 
pursue claims for fraud and 
misrepresentation under the New 
Jersey Consumer Fraud Act.

-- Sudden and Calamitous Events 

In Naporano Iron & Metal Co. v. 
American Crane Corp., 1999 WL 
1276733 (D.N.J. Dec. 30, 1999), 
discussed above, the plaintiff alleged 
that a crane failed in a “sudden and 
calamitous manner.” The district court 
determined that the New Jersey 
Superior Court had rejected the sudden 
and calamitous exception. Id. at *6.

-- Other Property 

If economic loss doctrine applies, 
neither damage to the product nor 
damage to property other than the 
product can be recovered in tort. 
Spectron Dev. Lab. v. American 
Hollow Boring Co., 123 N.M. 170, 

-- “Other Property” 

New York courts have held that the 
economic loss rule does not apply 
where the defective product causes 
damage to “persons or property other 
than the product itself.” Arkwright
| Delaval, Inc., supra. In Bocre Leasing, the court held that a purchaser in a commercial transaction may not recover in tort under a strict products liability or negligence theory from the manufacturer, where only the product itself is damaged and there is no allegation of physical injury or other property damage. Bocre Leasing dealt with a remote purchaser of a product. Recent New Jersey decisions have extended the economic loss rule in cases involving more immediate purchasers as well. See, e.g., 7 World Trade Co. v. Westinghouse Electric Corp., 256 A.D.2d 263, 682 N.Y.S.2d 385, 387 (1st Dept. 1998) (two workers for an electrical subcontractor could not bring negligence or products liability actions against the manufacturer of the building’s bus ducts which exploded during building renovations, where plaintiffs alleged losses only of an economic nature). Generally, where courts have deemed the underlying transaction to be a sale of goods, and no damage to other property or physical injury are alleged, New York courts have ruled that the plaintiff is limited to contractual remedies and typically may not maintain tort causes of action. In numerous recent decisions, courts applying New York law have precluded tort recovery for economic losses. Travelers Insurance Cos. v. Howard E. Conrad, Inc., 233 A.D.2d 890, 649 N.Y.S.2d 586 (4th Dept. 1996), (A subrogation action alleging negligence and strict products liability to recover for economic loss arising out of sinking of a yacht was precluded). See also 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 n.1 (N.Y. 2001) (stating

| Mut. Ins. Co. v. Bojoirve, Inc., 1996 WL 361535 at *3 (S.D.N.Y. June 27, 1996) (citations omitted). In that case, the plaintiff alleged that a defective component part damaged not only the generator in which it was housed, but also adjacent generators, floors, ceilings, furniture and other real and personal property. Thus, because “other property” beyond the product itself was damaged, the plaintiff could recover in tort. -- Abrupt, Cataclysmic Occurrences In State Farm Fire & Casualty Co. v. Southtowns Tele-Communications, Inc., 245 A.D.2d 1028, 667 N.Y.S.2d 157 (4th Dept. 1997), the court permitted a subrogation action against a contractor that had installed a music-on-hold system. The owners alleged that the system resulted in a fire causing extensive damage to the building and its contents. The court rejected the defendant’s argument that plaintiffs were limited to breach of contract remedies, holding that the plaintiffs had asserted a valid tort claim for negligent installation, “because the damages alleged sustained by the plaintiff do not arise from the failure of a music-on-hold system to perform as intended, but arise instead from an ‘abrupt, cataclysmic occurrence’ allegedly caused by defendant’s negligence.” Id. at 158 (citations omitted). See also, LaBarre v. Mitchell, 256 A.D.2d 850, 681 N.Y.S.2d 653 (3d Dept. 1998) (holding that a defectively designed fire alert system may be considered an inherently dangerous product and its failure to perform can have catastrophic consequences, therefore permitting plaintiffs’ cause of action for damage to real and personal property and lost income); Village of
that the rule applies to suits by "an end-purchaser of a product" against a manufacturer.

North Carolina

"[W]hen a plaintiff seeks recovery for damage to a product that is the subject of the contract between the parties, a plaintiff is limited to a contract or warranty action."

Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998) (citing Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C.App. 423, 432, 391 S.E.2d 211, 217 (1990) (adopting rule that "purely economic losses are not ordinarily recoverable under tort law" in context of products liability suit); AT&T Corp., 876 F.Supp. at 91 (noting that, with respect to losses recoverable in product liability suits, North Carolina follows the majority rule and does not allow recovery of purely economic losses in negligence actions); North Carolina State Ports Authority v. Lloyd A. Fry Roofing Company, 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."); rejected in part on other grounds, Trustees of Rowan Tech. College v. J. Hyatt Hammond Assoc., Inc., 313 N.C. 230, 328 S.E.2d 274 (1985)); and Spillman v. American Homes, 108 N.C.App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the

Groton v. Tokheim Corp., 202 A.D.2d 728, 608 N.Y.S.2d 565 (3d Dept. 1994) (regulator in underground fuel dispensing system failed to operate, leading to fuel leak; the court noted the potential for fire or explosion, notwithstanding that no actual cataclysmic event occurred, and permitted tort recovery).

-- Other Property

The economic loss rule only applies to "the product itself" and not to "other property." under Moore v. Coachmen Industries, Inc., 499 S.E.2d 772 (NC Ct. App. 1998) and Reecer v. Homerette Corporation, 429 S.E.2d 768 (NC Ct. App. 1993). Certain language in Moore, however, can be used to argue that the "other property" exception does not apply if there is an express warranty expressly disclaiming against liability for damage other property. The "other property" exception was recognized in Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 1998 WL 1107771 (E.D. N.C. 1998), where the plaintiff, a flooring installer, sued defendant, a plywood manufacturer, on the ground that the plywood underlayment sold by defendant to plaintiff had caused discoloration of the vinyl flooring plaintiff had sold and installed for various customers. The court held that plaintiff's claim for recovery of damages to the underlayment itself was barred by the economic loss rule. As to the vinyl flooring above that underlayment, the court noted that such property was "other property" within the meaning of the economic loss rule, but held that plaintiff lacked standing to recover those damages insasmuch as that property was owned by the customers and not by the plaintiff. In the unpublished decision of Land v. Tall
negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.”

