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Negligent Misrepresentation in Missouri: Tooling Up for the Tort of the Eighties

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COMMENT

NEGLIGENT MISREPRESENTATION IN MISSOURI: TOOLING UP FOR THE TORT OF THE EIGHTIES

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I. INTRODUCTION

In its most simple form, negligent misrepresentation allows for recovery of pecuniary loss resulting from reliance on a false statement made by a party who acted unreasonably in not ascertaining the truth.¹ Courts developed the doctrine in order to provide a remedy for pecuniary injuries which were not covered by tort law or contract law.² Historically, courts recognized that recovery of pecuniary loss in a tort action was limited by the negligence concept of "privity" of contract.³ Likewise, recovery for fraud and deceit in contract

1. The author proposes this definition of negligent misrepresentation without reference to any standard explanations or formulations of the theory. It is far too simple to be reliable in that many factors must be satisfied before liability will be imposed. These factors will be discussed subsequently, but this definition will suffice as a starting point.

2. W. KEETON, D. DOBBS, R. KEETON, & D. OWENS, PROSSER & KEETON ON THE LAW OF TORTS, § 92 at 655 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

3. *Id.* § 93 at 667; see also *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 15 S.W. 1112 (1891) (employee of quarry owner injured by negligence of railroad, but

actions was limited to situations in which misrepresentation is a hybrid theory of recovery which developed as a result of these tort and contract limitations. These divergent and sometimes conflicting bases for liability have caused much confusion in defining and limiting the scope of negligent misrepresentation.⁴ Ultimately, the negligent misrepresentation action served as a transition between negligence and fraud actions.⁵

Missouri is currently in the process of adopting section 552 of the *Restatement (Second) of Torts*.⁶ Section 552 attempts to formulate a coherent, unified cause of action for negligent misrepresentation out of the jumble of case law that existed at the fringes of negligence and fraud. The inevitable friction that emerges when two theoretically separate legal frameworks overlap results in some troubling questions that have not yet been answered adequately by the courts.⁷ Because of the difficulty in placing negligent misrepresentation on a firm analytical footing, both practitioners and judges have been unwilling to rely on the concept as the basis of their arguments or holdings.⁸ As a result,

denied cause of action because no privity). *But see* Carter v. St. Louis Dairy Co., 139 S.W.2d 1025 (Mo. App., St. L. 1940) (privity not required where implied warranty shown). The classic formulation of the privity requirement can be found in the English case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). In *Winterbottom*, the passenger of a public coach sustained injuries due to negligent maintenance of the coach. The court limited coverage to those parties in privity of contract with the maintenance company; the court denied the passenger a cause of action. *Id.* at 110, 152 Eng. Rep. at 403.

4. PROSSER & KEETON, *supra* note 2, § 107, at 740-41. It was not until as late as 1889 that the House of Lords, in the leading case of Derry v. Peek, 14 A.C. 337 (1880), clearly identified the deceit action with intentional misrepresentation and left negligence and strict liability to be dealt with by other remedies.

5. To illustrate, recovery of intangible economic losses such as lost profits is generally the domain of contract law. However, if the contract is silent and injuries result that could have been avoided through the exercise of due care, courts have normally been willing to invoke negligent misrepresentation to compensate the victim. *See, e.g.,* Hart v. Ed-Ley Corp., 482 P.2d 421 (Colo. Ct. App. 1971); McAfee v. Rockford Coca Cola Bottling Co., 40 Ill. App. 3d 521, 352 N.E.2d 50 (1976); Nevada Nat'l Bank v. Gold Star Meat Co., 89 Nev. 427, 514 P.2d 651 (1973).

6. *See infra* notes 74-81 and accompanying text for content of that section and notes 88-107 and accompanying text for Missouri cases applying section 552.

7. The most basic problem is whether negligent misrepresentation comprises a single tort or two separate torts that occasionally share the same name. Recent Missouri decisions have attempted to characterize negligent misrepresentation as one unified tort covering a range of situations. *See infra* notes 88-107 and accompanying text.

8. Of the seven appellate cases in Missouri that have dealt with § 552 and the tort of negligent misrepresentation, only two have stated that a cause of action based on the tort was properly pleaded and only one has upheld an actual jury verdict in favor of a plaintiff with a cause of action based on § 552. *See* Huttegger v. Davis, 599 S.W.2d 506, 510-11 (Mo. 1980) (recognizing negligent misrepresentation *in dicta*); Westerhold v. Carrol, 419 S.W.2d 73, 76-80 (Mo. 1967) (court rejects privity barrier and cites cases used as foundation for section 552); Chubb Group of Insurance Cos. v. C.F. Murphy & Assocs., 656 S.W.2d 766, 785 (Mo. App., W.D. 1983) (negligent misrepresentation cause of action properly pleaded); Springdale Gardens, Inc. v. Countryland Dev., 638 S.W.2d 813, 816 (Mo. App., E.D. 1982) (recognizing negligent misrep-

there is an amazing lack of Missouri case law to illuminate the crevasse that exists between negligence and fraud.⁹ This Comment will describe the development of negligent misrepresentation from both of its theoretical bases. It will assess the present status of the cause of action in Missouri and point to key questions that remain to be answered. Finally, it will propose answers to those questions based on legal theory and the manner in which other jurisdictions have addressed them.¹⁰

II. NEGLIGENT MISREPRESENTATION AS AN ADAPTATION OF NEGLIGENCE LAW

Prior to 1922, in order to recover for harm negligently inflicted upon an intangible economic interest, a plaintiff had to show privity of contract with the negligent party.¹¹ A contract was necessary to give rise to a duty of due care. Most courts evidently felt that pecuniary losses were of a class less worthy of protection than physical damage or personal injuries.¹² Thus courts were unwilling to find a compensable injury every time a party lost money resulting from a relationship in which another party failed to meet the standards of a reasonable man.

In 1922, the New York Court of Appeals, in the landmark case of *Glanzer v. Shepard*,¹³ permitted recovery for economic loss notwithstanding

resentation but reversed on other grounds); *Ligon Specialized Hauler v. Inland Container Corp.*, 581 S.W.2d 906, 908-09 (Mo. App., E.D. 1979) (court reinstated jury verdict in favor of plaintiff with cause of action based on § 552); *J. Louis Crum Corp. v. Alfred Lindgren, Inc.*, 564 S.W.2d 544, 550-51 (Mo. App., W.D. 1978) (recognizing negligent misrepresentation in dicta); *Aluma Kraft Mfg. Co. v. Elmer Fox & Co.*, 493 S.W.2d 378, 382 (Mo. App., St. L. 1973) (court cites § 552 for support for extending tort third party beneficiary doctrine).

9. The 1984 editions of *West's Missouri Digest 2d* list no cases under the fraud subsection relating to constructive fraud. Constructive fraud is the category of cases that manage to avoid the intent requirement for one reason or another. Traditionally, the existence of a fiduciary relationship was often relied on to impose fraud liability on a negligent party. The relationship imposed a duty of due care absent an express contract. See *White v. Mulvania*, 575 S.W.2d 184, 189 (Mo. 1978) (en banc). As will be seen subsequently, these cases do have a direct bearing on negligent misrepresentation where the fiduciary relationship arises in a business transaction. See *infra* notes 113-23 and accompanying text.

10. This Comment is not intended to be a complete study of negligent misrepresentation in other jurisdictions. Some states have recognized the tort for almost 100 years. See, e.g., *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898). Those states' case law is voluminous and often not particularly enlightening. Since Missouri appears to be limiting its cause of action to § 552 of the RESTATEMENT (SECOND) OF TORTS, special attention will be paid to those states which have specifically adopted that section or a cause of action very similar thereto. Such cases should be persuasive authority to Missouri courts as they begin to flesh out the tort as it will apply in this state.

11. See Note, *Negligent Misrepresentation—Liability of Accountants to Third Parties—The Privity Requirement*, 39 MO. L. REV. 466, 467 (1974).

