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The Economic Loss Rule and Its Application to the Tort of Negligent Misrepresentation in Texas

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THE ECONOMIC LOSS RULE AND ITS APPLICATION TO THE TORT OF NEGLIGENT MISREPRESENTATION IN TEXAS

*By: Charles E. Fowler, Jr.**

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I. INTRODUCTION

The economic loss rule generally limits the ability of a tort plaintiff to recover purely economic loss unaccompanied by physical damage.[1] Interesting questions arise at the interface of the economic loss rule

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1. *See* DAVID W. ROBERTSON, ET. AL., CASES AND MATERIALS ON TORTS 253 (3d ed. 2004) ("Traditional Anglo-American tort law denied recovery in negligence for [pure economic] losses, and there is still a pronounced reluctance to redress them.").

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and tort actions that expressly allow recovery for what would traditionally be thought of as pure economic loss.[2] This Article addresses Texas law with respect to the interface between the economic loss rule and negligent misrepresentation—a tort which imposes a legal duty on a narrow class of information suppliers to avoid negligently causing out-of-pocket pecuniary loss.

At first blush, one might think a rule that—at least in name—categorically bars tort claims for pure economic loss is entirely incompatible with a tort claim that expressly allows for such recovery. This Article defends the intuition that these two bodies of law are incompatible: the economic loss rule is not a helpful tool for limiting liability for negligent misrepresentation, and its use for that purpose can only lead to confusion among courts and litigants. Nonetheless, several Texas courts have purported to invoke the "economic loss rule" to dispose of negligent misrepresentation claims. This Article examines Texas law with respect to both the economic loss rule and the cause of action for negligent misrepresentation and analyzes how courts have applied the economic loss rule to negligent misrepresentation claims.

Part II of this Article begins by chronicling the origin of the economic loss rule; the present-day economic loss rule can be viewed as deriving from two fairly distinct areas. Part II then focus on the adoption of the economic loss rule in Texas and examines the contours of the doctrine under modern Texas law. Part III describes the cause of action for negligent misrepresentation as recognized in Texas, then surveys cases which purport to apply the economic loss rule to negligent misrepresentation claims. Part IV suggests a clarification of the law: negligent misrepresentation should be viewed as outside the reach of the economic loss rule. Though the policies behind the economic loss rule are worthy pursuits, the cause of action for negligent misrepresentation is narrowly drawn so as to inherently satisfy the concerns behind the economic loss rule. As this Article explains, the historical divide between general negligence, with its roots in the form of action of trespass on the case, and misrepresentation, its roots in the action of deceit, provides a useful means of accomplishing this limitation on the scope of the economic loss rule. Part V concludes.

II. The Economic Loss Rule

A. *Development of the Doctrine*

Most commentators recognize that no single, coherent "economic loss rule" exists in American law.[3] Indeed, an examination of the

2. *See generally* R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1789 (2000).

3. *See, e.g.*, Dan B. Dobbs & Ellen M. Bublick, Cases and Materials on Advanced Torts: Economic and Dignity Torts 445 (2006) ("[T]he economic

seminal cases giving rise to the economic loss rule in American law reveals two distinct "prongs": (1) the "no physical damage" prong;[4] and (2) the products liability prong.

1. The "No Physical Damage" Prong

Justice Holmes set forth what is commonly held to be the basis of the American economic loss rule[5] in *Robins Dry Dock & Repair Co. v. Flint*.[6] The charterer of a ship sued a dry-docking company for loss of use of the ship due to damage to the ship's propeller caused by the dry docking company's negligence.[7] However, only the dry docking company and the ship's owners were parties to the contract for dry docking services, and that contract imposed no immediate obligation on the dry docking company to third parties.[8] Denying recovery, the Court stated that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under contract with that other unknown to the doer of the wrong."[9]

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loss rule, as it is called, may be formulated in various ways and given greater or lesser scope."); Eddward P. Ballinger, Jr. & Samuel A. Thumma, *The Continuing Evolution of Arizona's Economic Loss Rule*, 39 ARIZ. ST. L.J. 535, 536 (2007) ("[C]onfusion might be attributed . . . to the view that there may be no single economic loss rule: 'There is an occasional tendency to speak of a single "economic loss" rule in the United States . . . . This seldom stands up to analysis.' In fact, cases addressing the doctrine in the United States and elsewhere often do not support the proposition that there is a single, unified economic loss rule . . . .") (quoting BRUCE FELDTHUSEN, ECONOMIC NEGLIGENCE 3 & n.8 (4th ed. 2000)); Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 733 (2006) ("It seems impossible to formulate a single economic loss rule. Instead, the problem of recovery for pure economic loss that is unaccompanied by physical harm to person or property occurs in a number of contexts that may invoke differing concerns of policy.").

4. Throughout this Article, this will be referred to as the *Robins/Testbank* prong after the cases credited for its creation. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021 (5th Cir. 1985) (en banc) (citing Robins Dry Dock v. Flint, 275 U.S. 303 (1927)) ("physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional . . . tort[s]").

5. *See, e.g., Testbank*, 752 F.2d at 1021–24 (interpreting *Robins Dry Dock* to create a physical damage requirement for recovery in tort); Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 706 (Pa. Super. Ct. 2004) ("When discussing the economic loss doctrine, the . . . court first noted its origins in *Robins Dry Dock* . . . ."); Steven M. Henderson, Note, *Walking the Line Between Contract and Tort in Construction Disputes: Assessing the Use of Negligent Misrepresentation to Recover Economic Loss After* Presnell, 95 KY. L.J. 145, 151 (2007) ("The economic loss rule originated with the U.S. Supreme Court's opinion in *Robins Dry Dock & Repair Co. v. Flint* in 1927."); Daniel A. Verrett, Comment, *Delay Damages Sufficient for a Preferred Maritime Lien?: The Economic Loss Doctrine Brings Certainty to the High Seas*, 47 HOUS. L. REV. 463, 465 (2010) ("The Economic Loss Doctrine, originally described by the U.S. Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, prohibits recovery in tort when the plaintiff has suffered only economic losses . . . .").

6. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

7. *Id.* at 307.

8. *Id.* at 307–08.

9. *Id.* at 309 (citing Savings Bank v. Ward, 100 U.S. 195 (1879)).

The *Robins Dry Dock* rule was revisited and expanded considerably in *State of Louisiana, ex rel. Guste v. M/V Testbank.*[10] Judge Higginbotham, delivering the majority opinion for the Fifth Circuit sitting en banc, purported to have "revisited the history and central purpose of *Robins Dry Dock.*"[11] The case arose from a ship collision that caused tons of pentachlorophenol—a dangerous chemical—to spill into the Mississippi River Gulf outlet and forced the Coast Guard to close the outlet and surrounding waters to all navigation.[12] Lawsuits were filed by numerous interests affected by the spill: "shipping interests, marina and boat rental operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen."[13] The defendants moved for summary judgment, and the district court granted the motion with respect to all but fishermen making a commercial use of the area.[14]

Judge Higginbotham explained that "*Robins* broke no new ground" insofar as it "refused recovery for negligent interference with 'contractual rights.'"[15] However, he immediately reframed the proposition more broadly: "[T]he prevailing rule denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which he had no proprietary interest."[16] The "literal holding" of *Robins Dry Dock*, he explained, was not so restricted as to limit the scope of its application to interference with contractual rights; if a contractual interest in the property suffering physical damage is too remote, "other claimants without even the connection of a contract are even more remote."[17] Given the "wave upon wave of successive economic consequences" of disasters such as the one in question, a contrary rule would require the courts to assume a managerial role.[18] Further, the *in terrorem* benefits of making shippers liable for all foreseeable economic loss of such an accident exceed the optimal level and require a more expensive system of third-party—rather than first-party—liability insurance.[19] Ultimately finding the rule against "recovery for pure

10. *Testbank*, 752 F.2d at 1021.
11. *Id.* at 1032.
12. *Id.* at 1020.
13. *Id.* at 1020–21.
14. *Id.* at 1021. Admiralty law has long recognized an exception to the *Robins/Testbank* rule for commercial fishermen. *See* Union Oil Co. v. Oppen, 501 F.2d 558, 569–70 (9th Cir. 1974) (excepting commercial fishermen from the economic loss rule because they "lawfully and directly make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business"). But "*Union Oil's* holding was carefully limited to commercial fishermen, plaintiffs whose economic losses were characterized as 'of a particular and special nature.'" *Testbank*, 752 F.2d at 1028 (quoting *Oppen*, 501 F.2d at 570).
15. *Testbank*, 752 F.2d at 1022.
16. *Id.*
17. *Id.* at 1023.
18. *Id.* at 1028.
19. *Id.* at 1029.

