A Nuanced and Inconsistent Application

The Economic-Loss Doctrine as Applied in the World of Design Professionals

By Gary Strong
and Kevin J. Riexinger

Overall, the economic-loss doctrine helps limit recovery in strict liability and negligence claims and provides predictability to contracting parties, but it limits will inevitably continue to be tested in litigation.

The economic-loss doctrine has long stood for the proposition that one cannot recover purely economic damages (*i.e.*, harm without property damage or personal injury) in tort, generally leaving the potential for recovery of economic losses available only to those in privity of contract. The reason for this is that contractual damages are more of a fixed nature while tort damages are less controllable. In the construction context—with many extracontractual parties involved in work that necessarily implicates the others—the economic-loss doctrine can present serious hurdles to a harmed party's recovery of damages actually incurred.

In the construction context, design professionals commonly contract directly with only a project owner. However, their responsibilities call for them to issue or draft reports, plans, specifications, payment applications, and change orders that are intended for and relied on by other parties to perform their own work on a project. If design deficiencies cause purely economic losses, such as delays to the construction schedule or costs to repair or replace work, the affected parties have limited recourse against the design professional under traditional applications of the economic-loss doctrine. Though seemingly straight forward, the doctrine's nuanced application is inconsistently applied by state and federal courts throughout the country. This article discusses the different approaches that courts take to applying the economic-loss doctrine to damages resulting from a design professional's services on a construction project. It also addresses

■ Gary Strong is a partner with Seiger Gfeller Laurie LLP in the firm's Princeton, New Jersey, office. Mr. Strong is a member of the firm's construction and professional practice groups. He represents owners, professionals, contractors, and subcontractors in complex construction cases. Kevin J. Riexinger is an associate with Seiger Gfeller Laurie LLP in the firm's Princeton, New Jersey, office. Mr. Riexinger is a member of the firm's construction-defect and insurance coverage practice groups. He regularly represents owners, design professionals, and contractors in construction disputes involving large property losses.

whether the economic-loss doctrine applies when parties lack privity.

Background of Economic-Loss Doctrine

New Jersey recognizes and enforces the economic-loss doctrine as a bar to tort claims when the damage alleged is purely economic, if and when the defendant owes no legal duty independent of a contract with the plaintiff. In the 2002 case of *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297 (N.J. 2002), the New Jersey Supreme Court adopted seven guidelines to assist in distinguishing between tort and contract claims:

(1) Obligations imposed by law are tort obligations;
(2) Tort obligations may not be disclaimable;
(3) Misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things;
(4) Recovery of intangible economic loss is generally determined by contract;
(5) There is no tort liability for nonfeasance, *i.e.*, for failing to do what one has promised to do in the absence of a duty to act apart from the promise made;
(6) Duties of affirmative action are often imposed by law apart from the promises made;
(7) Damages for a loss suffered by a promisee in reliance on a promisor to carry out a promise may be recoverable on a tort negligence theory.

Id. at 310.

Generally speaking, there is no universal duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things. *Id*. The *Saltiel* court noted that "recovery of intangible economic loss is generally determined by contract," and "most jurisdictions hold that a contractor's liability for economic loss is limited to the terms of the contract." *Id.* at 309–10. The court importantly went on to hold that under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law. *Id.* at 316.

In 2010, the New Jersey Supreme Court discussed the origin of the economic-loss doctrine. It stated, "The economic loss rule, which bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself, evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies." *Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 295 (N.J. 2010). The door has been conspicuously left open for tort remedies between contracting parties when a legal duty exists *independent* of the contract.

