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14 Economic Loss — The Line Between Contract and Tort

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I. [14.1] INTRODUCTION

Over the past few decades, Illinois courts have developed an analysis in certain loss cases that has become known as the economic-loss (or *Moorman*) doctrine. The term "economic loss" is unfortunately somewhat of a misnomer, and the result has been much confusion. The economic-loss doctrine was originally tied to the origin of the loss rather than the type of the loss (*e.g.*, repair costs, lost profits, etc.). However, the doctrine has recently been employed more broadly in lost profit cases in which there is a threat of unlimited or speculative damages.

The economic-loss doctrine is a bar to recovering in tort what are only contract losses. The economic-loss doctrine, in short, is a judicial roadblock to making a tort case out of a contract case. For example, the doctrine is relevant in determining whether a plaintiff can recover against a defendant builder in negligence for the defendant builder's failure to use workmanlike standards in laying a concrete driveway. The economic-loss doctrine would prohibit recovery in tort under such circumstances, limiting the plaintiff's case to a contract suit on the implied agreement to use workmanlike standards.

Traditionally, and in theory, the line between contract law and tort law is distinct. Contract law applies to those obligations that are voluntarily undertaken between parties and is grounded in the contracting parties' mutual expectations. Tort law, on the other hand, imposes a social responsibility regardless of undertaking. It imparts by law a required standard of conduct for the protection of others against unreasonable risk. A failure to conform to the prescribed standard and a resulting injury engender liability with or without contract. Whether a tort duty should be imposed is determined by reference to foreseeability, the likelihood of injury, the nature of the risk, the magnitude of the burden of guarding against injury, and the consequences of placing that burden on the defendant. Timothy L. Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine,* 17 J. Marshall L.Rev. 249, 250 (1984).

Prior to 1977, Illinois courts took an increasingly liberal view in allowing breaches of contract duty to be pleaded as tort cases. *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill.App.3d 194, 364 N.E.2d 100, 7 Ill.Dec. 113 (2d Dist. 1977), and ultimately *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), reversed that trend.

Several subsequent cases have extended *Moorman* to bar recovery of economic losses in tort even outside contractual settings. Unfortunately, *Moorman* and its progeny have yet failed to develop a cohesive body of law defining the bounds of the economic-loss doctrine.

II. [14.2] THE IMPORTANCE OF THE ECONOMIC-LOSS DOCTRINE

The significance of the economic-loss doctrine is several-fold. Although tort and contract cases differ in many ways, the following examples illustrate the impact of the economic-loss doctrine on case analysis.

The statute of limitations varies in tort and contract cases. Suits barred by a limitations period under contract may not be barred by a more generous tort limitations period, especially if the

discovery rule is applied. For example, the Uniform Commercial Code, 810 ILCS 5/1-101, *et seq.,* bars contract suits in respect to a sale of goods if the suit is commenced more than four years from tender, whereas the tort statute of limitations for general property-damage cases is five years. 810 ILCS 5/2-725; 735 ILCS5/13-205. A suit filed four and one-half years after the tender is thus barred in contract but not in tort.

Under contract law, the statute of limitations may be held to commence upon the tender of performance. Under tort, however, the limitations period is generally held to begin running on the occurrence of damage or on the discovery of the cause.

Standards of causation differ in tort and contract. Different defenses present themselves in contract and tort cases. Comparative negligence is a defense in tort but not in contract. Contribution is a tort concept, not a contract concept. Contractual disclaimers may not be binding in tort, but they are in contract. Fault is relevant to many torts (excluding, for example, products-liability actions) but is seldom relevant to contract actions.

The standard of compensation in contract and tort cases is not precisely the same. Moreover, contract law allows damages to be agreed on by stipulation at the time of contract (*i.e.,* liquidated damages). Tort does not recognize such a concept. Punitive damages can be obtained in tort actions for willful conduct but not in contract actions in which one can willfully breach a contract (although contract damages must be paid).

III. [14.3] DEFINING ECONOMIC LOSS

There are many formulations for defining "economic loss." Many confuse the issue by defining a type of loss rather than an origin of loss.

The classic definition of "economic loss" is "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits — without any claim of personal injury or damage to other property." Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum.L.Rev. 917, 918 (1966). This definition has proved inadequate, however, because repair costs, replacement costs, and lost profits can be recovered in tort. The definition is correct, yet incomplete, in referring to "damages for inadequate value."

A second definition of "economic loss" is "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." Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages — Tort or Contract?,* 114 U.Pa.L.Rev. 539, 541 (1966). This definition is closer to being accurate, although it is somewhat too narrow.

"Economic loss" is well defined as damages that stem from a defect of a qualitative nature with resulting harm that relates solely to a consumer's expectation that the product, improvement, or service is of a particular quality. The touchstone of economic loss is a qualitative defect that defeats consumer expectations.

The economic-loss doctrine applies to contracts for services as well as contracts for goods. *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986). Privity is not required. The absence of a contractual remedy does not overcome the economic-loss bar to recovery in tort. In short, economic loss exists in any setting in which the plaintiff had an opportunity to assess and allocate risks in a contractual relationship.

More recent cases have extended the definition of "economic loss" to claims for lost revenues even in the absence of a contractual setting. *See, e.g., In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265, 223 Ill.Dec. 532 (1997); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 821 N.E.2d 1099, 290 Ill.Dec. 525 (2004); *In re StarLink Corn Products Liability Litigation*, 212 F.Supp.2d 828, 839 – 843 (N.D.Ill. 2002). This is not the typical disappointed commercial expectation situation, because the loss is not from an inferior bargained-for product or service, although it is nominally an economic loss arising from a disappointed commercial expectation — *i.e.*, the plaintiff's loss of expected profits. The underlying basis of this branch of the economic-loss doctrine was originally the threat of unlimited or speculative damages potentially available in tort. Accordingly, this more recent extension of the economic-loss doctrine has both linguistic and theoretical ties to the more traditional view of economic loss.

IV. CASES PRIOR TO *MOORMAN*

A. [14.4] *Santor* and *Seely*

Two prominent early cases illustrating the opposing views on the recoverability of economic loss are *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), and *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965). In *Santor*, the plaintiff purchased from a retailer carpeting that had been manufactured by the defendant. After a short period of use, lines began to appear on the surface of the carpeting and the plaintiff sought relief for the value of the carpeting (*i.e.*, economic loss). Although the case was brought on a breach of warranty claim, the Supreme Court of New Jersey commented in passing that strict liability in tort would also be available as a theory of recovery for the plaintiff. The court opined that the responsibility of the manufacturer should be no different whether damage occurred solely to the article sold or to other property as well.

In *Seely*, the Supreme Court of California held that economic loss would not be recoverable under strict liability in tort. The plaintiff purchased a truck manufactured by the defendant, and several months later the truck overturned after brake failure, causing damage to the truck and loss of profits. While the court affirmed a judgment in favor of the plaintiff on the basis of an express warranty, the court held that relief under a tort theory was unavailable. The court expressly limited the application of tort to cases of personal injury or damage to other products. Specifically commenting on *Santor*, the court stated that only "if someone had been injured because the rug was unsafe for use would there have been any basis for imposing strict liability in tort." 403 P.2d at 151.

Following *Santor* and *Seely*, the issue of recovery for economic loss in tort cases has been addressed throughout the United States. While most courts deny recovery for economic loss, the application of the doctrine varies from state to state.

B. [14.5] Illinois Cases Prior to 1977

Illinois cases prior to 1977 reveal varied approaches to allowing a tort recovery for damages arising from a negligent contractual breach, although the term "economic loss" was not specifically utilized.

In *Grandt v. Chicago, Burlington & Quincy R.R.*, 195 Ill.App. 187 (1st Dist. 1915), the court observed that an action in tort would lie for the breach of a duty imposed by law, independently of contract. This intimated that a breach of contract alone would be insufficient to support tort liability. Likewise, in *Masters v. Central Illinois Electric & Gas Co.*, 7 Ill.App.2d 348, 129 N.E.2d 586, 597 (2d Dist. 1955), the court stated that "the mere breach of an executory contract where there is no general duty is not the basis of [a tort] action."

The court in *Hassell v. Sterling Federal Savings & Loan Ass'n*, 132 Ill.App.2d 1005, 271 N.E.2d 7 (3d Dist. 1971), suggested a more lenient rule. *Hassell* involved a suit brought for recovery of damages suffered from the defendant's failure to renew a fire insurance policy. The court stated: "Any negligence, *i.e.*, a potential breach of duty, must arise out of a positive duty which the law imposes because of the existence of the contractual relationship as mortgagor and mortgagee, or because of the negligent manner in which some act the contract provides for is done." 271 N.E.2d at 9.

Another significant case is *Normoyle-Berg & Associates, Inc. v. Village of Deer Creek*, 39 Ill.App.3d 744, 350 N.E.2d 559 (3d Dist. 1976), in which the noncontractual relationship of a supervising engineer to a general contractor was held to give rise to a duty of reasonable care. The damages suffered were additional construction expenses (*i.e.*, economic loss), and the plaintiff claimed they resulted from the negligent performance of the defendant's supervising contract. See also the pre-*Moorman* cases listed in *Palatine National Bank v. Charles W. Greengard Associates, Inc.*, 119 Ill.App.3d 376, 456 N.E.2d 635, 638, 74 Ill.Dec. 914 (2d Dist. 1983).

These cases are only symptomatic of the past confusion occurring in Illinois courts in respect to the recoverability of tort damages in the context of a negligent contractual performance.

C. [14.6] *Koplin* and Subsequent Cases

In 1977, the Second District decided *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill.App.3d 194, 364 N.E.2d 100, 7 Ill.Dec. 113 (2d Dist. 1977). This was the first case in Illinois to consider economic loss under that rubric. Two prior cases (*Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc.*, 68 Ill.App.2d 297, 216 N.E.2d 282 (1st Dist. 1965); *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill.App.2d 362, 219 N.E.2d 726 (1st Dist. 1966)) were essentially economic-loss cases, but those courts did not use the terminology of "economic loss."

In *Koplin*, the plaintiff claimed that it suffered damages resulting from the breakdown and failure of two air conditioning units manufactured by the defendant. The Second District held that those damages fell within the category of economic loss. Reviewing *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), and *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965), the *Koplin* court concluded that *Seely* was the better

reasoned approach and, on that basis, denied recovery to the plaintiff. The court observed: "The province of contract law is that group of situations which involve the reasonably foreseeable commercial expectations of purchasers and sellers. This area of law is governed by statutory law (*e.g.,* the Uniform Commercial Code) and the common law of contracts." 364 N.E.2d at 107.

Koplin was followed consistently until 1980. *Album Graphics, Inc. v. Beatrice Foods Co.,* 87 Ill.App.3d 338, 408 N.E.2d 1041, 42 Ill.Dec. 332 (1st Dist. 1980) (failure of defendant's glue to hold together plaintiff's cosmetic packages); *Herlihy v. Dunbar Builders Corp.,* 92 Ill.App.3d 310, 415 N.E.2d 1224, 47 Ill.Dec. 911 (1st Dist. 1980) (plaintiff alleged defendant defectively constructed condominiums); *Heat Exchangers, Inc. v. Aaron Friedman, Inc.,* 96 Ill.App.3d 376, 421 N.E.2d 336, 51 Ill.Dec. 828 (1st Dist. 1981) (defendant alleged plaintiff negligently performed contract duties in respect to heat pumps).

Fireman's Fund American Insurance Cos. v. Burns Electronic Security Services, Inc., 93 Ill.App.3d 298, 417 N.E.2d 131, 48 Ill.Dec. 729 (1st Dist. 1980), is a particularly insightful analysis of economic loss. The defendant was contracted to provide a burglar alarm system to the plaintiff. The burglar alarm system failed, and $800,000 worth of jewelry was stolen. The plaintiff brought suit against the defendant on a number of grounds, including negligence and strict liability. It was held that suit would not lie under the tort theories. The court further stated that *Koplin* had erroneously introduced into its definition of "economic loss" a dichotomy between physical harm and economic loss. The court observed:

> **The principal concern of the buyer is, of course, whether the product will accomplish what it is designed to do. Economic loss should be contrasted with loss which the parties could not reasonably be expected to have in mind such as hazards peripheral to what the product's function is. For example, if a defect in the fire alarm sets off a fire or even causes a stench which drives customers away and consequently results in loss of profits, without any physical harm, this is a peripheral hazard producing a non-economic loss.**
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> **The definition of economic loss is inextricably linked to the reasons why that type of loss is removed from the field of tort liability. When goods are sold, their soundness is the core of the bargain. It is for the parties to decide what the consequences will be if the bargain founders. An entire body of law, contracts — of which product warranties is a part — is available to govern those areas of the relationship concerning which the bargain is silent. There is thus no need for the law of torts to define the rights of parties in privity when they have done so themselves. When a buyer loses the benefit of his bargain because the goods are defective, that is, when he suffers economic loss, he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.** 417 N.E.2d at 133 – 134.

V. [14.7] *MOORMAN MANUFACTURING CO. V. NATIONAL TANK CO.* — THE SEMINAL CASE IN ILLINOIS ON ECONOMIC LOSS

In 1980, the Fourth District broke with *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill.App.3d 194, 364 N.E.2d 100, 7 Ill.Dec. 113 (2d Dist. 1977), in *Moorman Manufacturing Co.*

v. National Tank Co., 92 Ill.App.3d 136, 414 N.E.2d 1302, 47 Ill.Dec. 186 (4th Dist. 1980). In *Moorman,* the plaintiff sought recovery for the occurrence of a large crack in a steel grain storage tank owned by the plaintiff and manufactured by the defendant. After reviewing the economic-loss debate, the Fourth District rejected *Koplin* and instead took an approach that labeled a cause of action by the foundation on which it rested rather than on the basis of the harm that was suffered. The court concluded that the manner in which the product defect happened to manifest itself should not be the decisive factor in determining whether a plaintiff had stated a cause of action. The court reasoned that in respect to negligence, only the factors of proximate cause and foreseeability should limit recovery.

The decision of the Fourth District was reversed on appeal to the Illinois Supreme Court. *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). First reviewing the strict liability count, the Supreme Court commented that the unreasonably dangerous nature of a product had particular relevance when a personal injury resulted and damage to other property occurred but little relevance to economic loss if neither personal injury nor property damage was involved. The court defined "economic loss" with reference to commercial expectations: the defect is of a qualitative nature and the harm relates to the consumer's expectation that a product is of a particular quality so that it is fit for ordinary use. The court found that the law of sales, established in the Uniform Commercial Code, provided a thorough system governing the economic relationships between buyers and sellers of goods, including those situations in which commercial expectations are frustrated. The rules of warranty prevented a manufacturer from being held liable for damages of unknown and unlimited scope, whereas if a defendant were held liable in tort for commercial loss, the defendant "would be liable for business losses of other purchasers caused by the failure of the product to meet the specific needs of their business, even though those needs were communicated only to the dealer." 435 N.E.2d at 447. Purchasers, the court found, could provide themselves ample protection by bargaining for warranties. It was therefore preferable to limit the consumer to contract law in cases involving economic loss.