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economic losses" to be "workable and useful," the court affirmed summary judgment.[20]

2. The Products Liability Prong

The opinion credited with articulating the position that one cannot recover in tort when a defective product damages only itself is Chief Justice Traynor's opinion in *Seely v. White Motor Co.*[21] The plaintiff's truck, manufactured by the defendant, overturned as a result of a defect.[22] The accident damaged the truck, but the plaintiff was not injured.[23] The California Supreme Court upheld an award of damages on the basis of breach of express warranty; however, the Court denied recovery on the plaintiff's tort claims.[24] The Court noted that a manufacturer could appropriately be held liable in tort for physical injuries from a product's failure to meet a reasonable standard of safety but not for a product's failure to meet a given level of performance in the absence of an agreement to that effect.[25] Thus, "[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary . . . . [A] manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."[26]

The United States Supreme Court, per Justice Blackmun, explicitly adopted "an approach similar to *Seely*" in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[27] Justice Blackmun concisely summed up the issue to be decided in the case: "[W]hether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss."[28] After four ships malfunctioned, supertanker charterers claimed damages "for the cost of repairing the ships and for income lost while the ships were out of service."[29] Acknowledging products liability law's public policy concern for protection from dangerous products, Blackmun famously noted that if products liability was allowed to develop too far, "contract law would drown in a sea of tort."[30]

Justice Blackmun surveyed the spectrum of positions courts had taken on the issue from the *Seely* court's refusal to recognize tort lia-

20. *Id.* at 1032.
21. Seely v. White Motor Co., 403 P.2d 145, 147 (Cal. 1965).
22. *Id.*
23. *Id.*
24. *Id.* at 152.
25. *Id.* at 151.
26. *Id.* (citing Wyatt v. Cadillac Motor Car Div., 302 P.2d 665 (Cal. Ct. App. 1956), *disapproved on other grounds by* Sabella v. Wisler, 377 P.2d 889 (Cal. 1963)).
27. E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986).
28. *Id.* at 859.
29. *Id.* at 861.
30. *Id.* at 866.

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bility to the holding in *Santor v. A & M Karagheusian, Inc.* that "a manufacturer's duty to make nondefective products encompassed injury to the product itself."[31] The Court "adopt[ed] an approach similar to *Seely*."[32] The Court reasoned that, on the one hand, the tort concern for safety is weak when the product injures only itself.[33] On the other hand, contract is the natural solution to these cases because "[t]he maintenance of product value and quality is precisely the purpose of . . . warranties."[34] Thus, contract law is well-suited to these cases because the parties are free to set the terms of their agreement with respect to product value and quality. Accordingly, the Court saw no reason "to intrude into the parties' allocation of risk" or "to extricate the parties from their bargain."[35]

B. *The Economic Loss Rule in Texas*

The Texas Supreme Court has not explicitly endorsed a comprehensive economic loss rule. Rather, Texas's economic loss doctrine has focused on the second prong discussed above—the products liability prong precluding recovery for economic loss where a defective product injures only itself.[36] Still, Texas courts of appeals have endorsed the *Robins/Testbank* rule, and there is no indication the Texas Supreme Court will do otherwise.

The case typically credited with adopting the products liability prong of the economic loss rule in Texas is *Nobility Homes of Texas, Inc. v. Shivers*.[37] The Texas Supreme Court framed the question as whether a manufacturer is liable "for the economic loss his product causes a consumer with whom the manufacturer is not in privity."[38] The plaintiff, the buyer of a mobile home from an independent retailer who was no longer in business, brought suit against the manu-

31. *Id.* at 868–69.
32. *Id.* at 871.
33. *Id.*
34. *Id.* at 872.
35. *Id.* at 873, 875.
36. For the notion that the two prongs exist sufficiently independently of one another to allow a jurisdiction to adopt one prong but not the other, *see* William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 Tex. Tech. L. Rev. 477, 488 (1992) ("The bifurcated structure of the 'economic loss' rule, serving as it does two somewhat different sets of policies depending on whether the parties are contractual strangers, has not been appreciated by most courts or commentators . . . . [A] particular jurisdiction's commitment for, or against, the 'economic loss' rule in one setting does not necessarily compel a commitment for, or against, the 'economic loss' rule in the other setting.").
37. Nobility Homes of Tex., Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977). *Nobility Homes* is credited with adopting the economic loss rule in Texas. *See, e.g.*, Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Serv., Inc., 572 S.W.2d 308, 311 (Tex. 1978) (citing *Nobility Homes* for the proposition that "Texas has recently adopted the rule that economic loss resulting from a product with defective workmanship and materials" is not recoverable in tort because it is governed exclusively by the UCC).
38. *Nobility Homes*, 557 S.W.2d at 77.

facturer of the home.[39] The trial court found that the home was defective but did not cause physical harm to the plaintiff or his property.[40] The plaintiff's economic loss—the difference between the purchase price and the defective unit's reasonable market value—was "the only damage which [the plaintiff] suffered."[41]

Like Justice Blackmun's opinion in *East River Steamship*, the Court in *Nobility Homes* placed the New Jersey high court's opinion in *Santor* and the California high court's opinion in *Seely* on opposite ends of the spectrum with respect to tort liability when a product injures only itself.[42] Also consistent with *East River Steamship*, the Court stated, "Texas courts of civil appeals have consistently preferred the result in *Seely*."[43] However, the Court affirmed the verdict for the plaintiff on the ground that the UCC implied warranty of merchantability ran to the subsequent buyer of the mobile home without regard to privity, and the defects constituted a breach of that warranty.[44]

39. *Id.* at 77–78.

40. *Id.* at 78.

41. *Id.*

42. *Id.* at 79.

43. *Id.*

44. *Id.* at 81. The Court actually limited its holding with respect to the economic loss rule to the plaintiff's strict liability theory. *Id.* at 79–80. As to negligence, the Court stated that consumers actually *could* recover economic loss from someone with whom they are not in privity under negligence and affirmed judgment for the plaintiff on negligence grounds. *Id.* at 83. However, as Powers and Niver note, this language should not be read as contrary to the rule barring negligence liability when a product harms only itself:

> Texas lawyers sometimes state that *Nobility Homes* stands for the proposition that a consumer can recover for economic losses in negligence. Notwithstanding the head note, however, the court never held that a plaintiff can recover economic loss in negligence. The court did state that, "consumers have other remedies for economic loss against persons with whom they are not in privity. One of these remedies is a cause in negligence." The court, however, did not offer any authority for this proposition, and, more importantly, it is dicta. The plaintiff alleged negligence, and the trial judge found that the defendant's negligence was a proximate cause of the plaintiff's injuries. The defendant attacked these findings in the court of appeals on the ground that there was either no evidence or insufficient evidence to support them. The defendant did not attack these findings on the ground that, as a categorical matter, economic damages are not recoverable in negligence. The supreme court affirmed the negligence judgment solely on the ground that the defendant had not challenged these findings of the courts of appeal in the supreme court. Any confusion . . . has been laid to rest by *Jim Walter Homes*.

Powers & Niver, *supra* note 36, at 486–87. This explanation of the *Nobility Homes* negligence holding has been explicitly endorsed by at least one Texas court of appeals. *See* Coastal Conduit & Ditching, Inc. v. Noram Energy Corp., 29 S.W.3d 282, 286 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (setting forth the above-quoted passage in full and holding that "[t]he statement in *Nobility Homes* allowing for economic loss in negligence in a products liability case when there is no claim for personal injury or damage to other property is *obiter dictum*").

Thus, to the extent that *Seely* and *East River Steamship*—which explicitly adopted the approach in *Seely*—created an "economic loss rule," the Texas Supreme Court appears to have adopted the same economic loss rule in *Nobility Homes*. However, additional references to such a rule by the Texas Supreme Court are somewhat sparse and appear to be limited to the products liability prong.

For instance, nearly a decade after *Nobility Homes*, the Court decided a similar case but framed its ruling in somewhat broader language. In *Jim Walter Homes, Inc. v. Reed*, the plaintiff sued a building contractor for breach of warranty and gross negligence.[45] The contractor appealed an award of exemplary damages on the ground that no independently tortious injury supported such an award.[46] Noting that "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone,"[47] the Court held that the plaintiff's only injury was not receiving the house he was promised and had paid for.[48] Because the plaintiff suffered no injury other than loss of the benefit of his bargain, the Court reversed the exemplary damage award.[49]

The Court readdressed the economic loss rule and clarified its procedural aspects in what appears to be the first Texas Supreme Court case to actually refer to a distinct "economic loss rule."[50] In *Equistar Chemicals, L.P. v. Dresser-Rand Co.*, another products liability case, the plaintiff purchased compressors from the defendant and experienced significant damage to the compressors and its plant when impellers within the compressors failed.[51] The jury awarded damages "to restore the Equistar Chemicals' ethylene plant to the condition it was in immediately before the occurrence(s) in question."[52] The court of appeals held that damage to the compressors was contractual only and, given that the contractual cause of action arose out of a breach of the original sale contract some twenty-five years prior, was barred by limitations.[53] But because some evidence supported the plaintiff's tort claim for damages to other property in the plant, the court of appeals remanded for a new trial.[54]

On appeal to the Texas Supreme Court, the plaintiff argued that the defendant had not preserved error as to the economic loss rule in the trial court.[55] The Texas Supreme Court first set forth the economic

45. Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 617 (Tex. 1986).
46. *Id.* at 617–18.
47. *Id.* at 618 (citing, *inter alia*, *Nobility Homes*, 557 S.W.2d at 77).
48. *Id.*
49. *Id.*
50. Equistar Chems., L.P. v. Dresser-Rand Co., 240 S.W.3d 864, 864 (Tex. 2007).
51. *Id.* at 865.
52. *Id.* at 866.
53. *Id.*
54. *Id.*
55. *Id.*

loss rule generally: "The economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself."[56] While the Court held that the defendant was not required to assert the economic loss rule as an affirmative defense, the Court reversed the court of appeals on the ground that the defendant's no-evidence motion "did not clearly and distinctly make the trial court aware of a contention that the economic loss rule applied to bar [the plaintiff] from recovering tort damages for injuries to the compressor."[57]

Thus, the Texas Supreme Court appears to have embraced an embodiment of the economic loss rule, the purpose of which is to prevent recovery in tort arising out of the substance of a contract between the parties. This began in the narrow factual context of *Nobility Homes*—a case which expressly parroted the *Seely* rule—in which the manufacturer's defective product injured only itself. The rule was framed somewhat more broadly to potentially include other contractual contexts in *Jim Walter Homes*. However, no analog to the *Robins/Testbank* economic loss rule is immediately apparent. In fact, citations to *Robins* and *Testbank* by Texas courts are virtually nonexistent. One early court of appeals case cites *Robins Dry Dock* for the narrow rule that "not being parties to the lease contracts, [the plaintiffs] were not entitled to sue for the negligent breach thereof."[58] A couple of other cases, recounting unrelated or remotely related factual settings, cite *Robins Dry Dock* merely for the general notion that "the law does not spread its protection so far."[59]

On the other hand, two courts of appeals have adopted something akin to the *Robins/Testbank* prong of the economic loss rule while acknowledging the distinction between the prongs. In *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*,[60] the Fourteenth Court of Appeals in Houston affirmed summary judgment on the basis of a rule similar to that announced in *Testbank*. The plaintiff, who provided trenching services, sued an energy company who, though under

56. *Id.* at 867 (citing Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 79–80 (Tex. 1977); Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325 (Tex. 1978)).

57. *Equistar Chems.*, 240 S.W.3d at 867–69.

58. Doehring v. Gulf Prod. Co., 8 S.W.2d 723, 725 (Tex. Civ. App.—Galveston 1928, writ dism'd w.o.j.).

59. *See* Fort Bend Cnty. Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 398 (Tex. 1991) (holding that a county drainage district owed no tort duty to a truck driver injured in an accident that occurred on a privately-owned bridge constructed by the district); Suthers v. Booker Hosp. Dist., 543 S.W.2d 723, 730–31 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (Robinson, J., concurring) (holding that a doctor who contracted for services was not contractually liable to alleged third-party beneficiaries unless it appeared from the contract that the doctor would be liable to those individuals).

60. Coastal Conduit & Ditching, Inc. v. Noram Energy Corp., 29 S.W.3d 282, 291 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

no contractual duty to the plaintiff, was responsible for marking its underground electrical lines prior to the plaintiff performing its services. The plaintiff alleged that the energy company improperly executed its marking duties, causing the plaintiff to incur additional overhead and expenses. The trial court granted summary judgment for the defendant on counts of negligence, negligence per se, and gross negligence.

The court set out to "determine whether Texas law precludes the recovery of economic damages in a negligence case."[61] First, the court distinguished each case cited to it by both parties below—all products liability cases.[62] To the extent that the parties cited such cases for the statement that Texas recognizes no cause of action for negligence when the loss is purely economic, the court felt that they had "taken this statement out of context." Indeed, neither party had "cited any Texas authority regarding whether economic losses are recoverable in a negligence action when the parties are contractual strangers and when there is no claim for an accompanying injury to property or person."[63] However, the court's own research turned up *Rodriquez v. Carson*, in which the court denied tort recovery to a truck driver who suffered no physical injury but sued to recover for the lost use of his employer's truck due to damage from the defendant's negligence.[64] On the authority of *Rodriquez*, a string of admiralty cases (including both *Robins Dry Dock* and *Testbank*), and assorted non-admiralty authorities, the court held that, "in the absence of personal injury and property damage, . . . the trial court did not err in granting summary judgment" on the plaintiff's negligence claims.[65]

The Dallas court of appeals appears to have reached a similar conclusion. In *Express One International, Inc. v. Steinbeck*, Express One brought suit for, *inter alia*, negligence against a former employee.[66] The claim arose out of a post by the employee on an Internet message board—under the employer's screen name—in which the employer purported to discourage employees from voting to join a trade union.[67] As a result, Express One claimed damages for various ex-

61. *Id.* at 286.

62. *Id.* at 285–87.

63. *Id.* at 287.

64. *Id. See* Rodriquez v. Carson, 519 S.W.2d 214, 216 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *see also* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1027 (5th Cir. 1985) (en banc) (citing *Rodriquez* in support of the majority's position by stating that "Jurisprudence developed in the Gulf states informs our maritime decisions. It supports the *Robins* rule.").

65. *Coastal Conduit*, 29 S.W.3d at 290.

66. Express One, Int'l, Inc. v. Steinbeck, 53 S.W.3d 895, 897 (Tex. App.—Dallas 2001, no pet.).

67. *Id.* The message read: "For you vocal union supporters, I'd be watching your backs. We know who most of you are who are posting your anti-company propaganda. We're not stupid." *Id.* The opinion does not indicate the defendant's motive for posting his message.

penses incurred as a result of the post.[68] Affirming summary judgment for the employee, the court "conclude[ed] Express One failed to plead damages recoverable in its negligence action."[69] The court cited *Coastal Conduit*—the first case in a string cite that also included *Testbank*—for the proposition that "[d]amages resulting from economic harm generally are not recoverable in simple negligence actions"; rather, "a party must plead and prove either a personal injury or property damage."[70] The court listed "placing a reasonable limit on a defendant's liability" as among the policies supporting the rule.[71] Interestingly, the court in a footnote clarified the scope of the rule it applied: it used the term "simple negligence" to "distinguish it from other types of tort claims such as . . . negligent misrepresentation."[72]

Given these two cases—and the absence of any case expressly considering the matter and coming down against the *Robins/Testbank* prong of the economic loss rule—a strong argument exists that the prong is now a part of Texas law.[73] The Texas Supreme Court has given no indication that it would conclude differently.[74] Thus, Texas law appears to embrace some version of both prongs of the economic loss rule.

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68. *Id.* at 898.

69. *Id.*

70. *Id.* at 898–99.

71. *Id.* at 899.

72. *Id.* at 898 n.1.

73. *But see* Seven Seas Fish Market, Inc. v. Koch Gathering Sys., Inc., 36 S.W.3d 683 (Tex. App.—Corpus Christi 2001, pet. denied). In *Seven Seas*, the plaintiffs—each engaged in the seafood business—sought to recover for economic loss when an oil pipeline owned by the defendant ruptured, causing a leak, and, in turn, a disruption of the plaintiffs' business. *Id.* at 684. The trial court granted summary judgment on the ground that federal law preempted the state law negligence claims and that *Robins Dry Dock* precluded recovery under federal maritime law. *Id.* at 684–85. The court of appeals reversed, holding that the claims did not invoke admiralty jurisdiction because the relevant activity—shipment of oil mostly across *land*—did not bear a substantial relation to a traditional maritime activity; thus, the rule of *Robins Dry Dock*, which the court characterized as "the maritime common-law rule that there can be no recovery for economic loss absent physical injury to a proprietary interest," was inapplicable. *Id.* at 684, 686–88. This case could be characterized as implicitly rejecting a *Robins*-type rule under Texas law because, while the maritime rule was inapplicable, the court would have been reluctant to reverse if it believed an identical rule barred the claims under state law. But the appellees did urge the court to reach this conclusion "because, if the outcome would be the same under both maritime and state law, consideration of choice of law is a mere academic pursuit"; however, the court expressly declined to consider the state law defense because it was not raised below. *Id.* at 687 n.4. Thus, *Seven Seas* can be read as consistent with the cases announcing a *Robins*-like rule under Texas law.

74. *See* Powers & Niver, *supra* note 36, at 489 ("Texas courts have not spoken to situations involving contractual strangers, although there is no reason to think that a Texas court would not apply some version of the 'economic loss' rule to these cases."). While this statement appears to have been wholly accurate at the time it was made, it is now an overstatement in light of *Costal Counduit* and *Express One.* The notion expressed therein, however, is still applicable as to the Texas Supreme Court.

III. Negligent Misrepresentation Under Present Texas Law

A. *The Cause of Action for Negligent Misrepresentation in Texas*

It has been said that "[e]very Texas practitioner has heard of negligent misrepresentation, but few fully understand it."[75] Thus, it is appropriate to clearly understand this somewhat obscure tort before analyzing the application of the economic loss rule to the cause of action.

Under Texas law, the action for negligent misrepresentation is governed by the Restatement.[76] Restatement (Second) of Torts § 552, in full, states:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.[77]

Despite at least one court of appeals opinion casting doubt upon Texas's fidelity to section 552,[78] the Texas Supreme Court put any doubt to rest in *McCamish*. In *McCamish*, the Court—strictly following the Restatement—endorsed liability of an attorney to a non-client where the attorney intended that such non-client would rely on the information provided by the attorney.[79] As two later cases applying

75. Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 845, 846 (2008).

76. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999) (following Restatement § 552 strictly and implicitly overruling Texas cases that did otherwise); Wise & Poole, *supra* note 75, at 860 ("In sum, . . . Texas follows the restatement, as written, and not a foreseeability test.").

77. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

78. *See* Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 411–13 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (applying a "knows or should have known" standard essentially equivalent to the foreseeability standard).

79. *McCamish*, 991 S.W.2d at 791.

Texas law—one state[80] and one federal[81]—make clear, "[b]ecause *McCamish* wholly adopted section 552 and did not distinguish among the types of professionals liable for negligent misrepresentation, it necessarily overruled *Blue Bell* by implication."[82] Accordingly, under Texas law, the tort of negligent misrepresentation is governed by Restatement § 552. Section 552 sets forth an intermediate scope of liability, with other jurisdictions adopting the stricter "near-privity" standard or the broader "foreseeability" standard.[83]

Under the near-privity standard, if the plaintiff and defendant are not in privity of contract, the plaintiff must establish three elements: (1) the information provider knew that the misinformation would be used in a specific transaction or for a specific purpose; (2) the information provider knew that the misinformation would be relied on by the third-party plaintiff; and (3) there must have been some conduct by the information provider linking it to the third party that evinces the provider's understanding that the third party would rely on the misinformation.[84] Under this standard, most plaintiffs not in privity with the information provider cannot recover because there is typically no communication between the provider and the third party sufficient to satisfy the third element of the test.[85] By contrast, under the foreseeability standard, which is followed by three jurisdictions, any third party whose reliance on the information was reasonably foreseeable by the provider can recover.[86]

The Restatement standard falls between these two standards. It is broader than the near-privity standard in that it replaces the strict requirements of knowledge and conduct (typically, communication between the provider and the third party) with a more relaxed requirement that the plaintiff be one of a "group of persons for whose benefit and guidance [the provider] intends to supply the information

80. Abrams Centre Nat'l Bank v. Farmer, Fuqua & Hough, Prof'l Corp., 225 S.W.3d 171, 177 (Tex. App.—El Paso 2005, no pet.) (affirming summary judgment for a defendant auditor who did not have actual knowledge of the plaintiff lender's reliance on its report, noting that "*McCamish* wholly adopted Section 552").

81. *See* Compass Bank v. King Griffen & Adamson, Prof'l Corp., No. 3:01-CIV-2028-N, 2003 WL 22077721, at *2–4 (N.D. Tex. Sept. 5, 2003), *aff'd*, 388 F.3d 504 (5th Cir. 2004) (granting summary judgment for a defaulting borrower's auditor and against the plaintiff bank, opining that *McCamish* strictly adopted Restatement Section 552, under which the bank was not among the limited class of potential plaintiffs).

82. *See* Wise & Poole, *supra* note 75, at 859.

83. *See id.* at 849–51 (surveying and describing the two alternatives to the Restatement standard).

84. *See* Wise & Poole, *supra* note 75, at 849. As a point of clarification, "third party" is used for the purposes of this discussion simply to connote a plaintiff who is not in contractual privity with the defendant.

85. *Id.* at 849–50.

86. *Id.* at 850. The foreseeability standard is followed in Mississippi, New Jersey, and Wisconsin. *Id.*

or knows that the recipient intends to supply it."[87] It is narrower than the foreseeability standard in that it does not reach all plaintiffs whose reliance on the information was reasonably foreseeable but only those who fall within that limited group of persons.[88]

The limited class of potential plaintiffs may include those with or without contractual relationships with the information supplier. According to the Comments to section 552, if the plaintiff employed the defendant to supply the information and gave consideration for it—in other words, a contract to supply the information exists between the plaintiff and defendant—"[the plaintiff] has at his election either a right of action [for negligent misrepresentation] or a right of action upon the contract under which the information was supplied."[89] However, a plaintiff may also have an action for negligent misrepresentation under section 552 in the absence of contractual privity with the defendant. For example, the information supplier may have communicated information directly to the plaintiff although the information is paid for by another party to the transaction.[90] Alternatively, the information supplier may communicate the information directly to another party—the *only* party with whom the information supplier has a contract—who then communicates the information to the plaintiff.[91] In the latter situation, it is not necessary that the information supplier have in mind a particular person as the ultimate recipient of the information; the supplier must only intend that the information reach and influence "a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it."[92]

Further delimiting the cause of action set forth in section 552, Texas courts have also committed themselves to section 552B, which details

87. RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1977).

88. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a ("[O]ne who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.").

89. RESTATEMENT (SECOND) OF TORT § 552 cmt. g.

90. *Id.*

91. *Id.*

92. RESTATEMENT (SECOND) OF TORTS § 552 cmt. h. The comment supplies the following as one of several illustrations of this point:

> A, having lots for sale, negligently supplies misinformation concerning the lots to a real estate board, for the purpose of having the information incorporated in the board's multiple listing of available lots, which is distributed by the board to approximately 1,000 prospective purchasers of land each month. The listing is sent out by the board to B, and in reliance upon the misinformation B purchases one of A's lots and in consequence suffers pecuniary loss. A is subject to liability to B.

the damages available under the cause of action under section 552.[93] Section 552B limits recoverable damages to pecuniary loss including: "(a) the difference between the value of what [plaintiff] has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation."[94] The section adds that "the damages recoverable for a negligent misrepresentation *do not include the benefit of the plaintiff's contract* with the defendant."[95] Texas courts have extended this clause such that, in addition to excluding the benefit of the plaintiff's contract with the *defendant*, where the plaintiff has no contract with the defendant but was supplied the misinformation in relation to a transaction with *someone else*, the plaintiff cannot recover from the defendant the benefit of the plaintiff's contract with that other party.[96] Thus, "benefit-of-the-bargain damages" arising from the subject matter of the contract are not available for negligent misrepresentation but may only be recovered in an action on the contract.[97]

The principle that damages for breach of an entirely contractual duty may only be recovered under contract law is not novel and arises from the distinction between tort and contract duties.[98] However, a properly stated claim for negligent misrepresentation under sections

93. D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 663–64 (Tex. 1998) (quoting section 552B in full and barring plaintiff's claim for negligent misrepresentation because it did not meet its burden of proving the elements of damage set forth therein); Fed. Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442–43 (Tex. 1991) (adopting section 552B).

94. RESTATEMENT (SECOND) OF TORTS § 552B(1).

95. RESTATEMENT (SECOND) OF TORTS § 552B(2) (emphasis added).

96. *See, e.g.*, Sterling Chems., Inc. v. Texaco Inc., 259 S.W.3d 793, 798 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding that a manufacturer could not recover damages for the benefit of its bargain with a syngas supplier from the company that licensed proprietary technology to the supplier); *see also* Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that an oil and gas exploration company could not recover damages for the benefits of its bargain with a geological surveyor from the software developer who created the defective software used by the surveyor).

97. *Hillsboro*, 973 S.W.2d at 663 ("[T]he benefit of the bargain measure of damages is not available for a claim of negligent misrepresentation.") (citing *Fed. Land Bank Ass'n of Tyler*, 824 S.W.2d at 442–43); CCE, Inc. v. PBS & J Constr. Servs., Inc., No. 01-09-00040-CV, 2011 WL 345900, at *8 (Tex. App.—Houston [1st Dist.] Jan. 28. 2011, no pet. h.) (reversing summary judgment for the defendant where plaintiff's "live pleading and summary judgment evidence establish that [plaintiff] is actually seeking reliance damages as measured by its out-of-pocket expenditures and consequential losses, not damages for the benefit of its bargain on its contract"); *Sterling Chems.*, 259 S.W.3d at 797 ("[A] plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim.").

98. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 659 (5th ed. 1984) ("[T]o the extent that the duty a party to a contract owes to another party . . . is to be determined upon the basis of the first party's manifested intention, the obligation is . . . entirely contractual . . . . Such a claim should not be

552 and 552B alleges an "independent injury"[99] arising from the breach of "obligations imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others";[100] specifically, the obligation to avoid making a negligent misrepresentation to one of the limited class of potential plaintiffs that causes *out-of-pocket expenses* "over and above" loss of the benefit of one's contractual bargain.[101]

For example, in *PBS & J Construction Services*, the plaintiff, the general contractor on a road construction project, sued the defendant for negligent misrepresentations contained in the engineering plans for drainage control submitted by the defendant to the Texas Department of Transportation ("Department").[102] The plaintiff and defendant had separate contracts with the Department but were not in a contractual relationship with each other.[103] According to the plaintiff, misrepresentations relied upon in construction caused silt to build up on neighboring property, which led to the defendant's eventually being declared in default of its contract with the Department and forced the plaintiff to incur out-of-pocket expenses to have the work completed by a second contractor.[104] The court of appeals reversed summary judgment for the defendant because the plaintiff successfully alleged the limited type of independent, out-of-pocket injury which the tort properly redresses.[105] The out-of-pocket expense incurred in having the work completed by a second contractor constituted pecuniary damage separate from any loss of the benefit of the plaintiff's bargain with the Department—for example, impairment of the value of the consideration received by the plaintiff from the Department. Similarly, in *Oat Note, Inc. v. Ampro Equities, Inc.*, a court of appeals upheld a jury verdict in favor of a plaintiff on a negligent misrepresentation claim.[106] The defendants, Oat Note and its president, sold a parcel of land to a commercial developer.[107] As part of the transaction, Oat Note was obligated to build a road on adjacent land retained by Oat Note.[108] Oat Note subsequently contracted to sell the adjacent

translatable into a tort action in order to escape some roadblock to recovery on a contract theory.").

