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I. INTRODUCTION

Historically, tort recovery for purely economic loss unaccompanied by physical property damage has been barred by judicial application of the economic loss rule. The rule finds its roots in the English common law which generally defined legal duties in terms of contractual relationships. With the gradual expansion of tort law, the rule was developed in an effort to clearly define the outer limits of tort liability. Preservation of the physical harm requirement serves as a convenient touchstone for a manageable limit on liability. This article examines the history of the economic loss rule, both nationally and within the state of Wyoming. It explores the application of the rule and the exceptions which have developed to it. Although tort law has dramatically expanded from its English common law roots, the viability of the economic loss rule continues. Wyoming courts should avoid the quagmire of ad hoc exceptions and continue to apply a "bright line" rule.

II. HISTORY OF THE ECONOMIC LOSS RULE

The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectancy interests created through an agreement between private parties, and the law of tort, which seeks to protect citizens and their property by imposing a duty to use reasonable care to avoid physical harm to others.[1] Although there is some overlap, tort and contract are two distinct theories of recovery. Dean William Prosser summarized this distinction as follows:

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1. Sidney R. Barrett, Jr., *The Center Holds: The Continuing Role of the economic loss rule in Construction Litigation*, CONSTRUCTION LAW., April 1991, at 3. *See* Flintkote Co. v. Dravo Corp., 678 F.2d 942, 949 (11th Cir. 1982).

> 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 gave rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties . . . . 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.[2]

The economic loss rule precludes recovery in tort where a person suffers only economic loss. The rule is based upon the concept that, absent privity of contract, no cause of action lies against a defendant whose negligence prevents a plaintiff from obtaining a prospective pecuniary advantage.[3] The rule was largely adopted in section 766C of the Restatement (Second) of Torts. That section provides that an actor is not liable for purely pecuniary harm caused by the actor's negligent interference with a third-party's performance of his contract "with [the plaintiff], or . . . with [plaintiff's] performance of his contract or making the performance more expensive or burdensome."[4]

This rule has evolved throughout the past century, barring recovery for economic loss when unaccompanied by physical harm. Although receiving wide acceptance, the rule has been expressed in different ways and its result explained on various grounds. For example, some courts have simply ruled that the defendant owed no duty to plaintiff seeking compensation for purely economic losses.[5] Other courts have reached the same result by applying the doctrine of proximate cause.[6] Several courts have viewed the general rule against recovery as necessary to limit damages to reasonably foreseeable consequences of negligent conduct.[7] This

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2. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613 (4th ed. 1971).

3. Union Oil Co. v. Oppen, 501 F.2d 558, 563 (9th Cir. 1974). *See also* Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983) (Rovira, J., dissenting).

4. RESTATEMENT (SECOND) OF TORTS § 766C (1977).

5. *See, e.g.*, Mandal v. Hoffman Constr. Co., 527 P.2d 387 (Or. 1974) (denying contractor for a city recovery of economic losses resulting from another contractor's negligent performance of its contract with the city).

6. *See, e.g.*, Rickhards v. Sun Oil Co., 41 A.2d 267 (N.J. 1945) (denying merchant on island recovery for lost profits caused by negligent destruction of only bridge connecting mainland with island).

7. For example, in Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931), the court denied a lender's claim that the defendant's accountants had negligently audited financial statements on which the lender had relied. In dismissing the claim, Justice Cardozo stated, "If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate

concern is often manifested as an issue of causation and has lead to the requirement of physical harm which serves as a convenient touchstone to limit recovery. The physical harm requirement functions as part of the definition of the causal relationship between the defendant's negligent act and the plaintiff's economic damages, thereby acting as a convenient limit on otherwise boundless liability.[8] Pursuant to this view, the physical consequences of negligence are limited but indirect economic injury is unbounded. The Court of Appeals of Ohio elaborated upon the possibilities of indefinite liability in a case where the negligence of a gas company caused an immense fire which interrupted business activities of various companies in the vicinity, stating:

> If, one, who by his negligence is legally responsible . . . not only to those who have sustained personal injuries or physical property damage but also to everyone who has suffered an economic loss . . . . [T]he door would be open to claims for damages based on delay by all those who may have had contracts with [plaintiff's employer] either to deliver materials to the company or to receive from the company the products manufactured by it. Cases might well occur where a manufacturer would be obligated to close down his factory because of the inability of his supplier due to a fire loss to make prompt deliveries; the power company with a contract to supply a factory with electricity would be deprived of the profit which it would have made if the operation of the factory had not been interrupted by reason of fire damage; a man who had a contract to paint a building may not be able to proceed with his work; a salesman who would have sold the products out of the factory may be deprived of his commissions; the neighborhood restaurant which relies on the trade of the factory employees may suffer a substantial loss.[9]

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amount for an indeterminate time to an indeterminate class." *Id.* at 444. *See also* Aikens v. Baltimore & Ohio R.R. Co., 501 A.2d 277 (Pa. 1985). Employees of a plant damaged by a train derailment sued the railroad for lost wages. The court affirmed the dismissal of the complaint because the railroad had no knowledge of the contracts between the plant and its employees and thus had no way to foresee harm to the plaintiff's interests. Permitting the claim "would create an undue burden upon the industrial freedom of action," posing "a danger to our economic system." *Id.* at 279.

