ECONOMIC LOSS DOCTRINE: AN ANALYSIS OF THE RULE'S APPLICABILITY TO DESIGN PROFESSIONALS

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ABSTRACT

The economic loss doctrine delineates the difference between tort and contract. This paper examines the economic loss doctrine and its applicability to design professionals—architects and engineers—in light of a recent Iowa appellate decision in the case of St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, that the doctrine no longer applies to other licensed professionals, to wit: financial advisors. There are at least three reasons to believe that the economic loss doctrine may remain intact and applicable to design professionals: (1) the unique characteristics of the projects on which design professionals work; (2) the web of contracts covering the detailed aspects of the construction projects; and (3) the equal bargaining power among the contracting parties. To the extent that the doctrine remains applicable to design professionals, the contracting parties can decide amongst themselves the duties they choose to accept which promotes certainty as well as the efficient contractual allocation of risk.

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I. INTRODUCTION

This Article will examine the economic loss doctrine and its applicability to design professionals in Iowa and other states. This is an important doctrine. It allows contracted parties to decide for themselves the duties they want to undertake and promotes certainty and efficient contractual allocation of risk. The doctrine can prevent serious damage to the interests of professionals in a range of settings by disallowing tort claims from supplanting the contract remedies.

A. *The Fundamentals of the Economic Loss Doctrine*

The economic loss doctrine offers design professionals strong protections in litigation.[1] The doctrine originated in products liability cases to protect manufacturers from liability that exceeded the terms of the

1. *See* Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 458 (Md. 2017) (citing Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 740 (Ind. 2010)).

warranties for their products.[2] In recent years, courts have expanded the doctrine to protect design professionals from being sued for tort damages in breach of contract cases where the only losses suffered by the plaintiff were economic.[3] Effective use of the doctrine can produce a strikingly different result for a defendant. Instead of paying a large judgment for purely economic damages based on a tort theory, a defendant can often obtain summary judgment on that theory, and the plaintiff is only able to recover economic damages according to contract principles.[4]

Tort and contract law are separate and distinct theories of recovery available to plaintiffs in civil litigation.[5] A tort is a wrongful act or omission—other than a wrong that is only a breach of contract—for which the person wronged can obtain damages in a civil court.[6] Duties under tort law are created by statutes and case law.[7] For example, nearly every state codifies statutes that impose a duty on citizens to drive safely. If a person fails to drive safely and injures another as a result of this failure, a tort has been committed and the injured party may recover damages from the negligent party.[8] On the other hand, the duties owed under contract law arise solely from the contract itself.[9] For instance, in construction cases, the duties undertaken by the various parties—the property owner, design professional, contractor, subcontractor, and product manufacturers—are a product of

2. Seely v. White Motor Co., 403 P.2d 145, 150–51 (Cal. 1965); *see* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986).

3. *See, e.g.*, *Balfour Beatty Infrastructure, Inc.*, 155 A.3d at 459 ("[W]e find persuasive the logic of states barring negligence claims for purely economic damages against design professionals . . . .").

4. *See, e.g.*, Jenco Constr., Inc. v. City of Des Moines, No. LACL 132674, 2017 WL 10242484, at *3–5 (Iowa Dist. Ct. Sept. 11, 2017).

5. Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RSRV. L. REV. 286, 286–87 (1985). *But see* GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974).

6. *Tort*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803105014458 [https://perma.cc/A3LK-RHAY].

7. John C.P. Goldberg, *Tort Law at the Founding*, 39 FLA. ST. U. L. REV. 85, 87 (2011) ("Tort law is positive law: it is the product of judicial decisions and legislative acts.").

8. "Negligent" is defined as the failure of a person "to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Negligent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. *See* J. Brandon Sieg, Note, *Tort, Not Contract: An Argument for Reevaluating the Economic Loss Rule and Classifying Building Damage as "Other Property" When It Is Caused by Defective Construction Materials*, 53 WM. & MARY L. REV. 275, 282 (2011).

negotiations between the parties.[10] The parties have the opportunity to decide for themselves what contract terms are acceptable to them.[11] Courts should encourage this process of negotiation whereby parties take on only those duties they specifically agree to.[12]

The economic loss doctrine prohibits plaintiffs from bringing tort claims when the only damages suffered are economic and the only obligations between the parties exist through contract.[13] Economic loss or damage refers to the monetary damages that would be recoverable in a normal contract suit, as opposed to physical damages to a person (personal injury) or property that are only recoverable in a tort suit.[14] Personal injury and property damage are non-economic losses,[15] and contract law provides no basis for recovery of either.[16] Pecuniary damages such as lost profits, the cost of repair and replacement of a defective product, and delay damages are all examples of pure economic loss.[17]

By preventing a plaintiff from recovering in tort for purely economic loss, the doctrine protects the right to allocate economic risks through contract.[18] Transacting parties are limited to pursuing only the contractual remedies bargained for in their contracts.[19] This encourages the contracting parties to assess the risks of economic loss and to assume, allocate, or insure against that risk.[20] The parties' rights and duties are controlled by the

10. *See* Westwinds Dev. Corp. v. Outcalt, No. 2008–G–2863, 2009 WL 1741978, at *1 (Ohio Ct. App. June 19, 2009).

11. *See* Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 992–93 (Wash. 1994) ("A bright line distinction between the remedies offered in contract and tort with respect to economic damages also encourages parties to negotiate toward the risk distribution that is desired or customary. We preserve the incentive to adequately self-protect during the bargaining process. If we held to the contrary, a party could bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations.").

12. *Id.*

13. *See* Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 873 (9th Cir. 2007).

14. *See id.*

15. Personal injury can result in some damages that are economic in nature such as medical bills, lost wages, or lost future earning capacity.

16. *See* Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 126 (Iowa 1984) ("The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.").

17. *See Giles*, 494 F.3d at 878.

18. *See* Apollo Grp., Inc. v. Avnet, Inc., 58 F.3d 477, 480–81 (9th Cir. 1995).

19. *See* Digicorp, Inc. v. Ameritech Corp., 662 N.W.2d 652, 659 (Wis. 2003).

20. *Giles*, 494 F.3d at 878.

contract, and when purely economic loss occurs, no tort duty is implicated.[21] Without the doctrine, plaintiffs would systematically choose to bring claims in tort even when they have not suffered a personal injury or damage to other property. Simply put, the economic loss doctrine prevents parties from subverting their contract and recovering under tort law what they could not obtain through their contractual remedies.[22]

In a typical case involving the economic loss doctrine, the only obligations the parties owe to each other exist because of their mutually agreed upon contract, or in the case of products, because of an express or implied warranty.[23] Nonetheless, a plaintiff claiming a breach of contract or defective product will sometimes seek both contract and tort remedies—even if that party does not suffer tort damages, which would include personal injury or damage to other property.[24] A plaintiff does this to obtain the wider array of damages available through a tort claim. Contract claims generally limit a party's liability only to those damages that were reasonably foreseeable or actually contemplated by the parties at the time they entered into their contract or warranty,[25] whereas a tort cause of action can provide a much broader range of damages.[26] A cause of action based on tortious conduct will expand a defendant's liability to include all harm proximately caused by the defendant's conduct.[27] Because of this difference in remedies, a plaintiff may assert contract and tort claims in borderline cases where the losses suffered are economic in nature, but the facts are such that a plaintiff can argue a tort has been committed.[28]

21. McDowell, *supra* note 5, at 287, 298.

22. *See* All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 866 (7th Cir. 1999) ("The function of the economic-loss doctrine in confining contract parties to their contractual remedies is particularly well illustrated by cases involving product warranties . . . .").

23. *See, e.g.*, Seely v. White Motor Co., 403 P.2d 145, 150–51 (Cal. 1965).

24. The definition of "other property" varies by jurisdiction, but the basic concept is simple. If a defective product goes beyond damaging itself and causes damage to other property, then the plaintiff's claim is not barred by the economic loss doctrine. *See* Marshall v. Wellcraft Marine, Inc., 103 F. Supp. 2d 1099, 1103 (S.D. Ind. 1999) (holding a boat owner's tools, towels, canvas, pillows, various electronics, spare parts, photographs, food, supplies, and clothing constituted other property that was separate and distinct from the boat).

25. McDowell, *supra* note 5.

26. *Id.*

27. *Id.*

28. *Id.* at 287–88.

