

### **ECONOMIC LOSS DOCTRINE IN ALL 50 STATES**

*The generator in a \$300,000 luxury motor home produces arcing which ignites engine oil and the resulting fire soon destroys the entire vehicle. Your insured's printing press is destroyed when the entire unit becomes engulfed in flames after a catastrophic failure due to a design defect. Soot covers the entire inside of a new vacation home after its furnace puffs back due to a HVAC system malfunction. A steering system defect on a new GMAC truck results in overturn and destruction of the vehicle, but no personal injuries to the driver. An insured experiences complete destruction of a \$10,000,000 power generation system when defective blades on a turbine fail and fly through the attached generator. Despite a recall, a faulty ignition switch results in a fire and total loss of a used Ford Bronco owned by your insured. A property owner purchases a new home or building, and the structure begins to leak because of alleged defects in the roofing, siding, and/or windows. As a result, mold begins to grow. The mold damages interior walls and ceilings and requires the owner to repair and replace these building components. Although no one is sick, a \$400,000 home must be razed, and you're left holding the resulting insurance claim.*

All of the above real claim scenarios – or ones similar to them – should be familiar to insurance claims adjusters and subrogation professionals. All of them appear to have good subrogation potential. But, look again! Each of the above scenarios involves cases in which the defendant manufacturer was able to avoid liability due to the application of an often-misunderstood doctrine known as the Economic Loss Doctrine. Being familiar with this doctrine, understanding its parameters and limitations, and knowing when it does or doesn't apply, is all critical for subrogation professionals looking to maximize their property damage and lost profits claim payment recoveries. Not knowing is no longer an option.

#### **WHAT IS THE ECONOMIC LOSS DOCTRINE?**

The Economic Loss Doctrine (ELD) is a court-developed doctrine that has been adopted by a majority of U.S. states and jurisdictions. In its traditional form, it bars recovery in tort for strictly economic losses arising from a contract. When two parties have a contractual relationship, the ELD prevents one party from bringing a negligence action against the other over the first party's failed expectations. The classic application of the ELD involves a claim for loss of the value of a product (*e.g.*, automobile, agricultural tractor, industrial machine, etc.) which has been destroyed or seriously damaged due to the failure of the product itself (including a defect in design or manufacture). The rule prohibits the recovery of damages in tort (negligence, strict liability, etc.) when a product defect or failure results in only economic loss but does not cause personal injury or damage to any other property other than the product. The ELD actually has two related applications: (1) precluding contracting parties from asserting tort causes of action as a means to recover economic or commercial losses arising out of a contract; and (2) precluding a purchaser of a product from recovering from a manufacturer "on a tort theory for damages that are solely economic." The former application preserves the distinction between contract and tort by requiring contracting/transacting parties to pursue only their contractual remedies (as spelled out in the contract or warranty) for economic damages and encouraging the party best-situated to assess the risk of economic loss – the commercial purchaser, who can assume, allocate, or insure against that risk. The focus of this article is the latter application, because it is the defensive use of the ELD most frequently encountered by subrogation practitioners.

#### **WHAT IS ECONOMIC LOSS?**

A precise definition of "economic loss" is difficult to ascertain and varies from state to state. Purely economic loss is generally defined as "the loss of the benefit of the user's bargain ... including ... pecuniary damage for inadequate

value, the cost of repair and replacement of the defective product, or consequent loss of profits, *without any claim of personal injury or damage to other property.*" It encompasses "loss of the bargain, repair and replacement cost, loss of profits, and/or goodwill, including diminution in value. Rather, the purchaser is expected to protect itself under contract law and warranty principles. However, the ELD does not apply "if the damage is to property other than the defective product itself"; in that case, a complainant may pursue an action in tort. Although the ELD has over time been extended to the contractual privity context, the roots of the doctrine may be found in the products liability context. The Products Liability ELD was developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. As the theory of strict liability replaced the theory of implied warranties with regard to actions based on defective products that resulted in personal injury, the issue arose as to whether the courts should permit a cause of action in tort by one who suffered purely economic loss due to a defective product.

Damage to property other than the product itself is readily distinguishable from economic loss. For example, operation of a defective heater that causes property damage when it results in a fire which destroys the plaintiff's store and inventory constitutes economic harm when it results in conditions so uncomfortable that it causes the loss of customer patronage resulting in lost profits. At times, however, the distinction may be more difficult to draw. If A manufactures paste which it sells to B who uses it to cement shoes which he sells to C, a failure of the paste to properly adhere causes economic loss if it does not physically damage the shoes but merely renders them unsaleable. On the other hand, a defect in the paste that physically damages the shoes causes property loss. If the damage is to the defective product itself, similar distinctions must be drawn. When the defect causes an accident "involving some violence or collision with external objects," the resulting loss is treated as property damage. On the other hand, when the damage to the product results from deterioration, internal breakage, or other non-accidental causes, it is treated as economic loss. The definition of "economic loss" usually includes the cost of repair or replacement of the defective product.

Purely economic losses may be classified into two basic categories: direct economic losses and indirect or consequential economic losses. Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be "out of pocket" - the difference in value between what is given and received - or "loss of bargain" - the difference between the value of what is received, and its value as represented. Direct economic loss also may be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product. Economic loss is generally defined as damages resulting from inadequate value because the product "is inferior and does not work for the general purposes for which it was manufactured and sold." *Northridge Co. v. W.R. Grace & Co.*, 471 N.W.2d 179 (Wis. 1991). It includes both direct economic loss and consequential economic loss. The former is loss in value of the product itself; the latter is all other economic losses attributable to the product defect. In short, pure economic loss is damage to a product itself or monetary loss caused by the defective product, which does not cause personal injury or damage to other property. The important thing to remember is that the definition of "economic loss" usually includes the cost of repair or replacement of the defective product.

### **PURPOSE OF ECONOMIC LOSS DOCTRINE**

The ELD represents the line between the law of contracts, which secures the expectations of the parties, and the law of torts, which is governed by the duty owed to the injured party. The rationale for the doctrine began with the concern for unlimited liability because economic losses can result in wide-ranging liability based on one product. *Hininger v. Case Corp.*, 23 F.3d 124 (5<sup>th</sup> Cir. 1994) (quoting *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977)) (recognizing that courts "fear that holding manufacturers liable for economic loss imposes unlimited and unforeseeable liability upon manufacturers"). Courts also felt that the doctrine was needed to help separate warranty and tort claims, and to prevent warranty law from "drown[ing] in a sea of tort." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The Supreme Court noted that the law of product liability grew out of a public policy to offer injured persons greater protection from dangerous products than is afforded by the warranty of law. A consumer should not have to face alone the risk of personal injury or damage to property when he purchases a product. *Id.* Therefore, a manufacturer has a duty to manufacture a product which will not cause injury to persons or property. A product injuring itself is not the kind of harm against which public policy requires

manufacturers to protect, particularly when a plaintiff can recover in claims for breach of contract or breach of warranty. *Murray v. Ford Motor Co.*, 97 S.W.3d 888, 892 (Tex. App. 2003).

On the other hand, consumers may be burdened with the risk that a product will not meet his economic expectations, unless the manufacturer warrants that it will. Where a tort concern is not triggered and only a product is damaged, a plaintiff's loss is essentially the loss of the product, which is a loss that can be insured. Therefore, because tort law does not impose any duty to manufacture only such products that will meet the economic expectations of purchasers, the ELD serves to: (1) maintain the distinct functions of tort law and contract law; (2) protect the freedom of commercial parties to allocate economic risk between them by contract; and (3) encourage the commercial purchaser – best suited to assess the risk of economic loss – to assume, allocate, or insure against that risk.

If tort law replaced negotiation and sales agreements between parties, manufacturers would likely cover the resulting risk by raising prices on every contract. Put another way, the public policy issue is whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies. A majority of states refuse to do this and employ some version of the ELD.

### HISTORY OF ECONOMIC LOSS DOCTRINE

The ELD primarily developed in the context of product liability law. In the early 1900s, a person injured by a failed product had recourse under both negligence law *and* warranty law. However, both of these types of claims were frequently defeated by contractual warranty disclaimers or by the privity limitations. Traditional warranty law allowed disclaimers to prevent consumers from asserting breach of warranty actions to recover damages caused by defective products in the absence of negligence claims. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). Both manufacturers and retailers were allowed to disclaim all liability, some liability, or limit the availability of certain remedies. Manufacturers, therefore, had a means of avoiding liability. The requirement of “privity” (a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it) also presented significant obstacles. As a result, claims by anyone other than the original purchaser of the product could be defeated. Seriously injured victims of defective products faced serious hurdles.

As a result of these obstacles to recovery, strict tort liability developed. In 1963, the California Supreme Court first found that a manufacturer of a defective product is strictly liable in tort when a product is placed in the stream of commerce and injures someone. *Greenman v. Yuba Products*, 377 P.2d 897 (Cal. 1963). In 1965, the *Restatement (Second) of Torts* § 402A adopted strict liability for defective products. One after another, states followed suit, adopting strict tort liability for defective products, eliminating many of the defenses available under traditional negligence and warranty law, including privity and express warranty limitations. It was at this time and within this context that the ELD began to develop.

The origins of the American ELD go back to New Jersey and 1965. In *Santor v. A. & M. Karaghensian*, 207 A.2d 305 (N.J. 1965), an ordinary consumer of carpeting sued the manufacturer in tort for defect in carpeting. The carpeting developed lines running down the middle of it. After getting the runaround from the seller, the consumer went to the store where it was sold and found they were out of business. He tracked them down and sued them for a defective product under strict liability. The court decided that the U.C.C. did not provide the exclusive remedy for cases arising out of commercial transactions. If the product is defective, the consumer can bring either a strict product liability action (breach of implied warranty of reasonable fitness) or a warranty claim under the U.C.C. A consumer has a choice of remedies between contract and tort. The court reasoned that the law of strict liability exists to ensure that the cost of injuries or damage, either to the good sold or to other property, resulting from a defective product, is borne by the manufacturer, rather than party who suffered the loss, who generally are at a disadvantage in negotiating with the manufacturer. Although *Santor* became the genesis of the Minority Rule in the U.S., New Jersey later abrogated the *Santor* case with *Alloway v. Gen. Marine Industries*, 695 A.2d 264 (N.J. 1997).

## MINORITY RULE

In the same year the *Santor* decision was handed down in New Jersey, the courts in California were breaking ground on the same issue, but with completely opposite results. In *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), a consumer purchased a truck which was defective, resulting in its overturn and property damage to the truck. After the brakes failed, the plaintiff stopped making payments and the truck was repossessed. Plaintiff sued the manufacturer and the dealer for the property damage to the truck, the money he paid on the truck, and lost profits. The court rejected the *Santor* position allowing a tort action for economic damage only and noted that strict liability was not supposed to undermine the U.C.C., but rather to compensate for its inadequacies. A consumer should be able to pursue his warranty remedies only when the injury is to the product alone. The consumer shouldn't bear the risk that a product will cause physical injury but should bear the risk that a product "will not match his economic expectations." Also, the court felt that contract law is best at dealing with economic expectations and tort law is best left for dealing with physical injury to people or things other than the product. They held that the relative bargaining power of the parties should play no role, because manufacturers cannot disclaim tort liability for non-economic losses, because it would be irrational to require consumers to pay more so that manufacturers could insure the performance of their products. Courts applying the Majority Rule have found it necessary to create an exception for asbestos cases where the damages involve the removal of the asbestos from the building and are purely economic.

Following the decision in *Santor*, exceptions to the ELD began to develop, and a Minority Rule with regard to the application of the ELD was established in the U.S. The Minority Rule essentially rejects the strict application of the ELD and allows a plaintiff to recover in tort for economic loss without limitation. The minority rule is followed loosely by only a handful of states, some of which have even begun to chip away at its foundation. These states include **Arkansas, Connecticut, Louisiana, and Virginia**. The rest of the country follows either the Majority Rule or the Intermediate Rule.

## MAJORITY RULE

Many states eschew the Minority Rule and hold that a plaintiff cannot recover purely economic damages in tort, period. The Majority Rule flows from the *Seely* decision, which unlike *Santor*, is still good law today. However, the Majority Rule has been eroded somewhat with exceptions in various situations, such as the exception for asbestos. These exceptions have left several states following what has become known as the Intermediate Rule, discussed below.

The Majority Rule was significantly influenced by a U.S. Supreme Court decision in 1986. In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), plaintiffs, charterers of four oil supertankers, brought a strict liability products suit against the turbine manufacturer, seeking solely economic damages resulting from alleged design and manufacturing defects which caused the supertankers to malfunction while on the high seas. The court held that the ELD barred tort claims when "*a defective product purchased in a commercial transaction malfunctions, injuring only the product itself*". The *East River* approach was similar to that taken in *Seely*. The only difference was *East River* dealt with commercial parties, and did not address a consumer situation. *East River* rejected both the Minority Rule (recognizing that *Santor* raised legitimate questions about the theories behind restricting product liability) and the Intermediate Rule (which turned on the degree of risk and/or the manner in which the product is damaged). *East River* is binding in admiralty cases and the federal courts are split with review of diversity and other non-admiralty applications.

The stringent application of the Majority Rule has its drawbacks. It fails to protect victims from even unforeseeable dangers, dilutes the underlying tort policy of protecting against personal injury, significantly limits the discretion of courts, and leads to arbitrary results in certain circumstances. Using the example of a boat with an outboard motor, one can easily see the shortcomings of the Majority Rule. If the owner of a boat purchases an outboard motor and puts it on the boat, and the engine starts a fire which destroys the boat, the purchaser of the engine can recover from the manufacturer of the engine. However, if the boat and motor are purchased together, they become the "product" and the ELD prohibits the owner from recovering in tort for the fire. If the owner has no warranty options available to him, he is simply out of luck. In order to address these shortcomings, many states have crafted and adhere to an Intermediate Rule with regard to the ELD.

## INTERMEDIATE RULE

As a result of exceptions to the Majority Rule which grew over time, the Majority Rule in some states eroded into what has become known as the Intermediate Rule. The Intermediate Rule is similar to the Majority Rule, except that it allows for tort recoveries under certain limited circumstances, attempting to differentiate between the disappointed consumer and the endangered consumer. One example is the sudden and calamitous failure of a product or product failures which prove dangerous to the person of the consumer. The Intermediate Rule excepts the application of the ELD from such situations, while the Majority Rule does not. The Majority Rule focuses on the damages, while the Intermediate Rule focuses on the nature of the defect itself or the way in which the failure occurred and allows for recovery of economic damages to a product depending only on the nature of the failure.

The Intermediate Rule has advantages over the Majority Rule, and addresses some of its shortcomings. It offers equitable justice by looking at the nature of the defect. The “sudden and calamitous” and “unreasonable risk of injury” exceptions help insure that victims of accidents are compensated where the policy reasons for making manufacturers liable are exactly the same as they are under tort law. The Intermediate Rule discourages dangerous defects and still provides a limitation on liability necessary to preserve the integrity of the consumer transaction and the agreement of sale entered into between the buyer and the seller.

### “OTHER PROPERTY” EXCEPTION TO ECONOMIC LOSS DOCTRINE

While some states continued to expand application of the ELD, others began to use the same policies driving expansion to limit the doctrine. Some have distinguished between property damage to the defective product itself and damage to “other property.” In commercial cases, most courts have refused to allow tort recovery for damage to the product itself, considering such damage solely economic loss. Some courts have allowed plaintiffs to recover for damage to a dangerously defective product, along with other damages, under a strict liability theory, when the injury resulted from a sudden and calamitous event or accident. Some courts have allowed tort recovery for damage to the defective product itself where there was no danger or accident, but “other property” was also damaged. Be careful to determine whether the state you are subrogating in allows for recovery of damage to the product which is the subject of the insurance payment if there is concomitant damage to “other property” or whether it simply disallows recovery for damage to the product itself under all circumstances, but does allow for recovery of damages to the “other property”. States which adhere to the Majority Rule regarding the ELD may still differ on this point. As one Texas scholar put it:

*“A distinction should be made between the type of ‘dangerous condition’ that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort.”* Dean Keeton, *Annual Survey of Texas Law on Torts, Southwestern Law Journal*, Volume 32 (1978).

There is a great deal of litigation regarding precisely what constitutes “other property.” This analysis can be complicated by the facts of each case and the jurisdiction you are in. A pre-manufactured steel building may be a “product”, but if something is added to the building, is that “other property” or does it become integrated into the product? If a one-year-old mobile home has an 18-month warranty and has a microwave with a 90-day warranty, can you pursue the mobile home manufacturer for a failure of the microwave that burns down the entire mobile home? It is often difficult to distinguish a product from “other property.” Some jurisdictions apply the “integrated systems approach” under which damage by a defective product of an integrated system, to either the system as a whole or other system components, is not considered damage to “other property.” The applicable law of the jurisdiction involved should be considered.

## INDEPENDENT DUTY RULE

The Independent Duty Rule acts as another exception to the ELD. In states like **Colorado** and **Washington**, this rule allows for the recovery of economic loss damages in tort when an independent duty can be traced to a source other than the parties’ contract. Under this rule, economic damages are barred only when a contract expressly or by



necessary implication elects to replace tort principles actually or potentially establishing an independent duty. When the duty underlying a claim can be traced to both contract and tort, the plaintiff is limited to warranty remedies. However, when the duty can be found in tort independent of the parties' contract terms, the plaintiff's economic damages are recoverable in tort. For example, in **Washington**, professional negligence and negligent misrepresentation claims by residential property owners against their contracted engineer can result in the recovery of economic damages only. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 312 P.3d 620 (Wash. 2013). In **Colorado**, the "homeowner exception" to the ELD applies to subsequent – not original – homeowners. *S K Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC*, 342 P.3d 868 (Colo. 2015). Under the ELD, a breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not be allowed. However, if the duty breached arises independently of any contract duties between the parties, then a tort action premised on that breach remains viable.

The Independent Duty Doctrine, therefore, is an exception to the ELD. Absent an independent tort duty, under the ELD, a plaintiff is generally barred from suing in tort if: (1) the plaintiff seeks redress for breach of a contractual duty that caused only economic losses; (2) the plaintiff is a party to a contract or a third-party beneficiary of a contract; and (3) that contract defines the duty of care that the defendant allegedly violated or is interrelated with another contract that defines that duty of care. Home builders, including sub-contractors, owe an independent duty in the construction of homes such that homeowners can typically sue in tort for negligent construction. This duty is only owed to subsequent purchasers and transferees, not the original purchasers. A negligent misrepresentation claim can still proceed because the duty of the engineer or builder to avoid misrepresentations that would induce the property owners into a contract arises independently of the contract. For professional negligence claims, it must be determined if any professional duties of care arose independent of the terms of the contract.