The court suggested that a definite line could be drawn between contract and tort cases, a distinction drawn by the theoretical underpinnings of each. When a plaintiff's loss was merely a commercial loss of the type that the law of warranty was designed to protect, recovery would be limited to contract. The court attenuated the strength of these comments, however, by recognizing that the nature of the defect, the type of the risk, and the manner in which the damage arose were factors in determining whether a tort remedy could be appropriate. Thus, the court held that if there were a sudden or calamitous loss, such as damage to a front-end loader occurring as a result of a fire caused by a defect, a tort recovery would be appropriate. Similarly, if severe damage were caused to a trailer by a fire engendered by the ignition of polyurethane padding that came with the trailer, tort relief would be proper. Such defects posed a serious risk of harm to people and property. When a plaintiff suffered merely commercial loss of a type the law of warranty was designed to protect, however, and the harm related solely to the consumer's expectation that the product was of a particular quality, the court held that recovery would be limited to contract.

Applying this analysis to the *Moorman* facts, the Supreme Court held that relief could not be grounded in strict liability or negligence. The case presented an instance solely of disappointed commercial expectations, a loss for which contract law alone provided a framework for recovery.

A helpful summary of *Moorman* is found in the later Illinois Supreme Court case *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 347 – 349, 144 Ill.Dec. 227 (1990).

One underlying rationale of *Moorman* has been described as follows:

> [A] **manufacturer should not be held liable for downstream losses caused by a product failing to meet a subsequent purchaser's specific business expectations. . . . A manufacturer, in effect, [**otherwise**] would be exposed to potential liability of unknown and unlimited scope even though there was no damage to persons or property. [**Citation omitted.**]** *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 230 Ill.App.3d 662, 595 N.E.2d 650, 655, 172 Ill.Dec. 289 (2d Dist. 1992), citing *Moorman, supra*, 435 N.E.2d at 451 – 452.

VI. [14.8] EXTRA-CONTRACTUAL DUTIES: IS ECONOMIC LOSS EVER RECOVERABLE IN TORT, UNDER STATUTE, OR FOR BREACH OF FIDUCIARY DUTY?

Despite the Supreme Court's comment in *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), that a line of demarcation exists between contract and tort, it is clear that contract and tort may overlap. Contract losses (*i.e.*, "expectation interest" losses) as well as tort losses are recoverable when an extra-contractual duty can be found to exist. Recovery may also be had for breach of fiduciary duty (which is not a tort in Illinois) in cases of economic loss.

Four relationships have been historically recognized as giving rise to both contract and tort duties: (a) that of carrier and passenger; (b) that of innkeeper and guest; (c) that of business inviter and invitee; and (d) that of voluntary custodian and the one in custody if the circumstances deprive the latter of his or her normal opportunities for protection. *Burks v. Madyun*, 105 Ill.App.3d 917, 435 N.E.2d 185, 188, 61 Ill.Dec. 696 (1st Dist. 1982). The underlying relationship in each of these circumstances originates in contract. Each relationship, however, is also of special social significance and thereby falls within the boundaries of tort. A loss that gives rise to a tort suit thereby overlaps the expectation interest protected by contract; the result is that a tort remedy exists for economic losses.

Moorman implicitly admits the importance of conducting a tort analysis in the economic-loss context. The court emphasized the significance of examining two factors in determining whether a cause of action in tort would be appropriate: (a) the nature of the defect that caused the damage and (b) the manner in which the damage arose. 435 N.E.2d at 449. These factors constitute a part of a traditional tort analysis. The *Moorman* court evaluated the facts presented against these factors. Thus, although some of the court's comments are to the contrary, *Moorman* can be viewed as a case that involved an implicit tort analysis of a particular loss and in which it was determined that there was no tort duty arising on its facts.

It is particularly significant that the *Moorman* court specifically identified two prior cases of economic loss in which recovery was permitted in tort and affirmed the propriety of those

decisions against the principles set forth in *Moorman*. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969) (negligent misrepresentation by surveyor); *Soules v. General Motors Corp.*, 79 Ill.2d 282, 402 N.E.2d 599, 37 Ill.Dec. 597 (1980) (intentional misrepresentation).

Note, too, the Illinois Supreme Court's later decision in *Vaughn v. General Motors Corp.*, 102 Ill.2d 431, 466 N.E.2d 195, 80 Ill.Dec. 743 (1984). There the brakes locked on a truck the plaintiff was driving, the truck overturned, and the vehicle and an attached fuel oil tank were damaged. The driver was not personally injured. Suit was brought against the dealer manufacturer in strict liability and negligence. The Supreme Court allowed recovery in tort because there was a sudden and calamitous occurrence caused by a defect in the product. Although not discussed by the court, it seems readily apparent that the plaintiff was (at least at some time) possessed with a contractual warranty case for this loss. Thus this plaintiff had available both contract and tort theories to recover the same loss, which was of course economic loss. Any doubt that *Vaughn* involved economic loss is dispelled when the facts of *Vaughn* are considered against the facts of *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965), which the court in *Moorman* clearly identified as an economic-loss case. The *Vaughn* economic loss was recoverable in tort because the incident also fell within the orbit of those factors defining tort, but note that the Supreme Court later limited *Vaughn* in *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill.2d 21, 682 N.E.2d 45, 55, 224 Ill.Dec. 484 (1997).

In fact, one can even postulate cases in which personal injury would fall within the definition of economic loss. For example, if a mumps vaccine fails to work because it is inferior in quality and the recipient contracts mumps, certainly the recipient's expectation interest has been defeated. The injuries and losses that follow are clearly derived from a defect that is "qualitative in nature." Nevertheless, *Moorman* — and cases universally — hold that personal injury is cognizable in tort.

Some cases after *Moorman* also speak of a "line of demarcation" between contract and tort. However, language in the same cases (and in others) shows that there can be an overlap between contract and tort and that "economic loss" can be recovered in tort in certain situations — to wit, when there is an extra-contractual duty.

For example, in *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 230 Ill.App.3d 662, 595 N.E.2d 650, 655 – 656, 172 Ill.Dec. 289 (2d Dist. 1992), it was observed:

> **The determination of economic loss does not, however, turn upon a mechanical application of the definition; rather, it lies in the policy differences between the law of torts and contracts. (*Moorman*, 91 Ill.2d at 96, 61 Ill.Dec. 746, 435 N.E.2d 443 (Simon, J., specially concurring).) The policy underpinning of tort law is to protect persons and property from unreasonable risks of harm, whereas harm that relates to a purchaser's disappointed expectations that a product is of a particular quality so that it is fit for ordinary use is addressed by contract principles. (*Moorman*, 91 Ill.2d at 88, 61 Ill.Dec. 746, 435 N.E.2d 443.) The key determination, therefore, is whether the type of loss suffered is best resolved by the risk/responsibility allocations of contract/warranty law, or whether the defendants owed a duty to**

> **protect persons and property from harm thus invoking the safety/insurance policies of tort law. *Anderson Electric, Inc. v. Ledbetter Erection Corp.* [**115 Ill.2d 146, 503 N.E.2d 246, 251, 104 Ill.Dec. 689 (1986)] **(Simon, J., specially concurring).**

While this passage suggests that contract and tort are competing theories, an earlier discussion in *American Xyrofin* implicitly recognizes that when there is not "solely" economic loss, a tort theory may also be appropriate. 595 N.E.2d at 655. *See also Seegers Grain Co. v. United States Steel Corp.*, 218 Ill.App.3d 357, 577 N.E.2d 1364, 1371 – 1372, 160 Ill.Dec. 793 (1st Dist. 1991).

Thus, in *Collins v. Reynard*, 154 Ill.2d 48, 607 N.E.2d 1185, 1187, 180 Ill.Dec. 672 (1992), the Illinois Supreme Court recognized that "[i]n the field of contract, however, some breaches have crossed the line and become cognizable in tort." The opinion cites numerous cases representing the contract-tort overlap.

Further, in *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill.2d 137, 636 N.E.2d 503, 514, 201 Ill.Dec. 71 (1994), it was observed that in the service industry, "[w]here a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty." *See also Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989) (which seems to implicitly employ independent tort analysis); *Jones v. Rallos*, 373 Ill.App.3d 439, 869 N.E.2d 124, 138, 311 Ill.Dec. 450 (1st Dist. 2006); *Essex Insurance Co. v. Lutz*, 06-CV-0114-DRH, 2007 WL 844914 (S.D.Ill. Mar. 20, 2007).

In *Kanter v. Deitelbaum*, 271 Ill.App.3d 750, 648 N.E.2d 1137, 1139 – 1140, 208 Ill.Dec. 215 (1st Dist. 1995), it was recognized that the *Moorman* doctrine did not bar a fiduciary duty claim against an insurance broker who failed to procure health insurance coverage as agreed. The court reasoned that the broker's fiduciary duty arose outside the contract. *See Monarch Gems v. Malca-Amit USA, L.L.C.*, 04 C 7664, 2007 WL 2892636 (N.D.Ill. Sept. 27, 2007); *Beesen-Dwars v. Duane Morris LLP*, No. 06 C 5593, 2007 WL 2128348 (N.D.Ill. July 24, 2007); *In re Edgewater Medical Center (Edgewater Medical Center v. Rogan)*, 344 B.R. 864, 868 – 871 (Bankr. N.D.Ill. 2006). *See also Lake County Grading Company of Libertyville, Inc. v. Great Lakes Agency, Inc.*, 226 Ill.App.3d 697, 589 N.E.2d 1128, 168 Ill.Dec. 728 (2d Dist. 1992) (insurance broker has fiduciary duty); *Dahm v. First American Title Insurance Co.*, No. 06 C 5031, 2008 WL 1701901 (N.D.Ill. Apr. 9, 2008) (negligent procurement claim against mortgage broker barred because no extra-contractual duty exists).

See §14.22 below regarding the economic-loss doctrine and extra-contractual duties created by statute. *See also Bourgonje v. Machev*, 362 Ill.App.3d 984, 841 N.E.2d 96, 100 – 101, 298 Ill.Dec. 953 (1st Dist. 2005), regarding the distinction drawn on finding tort duties independent of contractual relations in cases involving misfeasance and nonfeasance.

See also Wausau Underwriters Insurance Co. v. Pronto Staffing Services, Inc., No. 11-C-928, 2011 WL 6016284 (N.D.Ill. Dec. 2, 2011) (good faith and fair dealing was implied term of insurance contract and therefore claim was not based on extra-contractual duty); *LaSalle Bank Nat'l Assoc v. Paramont Properties*, 588 F.Supp.2d 840 (N.D.Ill. 2008) (there was no duty of care owed by lenders to borrowers and therefore no extra-contractual duty existed); *Catalan v.*

GMAC Mortgage Corp., 629 F.3d 676 (7th Cir. 2011) (contract alone could not give rise to extra-contractual duty without some showing of fiduciary relationship between parties); *Trustmark Insurance Co. v. Harrington Benefit Services, Inc.*, No. 09 C 6825, 2010 WL 2432077 (N.D.Ill. June 15, 2010) (extra-contractual duty existed because fiduciary duty arose in insurance relationship).

In sum, Illinois cases accept that an extra-contractual duty may exist in a contractual setting. In such cases, the economic-loss doctrine is not a bar to the recovery of economic losses arising from the breach of the extra-contractual duty.

VII. THE STRUGGLE TO APPLY *MOORMAN*

A. [14.9] In General

Moorman Manufacturing Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), clearly a landmark case, has been applied in a wide variety of circumstances. Courts have read the opinion to suggest a number of tests for ferreting out the existence of economic loss and determining when a tort recovery is appropriate. Slavishly formalistic and artistically interpretive approaches have sometimes been utilized. The result, not surprisingly, is agreement on some points and continuing disagreement on others, without any single approach applicable to all cases. Numerous cases now recite that three exceptions exist to the *Moorman* doctrine: when there is (1) a sudden, calamitous, or dangerous occurrence coupled with physical harm to person or other property; (2) intentional misrepresentation; or (3) negligent misrepresentation by a defendant who is in the business of supplying information for the guidance of others in their business transactions. However, application of *Moorman* is unfortunately not so straightforward. Sections 14.10 – 14.23 below describe the primary areas of agreement, disagreement, and continuing development of the *Moorman* rule.

B. [14.10] Privity and Harm to "Expectation Interests" Alone

A clear mandate of *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), is to bar recovery of tort in those cases in which the parties are in privity, only an "expectation interest" is harmed, and none of those factors giving rise to tort can be said to exist. *Moorman* itself was such a case.

C. [14.11] Absence of Privity

Since economic loss is conceptually tied to contract negotiations and contract losses, it was originally thought that the economic-loss doctrine would apply only if the parties were in contract with each other. For example, a defendant builder contracts to build a house for *A*. *A* sells the home to *B* two years later. The chimney thereafter cracks away from the foundation due to poor construction techniques. *B* sues the builder, alleging negligent construction. Does the economic-loss doctrine bar the tort suit even though *B* and the builder had no contract?

The answer is affirmative, according to *Redarowicz v. Ohlendorf,* 92 Ill.2d 171, 441 N.E.2d 324, 327, 65 Ill.Dec. 411 (1982), in which the Supreme Court held that the loss was only to

commercial expectations — "the only danger to the plaintiff is that he would be forced to incur additional expenses for living conditions that were less than what was bargained for." *See also Swaw v. Ortell,* 137 Ill.App.3d 60, 484 N.E.2d 780, 92 Ill.Dec. 49 (1st Dist. 1984).

The same result was reached in *Anderson Electric, Inc. v. Ledbetter Erection Corp.,* 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986). There, Anderson sought to recover against Walther. Walther had no contractual relationship with Anderson; Walther had contracted with Ledbetter to inspect Anderson's work. Anderson's contract was with Ledbetter. Anderson alleged that Walther improperly required much of Anderson's work to be redone, causing Anderson to incur additional costs. The Supreme Court held Anderson's negligence claim to be properly dismissed under *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). Anderson's additional costs arose solely from disappointed commercial expectations in that Anderson had lost the anticipated profit of its contract with Ledbetter.

Absent a recognized exception, the economic-loss doctrine should be held applicable to the negligence of any party performing a duty in which the plaintiff directly or through others has a contractual expectation. For example, negligent performance by a subcontractor that causes loss to the owner is economic loss even though the owner and subcontractor have no contract. The work that the subcontractor is doing is derived from contractual expectations the owner has with the general contractor. In respect to the sale of products or improvements, tort suits would be barred against those in the chain of manufacture or ownership or those with whom such persons or entities contracted, absent a recognized exception to the economic-loss rule (*e.g.,* damage to other property). Timothy L. Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine,* 17 J. Marshall L.Rev. 249, 273 (1984).

D. [14.12] Tortious Interference and Recovery of Lost Contractual Expectations

There are indeed cases holding that when the sole and exclusive loss of the plaintiff is to contractual expectations, *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), does not necessarily bar suit in tort. In *Santucci Construction Co. v. Baxter & Woodman, Inc.,* 151 Ill.App.3d 547, 502 N.E.2d 1134, 104 Ill.Dec. 474 (2d Dist. 1986), and *Waldinger Corp. v. CRS Group Engineers, Inc.,* 775 F.2d 781 (7th Cir. 1985), the plaintiffs pled interference with contractual relations or expectations. The *Moorman* defense was presented and rejected in both cases, despite the plaintiffs' losses being solely to contractual expectations. *See also Voyles v. Sandia Mortgage Corp.,* 311 Ill.App.3d 649, 724 N.E.2d 1276, 1284, 244 Ill.Dec. 192 (2d Dist. 2000), *rev'd on other grounds,* 196 Ill.2d 288 (2001); *Werblood v. Columbia College of Chicago,* 180 Ill.App.3d 967, 536 N.E.2d 750, 754, 129 Ill.Dec. 700 (1st Dist. 1989). In such cases, the defendant is held to a duty in tort to prevent precisely the type of harm, economic or not, that occurred.