12. PROSSER & KEETON, *supra* note 2, § 92, at 657.

13. 233 N.Y. 236, 135 N.E. 275 (1922).

the lack of privity between the parties.¹⁴ In *Glanzer*, the seller of beans had them weighed by the defendant, a public weigher, who issued a certificate as to their weight, knowing that a subsequent buyer would pay on the faith of the certificate. The weigher negligently overstated the weight to the purchaser's damage.¹⁵ Judge Cardozo fixed liability upon the basis of a duty imposed by law arising out of the contractual relationship of the parties, indicating that diligence was owed "not only to him who ordered, but to him also who relied."¹⁶ Cardozo found that the very "end and aim" of the weighing was to shape the conduct of another. Under the circumstances "assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed."¹⁷

Glanzer marked the beginning of the end of the privity barrier in negligence law. As the concept of privity was eroded, courts tested new theories of potential liability under Cardozo's reasoning. Courts following *Glanzer* expanded its concepts with judicial zeal.¹⁸ Only nine years after *Glanzer*, Judge Cardozo attempted to restrain the runaway impact of his earlier decision. In *Ultrameres Corporation v. Touche*,¹⁹ the defendant was a public accounting firm employed to make an audit and produce a balance sheet for Fred Stern & Co. The accounting firm made the audit negligently and incorrectly certified on the balance sheet that capital and surplus were intact, when in fact, the company was insolvent.²⁰ Fred Stern & Co. approached plaintiff for a loan which was granted on the strength of the erroneous balance sheet supplied by the defendant.²¹

Cardozo found that the accounting firm could be held responsible for fraud but rejected liability for ordinary negligence.²² He reasoned that the duty of due care toward third parties must be limited in some manner²³ and

14. *Id.* at 238, 135 N.E. at 277.

15. *Id.* at 238, 135 N.E. at 275. The certificate misstated the proper weight by 11,854 pounds. *Id.* at 238, 135 N.E. at 275.

16. *Id.* at 242, 135 N.E. at 277.

17. *Id.* at 239, 135 N.E. at 275-76.

18. *See, e.g.*, *Doyle v. Chatham & Phenix Nat'l Bank*, 253 N.Y. 369, 379-80, 171 N.E. 574, 577 (1930) (bank trustee held liable to all good faith purchasers for negligently certifying corporate bonds); *Abounader v. Strohmeyer & Arpe Co.*, 243 N.Y. 458, 465, 154 N.E. 309, 311 (1926) (manufacturer liable for negligently mislabeling food).

19. 255 N.Y. 170, 174 N.E. 441 (1931).

20. *Id.* at 175, 174 N.E. at 442-43.

21. *Id.* at 175, 174 N.E. at 443.

22. *Id.* at 189, 174 N.E. at 448.

23. *Id.* at 180-81, 174 N.E. at 444. Cardozo stated:

A different question develops when we ask whether they owed a duty to [creditors and investors] to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. . . . [L]iability for negligence is one that is bounded by the

held that privity, or a bond so close as to approach privity, is essential to impose liability upon the public accountant.²⁴ In essence, the decision restricted the duty of due care to a relatively small and definable class of parties that might conceivably rely on the information to their detriment. This distinction was artificial and somewhat unworkable. It was often criticized²⁵ and has now been all but abandoned.²⁶

By the time Missouri addressed the privity issue, it was fairly well settled that the extension of negligence liability to third parties in economic loss cases hinged on a balancing of several factors.²⁷ In *Westerhold v. Carrol*,²⁸ an architect incorrectly certified the amount of material furnished and the amount of labor performed in the construction of a church. The owner of the building paid the contractor in accordance with the percentage of work the defendant architect certified as being completed. The contractor subsequently defaulted on the construction contract and the plaintiff, as the contractor's surety, was obligated to complete the job.²⁹ Because the defendant had greatly overestimated the amount of work the contractor had completed, the surety was obligated to expend large sums in order to complete the job.³⁰ The surety sued the architect for the loss resulting from his negligence.

The Missouri Supreme Court found that the surety had a right to rely on the contract between the defendant architect and the owner to the extent that the contract obligated the defendant to scrutinize the amount of work the con-

contract, and is to be enforced between the parties by whom the contract has been made.

Id. at 179, 189, 174 N.E. at 444, 448.

24. *Id.* at 185, 174 N.E. at 446.

25. See Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929).

26. Cardozo himself admitted that "[t]he assault upon the citadel of privity is proceeding in these days apace." *Ultramares*, 255 N.Y. at 180, 174 N.E. at 445. He warned that if liability absent privity were not arrested, it would extend to lawyers and title insurers. He indicated that these examples "may seem to be extreme," but would, in fact, result from the position asserted by plaintiff in *Ultramares*, carried to its logical conclusion. *Id.* at 188, 174 N.E. at 448. Cardozo's insight proved correct even though his logic has been dissected and ignored. See, e.g., *Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp.*, 245 N.Y. 377, 157 N.E. 272 (1928) (banker liable for negligently issuing letter of credit); *International Prod. Co. v. Erie R.R.*, 244 N.Y. 331, 155 N.E. 662 (1927) (railroad liable for negligently misinforming importer of warehouse location). It is now generally accepted that lawyers and title insurers are prime candidates for application of the doctrine of negligent misrepresentation. See e.g., *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (lawyer); *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (1976) (real estate broker).

27. See Masters, *Negligence and Economic Loss*, 32 U. TORONTO L.J. 231, 237 (1982); Note, *Accountant's Liability for Negligence*, 12 CAP. U. L. REV. 327 (1982); Annot., 65 A.L.R.2d 1363 § 2 (1959).

28. 419 S.W.2d 73 (Mo. 1967).

29. *Id.* at 74-75.

30. *Id.* at 75. The surety was forced to spend \$93,234.23. An indemnification agreement obligated the plaintiff to pay \$17,500.00 of that amount. *Id.* at 76.

tractor performed so that the owner could pay accordingly.³¹ Therefore, it was reasonable to assume that the surety would not have agreed to cover the contractor were it not for the supervision obligations of the architect.³² The court held that the determination of whether a defendant will be held liable on a contract to a third person not in privity is a matter of policy and involves the balancing of various factors. Factors to be considered include the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.³³

In 1973, the Missouri Court of Appeals for the Eastern District ruled on a case with facts similar to those in *Ultramarcs*. In *Aluma Kraft Manufacturing Co. v. Elmer Fox & Co.*,³⁴ the court held that where a buyer of shares of stock relies on a negligently performed audit in determining the book value of that stock, a cause of action lies against the accounting firm for resulting economic loss.³⁵ The court found nothing in the balancing factors set forth in *Westerhold* that precluded liability in *Aluma Kraft*.³⁶ What was important was that the defendant was aware that the information it supplied would be relied on by a known class of persons. It was not crucial that the accountants be able to identify a particular plaintiff. It was enough that the plaintiff was from a class that might reasonably rely on the information supplied by the defendant.³⁷

The court found support for its reasoning in the tentative draft of section 552 of the *Restatement (Second) of Torts*.³⁸ Additionally, the court looked to cases from other jurisdictions that served as the foundation for section 552.³⁹ The court correctly characterized the scope of section 552 when it noted that "[t]hese cases and the Restatement of the Law extend liability to third parties for whose benefit and guidance the accountant supplies the information, or to such third persons, although not identified, who the accountant knows the recipient of the audit intends to supply such information."⁴⁰

The theory underlying application of liability to public suppliers of infor-

31. *Id.* at 80.

32. *Id.* at 80-81.

33. *Id.* at 81.

34. 493 S.W.2d 378 (Mo. App., St. L. 1973).

35. *Id.* at 385.

36. *Id.* at 383.

37. *Id.*

38. See RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 12, 1964); see also *infra* notes 74-87.

39. See *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yauner & Jacobs*, 455 F.2d 847 (4th Cir. 1972); *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (D.R.I. 1968); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App. 1971).

40. *Aluma Kraft*, 493 S.W.2d at 383.

mation is based on the fact that such parties hold themselves out as reliable.⁴¹ Public suppliers of information are not in a relationship adverse to either of the contracting parties.⁴² Both parties to the contract expect due care from professionals who have no reason to supply false information to them. Such professionals exist because parties to business transactions need reliable information on which to base their business decisions.⁴³ Thus business necessity creates a valid basis for the extension of negligence liability for pecuniary losses to parties not in privity of contract. This development in third party beneficiary law applied to negligence principles nurtured the first root in the development of negligent misrepresentation.

III. NEGLIGENT MISREPRESENTATION AS AN ADAPTATION OF THE LAW OF FRAUD

The courts have long relied on the concept of fraud to remedy a plaintiff's resultant pecuniary losses. A cause of action for intentional misrepresentation causing pecuniary damage has existed since early English law.⁴⁴ The intent requirement in fraud has long been satisfied by actual knowledge of the falsity of the representation or by willful and wanton conduct amounting to recklessness regarding the falsity of the representation.⁴⁵

As the law of fraud developed, courts began to recognize the hardships encountered by plaintiffs who were victims of misinformation despite the fact that a defendant-seller may not have intended to defraud the plaintiff. Initially, courts of equity granted a remedy by rescinding contracts, based on a misrepresentation even absent an intent to defraud.⁴⁶ Today, rescission of con-

41. See Burger, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOYOLA L. REV. 1184, 1187 (1981). The degree to which one is justified in relying on information is determined by the type of information related.

