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**ARTICLE:** The Commercial Loss Doctrine: Ladies and Gentleman of the Jury ... Look at this Tangle of Thorns n1

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**LEXISNEXIS SUMMARY:**

... This is due to the fact that the policy rationale for product liability claims, which is to put the risk of loss on the manufacturer who is in the best place to prevent the defect and also in the best position to insure against the same, simply does not apply to the construction industry. ... This is because most contract claims do not allow for the open-ended recovery that the tort system allows for, and most contract claims have bargained-for limitations on what can be recovered and when. ... I make a narrow exception for allowing tort claims against architects and engineers because there are rational policy justifications for the existence of extra-contractual duties between architects and engineers, their clients, and third parties. ... In fact, it would be quite illogical to analyze misrepresentation cases under the traditional Moorman doctrine, because there is obviously no sudden and calamitous event, and no unreasonable risk of injury to persons or other property. ... Anderson could have brought a variety of other tort claims (with a much higher prospect of prevailing), and conceded that the damages were economic in nature but premised the claims on the theory that there are extra-contractual duties that allow tort claims for economic damages, e.g., implied warranty free of the privity requirement; third-party beneficiary doctrine; tortious misrepresentation; tortious interference with contract; and/or tortious interference with prospective business advantage.

**TEXT:**

[\*340]

I. Introduction

The line between tort and contract law has never been definitively drawn, especially when it comes to product liability law and construction law. In some instances, the theories have become so intertwined that practitioners have adopted the nomenclature of "contort" to designate claims that contain both theories of tort and contract. n2 In an attempt to

keep the line between contract claims and tort claims distinguishable, most states have adopted some form of the Commercial Loss Doctrine. n3 Originally applied in product liability cases, the traditional [\*341] Commercial Loss Doctrine holds that when a product is defective, a party may not recover in tort unless the defect causes personal injury or damage to property other than the product itself and does so via a sudden and calamitous event. n4 I will refer to this definition as the traditional Commercial Loss Doctrine or traditional Moorman doctrine throughout this paper. However, much of the confusion in the application of the Commercial Loss Doctrine stems from the fact that this definition only applies to product liability law and not to other areas of law, such as service contracts or construction contracts.

I will attempt to make two arguments in this article. Part I of this article argues that when courts need to determine whether the Commercial Loss Doctrine applies, they should not begin by asking whether the loss is "economic." Instead, the court should analyze whether the duties between the parties arose via the contract between the parties or via extra-contractual duties which govern the relationship between the parties. If the latter, then tort claims should be allowed. In determining whether extra-contractual duties exist, courts must articulate rational or historical policy reasons for the existence of such duties. Part V of this article argues that the Commercial Loss Doctrine should be applied to bar tort claims in the construction industry because the policy reasons for allowing tort claims in product liability cases do not apply in the construction industry.

#### A. The Policy of Tort Law Versus the Policy of Contract Law

To really understand the Commercial Loss Doctrine, and the arguments made herein, one must have a basic understanding of the difference between tort theory and contract theory. This is because the legal policy of contract law differs dramatically from the public policy of tort law. Contract law is based upon the theory that two parties can allocate certain risks of a transaction among themselves as they so choose; there is very little concern for general public policy. n5 Tort law, on the other hand, is based upon the theory that society has deemed it appropriate that people exercise due care in their interaction with others, whether there is a contractual relationship or not, and a breach [\*342] of this duty should leave the tortfeasor liable to the party that incurred injury. n6 This is a social policy deemed necessary to disperse the cost of injuries; it has nothing to do with two people contracting via mutual intent for some product or service. n7 Therefore, contract law is premised on the mutual intent of the parties, whereas tort law is derived from the social policy that courts and legislatures through the years have deemed to be good for society, i.e., that people owe each other a duty of due care in their relations with one another.

#### B. The Genealogy of Product Liability Laws

Given this conceptualization of tort law, it is easier to follow the genealogy of product liability law, starting with the fact that the sale of goods was traditionally governed by contract law and the mutual intent of the buyer and seller. n8 Therefore, to maintain a claim against the seller, the plaintiff had to be in "contractual privity" with the seller, which typically meant a party to the contract. n9 However, in many instances, a party that was not in privity with the manufacturer would become injured by a product, such as in the case of contaminated food or poisons, and courts did not believe it was just to leave such a victim remediless due to a lack of contractual privity with the manufacturer or producer of the product. n10 Therefore, in various jurisdictions throughout England and America, courts began to devise ways to allow tort claims for defective products to be brought by persons who were injured by that product but were not in contractual privity with the product's manufacturer. n11

For instance, in the United States, implied warranties were created by courts over the concern for the physical damage contaminated food could do to people, whether they were in privity with the seller or not, and whether there was proof of negligence or not. n12 In essence, this was the origin of strict product liability tort claims, but the courts termed these "implied warranty" claims. n13 In England, a court found [\*343] that a defendant not in contractual privity with the plaintiff could nonetheless be held liable in tort for general negligence for selling a bottle of mislabeled poison that put a person's health in danger because the product was "inherently dangerous." n14 This rationale was soon applied to all products whether "inherently dangerous" or not, n15 and was soon thereafter applied to all products

without the need to prove negligence, thus creating strict liability law. n16 Thus, another policy rationale for product liability tort claims was born, doing away forever with the contractual privity requirement between the buyer and seller.

The one thing all product liability claims had in common, whether strict liability, negligent liability, or implied warranty, was that they were court-created remedies based upon public policy concerns for the health and welfare of consumers who were not in privity with manufacturers in a modern mass market created by industrialization. n17 The Restatement (Second) makes clear that "the basis for the [strict liability] rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger safety of their person[] ... ." n18 Most courts have held that these are the justifications for holding manufacturers liable in tort: (1) the manufacturer has placed the product into the stream of commerce to make a profit, and thus should be responsible for its defects; and (2) in a mass market, the cost of injuries resulting from a defective product should be borne by the manufacturer, rather than the party who suffered the loss. n19 Furthermore, a manufacturer is in the best position to prevent product defects thus increasing general societal safety, and is also in the best position to compensate those who are injured. n20

[\*344]

### C. The Plaintiffs' Bar Attempts to Expand Tort Law and the "Birth" of the Commercial Loss Doctrine

Strict product liability was adopted in 1969 by the Illinois Supreme Court in the *Suvada* case, although negligent product liability and implied warranty claims were in existence before that time. n21 Once strict and negligent product liability laws were established for defective products, it only seemed logical that plaintiffs' attorneys would attempt to bring tort claims for defective products, even if the only damage was to the product itself. This is because most contract claims do not allow for the open-ended recovery that the tort system allows for, and most contract claims have bargained-for limitations on what can be recovered and when. n22 This is where the Commercial Loss Doctrine began to appear in litigation. Plaintiffs' counsel began to take the narrow exception that allowed for tort claims for defective products that caused injuries to persons or property and began trying to broaden the tort claims to encompass damage to the product itself, which was traditionally governed by contractual rules. n23 These claims were brought when the "defective" product did not cause any injury or damage to other persons or property, but instead merely failed to perform as was bargained for. To combat this assault on contract law, defendants had to argue that when the only damage is to the product itself, there is no rational policy for allowing a tort claim the way there is when a person or other property is damaged by the defective product. Thus, the remedy should be restricted to contract law. n24 This was the birth of the Commercial Loss Doctrine.

The policy behind the Commercial Loss Doctrine, as explained by the Supreme Court of the United States, is to prevent contract law from drowning in a "sea of tort." n25 Without such a rule almost all contractual remedies, which still require privity, would be rendered meaningless, as consumers could simply bring tort cases. In *East River*, the Supreme Court reasoned that when a person is injured, a tort remedy is appropriate because the cost of injury may be overwhelming, and the person would not be prepared to meet such a [\*345] cost. n26 However, when the product "injures" only itself, society has determined that consumers do not need the extra protection of tort law because consumers can willingly bargain for contractual warranty protections. n27 In essence, the Commercial Loss Doctrine protects the freedom of commercial parties to "allocate economic risk of defect, deterioration or failure of the product, between themselves by contract, which in turn allows the commercial purchaser, who is best suited to assess the risk of economic loss, to assume or insure against the risk of defect through bargaining for product warranties." n28 Furthermore, without the Commercial Loss Doctrine, the practice of bargaining for and paying a higher price for express warranties, or for limiting implied warranties, would no longer be an effective method for two parties to allocate who should bear certain risks regarding the longevity and quality of a product. n29 This would make manufacturers insurers of the economic quality of their products, in essence offering warranties for the duration of the applicable statute of limitations of product liability law.

As can be seen, the Commercial Loss Doctrine is based upon the very confusing intersection of tort and contract

law, which is troubling enough; however, the problem of conceptualizing the Commercial Loss Doctrine has been made even more nebulous because most [\*346] courts, commentators, and practitioners speak in a somewhat Orwellian manner when addressing the issue. n30 The Commercial Loss Doctrine is not a rule that limits tort actions; it is merely a restatement of what was a pre-existing area of law, i.e., contract law, in which tort law originally had no place. n31 We have reached such a convoluted conceptualization of the Commercial Loss Doctrine that practitioners will ask whether the Commercial Loss Doctrine should apply to a certain area of law to limit tort claims, or whether an "exception" to the Commercial Loss Doctrine should be created for certain industries. The assumption is that tort claims have always been allowed unless courts have explicitly said that the Commercial Loss Doctrine limits them. However, the opposite is true: courts have allowed tort claims in areas governed by contracts in a very narrow and limited manner, and for specific policy reasons, like to protect a person from bodily damage or damage to other property caused by another party who is in a better position to prevent or insure against the injury. n32

Nonetheless, practitioners now tend to think that tort claims are the norm and can be brought whenever the Commercial Loss Doctrine does not bar them. This effectively switches the burden of proof to the defendant instead of the plaintiff. If traditional contract law has governed a certain industry historically, then proponents of bringing tort claims should have the burden of articulating specific policy reasons justifying tort claims, just as the courts found public policy reasons [\*347] to allow tort claims for defective products in the past. n33 Defendants should not have to justify why the Commercial Loss Doctrine should apply to bar tort claims.

#### D. Courts Should Refrain from Labeling Damages as Economic in Nature and Start by Asking Whether Commercial Policy or Tort Policy Governs the Relationship Between the Parties

The first part of this article will attempt to unfurl the Commercial Loss Doctrine as it exists in Illinois regarding product liability law, service contracts, and professional service contracts. It is easier to conceptualize the proper application of the Commercial Loss Doctrine by determining whether the claim is one for a loss governed by commercial policy considerations, or for a loss that is governed by tort policy theories. Therefore, Illinois courts should stop beginning their analyses by asking whether the type of damage is "economic damage." As Judge Posner pointed out, this only confuses the matter because so many tort damages are purely economic in nature, e.g., lost wages, damages for tortious interference with a contract or business, professional malpractice, etc. n34 A true "Economic Loss Doctrine" would have to bar all of these claims. Instead, the court should ask, "are the damages commercial?" If so, the Commercial Loss Doctrine should apply to bar tort claims.

The difference between economic and commercial damages depends upon the legal theory under which the damages arise, not the type of damages incurred. For instance, as explained above, a tort is allowed when a defective product injures a person (or other property) because Illinois courts have determined that manufacturers owe an extra-contractual duty of care not to harm purchasers of their products. n35 This extra-contractual duty arises because the manufacturer is in the best position to prevent the defect and to insure that those injured by the defect are made whole. n36 When this type of extra-contractual policy governs the claim, the losses, whether personal or purely economic, should be recoverable in tort. However, when there are no extra-contractual relationships or duties between the parties, the relationship should be governed by the commercial contract. When conceptualized in this manner it is easy to determine whether [\*348] tort claims should be allowed or barred by the Commercial Loss Doctrine.

#### E. The Commercial Loss Doctrine in Construction Cases

The second part of this article argues that the Commercial Loss Doctrine should be applied very broadly in cases involving construction defects, because the same policy rationales for allowing tort claims in product liability cases simply do not apply to construction defect claims (in most cases). n37 I make a narrow exception for allowing tort claims against architects and engineers because there are rational policy justifications for the existence of extra-contractual duties between architects and engineers, their clients, and third parties.

It is hard to completely separate the product liability cases from the construction cases because they have evolved

together. Therefore, when I discuss the "sudden and calamitous" requirement or the "damage to other property" requirement in the first part of this article it will be necessary to discuss both types of cases together.

## II. Application of the "Traditional Moorman Rule" to Tangible Products

### A. Minority, Majority, and Intermediate Rules

In 1965, two different courts, one in New Jersey and one in California, addressed the problem of the Commercial Loss Doctrine in product liability cases and came to opposite conclusions regarding its application. In *Santor v. A. & M. Karagheusian*, a New Jersey court heard a case in which a purchaser of carpeting sued the manufacturer in tort for a defect in the carpeting and the court held that the tort claim could proceed because the Uniform Commercial Code ("U.C.C.") did not provide the exclusive remedy for commercial transactions. n38 The Santor court reasoned that the doctrine of strict liability exists so that the costs of injuries, to either the product itself or other property or persons, is borne by the manufacturer. n39 This became known as the minority rule, and its clear implications were that all contractual defenses a manufacturer might have were swallowed by the very broad liability doctrine of strict tort liability. n40 In a California case, *Seely v. White Motor Co.*, a consumer purchased a [\*349] truck which had a defect causing the truck to overturn, resulting in property damage to the truck, but not to the driver or to other property. n41 The Seely court did not allow a tort action for economic damage, reasoning that the consumer should bear the risk that the product will not conform to his economic expectations. n42 This became the majority rule.