| North Dakota | Manufacturer not liable in tort for damage to the product itself, even though the event may have created a risk of harm. Cooperative Power Assoc. v. Westinghouse Elec. Corp., 493 N.W.2d 661, 665 (N.D. 1992). The doctrine applies to consumer transactions as well as commercial transactions. Clarys v. Ford Motor Co., 592 N.W.2d 573, 578 (N.D. 1999). | House Building Co., COA03 (NC Ct. App. Aug. 17, 2004), the court deemed an entire house not to be “other property” in relation to the defective synthetic stucco that coated it, citing Wilson v. Dryvit Systems, Inc., 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002), aff’d, 71 Fed. Appx. 960 (2003). -- Torts Independent from Contract In a prior unpublished decision involving a contract to repair certain equipment, the North Carolina Court of Appeals held that the existence of a service contract precluded an action in tort for breach of the duties that arose from the contract. Kaplan Companies, Inc. and Guidecraft USA, Inc. v. Stiles Machinery, Inc. and Robert J. Kostelnik, unpublished opinion, Docket No. 01 CVS 3447 (N.C. App. May 6, 2003). However, unlike in Ellis-Don Construction, there was a governing contract in place between the parties. Moreover, the case involved service to equipment. Accordingly, even the unpublished cases applying North Carolina law stand for the proposition that the ELR only applies where there is a contract in place between the parties, the subject matter of which is physical property. Damages to property other than that designated in the contract would, arguably, be recoverable under tort theories. | -- Other Property |
Ohio

Ohio initially rejected the rule and allowed tort recovery for economic losses. See Inglis v. Am. Motors Corp., 209 N.E.2d 583 (Ohio 1965); Iacono v. Anderson Concrete Corp., 326 N.E.2d 267 (Ohio 1975). However, in Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 537 N.E.2d 624, 629 (Ohio 1989), the Ohio Supreme Court limited its previous holdings by applying the economic loss rule to parties in privity of contract, stating: "a commercial buyer seeking recovery from the seller for economic losses resulting from damage to the defective product itself may maintain a contract action for breach of warranty under the Uniform Commercial Code; however, in the absence of injury to persons or damages to other property the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence." 537 N.E.2d at 635. Thus, if the parties have a contractual relationship, they may not sue in strict liability or implied warranty for their economic damages, but instead must rely on the Uniform Commercial Code's ("U.C.C.") contractual remedies. See also Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn., 560 N.E.2d 206, 208 (1990). The Chemtrol court noted that where there is privity of contract and the parties have negotiated that contract from relatively equal bargaining positions, the parties are able to allocate the risk of all loss, including loss of the subject product itself, between themselves. Chemtrol Adhesives, 42 Ohio St. 3d at 45, 537 N.E.2d at 631. However, the Court expressly declined to consider whether the economic loss rule should also apply to parties lacking privity, but cast doubt on previous Ohio Supreme Court...
<table>
<thead>
<tr>
<th>State</th>
<th>Case Description</th>
<th>Other Property</th>
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<tr>
<td>Oregon</td>
<td>In Jones v. Emerald Pacific Homes, Inc., 188 Or App 471 (July 2, 2003), the Court appears to have implicitly recognized the economic loss doctrine, barring homeowners from suing their contractor in negligence, noting that even where there is a contract between the parties, a negligence claim does not arise unless the claimed damages “result from breach of an obligation that is independent of the terms of the contract, that is, an obligation that the law imposes on the defendant because of his or her relationship to the plaintiff, regardless of the terms of the contract between them.” Jones, 188 Or App at 476.</td>
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| State       | Applies the doctrine in tort actions between sophisticated commercial parties with comparable bargaining power but not to consumer transactions. Rosseau v. K.N. Constr., Inc., 727 A.2d 190 (R.I. 1999) | -- Other Property  
|-------------|----------------------------------------------------------------------------------------------------------------|--------------------------------------------------|
| Rhode Island| -- Consumer Transactions  
Not applicable to consumer transactions. Rosseau.                                                                 |

| State       | A party who has a commercial relationship or contract with another party cannot sue the other party in tort for purely economic damages to personal or commercial property. Brendle's Store, Inc. v. OTR, 978 F.2d 150 (4th Cir. 1992) (commercial tenant cannot sue builder in tort for economic losses resulting from defective construction, even where there is no contract between the two commercial entities); Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F.Supp. 1027 (D.S.C. 1995) (purchaser of fuel metering system barred by economic loss rule from negligence claim against seller of the device which had ruptured resulting in large fuel spill); Tommy L. Griffin Plumbing and Heating Co. v. Jordan, Jones and Goulding, Inc., 463 S.E.2d 85 (S.C. 1995) (if contract exists, then cannot sue in tort for purely economic damages, but can do so for breach of duty arising independently of any contract duties such as violation of statute). See also Koontz v. Thomas, 511 S.E.2d 407 (S.C. Ct. App. 1999) (the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed; a breach of a duty which arises under the provisions of a contract between the parties must be redressed under architects not barred by economic loss doctrine. Bilt-Rite Contractors, Inc., v. The Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005). | -- Other Property  
The “other property” exception was severely limited in the case of Palmetto Linen Service, Inc. v. U.N.X., Inc., 205 F.3d 126 (4th Cir. 2000), though it remains to be seen whether a South Carolina state court would apply similar reasoning. In Palmetto Linen, a linen cleaning service sued a company which installed a chemical dispensing system in service’s washers, and manufacturer of certain components of the system, for damages resulting from the alleged malfunction of the system, resulting in destruction of linens. The Fourth Circuit court of appeals affirmed dismissal of negligence claims based on the South Carolina economic loss rule. Significantly, the court found the “other property” exception inapplicable to damage outside the product itself, as follows: “Palmetto finally argues that the “other property” exception to the economic loss rule permits it to proceed in tort. We reject this argument as well. Although the economic loss rule generally “does not apply where other property damage is proven,” Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369, 371 (S.C.1990), “courts have tended to focus on the circumstances and context giving rise to the injury” in determining whether |
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<th>Contract and a tort action will not lie; however, a breach of a duty arising independently of any contract duties between the parties may support a tort action, such that when there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort claim; Beachwalk Villas Condo Ass’n v. Martin, 406 S.E.2d 372, 374 n.1 (S.C. 1991) (stating that the rule applies only to product defect cases in which the &quot;duties are created solely by contract&quot;)</th>
<th>Alleged losses qualify as &quot;other property&quot; damage, Myrtle Beach Pipeline Corp., 843 F.Supp. at 1057. Specifically, in the context of a commercial transaction between sophisticated parties, injury to other property is not actionable in tort if the injury was or should have been reasonably contemplated by the parties to the contract.&quot; 205 F.3d at 129-130.</th>
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<td><strong>Tennessee</strong> The Tennessee Court of Appeals once observed that &quot;Tennessee does not have a definitive body of law on the economic loss doctrine.&quot; Trinity Industries, Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 172 (Tenn.Ct.App. 2001) Since then, however, the court has taken pains to clarify that it does apply the rule, not only to products claims but also to construction claims. Amsouth Directors, LLC v. Scaggs Ironworks, Inc., 2003 WL 21878540 (Tenn. Ct. App. August 5, 2003). One older case holds that the doctrine applies in consumer transactions. Ritter v. Custom Chemicides, Inc., 912</td>
<td>-- Other Property -- Fraud and Misrepresentation Tennessee courts will allow claim of misrepresentation against a third party with whom there is no privity. John Martin Company, Inc. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991). John Martin was an action for negligent misrepresentation by subcontractor against construction manager and on-site superintendent. The Tennessee Supreme Court held that the subcontractor, despite lack of privity, could make claim against the construction manager based upon negligent misrepresentations, whether</td>
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Texas law expressly precludes the recovery of purely economic losses via tort claims in three instances. First, the Economic Loss Doctrine precludes a negligence cause of action for economic damages when the loss is the subject matter of a contract between the parties. *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 285 (Tex.App.—Houston [14th Dist.] 2000, no pet.); see also *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (Economic Loss Doctrine barred recovery where injury was lost profits resulting from telephone company’s failure to properly publish ad as contracted for); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) (Economic Loss Doctrine barred recovery in tort where injury was that the house they were promised and paid for was not the house they received); *Essex Ins. Co. v. Blount, Inc.*, 72 F. Supp.2d 722, 724 (E.D. Tex. 1999) (Economic Loss Doctrine barred recovery where injury was only to the heavy timber equipment that was the subject of the purchase contract).

