MIDWEST APPLICATION OF THE ECONOMIC LOSS DOCTRINE

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A. Introduction[1]

Typically, the economic loss doctrine arises from product liability cases where the "injury" is limited to the product itself. East River Steamship Corporation v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). In such cases, to recover for "economic losses," including damages for diminution or inadequate value, cost to repair or replacement of the defective product or consequent loss of use or profits, plaintiffs are limited to contract remedies. The policy behind the rule is that the loss of the value of a product that suffers physical harm is very much like the loss of the value of a product that does not work properly or at all. The complaining party has simply lost the benefit of its contractual bargain, and thus, "contract law, and the law of warranty in particular," is the appropriate remedy. Id. at 872-873.

According to the United States Supreme Court in East River, a plaintiff cannot recover for either the physical damage a defective product causes to the product itself, or those incidental or consequential damages flowing from damage to the product itself, i.e., lost profits, and cost of repair/replacement. A plaintiff can recover in tort for damage other than the product which the manufacturer placed in the stream of commerce and which was purchased by the initial user. For example, a large oven used in the manufacture of clay pots malfunctions, destroying itself and the plant it occupies. Under this scenario, damages caused by the malfunctioning oven (loss of plant, loss of profits, etc.) would not be subject to the economic loss doctrine. A majority of jurisdictions have adopted East River and prohibit tort recovery for economic damages where there is no personal injury or damage to property "other than the component that was the subject of the sale." See, *W. Dudley McCarter, The Economic Loss Doctrine in Construction Litigation*.

Indeed, each of the seven states comprising the Midwest region – Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri and Wisconsin – have adopted the economic loss doctrine in one form or another. There is, however, tremendous variation in each jurisdiction's application of the rule. The following summary will review the general considerations that shape the economic loss doctrine in addition to comparing the similarities and differences between these jurisdictions' approach to what may be more appropriately referred to as the "economic loss doctrines."

B. Economic Loss Defined

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[1] Thanks to Tom Regan, Cozen O'Connor, San Diego.

There is little variation among the states in the Midwest region regarding the definition of economic loss.

ILLINOIS – "Economic loss is damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property." In re Chicago Flood Litig., 680 N.E.2d 265, 274 (Ill. 1997), *citing* Mormon Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 449 (1982).

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).

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).

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).

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). Economic loss is defined as "the failure of the product to perform to the level expected by the buyer," and is commonly "measured by the cost of repairing or replacing the product and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold." 80 South 8th Street Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 396 (Minn. 1992)

MISSOURI – "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, as well as commercial loss for inadequate value and consequent loss of profits or use." Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 55 (Mo.App. 1981).

WISCONSIN – 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." Wasusau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999).

C. Adoption of the Economic Loss Doctrine

Each of the seven jurisdictions in the Midwest Region have adopted the Economic Loss Doctrine in one form or another.

ILLINOIS – Purely economic losses are generally not recoverable under the tort theories of strict liability, negligence, and innocent misrepresentation. 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).

INDIANA – 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).

IOWA – 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 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).

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." Huron Tool & Eng'g Co. v. Precision Consulting Servs., 532 N.W.2d 541, 543-44 (Mich.App. 1995), *citing* Niebarger v. Universal Cooperatives, Inc., 486 N.W.2d 612 (Mich. 1992).

MINNESOTA – In every state but Minnesota the Economic Loss Doctrine is a matter of common law. However, since 1991, Minnesota Statute Section 604.10,[2] which was revised into what is now Section 604.101,[3] has been Minnesota's unique statutory approach to the doctrine. Section 604.101 governs transactions that occurred on or after August 1, 2000, and Section 604.10 applies to all previous transactions. Notwithstanding codification of the economic loss doctrine in 1991, Minnesota law had previously denied tort recovery of economic loss as a matter of common law. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 572 N.W.2d 321, 324 (Minn.App. 1997).

MISSOURI – There can be no recovery in strict liability in tort where the only damage is to the product sold. Clayton Ctr. Assocs. v. W.R. Grace & Co., 861 S.W.2d 686, 692 (Mo.App.

[2] See Attachment.
[3] See Attachment.

1993), *citing* Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo.banc 1986).

WISCONSIN – 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 & Risberg, Inc., 437 N.W.2d 213 (1998).

