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Fraud and Negligent Misrepresentation Claims under Minnesota'a Economic Loss Doctrine after AKA Distributing Co. v. Whirlpool Corp., 137 F.3D 1083 (8Th Cir. 1998) and the 1998 Legislative Amendments for Marvin Windows

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FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS UNDER MINNESOTA'S ECONOMIC LOSS DOCTRINE AFTER *AKA DISTRIBUTING CO. V. WHIRLPOOL CORP.*, 137 F.3D 1083 (8TH CIR. 1998) AND THE 1998 LEGISLATIVE AMENDMENTS FOR MARVIN WINDOWS

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I. INTRODUCTION

Minnesota's economic loss doctrine exists, together with products liability law, at the crossroads of tort and contract.[1] It determines whether various tort claims are available to recover for economic losses or, alternatively, if claims for such losses are limited to contract.[2] One persistent problem in applying the economic loss doctrine is determining which tort claims are foreclosed. Although devised in response to strict liability in tort,[3] the economic loss doctrine soon precluded negligence claims as

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1. *See* Jonathan M. Bye & Eric J. Peck, *New Windows on Tort Claims: Minnesota's Economic Loss Doctrine*, BENCH & B. MINN., May/June 1988, at 41, 41; Mike Steenson, *A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third) of Torts: Products Liability*, 24 WM. MITCHELL L. REV. 1, 122 n.725 (1998) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 cmt. a (Proposed Final Draft, Apr. 1, 1997). Minnesota Supreme Court Associate Justice Lawrence R. Yetka stated the following in his dissent in *Hapka v. Paquin Farms*:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy, and not necessarily upon the will or intention of the parties. They may be owed to all those within the range of harm, or to some considerable class of people. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.

458 N.W.2d 683, 689 (Minn. 1990) (Yetka, J., dissenting) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 92, at 613 (4th ed. 1971)).

2. *See, e.g.*, Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 14 (Minn. 1992).

> The courts have not had an easy time in determining the appropriate interplay between tort and contract remedies for losses caused by a defective product. The critical problem has been to find some principled basis for deciding when breach of warranty lies exclusively and when the tort remedies of negligence and strict liability may apply also.

Id.

3. *See* Seely v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965) ("The history

well.[4] Moreover, broad language in some cases even seemed to indicate that the economic loss doctrine barred all tort claims, including fraud and negligent misrepresentation.[5] The Minnesota Supreme Court, however, has not yet specifically addressed this question.[6]

Recently, in *AKA Distributing Co. v. Whirlpool Corp.*,[7] the Eighth Circuit weighed in on this issue, holding that "in a suit between merchants, a fraud claim to recover economic losses must be independent of the [U.C.C.] Article 2 contract or it is precluded by the economic loss doctrine."[8] More recently, in a special session called to assist Minnesota-based Marvin Windows in its lawsuit against PPG Industries, Inc., the Minnesota Legislature amended Minnesota's economic loss doctrine statute[9] to allow fraud and intentional misrepresentation claims to survive the economic loss doctrine.[10] Although these amendments did not help Marvin Windows in its litigation,[11] the amendments represent a potentially significant

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of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries."). The *Seely* court established the economic loss doctrine. *See id.* at 149-50.

4. *See id.* at 151 (stating, in dicta, that "[e]ven in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone"); *see also* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) ("[E]conomic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability.").

5. *See, e.g.*, ETM Graphics, Inc. v. City of St. Paul, No. C2-91-2103, 1992 WL 61394, at *2, *4 (Minn. Ct. App. Mar. 31, 1992); Nelson Distrib., Inc. v. Stewart-Warner Indus. Balancers, 808 F. Supp. 684, 688 (D. Minn. 1992) (relying on *ETM Graphics* in ascertaining how the Minnesota Supreme Court would act).

6. *See* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 (8th Cir. 1998) ("[T]he Minnesota Supreme Court has not addressed whether the economic loss doctrine bars fraud and misrepresentation torts.").

7. 137 F.3d 1083 (8th Cir. 1998).

8. *Id.* at 1087.

9. *See* Act of Apr. 22, 1998, 1st Spec. Sess., ch. 2, 1998 Minn. Laws 2322 (codified as amended at MINN. STAT. § 604.10).

10. *See id.* § 1 (codified as amended at MINN. STAT. § 604.10(e)). The amendment was approved on April 22, 1998 to have effect the following day, and to apply to actions pending or commenced after that date. *See id.* § 4.

11. *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 743-44 (D. Minn. 1999), *argued*, No. 99-1424 (8th Cir. Nov. 15, 1999). The *Marvin* court found that the amendments made for Marvin Windows in the 1998 special session applied only to transactions governed by Minnesota Statutes section 604.10. *See id.* Because the transactions between Marvin Windows and PPG occurred before enactment of Minnesota Statutes section 604.10, those transactions were governed by the previously existing common law economic loss doctrine of Minnesota. *See id.* Consequently, the *Marvin* court avoided any need to find retroactive application of the 1998 amendments unconstitutional, as recommended

change to Minnesota's economic loss doctrine.

This casenote analyzes Minnesota's economic loss doctrine as it pertains to fraud and misrepresentation claims. First, it presents a historical development of the economic loss doctrine. Second, it analyzes the approaches to fraud and misrepresentation claims taken recently by the Eighth Circuit in *AKA* and the Minnesota Legislature in response to the Marvin litigation. Third, it explains that the *AKA* approach is needed to supplement the recent amendments by the Minnesota Legislature.

II. BACKGROUND

A. *A Brief Overview of Policies Underlying the Economic Loss Doctrine*

The law of products liability, including its twin theories of negligence[12] and strict liability,[13] was developed to protect consumers from the risk of personal injury without imposing the stringent privity, notice, and disclaimer requirements of contract law.[14] Conversely, the Uniform Commercial Code ("U.C.C.") was developed to provide a comprehensive commercial code that allows parties to negotiate and allocate risks, such as through disclaimers that limit liability.[15]

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by the magistrate judge. *See id.*; *see also* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., Civ. No. 4-95-739 (D. Minn. Aug. 6, 1998) (Report and Recommendation of Magistrate Judge Erickson).

12. *See generally*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (holding, in Judge Cardozo's often-cited opinion, that lack of privity of contract did not bar the plaintiff's negligence action against the manufacturer); *see also* Schubert v. J.R. Clark Co., 49 Minn. 331 (1892). Professor Michael K. Steenson points out that Minnesota's *Schubert* decision presaged Judge Cardozo's opinion in *MacPherson* by some twenty-four years. *See* Michael K. Steenson, *The Anatomy of Products Liability in Minnesota: The Theories of Recovery*, 6 WM. MITCHELL L. REV. 1, 9 (1980).

13. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77, 83, 97 (N.J. 1960) (adopting strict liability in tort). The Minnesota Supreme Court adopted strict liability in 1967. *See* Steenson, *supra* note 12, at 5 n.9 (citing McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (addressing a child that was scalded by water from a vaporizer that had been tipped over)).

14. *See* Steenson, *supra* note 12, at 122.

15. "Minnesota adopted the U.C.C. in 1965; it became effective July 1, 1966." Olsen-Frankman Livestock Mktg. Serv., Inc. v. Citizens Nat'l Bank of Madelia, 605 F.2d 1082, 1085 (8th Cir. 1979). "'Minnesota has adopted the most liberal privity position available in the U.C.C.'" TCF Bank & Sav., F.A. v. Marshall Truss Sys., Inc., 466 N.W.2d 49, 54 (Minn. Ct. App. 1991) (quoting Nelson v. International Harvester Corp., 394 N.W.2d 578, 581 (Minn. Ct. App. 1986)). *See* MINN. STAT. § 336.2-318 (1998) ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.").

The economic loss doctrine precludes certain tort remedies, in a commercial sale of goods, for purely economic losses unless accompanied by (1) physical injury or (2) damage to property other than the purchased good itself.[16] Recovery for such economic losses is limited to the terms of an underlying contract.[17] Like both products liability and the U.C.C., the economic loss doctrine recognizes that commercial parties and consumers present different policy considerations requiring cost allocation and cost shifting, respectively.[18]

Removing tort remedies for economic losses[19] arising from commercial sales of goods forces commercial parties to allocate risk through contract negotiations, as provided by U.C.C. Article 2.[20] The resulting price should reflect the cost allocation of such risks; neither party should obtain a windfall that it did not bargain for in negotiating the underlying contract.[21]

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16. *See* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981).

17. *See id.* The economic loss rule can alternatively be expressed in terms of what recovery is allowed, rather than what recovery is precluded. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1998) (defining "Harm to Persons or Property: Recovery for Economic Loss"). "For the purposes of this *Restatement*, harm to persons or property includes economic loss if caused by harm to: (a) the plaintiff's person; or (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff's property other than the defective product itself." *Id.*

18. *See* S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 433 (Minn. 1985). "The U.C.C. was enacted to govern and clarify the rights and remedies of parties to commercial transactions. As part of its risk allocation scheme, it permits parties to limit and modify by contract the remedies available for commercial losses." *Id.*

19. "Economic loss has been defined . . . to be direct, incidental, or consequential pecuniary loss, including, but not limited to, damage to the product in question, and nonphysical damage to property other than the product." 4A AMERICAN LAW OF PRODUCTS LIABILITY, § 60:36 (Timothy E. Travers et al. eds., 3d ed. 1991). "Economic loss" was defined by the Minnesota Supreme Court as that loss "resulting from the failure of the product to perform to the level expected by the buyer, commonly measured by the cost of repairing or replacing the product and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold." Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, 354 N.W.2d 816, 820-21 (Minn. 1984).

20. *See, e.g.*, Miller v. United States Steel Corp., 902 F.2d 573, 575 (7th Cir. 1990). In *Miller*, Judge Posner stated that commercial disputes ought to be resolved by commercial law rather than tort principles designed for accidents that cause personal injury or property damage. *See id.* "A disputant should not be permitted to opt out of commercial law by refusing to avail himself of the opportunities which that law gives him." *Id.*; *see also* Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990).

21. *See S.J. Groves*, 374 N.W.2d at 434.

Consumer transactions, on the other hand, are typically characterized by both unequal bargaining power and the inability to negotiate meaningfully.[22] Because consumer transactions lack negotiated risk allocation, consumers may recover in strict liability in tort, without establishing fault, for personal injury and damage to other property resulting from unreasonably dangerous products.[23] Consumer transactions require strict liability to shift costs from the consumer to the manufacturer because the manufacturer is able to insure against the risk of injury and allocate the resulting expense over a large population of consumers.[24]

The economic loss doctrine stands uneasy guard as the gatekeeper for tort recovery even for transactions that are not so easily categorized as purely consumer or commercial.[25] More importantly, if both contract and

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> The commercial buyer can protect himself by negotiation. He can induce the seller to accept, for a price, risks which the buyer cannot bear efficiently himself. Conversely, by relieving the seller of responsibility for product defects, the commercial buyer is likely to obtain the product at a lower price. When a buyer who has taken advantage of that opportunity invokes strict products liability with respect to a risk that was allocated to him by contract, he in effect asks the law to accord him a better bargain than he purchased.

Id. (quoting Purvis v. Consolidated Energy Prods. Co., 674 F.2d 217, 221 (4th Cir. 1982)); *see also* Jacquelyn K. Brunmeier, *Death by Footnote: The Life and Times of Minnesota's Economic Loss Doctrine*, 19 WM. MITCHELL L. REV. 871, 898 (1993); 2 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY, ¶ 27.03[1] (3d ed. 1994 & Supp. 1998) (noting that strict liability is unsuited for commercial parties having comparable bargaining power and the ability to make cost judgments, particularly where the goods are specialized or customized—such parties have a duty to allocate risk through contractual negotiations).

22. *See S.J. Groves*, 374 N.W.2d at 433 (noting that "individual consumers lack the bargaining power to avoid accepting contracts that unfairly limit their remedies"); *Hapka*, 458 N.W.2d at 688 ("Generally speaking, a consumer has neither the skill nor the bargaining power to negotiate either warranties or remedies."). By contrast, "the law is entitled to expect the parties to commercial transactions to be knowledgeable and of relatively equal bargaining power so that warranties can be negotiated to the parties' mutual advantage." *Id.*

23. *See* East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866-67 (1986).

24. *See Hapka*, 458 N.W.2d at 690 (Yetka, J., dissenting). "The primary burden of the law of products liability is imposed on sellers and manufacturers because they are in a better position to minimize or eliminate the risk of losses caused by defective products." *Id.*

25. *See, e.g.*, Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 16-17 (Minn. 1992) (dividing commercial transactions into those involving merchants and those involving merchants in goods of the kind, and applying the economic loss doctrine to preclude tort claims only by merchants in goods of the kind). *See also* Jennie-O Foods, Inc. v. Safe-Glo Prods. Corp., 582 N.W.2d 576, 578 (Minn. Ct.

tort claims exist, recovery often rests entirely on the economic loss doctrine in cases where a statute of limitations precludes recovery on the contract claims. The limitation period for a contract claim of breach of warranty is four years, triggered by the seller's delivery of the goods, while the limitation period for a negligence claim is six years, and does not begin to run until an injury occurs.[26] Where a negligence claim remains viable after a contract claim expires, a plaintiff must negotiate the labyrinthine in-

App. 1998) (noting that the Minnesota Supreme Court and the Eighth Circuit Court of Appeals differ in their interpretations of whether "commercial transactions" applies to all merchants or only to merchants in goods of the kind).