E. [14.13] No Limitation to Defective Products

The Uniform Commercial Code scheme of remedies for product sales was central to the analysis of *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982). Accordingly, it was once believed that *Moorman* was limited in its application to product sales. This notion was quickly disabused when the Supreme Court rendered

its decision in *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982). In *Johnston v. Tri-City Blacktop, Inc.*, 217 Ill.App.3d 388, 577 N.E.2d 529, 535, 160 Ill.Dec. 399 (3d Dist. 1991), the plaintiff's argument that *Moorman* was limited to defective products cases was specifically rejected. *See also Northern Illinois Gas Co. v. Vincent DiVito Construction*, 214 Ill.App.3d 203, 573 N.E.2d 243, 252 – 253, 157 Ill.Dec. 825 (2d Dist. 1991). Theoretically, the economic-loss doctrine should be held to apply to all types of transactions and conduct, subject to the exceptions noted in this chapter.

F. [14.14] Type of Loss Suffered

Despite the term "economic loss," application of the economic-loss doctrine traditionally did not turn on the type of loss sustained by the plaintiff. Loss of profits and similar injury to a plaintiff may be recoverable in tort. As stated by Justice Simon in his special concurrence in *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 250, 104 Ill.Dec. 689 (1986):

> **To conclude that an injury amounts to economic loss simply because it reduces or wipes out anticipated profits is too broad a sweep, and if applied mechanistically, such a rule could exclude from the definition of tortious conduct a wide array of negligent behavior. . . .**
>
> **Judges should "look to the policies behind the regimes of torts and contracts to see which is more appropriate" for assigning the loss in the case at hand . . . and the court should be less concerned with the metaphysical distinction between injuries to property versus profits than with the circumstances by which an interest in either has been injured. [**Citation omitted.**]** Quoting *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 455, 61 Ill.Dec. 746 (1982).

The courts in *Gaunt & Haynes, Inc. v. Moritz Corp.*, 138 Ill.App.3d 356, 485 N.E.2d 1123, 92 Ill.Dec. 880 (5th Dist. 1985), and *Goldberg v. Ruskin*, 128 Ill.App.3d 1029, 471 N.E.2d 530, 84 Ill.Dec. 1 (1st Dist. 1984), rejected formalistic definitions of "economic loss" centering on the mere existence of monetary loss.

The term "economic loss" continues to be somewhat of a misnomer. Monetary loss is not necessarily economic loss. Instead, the term "economic loss" relates to a purchaser's disappointed expectations that a product or service is of a particular quality. *American Xyrofin, Inc. v. Allis-Chalmers Corp.*, 230 Ill.App.3d 662, 595 N.E.2d 650, 655 – 656, 172 Ill.Dec. 289 (2d Dist. 1992). For this reason, at least one case has suggested the use of the term "commercial loss" as being more accurate. *Bulk Service Corp. v. Buick*, 203 Ill.App.3d 739, 561 N.E.2d 120, 121 n.1, 148 Ill.Dec. 814 (5th Dist. 1990). *See also Miller v. United States Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990).

However, recent expansion of the economic-loss rule has applied the rule to cases of lost profits even in the absence of disappointed contractual expectations in a product or service context. See §14.24 below. In these "access" cases, the type of harm — solely pecuniary harm — is critical to denying relief in tort.

Claims for personal injury, including emotional distress, are never barred by the economic-loss doctrine. *See, e.g., Martin v. Wal-Mart Stores, Inc.,* 07 C 3458, 2007 WL 3231414 (N.D.Ill. Oct. 26, 2007).

Economic-loss claims for discomfort and inconvenience associated with a breach of contract are also not recoverable in tort. *Mayer v. Chicago Mechanical Services, Inc.,* 398 Ill.App.3d 1005, 925 N.E.2d 317, 338 Ill.Dec. 820 (2d Dist. 2010). In *Mayer,* the plaintiffs alleged in negligence that a defective heating and air conditioning system furnished and installed by the defendant, Chicago Mechanical Services (CMS), caused mold growth that rendered their condominiums temporarily uninhabitable. 925 N.E.2d 317 – 318. CMS attempted to appease the plaintiffs and offered a temporary accommodation in smaller, less luxurious condominiums. Inter alia, the plaintiffs sought recovery for the discomfort and inconvenience of being required to leave their homes. The defendant contended that the "sudden and calamitous" growth of mold would be an exception to *Moorman.* 925 N.E.2d at 321. The Second District held that damages for discomfort and inconvenience were not available to the plaintiffs because their grievances were vague and subjective. The court reasoned that the plaintiffs had ignored the practical effects of being displaced from their homes and had instead focused principally on the abstract sense of satisfaction associated with one's home. 925 N.E.2d at 322 – 323. Further, the plaintiffs' theory of damages was rooted more in the sentimental attachment to their homes than in the tangible comforts and conveniences of living in those homes. Therefore, the type of harm for which the plaintiffs sought recovery was "simply too nebulous to serve as a basis for an award of damages." 925 N.E.2d at 323.

G. [14.15] Damage to Other Property

Moorman Manufacturing Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), and its progeny provide an exception to the economic-loss doctrine if damage is sustained to other property. A mere risk of injury to person or other property is not sufficient. *Board of Education of City of Chicago v. A, C & S, Inc.,* 131 Ill.2d 428, 546 N.E.2d 580, 586 – 587, 137 Ill.Dec. 635 (1989). The test distinguishing tort and contract is two-fold: (1) the nature of the defect; and (2) the manner in which the injury occurred. *Trans States Airlines v. Pratt & Whitney Canada, Inc.,* 177 Ill.2d 21, 682 N.E.2d 45, 51 – 52, 224 Ill.Dec. 484 (1997). Thus, a risk analysis in the absence of damage to other property is irrelevant.

This leads to several issues: (1) What is "other property"? (2) Should an exception be made whenever there is loss to other property? (3) Does damage to other property make all loss recoverable, including the economic loss?

It should be observed initially that the "what is other property" inquiry is potentially subject to tremendous practical abuse in respect to products and improvements. Almost every product or fixture consists of smaller parts; one could even divide basic parts into compounds and substances. Fine distinctions could thereby eviscerate the "other property" standard and the economic-loss doctrine itself.

Theoretically, too, sharp line-drawing in this area betrays reality. The economic-loss doctrine is centered on consumer expectations. When a consumer purchases a product, he or she typically

perceives the transaction as purchasing not a collection of parts but a cohesive whole. A theory of loss recovery based on consumer expectations should be in harmony with consumer perceptions.

The Illinois Supreme Court sensibly answered this question in *Trans States.* There, an engine failed after some of its interturbine duct bolts loosened and fractured in flight. Bolt fragments hit the engine's power turbine blades, damaging the blades and causing an imbalance overload of the power turbine rotor. The resulting fire damaged both the engine and the body of the aircraft. The plaintiff air carrier sued the manufacturer of the engine in tort, contract, and strict liability in federal court. The Seventh Circuit Court of Appeals certified several questions to the Illinois Supreme Court, including whether the airframe and the engine constituted a single product or two distinct products.

The Illinois Supreme Court examined various approaches to the "other property" question. The court ultimately adopted the "bargained-for" approach, which looks to the injured party's bargained-for expectation. The court found it reasonable that tort recovery would be barred "when a defective product causes the type of damage one would reasonably expect as a direct consequence of the failure of the defective product." 682 N.E.2d at 58. "Given the foreseeable consequences that a defective engine would result in damage to the airframe," the court concluded that parties could have bargained in consideration of the risks. *Id.* Thus, the engine and airframe would not be considered two separate products. *See also Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill.App.3d 346, 763 N.E.2d 428, 437 – 439, 261 Ill.Dec. 458 (4th Dist. 2002); *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174, 183 (7th Cir. 1986); *In re StarLink Corn Products Liability Litigation*, 212 F.Supp.2d 828, 840 – 841 (N.D.Ill. 2002); *Merix Pharmaceutical Corp. v. Clinical Supplies Management, Inc.*, No. 11 C 3318, 2012 WL 1577676 (N.D.Ill. May 4, 2012); *ExxonMobil Oil Corp. v. Amex Construction Co.*, No. 07 C 4278, 2008 WL 2168772 (N.D.Ill. May 23, 2008).

An earlier and consistent analysis is found in *Schuster Equipment Co. v. Design Electric Services, Inc.*, 197 Ill.App.3d 566, 554 N.E.2d 1097, 144 Ill.Dec. 58 (2d Dist. 1990). There, the defendant argued that it should not be held liable in tort when an electric service line the defendant constructed and installed provided too much voltage to the plaintiff's computer, resulting in a fire inside the computer. The defendant argued that the electric service line and the computer were part of a single electrical circuit and consequently the computer was not "other property." The court rejected the defendant's argument, holding that the computer was an appliance connected to the electrical circuit.

The bargained-for approach to the "other property" question adopted in *Trans States* is logical, consistent with *Moorman*, and subject to a straightforward factual resolution.

The Third District applied a "product bargained for" analysis in *Westerfield Insurance Co. v. Birkey's Farm Store, Inc.*, 399 Ill.App.3d 219, 924 N.E.2d 1231, 338 Ill.Dec. 705 (3d Dist. 2010). Sandrock Enterprises, an insured of Westfield, purchased a tractor from the defendant, Birkey's Farm Store, a certified dealer of Case tractors. 924 N.E.2d at 1234 – 1235. Sandrock initially considered purchasing a tractor without automatic steering, however Sandrock later elected to buy a similar model including an automatic steering system. Less than a year after the purchase, the tractor caught on fire and was extensively damaged. Sandrock submitted a claim for property

damage to Westfied. Westfield later filed a subrogation claim against Birkey's Farm Store. In an attempt to invoke the other property-damage exception to the economic-loss doctrine, the plaintiff alleged that the automatic steering system was a separate product from the tractor itself. 924 N.E.2d 1243 – 1244. The Third District Appellate Court disagreed and held the evidence was insufficient to establish that the automatic steering system was either separate or "other property" for purposes of the property-damage exception. 924 N.E.2d at 1244. The court reasoned that the tractor was placed into the stream of commerce as one integrated unit with the automatic steering system intact when it was delivered to Sandrock. The court similarly rejected the contention that damage to a fire extinguisher and other equipment was sufficient to trigger the application of the other property-damage exception. Additionally, Westfield lacked standing to assert any claims of personal injury or property damage on behalf of Sandrock employees, and Westfield's allegations of loss of employee time and productivity losses were solely economic losses to which the economic-loss doctrine clearly applied. Therefore, Westfield's claims were barred by the economic-loss doctrine. *Id.*

The court in *Allstate Insurance Co. v. Pulte Homes of St. Louis, LLC,* No. 10-cv-237, 2010 WL 4482360 (N.D.Ill. Nov. 1, 2010), similarly attempted to distinguish "other property" from actual property. The plaintiff, Allstate, insured the homeowner, Sumair, who had purchased a home from the defendant, Pulte Homes. 2010 WL 4482360 at *1. Allstate alleged that Pulte Homes failed to properly insulate or seal the plumbing in Sumair's home, which froze, burst, and flooded the house. Allstate paid for the water damage and filed a subrogation claim against Pulte Homes. Allstate argued that the exception for other property damage applied. In holding that the economic-loss rule prevented Allstate from recovering for damage to the house, the Northern District reasoned that the damages to the house did not fall within the "other property" exception because the pipes were a component part of the house. 2010 WL 4482360 at *5.

The second issue examines whether there should be an exception to the economic-loss doctrine in all cases of damage to other property. Many cases suggest such a rule. *See, e.g., Scott & Fetzer Co. v. Montgomery Ward & Co.,* 112 Ill.2d 378, 493 N.E.2d 1022, 98 Ill.Dec. 1 (1986); *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.,* 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983); *United Air Lines, Inc. v. CEI Industries of Illinois, Inc.,* 148 Ill.App.3d 332, 499 N.E.2d 558, 102 Ill.Dec. 1 (1st Dist. 1986); *American Centennial Insurance Co. v. Wells Fargo Alarm Services,* 152 Ill.App.3d 503, 504 N.E.2d 742, 105 Ill.Dec. 457 (1st Dist. 1986).

Other cases, however, suggest a refinement to the proposition, one that seems to best serve the theoretical bases of the economic-loss doctrine. Justice Simon, in his concurrence in *Moorman,* commented:

> **[I]f a product simply fails to live up to its promise, if it does not accomplish what it was supposed to the way it was supposed to, that is only an invasion of a contract-like interest: the user has lost the benefit of his bargain. If a refrigerator fails, the food inside may spoil, but there is no tort. . . . The only risk is to commercial expectations.** 435 N.E.2d at 455.

In short, these cases suggest that if the loss to other property (*i.e.,* property that is neither a "component part" nor a "product bargained for") is the direct consequence of a qualitative defect defeating consumer expectations, the suit should be barred in tort.

This position has been taken in several cases. *Washington Courte Condominium Association-Four v. Washington-Golf Corp.,* 150 Ill.App.3d 681, 501 N.E.2d 1290, 103 Ill.Dec. 752 (1st Dist. 1986); *Chicago Heights Venture v. Dynamit Nobel of America, Inc.,* 782 F.2d 723 (7th Cir. 1986). *See also Open Kitchens, Inc. v. Gullo International Development Corp.,* 126 Ill.App.3d 62, 466 N.E.2d 1313, 81 Ill.Dec. 511 (1st Dist. 1984), which may be construed as such a case. The Seventh Circuit in *Waldinger Corp. v. CRS Group Engineers, Inc.,* 775 F.2d 781, 791 (7th Cir. 1985), recognized that the term "economic loss" as utilized in *Moorman* includes both direct loss and consequential loss. *See also Fireman's Fund American Insurance Cos. v. Burns Electronic Security Services, Inc.,* 93 Ill.App.3d 298, 417 N.E.2d 131, 133, 48 Ill.Dec. 729 (1st Dist. 1980). *Cf. American Centennial Insurance, supra.*

In *American Xyrofin, Inc. v. Allis-Chalmers Corp.,* 230 Ill.App.3d 662, 595 N.E.2d 650, 654, 172 Ill.Dec. 289 (2d Dist. 1992), a compressor was alleged to have failed, with the result that a rotating impeller encased within the compressor "shot through" the casing of the compressor and damaged adjacent equipment. The plaintiffs argued that damage to other property had occurred and therefore recovery should be permitted in tort. The court rejected this argument, holding that the "mere existence of physical harm to other property should not make a claim compensable in tort where the resultant harm flows only from disappointed commercial expectations." 595 N.E.2d at 656. The court further stated:

> **Although we agree with plaintiffs' assertion that damage to other property is a significant factor in determining whether to invoke the safety policy of tort law, we are unable, based upon our reading of *Moorman* and subsequent case law, to discern a discrete exception based solely upon the existence of damage to surrounding property. Therefore, absent additional factual circumstances sufficient to implicate legitimate safety/insurance concerns, the sole existence of damage to other property, in and of itself, is insufficient to allow recovery in tort.** *Id.*

American Xyrofin also raises, but does not answer, the interesting question of whether the other property damage must have more than a "*de minimis* value" before the stage would even be set for application of the "damage to other property" exception. 595 N.E.2d at 657.

