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This issue discusses the issue of negligent misrepresentation by engineers. Although the following recent Wyoming court ruling is in favor of the engineer, there are other areas that still allow claims for negligent misrepresentation where no contractual privity exists. Maintaining solid Engineers Professional Liability Insurance can help safeguard you from this type of claim—review your policy regularly to be certain you have adequate malpractice coverage.

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## Wyoming Court Adheres to the Economic Loss Doctrine to Bar Negligent Misrepresentation Claims

By Luke R. Conrad, Esq

In a positive development for design professionals, the Wyoming Supreme Court has reaffirmed its strict adherence to the Economic Loss Doctrine to bar claims for negligent misrepresentation where no contractual privity exists. This decision represents a divergence from recent trends whereby courts have permitted parties to assert negligent misrepresentation claims for recovery of purely economic loss against third parties and thereby avoid the effects of the Economic Loss Doctrine.

In general terms, the Economic Loss Doctrine bars claims for purely economic loss between parties not in contractual privity; the exception is those claims that involve personal injury or damage to other property. However, many jurisdictions recognize negligent misrepresentation as an exception to the Economic Loss Doctrine, permitting a claimant to recover damages from a third-party where the claimant has allegedly relied upon information or representations to its detriment. Recently, in *Excel Construction v. HKM Eng'g, Inc.*, the Supreme Court of Wyoming declined to adopt this exception to the Economic Loss Doctrine.<sup>1</sup>

The Excel Court held that the Economic Loss Doctrine barred a contractor's negligent misrepresentation claim against the project engineer due to a lack of privity between the parties. The contractor sought recovery for what it believed were improper decisions made by the engineer, including (a) the engineer's requirement of additional backfill beyond the scope of the contract and refusal to authorize additional compensation for such backfill; (b) the engineer's assessment of liquidated damages after the contractor understood that it had been released; and (c) the engineer's decision to deny substantial completion, thereby barring access to the retainage.<sup>2</sup> The Wyoming Supreme Court rejected the contractor's arguments and ruled that **the parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and that they do not need the special protections of tort law to shield them from losses arising from such risks, including the alleged negligence of a design professional.**<sup>3</sup>

The Excel decision represents a divergence from other jurisdictions where parties have been utilizing negligent misrepresentation causes of action to circumvent the Economic Loss Doctrine for years. In *M. Miller Co. v. Dames & Moore*, an early California Court

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of Appeals decision, a subcontractor was permitted to assert a claim against an engineer on a sewer project on the basis that the bid documents allegedly failed to disclose unstable subsurface materials.<sup>4</sup>

In many jurisdictions, the application of the negligent misrepresentation exception to the Economic Loss Doctrine is grounded in the Restatement (second) of torts, § 552 (“Restatement”), which states:

**§ 552. Information Negligently Supplied for the Guidance of Others:**

*(1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.*

One such jurisdiction is Pennsylvania. In *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, the Pennsylvania Supreme Court, citing the Restatement, allowed a contractor to recover losses incurred as a result of the architect’s exterior wall design. The Court permitted the contractor to maintain its negligent misrepresentation lawsuit against the design professional despite the clear lack of privity of contract, opening the door to further claims against design professionals.<sup>5</sup>

Massachusetts has also adopted the negligent misrepresentation exception to the Economic Loss Doctrine. In *Nota Const. Corp. v. Keyes Associates, Inc.*, the Appeals Court ruled that an engineer can be liable for errors and omissions where the engineer failed to portray subsurface ledge encountered during the design and construction of a new school. The court stated that liability for the negligent furnishing of services to one not a party to the contract will turn on whether the defendant (engineer) knows that the party will rely on the services rendered. Finally, the court stated that it found no reason why a design professional should be exempt from liability for negligent misrepresentation merely because there is no privity of contract.<sup>6</sup>

Subsequently, in *KDK Enterprises, Inc. v. Peabody Construction*, a Massachusetts Superior Court demonstrated that the negligent misrepresentation exception to the Economic Loss Doctrine has its limits. When faced with a negligent misrepresentation claim for economic loss by a subcontractor against an architect with no contractual privity, the court found that the contractor premised its negligent misrepresentation claim on specifications that invoked the professional’s judgment, rather than on specifications that are susceptible to actual knowledge (facts), and denied the subcontractor’s claim.<sup>7</sup>

Similarly, in *Delaware Art Museum v. Ann Beha Architects, Inc.*, a Delaware court faced with a negligent misrepresentation claim, where the plaintiff was not in privity with the defendant-engineer, examined whether the engineering consultant was producing information as the “end and aim” product of its work. The court stated that where the end product of the services is information, there can be liability for negligent misrepresentation. However, where a professional’s end product is considered the tangible outcome of its design—professional judgment—the professional is not in the business of supplying information and cannot be pursued by a third-party under a negligent misrepresentation theory.<sup>8</sup>

Contrast these nuanced holdings with *Floor Craft Covering, Inc. v. Parma Community General Hospital Ass’n*, where the Ohio Supreme Court barred a claim against an architect that furnished plans and specifications by a flooring subcontractor. The Supreme Court ruled that the purely economic damages sought by the subcontractor could not be recovered from the architect because “in the absence of privity of contract no cause of action exists in tort to recover economic damages against the design professionals involved in drafting plans and specifications.”<sup>9</sup>

Like Ohio, Wyoming has embraced the fundamental and encouraging position (from the vantage point of the design professional) that a claim for economic loss, even when asserted as a negligent misrepresentation claim, cannot be asserted without privity. The Excel Court espouses the theory that the apportionment of risk between parties to a construction contract should be determined by that contract and not by judge and jury. This divergence from recent court decisions that

allow tort recovery against design professionals for negligent misrepresentation is a positive development for design professionals and, perhaps, a symbol of courts' recognition that negligent misrepresentation is a misused and misunderstood avenue for parties to a contract to reallocate risk that should have been negotiated and apportioned prior to contract performance. In jurisdictions where the Economic Loss Doctrine acts as a complete bar to tort claims in the absence of privity, design professionals can feel more secure in working in a cooperative manner with members of a project team to advance a project, without fear of claims from third-party project participants.

<sup>1</sup> Excel Const., Inc. v. HKM Engineering, Inc., 228 P3d 40 (Wyo. 2010).

<sup>2</sup> Id. at 42 (Wyo. 2010).

<sup>3</sup> Id. at 45 (citing Rissler & McMurry v. Sheridan Area Water Supply Joint Powers Bd., 929 P2d 1228 (Wyo. 1996)).

<sup>4</sup> M. Miller Co. v. Dames & Moore, 18 Cal.Rptr 13, 16 (Cal.App. 1962).

<sup>5</sup> Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 480 (Pa. 2005).

<sup>6</sup> Nota Const. Corp. v. Keyes Associates, Inc., 694 N.E.2d 401, 405-06 (Mass.App.Ct. 1998).

<sup>7</sup> KDK Enterprises, Inc. v. [Architectural Firm], Commonwealth of Massachusetts, Middlesex Superior Court, Civil Action No. 04-1305, Memorandum of Decision and Order, June 1, 2006.

<sup>8</sup> Delaware Art Museum v. Ann Beha Architects, Inc., No. 06-481 GMS, 2007 WL 2601472, at \*3 (D.Del. 2007).

<sup>9</sup> Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Ass'n, 560 N.E.2d 206, 212 (Ohio 1990).

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