### IMPLIED WARRANTY

Three standard product liability causes of action are (1) strict liability (tort), (2) negligence (tort), and (3) breach of express or implied warranty (contract). *Express warranties* involve manufacturer advertising, labeling or warranting their product in writing. It is essentially a breach of contract action. *Implied warranties*, as you might expect, are not written – they are implied by law. States differ on the implied warranty causes of action they allow. Some states, such as **Wisconsin**, do not recognize a product liability cause of action for breach of warranty – only a breach of contract action, assuming the warranty is still in effect. Others, such as **New York**, allow a cause of action for breach of warranty if the product is not safe for the ordinary purpose for which it is sold. Still others, such as California and Texas, define specific implied warranties under which a party can pursue the manufacturer of a product for a defect, such as the implied warranty of merchantability or the implied warranty of fitness for a particular purpose. It is clear that a majority of jurisdictions, however, do not allow recovery for economic loss in tort, but do allow for recovery of economic loss in contract. What is less clear is whether courts allow recovery for economic loss on an implied warranty theory. The implied warranty theories under which a plaintiff may pursue the manufacturer of a product for a product defect are varied. Examples of implied warranties include:

1. *Implied Warranty of Merchantability*. Requires that a product and its container meet certain minimum standards of quality, chiefly that the product be fit for the ordinary purposes for which such goods are sold. This includes a standard of reasonable safety. (U.C.C. § 2-314).
2. *Implied Warranty of Fitness For A Particular Purpose*. When seller knows of a particular purpose for which the product is required, and in which the buyer is relying on the seller to select or furnish a suitable product for such purpose, the seller warrants that the product is good for that particular purpose. (U.C.C. § 2-315).

Some states allow for recovery based on an implied warranty, even without privity, in situations where owners or second owners of homes sue the builder of the home for breach of the implied warranty of workmanlike quality, implied warranty of fitness for a particular purpose, implied warranty of merchantability, or similar implied warranties. Some states do not. Some states implicitly allow recovery for economic loss under such circumstances. *Moxley v. Laramie Builders*, 600 P.2d 733 (Wyo. 1979) (electrical wire defect); *Terlinde v. Neely*, 271 S.E.2d 768 (S.C. 1980) (ill-fitting doors); *Richards v. Powercraft Homes*, 678 P.2d 427 (Ariz. 1984) (separation of walls); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981) (faulty bricks); *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976) (leaky

basement walls). The courts which have allowed economic loss recovery in such situations have done so basically because the line between property damage and economic loss is not always easy to draw.

### **EXPRESS WARRANTY CLAIMS**

Even if there is no exception in a particular jurisdiction to the rule that precludes tort-based remedies for purely economic losses, the subrogating insurer may be able to step into the shoes of the insured and enforce the insured's contract and warranty-based remedies provided by the U.C.C., the sales contract itself and other statutes and rules that may be applicable in a given jurisdiction. Such contractual rights may be more limited and restrictive than tort-type remedies, and in some jurisdictions may not be available at all.

When an express manufacturer's warranty is involved, the subrogated carrier may be able to pursue a claim against the manufacturer, based on the warranty given to its insured by the manufacturer. For example, in *Ohio Casualty Ins. Co. v. Vermeer Manufacturing Co.*, 298 F. Supp.2d. 575 (W.D. Ky. 2004), the court held that the ELD barred the carrier's subrogated claim for negligent misrepresentation against the manufacturer of a tub grinder which was destroyed by fire, but did not apply to prevent recovery by the carrier under an express warranty. The insurer sought reimbursement from the tub grinder's manufacturer for the cost of the tub by "stepping into the shoes" of the insured-purchaser. The court determined in that "common sense" rendered the ELD inapplicable to the carrier's subrogated warranty claims. The ELD did not bar the insurer's warranty claim in subrogation against the manufacturer because the insurer had bargained for the benefit that the product would function properly. As the court put it, "*The essence of a warranty is to offer repayment for the damage to the product itself premised on the implicit bargain between the buyer and seller. For the Economic Loss Rule to apply to warranty claims would effectively end all warranty.*"

Breach of warranty actions may require privity requirements which may or may not be satisfied by subrogation. Other limitations also exist, such as the requirement that the seller receive reasonably prompt notice of the breach, the requirement that the buyer has relied on the warranty, and the ability of the seller to limit or disclaim entirely the implied warranties. Such limitations are most common as defenses to cases in which a product's failure causes economic loss.

A subrogated carrier's claims, arising from losses due to damage to a defective product, may be recoverable in a breach of warranty action. They likely would be subject to the applicable U.C.C. statute of limitations. While a subrogation claim based on strict liability is likely much easier, if the ELD bars such a claim the insurer may need to pursue warranty-based remedies. A warranty or a contract describes which defects and damages a manufacturer will and will not cover, and contains terms and conditions that govern the contractual relationship. Therefore, product warranties should be obtained in any claim involving loss or damage to a product resulting from a defect of the product itself. For example, if the insured's new car has an engine defect that causes it to set on fire under normal conditions, problems with the engine should be covered by the manufacturer's warranty that came with the car. If there is something wrong with the car, such as a problem with the fuel system which causes a fire, the manufacturer is likely in breach and can be responsible for problems that arose under the terms of the warranty.

When an insurance carrier issues a warranty for a product, a court may be less inclined to find the ELD applicable. For example, in one Western District of Kentucky federal court case, the court concluded that the ELD barred a subrogee's claim for negligent misrepresentation against a manufacturer. *Ohio Casualty Ins. Co. v. Vermeer Manufacturing Co.*, 298 F. Supp.2d. 575 (W.D. Ky. 2004). It held that the ELD did not apply, however, to the subrogee's warranty claim. In that case a tub grinder was destroyed by fire. The insurer sought reimbursement from the tub grinder's manufacturer for the cost of the tub by "stepping into the shoes" of the insured-purchaser. The court applied the ELD and granted summary judgment against the manufacturer on the carrier's negligent misrepresentation subrogation claim because "misrepresentation is essentially the defendant failing to meet the plaintiff's commercial expectations, which were covered by warranty and because the plaintiff was seeking purely economic loss." The court went on to state that even a fraudulent inducement claim would not survive the ELD.

### **RESTATEMENT (SECOND) TORTS § 402A EXCEPTION**

Another possible limitation to the application of the ELD may be the *Restatement (Second) Torts* § 402A. It states that a defendant is subject to strict liability for damages caused by an unreasonably dangerous defective product

only if the defendant is engaged in the business of selling the product. A **Colorado** federal court interpreted § 402A in such a way as to give rise to duties independent of those manufacturers may choose to assume or disclaim in a warranty. *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 358 F. Supp.2d 1021 (D. Colo. 2005). The court in *U.S. Aviation* used § 402A as support for its position that an insurer suffered more than “economic damages” when its insured’s aircraft crashed as a result of engine failure. The carrier filed a product liability subrogation action based on strict liability under § 402A and negligence against the manufacturer of the aircraft’s engine. The federal court distinguished *East River* as barring negligence and strict liability claims “where economic damage is caused by a breach of duty voluntarily assumed in contract and which results from a failure of the purposes or expectancies under the contract.” However, the court added that where an insured’s loss exceeds the limits of those expectancies or is the result of a breach of duties arising independently of the contract, such as under § 402A, the ELD does not apply. The court denied the manufacturer’s motion for summary judgment and allowed the carrier’s subrogated tort claims because the loss of the entire product was exactly “the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation.”

### ECONOMIC LOSS DOCTRINE IN WISCONSIN

We can look to Wisconsin as an example of how one state deals with and treats the application of the ELD. The ELD is a confusing array of various situations, tests, and conditions which underlie a very simple premise – a party is precluded from bringing tort claims to recover purely economic or commercial losses associated with a contractual relationship. While the ELD often arises in construction defect cases, where it has expanded considerably in Wisconsin, subrogation professionals also routinely encounter the ELD in connection with property damage or personal injuries resulting from a defective product. The ELD is not applied exactly the same in any two states. For that reason, it can become a trap for the unwary and it is important to look at its genesis and evolution over time in a single state – Wisconsin – in order to develop insight into how the ELD has evolved in the other 49 states. Wisconsin has been a hotbed of ELD litigation and development, resulting in perhaps more ELD decisions in the past 20 years than any other state. The development of the ELD in Wisconsin is tracked below, and its general application and nuances in any given state is summarized in the list which follows.

**Generally.** The ELD first developed in Wisconsin, as in other states, in the context of products liability disputes between commercial parties. For that reason, the definition that developed for the concept of “economic loss” was a definition that depended in large part on loss “resulting from inadequate value because the product ‘is inferior and does not work for the general purposes for which it was manufactured and sold’.” *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 852 (Wis. 1998). Since the initial recognition of the ELD, Wisconsin courts have significantly expanded the scope and breadth of the ELD. Wisconsin has eliminated any requirement of contractual privity, disregarded arguments that the doctrine leaves parties with no alternative remedy, applied them to services incidental to the purchase, rejected “bootstrapping” non-economic losses of third parties, rejected creating an exception for “sudden and calamitous” occurrences, applied the doctrine to commercial real estate purchases, and applied the doctrine to encompass consumer transactions. *Seltzer v. Brunzell Bros., Ltd.*, 652 N.W.2d 806 (Wis. App. 2002).

Economic loss in Wisconsin is considered damage to a product itself *or* monetary loss caused by a defective product that does not cause personal injury or damage to other property. *Biese v. Parker Coatings, Inc.*, 588 N.W.2d 312 (Wis. App. 1998). As discussed below, this “other property” exception has led to the development of a subsidiary “integrated system” doctrine, by which component parts (*i.e.*, a product) are integrated into the same contiguous system as the product that caused the damage and these component parts do not, therefore, constitute “other property.” *The Bay Breeze Condominium Assn, Inc. v. Norco Windows, Inc.*, 651 N.W.2d 738 (Wis. App. 2002). The ELD and the “integrated system” doctrine apply when building construction claims, described below, are concerned.

**First Recognized.** Wisconsin first recognized the ELD in 1989. *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213 (Wis. 1989). Sunnyslope purchased defective backhoes, and later sued to recover economic damages for replacement parts, labor, and lost profits. The written warranty covering the backhoes excluded these items of damage, so *Sunnyslope* circumvented the contract and the suit was brought in strict liability. The Supreme Court looked at the Uniform Commercial Code (U.C.C.) to determine the rules that govern a transaction between



two commercial parties of relatively equal bargaining power. The ELD was applied, but its application was limited to cases involving warranties. The Court didn't answer the following questions:

- (1) Does the ELD apply to parties not in privity?
- (2) Does the ELD apply to consumer transactions?
- (3) Does the ELD apply to unreasonably dangerous products?
- (4) Does the existence of a warranty preclude recovery in tort for damage to other property?
- (5) What constitutes damage to the product as opposed to damage to "other property"?

The ELD does not apply, however, "if the damage is to property other than the defective product itself". If other property is damaged as a result of a defective product, a plaintiff may pursue an action in tort for both the "other property" damage and the damage to the product. *Bay Breeze Condo. Ass'n, Inc. v. Norco Windows, Inc.*, 651 N.W.2d 738 (Wis. App. 2002). It is important, therefore, to look for any damage, however slight, which accompanies the destruction or failure of the product – such as a scorched garage floor which needs cleaning, soot, etc.

**Other Property.** The year after *Sunnyslope* was decided the Wisconsin Court of Appeals decided a case which dealt with the parameters of what was considered "other property". In *Midwhey Powder Co. v. Clayton Indus., Inc.*, 460 N.W.2d 426 (Wis. App. 1990), the ultimate purchaser of some steam generators brought an action against the manufacturer and seller, asserting negligence, strict liability, and other claims, after they produced poor quality steam that damaged the generators and turbines attached to them. The Court held that the turbines were sufficiently a component part of the overall energy production system bought by the plaintiffs, so that the ELD prohibited a tort claim for purely economic damages. The determination of what is separate and what is a component is determined by what the plaintiff buys – recognizing the integrated system rule which was later adopted by the Supreme Court in *Wausau Tile* and summarized as follows:

*Damage by a defective component of an integrated system to either the system as a whole or other system components is not damage to "other property" which precludes the application of the Economic Loss Doctrine.*

Wisconsin courts employ the ELD to bar the recovery of purely economic losses in consumer transactions through tort remedies where the only damage is to the product purchased by the consumer. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201 (Wis. 1999). When a defect in the product causes personal injury or damage to "other property," however, tort theories may permit recovery for economic losses. *Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445 (Wis. 1999). Wisconsin courts apply a two-part analysis to determine whether damaged property constitutes "other property" so as to trigger the possibility of tort recovery. *Foremost Farms U.S.A. Coop. v. Performance Process, Inc. (Foremost I)*, 726 N.W.2d 289 (Wis. App. 2006):

(1) First, courts consider whether the defective product and the damaged property are part of an "integrated system." *Id.* If the damaged property is part of an integrated system with the defective product, any damage to that property is considered to be damage to the product itself. *Id.* If the damaged property is not part of an integrated system with the defective product, then courts apply the "disappointed expectations" test by focusing on the expected function of the product and whether the purchaser should have foreseen that the product could cause the damage at issue. *Id.* The damaged property must survive both the "integrated system" and "disappointed expectations" tests to be considered "other property" for a tort claim to survive summary judgment.

(2) *Integrated System Test.* The integrated system test looks "to see whether the allegedly defective product is a component in a larger system." *Id.* "If a product has no function apart from its value as part of a larger system, the larger system and its component parts are not 'other property.'" *Id.* The defective product must be an "integral" part of the larger system that includes the damaged property for the two to be considered parts of an integrated system. *Wausau Tile*, 226 Wis.2d at 251. Therefore, a defective product must be integral to the function of the damaged property before the defective product and the damaged property may be considered part of the same integrated system.

In *Secura Insurance v. Super Products, LLC*, 2019 WL 3432520 (Wis. App. 2019), Wisconsin Utility Exposure, Inc. (WUE) who was insured by Secura, purchased an excavator called a Mud Dog from Super Products pursuant to a contract with a limited warranty. The Mud Dog was comprised of a truck chassis and cab on which Super Products

installed the Mud Dog heavy excavation equipment. The excavation equipment was the source of a fire that damaged the Mud Dog truck and chassis. After paying WUE for the property damage, Secura subrogated against Super Products, LLC, who moved for summary judgment based on the ELD. Secura sued for equipment stored around the product, total loss of the product, and expenses to clean up the debris. Secura argued that because of “imprecise language” in previous decision, where there is physical injury to “other property” (stepladders, etc.), the ELD did not apply and recovery for damages to the product and cleanup costs suddenly become available. The court noted that the “other property” exception has been limited by two concepts. First, when the product at issue is a component in a larger “system,” the components are not regarded as “other property” “in a legal sense, even if they are different property in a literal sense.” Second, courts have also adopted the “disappointed expectations” limitation on the “other property” exception. It applies when the other property damage could have been the subject of negotiations between the parties. It turns on the parties’ expectations of the function of the bargained-for product. Unanticipated damage to “other property” is outside the ELD’s bar. Under Wisconsin law, it is of no import that the damage was “abrupt,” and accidental, as the resulting loss “is essentially the failure of the purchaser to receive the benefit of its bargain. The Court of Appeals held that damages to a product do not suddenly become recoverable just because the product caused damage to “other property.”

**Component Parts.** What happens, however, if a product is bought by one party, who adds components onto the product and then sells that product on to future purchasers? What parts of the product are considered “other property”? The U.S. Supreme Court had previously shed some light on that subject in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997). In that case, the Court held that while a ship was the product itself when it left the initial seller’s hands, equipment added by that buyer and passed on with the ship to future buyers did not become part of the “product”, but were considered “other property”. In a dissent, Justice Scalia queried whether courts should look to the product purchased by the plaintiff/subsequent purchaser, or whether they should look to the product sold by the defendant. The Court’s decision appears to lean in favor of a more expansive definition of “other property” and more freedom to allow tort claims. Unfortunately, Wisconsin has gone in the other direction. In a subrogation suit brought by the insurance company of an insured who suffered damage to its printing press when a defective replacement part manufactured by the defendant failed, the Wisconsin Court of Appeals held that the ELD applies where a commercial purchaser buys used equipment containing a defective replacement part that causes damage to the equipment and results in repair costs and loss of business income. *Cincinnati Ins. Co. v. AM Int’l, Inc.*, 591 N.W.2d 869 (Wis. App. 1999). Wisconsin takes the “integrated systems” approach to the ELD, which means that damage by a defective component of an integrated system to either the system as a whole or other system components is not damage to “other property” that would preclude the application of the ELD. *Linden v. Cascade Stone*, 699 N.W.2d 189 (Wis. 2005).

**Asbestos Exception.** In 1991, Wisconsin adopted a public policy exception to the ELD – asbestos. *Northridge Co. v. W.R. Grace Co.*, 471 N.W.2d 179 (Wis. 1991). The asbestos defect (carcinogenic quality) caused physical damage to property other than the asbestos itself – the building it was in. Even though the asbestos functioned fine as a fire retardant, the product caused an unreasonable risk to health and safety – damages similar to economic losses. Because the asbestos implicated safety, its defect was best handled through tort, rather than contract law. This public policy exception to the Majority Rule didn’t quite rise to the level of an unreasonably dangerous product exception to the ELD, and its limits would be tested in 1999 in *Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445 (Wis. 1999).

**Privity.** The Wisconsin Supreme Court answered one of the questions left unanswered by *Sunnyslope* in 1998. *Daanen & Janssen v. Cedarapids, Inc.*, 573 N.W.2d 842 (Wis. 1998). In *Daanen*, a remote commercial purchaser of a rock crusher sued the manufacturer for repair costs, lost revenue, and prejudgment interest resulting from the defective machine. The Court held that even in the absence of privity, the ELD bars a remote commercial purchaser from recovering economic losses from a manufacturer under tort theories of strict liability and negligence. The Court confirmed that the ELD does not bar a commercial purchaser’s claims based on personal injury or damage to property other than the product, or economic loss claims that are alleged in combination with non-economic losses. The question of whether the existence of a warranty precludes recovery in tort for damage to other property.