26. *See* MINN. STAT. § 336.2-725 (1998). The statute provides:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (4) This section does not alter the law on tolling the statute of limitations, nor does it apply to causes of action which have accrued before this chapter becomes effective.
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> The limitations in this section do not apply to actions for the breach of any contract for sale of a grain storage structure or other goods that are incorporated into an improvement to real property, except equipment and machinery. These actions are subject only to the statute of limitations set forth in section 541.051.
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> *This section does not apply to claims against sellers of goods for damages to property caused by the goods where the property that is damaged is not the goods and the sale is not a sale between parties who are each merchants in goods of the kind.*

Id. (emphasis added); *see also* MINN. STAT. § 541.05, subds. 1(1), 1(2), 1(6) & 2 (1998) (providing a six year limitation period for contract claims outside the U.C.C. and for negligence, a four year limitation period for strict liability, and a six year limitation period for fraud, the period accruing after discovery of the facts constituting the fraud); *see also Den-Tal-Ez*, 491 N.W.2d at 16.

tricacies of the economic loss doctrine to recover any economic losses.

B. *Early Roots:* Santor *and* Seely

The competing policies of products liability law and the U.C.C. were considered in 1965 in the New Jersey case of *Santor v. A & M Karagheusian, Inc.*[27] *Santor* allowed recovery under the tort theory of strict liability for a purely economic loss, without personal injury,[28] for defective carpeting that was represented to be Grade No. 1 carpeting.[29] This was consistent with some early Minnesota cases allowing tort recovery for economic losses irrespective of whether such losses were accompanied by personal injury.[30]

Later in 1965, the California Supreme Court reached the opposite result in *Seely v. White Motor Co.*,[31] giving birth to the economic loss doctrine. In *Seely*, the plaintiff purchased a truck for his business of heavy-duty hauling.[32] A defective suspension caused violent bouncing[33] resulting in the plaintiff's loss of the truck's use during multiple repairs.[34] Failed brakes resulted in the truck overturning, for which the plaintiff incurred repair costs but suffered no personal injury.[35]

The plaintiff's claims against the defendant truck manufacturer included both a contract claim for breach of warranty[36] and tort claims of negligence[37] and strict liability.[38] The *Seely* court allowed damages under the breach of warranty claim for the plaintiff's lost profits and payments

27. 207 A.2d 305 (N.J. 1965). The *Santor* decision was never widely followed and was recently severely limited, if not overruled by the New Jersey Supreme Court. *See* 2 SHAPO, *supra* note 21, ¶ 27.02[1][a] (citing Alloway v. General Marine Indus., L.P., 695 A.2d 264, 267 (N.J. 1997), which allowed no tort recovery for injury only to a defective pleasure boat itself).

28. *See Santor*, 207 N.W.2d. at 311-12.

29. *See id.* at 306.

30. *See* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162-63 (Minn. 1981) (Yetka, J., dissenting) (citing Nieman v. Channellene Oil & Mfg. Co., 127 N.W. 394 (Minn. 1910) (allowing retailer to recover damages from wholesaler for lost profits resulting from contaminated cooking oil); Ellis v. Lindmark, 117 Minn. 390, 225 N.W. 395 (Minn. 1929) (allowing recovery for economic damages to plaintiff's poultry business resulting from mislabeling of raw linseed oil)).

31. 403 P.2d 145 (Cal. 1965).

32. *See id.* at 147.

33. *See id.*

34. *See id.* at 148.

35. *See id.* at 147.

36. *See id.* at 148-49.

37. *See id.* at 152.

38. *See id.* at 149-52.

on the purchase price of the truck.[39] Because the plaintiff failed to prove that the suspension defect caused the truck to overturn, the plaintiff's negligence claim for the accident repair costs failed for lack of causation.[40] As a result, recovery for the accident repair costs turned exclusively on the plaintiff's strict liability claim. However, the *Seely* court refused to allow recovery under either strict liability or negligence for the purely economic loss without accompanying physical harm or damage to other property.[41] The *Seely* decision attempted to ensure that manufacturers make products that are not so unreasonably dangerous as to cause physical harm to consumers.[42] *Seely* did not hold the manufacturer responsible for the level of performance of the products in the buyer's business unless the manufacturer agrees that the product was designed to meet the buyer's demands.[43]

C. *Minnesota Adopts the Economic Loss Doctrine:* Superwood

It was not until 1981 that the Minnesota Supreme Court adopted the economic loss doctrine in *Superwood Corp. v. Siempelkamp Corp.*[44] In *Superwood*, the plaintiff purchased a hot plate press that operated properly for twenty-one years until a cylinder failed.[45] Three years later, the plaintiff sued for negligence, strict liability, breach of warranty, and breach of con-

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39. *See id.* at 148.

40. *See id.* at 152.

41. *See id.* at 151-52. The *Seely* court cited the RESTATEMENT (SECOND) OF TORTS section 402A as limiting strict liability to physical harm to a person or property. *See id.* at 151. In dissent, Justice Peters complained that the majority's statements applying the economic loss doctrine to strict liability were mere dicta. *See id.* at 153 (Peters, J., dissenting). This criticism seems ill-founded; strict liability was addressed because the plaintiff's negligence claim failed for lack of causation. *See supra* text accompanying note 40. Application of the economic loss doctrine to negligence, however, did indeed constitute dicta because the negligence claim had already been resolved. *See id.*; *see also* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 161 (Minn. 1981). Nevertheless, since *Superwood*, Minnesota courts have consistently applied the economic loss doctrine to both negligence and strict liability claims, as discussed *infra*.

42. *See Seely*, 403 P.2d at 151.

43. *See id.* The *Seely* rule has been widely followed. *See* 2 SHAPO, *supra* note 21, ¶ 27.02[2][d] (citing cases from Illinois, New York and Minnesota that sided with *Seely*). The U.S. Supreme Court adopted the *Seely* approach in an admiralty case, which further promoted its widespread acceptance. *See* East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986); *see also* Christopher Scott D'Angelo, *The Economic Loss Doctrine: Saving Contract Warranty Law From Drowning in a Sea of Torts*, 26 U. TOLEDO L. REV. 591, 593, 609-19 (1995) (surveying the nature of any economic loss rules in each state).

44. 311 N.W.2d 159 (Minn. 1981).

45. *See id.* at 160.

tract, seeking recovery for damage to the press and for lost profits.[46] Because the plaintiff's breach of warranty and contract claims were time-barred, recovery rested entirely on the viability of the plaintiff's tort claims.[47] The *Superwood* court held, however, that "economic losses that arise out of commercial transactions, except those involving [1] personal injury or [2] damage to other property, are not recoverable under the tort theories of negligence or strict product liability."[48] The *Superwood* court reasoned that allowing unrestrained tort liability in commercial transactions would totally emasculate the liability limitations, warranty disclaimers, and notice provisions of the U.C.C.[49] The *Superwood* decision did not extend the economic loss doctrine to consumer transactions[50] or to tort theories other than negligence and strict liability.[51]

D. The "Other Property" Exception: Fine Arts

In 1984, the Minnesota Supreme Court addressed the "other property" exception to the economic loss doctrine in *Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.*[52] The *Fine Arts* plaintiff purchased 1.8 million glazed bricks that later deteriorated because of improper building design.[53] The plaintiff claimed breach of express and implied warranty, breach of contract, negligence, and strict liability for the defendant brick company's failure to warn the plaintiff or its agents of technical considerations in installing the brick.[54] The *Fine Arts* court found that the plaintiff failed to establish physical damage to property

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46. *See id.*
47. *See id.* at 160 & n.1.
48. *Id.* at 162.
49. *See id.*
50. *See id.* The *Superwood* court stated:

> "The laws of warranty still meet the needs of commercial transactions and function well in a commercial setting . . . . However, the *Restatement* theory of responsibility [strict liability] more adequately meets the public policy need to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions . . . ." Limiting the application of strict products liability to consumers' actions or actions involving personal injury will allow the U.C.C. to satisfy the needs of the commercial sector and still protect the legitimate expectations of consumers.

Id. (quoting Farr v. Armstrong Rubber, 288 Minn. 83, 179 N.W.2d 64 (1970).
51. *See supra* text accompanying note 48.
52. 354 N.W.2d 816 (Minn. 1984).
53. *See id.* at 818-19.
54. *See id.* at 817, 819.

other than the brick itself.[55] If buildings constituted "other property," *Superwood* would effectively be overruled as to every seller of basic building materials (e.g., concrete, brick or steel) because the "other property" exception would always apply.[56] According to *Fine Arts*, the "U.C.C. provisions as applicable to component suppliers would be totally emasculated" by such a finding.[57] Consequently, the *Fine Arts* court sided with other jurisdictions holding that "where a defect in a component part damaged the product into which that component was incorporated, economic losses to the product as a whole [are] not losses to 'other property' and therefore not recoverable."[58] As with *Superwood*, the *Fine Arts* court limited the economic loss doctrine's reach to the torts of negligence and strict liability.[59]

E. The "Personal Injury" Exception: S.J. Groves

In 1985, the Minnesota Supreme Court addressed the "personal injury" exception to the economic loss doctrine in *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*[60] In *S.J. Groves*, the plaintiff highway construction contractor alleged that a fatigue failure in a helicopter's pitch control unit caused the helicopter to crash,[61] killing the pilot, injuring a passenger, and destroying communication accessories that the plaintiff had purchased separately and installed in the helicopter.[62] The pilot's heirs brought and settled a wrongful death action against the helicopter manufacturer, alleging negligence and strict liability.[63] The plaintiff construction contractor sought recovery for "damage to the helicopter, loss of use, lost profits, and other incidental and consequential damages, under theories of breach of warranty, negligence, and strict liability."[64]

The *S.J. Groves* court denied recovery,[65] where the warranty claim was time-barred,[66] finding that the economic loss doctrine precluded the tort

55. *See id.* at 820.
56. *See id.*
57. *Id.*
58. *Id.*
59. *Id.* at 822.
60. 374 N.W.2d 431 (Minn. 1985).
61. *See id.* at 432.
62. *See id.*
63. *See id.*
64. *Id.*
65. *See id.* at 435 (answering the question certified to the Minnesota Supreme Court by the United States District Court, District of Minnesota, in the negative).
66. *See id.* at 432 (assuming facts in accordance with the defendant's answer). Because this case responded only to the questions certified by the federal court, this precise issue was not before the court. *See id.* at 433.

claims.[67] The court noted that "although personal injuries arose from the same occurrence, [plaintiff was] seeking economic loss arising only from the damage to the product itself, not from the personal injury."[68] Moreover, under *Fine Arts*, the damage to the plaintiff's communication accessories was insufficient to bootstrap the plaintiff's much larger claims for damages to the helicopter itself under the "other property" exception to the economic loss doctrine.[69] Thus, after *S.J. Groves*, the "personal injury" and "other property" exceptions to the economic loss doctrine are completely separate and independent threshold tests.[70] A plaintiff may recover only for those economic losses associated with the particular threshold (i.e., "personal injury" or "other property") that is satisfied."[71]

S.J. Groves also considered whether Minnesota should follow other jurisdictions in resolving the conflict between tort and contract by distinguishing between losses resulting from a "qualitative defect," for which only contract remedies are available, and those resulting from a "sudden and calamitous occurrence" for which recovery in tort is also allowed.[72]

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67. *See id.* at 433, 435 (citing Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159 (Minn. 1981)).

68. *Id.* at 433. Employers may also be barred from recovering for their economic losses suffered as a consequence of injury to an employee. *See* Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 113 (Supp. 1998).

69. *See S.J. Groves*, 374 N.W.2d at 434 n.2.

70. *Cf.* Bye & Peck, *supra* note 1, at 42. "The Court thus clarified the 'damage to other property' exception to the doctrine to apply only where economic losses arise out of personal injury or damage to other property." *Id.* Justice Scott dissented in *S.J. Groves*, arguing that courts should remedy economic losses for damage to other property whenever personal injury arises from the same occurrence. *See S.J. Groves*, 374 N.W.2d at 436 (Scott, J., dissenting). According to Justice Scott, the "requirement that there be damage to other property or personal injury is simply a shorthand way of determining whether a defect is part of the 'accident problem' against which tort law seeks to protect." *Id.*

71. *See S.J. Groves*, 374 N.W.2d at 435-36 (Scott, J., dissenting).