Second, the Economic Loss Doctrine bars recovery of economic damages in a negligence claim brought against the manufacturer or seller of a defective product where the defect results in damage only to the product itself and not to a person or to other property. *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d, 124, 126-27 (5th Cir. 1994); negligence was in the form of direction or supervision. In so ruling, the court recognized that there is a split of authority on the issue of whether the "economic loss doctrine" bars recovery in tort for economic damages absent privity.

-- Other Property
Recognizes this exception. *See Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978). The Dallas Court of Appeals in *Murray v. Ford Motor Company*, 97 S.W.3d 888 (Tex.App.—Dallas 2003) limits any tort recovery to the damage caused only to the "other property." The Fifth Circuit Court of Appeals has held that Texas does not recognize a negligence cause of action when a component part is involved. *See Hninger v. Case Corp.*, 23 F3d 124, 126-27 (5th Cir. 1994).

Texas considers the property to be the overall finished product bargained for by the buyer rather than its individual components. *See Alcan Aluminum Corp. v. BASF Corp.*, 133 F.Supp.2d 482 (N.D.Tex.2001); *Mid-Continent Aircraft Corp. v. 572 S.W.2d 308*;

-- Professional Malpractice
The Texas Supreme Court and the Dallas Court of Appeals have both specifically noted that the Economic Loss Doctrine does not apply in cases of professional malpractice. *See DeLanney, 890 S.W.2d at 494 n.1; Express One Int’l, Inc.*, 53 S.W.3d at 898 n.1. In Texas, “it is a well settled rule that an architect must use skill and care in the performance of his duties commensurate with the requirements
<table>
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<th>Indelco, Inc. v. Hanson Indus. N. Am.—Grove Worldwide, 967 S.W.2d 931, 932-33 (Tex.App.—Houston [14th Dist.] 1998, pet. denied) (damages caused by a defective crane were not recoverable where damages were only to crane itself). Third, Texas law precludes the recovery of economic damages in a negligence cause of action where the parties are contractual strangers and the damages are purely economic and there is no accompanying claim for damages to a person or property. Coastal Conduit &amp; Ditching, Inc., 29 S.W.3d at 288-90; See also Trans-Gulf Corp. v. Performance Aircraft Services, Inc., 82 S.W.3d 691 (Tex.App.—Eastland 2002, n.p.h.) (Economic Loss Doctrine barred negligence and negligence per se claims brought by purchaser of airplane against contractors hired to repair airplane months before it was sold, where contractors were contractual strangers with purchaser, and purchaser sought only to recover damages to the subject of the contract).</th>
<th>of his profession, and he is liable in damages if he is negligent in the performance of those duties.” Ryan v. Morgan Spear Assoc., Inc., 346 S.W.2d 678, 681 (Tex.Civ.App.—Corpus Christi 1977, writ ref’d n.r.e.); Romero v. Parkhill, Smith &amp; Cooper, Inc., 881 S.W.2d 522, 525 (Tex.App.—El Paso 1994, writ denied; I.O.I. Systems, Inc. v. City of Cleveland, 615 S.W.2d 786, 790 (Tex.Civ.App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.). Consequently, the Economic Loss Doctrine does not prohibit a professional negligence lawsuit.</th>
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<td><strong>Vermont</strong></td>
<td>Adopted the doctrine in Pacquette v. Deere &amp; Co., 168 Vt. 258, 719 A.2d 410 (1998), holding that where a plaintiff incurs a purely economic loss from a product defect, plaintiff’s claim is limited to breach of warranty theory, not tort theory. Other Property</td>
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<tr>
<td><strong>Virginia</strong></td>
<td>In contrast to most jurisdictions, one line of Virginia cases holds that the economic loss rule does not bar a lawsuit. -- Other Property -- Actual Fraud Plaintiff must show actual fraud, not</td>
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negligence claim so long as there is privity of contract between the parties, in which case a party may be able to sue in negligence even if the losses are purely economic. Under this line of cases, if there is no privity, there is no recovery for "purely economic" damages, but recovery for damage to "other property" is allowed. Sensenbrenner v. Rust, Orling & Neale, 236 Va. 419, 425 S.E.2d 55, 58 (1988). See also Gerald M. Moore and Son, Inc. v. Drewry, 467 S.E.2d 811 (Va. 1996) (absent of privity of contract, a person cannot be held liable for economic loss damages caused by his negligent performance of a contract, even if that person is an agent of an entity with whom the plaintiff does have privity of contract.); Miller v. Quarles, 242 Va. 343, 410 S.E.2d 639 (1991) (permitting recovery in tort where defendant's negligence arose from the performance of a contract); Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989) (no cause of action for legal malpractice where plaintiff was not in privity with lawyer); Redman v. Brush & Co., 111 F.3d 1174, 1182 (4th Cir. 1997) (Under Virginia law, plaintiff who lost coin collection could not bring a product liability action for purely economic damages against a safe manufacturer with whom plaintiff was not in privity.); Filbert v. Joel Stowe Assoc., Inc., 40 Va. Cir. 197 (1996) (claim by home purchaser against company hired by seller that allegedly negligently performed repair dismissed under economic loss rule for lack of privity); 243 Industrial Assoc., L.P. v. Consumer Fuelco, 35 Va. Cir. 322 (1994) ("[A]n action seeking damages for a purely economic loss does not lie where the loss results from negligent performance of a contractual