42. In cases of dual agency, the supplier of information is deemed by law to be acting as agent for each of two adverse principles. The development of law relating to dual agency in the case of real estate agents for example is similar to the development of law relating to professional suppliers of information in the area of negligent misrepresentation. See, e.g., *Harry M. Fine Realty Co. v. Stiers*, 326 S.W.2d 392, 398 (Mo. App., St. L. 1959) (real estate agent acting for two principals has fiduciary duty to avoid negligence towards both).

43. See Note, *supra* note 11, at 467. Courts have imposed § 552 liability against information suppliers from a variety of backgrounds. Among those professions that most often fall within § 552 are abstractors, accountants, architects, contractors, developers, engineers, and surveyors. See *infra* note 117. For a discussion of the treatment of professionals in most of these areas see Probert, *Negligence and Economic Damage: The California-Florida Nexus*, 33 U. FLA. L. REV. 485 (1981).

44. The writ of deceit was recognized as early as 1201 in England. 1 L. STREET, FOUNDATIONS OF LEGAL LIABILITY 375 (1906).

45. See *Dunn v. White*, 63 Mo. 181, 186 (1876) (early statement of Missouri law).

46. See, e.g., *Osterberger v. Hites Constr. Co.*, 599 S.W.2d 221, 227-29 (Mo. App., E.D. 1980) (discussion of the continued validity of rescission absent proof of intent although constructive intent present).

tracts for the sale of personalty is a widely accepted practice in the majority of states.⁴⁷ Rescission of contracts for the sale of property is less widespread but still significant.⁴⁸

Recognizing that rescission was not always an adequate remedy, courts have devised legal fictions to impose liability in unintentional misrepresentation cases. Some jurisdictions impute certain knowledge to a seller even though he is without actual knowledge.⁴⁹ Other jurisdictions, like Missouri, permit liability for false statements without actual knowledge of their truth or falsity.⁵⁰ In effect, these states impose a duty to discover the truth before making any statement that might justifiably be relied on by the buyer. Such methods of extending the intent requirement are most often referred to as "constructive" fraud.⁵¹ The intent presumed by constructive fraud applies to both "negligent" and "innocent" misrepresentations. Effectively, a seller of goods or property is held to a strict liability standard for statements made to a purchaser.⁵² In theory, the bounds of application of constructive fraud are limited only by the reasonableness of the listener in relying on the statements.⁵³

Arguably, Missouri courts never intended the fraudulent intent requirement to extend beyond the realm of recklessness. In fact, much of this state's case law rejects the idea of strict responsibility for negligent misrepresenta-

47. The remedy is largely statutory in that it is codified in the Uniform Commercial Code (U.C.C.), a formulation of which all 50 states have adopted. The U.C.C. is generally regarded as the exclusive source for ascertaining the remedies to which a seller is subject if the claim is based on intangible economic loss not attributable to physical injury or harm. See U.C.C. §§ 2-313 (express warranty), 2-314 (implied warranty of merchantability), 2-315 (implied warranty of fitness for a particular purpose) (1977); see also PROSSER & KEETON, *supra* note 2, § 95, at 680.

48. *Osterberger*, 599 S.W.2d at 225 (request for rescission of land sales contract).

49. See, e.g., *Sorenson v. Adams*, 98 Idaho 708, 716, 571 P.2d 769, 776 (1977) (overruled on other grounds, *Owen v. Boydston*, 102 Idaho 31, —, 624 P.2d 413, 418 (1981)) (landowner/seller is presumed to know correct number of acres and characteristics of land even though he is in fact without that knowledge).

50. See, e.g., *White v. Superior Trailer Sales*, 605 S.W.2d 812, 814 (Mo. App., W.D. 1980) (misrepresentations involving the sale of a truck were actionable where "consciously and reckless" made).

51. See 37 AM. JUR. 2d *Fraud & Deceit* § 4 (1983).

52. The drafters of the RESTATEMENT (SECOND) OF TORTS realized that strict responsibility for innocent misrepresentations falls within the same general category as negligent misrepresentations. Accordingly, they incorporated a provision in § 552 to limit recovery of damages to situations involving sales, rentals, or exchange transactions. See RESTATEMENT (SECOND) OF TORTS § 552C (1981).

53. See, e.g., *Vochatzer v. Public Water Supply Dist. Number 1*, 637 S.W.2d 418, 420 (Mo. App., W.D. 1982) (water user had no right to rely on statement by city that water would be available). The "right to rely" is a separate element that must be proven to establish fraud. The concept limits a buyer's claim of reliance on statements that are not outrageous or beyond the scope of belief of a reasonable man. By contrast, the concept of "puffing," or making representations in a sales context that would not be relied upon by a reasonable buyer, is still alive and well in the case law. See, e.g., *Strebler v. Rixman*, 616 S.W.2d 876, 877 (Mo. App., E.D. 1981).

tions.⁵⁴ In adopting the constructive intent concept, Missouri courts have imposed liability only for *conscious* lack of knowledge.⁵⁵ Several cases stated the intent requirement in much the same way as *Wilson v. Murch*:⁵⁶

To recover for fraudulent representations, it is not necessary that it be shown the defendant had actual knowledge of the falsity of the facts stated by him. It is sufficient that he made the representations with the consciousness that he was without knowledge as to their truth or falsity when in fact, they were false.⁵⁷

This state of mind requirement is more properly categorized as recklessness than it is as negligence. Black's Law Dictionary defines *recklessness* as "rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge."⁵⁸ Recklessness constitutes a higher state of guilt than does negligence.⁵⁹ It is a state of mind that courts have been more readily willing to condemn than mere negligence.⁶⁰

There is a very fine line between someone speaking when he does not know the truth and speaking when he knows he does not know the truth. This distinction is the difference between negligent and reckless conduct. Missouri courts have not always recognized this distinction. Several recent decisions state that in order to prevail on a claim of fraudulent misrepresentation, a plaintiff is obliged to prove the following elements: 1) a false, material representation; 2) the speaker's knowledge of its falsity or his ignorance of its truth; 3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; 4) the hearer's ignorance of falsity of the statement; 5) the hearer's reliance on its truth and the right to rely thereon; and 6) proximate injury.⁶¹

54. See, e.g., *Smithpeter v. Mid-State Motor Co.*, 74 S.W.2d 47, 50 (Mo. App., W.D. 1934) (a false statement innocently but mistakenly made will not afford a cause of action).

55. Compare *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483, 489 (Mo. 1966) (en banc) (real estate developer erected signs indicating city water hookups were available with sufficient circumstantial evidence to support a finding that he knew hookups were not available) with *Koch v. Victoria Loan Co.*, 652 S.W.2d 212, 216 (Mo. App., E.D. 1983) (seller of house told buyer roofs were in good shape without actual knowledge).

56. 354 S.W.2d 332 (Mo. App., E.D. 1962).

57. *Id.* at 338-39.

58. BLACK'S LAW DICTIONARY 1142 (5th ed. 1979).

59. PROSSER & KEETON, *supra* note 2, at § 34, at 213-14.

60. See, e.g., *Ackmann v. Keeney-Toelle Real Estate Co.* 401 S.W.2d 483, 489 (Mo. 1966) (en banc) (seller recklessly misrepresented model year of tractor).

61. See, e.g., *Marler v. House*, 637 S.W.2d 365, 367 (Mo. App., E.D. 1982). It is likely that such short-hand versions of the fraud elements were formulated in cases that did not involve the subtleties of constructive fraud. Such formulations have been repeatedly cited by the courts without objection because no objectionable issue was raised in those cases. By the time cases raising the speaker's conscious knowledge of his

The second element sets forth the speaker's knowledge requirement. "Ignorance of its truth" can reasonably be interpreted to mean recklessness or negligence. Conceivably, the phrase may even refer to a purely innocent misstatement. However, the courts have failed to make the key distinction as to why the speaker was ignorant of the truth or falsity of his statement. Unfortunately, the Missouri Approved Jury Instructions also fail to recognize the distinction.⁶² M.A.I. 23.05, entitled "Verdict Directing—Fraudulent Misrepresentations," states:

Your verdict must be for plaintiff if you believe:

First, defendant (represented to plaintiff that . . .) intending that plaintiff rely on such representation (in purchasing the item, etc.), and

Second, the representation was false, and

Third, defendant did not know whether the representation was true or false, and

Fourth, the representation was material to the purchase by plaintiff (of the item), and

Fifth, plaintiff relied on the representation in making the purchase, and (in so relying plaintiff was using ordinary care care, and)*

Sixth, as a direct result of such representation the plaintiff was damaged.