In Illinois, the seminal case was decided in 1982, when the Illinois Supreme Court ruled in *Moorman Manufacturing Co. v. National Tank Co.* n43 In *Moorman*, the plaintiff purchased a grain storage tank, which later exploded due to a crack that developed on one of its steel plates. n44 The plaintiff brought suit alleging design and manufacturing defects in the tank. n45 Even though the tank exploded suddenly, there were no injuries to any person or to any property other than the tank itself, and the only damages the plaintiff sought were for the tank's damage and loss of the use of the tank. n46 The Court held that the allegations of the complaint sounded in contract rather than tort and the plaintiff's damages were merely those of disappointed consumer economic expectations, properly left to warranty remedies. n47 The Court defined economic losses as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits - without any claim of personal injury or damage to other property." n48 The *Moorman* court reasoned that the strict liability theory adopted by the court in *Suvada* n49 and Section 402A of the Restatement n50 limited strict liability theory to "unreasonably dangerous defects" resulting in physical harm to the ultimate user or consumer, or to his property. n51 The "unreasonably dangerous" language of strict liability law indicates that there must be some aspect of the product that can cause a person or his property harm in a dangerous manner, which comports with the public policy of product liability law, because the manufacturer is in the best position to prevent such damages. n52 [\*350] Furthermore, the *Moorman* court pointed out that Comment d. to Section 402B of the Restatement of Torts implies that the rule of strict product liability was not meant to eclipse the U.C.C. or the common law of sales, which traditionally provided the only recovery of economic losses:

The liability stated in this section is liability in tort, and not in contract; and if it is to be called one of 'warranty,' it is at least a different kind of warranty from that involved in the ordinary sale of goods from the immediate seller to the immediate buyer. n53

Thus, the *Moorman* court would only allow a tort claim where there is damage to other property or persons from a defective product. However, the *Moorman* court also adopted the requirement that the damage result from a "sudden and dangerous" event. n54 This has become one version of the "intermediate rule," n55 which is similar to the majority rule, except that it allows for tort recoveries under certain limited circumstances, i.e., only where the event causing injury is sudden and calamitous. n56 The "sudden and calamitous" requirement insures that victims of accidents are

compensated in tort only when the policy rationale of tort liability is met, i.e., there must be an unreasonably dangerous condition of the product.

The Moorman court analyzed the instances in which tort claims should be allowed in product liability cases quite well. It is apparent that the court analyzed the policy reasons for allowing tort claims versus contract claims rather than merely looking to whether the damages [\*351] were economic in nature. However, by using the term "economic loss," the Moorman court inadvertently set in motion the standard by which courts tend to look at whether damage sustained is economic or not, instead of looking to whether there are tort policies to justify the claim or whether the claim is governed by contractual and commercial policies.

#### B. Sudden and Calamitous Event

Under the traditional Moorman doctrine, n57 even if a plaintiff can prove that there was a defect in the product and that a person or other property was in fact damaged, a plaintiff is also required to prove the injury resulted from a sudden and calamitous event before he can recover in tort. n58 This is known as the "sudden and calamitous" event prong of the test and prevents plaintiffs from recovering in tort if the damage to the person or other property results from the gradual deterioration of the product over time. (However, it is arguable whether *Section 402B of the Restatement of Torts (Second)* n59 and the Suvada n60 court's use of the language "unreasonably dangerous" for strict liability claims necessarily indicates that an unreasonably dangerous condition must be temporally limited, as the phrase "sudden and calamitous event" does.) Nonetheless, the Moorman court adopted the reasoning put forth in a 1966 Columbia Law Review article which stated the following: "when the defect causes an accident 'involving some violence or collision with external objects,' the resulting loss is treated as property damage. On the other hand, when the damage to the product results from deterioration, internal breakage, or other non-accidental causes, it is treated as economic loss." n61 By citing this language, it is clear the Moorman court required a "sudden and calamitous event" in order for a plaintiff to recover in tort in Illinois.

[\*352]

#### 1. Cases in Which the Event is Considered Sudden and Calamitous

In the past thirty years there have been numerous decisions in Illinois analyzing what constitutes a sudden and calamitous event. Justice Simon, in his special concurrence in the Moorman decision, defined a sudden event as one that arises from "hazards peripheral to the product's [intended] function." n62 This definition is a bit vague with respect to what is "peripheral" to a product's intended function and really has nothing to do with the suddenness of the event. In the Fourth Appellate District, the Mars case involved the construction of a warehouse in which steel beams were blown over by a large thunderstorm. n63 The Mars court held that a sudden occurrence is one that is "highly dangerous and presents the likelihood of personal injury or injury to other property." n64 Once again, nothing in this definition suggests suddenness or temporality. However, the consensus has been that the focus should be on the suddenness of the occurrence of the event that causes the injury, not the suddenness of the underlying cause leading to the event that finally caused the injury. n65 For instance, in *American Xyrofin*, a centrifugal compressor failed causing severe damage to itself and surrounding premises. n66 The court held that in characterizing an event as sudden and calamitous the focus should be upon:

the suddenness of the occurrence of an event - the point when the injury occurs ... where such occurrence causes personal injury or damage to property external to the defective product which exposes a party to an unreasonable risk of injury to himself or his property, rather than the suddenness or length of time within which the defect or cause of the occurrence develops ... and manifests itself in the sudden and calamitous occurrence. n67

This definition clears up scenarios in which the product gradually deteriorates over time, such as slow leakage which then results in a sudden event, like a roof collapse.

Since clearing up the definition of a sudden event, Illinois courts have found a sudden event in a number of different situations. In [\*353] *Scott & Fetzer Co. v. Montgomery Ward & Co.*, the Illinois Supreme Court held that a fire in a warehouse was a "sudden and dangerous conflagration." n68 In *United Airlines, Inc. v. CEI Industries*, the sudden and total collapse of a roof due to leaking water and defects was sudden. n69 In *Bi-Petro Ref. Co. v. Hartness Painting, Inc.*, the plaintiff, much like the plaintiff in *Moorman*, alleged damages resulting from a defect in a storage tank. n70 The Fourth Appellate District, however, distinguished the occurrence from that in *Moorman* because the tank "suddenly and violently ruptured" while being filled with water, whereas the complaint in *Moorman* had alleged the occurrence as taking place over the course of months. n71 Finally, in *Vaughn v. General Motors Corp.*, the court held that the roll-over of a vehicle, caused by defective brakes, was a sudden and calamitous event. n72 As one can see, the temporal aspect of a sudden and calamitous event remains the primary way to measure the event, and "suddenness" is measured at the time of injury.

In one noteworthy case, *Bagel v. American Honda Motor Co., Inc.*, an Illinois Appellate Court seems not to have considered the suddenness of the event that caused the injury, but instead looked to the suddenness of the build-up to the event. n73 In *Bagel*, a defect in a motorcycle engine caused the engine to "suddenly" stop, but the court held that it did not qualify as a sudden and calamitous event because the event did not occur in a dangerous manner that posed an unreasonable risk of injury to the plaintiff or his property. n74 The *Bagel* court could have made a ruling based upon the fact that there was no damage to other property, but the court went on to hold that the "loss resulted from a qualitative defect in the motorcycle like the crack in the grain storage tank in *Moorman* ... [which] developed over a period [\*354] of time." n75 Thus, even though the final event was sudden, the *Bagel* court held that the defect was the deterioration of the engine. n76

## 2. Cases in Which the Damage is Due to Gradual Deterioration

If a loss is due to "deterioration, internal breakdown, or non-accidental causes," the sudden and calamitous event prong of the *Moorman* test will not have been met, and the plaintiff will not be able to sustain a tort claim. n77 Such deterioration has been found mostly in latent building defects, such as damage from the gradual deterioration of siding that split open and fell off over a period of years, n78 gradual leaking from underground storage tanks, n79 or the gradual deterioration of construction of poor quality. n80

## 3. Mold and Contamination: A Sudden and Calamitous Event?

A difficult factual scenario for the courts has been property damage caused by mold. In *Muirfield Village-Vernon Hills, L.L.C. v. K. Reinke, Jr. & Co.*, the court addressed whether the development of mold in a house purchased by the plaintiffs could be considered a "sudden and calamitous" event. n81 Unlike the gradual accumulation of water on a roof which eventually results in a roof collapsing, the growth of mold in *Muirfield* was not actually sudden. n82 Nonetheless, the *Muirfield* court held that "while the growth of the mold and bacteria occurred gradually, it is still a sudden and calamitous event for purposes of analyzing the application of the economic loss rule." n83 The court reasoned as follows:

[The mold growth] was sudden and calamitous, damaging the [plaintiffs'] personal property and requiring them to flee their house or experience the likelihood of personal injury. Properly viewed from the point of injury, and not from the development of the mold and bacterial infestation, the occurrence was sufficiently sudden and calamitous to place it under the exception to the economic loss rule for property damage resulting from a sudden or dangerous occurrence. n84

[\*355] The Muirfield court focused on the fact that the mold's effect on the homeowners manifested itself suddenly, which seems to be a questionable premise. n85 The Muirfield decision did not comport with an earlier First Appellate District decision, *NBD Bank v. Krueger Ringier, Inc.*, n86 which involved a tort to recover costs incurred investigating, cleaning, removing, and restoring petroleum-contaminated soil on a parcel of land purchased from defendant. n87 Unlike the mold in Muirfield, the *NBD Bank* court held that "the damage alleged by plaintiffs was certainly caused by gradual deterioration, internal breakage, or other non-accidental causes, rather than a sudden or dangerous event." n88 Muirfield and *NBD Bank* are only inconsistent when analyzed via the traditional *Moorman* doctrine; instead, the courts should have asked whether there were any extra-contractual duties that allowed for tort claims.

Consider a pre-*Moorman* case in this milieu, *Van Brocklin v. Gudema*, in which manure from the defendant's barn contaminated the plaintiffs' well. n89 The issue considered by the court was "whether the law permits recovery for inconvenience and discomfort entailed in the temporary loss of a water supply caused by the negligence of another." n90 This was, in essence, an early economic loss claim. The court held that the plaintiffs "were entitled to recover for their inconvenience and discomfort during the period that their well was contaminated" because there was an extra-contractual tort duty not to contaminate the well. n91

Compare these rulings to *Mayer v. Chicago Mechanical Services, Inc.*, a case in which the plaintiffs sued their condominium complex's heating and air conditioning system installer after the system broke down, causing mold and requiring the plaintiff to obtain temporary, alternative housing. n92 The court held that it was not clear whether the *Moorman* doctrine applied to these facts but denied recovery because the plaintiff was seeking vague, intangible damages. n93

[\*356] Instead of contorting the *Moorman* doctrine in order to fit mold and contamination cases into the realm of "sudden and calamitous" events, courts would do better to ask whether there are extra-contractual duties that govern the relationship between the parties. n94 Furthermore, in cases involving residences, most plaintiffs can maintain a warranty of habitability claim without privity. n95 Therefore, extra-contractual duties that allow a plaintiff to bring tort claims exist where there is no sudden and calamitous event and thus the claim is purely economic.

#### 4. Death of the Sudden and Calamitous Requirement

One 1989 Illinois Supreme Court case appeared to eradicate the sudden and calamitous event requirement. In *Board of Education v. A, C & S, Inc.*, an asbestos case, the court held that it is not critical to a strict products liability action that a sudden and calamitous event occurred. n96 The court held:

Asbestos damages do not easily fit within the framework delineating tort and contract, and it is evidenced in this prong of *Moorman*. n97 However, we believe that the critical inquiry in this instance is whether the product has an unreasonably dangerous defect and whether the defect caused the property damage alleged. To prevent recovery in tort merely because the physical harm did not occur suddenly would defeat the underlying purposes of strict products liability. n98

However, in 1997, the Illinois Supreme Court stated in *Trans States Airlines v. Pratt & Whitney Canada* that it "[does] not read the proffered language in *A, C & S* as a wholesale rejection of the 'sudden and calamitous' requirement for other property cases. Clear from the language is that the court was attempting to confine its reasoning to the particular facts of the case." n99

[\*357] A, C & S was clearly an anomalous decision, and even though the A, C & S court flirted with the idea that there is no real policy reason as to why a sudden and calamitous event is necessary, n100 no Illinois court since has truly analyzed why such an event is required for a tort claim. Many cases have hinted that the reason for requiring a sudden and calamitous event is that a sudden event makes a product unreasonably dangerous and poses a risk of injury to persons and property. n101 But does that not also apply to processes that take time to develop and never result in a sudden and calamitous event such as asbestos or mold growth? Cannot gradual defects be unreasonably dangerous and pose a threat to the health and welfare of persons and property? I believe a sudden and calamitous event is necessary because the plaintiff has some duty to discover an event that is gradual. For instance, in A, C & S, the court reasoned that this factor is evidence of assumption of risk and comparative fault. n102

#### 5. Repair and Notice

Illinois courts have also noted that a history of repairs prior to the occurrence does not necessarily detract from the characterization of the event as "sudden and calamitous" when there is evidence proving that the product failed in a sudden and calamitous manner. In *Vaughn v. General Motors Corp.*, the plaintiff continued to use a truck despite knowledge of its faulty condition, eventually leading to a crash that damaged the truck. n103 The Illinois Supreme Court held that the plaintiff's knowledge of the defect was relevant to issues such as assumption of the risk and comparative fault rather than whether the Commercial Loss Doctrine precluded recovery. n104

This holding seems to be contrary to the policy analysis regarding the Commercial Loss Doctrine, and I believe if a plaintiff has notice of a defect that eventually results in a sudden and calamitous event, the policy reasons for allowing a tort claim do not apply. That is, it makes sense to allow tort claims in cases where manufacturers are in a better position to prevent unreasonably dangerous defects; however, when a consumer is repairing a product or has notice of the defect, he or she is then in a better position to prevent the unreasonably dangerous defect [\*358] from becoming a sudden and calamitous event. n105 As the *Vaughn* court stated, such notice may best be analyzed as part of a plaintiff's assumption of the risk or contributory negligence, n106 but I believe, given the rationale for allowing tort claims, it should bar the claim in the commercial context.