The same result seems also dictated by a literal interpretation of the Illinois Supreme Court's comments in *Trans States, supra.* The court there commented that tort recovery would be barred "when a defective product causes the type of damage one *would reasonably expect as a direct consequence* of the failure of the defective product." [Emphasis added.] 682 N.E.2d at 58. *See also Chicago Heights Venture, supra,* 782 F.2d at 729; *StarLink, supra,* 212 F.Supp.2d at 840 – 841.

But see ExxonMobil Oil Corp. v. Amex Construction Co., 702 F.Supp.2d 942 (N.D.Ill. 2010), which distinguished *Trans States,* though not with a great deal of clarity. The plaintiff, Exxon, was a petroleum refinery owner who purchased a temporary above-ground specialty pipe for the refinery's water cooling system. 702 F.Supp.2d at 951. The pipe was defective, decoupled, and required an emergency closing of the refinery. 702 F.Supp.2d at 955. Exxon subsequently filed a breach of warranty claim and negligence claim against the installer, defendant Amex. Amex argued that the pipe failure was not a sudden and dangerous occurrence and did not fall within the exception to the economic-loss rule. 702 F.Supp.2d at 968. Exxon claimed that the damage to the

heat exchangers, pump seals, and other mechanical devices went beyond the damage to the pipe itself, thus the sudden and dangerous exception applied to the economic-loss doctrine. The Northern District disagreed and held that mere damage to property is insufficient. The property must qualify as "other property" and be extrinsic from the product itself for the exception to the economic-loss doctrine to apply. The damaged property was not a component part that had been bargained for during the project, and therefore damage to the property could not have been foreseen as a direct consequence of any failure of the pipe. The court further concluded that there was a factual dispute as to whether the sudden and dangerous exception to the *Moorman* doctrine applied. 702 F.Supp.2d at 969.

In no instance is the existence of damage to other property sufficient in and of itself to avoid the economic-loss rule. The exception is "composed of a sudden, dangerous, or calamitous event *coupled with* personal injury or [other] property damage." [Emphasis added.] *In re Chicago Flood Litigation,* 176 Ill.2d 179, 680 N.E.2d 265, 275, 223 Ill.Dec. 532 (1997). *See also Trans States, supra;* §14.16 below.

The final issue concerns whether the damage to other property makes all losses, including expectation losses, recoverable in tort. *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill.App.3d 194, 364 N.E.2d 100, 7 Ill.Dec. 113 (2d Dist. 1977), suggests as much, but this seems a strange result. Why would damage to other property make a contract loss a tort loss?

The answer is clearly that it does not. A contract loss exists because an agreement, expressed or implied, was breached. If a tort loss exists, it does so because a tort duty, not a contract duty, was breached. Damage to other property is one of the factors to consider when determining whether a tort duty exists and was breached, but the existence of physical harm to other property is not in and of itself controlling. Justice Simon's *Moorman* concurrence is again instructive:

> **The appellate court opinion in this case demonstrates at length the illogical results of the no-physical-harm approach, especially if combined with the view that once there is any physical harm, all damages are recoverable, including those that would be considered economic loss when not accompanied by the physical harm. Physical harm should not guarantee recovery, and the absence of physical harm should not necessarily defeat recovery. For example, if an oven malfunctions and has to be repaired or replaced, that is clearly economic loss; if the roast inside is burned to a crisp (physical harm), should that make all the losses recoverable?** 435 N.E.2d at 455.

Pulte Homes, supra, addresses this issue head on. There a pipe burst, damaging both "component parts" (the house itself) and "other property" (personal property), *i.e.,* economic and noneconomic loss. The plaintiff asserted that once the sudden and calamitous event exception applies, that "means that a case must be removed fully from the application of the economic loss doctrine and allowed to proceed in tort as pled." 2010 WL 4482360 at *4. The court disagreed, observing that "the economic loss rule prevents Allstate from recovering for damage to the house (of which the pipes were a component part) because the damage does not fall within the 'other property' exception." 2010 WL 4482360 at *5.

In *Chicago Flood Litigation, supra,* the Illinois Supreme Court rejected the plaintiffs' claims for economic loss but allowed the claims of those plaintiffs who sought tort recovery for lost perishable inventory. 680 N.E.2d at 274 – 277. Although this precise issue was not discussed, the case illustrates that even when there is damage to other property, the economic loss does not thereby become compensable.

In *Cloverhill Pastry-Vend Corp. v. Continental Carbonics Products, Inc.*, 214 Ill.App.3d 526, 574 N.E.2d 80, 158 Ill.Dec. 286 (1st Dist. 1991), the plaintiff alleged that certain machinery purchased by the plaintiff from the defendant was causing small chips or flakes of metal to be dispersed through bakery dough. Prior to suit, the defendant reimbursed the plaintiff for the cost of the contaminated baked goods (the "other property"). The plaintiff thereafter brought suit in negligence to recover damages for loss of reputation and goodwill. The defendant filed a motion to dismiss based on *Moorman,* claiming that all of the damages sought were economic loss. Both the trial and appellate courts upheld the defendant's position. The appellate court observed that the plaintiff was not seeking to recover for injury to other property because it had already been reimbursed for such property. (Note that if damage to other property made all damages recoverable in tort, the prior reimbursement would not have barred the right to recover economic losses in tort in the subsequent suit.)

In *Test Drilling Service Co. v. Hanor Co.,* 322 F.Supp.2d 957, 962 (C.D.Ill. 2003), recovery of lost profits (*i.e.,* economic loss) was held to be barred under *Moorman* even though recovery could be had for damaged tangible property. To the same effect, although involving home deterioration and not lost profits, is *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.,* 349 Ill.App.3d 178, 810 N.E.2d 235, 247 – 250, 284 Ill.Dec. 582 (2d Dist. 2004).

Also on point are *In re Illinois Bell Switching Station Litigation,* 234 Ill.App.3d 457, 596 N.E.2d 678, 173 Ill.Dec. 54 (1st Dist. 1992), and *American Drug Stores, Inc. v. AT&T Technologies, Inc.,* 222 Ill.App.3d 153, 583 N.E.2d 694, 164 Ill.Dec. 778 (2d Dist. 1991). Both cases arose from the fire at the Illinois Bell switching station in Hinsdale in May 1988. The plaintiffs in both cases alleged loss through telephone service interruption and filed suit against the defendants on a statutory liability theory under the Public Utilities Act, 220 ILCS 5/1-101, *et seq.* The defendants in both cases raised *Moorman* as a defense. The plaintiffs argued that there had been damage to other property and, thus, *Moorman* should not apply. The appellate court in each case ruled in favor of the defendants on the basis that while other property may have been damaged, that other property did not belong to the plaintiffs.

These rulings have two implications. First, the damage to other property exception will apply only when the other property belongs to the plaintiff. Second, damage to other property does not necessarily make economic losses compensable in tort. However, it would seem that an outright rejection of recovering economic loss in this context is inappropriate. Consideration should be given to whether such losses, in addition to being expectation losses, are also losses that would be compensable under standard tort principles.

H. [14.16] Sudden and Calamitous (or Dangerous) Loss

Moorman Manufacturing Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), has been read as creating an exception to the economic-loss rule when the loss suffered by the plaintiff was "sudden and calamitous" or dangerous. This exception has been reviewed in numerous cases.

Cases recognizing a sudden calamitous or dangerous occurrence and an exception to the economic-loss rule include: *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill.2d 378, 493 N.E.2d 1022, 98 Ill.Dec. 1 (1986) (fire); *Vaughn v. General Motors Corp.*, 102 Ill.2d 431, 466 N.E.2d 195, 80 Ill.Dec. 743 (1984) (brake lock); *United Air Lines, Inc. v. CEI Industries of Illinois, Inc.*, 148 Ill.App.3d 332, 499 N.E.2d 558, 102 Ill.Dec. 1 (1st Dist. 1986) (sudden collapse of ceiling); *Bi-Petro Refining Co. v. Hartness Painting, Inc.*, 120 Ill.App.3d 556, 458 N.E.2d 209, 76 Ill.Dec. 70 (4th Dist. 1983) (violent rupture of tank while being filled); *MCI Worldcom Network Services, Inc. v. Big John's Sewer Contractors, Inc.*, 03 C 4991, 2003 WL 22532804 (N.D.Ill. Nov. 7, 2003) (excavation in violation of statute); *Electronics Group, Inc. v. Central Roofing Co.*, 164 Ill.App.3d 915, 518 N.E.2d 369, 115 Ill.Dec. 844 (1st Dist. 1987) (substantial amount of water leaking through roof during course of single day); *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill.App.3d 178, 810 N.E.2d 235, 247 – 250, 284 Ill.Dec. 582 (2d Dist. 2004) (mold and bacteria growth). Interesting and informative is *Mercury Skyline Yacht Charters v. Dave Matthews Band, Inc.*, 05 C 1698, 2005 WL 3159680 (N.D.Ill. Nov. 22, 2005) (human waste tank on motor coach emptied on grated bridge over boat). *See also ExxonMobil Oil Corp. v. Amex Construction Co.*, No. 07 C 4278, 2008 WL 2168772 (N.D.Ill. May 23, 2008) (pipe weld failure caused emergency shutdowns at refinery); *ExxonMobil Oil Corp. v. Amex Construction Co.*, 702 F.Supp.2d 942 (N.D.Ill. 2010) (factual question regarding whether decoupling of pipe was sudden and dangerous); *Allstate Insurance Co. v. Pulte Homes of St. Louis, LLC*, No. 10-cv-237, 2010 WL 4482360 (N.D.Ill. Nov. 1, 2010) (bursting of pipes was determined to be sudden and dangerous); *In Retail Fund Algonquin Commons, L.L.C. v. Abercrombie & Fitch Stores, Inc.*, No. 09-C-5824, 2010 WL 1874054 (N.D.Ill. May 10, 2010) (factual question regarding whether water intrusion was sudden and dangerous). One interesting case is *Grand Pier Center LLC v. Tronox, LLC*, No. 03 C 7767, 2008 WL 4776174 (N.D.Ill. Oct. 31, 2008), in which the court found that radioactive waste contamination presented significant health risks and therefore was sudden and dangerous.

Cases finding that the occurrence was not sudden, calamitous, or dangerous include: *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983) (deterioration due to poor construction); *Bagel v. American Honda Motor Co.*, 132 Ill.App.3d 82, 477 N.E.2d 54, 87 Ill.Dec. 453 (1st Dist. 1985) (motorcycle engine seized while idling in garage); *Wuench v. Ford Motor Co.*, 104 Ill.App.3d 317, 432 N.E.2d 969, 60 Ill.Dec. 70 (1st Dist. 1982) (axle break causing car crash); *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 782 F.2d 723 (7th Cir. 1986) (roof deterioration); *Nabisco, Inc., v. American United Logistics, Inc.*, No. 99 C 0763, 2000 WL 748131 (N.D.Ill. June 1, 2000) (vapors contaminated food in warehouse); *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691, 686 N.E.2d 704, 226 Ill.Dec. 921 (1st Dist. 1997) (soil contamination as result of petroleum leaking through ruptured underground storage tanks); *Dixie-Portland Flour Mills, Inc. v. Nation Enterprises, Inc.*, 613 F.Supp. 985 (N.D.Ill. 1985) (flour contaminated with sand); *Cloverhill Pastry-Vend Corp. v. Continental Carbonics Products, Inc.*, 214 Ill.App.3d 526, 574 N.E.2d 80,

158 Ill.Dec. 286 (1st Dist. 1991) (flakes of metal dispersed through bakery dough by machinery purchased by plaintiff); *Donovan v. County of Lake,* 2011 IL App (2d) 100390, 951 N.E.2d 1256, 351 Ill.Dec. 592 (county's failure to properly maintain water system was not actionable sudden or calamitous event; unfit drinking water manifested over five-year period); *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 404 Ill.App.3d 611, 936 N.E.2d 1093, 344 Ill.Dec. 336 (1st Dist. 2010) (leaks in residence existed before storms occurred and mold outbreak, but no injury); *Merix Pharmaceutical Corp. v. Clinical Supplies Management, Inc.*, No. 11 C 3318, 2012 WL 1577676 (N.D.Ill. May 4, 2012) (pharmaceutical property that was claimed to be damaged was same property that defendant had duty to handle or create under contract; case did not fall within sudden and dangerous occurrence exception).

The term "sudden" has been interpreted as referring to the suddenness of the incident or occurrence and not to the length of time in which the defect or cause of the occurrence develops. *United Air Lines, supra,* 499 N.E.2d at 562. *See also Muirfield Village-Vernon Hills, supra.*

More recently, the phrase "sudden and highly dangerous occurrence" has been applied to situations in which the sudden occurrence is *"highly dangerous and presents the likelihood of personal injury or injury to other property."* [Emphasis added by *Mars* court.] *Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill.App.3d 346, 763 N.E.2d 428, 435, 261 Ill.Dec. 458 (4th Dist. 2002) (suggesting thunderstorm can be such occurrence), quoting *Stepan Co. v. Winter Panel Corp.*, 948 F.Supp. 802, 807 – 808 (N.D.Ill. 1996).

One case has rejected the sudden and dangerous requirement of *Moorman*. *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989), involved a claim by school districts against suppliers of asbestos-containing materials. The Illinois Supreme Court found that to prevent recovery in tort merely because the physical harm did not occur suddenly would defeat the underlying purposes of strict products liability. 546 N.E.2d at 590. The court frankly conceded that asbestos damages did not fit easily within the framework delineating tort and contract but concluded that the critical inquiry was whether the product had an unreasonably dangerous defect and whether the defect caused the property damage alleged. *Id.*

However, the sudden and calamitous requirement gained fresh strength with the Supreme Court's subsequent decision in *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill.2d 21, 682 N.E.2d 45, 224 Ill.Dec. 484 (1997). The court concluded that *A, C & S* was not a "wholesale rejection" of the sudden and calamitous requirement for non-asbestos property cases. 682 N.E.2d at 55. Unfortunately, the opinion did not explain when that "rejection" would be operative outside an asbestos case.

Most significantly, the court in *Trans States* went on to state clearly that "*Moorman* requires a sudden and calamitous event coupled with personal injury or other property damage. Neither. . . standing alone is sufficient to bring a claim within the bounds of tort recovery." *Id.* This remains the law today, subject to the nebulous authority of *A, C & S. See also In re Chicago Flood Litigation,* 176 Ill.2d 179, 680 N.E.2d 265, 275, 223 Ill.Dec. 532 (1997); *Mars, supra,* 763 N.E.2d at 435 – 436; *Test Drilling Service Co. v. Hanor Co.*, 322 F.Supp.2d 957, 961 (C.D.Ill. 2003).

I. [14.17] Absence of Alternative Remedies

In *Ferentchak v. Village of Frankfort,* 121 Ill.App.3d 599, 459 N.E.2d 1085, 76 Ill.Dec. 950 (3d Dist. 1984), *rev'd on other grounds,* 105 Ill.2d 474 (1985), the Third District held that the absence of an alternative remedy relieves a party from the harsh consequences of the economic-loss rule — *i.e.,* if a plaintiff had no contract remedies, it would be allowed a tort remedy. Several subsequent cases followed this authority.