72. *See id.* at 435. *S.J. Groves* explained:

> This "violent occurrence" distinction stems from *Restatement (Second) of Torts* § 402A (1965), which provides for recovery for physical harm caused by a "product in defective condition unreasonably dangerous to the user or consumer," and resolution turns on "whether the safety-insurance policy of tort law or the expectation-bargain protection of warranty law is most applicable to a particular claim." Accordingly, damage to the product itself caused by a "qualitative defect" is recoverable only under the U.C.C. and contract law, whereas recovery in tort is allowed for damage to the product arising from a "sudden and calamitous occurrence."

Id. (internal citations omitted) (listing cases using the sudden and calamitous dis-

The *S.J. Groves* court rejected any such distinction as imprecise and arbitrary.[73] Thus, Minnesota's economic loss doctrine does not depend on whether the occurrence is sudden, violent, or calamitous.[74]

F. Defining Commercial Transactions: Valley Farmers' *and* McCarthy Well.

As originally adopted in *Superwood*, the economic loss doctrine rested on preventing "emasculation" of Article 2 of the U.C.C.[75] However, Article 2 of the U.C.C. applies only to sales of goods, and not to the delivery of services. In 1987, the Minnesota Supreme Court decided *Valley Farmers' Elevator v. Lindsay Bros. Co.*[76] and *McCarthy Well Co. Inc. v. St. Peter Creamery, Inc.*,[77] and explained which of *Superwood's* "commercial transactions"[78] fall within the purview of the economic loss doctrine.

In *Valley Farmers'*, the plaintiff purchased a negative flow aeration grain drying and storage system.[79] Five years after the purchase, the roof and sides of the center bin collapsed as a result of a partial vacuum created by the aeration fans when frost accumulated on exterior roof vents.[80] The plaintiff asserted negligence with regard to the defendant's system design services and its failure to warn, and strict liability for damage to the bin itself.[81] Thus, the plaintiff's claims involved a transaction in both goods and services.

In *Valley Farmers'*, the Minnesota Supreme Court adopted the "pre-

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tinction, and discussing the rationale underlying the distinction); *see also* Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc., 354 N.W.2d 816, 821 (Minn. 1984); David E. Bland & Robert M. Watson, *Property Damage Caused by Defective Products: What Losses Are Recoverable?*, 9 WM. MITCHELL L. REV. 1, 9 (1984) (discussing cases requiring the loss to result from a dangerous defect, occurring under circumstances that make the product unreasonably dangerous).

73. *See S.J. Groves*, 374 N.W.2d at 435 (Minn. 1985). In dissent, Justice Scott noted that, like the "personal injury" and "other property" exceptions to the economic loss doctrine, the sudden and calamitous occurrence criteria is based on the rationale that "tort law imposes a duty on manufacturers to produce safe products, regardless of whether the ultimate impact of the hazard is on people, other property, or the product itself." *See id.* at 436 (Scott, J., dissenting).

74. The sudden and calamitous failure exception to the economic loss rule has been rejected by most states. *See* D'Angelo, *supra* note 43, at 601-19 (analyzing decisions in each state for whether an "unduly dangerous condition" or "sudden and calamitous failure" exception is applied to the economic loss doctrine).

75. *See supra* text accompanying note 49.

76. 398 N.W.2d 553 (Minn. 1987).

77. 410 N.W.2d 312 (Minn. 1987).

78. *See supra* text accompanying note 48.

79. *See Valley Farmers'*, 398 N.W.2d at 554.

80. *See id.*

81. *See id.* at 555.

dominant factor" test, under which the court must ascertain the primary purpose of the contract at the time of sale to determine whether a hybrid contract is primarily for goods or services.[82] "That some added service is required to install or apply the product does not transform a contract of sale into a contract for services."[83] In *Valley Farmers'*, only $120,000 of the $504,000 contract price was attributed to labor.[84] Moreover, none of the labor was designated as compensation for design services, a factor indicating "the tangential and incidental nature of those services."[85] Thus, the court in *Valley Farmers'* held that the transaction was a sale of goods for which tort recovery was barred by the economic loss doctrine.[86]

In *McCarthy Well*, which was decided later in 1987, the defendant hired the plaintiff to restore an artesian well to its original capacity.[87] This restoration included inspecting the well by televised means, exploding dynamite and airlifting sand from the bottom of the well, and installing a new turbine pump.[88] After numerous pump failures, the defendant refused to make complete payment on the contract and hired another company to dig a new well and install a new pump.[89] When the plaintiff sued for breach of contract, defendant counterclaimed for negligent performance of the services.[90]

In *McCarthy Well*, the Minnesota Supreme Court held that the scope of "commercial transactions," for purposes of the economic loss doctrine, is coextensive with those transactions governed by U.C.C. Article 2.[91] The court noted that the economic loss doctrine exists only to protect the U.C.C. and is inapplicable when the U.C.C. does not apply.[92] Because only $8,329.45 of the $34,573.27 bill was identified as the cost of the pump, the hybrid contract primarily provided services.[93] Because the U.C.C. did not apply to such services, the economic loss doctrine did not

82. *See id.* at 556; *see also* Vesta State Bank v. Independent State Bank of Minnesota, 518 N.W.2d 850, 854 (Minn. 1994) (applying the "predominant factor" test).

83. *Valley Farmers'*, 398 N.W.2d at 556.

84. *See id.*

85. *Id.*

86. *See id.* at 556-57.

87. *See* McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 313 (Minn. 1987).

88. *See id.* at 314.

89. *See id.*

90. *See id.* at 313.

91. *See id.* at 314-15. As adopted in Minnesota, the U.C.C. is codified at Minnesota Statutes chapter 336 (1998).

92. *See McCarthy Well*, 410 N.W.2d at 315.

93. *See id.*

bar tort recovery on a negligence theory.[94]

G. *Revisiting "Other Property":* Holstad *and* Hapka

In 1988, the Minnesota Court of Appeals again interpreted the "other property" exception to the economic loss doctrine in *Holstad v. Southwestern Porcelain, Inc.*[95] In *Holstad*, the plaintiff purchased a prefabricated silo.[96] The defendant installed the silo and the plaintiff began storing feed in it.[97] Soon thereafter, the plaintiff's cows became sick from eating feed that had spoiled due to a rupture in the silo's air bag.[98] Defendant installed a replacement air bag but it also was ripped, probably during installation.[99] As a result, the plaintiff continued to lose feed and milk production.[100] The plaintiff sued for breach of express and implied warranty and under tort theories of negligence and strict liability.[101] However, because four years had elapsed since delivery of the silo, the statute of limitations barred the warranty claims.[102] As a result, the plaintiff's recovery depended entirely on resolution of his tort claims.

In applying the "predominant factor" test of *Valley Farmers'*, the *Holstad* court concluded that the services rendered in installing the prefabricated silo were even more minimal than those in *Valley Farmers'*, making this transaction predominantly a sale of goods rather than services.[103] As a result, the plaintiff could not recover for economic losses unless his loss of feed, livestock, and milk production constituted damage to "other property" as contemplated by *Superwood.*[104] The *Holstad* court concluded that the "other property" exception to the economic loss doctrine applies only where "the defect or damage is other than that which could ordinarily be

94. *See id.*
95. 421 N.W.2d 371 (Minn. Ct. App. 1988).
96. *See id.* at 372.
97. *See id.* at 372-73.
98. *See id.* at 373.
99. *See id.*
100. *See id.*
101. *See id.*
102. *See id.* at 373-74. The plaintiff also claimed tolling of the limitations period by defendant's fraudulent concealment of defendant's knowledge of the fact that the air bag was torn. *See id.* at 374. "Fraudulent concealment, if it occurs, will toll the running of the statute of limitations until discovery or reasonable opportunity for discovery of the cause of action by the exercise of due diligence." *Id.* (citing Wild v. Rarig, 302 Minn. 419, 450, 234 N.W.2d 775, 795 (1975)). But the *Holstad* court concluded that the plaintiff had not set forth sufficient facts to raise a genuine issue of whether there was fraudulent concealment. *See id.* at 374-75.
103. *See id.* at 373-74.
104. *See id.* at 375.

contemplated by the parties to a commercial transaction."[105] On that basis, the *Holstad* court denied the plaintiff's tort claims under the economic loss doctrine,[106] implying that the silo was not "dangerous to an extent beyond that which would be contemplated by the ordinary purchaser who purchases it, with the ordinary knowledge common to the community as to its characteristics."[107]

Again faced with the "other property" exception to the economic loss doctrine in 1990 in *Hapka v. Paquin Farms*,[108] the Minnesota Supreme Court completely eliminated the "other property" exception for commercial transactions.[109] In *Hapka*, the plaintiff purchased seed potatoes infected with ring rot which, in turn, contaminated the plaintiff's planting machinery.[110] As a result, the disease spread to the plaintiff's other fields that were planted with seed potatoes from other suppliers.[111] The plaintiff's claims included breach of express and implied warranty, misrepresentation, negligence, negligence per se, and strict liability.[112]

The *Hapka* court first recognized that the "other property" exception had already been narrowly interpreted.[113] It then found the "other property" exception improper when applied to commercial, as opposed to

105. *Id.*
106. *See id.*
107. *Id.* at 375 (quoting Purvis v. Consolidated Energy Prods. Co., 674 F.2d 217, 222 (4th Cir. 1982)).
108. 458 N.W.2d 683 (Minn. 1990).
109. *See id.* at 688.
110. *See id.* at 685.
111. *See id.*
112. *See* Hapka v. Paquin Farms, 431 N.W.2d 907, 909 (Minn. Ct. App. 1988). The trial court allowed the misrepresentation claim to be submitted to the jury. *See id.* However, the trial court refused to submit the other tort theories to the jury because of the economic loss doctrine. *See id.* at 910.
113. *See Hapka*, 458 N.W.2d at 687 (citing Thofson v. Redex Indus., 433 N.W.2d 901, 904 (Minn. Ct. App. 1988)). In *Thofson v. Redex Industries*, the court held that fire damage to grain from a defective dryer was within the ordinary contemplation of parties to the commercial transaction, and minor damage to incidental equipment was insufficient to bootstrap much larger claim for economic losses. 433 N.W.2d 901, 904 (Minn. Ct. App. 1988); *see also* Holstad v. Southwestern Porcelain, Inc., 421 N.W.2d 371, 375 (Minn. Ct. App. 1988) (finding damage to grain resulting in sick cows and diminished milk production was not beyond ordinary contemplation, as required by the "other property" exception of the economic loss doctrine); American Home Assur. Co. v. Major Tool & Mach., Inc., 767 F.2d 446, 447-48 (8th Cir. 1985) (applying Minnesota law and finding the "other property" exception inapplicable to damages to a single product fabricated under a series of subcontracts); Agristor Leasing v. Guggisberg, 617 F. Supp. 902, 908 (D. Minn. 1985) (finding damage to grain resulting in sick cows was essentially based on the failure of the product to perform as expected such that the "other property" exception did not apply).

consumer, transactions.[114] The *Hapka* court reasoned that the U.C.C. already provides consequential damages including those for "injury to person or property proximately resulting from any breach of warranty."[115] "Having negotiated the warranties and any limitations of liability, that a defective product causes damage to other property should not defeat the liability parameters the parties have set by opening the door to tort theories of recovery."[116] The *Hapka* court held that the U.C.C. controls exclusively for commercial transactions involving property damage without accompanying physical injury,[117] expressly overruling "any statement or implication to the contrary in *Superwood* and its progeny."[118] Thus, *Hapka* eliminated the "other property" exception that accompanied the economic loss doctrine since its adoption in *Superwood.*[119]

H. The Legislative Response to Hapka

In 1991, the Minnesota Legislature quickly overruled the 1990 *Hapka* decision, effectively restoring the legitimacy of *Superwood* and its progeny. Section 604.10 of the Minnesota Statutes codified the pre-*Hapka* economic loss doctrine, providing:

> (a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.
>
> (b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.
>
> (c) The economic loss recoverable in tort under this section does not include the economic loss due to damage to the goods themselves.[120]

The economic loss statute is poorly phrased. However, a close examination indicates that the statute divided the universe of potential

114. *See Hapka*, 458 N.W.2d at 687-88.
115. *Id.* at 688 (citing MINN. STAT. § 336.2-715(2) (1988)).
116. *Id.*
117. *See id.*
118. *Id.*
119. *See id.*
120. Act of June 4, 1991, ch. 352, § 2, 1991 Minn. Laws 2792-93 (codified at MINN. STAT. § 604.10 (1990 & Supp. 1991).

claimants into: (1) merchants in goods of the kind; (2) merchants; and (3) everybody else (i.e., consumers).[121] The statute also divided the universe of potential damages into: (1) damages for defects in the goods themselves; and (2) damages for injury to other tangible property.[122] Table 1 illustrates operation of the economic loss statute according to its plain language.[123]

TABLE 1: *Operation of the Economic Loss Statute*

Claimant	Goods themselves defective	Other tangible property damaged
Merchants in goods of the kind	Not recoverable in tort. MINN. STAT. §§ 604.10(a),(c).	Not recoverable in tort. MINN. STAT. § 604.10(a).
Other Merchants	Not recoverable in tort. MINN. STAT. §§ 604.10(b),(c).	Recoverable in tort. MINN. STAT. § 604.10(a).
Consumers	Not recoverable in tort. MINN. STAT. § 604.10(c).	Recoverable in tort. MINN. STAT. § 604.10(a).