#### 6. Actual Damage, Not Just Risk of Injury

The *Moorman* court also settled the question of whether a risk of injury to persons or other property from an unreasonably dangerous and sudden event is enough to plead a claim in tort. n107 That is, perhaps a grain storage tank which suddenly explodes, but does not injure a person or other property, would suffice to plead a tort claim. This is exactly what the plaintiff in *Moorman* tried to argue, that the defect posed an "extreme threat to life and limb, and to property of plaintiff and others" which only fortunately did not materialize. n108 The theory is that if the Commercial Loss Doctrine only allows tort claims where there is actual damage then it "permits identically situated plaintiffs in the same case to be treated differently for recovery of their damages based solely on the fortuity that one may have suffered property damage along with economic damage." n109 However, as in any tort case, actual damages are a requirement for a valid claim. Therefore, a product that poses a high degree of unreasonable risk of harm but in fact does not cause any harm will not be actionable as a tort claim pursuant to the Commercial Loss Doctrine. n110

#### C. Other Property Requirement

In addition to the requirement that there be a sudden and calamitous event, the *Moorman* doctrine requires that the defective product [\*359] must damage other persons or property. n111 The Illinois Supreme Court noted that the sudden and calamitous event, by itself, does not constitute an exception to the Commercial Loss Doctrine. Rather, the exception is composed of a sudden, dangerous, or calamitous event coupled with personal injury or damage to other property. n112

In 1984, the Illinois Supreme Court eliminated the requirement that there must be damage to "other property" in order for a plaintiff to recover in tort. n113 Thereafter, a plaintiff could recover for damage to the original property if

the event was sudden and calamitous. n114 However, in 1997, the Trans States court stated, "the evolution of the economic loss doctrine in Illinois and in other jurisdictions requires our reconsideration of the holding in Vaughn and particularly what constitutes Moorman property damage." n115 In overruling Vaughn, Trans States held that "where the product damages itself only, the harm that product liability law is designed to protect against is not realized." n116

Since Cardozo's *McPherson* decision, courts have allowed tort claims in products liability cases premised on the theory that consumers should not be limited by privity requirements to recover for personal injury or damage to other property that stemmed from an unreasonably dangerous condition of a product. n117 However, pursuant to the Vaughn decision, the little niche of tort law that acted as an exception to the remedies under the U.C.C. was beginning to "imprison the contract area with inapposite tort concepts." n118 Because Vaughn was overturned, damage to other property is now a necessary condition of pleading a claim for damages in tort law. n119 However, since the Trans States decision in 1997, there has been much analysis of what constitutes "other property," which is discussed below.

[\*360]

### 1. No Commercial vs. Consumers Distinction in Illinois

Some jurisdictions make a distinction between commercial transactions and consumer transactions in deciding whether "other property" must be damaged in order to sustain a tort claim. These jurisdictions allow tort recovery in consumer transactions when there is damage solely to the product itself; however, in transactions between two commercial vendors, the courts refuse to allow negligence or strict tort recovery for damage to the product itself and require "other property damage" to sustain the tort claim. n120 The theory for such a distinction is that retail consumers are not on an equal footing with the manufacturer or seller to bargain effectively for the allocation of risk, a concern inapplicable when commercial parties of equal bargaining power enter into a contract. n121 Nonetheless, the Trans States court was not persuaded that the consumer/commercial transaction distinction makes any difference and thus, under Illinois law, both retail consumers and commercial consumers will have to plead and prove damage to other property in order to sustain a tort claim. n122

### 2. Component Parts

The two most litigated areas regarding what constitutes "other property" are component parts in buildings and component parts in product liability cases. In order to determine whether a component part is considered part of the assembled whole or separate property, four different tests have arisen: (1) the product bargained for test; n123 (2) the product sold test; n124 (3) the foreseeability test; n125 and (4) the "separate-treatment" test. n126 While Illinois has adopted the product bargained for test, recent decisions may foreshadow a move towards the foreseeability test. n127

#### a. The "Product Bargained For" Test

In the Trans States case, the Illinois Supreme Court succinctly summarized the issues regarding whether damage caused by component parts to separate parts of the same product should be considered damage [\*361] to "other property." n128 In Trans States, the defendant, Pratt & Whitney Canada ("Pratt"), manufactured airplane gas turbine engines and sold the engines to Aerospatiale, a large French aircraft manufacturer, under a written sales contract that included express warranties. n129 Aerospatiale incorporated the engines into one of its airplanes and then sold that plane to McDonnell Douglas. n130 McDonnell Douglas leased the plane to a company called GPA ATR, Inc., which in turn subleased the plane to the plaintiff, Trans States Airlines. n131 An engine fire started mid-flight, and, after the plane successfully landed, it was determined that some of the inter-turbine duct bolts had loosened and fractured, hitting the engine's power turbine blades. n132 The engine caught fire and destroyed other parts of the aircraft. n133 Because of the many players in the supply chain of the engine, it was not clear that any express warranties would pass through to the plaintiff, and thus the plaintiff pled a case in tort for the damage to the aircraft caused by Pratt's defective engine. n134

In order to overcome the Commercial Loss Doctrine, the plaintiff had to allege that there was damage to property other than the engine itself. The plaintiff argued that a "separate-treatment" test should be used in order to determine whether the engine was separate from the fuselage of the airplane, which was also damaged in the fire. n135 The plaintiff's separate-treatment theory maintained that: (1) the engine was certificated at Pratt separate and apart from the airframe certification; (2) the engine came with its own maintenance, parts, and service publication manuals prepared by Pratt; (3) each engine had its own maintenance logbook which was kept independently of the airframe maintenance logbook; (4) the engine came with its own warranty issued by Pratt, which was separate and distinct from the airframe warranty; and (5) each engine had its own title documentation separate and apart from the airframe. n136 In opposition, the defendant argued that the plaintiff "bargained for" and received a fully integrated aircraft, complete with the engine as a component part from the seller/lessor GPA ATR. n137 The Trans States court held that [\*362] the "separate-treatment" test was unsupported by any authority and is problematic because most products are comprised of components, many of which are removable and interchangeable. n138 Furthermore, the court reasoned that it was necessary to look to the sublease agreement between the plaintiff and the immediate lessor of the aircraft in order to determine what the "product bargained for" was. n139 In the sublease, "the Aircraft" was defined as a "fully integrated aircraft." n140 Therefore, the Trans States court adopted the "product bargained for" test in order to determine whether other property was damaged. n141

#### b. The "Product Sold" Test

Some jurisdictions will look to the "product sold" in order to determine what the product is for purposes of determining whether other property has been damaged. In most transactions, the product sold by the manufacturer and the product purchased by the plaintiff is one in the same. However, there are some cases in which subsequent buyers have purchased a product in which other parts have been added, such as the airplane in Trans States. That is, in Trans States, the product bargained for by the plaintiff was the fully integrated aircraft, whereas the products sold by Pratt, the defendant manufacturer, were only the engines; n142 thus, under the "product-sold" test, the damage to the fuselage would be considered "other property."

The product sold test was adopted by the United States Supreme Court in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, where a primary purchaser of a ship added a skiff, a fishing net, and spare parts, then sold the ship to a secondary purchaser. n143 An engine room fire led to the sinking of the ship, and a faulty hydraulic system was determined to be the cause of the sinking. n144 The United States Supreme Court held that the vessel itself, as placed in the stream of commerce by the manufacturer, was the "product," thus drawing a distinction between components added to a product by a manufacturer before the product's sale to a user and those added after by an intermediary in the supply chain. n145 Therefore, even though the plaintiff "bargained for" and purchased the product with all the additional parts already added by persons in the supply chain, the Court determined [\*363] that the vessel the manufacturer sold was the "product" and the other additions constituted "other property" that was damaged, thus allowing the tort claim to proceed. n146 Illinois does not follow this rule.

#### c. Foreseeable Damage

Some states are expanding the Commercial Loss Doctrine to bar tort recovery to other property if it was foreseeable by the plaintiff at the time of purchase that the product might damage the surrounding property. For instance, in *Dakota Gasification Co. v. Pascoe Building Systems*, the plaintiff purchased an oxygen plant from the government. n147 The plaintiff also purchased steel from a separate party which was used to build the roof, and thereafter the roof of the plant collapsed due to a faulty weld. n148 The steel that failed was supplied separately by a sub-contractor and the damage was not merely to the supplied steel, but also to the oxygen plant building and its equipment. n149 Under a Moorman analysis, the product purchased by the plaintiff was steel, and thus there was clearly damage to other property - the plant and equipment - via a sudden and calamitous event. n150 Nonetheless, the Dakota court held that because the damage to the oxygen plant from the defective steel was a harm that was "reasonably foreseeable" to the parties at the time of contracting, "contract law, and not tort law, must provide the remedy for this purely economic loss." n151 The Dakota

court reasoned that because the damaged property was within the contemplation of the parties to the contract, "the parties contractually determined their respective exposure to risk, regardless whether the damage was to the 'goods' themselves or to 'other property.'" n152

Illinois does not follow this rule. However, in 2010, the Third District of Illinois decided *Westfield Ins. Co. v. Birkey's Farm Store, Inc.*, [\*364] in which the defendant sold the plaintiff a tractor with an automatic steering unit that subsequently caught on fire and was damaged. n153 The court held that the Commercial Loss Doctrine applied because the automatic steering unit was an integrated tractor part; therefore, there was no damage to other property. n154 However, the *Westfield* decision went further and held that the Commercial Loss Doctrine also bars tort recovery for "any type of damage that one would reasonably expect as a direct consequence of, or incidental to, the failure of the defective product." n155 Therefore, the plaintiff's allegation of damage to the fire extinguisher, equipment, employee clothing, and claims for loss of employee time and even physical injury did not constitute "other property" for the purpose of sustaining a claim in tort. n156 Whether the Illinois Supreme Court will adopt the "reasonably foreseeable" test has yet to be seen.

#### D. Summary of Product Liability Law

As can be seen, the *Moorman* court's analysis focused on the instances in which tort claims should be barred in product liability cases, and the court's policy analysis comported with that of product liability law. n157 The *Moorman* court clearly enunciated the extra-contractual duties that arise when a product is unreasonably dangerous and causes damage to other property via a sudden and calamitous event. n158 The problem is that the traditional *Moorman* test for product liability cases was misconstrued as being a test to determine when damage is purely economic in all scenarios, and thus Illinois courts began the long tradition of asking whether damages were economic in nature in order to determine whether tort claims should be allowed, instead of asking whether there were extra-contractual tort duties between the parties. This misguided interpretation of the *Moorman* holding has led to much confusion in its application to other areas of law, and therefore Illinois courts should stop asking whether damages are economic and start asking whether there are extra-contractual duties between the parties.

[\*365]

#### E. Attempts to Turn Warranty Law into Tort Law

Before leaving the discussion of product liability law, I would like to address one author's suggestion that privity requirements for warranty claims should be eradicated in order to combat the limitation imposed by the Commercial Loss Doctrine, because such a theory is irrational. In his article, *Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code § 2-318*, Steven Bonanno has suggested technical ways around the prohibitions surrounding the bringing of tort claims for purely economic loss. n159 One method is to admit that the loss is commercial in nature and thus governed by contract law and warranties; however, a plaintiff would then argue that all privity requirements should be eliminated under the U.C.C., essentially turning contract law into tort law. n160

Mr. Bonanno argues that potential revisions to *810 Ill. Comp. Stat. 5/2-318* should allow for warranties to extend beyond the purchaser to all ultimate users of products, thus eliminating all privity requirements. n161 *810 Ill. Comp. Stat. 5/2-318* was adopted by Illinois and extended warranties, express and implied, to members of the purchaser's household and guests in the home, even though these parties were never in privity of contract with the seller. n162 Thereafter, Illinois courts have taken it upon themselves to further extend the erosion of privity requirements to third parties such as employees. For instance, in *Whitaker v. Lian Feng Mach. Co.*, the court felt that warranties should extend to employees when employee safety was part of the benefit of the bargain negotiated by the employer with the seller. n163 This decision essentially expanded horizontal privity - persons not in the supply chain but instead in the purchaser's house or place of employment, but not vertical privity - those parties downstream in the supply chain. n164 However, not long thereafter, Illinois courts also eradicated vertical privity requirements in cases of personal injury,

allowing a person who was physically injured to bring warranty claims even though he was not in privity of contract with the buyer. n165

Mr. Bonanno argues that § 2-318 should be expanded to eliminate all vertical privity requirements and allow warranties to cover persons [\*366] who have suffered only economic loss. n166 Bonanno's argument is that because Moorman prevents tort claims in these situations, Illinois should expand contract claims to cover these parties. n167 For instance, he argues that "a plaintiff who has suffered only economic losses should not be subject to a more rigorous privity requirement than one who has suffered personal injury." n168 The author's solution is to extend all warranties to the "ultimate user," in essence creating a strict liability regime under contract law for economic damages, merely to provide a remedy to those who cannot recover under tort law. n169 However, this is not an argument or a theory. It is a preference, a posit, a dictate, and a personal opinion of justice which ignores the policy rationales for allowing tort or contract claims. Bonanno does not even mention the policy rationales for allowing tort claims when personal injuries occur or where there is an extra-contractual duty, compared to the policy rationales for recovery for mere deterioration of a product in contract law. Illinois courts have not, and should not, consider expanding the scope of *810 Ill. Comp. Stat. 5/2-318*. Bonanno ignores the fact that contract law is supposed to protect the mutual intent of the contracting parties, and eliminating the privity requirement for economic loss merely turns the contract claim into a tort claim without any rational policy basis for doing so.

### III. The "Other" Moorman Doctrines: Intentional and Negligent Misrepresentations

The Moorman Manufacturing Co. v. National Tank Co. case primarily discussed the Commercial Loss Doctrine in the context of product liability law as applied to a manufacturer of goods; however, the Moorman court also held that a plaintiff should be allowed to bring tort claims for purely economic damage where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, i.e., fraud; or where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant "in the business of supplying information for the guidance of others in their business transactions." n170 These exceptions make sense if the Commercial Loss Doctrine begins with an analysis of the policy reasons for allowing tort claims based on the extra-contractual duties between parties. [\*367] However, they do not make sense if one starts by categorizing the damages as economic versus non-economic. That is, when bringing a tort claim pursuant to misrepresentation theories, a plaintiff concedes that the damages are economic in nature and instead argues that an extra-contractual tort duty exists, which arises via a potential defendant's non-contractual relationships to third parties. Allowing for misrepresentation claims for purely economic damages should only be allowed in cases in which there are policy reasons that take the loss out of the realm of commercial loss and clearly place it in the realm of tort.