**Consumer Transactions.** The second question left open by *Sunnyslope* was answered in 1999 by *State Farm Mutual Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201 (Wis. 1999). A consumer purchased a Ford Bronco “as is”, and it

subsequently burned due to a faulty ignition switch common to those vehicles and which was the subject of a recall. Nothing else was damaged. The consumer's insurance company brought a subrogation action. The Court cited the *East River* goals of the ELD and extended the ELD to consumer transactions, stating that relative bargaining power between the parties is not required. Even where a product is sold "as is", the consumer is in the best position to insure against or allocate risk. It held that the ELD barred tort damages for purely economic losses in a consumer transaction. The Court also addressed the third issue left open by *Sunnyslope*, by indicating that where the threat of injury to a person is not realized as a result of a product failure, there is no reason to allow strict liability to come into play. Contract law, the law of warranty and the U.C.C are designed to allow the parties to allocate the risk of product failure.

**Public Policy Exceptions.** That same year, the Supreme Court looked at the limits of the public policy exception to the ELD. In *Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445 (Wis. 1999), the manufacturer of concrete paving blocks brought an action against a cement supplier and its commercial liability insurer under theories of breach of warranty, breach of contract, negligence, indemnification, contribution and strict liability, seeking recovery for defects in paving blocks allegedly caused by defective cement. The Supreme Court refused to extend the *Northridge* public policy exception, even though plaintiffs alleged that buckling, curling and cracking allegedly caused by defective cement constituted a public safety hazard. The Court stated that there was no "broad public safety exception" to the ELD; it didn't describe how narrow that exception was.

**Fraud and Misrepresentation.** Wisconsin, like many states, provides for an exception to the ELD when there is misrepresentation or fraud in the inducement. In *Douglas-Hanson Co. v. B.F. Goodrich Co.*, 598 N.W.2d 262 (Wis. App. 1999), the Court of Appeals held that there was a general fraud in the inducement exception to the ELD. It concluded that "the Economic Loss Doctrine does not preclude a plaintiff's claim for intentional misrepresentation when the misrepresentation fraudulently induces a plaintiff to enter into the contract". *Kailin v. Armstrong*, 643 N.W.2d 132 (Wis. App. 2002). In *Douglas-Hanson*, the plaintiff alleged that the manufacturer had intentionally misrepresented that it had a commercially viable product it could deliver for processing. When the product failed, Douglas-Hanson sued. The Court held that the ELD does not apply where the seller intentionally misrepresents something to the buyer which induces the buyer into the transaction. The Wisconsin Supreme Court, in a per curiam opinion, stated that the Supreme Court was equally divided on the question of whether the *Douglas-Hanson* exception to the ELD should be affirmed, thereby affirming it without the binding authority of Supreme Court precedent. *State v. Hughes*, 607 N.W.2d 621 (Wis. 2000).

**Court Confusion Over Fraud-In-Inducement Exception.** In 2003, the Wisconsin Supreme Court decided *Digicorp, Inc. v. Ameritech Corp*, 662 N.W.2d 652 (Wis. 2003), a case in which the distributor of telephone calling services sued a telecommunications provider, alleging breach of contract, negligence, and intentional, strict liability, and negligent misrepresentation. The decision recognized a narrow exception to the ELD for fraud in the inducement, but the extent of that exception was very unclear, due to a divided court. Subsequently, the Supreme Court decided *Tietzworth v. Harley-Davidson Motor Co.*, 677 N.W.2d 233 (Wis. 2004), in which purchasers of motorcycles sued the manufacturer in strict liability when motorcycles they said were of "premium quality" showed a propensity for engine failure. The Court stated that *Digicorp* "did not produce the necessary agreement for an element-specific fraud-in-the-inducement tort cause of action as an exception to the ELD". However, they did not declare a new rule. The fraud-in-the-inducement exception is still somewhat up in the air in Wisconsin. In 2005, the 7<sup>th</sup> Circuit Court of Appeals, applying Wisconsin law, decided *Cerabio, L.L.C. v. Wright Medical Technology, Inc.*, 410 F.3d 981 (7<sup>th</sup> Cir. 2005). A corporation which sold assets and technological know-how to a medical company brought a breach of contract action against the medical company and the medical company counterclaimed alleging breach of contract, fraudulent inducement of contract, pre-contract negligent misrepresentation, and negligent misrepresentation. The Court held that under Wisconsin law, the fraud in the inducement exception to the ELD did not apply to the agreement between the parties in which one agreed to sell its assets and technological know-how to the other. The Court noted that the parties were sophisticated and well-represented business entities, the crux of agreement centered around the sale and purchase of assets so that company could produce corporation's product, the company's concern was whether it could replicate the process, and alleged fraud was character and quality of product that was subject matter of the agreement. Furthermore, there was a disclaimer of warranty and non-reliance clause in the contract. In 2015, the Court of Appeals seemed to indicate that, at least with regard to a contract for sale of business assets, the ELD would ordinarily preclude the contracting parties from pursuing tort

claims for damages arising, unless there was “fraud in the inducement.” *Parnau v. Weiman*, 2015 WL 247889 (Wis. App. 2015).

**Service Contracts.** In 2004, the Wisconsin Supreme Court decided *Insurance Co. of N. Am. v. Cease Elec., Inc.*, 688 N.W.2d 462 (Wis. 2004). It declared that because the U.C.C. does not apply to services, neither should the ELD. In its holding, it stated that by applying the ELD to service contracts, lawsuits against professionals could be affected, and they generally lie in both tort and contract.

**Service v. Products: Mixed Contracts.** On July 8, 2005, the Supreme Court decided the case of *Linden v. Cascade Stone*, 699 N.W.2d 189 (Wis. 2005). This case involved homeowners who brought contract and tort claims against subcontractors, who worked on building their home, for damages arising from water intrusion into the home. The Court held that the general contract between property owners and general contractor, not subcontracts between general contractor and subcontractors, controlled with respect to whether the contract was predominantly for sale of product or for services for purposes of ELD – the “predominant purpose test”. It further stated that the “totality-of-the-circumstances test”, which includes both quantitatively objective and subjective factors, not quantitatively objective test, which determines whether service component or sale of goods component of contract costs more, is the appropriate test when determining predominant purpose of mixed contract for purposes of ELD, which precludes the buyer’s recovery from the manufacturer on a tort theory for damages that are solely economic. A contract must be analyzed first to determine if it is a mixed contract for services and goods. If it is, then the determination has to be made with regard to its predominant purpose. *1325 North Van Buren, L.L.C. v. T-3 Group, Ltd.*, 716 N.W.2d 822 (Wis. 2006).

**Disappointed Expectations Test.** Under the “disappointed expectations test”, the ELD precludes tort recovery if prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product. *Grams v. Milk Prods., Inc.*, 699 N.W.2d 167 (Wis. 2005). If a product is expected and intended to interact with other products and property and, if the cause of the damage to those other products and property stems from the parties’ expectations of the function of the bargained-for product, then recovery in tort is precluded. The first step of the test revolves around the expectations of the consumer, necessitating an inquiry into the substance and the purpose of the transaction. The next step is to inquire whether the plaintiff’s claim is about disappointment with those expectations. The applicability of the ELD under this test could turn on the purpose for purchasing the product, the reasonableness of anticipating a risk of the product’s failed performance, the availability of warranties or risk sharing mechanisms, and the extremity of the facts. For example, the failure of a leaking water heater doesn’t have anything to do with the purpose for which the water softener was purchased (e.g., defective water softening).

**Construction Disputes.** The ELD has expanded in many states far beyond its application to product liability cases. It has potential application in any dispute between parties which is governed by a contract. A construction contract which limits warranties and remedies available to the owner when the building has defects cannot generally be avoided by suing for negligence in the performance of the services required under the contract. By limiting the remedies available to the parties to the contract, the parties are bound by the bargain they struck. Simply put, the ELD bars causes of action sounding in tort when the building (i.e., the building) is the subject of a contract between the parties and the damages are purely economic. The ELD and the “integrated system” doctrine apply when building construction claims are concerned. *The Bay Breeze Condominium Association, Inc. v. Norco Windows, Inc.*, 651 N.W.2d 738 (Wis. App. 2002). For example, in one case, windows installed in condominium units are considered to be part of an “integrated system” such that the “other property” exception to the ELD did not apply. *Id.* The manufacturer’s warranty precludes a condominium association’s tort recovery for damages caused by defective windows. The ELD is based on an understanding that contract law, and particularly the law of warranty, is better suited than tort law for dealing with purely economic loss in the commercial arena. However, a product must be “integral” to the function of the damaged property before the defective product and the damaged property are considered to be part of the same integrated system. As an example, damaged drywall, flooring, and woodwork were not part of the integrated system with a water softener. *State Farm Fire & Cas. Co. v. Hague Quality Water, Int’l*, 826 N.W.2d 412 (Wis. App. 2013), *aff’d*, 841 N.W.2d 819 (2014).

**Wisconsin Summary.** Since the initial recognition of the ELD, Wisconsin courts have significantly expanded the doctrine’s scope and breadth. Wisconsin has eliminated any requirement of contractual privity, disregarded arguments that the doctrine leaves parties with no alternative remedy, applied the ELD to services incidental to the



purchase, rejected “bootstrapping” non-economic losses of third parties, rejected creating an exception for “sudden and calamitous” occurrences, applied the doctrine to commercial real estate purchases, and applied the doctrine to encompass consumer transactions. Wisconsin courts employ the ELD to bar the recovery of purely economic losses in consumer transactions through tort remedies where the only damage is to the product purchased by the consumer. However the ELD does not bar tort actions for personal injury or damage to “other property” caused by product defects, so long as the plaintiff survives the “integrated system” and “disappointed expectations” tests. If the damaged property is part of an integrated system with a defective product, any damage to that property is considered to be damage to the product itself and tort claims would be barred by the ELD.

### **SUBROGATION AND THE ECONOMIC LOSS DOCTRINE**

Subrogation professionals must be familiar with the application of the ELD in the claims they are involved in. When reviewing a product failure which destroys the product itself and results in a claim payment for those damages, it is important to look to the possible application of exceptions to and ways to get around the harsh application of the ELD. The following are some of the things to look for:

- **Is there damage to “other property”?** Many jurisdictions allow for an “other property” exception or an exception where there is a significant risk of injury to persons or property. **Alaska** and **Maryland** are examples.
- **Was there a sudden and calamitous event?** The ELD was originally intended to prevent tort claims simply when the product didn’t work as intended or didn’t live up to expectations. Such claims are better suited to warranty and contract claims. As a result, some states allow for an exception to the ELD when there is a catastrophic failure, explosion, fire, etc., as opposed to a gradual deterioration over time, especially if the loss is combined with injury to persons or damage to other property.
- **Was there privity?** Some states require that there be privity between the plaintiff and product manufacturer before the ELD will apply. This is because, without privity, the plaintiff will not have recourse under warranty or contract law like the purchaser of the product would have.
- **Was a consumer involved?** Some states have allowed consumers who are not commercial purchasers to recover purely economic loss despite the ELD. Commercial parties are better able to protect themselves in the bargaining of contract terms than are consumers.
- **Is there a professional liability or malpractice claim?** Some states do not apply the ELD when the claim involves a professional who is paid to supply information or advice in guiding others in their transactions. This would possibly include engineers, accountants, appraisers, architects, etc.
- **Intentional acts.** Fraud and intentional acts are almost universal exceptions to the ELD.
- **Negligent misrepresentation.** When a party is fraudulently induced into entering into a contract, as opposed to a claim over the performance of the contract itself, the ELD may not apply, depending on the jurisdiction. The court will look at the focus of the misrepresentation. If it was intended to induce the plaintiff to enter into the contract, as opposed to misrepresentation in the performance of the contract, there is a good chance the ELD will not apply.
- **Common law warranty claims.** The common law warranties of habitability and good and workmanlike manner protect purchasers of products and services and may help avoid the ELD. If something is damaged because it was not installed in a good and workmanlike manner, the ELD might be avoided.
- **Statutory causes of action.** The ELD might not be applicable if there are statutory causes of action, such as deceptive trade practices legislation, which provides a cause of action. As a common law theory, the ELD would be trumped by the statutory scheme.
- **Express warranty and contract claims.** The ELD will not prevent pursuit of a warranty or breach of contract claim which the consumer or the subrogated carrier may have. Written warranties, design specifications, and general terms and conditions for installation of a product or thing are essential to the pursuit of a warranty or contract claim.



## SUMMARY OF ECONOMIC LOSS DOCTRINE IN ALL 50 STATES

**ALABAMA: Majority Rule.** A cause of action does not arise in tort under theories of negligence, wantonness, strict liability, or Extended Manufacturer's Liability Doctrine when a commercial product malfunctions or is defective and the malfunction or defect results in damage only to the product itself, and not personal injury or damage to "other property". *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So.2d 671 (Ala. 1989). A product is considered "other property" when a replacement part on that product fails and causes damage to the product. *Everett v. Brad Ragan, Inc.*, 2000 WL 360240 (S.D. Ala. 2000) (defective fuel filter replacement on truck). There is also no cause of action under the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) for damage suffered to the product only. *Wellcraft Marine v. Zarzour*, 577 So.2d 414 (Ala. 1990). An exception to the ELD is 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 when the product was in fact working properly." *Ford Motor Co. v. Rice*, 726 So.2d 626 (Ala. 1998). The ELD only applies in product liability claims as to manufacturers. *Lloyd Wood Coal Co.*, supra. There is no tort action allowed against a product manufacturer where the product malfunctions and causes damages only to its self. *Harris Moran Seed Co. v. Phillips*, 949 So.2d 916 (Ala. App. 2006). When a product defect results in damage only to the product itself, there is no cause of action in tort under theories of negligence, wantonness, strict liability, or extended manufacturer's liability doctrine.

**ALASKA: Intermediate Rule.** When a defective product creates a situation potentially dangerous to persons or other properties, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself. In order to recover on such a theory plaintiff must show (1) that the loss was a proximate result of the dangerous defect and (2) that the loss occurred under the kind of circumstances that made the product a basis for strict liability. *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981). A "dangerous situation" may provide an exception to the ELD in Alaska. *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173 (Alaska 1993); *St. Denis v. Dep't of Hous. & Urban Dev.*, 900 F. Supp. 1194 (D. Alaska 1995).

**ARIZONA: Intermediate Rule.** The ELD bars recovery in tort for damage only to a defective product (*i.e.*, economic losses such as repair costs, diminished value, or lost profits), provided there is no damage to person or other property. Three factors must be looked at to determine whether contract or tort law provides the remedy for a product defect which causes damage to the product only: (1) the nature of the product defect that caused the loss to the plaintiff; (2) the manner in which the loss occurred; and (3) the type of loss for which the plaintiff seeks redress. *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198 (Ariz. 1984) (unreasonable risk of harm), *abrogated on other grounds by, Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003 (Ariz. 2005). If a defect causes a product to malfunction and the malfunction affects the product which catches on fire and is completely destroyed, the property damage to the product itself would be recoverable in strict tort liability action, since the defect would be unreasonably dangerous to person or property and cause accidental damage to other property. *Salt River Project*, supra. A plaintiff may recover under tort theory if the loss was the result of an unreasonably dangerous defect in the product supplied by the manufacturer and the loss occurred by fire in a sudden accident which was of the type which could endanger persons and other property. *Salt River Project*, supra. The gist of a products liability tort case is not that the plaintiff failed to receive the quality of product he expected, but that the plaintiff has been exposed, *through a hazardous product*, to an unreasonable risk of injury to his person or property. *Cloud v. Kit Manufacturing*, 563 P.2d 248 (Ariz. 1977) (losses resulting from a sudden accident and those occurring from a slow process of deterioration). However, where economic loss is accompanied by damage to other property, strict tort liability applies. *Salt River Project*, supra. When a construction defect causes only damage to the building itself, or other economic loss, common law contract remedies alone provide relief. *Travelers Indem. Co. v. Crown Corr, Inc.*, 2011 WL 6780885 (D. Ariz. 2011). Damage to speakers in a stadium being constructed was not considered "other property" such as to fall within the exception to the ELD. *Salt River Project Agr. Imp. and Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198 (Az. 1984).

**ARKANSAS: Minority Rule.** A recovery in tort/strict liability can be pursued even when the damages are solely to the product and are economic in nature. *Farm Bureau Ins. Co. v. Case Corp.*, 878 S.W.2d 741 (Ark. 1994). The case of *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128 (Ark. 1983), held strict liability was not applicable

and was ultimately decided on the basis that the defective product was not unreasonably dangerous. *Alaskan Oil, Inc. v. Central Flying Services, Inc.*, 975 F.2d 553 (8<sup>th</sup> Cir. 1992); *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011); *Farm Bureau Ins. Co. v. Case Corp.*, 878 S.W.2d 741 (Ark. 1994); *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321 (Ark. 1981).

**CALIFORNIA: Intermediate Rule.** In California, economic losses are defined as “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 damages to other property.” *Frank M. Booth, Inc. v. Reynolds Metals Co.*, 754 F.Supp. 1441 (E.D. Cal. 1991). The line between physical injury to property and economic loss reflects the line of demarcation between tort theory and contract theory. *Philadelphia Indem. Ins. Co. v. Simplex Grinnell, L.P.*, 2012 WL 1668979 (N.D. Cal., May 11, 2012). The negligent performance of a construction contract, without more, does not justify an award of tort damages. *Aas v. Superior Court*, 24 Cal.4<sup>th</sup> 627, 12 P.3d 1125 (2000).

The ELD bars recovery in tort for economic damages caused by a defective product with two exceptions: (1) the loss is accompanied by some form of personal injury or damage to property other than the defective product itself, or (2) a “special relationship” exists. *Jimenez v. Superior Court*, 59 P.3d 450 (Cal. 2002). The “other property” exception is found in *KB Home v. Superior Court*, 112 Cal.App.4<sup>th</sup> 1076 (Cal. App. 2003). This includes damage to one part of a product caused by another defective part. The injured “component” may be defined as “other property” if a jury determines that it is “a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product.” *Aas v. Superior Court*, 24 Cal.4<sup>th</sup> 627 (Cal. 2000). The court must first determine what the product at issue is; only then does the court find out whether the injury is to the product itself, for which recovery is barred by the ELD, or to property other than the defective product, for which plaintiffs may recover in tort. *KB Home*, *supra*. Nevertheless, in construction defect cases where property damage is alleged - *e.g.*, a defect that causes harm to other portions of the property, as a result of a contractor’s negligence - the plaintiff has alleged a duty independent of any contract. *Robinson Helicopter*, 102 P.3d 268 (Cal. 2004) (citing *Jimenez v. Superior Court*, 59 P.3d 450 (Cal. 2002)). Thus, to the extent that plaintiffs are asserting property damage resulting from the negligence of the defendant, they can state a claim for negligence.