However, the Illinois Supreme Court has held that the economic-loss doctrine is a bar regardless of the plaintiff's inability to recover under an alternative theory. *Anderson Electric, Inc. v. Ledbetter Erection Corp.,* 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986). *See also National Production Workers Union Insurance Trust v. CIGNA Corp.,* 05 C 5415, 2006 WL 140544 (N.D.Ill. Jan. 13, 2006).

J. [14.18] Professional Services and Fiduciary Duties

One of the most interesting issues raised by *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), is the application of the economic-loss doctrine to professional service contracts.

Moorman clearly applies to regular service contracts. For example, if a cement finisher fails to create a smooth or uniform cement surface, he or she violates a contractual expectation, not a tort interest.

Professional malpractice, however, poses a more difficult issue. Professionals are typically state-certified, and violations of established standards may result in their decertification. They practice arts that by definition go beyond the common person's knowledge and understanding, and their work frequently implicates health and safety.

One line of early cases considering the special factors applied to professionals set forth above held that the economic-loss doctrine was not a bar to recovering in tort for architectural or engineering professional malpractice. *People ex rel. Skinner v. FGM, Inc.,* 166 Ill.App.3d 802, 520 N.E.2d 1024, 117 Ill.Dec. 673 (5th Dist. 1988); *Wheeling Trust & Savings Bank v. Tremco Inc.,* 153 Ill.App.3d 136, 505 N.E.2d 1045, 106 Ill.Dec. 254 (1st Dist. 1987); *Rosos Litho Supply Corp. v. Hansen,* 123 Ill.App.3d 290, 462 N.E.2d 566, 78 Ill.Dec. 447 (1st Dist. 1984). It was observed in some of these cases that to hold otherwise would overturn a substantial body of existing law.

Another line of cases held to the contrary, stating that there was nothing special in the status of an architect or engineer justifying the creation of an exception to the economic-loss rule. *Fence Rail Development Corp. v. Nelson & Associates, Ltd.,* 174 Ill.App.3d 94, 528 N.E.2d 344, 123 Ill.Dec. 799 (2d Dist. 1988); *People ex rel. Skinner v. Graham,* 170 Ill.App.3d 417, 524 N.E.2d 642, 120 Ill.Dec. 612 (4th Dist. 1988); *Oldenburg v. Hagemann,* 159 Ill.App.3d 631, 512 N.E.2d 718, 111 Ill.Dec. 329 (2d Dist. 1987); *City of East Moline v. Bracke, Hayes & Miller,* 133 Ill.App.3d 136, 478 N.E.2d 637, 88 Ill.Dec. 322 (3d Dist. 1985); *Bates & Rogers Construction Corp. v. North Shore Sanitary District,* 128 Ill.App.3d 962, 471 N.E.2d 915, 84 Ill.Dec. 149 (2d

Dist. 1984), *aff'd*, 109 Ill.2d 225 (1985); *Palatine National Bank v. Charles W. Greengard Associates, Inc.*, 119 Ill.App.3d 376, 456 N.E.2d 635, 74 Ill.Dec. 914 (2d Dist. 1983); *Kishwaukee Community Health Services Center v. Hospital Building & Equipment Co.*, 638 F.Supp. 1492 (N.D.Ill. 1986). See also Steven G.M. Stein et al., *A Blueprint for the Duties and Liabilities of Design Professionals After* Moorman, 60 Chi.-Kent L.Rev. 163 (1984); Mark C. Friedlander, *The Impact of Moorman and Its Progeny on Construction Litigation*, 77 Ill.B.J. 654 (1989).

These opinions argue that the loss suffered from such malpractice is solely an instance of disappointed expectations. *Kishwaukee* is of special interest in that it emphasizes the relationship of the service of the architect or engineer to a definite product and thus finds that the architect or engineer is more like a tank manufacturer or contractor than like a doctor or lawyer.

A third approach is derived from language contained in *Republic Steel Corp. v. Pennsylvania Engineering Corp.*, 785 F.2d 174 (7th Cir. 1986), in which a corporation that had sought goods and services brought an action against the supplier of professional engineering services and furnaces for failure of a furnace drive assembly. The plaintiff alleged breach of implied warranty, products liability, and negligence theories. The court held that the products liability and negligence claims were barred by the economic-loss rule, but it did so on the basis that the predominant character of the contract with the engineering firm was for the sale of goods, not for the rendition of services. Thus, the court looked specifically to what was rendered by the professionals and did not apply or accept a per se rule applying to professionals.

Applying each of the approaches described above creates problems in respect not only to architects and engineers but also to all professionals. Guidance is fortunately provided by several subsequent decisions.

In *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990), the Illinois Supreme Court addressed the application of the *Moorman* doctrine to architects. Siding with the second line of cases above, the court concluded that a tort action would not lie against an architect when the plaintiffs sought to recover "purely economic losses due to defeated expectations of a commercial bargain." 555 N.E.2d at 350, quoting *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 249, 104 Ill.Dec. 689 (1986). The *2314 Lincoln Park West* court conceded that an architect may supply information that will be relied on by others, but the core of that plaintiff's complaint was the design of a condominium (*i.e.*, a quality concern). Hence, the information provided by the architect was incidental to the tangible object (*i.e.*, the condominium), and the plaintiff's claim was to be resolved under contract law. 555 N.E.2d at 352 – 353. The court 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. 555 N.E.2d at 351, quoting *Rankow v. First Chicago Corp.*, 870 F.2d 356, 364 (7th Cir. 1989).

In the usual case, the information supplied by the architect is transformed into the building itself.

Subsequently, in *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill.2d 160, 679 N.E.2d 1197, 223 Ill.Dec. 424 (1997), the Supreme Court addressed the liability of an engineer in an economic-loss context. There, the engineer was to provide engineering plans for improvements that included water supply lines. The engineer supplied drawings and plans that specified where the contractor should dig a tunnel and use an auger to bore into water supply lines. The plans erroneously located the site for digging and boring at a spot approximately 73 yards south of the correct location. The contractor worked at the wrong location and damaged the shoulder of the adjoining highway, thereby requiring the contractor to repair the highway. A claim against the engineer was made by the contractor's insurer, who had become subrogated on the claim. Relying on *2314 Lincoln Park West*, the court focused on the "ultimate result of the professional's work." 679 N.E.2d at 1201. Here that end result was a tangible object — *i.e.*, the water supply system. The engineer's plans and drawings were incidental to a tangible product and thus the "accuracy of such plans [could] be memorialized in contract terms." 679 N.E.2d at 1202. Accordingly, *Moorman*'s negligent misrepresentation exception to the economic-loss doctrine did not apply to the case.

However, in *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill.App.3d 18, 719 N.E.2d 288, 241 Ill.Dec. 427 (1st Dist. 1999), the Illinois appellate court addressed the question of whether *2314 Lincoln Park West* or *Fireman's Fund Insurance* established an absolute rule that the negligent misrepresentation exception could never apply to architects and engineers. The court concluded to the contrary. "Instead, the cases indicate that the court must evaluate the particular circumstances of each case and determine whether defendant provided information for the guidance of others or whether defendant provided information that was ancillary to a tangible end product." 719 N.E.2d at 295. Considering then the specific facts of the case before it, the court distinguished between the defendant parties. Two of the defendants were retained to provide a specific end product. They were "retained to design and construct the townhomes." 719 N.E.2d at 298. Because the information supplied by these defendants during the course of the construction was incidental to the tangible object, a tort action would not lie against them. However, a third defendant was possibly hired solely as a consultant (as opposed to being intimately involved in the construction of the project), and thus the case was remanded to determine the latter defendant's actual role. *See also Martusciello v. JDS Homes, Inc.*, 361 Ill.App.3d 568, 838 N.E.2d 9, 297 Ill.Dec. 522 (1st Dist. 2005) (absence of architectural contract does not allow recovery in tort).

In sum, economic-loss cases in tort against an architect or an engineer will ultimately rise or fall based on the role that the architect or engineer takes in the project. (This may be a difficult line to draw.) *See also Brethren Home of Girard, Illinois v. OSM, Inc.*, No. 06-3161, 2006 WL 3333594 (C.D.Ill. Nov. 16, 2006).

In *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill.2d 137, 636 N.E.2d 503, 201 Ill.Dec. 71 (1994), the Supreme Court held that accountants could be held liable in tort for economic loss. The court's analysis concentrated on the professional nature of

the accountants' services, a duty that, because of its intangible nature, cannot be adequately memorialized in a contract. In *In re Nanovation Technologies, Inc.,* 364 B.R. 308 (Bankr. N.D.Ill. 2007), another case allowing tort relief for alleged accountant malpractice, the court's inquiry focused on whether the accountant would be required to utilize his knowledge, expertise, and judgment independent of contractual obligations. In yet another case, the court stressed that the elements of the accountant-client relationship cannot be readily memorialized as a contract. *Martusciello, supra. See also Tricontinental Industries, Ltd. v. PricewaterhouseCoopers, LLP,* 475 F.3d 824 (7th Cir. 2007), respecting an accountant's liability to a third party for negligence.

The question of whether the *Moorman* doctrine applies to legal malpractice was finally answered in the second opinion of the Illinois Supreme Court in *Collins v. Reynard,* 154 Ill.2d 48, 607 N.E.2d 1185, 180 Ill.Dec. 672 (1992). The second *Collins* opinion reversed the initial opinion of the Supreme Court, No. 70325, 1991 WL 220561 (Oct. 31, 1991), which had held that legal malpractice cases were barred in tort under *Moorman.* Recognizing "the long standing Illinois practice" of allowing legal malpractice cases to proceed in tort or contract, the second opinion allowed legal malpractice cases to be couched in either contract or tort. 607 N.E.2d at 1187. While not faulting the logic of its first decision and the opinions of the lower courts, the court observed that "[i]f something has been handled in a certain way for a long period of time and if people are familiar with the practice and accustomed to its use, it is reasonable to continue with that practice until and unless good cause is shown to change the rule." 607 N.E.2d at 1186. *See also York Center Fire Protection District v. Kubiesa, Spiroff, Gosselar & Acker, P.C.,* 375 Ill.App.3d 352, 872 N.E.2d 1077, 1079 – 1080, 313 Ill.Dec. 688 (2d Dist. 2007).

The *Collins* court overruled several prior decisions holding that legal malpractice cases in tort were barred by *Moorman* (some of which had followed the Supreme Court decision in the original *Collins* opinion). Other prior appellate decisions had refused to apply *Moorman* to legal malpractice.

Neumann v. Carlson Environmental, Inc., 429 F.Supp.2d 946, 951 – 953 (N.D.Ill. 2006), contains a helpful list of cases involving service providers and identifying when the economic loss is generally a bar to malpractice actions (engineers, architects, and insurance agents) and when it is typically not a bar (attorneys, accountants, and insurance brokers). *See LeDonne v. Axa Equitable Life Insurance Co.,* 411 F.Supp.2d 957, 963 (N.D.Ill. 2006); *Durham v. Loan Store, Inc.,* No. 04 C 6627, 2006 WL 3422183 (N.D.Ill. Nov. 27, 2006) (mortgage contracts also fall outside *Moorman* doctrine). The key distinguishing factor appears to be whether the service looks ultimately to the production of an analysis or to a tangible result.

Veterinary malpractice claims are not barred by *Moorman. Loman v. Freeman,* 375 Ill.App.3d 445, 874 N.E.2d 542, 314 Ill.Dec. 446 (4th Dist. 2006), but see the Illinois Supreme Court opinion affirming on other grounds at 229 Ill.2d 104, 890 N.E.2d 446, 321 Ill.Dec. 724 (2008), and the discussion in the dissent.

Whether an insurance relationship gives rise to an independent fiduciary duty was discussed in *Wausau Underwriters Insurance Co. v. Pronto Staffing Services, Inc.,* No. 11-C-928, 2011 WL 6016284 (N.D.Ill. Dec. 2, 2011). The defendant, Pronto Staffing, purchased workers' compensation insurance policies from the plaintiff, Wausau Underwriters Insurance Company. 2011 WL 6016284 at *1. The policies allowed Wausau to retrospectively adjust the premiums

based on Pronto's claim activity. Wausau subsequently raised the premiums for three policies. Pronto refused to pay the premiums and claimed that Wausau failed to properly investigate and adjust the claims, which had caused the premiums to unfairly increase. Wausau filed a claim for breach of contract, and Pronto subsequently filed counterclaims alleging that Wausau breached the insurance contracts and breached a fiduciary duty by mishandling Pronto's claims. *Id.* Pronto argued in its fiduciary counterclaim that the tort committed (breach of good faith and fair dealing) was based on an extra-contractual duty. Wausau moved to dismiss based on *Moorman.* The Northern District held that the alleged breach of good faith and fair dealing was not based on an extra-contractual duty because it is an implied term of every insurance contract. 2011 WL 6016284 at *4. The court further noted that a term that is part of the contract by implication, even if the parties did not explicitly include it, is not extra-contractual because it is part of the contract. Therefore, the economic-loss doctrine barred Pronto's negligence claim. *Id.*

In *Trustmark Insurance Co. v. Harrington Benefit Services, Inc.*, No. 09 C 6825, 2010 WL 2432077 at *1 (N.D.Ill. June 15, 2010), Harrington sold and administered Trustmark's Insurance products to groups of insureds. Trustmark relied on Harrington to provide it with accurate data regarding the rate of insurance claims that Harrington paid so that Trustmark could compute appropriate premium rates. After Harrington was acquired by United Insurance, Harrington allegedly ceased to process claims on a consistent basis, which led to a backlog of unprocessed claims and rendered Trustmark unable to set the proper premium rates. Trustmark filed various claims, including a breach of fiduciary duty claim, for recovery of economic loss and contended that an extra-contractual duty existed between the parties. Harrington filed a motion to dismiss and argued Trustmark's allegations did not support the existence of a fiduciary relationship. 2010 WL 2432077 at *2. The Northern District recognized an exception to the *Moorman* doctrine when there was an extra-contractual duty, such as a fiduciary relationship. The court concluded that a claim for breach of fiduciary duty was stated and the motion to dismiss was denied. 2010 WL 2432077 at *4.

In *In re Michaels Stores Pin Pad Litigation*, 830 F.Supp.2d 518 (N.D.Ill. 2011), Michaels, a specialty arts and crafts retailer, utilized PIN pads to process customers' debit and credit card payments. Michaels was not in compliance with new security requirements established by major credit card companies to prevent "skimming" (the theft of debit and/or credit card data by unauthorized persons). As a result, skimming occurred. The plaintiffs filed a complaint for negligence and breach of implied contract against Michaels on behalf of all consumers whose financial information was stolen. Michaels filed a motion to dismiss the complaint, inter alia, asserting that the economic-loss rule barred the plaintiffs' negligence claims. The plaintiffs contended that Michaels breached a duty owed to the plaintiffs independent of any contractual obligation or warranty required by the economic-loss rule. However, the Northern District held that the exception for professional services only applies to professional malpractice claims when the ultimate result of the defendant's work is intangible. *See Fireman's Fund Insurance, supra.* Here, the plaintiffs' claims were not for professional malpractice and the transaction was for a sale of products, not intangible services. Therefore, the court dismissed the plaintiffs' negligence claims.