The following scenario provides an example of the economic loss doctrine in action in design professional litigation. A contractor sues a design professional for delay damages on a project, alleging that the design schematics were negligently prepared and caused additional labor and time to complete the project. The contract between the design professional and contractor does not allow recovery for these types of speculative damages, but nonetheless the contractor alleges that it was unable to bid on other jobs because of the construction delays due to the design professional's alleged negligence. The contractor alleges it should be compensated for this economic loss.[29] In this situation, the economic loss doctrine would prohibit the contractor from suing for damages not permitted under the terms of the contract.[30] A court applying the doctrine would deny the contractor recovery of damages related to their inability to bid on other projects because the contractor "had the opportunity to allocate the risks that might occur" but failed to do so when they negotiated the terms of the contract with the design professional.[31]

The hypothetical above is based on the Colorado case, *BRW, Inc. v. Dufficy & Sons, Inc.*, wherein the court applied the economic loss doctrine to prevent a contractor from recovering under a negligent misrepresentation tort theory against an engineering firm when a contract governed the duties and remedies available to the parties.[32] The contractor alleged that the engineering firm failed to exercise reasonable care—a tort standard—when it prepared design drawings and specifications for the subject construction project and sued the engineering firm under a negligence theory of recovery.[33] The Colorado Supreme Court reasoned that the contractor's tort claims should be precluded for three reasons:

> (1) to maintain a distinction between contract and tort law; (2) to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and (3) to encourage the parties to build the cost considerations into the contract because they will not be able to recover the economic damages in tort.[34]

29. *See* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965).

30. *See generally* BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 72 (Colo. 2004).

31. *Id.* at 73.

32. *Id.* "Negligent misrepresentation" is defined as "[a] careless or inadvertent false statement in circumstances where care should have been taken." *Misrepresentation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

33. *BRW, Inc.*, 99 P.3d at 70.

34. *Id.* at 72.

In simple terms, the court held that if the contractor wanted to recover for the loss of opportunity to bid on other projects, these damages needed to be explicitly provided for in the contract, but they were not.[35]

The doctrine serves as a broad shield in a defense attorney's armory. It allows a defendant to ward off a plaintiff's tort action when the contract between the parties only allows specific, agreed upon remedies for a breach.[36] To better understand the policies behind the economic loss doctrine, insight into how the doctrine was developed and how it has progressed is essential.

B. *A Brief History of the Doctrine*

California first established the economic loss doctrine in 1965 in *Seely v. White Motor Co.*, a products defect case.[37] In *Seely*, the plaintiff purchased a truck from a car salesman.[38] The truck bounced violently when it was driven; and as a result of the bouncing, it eventually tipped over and crashed.[39] The plaintiff did not suffer any personal injury as a result of the tipped truck and no other property was damaged besides the truck.[40] The court in *Seely* held that the plaintiff could proceed with a breach of warranty claim under contract law but could not recover economic damages under tort law.[41] The California Supreme Court stated:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.[42]

The court determined that if a product caused personal injury, the manufacturer should be held accountable under a torts or products liability theory of recovery.[43] However, if the product caused no personal injury or damage to other property, but merely failed to function in the way the

35. *Id.*

36. *See* Van Sickle Constr. Co. v. Wachovia Com. Mortg., Inc., 783 N.W.2d 684, 693 (Iowa 2010).

37. 403 P.2d 145 (Cal. 1965).

38. *Id.* at 147.

39. *Id.*

40. *Id.* at 147–48.

41. *Id.* at 151.

42. *Id.*

43. *Id.*

consumer desired, the consumer's sole remedy existed under the terms of the warranty.[44] The plaintiff suffered no personal injury and no damage to other property as a result of the tipped truck; therefore, the doctrine limited the plaintiff's recovery to the terms of the manufacturer's warranty for the truck.[45]

The U.S. Supreme Court adopted the economic loss doctrine in the 1986 admiralty case *East River Steamship Corp. v. Transamerica Delaval, Inc.*, where it found the economic loss doctrine precluded recovery in tort for purely economic loss.[46] In that case, the plaintiff—an owner of oil tankers—sued the manufacturer of boat engine turbines when the turbines failed to function properly and prevented the tankers from carrying out their business.[47] The plaintiff sued for the cost of repairs to the ship and the income his business lost while the ships were out of service.[48] The warranty for the turbines did not include a provision addressing such damages.[49]

The Supreme Court held that when the damage is solely to the product itself—as it was in this case because the engine turbines were defective and did not work properly, but they did not cause any personal injury or damage to other parts of the ship—the claim should proceed under warranty law because the parties set the terms of their own agreement for the purchase of goods and services.[50]

At around the same time the Supreme Court decided *East River*, state courts across the country were adopting the economic loss doctrine to preclude tort claims when plaintiffs suffered solely economic losses. Nearly every jurisdiction has adopted some form of the economic loss doctrine. While referring to anything as a "doctrine" might make it sound like a unified and agreed upon principle, every state that has adopted the economic loss doctrine has its own version with different limitations and exceptions.[51] As one legal scholar noted, "[I]t is impossible to distill from the cases a consistent rule of national standing or even a majority approach to the

44. *Id.*
45. *Id.* at 151–52.
46. 476 U.S. 858, 876 (1986).
47. *Id.* at 860–61.
48. *Id.* at 861.
49. *Id.* at 861–62.
50. *Id.* at 871–73.
51. *See* Carl J. Circo, *Placing the Commercial and Economic Loss Problem in the Construction Industry Context*, 41 J. MARSHALL L. REV. 39, 41–42 (2007).

economic loss problem in the construction industry setting."[52] While each state's version of the economic loss doctrine may include different exceptions and limitations, the general principles of the doctrine remain the same.[53]

II. THE CURRENT STATE OF THE ECONOMIC LOSS DOCTRINE

A. *Iowa*

Iowa first applied the economic loss doctrine in *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp*.[54] In *Nebraska Innkeepers Inc.*, business owners lost substantial revenue because of a delay in the reopening of a bridge that was under construction for months.[55] The affected business owners sued the contractor responsible for the construction of the bridge under a tort theory of public nuisance.[56] The Iowa Supreme Court held that no recovery in tort was available absent physical or personal loss and that the business owners' alleged damages—lost business due to the delay in reopening the bridge—were solely economic and thus not recoverable under tort law.[57] Iowa later extended the economic loss doctrine to bar the recovery of purely economic loss under strict liability claims as well.[58]

With few exceptions, the economic loss doctrine offers broad protections to defendants in Iowa. For instance, in *Annett Holdings, Inc. v. Kum & Go, L.C.*,[59] the Iowa Supreme Court concluded that a negligence claim against a party with no privity of contract may still be barred by the "stranger" economic loss doctrine.[60] This means that even if there is no direct

52. *Id.* at 58.

53. *Id.*

54. 345 N.W.2d 124, 130 (Iowa 1984).

55. *Id.* at 125.

56. *Id.* at 126. "Public nuisance" is defined as "an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." *Nuisance*, BLACK'S LAW DICTIONARY (11th ed. 2019).

57. *Neb. Innkeepers Inc.*, 345 N.W.2d at 130.

58. Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988).

59. 801 N.W.2d 499 (Iowa 2011).

60. *Id.* at 504 (citing Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 715 (2006)). "Privity" is defined as the "connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest." *Privity*, BLACK'S LAW DICTIONARY (11th ed. 2019). In this context, stranger means that there is no contractual relationship between the parties.

privity of contract between the parties (making them strangers), the doctrine may still bar recovery in tort depending on the circumstances of the case.[61]

In *Annett Holdings*, a dishonest employee of a trucking company used his company card to get cash under the guise of purchasing fuel for co-workers.[62] The gas station paid out the cash to the dishonest employee, and "[t]he card issuer in turn was reimbursed under a separate contract with the trucking company's parent."[63] After several years of this fraud, the dishonest employee was eventually arrested and convicted of theft.[64] The trucking company's parent company sought to recoup its money by suing the gas station "both for negligence and as an alleged third-party beneficiary of the contract between the card issuer and the [gas station]."[65]

The Iowa Supreme Court decided that the proper remedy to this lawsuit existed in the network of contracts between the gas station, card issuer, and truck-company employer, and not in tort:

> [A]lthough [the trucking company] did not have a direct contractual relationship with [the gas station], it had a contract with [the card issuer] which in turn had contracted with [the gas station]. When parties enter into a chain of contracts, even if the two parties at issue have not actually entered into an agreement with each other, courts have applied the "contractual economic loss rule" to bar tort claims for economic loss, on the theory that tort law should not supplant a consensual network of contracts.[66]

The idea that a "network," "chain," or "web" of contracts should limit a party's remedies is significant in the design professional context. This argument has been successfully used in other states to preclude negligence actions against design professionals where there is a similar network or web of contracts which govern the duties the parties owe to one another.[67] While the Iowa Supreme Court has yet to address the issue of how the economic loss doctrine applies to negligence actions against design professionals, this opinion provides the court with legal foundation to apply the doctrine to bar negligence actions against design professionals for solely economic damages.