The second exception is if a “special relationship” exists. *J’Aire v. Gregory*, 24 Cal.3d 799 (Cal. 1979). When there is a special relationship between the plaintiff and defendant, recovery for damage to the product only can be had. *Id.* This special relationship exists where (a) the plaintiff is an intended beneficiary of the defendant’s obligations under a contract, (b) the plaintiff’s loss is foreseeable, (c) it is very likely that the plaintiff would suffer the loss from the defendant’s conduct, (d) there is a close connection between the plaintiff’s conduct and the defendant’s loss, (e) the defendant’s conduct is morally blameworthy, and (f) public policy favors liability on the defendant. *Biankanja v. Irvine*, 49 Cal.2d 647 (Cal. 1958). There is an exception for fraud or conversion, or where one party breaches the contract intentionally. *Robinson Helicopter, Inc. v. Dana Corp.*, 102 P.3d 1256 (Cal. 2004).

Therefore, where the product purchaser’s expectations are frustrated because the product purchased is not functioning properly, the remedy is in contract alone, because the owner has suffered only “economic” losses. *Robinson Helicopter Co., Inc. v. Dana Corp.*, *supra*. The ELD is followed and requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.

**COLORADO: Intermediate Rule.** Colorado first adopted the ELD in *Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301 (Colo. App. 1988). In *Jardel*, the court refused to permit a restaurant owner to bring a negligence claim against a subcontractor for lost profits resulting from the delayed opening of the restaurant when the subcontractor misread the building plans and constructed the building foundation in the wrong location. As a general rule, no cause of action lies in tort when purely economic damage is caused by negligent breach of a contractual duty. This ELD prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract. It has been applied in different contexts: *Grynberg v. Agri Tech, Inc.*, 985 P.2d 59, 63 (Colo. App. 1999) (holding that the ELD bars negligence claim for failure to receive a particular return on cattle investment program); *Terrones v. Tapia*, 967 P.2d 216, 220 (Colo. App. 1998) (holding that the ELD bars negligence claim for lost profits as a result of restaurant owner’s inability to use drive-through window); *Chellsen v. Pena*, 857 P.2d 472, 477 (Colo. App. 1992)(citing ELD to bar action for negligent termination of

employment); *Scott Co. of California v. MK–Ferguson Co.*, 832 P.2d 1000, 1005 (Colo. App. 1991) (holding that the ELD bars subcontractor’s negligence claim because no independent duty was breached); *Centennial Square, Ltd. v. Resolution Trust Co.*, 815 P.2d 1002, 1004 (Colo. App. 1991) (upholding dismissal of borrowers’ negligence claim against lender because no independent duty was breached); cf. *Consolidated Hardwoods, Inc. v. Alexander Concrete Constr., Inc.*, 811 P.2d 440, 443 (Colo. App. 1991) (allowing homeowner’s negligence claim against subcontractor because independent duty was breached).

The ELD was originally born from product liability law, but the application of the ELD is broader, because it serves to maintain a distinction between contract and tort law. The difference between tort and contract obligations is the source of the duties of the parties. Tort obligations generally arise from duties imposed by law. Tort law is designed to protect all citizens from the risk of physical harm to their persons or to their property. These duties are imposed by law without regard to any agreement or contract. In contrast, contract obligations arise from promises made between parties. Contract law is intended to enforce the expectancy interests created by the parties’ promises so that they can allocate risks and costs during their bargaining.

No tort claim may be brought for economic damages flowing from breach of an express or implied contract, unless there is an independent, professional duty owed. *Town of Alma v. Shanks*, 10 P.3d 1256 (Colo. 2000) (e.g., insurance brokers, attorneys, accountants and architects). Negligent misrepresentation is an exception to the ELD. *Colo. Nat’l Bank of Denver v. Adventura Associates, Inc.*, 757 F.Supp. 1157 (D. Colo. 1991). Under Colorado’s ELD, a party suffering purely economic loss from the breach of an express or implied contractual duty is barred from asserting a tort claim for such a breach, absent an independent duty of care under tort law; in order to determine whether the doctrine applies, a court must focus on the source of the duty alleged to have been violated. *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp.2d 1175 (D. Colo. 2002). However, because strict product liability imposes a duty on the product’s manufacturer to act reasonably in the design and manufacture of a product, in addition to any duty imposed by contract, the ELD will not prevent a plaintiff from pursuing a tort claim for damages to the product only or other economic damages flowing from the product’s failure. *Loughridge*, supra. The ELD will prevent a subcontractor’s tort claim against a design engineer for breach of his professional duty and negligent misrepresentation. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004). Under Colorado law, broad disclaimers of tort liability based on sale, use, or manufacture of product are disfavored and enforceable only if specifically agreed to in negotiations between a commercial seller and commercial buyer. *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 358 F. Supp.2d 1021 (D. Colo. 2005). When the loss extends beyond the economic risks allocated by contract to include the physical loss of the end product in which warranted components were installed, the ELD does not limit remedy to warranties, but instead permits claims for negligence or strict liability based on breaches of duty not to inject defective products into stream of commerce. *Id.* The *Restatement (Second) Torts § 402A* gives rise to duties independent of those manufacturers may choose to assume or disclaim in a warranty. *Id.* The ELD implicates some of the following types of economic harm that are sometimes recoverable through tort claims:

- *diminution in value;*
- *lost profits;*
- *cost of repair/replacement; and*
- *damages other than physical harm to persons or property.*

**CONNECTICUT: Minority Rule** (via statute for consumer claims only). Connecticut’s Product Liability Law displaces the common law of products liability. Conn. Gen. Stat. §§ 52-572m(b), 52-572n(a). Under the statutory scheme, the victims of defective products may recover for “harm,” Conn. Gen. Stat. § 52-572n(a), which is defined to include “*damage to property, including the product itself, and personal injuries including wrongful death.*” Conn. Gen. Stat. § 52-572m(d). The definition of harm itself states that “[a]s between commercial parties, ‘harm’ does not include commercial loss.” As between commercial parties, commercial loss caused by a product is not harm and may not be recovered by a commercial claimant in a product liability claim. An action for commercial loss caused by a product may be brought only under, and shall be governed by, Title 42a, the Uniform Commercial Code (U.C.C.). Therefore, economic loss recovery is allowed in noncommercial product liability claims. *Chiang v. Pyro Chemical, Inc.*, 1997 WL 330622 (Conn. Super. 1997). The ELD is a bar to tort actions where the relationship between the parties is contractual and the damages are economic in nature.

**DELAWARE: Majority Rule** (exception for residential construction). The ELD prevents recovery in tort where only the product itself has been damaged. *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. Super. 1999). In 1996, the Delaware General Assembly passed the Homeowner's Protection Act, 6 Del. C. §§ 3651-52. This Act expressly does away with the ELD in certain residential construction cases. Otherwise, where solely economic losses were sought and no damage to persons or other property had occurred, the plaintiff is limited to remedies under the U.C.C. and may not proceed in tort. When two separate parts are integrated into one functioning whole, damage to either integrated piece by the other component does not constitute damage to "other property" for which tort recovery is allowed. *Delmarva Power & Light v. Meter-Treater, Inc.*, 218 F.Supp.2d 564 (D. Del. 2002). An exception to the ELD exists where there is negligent misrepresentation. *Guardian Constr. Co. v. Tetra Tech. Richardson, Inc.*, 583 A.2d 1378 (Del Super. 1990).

**DISTRICT OF COLUMBIA: No Rule Adopted**, but leaning toward Minority Rule. The District of Columbia has not expressly adopted the ELD.

**FLORIDA: Majority Rule.** Florida's "Independent Tort Doctrine" (ITD) has eclipsed the ELD in that state. The ITD bars a plaintiff from pursuing a tort action where a contract created the duty to act, performance is measured against the contractual obligations, and the contract provides the remedy for defective performance. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos. Inc.*, 110 So.3d 399 (Fla. 2013). In effect, it prevents raising a tort cause of action that restates a breach of contract action. The Economic Loss Doctrine applies in only two situations: (1) where the parties are in contractual privity and a party seeks to recover tort damages for matters arising out of the contract, or (2) where the defendant is a manufacturer or distributor of a defective product which damages itself but does not cause personal injury or damage to any other property. *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004). The ELD is still in use, but it is mainly applied in cases involving product liability. *Id.* The ELD bars tort actions when the plaintiff has not suffered damages to property other than the damaged product itself. Simply put, the ELD is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532 (Fla. 2004). The exact origin of the ELD is subject to some debate and its application and parameters are somewhat ill-defined. *Moransais v. Heathman*, 744 So.2d 973 (Fla. 1999). In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla. 1993), Florida recognized the ELD as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." Florida relied on *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) when it adopted the ELD. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899 (Fla. 1987). However, Florida recognizes several exceptions below, including allowing claims for torts committed independently of the breach of contract, such as fraudulent inducement and negligent misrepresentation, and claims for which they found public policy prohibits limiting liability, such as claims for professional negligence.

**Service Contracts.** The ELD does not apply to service contracts. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, *supra*. It applies to homeowners. *Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc.*, *supra*.

**No Alternative Theory of Recovery.** Florida recognizes a "no alternative theory of recovery" exception to the ELD. *Airport Rent-a-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628 (Fla. 1995). However, this exception applies only when there is a supervisory relationship between the parties. *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (Fla.1973). Therefore, after the 2013 limitation of the ELD, it has little application to product liability cases.

**Privity of Contract.** In 2004, the Florida Supreme Court further declared that the ELD did not bar a tort action against a company which was neither a manufacturer nor distributor of a product, as the parties were not in privity of contract. *Am. Aviation, Inc.*, *supra*. The ELD applies where the parties are in contractual privity or the defendant is a manufacturer of a product. *Id.* Lack of privity is a defense if it is a service rather than product liability.

**Statutory Violation.** Another exception to the ELD is for statutory violations. *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999).

**Other Property.** Florida recognizes an exception to the ELD if there is damage to property other than the product. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla. 2004). Little precedent exists delineating the



border between “property” and “other property” under the Economic Loss Rule. A roof of a building is an integral part of the building. *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 804 F. Supp. 1471 (M.D. Fla. 1992). A seawall is an integrated component part of a house, pool, and patio, despite the fact that it is physically distinctive and geographically separate from the other parts of the house. The “product” is the home with all of its component parts. *Fishman v. Boldt*, 666 So.2d 273 (Fla. App. 1996). The analysis isn’t as simple as determining whether the product “came with” the finished product. For example, an under counter coffee maker which came with a motor home was not an “integral component” of the motor home and the home constituted “other property” in an action against the manufacturer of the coffee maker, Black & Decker. *McAteer v. Black & Decker, Inc.*, 1999 WL 33836701 (M.D. Fla. 1999).

**Sudden and Calamitous Event.** Florida has rejected the “sudden, calamitous event” exception. *Casa Clara Condo, Ass’n, supra*; *Airport Rent-a-Car, Inc. v. Prevost Car, Inc.*, *supra*.

**Application To Cases Not Involving Product Liability.** Despite its underpinnings in the products liability context, the ELD was, over time, applied to other circumstances when the parties have entered into a contract and one party seeks to recover damages in tort for matters arising from the contract. However, that came to an end with the court’s decision in *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Companies, Inc.*, *supra*.

**Manufacturer Or Distributor In A Commercial Relationship.** A manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532 (Fla. 2004).

**Breach of Warranty.** A warranty claim, whether implied or express, against a supplier of a product is barred if there is no privity between the injured party and the supplier. *T.W.M. v. American Medical Systems, Inc.*, 886 F. Supp. 842 (N.D. Fla. 1995). In *T.W.M.*, the plaintiff was injured from a defective implant which the plaintiff did not purchase from the manufacturer, but had surgically implanted by a doctor. Although the written opinion does not clarify whether a manufacturer’s written warranty was delivered as part of the deal, it does make the following broad statement:

*The law of Florida is that to recover for the breach of a warranty, either express or implied, the plaintiff must be in privity of contract with the defendant. Kramer v. Piper Aircraft Corp., 520 So.2d 37 (Fla. 1988); West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976). “Privity is required in order to recover damages from the seller of a product for breach of express or implied warranties.” Intergraph Corp. v. Stearman, 555 So.2d 1282, 1283 (Fla. 2d DCA 1990).*

**Extraordinary Circumstances.** In order to proceed on a common law negligence claim based solely on economic loss, there must be some sort of link between the parties or some other extraordinary circumstance that justifies recognition of such a claim. *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So.3d 383 (Fla. App. 2018); *Monroe v. Sarasota County School Bd.*, 746 So.2d 530 (Fla. App. 1999) (holding that the general rule is “that bodily injury or property damage is an essential element of a cause of action in negligence,” but recognizing that essential element could be waived “under extraordinary circumstances which clearly justify judicial interference to protect a plaintiff’s economic expectations”); *Limones v. Sch. Dist. of Lee Cty.*, 161 So.3d 384, 389 n.5 (Fla. 2015) (“Of course, as *McCain* [593 So.2d at 503–04] acknowledges, some facts must be established to determine whether a duty exists, such as the identity of the parties, their relationship, and whether that relationship qualifies as a special relationship recognized by tort law and subject to heightened duties.”); *DaimlerChrysler Ins. Co. v. Arrigo Enters.*, 63 So.3d 68, 74 (Fla. 4<sup>th</sup> DCA 2011) (“The existence of a legal duty means that a defendant stands in a ‘relation to the plaintiff as to create [a] legally recognized obligation of conduct for the plaintiff’s benefit.’” (quoting *Biglen v. Fla. Power & Light Co.*, 910 So.2d 405, 408 (Fla. 4<sup>th</sup> DCA 2005)).

**GEORGIA: Intermediate Rule** (via statute). *Tort v. Contract*: When a party to a written contract can recover economic damages from the other contracting party for mere negligence in carrying out its contractual duties is an issue that has produced conflicting case decisions. In *Long v. Jim Letts Oldsmobile, Inc.*, 217 S.E.2d 602 (Ga. App. 1975), the court held that negligence in the performance of a contract may give rise to a tort action. In *Mauldin v. Sheffer*, 150 S.E.2d 150 (Ga. App. 1966), the court held that in order to maintain an action in tort because of a breach of duty growing out of a contract, the breach must be shown to have been a breach of a duty imposed by law and



not merely the breach of a duty imposed by the contract itself. Over time, the courts have generally prohibited parties to a contract from recovering in negligence for economic losses resulting from negligent performance of contractual duties but allowed such claims where they were premised on a professional or “special” relationship between the parties. *Orkin Exterminating Co. v. Stevens*, 203 S.E.2d 587 (Ga. App. 1973) (pest exterminator); *Mauldin*, *supra*. (mechanical engineer). These special contractual relationships include, for example, those between principal and agent, bailor and bailee, attorney and client, physician and patient, carrier and passenger or shipper, and master and servant. *Bulmer v. Southern Bell Tel. & Tel. Co.*, 317 S.E.2d 893 (Ga. App. 1984). Such negligence claims are allowed, despite arising from a contractual duty, because the law imposes a duty of care in these special relationships which is separate from the duty imposed by the contract.

**Product Liability:** Georgia has enacted its own statutory product liability law, rather than relying on common law or § 402A of the *Restatement*. O.C.G.A §51-1-11. No recovery in tort is allowed when damage is to the product only, unless there is personal injury or damage to “other property”. *Busbee v. Chrysler Corp.*, 524 S.E.2d 539 (Ga. App. 1999). Exception exists when there is a sudden and calamitous event that causes risk of injury to persons or other property. *Vulcan Materials*, *supra*. Another exception exists for misrepresentation relied on by the purchaser. *Robert & Co. Assoc. v. Rhodes-Haverty Partnership*, 300 S.E.2d 503 (Ga. 1983). A plaintiff can recover in tort for personal injuries and damage to other property, but recovery for damage to the product itself is not allowed. *Jim Letts*, *supra*.; *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942 (11<sup>th</sup> Cir. 1982); *Vulcan Materials*, *supra*. For example, if a product simply stops working, the owner cannot maintain a negligence claim against the seller for diminution in value, repair costs, and loss of use. *Jim Letts*, *supra*. The owner is left with only a contract warranty action to obtain compensation. There is also an accident exception to the general rule that an action in negligence does not lie absent personal injury or damage to property other than to the allegedly defective product. *Vulcan Materials*, *supra*. There is a general duty under tort law, independent of any contract, to avoid causing “a sudden and calamitous event which, although it may only cause damage to the defective product itself, poses an unreasonable risk of injury to other persons or property.” *Id.* In *Vulcan Materials*, a failed hydraulic tube leaked hydraulic fluid and caused a sudden fire when ignited by the hot engine surface. This qualified as a sudden and calamitous event which the court held could not be construed as merely a “defect of quality, evidenced by internal deterioration or breakdown [which would be] assigned to the economic loss category.” *Id.*

**HAWAII: Majority Rule.** The ELD bars claims for relief based on products liability or negligent design and/or manufacture theory for economic loss stemming from the product alone. *Bronster v. United States Steel*, 919 P.2d 294 (Haw. 1996). Exceptions exist for negligent misrepresentation and fraud. In a construction context, purely economic losses cannot be recovered in tort from design professionals by those in privity of contract with those professionals. *City Express, Inc. v. Express Partners*, 959 P.2d 836 (Haw. 1998).

**IDAHO: Majority Rule.** Absent accompanying personal injury or property damage to property other than the product, purely economic losses alone are not recoverable in tort. *Duffin v. Idaho Crop Improvement Ass’n*, 895 P.2d 1195 (Idaho 1995). An exception exists when there is a special relationship involved, such as professional or quasi-professional relationships, or there is “parasitic injury to person or property.” *Id.*

**ILLINOIS: Intermediate Rule.** Illinois follows the Intermediate Rule and refers to the ELD as the “*Moorman Doctrine*.” The *Moorman Doctrine* precludes recovery of purely economic losses in tort for failure to fulfill contractual obligations. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7<sup>th</sup> Cir. 2012); *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676 (7<sup>th</sup> Cir. 2011); *Rardin v. T & D Machine Handling*, 890 F.2d 24 (7<sup>th</sup> Cir. 1989). Illinois defines “economic loss” as “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, as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.” *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982). Where only the defective product itself is damaged, the *Moorman Doctrine* applies and the plaintiff is limited to recovery under contract law. *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 682 N.E.2d 45 (Ill. 1997). This is so because “when the product damages itself only, the risks against which products liability law was designed to protect simply are not realized.” *Id.*

There are three exceptions to the ELD: (1) where the plaintiff has sustained personal injury or property damage resulting from a sudden or dangerous occurrence; (2) where the plaintiff's damages are proximately caused by the defendant's intentional, false representation; and (3) where the plaintiff's damages are proximately caused by the defendant's negligent misrepresentation where the defendant is in the business of supplying information to guide others in their business transactions." *Progressive N. Ins. Co. of Illinois v. Ford Motor Co.*, 259 F. Supp.3d 887 (S.D. Ill. 2017). A plaintiff may not recover for solely economic damages such as damage to the product alone in tort, unless accompanied by injury or damage to "other property". *Id.* In *Great West Casualty Co. v. Volvo Trucks North America, Inc.*, 2013 WL 617068 (N.D. Ill. 2013), a new Volvo truck caught fire and was destroyed due to a defect. The truck was purchased in January of 2006, a recall was issued shortly thereafter, and the fire occurred in November of 2006 before the trucks were repaired. Volvo argued that Chicago Logistics' (Great West's insured) remedy lie in contract law and its request for tort damages under theories of strict liability, failure to warn, and negligence were barred by the *Moorman* Doctrine. Great West argued that the damage to truck was separate from the damage to the engine within; *i.e.*, the truck was *other property* excluded from the bar of the *Moorman* Doctrine. However, the federal district court rejected that argument, pointing out that the Illinois Supreme Court had announced in *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 682 N.E.2d 45 (Ill. 1997), that the truck and engine constituted a single product. This is because the plaintiff bargained for a fully integrated truck.