D. Personal Injury or Damage to Other Property is Required

As a general proposition, personal injury and damage to property other than the defective product are exempted from the definition of "economic loss." As such, in nearly every jurisdiction, one can seek redress for personal injury or damage to "other property" caused by a defective product under the tort theories of negligence or strict liability.

However, in one of the most interesting new developments to the economic loss doctrine, Michigan and a few other jurisdictions have extended the economic loss doctrine to prohibit tort recovery for *both* personal injury *and* damage to other property in certain situations. Where the potential for the defendant's product to cause personal injury or damage other property was foreseeable at the time of purchase, these jurisdictions preclude recovery for personal injury or other property damage in tort. Because the damage could have been anticipated at the time of contracting, these jurisdictions place the responsibility upon the purchaser to negotiate an appropriate contractual remedy with the manufacturer to address such contingencies.

ILLINOIS – 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)

INDIANA – "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." I/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).

IOWA – "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).

MICHIGAN – 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. Neibarger v. Universal Cooperatives, Inc., 486 N.W.2d 612, 620 (Mich. 1992).

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). "Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract." Minn.Stat. §604.10(a) (2002). "A buyer may not bring a product defect tort claim against the seller for compensatory damages unless the defect in the goods sold or leased caused harm to the buyers tangible personal property other than the goods or to the buyer's real property." Minn.Stat. §604.101(3) (2002).

MISSOURI – Economic losses cannot be recovered under the tort theories of strict liability or negligence in the absence of personal injury or damage to other property. Landmark Am. Ins. Co. v. Paccar, Inc., 103 S.W.3d 894, 895 (Mo.App. 2003)

WISCONSIN – "Economic losses do not include property damage to property other than the defective product or a system in which it is incorporated, nor do economic losses include damage arising from personal injury caused by the product." Prent Corp. v. Martek Holdings, Inc., 618 N.W.2d 201, 206 (Wis. App. 2000), *citing* Daanen & Janssen, Inc. v. Cedarrapids, Inc., 573 N.W.2d 842, 845 (Wis. 1998).

E. Drawing The Line Between Other Property and the Product

As noted by the United States Supreme Court in East River, *supra,* "all but the very simplest of machines have component parts." Therefore, in order for the economic loss doctrine to rely upon the distinction between the defendant's product and "other property," courts have been faced with the task of determining where the defendant's product stops and where the "other property" begins.

ILLINOIS – 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).

INDIANA – 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 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.

IOWA – Where the damaged product was "an integral part 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).

MICHIGAN – 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* Neibarger v. Universal Coops., 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.

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). Minnesota Statute Section 604.101 does not define the concept of "other property." The legislative working group which drafted the statute had no consensus for a precise definition of other property, and concluded that in Minnesota, as elsewhere around the nation, the concept is best developed through case law. S.J. Groves & Sons v. Aerospatiale Helicopter, Corp., 374 N.W.2d 431, 434 (Minn. 1985).

WISCONSIN – "Once a part becomes integrated into a 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* Wasusau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445 (Wis. 1999).

F. Recovery for Damage to the Product Itself

As a general proposition, courts take three approaches to the question of whether injury to a product itself may be recovered in tort: (1) some courts deny recovery for damages to the product itself, holding that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm; (2) other courts permit recovery of damages to the product itself, holding that a manufacturer's duty to make non-defective products encompassed injury to the product itself, whether or not the defect created an unreasonable risk of harm; and (3) other courts attempt to differentiate between disappointed and endangered users based upon nature of the defect, the type of risk, and the manner in which the injury arose, permitting only endangered users to sue in tort for recovery of damage to the product itself. East River, *supra.*

States in the Midwestern Region have adopted a variety of these positions. In Indiana, Illinois, Iowa, Michigan and Minnesota, the economic loss doctrine precludes tort recovery for damage to the product itself even where the defendant's product has also caused personal injury or damage to other property. Damage to the product itself must be recovered in contract. However, jurisdictions such as Missouri and Wisconsin permit the recovery damages to the product in tort under certain circumstances.

ILLINOIS – "A defective product can cause three types of injury: personal injury, property damage, and economic loss." Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 48 (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).

INDIANA – "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).

IOWA – 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).