The economic loss statute restores the "other property" exception,

121. *See* MINN. STAT. § 604.10 (1990 & Supp. 1991).

122. *See id.*

123. *See id.* Entries in accompanying text Tables 1-3, referring to "tort," include only the torts of negligence and strict liability. *See also* Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 17 n.7 (Minn. 1992). The reader is cautioned that federal courts have interpreted the Minnesota economic loss statute according to Table 2. *See infra* text accompanying note 176. In 1993, the Minnesota Legislature further defined the "other property" exception by amending the economic loss statute, to add paragraph (d) "[t]he economic loss recoverable in tort under this section does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods." Act of May 5, 1993, ch. 91, § 1, 1993 Minn. Laws 274 (codified as amended at MINN. STAT. § 604.10(d) (1992 & Supp. 1993)). This is consistent with the *Fine Arts* decision, which refused to consider a finished product as "other property." *See supra* notes 55-58 and accompanying text. Moreover, because such a manufacturer would likely be considered a merchant in goods of the kind, other sections of the statute would already bar recovery. *See* MINN. STAT. §§ 604.10(a), (c) (1992 & Supp. 1993).

which was eliminated in *Hapka*, for consumers and merchants, but not for merchants in goods of the kind.[124] The economic loss statute also clearly applies even to consumer plaintiffs.[125] Moreover, in addition to overruling *Hapka*,[126] the 1991 statute raises the question of whether *Holstad* survives. Unlike *Holstad*, the economic loss statute does not look beyond "other property" to further require that "the defect or damage is other than that which could ordinarily be contemplated by the parties to a commercial transaction."[127]

I. Hard Facts in an Asbestos Case: 80 South Eighth

In 1992, the Minnesota Supreme Court decided *80 South Eighth Street Ltd. Partnership v. Carey-Canada, Inc.*[128] without applying the economic loss statute, because the case was already pending when the economic loss statute was enacted.[129] In *80 South Eighth*, the plaintiff's building con-

124. *See* MINN. STAT. § 604.10 (1990 & Supp. 1991).

125. *See id.* § 604.10(c).

126. *But see Den-Tal-Ez*, 491 N.W.2d at 13-15. Although Justice Simonett diplomatically concludes that *Hapka* survives enactment of Minnesota's economic loss statute, he does so only by completely redefining its holding to apply U.C.C. exclusivity only to merchants in goods of the kind. *See id.* No such limitation appears anywhere in the *Hapka* decision itself. *See generally Hapka*, 458 N.W.2d at 683.

127. *Holstad*, 421 N.W.2d at 375. *See supra* text accompanying notes 105-07. If *Holstad* does not survive enactment of the economic loss statute, then the merchant farmer in *Holstad* could recover in tort for damage caused by the defective silo to other property (i.e., the stored feed), because the farmer would likely not be considered a merchant in goods of the kind for the defective silo. *See supra* Table 1 in text accompanying note 123. If, however, *Holstad* does survive the enactment of economic loss statute, then *Holstad* would further require that the damage be outside the contemplation of the parties, which resulted in no tort recovery for the farmer in *Holstad*. *See supra* text accompanying notes 105-07. There is some indication that *Holstad* did survive enactment of the economic loss statute. *See* Regents of the Univ. of Minn. v. Chief Indus., Inc., 106 F.3d 1409, 1412 (8th Cir. 1997). *Chief Industries* interprets merchants in goods of the kind to include more than dealers of stock in trade, that is, to include any purchaser that has specialized knowledge or skill peculiar to the goods in question. *Id.* at 1412. This would include the farmer in *Holstad*, who would have specialized knowledge about silos. The specialized knowledge test seems merely another way of ascertaining what was within the buyer's ordinary contemplation.

128. 486 N.W.2d 393 (Minn. 1992), *amended*, 492 N.W.2d 256 (Minn. 1992). In *80 South Eighth*, the United States District Court, District of Minnesota, certified three questions to the Minnesota Supreme Court. *See* 486 N.W.2d at 394. But the court only decided the question of whether the economic loss doctrine of *Superwood* and *Hapka* bars the owners of a building containing asbestos fireproofing from suing the manufacturer under negligence and strict liability for the costs of maintenance, removal, and replacement of the fireproofing. *See id.* at 394, 399.

129. *See id.* (finding no occasion to answer the question of retroactive application of chapter 352 of the 1991 Minnesota Session laws).

tained asbestos fireproofing, which damaged "other property" (i.e., the building) only by creating a health hazard to the building's occupants.[130] Notably, the asbestos fireproofing did not fail to perform its fireproofing function.[131]

In allowing the tort action against the fireproofing's manufacturer,[132] the *80 South Eighth* court used the "personal injury" exception rather than the "other property" exception to the economic loss doctrine.[133] Although the court could justify allowing tort recovery here under the "other property" exception by distinguishing the case from *Fine Arts*,[134] it

130. *See id.* at 394-95. The plaintiff sought no damages for personal injuries. *See id.* at 395.

131. *See id.*

132. *See id.* at 399.

133. *See id.* at 397. The court stated:

> We simply do not believe that 80 South Eighth's claim of asbestos contamination is one for economic loss. 80 South Eighth is not seeking enforcement of the benefit of their bargain regarding the fireproofing performance of the Monokote [fireproofing]. In seeking the costs of maintenance, removal and replacement, 80 South Eighth seeks the costs of eliminating the risks of injury and of making the building safe for all those who use and occupy this property.

Id. (citation and footnote omitted). While this emphasizes the risk of personal injury over damage to other property, the last sentence makes it clear that, on these facts, these two considerations are inseparable. *See id.*

134. *See id.* On this point, the court stated:

> Here, however, there is a distinguishing factor. The claim here is not that the fireproofing failed to perform satisfactorily as fireproofing. Such a claim arising from the failure of the product to meet expectations of suitability, quality and performance resulting in damages which a party to a sales contract could reasonably expect would flow from a defect in the product is a benefit of the bargain claim better addressed under contract and the Uniform Commercial Code. Rather, the claim here is that the Monokote [fireproofing] introduced into the building asbestos which is highly dangerous to humans.

Id. *80 South Eighth* can be understood as an expansion of the "personal injury" exception of the economic loss doctrine to include risk of personal injury. *See supra* note 133. Alternatively, *80 South Eighth* represents an exception to *Fine Arts*, allowing tort recovery for damage to "other property" where the good itself is unreasonably dangerous to humans in a way that is different from its failure to perform its intended function. *See 80 South Eighth*, 486 N.W.2d at 397. Such a view presently makes sense because the Minnesota Legislature has at least partially restored the "other property" exception by overruling *Hapka*. However, *80 South Eighth* did not rely on retroactive application of the economic loss statute. *See id.* at 399. Other language in *80 South Eighth* indicates a return to the *Holstad* approach of determining whether the damages were within the contemplation of the parties.

could not escape *Hapka*'s repudiation of the "other property" exception for commercial transactions.[135] Consequently, *80 South Eighth* expanded the economic loss doctrine's "personal injury" exception to also include risk of personal injury,[136] even though such risk of personal injury is, in some respects, virtually indistinguishable from damage to other property.[137]

J. *Clarifying* Hapka: Den-Tal-Ez

The Minnesota Supreme Court also decided another pending case, *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*,[138] in 1992. *Den-Tal-Ez* did not rely on the newly-enacted economic loss statute,[139] but it reached a consistent result.[140] In *Den-Tal-Ez*, one of the plaintiffs purchased a dental business together with a second-hand motorized dental chair.[141] The chair allegedly caused a fire that destroyed the dentist's other property, and substantial damage to the property of other tenants and the building.[142]

The Minnesota Court of Appeals held that tort claims were pre-

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See id. at 397 (analyzing whether the damages could reasonably have been expected to flow from a defect in the product, and whether the risk is of a type normally allocated between the parties to a contract by an agreement); *see also supra* text accompanying note 107. Such inquiries are risky and unprincipled because damages flowing from a defect are often (even usually) outside the contemplation of the parties to a contractual agreement. Instead, *80 South Eighth* is better viewed as an expansion to the "personal injury" exception for risk of personal injury, or better still, as an expansion to the "other property" exception for a good that performs its intended function, but renders other property unreasonably dangerous to humans. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 cmt. e, reporters' note (1998). By limiting expansion of the exception to instances where the good did not fail its intended function, *80 South Eighth* does not create a wide open exception for any defective good that poses an unreasonable risk of death or personal injury. *Cf.* D'Angelo, *supra* note 43, at 601-08 (noting that the difficult asbestos abatement cases are typically resolved using a harm to other property rationale).

135. *See 80 South Eighth*, 486 N.W.2d at 398.

136. *See id.*

137. *See supra* notes 133-34.

138. 491 N.W.2d 11 (Minn. 1992).

139. *See id.* at 17 n.7.

140. *See supra* Table 1 in text accompanying note 123. *Den-Tal-Ez* has, however, been interpreted instead according to Table 2, in the text accompanying note 176. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 21 cmt d., reporters' note (1998). Such an interpretation, however, ignores Justice Simonett's directive that "the U.C.C. provides the exclusive remedy for other property damages arising out of a sale of goods only when . . . the parties to the sale are dealers in the same goods or, to use a more precise term, 'merchants in goods of the kind.'" *Den-Tal-Ez*, 491 N.W.2d at 17 (footnote omitted).

141. *See Den-Tal-Ez*, 491 N.W.2d at 12-13.

142. *See id.*

cluded by the economic loss doctrine because *Hapka* foreclosed the "other property" exception.[143] The Minnesota Supreme Court reversed,[144] finding that *Hapka* only foreclosed the "other property" exception for merchants engaged in the buying and selling of their stock in trade.[145] In other words, merchants in goods of the kind can only recover under the contract, even for damage to property other than the defective good itself.[146] Parties other than merchants in goods of the kind, however, may recover in tort for damage to property other than the defective good itself.[147] Although the dentist who purchased the defective chair was a merchant, dental chairs were not his stock in trade.[148] As such, he was not a merchant in goods of the kind, and could recover in tort.[149]

The other plaintiffs, including the building owner and other tenants, "never had anything to do with the chair."[150] For such third party plaintiffs, *Den-Tal-Ez* found no good reason not to allow tort claims, because doing so did not jeopardize the integrity of the commercial code.[151] Moreover, the Uniform Commercial Code itself recognizes that "the rights and duties of a third party may not be adversely varied by an agreement to which he is not a party or by which he is not otherwise bound."[152]

K. *"Merchants" vs. "Merchants in Goods of the Kind":* Chief Industries *and* Jennie-O

The *Den-Tal-Ez* decision provided a "principled basis" for applying the economic loss doctrine,[153] albeit narrowly, such that only merchants in goods of the kind were limited to contractual remedies for damage to "other property."[154] *Den-Tal-Ez* and the plain language of the Minnesota

143. *See* Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 478 N.W.2d 510, 513-14 (Minn. Ct. App. 1992).
144. *See Den-Tal-Ez*, 491 N.W.2d at 12.
145. *See id.* at 17.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *Id.* at 14.
151. *See id.* at 15-16. *But see* 2 SHAPO, *supra* note 21, ¶ 27.04[1][b] (raising the inevitable question of how to afford a remote seller the ability to limit its liability).
152. *Den-Tal-Ez*, 491 N.W.2d at 16 n.6 (citing U.C.C. § 1-102(3)(b)). This section of the U.C.C. has since been deleted because it was thought unnecessary. *See id.*; *see also* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-10, at 170 (3d ed. 1988) (noting that the U.C.C. third party protections are non-variable).
153. *See Den-Tal-Ez*, 491 N.W.2d at 14.
154. *See id.* at 17 (holding "that the U.C.C. provides the exclusive remedy for other property damages arising out of a sale of goods only when that sale fits

economic loss statute yielded identical results.[155] After *Den-Tal-Ez*, the Minnesota Supreme Court decided no further economic loss cases.[156] Other courts, however, adopted very different interpretations of *Den-Tal-Ez*.[157]

In *Regents of the University of Minnesota v. Chief Industries, Inc.*,[158] the Eighth Circuit Court of Appeals stretched the *Den-Tal-Ez* decision, although Judge Lay offered a well-reasoned dissent. *Chief Industries* denied tort claims[159] to the University of Minnesota for a grain dryer heater with an allegedly defective solenoid that caused a fire damaging an attached grain drying structure at an agricultural research station operated by the University.[160]

Although Minnesota's economic loss statute,[161] *Den-Tal-Ez*,[162] and the U.C.C.[163] each explicitly distinguished between "merchants" and "merchants in goods of the kind," the *Chief Industries* court merged these two categories for precluding tort recovery.[164] It correctly read the U.C.C. definition of "merchant" to include: (1) dealers in those goods (i.e.,

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Hapka's narrow definition of a 'commercial transaction,' i.e., where the parties to a sale are dealers in the same goods or, to use a more precise term, 'merchants in goods of the kind.'").