8. *See* Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974). The United States Court of Appeals recognized the strength of the rule, stating "that a contrary rule, which would allow compensation for all losses of economic advantages caused by defendant's negligence, would subject the defendant to claims based upon remote and speculative injuries which he could not foresee in any practical sense of the term." *Id.* at 563; *see also* Byrd v. English, 43 S.E. 419 (Ga. 1903) (holding a plaintiff who owned a printing plant could not recover lost profits when defendant negligently damaged utilities electrical conduits which supplied power to the plant).

9. Stevenson v. East Ohio Gas Co., 73 N.E.2d 200, 203-04 (Ohio Ct. App. 1946).

The immediate policy reasons behind the rule are readily apparent. Given the vestigial control devices in the early law of negligence, the courts feared that once a duty to avoid economic loss was recognized outside a contractual relationship, there would be no logical end to this kind of liability.[10] "The old bogey of 'the opening of the flood gates of litigation' raised its head . . . in many early negligence cases,"[11] spawning a judicial reluctance to intertwine the law of contracts and the law of tort.[12]

The rule has been applied in a wide variety of factual circumstances. A common scenario is negligent injury to the person or property of one party which in turn causes economic loss to another party, usually the plaintiff in a tort action. For example, courts have denied recovery where personal injury to a victim results in economic loss to the victim's employer through loss of the victim's services,[13] or to one who had a con-

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10. *See* General Foods Corp. v. United States, 448 F. Supp. 111, 113 (D. Md. 1978). Plaintiff sought to recover economic damages from defendants Penn Central Transportation Co. and the United States for its injuries arising out of the closing of a bridge over a canal which interrupted plaintiff's business activities. *Id.* In denying defendants' motion to dismiss, the court applied the economic loss rule, stating:

> Courts which have addressed this issue have repeatedly expressed concern that a contrary rule would open the door to virtually limitless suits, often of a highly speculative and remote nature. Such suits would expose the negligent defendant to a severe penalty, and would produce serious problems in litigation, particularly in the areas of proof and apportionment of damages.

Id. at 113.

11. *See* Christopher Harvey, *Economic Losses and Negligence*, 50 CAN. BAR REV. 580, 582 (1972).

12. The United States Supreme Court, in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), upheld the economic loss rule. In that case, the manufacturer of ship turbines failed to properly install certain components, resulting in the destruction of the turbines. The owner of the ship sued the manufacturer in negligence and strict liability to recover the cost of repair and lost profits from loss of use of the ship. The Court based its decision not on the nature of the damages incurred, but on the source of the duty to avoid harm. The opinion acknowledged the "need to keep [tort law] and contract law in separate spheres and to maintain a realistic limitation on damages." *Id.* at 871. Similarly, the Fourth Circuit Court of Appeals upheld the economic loss rule, applying South Carolina law. 2000 Watermark Assocs., Inc. v. Celotex Corp., 784 F.2d 1183 (4th Cir. 1986). There, the court held that a condominium association could not recover the cost of repairing a defective roof in an action for negligence. The court found that this was properly a contract claim, stating that "historically the only tort action available to the disappointed purchaser suffering an intangible economic loss was an action for fraud." *Id.* at 1185.

13. *See, e.g.*, Baughman Surgical Assocs., Ltd. v. Aetna Casualty & Sur. Co., 302 So. 2d 316 (La. Ct. App. 1974) (holding defendant insurer not liable to plaintiff professional medical corporation for loss of working time when one of its employees was injured as a result of the accident with the insured); Ferguson v. Green Island Contracting Corp., 328 N.E.2d 792, (N.Y. 1975) (denying employer recovery of economic loss sustained as a result of negligent injury to employee responsible for product design and development who was very difficult to replace); and Snow v. West, 440 P.2d 864 (Or. 1968) (holding employer had no cause of action for lost profits due to loss of employees' services resulting from defendant's alleged negligence in causing their deaths).

tractual obligation to provide medical care to the victim,[14] or to an insurance company that insured the victim's life or health.[15] In other cases, courts have denied recovery where the destruction of property belonging to a party resulted in some economic injury to the plaintiff.[16] In several cases, courts have denied recovery for losses sustained by plaintiffs as a result of the defendant's negligent destruction of a bridge which caused economic losses to plaintiffs.[17] In another, plaintiffs who lost their jobs after the defendant negligently destroyed the factory where they worked could not recover their loss of employment.[18] Likewise, courts have denied recovery in numerous cases where the defendant negligently cut a utility company's power cable or gas line thereby depriving plaintiff of gas or electricity.[19]

Judicial discomfort with the rule's general restriction of liability for the economic consequences of negligence has lead to numerous exceptions. Two generalizations underlie the numerous exceptions. First, the common rationale for allowing recovery of purely economic losses is foreseeability.[20] Second, the degree to which a defendant knew or should

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14. Fifield Manor v. Finston, 354 P.2d 1073 (Cal. 1960) (denying recovery to a non-profit organization retirement home which was obligated under a lifecare contract to provide medical care to party negligently injured by defendant).