* used where right to rely is at issue.⁶³

Paragraph Third of the verdict director allows a jury to find liability for fraud whenever the speaker is without knowledge of the truth or falsity of his statement.⁶⁴ Once again, lack of knowledge is not limited to recklessness but could result from mere negligence or innocence. Oddly enough, the committee's comment to M.A.I. 23.05 cites the exact language from *Wilson* as support for the proposition that liability can be imposed for a mere lack of knowledge.⁶⁵ The failure of the courts and the Missouri Approved Jury Instructions to differentiate between recklessness and negligence or innocence has not gone unnoticed.⁶⁶ Even so, the Missouri Supreme Court has made no attempt to

falsity came before the courts, such formulations were the "settled" law. It is difficult to attack a legal formula that has found its way into countless opening paragraphs in fraud cases, innumerable headnotes, and now, the Missouri Approved Jury Instructions. See *infra* note 62 and accompanying text.

62. See M.A.I. 23.05 (1982).

63. M.A.I. 23.05 (1982).

64. Once again there has been a failure to make the distinction as to why the speaking party was unaware of the falsity of his statement. It is difficult to believe that the framers of this verdict director failed to recognize this distinction. The wording of such an instruction is surely the result of proposals, discussion, and argument. Although M.A.I.s supposedly codify existing Missouri case law, it is arguable that in this instance the drafting committee consciously moved the state toward absolute liability for innocent or negligent misrepresentations without a judicial mandate to do so.

65. M.A.I. 23.05 comment (1982).

66. See *Huttegger v. Davis*, 599 S.W.2d 506, 515-16 (Mo. 1980) (Welliver, J., dissenting) (M.A.I. verdict director fails to distinguish between fraud and negligence); see also *infra* note 125 and accompanying text.

limit the cases or modify the verdict director.

At any rate, there are at least some Missouri courts that have imposed fraud liability for negligent misrepresentations.⁶⁷ However, these cases most often arise in a buyer-seller relationship and amount to a seller being forced to warrant that he has not misrepresented what he has sold. The idea is not inconsistent with the modern trend toward products liability and implied warranties that have developed in tort and contract law.⁶⁸

This expansion of the intent requirement in the law of fraud is the second basis for the development of negligent misrepresentation. Coverage of negligent misrepresentations through the use of constructive intent in fraud law is fundamentally different than the concept of a third party beneficiary as it developed in tort law. First, there is no requirement in fraud that the hearer prove a duty on the part of the speaker to refrain from acting negligently. This "due care" requirement is the essence of negligence law.⁶⁹ Second, the fraud version of negligent misrepresentation sets no limits on the number of potential plaintiffs that might reasonably rely on the speaker's statement.⁷⁰ "Proximate cause" and "duty to an ascertainable class" limit the number of plaintiffs that can recover under negligence principles.⁷¹ Third, the fraud cause of action is grounded in contract, and the duties imposed on a speaker are those that can be implied from the actual intent of the contracting parties.⁷² The duty in negligence law is imposed as a matter of public policy. It extends only as far as it would be extended by a hypothetical reasonable man. Parties to a con-

67. See, e.g., *Ligon*, 581 S.W.2d at 909-10 (shipping foreman negligently misrepresented weight of machine); see also *infra* notes 88-106 and accompanying text.

68. See PROSSER & KEETON, *supra* note 2, § 107, at 748.

69. *Id.* § 30, at 164. Thus, under the tort formulation there is a built-in limitation on the scope of liability. No defendant will be liable to a greater extent than the reasonable man in the same situation. The lack of any such limitation in the law of fraud leaves courts with an all or nothing situation. Liability will be either confined to intentional fraud or extended to the limits of strict responsibility. *Id.* § 92, at 655.

70. Early on, commentators explained the differing results in *Glanzer* and *Ultramares* on the basis of the number of potential plaintiffs that could be identified. *Glanzer* seemed to say one identifiable plaintiff was enough, but *Ultramares* stated that 30 was too many. Such distinctions were too simplistic and have given way to a more refined analysis. See Note, *supra* note 11, at 469.

71. Proximate cause serves to limit the size of the class that will be able to sue under negligent misrepresentation to those potential plaintiffs who were foreseeable to the reasonable man in the shoes of the defendant. PROSSER & KEETON, *supra* note 2, § 41, at 263. Early interpretations of *Glanzer* and *Ultramares* spoke of the "duty only running to an ascertainable class." Only "reasonably foreseeable" plaintiffs qualified as an "ascertainable class." *Id.* § 107, at 747. Such a limitation is now incorporated into the concept of proximate cause. Moreover, the "reasonably foreseeable" test is now accepted as the proper means by which to limit the class of potential plaintiffs in negligent misrepresentation suits. *Id.*

72. *Toenjes v. L.J. McNearly Constr. Co.*, 406 S.W.2d 101, 105 (Mo. App., St. L. 1966). Contracts exist only to the extent that there is "intent," either actual or implied. Therefore, only an "intentional" misrepresentation should serve to sever the contract and allow a cause for damages to the listener.

tract need not be reasonable so long as both parties agree to its terms.⁷³ The concept of constructive intent in fraud law and the third party beneficiary concept in tort law are simply so different as to defy locating a clean seam where their fabrics overlap.

IV. SECTION 552 OF THE RESTATEMENT (SECOND) OF TORTS

The framers of the *Restatement (Second) of Torts* were confronted with a wide variety of divergent theories and conflicting cases which attempted to impose liability for negligent misrepresentations. They were able to strike a balance between negligence and fraud and the duties owed to receivers of false information. The result of their efforts is section 552.⁷⁴

The general rule of liability is contained in the opening paragraph:

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.⁷⁵

This section applies to both the professional suppliers of information, who were the subject of the collapse of the privity rule in negligence cases, and the seller of goods, a common suspect in fraud cases due to his pecuniary interest in the transaction. Liability is limited to representations that the hearer could justifiably rely upon.⁷⁶ This "right to rely" is not only an express element of fraud⁷⁷ but also relates to the concept of contributory negligence under a purely negligence based formulation.⁷⁸ Finally, the speaker's state of mind is limited to "failure to exercise reasonable care,"⁷⁹ a negligence standard which does not encompass liability for purely innocent mistakes.⁸⁰

Though the first subsection of section 552 defines liability, it sets no

73. *Thacker v. Massman Constr. Co.*, 247 S.W.2d 623, 629 (Mo. 1952). In essence, parties are allowed to make irrational agreements as long as they know the agreement is irrational. By contrast, parties who are not given the correct facts cannot know of the wisdom of their decisions until after something goes wrong. Society is slow to place a loss on an injured party when another party's negligence caused the injury. However, when both parties are equally innocent, the practice has been for the courts to leave the parties as it found them. PROSSER & KEETON, *supra* note 2, § 107, at 748.

74. See RESTATEMENT (SECOND) OF TORTS § 552 (1976).

75. RESTATEMENT (SECOND) OF TORTS § 552(1) (1976).

76. See *id.* comment a.

77. See *supra* note 61 and accompanying text.

78. See also *infra* note 155 concerning the continued importance of contributory negligence even in comparative fault states.

79. RESTATEMENT (SECOND) OF TORTS § 552(1) (1976).

80. Even though § 552 imposes no monetary liability for a purely innocent mistake, courts of equity may continue to allow rescission for innocent mistakes. Nothing in an equity action would be inconsistent with the denial of monetary awards in such situations. *Id.* comment.

boundaries on the scope of coverage. Subsections (2) and (3) attempt to enumerate those parties that will be allowed to bring suit for negligent misrepresentation:

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.⁸¹

Subsection (2)(a) is consistent with the logic of *Ultramares* in that it limits liability to the foreseeable plaintiff.⁸² The "spectre of unlimited liability"⁸³ is thus kept safely in its bottle. This formulation limits the liability of a seller to his immediate buyer or to one who the buyer has informed him will be the beneficiary of such information.⁸⁴

Subsection (2)(b) further limits the scope of liability to the transaction in which the information was supplied.⁸⁵ Thus a surveyor who negligently performs a survey need not worry of liability to purchasers of the land beyond that for which he supplied the survey. Nor need a seller of an automobile be concerned that a purchaser, several steps removed from his sale, might hold him accountable for a misrepresentation that he made to a purchaser years earlier.⁸⁶

Subsection (3) is self-explanatory and the product of other misrepresentation problems involving public officials. When the duty is specifically expressed

81. RESTATEMENT (SECOND) OF TORTS §§ 552(2), (3) (1976).

82. The plaintiff is free to expand the class to any size by informing the misrepresenter of the large group to which he intends to supply the information. Even if that large group becomes potential plaintiffs, they can become actual plaintiffs only by being injured "by reason of" the misrepresentation. If the risk of liability remains too high for the information give, he can serve to insure himself by demanding compensation commensurate with the greater risk.