MICHIGAN – The economic loss doctrine bars tort claims for damage to the defective product itself. Affiliated F.M. Ins. Co. v. Abolite Lighting, Inc., 1998 Mich.App. LEXIS 2558 (Mich.App. 1988), *citing* Neibarger v. Universal Coops., 486 N.W.2d 612, 617 (Mich. 1992)

MINNESOTA – See attached Minnesota Statutes §§ 604.10, 604.101 (2002). "The economic loss recoverable in tort under [Section 604.10] does not include economic loss due to damage to the goods themselves." Minn. Stat. § 604.10(c) (2002). Minnesota Statutes § 604.101(3) excludes recovery for damage to, diminution in the value of, and loss of the defective product itself. Minn. Stat. § 604.101(3) (2002).

MISSOURI – "Recovery in tort for purely economic damages limited to those cases whether it is personal injury, damage to property other than that sold, *or destruction to the property sold* due to some violent occurrence." Wilbur Waggoner Equip. & Excavating Co. v. Clark Equip. Co., 668 S.W.2d 601, 603 (Mo. App. 1984), *citing* Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. Banc 1978).

WISCONSIN – 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* Wasusau Tile, Inc. v. County Concrete Corp., 593 N.W.2d 445, 451 (Wis. 1999).

G. Disappointed Users v. Endangered Users

As noted above, some courts attempt to differentiate between disappointed and endangered users based upon nature of the defect, the type of risk, and the manner in which the injury arose. As a general proposition, damage caused by gradual deterioration, internal breakage or other non-accidental causes tend to result in disappointed, not endangered consumers. Because the party's damages amount to disappointed commercial expectations, redress is provided by contract law – particularly, under the law of warranty – rather than tort law. By contrast, tort damages tend to arise from sudden, dangerous, or calamitous occurrences.

Although these observations are generally accepted, there is much disagreement as to whether they should be codified into formal requirements against which to test the facts of particular cases in order to determine the viability of contract or tort claims, and therefore to determine the applicability of the economic loss doctrine.

In East River, *supra*, the United States Supreme Court refused to adopt a formal test to distinguish between disappointed and endangered consumers as a means to determine the applicability of the economic loss doctrine. The court found that those positions that turn upon the degree of risk to the consumer are too indeterminate to enable manufacturers to structure their business behavior. Likewise, those distinctions which turn upon the manner in which the product was damaged were determined to be unsatisfactory because, according to the Court, regardless of whether the damage is caused by a calamitous event or through deterioration or internal breakage, since "no person or other property is damaged, the resulting loss is purely economic."

By contrast, the applicability of the economic loss doctrine in several Midwestern states does turn upon the nature of the defect, the type of risk, and the manner in which the injury arose. Illinois, Indiana and Iowa, for example, require a showing that the injury complained of arose from a sudden, dangerous or calamitous occurrence. Other jurisdictions – taking a position similar to the United States Supreme Court in East River – permit tort recovery for damage occasioned by deterioration or internal breakage provided that the damage involves personal injury or damage to other property.

ILLINOIS – Illinois law requires a showing of either personal injury or damage to other property coupled with a "sudden or dangerous occurrence" to avoid the economic loss doctrine and recover in tort. Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 55 (Ill. 1997), *citing* Mormon Mfg. Co.v. National Tank Co., 435 N.E.2d 443 (1982). There must be a showing of harm above and beyond disappointed expectations. Mars, Inc. v. Heritage Builders of Effingham, 763 N.E.2d 428, 434 (Ill.App. 2002).

INDIANA – 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).

IOWA – 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).

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000).

MISSOURI – "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).

WISCONSIN – 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).

H. Privity of Contract

Some injured parties lack a direct contractual relationship with the person or entity responsible for its injuries. The manufacturer of a defective product, for example, is often several transactions removed from the consumer who is ultimately harmed by its product, which may have been passed through a network of distributors before reaching the consumer. In such situations, the manufacturer and consumer are said to lack "privity" of contract, the benchmark of contract law upon which actions for contractual breach are founded.

Injured consumers who lack contractual privity with the manufacturer of the defective product may therefore lack a contractual remedy for their injuries, requiring them to seek tort redress in negligence or strict liability alone. However, to the extent that its injuries constitute "economic loss," the consumer may be precluded from pursuing these tort remedies against the manufacturer by operation of the economic loss doctrine. This would insulate the manufacturer from liability in both tort and contract, both depriving the consumer of redress for its injuries, and creating a windfall for the manufacturer.