15. *See, e.g.*, Conn. Mut. Life Ins. Co. v. New York & N.H. Railroad, 25 Conn. 265 (1856) (insurance company paid on life insurance policy; holding payment from tortfeasor in absence of subrogation not recoverable when insurance company paid on life insurance policy); and Peoria Marine and Fire Ins. Co. v. Frost, 37 Ill. 333 (1865) (fire insurance policy).

16. *See* cases cited *supra* note 12. *See also* cases cited *infra* note 17.

17. Rickards v. Sun Oil Co., 41 A.2d 267 (N.J. 1945) (holding defendant not liable to plaintiffs who sought recovery of "losses from expectant gains" when defendant's barge negligently crashed into and damaged a draw bridge which served as the only means of access to the island on which plaintiffs' business premises were situated); In Petition of Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968) (holding defendant whose negligence caused the closing of a bridge over the Buffalo River was not liable to plaintiffs who were engaged in the business of shipping grain on the river and who sought recovery of expenses incurred as a result of the interruption of their business); and In re Marine Navigation Sulphur Carriers, Inc., 507 F. Supp. 205 (E.D. Va. 1980), *affirmed* 638 F.2d 700 (4th Cir. 1981) (dismissing plaintiff's claims for damages which included interference with contractual obligations, loss of business expectancies, and increased business expenses, against defendant who negligently caused the closing of a bridge).

18. Adams v. Southern Pac. Transp. Co., 123 Cal. Rptr. 216 (Cal. Ct. App. 1975); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio Ct. App. 1946). To the extent that *Adams* holds that there can be no recovery for negligent interference with prospective economic advantage, it was later disapproved by the California Supreme Court in J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979).

19. *See, e.g.*, Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212 (5th Cir. 1980); Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957 (5th Cir. 1972); and Byrd v. English, 43 S.E. 419 (Ga. 1903).

20. *See, e.g.*, Heyer v. Flaig, 449 P.2d 161 (Cal. 1969) (decedent's daughters not barred from maintaining action against attorney who negligently failed to fulfill testamentary directions) *overruled on other grounds*, Laird v. Blacker, 828 P.2d 691 (Cal. 1992); Licata v. Spector, 225 A.2d 28 (Conn. C.P. 1966) (holding legatees could sue attorney for negligent drafting of will); Rozny v. Marnul, 250 N.E.2d 656, 663 (Ill. 1969) (holding surveyor liable to remote purchasers for negligently measuring boundary lines);

have known the extent of the consequences of the negligent conduct, including economic loss, plays a dispositive role in a court's holding; more knowledge means more culpability.[21]

One of the most common circumstances in which courts permit recovery of economic loss is where there is also some physical injury.[22] In that regard, a common tenet of the general rule is that there can be no recovery for economic loss in the absence of some physical injury.[23] Another well-established exception to the rule arises in cases involving private actions for public nuisances. For example, in some cases plaintiffs were able to recover from a defendant who had negligently interfered with or destroyed the plaintiffs' exercise of a public right of access to a public or common resource when the plaintiffs' business was based, in part, on this right.[24] These cases have allowed recovery based on the theory that the defendant could foresee the pecuniary losses that those who made direct use of the resource would suffer because the losses were so closely linked, through defendant's behavior, to the resource.[25]

Courts have also recognized exceptions where there is some special relationship between the tortfeasor and the individual or business deprived of economic expectations. Such relationship is commonly found where the defendant stands in a fiduciary or professional relationship to the plaintiff. For example, a trustee may be liable if, in fulfilling his fiduciary obligations, he negligently injures the economic interests of a beneficiary.[26] The

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H. Rosenblum, Inc. v. Adler, 461 A.2d 138, 153 (N.J. 1983) (holding independent auditor who negligently made inaccurate public statement liable to stockholder subsequently holding worthless stock); and A.E. Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764 (Wis. 1974) (allowing tenant to maintain action to recover from architect and builder for defective design and construction of building that resulted in economic loss to tenant even though parties not in privity).

21. *See* cases cited *supra* note 20.