In applying the economic-loss doctrine to fraud claims, there is a conspicuous (and perhaps odd) split between New Jersey state and federal courts. While disallowing negligence and strict liability claims, New Jersey state courts have long protected fraud claims notwithstanding the economic-loss doctrine. A federal court sitting in diversity should seek to achieve the outcome that it believes the state's highest court would reach. Despite that specific and defined role, New Jersey federal courts have deviated and imposed their own "extraneous to the contract" standard when dealing with fraud claims between contracting parties. Those federal courts have sought to determine whether a fraud was committed in the performance of, or extraneous to, the contract. The former is barred by the economic-loss doctrine, and the latter is not. *See Bracco Diagnostics, Inc. v. Bergen Brunswig Drug Co.*, 226 F. Supp. 2d 557, 563 (D.N.J. 2002) (holding that the doctrine bars plaintiff's claim for common law fraud because the distinction between fraud in the inducement and fraud in the performance of a contract remains relevant to the application of the doctrine in New Jersey and also stating that no decision has formally negated the distinction between fraudulent inducement extraneous to the contract and fraud in its subsequent performance); *G & F Graphic Servs., Inc. v. Graphic Innovators, Inc.*, 18 F. Supp. 3d 583 (D.N.J. 2014) (holding that under New Jersey law, the fraud in the inducement exception to the doctrine applied to a commercial printing press buyer's common law fraud claim against seller and its president, alleging that it was sold a different model than specified in the parties' contract; the contract contained no warranty that the press was a particular model and disclaimed all other express and implied warranties so that the alleged fraud was not contained within the four corners of the contract, and the contract did not limit the remedies for an intentional tort claim); *7-Eleven, Inc. v. Maia Inv. Co.*, 2015 U.S. Dist. Lexis 50753, 2015 WL 1802512, at *5 (D.N.J. 2015) (holding that although the New Jersey Supreme Court has yet to resolve the question, courts in this district consistently distinguish between fraud in the inducement and fraud in the performance of a contract and holding that state and federal courts have repeatedly recognized that New Jersey law remains unsettled whether the doctrine bars a claim for fraud where the alleged fraud is circumscribed by a contract between the parties); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177, 134 S. Ct. 773, 187 L.Ed.2d 669 (2014) (describing the unsettled application of the doctrine to fraud claims based on the same underlying facts as a contract claim as "very complex and troublesome").

Each court in each case applied the same "extraneous to the contract" standard and still arrived at different conclusions pertaining to whether a fraud claim could stand.

The New Jersey federal courts' "extraneous to the contract" standard is taken directly from the Second Circuit's application of New York law in *Triangle Underwriters v. Honeywell, Inc.*, 604 F.2d 737, 747–48 (2d Cir. 1979). Thus, federal courts in New Jersey have consistently applied another jurisdiction's law despite no example of any New Jersey state court applying that standard. Furthermore, the standard has not resulted in easily predictable outcomes. Both *Capital-Plus Equity, LLC v. Prismatic Development Co.*, 2008 U.S. Dist. Lexis 54054, 2008 WL 2783339 (D.N.J. 2008), and *Titan Stone, Tile*

& Masonry, Inc. v. Hunt Const. Grp., Inc., 2007 U.S. Dist. Lexis 4661, 2007 WL 174710, at *2 (D.N.J. Jan. 22, 2007), considered representations made regarding payments due during the course of contract performance. Each court in each case applied the same "extraneous to the contract" standard and still arrived at different conclusions pertaining to whether a fraud claim could stand.

The Arizona Supreme Court held that in the absence of physical injury to persons or other property, an owner who contracts for design services cannot recover in tort for purely economic loss, unless the contract otherwise provides.

Economic-Loss Doctrine for Design Professionals

The 2013 unreported state court decision of *Spectraserv, Inc. v. Middlesex County Utilities Authority* provided a detailed roadmap for applying the economic-loss doctrine to design professionals. *Spectraserv, Inc. v. Middlesex County Utilities Authority*, 2013 N.J. Super. Unpub. Lexis 2173, 2013 WL 4764514 (N.J. Super. 2013). The *Spectraserv* court dismissed the plaintiff's negligence actions against the defendant design professionals, holding that such claims were barred by the economic-loss doctrine. The court provided the following detailed analysis:

> Regarding this dilemma of applying contract or tort law, New Jersey courts have consistently held that contract law is better suited to resolve disputes where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities and that could have been the subject of their negotiations. Most jurisdictions have adopted a similar view concluding that a contractor's liability for economic loss is limited to the terms of the contract.

2013 N.J. Super. Unpub. Lexis 2173at *19–20 (internal quotations and citations omitted).

Synopsis: The Economic-Loss Doctrine in Other Jurisdictions

The following offers insight into a few different jurisdictions' economic-loss doctrine jurisprudence.