61. *Annett Holdings*, 801 N.W.2d at 504.
62. *Id.* at 501–02.
63. *Id.* at 500.
64. *Id.*
65. *Id.*
66. *Id.* at 504–05.
67. *Id.* (citing Dobbs, *supra* note 60, at 726); *see also* Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 764–65 (2006).

B. *Exceptions to the Doctrine*

While the economic loss doctrine's application expanded in Iowa throughout the 1970s and 1980s, Iowa courts began to chip away at the broad protections afforded by the doctrine in the 1990s.[68] In 1994, the Iowa Supreme Court held that the economic loss doctrine did not preclude tort claims for purely economic damages against a lawyer when the claim was for malpractice.[69] In 1998, the Iowa Supreme Court further refused to extend the protections of the economic loss doctrine to an accounting firm that was sued for breach of contract and professional negligence.[70] As recently as 2013, the Iowa Supreme Court held that the economic loss doctrine does not protect financial advisors.[71] In summary, Iowa courts have consistently held that the economic loss doctrine's protections do not apply to most professional negligence claims.[72]

While Iowa's refusal to apply the economic loss doctrine to cases of professional negligence against attorneys, accountants, and financial advisors would appear to suggest the doctrine would not protect design professionals, there is reason to believe otherwise.[73] There is a critical distinction between attorneys, financial advisors, and accountants compared to design professionals.[74] In every construction-related job, design professionals typically work on projects that involve a web of contracts covering every detail of the construction project.[75] The duties owed by the parties are explicitly set forth in the terms of the contract.[76]

A design professional, project owner, general contractor, and subcontractor bargain for each duty and responsibility present in a

68. *See* Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972); Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 129–31 (Iowa 1984); Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988); Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 651–52 (Iowa Ct. App. 1996); Kemin Indus., Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212, 220–21 (Iowa 1998).

69. *See* Holsapple v. McGrath, 521 N.W.2d 711, 713–14 (Iowa 1994) (holding purely economic losses are recoverable in a negligence claim against an attorney for the loss of a testamentary benefit).

70. *Kemin Indus.*, 578 N.W.2d at 222.

71. St. Malachy Roman Cath. Congregation of Geneseo v. Ingram, 841 N.W.2d 338, 351–52 (Iowa 2013).

72. *See id.*; *see also Kemin Indus.*, 578 N.W.2d at 221–22.

73. *See Neb. Innkeepers, Inc.*, 345 N.W.2d at 129–31.

74. *See* Iowa Ct. R. 32.

75. *See* Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 460 (Md. 2017).

76. *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

construction project.[77] These contracts spell out the exact expectations of the parties, including the scope of work expected from each party, duties owed to one another, and timelines in which to complete their respective tasks.[78] Likewise, typical construction contracts contain explicit indemnity, contribution, and insurance clauses for when the parties' expectations are not met.[79] With the duties owed to one another and the remedies available in the event of a breach spelled out in the web of contracts, the economic loss doctrine fits the design professional better than attorneys, accountants, and financial advisors. No similar web of contracts exists in the typical transaction between a client and attorney or client and accountant.[80]

Although the web of contracts present in a typical design transaction is likely enough to overcome Iowa's general bar against applying the economic loss doctrine in most cases of professional negligence, another limitation may prevent the design professional from successfully asserting the doctrine.[81] In addition to the exception for certain cases of professional negligence, the economic loss doctrine also does not apply to negligent misrepresentation claims in Iowa.[82] In *Van Sickle Construction Co. v. Wachovia Commercial Mortgage Inc.*, the Iowa Supreme Court determined that:

> [There is] no reason to apply the [economic loss] rule to bar a recovery of economic losses for the tort of negligent misrepresentation that is, and always has been, an economic tort allowing for recovery of purely economic damages. Application of the economic loss doctrine in negligent misrepresentation cases would essentially eliminate the tort.[83]

The court further reasoned that "the purposes of the economic loss doctrine would not be served by applying it to negligent misrepresentation claims" because the tort of negligent misrepresentation specifically "defines an independent duty for which recovery in tort for economic loss is" made

77. *See, e.g.*, E. Steel Constructors Inc. v. City of Salem, 549 S.E.2d 266, 267–68 (W. Va. 2001) (discussing contracts between design professionals).

78. *See* Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 130 A.3d 1024, 1045 (Md. Ct. Spec. App. 2016) ("[Plaintiff] told [defendant] that the 845R project would be completed on a certain date.").

79. *See Balfour Beatty Infrastructure, Inc.*, 155 A.3d at 462.

80. *See* Holsapple v. McGrath, 521 N.W.2d 711, 712 (Iowa 1994).

81. *See* Van Sickle Constr. Co. v. Wachovia Com. Mortg., Inc., 783 N.W.2d 684, 693 (Iowa 2010).

82. Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011).

83. *Van Sickle Constr. Co.*, 783 N.W.2d at 693 (citation omitted).

explicitly available.[84] The application of the doctrine in such cases would essentially eliminate the tort as recognized in Iowa.[85]

C. *Designer Liability to Third Parties*

A design professional in an advisory role needs to be aware that if they provide information or otherwise have a pecuniary interest in providing information,[86] they could be liable for the tort of negligent misrepresentation if the information they give is not correct, accurate, or thorough.[87] In *Van Sickle Construction Co.*, the Iowa Supreme Court explained the rationale for requiring the defendant to be in the business of supplying information by stating:

> [T]hose liable are only those who supply information in an advisory capacity and are "manifestly aware" of how the information will be used and "intend to supply it for that purpose." The restriction also ensures that those liable are "in a position to weigh the use for the information against the magnitude and probability of the loss that might attend the use of the information if it is incorrect."[88]

In addition to being in the business of supplying information, to be liable for negligent misrepresentation it must be shown that:

> (1) [T]he defendant was in the business or profession of supplying information to others; (2) the defendant intended to supply information to the plaintiff or knew that the recipient intended to supply it to the plaintiff; (3) the information was false; (4) the defendant knew or reasonably should have known that the information was false; (5) the plaintiff reasonably relied on the information in the transaction that the defendant intended the information to influence; (6) and the false information was the proximate cause of damage to the plaintiff.[89]

84. *Id.* at 694 (quoting Presnell Constr. Managers, Inc. v. EH Constr., LLC, 134 S.W.3d 575, 582 (Ky. 2004)).

85. *Id*.

86. In a negligent misrepresentation context, "the pecuniary interest requirement normally comes from the consideration paid or given to the person who supplies the information as a part of the transaction." Dinsdale Constr., LLC v. Lumber Specialties, Ltd., 888 N.W.2d 644, 652 (Iowa 2016).

87. *See id.* at 650.

88. 783 N.W.2d at 691 (quoting Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 124–125 (Iowa 2001)).

89. Boliver v. Kester, No. 15-1973, 2016 WL 4384369, at *3 (Iowa App. Aug. 17,

The rule sets forth that if the defendant knew that the recipient intended to supply the information to the plaintiff, the defendant could be held liable even if the defendant did not supply the information to the plaintiff directly.[90] This language, therefore, sets out a potential limit to the liability a design professional could face when supplying information.[91] If the rule requires that a defendant has knowledge that the information is intended to be supplied to the plaintiff, it follows that if the provided information is conveyed to a third party, and the defendant was not aware of the intention to supply the information to that party, the defendant might not be liable for any damages to the third party caused by their reliance on the defendant's provided information.

The Iowa Supreme Court has yet to hear a case against a design professional involving the economic loss doctrine in the context of a negligent misrepresentation claim.[92] As mentioned above, design professionals typically work on projects where there is a web of contracts that explicitly set forth the duties each party owes to one another.[93] Given the prevalence of contracts in construction projects, Iowa courts may find that the duties the parties owe each other should be limited to those spelled out in the web of contracts.[94] This would allow design professionals to assert the doctrine when they are sued under a negligent misrepresentation claim, which occurs frequently in construction litigation.[95]

D. *The Doctrine as Currently Applied to Design Professionals in Iowa*

Iowa district courts have consistently applied the economic loss doctrine to claims of professional negligence against design professionals.[96] The district courts have noted their hesitation to do otherwise absent a

2016) (citing McLeodUSA Telecomm. Servs., Inc. v. Qwest Corp., 469 F. Supp. 2d 677, 692 (N.D. Iowa 2007)).