83. Judge Cardozo created this phrase himself by repeatedly adverting to the problem of ruinous consequences for a defendant who was guilty of nothing more than negligence. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 400 (1939). It is a concept that refuses to die. See PROSSER & KEETON, *supra* note 2, at 107, at 747.

84. Subsection (2)(a) most likely limits the class of potential plaintiffs to those in existence at the time the agreement or transaction was entered into. See Note, *supra* note 41, at 1187.

85. RESTATEMENT (SECOND) OF TORTS § 552(2)(b) (1976).

86. Sales of land must be in writing to be enforceable under the Statute of Frauds. MO. REV. STAT. § 432.010 (1952). As such, the death of the misrepresentating party should end any cause of action based on a land sales contract.

in a statute or ordinance, the scope of liability is likewise limited to the group for which the statute was written.⁸⁷

V. ADOPTION OF SECTION 552 IN MISSOURI

Since *Aluma Kraft* in 1973, Missouri has moved slowly but significantly towards the adoption of section 552 as the formulation for a negligent misrepresentation cause of action. The number of cases on point is limited, and although Missouri courts have recognized section 552, they have not been overly zealous in exploring its full ramifications. For five years after *Alma Kraft* no reported Missouri decision mentioned section 552. Then, in 1978, the Court of Appeals for the Western District refused to apply section 552 to plaintiff's cause of action in *J. Louis Crum Corp. v. Alfred Lindgren, Inc.*,⁸⁸ finding that there had been no actual misrepresentation.⁸⁹

However, the court did explain that cases that come to the type of result reached in *Aluma Kraft* are the basis of section 552.⁹⁰ The court pointed out that liability in such cases has been imposed in three situations: first, where the negligent actor has knowledge of the specific injured party's reliance;⁹¹ second, where the plaintiff is a member of a group that the negligent actor seeks to influence;⁹² and third, where the negligent actor has special reason to know that some member of a limited group will rely on the information misrepresented.⁹³ The court added that other courts have denied recovery in this last category of cases.⁹⁴ No Missouri court had yet directly adopted section 552.

In 1979, the Court of Appeals for the Eastern District held that liability could result based on section 552 of the *Restatement*. In *Ligon Specialized Hauler v. Inland Container Corp.*,⁹⁵ the court found that the plaintiff made a submissible case against a seller of a die cutting machine for negligently un-

87. See RESTATEMENT (SECOND) OF TORTS § 552 comment k, illustrations 16-18 (1976).

88. 564 S.W.2d 544 (Mo. App., K.C. 1978).

89. *Id.* at 551.

90. *Id.*

91. *Id.* (citing *Aluma Kraft*, 493 S.W.2d 378 (Mo. App., St. L. 1973)); see note 34 and accompanying text.

92. *Lindgren*, 564 S.W.2d at 551 (citing *Granberg v. Turnham*, 166 Cal. App. 2d 390, 333 P.2d 423 (1958) (real estate broker acting on behalf of third party negligently acquired land subject to zoning restrictions)).

93. *Lindgren*, 564 S.W.2d at 551 (citing *M. Miller Co. v. Domes & Moore*, 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961) (plaintiff contractor allowed recovery against soil engineer for report negligently done for city on which plaintiff relied in computing bid)).

94. *Lindgren*, 564 S.W.2d at 551 (citing *Texas Tunneling Co. v. City of Chattanooga*, 329 F.2d 402 (6th Cir. 1964) (plaintiff subcontractor cannot recover against engineer who designed city's sewage system when negligently made drawings induced plaintiff to underestimate cost of completion in bid)).

95. 581 S.W.2d 906 (Mo. App., E.D. 1979).

derstating the weight of the machine. Plaintiff, a hauling company hired by the purchaser, relied on the representation by attempting to haul the machine on a truck too small for its size. The machine broke its chains, fell from the truck and was damaged. Plaintiff sued for the expenses which resulted from the damage to the machine.⁹⁶ The court looked to section 552 in order to obtain an equitable result for the plaintiff.⁹⁷ The court hypothesized a duty on the part of the seller to use due care in making weight representations because of the commercial nature of the transaction and the reasonableness of plaintiff's reliance on a statement made by a professional in that area.⁹⁸ In *Ligon*, the court was well on its way to adopting the *Restatement* version of negligent misrepresentation.

Approximately one year later, the Missouri Supreme Court distinguished between an action based on intentional fraudulent misrepresentation and one based on negligent representation in *Huttegger v. Davis*.⁹⁹ A real estate seller misrepresented the fact that the purchasers would be able to procure a water hook-up from the local water district. The trial court and, ultimately, the supreme court found that plaintiffs had limited their pleadings and evidence to a cause of action based on intentional fraudulent misrepresentation. On appeal, however, plaintiffs modified their argument to meet the requirements of negligent misrepresentation.¹⁰⁰ In recognizing the difference between the two theories, the court pointed to *Ligon* as an example of negligent misrepresentation.¹⁰¹ Judge Welliver dissented from the court's opinion and stated that the time was ripe for the court to recognize a cause of action for negligent misrepresentation.¹⁰² Moreover, Judge Welliver urged that the court's adoption of the cause of action be based on section 552 of the *Restatement*.¹⁰³

Subsequently, in 1982, the Court of Appeals for the Eastern District again recognized its adoption of a negligent misrepresentation cause of action in *Springdale Gardens, Inc. v. Countryland Development*.¹⁰⁴ In this case, however, the court ruled that plaintiff failed to meet his burden of producing evidence necessary to make out a cause of action as recognized in *Ligon*.¹⁰⁵ The

96. *Id.* at 907. Section 311 of the Restatement, relating to physical damage or injury, would probably have been more proper under the circumstances. Plaintiff, however, limited their damages only to the resultant pecuniary loss. *Id.* at 908. Section 311 states: "One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information." RESTATEMENT (SECOND) OF TORTS § 311 (1976).

97. 581 S.W.2d at 909-10.

98. *Id.*

99. 599 S.W.2d 506 (Mo. 1980) (en banc).

100. *Id.* at 512.

101. *See id.* at 512 n.4.

102. *Id.* at 513-16 (Welliver, J., dissenting). Judge Welliver argued that the plaintiffs should be permitted to amend their pleadings and retry the case. *Id.* at 514 (Welliver, J., dissenting).

103. *Id.* at 515 (Welliver, J., dissenting).

104. 638 S.W.2d 813 (Mo. App., E.D. 1982).

105. *Id.* at 816. In *Springdale*, a purchaser of real estate brought an action

Court of Appeals for the Western District followed the Eastern District's lead in *Chubb Group of Insurance Cos. v. C.F. Murphy & Associates*,¹⁰⁸ decided in 1983. The court ruled that plaintiffs properly pleaded a cause of action for negligent misrepresentation within the narrow limitations of section 552 and so overruled the trial court's grant of summary judgment for defendants.¹⁰⁷

It is this unsettled state of affairs that confronts the legal practitioner in Missouri. The Missouri Supreme Court has yet to officially sanction the adoption of section 552, although it appears as if it will when presented with the proper case.¹⁰⁸ Since the only direct holdings on point are the result of overturning summary judgments,¹⁰⁹ the courts have not enunciated how negligent misrepresentation is to be pleaded and proved at trial. Hopefully, the Missouri Supreme Court will follow section 552, along with the comments and cited authority in that section, to fashion a negligent misrepresentation cause of action that will comport with Missouri jurisprudence.¹¹⁰

It is important that the courts be willing to adopt section 552 in its entirety, including the logical extensions that flow from it. Section 552 is the result of a neatly crafted compromise. It attempts to provide a remedy for an injury which the case law clearly shows needs to be addressed. At the same time, it seeks to limit the scope of that remedy for the protection of merely negligent parties.¹¹¹ The compromise will be ineffectual if the recent develop-

against a realty company and the seller to recover additional surveying expenses incurred because a plat provided by seller indicated that the land could be divided into 171 lots when the actual number was 165. The court pointed out that "[i]n the present case, the only evidence of negligence presented was on the part of the engineer who prepared the Rowland Survey." *Id.* at 816. The surveyor was not a party to the suit. Had he been, it appears as if his negligence would have fallen squarely within the coverage of § 552 as interpreted by the court. *See id.*

106. 656 S.W.2d 766 (Mo. App., W.D. 1983).

107. *Id.* at 783-85.

108. This presumption is based on the court's favorable reference to *Ligon* in *Huttegger*. *See supra* note 101.

109. *See Chubb Group*, 656 S.W.2d at 769; *Ligon*, 581 S.W.2d at 907.