Arizona

Arizona is one state that might serve as the model for economic-loss doctrine application. The Arizona Supreme Court tackled this issue as a matter of first impression in 2010, in the landmark case of *Flagstaff Affordable Housing Ltd. Partnership v. Design Alliance, Inc.*, 223 Ariz. 320 (2010). In short, the Arizona Supreme Court held that the economic-loss doctrine bars professional negligence actions against architects seeking purely economic damages. *Id.* The court expressly stated that "[t]he economic loss doctrine applies to architects because the policy concerns that justify applying the doctrine to construction defect cases do not justify distinguishing design professionals from contractors." *Id.* at 329. The *Flagstaff* matter involved an owner who hired an architect to design an apartment building. *Id.* at 321. The apartments were built in accordance with the architect's plans and specifications; however, the United States Department of Housing and Urban Development (HUD) subsequently determined that the design and construction violated the Fair Housing Design Act's accessibility guidelines. *Id.* The owner was forced to remedy the deficiencies. *Id.* Importantly, no personal injury or property damage had occurred, and the owner sought only economic losses as compensatory damages. *Id.* 322.

The Arizona Supreme Court held that in the absence of physical injury to persons or other property, an owner who contracts for design services cannot recover in tort for purely economic loss, unless the contract otherwise provides. *Id.* at 321. The court reasoned that the contract law policy of upholding parties' expectations has great force in construction-defect cases. *Id.* at 327. Construction-related contracts often are negotiated between the parties on a project-specific basis and have detailed provisions allocating risks of loss and specifying remedies. *Id.* at 325. To allow tort claims poses a great danger of undermining the policy concerns of contract law, which seeks to encourage parties to order their prospective relationships, including the allocation of risk of future losses and the identification of remedies, and to enforce any resulting agreement consistent with the parties' expectations. *Id.* Moreover, in construction-defect cases involving only pecuniary losses related to the contracted-for building, there are no strong policy reasons to impose common law tort liability in addition to contractual remedies; common law contract remedies provide an adequate remedy because they allow recovery of the costs of remedying the defects and of other damages reasonably foreseeable to the parties upon entering the contract. *Id.* The policies of accident deterrence and loss spreading also do not require allowing tort recovery in addition to contractual remedies for economic loss from construction defects because parties to a site-specific construction contract have likely allocated the risk of loss and identified remedies for non-performance. *Id.*

The court continued that although architects have common law duties of care, it is often difficult to draw bright lines between obligations imposed by law and those arising from contract. *Id.* at 328. In this case, the architect's duties with regard to the owner's project existed only because of the contract between the parties. *Id.* The owner alleged that the architect designed a building that did not conform to certain requirements of the federal Fair Housing Act; the complaint alleged that this conduct both breached the architect's contractual obligations and constituted professional negligence. *Id.* Attempting to label claims by distinguishing between contractual and extra-contractual duties is an unduly formalistic approach to determining if plaintiffs like owner should be limited to their contractual remedies for economic loss. *Id.* Nor should the professional status of architects determine whether the economic-loss doctrine applies. *Id.* The purposes of the doctrine are served by applying it to contracts entered by architects and design professionals. *Id.* Moreover, the fact that

an architect is a professional with legally imposed duties of care does not displace the general policy concerns that parties to construction-related contracts should structure their relationships by prospectively allocating the risks of loss and identifying remedies. *Id*. The economic-loss doctrine applies to architects because the policy concerns that justify applying the doctrine to construction-defect cases do not justify distinguishing design professionals from contractors. *Id.* at 329.

Considering the above, one might believe *Flagstaff* seems relatively cut-and-dried in that Arizona fully endorses the economic-loss doctrine. However, the decision left open the door for tort remedies when contracting parties choose to preserve them. Specifically, the *Flagstaff* court held:

> In the construction context, the economic loss doctrine respects the expectations of the parties when, as will often be true, they have expressly addressed liability and remedies in their contract. Thus, the parties can contractually agree to preserve tort remedies for solely economic loss, just as they may otherwise specify remedies that modify common law recovery.

Id. at 326.

Flagstaff, therefore, does not act as an outright bar of tort remedy in the face of purely economic losses. Rather, it gives the utmost deference to contracting parties to determine terms—including remedies. In the event that a contract is silent on the matter, it would then appear that under Arizona law the economic-loss doctrine bars any tort claim related to purely economic loss.