Banking malpractice damages may or may not be recoverable. In *Bilek v. American Home Mortgage Servicing*, No. 07 C 4147, 2010 WL 2836976 (N.D.Ill. July 15, 2010), the Bilek's took out an adjustable rate note and mortgage secured by their home with American Home Mortgage

Service (AHM), the prior defendant. The Bilek's contended that AHM had erroneously charged fees to the Bilek's and misreported their mortgage as delinquent after Bank of America purchased AHM. Bank of America filed a motion to dismiss the breach of contract and negligence claims of the Bilek's. In response, the Bilek's contended that the economic-loss rule did not bar their negligence claim because mortgage contracts carry with them an implied duty of professional competence. The Northern District held that Bank of America had a duty of care in servicing the mortgage that existed outside of the contract's obligations. The court noted that the Bilek's also sufficiently alleged their negligence claim by stating that Bank of America owed a duty to act reasonably in handling and servicing the mortgage but failed to do so. Thus, the Bilek's negligence claim was not barred by the economic-loss doctrine and Bank of America's motion to dismiss was denied. *But see LaSalle Bank Nat'l Assoc v. Paramont Properties,* 588 F.Supp.2d 840 (N.D.Ill. 2008); *Catalan v. GMAC Mortgage Corp.,* 629 F.3d 676 (7th Cir. 2011).

However, in *Catalan,* the plaintiffs, Saul Catalan and Mia Morris, purchased a home and obtained a mortgage from RBC Mortgage. 629 F.3d at 680. RBC incorrectly entered the plaintiffs' mortgage payment due date, which caused them to default on their first payment and their monthly payment increased. 629 F.3d at 681. Unaware of the increase, Catalan and Morris continued to make mortgage payments for the original amount. RBC filed for foreclosure on the home, and GMAC assumed the plaintiffs' mortgage. GMAC failed to notify the plaintiffs of the transfer, and the plaintiffs sued RBC and GMAC for negligence and breach of contract. 629 F.3d at 682. The circuit court granted summary judgment on the negligence claims. On appeal, the defendants argued that the plaintiffs were prevented from recovering on their negligence claims pursuant to the economic-loss doctrine. 629 F.3d at 692 – 693. The Seventh Circuit held that the mortgage contract itself could not give rise to an extra-contractual duty because the plaintiffs failed to show that there was a fiduciary relationship between the parties. 629 F.3d at 693. Therefore, the trial court's dismissal of their claims was affirmed. *Id.*

In *LaSalle,* the defendant borrower was sued by the lender when the borrower failed to pay. The defendant filed a counterclaim alleging an extra-contractual duty of care between lenders and borrowers, and that the lender breached the duty by violating its internal lending guidelines. Illinois courts have explicitly held that lenders have "no duty to refrain from making a loan [even] if the lender knows or should have known that the borrower cannot repay the loan." 588 F.Supp.2d at 852. Finding no support for the defendant's position in Illinois law, the counterclaim was dismissed based on *Moorman*. *Id. See also Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547 (7th Cir. 2012) (no extra-contractual duty by lender to employ qualified people and supervise them appropriately in servicing plaintiff's home loan, thus *Moorman* doctrine bars negligence claim).

It can be expected that the professional services area will continue to develop over time as the courts attempt to resolve the issues created by custom, public policy, unique factual circumstances, and the economic-loss precedent.

K. [14.19] Peripheral Hazards

Early authority existed for the proposition that any damage originating from a hazard peripheral to the product's function does not fall within the orbit of economic loss. *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 455 – 456, 61 Ill.Dec. 746

(1982); *Fireman's Fund American Insurance Cos. v. Burns Electronic Security Services, Inc.,* 93 Ill.App.3d 298, 417 N.E.2d 131, 133, 48 Ill.Dec. 729 (1st Dist. 1980). However, the "peripheral hazard" exception to the economic-loss rule was never developed and case authority essentially rejects it. *See East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 90 L.Ed.2d 865, 106 S.Ct. 2295 (1986), which rejected *Cloud v. Kit Manufacturing Co.,* 563 P.2d 248 (Alaska 1977), and *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.,* 652 F.2d 1165 (3d Cir. 1981), and which was favorably commented on by *Anderson Electric, Inc. v. Ledbetter Erection Corp.,* 115 Ill.2d 146, 503 N.E.2d 246, 250, 104 Ill.Dec. 689 (1986).

L. [14.20] Contribution and Indemnity

Third-party contribution cases are barred if the third-party defendant could not be held liable to the original plaintiff due to the economic-loss doctrine. *LaSalle National Bank v. Edward M. Cohon & Associates, Ltd.,* 177 Ill.App.3d 464, 532 N.E.2d 314, 320 – 321, 126 Ill.Dec. 629 (1st Dist. 1988); *J.M. Krejci Co. v. Saint Francis Hospital of Evanston,* 148 Ill.App.3d 396, 499 N.E.2d 622, 623 – 624, 102 Ill.Dec. 65 (1st Dist. 1986). Because no tort suit could be maintained against the third-party defendant by the original plaintiff, the third-party defendant is not a joint tortfeasor with the original defendant. *But see Cirilo's, Inc. v. Gleeson, Sklar & Sawyers,* 154 Ill.App.3d 494, 507 N.E.2d 81, 107 Ill.Dec. 417 (1st Dist. 1987).

In *Granville Beach Condominium Ass'n v. Granville Beach Condominiums, Inc.,* 227 Ill.App.3d 715, 592 N.E.2d 160, 169 Ill.Dec. 673 (1st Dist. 1992), plaintiff owners brought suit in contract and tort for economic loss against the developer and architect of certain condominiums. The plaintiffs and the architect reached a settlement. Pursuant to the settlement, a good-faith hearing was held, and the architect was discharged from all liability for contribution. On the same day, the codefendant developers obtained leave to file a third-party complaint against the architect based on contractual indemnity. The trial court subsequently dismissed the codefendant developer's third-party complaint on the grounds that it was barred by the contribution settlement.

On appeal, the appellate court reversed. Inter alia, the court found that the plaintiffs' complaint sought only economic loss, that the Joint Tortfeasor Contribution Act (Contribution Act), 740 ILCS 100/0.01, *et seq.,* established a right of contribution only between persons *"subject to liability in tort arising out of the same injury to person or property,"* and that economic loss was not injury to person or property. [Emphasis in original.] 592 N.E.2d at 164, quoting §2(a) of the Contribution Act. Thus, the Contribution Act was inapplicable and had never established a right of contribution between the architect and the developers, so the good-faith finding could not be used as a basis for discharging the architect's liability. The contractual indemnity claim could proceed.

An interesting case is *Maxfield v. Simmons,* 96 Ill.2d 81, 449 N.E.2d 110, 70 Ill.Dec. 236 (1983). Maxfield sued Simmons alleging that Simmons built a dwelling for Maxfield and constructed the roof in a "poor and shoddy manner." 449 N.E.2d at 110. Simmons filed a third-party complaint for "indemnity or contribution" against the roof truss manufacturer and supplier claiming that the trusses were defective. *Id.* The third-party defendants raised *Moorman Manufacturing Co. v. National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), but the Supreme Court ultimately upheld the third-party claims, stating:

> **The third-party complaint alleges tortious conduct on the part of DeNeal and Holt sufficient to give rise to the right to indemnification and contribution in that it was the tortious conduct that caused the roof of the house in question to "buckle, bend and dip." The implied contract of indemnity arose from the contractual relationship between the parties, but the liability, if any, imposed on Simmons will be the result not of breach of contract, but of tortious conduct. Under the circumstances we fail to perceive why the situation here should differ from that in a products liability case.** 449 N.E.2d at 112.

M. [14.21] Misrepresentation

Moorman Manufacturing Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), explicitly carved out two exceptions to the economic-loss doctrine: (1) intentional misrepresentation (*Soules v. General Motors Corp.,* 79 Ill.2d 282, 402 N.E.2d 599, 37 Ill.Dec. 597 (1980)); and (2) negligent misrepresentation (*Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969)). Intentional fraud continues to be recognized as an exception to the *Moorman* doctrine. *Faust Printing, Inc. v. MAN Capital Corp.,* No. 02 C 9345, 2006 WL 1719532 (N.D.Ill. June 16, 2006). The category of negligent misrepresentation has been the subject of substantial litigation, comment, and definition.

Rozny has been termed the seminal negligent misrepresentation case in Illinois. *Rankow v. First Chicago Corp.,* 870 F.2d 356, 367 (7th Cir. 1989). In *Rozny,* the plaintiff sought recovery in tortious misrepresentation for the preparation of an inaccurate survey by the defendant surveyor. The Supreme Court deemed the loss as occurring to "intangible economic interests" and noted that recovery for such a loss, when the loss arose from negligent performance of a private contract, was permissible when the class of potential plaintiffs was small and it was undesirable to leave the innocent party without remedy. 250 N.E.2d at 661. Several factors were deemed important to the court in its determination: (1) the "absolute guarantee for accuracy" appearing on the face of the inaccurate plat; (2) the defendant's knowledge that the plat would be relied on by third parties, including the plaintiff; (3) the fact that potential liability was restricted to a small group; (4) the absence of proof that copies of a corrected plat were delivered to anyone; (5) the undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistake; and (6) the fact that allowing recovery by a reliant user whose ultimate use was foreseeable would promote cautionary techniques by surveyors. 250 N.E.2d at 663.

Subsequent to *Rozny* but prior to *Moorman*, the First District in *Black, Jackson & Simmons Insurance Brokerage, Inc. v. International Business Machines Corp.,* 109 Ill.App.3d 132, 440 N.E.2d 282, 64 Ill.Dec. 730 (1st Dist. 1982), introduced a new requirement into negligent misrepresentation cases — *i.e.,* that the defendant must be in the business of supplying information for the guidance of others in their business transactions with third parties. The Illinois Supreme Court deleted the "with third parties" requirement in *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.,* 176 Ill.2d 160, 679 N.E.2d 1197, 1199 – 1200, 223 Ill.Dec. 424 (1997), and the resulting standard has now become widely accepted.

A case-specific inquiry is required to determine whether a particular enterprise is in the business of supplying information for the guidance of others in business transactions. *Rankow, supra; Central DuPage Health v. 3M Co.*, No. 05 C 0241, 2005 WL 2848396 (N.D.Ill. Oct. 26, 2005); *In re Ameriquest Mortgage Company Mortgage Lending Practices Litigation,* No. 05-7097, 2008 WL 630883 (N.D.Ill. Mar. 5, 2008).

Post-*Moorman* cases holding that the defendant was not in the business of supplying information for the guidance of others in their business transactions include: *Navistar International Corp. v. Hagie Manufacturing Co.,* 662 F.Supp. 1207 (N.D.Ill. 1987) (sellers of crop sprayers); *National Can Corp. v. Whittaker Corp.,* 505 F.Supp. 147 (N.D.Ill. 1981) (compound manufacturer); *Brogan v. Mitchell International, Inc.,* 181 Ill.2d 178, 692 N.E.2d 276, 229 Ill.Dec. 503 (1998) (misrepresentations made by prospective employer that caused plaintiff to change jobs and suffer consequent emotional harm); *Anderson Electric, Inc. v. Ledbetter Erection Corp.,* 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986) (precipitator manufacturer); *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.,* 218 Ill.2d 326, 843 N.E.2d 327, 300 Ill.Dec. 69 (2006) (title insurance); *Midfirst Bank v. Abney,* 365 Ill.App.3d 636, 850 N.E.2d 373, 386 – 387, 302 Ill.Dec. 936 (2d Dist. 2006) (title insurance agent); *Fox Associates, Inc. v. Robert Half International, Inc.,* 334 Ill.App.3d 90, 777 N.E.2d 603, 267 Ill.Dec. 800 (1st Dist. 2002) (temporary employment agency); *Prime Leasing, Inc. v. Kendig,* 332 Ill.App.3d 300, 773 N.E.2d 84, 265 Ill.Dec. 722 (1st Dist. 2002) (directors and officers of retail store not in business of supplying information to store's creditors); *Peter J. Hartmann Co. v. Capital Bank & Trust Co.,* 296 Ill.App.3d 593, 694 N.E.2d 1108, 230 Ill.Dec. 830 (1st Dist. 1998) (environmental waste disposal contract); *Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor,* 295 Ill.App.3d 567, 692 N.E.2d 812, 229 Ill.Dec. 823 (1st Dist. 1998) (recommendation letter); *University of Chicago Hospitals v. United Parcel Service,* 231 Ill.App.3d 602, 596 N.E.2d 688, 173 Ill.Dec. 64 (1st Dist. 1992) (defendant's employee misrepresented to plaintiff hospital amount of insurance proceeds available); *Regas v. Associated Radiologists, Ltd.,* 230 Ill.App.3d 959, 595 N.E.2d 1223, 172 Ill.Dec. 553 (1st Dist.) (plaintiff building purchaser not advised of defects by defendant seller), *appeal denied,* 146 Ill.2d 651 (1992); *Lang v. Consumers Insurance Service, Inc.,* 222 Ill.App.3d 226, 583 N.E.2d 1147, 164 Ill.Dec. 825 (2d Dist. 1991) (insurance agent misstated coverage); *Century Universal Enterprises, Inc. v. Triana Development Corp.,* 158 Ill.App.3d 182, 510 N.E.2d 1260, 110 Ill.Dec. 229 (2d Dist. 1987) (developer); *Zimmerman v. Northfield Real Estate, Inc.,* 156 Ill.App.3d 154, 510 N.E.2d 409, 109 Ill.Dec. 541 (1st Dist. 1986) (real estate seller); *Tan v. Boyke,* 156 Ill.App.3d 49, 508 N.E.2d 390, 108 Ill.Dec. 229 (2d Dist. 1987) (apartment builder and owner); *Grass v. Homann,* 130 Ill.App.3d 874, 474 N.E.2d 711, 85 Ill.Dec. 751 (4th Dist. 1984) (termite report prepared for and directed to third party), *modified by Fireman's Fund Insurance, supra,* 679 N.E.2d at 1199 – 1200; *Black, Jackson & Simmons Insurance Brokerage, supra* (computer manufacturer); *Lozosky v. State of Illinois,* 54 Ill.Ct.Cl. 470 (2001) (allegedly erroneous medical insurance coverage information supplied by defendant university). *See also Bulk Service Corp. v. Buick,* 203 Ill.App.3d 739, 561 N.E.2d 120, 148 Ill.Dec. 814 (5th Dist. 1990) (failure to procure appropriate insurance); *Oldenburg v. Hagemann,* 159 Ill.App.3d 631, 512 N.E.2d 718, 111 Ill.Dec. 329 (2d Dist. 1987) (contractor and architect who allegedly gave bad advice on ceiling tiles); *Popp v. Dyslin,* 149 Ill.App.3d 956, 500 N.E.2d 1039, 102 Ill.Dec. 938 (2d Dist. 1986) (bank's duty to third-party creditor for negligently investigating financial qualifications of borrower); *General Electric Co. v. Honeywell International, Inc.,* No. 05-3239, 2006 WL 988468

(C.D.Ill. Apr. 13, 2006) (aircraft engine manufacturer allegedly providing false information in tax exemption certificates to service subcontractor); *Trudeau v. Lanoue,* No. 04 C 7165, 2006 WL 516579 (N.D.Ill. Mar. 2, 2006) (product sales; court observes *Moorman* exception intended to refer to businesses that focus on guidance such as surveyors or real estate brokers); *Equity Builders & Contractors, Inc. v. Russell,* 406 F.Supp.2d 882, 892 (N.D.Ill. 2005) (building contractor and architect; product not "assurance that its design would be free of copyright infringement claims; its product was the design and construction of the home"); *First Magnus Financial Corp. v. Dobrowski,* 387 F.Supp.2d 786 (N.D.Ill. 2005) (title companies); *Tyler v. Gibbons,* 368 Ill.App.3d 126, 857 N.E.2d 885, 888 – 889, 306 Ill.Dec. 486 (3d Dist. 2006) (because company selling agricultural products not in business of supplying information, neither are its defendant officers and directors in regard to negligent misrepresentation claims of plaintiff shareholder).