90. *Id*.

91. *See id.*

92. Roger W. Stone, *Architects' and Engineers' Liability Under Iowa Construction Law*, 50 DRAKE L. REV. 33, 52 (2001).

93. *See* Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 460 (Md. 2017).

94. *See* Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011) (describing construction contracts as "a chain of contracts").

95. *See, e.g.,* Holden Farms, Inc. v. Hog Slat, Inc., 347 F.3d 1055, 1058–59 (8th Cir. 2003).

96. *See* Jenco Constr., Inc. v. City of Des Moines, No. LACL 132674, 2017 WL 10242484, at *1 (Iowa Dist. Ct. Sept. 11, 2017); *see also* R.L. Smith, Ltd. v. Cmty. Nat'l Bank, No. LACV101401, 2008 WL 4441671, at *1 (Iowa Dist. Ct. Feb. 15, 2008).

directive from the Iowa Supreme Court.[97] Two district court cases to address the issue have held that professional negligence claims against design professionals for purely economic damages were precluded by the economic loss doctrine.[98] The cases also involved a negligent misrepresentation claim.[99]

In *Jenco Construction, Inc. v. City of Des Moines*, a construction company sued a structural engineering firm under theories of general negligence and negligent misrepresentation.[100] The defendant, a structural engineering firm,[101] successfully argued that the economic loss doctrine barred the construction company's general negligence claim against it by contending that the construction company sought remote damages for economic loss—specifically its ability to recover additional compensation for the costs caused by the structural engineering firm's alleged negligence—derived from its contract with the project owner.[102]

The district court determined that "tort law should not supplant the consensual network of contracts" between the relevant parties.[103] The district court further noted that the professional negligence exception to the doctrine did not seem to fit construction cases, "an arena generally recognized to govern responsibility among those involved in a construction project based on their contractual obligations and not the broad parameters of tort law."[104]

The district court granted the defendant's motion for summary judgment for all claims including negligence and negligent misrepresentation.[105] The ruling by the district court granting the defendant's

97. *See R.L. Smith, Ltd.*, 2008 WL 4441670, at *1–2.

98. *Jenco Constr., Inc.*, 2017 WL 10242484, at *1; *R.L. Smith, Ltd.*, 2008 WL 4441670, at *1.

99. *Jenco Constr., Inc.*, 2017 WL 10242484, at *1; *R.L. Smith, Ltd.*, 2008 WL 4441670, at *1.

100. 2017 WL 10242484, at *1.

101. *Id.* at *1. The law firm that successfully represented the design professional defendant in this case was Goodman/Keller P.C.

102. *Id.* at *3–5.

103. *Id.* at *3 (quoting Annett Holdings Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011)).

104. *Id.*

105. *Id.* (Summary judgment for the negligent misrepresentation claim was granted on grounds other than the economic loss doctrine. The court noted, "The economic loss doctrine is of no assistance to [the structural engineering firm] in disposing of Jenco's claim for negligent misrepresentation, as such claims have been exempted from its application under Iowa law.").

motion for summary judgment was not appealed to the Iowa Supreme Court, so it is still unknown how the court might rule on the issue of the applicability of the economic loss doctrine to design professionals.

E. *The Doctrine in Other States*

A majority of courts in other states uphold the protections of the economic loss doctrine in the design professional context.[106] An examination of the rationale behind the cases where the doctrine is upheld, or an exception is created, provides insight into how Iowa may ultimately apply the doctrine to design professionals.

1. *Maryland*

Maryland recently extended the protections of the economic loss doctrine to design professionals in *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*.[107] In *Balfour*, the city of Baltimore contracted with an engineering firm to design plans for a wastewater treatment facility and then contracted with a contractor to execute the design to build the facility.[108] After the project was completed, construction leaks were found in the treatment facility.[109] Under the terms of the contract, the contractor was obligated to fix the leaks, a process that resulted in substantial loss to the contractor.[110] The contractor sought to recoup its losses by suing the engineering firm under a tort theory of faulty design.[111] The plaintiff contractor sued the engineer under three tort causes of action: (1) professional negligence in designing the facility; (2) negligent misrepresentation; and (3) a *Restatement (Second) of Torts* § 552 claim.[112] The plaintiff contractor claimed extensive financial damages including delay

106. *See, e.g.*, Terracon Consultants W., Inc. v. Mandalay Resort Grp., 206 P.3d 81, 86–88 (Nev. 2009); Bronster *ex rel.* State v. U.S. Steel Corp., 919 P.2d 294, 302 (Haw. 1996); Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n, 560 N.E.2d 206, 208 (Ohio 1990).

107. 155 A.3d 445, 462–63 (Md. 2017).

108. *Id.* at 447–48.

109. *Id.* at 448.

110. *Id.*

111. *Id.* at 447–50.

112. *Id.* at 448; RESTATEMENT (SECOND) OF TORTS § 552 (AM. L. INST. 1977). Restatement (Second) claims are a specific type of negligent misrepresentation where the defendant is in the business of supplying information. *Id.* Iowa differs from Maryland in that the only type of negligent misrepresentation claims that can be brought are § 552 claims. When an Iowa court refers to negligent misrepresentation, it means specifically a § 552 claim. *See* Bagelmann v. First Nat'l Bank, 823 N.W.2d 18, 30 (Iowa 2012).

losses in constructing the facility, costs for fixing the leaks, and additional financial losses.[113] Of note, the plaintiff contractor did not have a contract with the defendant engineer.[114]

While Maryland's economic loss doctrine varies slightly from Iowa's, the policy reasons for applying the economic loss doctrine to design professionals are the same. In determining if there is a duty of care under tort law, Maryland courts "examine: (1) 'the nature of the harm likely to result from a failure to exercise due care,' and (2) 'the relationship that exists between the parties.'"[115] The plaintiff contractor in *Balfour* argued that the defendant engineer should be treated similarly to other professionals such as attorneys and accountants.[116] That is, a tort duty to act with reasonable care would be imposed on those professionals who hold themselves out as possessing the requisite skill required by their profession, and the economic loss doctrine would not apply regardless of whether a contract existed.[117] The court found the plaintiff contractor's argument unpersuasive and instead honed in on the nature of large-scale public construction projects.[118] The court stated: "[W]e think the complex web of contracts that typically undergirds a public construction project should govern because parties have sufficient opportunity to protect themselves (and anticipate their liability) in negotiating these contracts."[119]

The court also noted that the construction industry is "vitally enmeshed in our economy and dependent on settled expectations. The parties involved in a construction project rely on intricate, highly sophisticated contracts to define the relative rights and responsibilities of the many persons" involved on a project.[120] The court reasoned that it should be up to the parties involved in a construction project—the owner, architect, engineer, contractor, and subcontractor—to allocate risks via contract, and that tort duties would hamper these contractual negotiations.[121]

113. *Balfour Beatty Infrastructure, Inc.*, 155 A.3d at 448–49.

114. *Id.* at 449, 457.

115. *Id.* at 451 (quoting Jacques v. First Nat'l Bank of Md., 515 A.2d 756, 759 (Md. 1986)).

116. *Id*. at 455–57.

117. *Id.* at 459.

118. *Id.* at 460.

119. *Id.*

120. *Id.* (quoting Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 737–38 (Ind. 2010)).

121. *Id.* at 460–61.