New York

A design professional under New York law may be subject to tort liability for failing to exercise reasonable care, irrespective of its contractual duties. *Castle Vill. Owners Corp. v. Greater New York Mut. Ins. Co.*, 868 N.Y.S.2d 189, 193 (N.Y. App. Div. 2008). An action for professional malpractice may lie in the context of a contractual relationship if the professional negligently discharged the duties arising from that relationship. *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554, 559 (N.Y. App. Div. 1999). A simple breach of contract does not give rise to a tort claim unless a legal duty independent of the contract has been violated. *Id.* A contracting party seeking only a benefit of the bargain recovery, *i.e.*, economic loss under the contract, may not sue in tort notwithstanding the use of familiar tort language in its pleadings under New York law. *Id.* (citing *Bellevue S. Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 294–95 (N.Y. 1991)); *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 552 (N.Y. 1992).

New Hampshire

The New Hampshire doctrine is a judicially created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship. *Plourde Sand & Gravel v. JGI E., Inc.*, 154 N.H. 791, 794 (N.H. 2007). When a plaintiff may recover economic loss under a contract, generally a cause of action in tort for purely economic loss will not lie. *Id.* However, when a duty that lies outside the terms of the contract is owed, many states allow a plaintiff to recover economic loss in tort against the defendant contracting party. *Id.* When an independent duty exists, the economic-loss rule does not bar a tort claim because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule. *Id.* Whether a duty exists between a design professional and a contractor, as would support applying special-relationship exception-to-privity rule for purposes of the economic-loss doctrine, must be determined on a case-by-case basis. *Id.* at 796.

Third-Party Lawsuits Against Design Professionals (No Privity)

The fundamental principle of the economic-loss doctrine is rational and relatively easy to understand. In essence, to permit parties who entered into a contract to sue one another both under that contract and in tort would be to undermine or diminish the utility of the contract. It weighs against the bargain (so to speak) because, in theory, the parties had the opportunity to consider non-compliance with the contract when it was negotiated. Consequently, they had the opportunity to consider remedies in the event of undesirable outcomes. But what happens when a design professional's conduct causes purely economic damage to a party not in privity with that design professional? Obviously, such a party could not control the remedies of the design professional's conduct because they had no contract. There was no opportunity to bargain. Courts across this country have taken a wide range of approaches in resolving third-party claims for purely economic losses against design professionals.

In 2013, the *Spectraserv* court stated, "Whether the absence of privity of contract between plaintiff and defendants renders the [doctrine] inapplicable presents an issue of first impression in New Jersey." *Spectraserv*, 2013 WL 4764514, at *7. The following review of the *Spectraserv* decision as it relates to privity provides an excellent look into how this issue is addressed in various jurisdictions throughout the United States.

Whether a duty exists between a design professional and a contractor, as would support applying special-relationship exception-to-privity rule for purposes of the economic-loss doctrine, must be determined on a case-by-case basis.

First, the *Spectraserv* court looked to *Horizon Grp. of New England, Inc. v. New Jersey Sch. Const. Corp.*, 2011 N.J. Super. Unpub. Lexis 2271, 2011 WL 3687451 (N.J. Super. 2011), as instructive (though it neither created precedent nor was binding). The *Spectraserv* court pointed out that in the past, New Jersey courts have applied the economic-loss doctrine to bar negligence claims brought by a contractor against multiple parties, despite the absence of privity. *Id.* The *Horizon* court relied on *Saltiel* in holding that two of the parties did not owe an independent duty imposed by

law to the contractor, and hence the negligence claims against the third parties were barred. *Id.*

With respect to the remaining two parties, notwithstanding the assignment of the owner's indemnification claims against the third parties to the contractor, the *Horizon* court recognized that the contractor had other remedies available to address its loss. *Horizon,* 2011 WL 3687451, at *7. Specifically, the court determined that the contractor could invoke contractual remedies to request change orders and obtain other accommodations. *Id.* at *6. Furthermore, if necessary, the contractor could sue the owner directly for breach of contract (as was the case in *Horizon*). *Spectraserv,* 2013 WL 4764514, at *24–25 (internal quotations omitted). The *Horizon* court determined that the contractor entered into a contract that clearly described the nature of the relationship, or lack of any, among the various contractors and professionals. *Horizon,* 2011 WL 3687451, at *7. In addition, the court noted that the contractual scheme was specifically defined with the owner functioning as the hub. *Id.* The *Horizon* court's reference to these remedies evidences a belief that privity of contract is not necessary for the application of the economic-loss doctrine. *Id.* Moreover, the *Horizon* court never stated that its application of the economic-loss doctrine was conditioned on the assignment alone. *Id.*

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The *Spectraserv* court also looked to various external jurisdictions in reaching its conclusion that privity of contract is not necessary for the economic-loss doctrine to apply. The court pointed out that in *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004), the Supreme Court of Colorado succinctly noted that the policies underlying the application of the economic-loss rule to commercial parties are unaffected by the absence of a one-to-one contract relationship. *BRW.*, 99 P.3d at 72. The *BRW* court enumerated three policies underlying the economic-loss doctrine:

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

Id.