Recovery depends upon the nature of defect and the manner in which damage occurred. When the defect causes an accident "involving some violence or collision with external objects," the resulting loss is treated as property damage. On the other hand, when the damage to the product results from deterioration, internal breakage, or other non-accidental causes, it is treated as economic loss. Exceptions exist when fraud or negligent misrepresentation are involved. *In re Chicago Flood Litigation*, 680 N.E.2d 265 (Ill. 1997).

A "sudden and dangerous occurrence" has somewhat circularly been defined as an occurrence that is "*highly dangerous and presents the likelihood of personal injury or injury to other property.*" *ExxonMobil Oil Corp. v. Amex Constr. Co., Inc.*, 702 F.Supp.2d 942 (N.D. Ill. 2010). The Court in *Moorman* had in mind fires, explosions, or other calamitous occurrences due to the product and the resulting risk of harm to persons or property. *Loman v. Freeman*, 890 N.E.2d 446 (Ill. 2008). A sudden, dangerous, or calamitous event by itself is not sufficient - it must be *coupled* with personal injury or property damage. Mere damage to any property is not sufficient; instead, the property must be "other property," extrinsic from the product itself. *Allstate Ins. Co. v. Pulte Homes of St. Louis, LLC*, 2010 WL 4482360 (N.D. Ill. 2010); *Progressive N. Ins. Co. of Illinois v. Ford Motor Co.*, 259 F. Supp. 3d 887 (S.D. Ill. 2017). In a subrogation action to recover for damages to a Ford F-150 which started on fire, a federal district court held that manufacturing defects which caused a "sudden or dangerous occurrence", such as a fire leading to the complete destruction of the vehicle, is not sufficient to overcome the ELD, where the only damage is to the truck itself. *Progressive N. Ins. Co. of Illinois v. Ford Motor Co.*, 2017 WL 1425953 (S.D. Ill. 2017). When damages to other property are properly pleaded, "the sudden and calamitous event exception to the economic loss rule ... allows a plaintiff to pursue non-economic damages." *Allstate Ins. Co. v. Pulte Homes of St. Louis, LLC*, 2010 WL 4482360 (N.D. Ill. 2010). Illinois law is well-settled that the sudden or dangerous occurrence exception only applies when a plaintiff incurs either personal injury or damages to property other than the defective product itself. *Progressive N. Ins. Co. of Illinois v. Ford Motor Co.*, 259 F. Supp.3d 887 (S.D. Ill. 2017).

**INDIANA: Majority Rule** (but also doesn't allow recovery for damage to product even if there is injury or damage to other property). The ELD provides that "*a defendant is not liable under a tort theory for any purely economic loss caused by its negligence (including, in the case of a defective product or service, damage to the product or service itself) - but that a defendant is liable under a tort theory for a plaintiff's losses if a defective product or services causes personal injury or damage to property other than the product or service itself.*" *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729 (Ind. 2010) (hereinafter "*IMCPL*"). Economic losses are not recoverable for product's failure to perform, unless personal injury or damage to other property is present. *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933 (Ind. App. 1996). However, Indiana defines "economic loss" 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.*" This is also true under Indiana's Strict Products Liability Act. Ind. Code § 34-20-2-1. Therefore, Indiana does not allow for recovery of damage to the product itself, even when accompanied

by personal injury or damage to other property. *Fleetwood Enterprises, Inc. v. Progressive Northern Ins. Co.*, 749 N.E.2d 492 (Ind. 2001). However, the Indiana Product Liability Act defines “physical harm” as:

*(a) “Physical harm”, for purposes of IC 34-20, means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. (b) The term does not include gradually evolving damage to property or economic losses from such damage.*

Despite this language, Indiana courts have held that even if damage to the product is “sudden” and “major”, the legislature did not provide for recovery of damages to the product alone. *Progressive Ins. Co. v. General Motors*, 749 N.E.2d 484 (Ind. 2001). The ELD does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated. *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150 (Ind. 2005). In *Gunkel*, the plaintiff contracted for the purchase of a new home with a general contractor and separately entered into a contract with a stonemason to add a stone façade to the house. The stonemason allegedly improperly constructed and sealed the façade, allowing water to seep behind the stone, damaging not only the stone façade but also the interior walls and flooring of the home. The Indiana Supreme Court concluded that, under the Economic Loss Rule, the plaintiff could not sue the stonemason in tort for the damage to the façade.

With regard to the “other property” exception, a home is considered “other property” from the stone façade put on a house at the time of its construction if the façade was built by a separate company from the home builder who dealt with the homeowners separately. *Id.* The ELD does not bar recovery in tort for damage that a separately acquired defective product or service causes to other portions of a larger product into which the former has been incorporated. *Id.* The Indiana Supreme Court again addressed the “other property” aspect of the rule in *IMCPL*. In *IMCPL*, the Public Library in the City of Indianapolis brought suit against engineering subcontractors alleging that they provided defective design and inspection services during construction of an underground parking garage built as part of a renovation project of the entire library facility. The *IMCPL* Court held that the dispositive question was what “product” the plaintiff had contracted to purchase, because, under the rationale set forth in *Gunkel*, only the supplier furnishing the defective property or service is in a position to bargain with the purchaser for allocation of the risk that the product or service will not perform as expected. If a component is sold to the first user as part of the finished product, the consequence of its failure are fully within the rationale of the ELD and is not considered to be “other property.” *IMCPL*, 929 N.E.2d at 731 (quoting *Gunkel*, 822 N.E.2d at 155).

Distinguishing the facts from those in *Gunkel*, the Court in *IMCPL* reasoned that, unlike the separate transactions in which the homeowner in *Gunkel* had engaged, the Library had “*purchased a complete renovation and expansion of all the components of its facility as part of a single, highly-integrated transaction,*” and that the service purchased from the defendants “*was an integral part of the entire library construction project, not independent from it.*” The *IMCPL* Court concluded that the product the Library purchased was “*the renovated and expanded library facility itself,*” and thus, that “*any damages alleged to have resulted from the defendants’ negligence were to the ‘product’ the Library purchased, not to ‘other property.’*”

In *Citizens Ins. Co. of Am. v. Manville*, 2013 WL 1438096 (S.D. Ind. 2013), Citizens filed a subrogation suit against Johns Manville supplied a roof system to a new building being built. Anderson University entered into a construction contract with Meyer Najem for the construction of the entire Flagship Enterprise Center building, including the roof system, the metal decking of the roof, the HVAC system, and the nailer boards attached to the top of the parapet walls. In order to perform under that overarching contract, Meyer Najem subcontracted the purchase and installation of the roofing system to Richmond Guttering who purchased certain materials to assemble the roofing system from Johns Manville. An inspection after construction revealed a parapet wall pulling away from the roof decking and moisture on the exterior walls. The facts in this case were distinguishable from *Gunkel* in that the University did not enter into a separate transaction with Johns Manville for an entirely independent service or product that was not integral to the overall construction project. Thus, based on the reasoning set forth by the Indiana Supreme Court in *IMCPL*, the court found that the “product” purchased by Anderson University was the entire building itself, and therefore, any damage to the building, including to its component parts, was to the product the University purchased, not to “other property.”

The ELD precludes tort liability for purely economic loss—that is, pecuniary loss unaccompanied by any property damage or personal injury (other than damage to the product or service itself. *Indiana Farm Bureau v. CNH Industrial America, LLC*, 130 N.E.3d 604 (Ind. App. 2019). When analyzing the “other property” exception, the question is what product was purchased by the plaintiff. In *CNH Industrial America, LLC*, the product was a Combine and Corn Head combination; which the court noted were “one product” because they were purchased to be used together, from the same seller, and one without the other wouldn’t function. The court held that the seller of a product could not be sued for negligent maintenance of the product where the purchase order disclaimed warranties and “a claim that a product or service did not perform as expected is best left to contract law remedies.” A subrogated carriers claims of negligent servicing were barred by the ELD.

**IOWA: Intermediate Rule.** Generally, tort recovery for purely economic losses is prohibited, and such claims are consigned to contract law. Factors to be considered in determining whether a product liability claim sounds in tort or contract are the nature of the defect, the type of risk, and the manner in which the injury arose. *American Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437 (Iowa 1999). Tort recovery for damage to the product alone is recoverable when accompanied by 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. Iowa makes a distinction between disappointed consumers from endangered consumers. As an example, if a fire alarm fails to work and the building burns down, that is considered an “economic loss” even though the building was physically harmed. It was a foreseeable consequence from the failure of the product to work properly. But, if the fire was caused by a short circuit in the fire alarm itself, it is not economic loss.

Tort claims remain available in circumstances where the loss involves a safety hazard or sudden danger that results in personal injury or harm to property other than the subject of the contract. *Des Moines Flying Serv., Inc. v. Aerial Servs., Inc.*, 880 N.W.2d 212 (Iowa 2016) (“[I]f the damage resulted from a failure of the product to work properly, the claim would sound in contract, but if it resulted from a genuine hazard resulting in a sudden or dangerous occurrence based on the nature of the product defect, the claim would sound in tort.”); *Determan*, 613 N.W.2d 259 (Iowa 2000) (stating that in order for tort recovery to be available, “at a minimum ... the damage for which recovery is sought must extend beyond the product itself”). Ultimately, however, “the line to be drawn is one between tort and contract rather than between physical harm and economic loss.” *Nelson v. Todd’s Ltd.*, 426 N.W.2d 120 (Iowa 1988); *S. Ins. Co. Lowenberg v. CJG Enterprises, Inc.*, 2017 WL 3449610 (S.D. Iowa 2017).

Defects of suitability and quality are redressed through contract actions and safety hazards through tort actions. There can be no recovery in tort if the product causes no injury or damage to other property. *Nelson v. Todd’s, Ltd.*, 426 N.W.2d 120 (Iowa 1988). However, in a case in which the defendant constructed four barns using pre-engineered designs and components provided by another defendant, and seven years later, the barns suffered damage during a windstorm, a suit claiming that the damage suffered was due to design and construction deficiencies and brought as a subrogation action, was dismissed based on the ELD. *Lowenberg v. CJG Enterprises, Inc.*, 2017 WL 3449610 (S.D. Iowa 2017). The court dismissed the case because, even though there was a genuine hazard resulting in a sudden or dangerous occurrence based on the nature of the product defect, the nature of the defect at issue was the quality of CJG’s construction and Lester’s design of the Lowenberg’s barns. The insureds contracted for the buildings to withstand Iowa’s mercurial weather, and the subrogated carrier’s claim that the barns failed to withstand the weather arises from their insured’s unfulfilled expectations with respect to the bargained-for quality of the barns. This is an economic loss properly redressed by contract, not tort.

**KANSAS: Intermediate Rule.** In Kansas, the ELD developed in the 1990s after the expansion of the doctrine in other jurisdictions. *Koss Constr. v. Caterpillar, Inc.*, 960 P.2d 255 (Kan. App. 1998). Following *Koss Construction*, Kansas expanded the ELD to consumer product liability claims. In *Jordan v. Case Corp.*, 993 P.2d 650 (Kan. App. 1999), a farmer’s insurer subrogated when a combine caught fire because of an engine defect. Claims against the manufacturer for breach of implied warranty, strict liability, and negligence were barred, despite the carrier’s argument that the engine was “other property” rather than a component part. The Court of Appeals extended the doctrine outside the business context and applied it to a consumer claim, and it was the beginning of the ELD’s expansion in Kansas. After *Jordan*, the ELD was applied in the construction context. *Northwest Arkansas Masonry, Inc. v. Summit Specialty Products, Inc.*, 31 P.3d 982 (Kan. App. 2001). In *Northwest Arkansas*, the court considered



whether the other property exception applied to the defective cement used by Northwest to build a cement wall, and found that in construction cases, an item must be distinguished as other property or part of an “integrated system” of a structure. If the item is part of an integrated system, then the ELD bars recovery of damages to the item itself.

After more than a decade of the ELD’s expansion in Kansas, three decisions provide limitations to the application of the ELD in the home construction, but provide confusion outside of this area. Later, the ELD was applied to residential home construction cases, regardless whether there was a service or a product, or whether it involved residential or business parties. *Prendiville v. Contemporary Homes, Inc.*, 2001 WL 35911172 (Kan. Dist. Ct. Sept. 24, 2001). It wasn’t until 2011 that Kansas courts began to limit the expansion of the ELD, and it did so in three cases:

1. *David v. Hett*, 270 P.3d 1102 (Kan. 2011). The ELD does not apply in residential construction cases. Homeowners brought breach of contract, negligence, fraud, fraudulent concealment, and violation of the Kansas Consumer Protection Act claims against their homebuilder after their house began settling. Up to this point, the ELD barred economic loss claims in construction cases. This court allowed the homeowners’ claims for negligence based on several policy reasons. First, the rule that warranty remedies are sufficient when the only damage is to a product itself do not work when a service, rather than a product, is involved. The court added that implied warranty to perform services in a workmanlike manner does not apply in Kansas to all services, such as professional services by a doctor or lawyer, so tort recovery for economic loss in this context is allowed. It also held that, because home defects are often discovered after the warranty time period has expired, warranty law offers little protection to homeowners.
2. *Coker v. Siler*, 304 P.3d 689 (Kan. Ct. App. 2013). Created Independent Duty Rule in Kansas. This involved a claim by a homeowner after a water line separated and caused cracking in the home’s foundation and walls. The homeowner sued the seller of the home for breach of express warranty and sued the plumber who caused the damage for negligence. Because the plumber owed an independent duty to the homeowner, the tort claim against the plumber could proceed.
3. *Rinehart v. Morton Bldgs., Inc.*, 305 P.3d 622 (Kan. 2013). Economic loss recovery is allowed in tort in negligent misrepresentation cases. Owners of a building sued their construction company on theories of breach of contract, breach of warranty, violation of the Kansas Consumer Protection Act, and negligent misrepresentation. The contractor misrepresented that the building complied with the plans and specifications.

The above three cases opened the door to tort liability in home construction economic loss cases in Kansas. It is unclear whether these limitations to the ELD might be applied outside the home construction context in the future.

The ELD still does not allow actions in tort where the only damages are to the defective product. *Prendiville v. Contemporary Homes, Inc.*, 83 P.3d 1257 (Kan. App. 2004); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1581 (10<sup>th</sup> Cir. 1984) (unreasonable dangerousness); *AgriStor Leasing v. Meuli*, 634 F. Supp. 1208, 1216-18 (D. Kan. 1986), *aff’d*, 865 F.2d 1150 (10<sup>th</sup> Cir. 1988) (one must examine the nature of the defect, the type of risk, and the manner in which the injury arose to decide whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty is applicable). Kansas has applied the “integrated systems approach” to the ELD. *Northwest Arkansas Masonry, Inc. v. Summit Specialty Products, Inc.*, 31 P.3d 982 (Kan. App. 2001).

**KENTUCKY: Majority Rule.** Until recently, the Kentucky Supreme Court had never officially addressed the issue. The ELD permits recovery for damages to property other than the product purchased but denies recovery for damage to the product itself. *Mt. Lebanon Personal Care Home v. Hoover*, 276 F.2d 875 (6<sup>th</sup> Cir. 2002). However, in 2011, the Kentucky Supreme Court first announced that the ELD applies in Kentucky. *Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729 (Ky. 2011). The ELD in Kentucky has its origins in products liability actions where the parties’ duties are defined by the Uniform Commercial Code (U.C.C.) and their contract. *Louisville Gas and Elec. Co. v. Cont’l Field Sys., Inc.*, 420 F. Supp.2d 764 (W.D. Ky. 2005). That court noted that “[v]irtually every classic description of the economic loss doctrine pertains to and often limits its application to the sale of products [in order to] ... preserve the distinction between the remedies available under the U.C.C. and those available in tort. The ELD prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the



*malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law.” Giddings & Lewis, Inc., supra.* Stated differently, “the economic loss rule prohibits purchasers of products from recovering purely economic damages under most tort theories.” *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6<sup>th</sup> Cir. 2003). Although the rule originally applied to products liability cases, it the Kentucky Court of Appeals recently held that it does not extend to negligent misrepresentation (in construction litigation and construction service contracts under *Restatement (Second) of Torts* § 552. *D.W. Wilburn, Inc. v. K. Norman Berry Associates Architects, PLLC*, 2016 Ky. App. LEXIS 206 (Ky. 2016). There is no calamitous exception to the ELD. *Id.* Kentucky courts believe that the parties’ allocation of risk by contract should control without disturbance by the courts via product liability theories borne of a public policy interest in protecting people and their property from a dangerous product. *Id.* The 6<sup>th</sup> Circuit held that Kentucky would follow the ELD in at least some circumstances, such as to preclude tort recovery for economic losses stemming from business purchases. The doctrine applies when parties engage in complex commercial endeavors, in order to preserve parties’ abilities to distribute risks via contract, warranty, and insurance. In an unpublished opinion, it seemed as though Kentucky was leaning toward the Intermediate Rule, by indicating that the ELD applies only where there is not the kind of harm which public policy requires manufacturers to protect independent of contractual obligation. *Williams v. Volvo-White*, 2003 WL 22681457 (Ky. App. 2003) (*unreported decision*). If an insured can pursue a warranty claim, so can a subrogated insurer – even without privity. *Ohio Cas. Ins. Co. v. Vermeer Mfg. Co.*, 298 F.Supp.2d 575 (W.D. Ky. 2004). The ELD applies whenever the purchasing party has the opportunity to allocate the risk of loss via contract or warranty. *Hoover, supra*. A Kentucky federal judge has held that the ELD barred a distributor’s claim based on fraudulent inducement, provided the fraudulent misrepresentation is inseparable from the essence of the parties’ agreement. *General Elec. Co. v. Latin American Imports*, 214 F.Supp.2d 758 (W.D. Ky. 2002). Another federal court held that the ELD applies to bar torts claims arising not only from purchases of goods themselves, but any transaction that may be characterized a “business purchase”, and that the ELD bars tort claims seeking recovery not only for damage to products themselves but also for consequential economic loss. *Westlake Vinyls, Inc. v. Goodrich Corp.*, 2007 WL 2812865 (W.D. Ky. 2007).