In *Balfour*, the court determined that the plaintiff contractor controlled its risk exposure by bargaining for the duties and remedies included in the construction contract, even though the plaintiff contractor lacked contractual privity with the defendant engineering firm.[122] The plaintiff contractor had sufficient opportunity to anticipate liability and protect itself when it negotiated its contract for the project but failed to do so.[123] Since the plaintiff contractor sought remedies outside "the complex web of contracts" that governed the duties and remedies available to the parties on the project, the court barred the plaintiff's claims with the economic loss doctrine.[124]

The *Balfour* court limited its ruling to only extend the doctrine to design professionals involved in large-scale public construction projects, where the complex web of contracts is almost certain.[125] Regardless, where a design professional can show that a web of contracts covers a project, Maryland courts will likely apply the economic loss doctrine to protect the design professional.[126]

The court also dismissed the plaintiff contractor's negligent misrepresentation claim.[127] Once again, the court relied on the web of contracts present in a construction case to hold that imposing an additional tort duty would be inappropriate.[128] "The complex web of contractual arrangements" in a large-scale construction project sets forth the parties' duties and remedies, and "injecting a tort duty is not in the public interest."[129]

2. *Texas*

Texas also affords the protections of the economic loss doctrine to design professionals.[130] In *LAN/STV v. Martin K. Eby Construction Co.*, the city of Dallas contracted with several parties on the construction of a light rail transit line.[131] When the contractor responsible for constructing the light rail transit line suffered losses from delays caused by allegedly negligent

122. *Id.* at 449–50.
123. *See id*. at 460–61.
124. *Id.* at 460.
125. *Id*. at 462.
126. *See id*. at 461–62.
127. *Id*.
128. *Id*. at 462.
129. *Id.*
130. *See* LAN/STV v. Martin K. Eby Constr. Co., 435 S.W.3d 234, 236 (Tex. 2014).
131. *Id.*

design plans from the architectural firm that designed the transit line, the contractor brought suit against the architectural firm.[132] The plaintiff contractor sought economic damages including the costs of delay and additional labor and materials to complete the project.[133] In deciding that the economic loss doctrine's protections applied to design professionals, the *LAN/STV* court discussed at length the ideas of indeterminate and disproportionate liability and deference to contract law.[134]

The Texas Supreme Court reasoned that economic losses are distinct from other types of damages in that they can proliferate so quickly: "Economic losses proliferate more easily than losses of other kinds. . . . A single negligent utterance can cause economic loss to thousands of people who rely on it, those losses may produce additional losses to those who were relying on the first round of victims, and so on."[135]

Tort damages are typically more confined.[136] For example, a badly driven car will only cause physical harm to others nearby.[137] In contrast, economic losses are not similarly self-limiting.[138] Economic loss can quickly balloon in unpredictable ways.[139] For example, in *LAN/STV* the contractor's damages stemming from the allegedly negligent design plans totaled $14 million—consisting of the costs of delay losses and additional labor and materials to deal with changed design plans—for the $25 million project.[140]

Deference to contract principles further persuaded the Texas Supreme Court to conclude that the risks of economic loss presented by the construction project were better suited to allocation by contract.[141] The court reasoned that the contracting parties should settle responsibility for risk

132. *Id.* at 237.

133. *See id*. at 236–37.

134. *Id.* at 240.

135. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (AM. L. INST., Tentative Draft No. 2, 2014)).

136. *See id.* at 240–41 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (AM. L. INST., Tentative Draft No. 2, 2014)).

137. *Id*. at 240 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (AM. L. INST., Tentative Draft No. 2, 2014)).

138. *Id*. (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (AM. L. INST., Tentative Draft No. 2, 2014)).

139. *Id*. (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (AM. L. INST., Tentative Draft No. 2, 2014)).

140. *Id.* at 236.

141. *Id.* at 240, 250 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. C (AM. L. INST., Tentative Draft No. 2, 2014)).

allocation rather than rely on a judicial assignment of a remedy after the harm is done.[142] When the parties have the opportunity to assess and manage the risk involved, the remedy should remain in contract law.[143]

3. *Nevada*

In Nevada, the economic loss doctrine bars "negligent misrepresentation claims against commercial construction design professionals where the recovery sought is solely for economic losses."[144] The Supreme Court of Nevada reasoned that exceptions to the economic loss rule are appropriate only when "there is significant risk that 'the law would not exert significant financial pressures to avoid such negligence.'"[145] The court determined that there is no such risk in the context of commercial construction design professionals because of the web of contracts covering a project.[146] The contracts delineate each party's risks and liabilities, which in turn provides the necessary financial pressure to incentivize parties to avoid committing negligence.[147] The court also noted that:

> [C]omplex construction contracts generally include provisions addressing economic losses. Therefore, the parties' "disappointed economic expectations" are better determined by looking to the parties' intentions expressed in their agreements. This is further supported by the fact that design professionals supply plans, designs, and reports that are relied upon to create a tangible structure; the ultimate quality of the work can be judged against the contract. The drawings, reports, and on-site instructions are "incidental to a tangible product." Thus, requiring parties that are not in direct privity with one another but involved in a network of interrelated contracts to rely upon that network of contracts ensures that all parties to a complex project have a remedy and maintains the important distinction between contract and tort law.[148]

Nevada's economic loss doctrine offers strong protections to design professionals because it bars both general negligence claims and negligent

142. *Id*. at 239, 241.

143. *Id.*

144. Halcrow, Inc. v. Eighth Jud. Dist. Ct., 302 P.3d 1148, 1150 (Nev. 2013).

145. *Id.* at 1153.

146. *Id.* ("[I]n commercial construction situations, the highly interconnected network of contracts delineates each party's risks and liabilities in cases of negligence. . . .").

147. *Id.* (quoting Terracon Consultants W., Inc. v. Mandalay Resort Grp., 206 P.3d 81, 88 (Nev. 2009)).

148. *Id.* (citations omitted).

misrepresentation claims when a plaintiff's losses are solely economic.[149] The sound reasoning and application of the doctrine in *Halcrow* provides design professionals in other states with a roadmap for how to successfully argue that the economic loss doctrine should bar both general negligence and negligent misrepresentation claims.[150]

4. *Illinois*

The economic loss doctrine adopted by Illinois courts, which is sometimes referred to as the *Moorman* doctrine, precludes a plaintiff from recovering "for solely economic loss under the tort theories of strict liability, negligence and innocent misrepresentation."[151] The *Moorman* court defined 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."[152] The doctrine was later extended to preclude tort remedies for claims of defective services.[153]

In the case *2314 Lincoln Park West Condominium Association v. Mann, Gin, Ebel & Frazier, Ltd.*, the Supreme Court of Illinois applied the protections of the economic loss doctrine to deny a client's tort claim against an architectural firm stating:

> The present claim, however, is limited to the plaintiff's theory that the defendant architectural firm was negligent in its design of the structure. As our prior decisions concerning the construction industry fully illustrate, such a claim concerns the quality, rather than the safety, of the building and thus is a matter more appropriately resolved under contract law. . . . The architect's responsibility originated in its contract with the original owner, and in these circumstances its duties should be measured accordingly. Recovery of the nature requested here essentially seeks damages for a difference in quality.[154]

149. *See id*. at 1154.

150. *See generally id*.

151. Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 453 (Ill. 1982); ExxonMobil Oil Corp. v. Amex Constr. Co., 702 F. Supp. 2d 942, 950 (N.D. Ill. 2010) (discussing the applicability of the "Moorman Doctrine").

152. *Moorman Mfg. Co.*, 453 N.E.2d at 449.

153. Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 636 N.E.2d 503, 512 (Ill. 1994).

154. 555 N.E.2d 346, 352–53 (Ill. 1990).

This protection of design professionals was further discussed in *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, L.L.C.*, wherein the court held that the economic loss doctrine precluded an LLC member from bringing a negligent design cause of action against an architectural firm.[155]

Courts have held that the economic loss doctrine in Illinois does have several limited exceptions including:

> (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.[156]

When addressing the third exception and its applicability to design professionals such as architects, the Supreme Court of Illinois clarified that:

> [W]hile it may be the case that an architect does in fact supply information relied on by others, we do not believe that the character of that function should be overstated. Discussing the question, it has been observed: "Obviously, a great many businesses involve an exchange of information as well as of tangible products—manufacturers provide operating or assembly instructions, and sellers provide warranty information of various kinds. But if we ask what the product is in each of these cases, it becomes clear that the product (a building, precipitator, roofing material, computer or software) is not itself information, and that the information provided is merely incidental." In the usual case, the information supplied by the architect is transformed into the building itself.[157]

Illinois courts have consistently applied the economic loss doctrine in construction cases to protect design professionals from tort claims for purely economic loss.[158] The courts have reasoned that the responsibilities owed by architects originate out of their contract with the owner and therefore,

155. 865 N.E.2d 228, 237 (Ill. App. Ct. 2007).

156. Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. and Co., 810 N.E.2d 235, 247 (Ill. App. Ct. 2004) (citing *In re* Chicago Flood Litig., 680 N.E.2d 265 (Ill. 1997)).

157. *2314 Lincoln Park W. Condo. Ass'n*, 555 N.E.2d at 351 (quoting Rankow v. First Chicago Corp., 870 F.2d 356, 364 (7th Cir. 1989)).