For instance, in *Rozny v. Marnul*, the plaintiff homeowners brought a suit against a defendant surveyor for an inaccurate survey prepared for a builder, which resulted in building encroachments on neighboring land. n171 The plaintiffs were not in contractual privity with the surveyor and therefore the plaintiffs argued that they were entitled to tort recovery. n172 The plaintiff argued that there are numerous theories of recovery available to a party not in privity of contract with the defendant, including: (1) strict liability in tort; (2) implied warranty free of the privity requirement; (3) third-party beneficiary doctrine; (4) express warranty free of the privity requirement; and (5) tortious misrepresentation. n173 The Rozny court proceeded under the fifth theory, indicating that the defendant's knowledge that the survey would be used and relied on by persons other than the builder (including plaintiffs, whose ultimate use was foreseeable) gave rise to claim for tortious misrepresentation if the plaintiff justifiably relied on these representations. n174

The Rozny court allowed for negligent misrepresentation tort claims thirteen years before the Illinois Supreme Court addressed the Commercial Loss Doctrine. However, this is not to say that misrepresentation claims should be allowed as an exception to the Commercial Loss Doctrine simply for the sake of stare decisis. Instead, there are rational, extra-contractual tort policies for these claims. For instance, when a defendant can reasonably foresee that a third party not in privity with the defendant may rely on the information provided, the defendant has a duty to make representations in a non-negligent manner. n175 Originally developed out of warranty law, the history of misrepresentation [\*368] claims parallels the development of strict tort liability claims from implied warranties, and it is clearly an

extra-contractual tort remedy based upon public policy and not the mutual intent of the parties. n176

As for intentional misrepresentation claims, in *Soules v. General Motors Corp.*, the plaintiff invested in a franchise based upon an auto manufacturer's oral representations that the franchise met its minimum financial requirements; however, it was shown that the auto manufacturer knew that the franchise did not meet its original or continuing financial requirements and that its periodic financial reports were false. n177 The investor brought a tort suit alleging fraudulent misrepresentation. n178 "The elements of a cause of action for fraudulent misrepresentation ... are: (1) false statement of material fact, (2) known or believed to be false by the party making it, (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." n179 The appellate court conceded that the manufacturer made misrepresentations about the financial statements, but held that the plaintiff was a director of the corporation and therefore was not justified in relying on the defendant's representations that the franchisee met the capital requirements. n180 The Illinois Supreme Court agreed that whether the plaintiff's reliance on information was reasonable is based upon the facts of which the "plaintiff had actual knowledge as well as those of which he 'might have availed himself by the exercise of ordinary prudence.'" n181 However, in this case, the examination of allegedly false reports would "not have revealed that the franchisee failed to meet its continuing financial requirements." n182 Therefore, the plaintiff reasonably relied upon the misrepresentations, and the tort claim for the economic loss could proceed. n183 This analysis is suffused with tort language and concepts. It is clear that the claim for fraudulent misrepresentation is also based [\*369] upon extra-contractual tort policies as was the claim in *Rozny*; however, if one begins the analysis by asking whether the damages are economic under the traditional *Moorman* product liability test, the tort claim would be barred as the damages are clearly economic.

Finally, in *Tolan & Son, Inc. v. KLLM Architects, Inc.*, the court extended negligent misrepresentation claims to defendants not ordinarily in the business of supplying information. n184 Before *Tolan*, a defendant that was not in the business of supplying information could only be held liable for intentional misrepresentation; however, the *Tolan* Court felt that the Restatement (Second) Section 552 phrase "any other transaction in which [the defendant] has an interest" means that a defendant need not necessarily be in the business of supplying information, but must merely have an interest in the transaction. n185

The *Tolan* court expanded the reach of misrepresentation claims further than the *Moorman* court. Under *Tolan*, as long as the information is "important" to the nature of the business, the negligent misrepresentation claim will be allowed, but if it is "ancillary" then it is still barred. n186 This may be a distinction without a difference. Nonetheless, *Tolan* is a First Appellate District case and does not overrule *Moorman*, which was an Illinois Supreme Court case. n187 Furthermore, the *Tolan* court did not extend negligent misrepresentation claims to manufacturers of goods, which means that a plaintiff bringing a suit against a manufacturer of goods must still allege intentional misrepresentations when there is only economic loss. n188 Neither *Soules*, *Rozny* nor *Tolan* implied that economic loss was recoverable for innocent misrepresentation.

On their face, the *Soules*, *Rozny* and *Tolan* cases seem to be exceptions to the traditional *Moorman* doctrine in that they provide the framework for expanding tort recovery for economic loss to parties that are not in privity of contract and expanding tort claims to numerous service industries. n189 However, this is a misreading of the cases [\*370] and a misunderstanding of the genealogy of the *Moorman* doctrine. First, the *Soules* and *Rozny* cases preceded the *Moorman* case, and they did not reference the same principles and concerns that the *Moorman* case analyzed in deciding whether a tort claim can be allowed for the economic loss to a "good." The *Soules* and *Rozny* cases simply discuss an extra-contractual duty to not make tortious misrepresentations. It is one of the five tort recovery theories discussed by the *Rozny* court and has nothing to do with the traditional *Moorman* doctrine that is applied in product liability cases. A traditional product liability case analyzed under the *Moorman* doctrine begins by asking whether there is damage to other property via a sudden and calamitous event, which determines whether the damages are economic in nature, which in turn determines whether recovery is allowed in tort. n190 However, in misrepresentation cases, the plaintiff concedes that the damage is purely economic, a concession that would mean a per se denial of recovery in applying the traditional *Moorman* doctrine to the sale of goods. In fact, it would be quite illogical to analyze misrepresentation cases under the

traditional Moorman doctrine, n191 because there is obviously no sudden and calamitous event, and no unreasonable risk of injury to persons or other property. Therefore, even though the Moorman court lists negligent and intentional misrepresentations as the second and third means to recover for economic damages, when one analyzes misrepresentation theories under Moorman, as one would analyze "goods" under Moorman, it simply muddies the waters. n192

The Moorman court concisely defined a rational tort theory for allowing recovery for purely "economic damages" for defective goods under product liability law, but the Moorman court did not expand on the policy justifications for allowing misrepresentation claims, and therefore misrepresentation claims seem to be an exception carved out of the traditional Moorman doctrine simply because they pre-existed the Moorman decision. n193 Instead, misrepresentation claims should be analyzed as extra-contractual duties that society has [\*371] deemed should be recoverable in tort because they are founded upon rational tort policies, i.e., persons who provide information when they know others will rely on it have created a special relationship between themselves and the other person out of which a duty not to be negligent in providing that information arises. n194 Therefore, if one begins by asking whether the damages are economic in nature or not, the three exceptions in the Moorman decision are not consistent: economic damages to goods are not recoverable, but economic damages caused by misrepresentations are. However, when one begins a Moorman analysis by asking whether extra-contractual tort duties control the relationship between the plaintiff and the defendant, all three exceptions listed in the Moorman decision are consistent. If there are extra-contractual duties that justify the claim, then the Commercial Loss Doctrine does not apply and it makes no difference if the damages are economic or not.

Conceptualizing the application of the Moorman doctrine in this manner will allow future Illinois courts to apply the doctrine to other areas of law governed by contracts, especially services and professional services, in which the application of the traditional Moorman doctrine for "goods" only serves to confuse the issues. As will be seen, the Commercial Loss Doctrine was originally applied to product liability cases and misrepresentation cases, but has since been extended to the service industries n195 and to the professional service industries. n196 Much of the confusion in its application stems from trying to analyze such cases as traditional Moorman cases and beginning with the question, "are the damages economic?"

#### IV. The Commercial Loss Doctrine Expanded to Service Contracts n197

The application of the Commercial Loss Doctrine to the service industry has been somewhat controversial and completely nebulous. This is largely due to the fact that many lawyers and judges have conflated different aspects of the traditional Moorman doctrine and tort claims for misrepresentation with regard to service providers. For instance, [\*372] in *Anderson*, Ledbetter hired Anderson to work on a machine, and Ledbetter also hired Walther to inspect Anderson's work and inform Ledbetter of any deviations from the specifications so that corrections could be made. n198 Anderson had no contractual relationship with Walther, but sued Walther pursuant to the theory that Walther undertook a duty to supervise and inspect Anderson's work and that Walther negligently performed that duty by requiring much of the work to be redone unnecessarily. n199 This caused Anderson to incur unnecessary additional costs. n200

If Anderson is analyzed as a traditional Moorman claim, there can be no recovery, because Anderson made no claim for personal injury or property damage (nor was there an allegation of a sudden and calamitous event, only dissatisfaction with the quality of inspections made by Walther). n201 Therefore, the court correctly held that there was no economic loss and that the claim should be barred by the traditional Moorman doctrine. n202 However, the court pointed out that Anderson did not claim Walther was a supplier of information for the guidance of others in their business transactions and that it made negligent or intentional representations. n203 Such a claim would perhaps be redressable in tort, but the court did not reach that issue. n204

The *Anderson* case is important in that it underscores the need to understand and properly plead a tort claim against a service provider. Why would Anderson plead a product liability tort claim and try to prove that the traditional Moorman doctrine does not apply? It is obvious that there was no sudden event or damage to other property, and

therefore, there is obviously no issue as to whether the damages were completely economic in nature. And once the damages are determined to be economic, the traditional Moorman doctrine bars them per se. Anderson could have brought a variety of other tort claims (with a much higher prospect of prevailing), and conceded that the damages were economic in nature but premised the claims on the theory that there are extra-contractual duties that allow tort claims for economic damages, e.g., implied warranty free of the privity requirement; third-party beneficiary doctrine; tortious misrepresentation; tortious interference with contract; and/or tortious interference with prospective business advantage.

[\*373]

#### A. Legal Malpractice

In addition to regular service providers, the Commercial Loss Doctrine has been analyzed and found to apply to many professional service providers such as architects and engineers. n205 However, in 2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., a case in which the Illinois Supreme Court did not allow the plaintiff to sue in tort for malpractice against an architect and engineer, the court, in dicta, noted that the holding should not be interpreted to stand for the end of all recovery for malpractice in tort. n206 By their very nature, these types of damages are economic. n207 The Lincoln Park court noted that, historically, legal malpractice claims had been allowed in tort because Illinois courts had found that attorneys owe extra-contractual fiduciary duties to their clients, which arise not from contract, but from the traditional responsibilities that a lawyer owes to a client and to third-parties. n208 Fiduciary duties encompass much more than the extra-contractual duties involved in negligent and intentional misrepresentation claims, and fiduciary duties arose long before the Commercial Loss Doctrine.

For instance, in *Collins v. Reynard*, the Illinois Supreme Court held that a complaint against a lawyer for professional malpractice may be couched in either contract or tort. n209 The appellate court had reasoned that Moorman should be extended to bar a legal malpractice claim, even though the Lincoln Park court expressly stated that it did not intend to determine the future application of Moorman in all areas of professional malpractice. n210 The case was appealed to the Illinois Supreme Court, which reversed the appellate court's decision. n211 The Illinois Supreme Court explicitly stated:

our ruling is grounded on historical precedent rather than logic. If 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 [\*374] its use, it is reasonable to continue with that practice until and unless good cause is shown to change the rule. n212

However, the court should not have based this decision on stare decisis: there was a rational policy basis for the holding. In his special concurrence, Justice Miller pointed out that in all other service cases in which Illinois's courts held that the Commercial Loss Doctrine barred the tort claim, the courts explicitly noted, "the commercial or contractual nature of the parties' relationship," n213 and that "the complaining party, if he wished protection against the particular type of harm suffered, could have bargained for a guarantee or warranty against it." n214

Justice Miller pointed out why legal malpractice claims are different:

it is difficult to apply [the Commercial Loss Doctrine] in the area of legal representation, where the purpose of retaining counsel is to obtain a representative who will function as a fiduciary and will act professionally, with reasonable skill and ability, to advance the client's interests. It would be rare indeed for an attorney to guarantee or to promise to achieve a particular result in a matter. n215

That is well said. Justice Miller tried to bring the Collins decision back into the realm of logical reasoning so that the court did not have to merely rely on stare decisis to allow legal malpractice tort claims. A contract for legal services is clearly a commercial contract, as are other service contracts in which the court has held that the economic loss should bar recovery. n216 However, the most logical reason for allowing tort claims in legal malpractice cases is similar to the extra-contractual duties that make for a misrepresentation claim. That is, an attorney cannot warrant results, only that he will exercise a certain standard of competence. This is a reasonable standard of care, which is a tort concept. Furthermore, if a client could only recover on his contract with his attorney, who does he consult to make sure the contract sufficiently allows recovery for breached fiduciary duties? Another attorney, and so on ad infinitum? There are logical reasons for allowing legal malpractice tort claims, and these reasons bring the attorney-client relationship out of the realm of a commercial contract and into a realm of law that deals with standards of care and tort claims.

[\*375]

#### B. Accountants

In *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, the Illinois Supreme Court stated the following:

the evolution of the [Commercial] Loss Doctrine shows that the doctrine is applicable to the service industry only where the duty of the party performing the service is defined by the contract that he executes with his client. Where a duty arises outside of the contract, the [Commercial Loss ] doctrine does not prohibit recovery in tort for the negligent breach of that duty. n217

The question before the court was whether the duty an accountant owes his client is defined by his contractual obligations, or is extra-contractual. The court held that the duty is extra-contractual, stating:

[a] client should know that an accountant must make certain decisions independently, and the client had the right to rely on the accountant's knowledge and expertise when those decisions are made by the accountant. This knowledge and expertise cannot be memorialized in contract terms, but is expected independent of the accountant's contractual obligations. n218

In essence, the Congregation court reaffirmed the idea that if duties arise outside of a contract, a tort claim is possible; however, the court had to answer this vexing question, "how do we know if there are duties that arise outside of the context of a contract?" In making a distinction between architects, in which the Commercial Loss Doctrine bars tort claims, and lawyers and accountants, in which tort claims are allowed, the Congregation court reasoned as follows:

whether the professional produces a legal brief or a financial statement, the value of the services rendered lies in the ideas behind the documents, not in the documents themselves. In contrast to the relationship between an attorney or accountant and their client, the relationship between an architect and his client produces something tangible, such as a

plan that results in a structure. The characteristics of a tangible object are readily ascertainable, and they can be memorialized in a contract and studied by the parties. n219

This seems to be a very metaphysical distinction that can only serve to complicate the issues, and as discussed in Part II, I believe that architects and engineers should be held liable in tort because there are extra-contractual duties they owe to clients that are similar to those an accountant or lawyer owes to their clients. n220

[\*376] The Congregation court seems to be saying that if the final product produced is abstract ideas then there is a duty to use reasonable care, but if the final product is tangible then there are not extra-contractual duties to use reasonable care because tangible items can be captured in a contract. Therefore, the duties a lawyer or accountant owes to a client cannot be reduced to contractual terms, while the duties an architect or engineer owes to his or her clients can be reduced to contractual terms. n221 This is of course not true: just because the plans and specifications of an architect or engineer can be reduced to tangible terms does not mean the duties owed between the parties can be reduced to tangible terms.