110. The court must take special care in reading the comments and illustrations of § 552. The actual wording of the section is arguably less limited than the constraints placed on it by the comments. The illustrations generally involve businessmen who make misrepresentations in the course of their business dealings. *See* RESTATEMENT (SECOND) OF TORTS § 552 illustrations 1-12. A seller, not ordinarily in the business of selling, could fall within the scope of a literal interpretation of § 552 because he has realized a pecuniary gain. Some commentators have argued that a commercial gloss should be read into § 552. *See Mess, Accountants and the Common Law: Liability to Third Parties*, 52 NOTRE DAME LAW. 838 (1977). That suggestion has not been followed by all courts, however, and at least the potential exists for applying § 552 to all sales transactions, although some discount that potential. *See PROSSER & KEETON, supra* note 2, § 107, at 747.

111. *See supra* notes 81-86 and accompanying text. Negligent parties are not "bad guys" to the extent that intentional defrauders are. Section 552 makes such negligent parties pay for the immediate damage that their negligence has caused but not for the full range of consequences that may result. *See* RESTATEMENT (SECOND) OF TORTS § 552(2)(b) (1976).

ment in fraud law that blurs the distinction between intent and recklessness on the one hand and negligence and strict liability on the other continues to persist.¹¹²

The duty imposed by section 552 arises from the relationship between the parties. In trying to determine whether or not a cause of action for negligent misrepresentation lies, the inquiry should be one directed to the nature of the services provided by the person making the representations and the relationship he has with the relying party. If the person provides services requiring special competence (as in the case of professional suppliers of information), or if he is in the position of one with unique information (as in the case of a party selling his own home), he should be held to the standard of competence commensurate with his position. It is this special competence that has attracted those who deal with such a person. The law should impose upon him the affirmative duty, arising out of the relationship between himself and the party to whom he speaks, to exercise care and diligence in the representations he makes.¹¹³ The relationship between a buyer and a seller is not necessarily such a relationship.

An investigation of the case law indicates that courts have provided a remedy for negligent misrepresentation principally against those who advise in an essentially non-adversarial capacity.¹¹⁴ On the other hand, in the case of presumed antagonists, the tendency of most courts has been either to rely on fraud with the requirement of scienter or to impose strict liability.¹¹⁵

Fraud actions should be limited to those covered by actual intent or recklessness.¹¹⁶ It seems clear that a party buying a 1972 Chevrolet from a shift

112. See *supra* notes 54-66 and accompanying text. Section 552 takes great pains to limit its liability to the scope of the negligence tort action. If plaintiffs could resort to the Missouri common law of fraud, relying on constructive fraud to bring about absolute liability, then little would be left of § 552.

113. See Note, *Misrepresentation in Indiana: What Hath Fraud Wrought?*, 53 IND. L.J. 559, 567 (1977-78).

114. See James, *Misrepresentation—Part I*, 37 MD. L. REV. 286, 313 (1977).

115. *Id.* In the dozen or so states that purport to have adopted a cause of action similar to that of § 552, there are a few cases which appear to impose a duty of reasonable care in a simple buyer-seller relationship. See, e.g., *Hardy v. Carmichael*, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (1962). These cases, however, can usually be explained away by the fact that they were either mischaracterized as sounding in negligence, when in fact they sounded in fraud, or the discussion of negligent misrepresentation was unnecessary and confused dicta. This, however, is not always the case. See *Ligon*, 581 S.W.2d at 908 (seller's foreman misrepresents weight of machine); *Jasper Aviation v. McCollum Aviation*, 497 S.W.2d 240 (Tenn. 1972) (private seller of a helicopter could be liable for negligent misrepresentations); *Susser Petroleum Co. v. Latina Oil Corp.*, 574 S.W.2d 830 (Tex. Civ. App. 1978) (oil company liable for negligently misrepresenting the quantity of fuel which it would have available to ship to plaintiff); see also *supra* note 95 and accompanying text.

116. Actual intent or recklessness has been the traditional basis for the deceit cause of action since *Derry v. Peek*, 14 A.C. 337 (1880). The expansion of the deceit cause of action to include negligent or innocent misrepresentations was either inadvertent or not well reasoned. Other theories for imposing liability for less than reckless

used-car salesman is in a different situation than is a businessman who hires an accounting firm to determine the book value of his stock in a corporation.¹¹⁷ This common sense idea is not new. An article on the scope of deceit written by Professor Green, which is now over fifty years old, is still timely:

While caveat emptor no longer controls, it must be recognized that the interests of parties to business transactions are naturally adverse, since each is vying for the most advantageous position at the other's expense. The relationship between the two parties permits a plaintiff, exercising the minimum caution the law requires, to expect honesty and non-reckless behavior from the defendant, but no more. Plaintiff may not rely on the competence of defendant and a fortiori may not rely upon the information imparted as being warranted or accurate.¹¹⁸

It follows that the terms of section 552 should be the sole method of stating a cause of action for negligent misrepresentation in Missouri. Inconsistent liability for negligence under the fraud requirements will serve only to undermine the delicate balance established by section 552.¹¹⁹

This is not to say that section 552 is applicable only to cases involving a third party in the business of supplying information. For instance, in *Ligon*, the seller who negligently misstated the weight of the die cutting machine was not in the business of supplying such information.¹²⁰ The seller and the hauler were brought together in a business context for their mutual benefit. The hauler was not in a position adverse to the seller. He had no reason to doubt the truth of the representation made by the shipping foreman. Liability under section 552 was applicable because of the nature of the relationship between the parties.¹²¹ *Ligon* is the only reported Missouri case which correctly applies

behavior are now available in §§ 552 and 552C. The advantages in keeping such concepts analytically separate from fraud and deceit far outweigh the disadvantages encompassed in the need to retreat and clarify past ambiguous decisions.

117. Jurisdictions that have adopted a cause of action for negligent misrepresentation have invoked it primarily against defendants in the business of giving information or advice to the general public. See *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 484 P.2d 639 (1971) (title company); *Kovaleski v. Tallahassee Title Co.*, 363 So. 2d 1156 (Fla. Dist. Ct. App. 1978) (abstractor); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969) (certified public accountant); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976) (accountant); *Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (1978) (appraiser); *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (1976) (real estate broker); *Banker's Trust Co. v. Steenburn*, 95 Misc. 2d 967, 409 N.Y.S.2d 51 (1978) (banker); *Rempel v. Nationwide Life Ins.*, 471 Pa. 404, 370 A.2d 366 (1977) (insurance agent); *Isaacs v. Bokor*, 566 S.W.2d 532 (Tenn. 1978) (builder); *Tartera v. Palumba*, 453 S.W.2d 780 (Tenn. 1970) (surveyor); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. 1971) (auditor); *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980) (realtor); *Rogers v. City of Toppeish*, 23 Wash. 2d 554, 596 P.2d 1096 (1979) (city zoning official); *Wilber v. Western Properties*, 22 Wash. 2d 458, 589 P.2d 1273 (Wash. App. 1979) (city administrator).

118. Green, *Deceit*, 16 VA. L. REV. 749 (1930).

119. See *supra* note 112.

120. See *Ligon*, 581 S.W.2d at 909.

121. *Ligon*, 581 S.W.2d at 910. This relationship was, in fact, a business rela-

section 552 to a situation it was intended to preempt from fraud law.¹²² In fact, *Ligon* is one of the few reported cases that makes this application under section 552.¹²³ The plaintiff in *Ligon* was given a remedy under the *Restatement* formulation of negligent misrepresentation even though he would probably not have found recourse under the constructive fraud concept or as a third party beneficiary.

VI. IN MISSOURI PRACTICE

As the prior discussion indicates, Missouri and many other states are in a transitional state regarding application of negligent misrepresentation as an actionable theory of recovery. Much of the existing fraud machinery will have to be retooled in order to handle negligent misrepresentation. So too, many of the options that might be included will have to be carefully chosen and incorporated into the framework. In the near future the courts will be forced to address needed changes in the Missouri Approved Jury Instructions and the effect of negligent misrepresentation on comparative fault and contributory negligence.

A. M.A.I. Verdict Director

M.A.I. 23.05, the verdict director for fraudulent misrepresentations,¹²⁴ can now be read to impose liability for negligent and innocent misrepresentations as well as for intentional fraud. In his dissent in *Huttegger v. Davis*,¹²⁵ Judge Welliver pointed out the problem and its simple solution:

Paragraph third of M.A.I. 23.05 permits recovery for fraudulent misrepresentation if the jury believes that "defendant did not know whether the representation was true or false." More properly, the instruction should express the requirement that the defendant made a false representation "with the

relationship, not a contractual one. The seller had nothing to gain by misrepresenting the weight of the die cutter. The seller's shipping foreman had conferred with the seller's master mechanic before ordering the flatbed truck. *Id.* at 909. The hauler was thus justified in deferring to the opinion of the seller.