99. *See Sterling Chems.*, 259 S.W.3d at 797 ("Texas courts have adopted the independent injury requirement of Section 552B of the Restatement (Second) of Torts for negligent misrepresentation claims.").

100. KEETON ET AL., *supra* note 98, § 92, at 655.

101. *PBS & J Constr. Servs.*, 2011 WL 345900, at *8.

102. *Id.* at *1–2.

103. *Id.*

104. *Id.*

105. *Id.* at *8.

106. Oat Note, Inc. v. Ampro Equities, Inc., 141 S.W.3d 274, 282 (Tex. App.—Austin 2004, no pet.).

107. *Id.* at 276.

108. *Id.*

land to Ampro, who assumed the obligation to construct the road.[109] When the road was not completed on schedule, the commercial developer sued Oat Note, its president, and Ampro.[110] Ampro settled the claim against it and subsequently filed a cross-claim against Oat Note and its president for negligently misrepresenting the nature of the obligation assumed by Ampro to construct the road.[111] Noting that a plaintiff "must prove that an injury occurred independent from any benefit-of-the-bargain measures of recovery,"[112] the court upheld the damage verdict, reasoning that the misrepresentation "harmed Ampro because it led to the filing of a lawsuit against it, not because it resulted in Ampro's getting less than it expected to be the benefit of its bargain in the real estate deal."[113]

B. *Application of the Economic Loss Rule to Negligent Misrepresentation Claims in Texas*

Because section 552 expressly—indeed, exclusively—provides for liability for "pecuniary loss," it is curious that a court might bar a claim under that section on the ground of some rule that requires physical damage to a proprietary interest in order to recover on a negligence theory.[114] However, Texas courts have nonetheless at least purported to invoke the "economic loss rule" to bar negligent misrepresentation claims on several occasions. This has generated a confusing body of case law, which could be clarified by deciding these cases based on a narrow duty to avoid negligent misrepresentation and without reference to the economic loss rule.

Application of the economic loss rule to negligent misrepresentation in Texas has been traced to *D.S.A., Inc. v. Hillsboro Independent School District*.[115] The court of appeals held that the defendant was negligent in representing the functions it would perform under a construction contract with the plaintiff.[116] The court of appeals reduced the actual damage award by a mere $416.67 to $220,244.33 and upheld a substantial exemplary award.[117] The Supreme Court reversed, holding that the damages available for negligent misrepresentation in-

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 279–80 (citing D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 663–64 (Tex. 1998)).
113. *Id.* at 280.
114. *See supra* notes 36–74 and accompanying text.
115. *Hillsboro*, 973 S.W.2d at 663. For the proposition that this case is credited with applying the economic loss rule to negligent misrepresentation in Texas, see Barton, *supra* note 2, at 1822–23 (explaining that *Hillsboro* imposed a requirement of physical harm to "overcome the economic loss rule" and applied the economic loss rule to negligent misrepresentation in the same manner it applied the rule to negligence and strict liability).
116. *Hillsboro*, 973 S.W.2d at 663.
117. *Id.*

cluded only "(a) the difference between the value of what [plaintiff] has received . . . or . . . value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation"—essentially, out-of-pocket restitutionary and reliance damages—but not "the benefit of the plaintiff's contract with the defendant."[118] To allow a plaintiff to recover for the benefit of his bargain, the court stated, "would potentially convert every contract interpretation dispute into a negligent misrepresentation claim."[119] Because the plaintiff "did not attempt any distinction between its out-of-pocket damages and the benefit of the bargain," the court denied recovery.[120] Thus, while the decision was based on one of the policy considerations that also underlies at least one prong of the economic loss rule—namely, preventing tort from intruding too far into the realm of contract law[121]—the court merely adhered to the requirement of Restatement § 552B and announced no broad rule requiring physical damage for recovery for negligent misrepresentation.

Against the backdrop of *Hillsboro*, several Texas courts of appeals incorporated "economic loss rule" terminology into their analyses.[122]

118. *Id.* at 663–64 (quoting RESTATEMENT (SECOND) OF TORTS § 552B (1977)).

119. *Id.* at 664.

120. *Id.*

121. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986) (expressing concern that contract law could "drown in a sea of tort").

122. Though this Article focuses on state cases, a handful of federal courts interpreting Texas law have done the same. In *New Century Financial, Inc. v. Olympic Credit Fund, Inc.*, for example, the court granted defendant's motion for summary judgment on negligent misrepresentation. New Century Fin., Inc. v. Olympic Credit Fund, Inc., No. H-09-2060, 2011 WL 918380, at *6 (S.D. Tex Mar. 11, 2011). The court reasoned that, because the plaintiff suffered no injury independent of the breach of an agreement to assume another party's interest in a factoring relationship, the economic loss rule barred the tort claim. *Id.* at *4; *see also*, L.L.C. v. JPMorgan Chase Bank, No. A-09-CA-576-SS, 2009 WL 3784347, at *8 (W.D. Tex. Nov. 9, 2009) (granting summary judgment for defendant on negligent misrepresentation because, as the plaintiff was seeking contractual damages only, the economic loss rule barred a negligent misrepresentation claim); Mehler Texnologies, Inc. v. Monolithic Constructors, Inc., No. 3:09-cv-0655-M, 2009 WL 3149383, at *4–5 (N.D. Tex. Sept. 29, 2009) (holding that, as to costs already incurred in consequence of faulty fabric used in church domes, the plaintiff dome manufacturer stated a claim for negligent misrepresentation against the fabric supplier, but as to reimbursement for unusable fabric in inventory, the negligent misrepresentation claim sought only benefit-of-the-bargain damages and was barred by the economic loss rule); Collier v. Wells Fargo Home Mortg., No. 7:04-CV-086-K, 2006 WL 1464170, at *7–8 (N.D. Tex. May 26, 2006) (holding that, because plaintiffs' claims for, *inter alia*, negligent misrepresentation "arise from the mortgage contracts between the parties and the damages claimed by Plaintiffs flow from Defendant's purported mishandling of Plaintiffs' mortgage accounts," the claims were barred by the economic loss rule); Century Prods. Co. v. COSCO, Inc., No. 3:00-CV-0800-BC, 2001 WL 1577607, at *2–4 (N.D. Tex. Dec. 6, 2001) (holding that, where the plaintiff's claim for negligent misrepresentation based on failure to disclose claims against assets subject to an Asset Purchase Agreement merely "frustrated its contractual expectation that its Assumed Obligations under the Agreement were limited to certain identified claims," the misrepresentation claim was barred by the economic loss rule).

For example, in *Hou-Tex, Inc. v. Landmark Graphics*, the Fourteenth Court of Appeals in Houston affirmed summary judgment for the defendant.[123] The plaintiff, an oil and gas exploration company, contracted with a geological surveying company to determine where to place a well.[124] The surveyor employed SeisVision, a computer program licensed to the surveyor by the defendant.[125] After the plaintiff drilled a dry hole, it sued the software licensor for both negligence and negligent misrepresentation, alleging the licensor negligently misrepresented the software's abilities.[126] The court stated that "economic damages are not recoverable unless they are accompanied by actual physical harm to a person or their property."[127] Drawing no distinction between the plaintiff's negligence and negligent misrepresentation claims, the court held that, because the plaintiff "suffered only economic damages for its costs of drilling a dry well," the economic loss rule barred the claims.[128] As to whether the economic loss rule applied to a third party with whom the plaintiff had no contract, the court held that it did; otherwise, a plaintiff who had waived tort liability with its contractual partner "could reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising that chain."[129]

A pair of 2007 cases similarly applied the economic loss rule to bar negligent misrepresentation claims. In *Bank of America, N.A. v. Hubler*, the plaintiff, a customer of the defendant bank, sued the bank for, *inter alia*, negligent misrepresentation, alleging that the defendant misrepresented the safety of the plaintiff's money with respect to a check the plaintiff had attempted to stop payment of, which the bank ultimately paid.[130] Under the heading of "Economic Loss Rule," the court purported to apply a rule that "[a] party cannot recover economic losses in negligence when the loss is the subject matter of a contract between the parties."[131] Because the bank essentially withdrew funds in violation of the deposit agreement, actions contrary to the bank's representations amounted to a breach of contract.[132] Be-

123. Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
124. *Id.* at 106.
125. *Id.*
126. *Id.*
127. *Id.* at 107.
128. *Id.*
129. *Id.* (quoting Hininger v. Case Corp., 23 F.3d 124, 125 (5th Cir. 1994)).
130. Bank of Am. v. Hubler, 211 S.W.3d 859, 861–62 (Tex. App.—Waco 2007, pet. granted, judgm't vacated w.r.m.).
131. *Id.* at 863 (internal quotations omitted). In support of this rule statement, the court cited *Coastal Conduit & Ditching*, one of the Texas cases which purports to adopt and apply the *Robins/Testbank* prong on the economic loss rule—not any version of the rule primarily based on the policy of keeping contract and tort separate. *See supra* text accompanying notes 61–65.
132. *Id.* at 863–64.

cause the plaintiff's misrepresentation claim was "purely economic" and "sounds in contract alone," the court held it was barred by the economic loss rule.[133]

In *Sterling Chemicals, Inc. v. Texaco, Inc.*, the court of appeals again held a negligent misrepresentation claim to be barred by the economic loss rule.[134] Sterling produced acetic acid, a process which requires synthetic gas ("syngas").[135] Praxair submitted a proposal to supply Sterling's increased needs for syngas.[136] The proposal featured Texaco's proprietary gasification technology, and Texaco representatives allegedly participated in meetings and made representations regarding the technology.[137] Sterling entered into an agreement with Praxair, who, in turn, entered into a licensing agreement with Texaco, but there was no contract between Sterling and Texaco.[138] When a syngas cooler failed, causing disruptions to Sterling's production process, Sterling sued Texaco for negligent misrepresentation.[139] The trial court granted summary judgment for Texaco "on the ground that the claim was barred by the economic loss rule."[140]

The court explained that, in *Hillsboro*, the Texas Supreme Court "specifically addressed the application of the economic loss rule to negligent misrepresentation claims."[141] "Under the economic loss rule," the court continued, "a plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim."[142] The court held that, because Sterling's alleged damages—lost profits from the business interruptions—were consequential losses amounting to loss of the benefit of Sterling's bargain (as opposed to "*out-of-pocket* expenditures"), the economic loss rule barred recovery of these damages.[143]

The court rejected the argument that the economic loss rule does not preclude tort claims between parties not in privity.[144] However, evincing at least some confusion on the part of the court, it cited *Coastal Conduit*—a case applying the *Robins/Testbank* prong of the economic loss rule and expressly stating that it had no application to

133. *Id.* at 864.
134. Sterling Chems., Inc. v. Texaco Inc., 259 S.W.3d 793, 800 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
135. *Id.* at 794–95.
136. *Id.* at 795.
137. *Id.*
138. *See id.*
139. *Id.* at 795–96.
140. *Id.* at 796.
141. *Id.* at 797 (citing D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 664 (Tex. 1998)).
142. *Id.* (citing *Hillsboro*, 973 S.W.2d at 664).
143. *Id.* at 798.
144. *Id.* at 799.

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the products liability or contractual contexts—among authorities for the proposition that the economic loss rule applied between parties not in privity of contract.[145] Furthermore, the court rejected that courts "should recognize claims for negligent misrepresentation as an exception to the economic loss doctrine," opining that the Texas Supreme Court expressly declined to do so.[146] Finally, the court added in a footnote that no authority existed for treating negligent misrepresentation any differently than negligence "regarding the applicability of the economic loss rule."[147]

IV. A Proposed Clarification of Negligent Misrepresentation and the Economic Loss Rule in Texas

Texas courts should not apply the economic loss rule to negligent misrepresentation. Instead, negligent misrepresentation under sections 552 and 552B should be viewed as a narrow, stand-alone tort that exists outside of the reach of the economic loss rule. The economic loss rule is not a useful concept with respect to negligent misrepresentation because strict adherence to the Restatement inherently satisfies the principles behind each prong of the economic loss rule, applying the rule to negligent misrepresentation is redundant and confusing. Thus, courts should focus on whether a plaintiff's claim satisfies all of the Restatement's requirements and decide cases strictly on that basis, without reference to any separate economic loss rule.

A. *Addressing the Principles Behind the Economic Loss Rule*

To be sure, a broad cause of action to recover economic loss resulting from negligently supplied information may implicate the principles behind both prongs of the economic loss rule. With respect to the *Robins/Testbank* prong, negligent misrepresentations could give rise to vast liability similar to the "wave upon wave" of economic consequences that could result from a physical disaster.[148] As Chief Judge Cardozo wrote for the New York Court of Appeals, given the fluidity with which information moves about the economy, "[i]f liability for [negligent misrepresentation] exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive en-

145. *Id.* at 797.

146. *Id.* at 799 (citing *Hillsboro*, 973 S.W.2d at 663 (holding that the benefit of the bargain damages were not recoverable in negligence)).

147. *Id.* at 799 n.5 ("Sterling does not offer any persuasive authority as to why we should ignore Texas caselaw precedent . . . and treat negligent misrepresentation claims differently from negligence claims.").

148. *See* Restatement (Second) of Torts § 552 cmt. a (1977) ("When the harm that is caused is only pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it.").

tries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[149]

The principal policy behind the *Seely/East River* prong—protecting the clear divide between contract and tort law—is even more obviously implicated when a party claims negligent misrepresentation. Most Texas cases in which a plaintiff alleges negligent misrepresentation arise from some kind of commercial transaction. Typically, either the plaintiff's contractual partner or another party who also contracted with the plaintiff's contractual partner (but has no contract with the plaintiff) supplied the alleged misinformation to the plaintiff (directly or indirectly) during pre-contractual negotiations. For this reason, a major concern of Texas courts has been preserving "the risk allocations that have been worked out in the transactions comprising" the chain of production and distribution.[150] If courts did not somehow limit the ability of commercial parties to sue others in the production and distribution chain for negligent misrepresentation, they "would potentially convert every contract interpretation dispute into a negligent misrepresentation claim."[151]

However, a narrowly drawn duty for negligent misrepresentation cleanly addresses these policy concerns without the need for a separate economic loss rule. And that is precisely what Restatement §§ 552 and 552B collectively provide. With respect to the problem of vast liability, the Restatement strictly limits the class of plaintiffs who may sue for negligent misrepresentation.[152] While the approach taken by Texas courts is broader than the near-privity standard set forth by Justice Cardozo in *Ultramares*, liability is confined to a limited class of potential plaintiffs to whom the information provider: (i) intended to supply the information for their benefit; or (ii) knows the recipient of the information intends to supply the information. Thus, this test excludes the "wave upon wave" of other potential plaintiffs who could encounter the information in a commercial context and rely on the information to their pecuniary detriment.[153] Because the Restatement expressly rejects foreseeability in favor of a stricter require-

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149. Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

150. Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

151. D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 664 (Tex. 1998).

152. *See supra* notes 89–95 and accompanying text.

153. *See, e.g.*, Abrams Centre Nat. Bank v. Farmer, Fuqua & Huff, Prof'l Corp., 225 S.W.3d 171, 173, 178 (Tex. App.—El Paso 2005, no pet.) (affirming summary judgment for a defendant independent auditor where the auditor did not know the plaintiff bank "would receive the audits nor did it intend for Abrams to rely on the audited information in loaning money" to a defunct college); Trans-Gulf Corp. v. Performance Aircraft Servs., Inc., 82 S.W.3d 691, 696 (Tex. App.—Eastland 2002, no pet.) (holding that a mechanic who makes incorrect entries in an airplane's maintenance log is not liable to the future purchaser of the airplane, though "one might argue that [the mechanic] should have assumed that a subsequent owner of the aircraft might rely on [the] repair records").

ment,[154] it serves a similar purpose as the *Robins/Testbank* rule in that it "places a pragmatic limitation on the doctrine of foreseeability."[155]

The Restatement version of negligent misrepresentation, if properly read and construed, also satisfies the policy of keeping tort and contract sufficiently separate. Section 552B provides—and the Texas Supreme Court has expressly endorsed—a prohibition on recovering in tort the loss of the benefit of a bargain entered into by the plaintiff.[156] This is to say that the plaintiff cannot recover in tort on the subject matter of the contract.[157] The Restatement creates a narrow tort duty separate from any contractual obligations between the parties and rules out the possibility of recovering contractual damages. Where the defendant supplied the information to the plaintiff pursuant to a contract between them, the plaintiff must choose between a contract action (for the benefit of his bargain) or a negligent misrepresentation action (recovering any out-of-pocket expenses independent of the benefit of his contract).[158] Where no contract exists between the parties, the plaintiff is nonetheless unable to recover essentially contractual damages from a party to the transaction who is not the plaintiff's immediate contractual partner.[159] So limited, the narrow tort of negligent misrepresentation does not pose a danger of intruding into contract law's realm.

Thus, the tort duty created by Restatement §§ 552 and 552B is narrow in scope. First, the duty is only owed to a limited class of potential plaintiffs. This limitation satisfies the policy concerns behind *Robins Dry Dock* and *Testbank*. Second, the duty is only to prevent losses "over and above" those losses that constitute damage for a breach of a contractual obligation. This is true whether or not the plaintiff seeks to recover the benefit of his or her bargain from his or her immediate contractual partner or another party to the transaction. This limitation satisfies the well-recognized policy—underscored by the doctrine of *Seely* and *East River Steamship*—to keep tort and contract law separate. Accordingly, the principles behind the rule are best accommodated in the context of negligent misrepresentation by explicitly recognizing the inherent limits on the legal duty imposed, not by introducing the additional confusion of the economic loss rule.