Furthermore, the Congregation court's distinction between architects and lawyers seems to be a bit tenuous and only serves to muddy the waters of Moorman analysis, as Judge Heiple points out in her dissent:

once again, this court has plunged into the quagmire known as the Moorman doctrine and dredged up yet another ill-conceived exception to add to the current confusion... . The majority opinion puts litigants and trial judges in a position of having to guess what the exception of the month is. Yesterday it was attorneys. Today, it is accountants but not architects. Tomorrow, who can say? n222

This dissent concisely underscores the confusion that arises by conceptualizing "exceptions" to the Moorman doctrine that are created seemingly piecemeal, instead of conceptualizing the doctrine as a Commercial Loss Doctrine in which tort claims should be allowed only if a duty to use reasonable care exists because of the special relation between an accountant or attorney and a client.

### C. Veterinarians

In *Loman v. Freeman*, the plaintiff alleged property damage to his horse resulting from the negligent practice of veterinary medicine. n223 Instead of asking whether extra-contractual duties existed that would allow a tort claim, the court applied the traditional product liability Moorman analysis. n224 The damage was a laceration with a scalpel, which the appellate court had held was relatively "sudden and dangerous," compared with a process of deterioration such as the development [\*377] of a crack in a grain-storage tank in *Moorman*. n225 The Illinois Supreme Court pointed out that "the application of the 'sudden and dangerous' exception to the Moorman doctrine to the conduct of one who has contracted to provide a service, as opposed to the failure of a product, is awkward at best." n226 The Court further stated that "the owner of an animal could seek a remedy in tort if he alleged malpractice in the performance of veterinary surgery, but he would be limited by Moorman to a contractual remedy if he alleged that the veterinarian misdiagnosed a disease or failed to render the proper non-surgical treatment." n227 Instead of using the traditional Moorman product liability test, the *Loman* court should have considered whether there might be extra-contractual duties that a veterinarian owes a client similar to a doctor, lawyer or an accountant.

### V. The Commercial Loss Doctrine Applied to the Construction Industry n228

The application of the Commercial Loss Doctrine to the construction of buildings is very similar to that of product liability law in which there are many component parts that are added to the product at different times in the process. However, in applying the Moorman doctrine to construction cases, there seem to be many awkward contortions of the doctrine in order to fit construction claims into traditional product liability claims. I believe the policy reasons that the Moorman court articulated for allowing tort claims in product liability cases simply do not apply to the construction industry, and thus the Commercial Loss Doctrine should usually be applied to bar tort claims, unless those claims are based upon negligent or intentional misrepresentation, or are plead against an architect or engineer. This is due to the fact that the policy rationale for product liability claims, i.e., putting the risk of loss on the manufacturer, who is in the best position to prevent the defect and to insure against the same, simply does not apply to the construction industry, even when the construction involves a single family home purchased by unsophisticated buyers. This is because construction contracts are not consummated in the same way or with the frequency that product sales are in a mass market global economy. That is, every time a building is constructed, all parties, including the owners, developers, architects, engineers, [\*378] purchasers and subcontractors, are all sophisticated parties that are experienced in the industry and retain counsel, or should retain counsel, to review contracts for risk of loss and risk shifting. There is every opportunity, by every party involved, to allocate the risk of all events, even sudden and calamitous events that result in injuries to persons or other property. The only exception to this should be for tort claims against architects and engineers, who, I believe, have duties that cannot be reduced to a contract and thus are extra-contractual. However, Illinois courts have not analyzed construction cases in this manner. Instead, the Moorman doctrine has been applied piecemeal, resulting in a variety of inconsistent rules.

#### A. Buildings, Service Contractors, and Other Property

Shortly after the Moorman decision in 1982, the Illinois Supreme Court had the opportunity to apply the Moorman doctrine to a case involving a defective home. n229 In *Redarowicz*, the chimney and the adjoining wall of the plaintiff's house pulled away from the rest of the house. n230 The plaintiff sued the original builder of the house in tort because the plaintiff was not in privity with the builder, and the court held that the Commercial Loss Doctrine barred the plaintiff's claim for damages for the cost of repairing the house itself because there was no damage to "other property." n231 However, the court noted that "the adjoining wall [did] not collapse[] on and destroy[] the plaintiff's living room furniture," thus suggesting that the Commercial Loss Doctrine would not bar a tort claim for damage to personal property within the house if that damage had materialized. n232 After *Redarowicz*, it became clear that under Illinois law, damage to inventory, furniture, and other goods that are stored in a building would be considered damage to "other property" barring the application of the Commercial Loss Doctrine, presumably because that property is "bargained for" separately than the building itself. n233

[\*379] The District Court for the Northern District of Illinois has also addressed the issue of what constitutes other property in the context of construction cases. In one case, the plaintiff's home was flooded when a sprinkler system malfunctioned. n234 The court found that the flooding was sufficiently sudden and dangerous, but only allowed recovery for plaintiff's personal belongings - not for any damage done to the rest of his home - because the sprinkler system was a component part of the house. n235 The court's explanation went no further than stating that the sprinkler was a component part of the house. There was no explanation of whether the sprinkler system was installed before or after the sale to the plaintiff or whether the court was using the "product bargained for" test outlined in *Trans States*. n236

However, the District Court for the Northern District of Illinois addressed the same scenario one year later and used the "product bargained for" test and "foreseeability" test, directly citing the *Trans States* decision. n237 In *City of Peru*, the plaintiff, the City of Peru ("the City"), owned the Starved Rock hydroelectric plant, and a fire started from an inadvertent brake application during testing of one of the plant's generators. n238 The City sued two contractors and two subcontractors, and the subcontractors brought motions to dismiss the tort claims based upon the Commercial Loss Doctrine. n239 The contractors were hired to provide design, consulting, and engineering services, while one subcontractor provided electrical generators, and the other provided services in connection with the installation and

operation of software systems. n240 The City's theory was that since the subcontractors only worked on certain component parts of the plant, all other property in the plant constituted "other property" for which plaintiff could recover in tort. n241 However, the court held that the "city did not bargain separately for electrical generators or software. It bargained for a plant. It was foreseeable that defective component parts could result in damage to the whole plant, and the City could have bargained [\*380] in consideration of such risks." n242 It is clear that the court used the "product bargained for" test and the "foreseeable damage" test that was used in product liability law.

The leap from product liability law to Redarowicz, Metro., and City of Peru is conceptually coherent because the defendants were sellers of a tangible item, a building. However, as stated above, the same policy reasons for allowing a tort claim in the realm of product liability simply do not apply in construction cases. For instance, when someone purchases a home, he has every opportunity to retain professional lawyers, real estate brokers, inspectors, and so forth. He also has every opportunity to fully consider every provision of the purchase contract and allocate risk in a manner of their choosing. This is a major purchase, not the purchase of a mass-produced consumer product, and therefore the same policy rationale for allowing tort claims in product liability cases simply does not apply to construction and real estate cases.

To complicate matters even further in the realm of construction law, once a plaintiff sues a pure service provider for negligent installation of a product that results in damage to that product, the entanglement with the Moorman doctrine serves no purpose but to confuse all parties involved. For instance, in one Illinois Appellate case, a property owner hired a contractor, who hired a subcontractor, to erect a steel-frame system that would eventually support a building. n243 The steel frame collapsed, and the plaintiff brought suit against the subcontractor for negligence in failing to properly brace the frame. n244 The plaintiff sought damages for the loss of value of the frame itself and lost profits due to the delay in construction. n245 The defendant sought dismissal on the grounds that the negligence claim was barred by the Commercial Loss Doctrine due to the fact that the steel-frame system the defendant erected was part of the same "product bargained for" by the plaintiff. n246 The plaintiff's argument, a creative one, was that the steel frame was purchased separately from the service contract to erect the frame and thus when the steel frame collapsed and was damaged, "other property" was damaged. n247 The court looked at the purchase order between the plaintiff and the general contractor, which stated that the general contractor was to "provide materials, [\*381] labor, equipment, engineering, and supervision to construct a warehouse" and to "furnish all of the materials and perform all the labor necessary." n248 Therefore, in the court's view, the plaintiff clearly bargained for the completed warehouse, including the steel frame and the installation service. n249

The court did point out that if "the complaint alleged the frame fell and damaged the existing warehouse, or vehicles belonging to the plaintiff, our analysis might be different." n250 The court was therefore indicating that a party who provides only a service governed in all aspects by a contract could still be held liable in tort if the performance of that service resulted in damage to other property. This would in effect import product liability law into the realm of pure service contracts, where there simply is no rational policy reason to do so. Every aspect of risk in these settings can be freely negotiated and parties can decide to include warranties, incidental and consequential damages, indemnity provisions, etc., for the breach of a service contract.

#### B. Elimination of the "Other Property" Requirement in Construction Cases

In *Board of Education of Chicago v. A, C & S, Inc.*, the plaintiffs, 34 school districts, pled a cause of action to recover the removal and repair costs of asbestos-containing material (ACM) in their buildings from the various defendants who were involved in the manufacturing and distribution chain of the ACM. n251 The court found that the complaints sufficiently alleged that the ACM caused damage to other property or injury to persons required to sustain a tort claim. n252 However, a plain reading of the complaint showed that there were no allegations of contamination of the building and, therefore, no claim for other property damage. n253 Nonetheless, the court believed it could make a reasonable inference from the pleadings that harmful asbestos existed throughout the buildings. n254

In making this ruling, the court greatly expanded the reach of acceptable tort claims by redefining what counts as a

singular product. The general rule is that allegations of faulty workmanship in construction [\*382] of residencies with no allegation of physical injury or damage to property other than to the residencies themselves will not yield damages. n255 The court pointed out that allowing recovery in this case was a rare exception under the principles established in Moorman and should not be construed as an invitation to bring economic loss contract actions within the sphere of tort law through the use of some fictional "other property" damage. n256 However, the court's reasoning for allowing a tort claim in the first place was not based upon any rational analysis of policy reasons.

### C. Architects n257

Four years after the Anderson n258 decision, the Illinois Supreme Court addressed the very narrow question, "should there be an exception to the rule set forth in Moorman which would permit Plaintiffs seeking to recover purely economic losses due to defeated expectations of a commercial bargain to recover from an architect or engineer in tort?" n259 There, the plaintiff condo association hired the defendant architect to design condominium units. n260 The plaintiff alleged that after the units were completed, the windows and doors were loose, the roof leaked, the garage was settling, and the utilities were inadequate and did not function properly. n261 The condo association brought suit against the defendant on both tort and contract theories. n262 The plaintiff did not deny that the damages were commercial, but instead argued that one of the three exceptions to the Commercial Loss Doctrine, as outlined in Moorman, should apply. n263 Until the Lincoln Park decision, Illinois appellate courts had ruled both ways in determining whether the Commercial Loss Doctrine should bar tort claims as applied to architects and engineers. n264

[\*383] First, the plaintiff attempted to make the argument that an architect supplies information to be used by others, and therefore the claim should come within the exception recognized in Moorman permitting recovery of commercial losses for the torts of negligent and intentional misrepresentation, both based upon extra-contractual duties. n265 However, the Lincoln Park court held that:

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. n266

The court seemed to concede that the duty to not intentionally or negligently make misrepresentations is an extra-contractual tort duty; however, the court seemed to introduce another distinction which muddies the waters more: some defendants are in the business of providing information per se and others only provide information incidental to a tangible product. n267 This distinction is problematic. If a defendant provides incidental information, but intentionally and willfully misrepresents that information, thus breaching a non-contractual duty, is it recoverable in tort under the Lincoln Park holding? I do not believe so.

[\*384] The second argument the plaintiff made is that architects are professionals akin to doctors and lawyers and therefore they are bound by extra-contractual fiduciary duties. n268 However, the court stated that "the concept of duty is at the heart of distinction drawn by the [commercial] loss rule," n269 and because the architect's responsibility originated in its contract, the court found its duties should be measured accordingly. n270

In another Illinois Supreme Court case, the court reasoned that a provider of services and its client have an important interest in being able to establish the terms of their relationship prior to entering into a final agreement, and "the policy interest supporting the ability to comprehensively define a relationship in a service contract parallels the policy interest supporting the ability to comprehensively define a relationship in a contract for the sale of goods." n271 I think this is correct reasoning in the construction context when one is examining contracts between builders, suppliers,

owners, etc. All parties should be in a position to allocate every type of risk in their contracts. However, that same policy rationale does not apply to architects and engineers, which do owe a client extra-contractual duties.

The Congregation court recognized the existence of extra-contractual duties that are the basis of tort claims, stating that the Commercial Loss Doctrine should only be applicable to bar tort claims in the service industry "where the duty of the party performing the service is defined by the contract that he executes with his client. Where a duty arises outside of the contract, the Commercial Loss Doctrine does not prohibit recovery in tort for the negligent breach of that duty." n272 The Lincoln Park court also recognized that in the context of product liability law, duties do in fact arise outside of a contract, stating "the rule does not prevent a tort action to recover for injury to other property and persons because the duty breached generally arises independent of the contract." n273 I agree with this test, and I also agree that in the context of construction law, most duties should be defined by the contracts because the policy theories of construction law differ from those of product liability law. But I do not believe that the duties [\*385] architects and engineers owe their clients and third parties can arise strictly from the contract. However, that is what the plaintiff in Lincoln Park argued: that the duties are fiduciary and not contractual. The Lincoln Park court seemed to acknowledge the plaintiff's argument, but then simply determined that a duty an architect owes is strictly contractual, with no further elaboration. n274 The Lincoln Park court contrasted architects and lawyers stating that Illinois recognizes the fiduciary duties of lawyers as extra-contractual, but "such [] duties arise[] from a consideration of the nature of the undertaking and the lawyer's traditional responsibilities. The same cannot be said with respect to the defendant architect in the present case." n275 This seems to be an odd distinction.

The question the court should have asked is, "are there extra-contractual duties that exist between an architect and his client or third parties that are based on rational tort policy?" For instance, the extra-contractual duties of product liability law are based upon public policy concerns discussed herein, n276 and legal malpractice claims are premised on extra-contractual fiduciary duties that are based on rational consistent tort polices also discussed herein. n277 If the court had analyzed the problem in this fashion, I believe they would have come to the conclusion that architects have extra-contractual fiduciary duties because their clients hire them to conduct a professional service, which per se requires exercising their professional judgment, a duty of care that cannot be reduced to contracts. How could a client reduce these duties to a contract when he does not have the requisite professional knowledge to even know how an architect goes about his work?