22. *See, e.g.*, LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342 (8th Cir. 1991), *cert. denied*, 455 U.S. 1019 (1982); Newlin v. New Eng. Tel. & Tel. Co., 54 N.E.2d 929 (Mass. 1944); Duchene v. Wolstan, 258 N.W.2d 601 (Minn. 1977); Dunlop Tire & Rubber Corp. v. F.M.C. Corp., 385 N.Y.S.2d 971 (N.Y. App. Div. 1976); Guido v. Hudson Transit Lines, 178 F.2d 740 (3d Cir. 1950) (allowing plaintiff to recover expected profit from a two-year lease of its truck, which was destroyed by defendant).

23. *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Test Bank, 752 F.2d 1019, 1021 (5th Cir. 1985); Just's, Inc. v. Arrington Constr. Co., Inc., 583 P.2d 997 (Idaho 1978).

24. *See, e.g.*, Louisiana *ex rel.* Guste v. M/V Test Bank, 752 F.2d 1019 (5th Cir. 1985) (*en banc*) (holding defendants, responsible for ship collision that polluted Mississippi River, liable for economic loss to all commercial fisherman, shrimpers, crabbers, and oystermen); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (commercial fishermen who used commercial waters allowed to recover from defendant who negligently caused oil spill); Masonite Corp. v. Steede, 23 So. 2d 756 (Miss. 1945) (granting operator of fishing resort recovery for profits lost due to pollution); Hampton v. North Carolina Pulp Co., 27 S.E.2d 538 (N.C. 1943) (holding polluter liable for downstream landowner's economic losses).

25. *See* cases cited *supra* note 20.

26. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 174, 201 (1979).

special relationship exception has been extended to auditors,[27] surveyors,[28] termite inspectors,[29] engineers,[30] and attorneys.[31] Common among those cases which have expanded the special relationship exception is the fact that the plaintiffs belong to a particularly foreseeable group. The special relationship exception appears to be an expression of the court's satisfaction that a duty of care existed because the plaintiffs were particularly foreseeable and the injury was proximately caused by the defendant's negligence.

Courts have also imposed liability for negligent injury to economic interests where there is a special relationship between the plaintiff and the initial victim of the defendant's negligence, as opposed to those examples provided above where there is a special relationship directly between the plaintiff and the defendant. This most often occurs in cases involving a family relationship.[32] Spouses have recovered damages for loss of consortium resulting from an injury to the other spouse, and parents have recovered for the loss of services resulting from injury to a child.[33] In some cases, family members of the victim have also recovered costs incurred in caring for the victim.[34]

Another instance in which a claim for economic loss has been recognized involves the situation where the economic loss flowed from or was "parasitic" to physical damage to the person or property. As stated by the Ninth Circuit:

> The right to recover for economic losses which are parasitic to an injury occurring to person or property is not questioned . . .

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27. *See* H. Rosenblum, Inc. v. Adler, 461 A.2d 138 (N.J. 1983) (holding independent auditor whose negligence resulted in inaccurate public financial statement liable to plaintiff who bought stock in company for purposes of sale of business to company when stock subsequently proved to be worthless).

28. *See* Rozny v. Marnul, 250 N.E.2d 656 (Ill. 1969) (holding surveyor whose negligence resulted in error in depicting boundary of lot held liable to remote purchaser).

29. *See* Hardy v. Carmichael, 24 Cal. Rptr. 475 (Cal. Ct. App. 1962) (holding termite inspectors whose negligence resulted in purchase of infested home liable to out-of-privity buyers).

30. *See* M. Miller Co. v. Central Contra Costa Sanitary Dist., 18 Cal. Rptr. 13 (Cal. Ct. App. 1961) (holding engineers whose negligence resulted in successful bidder's losses in performing construction contract liable).

31. *See* Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962) (holding attorney whose negligence caused intended beneficiary to be deprived of proceeds of the will liable to beneficiary).

32. *See* WILLIAM L. PROSSER AND W. KEETON, THE LAW OF TORTS § 125 (5th ed. 1984).

33. *See id. See also* In re Knowles v. United States, 554 N.W.2d 183 (S.D. 1996) and United States v. Dempsey, 635 So. 2d 961 (Fla. 1994).

34. *See, e.g.*, Follansbe v. Benzenberg, 265 P.2d 183 (Cal. Ct. App. 1954); Thompson v. City of Bushnell, 105 N.E.2d 311 (Ill. 1952); and Hansen v. Hayes, 154 P.2d 202 (Or. 1944).

> Furthermore, this is the case even though frequently the magnitude of the economic loss so far overshadows that of the physical injury as to warrant the assertion that the general rule, barring recovery absent a physical injury, is but a formalism.[35]

Thus, where the injury was initially to the person or the property of the person with whom plaintiff was engaged in economic relations and plaintiff's economic expectancy was damaged by reason of such injury, recovery has been allowed.