154. *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977) ("The liability stated in this section is . . . more restricted than that for fraudulent misrepresentation stated in § 531." Section 531 imposes "liability to the persons or class of persons whom he intends or *has reason to expect* to act or to refrain from action in reliance upon the misrepresentation.") (emphasis added).

155. Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc).

156. *See supra* notes 97–101 and accompanying text.

157. *Id.*

158. RESTATEMENT (SECOND) OF TORTS § 552 cmt. a.

159. *Cf.* Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 109 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (reasoning that without vertical privity between the parties, suits against a seller for economic damages are not permitted).

B. *What's Wrong with Using the Economic Loss Rule?*

By barring negligent misrepresentation claims on the basis of the "economic loss rule," courts sacrifice the doctrinal clarity that could be gained by viewing the tort as outside the scope of any economic loss rule and adhering strictly to the Restatement. The term "economic loss rule" embodies various concepts in both Texas law[160] and American law generally.[161] Among the Texas negligent misrepresentation cases surveyed in this Article, courts appear to use the "economic loss rule" quite inconsistently. For instance, the "economic loss rule" in *Hou-Tex* was that "economic damages are not recoverable unless they are accompanied by actual physical harm to a person or their property"—a standard hornbook recitation of the *Robins/ Testbank* prong.[162] By contrast, the rule applied in *Sterling Chemicals* was that "a plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses [of] a breach of contract claim." The court in *Hubler* set forth a similar rule to *Sterling Chemicals*. Though the latter cases reached the same result as *Hou-Tex*, this "economic loss rule" appears to resemble the "physical harm" requirement announced in *Hou-Tex* in name only.

In fact, the "economic loss rule" applied to several Texas negligent misrepresentation cases appears to be little more than a recitation of the type of harm that Restatement § 552B imposes a duty to avoid—out-of-pocket expenses separate from the benefit of the plaintiff's contract.[163] Where this is the case, it is not the substance of the

160. *Compare* Coastal Conduit & Ditching, Inc. v. Noram Energy Corp., 29 S.W.3d 282, 286 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (recognizing an "economic loss rule" barring tort claims where "there is no accompanying claim for damages to a person or property"), *with* Bank of America v. Hubler, 211 S.W.3d 859, 863 (Tex. App.—Waco 2007, pet. granted, judgm't vacated w.r.m.) (holding that the "economic loss rule" bars claims where there is no injury independent of the subject matter of a contract between the parties).

161. *See* Catherine Paskoff Chang, *Two Wrongs Can Make Two Rights: Why Courts Should Allow Tortious Recovery for Intentional Concealment of Contract Breach*, 39 COLUM. J.L. & SOC. PROBS. 47, 59 (2005) ("The variety of formulations of the rule across jurisdictions complicates any discussion of the effects of the economic loss rule."); *see also supra* note 3.

162. *See, e.g.*, 3 MODERN TORT LAW: LIABILITY AND LITIGATION § 26:40 (2d ed. 2011) ("[T]he economic loss doctrine does not bar recovery when economic loss is accompanied by physical injury to persons or other property."); 68 AM. JUR. 3D *Proof of Facts* § 16 (2002) ("[T]ort actions are subject to the economic loss rule, under which economic damages in tort are not recoverable unless they are accompanied by actual physical harm to persons or their property.").

163. *See* Sterling Chems., Inc. v. Texaco, Inc., 259 S.W.3d 793, 797–98 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding the plaintiff's negligent misrepresentation claim to be barred by the economic loss rule because the plaintiff did not satisfy the independent injury requirement of Section 552B); *accord Hou-Tex*, 26 S.W.3d at 107; CCE, Inc. v. PBS & J Constr. Servs., Inc., No. 01-09-00040-CV, 2011 WL 345900, at *8 (Tex. App.—Houston [1st Dist.] 2011, no pet. hist.) (holding that, because the plaintiff's claim satisfied the independent injury requirement of section 552B, the

courts' analysis that is misguided, but merely the terminology. It would be clearer for the court in *Sterling Chemicals*, for example, to have held that, because plaintiff did not claim damages permitted under section 552B, the claim simply did not meet the requirements for the narrow tort of negligent misrepresentation recognized in Texas. Instead, the court appears to have held that, *because* the plaintiff's claim did not satisfy section 552B, it was barred by the "economic loss rule."[164] At first glance, this may seem like merely a formal refinement; however, given the myriad meanings of "economic loss rule," it can only create a risk of confusion to incorporate this terminology into the application of section 552B. Thus, the refinement is pragmatic as well.

The inconsistency in courts' understanding of the term "economic loss rule" is further demonstrated by the cases cited to support the rule. For instance, *Hubler* cited *Coastal Conduit* for the general rule that "a party cannot recover 'economic losses in negligence.'"[165] On that basis, the court held that the plaintiff could not recover because her claim "sounds in contract alone."[166] However, the court in *Coastal Conduit* expressly distinguished itself from the cases holding that the economic loss rule bars negligence claims arising from the subject matter of a contract; instead it endorsed a rule like that in *Testbank*, applicable primarily between contractual strangers.[167] *Sterling Chemicals* also cited *Coastal Conduit*, this time for the proposition that the "economic loss rule" applied to claims by third parties. But, again, the "economic loss rule" applied in *Coastal Conduit* was completely different in nature from the rule in *Sterling Chemicals* (barring claims arising from the subject matter of a contract), making the analogy entirely inappropriate. Finally, *Sterling Chemicals* explains that *Hillsboro* "specifically addressed the application of the economic loss rule to negligent misrepresentation."[168] But in reality, *Hillsboro* makes no mention of a distinct "economic loss rule"; instead, *Hillsboro* does precisely what this Article suggests: it recites and strictly applies the limitations in the Restatement.[169] That appellate judges cannot consistently cite economic loss rule authority that actually sup-

claim was not barred by the economic loss rule); *see also Hou-Tex, Inc.*, 26 S.W.3d at 109 (describing federal cases interpreting Texas law, many of which decide whether the "economic loss rule" bars a claim for negligent misrepresentation based on whether section 552B is satisfied).

164. *Sterling Chems., Inc.*, 259 S.W.3d at 797–98.

165. *Hubler*, 211 S.W.3d at 863.

166. *Id.*

167. *See* Coastal Conduit & Ditching, Inc. v. Noram Energy Corp., 29 S.W.3d 282, 287 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (concluding that the products liability cases cited by the parties were taken "out of context").

168. *Sterling Chems., Inc.*, 259 S.W.3d at 797.

169. D.S.A., Inc. v. Hillsboro Indep. Sch. Dist., 973 S.W.2d 662, 663–64 (Tex. 1998) (reproducing Restatement § 552B in full and holding that negligent misrepresentation requires an "independent injury").

ports their substantive propositions militates against the rule's continued viability in the context of negligent misrepresentation.

C. *History Sheds Light Upon the Proper Scope of the Economic Loss Rule*

The common law roots of the actions for general negligence and misrepresentation, respectively, reveal a historical divide that provides a useful means of implementing the restriction on the economic loss rule suggested in this Article.[170] The Restatement version of negligent misrepresentation is found in section 552, which appears in Division Four. Division Four—"Misrepresentation"—articulates the modern descendants of the common law writ of deceit.[171] The modern actions for fraud and negligent misrepresentation "have a common ancestor in the old writ of deceit."[172] The deceit-derived actions appear to be closer cousins to contract actions than modern negligence actions, the old writ of deceit having been "thought of solely in relation to a contract[,] its use being limited almost entirely to cases of direct transactions between the parties."[173] It was not until the case of *Pasley v. Freeman* imposed liability for deceit against a defendant, whose misrepresentation induced the plaintiff to enter into contractual relations with a third party, that an independent tort was born.[174] Many actions that now fall under section 552 can still be explained under contract principles: courts imply a promise of care on information suppliers to the recipient and extend the benefit of that promise to certain "third-

170. On the value of examining the historical context of legal rules to better understand their modern application, Justice Oliver Wendell Holmes stated:

> The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. [It is a part of the] skepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

171. *See* RESTATEMENT (SECOND) OF TORTS ch. 22 scope note (1965) ("So far as misrepresentation has been treated as giving rise in and of itself to a distinct form of tort liability, it has been concerned and identified with resulting pecuniary loss. Its origin lay in the common law action of deceit . . . .").

172. Case Comment, *Liability of Advertising Endorsers*, 2 STAN. L. REV. 496, 500 (1950); *see also* KEETON ET AL., *supra* note 98, § 105, at 727–28 ("There was an old writ of deceit known as early as 1201 . . . . At a later period this writ was superseded by an action on the case in the nature of deceit, which became the general common law remedy for fraudulent or even non-fraudulent misrepresentation . . . .").

173. Case Comment, *supra* note 172, at 500; *see also* KEETON ET AL., *supra* note 98, § 105, at 728 ("Its use was limited almost entirely to cases of direct transactions between the parties, and it came to be regarded as inseparable from some contractual relation.").