commitment brought by a non-party to the contract."). However, another line of cases has questioned this approach to the E.R. Rotonda Condominium Unit Owners Ass’n v. Rotonda Assoc., 380 S.E.2d 876 (Va. 1989) (condominium association, despite privity with condominium developer, cannot recover in negligence for purely economic damages); P&T Associates v. Paciulli, Simmons & Assoc., Ltd, 27 Va. Cir. 405 (1992) (economic loss rule warranted dismissal of a negligence claim even where privity was present; but tort remedy is available when the “safety” of a person or property is at issue); Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co., 1997 U.S. Dist. LEXIS 2797 (W.D. Va., March 13, 1997) (same result as P&T Assoc.); C. Kailani Memmer, Evolution of Economic Loss Rule 15, at 21-22 JOURNAL OF CIVIL LITIGATION, VOL X, No. 1 (1997).

In any event, privity is critical in a case involving the sale of goods, as demonstrated by Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 491 S.E.2d 731 (Va. 1997). There, the Virginia Supreme Court noted that the plaintiffs had attempted to circumvent the privity requirement for recovery of consequential damages by arguing that consequential damages are impliedly allowed under §§ Va.Code 8.2-318, which provides in pertinent part: “Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was
a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods[.]"

In rejecting plaintiff's argument, the Virginia Supreme Court held that §§ Va.Code 8.2-318 is superseded by the more specific UCC provision of §§ Va.Code 8.2-715(2)(a) which requires the presence of a contract to recover consequential damages. The court began its analysis by citing, at 244, to § 8.2-715(2), which states: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."

The court noted, at 255, that "the language of the section itself contains a presumption that there is a contract between the parties" in that "[t]he phrase 'at the time of contracting' in subparagraph (a) conveys the understanding of a contract between two parties." The court thus concluded "that § 8.2-715(2)(a) requires a contract between the parties for the recovery of consequential economic loss damages incurred as a result of a breach of warranty by the seller." The court then noted that this contract requirement appears to conflict with 8.2-318, but resolved the conflict by holding that the more specific provision, 8.2-715(2)(a) prevails.

The case of Printpack, Inc. v. Pak-Tec, Inc., 2000 WL 890729 (Va. Cir. Ct. June 29, 2000), suggests that privity can be established by virtue of the
warranty being conferred directly to the purchaser: "[A]ccording to Printpack's allegations, there was privity. In its warranty counts (III and IV), Printpack alleges that Imaje (and Pak-Tec) warranted the printing system, breached the warranties, and those breaches caused the loss suffered by Printpack. If these allegations are proven, there was a contractual relationship between Printpack and Imaje. Such a relationship establishes privity. With privity, Printpack's loss would be consequential damages resulting from breach of warranty instead of a non-recoverable economic loss."

**Washington**  

**-- Other Property**  
-- Sudden and Dangerous Event  
Recognizes this exception. **WWP. In Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 774 P.2d 1199 (1989), the Court noted the two tests used to evaluate the "risk of harm" exception, but did not expressly adopt either one. Id. at 866-67. The Court noted the two tests used to analyze the exception, namely the "sudden and dangerous" test and the "evaluative" approach. Id. at 866-67, see also, Touchet Valley v. Opp & Seibold Const., 119 Wn.2d 334, 351 831 P.2d 724 (1992). The "evaluative" approach is based on the idea that a "product user should not have to suffer a calamitous event before earning his remedy." Stanton v. Bayliner Marine Corp., 123 Wn.2d 64, 72, 866 P.2d 15 (1994). This approach takes a number of factors into consideration including the nature of the defect, the type of risk, and "the manner in which the injury arose." Touchet, 119 Wn.2d at 351. Accordingly, Washington courts appear to use two tests, "the sudden and dangerous test" and "the risk of..."**
<table>
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<th>State</th>
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<tr>
<td>West Virginia</td>
<td>“[S]trict liability in tort is available in cases involving physical injury as well as when there is damage to the defective product itself or to other property if such damage is the result of a ‘sudden calamitous event.’ However, where the only loss suffered is an economic loss, as in the case of losses which are associated with a ‘bad bargain,’ the injured party must pursue the remedies provided in the Uniform Commercial Code, subject to the statute of limitations contained therein. We will not circumvent the Uniform Commercial Code’s remedial scheme by applying the discovery rule to a contract action in a manner not prescribed by the Code.” Basham v. General Shale, 180 W. Va. 526, 377 S.E.2d 830 (WV 1988) (barring homeowners’ strict liability claim against brick manufacturer for defective brick that allegedly caused damages to home).</td>
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<tr>
<td>Wisconsin</td>
<td>The economic loss doctrine prevents a commercial purchaser of a product from recovering solely economic losses from the manufacturer under negligence or strict liability theories. Sunnyslope Grading, Inc. v. Miller, Bradford &amp; Risberg, Inc., 437 N.W.2d 213 (1998). Economic loss is that loss “in a product’s value which occurs because the product is inferior in quality and does not work for the general purposes for which it was manufactured or sold.” Wausau Tile,</td>
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<td>Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999).</td>
<td>completed product or system, the entire product or system ceases to be ‘other property’ for the purposes of the economic loss doctrine.” Seltzer v. Brunsell Bros., Ltd., 652 N.W.2d 806, 817 (Wis.App. 2002), citing Wasausau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445 (Wis. 1999). The economic loss doctrine does not bar recovery of economic losses in tort when economic loss is alleged in combination with damage to other property. Bay Breeze Condominium Ass'n, Inc. v. Norco Windows, Inc., 651 N.W.2d 738, 742 (Wis.App. 2002), citing Wasausau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999). -- Sudden or Dangerous Event Wisconsin courts will not apply the “other property” exception to the economic loss doctrine if the plaintiff’s claim, fairly stated, involves disappointed performance expectations. Seltzer v. Brunsell Bros., Ltd., 652 N.W.2d 806, 817 (Wis.App. 2002). -- Lack of Privity of Contract The economic loss doctrine precludes recovery in tort for solely economic losses, regardless of whether privity of contract exists between the parties. Digicorp, Inc. v. Ameritech Corp., 2003 WL 21267123 *1 (Wis. 2003); Daanen &amp; Janssen, Inc. v. Cedarrapids, Inc., 573 N.W.2d 842 (Wis. 1998). -- Applicability to Service Contracts Wisconsin has not yet extended the economic loss doctrine to the service contract context. Notwithstanding a dispute between the Wisconsin Court of Appeals and the Wisconsin federal courts regarding the economic loss doctrine applicability to service contracts, the Wisconsin Supreme Court expressly reserved the issue for</td>
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-- Applicability to Consumers
The economic loss doctrine has been held to bar recovery of economic losses in tort in consumer transactions as well as commercial transactions. *State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 314 N.W.2d 201, 205 (Wis. 1999); *Seltzer v. Brunsell Bros., Ltd.*, 652 N.W.2d 806, 817 (Wis.App. 2002).