Likewise, in *Aktieselskabet Cuzco v. Sucarseco*,[36] plaintiff cargo owners recovered sums which they had been obliged to pay under a contribution clause after the carrying ship was damaged through defendant's negligence. There, both vessels were at fault and both were damaged. Although the cargo was physically damaged by the collision, this fact appears to have had no bearing on the Court's resolution of the issue. Rather, the Court recognized that the right of cargo owners to have their general average contribution restored sprang directly from the tort and was in no sense derivative or parasitically dependent upon the presence of a physical injury.[37]

Finally, some courts have permitted recovery of economic losses under alternative theories where plaintiff would have otherwise had no direct action against defendant based upon a negligence theory. The doctrine of subrogation has been used to recover economic loss where such recovery would be otherwise unavailable in a direct negligence action.[38] A defendant who negligently destroys property is normally liable in negligence only to the owner of the property.[39] Nevertheless, the company

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35. Union Oil Co. v. Oppen, 501 F.2d 558, 567 (9th Cir. 1974).

36. 294 U.S. 394 (1935).

37. *Id.* at 399.

38. Subrogation is defined as:

> The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who has substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities. Subrogation denotes the exchange of a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtor all the rights, which the creditor, if unpaid, might have done.

BLACK'S LAW DICTIONARY 1427 (6th ed. 1990); *See also* United States v. Munsey Trust Co. of Wash. D.C., 332 U.S. 234, 242 (1947).

39. Insurance Co. v. Brame, 95 U.S. 754 (1877) states:

> The relation between the insurance company and McLemore, the deceased, was created by contract between them, to which Brame [the person who killed the deceased] was not a party. The injury inflicted by him [Brame] was upon McLemore, against his personal rights; that it happened to injure the plaintiff [Insurance Company] was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing.

which insures the property owner may be subrogated to the insured's claim against the defendant and is therefore allowed to recover from defendant the amount paid under the policy of insurance.[40]

In other circumstances, plaintiffs are allowed to bring an action directly against a defendant for breach of contract, although plaintiff has suffered only economic losses. A case in point involved a defendant who entered into a contract with a city for the renovation of a downtown business area.[41] The contract required the defendant to take certain precautions to limit the disruption to the businesses within the area to be renovated. Plaintiff, the operator of a retail business located within the renovation area, brought an action against the defendant claiming that its business had been damaged by the defendant's negligent failure to take precautions required in the contract. Applying the economic loss rule, the court specifically held that the plaintiff could not recover in negligence because the damages were purely economic.[42] However, the court found that plaintiff could bring an action directly against the defendant for breach of contract under a third party beneficiary theory.[43]

One may draw several conclusions after examining the decisions of the courts that have construed these exceptions. One differentiating factor between those cases allowing recovery and those denying recovery is foreseeability; that is, recovery hinges on whether a defendant could foresee that the negligent conduct would cause harm to a specific person, known class of persons, or foreseeable persons under the circumstances.[44] What a reasonably prudent person would do under the circumstances of a particular case comprises the most general test of negligence. Specifically, courts discussing the concept of duty have stated that it should encompass one's knowledge of the circumstances and the risk of harm one's actions created in these circumstances, including one's reasonable apprehension of risk.[45]

Id. at 758. *See also* Connecticut Mut. Life Ins. Co. v. New York & N. H. Railway, 25 Conn. 265 (1856) (holding insurance company has no direct right of action against negligent tortfeasor who injures the insured because its damages were too remote and indirect); and Peoria Marine & Fire Ins. Co. v. Frost, 37 Ill. 33 (1865) (holding insurance company cannot maintain an action in its own name against tortfeasor who has damaged insured property in order to recovery for what it has paid the insurer).

40. Just's, Inc. v. Arrington Constr. Co., Inc., 583 P.2d 997 (Idaho 1978).

41. *Id.*

42. *Id.* at 1005-06.

43. *Id.* at 1002.

44. *See* cases cited *supra* note 20. The issue of foreseeability is important both to the question of the duty that a defendant owed and the proximate cause of a plaintiff's injuries. Kelly M. Hnatt, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L.R. 1181 (1988).

45. *See* cases cited *supra* note 20.

Although recovery of economic loss has generally been limited to circumstances in which the potential for open-ended liability can be avoided, a few recent cases suggest a more relaxed judicial attitude towards the problem of indefinite liability, or at least a greater willingness to deal with it on a case-by-case basis. For the most part, however, such liability has been extended only to third parties whose losses were not only foreseeable, but actually foreseen. In two relatively recent cases, *H. Rosenblum, Inc. v. Adler*[46] and *Citizens State Bank v. Timm, Schmidt & Co.*,[47] the New Jersey and Wisconsin Supreme Courts respectively refused to restrict liability to specifically foreseen plaintiffs, holding instead that liability should extend to virtually all foreseeable plaintiffs. The Wisconsin court stated specifically that liability of accountants for economic loss suffered by third parties should be governed by the general principles of Wisconsin negligence law according to which a tortfeasor is fully liable for all foreseeable consequences of his negligence, unless under the facts of a particular case liability is denied on grounds of public policy.[48] Among the factors mentioned by the court to be considered on a case-by-case basis as matters of public policy were whether the injury was wholly out of proportion to the culpability of the defendant; whether allowance of recovery would place too unreasonable a burden on the defendant; and whether allowance of recovery would enter a field that has no sensible or just stopping point.[49] Thus, the problems associated with indeterminate liability are still considered, but on a case-by-case basis.