174. *See Pasley v. Freeman*, (1789) 100 Eng. Rep. 450 (K.B.); *see also* WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 329 (2d ed. 1932) ("[Deceit] doctrine was not finally established until the decision of [Pasley] v. Freeman in 1789" (footnote omitted)).

party beneficiaries" for whose use and guidance the information supplier intended the information.[175]

On the other hand, negligence is found in Division Two of the Restatement. The modern negligence action derives from the old writ of trespass on the case.[176] Far from the pecuniary loss redressed by the deceit-based actions, the action for trespass originally provided a remedy for plaintiffs who "[were] beaten, wounded, chained, imprisoned, starved, carried away to another country, or suffered many 'enormities,'" but it was broadened to include all avoidable harm to persons or tangible property.[177] And it was exclusively this realm where the actions later limited by the economic loss rule developed.[178] Accordingly, the outer limits of this body of tort law conveniently mark the outer limits of the economic loss rule's sensible scope of application. "Negligent misrepresentation is a species of fraud with the scienter requirement relaxed; it is not a general application of negligence."[179] Thus, it is outside the area of tort law to which the economic loss rule sensibly applies.

One may argue that placing negligent misrepresentation outside the scope of the economic loss rule is merely semantics. This is because, as noted, many of the state and federal cases barring claims for negligent misrepresentation on the basis of the economic loss rule are, in effect, merely stating that the defendant prevails under an "economic loss rule" that bars claims for negligent misrepresentation that do not meet all the requirements of sections 552 and 552B. Framed this way, the cause of action created by those Restatement sections carves out a narrow *exception* to the economic loss rule, which bars the claim if the requirements of those sections are not satisfied. In contrast, under the approach suggested by this Article—conceptualizing negligent misrepresentation as a narrow tort to which the economic loss rule is inapplicable—the tort is not an exception to the economic loss rule but *outside of its reach altogether*; a claim failing to satisfy each element of

175. *See* Powers & Niver, *supra* note 36, at 495–96 (explaining cases of negligent misrepresentation by accountants on contract principles, but noting that a better explanation is that such cases "are [fraudulent] misrepresentation cases with inroads into the scienter requirement in fraud").

176. RESTATEMENT (THIRD) OF TORTS § 6 cmt. c (2010) ("Negligence liability for physical harm has deep roots in the common law. . . . [W]ithin the common-law writ system, negligence was the typical standard of liability when the plaintiff pleaded trespass on the case.").

177. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 465–67 (5th ed. 1956).

178. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 307–08 (1927) (expressly styled as some form of negligence action); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1020–21 (5th Cir. 1985) (en banc) (expressly styled as some form of negligence action); *see also* DOBBS & BUBLICK, *supra* note 3, at 444–45 (noting that "[p]roducts liability law grew up mostly in personal injury cases, not economic tort cases").

179. Powers & Niver, *supra* note 36, at 497.

the Restatement provisions fails, but not because of the economic loss rule. And the effect of this clarification goes beyond mere semantics.

Viewing negligent misrepresentations that meet the requirements of sections 552 and 552B as an exception to the economic loss rule would place the rule among a host of judicially created exceptions to the rule.[180] These exceptions, which vary by jurisdiction, were likely created in response to courts' application of the rule outside the factual contexts in which it originated. Courts often craft exceptions where they determine that imposing liability for economic harms will not proliferate lawsuits or where certain claims "carry with them an obvious self-limiting principle."[181]

However, in urging that negligent misrepresentation constitutes an exception to the economic loss rule, a plaintiff implicitly concedes to the defendant an important point—that the rule applies to misrepresentation claims *in the first place.* In the closely related context of fraud—another deceit-derived tort[182]—Professors Dobbs and Bublick spoke of the "rhetorical advantage" gained by proponents of the economic loss rule when courts began discussing fraud in terms of whether it was an exception to the economic loss rule.[183] They continued:

180. *See, e.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 55–56 (1st Cir. 1985) (citing the "many exceptions" to the economic loss rule, stating that "courts have neither enforced one clear rule nor considered the matter case by case"). Then-Circuit Judge Breyer went on to cite cases supporting the following nine exceptions: (i) economic loss accompanying physical harm; (ii) intentionally caused harm, generally; (iii) defamation and injurious falsehood; (iv) loss of consortium; (v) an injured person's medical costs paid by a family member; (vi) "negligent misstatements about financial matters"; (vii) "master-servant" liability; (viii) "telegraph-addressee"; and (ix) "commercial fishermen as special 'favorites of admiralty.'" *Id.* at 56. While Breyer's list of "exceptions" is illustrative of the way courts deal with the economic loss rule, he actually lists both exceptions to the rule and actions that fall outside the scope of the rule's application. *See id.* For instance, his first "exception"—economic loss accompanying physical harm—covers cases that fall without most formulations of the economic loss rule. *Id.* By definition, the economic loss rule applies only to *pure* economic losses—that is—those *unaccompanied* by physical harm. *See* ROBERTSON, ET. AL., *supra* note 1, at 253 ("[I]n ordinary negligence-based personal injury cases, all of the traditional elements of damages, aside from the pain and suffering portions, are designed to compensate for economic loss."); *see also* Priority Finishing Corp. v. LAL Const. Co., 667 N.E.2d 290, 292 (Mass. App. Ct. 1996) (stating, "we conclude that the economic loss doctrine does not apply because the plaintiff's pecuniary losses are derived from physical harm to property"); DOBBS & BUBLICK, *supra* note 3, at 445 (stating a related notion which actually *is* an exception for pure economic loss resulting from conduct that also *risks* personal injury, but that exception "has been undermined and it seems to have little current support").

181. *Barber Lines*, 764 F.2d at 56; *see also* Emily Kuwahara, Note, *Torts v. Contracts: Can Microsoft be Held Liable to Home Consumers for Its Security Flaws?*, 80 S. CAL. L. REV. 997, 1025 (2007) ("Essentially, the economic loss doctrine wipes away all liability, unless the courts create an exception for public policy reasons.").

182. *Cf. supra* notes 176–81 and accompanying text.

183. DOBBS & BUBLICK, *supra* note 3, at 629.

> [H]istorically, the *Seely* type of economic loss rule . . . did not deal with fraud of any kind, barring only negligence and strict liability suits, not intentional tort claims. And the *Robins* [type] rule . . . only addressed negligence claims by a plaintiff who had no property interest in the damaged goods. To allow the fraud claim does not look like an "exception" to the rules that never covered fraud in the first place.[184]

An analogy familiar to the tort scholar is the rhetorical significance of characterizing conduct as either: (i) misfeasance; or (ii) nonfeasance subject to an exception. While "[b]roadly speaking no person is under a duty to another unless he has entered upon some course of conduct towards another,"[185] the rule barring tort recovery for nonfeasance is subject to several loosely delineated exceptions: the volunteer exception, the relationship with the victim exception, the prior conduct exception, and the relationship with the perpetrator exception.[186] From "[a]n advocacy perspective," a plaintiff who loses the characterization battle, settling for a claim of nonfeasance subject to an exception, starts out at a significant rhetorical disadvantage.[187] The same effect likely faces the misrepresentation-plaintiff who settles for arguing that his or her claim is covered by—but also within an exception to—the economic loss rule. Thus in addition to doctrinal clarity,[188] the suggested clarification has the advantage of eliminating the rhetorical consequences courts cause litigants to face by re-conceptualizing Restatement negligent misrepresentation as an exception to the economic loss rule rather than a narrow, stand-alone tort to which the economic loss rule is not applicable.

V. CONCLUSION

"In conclusion, having reexamined the history and central purpose"[189] of both the economic loss rule and the tort of negligent misrepresentation recognized by Texas law, it appears that the two are genuinely incompatible. Thus, courts should restrict the scope of the economic loss rule such that it does not cover the cause of action for negligent misrepresentation. This will avoid the risk of confusion arising from unnecessarily invoking a rule with such ambiguous content.

184. *Id.*; *see also* Powers & Niver, *supra* note 36, at 497 ("In the case of negligent misrepresentation, it may be viewed as an outgrowth of the law of fraud, where the 'economic loss' rule has never been applicable.").

185. ROBERTSON, ET AL., *supra* note 1, at 222 (quoting Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1026–27 (1928)).

186. *Id.* at 223 n.2.

187. *See id.* at 234–35 (discussing the unfavorable outcomes for plaintiffs in cases in which the parties mischaracterized an arguable claim for misfeasance as a claim for nonfeasance or characterized their conduct as falling within the wrong exception).

188. *See supra* notes 170–75 and accompanying text.

189. Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc).

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It will also avoid the rhetorical consequences of viewing negligent misrepresentation as an exception to a general no-liability rule.

But by doing so, courts need not invite the dangers targeted by the economic loss rule—principally, vast, indeterminate liability and the blurring of the line between tort and contract law. Instead, the cause of action may be framed to impose a narrow tort duty to a limited class of plaintiffs to avoid causing non-contractual, out-of-pocket pecuniary loss. Fortunately, no change in the substantive law of negligent misrepresentation is necessary to effect this clarification. This is because the tort described in Restatement §§ 552 and 552B—to which Texas is firmly committed—is already nicely tailored to satisfy the policy goals of the economic loss rule.

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