Post-*Moorman* cases holding that the defendant was in the business of supplying information for the guidance of others in their business transactions include: *Rankow, supra* (financial information provided to stock purchasers); *Kelley v. Carbone,* 361 Ill.App.3d 477, 837 N.E.2d 438, 441 – 442, 297 Ill.Dec. 355 (2d Dist. 2005) (appraiser); *United Laboratories, Inc. v. Savaiano,* No. 06 C 1442, 2007 WL 4162808 (N.D.Ill. Nov. 19, 2007) (ESOP trustee); *Illinois Bell Telephone Co. v. Plote, Inc.,* 334 Ill.App.3d 796, 778 N.E.2d 1203, 268 Ill.Dec. 581 (1st Dist. 2002) (statutory liability under Illinois Underground Utility Facilities Damage Prevention Act); *Notaro Homes, Inc. v. Chicago Title Insurance Co.,* 309 Ill.App.3d 246, 722 N.E.2d 208, 242 Ill.Dec. 719 (2d Dist. 1999) (title insurance), *overruled by First Midwest Bank, supra; DuQuoin State Bank v. Norris City State Bank,* 230 Ill.App.3d 177, 595 N.E.2d 678, 172 Ill.Dec. 317 (5th Dist. 1992) (defendant bank supplied information on prospective debtors to plaintiff bank); *Zimmerman, supra* (real estate brokers); *Richmond v. Blair,* 142 Ill.App.3d 251, 488 N.E.2d 563, 94 Ill.Dec. 564 (1st Dist. 1985) (realtor); *Perschall v. Raney,* 137 Ill.App.3d 978, 484 N.E.2d 1286, 92 Ill.Dec. 431 (4th Dist. 1985) (termite company making report to prospective purchaser); *Lehmann v. Arnold,* 137 Ill.App.3d 412, 484 N.E.2d 473, 91 Ill.Dec. 914 (4th Dist. 1985) (developer's property plat in violation of statute); *Duhl v. Nash Realty Inc.,* 102 Ill.App.3d 483, 429 N.E.2d 1267, 57 Ill.Dec. 904 (1st Dist. 1981) (real estate brokerage); *Penrod v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 68 Ill.App.3d 75, 385 N.E.2d 376, 24 Ill.Dec. 464 (3d Dist. 1979) (stock brokers); *Central DuPage Health, supra* (computer software supplier); *Ameriquest Mortgage, supra* (credit reporting agencies); *Hotel Employees & Restaurant Employees International Union Welfare Fund. v. SAV-RX,* No. 07 C 0916, 2007 WL 1423863 (N.D.Ill. May 10, 2007) (plaintiff trust made payments for prescriptions received by members in reliance on information received from defendant pharmacy benefit plan managers); *Credit General Insurance Co. v. Midwest Indemnity Corp.,* 916 F.Supp. 766 (N.D.Ill. 1996) (cross-defendant in business of administering and adjusting claims on surety bonds); *Dahm v. First American Title Insurance Co.,* No. 06 C 5031, 2008 WL 1701901 (N.D.Ill. Apr. 9, 2008) (misrepresentation claim upheld against mortgage brokers who allegedly certified state of title and invalidity of mortgage; however, negligent procurement claims barred); *Dvore v. Casmay,* No. 06-CV-3076, 2008 WL 4427467 (N.D.Ill. Sept. 29, 2008) (personal banker who made referral); *U.S. ex rel. Pileco, Inc. v. Slurry Systems, Inc.,* No. 09 C 7459, 2010 WL 3516152 (N.D.Ill. Aug, 30, 2010) (manufacturer of engineering equipment); *Piasa Commercial Interiors, Inc. v J.P. Murray Co.,* No. 07-617-DRH, 2010 WL 1241563 (S.D.Ill. Mar. 23, 2010) (fireproofing inspector); *Budnick Converting, Inc. v. Nebula Glass International, Inc.,* No. 09-cv-646-DRH, 2012 WL 1107746 (S.D.Ill. Mar. 30, 2012) (supplier of insulated glass products); *Ace Hardware Corp. v. Landen Hardware, LLC,*

No. 10 C 2884, 2011 WL 5979451 (N.D.Ill. Nov. 28, 2011) (hardware franchisor); *Dual-Temp of Illinois, Inc. v. Hench Control Corp.,* No. 09-cv-595, 2011 WL 1642513 (N.D.Ill. May 2, 2011) (supplier of energy management control systems for industrial refrigeration).

First Midwest Bank, N.A. v. Stewart Title Guaranty Co., 355 Ill.App.3d 546, 823 N.E.2d 168, 178 – 179, 291 Ill.Dec. 158 (1st Dist. 2005), contains a listing of additional cases falling on both sides of this issue. *See also Tricontinental Industries, Ltd. v. PricewaterhouseCoopers, LLP,* 475 F.3d 824 (7th Cir. 2007), regarding an accountant's liability to third parties for negligence.

Negligent misrepresentation cases typically turn on the nature of the information at issue and its relation to the kind of business being conducted. *Prime Leasing, supra,* 773 N.E.2d at 94 – 95; *Orix Credit Alliance, Inc. v. Taylor Machine Works, Inc.,* 125 F.3d 468, 475 (7th Cir. 1997). A business that provides informational services as well as a product may be considered a business that supplies information. *Prime Leasing, supra,* 773 N.E.2d at 94. The test is whether the

> **end product of the relationship between plaintiff is a tangible object (*i.e.*, a product) which could be readily described in a contract or whether it is intangible. . . . In short, if the intended end result of the plaintiff-defendant relationship is for the defendant to create a product, a tangible thing, then the defendant will not fit into the "business of supplying information" negligent misrepresentation exception.** 773 N.E.2d at 95, quoting *Tolan & Son, Inc. v. KLLM Architects, Inc.,* 308 Ill.App.3d 18, 719 N.E.2d 288, 296, 241 Ill.Dec. 427 (1st Dist. 1999).

Many transactions involve a product, improvement, or service accompanied by an exchange of information. When the informational aspect of the transaction is incidental to and an insubstantial part of the transaction, the economic-loss doctrine is a bar to recovery in tort. *See, e.g., Knox College v. Celotex Corp.,* 117 Ill.App.3d 304, 453 N.E.2d 8, 72 Ill.Dec. 703 (3d Dist. 1983). As the informational aspect of the transaction becomes more substantial, however, courts become more likely to allow recovery in tort.

Put yet another way, "the negligent misrepresentation exception to the *Moorman* doctrine is not applicable if the information supplied is merely ancillary to the sale of a product." *First Midwest Bank, supra,* 843 N.E.2d at 335, citing *Fireman's Fund Insurance, supra,* 679 N.E.2d at 1201.

A thorough discussion is found in *Dvore, supra:*

> **In order to determine that a defendant is in the business of supplying information: (i) the defendant must supply the information in the course of his or her business, and (ii) the information must be supplied for the guidance of others in their business transactions. See [***Fireman's Fund Insurance Co. v. SEC Donohue, Inc.,* 176 Ill.2d 160, 679 N.E.2d 1197, 1199 – 1200, 223 Ill.Dec. 424 (1997)**]. And, in undertaking that analysis, the Court must focus on "the nature of the information and its relation to the particular type of business conducted." [***Orix Credit Alliance, Inc. v. Taylor Machine Works, Inc.,* 125 F.3d 468, 475 (7th Cir. 1997)**].**

Attempts to further define an enterprise "in the business of supplying information for the guidance of others in their business transactions" under Illinois law not surprisingly have lacked precision, focusing instead on broad efforts at classification, with the recognition that there will be many close, difficult determinations to be made on a case-by-case basis. The Illinois Appellate Court has observed that it may be useful to "envision a continuum [of enterprises] with pure information providers at one end and pure tangible good providers at the others." [*Tolan & Son, Inc. v. KLLM Architects, Inc.***, 308 Ill.App.3d 18, 719 N.E.2d 288, 296 – 297, 241 Ill.Dec. 427 (1st Dist. 1999)**]. At the pure information end are examples such as accountants, attorneys, insurance brokers, stockbrokers, real estate brokers, termite inspectors, and environmental assessors. . . . With pure information providers, the product is information itself. . . . "In other words, the end product is the ideas, not the documents or other objects into which the ideas are incorporated." *Id.* (citing *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill.2d 137, 163, 201 Ill.Dec. 71, 636 N.E.2d 503 (1994)). At the tangible product end of the continuum are examples such as manufacturers of computers and software, among other products, and sellers of crop sprayers. . . . With tangible product providers, "while the entity may exchange information, the information relates only to the goods or services, and thus, is "supplied incidental to the sale of the product." *Id.* (citing *Gen. Elec. Captial, Corp. v. Equifax Servs.*, 797 F.Supp. 1432, 1442 (N.D.Ill. 1992)).**

In between the pure information and the tangible product ends of the spectrum are the "difficult cases" which can go either way, such as those involving life insurance companies, banks and financial service providers, and financing inspectors. *Tolan,* **308 Ill.App.3d at 28, 241 Ill.Dec. 427, 719 N.E.2d 288 . . .). This "in between" category consists of businesses that supply tangible goods (or non-informational goods or services) as well as information. *Id.* (citing [***Rankow v. First Chicago Corp.***, 870 F.2d 356, 364 (7th Cir. 1989)**]). "The critical question for businesses in this category is whether the information is an important part of the product offered. These businesses will be deemed to be in the business of supplying information if the information furnished along with the non-informational good or services is central to the business transactions." *Id.* (quoting *Gen. Elec. Captial,* 797 F.Supp. at 1443.)** [Citations omitted.] 2008 WL 4427467 at *7.

In sum, negligent misrepresentation cases are decided on their own peculiar facts and circumstances.

The effect of the *Moorman* doctrine in negligent misrepresentation cases might be avoided when there are extra-contractual duties. In *Lake County Grading Company of Libertyville, Inc. v. Great Lakes Agency, Inc.*, 226 Ill.App.3d 697, 589 N.E.2d 1128, 168 Ill.Dec. 728 (2d Dist. 1992), the plaintiff filed suit against his insurance broker, alleging that the broker failed to perform its agreement to procure certain policies of insurance at a set premium. Count II alleged certain negligent misrepresentations. The court observed that the relationship between the insurance broker and the proposed insured was a fiduciary one. Accordingly, the broker in this instance had an extra-contractual fiduciary duty to procure insurance or to advise the proposed insured (the

plaintiff) of the unavailability of insurance. *Moorman* was consequently not a bar to recovery due to the extra-contractual fiduciary duty. See §14.8 above; *Shipman v. Case Handyman Services, L.L.C.*, 446 F.Supp.2d 812, 814 (N.D.Ill. 2006).

Intentional fraud was recognized as an exception to the *Moorman* doctrine by the Fifth District in *Olson v. Hunter's Point Homes, LLC*, 2012 IL App (5th) 100506, 964 N.E.2d 60, 357 Ill.Dec. 697. The Olsons entered into a contract to purchase property from the defendant, Hunter's Point Homes. The Olsons alleged that employees of Hunter's made representations to them that the house was located on a lot on which permanent structures could be built and that the house was built in accordance with applicable law. The plaintiffs' complaint alleged that the majority of the lot could not be used to build a structure due to an easement possessed by Illinois Power, which prohibited the erection of structures on the lot. The Fifth District recognized that economic loss is recoverable when an individual intentionally makes false representations. Hence, the court held that the counts that alleged common-law fraud against the defendants were improperly dismissed because they contained allegations of intentional misrepresentations. The economic-loss rule did not bar the purchasers' common-law fraud and Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, claims and the dismissal of the fraud counts was reversed.

Intentional fraud was also addressed in *Lorillard Tobacco Co. v. Elston Self Service Wholesale Groceries, Inc.*, No. 03 C 4753, 2009 WL 1635735 (N.D.Ill. June 9, 2009), in which the Northern District held that the economic-loss doctrine did not apply when intentional misrepresentations were alleged.

N. [14.22] Statutory Liability

A 1992 case applied *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982), in a novel fashion. *In re Illinois Bell Switching Station Litigation*, 234 Ill.App.3d 457, 596 N.E.2d 678, 173 Ill.Dec. 54 (1st Dist. 1992), related to a fire at Illinois Bell facilities in Hinsdale in May 1988. The fire resulted in a widespread disruption of telephone service for approximately one month in the western and southwestern suburbs of Chicago.

Litigation ensued between telephone consumers and Illinois Bell. The plaintiffs contended, inter alia, that Illinois Bell had violated its statutory obligations under the Public Utilities Act to provide " 'adequate,' 'reliable,' and 'efficient' service and facilities" and that, under the Act, if the utility failed to provide what was required, it was liable "for all loss, damages or injury caused thereby." 596 N.E.2d at 682 – 683, quoting 220 ILCS 5/5-201 and citing 220 ILCS 5/8-101, 5/8-401, and 5/8-501. Illinois Bell argued that the plaintiffs had suffered purely economic losses, based on expectation damages, and thus their claims were barred by the economic-loss doctrine. The court agreed.

The basis of the court's decision was that the Public Utilities Act was in derogation of common law and, under applicable precedent, tort principles limiting the plaintiffs' claims would not be abrogated unless "it plainly appear[ed] that the intent of the statute" was to abrogate those principles. 596 N.E.2d at 684, quoting *Barthel v. Illinois Central Gulf R.R.*, 74 Ill.2d 213, 384

N.E.2d 323, 327, 23 Ill.Dec. 529 (1978). While the wording of the Public Utilities Act was incompatible with *Moorman*'s common-law tort principles, which do not allow recovery for economic damages in tort actions, the statute did not plainly evidence legislative intent to abrogate the *Moorman* rule. Thus, the plaintiffs were not allowed to escape the economic-loss doctrine. 596 N.E.2d at 684. Justice Scariano wrote a stinging dissent that is well worth reading.

However, in *Illinois Bell Telephone Co. v. Plote, Inc.*, 334 Ill.App.3d 796, 778 N.E.2d 1203, 268 Ill.Dec. 581 (1st Dist. 2002), a highway construction company filed a counterclaim against a telephone company alleging several claims relating to the telephone company's alleged failure to locate conflicts between the construction company's road project and the telephone company's underground telephone facilities. Plote, the construction company, alleged that it was not barred by *Moorman* from recovering economic losses for Illinois Bell's alleged failure to properly mark the location of its underground facilities. Plote alleged that Illinois Bell had that obligation under the Illinois Underground Utility Facilities Damage Prevention Act, 220 ILCS 50/1, *et seq.* The court agreed and upheld the cause of action.