Colorado's highest court concluded that contractual duties arise just as surely from networks of interrelated contracts as from two-party agreements. *Id.*

The *BRW* court explained, in the context of larger construction projects, multiple parties are often involved. These parties typically rely on a network of contracts to allocate their risks, duties, and remedies:

> Construction projects are multiparty transactions, but it is rarely the case that all or most of the parties involved in the project will be parties to the same document or documents. In fact, most construction transactions are documented in a series of two-party contracts, such as owner/architect, owner/contractor, and contractor/subcontractor. Nevertheless, the conduct of most construction projects contemplates a complex set of interrelationships, and respective rights and obligations.

Id.

The *Spectraserv* court then discussed *Am. Stores Props., Inc. v. Spotts, Inc.*, 648 F. Supp. 2d 707 (E.D. Pa. 2009). In that matter, the United States District Court for the Eastern District of Pennsylvania observed that controlling federal and Pennsylvania state law hold that privity of contract is not required for the economic-loss doctrine to apply to negligence claims. *Spectraserv,* 2013 WL 4764514, at *8. The court highlighted that the rationale behind the application of this doctrine was appropriate in the instant matter because to allow a negligence cause of action for purely economic loss would be to open the door to every person in the economic chain of the negligent person or business to bring a cause of action. *Id.* The *Am. Stores Props.* court concluded that such an outstanding burden is clearly inappropriate and a danger to the economic system.

The *Spectraserv* court also addressed *Ass'n of Apt. Owners v. Venture 15, Inc.*, 167 P.3d 225 (Haw. 2007). In *Venture 15*, the Supreme Court of Hawaii held that recovery for economic loss in negligence is barred, even in the absence of privity of contract, when allowing such recovery would blur the distinction between contract and tort law. *Ass'n of Apt. Owners v. Venture 15, Inc.*, 167 P.3d 225, 285 (Haw. 2007). The court determined that when a general contractor and subcontractor had allocated the risks and benefits of performance in their contract, imposing a tort duty on the subcontractor correlative to the contract's specifications would disrupt the contractual relationships between and among the various parties. *Id.*

The *Spectraserv* court circled back to apply the above analysis. The court pointed out that the matter at hand dealt with a large construction project, with multiple parties. *Spectraserv*, 2013 WL 4764514, at *29. It acknowledged a series of interrelated contracts between those various parties including design, engineering, and construction management contracts. *Id.* The court focused on the fact that the parties relied on these contracts to allocate their risks, duties, and remedies, holding that given the nature of the relationships among the parties, the absence of a direct contractual relationship did not preclude the application of the economic-loss doctrine. *Id.* at *29-30. Applying the doctrine in such cases will serve its purpose of limiting the expansion of tort liability where contractual remedies exist. *Id.* at *30. The court then concluded that this is the proper course of action because, "where two competing yet sensible interpretations of New Jersey law exist, the Court should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of New Jersey decides differently." *Id.* at *9 (quoting *Travelers Indem. Co. v. Dammann & Co.,* 594 F.3d 238, 253 (3d Cir. 2009)). To date, the Supreme Court of New Jersey has not decided differently.

The Economic-Loss Doctrine in Various Jurisdictions When Third Parties Lack Privity with Design Professionals

Third parties lacking contractual rights have no legal basis for recovery of economic loss based on theories of tortious conduct that cause neither personal injury nor damage to property beyond the defective property itself. *See* 6 Bruner & O'Connor, Construction Law §19:10 (Limitation on Tort Damages—Doctrine of Economic Loss). Notwithstanding such straightforward distinctions, third-party recovery in tort for economic loss caused by breaches of contract or warranty duties owed between others has been for decades a subject of heated controversy. *Id*. There has been a definite lack of uniform treatment. *Id*. The following offers insight into a few different jurisdictions and their treatment of third-party lawsuits against design professionals in other jurisdictions when third parties lack privity.