**LOUISIANA: Minority Rule** (via statute). With regard to defective products, Louisiana has enacted the Louisiana Products Liability Act (LPLA). La. Rev. Stat. Ann. § 9:2800.51, *et. seq.* The LPLA defines the “damages” recoverable for a product defect as to include “damage to the product itself”. La. Rev. Stat. Ann. § 9:2800.53(5). Economic loss alone is recoverable in Louisiana. *DeAtley v. Victoria’s Secret Catalogue*, 876 So.2d 112 (La. App. 2004). However, the 5<sup>th</sup> Circuit has indicated that this language may intend to say that the ELD doesn’t apply if the aggrieved party does not have the ability to pursue a warranty claim.

For other applications, the Louisiana Supreme Court has abandoned a mechanical application of the ELD in favor of a case-by-case application of the traditional duty/risk analysis. *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984). Louisiana does not recognize a traditional ELD; nor does it recognize a doctrine sufficiently similar to enable the court to conduct an ELD analysis of a plaintiff’s tort claims. Tort damages for economic losses may be recoverable under laws unique to Louisiana. *In re Chinese Manufactured Drywall Products Liability Litigation*, 680 F. Supp.2d 780 (E. D. La. 2010).

**MAINE: Majority Rule.** Maine strictly adheres to the ELD. *Oceanside at Pine Point Condominiums v. Peachtree Doors, Inc.*, 659 A.2d 267 (Me. 1995). With regard to component parts, Maine follows the “Integrated Products Rule”, which is premised on the view that one must look to the product purchased or bargained for by the plaintiff rather than to the particular product sold by the defendant. *Fireman’s Fund v. Childs*, 52 F.Supp.2d 139 (D. Me. 1999). The relevant product is the product as it is viewed from the purchaser’s prospective. Maine includes service contracts (not including fiduciary relationships) within the purview of the ELD. *Maine Rubber Int’l v. Environmental Mgmt. Group*, 298 F.Supp.2d 133 (D. Me. 2004). Maine applies the “Integrated Product Rule” to the “other property” exception to the ELD. *Childs, supra*.

**MARYLAND: Intermediate Rule.** There is no recovery under a negligence theory for purely economic losses resulting from a defective product, unless the defect causes a dangerous condition creating risk of death or personal injury; “economic losses” include loss of value or use of product itself, cost to repair or replace the product, or lost profits resulting from loss of use of the product. *A.J. Decoster v. Westinghouse Electric Corp.*, 634 A.2d 1330 (Md.

1994). An exception exists for “other property.” *National Coach Works v. Detroit Diesel Corp.*, 128 F.Supp.2d 821 (D. Md. 2001). Another possible exception to the rule exists when the plaintiff passes the “legal threshold of pleading the existence of a clear and extreme danger of death or serious personal injury.” *Pulte Home Corp. v. Parex, Inc.*, 723, 923 A.2d 971 (Md. App. 2007); *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Corp.*, 517 A.2d 336, 345-48 (Md. 1986) (clear danger of death or personal injury). When there is a “dangerous condition and risk of death or personal injury” this is an exception to the ELD. *Morris v. Osmose Wood Preserving*, 667 A.2d 624 (Md. 1995). Maryland has a two-part test to determine the degree of risk required to circumvent the ELD, both the nature of the damage threatened and the probability of the damage occurring are examined to determine whether the two, viewed together, show a clear, serious, and unreasonable risk of death or personal injury. *Morris v. Osmose Wood Preserving*, 667 A.2d 624 (Md. 1995). Where the possible injury is severe (e.g., multiple deaths), the probability of the injury is not required to be as high as if the possible injury was only a minor injury. *Id.*; *A.J. Decoster Co. v. Westinghouse Electric Corp.*, 634 A.2d 1330 (Md. 1994).

The ELD applies in construction disputes. In *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 2016 WL 360875 (Md. App. 2016), the court acknowledged that while some jurisdictions permit a contractor’s cause of action against a design professional/engineer for negligence arising from defective plans and specifications, even in the absence of contractual privity, Maryland is not one of them. The ELD does not allow a cause of action for purely economic losses (such as delays, or problems caused by defective plans) in the absence of direct contractual privity or its equivalent between the construction contractor and the design professional.

**MASSACHUSETTS: Intermediate Rule** (no strict liability in MA). There is no independent claim of strict liability in tort under Massachusetts law, and the most common causes of action in product liability cases are negligence, breach of the implied warranty of merchantability (virtually the same as strict liability), and unfair deceptive acts or practices in violation of Massachusetts’ laws. Under Massachusetts law, the ELD provides that purely economic losses are not recoverable in negligence and strict liability actions in the absence of personal injury or damage to property other than the product itself. *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 533 N.E.2d 1350 (Mass. 1989). Under Massachusetts law, “economic loss” is defined as damages for inadequate value, costs of repair and replacement of a defective product, or the resulting loss of profits, without any claim of personal injury or damage to other property. *Cruickshank v. Clean Seas Co.*, 346 B.R. 571 (D. Mass. 2006). Where a commercial product injures itself and nothing or no one else, there is no need to create a product liability cause of action independent of contract obligation. The ELD draws a distinction between the situation where the injury suffered is merely the failure of the product to function properly,’ and the situation, traditionally within the purview of tort law, where the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property. *Sebago, Inc. v. Beazer East, Inc.*, 18 F.Supp.2d 70 (D. Mass. 1998). In order for “other property” damage to negate application of the ELD, the “other property” must belong to the plaintiff – it can’t be property belonging to others. *Id.*

**MICHIGAN: Intermediate Rule.** Michigan employs the ELD, but only when the transaction involves two commercial parties. *Niebarger v. Universal Cooperatives*, 486 N.W.2d 612 (Mich. 1992). By stating that the ELD applies to the sale of goods for *commercial purposes* as opposed to the sale of goods to consumers, the court in *Niebarger* appeared to limit the ELD to cases involving only commercial parties. The Doctrine does not operate to bar tort claims in lawsuits concerning “the sale of defective products to individual consumers who are injured in a manner which has been traditionally been remedied by resort to the law of torts”. *Frankenmuth Mut. Ins. Co. v. Ace Hardware*, 899 F.Supp.2d 348 (W.D. Mich. 1995). Michigan recognizes, even between commercial parties, a fraud-in-the-inducement exception to the ELD, which addresses situations where one party was tricked into contracting. *Huron Tool & Eng’g Co. v. Precision Consulting Services, Inc.*, 532 N.W.2d 541 (Mich. App. 2001). In addition, Michigan will not extend the ELD to cover the tort of the implied covenant of good faith and fair dealing in performance of a contract. *Masters Grp. Int’l, Inc. v. Comerica Bank*, 2015 WL 4076816 (Mont. 2015).

In *State Farm Fire & Casualty Co v. Ford Motor Co.*, 2010 WL 866149 (Mich. App. 2010), the plaintiff purchased a used 1994 Ford F-150 pick-up truck which started on fire some years later in his garage as the result of a defective cruise control. Ford filed a motion for summary judgment based on the ELD as set forth in *Niebarger*. The Court

held that the ELD did not bar the claim because the loss by fire was not anticipated or contemplated by the plaintiffs when they, or even a previous owner, first purchased the vehicle.

When it does apply, the Michigan ELD is broadly applied because it applies to bar recovery of damage to even other property when this damage was within the contemplation of the parties to the agreement. *Quest Diagnostics, Inc v. MCI Worldcom, Inc.*, 656 N.W.2d 858 (Mich. 2002). The ELD does not apply to service contracts. *Id.* However, the ELD will not bar a claim for damage to “other property” resulting from a defective product. *State Farm Fire and Casualty v. General Electric Company*, 2020 WL 39992 (Mich. App. 2020).

Ten years after *Neibarger*, Michigan extended the ELD to cover individual consumer transactions. *Sherman v. Sea Ray Boats, Inc.*, 649 N.W.2d 783 (Mich. App. 2009). It expanded the ELD to the sale of consumer goods, even when the plaintiff consumer enters into a transaction with an entity of greater knowledge or bargaining power. But the ELD involves in consumer cases only when the plaintiff has disappointed economic expectations, NOT where the product bursts into flames. Michigan product liability law defines “economic loss” as including “loss of use of property” and “costs of repair or replacement of property.” M.C.L. § 600.2945(c). In order for the ELD to apply, there must be an underlying transaction which provides the plaintiff an opportunity to negotiate to protect himself. *Quest Diagnostics*, supra.

**MINNESOTA: Majority Rule** (via statute). Minnesota has adhered to the ELD for many years, although the doctrine has been through a metamorphosis. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159; *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). In 1991 Minnesota codified the ELD in their statutes. Minn. Stat. § 604.10. The statute, entitled *Economic Loss Arising From The Sale Of Goods*, prohibits recovery in tort for damage to the product only, but provides exceptions where there is damage to “other property” or fraud or fraudulent or intentional misrepresentation. The ELD codification was amended in 2000 and applies to sales or leases that occur on or after August 1, 2000. Minn. Stat. § 604.101. Under the new statute, the ELD applies to products both sold and leased and both consumer and commercial transactions. Misrepresentation claims are now limited to cases involving intentional or reckless misrepresentation. The statute reads as follows:

*Minn. Stat. § 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; and (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.*

**MISSISSIPPI: Majority Rule.** As of 1999, Mississippi adheres to the ELD. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So.2d 384 (Miss. App. 1999). Mississippi has a statute which governs product liability suits. Miss. Code Ann. § 11-1-63. The statute exempts “commercial damage to the product itself” from recoverable damages. Any such damages must be recovered under warranty or breach of contract.

**MISSOURI: Majority Rule.** In a Missouri product liability case, the product must be “defective and unreasonably dangerous”, and the damages recoverable are limited to personal injury or to property other than the property sold, unless the product was rendered useless by some “violent occurrence”. *Clevenger and Wright, Co. v. A.O. Smith Harvestore Products, Inc.*, 625 S.W.2d 906 (Mo. App. 1981) (action by owner of grain silo for damages caused by tornado). If a warranty remedy is not available, the buyer is limited to recovery under a contract theory, which may be subject to defenses based on disclaimer of warranties. *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978) (homeowner sued contractor for failure to build home in workmanlike manner). A subsequent Court of Appeals decision, however, held that a secondary purchaser of goods may recover damages for injury to the goods sold on a negligence theory, even absent a violent occurrence. *Groppe Co. v. United States Gypsum*, 616 S.W.2d 49 (Mo. App. 1981). The *Groppe* opinion derived the duty of care for this type of negligence cause of action directly from

the implied warranty of merchantability provision in Missouri's version of §§2-314 through 318 of the U.C.C. The 8<sup>th</sup> Circuit later resolved the conflict by holding that *Clevenger* correctly stated the law in Missouri denying recovery for damage to the product only under a negligence theory. *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8<sup>th</sup> Cir. 1983). A fraud claim to recover economic losses is precluded by the ELD where plaintiffs' claims for damages are not above and beyond any mere disappointed commercial expectations or desire to enjoy the benefit of the dealer agreements. *Self v. Equilon Enterprises, Inc.*, 2005 WL 3763533 (E.D. Mo. 2005). The ELD applies to sales of goods, not services.

**MONTANA: Intermediate Rule.** When the use of a product for the purpose for which it was intended has the foreseeable potential of damaging the user's property, the doctrine of strict liability applies, even if the damages are to the product only. *Streich v. Hilton-Davis*, 692 P.2d 440 (Mont. 1992). Economic damages only are recoverable under both negligence and misrepresentation causes of action. *Jim's Excavating Service, Inc. v. HKM Associates*, 878 P.2d 248 (Mont. 1994); *Ellinger v. Northwestern Agency, Inc.*, 938 P.2d 1347 (Mont. 1997).

**NEBRASKA: Majority Rule.** The ELD is "a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." *Lesiak v. Central Valley Ag Co-op., Inc.*, 808 N.W.2d 67 (Neb. 2012); *BNSF Railway Co. v. Seats, Inc.*, 2019 WL 266421 (D. Neb. 2019). No recovery in tort/product liability is allowed for economic damages to the product alone unless there is an accompanying personal injury or property damage to other property. *National Crane Corp. v. Ohio Steel Tube*, 332 N.W.2d 39 (Neb. 1983). There is an exception for intentional interference with a business relationship. *Koster v. P & P Enter., Inc.*, 539 N.W.2d 274 (Neb. 1995). The ELD precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. "Economic losses" are defined as "commercial losses, unaccompanied by personal injury or other property damage." *Lesiak, supra*. Where a defective product causes harm only to itself, unaccompanied by either personal injury or damage to other property, contract law (*i.e.*, warranty) provides the exclusive remedy to the plaintiff. *Dobrowolny v. Ford Motor Co.*, 793 N.W.2d 445 (Neb. 2011).

**NEVADA: Majority Rule** Majority Rule (exception for owners of new homes). The Supreme Court of Nevada has explained that the ELD marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby generally encourages citizens to avoid causing physical harm to others. *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 206 P.3d 81 (Nev.2009). To accomplish this purpose, the ELD bars unintentional tort actions when the plaintiff seeks to recover purely economic losses. *Id.* A plaintiff may not recover economic loss under theories of strict products liability or negligence. *Calloway v. City of Reno*, 993 P.2d 1259 (Nev.2000), *overruled on other grounds by, Olson v. Richard*, 89 P.3d 31 (Nev.2004). When an integrated component of a product, such as a building's heating or plumbing system, fails and causes damage to the larger product but not to other property, only economic loss has occurred. *Tharaldson Fin. Grp., Inc. v. AAF McQuay Inc.*, 2014 WL 4829649 (D. Nev. 2014). When an integral component of a product - including a building - fails and damages the larger product, only economic loss occurs and, thus, tort recovery is barred. *Fireman's Fund Ins. Co. v. Sloan Valve Co.*, 2011 WL 5598324 (D. Nev. 2011).

Whether an HVAC unit which had been installed in the property for over a year is considered an integral part of the property is a question of fact. In *Calloway*, the Supreme Court of Nevada specifically held that "a building's heating and plumbing system is a necessary and integrated part of the greater whole. Consequently, when a heating and plumbing system damages the building as a whole, the building has injured itself and only economic losses have occurred." *Calloway*, 993 P.2d at 1268. A toilet flush valve is an integrated and integral part of a building. *Sloan Valve Co.*, *supra*. Therefore, while it may be a question of fact whether some products installed in buildings retain their separate identity as products, in Nevada, an installed HVAC unit is an integrated and integral part of the building, and damage to the property caused by the HVAC is purely economic loss. Damage to other property beyond the building in which the HVAC unit is an integrated part is not a purely economic loss. *Calloway, supra*.

**NEW HAMPSHIRE: Intermediate Rule** (implied warranty claims only). When a defective product accidentally causes harm to persons or property, the resulting harm is treated as personal injury or property damage; when damages



occurs only to an inferior product itself, through deterioration or non-accidental causes, harm is characterized as “economic loss.” *Ellis v. Robert C. Morris, Inc.*, 513 A.2d 951 (N.H. 1986). Despite absence of privity of contract, subsequent purchasers of real property are entitled to sue a builder or contractor on the theory of implied warranty of workmanlike quality for latent defects that cause economic loss, so long as latent defects become manifest after the purchase of the property and would not have been discoverable had reasonable inspection of structure been made prior to purchase. *Lemke v. Dagenais*, 547 A.2d 290 (N.H. 1988). Recovery of economic losses in implied warranty claims, even without privity, for defective products is allowed.

**NEW JERSEY: Majority Rule.** A consumer may not bring an action in negligence and strict liability for economic loss arising from the purchase of a defective product, but must rely on breach of warranty remedies in U.C.C. *Alloway v. General Marine Indus., L.P.*, 695 A.2d 264 (N.J. 1997). New Jersey has not decided whether the ELD applies when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages. In 1987, New Jersey adopted the ELD via statute with the Product Liability Act, in which it defines “harm” as physical damage to property, other than the product itself. N.J.S.A. § 2A-58C-1. Where a subrogation suit is brought against the insurer of a yacht that sunk, the subrogated carrier is limited to warranty claims with regard to recovery of damages to the yacht itself. *Alloway*, *supra*. Exceptions include when there is damage to “other property” (*Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp2d 494 (D. N.J. 1999)) and fraud and misrepresentation (*Coastal Group, Inc. v. Dryvit Sys., Inc.*, 643 A.2d 649 (N.J. 1994)). There is no “sudden and calamitous” event exception. *Naporano*, *supra*.

Within the ELD, the “product” includes all component parts. *Sea-Land Serv., Inc. v. General Elec. Co.*, 134 F.3d 149 (3<sup>rd</sup> Cir. 1998) (defective master connecting rods caused ship engine failure). Since all but the very simplest of machines have component parts, a contrary holding would require a finding of property damage in virtually every case where a product damages itself. A battery is considered a component part of a sailboat if it is originally outfitted with the boat when purchased. *Cont’l Cas. Co. v. Exide Techs.*, 2010 WL 11570369 (D. N.J. 2010) (Note: plaintiff claimed the battery created a health risk to its insured, but the court noted that such potential for harm to the insured was not pled in the Amended Complaint, which sought recovery for “substantial damage and destruction to the Sailboat.”).

**NEW MEXICO: Majority Rule.** As between commercial parties where there is no great disparity of bargaining power, the ELD prevents a plaintiff from recovering purely economic damages in tort actions. *Utah Int’l, Inc. v. Caterpillar Tractor Co.*, 775 P.2d 741 (N.M. App. 1989). New Mexico feels such losses are better allocated to warranties and/or insurance. New Mexico has not yet decided whether the ELD applies to non-commercial consumers. The Supreme Court of New Mexico has declined to overrule *Utah Int’l, Inc. v. Caterpillar Tractor, Co.*, stating that, if it did, “contract law would be subsumed by strict liability and negligence.” *In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. at 550, 893 P.2d at 446. The Supreme Court stated it would retain the rule to preserve the bedrock principle that contract damages be limited to those within the contemplation and control of the parties in framing their agreement. The law of contract allows parties to bargain and allocate the risk that the product will self-destruct. As a matter of policy, the parties should not be allowed to use tort law to alter or avoid the bargain struck in the contract. The law of contract provides an adequate remedy. If we overrule *Utah Int’l, Inc.*, contract law would be subsumed by strict liability and negligence. In order to preserve the line between contract law and tort law, the Supreme Court has declined to overrule *Utah Int’l Bhandari v. VHA Sw. Cmty. Health Corp.*, 2011 WL 1336515 (D. N.M. 2011).