Also, in *Golf v. Henderson,* 376 Ill.App.3d 271, 876 N.E.2d 105, 112 – 113, 315 Ill.Dec. 105 (1st Dist. 2007), and *Country Mutual Insurance Co. v. Carr,* 366 Ill.App.3d 758, 852 N.E.2d 907, 915 – 916, 304 Ill.Dec. 451 (4th Dist. 2006), statutory provisions were found to create extra-contractual duties that trumped *Moorman.*

It would seem that the latter cases are properly decided pursuant to an extra-contractual duty analysis. See §14.8 above.

O. [14.23] Miscellaneous Economic-Loss Cases

A bank's failure to properly monitor a vault to prevent unauthorized persons from gaining access to an individual safe-deposit box is not actionable in tort under the economic-loss doctrine. *Jewelers Mutual Insurance Co. v. Firstar Bank Illinois,* 341 Ill.App.3d 14, 792 N.E.2d 1, 274 Ill.Dec. 906 (1st Dist. 2003).

The economic-loss rule is not avoided because the defendant acted willfully. *In re Michaels Stores Pin Pad Litigation,* 830 F.Supp.2d 518 (N.D.Ill. 2011). *See In re Illinois Bell Switching Station Litigation,* 161 Ill.2d 233, 641 N.E.2d 440, 441 – 442, 444, 204 Ill.Dec. 216 (1994).

Courts dealing with data breach cases have held that the economic-loss doctrine bars the plaintiff's tort claim because the plaintiff has not suffered personal injury or property damage. *See e.g., In re TJX Companies Retail Security Breach Litigation,* 564 F.3d 489, 498 – 499 (1st Cir. 2009). *Michaels Stores, supra,* follows suit.

Economic loss arising from spoliation of critical evidence is not barred from recovery under the economic-loss rule. *Stinnes Corp. v. Kerr-McGee Coal Corp.,* 309 Ill.App.3d 707, 722 N.E.2d 1167, 243 Ill.Dec. 98 (5th Dist. 1999).

The economic-loss rule does not bar claims based in defamation or trespass. *Voyles v. Sandia Mortgage Corp.,* 311 Ill.App.3d 649, 724 N.E.2d 1276, 1284, 244 Ill.Dec. 192 (2d Dist. 2000),

rev'd on other grounds, 196 Ill.2d 288 (2001); *Lyons v. State Farm Fire & Casualty Co.,* 349 Ill.App.3d 404, 811 N.E.2d 718, 285 Ill.Dec. 231 (5th Dist. 2004).

See also Acree v. Wal-Mart Stores, Inc., No. 06 C 6007, 2007 WL 3231428 (N.D.Ill. Oct. 29, 2007) (claim alleging negligent sale or representation in sale of CDs with explicit lyrics or images seeks recovery of economic loss since no physical injury pleaded); *TNT Logistics North America, Inc. v. Bailly Ridge TNT, LLC,* No. 05 C 7219, 2006 WL 2726224 (N.D.Ill. Sept. 21, 2006) (voluntary undertaking claim barred by economic-loss doctrine in absence of physical injuries or property damage).

A loss to reputation is an "economic loss" rather than a "personal injury." *Brawley v. U.S. Bank, N.A.,* No. 05-911-JPG, 2007 WL 315012 (S.D.Ill. Jan. 31, 2007); *Cloverhill Pastry-Vend Corp. v. Continental Carbonics Products, Inc.,* 214 Ill.App.3d 526, 574 N.E.2d 80, 82 – 83, 158 Ill.Dec. 286 (1st Dist. 1991).

All elements of a defense to the economic-loss rule need not be pleaded to avoid a motion to dismiss, at least in federal court. *Daimler Chrysler Insurance Co. v. Barrington Motor Sales RV,* No. 05 C 6306, 2006 WL 1005859 (N.D.Ill. Apr. 13, 2006); *Elovic v. Nagar Construction Co.,* No. 06 C 943, 2007 WL 1149205 (N.D.Ill. Apr. 16, 2007).

The fact that the plaintiff seeks equitable relief does not bar application of the *Moorman* rule. *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547, 568 (7th Cir. 2012).

The "voluntary undertaking" theory of liability does not apply in cases of purely economic loss absent bodily harm. *Rojas Concrete, Inc. v. Flood Testing Laboratories, Inc.,* 406 Ill.App.3d 377, 941 N.E.2d 940, 347 Ill.Dec. 71 (1st Dist. 2010). *See Fox Associates, Inc. v. Robert Half International, Inc.,* 334 Ill.App.3d 90, 777 N.E.2d 603, 610, 267 Ill.Dec. 800 (1st Dist. 2002).

VIII. [14.24] THE BROAD EXPANSION OF THE ECONOMIC-LOSS RULE BEYOND DISAPPOINTED CONTRACTUAL EXPECTATIONS

The most significant development in the economic-loss rule in the last two decades has been the expansion of the doctrine from its early nexus with disappointed contractual expectations in a contractual setting to an application in any case involving loss without harm to a plaintiff's person or other property.

One of the earliest such cases in Illinois was *Dundee Cement Co. v. Chemical Laboratories, Inc.,* 712 F.2d 1166 (7th Cir. 1983), in which the defendant's chemical spill resulted in the road accessing the plaintiff's plant being closed. The plaintiff claimed lost profits. The defendant sought to avoid liability under the economic-loss doctrine. Despite the absence of any lost "contractual expectations," the court, with little analysis of the point, denied relief to the plaintiff.

Dundee is an example of what have come to be known as "access cases" or "bridge cases." In these cases, the plaintiff seeks compensation for lost profits because the alleged tort prevented customers from reaching the plaintiff's business. Some courts refuse recovery in such cases on the basis of the economic-loss doctrine.

One court has explained:

> **Although they are nominally under the same economic loss rule, there are really some different policy issues driving the doctrine in access cases. The usual concerns about interfering with contract law and the parties' freedom to allocate risks are not present because there is no contractual relationship. The parties are typically strangers and, with no foreknowledge of each other's activities, had no opportunity to assess and allocate risk *ex ante.* What these cases share in common with traditional economic loss doctrine jurisprudence is the lack of property damage. Moreover, because the only harms alleged were profits lost due to customers' inability to access the premises, these damages fit neatly within the rubric of "disappointed commercial expectations." Courts also emphasize the speculativeness and potential magnitude of damages in access cases. Lost profits are frequently speculative because we cannot predict potential customers' behavior to a sufficient degree of certainty. And the tort's effects on plaintiffs are not qualitatively different from the effects on society at large. In theory, any bridge or road closing affects everyone to some extent by eliminating one potential travel route. Given the unbounded group of potential plaintiffs, damages would be limitless. So, although the original policy bases for the economic loss doctrine are not present, because of the type of injury, these cases seem to fit, at least linguistically, within the economic loss doctrine.** *In re StarLink Corn Products Liability Litigation,* 212 F.Supp.2d 828, 840 (N.D.Ill. 2002).

Illinois has embraced this expansion of the economic-loss doctrine. *In re Chicago Flood Litigation,* 176 Ill.2d 179, 680 N.E.2d 265, 223 Ill.Dec. 532 (1997), addressed certain claims arising from the flooding of old freight tunnels adjoining the Chicago River that were allegedly breached due to the actions of a bridge repair contractor. The class plaintiffs were "individuals and businesses that claim[ed] property damage and economic loss" due to the flood and that suffered "injury to their property; lost revenues, sales, profits, and good will; lost wages, tips, and commissions; lost inventory; and expenses incurred in obtaining alternate lodging." 680 N.E.2d at 267 – 268. The defendant was the City of Chicago.

Clearly, this was not a typical economic-loss case, as the plaintiffs had not suffered commercial losses in a contractual sense. Their losses were economic (at least in part), but they had no ex ante relationship — directly or indirectly — with the city or the bridge repair contractor or their privities. Nevertheless, the Supreme Court held that those plaintiffs that did not incur personal injury or other property damage could not recover in tort for their solely economic losses.

The court cited to the policy behind the economic-loss rule recognizing that economic losses of any single accident could be virtually limitless. If a defendant were held liable for every economic effect of its negligence, it would face virtually uninsurable risks far out of proportion to its culpability. The economic-loss rule thus avoids the consequences of open-ended tort liability. The court further noted that only three exceptions had been articulated to the economic-loss rule and none was present in the case. The court rejected the plaintiffs' argument that the court's analysis reduced the right to recovery to a matter of fortuity based on the type of damage suffered.

To the same effect is *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 821 N.E.2d 1099, 290 Ill.Dec. 525 (2004). There, the City of Chicago and Cook County brought a public nuisance case against various manufacturers, distributors, and dealers of handguns seeking compensation for the costs of medical services for gun victims, law enforcement efforts, the prosecution of violations of gun control ordinances, and other related expenses, including the expenses for providing defense counsel to those accused of gun crimes. In holding that the economic-loss doctrine barred a recovery of the losses sought, the court squarely addressed the argument that the *Moorman* rule had moved substantially beyond *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982) — *i.e.*, that the rule was being applied outside a contractual-based setting. "Although the economic loss doctrine is rooted in the theory of freedom of contract, it has grown beyond its original contract-based policy justifications of maintaining the fundamental distinction between contract and tort and protecting the freedom of parties to allocate risk by contract." 821 N.E.2d at 1142. After discussing the rationale for applying the economic-loss rule in the so-called access cases, the court observed that the "concerns regarding speculativeness and potential magnitude of damages that are present in the access cases are present here." 821 N.E.2d at 1143. The court concluded that the claimed damages were "solely economic damages" in the sense that they represented costs incurred in the absence of harm to a plaintiff's person or property and hence no recovery would be permitted. *Id.* (The opinion also addresses the issue of fortuity and rejects an exception based on foreseeability.)

Another significant case in this arena is *StarLink, supra.* In *StarLink,* corn farmers brought class actions against the creator and manufacturer/distributor of genetically modified corn. The modified corn contained a protein (Cry9C) that was toxic to insects and that made the corn unfit for human consumption. It was alleged that the Cry9C corn contaminated the entire United States corn supply, increasing costs and depressing corn prices. A variety of legal theories, including tort theories, were pleaded. Commenting on the application of the economic-loss doctrine to the facts before it, the court observed:

> **The StarLink situation does not fit neatly into traditional economic loss doctrine analysis. Plaintiffs here had no commercial dealings with defendants or defendants' customers. This is more than a lack of direct privity, and not a situation where a party could have negotiated warranty or indemnity protection and chose not to. Plaintiffs had no opportunity to negotiate contractual protection with anyone. Still, as the access cases aptly demonstrate, the economic loss doctrine has grown beyond its original freedom-of-contract based policy justifications. Farmers' expectations of what they will receive for their crops are just that, expectations. Absent a physical injury, plaintiffs cannot recover for drops in market prices. Nor can they recover for any additional costs, such as testing procedures, imposed by the marketplace. But if there was some physical harm to plaintiffs' corn crop, . . . the lack of a transaction with defendants affects what will be considered "other property." Assuming plaintiffs did not buy corn seeds with the Cyr9C protein, it cannot be said that a defective part of their crop injured the whole, that a defective product was integrated into a system or that the harm to their crop was a foreseeable consequence of the seeds' failure to perform. These facts are distinguishable from [***Hapka v. Paquin Farms***, 458 N.W.2d 683, 688 (Minn. 1990)] (holding farmer who purchased diseased seeds could not recover for harm to rest of crop). Plaintiffs' seeds, as purchased, were adequate. The StarLink contaminant was wholly external.**

> **Nor does the StarLink controversy present the unlimited or speculative damage concerns common in access cases. There are a finite number of potential plaintiffs — only non-StarLink corn farmers — who can claim injury. This may be a sizable group, and the damages may be tremendous, but the fact that defendants are alleged to have directly harmed a large number of plaintiffs is not a defense. StarLink's effects on commercial corn farmers are distinct and qualitatively different from society at large. And damages are easily measured through price changes because corn is a regularly traded commodity with a readily measurable market. Further, as discussed above, the contamination of plaintiffs' corn supply is a physical injury.**
>
> **To the extent plaintiffs allege that their crops were themselves contaminated, either by cross-pollination in the fields or by commingling later in the distribution chain, they have adequately stated a claim for harm to property. Once plaintiffs have established this harm they may be entitled to compensation for certain economic losses. *See, e.g., Schiltz v. Cullen-Schlitz & Assoc.*, 228 N.W.3d 10, 21 (Iowa 1975) (holding plaintiff who established tangible harm may also recover cleanup costs because they are an integral part of direct property damage); [***Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166, 1170 (7th Cir. 1983)**] (nothing recovery of lost profits permitted where plaintiff's property was physically injured). But we caution that proving direct harm to their own property is a predicate to any recovery. We leave for another day the question of what, if any, consequential damages they may also collect.** 212 F.Supp.2d at 842 – 843.

An older case, *Northern Illinois Gas Co. v. Vincent DiVito Construction*, 214 Ill.App.3d 203, 573 N.E.2d 243, 157 Ill.Dec. 825 (2d Dist. 1991), is also relevant to this discussion. There, recovery of delay costs — labor and equipment — was barred in absence of personal injury or property damages. Damages were not speculative or unlimited and no contractual relationship existed directly or indirectly between the parties.

Test Drilling Service Co. v. Hanor Co., 322 F.Supp.2d 957, 962 (C.D.Ill. 2003), provides perhaps the most expansive reading of the economic-loss doctrine. In *Test Drilling Service*, animal waste from the defendant's hog facilities was alleged to have leaked underground and to have caused damage to the plaintiff's oil and pumping equipment. There was no contractual link whatsoever between the plaintiff and the defendant. Damages were not speculative or unlimited. There was damage to "other property" (under the *StarLink* analysis). The court described the occurrence as "dangerous." 322 F.Supp.2d at 962. Recovery was allowed for the damaged equipment. Nevertheless, recovery of economic loss (*i.e.*, lost profits) was barred.

In sum, Illinois cases now support the principle that the economic-loss doctrine bars recovery of economic loss in tort regardless of any contractual setting or framework. Whether and how the unlimited damages concern underlying this extension of the economic-loss rule might be ameliorated by the facts of a case such that recovery would be allowed is unclear. Whether this concern would be better dealt with in the long run as a traditional causation or "remoteness" issue also remains unresolved. *See Kraft Chemical Co. v. Illinois Bell Telephone Co.*, 240 Ill.App.3d 192, 608 N.E.2d 243, 181 Ill.Dec. 170 (1st Dist. 1992). Moreover, some cases even apply the rule

to bar recovery of lost profits when there are no speculative or unlimited damages and no contractual nexus, yet "sudden" damage has occurred to other property. Clearly, once the tether to a contractual framework was cut, the question of when and where the economic-loss doctrine bars recovery became much more difficult to answer.

IX. [14.25] CONCLUSION

Development of the economic-loss doctrine has been and will continue to be gradual and difficult in Illinois. Clearly, the economic-loss doctrine does not prohibit tort recovery in an appropriate case involving economic loss. Nevertheless, defining that appropriate case involves careful navigation through a thicket of precedent, some of which is conflicting. Moreover, the expansion of the economic-loss doctrine beyond its traditional contract nexus presents a challenge in developing a cohesive and rational body of law.