New York

In the matter of *Ossining Union Free School Dist. v. Anderson LaRocca Anderson,* 541 N.Y.S.2d 335 (N.Y. 1989), a school district hired a firm to provide a feasibility study of school buildings and that firm then hired two consulting engineers who undertook their work, knowing that it was for the school district. The New York Court of Appeals held that recovery may be had for pecuniary loss arising from negligent representations when there is actual privity of contract between the parties or a relationship so close as to approach that privity. *Id.* at 337.

The recent decision of *Dormitory Auth. v. Samson Constr. Co.,* 30 N.Y.3d 704 (N.Y. 2018), potentially expanded New York design professionals' liability in tort. Although its full effect remains to be seen, the First Department Appellate Division held in *Dormitory Authority* that an architect can be liable for pure economic loss when violations of a professional duty to the public result in "catastrophic consequences." 30 N.Y.3d 704, 711 (N.Y. 2018). In that case, the Dormitory Authority of the State of New York (DASNY) hired an architect to design a forensic biology laboratory for New York City. *Id.* at 707. After the foundation contractor began driving piles for the project, surrounding structures sustained damage, including an adjacent building that settled as much as eight inches. *Id.* at 708. Based on the architect's alleged failure to conduct an adequate site investigation and provide an adequate foundation design, DASNY sued the architect for breach of contract and negligence (failure to exercise due care). *Id.* at 708–09.

The *Dormitory Authority* court eventually ruled that there was no injury alleged in the case that a separate negligence claim would capture that was not already encompassed in DASNY's contract claim. *Id.* at 713. However, on its way to reaching that decision, the *Dormitory Authority* court made an important distinction. It stated, "Clearly, there are circumstances where a professional architect may be subject to a tort claim for failure to exercise due care in the performance of contractual obligations." *Id.* The court continued, "In seeking to disentangle tort and contract claims, we focused in [sic] *Sommer* both on potential catastrophic consequences of a failure to exercise due care and on the nature of the injury, the manner in which it occurred, and the resulting harm." *Id.* (internal quotations omitted). The court specifically distinguished between a situation in which the harm was an abrupt, cataclysmic occurrence not contemplated by the contracting parties and one in which the plaintiff was essentially seeking enforcement of contract rights. *Id.*

Florida

Florida recognizes a cause of action against professionals based on their negligence despite the lack of privity of contract. *Hewett-Kier Const., Inc. v. Lemuel Ramos and Associates, Inc.,* 775 So. 2d 373 (Fla. Dist. Ct. App. 2000) (holding that the economic-loss rule does not bar actions for purely economic losses where a special relationship exists between the professional and a third party affected by the professional's negligent acts). In *Hewett-Kier Const., Inc.,* an architect allegedly prepared erroneous design documents with the knowledge that the school board would supply those documents to the successful bidder, who would be injured if they were inadequate.

Illinois

In Illinois, the state was not permitted to sue in tort for negligent performance of professional services when real injury was to a product that did not meet state's expectations. *People ex rel. Skinner v. Graham,* 524 N.E.2d 642 (Ill. App. Ct. 1988) (holding that economic loss alone cannot be a basis for recovery in tort and holding that where the construction defects do not cause physical injuries or property damage, courts are unwilling to impose tort liability on a builder for breach of his or her contract with the purchaser, even if the breach was willful and wanton).

Overall, the economic-loss doctrine helps to limit recovery in strict liability and negligence claims and provides predictability to contracting parties.

Conclusion

Overall, the economic-loss doctrine helps to limit recovery in strict liability and negligence claims and provides predictability to contracting parties. With the increase of design professionals both designing and supervising construction projects, the limits of the economic-loss rule will inevitably continue to be tested in litigation. This article suggests that the economic-loss rule should not be applied inflexibly. Rather, it should be adapted to the economic realities and complexities of construction projects with an understanding of the interrelated nature of project participants, their individual functions, their contractual duties, and their risk assumptions. Against this backdrop, an application of traditional legal principles—duty, foreseeability, and reliance—to negligence claims should not lead to expanded tort liability. In sum, parties that hire design professionals should be limited in their recovery to breach of contract claims as opposed to being able to recover what can amount to open-ended damages when a claim is based in tort. FD