122. As discussed previously, the extent of recovery for pecuniary loss has generally been bounded by the contract. *See supra* notes 3 and 25 and accompanying text. It is in cases like *Ligon*, where no contractual relationship is present, that § 552 has novel application. If application of § 552 is limited to scenarios requiring privity, then the law of contracts adequately preempts § 552, which consequently becomes no more than meaningless surplusage. To the extent that an adverse seller must warrant the complete accuracy of his statements, the case law arguably goes too far. *See* notes 54-66 and accompanying text. Section 552 balances these two extremes.

123. Few cases have focused on negligent misrepresentation as set forth in § 552. As yet, decisions under § 552 applicable to non-professional suppliers of information are relatively few. *See* note 115 *supra*.

124. *See* note 63 and accompanying text.

125. *Huttegger*, 599 S.W.2d at 513-16 (Welliver, J., dissenting).

consciousness that he was without knowledge as to their truth or falsity."¹²⁶

Judge Welliver's suggested change in the verdict director would accomplish three important goals. First, it would distinctly separate fraud liability from negligent misrepresentation liability. Further, it would eliminate the possibility that a seller would be strictly responsible for misrepresentations made when he deals with a buyer in a bargaining position equal to his own.¹²⁷ Second, the proposed change would reintroduce the scienter requirement into a fraud cause of action. Scienter implies a guilty knowledge or a guilty lack of knowledge on the part of the tort-feasor.¹²⁸ Consequently, the misrepresentation would have to be made with an intent to deceive or with recklessness. Thus, this change would limit the scope of fraud coverage to that area fraud has traditionally occupied.¹²⁹

Third, and most important, the change in the verdict director would eliminate the possibility of imposing punitive damages for merely negligent or innocent mistakes.¹³⁰ Missouri courts authorize the award of punitive damages upon a showing of fraud.¹³¹ Punitive damages are justified in situations where a defendant intentionally or recklessly harms a plaintiff because of the presumed existence of moral guilt.¹³² However, punitive damages are seldom justified in cases of negligence. They are even less justified when the speaker

126. *Id.* at 516 n.4 (Welliver, J., dissenting).

127. A mere lack of knowledge without culpability based on scienter would not be covered by fraud or negligence but might still fall within a contractual warranty.

128. *See, e.g.,* *Dudley v. Dumont*, 526 S.W.2d 839, 842 (Mo. App., St. L. 1975) (thorough discussion of scienter requirement in Missouri).

129. *Green, supra* note 113, at 751. Though that article was written in 1930, it remains one of the most analytically sound treatments of the tort of deceit ever written. PROSSER & KEETON, *supra* note 2, § 107, at 741.

130. *See* M.A.I. 10.04 (exemplary damage instruction). Judge Welliver, in his *Huttegger* dissent, pointed out that plaintiffs had limited their cause of action to intentional fraud "in an effort to preserve their award of punitive damages." 599 S.W.2d at 514. If negligent misrepresentation under § 552 is encompassed by both the common law areas of fraud and negligence, then a plaintiff, wishing to maximize his or her recovery through the imposition of punitive damages, will always plead fraud. As long as the fraud verdict director fails to distinguish between intentional and constructive fraud, a finding of fraud pursuant to M.A.I. 23.05 holds out the possibility of punitive damages based on mere negligence. *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483, 486 (Mo. 1966) (en banc).

131. *Id.* Courts typically impose punitive damages only in instances in which a plaintiff produces evidence that the defendant "maliciously, willfully, intentionally, or recklessly injured the prospective purchasers." *Franta v. Hodge*, 302 S.W.2d 291, 294 (Mo. App., K.C. 1957). These states of mind satisfy the traditional scienter requirements for fraud and the case law is replete with examples of the short-hand statement that punitives are authorized upon a showing of fraud. *See, e.g.,* *Shepherd v. Woodson*, 328 S.W.2d 1 (Mo. 1959); *Brown v. Sloan's Moving & Storage Co.*, 296 S.W.2d 20 (Mo. 1956).

132. Punitive damages are imposed to punish a defendant whose actions are worthy of retribution. "Recklessness" is a gross deviation of the standard of care required of citizens in a free society. The courts have declared such flagrant disregard of damages blameworthy. PROSSER & KEETON, *supra* note 2, § 34, at 213.

makes a purely innocent mistake.¹³³

The present verdict director does not make a distinction between fraud that is malicious or reckless and fraud that is only negligent or innocent. If a jury returns a verdict in favor of a plaintiff on the ground of fraud, a judge would be unable to determine whether the jury found sufficient scienter to merit punitive damages. Punitive damages would not be available based upon the proposed negligent misrepresentation verdict director.¹³⁴

B. M.A.I. Damages Instruction

Damages for misrepresentation of property are covered by Missouri Approved Jury Instruction 4.03.¹³⁵ It states:

If you find in favor of the plaintiff then you must award plaintiff such sum as you believe was the difference between the actual value of the (described property) on the date it was sold to plaintiff and what its value would have been on that date had (described property) been as represented by defendant.¹³⁶

The instruction correctly states the measure of damages for intentionally fraudulent misrepresentation, but may be inadequate for the measure of damages for liability based on negligence.

The measure of damages set forth in M.A.I. 4.03 is referred to as the "benefit-of-the-bargain" approach.¹³⁷ The plaintiff is awarded damages in an amount that would put him in a position he would have been in had all the representations been true.¹³⁸ Another measure of damages applied in misrepre-

133. The RESTATEMENT (SECOND) OF TORTS § 908 (1976) indicates that punitive damages may be awarded for conduct that is outrageous, that is a product of the defendant's evil motive, or that is a product of his reckless indifference to the rights of others. *Id.* Other jurisdictions recognize that not all types of fraud justify punitive damages. *See, e.g.,* *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 215 (Iowa 1980) ("ordinary" or "simple" fraud was not enough to impose punitive damages); *see also* *Annot.*, 19 A.L.R.4th 792 (1983).

134. RESTATEMENT (SECOND) OF TORTS § 552B (1976) limits damages to out-of-pocket losses. It makes no provision for punitive damages, either specifically or analytically. *See infra* note 144 and accompanying text.

135. M.A.I. 4.03 (1969).

136. This instruction was new in 1969 and has remained unchanged. At the time the instruction was written, the acceptance of § 552 in Missouri was uncertain. The need for a new damage instruction may not become obvious until the distinction between intentional and constructive fraud is clarified by the introduction of a new verdict director.

137. The majority of jurisdictions, including Missouri, follow the benefit-of-the-bargain measure of damages in fraud cases. *See* *Smith v. Tracy*, 372 S.W.2d 925 (Mo. 1963); *Kendrick v. Ryus*, 225 Mo. 150, 123 S.W. 937 (1910); *Cotner v. Blinne*, 623 S.W.2d 615 (Mo. App., S.D. 1981); *see also* 22 AM. JUR. 2d *Damages*, §§ 80-83 (1965); *Annot.*, 13 A.L.R.3d 875 (1967).

138. For example, had plaintiff been told that land he was buying contained 100 acres of marketable logging timber, when in fact there was none, plaintiff would be able to recover the value of 100 acres of logging timber land even if he paid less than

sentation cases is called the "out-of-pocket" approach. This approach awards the plaintiff the difference between the value of what he has parted with and the value of what he has received. If what he received is worth what he paid for it, he has not been damaged and therefore can not recover.¹³⁹

As a matter of the strict logic of the tort form of action, the "out-of-pocket" measure of damages is the more consistent with the purpose of tort remedies. In tort actions the general rule allows recovery only for actual and direct, or "proximate" losses occasioned by a defendant's wrongful act; there can be no recovery for remote or speculative damages. Out-of-pocket damages are the traditional measure of recovery in tort suits.¹⁴⁰

On the other hand, it is urged in support of benefit-of-the-bargain rule that the form of the action should be of little importance. In an action in the form of tort for breach of warranty the plaintiff is given the benefit of his bargain and the addition of an allegation of intent to deceive should certainly not decrease his recovery. In many cases the out-of-pocket measure will permit the fraudulent defendant to escape all liability and have a chance to profit by the transaction if he can get away with it.¹⁴¹

Missouri has generally followed the majority of jurisdictions in applying the benefit-of-the-bargain rule. In cases of intentional or reckless misrepresentation, damages are fairly easily ascertained under M.A.I. 4.03. Missouri courts have had difficulty, however, when the cause of action is based on something less than intent or recklessness.¹⁴² Prosser has indicated that the choice between measures of damages has been particularly troublesome in negligent misrepresentation cases.¹⁴³

The drafters of section 552 were acutely aware of the measure of damages problem and saw fit to add a section on its proper resolution. Section 552B of the *Restatement* states that damages for fraudulent misrepresentation should be limited to out-of-pocket damages.¹⁴⁴ It would permit plaintiff the

that amount for his property. *See, e.g.*, *Miller v. Higgins*, 452 S.W.2d 121 (Mo. 1970).