The contours of the ELD are uncertain at this point. The ELD “extends beyond the limited context of products liability law and applies to service contracts,” reasoning that the “legal and policy considerations that motivated New Mexico courts to adopt the Economic Loss Rule in the products liability context apply equally to service contracts.” *Farmers Alliance Mut. Ins. Co. v. Naylor*, 452 F.Supp.2d 1167 (D. N.M. 2006). A case note interpreting the existing law in New Mexico, has stated that it appears that New Mexico’s ELD “precludes recovery of economic loss”: (i) “when there is no great disparity in bargaining power between commercial parties to a contract for the sale of goods and the damages arise from injury of a product to itself”; and (ii) “when the parties to a service contract are sophisticated commercial entities and the tort claim is not based on an independent duty of care.” Daniel M. Alsup, Note, *New*

*Mexico's Economic Loss Rule, Unconscionability Doctrine, and the Gap Between Them: Concepts, Realities, and How to Mend the Gap*, 38 N.M. L.Rev. 483 (2008).

**NEW YORK: Majority Rule.** Where a product fails to perform as promised due to negligence in either the manufacturing or installation process, a plaintiff is precluded from recovering tort damages for its economic loss. *Suffolk Laundry Servs., Inc. v. Redux Corp.*, 238 A.D.2d 577, 578 (N.Y. App. 1997). Tort recovery in strict products liability and negligence against a manufacturer should not be available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract. *Bocre Leasing Corp. v. General Motors Corp.*, 645 N.E.2d 1195 (N.Y. 1995). An end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer for damages to the product alone. *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 436 N.E.2d 1322 (N.Y. 1982). An exception for service contracts exists. *MCI Telecommunications Corp. v. John Mezzalingua Associates, Inc.*, 921 F.Supp. 936 (N.D. N.Y. 1996). In sum, the "Economic Loss Rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort." *Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 206 A.D.2d 177, 181 (N.Y. App. 1994). Failure of a component part is still considered to be part of the product, and a plaintiff cannot argue that the component part which caused damage to the greater product (such as defective switch in a vehicle causing the vehicle to burn) caused damage to "other property". *Trump Int'l Hotel & Tower v. Carrier Corp.*, 524 F.Supp.2d 302 (S.D. N.Y. 2007). All the parts are considered an "integrated unit". *Trump Int'l. Hotel & Tower, supra*. An exception to the ELD exists when a defective product causes damage not only to the product itself, but also to other property. *Arkwright Mut. Ins. Co. v. Bojoirve, Inc.*, 1996 WL 361535 (S.D. N.Y. 1996). When you have an abrupt, cataclysmic occurrence caused by defendant's negligence, the ELD will not apply. *State Farm Fire & Cas. Co. v. Southtowns Tele-Communications, Inc.*, 667 N.Y.S.2d 157 (N.Y. 1997). New York has flirted with another possible exception to the ELD. When the product is "unduly dangerous" such that the defect causes physical damage, presumably due to an accident, to either persons or property, some case law provides that a tort action may be maintained. *Schiavone Constr. Co. v. Elgood Mayo Corp.*, 436 N.E.2d 1322 (N.Y. 1982). However, this "unduly dangerous" exception appears to have been rejected in subsequent decisions. *Bocre Leasing Corp. v. Gen. Motors Corp. (Allison Gas Turbine Div.)*, 645 N.E.2d 1195 (N.Y. 1995).

**NORTH CAROLINA: Majority Rule.** Damages to the product itself may not be recovered in tort based on a defect of the product. *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 722 (N.C. 1998). However, where "other property" is damaged, the damage to product can be recovered. *Lord v. Customized Consulting Specialty, Inc.*, 643 S.E.2d 28 (N.C. App. 2007). Damage to the underlayment of flooring is not recoverable due to the ELD because the underlayment is not considered to be "other property", but the vinyl flooring over the underlayment is considered "other property." *Terry's Floor Fashions, Inc. v. Georgia-Pac. Corp.*, 1998 WL 1107771 (E.D. N.C. 1998). However, the entire house is not considered "other property" with regard to damage done by synthetic stucco covering the house. *Land v. Tall House Building Co.*, 602 S.E.2d 1 (N.C. App. 2004).

**NORTH DAKOTA: Majority Rule.** North Dakota adopted the ELD in 1984. *Hagart Farms v. Hatton Indus., Inc.*, 350 N.W.2d 591 (N.D. 1984). You can't sue the manufacturer of a product for damage to the product alone where there is no accompanying personal injury or damage to "other property". The ELD applies equally to commercial and consumer transactions. *Clarys v. Ford Motor Co.*, 592 N.W.2d 573 (N.D. 1999).

**OHIO: Majority Rule.** In Ohio, the ELD generally prevents recovery in tort damages for purely economic loss. It bars the use of negligence or strict liability theories of recovery of economic losses arising out of commercial transactions where the loss is not a consequence of an event causing personal injury or damage to another's property. The ELD applies primarily in the absence of contractual privity when a plaintiff seeks to recover in tort for purely economic damages. In the absence of privity of contract between two parties, Ohio says there is no duty to exercise reasonable care to avoid economic loss or damage to others that do not arise from tangible physical harm to persons and tangible things. Therefore, unless there is some agreement between the parties, no duty exists with respect to purely economic harm, and no cause of action exists in tort to recover economic damages. As a result of the ELD, most building project owners are barred from recovering purely economic damages against a subcontractor based on a breach of contractually created duties.

A commercial plaintiff is not permitted to recover in tort for purely economic damages – including damages to the product alone. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention*, 678 N.E.2d 519 (Ohio 1997). Tort theories may be used if other, non-economic damages are sustained. *Lawyers Coop. Publishing Co. v. Muething*, 603 N.E.2d 969 (Ohio 1992). An Ohio statute makes it clear that although a cause of action may concern a product, it is not a product liability claim within the purview of Ohio’s product liability statutes unless it alleges damages other than economic ones, and that a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes. R.C. § 2307.72.

A commercial buyer seeking recovery from a seller for economic losses resulting from damage to a defective product itself could maintain a contract action for breach of warranty under U.C.C., but absent injury to persons or damage to other property, could not recover for economic losses premised on tort theories of strict liability or negligence. *Chemtrol Adhesives, Inc. v. American Manufacturers’ Mut. Ins. Co.*, 537 N.E.2d 634 (Ohio 1989). A non-commercial plaintiff may recover for purely economic damages under the common law theory of implied warranty in tort. *Iacono v. Anderson Concrete Corp.*, 326 N.E.2d 267 (Ohio 1975).

The ELD in Ohio has also been extended to include insurance agents, holding that negligence claims by insureds against their insurance agents for failing to procure coverage are specifically barred by the doctrine. *Mafcote, Inc. v. Genatt Associates*, 007 U.S. Dist. Lexis 10117 (S.D. Ohio 2007).

However, there are some exceptions to the ELD.

*Pre-Existing Independent Tort Duty.* A party can pursue a tort claim if it is based exclusively on a discrete pre-existing duty in tort and not on any terms of a contract or rights accompanying privity. In such circumstances, the ELD would not apply, and a party who suffered purely economic damages is allowed to proceed in tort where the defendant breaches a duty that does not arise solely from contract.

*Negligent Misrepresentation.* A party remains liable for negligent misrepresentation if, in the course of business, it negligently supplies false information, knowing that the recipient intends to rely on it in business. This is because it is based on a separate duty owed in tort and, therefore, the ELD would not apply.

*Privity.* Economic damages can be recovered in a tort action where privity or a sufficient nexus to substitute for privity is established. Privity establishes a relationship necessary to allow for the bringing of a tort action for purely economic damages. In addition, a lack of privity is not an absolute bar to a claim against a professional when there is a sufficient nexus that can serve as a substitute for privity. As an example, this applies when a plaintiff is a member of a limited class whose reliance is specifically foreseen, such as surveyors and civil engineers.

**OKLAHOMA: Majority Rule.** Oklahoma recognizes the ELD, which provides that a product liability claim is not available for injury but only to the product itself resulting in purely economic loss. *Waggoner v. Town and Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990). The Oklahoma Supreme Court has amended the ELD in two important ways. The ELD does not apply in any case where the plaintiff is alleging a personal injury from using an allegedly defective and unreasonably dangerous product. *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 193-94 (Okla. 1992) (plaintiff could collect damages for personal injury and damage to the product in a products liability action without bringing a separate breach of warranty claim to recover damages for economic loss). The ELD does not preclude recovery for damage to a defective product in cases where the plaintiff was personally injured or suffered damage to “other property”. *United Golf, L.L.C. v. Westlake Chemical Corp.*, 2006 WL 2807342 (N.D. Okla. 2006). Oklahoma has gone about as far as any state in destroying tort remedies for defective products and relying on warranty remedies. The illogical holding in *United Golf* closes the door opened by *Dutsch*, holding that “consequential damages” to be governed by the ELD 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. Okla. Stat. tit. 12A, § 2-715.

The Oklahoma Supreme Court has focused on the foreseeability of damages to determine if the alleged harm qualifies as consequential damages under the U.C.C. *United Golf*, *supra*.

**OREGON: Intermediate Rule.** *Russell v. Ford Motor Co.*, 575 P.2d 1383 (Or. 1978) (The loss must be a consequence of the kind of danger and occur under the kind of circumstances, “accidental” or not, that made the condition of the product a basis for strict liability. This distinguishes such a loss from economic losses due only to the poor performance or the reduced resale value of a defective, even a dangerously defective, product. It is a difference between the endangered consumer and the disappointed consumer). A plaintiff may recovery in tort for property damage because it is not “economic loss.” *Harris v. Suniga*, 149 P.3d 224 (Or. App. 2006). The recovery of economic loss such as lost profits or lost sales is not recoverable in Oregon in product liability actions where strict liability is alleged. In *Brown v. Western Farmers Assoc.*, 268 Or 470, 480 (1974), the Oregon Supreme Court held that strict product liability was not designed or intended to offer a remedy for such commercial aspirations as sales and profits. Oregon is a physical injury state and Oregon appellate courts have uniformly held that strict liability is not a remedy for purely economic loss in the absence of a physical injury to persons or property. *Russell v. Deere & Co.*, 61 P.3d 955 (Or. App. 2003).

**PENNSYLVANIA: Majority Rule.** Under Pennsylvania law, the ELD “prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract.” *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 671 (3<sup>rd</sup> Cir. 2002) (quoting *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3<sup>rd</sup> Cir. 1995)). It is “designed to...establish clear boundaries between tort and contract law.” *Id.* at 680. Accordingly, where a “plaintiff’s only alleged damage is a diminution in the value of a product plaintiff has purchased, Pennsylvania law says that plaintiff’s redress comes from the law of contract, not the law of tort.” *Martin v. Ford Motor Co.*, 765 F. Supp.2d 673, 684 (E.D. Pa. 2011) (quoting *Stein v. Fenestra Am., L.L.C.*, 2010 WL 816346 (E.D. Pa. 2010)); *Murphy v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4917597 (E.D. Pa. 2016). Recovery is permitted only when there is injury or damage to other property. *R.E.M. Coal Co., Inc. v. Clark Equip. Co.*, 563 A.2d 128 (Pa. Super. 1989). Where a plaintiff sues a component manufacturer, rather than the manufacturer of a final assembled product, a court must *not* look to the component part to define the product; rather, the relevant “product” remains “what the plaintiff bargained for,” *i.e.*, the fully assembled product that the plaintiff ultimately purchased. *Commercial Union Ins. Co. v. Kirby*, 149 F.3d 1163 (3<sup>rd</sup> Cir. 1998). The ELD also applies to service contracts. *Valley Forge Convention and Visitors’ Bureau v. Visitors’ Services, Inc.*, 28 F.Supp.2d 947 (E.D. Pa. 1998). However, there is a negligent misrepresentation exception to the ELD. A reasonable reading of this exception is that now any deviation from the standard of care in the design documents prepared by an architect is sufficient to meet the requirements of the negligent misrepresentation criteria adopted by this Pennsylvania court. *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005). There is also an exception for claims based on fraud in the inducement where the fraud is “extraneous to the contract, not interwoven with the breach of contract.” *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F. Supp.2d 643 (E.D. Pa. 2002).

**RHODE ISLAND: Intermediate Rule** (not well defined). Rhode Island holds that if a defendant owes a duty of care to a third party that arises out of an existing contract, and the party to whom the duty is owed is injured, the injured party may bring a negligence action against the defendant even though the damages are purely economic. *Rousseau v. K.N. Constr., Inc.*, 727 N.E.2d 190 (R.I. 1999). The ELD bars plaintiffs from “recovering purely economic losses in a negligence cause of action.” *Boston Investment Property #1 State v. E.W. Burman, Inc.*, 658 A.2d 515 (R.I. 1995). Economic loss is defined as “costs associated with repair and-or replacement of a defective product, or loss of profits consequent thereto.” *Hart Eng’g Co. v. FMC Corp.*, 593 F.Supp. 1471 (D. R.I. 1984). An exception exists for consumer transactions. *Franklin Grove Corp. v. Drexel*, 936 A.2d 1272 (R.I. 2007).

**SOUTH CAROLINA: Majority Rule** (waffling). There is no tort liability for a product defect if the damage suffered by a plaintiff is only to the product itself. *Kennedy v. Columbia Leather and Mfg. Co., Inc.*, 384 S.E.2d 730 (S.C. 1989). A plaintiff cannot seek economic damages, including damages to the product only, in tort. *Palmetto Linen Serv., Inc. v. U.N.X., Inc.*, 105 F.3d 126 (4<sup>th</sup> Cir. 2000). South Carolina meekly recognizes the “other property” exception to the ELD when non-commercial parties are involved, but 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. In a case where it applied the asbestos exception to the Majority Rule, the South Carolina Supreme Court noted their “difficulty with the Economic Loss Rule generally” and has partially rejected the rule in the residential home building context. *Kershaw County Board of Educ. v. U.S.*



*Gypsum, Co.*, 396 S.E.2d 369 (S.C. 1990) (citing *Kennedy*). South Carolina courts have held that if there is a legal duty owed to the plaintiff independent of any contract between the parties, a tort action may be pursued. *Koontz v. Thomas*, 511 S.E.2d 407 (S.C. App. 1999). There is an exception where there is a serious threat of bodily harm. However, in 2009, the South Carolina Supreme Court affirmed that the buyer of a product could not recover in tort for purely economic damages. *Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009). In particular, a federal court confirmed a plaintiff cannot avoid the ELD by simply classifying a component part (*i.e.*, a hydraulic hose and its fitting) as the “defective product” and the main product as the “other property” that it damaged. *Fireman's Fund Ins. Co. v. Am. Equip. Co., Inc.*, 2009 WL 10711040 (D.S.C. 2009).

**SOUTH DAKOTA: Majority Rule.** When there is no accident and no physical harm so that the only loss is pecuniary – such as damage to the product itself – there can be no recovery in tort. *Diamond Surface, Inc. v. State Cement Plant Commission*, 583 N.W.2d 155 (S.D. 1998). The general rule is that economic losses are not recoverable under tort theories; rather, they are limited to the commercial theories found in the U.C.C. One exception to the general rule is when personal injury is involved. *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330 (S.D. 1994). The second exception may apply when the damage is to “other property” as opposed to the specific goods that were part of the transaction. Other property has been defined as damage to property collateral to the product itself.

**TENNESSEE: Majority Rule** In a contract for the sale of goods where the only damages alleged are damages to the product itself, the rights and obligations of the buyer and seller are governed exclusively by the contract. *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159 (Tenn. Ct. App. 2001). Tennessee accepts the ELD as a “crude proxy” for the dividing line between what is tort and what is not. The Tennessee Supreme Court decided a case involving a farmer who had used a product on tomato plants in attempt to protect plants from frost damage, resulting in economic loss in the form of lost profits due to damage to the tomatoes. Because the plaintiffs sued for “lost profits” instead of damage to the tomatoes, the Court held they could not proceed on tort theories – only warranty and contract. *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128 (Tenn. 1995). In *Ritter*, the door appears to have been left open to pursue a tort action for damages to the product only when “*the plaintiff has been exposed to an unreasonable risk of injury to his person or his property*” as opposed to mere failure of the product to perform as expected. However, the Tennessee Supreme Court more recently announced that Tennessee does not adopt exceptions for unreasonably dangerous products or sudden, calamitous events. *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487 (Tenn. 2009).

The Tennessee Products Liability Act governs product liability in Tennessee. It says that a “product liability action” includes all actions brought for or on account of personal injury, death or *property damage* caused by or resulting from the manufacture, design, and marketing of any product. “Product liability action” includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; and breach of or failure to discharge a duty to warn or instruct. Tenn. Code Ann. § 29-28-102(6).

The ELD prevents recovery under tort law of (1) direct economic losses, *i.e.*, injuries to the defective product itself, and of (2) consequential economic losses, *i.e.*, losses stemming from the inability to use of the defective product as expected. Charter Oak seeks to distinguish these two types of non-recoverable economic loss from lost profits, which stem from tangential circumstances, *i.e.*, from harm to “the plaintiff’s property other than the defective product itself.” When a defective product causes no personal injury and no property injury other than to the product itself, only purely economic loss has been sustained. However, Tennessee recognizes the “other property” exception to the ELD, noting that although tort victims cannot recover for physical damage caused to the defective product itself, they can recover for physical damage the product caused to “other property.” *Charter Oak Fire Ins. Co. v. Broan Nutone, LLC*, 2006 WL 8435269 (W.D. Tenn. 2006). However, it uses the “integrated package” approach in labeling the entire “product itself” defective if an integrated component part is defective. *Tennessee Farmers Mut. Ins. Co. v. Ford Motor Co.*, 2002 WL 1332492 2002 WL 1332492 (Tenn. App. 2002). However, in *Corporate Air Fleet of Tennessee, Inc. v. Gates Learjet, Inc.*, 589 F. Supp. 1076 (M.D. Tenn. 1984), the court allowed the plaintiff jet owner to sue in strict liability for faulty repairs to the jet after it had crashed, noting that although the only damage was to the defective product itself, recovery based on a theory of negligence.