158. *F.H. Paschen/ S.N. Nielsen, Inc.*, 865 N.E. 2d at 236–37.

economic loss disputes arising from those contracts are appropriately resolved under contract law.[159]

5. *Kansas*

The Kansas economic loss doctrine was developed in products liability law.[160] The doctrine was later expanded to preclude tort claims such as negligence when there was no personal injury or fiscal damage to property.[161] That concept was narrowed in the case *David v. Hett* wherein the Kansas Supreme Court addressed the applicability of the economic loss doctrine to actions for economic loss brought by homeowners against residential contractors.[162]

In *Hett,* the court discussed their previous application of the economic loss doctrine to claims for economic damages where there was only damage to the product itself.[163] The court stated that those claims were best governed under contract law because "(1) those losses are easily insured; (2) restricting the parties to the contractual remedies allows the parties to allocate the risk through the bargaining process; and (3) warranty damages are sufficient to cover the injury."[164] Nevertheless, the court reasoned that those three rationales do not justify a preclusion of claims for purely economic damages brought by a homeowner against a residential contractor.[165]

The court gave three main policy reasons for their decision.[166] First, because the Kansas Uniform Commercial Code is limited to the sale of goods, there is a lack of warranty protections within service contracts.[167] Second, contracts governing residential construction projects rarely involve the sophisticated parties with equal bargaining power that is witnessed in contracts outside of residential construction.[168] The application of the economic loss doctrine in this situation would unequally benefit the

159. *Id.* at 237.

160. Prendiville v. Contemp. Homes, Inc., 83 P.3d 1257, 1260 (Kan. App. 2004) (citing East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 866–76 (1986)), *overruled by* David v. Hett, 270 P.3d 1102 (Kan. 2011).

161. *Id.* at 1264.

162. 270 P.3d at 1103.

163. *Id.* at 1107.

164. *Id.* at 1113 (citing *East River S.S. Corp.*, 476 U.S. at 871–74).

165. *Id.*

166. *Id.* at 1114.

167. *Id.*

168. *Id.*

contractor because of this imbalance.[169] Third, the application of the economic loss doctrine in home construction scenarios unfairly focuses on the consequences or damages rather than the breach.[170]

The court also stated that whether a claim was rooted in contract or tort would be determined by the facts alleged in the pleadings.[171] This case opened the door to tort liability within the residential construction industry.[172] The mere presence of a contract would not grant automatic protection against claims for economic loss.[173] Design professionals within the residential construction industry in Kansas should therefore be aware of these issues and the potential lack of protection.

6. *Minnesota*

A Minnesota court held that tort claims for economic losses arising out of professional service transactions were not precluded by the economic loss doctrine in the case of *Waldor Pump & Equipment Co. v. Orr-Schelen-Mayeron & Associates, Inc.*[174] This ruling is supported by the Minnesota economic loss doctrine statutes 604.10 and 604.101, which limit the economic loss doctrine's protections to the sale of goods.[175] The specification limiting the application to the sale of goods suggests that the statute, and therefore the economic loss doctrine, is inapplicable to service contracts entered into by engineers, architects, and other design professionals.[176]

7. *Missouri*

In Missouri, the application of the economic loss doctrine is dependent on whether the design professional has contracted with the party bringing the claim.[177] The court in *Captiva Lake Investments, LLC v. Ameristructure, Inc.* addressed the application of the economic loss doctrine to claims of negligence brought by parties the architect contracted with, stating:

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* Corvias Mil. Living, LLC v. Ventamatic, Ltd., 397 P.3d 441, 448 (Kan. App. 2017), *aff'd in part, rev'd in part*, 450 P.3d 797 (Kan. 2019).

173. *David*, 270 P.3d at 1113.

174. 386 N.W.2d 375, 378 (Minn. Ct. App. 1986).

175. MINN. STAT. §§ 604.10, 604.101 (2022).

176. *See id.* § 604.10.

177. Captiva Lake Invs., LLC v. Ameristructure, Inc., 436 S.W.3d 619, 628 (Mo. Ct. App. 2014).

> The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature. Recovery in tort for pure economic damages are only limited to cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence.[178]

Further, "a defendant who has contracted with another owes no duty to a plaintiff who is not a party to that agreement, nor can a non-party sue for negligent performance of the contract."[179] This rule is designed to protect contracted parties from exposure to unlimited liability and from the risk of burdening parties with obligations that they have not agreed to.[180]

In the case *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*,[181] the Missouri Court of Appeals addressed the duty an architect owes to parties whom they are not contracted with.[182] The court stated, "[A]n architect owes no tort duty of care and is not liable to a general contractor or construction manager for damages for economic losses arising as a result of the architect's negligent performance of its contract with the owner."[183]

The court reasoned that economic loss is to be controlled by contract negotiation and assignment.[184] If the court were to find that the architect owed a duty to third parties, they feared the architect's ability to negotiate and assign their risk of economic loss and their overall control over their contracts would be greatly hindered.[185]

8. *Nebraska*

Nebraska courts have set forth that "[t]he economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses, and either: (1) a defective product caused the damage or

178. *Id.* (citing Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc., 332 S.W.3d 184, 192 (Mo. Ct. App. 2010)).

179. *Id.* at 626.

180. *Id.*

181. 870 S.W.2d 832 (Mo. Ct. App. 1993).

182. *Id.* at 833.

183. *Id.* at 834.

184. *Id.* at 837.

185. *Id.* ("To find that an architect owes a duty of care to the construction manager could hinder the architect's ability to negotiate concerning the risk of economic loss.").

(2) the duty which was allegedly breached arose solely from the contractual relationship between the parties."[186]

The doctrine does not bar tort claims for damages that are (1) not entirely economic; (2) arose from the alleged breach of an independent tort duty that was separate and distinct from the contractual duty; or (3) when there is a claim for negligence, and it is alleged that the negligent party's conduct damaged property other than the property that was sold pursuant to the contract.[187]

Additionally, design professionals should be aware that Nebraska courts have ruled that an action for professional negligence can be maintained against an architect or engineer, but under state law, the plaintiff must show privity of contract.[188]

9. *Wisconsin*

The applicability of the economic loss doctrine in Wisconsin hinges on whether the contract that the economic loss arose out of was for services or for goods.[189] The economic loss doctrine is inapplicable to claims for economic losses arising out of contracts for services.[190] Conversely, the doctrine is applicable to claims for economic losses arising out of contracts for goods.[191] If there is a mixture of goods and services, the determination is made by utilizing the predominant purpose test as laid out in the Wisconsin Supreme Court case, *Linden v. Cascade Stone Co*.[192] This process of analysis was summarized in the case *1325 N. Van Buren, LLC v. T-3 Group, Ltd.*, which states:

186. E3 Biofuels-Mead, LLC v. Skinner Tank Co., No. 8:06CV706, 2014 WL 351971, at *3 (D. Neb. Jan. 30, 2014).

187. *Id.* at *4.

188. *See* Bd. of Regents v. Wilscam Mullins Birge, Inc., 433 N.W.2d 478, 483 (Neb. 1988) (citing NEB. REV. STAT. § 25–222 (1985)) (discussing how services performed by design professionals involve "professional acts contemplated" by the parties to the contract).

189. 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 716 N.W.2d 822, 832 (Wis. 2006); Ins. Co. of N. Am. v. Cease Electric, Inc., 688 N.W.2d 462, 472 (Wis. 2004) ("[W]e determine that the economic loss doctrine is inapplicable to claims for the negligent provision of services.").

190. *1325 N. Van Buren, LLC*, 716 N.W.2d at 832.

191. *Id.*

192. 699 N.W.2d 189, 192–200 (Wis. 2005).

> First, we consider the nature of the contract. That is, we must determine whether the contract was one for products, services, or a mixed contract encompassing both products and services. . . . If the contract is purely a service contract, the economic loss doctrine does not apply. . . . However, if the contract is a mixed contract for products and services, whether the economic loss doctrine applies depends upon whether the contract is predominantly for a product or for services.
>
> . . . .
>
> In deciding the predominant purpose of a contract, this court uses "the totality of the circumstances test, which includes both quantitatively objective and subjective factors." Among the factors this court considers are: "the language of the contract, the nature of the business of the supplier, the intrinsic worth of the materials, the circumstances of the parties, and the primary objective they hoped to achieve by entering into the contract."[193]

When applying this analysis to a claim for economic damages arising out of a contract which included architectural and engineering services, the court in *Kalahari Development, LLC v. Iconica, Inc.*, stated:

> [O]ur supreme court has addressed construction contracts involving both construction services and materials, and has concluded that those contracts were predominantly for a product, namely, the final structure. [The plaintiff] nonetheless argues that a unique aspect of the contract here distinguishes it from the contracts in these cases. Specifically . . . [the] architectural and engineering services, which are types of services not discussed in *Linden* . . . .
>
> Assuming without deciding that there is some meaningful distinction between the types of services generally involved in supervising construction projects and the "architectural and engineering services" involved here, the latter services were a small fraction of the cost of the entire project. [The plaintiff] acknowledges that, out of approximately $7.1 million allocated for the water park, only $240,000 was for "architectural and engineering services." Overall, the record reveals that approximately $1,091,000 was allocated to architectural and engineering services out of an approximately $26,200,000 final contract price. This equates to about 4% of the contract price. . . .