In an opinion of potentially broader applicability, the California Supreme Court indicated its willingness to deal with problems of indefinite liability on a case-by-case basis. In *J'Aire Corp. v. Gregory*,[50] the defendant negligently failed to complete a construction project in a timely manner thereby forcing the plaintiff, a lessee who operated a restaurant in the premises involved, to remain closed for a long period of time. The trial court sustained a demurrer to plaintiff's claim for lost profits, but the California Supreme Court reversed and held that there was no absolute bar to recovery for negligent interference with prospective economic advantage.[51] The court acknowledged the problems associated with inde-

46. 461 A.2d 138 (N.J. 1983).
47. 335 N.W.2d 361 (Wis. 1983).
48. *Id.* at 366.
49. *Id.*
50. 598 P.2d 60 (Cal. 1979).
51. *Id.* at 65-66. The court said:
These factors [enumerated in Biakanja v. Irving, 320 P.2d 16 (Cal. 1958)] and ordinary principles of tort law such as proximate cause fully adequate to limit recovery without the drastic consequences of an absolute rule which bars recovery in all cases [where economic interests are harmed]. (Citation omitted). Following these principles, recovery for negligent

terminate liability but concluded that a case-by-case consideration of factors such as the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury, together with ordinary principles of tort law, are fully adequate to limit liability without resort to an absolute rule.[52]

Several maritime decisions also point in the same direction. In *In re Kinsman Transit Co.*,[53] the court, in denying recovery for damages resulting from a blockage of the Buffalo River, rejected any absolute rule prohibiting recovery for negligent interference with contract.[54] Instead, the court chose to apply normal tort principles and conclude that, on the facts of that case, the connection between defendant's negligence and the plaintiff's damages was too tenuous to permit recovery.[55]

In *Union Oil Co. v. Oppen*,[56] the plaintiffs, commercial fishermen, suffered losses as a result of an oil spill which diminished the quantity of aquatic life in the Santa Barbara Channel. The court acknowledged the general rule that negligent interference with prospective economic advantage is not actionable but nevertheless refused defendants' request for partial summary judgment.[57] In effect, the court held that the defendants' alleged negligent conduct was actionable because plaintiffs' alleged injury was a foreseeable consequence of that conduct, thus applying general principles of negligence law even though plaintiffs' injuries were purely economic.[58] On the other hand, the court noted that plaintiffs, as commercial fishermen, made direct use of the sea in the ordinary course of their business, and carefully stated that it did not mean to open the door to claims by other parties who might have suffered economic losses as a

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interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk.

J'aire, 598 P.2d at 65-66.

52. *J'Aire Corp.*, 598 P.2d at 64.

53. 388 F.2d 821 (2d Cir. 1968).

54. *Id.* at 823

55. *Id.* at 824.

56. 501 F.2d 558 (9th Cir. 1974).

57. *Id.* at 570.

58. *Id.* at 569.

[W]e cannot escape the conclusion that under California law the presence of a duty on the part of the defendants in this case would turn substantially on foreseeability. That being the crucial determinate, the question must be asked whether the defendants could reasonably have foreseen the negligently-conducted drilling operations might diminish aquatic life and thus injure the business of commercial fishermen. We believe the answer is yes.

Id.

result of the oil spill.[59] Thus, although the court spoke in terms of foreseeability, the opinion strongly suggests that the court would restrict liability short of the limits of foreseeability, perhaps to those who make direct use of the sea.

Another case involving familiar facts forced the court to confront the problem of indefinite liability more directly. In *Pruitt v. Allied Chemical Corp.*,[60] the defendants were allegedly responsible for chemical pollution of the James River and the Chesapeake Bay. Plaintiffs included commercial fishermen, seafood wholesalers, retailers, restaurateurs, marina operators, boat owners, tackle and bait shop owners, and others, all of whom claimed the pollution in some way caused them economic loss. The defendant, relying on *Union Oil*, urged the court to limit its liability to those who exploited the bay directly. The court observed, however, that no sharp distinction existed between those who relied on the bay directly and those who relied on the bay indirectly, rather that the different groups of plaintiffs depended on the bay in varying degrees of immediacy.[61] Moreover, the court noted that, as one traced the stream of profits flowing from the bay's seafood, the set of potential plaintiffs became almost infinite.[62] Accordingly, the court acknowledged a need to impose some limit on the defendant's potential liability, but confessed that it had no articulable reason for excluding any particular group of plaintiffs.[63] Ultimately, the court held that the losses suffered by those who purchased and marketed seafood from commercial fishermen were not actionable, because they were too remote, but that the losses suffered by commercial fishermen and by boat, tackle and bait shop, and marina owners were actionable.[64] The court described its resolution of the case as "an attempt to tailor justice to the facts of the instant case."[65]