In *Charter Oak Fire Ins. Co.*, subrogee Charter Oak sued for damages to a building and lost profits, maintaining that losses resulting from the tortious failure of a product which are unrelated to the functional purpose of the product, such as lost profits due to business interruption caused by the inability to use one's premises, can be recoverable under tort law. It noted that a bathroom fan is not an integrated component of the entire building. The court allowed recovery, noting that the fan was not a mechanical part of the building that was critical to its function. Instead, it was an addition, separate from the building, which independently constituted "other property."

**TEXAS: Majority Rule.** The ELD prohibits a plaintiff in a *non-product liability* case from recovering in negligence or strict liability for purely economic losses. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927 (Tex. App. 1997); *Equistar Chems. L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986). In Texas, the ELD has historically only been applied in cases involving strict product liability or failure to perform a contract. The ELD has never been a general rule of tort law; it is a rule sounding in *negligence* and *strict product liability*. Pure economic loss is still commonly recoverable in certain torts, including: (1) negligent misrepresentation, *Grant Thornton L.L.P. v. Prospect High Income Fund*, 314 S.W.3d 913, 920 (Tex. 2010); (2) legal malpractice, *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009); (3) accounting malpractice, *Atkins v. Crosland*, 417 S.W.2d 150, 152–53 (Tex. 1967); (4) breach of fiduciary duty, *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873–74 (Tex. 2010); (5) fraud, *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983); (6) nuisance, *Comminge v. Stevenson*, 76 Tex. 642, 13 S.W. 556, 558 (Tex. 1890); (7) fraudulent inducement, *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998); and (8) fraudulent interference with contract, *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990).

**Product Failure.** The ELD applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself. The ELD in Texas was originally established to set perimeters only in such product liability cases. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011). In such cases, recovery is generally limited to remedies grounded in contract (such as warranty claims or contract-based statutory remedies), rather than tort. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (Tex. 1978) (Where only the product itself is damaged, such damage constitutes economic loss recoverable only as damages for breach of an implied warranty under the Business and Commerce Code). Usually, written or implied warranty claims are the only recourse in such situations, although an implied warranty claim could sound in either contract or tort depending on the damages alleged. *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008). Injury to the defective product itself is an "economic loss" governed by the Uniform Commercial Code. *Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Serv. Inc.*, 572 S.W.2d 308 (Tex. 1978) (distinguished cases involving personal injury or damage to property other than the product itself, noting that those damages could be recovered under strict liability theories). Where a defective product causes damages to the product itself and to surrounding property, the damages to the product itself can be recovered in tort along with the damage to the surrounding property. *Signal Oil and Gas Co. v. Universal Oil Products*, 572 S.W.2d 320 (Tex. 1978). The ELD bars recovery for economic loss alone in cases involving defective product claims. *In re Smith*, 524 B.R. 125 (Bankr. S.D. Tex. 2015). Furthermore, Texas applies the "benefit of the bargain" test, which means that a commercial buyer cannot recover economic losses from a component-part manufacturer for damage caused to a product by the integrated component part. *Golden Spread Coop., Inc. v. Emerson Process Mgmt. Power & Water Sols., Inc.*, 2019 WL 403577 (N.D. Tex. 2019).

**Failure to Perform Contract.** Recently, Texas has expanded the ELD to prohibit tort claims when economic damages result from the failure to perform a contract properly, even where there is no contractual privity between the parties. *Schambacher v. R.E.I. Elec., Inc.*, 2010 WL 3075703 (Tex. App. 2010). Unfortunately, this can leave some plaintiffs without a remedy when a subcontractor's negligence causes economic damages. Where there is a negligent failure to perform a contract and the plaintiff seeks damages for breach of a duty created under contract, as opposed to a duty imposed by law, tort damages are unavailable as a result of the ELD. *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991). The ELD does not prohibit recovery for damage to property falling outside the scope of a subcontract, but within the scope of the overall contract. *Munters Euroform GMBH v. American Nat'l Power, Inc.*, 2009 WL 2837643 (Tex. Civ. App. – Austin, 2009). It does not limit recovery from a subcontractor to the subject of a subcontract when the subcontractor's actions or product damages property

beyond the scope of the subcontract. *Id.* The ELD bars recovery for economic loss alone only in claims that arise from party's failure to perform contractual duty. *In re Smith*, 524 B.R. 125 (Bankr. S.D. Tex. 2015).

**Exceptions:** An exception to the ELD exists when there is a fraudulent inducement, even if the plaintiff suffers only economic damages to the subject of the contract. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998). The ELD also applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself. *Equistar Chemicals, L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007). Texas has clarified that although many courts have stated in overly broad terms that the ELD means that "*purely economic losses cannot be recovered in tort*", such broad statements are not accurate. *Sharyland Water, supra*.

While the ELD generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy, it does not bar all tort claims arising out of a contractual setting. In *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014), a builder contracted with a plumber to install the plumbing system in a house during original construction. The homeowner and builder later sued the plumber and asserted breach of contract claims arising from extensive damages caused by plumbing leaks. The trial court granted summary judgment (1) in favor of the plumber on the builder's breach of contract claims because the builder was not the owner of the property and did not suffer compensable damages, and (2) in favor of plumber on the homeowner's breach of contract claim because the homeowner was not a party to the plumbing subcontract, and (3) in favor of the plumber on the homeowner's negligence claim because the homeowner's pleadings alleged only breach of contract. The Court of Appeals affirmed, stating that the homeowner's tort claims were barred by the ELD because the homeowner's property damage was "a mere economic loss arising from the subject matter of the plumbing subcontract." In reversing the Court of Appeals, the Supreme Court held that the ELD does not bar a homeowner's negligence claims against a subcontractor because the subcontractor owes an independent duty to the homeowner. Damages caused by the subcontractor's breach of that independent duty "extend beyond the economic loss of any anticipated benefit under the subcontract." *Id.* The Court based its opinion on a long-standing common law duty to perform a contract with due care. *Montgomery Ward & Co. v. Scharrenbock*, 204 S.W.2d 508 (Tex. 1947). This duty supports a claim in tort, in contract, or both. Therefore, a defendant cannot avoid tort liability to the world simply by entering into a contract with one party. If it could, the ELD consumes all claims between contractual and commercial strangers. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011). After *Chapman*, a plaintiff can recover in tort where the defendant breaches a duty which is independent of the contractual undertaking and the harm suffered is not merely the economic loss of a contractual benefit. The Supreme Court held that the plumber's duty not to flood or otherwise damage the house is independent of any obligation undertaken in its plumbing contract with the builder, and the damages flowing from a breach of that duty extend beyond the economic loss of any anticipated benefit under the contract itself. After *Chapman*, the ELD precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists *only* of the economic loss of a contractual expectancy. It no longer bars all tort claims arising out of the performance of a contract.

The ELD will not apply when the plaintiff seeks damages to property other than the construction work itself. If a subcontractor's work causes a fire, the building owner may pursue a tort claim against the subcontractor because, when undertaking the plumbing work, the plumber assumed a duty not to start a fire or otherwise damage the building. *Chapman, supra*. The ELD will apply, however, to bar a tort claim by the homeowner if the damages sustained as a result of the plumber's work were only to the plumber's work or were other purely economic losses.

**UTAH: Intermediate Rule.** (Waffling and has independent duty exception) Only recently has Utah adopted the ELD, prohibiting the recovery in tort of solely economic damages, including damages to or diminution in value of the product itself. *Hermansen v. Tasulis*, 48 P.3d 234 (Utah 2002). However, Utah has carved an exception which says that the ELD does not bar tort claims when those tort claims *are based on a duty independent of those found in the contract*. *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1 (Utah 2003). In Utah, tort law governs the duties and liabilities imposed by legislatures and courts upon non-consenting members of society, and contract law governs independent duties that exist apart from the contract. All contract duties and all breaches of those duties - no matter how intentional - must be enforced pursuant to contract law. Until the *Hermansen* decision in 2002, Utah had adhered to the rule that where the alleged defective manufacture of a product results in the deterioration of

or damage to that product, the consumer's damages are not "purely economic," or economic loss alone, and actions to recover all damages resulting from the product's deterioration should be allowed under a negligence theory. *W.R.H., Inc. v. Economy Builders' Supply*, 633 P.2d 42 (Utah 1981). Utah had never recognized the ELD as applicable except as against claims of negligent design and construction of improvements to real property. *Steiner Cor. v. Johnson & Higgins of Cal.*, 196 F.R.D. 653 (D. Utah 2000). The Utah Supreme Court has also strictly limited the reach of *W.R.H.* to its facts, and declined to extend its rule to govern transactions between sophisticated commercial entities. *Salt Lake City Corp. v. Kasler Corp.*, 842 F. Supp. 1380 (D. Utah 1994). More recently, Utah passed a statute which codifies the ELD. Section 78B-4-513 provides:

**§ 78B-4-513. Cause of action for defective construction.**

(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include: (a) the failure of construction to function as designed; or (b) diminution of the value of the constructed property because of the defective design or construction.

(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.

(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.

(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

Utah does have an "other property" exception to the ELD. *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182 (Utah 1996) abrogated by *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing*, 221 P.3d 234 (Utah 2009).

*Independent Duty Exception.* If an independent duty exists under the law outside of any contractual obligations, the ELD does not bar a tort claim because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule. *Davencourt*, *supra*. In *AAAG-California, LLC v. Kisana*, 2020 WL 763651 (D. Utah 2020), an auction house sent 43 cars to the defendant's dealerships and retained title to the vehicles. The defendant worked with an employee of the plaintiff to steal the cars' titles, enabling them to take ownership of the cars without payment. They sold the vehicles and took the money. Plaintiff sued for a constructive trust against the defendants, who argued the ELD applied. The court ruled that the ELD did not apply to bar the tort claims, however, where "the basis for the [those] claims is distinct and separable from the basis for the contract claims." In addition, the court held that "[t]he independent duty principle is a means of measuring the reach of the economic loss rule." *Reighard v. Yates*, 285 P.3d 1168 (Utah 2012). When an independent duty exists that does not overlap with those contemplated in a contract, the ELD does not bar a tort claim because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule. Here, defendants had violated a well-established independent duty—a duty not to take property that belongs to another.

**VERMONT: Majority Rule.** In 1998, Vermont adopted the ELD to prohibit owners of a motor home from recovering, in a strict product liability action, purely economic losses consisting of reduced value of the motor home resulting from its defective wiring system and related problems. *Paquette v. Deere and Co.*, 719 A.2d 410 (Vt. 1998). Absent some accompanying physical harm, there is no duty to exercise reasonable care to protect another's economic interests – including damages to the product alone.

There is no duty to exercise reasonable care to avoid intangible economic loss "unless one's conduct has inflicted some accompanying physical harm." *Gus' Catering, Inc. v. Menusoft Sys.*, 762 A.2d 804 (Vt. 2000); *O'Connell v. Killington, Ltd.*, 665 A.2d 39, 42 (1995). Plaintiffs may be barred from bringing tort claims that result in purely



economic loss without accompanying physical harm. *See Springfield Hydroelectric Co. v. Copp*, 779 A.2d 67 (Vt. 2001). Economic loss is defined as “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.” *Gus’ Catering, Inc.*, *supra*. In addition to limiting tort recovery in the absence of physical injury, the ELD plays a separate role in cases in which damage to property has occurred in the course of construction or repair. The general rule is that claims for damage to the property which is the subject of a contract between the parties are governed by contract principles. A tort claim is not permitted. The result may affect the applicable limitations period, the elements of proof, or the measure of damages. *City of Burlington v. Zurn Indus., Inc.*, 135 F. Supp. 2d 454 (D. Vt. 2001) (ELD bars negligence claim because alleged negligence in the installation of a boiler caused damage only to the boiler). In *Walsh v. Cluba*, 117 A.3d 798 (Vt. 2015), damage to commercial rental space was governed by the terms of the parties’ lease, not by general principles of negligence. In addition, economic loss resulting from defects in the construction of a building are generally not recoverable on a claim for “contractor’s negligence.” *Long Trail House Condo. Ass’n v. Engelberth Constr., Inc.*, 59 A.3d 752 (Vt. 2012); *Heath v. Palmer*, 915 A.2d 1290 (Vt. 2006) (holding “purely economic losses resulting from the reduced value or costs of repairs of the construction defects sounded in contract rather than tort”).

**VIRGINIA: Minority Rule.** In Virginia, the ELD must be used hand-in-hand with the “Source-of Duty” Rule to determine whether economic loss can be recovered in tort. A party cannot sue under Virginia law for economic losses without establishing privity of contract. *Kaltman v. All Am. Pest Control, Inc.*, 706 S.E.2d 864 (Va. 2011). Another case and its progeny ruled that a plaintiff cannot sue in tort for a duty assumed solely by contract. *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344 (Va. 1998). The ELD does apply to real property and home sales/construction. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55 (Va. 1988). It also applies to negligent performance of a contract. *Gerald M. Moore & Son, Inc. v. Drewry*, 467 S.E.2d 811 (Va. 1996). However, despite sweeping language in early ELD cases, the doctrine applies with significant limitations: (1) It appears that a plaintiff may sue in tort for economic damages where the plaintiff and defendant are in contractual privity; (2) It applies only to negligence and construction (negligent or innocent) fraud; and (3) It is limited to claims for purely economic loss.

In other words, in Virginia, a plaintiff may not recover purely economic damages in a tort action unless it has a contract with the defendant. *Blake Constr. Co., Inc. v. Alley*, 353 S.E.2d 724 (Va. 1987). When a plaintiff suffers only disappointing economic expectations assumed by agreement, contract, rather than tort law, applies. However, Virginia also has another rule, called the “Source of Duty Rule” which it applies to determine whether tort or contract law applies. *Richmond Metro. Auth.*, *supra*. To determine whether an action sounds in contract or tort, the court must determine the source of the duty owed. To recover in tort, the duty breached must be a common law duty, not one existing between the parties solely by virtue of the contract. The Source of Duty Rule is related to the ELD in that both rules reflect the Supreme Court’s often-stated interest in maintaining the wall between tort and contract principles. The ELD addresses non-privity situations, while the “Source of Duty Rule” addresses situations where the plaintiff and defendant are in contractual privity. “*Together, the two rules may be evolving into a more comprehensive rule simply requiring that claims arising out of agreements be resolved pursuant to contract rather than tort law. Such a rule might be called the ‘Contract Loss Rule’ and would apply whether the controlling agreement is between the plaintiff and defendant or between the plaintiff and another party.*” Nicholas, *The Economic-Loss and Source-Of-Duty Rules*, 59 Virginia Lawyer 42 (October 2010). Damage to a product itself constitutes “economic loss” because, although damages to a product itself have certain attributes of a product liability claim, the injury suffered (failure of the product to perform properly) is the essence of a warranty action through which a contracting party can seek to recoup the benefit of its bargain. *Burner v. Ford Motor Co.*, 2000 WL 33259938 (Va. Cir. Ct. 2000).

**WASHINGTON: Intermediate Rule.** In 1976, Washington adopted a minority view and permitted a plaintiff to recover damages in tort for purely economic damages (lost profits) after a defectively manufactured engine malfunctioned during a commercial fishing trip. *Berg v. General Motors Corp.*, 555 P.2d 818 (Wash. 1976). The *Berg* decision was short-lived, however, as the Legislature effectively overruled *Berg* in 1981 with the enactment of the Washington Products Liability Act (WPLA), R.C.W. § 7.72. Under the WPLA, the Legislature specifically excluded a recovery in tort for economic losses, deferring such claims instead to the U.C.C. Architectural services, engineering

services, and inspection services are not “products” under the WPLA. Washington analyzes interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to the claim in question. *Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199 (Wash. 1989). Washington recognizes an exception to the ELD, known as the Independent Duty Doctrine. Under this doctrine, an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 2010 WL 4350338 (Wash. 2010). Washington courts apply this doctrine rather than superficially classify the plaintiff’s injury as economic or noneconomic. Washington recognizes a “Sudden and Dangerous Event” exception to the ELD. *Washington Water Power Co.*, supra. Courts must consider the nature of the defect, type of risk, and manner the injury arose.

**WEST VIRGINIA: Intermediate Rule.** Property damage to a defective product alone, which results from a sudden calamitous event attributable to the dangerous defect or design of the product itself, is recoverable under a strict liability cause of action. *Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 192-93 (W. Va. 1991). Where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of quality. This standard must be defined by reference to that which the parties have agreed upon. *Blake Constr. Co. v. Alley*, 353 S.E.2d 724 (Va. 1987). However, where there is no claim of “deterioration or loss of bargain” or “failure to meet some standard of quality defined by reference to what the parties have agreed upon”, West Virginia courts make a distinction between economic loss and physical injury. *AIU Ins. Co. v. Omega Flex, Inc.*, 2011 WL 2295270 (W.D. Va. 2011). Where there is no accident and physical damage, and the only loss is a pecuniary one, through loss of the value or use of the product sold, or the cost of repairing it, the courts have adhered to the rule that purely economic interests are not entitled to protection against mere negligence and have denied the recovery. *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 (4<sup>th</sup> Cir. 1985). Where the plaintiff suffers property damage *and* economic loss, the ELD does not preclude recovery if the alleged breach of the duty does not implicate contractual provisions and if damages other than for economic losses are being sought, *e.g.*, damage to property not subject of the contract. *Factory Mut. Ins. Co. v. DLR Contracting, Inc.*, 2005 WL 2704502 (E.D. Va. 2005). An exception exists when there is a “sudden, calamitous event.” *Capital Fuels, Inc. v. Clark Equip. Co.*, 382 S.E.2d 311 (W. Va. 1989).

**WISCONSIN: Majority Rule.** The ELD applies in Wisconsin when it “restrict[s] contracting parties to contract rather than tort remedies for recovery of economic losses associated with the contract relationship.” *Acuity v. Society Ins. Co.*, 810 N.W.2d 812 (Wis. App. 2012). A commercial or consumer purchaser of a product may not sue the manufacturer in strict liability or tort for failure of the product unless the failure injures somebody or causes damage to other property. *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213 (Wis. 1989). The ELD precludes tort recovery when the defective product causes damage to a system in which the product had been integrated as a component part. *Midwhey Powder Co. v. Clayton Indus., Inc.*, 460 N.W.2d 426 (Wis. App. 1990). See introduction to this chart for detailed discussion of Wisconsin law and the ELD.

**WYOMING: Majority Rule.** Recovery under tort law is not allowed where the claim is solely for economic damages unaccompanied by personal injuries or damage to other property. Only theories allowed are breach of warranty or breach of contract. *Continental Ins. Co. v. Page Eng’g Co.*, 783 P.2d 641 (Wyo. 1983).

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