-- Fraud and Misrepresentation
Recognizes a narrow fraud in the inducement exception to economic loss doctrine. A party to a business transaction is under a duty to disclose facts basic to the transaction if it knows the other party is about to enter into the contract with mistaken information regarding those facts, provided that the other party could reasonably expect a disclosure of the same. Wisconsin law does not allow parties perpetrating fraud in the negotiation of contracts to hide behind their contractual remedies, provided that the fraudulent conduct induced the other party to enter into the contract.*


-- The Public Safety Exception
The public safety exception to the economic loss doctrine was designed "to address special public safety concerns present in claims involving contamination by inherently dangerous substances like asbestos." *Bay Breeze Condominium Ass'n, Inc. v. Norco Windows, Inc.*, 651 N.W.2d 738, 742
|-----------------|----------------------------------------------------------------------------------------------------------------|
The Economic Loss Rule

What Is It?

- A court created rule
- Involves a "product"
- Involves a contract
- Separate "tort" from contract
  - You're stuck with your contract
  - Can't sue in "tort"
- Product damages "only itself"
  - No "other property" damage
  - No personal injury

The Restatement 3d of Torts

Damages may include economic loss, but only when one of the following is present:

- Harm to the plaintiff's person
- Harm to the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law
- Harm to the plaintiff's property other than the defective product itself
Key Considerations with Contract and Warranty Claims

- Express v. Implied Terms
- Written v. Oral Terms
- Amendments/Modifications/Limitations/
  Voided Terms/Waivers
- Privity of Contract
- Disclaimers
- Do you need to prove negligence?
- If no warranty remedy, can you sue under tort theories?

“Product” v. “Other Property”

- A structure can be a “product”
- “Other property”
  - Contents
  - Non-integral parts
  - After-market additions
  - Outside scope of contract

Exceptions

- Building Code violation
- Public safety exception
- Sudden calamitous event
- Service transaction (e.g., repair or addition)
- Lack of privity
- Professional negligence
- Tort “independent” of contract
- Fraud (actual)
- Intentional misrepresentation
- Consumer/commercial product distinction
Special Issues
In Managing
The Large
Workers' Compensation
Loss

BY MARK C. SCHULTZ
COZEN O'CONNOR
PHILADELPHIA, PENNSYLVANIA
The serious work-related accident often presents challenges to a successful recovery which are infrequently encountered in other types of claims. These problems include a "bad attitude" on the part of the insured, dealing with regulatory authorities and loss prevention personnel, and the changing nature of construction sites. This article is an attempt to identify these challenges and suggest approaches for addressing them.

Educating the Insured

The insured knows that a catastrophic workers' compensation loss can have an equally catastrophic effect on their workers' compensation insurance premiums. Where the premium is retrospectively rated, the impact is direct and the insured immediately begins paying for the loss out of its own pocket. Unfortunately, the insured often does not understand the benefit of a successful workers' compensation subrogation recovery on their premiums.

Quite to the contrary, the insured often views the subrogation investigation as an interference with their normal business operations since the investigation may tie up their resources. The recovery effort necessarily involves the cooperation of the injured worker, who may be bringing his own third party claim, and the insured therefore becomes concerned that the subrogation investigation may result in a lawsuit against the employer. The trauma of a serious injury or death at work can lead employees to blame the injured worker or themselves for the accident. This lack of sophistication can result in counterproductive behavior, or even a lack of cooperation. This can sabotage the recovery effort in its infancy.

Key employees at the insured company need to know that a successful recovery is in everyone's best interests. Depending on their premium structure, the employer may receive a direct monetary benefit when the case is resolved. Any recovery will reflect favorably on their claims experience. The insured also needs to know that they cannot be sued by their employees. In fact, in the absence of a proper indemnity agreement, with some rare exceptions, they cannot even be joined as a third party defendant. At the end of this article is a letter which can be sent to the insured to help explain the subrogation process in the workers' compensation claim.

The employer needs to understand that there is absolutely no benefit to cultivating an attitude that the employee brought the accident on himself by being careless. This attitude may be a genuine belief or a "defense mechanism" to deflect blame or relieve a guilty conscience. This is the most frequently seen obstacle to a successful recovery. The insured must understand that as far as subrogation and recovery are concerned, the injured worker and the employer are in the same boat. Since the employer and the insurance carrier are subrogated to the third party rights of the injured worker, the success of the recovery action rises and falls with the injured worker's rights. If the injured worker loses, the employer loses. Furthermore, even if the injured worker was negligent, the employer must understand that other parties may still be legally responsible and that machines have to be designed to allow for human error.

OSHA and State Regulatory Authorities

A serious on-the-job injury will often result in an investigation by OSHA, the Federal agency charged with enforcing workplace safety regulations. Many states, such as Virginia and Maryland, have their own agencies which enforce state work safety rules and investigate industrial accidents. An agency inquiry will usually involve government investigators talking to employees, reviewing records and taking photographs. The investigation can lead to a finding of OSHA violations against the insured which usually results in a fine and an order to correct a dangerous condition. OSHA has the authority to issue citations not only to the employer of the injured worker, but to the general contractor, the premises owner and to other subcontractors on the work site.

The results of an OSHA inspection can potentially damage subrogation potential. While not dispositive, the citations against the insured can influence the judge or jury in the circumstances where the findings are admissible and will usually impact settlement discussions. In states where employer negligence can defeat subrogation such as North Carolina and California, such findings can be particularly harmful. On the other hand, a finding against a party other than the insured will enhance the possibility of a successful recovery against that party. The investigative material developed by the agency is largely discoverable and can be used by the litigants in the party action to develop their case.