Finally, in *People Express Airlines, Inc. v. Consolidated Rail Corp.*,[66] the New Jersey Supreme Court fashioned a tort of negligent infliction of economic loss. The court's decision represents a cogent analysis of tort law and the economic loss rule. There, a fire began in the freight yard of defendant Consolidated Rail Corporation (Conrail) after gas escaped from a tank car punctured during coupling operation. The municipal authorities, in consultation with Conrail, evacuated the area

59. *Id.* at 570.
60. 523 F. Supp. 975 (E.D.Va. 1981).
61. *Id.* at 978-79.
62. *Id.* at 979.
63. *Id.* at 980.
64. *Id.*
65. *Id.*
66. 495 A.2d 107 (N.J. 1985).

within a one-mile radius of the fire to lessen the risk if the tank car exploded. The evacuation area included a terminal of the Newark International Airport housing People Express' business operations. Although the feared explosion never occurred, People Express employees could not use the terminal for twelve hours. The airline sued Conrail for negligence, seeking to recover the amount of its fixed operating costs allocable to the period of evacuation and lost profits. The trial court applied the economic loss rule and granted summary judgment to Conrail.[67] People Express appealed.

The New Jersey Supreme Court attempted to strike a compromise by fashioning a tort of negligent infliction of economic loss. The court reasoned that ordinary principles of foreseeability would create hopelessly unpredictable claims.[68] A per se rule against recovery, however, would frustrate the purposes of tort law to compensate wronged persons for their injuries and to hold liable the responsible parties.[69] The court attempted to resolve the dilemma by holding that a defendant has a duty of due care to avoid inflicting economic loss "to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer damages from its conduct."[70] The court's proximate cause and damage analysis ran together. A defendant cannot proximately cause economic loss that is "only generally foreseeable," but may proximately cause economic loss that it is "in a position particularly to foresee."[71] It is liable only for those damages it proximately causes, that is, those that "are reasonably to be anticipated in view of defendant's capacity to have foreseen . . . the risk" to the plaintiff or class of plaintiffs.[72] The New Jersey Supreme Court held that Conrail could have foreseen People Express' economic loss in the event of a gas leak because of the proximity of its offices to the freight yard, defendant's knowledge of the volatility of the gas, the obvious impact of a shutdown on the airline's operations, and the apparent existence of an emergency response plan which called for the nearby area to be evacuated in the event of a leak.[73]

The cases discussed above illustrate the difficulties that courts have encountered when they recognize exceptions to the general rule of nonliability for purely economic loss. The law is replete with cases in which

67. *Id.* at 109.
68. *Id.* at 116.
69. *Id.* at 111.
70. *Id.* at 116.
71. *Id.* at 117.
72. *Id.* at 118.
73. *Id.*

recovery is allowed without a well-reasoned or well-defined basis for the decision. In the aftermath of these appellate decisions, trial courts and trial counsel are left to deal with, essentially, ad-hoc exceptions to the general rule. Across the country, the state of the law is, at best, a confusing mosaic of appellate decisions.

III. HISTORY OF THE ECONOMIC LOSS RULE IN WYOMING

The economic loss rule was first recognized by the Wyoming Supreme Court in *Buckley v. Bell*.[74] There, plaintiff brought an action to recover the cost of his hay baler which was destroyed by a fire caused by the acts of defendant. Plaintiff had ordered some regular gasoline from defendant for the baler but defendant's employee incorrectly filled the baler with diesel fuel. Upon discovering the mistake, plaintiff drained the diesel fuel from the baler's tank and filled the tank with regular gasoline. The engine backfired and the gasoline was ignited. The hay baler was destroyed in the fire. Plaintiff filed seeking recovery for the cost of his hay baler and additional costs incurred in harvesting his hay because his hay baler was destroyed. Plaintiff's action was premised upon theories of strict products liability, breach of warranties, and negligence. Because plaintiff sustained injury to his property (the hay baler), the economic loss rule was not applicable. However, the Wyoming Supreme Court expressly recognized that the tort theory of strict products liability is an inappropriate vehicle for recovery of a purely economic loss.[75] Approximately four years later, the Wyoming Supreme Court again opined that in the absence of injury to a plaintiff or her property, recovery of purely economic losses is not available under a tort theory.[76] In *Champion Well Service, Inc. v. NL Indus.*, the plaintiff/employer sued defendant claiming that defendant negligently injured one of plaintiff's key employees and, as a result, caused economic loss to plaintiff. It was undisputed that plaintiff suffered no direct injury. Defendant filed a motion to dismiss under Rule 12(b)(6) of Wyoming Rules of Civil Procedure, which was granted by the trial court. On appeal, the Wyoming Supreme Court expressly recognized that where the economic damages are not associated with any injury to person or property, there is no cause of action for purely economic losses.[77] In so holding, the court stated that:

74. 703 P.2d 1089 (Wyo. 1985).
75. *Id.* at 1095.
76. *See* Champion Well Serv., Inc. v. NL Indus., 769 P.2d 382 (Wyo. 1989).
77. *Id.* at 384.