Some jurisdictions, such as Michigan and Wisconsin, take no measures to mitigate the harshness of this application of the economic loss doctrine. However, other jurisdictions, such as Indiana and Missouri, would permit the consumer to sue the manufacturer in contract notwithstanding the lack of contractual privity. To this end, courts may indulge in a variety of legal fictions in place of privity; allowing the consumer to enforce express warranties provided by the manufacturer to intermediaries up the distributive chain who are in privity with the manufacturer; or possibly permitting the consumer to recover under an implied warranty theory. Other jurisdictions, such as Iowa, have adopted an intermediate approach, permitting recovery of direct economic loss in tort, but denying tort recovery of consequential economic loss.

ILLINOIS – 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).

INDIANA – Lack of privity is no defense in an action that is brought under the Product Liability Act. Yasuda Fire & Marine Ins. Co. v. Lakeshore Elec. Corp., 744 F.Supp.864 (S.D. Ind. 1990). "A plaintiff may recover against a manufacturer for economic loss for breach of express warranties, even though the plaintiff is not in privity with the manufacturer" Prairie Production, Inc. v. Agchem Division-Pennwalt Corp., 514 N.E.2d 1299, 1303 (Ind. App. 1987).

IOWA – 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 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).

MICHIGAN - Michigan courts have "expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract." Citizens Ins. Co. v. Osmose Wood Preserving, Inc., 585 N.W.2d 314, 316 (Mich.App. 1998), *citing* Freeman v DEC Int'l, Inc., 536 N.W.2d 815 (Mich.App. 1995).

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). Section 604.101 does not make privity a precondition to applying the Economic Loss Doctrine, i.e., consumers may recover against other persons or entities in the chain of distribution even if they do not have a direct contractual relationship. "Minnesota has adopted the most liberal privity position available in the U.C.C." TCF Bank & Sav. v. Marshall Truss Sys., Inc., 266 N.W.2d 49, 54 (Minn.App. 1991), 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).

MISSOURI - "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 coterminous 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").

WISCONSIN – 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 & Janssen, Inc. v. Cedarrapids, Inc., 573 N.W.2d 842 (Wis. 1998).

I. Applicability to Service Contracts

Some courts apply the economic loss doctrine to bar tort recovery against providers of defective services, as opposed to restricting application of the rule to prevent recovery in tort against the manufacturer of defective products.

ILLINOIS - "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.

MICHIGAN - 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 (Mich.App. 2002), *quoting* Higgins v Lauritzen, 530 N.W.2d 171 (1995).

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). This issue is currently unresolved. Historically, the economic loss doctrine did not preclude tort recovery for economic losses caused by the negligent rendition of services. McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn.1987).

WISCONSIN – 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 future resolution. Daanen & Janssen, Inc. v. Cedarrapids, Inc., 574 N.W.2d 842, 851 (1998); Barr v. Premium Production Co., Inc., 2002 WL 31749954 (Wis.App).

J. Distinguishing Between Contracts for the Sale of Goods and Services

Many modern commercial transactions cannot be classified as transactions purely for goods or for services, but are "mixed," involving both goods and services. Whether these mixed contracts are treated as transactions for goods or services is very important for the purposes of the economic loss doctrine. Although every jurisdiction in the Midwest Region applies the economic loss doctrine to prevent tort recovery for the sale of a defective product, only some jurisdictions have extended the economic loss doctrine to bar tort recovery for the negligent rendition of services. To determine whether a "mixed" contract should be treated as a transaction for the sale of goods or services, courts in the Midwest Region apply what is widely known as the "predominant purpose" test.

ILLINOIS – "Where a contract provides both for the sale of goods and for the rendition of services, courts apply the "predominant purpose" test in determining whether the contract falls within article 2 of the Uniform Commercial Code (UCC); under this test, if the contract is predominantly for the sale of goods, with services being incidental thereto, the contract will be governed by article 2, but if the contract is predominantly for services, with the sale of goods being incidental thereto, the contract will not fall within article 2." Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177, 194 (Ill. 2002).

INDIANA – "Under the predominant thrust test, the applicability of the Uniform Commercial Code to a mixed transaction is determined by considering whether the transaction's predominant factor, its thrust, its purpose, reasonably stated, is the rendition of service, with

goods incidentally or is a transaction of sale, with labor incidentally involved." Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, 746 N.E.2d 941, 953 (Ind. 2001), *citing* Insul-Mark Midwest v. Modern Materials, 612 N.E.2d 550, 553-4 (Ind. 1993).