193. *1325 N. Van Buren, LLC*, 716 N.W.2d at 832, 834 (citations omitted).

> [W]e discern[] no reason why such a small component of the contract, as measured by price, should matter. Accordingly, we conclude that, just as the owner in *Linden* primarily contracted for a house, and the owner in *1325 North Van Buren* primarily contracted for a condominium complex, [the plaintiff] primarily contracted for a water park resort and convention center.[194]

This line of analysis supports the idea that if a construction project's predominant purpose is a good, such as a final structure, the entire contract could be determined to be a contract for a good, and the design professional could be protected by the economic loss doctrine.[195]

10. *California*

In California, design professionals owe a duty of ordinary care in creating design plans and supervising construction.[196] If this duty is breached, a plaintiff may recover solely economic losses from the design professional for the breach.[197]

In *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill, LLP*, a condominium owners' association brought a construction design defect action against the architectural firm which designed the homes because the alleged defects made the homes unsafe and uninhabitable for significant portions of the year due to high temperatures.[198] The Supreme Court of California noted that in the manufacturer defect context, when "the nature of a [manufactured] thing is such that is reasonably certain to place life and limb in peril when negligently made," a manufacturer will be held liable when it is made defectively.[199] The court reasoned that since it holds manufacturers liable for defects on products such as ladders and tires, extending this principle to design professionals was a logical step.[200] Ultimately, the court held design professionals owe a duty of ordinary care

194. Kalahari Dev., LLC v. Iconica, Inc., 811 N.W.2d 825, 832–33 (Wis. Ct. App. 2012).

195. *See id.* at 833.

196. Beacon Residential Cmty. Ass'n v. Skidmore, Owings, & Merrill, LLP, 327 P.3d 850, 855 (Cal. 2014) (quoting Montijo v. Swift, 33 Cal. Rptr. 133 (Ca. Dist. Ct. App. 1963)).

197. *Id.* at 856.

198. *Id.* at 852–53.

199. *Id.* at 854 (quoting Kalash v. L.A. Ladder Co., 34 P.2d 481, 482 (Cal. 1934)).

200. *Id.*

in creating design plans and supervising construction.[201] This duty applies to any person who is foreseeably injured by a failure to do so, even though the injury may happen after completion of the design professionals' services, and approval by the party engaging the services has been given.[202] The court limited its holding to the lead project architect.[203]

11. *Pennsylvania*

Pennsylvania is another jurisdiction that does not afford the protections of the economic loss doctrine to design professionals.[204] In *Bilt-Rite Contractors, Inc., v. Architectural Studio*, a contractor for a public school construction project sued an architect for negligent misrepresentation based upon allegedly faulty plans and specifications upon which the contractor relied in submitting the winning bid for construction of the school.[205] There was no privity of contract between the contractor and architect.[206] The contractor alleged that the design professional's incorrect specifications caused large cost overruns.[207] The court ultimately ruled in favor of the contractor, using five factors to establish a duty of care: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing the duty on the actor; and (5) the overall public interest in the proposed solution."[208] Using these factors, the court determined that the design professionals owed a separate duty of care to the plaintiff contractor and extended the exception to the economic loss doctrine for lawyers and accountants to design professionals.[209]

201. *Id*. at 857 ("[S]uch a duty [of ordinary care] exists under the facts alleged here.").

202. *Id.* at 862.

203. *Id.* at 863 ("[D]efendants here were the sole entities providing architectural services to the Project.").

204. *See* Bilt-Rite Contractors, Inc., v. Architectural Studio, 866 A.2d 270, 272 (Pa. 2005).

205. *Id*. at 272–73.

206. *Id.*

207. *Id.* at 272, 282.

208. *Id.* at 281 (quoting Althaus *ex rel.* Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000)).

209. *Id.* at 288.

III. ARGUMENTS SUPPORTING THE DOCTRINE'S APPLICATION

While it is unknown how the Iowa Supreme Court will ultimately rule on the issue of the applicability of the economic loss doctrine to claims of professional negligence against design professionals which seek purely economic damages, cogent and potent arguments exist supporting the economic loss doctrine's application.[210] In addition to the argument that arises as a result of the web of contracts inherent in every construction-related project discussed above, arguments concerning the risk of cross-subsidization and the importance of not compromising the architect's fiduciary duty to the owner are examples of arguments that parties can raise to support a court's application of the doctrine.[211]

A. *Transfer of Cost Will Lead to Cross-Subsidization*

The first argument supporting the application of the economic loss doctrine to claims of negligence against design professionals involves the issue of transferring the cost of insurance to all parties in a construction project.[212] This issue was discussed by the Supreme Court of Texas in *LAN/STV*.[213]

In *LAN/STV*, as discussed in Part II E.2, an owner contracted with an architect to prepare designs for a light rail transit line and separately with a construction company to use the plans to build the light rail transit line.[214] The architect and construction company had no contract with each other.[215] Issues with the designs caused the construction company to lose millions of dollars on the project and as a result, the construction company sued the architect for negligently preparing the plans.[216] The Supreme Court of Texas discussed the issues with allowing a non-party to bring an action against a

210. *See e.g.*, LAN/STV v. Martin K. Eby Constr. Co., 435 S.W.3d 234, 236–41 (Tex. 2014); Grant Thornton LLP v. Prospect High Income Fund Ltd., 314 S.W.3d 913, 919–20 (Tex. 2020).

211. *See* Yerington Ford, Inc. v. Gen. Motors Acceptance Corp., 359 F. Supp. 2d 1075, 1098 (D. Nev. 2004).

212. *See* Terracon Consultants W., Inc. v. Mandalay Resort Grp., 206 P.3d 81, 88 (Nev. 2009) (citing Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54 (1st Cir. 1985)).

213. 435 S.W.3d at 236.

214. *Id.*

215. *Id.*

216. *Id.* at 236–37.

contracting party for economic damages arising out of a contract and ultimately used the economic loss doctrine to bar the suit.[217] The court stated:

> We think it beyond argument that one participant on a construction project cannot recover from another . . . for economic loss caused by negligence. If the roofing subcontractor could recover from the foundation subcontractor damages for extra costs incurred or business lost due to the latter's negligent delay of construction, the risk of liability to everyone on the project would be magnified and indeterminate . . . .[218]

The court went on to quote the *Restatement (Third) of Torts: Liability for Economic Harm*'s analysis on why claims for economic damages brought by parties who are not contractually bound, but rather indirectly linked, should be precluded.[219] The *Restatement* states:

> There is no liability in tort . . . when the owner of a construction project sues a subcontractor for negligence resulting in economic loss; nor is liability found when one subcontractor is sued by another because the negligence of the first drives up the costs of the second. A subcontractor's negligence in either case is viewed just as a failure in the performance of its obligations to its contractual partner, not as the breach of a duty in tort to other subcontractors on the same job, or to the owner of the project. This way of describing the subcontractor's role is not inevitable in all cases. General rules are favored in this area of the law, however, because their clarity allows parties to do business on a surer footing. In this setting, a rule of no liability is made especially attractive by the number and intricacy of the contracts that define the responsibilities of subcontractors on many construction projects. That web of contracts would be disrupted by tort suits between subcontractors or suits brought against them by a project's owner.[220]

Courts have also noted that contracting parties are free to allocate liability within the terms of their contract to make up for what the law does not allow in tort.[221] Forbidding parties who are indirectly linked by contract

217. *Id.* at 249 (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 307–08 (1927)).

218. *Id.* at 246.

219. *Id.*

220. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 6 cmt. b. (Am. L. Inst. 2020)).