#### D. Engineers

The Commercial Loss Doctrine was also addressed in regards to the services of engineers. In *Ferentchak v. Village of Frankfort*, the plaintiff home buyers brought tort claims against the defendant engineer for negligently designing their sub-division, which lead to flooding in their home. n278 The water entered the home because the foundation grade level was too low. n279 In the contractual privity chain the land [\*386] developer engaged the engineer to design plans, so there was no privity between the homebuyer and the engineer. Therefore, the plaintiffs brought a tort claim against the engineer alleging that the engineer's duty arose from his professional responsibility as a registered civil engineer. n280

The *Ferentchak* court held that the "degree of skill and care required of [the engineer] in this situation is dependant on his contractual obligation to [the developer]," and "the scope of that duty, although based upon tort rather than contract, is nevertheless defined by the engineer's ... contract with the owner." n281 The evidence presented at trial showed that foundation grade elevations were not set by the contracts and therefore the engineer did not have a duty to the plaintiff. n282 The *Ferentchak* court is stating that an engineer's duties stem from their contracts, whereas the plaintiff was trying to argue that there are extra-contractual duties, such as fiduciary duties, that are above and beyond mere contractual and most traditional tort duties. However, the *Ferentchak* court refused to create fiduciary duties for engineers. n283

Compare the *Ferentchak* holding to *Thompson v. Gordon*, where a contract contained a provision stating that "the standard of care for [defendants'] services will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services." n284 The court pointed out that such a provision

added an important qualifier to the defendants' work because it obligated them to act within the prescribed standard of care. n285 The contract's articulation of the standard of care matches the standard of care generally applied to professionals under Illinois law, which is to use the "same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances." n286

The Thompson trial court granted defendant's motion for summary judgment on the ground that the contract, which controlled defendants' [\*387] duties, "[did] not call for an assessment of the sufficiency of the median barrier" because there was no express provision in the contract to do so. n287 However, the appellate court held that the defendants' contract obligated them to "employ a professional standard of care in designing a replacement for the bridge deck, and the expert's affidavit was evidence that the defendants breached that standard of care by not considering or designing an improved median barrier." n288 The Illinois Supreme Court recently accepted review of the Thompson case n289 and it is an interesting case in that the appellate court held engineers to a professional standard of care just like attorneys and accountants, but it also comports with the Ferentchak decision in that the tort duty only arose because it was a provision of the contract. The Illinois Supreme Court should take the opportunity to hold architects and engineers to the same standard that lawyers and accountants are held to. Architects and engineers clearly have extra-contractual duties that cannot be reduced to the terms of a contract because they are professionals that are responsible for exercising professional judgment in the design of structures. How could each professional judgment be reduced to a contract? Is the owner required to have the requisite knowledge of what needs to be designed and in what manner to put it in the contract? This is clearly not the case. Architects and engineers are hired to exercise their professional judgment in the design of structures, and thus they should be held to a professional standard of care whether it is placed in a contract or not. This is clearly an extra-contractual duty.

## VI. Damages Recoverable

The definition of "economic loss" usually includes direct, incidental and consequential damages. n290 Direct damages are the cost of the product itself, which can be determined by the difference between the price paid and the market value of the product as defective. n291 Economic loss also includes incidental damages such as the cost of repair [\*388] or replacement of the defective product, and consequential damages which are the lost profits from delay and replacement. n292 Whether one can recover for the direct, incidental, and consequential damages arising from the product itself or only for the direct, incidental, and consequential damages to the "other property" has not yet been determined in Illinois. It is a very important question because a plaintiff could sustain large damages from a defective product, including costs of repair and lost profits, but only very minor damages to other property. Should the plaintiff be able to recover all of the damages?

It does not seem to make sense under the principles articulated in *Moorman* to allow recovery for physical harm to the product and lost profits caused by the harm to the product, even if there is damage to other property via a sudden event. This is because the damage to the product is still only economic loss; it is the damage to other property that brings the claim within the realm of tort theory. However, in *American Xyrofin*, the appellate court held that "we are unable to find support for the defendants' contention that even if a sudden and calamitous occurrence resulting in damage to surrounding property were shown to exist, recovery for damages to the [product itself] and lost profits would nevertheless be unrecoverable in tort." n293 In fact, the *American Xyrofin* court held that "recovery should include damages for any harm which proximately resulted from defendants' breach of their duty including damage to the [product] and lost profits." n294

Given this holding, it will be in the plaintiff's attorney's best interest to look for any damage to other surrounding property, however slight, in conjunction with the failure of the product in order to bypass the economic loss rule and allow for recovery in tort. Once the plaintiff has found damage to other property, he can then seek recovery for the other property along with the damage caused to the product itself and any incidental and consequential damages that resulted from the loss of use of the product itself. Let's take an example ad absurdum. Consider a plaintiff that owned a \$ 1 million piece of equipment that broke down and shot a screw out that hit the plaintiff, resulting in a trip to the hospital, but only a few stitches and a \$ 2,000.00 medical bill. Because of the damage to the equipment, the plaintiff had to shut

down his business for two weeks and therefore lost \$ 100,000.00 in net profits. Under the American Xyrofin holding, the plaintiff could recover all \$ 1,102,000.00, in tort, because the Commercial Loss Doctrine [\*389] would not bar the claim. This is an absurd outcome. There is no doubt that the plaintiff should be able to recover his \$ 2,000.00 medical bill in tort, but the additional \$ 1,100,000.00 should be governed by the contractual terms and warranties between the plaintiff and the manufacturer of the equipment.

## VII. Conclusion

Given the confusion that the Commercial Loss Doctrine has caused in Illinois, I believe that when Illinois courts are called upon to determine whether the Commercial Loss Doctrine applies, they should not begin by applying the traditional Moorman test, i.e., is the damage to other property via a sudden a calamitous event. Instead, they should analyze whether the duties between the parties arise via the contract between the parties or via extra-contractual duties which govern the relationship between the parties. If the latter, then tort claims should be allowed. In determining whether extra-contractual duties exist, courts must articulate rational and/or historical policy reasons for the existence of such duties, not just a preference for justice.

I also hope I have shown that the Commercial Loss Doctrine should be applied to bar tort claims in the construction industry because the policy reasons for allowing tort claims do not apply in the construction industry, with the exception of claims against architects and engineers. This is due to the fact that the policy rationale for product liability claims, which is to put the risk of loss on the manufacturer who is in the best place to prevent the defect and also in the best position to insure against the same, simply does not apply to the construction industry. This is the case even when the construction involves a single family home purchased by unsophisticated buyers. This is because construction contracts are not consummated in the same way and with the frequency that product sales are in a mass market global economy. That is, every time a building is constructed, all parties, including the owners, developers, architects, engineers, purchasers and subcontractors, are sophisticated parties that retain counsel, or should retain counsel, to review contracts for risk of loss and risk shifting. There is every opportunity, by every party involved, to allocate the risk of all events, even sudden and calamitous events that result in injuries to person or other property. Tort claims against architects and engineers should be allowed because these parties must exercise professional judgment in designing plans: it is an extra-contractual duty that the client cannot reduce to the terms of a contract.

Unless courts are ready to drop all distinctions between contract claims and tort claims, which would be a grave mistake, courts need to [\*390] make an effort to clarify the Moorman doctrine and its application, and define certain workable rules to provide practitioners guidance in litigating these claims.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Commercial Law (UCC)Sales (Article 2)WarrantiesExclusion & ModificationInsurance LawClaims &  
 ContractsGeneral OverviewTortsProducts LiabilityGeneral Overview

### FOOTNOTES:

n1. Vladimir Nabokov, *Lolita* 9 (Vintage Books 2d ed. 1997) (1955).

n2. Grant Gilmore, *The Death of Contract* 90 (1974).

n3. See *Miller v. United States Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990). Judge Posner of the Seventh Circuit pointed out that we should use the term "commercial loss" rather than "economic loss" to describe this concept. He states, "it would be better to call it a 'commercial loss,' not only because personal injuries and especially property losses are economic losses, too - they destroy values which can be and are monetized - but also, and more important, because tort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law." *Id.* I think this conceptualization and nomenclature clears up a lot of the confusion that has arisen as Illinois courts apply the Commercial Loss Doctrine to different industries, and therefore I will refer to the Commercial Loss Doctrine in this article.

n4. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982).

n5. Jay M. Feinman, *The Significance of Contract Theory*, 58 *U. Cin. L. Rev.* 1283, 1285-87 (1990). Herein I am referring to classical contract theory, which is the body of law usually associated with Holmes, Williston, and the original Restatement of Contracts. However, as Mr. Feinman points out, even classic contract theory is based somewhat on public policy concerns as courts have to interpret, fill gaps, and even impose pre-contractual and quasi-contractual liability that are not bargained for.

n6. *Id.* at 1286.

n7. This is of course a dramatic oversimplification of the origins and theory of tort law, for which, to this day, there is no consensus. For a full discussion of tort theory, see Mark Geistfeld, *Principles of Product Liability* (2006).

n8. *Thomas v. Winchester*, 6 *N.Y.* 397, 408 (N.Y. 1852).

n9. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. Legal Stud.* 461, 461 (1985).

n10. *MacPherson v. Buick Motor Co.*, 111 *N.E.* 1050 (N.Y. 1916).

n11. See Geistfeld, *supra* note 7, at 20-26 (explaining the development of product liability law in Anglo-American jurisprudence).

n12. *Id.* at 22-24.

n13. William L. Prosser, *The Assault on the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1104 (1960).

n14. Geistfeld, *supra* note 7, at 19-20.

n15. *MacPherson*, 111 *N.E.* at 1054-55.

n16. Geistfeld, *supra* note 7, at 22.

n17. *Id.* at 19-26. The issue is even more complicated, as some legal scholars believe that the doctrine of implied warranty is not a contract doctrine, but instead was derived from tort principals and thus is a tort doctrine. The lines have never been definitively drawn. *Id.*

n18. *Restatement (Second) of Torts* § 402A cmt. f (1965).

n19. Geistfeld, *supra* note 7, at 21-26.

n20. In essence, the manufacturer acts like an insurance company in which all buyers of the product have paid a little extra for the product (one could imagine the increase in price as an insurance premium) so that when one consumer is hurt, that consumer will not be left without financial recompense for his damages.

n21. *Suvada v. White Motor Co.*, 210 N.E.2d 182, 185-86 (Ill. 1965).

n22. See, e.g., William C. Way, The Problem of Economic Damages: Reconceptualizing the Moorman Doctrine, 1991 U. Ill. L. Rev. 1169, 1171-73 (1991).

n23. See *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982); *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 870-71 (1986); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965).

n24. See *Moorman*, 435 N.E.2d 443; *E. River S.S. Corp.*, 476 U.S. at 870-71; *Seely*, 403 P.2d 145.

n25. *E. River S.S. Corp.*, 476 U.S. at 866.

n26. *Id.* at 866-67 (indicating that this is the public policy rationale for allowing tort claims in traditional product cases).

n27. See, e.g., Priest, *supra* note 9, at 492-93.

n28. *Id.* One of the most confusing aspects of drawing a line between tort law and contract law is the fact that most commentators believe that tort law should be permissible for product defects that cause personal injury or damage to other property because manufacturers are best suited to prevent the defects and compensate consumers. See Richard C. Ausness, An Insurance-Based Compensation System for Product-Related Injuries, 58 U. Pitt. L. Rev. 669, 671 (1997); Guido Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965); see also Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961). This is due to the fact that manufacturers can act like a giant insurance company that charges a premium for coverage, i.e., raising the price of the product by some percentage, so that when one person is injured that person will be compensated by the other purchasers via the premiums paid. Richard C. Ausness, An Insurance-Based Compensation System for Product-Related Injuries, 58 U. Pitt. L. Rev. 669, 671 (1997). Is it not true that the same reasoning applies to defective products that merely fail but do not cause injury to other persons or property? Instead of each person negotiating individually and paying extra for a warranty that will protect their product if it fails, why should not society do away with product warranties and have the manufacturer raise the price on all the products so that they can act as an insurer for any product that proves to be defective?

n29. See U.C.C. § 2-316 (2004) (permitting parties to a sales contract to limit warranties in any reasonable manner, or to agree that the buyer possesses no warranty protection at all. The parties can also agree to exclude the implied warranties of merchantability and fitness if they do so in writing, or modify the implied warranty by clear and conspicuous language.); U.C.C. § 2-719 (2004) (allowing parties to exclude or restrict remedies for consequential damages resulting from commercial losses (but not from personal injury)).

n30. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503, 520-25 (Heiple, J., dissenting). Part of the problem is that practitioners advocate "exceptions" to the Commercial Loss Doctrine, when they would not be exceptions at all. That is, if there is an extra-contractual tort duty, the Commercial Loss Doctrine would not apply in the first place. Therefore, there should not be "exceptions" to the Commercial Loss Doctrine; it either applies or it does not.

n31. The way we speak about the Commercial Loss Doctrine is not unlike what happened to the United States Bill of Rights. That is, the Federalists, lead by Alexander Hamilton, argued that there was no purpose for having a Bill of Rights because the federal government was limited and could only act as provided for by the Constitution. Because the Constitution does not expressly provide the federal government with the right to violate any of the rights enumerated in the Bill of Rights, the government simply has no power to do so, whether the Bill of Rights exists protecting those rights or not. In fact, Hamilton believed that by expressly limiting certain powers of the federal government, a Bill of Rights could be interpreted to grant all others. The Federalist No. 84 (Alexander Hamilton). Is this not what has happened over time, i.e., people have conceptualized the federal government as being able do anything so long as not limited by the Bill of Rights? That being said, the Commercial Loss Doctrine is essentially the Bill of Rights of Tort Law, which was created for very narrow and express reasons like the federal government. There was no reason to assume that any doctrine was needed to protect the areas of law where tort had no authority to tread, but because we created the Commercial Loss Doctrine, the same fears Hamilton expressed about the Bill of Rights are material in tort law.

n32. Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 *U. Pitt. L. Rev.* 669, 671 (1997).

n33. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (N.Y. 1916); *Thomas v. Winchester*, 6 N.Y. 397 (N.Y. 1852).

n34. *Miller v. United States Steel Corp.*, 902 F.2d 573, 574 (7th Cir. 1990).

n35. See, e.g., *Suvada v. White Motor Co.*, 210 N.E.2d 182, 86 (Ill. 1965).

n36. Id.

n37. I will discuss some construction cases in the first part of the paper given their pertinent place in the history of the development of the Commercial Loss Doctrine.

n38. 207 A.2d 305, 311-12 (N.J. 1965).