155. *Compare* Den-Tal-Ez, 491 N.W.2d at 17 (holding that only merchants in goods of the kind are barred under the U.C.C. from tort recovery) *with supra* Table 1 in text accompanying note 123 (same result).

156. *See* Regents of the Univ. of Minn. v. Chief Industries, Inc., 106 F.3d 1409, 1411 (8th Cir. 1997).

157. *Compare Chief Indus.*, 106 F.3d at 1411-12 (holding that the University was a merchant and thus barred under the U.C.C. from tort recovery) *with* Jennie-O Foods, Inc. v. Safe-Glo Prods. Corp., 582 N.W.2d 576, 581 (Minn. Ct. App. 1998) (holding that "Jennie-O was entitled to recover in tort [for fire losses] because it was not a 'merchant in goods of the kind'") *and* Dietz Bros., Inc. v. Klein Tools, Inc., No. C9-92-1136, 1993 WL 19709, at *4 (Minn. Ct. App. Jan. 26, 1993) (affirming trial court's judgment "because the buyer is not a merchant and general principles of Minnesota tort law permit it to assert non-code claims"). The differences are discussed *infra* in text accompanying notes 183-89.

158. 106 F.3d 1409 (8th Cir. 1997).

159. *See id.* at 1412.

160. *See id.* at 1410.

161. *See supra* Table 1 in text accompanying notes 120-23.

162. *See supra* note 154 and accompanying text.

163. *See* MINN. STAT. § 336.2-104(1) (1998) (defining a "merchant" as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill"). The U.C.C. comment indicates that those few U.C.C. provisions that apply only to merchants of goods of the kind are identified by their specific use of that term. *See* U.C.C. § 2-104 cmt. 2 (1990).

164. *See Chief Industries*, 106 F.3d at 1411-12.

"merchants in goods of the kind"[165]), and (2) those with specialized knowledge of the goods (i.e., other merchants).[166] Contrary to the plain language of the economic loss statute and *Den-Tal-Ez*, however, the *Chief Industries* court unwittingly precluded tort recovery arising from damage to "other property" for all merchants, rather than for only merchants in goods of the kind.[167] The *Chief Industries* court interpreted the economic loss statute to reach the same result as *Hapka*, even though the Minnesota Legislature enacted the economic loss statute to overrule *Hapka*.[168]

The *Chief Industries* court found that the University had acquired specialized knowledge about the grain dryers by: (1) purchasing a number of such units over the prior 30 years; (2) having a centralized purchasing department that solicited bids for the purchase; and (3) consulting an engineering expert for providing specifications.[169] The court found that this knowledge informed the University of the product's risks.[170] *Chief Industries* does not adequately explain, however, how having specialized knowledge of the risk posed by an isolated purchase translates into a commercial transaction in which the buyer can engage in meaningful negotiated risk allocation. By distinguishing between merchants and merchants in goods of the kind, the *Den-Tal-Ez* decision better supports the policy of the economic loss doctrine.

The U.C.C. definition of "merchant" indicates that the *Chief Industries* court failed to leave any merchants who could still recover in tort.[171] Dealers and those with specialized knowledge[172] make up the entire population of U.C.C. merchants.[173] A party without specialized knowledge is, by definition, not a merchant, but is instead a consumer.[174] Thus, con-

165. *See Den-Tal-Ez*, 491 N.W.2d at 17.

166. *See Chief Industries*, 106 F.3d at 1411.

167. *See supra* note 163 and accompanying discussion. An argument exists, however, that the plain language of section 604.10(a) referring to "merchants in goods of the kind" should be ignored and read as "merchants," because the economic loss statute intended to codify the pre-*Hapka* economic loss doctrine, which did not distinguish between merchants and merchants in goods of the kind. *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 745-46 (D. Minn. 1999), *argued*, No. 99-1424 (8th Cir. Nov. 15, 1999).

168. *See supra* note 167 and accompanying text; *see also* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 n.3 (8th Cir. 1998).

169. *See Chief Industries*, 106 F.3d at 1412.

170. *See id.*

171. *See supra* note 163.

172. According to the U.C.C. and, as used herein, "specialized knowledge" refers to both personal knowledge as well as an agent's specialized knowledge. *See supra* note 163.

173. *See id.*

174. *See id.*

trary to the plain language of Minnesota Statutes section 604.10(a),[175] *Chief Industries* prohibited any merchant from seeking tort recovery, as illustrated in Table 2.[176]

TABLE 2: *Operation of the Economic Loss Statute as interpreted in* Chief Industries[177]

Claimant	Goods themselves defective	Other tangible property damaged
Merchants in goods of the kind	Not Recoverable in tort. MINN. STAT. §§ 604.10(a),(c).	Not Recoverable in tort. MINN. STAT. § 604.10(a).
Other Merchants	Not Recoverable in tort. MINN. STAT. §§ 604.10(b),(c).	Not Recoverable in tort. *Chief Industries.*
Consumers	Not Recoverable in tort. MINN. STAT. § 604.10(c).	Recoverable in tort. MINN. STAT. § 604.10(a).

Another, more charitable, view of the *Chief Industries* decision exists. The "specialized knowledge" test of *Chief Industries*[178] could be replaced by the more specific "within the ordinary contemplation of the parties" test of *Holstad*,[179] if *Holstad* survived enactment of Minnesota's economic loss statute.[180] Because the *Chief Industries* court used "specialized knowledge"[181] to indicate whether the University knew "of the risks posed by the product and the potential damage to both the product and other property that could result from product failure,"[182] the *Chief Industries* court likely simply tried to incorporate the fact-intensive *Holstad* inquiry into the framework of the economic loss statute. Table 3 illustrates this possible interpretation of the economic loss doctrine.

175. *See supra* Table 1 in text accompanying notes 120-23.
176. *See supra* text accompanying notes 171-74.
177. *See Chief Industries*, 106 F.3d at 1410-12.
178. *See id.* at 1412.
179. *See supra* text accompanying note 105.
180. *See supra* text accompanying notes 126-27.
181. *See Chief Industries*, 106 F.3d at 1412.
182. *Id.*

TABLE 3: *Operation of the Economic Loss Statute Incorporating* Holstad.

Claimant		Goods themselves defective	Other tangible property damaged
Merchants in goods of the kind		Not Recoverable in tort. MINN. STAT. §§ 604.10(a),(c).	Not Recoverable in tort. MINN. STAT. § 604.10(a).
Other Merchants	Within Ordinary Contemplation	Not Recoverable in tort. MINN. STAT. §§ 604.10(b),(c).	Not Recoverable in tort. MINN. STAT. § 604.10(a) & *Holstad.*
	Outside Ordinary Contemplation	Not Recoverable in tort. MINN. STAT. §§ 604.10(b),(c).	Recoverable in tort. MINN. STAT. § 604.10(a) & *Holstad.*
Consumers		Not Recoverable in tort. MINN. STAT. § 604.10(c).	Recoverable in tort. MINN. STAT. § 604.10(a).

While the economic loss doctrine frameworks illustrated in Tables 2 and 3 are interesting to consider, the plain language of the economic loss statute does not support them.[183] In *Jennie-O Foods, Inc. v. Safe-Glo Products Corp.*,[184] the Minnesota Court of Appeals found persuasive Judge Lay's well-reasoned dissent in *Chief Industries.*[185] Jennie-O was allowed to recover in tort for defective heaters that caused fires destroying two turkey brooder barns.[186] Although Jennie-O was a merchant, it was not a merchant in goods of the kind with respect to heaters.[187] The *Jennie-O* court gave effect to the legislature's choice of the term "merchants in goods of the kind," as manifesting its intent to narrow application of the economic

183. *See supra* Table 1 accompanying note 123.
184. 582 N.W.2d 576 (Minn. Ct. App. 1998).
185. *See id.* at 579.
186. *See id.* at 577-79, 81.
187. *See id.* at 579, 581.

loss doctrine.[188] Together with *Den-Tal-Ez* and the plain language of the economic loss statute, *Jennie-O* made *Chief Industries* suspect as being unsupported by Minnesota statutes and existing case law.[189]

III. FRAUD, MISREPRESENTATION AND THE ECONOMIC LOSS DOCTRINE

A. *What Constituted "Tort" Claims During Development of Minnesota's Economic Loss Doctrine*

The economic loss doctrine emerged in response to strict liability.[190] Soon, however, it also precluded negligence claims.[191] Minnesota's first economic loss doctrine case, *Superwood*, expressly limited application of the economic loss doctrine to the torts of negligence and strict liability,[192] as did *Fine Arts*,[193] *S.J. Groves*,[194] *80 South Eighth*,[195] and *Den-Tal-Ez*,[196] despite some discussion in these cases about tort claims generally.

Some of the early economic loss doctrine cases actually included fraud or misrepresentation claims.[197] For example, *Holstad* allowed a

188. *See id.* at 579.

189. *See id.* The *Chief Industries* decision will continue to confound application of the economic loss doctrine in federal courts until the Minnesota Supreme Court clarifies whether the fact-intensive *Holstad* test for damage within the ordinary contemplation of the parties' survives enactment of the Minnesota economic loss statute. *See, e.g.*, Minnesota Forest Prods., Inc. v. Ligna Mach., Inc., 17 F. Supp. 2d 892, 905-08 (D. Minn. 1998) (applying *Chief Industries*, but finding a factual question regarding whether the buyer had acquired enough specialized knowledge to be considered a merchant).

190. *See supra* note 3.

191. *See supra* note 4.

192. *See* Superwood v. Siempelkamp, 311 N.W.2d 159, 162 (Minn. 1981).

193. *See* Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc., 354 N.W.2d 816, 822 (Minn. 1984); *see also* Valley Farmers' Elevator v. Lindsay Bros. Co., 398 N.W.2d 553, 556 (Minn. 1987) (addressing negligence claim); McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 315 (Minn. 1987) (addressing negligence claim).

194. *See* S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 435 (Minn. 1985) (answering in the negative the certified question of whether a plaintiff could recover economic losses under negligence or strict liability, but referring broadly to tort claims generally).

195. *See* 80 South Eighth Street Ltd. Partnership v. Carey-Canada, Inc., 486 N.W.2d 393, 399 (Minn. 1992).

196. *See* Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 17 (Minn. 1992).

197. *See, e.g.*, Thofson v. Redex Indus., Inc., 433 N.W.2d 901, 904-05 (Minn. Ct. App. 1989). *Thofson* barred negligence and strict liability claims under the economic loss doctrine because the damage to "other property" was minimal relative to the damages alleged. *See id.* The *Thofson* court separately considered a negli-

claim of fraudulent concealment during performance of the contract based on an assertion that the defendant knew that plaintiff's silo air bag was torn, but concealed this fact from the plaintiff.[198] Similarly, *Hapka*'s broad language about the economic loss doctrine precluding tort claims[199] must be understood in light of its narrow definition of tort claims as being limited to negligence and strict product liability.[200] In fact, *Hapka* allowed a misrepresentation claim to survive the economic loss doctrine.[201]

B. *Early Cases Focusing on the Effect of the Economic Loss Doctrine on Fraud and Misrepresentation*

A 1982 federal court decision, *Northern States Power Co. v. International Telephone & Telegraph Corp.*,[202] dealt squarely with the question of whether the economic loss doctrine operated to preclude all tort claims, including fraud and misrepresentation, or instead operated only to bar negligence and strict liability claims.[203] In *N.S.P.*, the plaintiff purchased screw anchors for holding its power line towers in place using guy wires.[204] Defects in the anchors resulted in several fallen towers.[205] The plaintiff's claims included breach of warranty, breach of contract, misrepresentation, strict liability, negligence, and fraudulent inducement to contract.[206] The economic loss doctrine limited recovery on the negligence and strict liability claims to the damage to "other property," i.e., the towers.[207] The *N.S.P.*

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gent misrepresentation claim that the seller failed to fully disclose hazards associated with a grain dryer. *See id.* The negligent misrepresentation claim failed not under the economic loss doctrine of *Superwood*, but rather, because the plaintiff failed to support its allegation with sufficient specific facts. *See id.* at 905.

198. *See* Holstad v. Southwestern Porcelain, Inc., 421 N.W.2d 371, 374-75 (Minn. Ct. App. 1998) (allowing the claim of fraudulent concealment, but finding insufficient facts to support it).

199. *See* Hapka v. Paquin Farms, 458 N.W.2d 683, 687 (Minn. 1990) ("[M]aking tort theories of recovery available in commercial transactions flies in the face of the court's recognition of the intended purview of the U.C.C.").

200. *See id.* at 686 (defining the tort theories of liability under review as negligence and strict products liability).