The insured obviously cannot control the results of the investigation, but careless statements made to agency investigators can lead to adverse findings. For example, conclusions such as "he was stupid and this whole thing was his fault," or "he should have known better; he had no reason to put his hand in there" should be avoided at all costs. The investigators should be provided facts - not opinions, guesses or conclusions. Facts concerning the conduct of third parties, such as subcontractors should be brought to the investigators' attention, as well as issues concerning machine design. This will insure that OSHA personnel have all the important facts at their disposal when they draw their final conclusions.

Construction Site Accidents

Work on a construction site does not stop after a worker has been seriously injured or killed and you cannot take control of the scene as you can where there has been a large property loss. You probably will not even be able to take possession of critical evidence. There are schedules and deadlines that still must be met and many parties are
involved in the construction process other than your insured. Unfortunately, the show must go on. Within a few days it may be impossible to take critical photographs of the construction site that have any relevance to the case. Walls are completed; beams, pipes and electrical conduits get covered. Subcontractors may be off the job and their employees who were important witnesses may be difficult to locate.

After a construction site accident has occurred, the appropriate expert should be engaged immediately in conjunction with a professional photographer or videographer. You cannot wait to see if the injured worker or his family employ counsel. Photographs and video taken within 48 hours of the accident can preserve your chances of a successful recovery action. Once the beams and columns have been covered, your subrogation potential may have been lost forever. The site should be canvassed to identify workers who not only may have witnessed the accident, but who may have important information about events which occurred before or after the accident. The investigator should obtain their names, addresses and telephone numbers.

DEALING WITH LOSS CONTROL/LOSS PREVENTION STAFF

Insurance companies with loss control departments will often have those departments involved in the investigation of the large workers’ compensation loss. The goal in that situation is to insure that a similar incident does not occur resulting in an injury to another employee. While the goals of loss prevention are worthy, the loss prevention staff can inadvertently damage the chances of a successful recovery if they are not conscious of the implications of their actions. For example, loss prevention reports will often characterize conditions on the insured’s premises as dangerous or point to the insured’s practices as the “root cause” of the accident. Loss prevention may criticize the employee (often this is fueled by the insured’s attitude) and blame the entire incident on the conduct of the injured worker. Loss control staff have been known to make gratuitous statements exonerating third parties such as: “there is no way this machine could have been designed to prevent this accident” or “the general contractor complied with all OSHA regulations.”

Loss prevention personnel need to be mindful of the potential for recovery against a third party. The reports they generate are discoverable and the reports may lead to their depositions being taken. If they can do their job without jeopardizing the subrogation action, it is critical that they do so. Their job should not include offering unnecessary speculation or opinions concerning the cause of the accident or the liability of third parties.
WORKER'S COMPENSATION SUBROGATION: LOSS RECOVERY

All losses are unfortunate occurrences. They are particularly unfortunate when they occur because of the actions or omissions of some outsider. It is extremely difficult to protect against or prevent loss or injury to your employees caused by defective products or the recklessness, carelessness or indifference of another company. All too often this leads to injuries to your employees, which in turn leads to medical bills and lost wages. You and your workers' compensation insurance carrier then respond to meet the financial needs of your injured employee.

Fortunately the law provides a means whereby your insurance company can seek to recover these payments made on behalf of your injured worker from the legally responsible party. It is called "subrogation." In its simplest sense, subrogation is a legal right to recover the payments from the other company who is actually legally responsible for the loss. It really just boils down to basic fairness: shouldn't the person or company responsible for the loss be the one who ultimately foots the bill?

Beyond fairness, there are important social and economic policies behind subrogation. If a wrongdoer is not made to pay for his mistakes, he has no incentive to act carefully and reasonably in the future. Society suffers because the risk of someone else being victimized by the wrongdoer is greater when he believes that there will be no cost to him. As an economic matter, the more successful we are in putting the loss where it rightfully belongs, in the hands of the wrongdoer, the greater the potential to hold down your insurance costs.

We believe that a better understanding of the subrogation program will ease any concerns you may have about its purpose and, at the same time, enhance your appreciation of its advantages to you.

Your insurance company conducts its subrogation investigation under the guidance of subrogation attorneys. The exclusive function of these lawyers is, with your cooperation and assistance, to direct the activities of forensic consultants and investigators for the purpose of establishing cause and responsibility for an occurrence. Subrogation counsel do not become involved in adjustment of the worker's compensation claim itself, which is the exclusive province of the Claims Department acting through the assigned adjuster.

Over the years, we have learned that a critical element of an effective subrogation investigation is the earliest possible direct involvement of our subrogation attorneys in the causation investigation. To that end, after prior notice to you, our subrogation attorneys, along with the adjuster and other consultants, may participate in fact-gathering meetings with your representatives. If possible, critical evidence will be identified and preserved, photographs will be taken and interviews will be conducted of eyewitnesses or other knowledgeable persons. Our attorneys will treat all information in a confidential manner. They will work closely with any internal investigation you may be conducting.

We believe it is also important to understand what our subrogation attorneys are not doing. They are not attempting to develop grounds for denial of a claim, nor is the information or documentation they request intended to affect or influence the adjustment of the claim. They are also not looking to develop any type of liability claim against you as the injured worker's employer. They are looking for other entities to pursue.

The services of these skilled attorneys may well be of invaluable assistance to you as well as to us. Their experience in investigation and evaluation of accidents may enable you to reduce workers' compensation ratings when applicable and provide other significant benefits. Some extra effort may be necessary, but there are also potential dividends, including supplementation of loss prevention activities by providing an independent evaluation of how the accident occurred and the reduction of premiums for retrospectively rated policies.

We know that you have a business to run, so in those cases where we will ask for your cooperation to pursue subrogation, our intrusion will be minimal. Our attorneys and consultants will make every effort to develop the necessary information from the claims documentation and other sources. However, there may be times when we will have to speak to your knowledgeable employees and to review essential documents. We will only do so with your knowledge and consent.

We hope that the foregoing has enhanced your understanding of the purpose of subrogation and its benefits to you. Your representative will be happy to put you, or your staff, in touch with the individuals responsible for administering our subrogation program if you have any questions or comments.
Q: What gear were you in at the time of the crash?
A: Gucci sweats and Reeboks.

Q: Have you lived in this town all your life?
A: Not yet
Q: Did you blow your horn or anything?
A: After the accident?
Q: Before the accident.
A: Sure, I played for ten years. I even went to school for it.