n39. Id. at 311-12 (citing *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963)).

n40. New Jersey no longer holds this minority view. See, e.g., *Alloway v. Gen. Marine Indus., L.P.*, 695 A.2d 264, 275 (N.J. 1997).

n41. 403 P.2d 145, 147 (Cal. 1965).

n42. Id. at 151-52.

n43. 435 N.E.2d 443 (Ill. 1982).

n44. Id. at 445.

n45. Id.

n46. *Id.* at 444-45.

n47. *Id.* at 450.

n48. *Moorman*, 435 N.E.2d at 449 (quoting Note, Economic Loss in Products Liability Jurisprudence, 66 *Colum. L. Rev.* 917, 918 (1966)).

n49. *Suvada v. White Motor Co.*, 210 N.E.2d 182, 188 (Ill. 1965).

n50. *Restatement (Second) of Torts* § 402A (1965).

n51. *Moorman*, 435 N.E.2d at 447.

n52. *Id.* at 448. The *Moorman* court felt that product liability tort law should also apply to claims in which "other property" is damaged by an unreasonable dangerous condition because "physical injury to property is so akin to personal injury that there is no reason to distinguish them." *Id.* (quoting *Seely v. White Motor Co.*, 403 P.2d 145, 152 (Cal. 1965)).

n53. *Id.* at 452 (quoting *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 288 (3d Cir. 1980) (quoting *Restatement (Second) of Torts* § 402B cmt. d (1965)).

n54. *Id.* at 450.

n55. There is a second version of the intermediate rule that has been adopted by some courts. That is, in the *Moorman* case, there must be damage to other property or persons and the damage must have occurred via a sudden and calamitous event. It is a conjunctive relationship, both requirements must be met. In a Tennessee case, *Lincoln Gen. Ins. Co.*, the plaintiff argued that recovery should be permitted if there is damage to other property/persons or if there is a sudden and calamitous event. This is a disjunctive relationship, i.e., either there

could be damage to other persons or property and tort claims would be allowed, or there could be damage to the product itself via a sudden and calamitous event and a tort claim would be allowed. This version of the intermediate rule is discussed in *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487 (Tenn. 2009); *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324 (Alaska 1981).

n56. The requirement that the damage result from a sudden and dangerous event has often been called the "sudden and calamitous" requirement. These terms are used interchangeably. Throughout this article, the term "sudden and calamitous" refers to the Moorman "sudden and dangerous" requirement.

n57. I will refer to the traditional Moorman doctrine as the traditional product liability analysis enunciated in the Moorman case involving damage to other property via a sudden and calamitous event.

n58. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 450 (Ill. 1982). But see *Bd. of Educ. of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 590 (Ill. 1989). There was a brief period in Illinois in which the Illinois Supreme Court implied that the sudden and calamitous requirement was no longer needed to sustain a tort claim.

n59. *Restatement (Second) of Torts* § 402B (1965).

n60. *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186 (Ill. 1965).

n61. *Moorman*, 435 N.E.2d at 449 (quoting Note, Economic Loss in Products Liability Jurisprudence, 66 *Colum. L. Rev.* 917, 918 (1966)).

n62. *Id.* at 455-456 (Simon, J., concurring specially).

n63. *Mars, Inc. v. Heritage Builders of Effingham*, 763 N.E.2d 428, 432 (Ill. App. Ct. 2002)

n64. *Id.* at 435 (quoting *Stepan Co. v. Winter Panel Corp.*, 948 F. Supp. 802, 807-08 (N.D. Ill. 1996)).

n65. *Am. Xyrofin, Inc. v. Allis-Chalmers Corp.*, 595 N.E.2d 650, 657 (Ill. App. Ct. 1992); *United Airlines, Inc. v. CEI Industries of Ill., Inc.*, 499 N.E.2d 558, 562 (Ill. App. Ct. 1986).

n66. *Am. Xyrofin*, 595 N.E.2d at 653.

n67. *Id.* at 657 (quoting *United Airlines, Inc. v. CEI Indus. of Ill., Inc.*, 499 N.E.2d 558, 562 (Ill. App. Ct. 1986)) (emphasis omitted).

n68. 493 N.E.2d 1022, 1026 (Ill. 1986).

n69. 499 N.E.2d 558, 563 (Ill. App. Ct. 1986).

n70. *Bi-Petro Ref. Co. v. Hartness Painting, Inc.*, 458 N.E.2d 209, 210 (Ill. App. Ct. 1983).

n71. *Id.* at 212; *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982).

n72. 466 N.E.2d 195, 197 (Ill. 1984); see, e.g., *Exxonmobil Oil Corp. v. Amex Constr. Co.*, 2008 U.S. Dist. LEXIS 41495, at 8 (N.D. Ill. 2008) (decoupling of a pipe stopped water circulation to the refinery's cooling system, necessitating an emergency shutdown of various units within the refinery); *Mercury Skyline Yacht Charters v. Dave Matthews Band*, 2005 U.S. Dist. LEXIS 29663, at 16-17 (N.D. Ill. 2005) (dumping of human waste on a tour boat was a sudden and dangerous event); *Mars, Inc. v. Heritage Builders of Effingham*, 763 N.E.2d 428, 436 (Ill. App. Ct. 2002) (thunderstorming weather was a sudden and dangerous event); *Am. Xyrofin*, 595 N.E.2d at 654 (failure of compressor unit was a sudden and dangerous event); *Elec. Group, Inc. v. Cent. Roofing Co., Inc.*, 518 N.E.2d 369, 371 (Ill. App. Ct. 1987) (leaking water in a roof was a sudden and dangerous event).

n73. *Bagel v. Am. Honda Motor Co., Inc.*, 477 N.E.2d 54, 58 (Ill. App. Ct. 1985).

n74. Id.

n75. Id.

n76. Id.

n77. *Moorman Mfg. Co. v. Nat'l Tank Co*, 435 N.E.2d 443, 450 (Ill. 1982).

n78. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 435 N.E.2d 210, 216 (Ill. App. Ct. 1982); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 326-27 (Ill. 1982).

n79. *NBD Bank v. Krueger Ringier, Inc.*, 686 N.E.2d 704, 708 (Ill. App. Ct. 1997).

n80. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 479 N.E.2d 476, 479 (Ill. App. Ct. 1985).

n81. 810 N.E.2d 235, 249 (Ill. App. Ct. 2004).

n82. Id.

n83. Id.

n84. Id.

n85. *Id.*

n86. *686 N.E.2d at 708.*

n87. *Id. at 706.*

n88. *Id. at 708.*

n89. *199 N.E.2d 457, 458-59 (Ill. App. Ct. 1964).*

n90. *Id. at 461.*

n91. *Id. at 462.*

n92. *925 N.E.2d 317, 318 (Ill. App. Ct. 2010).*

n93. *Id. at 323.* The court analyzed the *Restatement (Second) of Torts § 929(1)* (1979), which provides that "if one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for ... the difference between the value of the land before the harm and the value after the harm ... ." However, § 929(1) pertains to damages recoverable and not to whether a tort has been committed.

n94. It is clear the court flirted with the concept of nuisance as an extra-contractual duty in *Van Brocklin*, *199 N.E.2d at 461.*

n95. See, e.g., *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1982).

n96. 546 N.E.2d 580, 590 (Ill. 1989) (citing *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 870 (1986)).

n97. This is the problem of squeezing everything into the traditional Moorman doctrine instead of asking whether there are extra-contractual duties that should allow for the tort claim to proceed.

n98. 546 N.E.2d at 590 (citing *Restatement (Second) of Torts § 402A*, cmt. c. (1965), which notes that the purpose of products liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons).

n99. *Trans States Airlines v. Pratt & Whitney Can.*, 682 N.E.2d 45, 55 (Ill. 1997).

n100. 546 N.E.2d at 590.

n101. See, e.g., *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 451 (Ill. 1982).

n102. *Id.*

n103. 466 N.E.2d 195, 195 (Ill. 1984).

n104. *Id.* at 197. Cf. *United Air Lines, Inc. v. CEI Indus. of Ill., Inc.*, 499 N.E.2d 558, 562 (Ill. App. Ct. 1986) (holding that a roof collapse was sudden and calamitous even though plaintiff was aware of water accumulation resulting from roof leaks).

n105. In fact, what is to prevent a plaintiff from constantly and unreasonably making repairs to a product due to its deterioration until the product fails in a sudden and calamitous manner, at which point the plaintiff could recover for not only nominal damages to other property but also for the direct and indirect economic losses to the product itself?

n106. *466 N.E.2d at 197.*

n107. *Moorman Mfg. Co. v. Nat'l Tank Co., 435 N.E.2d 443, 450 (Ill. 1982).*

n108. *Id. at 449.*

n109. *In re Chi. Flood Litig., 680 N.E.2d 265, 275 (Ill. 1997); Vill. of Deerfield v. Commonwealth Edison Co., 929 N.E.2d 1, 13 (Ill. App. Ct. 2010).*

n110. See *Bd. of Educ. v. A, C & S, Inc., 546 N.E.2d 580, 587 (Ill. 1989)* (reaffirming the position that an allegation of risk alone is not a proper extension of the Commercial Loss Doctrine. There must also be actual physical harm caused by the product); see also *In re Ill. Bell Switching Station Litig., 641 N.E.2d 440, 444 (Ill. 1994)* (analyzing why the "other property" requirement is not a fortuity). This was not true in all jurisdictions, for instance a federal court held that the allegation of unreasonable risk of harm alone is sufficient to plead a claim in tort. *Penn. Glass Sand Co. v. Caterpillar Tractor Co., 652 F.2d 1165, 1167 (3d Cir. 1981).*

n111. *435 N.E.2d at 450.*

n112. *Redarowicz v. Ohlendorf, 441 N.E.2d at 327 (1982).*

n113. *Vaughn v. Gen. Motors Corp., 466 N.E.2d 195, 197 (Ill. 1984).*

n114. *Id. at 196* (noting that if a defect in a product "creates a dangerous condition and causes damages of a

sudden and calamitous nature, the loss, even if it is limited to the product itself, is considered property damage and the injured party has a tort action").

n115. *Trans States Airlines v. Pratt & Whitney Can.*, 682 N.E.2d 45, 50 (Ill. 1997). The Trans States court pointed out that the 1989 case, *Bd. of Educ. of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989), expressly rejected Penn. Glass, which provided the basis for the Vaughn court's theory allowing recovery in tort for damage to the product itself. *Id.* at 50-51.

n116. *Id.* at 53.

n117. See Beth Rogers, Legal Reform - At The Expense Of Federalism?: House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act, 21 *Dayton L. Rev.* 513 (1996).

n118. *Trans States*, 682 N.E.2d at 54 (quoting Note, Manufacturers' Liability To Remote Purchasers For "Economic Loss" Damages-Tort or Contract?, 114 *U. Pa. L. Rev.* 539, 549 (1966)).

n119. *Id.* at 53.

n120. *Id.* (citing W. Keeton, Prosser & Keeton on Torts § 101 n.14.5 (5th ed. Supp. 1988)); see, e.g., *Sherman v. Johnson & Towers Balt., Inc.*, 760 *F. Supp.* 499 (D. Md. 1990).

n121. *Trans States*, 682 N.E.2d at 54.

n122. *Id.* at 54.

n123. *Id.* at 57.

n124. *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 877 (1997).

n125. *Dakota Gasification Co. v. Pascoe Building Sys.*, 91 F.3d 1094, 1096-97 (8th Cir. 1996).

n126. *Trans States*, 682 N.E.2d at 58.

n127. *Westfield Ins. Co. v. Birkey's Farm Store, Inc.*, 924 N.E.2d 1231, 1235 (Ill. App. Ct. 2010).

n128. *Trans States*, 682 N.E.2d at 45.

n129. *Id.* at 46.

n130. *Id.*

n131. *Id.*

n132. *Id.* at 47. The engine was warranted separate and apart from the Aerospatiale airframe warranty.

n133. *Trans States*, 682 N.E.2d at 46.

n134. *Id.*

n135. *Id.* at 55.

n136. *Id.*

n137. *Id. at 56.*

n138. *Trans States, 682 N.E.2d at 58.*

n139. *Id. at 57.*

n140. *Id. at 58.*

n141. *Id. at 58-59.*

n142. *Id. at 46-47.*

n143. *Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875, 877 (1997).*

n144. *Id.*

n145. *Id. at 884-85.*

n146. *Id. at 879.*

n147. *Dakota Gasification Co. v. Pascoe Building Sys.*, 91 F.3d 1094, 1096-97 (8th Cir. 1996).

n148. *Id.* at 1097.

n149. *Id.*

n150. *Id.* at 1096-97. The plaintiff bought the building from the U.S. government "as is" and without any warranties.

n151. *Id.* at 1101.

n152. 91 F.3d at 1099. This is a very interesting holding because it brings the policy position behind the Commercial Loss Doctrine full circle. That is, purely economic damages can be allocated among the buyer and seller of a product via negotiations for warranty and price reduction and therefore we prefer contract claims to govern the loss. The Dakota court indicated that the parties could also negotiate which party should bear the risk of damage to other property from a defective, even unreasonably dangerous, product. As I discussed in the beginning of this article there is no real reason why such contractual warranties should not govern personal injury claims. (Other than the fact that consumers may refrain from purchasing them.)

n153. 924 N.E.2d 1231, 1235 (Ill. App. Ct. 2010).

n154. *Id.* at 1244.

n155. *Id.* at 1243-44 (citing *Trans States*, 682 N.E.2d at 51).

n156. *Id.* at 1244 (citing *Trans States*, 682 N.E.2d at 58-59).

n157. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982).

n158. *Id.*

n159. Steven Bonanno, Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code § 2-318, 25 *J. Marshall L. Rev.* 177 (1991).

n160. *Id. at 198.* It would of course not exactly be a tort claim because it would still be subject to warranty limitations and contractual defenses.

n161. *Id. at 205.*

n162. 810 Ill. Comp. Stat. 5/2-318 (2010).

n163. 509 N.E.2d 591, 595 (Ill. App. Ct. 1987).

n164. The Illinois statute does not apply to economic loss.

n165. *Berry v. G. D. Searle & Co.*, 309 N.E.2d 550, 558 (Ill. 1974).

n166. Bonanno, *supra* note 119, at 205.

n167. *Id. at 197-98.*

n168. *Id.* at 198-99.