201. *See* Hapka v. Paquin Farms, 431 N.W.2d 907, 909-11 (Minn. Ct. App. 1989). The trial court allowed the issue of misrepresentation to be submitted to the jury. *See id.* at 909. The jury did not find misrepresentation by the seller. *See id.* at 910. The court of appeals found adequate evidence to support this verdict, because a grower simply could not guarantee potatoes to be totally disease free. *See id.* at 910-11.

202. 550 F. Supp. 108 (D. Minn. 1982).

203. *See id.* at 111-12.

204. *See id.* at 109.

205. *See id.* at 110.

206. *See id.* at 109.

207. *See id.* at 111. The damage to "other property," (i.e., the towers), how-

court, however, refused to broadly construe dicta in *Superwood* to preclude claims for misrepresentation and fraudulent inducement to contract.[208] It found that *Superwood* only limited the use of negligence and strict liability tort theories,[209] such that "claims for fraudulent inducement to contract and misrepresentation may be brought in addition to claims in contract and warranty."[210]

In 1992, the Minnesota Court of Appeals reached a contrary result in an unpublished decision, *ETM Graphics, Inc. v. City of St. Paul.*[211] In *ETM*, the plaintiff purchased adhesive that it used to install canvas murals.[212] A defect in the adhesive caused bubbles to form behind the murals.[213] The plaintiff's claims included fraud, misrepresentation, breach of contract, breach of implied and express warranties, and negligence.[214] The *ETM* court relied on broad language in *Hapka* that "the Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involves property damages only,"[215] to strike the plaintiff's misrepresentation claim.[216] The *ETM* court also noted *Hapka*'s statement that "[t]he Code [U.C.C.] itself indicates that the U.C.C. is intended to displace tort liability."[217] Although several other decisions followed *ETM*,[218] the *ETM* court likely could have decided that case on nar-

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ever, was a small fraction of the total damages sought. *See id.*

208. *See id.*

209. *See id.* at 111-12.

210. *Id.* at 112 ("Misrepresentation is a distinct tort, however, and *Superwood* did not address whether this right of action should be discontinued in commercial settings.").

211. No. C2-91-2103, 1992 WL 61394 (Minn. Ct. App. Mar. 31, 1992).

212. *See id.* at *1.

213. *See id.*

214. *See id.* The plaintiff asserted fraud and misrepresentation claims in an attempt to avoid disclaimers on the adhesive containers that limited seller's liability to replacing or reimbursing any material found defective. *See id.* at *2, *4.

215. *Id.* at *2 (citing Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990)).

216. *See id.*

217. *Id. ETM* relies heavily on *Hapka*; however, *Hapka* was considering only the tort theories of negligence and strict liability, and purports only that the U.C.C. displaces negligence and strict liability. *See Hapka*, 458 N.W.2d at 688; *see also supra* notes 199-200 and accompanying text. It is erroneous to conclude that the U.C.C. automatically preempts fraud and misrepresentation claims. *See* MINN. STAT. § 336.1-103 (1996) ("Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, *fraud, misrepresentation*, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.") (emphasis added).

218. *See* Nelson Distrib., Inc. v. Stewart-Warner Indus. Balancers, 808 F. Supp. 684, 688 (D. Minn. 1992) (believing that the Minnesota Supreme Court would fol-

rower grounds,[219] and *ETM* should carry little weight today. First, a careful reading of *Hapka* indicates that the *Hapka* court only considered the economic loss doctrine to preclude the torts of negligence and strict liability, not misrepresentation.[220] Second, *Den-Tal-Ez* clearly reinterpreted and severely limited *Hapka*,[221] and the Minnesota Legislature overruled *Hapka* by enacting section 604.10 of the Minnesota Statutes.[222]

C. *A Hybrid Approach:* AKA

Until recently, the opposite approaches of *N.S.P.* and *ETM* in applying the economic loss doctrine to fraud and misrepresentation claims stood in sharp contrast to each other. In early 1998, however, the Eighth Circuit Court of Appeals adopted a hybrid approach in *AKA Distributing Co. v. Whirlpool Corp.*[223] In 1985, the plaintiff vacuum cleaner distributor, AKA, had entered into a one year distribution agreement with Whirlpool, the defendant manufacturer, to distribute a new line of branded vacuum cleaners.[224] After the distribution agreement expired, the parties agreed that the relationship would continue under the same terms without a written contract.[225] In the presence of other distributors in 1986, Whirlpool assured AKA that this was to be a long-term relationship.[226] AKA made many engineering suggestions to improve the Whirlpool products, which had many problems, and, in one instance, AKA's suggestions prevented a

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low the *ETM* extension of *Hapka* despite the fact that the court had severely curtailed *Hapka* only two months earlier in *Den-Tal-Ez*); Upsher-Smith Lab., Inc. v. Mylan Lab., Inc., 944 F. Supp. 1411, 1435-36 (D. Minn. 1996) (concluding that the broad reasoning of *Hapka* supports its decision); *In re* Grain Land Coop, 978 F. Supp. 1267, 1279-80 (D. Minn. 1997) (recognizing that *Hapka* principles were sharpened in *Den-Tal-Ez*).

219. *See* MINN. R. CIV. P. 9.02 ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Courts should use the heightened pleading requirements, where possible, to eliminate unsubstantiated claims of fraud and misrepresentation. *See, e.g.*, Thofson v. Redex Indus., Inc., 433 N.W.2d 901, 905 (Minn. Ct. App. 1989) (holding that summary judgment was proper on negligent misrepresentation claim where plaintiffs relied on general allegations and did not present specific facts).

220. *See supra* notes 200-201 and accompanying text.

221. *See supra* notes 144-47 and accompanying text.

222. *See supra* note 126 and accompanying text.

223. 137 F.3d 1083 (8th Cir. 1998). The Eighth Circuit Court of Appeals followed the trial court decision, in which Judge David S. Doty established this hybrid approach. *See* AKA Distrib. Co. v. Whirlpool Corp., 948 F. Supp. 903, 907-08 (D. Minn. 1996) (citing Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc., 532 N.W.2d 541 (Mich. Ct. App. 1995)).

224. *See AKA*, 137 F.3d at 1084.

225. *See id.*

226. *See id.*

recall.[227] In 1988, Whirlpool terminated the distribution agreement on the same day that it announced a major purchase commitment from Sears Roebuck and Company.[228]

AKA did not sue until 1993, when it asserted claims including breach of contract, fraudulent misrepresentation, constructive fraud, and negligent misrepresentation.[229] AKA alleged that Whirlpool fraudulently told distributors they could sell Whirlpool products for a long time in an attempt to conceal its secret plan of manufacturing private label vacuum cleaners for Sears.[230] According to AKA, Whirlpool lured AKA into signing the distributorship contract to capture its engineering talents in developing a product line acceptable to Sears.[231]

The *AKA* court applied the "predominant purpose" test of *Valley Farmers*[232] and found the distribution agreement predominantly for the sale of goods rather than for the ancillary provision of engineering services by the plaintiff.[233] As such, the four year U.C.C. statute of limitations barred the breach of contract claims.[234]

The *AKA* court also considered whether the economic loss doctrine bars fraud and misrepresentation torts.[235] It recognized that in spite of broad dicta in *Superwood* and its progeny regarding the viability of tort liability in commercial transactions, no Minnesota Supreme Court case had directly incorporated fraud and misrepresentation into the economic loss doctrine.[236] However, it noted that "the presence of a governing commer-

227. *See id.* at 1084-85.
228. *See id.* at 1085.
229. *See AKA*, 948 F. Supp. at 904.
230. *See AKA*, 137 F.3d at 1085.
231. *See id.*
232. *See supra* notes 82-83 and accompanying text.
233. *See AKA*, 137 F.3d at 1085.
234. *See id.*
235. *See id.* at 1085-87.
236. *See id.* at 1086. However, the *AKA* court curiously suggested that post-*Superwood* extension of the economic loss doctrine to all contracts governed by U.C.C. Article 2 implies that the Minnesota Supreme Court would also extend the economic loss doctrine to all other kinds of torts. *See id.* The mistake in this reasoning is readily apparent from the nature of the *AKA* case itself. Unlike the other economic loss doctrine cases, which dealt with products liability in the context of a commercial transaction, *AKA* does not even concern liability for a defective product. The policy considerations for fraud and misrepresentation in the context of *AKA* are likely to be quite different from policies underlying the economic loss doctrine as applied to products liability. Moreover, fraud and misrepresentation are distinguishable from negligence and strict liability. Fraud and misrepresentation may address the basis for contract formation, while negligence and strict liability address contract performance. Thus, there may be good reason to treat fraud and misrepresentation differently from negligence and strict liability under

cial contract neither preempts nor eliminates" all fraud claims.[237] Under traditional principles of contract and tort law, a "fraud claim independent of the contract is actionable, but it must be based upon a misrepresentation that was outside of or collateral to the contract, such as many claims of fraudulent inducement."[238] The *AKA* court applied this rule to the economic loss doctrine, holding that "in a suit between merchants, a fraud claim to recover economic losses must be independent of the [U.C.C.] Article 2 contract or it is precluded by the economic loss doctrine."[239]

The court found AKA's fraud claim—that Whirlpool lied about a long term relationship—indistinguishable from its breach of contract claim; both claims were premised on an alleged failure by Whirlpool to perform for the duration of the alleged contract.[240] For this claim, the court limited AKA to its U.C.C. remedies.[241] But the court found AKA's constructive fraud and negligent misrepresentation claims—that Whirlpool failed to disclose its plan to move its distribution to Sears—constituted a "collateral subject that [could] support an independent fraud-in-the-inducement claim."[242] However, because AKA and Whirlpool had an arms-length relationship, Whirlpool had no duty to disclose its plans to AKA.[243] In such a situation, the court required an affirmative misrepresentation for the tort claim to be actionable.[244] In summary, the economic loss doctrine did not bar AKA's "independent" fraud and misrepresentation tort claims, but AKA failed to establish all the required elements of such claims.[245]

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the economic loss doctrine.

237. *Id.*

238. *Id.*

239. *Id.* at 1087. By implication, *AKA* would allow a fraud claim by a consumer even if not independent of the contract for sale of goods. *See id.*

240. *See id.*

241. *See id.*

242. *Id.*

243. *See id.*

244. *See id.*

245. *See id.*

D. *Marvin Windows Evokes a Swift Legislative Response*

In 1998, Marvin Windows, which has significant operations in Warroad, Minnesota, made an urgent request to the Minnesota Legislature.[246] Marvin was embroiled in litigation with Pennsylvania-based PPG Industries based on Marvin's allegation that PPG supplied defective wood preservative that caused Marvin's windows to rot prematurely.[247] The court initially dismissed Marvin's common law tort claims, which included negligence, strict liability, fraud, and misrepresentation, as barred by the economic loss doctrine to the extent they sought damages beyond damage to "other property."[248] In response, then Minnesota Governor Arne Carlson called the Minnesota Legislature into special session,[249] and the legislature amended Minnesota's economic loss statute[250] to allow fraud and misrepresentation claims to the extent allowed under the common law.[251] As amended, Minnesota Statutes section 604.10 provides:

> Section 1. Minnesota Statutes 1996, section 604.10, is amended to read:
>
> 604.10 ECONOMIC LOSS ARISING FROM THE SALE OF GOODS

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246. *See Marvin Windows President Pushes For Special Session*, ST. PAUL PIONEER PRESS, Apr. 15, 1998, at D1. Marvin's lawsuit and the special session generated significant publicity in Minnesota. *See, e.g.*, Robert Whereatt, *Bill Would Clarify Law In Suit Involving Marvin Windows*, STAR TRIB. (Minneapolis-St. Paul), Apr. 9, 1998, at 3D; Susan E. Peterson & Tony Kennedy, *Marvin Windows' Predicament: Standing Behind Its Product Could Bring About Its Demise*, STAR TRIB. (Minneapolis-St. Paul), Apr. 18, 1998, at 1A; Susan Marvin, *To Close a Loophole That Lets In Fraud*, STAR TRIB. (Minneapolis-St. Paul), Apr. 20, 1998, at 13A; Larry Oakes, *Marvin Windows Is the Lifeblood of a Small Town*, STAR TRIB. (Minneapolis-St. Paul), Apr. 20, 1998, at 1A; Dane Smith et al., *Senate OKs Help For Marvin*, STAR TRIB. (Minneapolis-St. Paul), Apr. 21, 1998, at 1A; Robert Whereatt & Conrad deFiebre, *House Passes Marvin Windows, Spending Bills*, STAR TRIB. (Minneapolis-St. Paul), Apr. 23, 1998, at 1A.

247. *See* Robert Whereatt, *Special Session Possible To Aid Warroad Company*, STAR TRIB. (Minneapolis-St. Paul), Apr. 14, 1998, at 1B.

248. *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 741 (D. Minn. 1999), *argued*, No. 99-1424 (8th Cir. Nov. 15, 1999); *see also* Bye & Peck, *supra* note 1, at 41, 44, 45 n.23.