> [T]o hold that [defendant] owed a duty to diverse third persons, including [plaintiff/employer], to avoid injury to [plaintiff's employee] would be to adopt a rule that is too broad, unwieldy, and impractical in present day society . . . . We are convinced that the cause of action argued by [plaintiff] would erase the bright line which "has traditionally marked negligence claims for economic harm as off limits."[78]

In that same year, the Wyoming Supreme Court again held that the economic loss rule is the law in Wyoming.[79] Recognizing that the economic loss rule is based upon the principle that a claim for economic loss on contract cannot be translated into a tort action, the court echoed the reasoning employed by numerous courts throughout the past century which have also applied the rule.

> The recognized majority rule is that a claim for pure economic loss . . . does not lie on a theory of negligence or strict liability . . . . This rule is founded on solid policy justifications . . . . The authorities recognize that the law of contracts is far better suited to deal with the dissatisfaction on the part of [the contracting parties].[80]

If there were any confusion as to the application of the economic loss rule in Wyoming, such confusion was put to rest in *Richardson Assoc. v. Lincoln-Devore, Inc.*,[81] and *Schneider Nat'l, Inc. v. Holland Hitch Co.*[82] In *Richardson Assocs.*, a faulty construction case, the court refused to apply tort concepts to a cause of action premised upon contractual principles.[83] Similarly, in *Schneider Nat'l*, the court stated in clear and unequivocal language that purely "economic damages . . . are not recoverable under tort theories of strict liability and warranty."[84] Accordingly, the economic loss rule is the law in Wyoming and establishes that a claim for economic loss on contract cannot be translated into a tort action.

The economic loss rule cannot be cast aside simply by characterizing defendant's conduct as negligent. This principle was recognized by Justice Joseph Cardine in his statement that:

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78. *Id.* at 385 (citing WILLIAM L. PROSSER & W. KEETON, THE LAW OF TORTS § 129, at 1001 (5th ed. 1984)).

79. Continental Ins. v. Page Eng'g Co., 783 P.2d 641 (Wyo. 1989).

80. *Id.* at 647 (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)).

81. 806 P.2d 790 (Wyo. 1991).

82. 843 P.2d 561 (Wyo. 1992).

83. *Richardson Assocs.*, 806 P.2d at 814.

84. *Schneider National, Inc.*, 843 P.2d at 586.

> An action upon a contract does not become an action also in tort simply by use of the word negligence in a pleading. If that were so, every contract action would also be a tort action.[85]

This distinction has also been recognized by Justice Richard Thomas:

> It is clear to me that, when the relationship of the parties to an action is founded in a business context, and they have made contracts concerning their obligations to one another, those contractual responsibilities ought to be resolved as contractual matters. I shall always perceive it a mistake to create a tort claim as an overlay to a breach of contract. That has the effect only of confusing two very separate areas of the law.[86]

These two statements indicate that the Wyoming Supreme Court recognizes the important distinction between contract and tort actions.

The Wyoming Supreme Court has had the opportunity to address the economic loss rule on a number of occasions over the last decade. The Wyoming cases have arisen in a number of factual settings. To its credit, the Wyoming Supreme Court has limited tort recovery for purely economic losses. The decisions have been well-reasoned and reflect appropriate recognition of the legitimate purpose of the rule, which is to establish a well-defined limit on tort recovery. The continuing vitality of the economic loss rule in Wyoming requires that future decisions follow this precedent. The Wyoming Supreme Court should avoid the temptation to create exceptions to the rule which will result in case-by-case decision making, as is found in many states.

V. CONCLUSION

At common law, the courts in England understood and accepted contract principles. Courts in England disliked and limited tort principles. The concerns in Old England ring true today. As Justice Cardine noted, every contract action could conceivably be a tort action. The economic loss rule maintains the important distinction between contract and tort principles. It imposes well-defined, manageable limits upon tort actions. Wyoming courts should avoid the temptation to create exceptions to the rule, as many states have done. The economic loss rule should continue to

85. *See* First Wyo. Bank v. Continental Ins. Co., 860 P.2d 1064, 1093 (Wyo. 1993) (Cardine, J., concurring in part and dissenting in part).

86. *Id.* at 1093-94 (Thomas, J., dissenting opinion).

be applied in the state of Wyoming to maintain the delicate balance between the well-defined boundaries of contract claims and the amorphous boundaries of tort claims.