n169. *Id.* at 204. Bonanno also believes that § 2-318 should be amended to change the words "injured in person" to merely "injured" which would encompass all economic damages. *Id.*

n170. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 452 (Ill. 1982).

n171. 250 N.E.2d 656, 657 (Ill. 1969).

n172. *Id.* at 659.

n173. *Id.*

n174. *Id.* at 660 (citing *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966)).

n175. See generally William L. Prosser, *Misrepresentation and Third Persons*, 19 *Vand. L. Rev.* 231 (1966) (discussing the history of misrepresentation claims).

n176. The provenance of implied warranty claims indicates that they are derived by courts pursuant to public policy needs. There is nothing contractual about them under classical contract theory, which is based upon mutual intent of the parties. Sean M. Flower, *Is Strict Product Liability in Tort Identical to Implied Warranty in Contract in the Context of Personal Injuries?*, 62 *Mo. L. Rev.* 381 (1997); Marshall S. Shapo, *The Law of Products Liability* ch. 6 (3d ed. 1994) (discussing the history of implied warranty).

n177. 402 N.E.2d 599, 600 (Ill. 1980).

n178. Id.

n179. *Id. at 601* (citing *Steinberg v. Chi. Med. Sch.*, 371 N.E.2d 634 (Ill. 1977)).

n180. Id. at 601.

n181. Id. (quoting *Schmidt v. Landfield*, 169 N.E.2d 229, 232 (Ill. 1960)).

n182. *Soules*, 402 N.E.2d at 601.

n183. Id.

n184. *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 719 N.E.2d 288 (Ill. App. Ct. 1999).

n185. *Id. at 298*. Some Illinois courts have extended negligent representation theory to defendants that are under a "public duty" to provide accurate information, even if they are not technically "in the business of supplying information." See *Lehmann v. Arnold*, 484 N.E.2d 473 (Ill. App. Ct. 1985); see also *Stewart v. Thrasher*, 610 N.E.2d 799 (Ill. App. Ct. 1993).

n186. *Tolan*, 719 N.E.2d at 296.

n187. The Seventh Circuit, in *Rankow v. First Chicago Corp.*, 870 F.2d 356, 364 (7th Cir. 1989), divided information providers into three categories: defendants that supply information in conjunction with tangible products, those that provide only information, and those in between.

n188. See *Tolan*, 719 N.E.2d at 297.

n189. Since *Moorman*, Illinois's courts have allowed recovery of economic losses in tort for intentional interference with contract and intentional interference with prospective business advantage. See also *Werblood v. Columbia Coll. of Chi.*, 536 N.E.2d 750 (Ill. App. Ct. 1989); *Santucci Constr. Co. v. Baxter & Woodman, Inc.*, 151 Ill. App. 3d 547, 502 N.E.2d 1134 (Ill. App. Ct. 1986). The principle common to those decisions is that the defendant owes a duty in tort to prevent precisely the type of economic harm that occurred.

n190. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982). What the traditional *Moorman* analysis is really determining is whether the claim is commercial or tortious in theory.

n191. To reiterate, I am using the phrase traditional *Moorman* doctrine to denote the traditional claim in product liability cases in which unreasonably dangerous products cause damages to other persons or property via a sudden and calamitous event.

n192. *Moorman*, 435 N.E.2d at 452.

n193. *Id.* at 452.

n194. Society has deemed tortious misrepresentation claims to be justified pursuant to fiduciary, or regular, duties that exist between the parties, whether a contract makes provisions for them or not. Andrew C.J. McCandless Kidd, *The Perimeters of Liability for Negligent Misrepresentation in Maryland*, 48 *Md. L. Rev.* 384, 387 (1989).

n195. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246 (Ill. 1986).

n196. *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346 (Ill. 1990).

n197. For more analysis see Timothy L. Bertschy, *Negligent Performance of Service Contracts and the Economic Loss Doctrine*, 17 *J. Marshall L. Rev.* 249 (1984).

n198. *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 247 (Ill. 1986).

n199. *Id.*

n200. *Id.*

n201. *Id.*

n202. *Id. at 249.*

n203. *Anderson*, 503 N.E.2d at 249-50.

n204. *Id.*

n205. See 2314 *Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 350 (Ill. 1990).

n206. *Id. at 353.*

n207. Unless the negligent design results in injury or damage to other property.

n208. *Id. at 353.*

n209. *607 N.E.2d 1185, 1187 (Ill. 1992)*; see also *McLane v. Russell*, *546 N.E.2d 1185 (Ill. 1989)* (beneficiaries of will were allowed to bring a malpractice action against attorney); *Ogle v. Fuiten*, *466 N.E.2d 224 (Ill. 1984)* (plaintiffs allowed to bring a malpractice action against attorney even though they were not beneficiaries of the will in question); *Pelham v. Griesheimer*, *440 N.E.2d 96 (Ill. 1982)* (plaintiffs allowed to bring a malpractice action against attorney under contractual breach or negligence).

n210. *Collins*, *607 N.E.2d at 1186*.

n211. *Id. at 1187*.

n212. *Id. at 1186*.

n213. *Id. at 1188* (Miller, C.J., concurring).

n214. *Id. at 1189*.

n215. *Collins*, *607 N.E.2d at 1189* (Miller, C.J., concurring) (citing Ronald E. Mallen & Jeffrey M. Smith, 1 *Legal Malpractice* § 8.4, at 415 (3d ed. 1989)).

n216. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, *503 N.E.2d 246 (Ill. 1986)*; *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, *555 N.E.2d 346, 353 (Ill. 1990)*.

n217. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, *636 N.E.2d 503, 514 (Ill. 1994)*.

n218. *Id. at 515*.

n219. *Id.*

n220. See *supra* Part II.

n221. This seems a bit odd. So when a deal is made to construct a building that has defects the architect can only be sued in contract because the final result of his work-product is a tangible building, whereas a lawyer that closes the same deal can be sued in tort if the lawyer makes a mistake during the transaction?

n222. *Congregation*, 636 N.E.2d at 520-25.

N223. *Loman v. Freeman*, 890 N.E.2d 446, 450 (Ill. 2008).

n224. *Id.* at 453.

n225. *Id.* at 452.

n226. *Id.*

n227. *Id.*

n228. For more analysis see Mark C. Friedlander, *The Impact of Moorman and Its Progeny on Construction Litigation*, 77 *Ill. B.J.* 654 (1989).

n229. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (1982).

n230. *Id.* at 325.

n231. *Id.* at 327.

n232. *Id.*

n233. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022 (1986). There, a fire broke out in Montgomery Ward and caused extensive damage to the property of the tenants of the remaining portions of the building. The court held that the losses were not purely economic: "They are seeking damages for the loss of property other than the defective product. The complaints pray for damages resulting from the loss of audio equipment, paint sprayers, speakers, inventory, supplies, and stock." *Id.* at 1026. See also *Chicago Flood*, 680 N.E.2d 265, 281 (Ill. 1997) (goods stored in a tunnel that was flooded due to damage done to a bridge during its repair were considered other property).

n234. *Metro. Prop. & Cas. Ins. Co. v. James McHugh Constr. Co.*, No. 99 C 256, 1999 U.S. Dist. LEXIS 16475, at 1 (N.D. Ill. 1999).

n235. *Id.* at 10-11; see also *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 449 N.E.2d 125, 128 (Ill. 1983) (holding that Moorman barred a negligence action for deterioration due to faulty construction and for the costs of repairing and replacing allegedly defective siding).

n236. *Trans States Airlines v. Pratt & Whitney Can.*, 682 N.E.2d 45, 57 (Ill. 1997).

n237. *City of Peru v. Bouvier Hydropower, Inc.*, No. 00 C 1179, 2000 U.S. Dist. LEXIS 19393, at 6 (N.D. Ill. 2000).

n238. *Id.* at 2.

n239. *Id.* at 5-6.

n240. *Id.* at 6-7.

n241. *Id.* at 7.

n242. *City of Peru, 2000 U.S. Dist. LEXIS 19393, at 7.*

n243. *Mars, Inc. v. Heritage Builders of Effingham, 763 N.E.2d 428, 431 (Ill. App. Ct. 2002).*

n244. *Id.*

n245. *Id. at 432.*

n246. *Id.*

n247. *Id.* This is a great example of how confusing the Moorman doctrine becomes when it is applied outside the realm of product liability.

n248. *Mars, 763 N.E.2d at 432.*

n249. *Id. at 438.*

n250. *Id. at 439.*

n251. *546 N.E.2d 580, 583 (Ill. 1989).*

n252. *Id. at 591.*

n253. *Id. at 584.*

n254. *Id.*

n255. *Morrow v. L.A. Goldschmidt Associates, Inc., 492 N.E.2d 181, 185 (Ill. 1986).*

n256. *A, C & S, 546 N.E.2d at 588.*

n257. For more analysis see 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).

n258. *Anderson Elec., Inc. v. Ledbetter Erection Corp., 479 N.E.2d 476 (Ill. App. Ct. 1985).*

n259. *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 348 (Ill. 1990).*

n260. *Id. at 346-47.*

n261. *Id. at 347.*

n262. *Id.*

n263. *Id. at 350.*

n264. Some decisions have allowed negligence actions against architects or engineers for purely economic losses. See *People ex rel. Skinner v. FGM, Inc.*, 520 N.E.2d 1024 (Ill. App. Ct. 1988) (action against architect); *Rosos Litho Supply Corp. v. Hansen*, 462 N.E.2d 566 (Ill. App. Ct. 1984) (action against architect); *Wheeling Trust & Sav. Bank v. Tremco Inc.*, 505 N.E.2d 1045, 1050 (Ill. App. Ct. 1987) (discussing Rosos). Other decisions, however, have denied recovery in those circumstances. *Tolona Pizza Products Corp. v. Davy McKee Corp.*, 543 N.E.2d 225 (Ill. App. Ct. 1989) (action against professional engineering firm and individual engineer; rejecting Rosos); *Fence Rail Dev. Corp. v. Nelson & Assoc., Ltd.*, 528 N.E.2d 344 (Ill. App. Ct. 1988) (action against architect).

n265. *Lincoln Park*, 555 N.E.2d at 351. It is interesting that the court would use this language given that both Soules and Rozny pre-dated the Moorman decision and thus never used the language "Economic Loss Doctrine."

n266. *Id.* (citing *Rankow v. First Chicago Corp.*, 870 F.2d 356, 364 (7th Cir. 1989) (emphasis added)).

n267. *Id.* Keep in mind that Ronzy, Soules and Tolan highlight the distinction between those entities that are "in the business of supplying information" from those entities that are "not ordinarily in the business of supplying information." That is, if an entity is in the business of supplying information it can be held liable for both intentional and negligent performance in supplying the information. However, those entities that are not ordinarily in the business of supplying information can only be held liable for intentional misrepresentation. (Although the Tolan court does away with this distinction it is not an Illinois Supreme Court case.) *Lincoln Park* adds another distinction, i.e., is the defendant providing information incidental to a tangential product? So now there would be four combinations of these two tests that the court would have to analyze: (1) is the defendant ordinarily in the business of supplying information, but that information is incidental to a finished product; (2) is the defendant ordinarily in the business of supplying information, but that information is not incidental to a

finished product; (3) is the defendant not ordinarily in the business of supplying information but did so for this project, but only incidentally to building a finished product; (4) is the defendant not ordinarily in the business of supplying information but did so for this project, and it was not incidental to the finished product?

n268. *Lincoln Park*, 555 N.E.2d at 351.

n269. *Id.*

n270. *Id. at 353.*

n271. *Congregation of the Passion v. Touche Ross & Co.*, 636 N.E.2d 503, 514 (Ill. 1994).

n272. *Id. at 526.* This test is the basic thesis of this article and I believe it should be used by all courts in determining when a tort duty should be viable, instead of the asking, "are the damages economic?"

n273. *Lincoln Park*, 555 N.E.2d at 352 (citing *Flintkote Co. v. Drave Corp.*, 678 F.2d 942, 948 (11th Cir. 1982)).

n274. *Id.* It should also be acknowledged that the Lincoln Park test seems tautological, i.e., the plaintiff argues that the tort claim should be allowed because an architect's duty arises extra-contractually, but the court responds by saying that we can tell what duties arise between an architect and his client based upon the contract they have with one another.

n275. *Id. at 318.*

n276. See *supra* Part II.

n277. See supra Part IV.

n278. 475 N.E.2d 822, 823 (Ill. 1985).

n279. Id.

n280. *Id. at 826*. The plaintiffs pointed to decisions of the Illinois appellate courts which required that engineers exercise the degree of care and skill ordinarily required of other civil engineers in the community. See, e.g., *Mississippi Meadows, Inc. v. Hudson*, 299 N.E.2d 359, 364 (Ill. App. Ct. 1973); *Bates & Rogers Constr. Corp. v. N. Shore Sanitary Dist.*, 414 N.E.2d 1274 (Ill. App. Ct. 1981).

n281. *Ferentchak*, 475 N.E.2d at 826 (quoting *Bates & Rogers Constr. Corp. v. N. Shore Sanitary Dist.*, 414 N.E.2d 1274, 1280 (Ill. App. Ct. 1981)).

n282. *Ferentchak*, 475 N.E.2d at 826.

n283. Id.

n284. 923 N.E.2d 808, 811 (Ill. App. Ct. 2009).

n285. *Id. at 814*.

n286. See *Advincula v. United Blood Services*, 678 N.E.2d 1009, 1020 (Ill. 1996).

n287. *Thompson*, 923 N.E.2d at 812.

n288. *Id. at 816*. In his dissent, Justice Hutchinson felt that the defendants' task was to provide plans to rebuild the "bridge deck and median as they then existed, with the degree of skill and diligence normally employed by a professional engineer, but nowhere does this extend to include a requirement that defendant redesign the bridge deck to include a jersey barrier." *Id. at 821*. However, this reasoning misses the point that it is the engineer that is retained to exercise his professional judgment and know that such barriers may be needed to safely construct the bridge. This extra-contractual duty is akin to duties lawyers have to their clients.

n289. *932 N.E.2d 1037*.

n290. U.C.C. § 2-715 (2004).

n291. Thomas A. Diamond & Howard Foss, Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale, *63 Fordham L. Rev.* 665, 667-68 (1994).

n292. *Id.*

n293. *Am. Xyrofin, Inc. v. Allis-Chalmers Corp.*, *595 N.E.2d 650, 657-58 (Ill. App. Ct. 1992)*.

n294. *Id. at 673* (emphasis added).

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