249. *See* Robert Whereatt & Donna Halvorsen, *It's Back to the Capitol for Spending, Fraud Bills*, STAR TRIB. (Minneapolis-St. Paul), Apr. 17, 1998, at 1A.

250. *See* Act of Apr. 22, 1998, 1st Spec. Sess., ch. 2, 1998 Minn. Laws 2322 (codified as amended at MINN. STAT. § 604.10).

251. *See id.* § 1 (codified at MINN. STAT. § 604.10(e)). The legislature approved the amendment on April 22, 1998 to have effect the following day, and to apply to actions pending or commenced after that date. *See id.* § 4.

(a) Economic loss that arises from a sale of goods that is due to damage to tangible property other than the goods sold may be recovered in tort as well as in contract, but economic loss that arises from a sale of goods between parties who are each merchants in goods of the kind is not recoverable in tort.

(b) Economic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort.

(c) The economic loss recoverable in tort under this section does not include the economic loss due to damage to the goods themselves.

(d) The economic loss recoverable in tort under this section does not include economic loss incurred by a manufacturer of goods arising from damage to the manufactured goods and caused by a component of the goods.

(e) This section shall not be interpreted to bar tort causes of action based upon fraud or fraudulent or intentional misrepresentation or limit remedies for those actions.

Sec. 2. LEGISLATIVE INTENT. The amendment in section 1 is intended to clarify, rather than to change, the original intent of Minnesota Statutes, section 604.10.

Sec. 3. REVISOR'S INSTRUCTION. In the next and subsequent editions of Minnesota Statutes, the revisor shall insert an annotation to Minnesota Statutes, section 336.2-721, alerting the reader to Minnesota Statutes, section 604.10, and the interrelationship of the two sections.

Sec. 4. EFFECTIVE DATE. This act is effective the day following final enactment and applies to actions pending on or commenced on or after that date.[252]

252. *See* Act of Apr. 22, 1998, 1st Spec. Sess., ch. 2, 1998 Minn. Laws 2322 (codified as amended at MINN. STAT. § 604.10) (the 1998 amendments are underlined). In Minnesota, the elements of fraud are:

> [A] false representation pertaining to a material past or present fact susceptible of human knowledge, knowledge by the person making the representation of its falsity or assertion of it without knowledge of its truth or falsity, an intention that the other person act on it, or circumstances justifying the other person in so acting, and the other person being in fact reasonably induced to act upon the representation, relying upon it and suffering damage attributable to the misrepresentation.

In re Strid, 487 N.W.2d 891, 893 (Minn. 1992).

The Minnesota Legislature failed in its parochial effort to assist Marvin Windows because the *Marvin* court found that these amendments applied only to transactions governed by section 604.10 of the Minnesota Statutes.[253] Because the transactions between Marvin Windows and PPG occurred before enactment of the statute, those transactions were governed by the previously existing common law economic loss doctrine of Minnesota, and not by the economic loss statute or its most recent amendments.[254]

Marvin also recognized the split between the Eighth Circuit Court of Appeals in *Chief Industries* and the Minnesota Court of Appeals in *Jennie-O* over whether the other property exception to the economic loss doctrine is foreclosed for all merchants, or merely for merchants in goods of the kind.[255] The *Marvin* court sided with *Chief Industries*, in dicta, finding the other property exception foreclosed for all merchants.[256] However, Marvin Windows was clearly a merchant in goods of the kind because of its long history of purchasing window treatments, its membership in a trade association, and its equality of bargaining power with PPG.[257] Thus, the *Chief Industries–Jennie-O* split played no role in the outcome of this case.

The *Marvin* court applied the *AKA* test and found that Marvin's fraud and misrepresentation claims were not independent of the underlying contract.[258] Marvin argued that its fraud and misrepresentation claims were outside the scope of the contract because PPG's statements regarding its own good will and trustworthiness were of a more global nature.[259] The *Marvin* court disagreed, noting U.C.C. provisions that create express warranties of the Seller's promises, descriptions, or affirmations of fact relating to the good and becoming part of the basis of the bargain.[260] The *Marvin* court summarily declared that because each of PPG's statements involved matters "closely tied" to the wood preservative sales contracts, these statements created express warranties that became part of the contract, such that the economic loss doctrine barred tort recovery.[261] The *Marvin* court failed to adequately explain exactly how PPG's statements related to the goods rather than to ancillary matters of a more global na-

253. *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 743-44 (D. Minn. 1999), *argued*, No. 99-1424 (8th Cir. Nov. 15, 1999).
254. *See id.*
255. *See id.* at 747-48.
256. *See id.* at 748.
257. *See id.*
258. *See id.* at 749.
259. *See id.*
260. *See id.*
261. *See id.*

ture that might have constituted fraudulent inducement to contract or other claims that were independent of the underlying contract.[262]

Though ineffectual for Marvin's dispute, the recent amendments are a potentially significant change to Minnesota's economic loss statute. By its terms, subsection (e) applies regardless of whether the plaintiff is a merchant in goods of the kind, a merchant, or a consumer, or whether the plaintiff asserts damage to the good itself or to other property.[263] Moreover, even though subsection (e) allows tort causes of action based upon fraud or fraudulent or intentional misrepresentation, the tort theory of negligent misrepresentation is conspicuously absent,[264] unless the term fraud is understood to include negligent misrepresentation.[265] Thus, it is unclear whether the newly amended economic loss statute precludes claims of negligent misrepresentation.[266]

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262. *See id.*

263. *See* MINN. STAT. § 604.10(e) (1998).

264. *See id.* In Minnesota, actionable misrepresentation includes both intentional and negligent misrepresentation. *See* Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1986). Intentional misrepresentations are: (1) known to be false, or (2) asserted as being of the representer's own knowledge when he or she does not in fact know whether the representation is true or false. *See id.* (noting that Minnesota law of fraudulent misrepresentation parallels RESTATEMENT (SECOND) OF TORTS § 526 (1977)). The second prong of intentional misrepresentation, stated above, is sometimes referred to as reckless misrepresentation. *See id.* at 177 & n.2 (Simonett, J. concurring specially). Negligent misrepresentation occurs when the misrepresenter has not discovered or communicated certain information that the ordinary person in his or her position using reasonable care would have discovered or communicated. *See id.* at 174. In Minnesota, negligent misrepresentation is actionable only when the misrepresenter is "supplying information, either for: (1) the guidance of others in the course of a transaction in which one has a pecuniary interest; or (2) in the course of one's business, profession, or employment." *Id.* (citing Bonhiver v. Graff, 311 Minn. 111, 122, 248 N.W.2d 291, 298-99 (1976), which adopted the definition of negligent misrepresentation in RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 12 1966)). The *Florenzano* court also held that comparative fault principles apply to negligent misrepresentation, increasing the difficulty of recovering for such claims even if they are not precluded by the economic loss doctrine. *See id.* at 176.

265. *See* Juster Steel v. Carlson Cos., 366 N.W.2d 616, 620 (Minn. Ct. App. 1985) (noting that "Minnesota courts have recognized that negligent misrepresentation constitutes fraud").

266. *See id.*; *see also* Northern States Power Co. v. International Tel. & Tel. Corp., 550 F. Supp. 108, 112 (D. Minn. 1982) (noting that "it is arguable that recovery for merely negligent misrepresentation should not be allowed since *Superwood* disallowed negligence actions for economic loss in commercial transactions"). Intentional misrepresentation and fraudulent inducement to contract present clear cases for recovering economic losses in tort. *See* 2 SHAPO, *supra* note 21, ¶ 27.04[8]. The economic loss doctrine should preclude negligent misrepresentation claims that are indistinguishable from mere disappointed expectations, and are not separate and independent from the contract. *See id.* ¶ 27.04[8a]

ETM and its progeny,[267] which barred all tort claims under the economic loss doctrine, were apparently legislatively overruled by the enactment of subsection (e), whereas the opposite approach taken in *N.S.P.*[268] appears to remain viable. But the language used in subsection (e)[269] appears to leave room for the hybrid approach of *AKA*, which required that the fraud or misrepresentation claim be independent of the underlying contract for a sale of goods between merchants.[270] Whether *AKA* survived the enactment of subsection (e) remains an open question.

IV. THE MINNESOTA SUPREME COURT SHOULD ADOPT THE *AKA* RULE

A. *Judicial Guidance is Needed*

Although arguably enacted as a knee-jerk response to a powerful constituent,[271] subsection (e) is not completely without basis. In the absence of carefully articulated guidance from the Minnesota Supreme Court,[272] subsection (e) halted a disturbing trend toward foreclosing all claims of fraud and misrepresentation in commercial transactions for the sale of goods.[273] This trend represented overextension by the economic loss doctrine without sufficient analysis of its underlying policy basis.[274]

Without *AKA*, however, the newly enacted subsection (e) stands as an

(Supp. 1998) (citing Coleman Cable Sys., Inc. v. Shell Oil Co., 847 F. Supp. 93, 95 (N.D. Ill. 1994)). *But see* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 9 & cmt e. (1998) (allowing liability for negligent, and even innocent, misrepresentation, regardless of whether it is independent of the contract). *See also* Richard P. Salgado, *Negligent Misrepresentation and The Economic Loss Rule*, 22 COLO. LAW. 1689, 1689-90 (describing additional requirements courts may impose to restrict recovery for negligent misrepresentation).

267. *See supra* note 218 and accompanying text.

268. *See supra* text accompanying notes 208-10.

269. *See* MINN. STAT. § 604.10(e) ("This section shall not be interpreted to bar . . . ."). Such language appears to leave intact any common law doctrine that is not wholly inconsistent with the statute itself. *See id.*

270. *See supra* note 239 and accompanying text.

271. *Cf.* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., Civ. No. 4-95-739, slip op. at 66-69 (D. Minn. Aug. 6, 1998) (Report and Recommendation of Magistrate Judge Erickson).

272. *See* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 (8th Cir. 1998) ("[T]he Minnesota Supreme Court has not addressed whether the economic loss doctrine bars fraud and misrepresentation torts.").

273. *See supra* note 218 and accompanying text.

274. *See supra* note 218 and accompanying text; *see also* Kee v. National Reserve Life Ins. Co., 918 F.2d 1538, 1543 (11th Cir. 1990) (applying Florida law) (noting that "the mere existence of a contract claim does not automatically vitiate all causes of action in tort").

open invitation for disappointed purchasers of defective goods to replead their contract claims of economic losses to sound in tort,[275] creating access to a substantially extended limitations period.[276] The "collateral tort" requirement of *AKA* limits plaintiffs to proper fraud and misrepresentation claims.[277] *AKA* also comports with established principles of contract and tort law,[278] the economic loss doctrine,[279] and the legislative intent of subsection (e).[280] Moreover, the *AKA* rule is part of a recognizable emerging trend.[281]

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275. *See* Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74, 77-78 (Fla. Dist. Ct. App. 1997) (citing Puff 'N Stuff of Winter Park, Inc. v. Bell, 683 So. 2d 1176, 1179-80 (Fla. Dist. Ct. App. 1996) (Harris, J. concurring specially)). Almost any contract claim can be framed as a fraud claim, and perhaps even as a fraud in the inducement claim. *See id.* The *AKA* rule does not offer a bright line test; it requires a careful examination of the substance of the claim. *See id.*

276. *See supra* note 26 and accompanying text. The plaintiff will not, however, gain access to punitive damages unless the tort is independent of the contract. *See* Jacobs v. Farmland Mutual Ins. Co., 377 N.W.2d 441, 444-45 (Minn. 1985). Since this is the same requirement as the *AKA* rule (for situations involving the sale of goods), *AKA* leaves access to punitive damages unchanged. *See supra* note 239 and accompanying text. In Minnesota, punitive damages may be unavailable in products liability cases unaccompanied by personal injury. *Compare* Independent Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728, 732 (Minn. 1994) (requiring personal injury for punitive damages in a products liability action) *with* Molenaar v. United Cattle Co., 553 N.W.2d 424, 427-28 (Minn. Ct. App. 1996) (construing *Keene* as being limited to products liability cases, and distinguishing intentional acts from products liability based on simple negligence and strict liability). *See also* Tracy M. Borash, *Torts—Punitive Damages in Non-Personal Injury Cases: Minnesota's Approach to Punishment and Deterrence*, 24 WM. MITCHELL L. REV. 213, 228-30 (1998) (analyzing the *Molenaar* case).

277. *See supra* note 239 and accompanying text.

278. *See* AKA Distrib. Co. v. Whirlpool Corp., 137 F.3d 1083, 1086 (Minn. 1998).

279. *See infra* notes 282-88 and accompanying text.

280. *See supra* note 269.