IOWA – "The test for inclusion or exclusion [under Article 2] is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved or is a transaction of sale, with labor incidentally involved." Semler v. Knowling, 325 N.W.2d 395, 398-99 (Iowa 1982).

MICHIGAN – "Where a contract involves a mixture of goods and services, the test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved or is a transaction of sale, with labor incidentally involved." Higgins v. Lauritzen, 530 N.W.2d 171, 173 (1995).

MINNESOTA – Minnesota has adopted the "predominant factor" test, under which the Court must ascertain the primary purpose of the contract at the time of sale to determine whether a hybrid is primarily for goods or services. Valley Farmers Elevator v. Lindsay Bros. Co., 398 N.W.2d 553, 556 (Minn. 1997); Kietzer v. Land O'Lakes, 2002 Minn. App. LEXIS 219 (Minn.App. 2002). "That some added services required to install or apply the product does not transform a contract of sale into a contract for services." Id. at 556.

MISSOURI - Cases involving "hybrid" transactions for both the sale of goods and the sale of services require courts to inquire which element was the predominant factor in the transaction. Morgan Publs., Inc. v. Squire Publrs., Inc., 26 S.W.3d 164, 173 (Mo.App. 2000).

WISCONSIN – "To determine whether a mixed contract for goods and services is a sale of goods under the UCC, the test is whether the predominant factor, the thrust, the purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or is a transaction of sale, with labor incidentally involved." Biese v. Parker Coatings, Inc., 588 N.W.2d 312, 316 (Wis.App. 1998), *citing* W.S.A. §402.102 (2001).

K. Applicability to Professional Services

Some courts apply the economic loss doctrine to bar tort recovery against providers of professional services, such as architects and engineers.

ILLINOIS – The economic loss doctrine bars tort actions against engineers and architects for strictly economic loss. Fireman's Fund Ins. Co. v. SEC Donohue, 679 N.E.2d 1197, 1200-01 (Ill. 1997).

L. Applicability to Consumers

Commercial purchasers tend to be sophisticated parties with bargaining power relatively equal to that of commercial sellers and manufacturers. As such, courts generally assume that parties to a commercial transaction are capable of negotiating appropriate contractual remedies for foreseeable contingencies. Private consumers, however, typically purchase goods on a "take-it-or-leave-it" basis. Forced to assent to the seller's terms and conditions – which are, of course, favorable to the seller – consumers lack the ability to negotiate appropriate contractual remedies to address both economic loss to the product itself and damage to other property caused by the product. For this reason, consumers are forced to rely upon tort remedies to a much greater extent than commercial purchasers who are in a position to negotiate for remedies in contract. To address this inequality of bargaining power, some jurisdictions permit consumers to recover economic losses in tort. None of the Midwest Region jurisdictions, however, have adopted such a consumer transaction exception to the economic loss doctrine.

ILLINOIS – "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." Trans States Airlines v. Pratt & Whitney Can., 682 N.E.2d 45, 53-54 (Ill. 1997).

IOWA – 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).

MICHIGAN – 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.

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000).

WISCONSIN – 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).

M. Fraud and Misrepresentation Exceptions

The economic loss doctrine rests upon the assumption that redress for some injuries must be sought in contract rather than tort. However, in situations where fraud was perpetrated by one contracting party against another, some courts will not allow the perpetrator to hide behind the contract by limiting the victim to the remedies provided by that contract. Rather, those courts have created a fraud and misrepresentation exception to the economic loss doctrine that permits the victim to set aside the contract and recover its economic losses in tort.

ILLINOIS - 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 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).

MICHIGAN – 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.

MINNESOTA – See attached 2002 Minnesota Statutes §§ 604.10 (governing transactions before August 1, 2000), 604.101 (governing transactions on or after August 1, 2000). Section 604.10 "shall not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation or limit remedies for those actions." Minn. Stat. § 604.10(e) (2002). Section 604.101(4) permits recovery and tort for intentional or reckless misrepresentation claims relating to goods sold or leased.[4]

MISSOURI – 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)

[4] The Minnesota Legislature called a special session in 1998 to amend Minnesota's Economic Loss Statute to allow fraud and intentional misrepresentation claims to survive the economic loss doctrine.