221. *Id.* at 247; Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc., 223 P.3d

from bringing tort claims "would put pressure on them to specify their rights carefully in advance, thus sparing courts the need to inquire into them later."[222] The court quoted an article analyzing the economics of construction sites written by Professor William Powers.[223] Professor Powers stated:

> In fact, construction disputes . . . are good candidates for precluding recovery under the "economic loss" rule, because the parties are in a position to protect themselves through bargaining. Though the parties do not necessarily have contracts with each other, they typically all have contracts with the owner, or subcontracts with someone who does have a contract with the owner. If contractors want to be protected, they can insist on that protection from the owner who will get protection from the architect. The contractors can take less compensation from the owner, so that the owner can in turn compensate the architect for the added risk.
>
> The issue is who will buy business protection insurance. It makes sense to let the parties bargain about this rather than impose a "legal" solution.[224]

The court did acknowledge concerns raised in the *Restatement* that the assignment of risk could jeopardize unsophisticated parties.[225] The court quoted the *Restatement*, stating:

> [T]hat incentive is most likely to be noticed by sophisticated parties negotiating large projects, and for them the rule is unlikely to be of great importance. They will negotiate allocations of risk that look similar in the end notwithstanding the rule of tort law in the background. Meanwhile, less sophisticated parties would stand a good chance of being tripped up by a broad rule, as when they fail to provide for indemnification in some direction and inadvertently leave a party who has been wronged with no remedy.[226]

664, 665–66 (Ariz. 2010); Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 447 (Md. 2017).

222. *LAN/STV*, 435 S.W.3d at 247.

223. *Id.* at 248.

224. *Id.* (quoting William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 TEX. TECH L. REV. 477, 481 (1992)).

225. *Id.* at 247.

226. *Id.* at 247–48 (citing RESTATEMENT (THIRD) OF TORTS § 3 reporter's note to cmt. f (Am. L. Inst., Tentative Draft No. 1, 2012)).

The court went on to conclude that regardless of the concern addressed in the *Restatement*, the availability of contractual remedies must bar recovery in tort generally because clarity of the rule allows parties to a construction project to do business on a surer footing.[227] The court relied on the *Restatement's* observation that when a contract could be used to allocate the risk of loss it is unlikely that a court will recognize a duty to avoid the loss in tort because courts prefer, if feasible, that economic losses be allocated by contract.[228]

The Supreme Court of Texas further quoted the economics of construction sites article written by Professor Powers in which he gives an "additional reason[] to decline imposing a general tort duty on architects and engineers."[229] The article states:

> [I]mposing the risk of economic loss on the architect requires the architect to pass the cost along to the owner. The owner will then pass the cost along to the various contractors and subcontractors. Different contractors and subcontractors have different susceptibilities to economic loss, but the owner has no way of distinguishing among the various contractors and subcontractors. Some contractors and subcontractors will benefit greatly, some will not. Yet all will pay the price for this protection, not in proportion to their benefit from the protection, but roughly in proportion to the dollar value of their services. This will lead to a cross-subsidization. Contractors and subcontractors who are not subject to losses from delays effectively "pay" for protection that they do not need. In effect, they subsidize other contractors and subcontractors who are more susceptible to this type of loss.
>
> This inequity could be remedied if the owner could determine which contractors and subcontractors benefit most and then charge them more by paying them less. But this would require the owner to be in the business of evaluating contractors' susceptibility to economic loss, which would effectively put the owner in the insurance evaluation business. Individual contractors and subcontractors are in a better position to evaluate their own susceptibility to economic loss and determine whether to buy insurance. Thus, fairness and efficiency

227. *Id.* at 248 (citing RESTATEMENT (THIRD) OF TORTS § 6 cmt. b (Am. L. Inst., Tentative Draft No. 2, 2014)).

228. *Id.* (citing RESTATEMENT (THIRD) OF TORTS § 3 cmt. f (Am. L. Inst., Tentative Draft No. 1, 2012)).

229. *Id*. at 248 (quoting Powers & Niver, *supra* note 224, at 521.

> support leaving these losses on the contractors and subcontractors, who can decide for themselves whether and for how much to insure.[230]

While the issue has not yet been addressed by the Iowa Supreme Court, the court might be persuaded by an argument that focuses on the vertical nature of the contracts present in construction-related projects.[231] The court could find fairness and efficiency issues, arising out of the cross-subsidization that would occur throughout the construction industry, as a compelling reason to bar parties to a construction project that are not contracted with the architect, but are merely indirectly linked, from bringing negligence suits against the architect for purely economic damages.[232]

B. *The Issue of Neutrality*

Another argument supporting the application of the economic loss doctrine to claims of negligence against design professionals involves the roles of the parties in a construction project and the issue of the neutrality of the architect.[233] In the article analyzing the economics of construction sites written by Professor Powers that was cited by the court in *LAN/STV*, Professor Powers stated:

> [C]ontracts between owners and supervising architects can vary. Sometimes the supervising architect might be hired for the benefit of the contractors and subcontractors. However, in most cases, the architect is hired either as a neutral arbitrator or, most often, as the agent of the owner . . . If the architect is supposed to be neutral or to operate as the agent of the owner, negligence principles—which would be decided by the jury after the fact—would create a chilling effect on the architect's neutrality or fiduciary duty to the owner.
>
> This analysis suggests that each situation is different and that courts should use contract principles[,] not tort principles, to determine whether the architect has "contractual" obligations to the contractors and subcontractors.[234]

230. *Id.* at 248–49 (quoting Powers & Niver, *supra* note 224).

231. *See* United States v. Apple, Inc., 791 F.3d 290, 313–14 (2d Cir. 2015) (quoting Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012)) (explaining that vertical agreements are those created between parties "at different levels of [a] market structure").

232. *LAN/STV*, 435 S.W.3d at 248.

233. *Id.* at 249.

234. *Id.* at 248–49 (quoting Powers & Niver, *supra* note 224).

The architect's contractual responsibilities arise out of their agreement with the owner, just as the contractor's responsibilities arise out of their contract with the owner.[235] The general role of a contractor is not to choose the architect, nor does the contractor pay or instruct them.[236] The architect's only contractual duties are to the owner.[237] Allowing parties to a construction project, to whom the architect owes no contractual duty, to bring a negligence suit against the architect for purely economic damages could put the architect in a difficult position and risks compromising the fiduciary duty they contractually owe the owner.[238] As the *LAN/STV* court noted, "the contractor's principal reliance must be on the presentation of the plans by the owner, with whom the contractor is to reach an agreement, not the architect, a contractual stranger."[239]

IV. CONCLUSION

The litigation protections afforded to design professionals by the economic loss doctrine are both strong and broad.[240] By limiting a party's right to recovery to only what was contractually agreed upon, design professionals are able to allocate risk.[241] Although some states do not apply the economic loss doctrine's protections to design professionals under certain circumstances—in cases of negligent misrepresentation or under the professional duty exception—this is the exception rather than the rule.[242]

States applying the economic loss doctrine's protections to design professionals have largely relied on the web or network of contracts that cover typical construction projects.[243] These courts reason that the parties' expectations, duties, and remedies are better left to contract than a judicially imposed tort standard.[244] In many circumstances, even if parties are not in direct contractual privity, the web of contracts theory still extends the

235. Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011) (citing Dobbs, *supra* note 60, at 723).

236. *LAN/STV*, 435 S.W.3d at 247.

237. *Id.*

238. *See id.* at 248–49.

239. *Id.* at 247.

240. *See* Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988).

241. *See* Apollo Grp., Inc. v. Avnet, Inc., 58 F.3d 477, 480–81 (9th Cir. 1995).

242. *See* discussion *supra* Section II.E.

243. *See, e.g.*, Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, 155 A.3d 445, 460 (Md. 2017).

244. *See id.*; *see also* Halcrow, Inc. v. Eighth Jud. Dist. Ct., 302 P.3d 1148, 1150 (Nev. 2013).

protections of the doctrine to design professionals because parties are often aware of the other roles different entities partake in a transaction.[245]

The web of contracts argument can also be used to overcome negligent misrepresentation claims.[246] The contracts between the parties delineate each party's risks and liabilities, which in turn provides the necessary financial pressure to incentivize parties to avoid committing negligence, rendering a judicially created tort standard unnecessary.[247]

Although the economic loss doctrine's application varies from state to state, the general principles guiding the use of the doctrine remain constant. The doctrine offers design professionals broad protections and limits the plaintiff to seeking only the remedies spelled out in the contract between the parties. Effective use of the doctrine as a defense can save a design professional from a judgment in tort for millions of dollars for purely economic losses.

245. *See generally* Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 504 (Iowa 2011).

246. *Halcrow, Inc.*, 302 P.3d at 1150.

247. *Id.* at 1153.