281. *See AKA*, 137 F.3d at 1086-87 (finding fraudulent inducement actionable in sale of goods, but unsubstantiated by any affirmative misrepresentation); *Accord* Northern States Power Co. v. International Tel. & Tel. Corp., 550 F. Supp. 108, 111-12 (D. Minn. 1982) (denying motion to dismiss fraudulent inducement claim in sale of goods without examining its underlying basis), Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc. 532 N.W.2d 541, 546 (Mich. Ct. App. 1995) (finding fraudulent inducement actionable in sale of goods, but finding representations about quality of software indistinguishable from terms of contract and warranty); Allmand Assocs., Inc. v. Hercules Inc., 960 F. Supp. 1216, 1227-28 (E.D. Mich. 1997) (finding fraudulent inducement actionable in sale of goods, but finding representations about molding resin not extraneous to the contractual dispute); R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 831 (8th Cir. 1983) (denying motion to dismiss fraudulent inducement claim in sale of goods, but expressing doubts about whether plaintiffs could prove facts of all elements).

B. *Policy Basis of* AKA

In Minnesota, the economic loss doctrine exists only to defend the U.C.C. against circumvention.[282] However, the U.C.C. itself admits that certain fraud and misrepresentation claims are outside its purview.[283] As always, the "critical problem [is] to find some principled basis for deciding"[284] when the U.C.C. remedies lie exclusively, and when fraud and misrepresentation also apply.[285] The collateral tort requirement of *AKA* provides such a principled basis and is supported by the policies underlying the economic loss doctrine, as discussed below.

The economic loss doctrine "encourages parties to negotiate economic risks through warranty provisions and price"[286] thus "keeping the risks of liability reasonably calculable."[287] The economic loss doctrine "does not apply where there is no contractual relationship between the parties—that is, where the parties have never been in a position to negotiate the economic risks themselves."[288]

Fraud and misrepresentation claims based on conduct prior to con-

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282. *See* Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) (stating that "the legislature did not intend for tort law to circumvent the statutory scheme of the U.C.C."); *see also* McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 314-15 (Minn. 1987) (noting that "when the U.C.C. does not apply, there is no reason for the *Superwood* rule to apply"). In other jurisdictions, the economic loss doctrine is broader than the scope of the U.C.C. *See, e.g.*, Raytheon Co. v. McGraw-Edison Co., 979 F. Supp. 858, 869 (E.D. Wis. 1997) (applying Wisconsin law and concluding that federal courts in Wisconsin have not limited the application of the economic loss doctrine to disputes arising out of the sale of goods). One must be careful citing non-U.C.C. decisions in Minnesota; such cases may not be persuasive. *See In re* Grain Land Coop, 978 F. Supp. 1267, 1280 (D. Minn. 1997) (stating that cited cases not implicating the U.C.C. are "simply inapposite" to contract at issue, which was within the scope of the U.C.C.).

283. *See supra* note 217; *see also* MINN. STAT. § 336.2-721 (1996). "Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy." *Id.* The purpose of this statute is to correct the situation where the remedies for fraud (e.g., rescission) are more circumscribed than the remedies for breach of warranty (e.g., money damages). *See* U.C.C. § 2-721 cmt. (1990).

284. Lloyd F. Smith Co. v. Den-Tal-Ez, Inc., 491 N.W.2d 11, 14 (Minn. 1992).

285. *See id.*

286. *Huron Tool*, 532 N.W.2d at 545 (quoting Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 901 (Fla. 1987)).

287. *Id.* (quoting Bay Garden Manor Condominium Ass'n, Inc. v. James D. Marks Assocs., Inc., 576 So. 2d 744, 745 (Fla. Ct. App. 1991)).

288. *Id.* (citing Neibarger v. Universal Coops., Inc., 486 N.W.2d 612, 617 (Mich. 1992)).

tract formation[289] may constitute fraud in the inducement, for which several courts have carved an exception to the economic loss doctrine:[290]

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely—which normally would constitute grounds for invoking the economic loss doctrine—but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior.[291]

Collateral fraud in the inducement is distinct from: (1) misrepresentations concerning the quality or character of the goods sold, for which the buyer is still free to negotiate warranty and other terms; and (2) misrepresentations concerning the breaching party's performance, which did not induce the other party to enter into the contract and which are indistinguishable from a breach of contract claim.[292] Under the collateral tort requirement of *AKA*, the economic loss doctrine precludes these latter two types of claims, while leaving open a claim for collateral fraud in the inducement.[293] Together with the heightened pleading requirements of

289. *See, e.g.*, Allmand Assocs., Inc., v. Hercules Inc., 960 F. Supp. 1216, 1227 (E.D. Mich. 1997) ("The Michigan courts have carved out one exception to the economic loss doctrine, to wit: fraud in the inducement."). Where a series of successive contracts are involved, however, a court will have more difficulty applying the *AKA* requirement of a collateral tort, such as fraud in the inducement. *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 34 F. Supp. 2d 738, 748 (D. Minn. 1999), *argued*, No. 99-1424 (8th Cir. Nov. 15, 1999).

290. *See Allmand*, 960 F. Supp. at 1227. Other intentional torts (e.g., defamation, intentional misrepresentation, tortious interference with prospective economic advantage, and intentional interference with contractual relations) may also fall outside the purview of the economic loss doctrine. *See Huron Tool*, 532 N.W.2d at 544 (citations omitted).

291. *Huron Tool*, 532 N.W.2d at 545.

292. *See id.* This comports with established Minnesota law that an oral representation or description of the goods creates an express warranty. *See* MINN. STAT. § 336.2-313 (1998). "It has long been the law in Minnesota that, once made, an express warranty as to the quality or nature of a good becomes a part of the contract for the sale of the good itself." *See* Marvin Lumber & Cedar Co. v. PPG Indus., Inc., Civ. No. 4-95-739, slip op. at 85 (D. Minn. Aug. 6, 1998) (Report and Recommendation of Magistrate Judge Erickson) (citing Heil v. Standard Chemical Mfg. Co., 301 Minn. 315, 321-22, 223 N.W.2d 37, 40-41 (1974); McNaughton v. Wahl, 99 Minn. 92, 96, 108 N.W. 467, 468 (1906); Schurmeier v. English, 46 Minn. 306, 307, 48 N.W. 1112, 1113 (1892), Thompson v. Libby, 36 Minn. 287, 289, 31 N.W. 52, 53 (1886)). Also, misrepresentations of present fact are more likely to be actionable than misrepresentations of future intent. *See* OHM Remediation Servs. Corp. v. Hughes Envtl. Sys., Inc., 952 F. Supp. 120, 122 (N.D.N.Y. 1997) (dealing with services, not the sale of goods).

293. *See supra* notes 239 & 242 and accompanying text.

fraud and misrepresentation,[294] the *AKA* rule establishes a remarkably high threshold which ensures that only proper fraud and misrepresentation claims survive.[295]

C. *Unanswered Questions and Remaining Issues*

AKA applied the collateral tort requirement in sales of goods between merchants, but should it be restricted to merchants in goods of the kind or expanded to include consumers?[296] Both subsection (e) and the collateral tort requirement are presently limited to intentional torts; does the economic loss doctrine still preclude claims of negligent misrepresentation?[297] If the *AKA* collateral tort requirement is adopted, the Minnesota Supreme Court will have to decide the effect of an integration clause, by which all prior agreements are superseded by the written contract.[298] Does an integration clause remove all possibility of a collateral claim of intentional fraud or misrepresentation?[299] The Minnesota Supreme Court should also answer whether *Chief Industries* properly defined merchants in goods of the kind in view of *Den-Tal-Ez*, and whether the *Holstad* test (i.e., whether the defect was within the ordinary contemplation of the parties), still applies.[300] The Minnesota Legislature may answer some of these questions by completely revising the Minnesota economic loss statute.[301]

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294. *See* FED. R. CIV. P. 9(b); *see also supra* note 220.

295. *See supra* note 282.

296. *See supra* text accompanying note 239.

297. *See supra* note 290; *see also supra* notes 264-66 and accompanying text.

298. *See* OHM Remediation Servs. Corp. v. Hughes Envtl. Sys., Inc., 952 F. Supp. 120, 123 (N.D.N.Y. 1997) ("[I]f the fraud claim is based on an agreement not integrated into the contract at issue, such as a collateral oral agreement, the plaintiff may maintain a claim for fraud simultaneously with the breach of contract claim.").

299. *See id.*

300. *See supra* notes 154-88 and accompanying text.

301. *See* S.F. 1126, 81st Legis. Sess. (Minn. 1999) (introduced on Feb. 25, 1999 by Sen. Betzvold); H.F. 1267, 81st Legis. Sess. (Minn. 1999) (introduced on Mar. 1, 1999 by Rep. Pawlenty). On March 24, 1999, H.F. 1267 passed out of the House Civil Law Committee after amendment. *See* H.F. 1267, 1st Engrossment, 81st Legis. Sess. (Minn. 1999). Senate File 1126 follows *Chief Industries* and *Hapka* in applying the economic loss doctrine to all merchants, even though the Minnesota Legislature enacted the present economic loss statute specifically to overrule *Hapka*. *See* S.F. 1126, subd. 2(a); *see also supra* text accompanying note 168. Although any clarification of the *Chief Industries–Jennie-O* split is welcome, this extraordinary reversal in the policy of the economic loss statute seems quite inexplicable. *See supra* text accompanying notes 161-68, 171-76. Nonetheless, it solves the problem of *Chief Industries* being inconsistent with the economic loss statute, but does so by simply changing the economic loss statute. Senate File 1126 also adopts *AKA*'s collateral tort requirement, though it limits collateral torts to fraud in the

V. CONCLUSION

The Minnesota Supreme Court has not yet addressed whether the economic loss doctrine forecloses fraud and misrepresentation claims. Now, the Minnesota Legislature has spoken, declaring that such claims are not foreclosed, at least not by statute. Without guidance from the Minnesota Supreme Court, the economic loss statute creates the "danger of allowing contract law to 'drown in a sea of tort' . . . where the fraud and breach of contract claims are factually indistinguishable."[302] Thus, the

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inducement. *See* S.F. 1126, subd. 2(a)-(b). Senate File 1126 also removes existing ambiguity by clearly precluding recovery for economic losses based on negligent misrepresentation. *See id.* subd. 1(c). However, Senate File 1126 departs from the existing economic loss statute by also precluding recovery for economic losses based on reckless misrepresentations, which Minnesota law presently considers part of intentional misrepresentation. *See id.*; *see also supra* text accompanying notes 263-64; Letter from Linda J. Rusch, Professor of Law, Hamline University School of Law, and Daniel S. Kleinberger, Professor of Law, William Mitchell College of Law, to Sen. Jane Ranum, Chair, Minnesota Senate Judiciary Committee, and Rep. Steve Smith, Chair, Minnesota House Civil Law Committee, at 3-4 (Feb. 24, 1999) (on file with author).

House File 1267 differs from Senate File 1126 in several respects. House File 1267 allows recovery for economic losses based on reckless and intentional misrepresentations, making it consistent with existing Minnesota law concerning fraud and misrepresentation. *See* H.F. 1267, 1st Engrossment, subd. 1(c); *see also supra* note 264. Unlike Senate File 1126, House File 1267 uses merchants in goods of the kind, rather than merchants, as the touchstone for determining the extent to which economic losses should be precluded. *Compare* H.F. 1267, 1st Engrossment, subd. 1(d) *with* S.F. 1126, subd. 1(d). Thus, House File 1267 is consistent with the original purpose of the present economic loss statute in legislatively overruling *Hapka*. *See supra* text accompanying note 168. Moreover, it equates merchants in goods of the kind with "dealers," thereby correctly resolving the *Chief Industries–Jennie-O* split in favor of *Jennie-O* and *Den-Tal-Ez*. *Compare* H.F. 1267, 1st Engrossment, subd. 1(d) *with* S.F. 1126, subd. 1(d); *see also supra* text accompanying notes 161-68, 171-76. However, House File 1267 departs from the longstanding principle that in Minnesota the economic loss doctrine exists only to protect sales of goods under U.C.C. Article 2. *See supra* text accompanying note 75. House File 1267 would extend the economic loss doctrine to preclude recovery for noncollateral economic losses "in transactions outside the scope of article 2 . . . where the buyer is a merchant in goods of the kind." H.F. 1267, 1st Engrossment, subd. 2(a). Thus, House File 1267 would eliminate the *Valley Farmers'* predominant factor test, but only where the buyer is a dealer in goods of the kind. *See id.*; *see also supra* text accompanying note 82. For other buyers, the predominant factor test may still apply. While this proposed extension of the economic loss doctrine beyond U.C.C. Article 2 seems unlikely to arise in practice, it needlessly destroys the long-existing bright line *Superwood* rule based on the clearly articulated policy basis of protecting the U.C.C. *See supra* text accompanying note 75. The Minnesota Legislature should either offer a clear policy justification for enlarging application of the economic loss doctrine outside the U.C.C., or it should eliminate this language from House File 1267.

302. Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc., 532 N.W.2d

Minnesota Supreme Court should follow the *AKA* court in recognizing the emerging trend of requiring any claim for fraud or intentional misrepresentation to be independent of, or collateral to, an underlying contract for the sale of goods between merchants.

541, 546 (Mich. Ct. App. 1995) (quoting Neibarger v. Universal Coops., Inc., 486 N.W.2d 612, 618 (Mich. 1992)).