Recorded Statements

- The Impact of the Statement on the Third-Party Case
- Should a Recorded Statement Be Taken?
- Advice for Taking a Statement

Impact of the Statement

- Not privileged
- Discoverable in the third-party case
- Admissible against the worker
- Will carry great weight with the jury
Should a Statement Be Taken – Two Schools of Thought

☐ Yes – Preserve evidence and let chips fall where they may

☐ No – Too prejudicial to third-party case

Pitfalls with Statements

☐ Importance of details unclear at the time

☐ Worker guesses at answers, tries to be helpful

☐ Worker hesitant about being truthful

☐ Worker humbly accepts blame

☐ Downplays seriousness of injuries
So, you know, honestly, if it boiled down to it, I'd have to say that the people that installed the rods are basically faulted for, you know, for putting them in the way they did. I just don't see any other way. The ZBI guys -- the N & R, the sheet...

...remember that and get my paice and boys and so forth. And I just started walking around the back of my car to walk into the building and to be honest, I don't know what happened. I'm assuming I slipped there was ice, I guess...

...it might've been black ice, there was ice there. I think and just, I don't know what happened to be honest...

...I think, guess I didn't get too far. I honestly don't really you know, feeling that I was slipping or falling or anything and I...

---

Advice for Taking Statements

- Retain Counsel in Serious Cases
- Take Notes Instead
- Give Instructions to the Witness First
- Do a Dry Run
- Stick to the Relevant Facts
- Remain Serious At All Times
Remember what Mark Twain said:

It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so.
Top Ten Reasons for Mediocre Workers' Compensation Recoveries

Relying on the Plaintiff's Bar to Collect your Money
Assuming the Insured will Cooperate
Hiring the Wrong Expert

Accepting the First Loss Report at Face Value
Waiting Until the End of the Case to Negotiate
"It was a Freak Accident"
Delaying in Referral of the Claim to Counsel

The Employee Was Negligent
SUBROGATION LITIGATION AGREEMENTS
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Subrogation Rights of Insurer and Insured

- When a loss occurs:
  - The insurer has a right to subrogate against a third party deemed responsible for the loss.
  - The insured also has a right to seek full compensation for its losses from the third party deemed responsible for the loss.
- And in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee (as well as in other states outside the southeastern US):
  - The insured is entitled to be reimbursed first for any recovery from a third party.
  - While the insurer is only entitled to receive any remaining balance to reimburse it for its payment to the insured.
- What questions do we all get along?

So, how do we all get along?

- By using a Subrogation Litigation Agreement — otherwise known as:
  - Loan Receipts
  - Subrogation Agreements/Subrogation Assignments
  - Pro-Rata/Joint Prosecution Agreements
Loan Receipts

What is it?
- An agreement whereby the insured extends a “loan” without interest to its insured repayable only in the event and to the extent of any net recovery that the insured may obtain from any person or entity responsible for causing a loss.
- In other words, it is a legal fiction where, for the convenience of the insured, the insurer advances money which, even if the insured is not successful in recovering against the tortfeasor, the insurer was required to pay the insured under its insurance policy.

How do Loan Receipts Arise?
- It generally involves:
  1. A loss;
  2. A claim (whether in the form of a proof of loss, or otherwise); and
  3. A payment in the form of a “loan” to an insured by its insurer which was the result of a tortuous act of a third party.
- The result is that the insured, who is the owner of the cause of action, accepts payment for its insured as a “loan.” In exchange, the insured agrees to repay the “loan” from any recovery obtained against the responsible third party.
- If the insured were to prosecute the cause of action following execution of the loan receipt to the exclusion of the insurer, the insurer would retain the right to be paid from the insured the amount which had been advanced under the loan receipt.

Does it assign the insured’s Cause of Action to the Insurer?
- It typically does not assign the claim to the insurer; rather, it is an agreement memorializing the loan of money.
- This is preferred because in a typical subrogation action the insurer does not want an assignment. An “assignment” is a formal transfer of rights whereby the assignee (the insurer) receives from the assignor (the insured) all that the assignor holds (the cause of action).
- If the loan record only memorializes a loan, it does not assign the insured’s cause of action to the Insurer. This means the insured remains the real party in interest and accordingly, suit can be brought in the name of the insured. If there is an assignment, the insurance company becomes the real party in interest and suit must be brought in the name of the insurance company.
Sample Loan Receipt

Received from XYZ Insurance Company (hereafter referred to as "Company") the sum of $10,000.00, as a loan, without interest, repayable on or before the 1st day of January, 2025, for the benefit of ABC Corporation, or other parties, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months. The undersigned hereby agrees to indemnify the Company against any loss or damage to the property described below, or any part or parts thereof, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months.

The undersigned will have the right to rent the property described below, or any part or parts thereof, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months. The undersigned will have the right to rent the property described below, or any part or parts thereof, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months.

The undersigned will have the right to rent the property described below, or any part or parts thereof, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months. The undersigned will have the right to rent the property described below, or any part or parts thereof, as long as long as the property described below, or any part or parts thereof, is not damaged by fire or other cause within the past three (3) months.

Subrogation Agreements

- What are they?
  - Take on no particular form
  - Are referred to as "subrogation agreements" or "subrogation assignments"

Subrogation Agreements

- What do they convey?
  - A complete assignment of the insured's cause of action.
  - The insured relinquishes all of his or her right to the cause of action and the insurer is the entity which assumes the right to prosecute the cause of action in the event it desires to do so.
Sample Subrogation Agreement

Received XYZ Insurance Company, the sum $ in full settlement of all claims and demands of the undersigned for loss and damage to the property described in policy no. 123456, issued through the McClellan, Georgia agency of said company, in consideration of and to the extent of said payment, the undersigned hereby subrogates said insurance company, to all the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss or damage stated above, and authorize the said insurance company to sue, compromise or settle with the undersigned on demand or otherwise and all such claims and to execute and sign releases and assignments and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.

Witnessed no settlement has been made by the undersigned with any person or corporation against whom claim may be, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor releases given by the undersigned that do not have written consent of the undersigned.

I agree to cooperate fully with said insurance company in the prosecution of such claims, and to procure and furnish all papers and documents necessary in such proceedings and to attend court and testify if the insurance company deems such to be necessary, but it is understood that the undersigned is to be saved harmless from costs in such proceedings.