WISCONSIN – 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. Digicorp, Inc. v. Ameritech Corp., 2003 WL 21267123 *1, *5 (Wis. 2003); Huron Tool and Engineering Co. v. Precision Consulting Serv., Inc., 532 N.W.2d 541 (1995).

N. The Public Safety Exception

In cases where the defendant's conduct creates a significant public heath hazard, some courts have permitted injured parties to avoid the typical application of the economic loss doctrine and recover economic losses in tort. This exception appears most frequently in asbestos cases, where a building owners have been permitted to recover the economic losses associated with asbestos mitigation and removal.

ILLINOIS – 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.

MINNESOTA – Asbestos contamination of the building itself, other parts of the building, and the building contents, is damage to "other property" that is recoverable in tort in spite of the Economic Loss Doctrine. 80 S. 8th St., Ltd. Partnership v. Kerry-Canada, 486 N.W.2d 393 (Minn. 1992); Independence School District No. 197 v. WR Grace & Co., 752 F.Supp. 286 (D. Minn. 1990).

WISCONSIN – 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 (Wis.App. 2002), *citing* Northridge Co. v. W.R. Grace & Co., 471 N.W.2d 179 (1991).

Minn. Stat. § 604.101

MINNESOTA STATUTES 2002

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Judicial Proof
CHAPTER 604 CIVIL LIABILITY
ECONOMIC LOSS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Minn. Stat. § 604.101 (2002)

604.101 Economic loss doctrine

1. Definitions:

(a) The definitions in this subdivision apply to this section.

(b) "Buyer" means a person who buys or leases or contracts to buy or lease the goods that are alleged to be defective or the subject of a misrepresentation.

(c) "Goods" means tangible personal property, regardless of whether that property is incorporated into or becomes a component of some different property.

(d) "Period of restoration" means the time a reasonable person would find reasonably necessary to repair, replace, rebuild, or restore other tangible property and real property harmed by the defect in the goods to a quality level reasonably equivalent to the quality level that existed before the defect caused the harm, but excluding in all circumstances:

(1) time necessary to repair, replace, rebuild, or restore the goods themselves;

(2) delays or other impediments resulting from a difficulty in obtaining financing; and

(3) delays or other impediments resulting from zoning or environmental requirements imposed by law that did not apply to the use of the harmed property immediately before the harm occurred.

(e) "Product defect tort claim" means a common law tort claim for damages caused by a defect in the goods but does not include statutory claims. A defect in the goods includes a failure to adequately instruct or warn.

(f) "Seller" means a person who sells or leases or contracts to sell or lease the goods that are alleged to be defective or the subject of a misrepresentation.

(g) If a good is a component of a manufactured good, harm caused by the component good to the manufactured good is not harm to tangible personal property other than the component good.

2. Scope:

This section does not apply to claims for injury to the person. This section applies to any claim by a buyer against a seller for harm caused by a defect in the goods sold or leased, or for a misrepresentation relating to the goods sold or leased:

(1) regardless of whether the seller and the buyer were in privity regarding the sale or lease of the goods; and

(2) regardless of whether article 2 or article 2A of the Uniform Commercial Code under chapter 336 governed the sale or lease that caused the seller to be a seller and buyer to be a buyer.

3. Limits on product defect tort claims:

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

(3) additional family, personal, or household expenses that are actually incurred during the period of restoration.

4. Limits on common law misrepresentation claims:

A buyer may not bring a common law misrepresentation claim against a seller relating to the goods sold or leased unless the misrepresentation was made intentionally or recklessly.

5. Relation to common law:

The economic loss doctrine applies to claims only as stated in this section. This section does not alter the elements of a product defect tort claim or a common law claim for misrepresentation.

6. Application; effect on existing statute:

This section governs claims by a buyer against a seller if the sale or lease that caused the seller to be a seller and the sale or lease that caused the buyer to be a buyer both occurred on or after August 1, 2000. Section 604.10 does not apply to a claim governed by this section.

Minn. Stat. § 604.10

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CHAPTER 604 CIVIL LIABILITY
ECONOMIC LOSS

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Minn. Stat. § 604.10 (2002)

604.10 Economic loss arising from the sale of goods

(a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.

(b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.

(c) The economic loss recoverable in tort under this section does not include economic loss due to damage to the goods themselves.

(d) The economic loss recoverable in tort under this section does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods.

(e) This section shall not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation or limit remedies for those actions.