139. *See, e.g.*, *Budd v. Budd*, 97 S.W.2d 149 (Mo. App., Spr. 1936) (difference between value of stock purchased and parted with is proper measure of damages). Under the out-of-pocket approach, the plaintiff who thinks he is buying 100 acres of logging timber could recover only the difference between the value of his 100 acres and what he paid for it, even if a single tree were not on the property.

140. PROSSER & KEETON, *supra* note 2, § 105, at 734-35.

141. *Id.*

142. *See, e.g.*, *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206 (8th Cir. 1982) (apparently applying Missouri law, court permitted an alternative measure to the benefit-of-the-bargain because of the peculiar circumstances of the case), *cert. denied*, 103 S. Ct. 1191 (1983); *Fong v. Town & Country Estates, Inc.*, 600 F.2d 179 (8th Cir. 1979) (court indicated that benefit-of-the-bargain rule applies to damages, but if plaintiff seeks rescission, out-of-pocket rule applies), *cert. denied*, 100 S. Ct. 298 (1979); *Lindberg Cadillac Co. v. Aron*, 371 S.W.2d 651, 653 (Mo. App., St. L. 1963) (cost of making repairs to a cracked engine-block was the proper measure of damages since it went to the value of the car as represented and its actual value).

143. PROSSER & KEETON, *supra* note 2, § 105, at 734.

144. RESTATEMENT (SECOND) OF TORTS § 552B (1976).

recovery of:

(a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and

(b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

(2) The damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.¹⁴⁵

Comment (b) to section 552 explains the rationale behind the different treatment given to damages for fraudulent misrepresentation. It indicates that the policy considerations that have led the courts to compensate the plaintiff for the loss of his bargain stem from the belief that the deception of a deliberate defrauder should not be profitable to him. Such considerations do not apply when the defendant has had honest intentions but has merely failed to exercise reasonable care in what he says or does.¹⁴⁶

M.A.I. 4.03 was written prior to the recognition of negligent misrepresentation in Missouri. Consequently, the adoption of a negligent misrepresentation cause of action has left the Missouri Approved Jury Instructions inadequate to handle the situation. A new damage instruction, awarding out-of-pocket damages should be substituted for M.A.I. 4.03 in the case of negligent misrepresentations.¹⁴⁷

C. *Comparative Fault and Contributory Negligence Applied to Negligent Misrepresentation*

The final area that needs to be explored is the effect that comparative fault and contributory negligence will have on a cause of action based on negligent misrepresentation.¹⁴⁸ Until recently, contributory negligence was a complete bar to any charge of primary negligence by a defendant in Missouri. The bar included negligence resulting in physical or pecuniary damage. In *Gustafson v. Benda*,¹⁴⁹ however, the Missouri Supreme Court adopted a system of pure comparative fault based on the Uniform Comparative Fault Act.¹⁵⁰

Application of the Uniform Comparative Fault Act is confined to physical

145. *Id.*

146. RESTATEMENT (SECOND) OF TORTS § 552B comment b (1976).

147. A possible new instruction could read:

If you find in favor of the plaintiff then you must award plaintiff such sum as you believe was the difference between the actual value of the (describe property) on the date it was sold to plaintiff and the value of the consideration given by plaintiff in exchange for the (describe property).

148. Comparative fault is the process of allocating damages between negligent parties. In practice it serves to reduce a plaintiff's damages if he has been guilty of negligence that contributed to his injury. PROSSER & KEETON, *supra* note 2, § 67, at 470. Contributory negligence is a long standing doctrine denying recovery on behalf of a plaintiff who contributed to his own injury. *Id.* at 451.

149. 661 S.W.2d 11 (Mo. 1983) (en banc).

150. *Id.* at 16. See UNIF. COMPARATIVE FAULT ACT (1979).

harm to persons or property.¹⁵¹ It specifically states that the Act was not intended to include matters like economic loss resulting from a tort such as negligent misrepresentation.¹⁵² The comment to section 1 goes on to state that "failure to include these harms specifically in the act is not intended to preclude application of the general principal to them if a court determines that the common law of the state would make the application."¹⁵³ The exact meaning of the quoted part of this comment is not clear. It has been suggested that the comment merely means that if a comparative fault state had been applying comparative fault to cases of economic loss before the adoption of the Uniform Act, adoption of the Act was not intended to change that common law.¹⁵⁴

Since Missouri was not a comparative fault state prior to adoption of the Act, it is unlikely that Missouri courts would apply comparative fault to negligence based torts causing only pecuniary loss. To the extent that the Act does not change the common law in the area of negligent misrepresentation, contributory negligence should remain a complete bar to a plaintiff's cause of action.¹⁵⁵

It might come as a shock to Missouri attorneys that contributory negligence is still alive and well following the adoption of a system of pure comparative fault. Exactly what will constitute contributory negligence under negligent misrepresentation is left to the courts and the unique facts of each case.

151. UNIF. COMPARATIVE FAULT ACT § 1 comment (1979). The comment further states:

The Act does not include intentional torts. Statutes and decisions have not applied the comparative fault principle to them. But a court determining that general principle should apply at common law to a case before it of an intentional tort is not precluded from that holding by the Act.

Id.

152. *Id.*

153. *Id.*

154. *Id.* The suggestion has been made to the author while discussing the effect of the Act with several Missouri practitioners. This interpretation is logical, but begs the question as to why the commission did not directly state its meaning as it did in the case of intentional torts. See *supra* note 148.

155. See Note, *Torts—Comparative Negligence: Action for Wanton and Willful Conduct is Beyond Purview of New Jersey Comparative Negligence Statute*, 8 RUT. CAM. L.J. 376, 379 (1977). The policy considerations which prevent negligence from barring a cause of action for intentional fraud do not apply in the case of negligent misrepresentation. Since no one party is more at fault than another, the plaintiff is held to the standard of care, knowledge, intelligence, and judgment of a reasonable man, even though he does not possess the qualities necessary to enable him to conform to that standard. RESTATEMENT (SECOND) OF TORTS § 552A comment a (1976); accord *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127 (Tenn. 1982) (even though manufacturer's recommendation of contractor to erect plaintiff's prefabricated home was negligent, plaintiff's action in hiring him was contributorily negligent and barred recovery); *Zack Cheek Builders v. McLeod*, 597 S.W.2d 888, 894 (Tenn. 1980) (court upheld jury finding that a house builder had made negligent misrepresentations that the house, built on a hill of fill material, was safe but denied plaintiff relief because of contributory negligence); see also *supra* note 5 for additional cases.

What is important to practitioners is that they recognize the potential hurdle or saving defense posed by contributory negligence in the case of torts resulting in pecuniary loss.¹⁵⁶

VII. CONCLUSION

It seems clear that the Missouri Supreme Court will follow the lead of the Eastern and Western District Courts of Appeals and recognize a cause of action for negligent misrepresentation based on section 552 of the *Restatement (Second) of Torts*.¹⁵⁷ Its adoption will require some minor changes in the M.A.I.s as well as the recognition that comparative fault is inapplicable, whereas contributory negligence probably still is applicable.¹⁵⁸

All in all, the adoption of section 552 of the Restatement is a positive step for Missouri jurisprudence. It represents a coherent balance in the conflict that had developed in the law between intentional fraud and the theory of negligence. It establishes a remedy for a wide variety of business related injuries that continue to change and develop as our society and relationships change and develop. It establishes a duty to use care in dealing with those persons who justifiably rely on others for information, yet it limits liability on the part of the negligent party to a fair and equitable standard.

Negligent misrepresentation gives the practitioner in Missouri a new tool with which to work. As with most judicial tools, it can be used to hammer away at the thorns of unfairness and inequality, or it can be used to help mold the cause of justice in Missouri for years to come. It has been said that a craftsman is only as good as his tools. We should remember that tools, by themselves, can do nothing. They are only as good as the craftsman that puts them to use.

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156. It appears that courts in the future are free to apply comparative fault to torts causing only pecuniary damage regardless of the adoption of the Uniform Act. A practitioner might still want to argue for comparison of fault under negligent misrepresentation as a logical development in the common law of pecuniary torts.

157. See *supra* notes 88-106 and accompanying text.

158. See *supra* notes 124-56 and accompanying text.