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Subrogation Agreements vs. Loan Receipts

- Loan Receipts are Preferred because:
  - You can file suit in the name of the insured with a loan receipt because the insured is the real party in interest.
  - If there is a subrogation agreement, the insured assigns its rights, meaning the insured is the real party in interest. Problems can arise:
    - As discussed, suit should be brought in the name of insurance company.
    - When pursuing causes of actions such as strict liability, other issues can arise. For example, in Georgia, only a natural person can bring a claim for strict liability. Thus, the insurer cannot bring a cause of action for strict liability. This means the subrogation agreement effectively blocked the insurer's ability to prosecute the action. U.S. Fidelity & Guar. Co. v. J.I. Case Co., 430 S.E.2d 654 (Ga. App. 1993).
- Either way though, in Florida, they are necessary:
  - If the insured has not been made whole and has not executed a loan receipt or subrogation agreement, the insured cannot recover any portion of the claim before the insured assigns an agreement to the contrary. Florida Farm Bureau v. Martins, 377 So.2d 927 (Fl. 1st DCA 1979).

Is a Loan Receipt or Subrogation Agreement Enough to Pursue the Claim?

- Not always. Although a Loan Receipt or Subrogation Agreement provide for a right of subrogation, these documents do not address:
  - How is a recovery divided?
  - What if the assets or insurance of the third party is substantially less than the total loss?
  - Who pays the costs?
  - What if the insurer wants to settle and the insured does not? Or vice versa?
  - How are damages measured — RCV or FMV?
  - What if there is no recovery at all?
  - What if the insured and insurer disagree on litigation strategy?
Examples When a Loan Receipt or Subrogation Agreement is Not Enough:

- A fire loss results in a $400,000.00 insurance payment and $300,000.00 in uninsured losses. The responsible third party offers you the limits of its $500,000.00 liability policy and has no other assets from which recovery may be obtained.
- Same scenario as above, except this time, the responsible third party has $1,000,000.00 in coverage. However, the third party disputes the uninsured losses and offers $400,000.00 to you and only $50,000.00 to the insured. And the third party also insists that any settlement involve all parties and completely resolve all claims.

Solution - Joint Prosecution/Pro Rata Agreements

- What is it?
  - They are broader in scope than standard subrogation agreements or loan receipts and specifically control the relationship between counsel, the subrogating carrier and the insured.
- Basically two parts:
  1. Agreement between the insured and insurer regarding division of recovery, costs and settlement/litigation authority.
  2. Agreement between counsel and the insured to address the formation of the attorney-client relationship.
- Goal is to reduce or eliminate the potential for the interests of the carrier and the insured to become adverse during the recovery effort and avoid potential conflicts of interest developing for counsel.

Joint Prosecution/Pro Rata Agreements Elements

- Addresses all potential conflicts that could arise between the insurer and the insured, including:
  - responsibility for attorney's fees
  - non-recoverability of claimed damages
  - settlement authority
- Provides that the insured will cooperate fully with the insurer in the pursuit of a recovery
- Confirms responsibility for reimbursement of recovery expenses
  - Typically, carrier advances expenses during case, and is reimbursed out of the insured's share of recovery
  - If there is no recovery, the insurer typically has no responsibility for expense reimbursement
- "Typical" arrangement is subject to modification, depending upon insured's state and jurisdiction
- Authorizes the attorney to represent the insured.
Joint Prosecution/Pro Rata Agreements

Benefits to Each

- Insurer
  - Eliminates conflicts between Insurer and Insured.
  - Gives the insured economic incentive to cooperate wholeheartedly in recovery effort.
  - May be able to pursue recovery in the name of the insured.
  - Allows recovery of "lost money."
  - Insured will reimburse pro-rata portion of costs out of recovery.

- Insured
  - Expert and other out of pocket litigation costs fronted by Insurer results in fairly risk free litigation.
  - Only pay pro-rata of costs after recovery.
  - Only pays attorneys fees if there is a recovery.

Joint Prosecution/Pro Rata Agreements

Benefits to All

- Helps to avoid disagreements during litigation that could jeopardize or delay settlement of the claims and recovery.
- Assures unified and coordinated pursuit of recovery.

Joint Prosecution/Pro Rata Agreements

Risks to Insurer

- Getting locked into a pro-rata agreement based upon inflated or non-recoverable uninsured claims can unfairly "dilute" the carrier's fair share of the recovery, and reduce the prospects for a successful settlement.
Joint Prosecution/Pro Rata Agreements
Calculating Damages

- Agree on recoverable damages in the agreement.
- The insured's right to recover damages in excess of those paid by the insurer is governed by the law of the local jurisdiction on recoverable damages, not by the total amount for which the insured could have been insured.
- Generally, the right to recover is limited to the diminution in the fair market value of the property or the cost of replacement, whichever is less.
- Therefore, if the insured has received payment for property losses under a replacement cost policy, but the diminution in value of the damaged property is a smaller amount, the insured may be considered to have been "made whole" under general principles of damage law even though a substantial deductible remains on the replacement cost policy.

Joint Prosecution/Pro Rata Agreements
Calculating the "Pro Rata"

- A mathematical formula which apportions recovery from third parties between the policyholder and the insurer.
- For example, when the insured has sustained a total loss of $100,000 and the insurer has paid the insured the limit of a $50,000 policy, a negotiation would provide for a sharing of any recovery, as well as expenses, on the basis of 40 percent share for the insured and 60 percent share for the insurer.
- A modified approach may also be used. For instance, the agreement may provide that the insurer and policyholder apportion recovery on an 80/20 basis up to the first $200,000.00 recovered, with any amounts recovered in excess of $250,000.00 payable to the policyholder. Such an approach may be used in a case where the insured had a $200,000.00 policy limit, whereas the insured agreed on an adjusted loss figure of $200,000.00, yet the insured claimed items of damage in excess of $250,000.00 which the insurer did not recognize.
- Also applies to costs and in most instances will follow the same formula used to apportion recovery.

Subrogation Agreements vs. Loan Receipts vs. Pro Rata/Joint Prosecution Agreements

- As various ramifications flow from the language employed in subrogation agreements and loan receipts, you should develop a clear understanding of the differences between the two and the language required for a loan receipt.
- The sample loan receipt on the previous slide was tested at trial and approved by the Georgia Court of Appeals.
- You may think that a particular agreement will preserve the insurer's right to maintain a subrogation lawsuit in your insured's name, but a few misplaced words will turn a so-called loan receipt into a subrogation agreement and prejudice you from being able to do so.
- As always, you should focus on potential subrogation prospects and make certain that the settlement agreement with the insured is structured to maximize the benefits which will flow to the insurer.