

1-1-2000

Redefining the Professional Service Contract: The Evolution and Deconstruction of Florida's Economic Loss Rule

Emily M. Usow

Follow this and additional works at: <http://repository.law.miami.edu/umblr>



Part of the [Law Commons](#)

Recommended Citation

Emily M. Usow, *Redefining the Professional Service Contract: The Evolution and Deconstruction of Florida's Economic Loss Rule*, 8 U. Miami Bus. L. Rev. 1 (2000)

Available at: <http://repository.law.miami.edu/umblr/vol8/iss1/2>

**REDEFINING THE PROFESSIONAL SERVICE CONTRACT: THE
EVOLUTION AND DECONSTRUCTION OF FLORIDA'S
ECONOMIC LOSS RULE**

EMILY M. USOW, ESQ.*

I. INTRODUCTION	1
II. THE SCOPE AND ORIGIN OF THE ELR	3
III. ARGUMENTS FOR AND AGAINST REDUCING THE SCOPE OF THE ELR	10
IV. PROFESSIONAL MALPRACTICE - CONTRACT OR TORT	13
V. THE ELR, PROFESSIONAL STANDARDS, AND STATUTORY REMEDIES FOR PROFESSIONAL MALPRACTICE	22
VI. CONCLUSION	27

I. INTRODUCTION

In 1999, the Florida Supreme Court disarmed a common law doctrine called the economic loss rule (“ELR”) that threatened to extinguish many commercial tort causes of action. In *Moransais v. Heathman*, the Florida Supreme Court took its stand against the invidiously expanding doctrine.¹ Subsequently, Florida courts have issued several opinions commenting on, expanding, or interpreting *Moransais*, and consequently have redefined common law negligence.

Generally, the economic loss rule prohibits plaintiffs from bringing tort claims to recover damages arising from defendants’ breaches of contracts, unless the tort caused personal injury or damage to property outside the scope of the contract.² If the ELR is strictly applied, the defendants’ liability is limited to damages contemplated in the contract, even if intentional torts were committed.³ The application of this common law doctrine, which apparently

* Emily M. Usow, Esq., an associate of Rollnick & Linden, P.A. in Coral Gables, Florida, earned her J.D. from the University of Miami School of Law in 1999. She thanks Professor Patrick Gudridge of the University of Miami School of Law, and Neil P. Linden, Esq. and Philippe Dev , Esq. of Rollnick & Linden, P.A., for their advice in the preparation of this article.

¹ *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

² See Harold D. Oehler & John W. Campbell, *And the Walls Came Tumbling Down: Tort Remedies Collapse Under the Growing Weight of the Economic Loss Rule*, THE ADVOCATE, Sept. 1994, Vol. 21, No. 1, at 1, 1.

³ See *id.*

originated in Florida,⁴ has caused a lot of confusion in courts throughout the United States.

The active debate surrounding the ELR prompted commercial plaintiffs to condemn the rule as “the monster that ate commercial torts,”⁵ while commercial defendants cheered, “finally, a contract is worth the paper it’s written on!”⁶ The courts have carved out numerous exceptions to the ELR, including prohibiting many professionals⁷ from asserting the economic loss rule as a defense to negligence and malpractice. Until recently, the question of whether the ELR should be allowed to preclude commercial tort actions against professionals was unresolved in most states that recognized the economic loss rule defense.⁸

In 1999, the Florida Supreme Court addressed this question in *Moransais v. Heathman*.⁹ The court recognized that the question of whether professionals should be treated differently than other contractors has been an area of concern in the ELR controversy. In response, the *Moransais* court asserted firmly that providers of professional services, regardless of their profession, should not be able to assert the economic loss rule as a defense to malpractice claims.¹⁰

This article considers the *Moransais* decision and subsequent opinions in light of the origin of the economic loss rule and the reasoning behind previous exceptions to the ELR. Additionally, this article examines the ways in which the common law of negligence has been altered since the inception of the

⁴ The economic loss rule originated when “the Florida Supreme Court held that contract principles, not tort principles, must govern claims for economic loss without an accompanying physical injury or damage to property outside the contract.” See Robert H. Buesing & John E. Johnson, *The Economic Loss Rule: A Trial Lawyer’s Guide to Protecting Contract Rights*, 66 FLA. B.J. April 1992, at 38 (citing *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987)). But see *Moransais*, 744 So. 2d at 979 (“the exact origin of the economic loss rule is subject to some debate”).

In 1987, the Florida Supreme Court addressed the ELR in three decisions: *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987), *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc.*, 511 So. 2d 992 (Fla. 1987), and *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). These cases are referred to as the “*Florida Power, Aetna Life, and AFM trilogy*.”

⁵ Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J., Nov. 1995, at 34.

⁶ Buesing & Johnson, *supra* note 4.

⁷ In Florida, a profession is “any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida.” *Moransais*, 744 So. 2d at 976 (citing *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992)).

⁸ See generally *Blanche M. Manning, Legal Malpractice: Is it Tort or Contract?*, 21 LOY. U. CHI. L.J. 741 (1990); but see *Moransais*, 744 So. 2d at 983 (holding the economic loss rule should not bar any professional malpractice action, including actions against attorneys) and *Collins v. Reynard*, 607 N.E. 2d 1185, 1186 (Ill. 1992) (holding that legal malpractice may be brought in either tort or contract).

⁹ *Moransais*, 744 So. 2d 973 (Fla. 1999).

¹⁰ See *id.* at 983.

economic loss rule. The article also reflects upon previous arguments for the expansion and suppression of the ELR and comments on the consequences of the court's decision in *Moransais*.

II. THE SCOPE AND ORIGIN OF THE ELR

Until recently, the ELR barred recovery of damages in most tort actions unless the victim had also suffered a personal injury or property damage apart from a preexisting contract.¹¹ Under the economic loss rule, a plaintiff who suffered only monetary injury as a result of another's conduct could not recover those losses in tort.¹²

The economic loss rule originated in the products liability context.¹³ The United States Supreme Court first recognized the ELR in *East River Steamship Corp. v. Transamerica Delaval, Inc.*¹⁴ In *East River* the parties contracted for the design, manufacture, and installation of turbines for supertankers; however, the turbines malfunctioned, resulting in damage to the turbines, but causing no other property damage or personal injury.¹⁵ The plaintiff filed a products liability action seeking damages for the cost of repairs and income lost due to the broken turbines.¹⁶ The Supreme Court set forth the very narrow holding that a products liability claim could not stand if a commercial plaintiff alleged injury to only the product itself resulting in purely economic loss.¹⁷

¹¹ See Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter Than Morals of the Marketplace?*, 42 VILL. L. REV. 789 (1997); Jeffery A. Winikoff & Maxine Streeter Bradford, *Blue Sky Law: 1993 Survey of Florida Law*, 18 NOVA L. REV. 45, 94 (1993). See also *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987); *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc.*, 511 So. 2d 992 (Fla. 1987); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). But see *Monroe v. Sarasota County Sch. Bd.*, 746 So. 2d 530 (Fla. 2d DCA 1999) ("Despite dicta in *Moransais* that suggests a cause of action can be alleged without allegations of bodily injury or property damage, we continue to hold, as a general rule, that bodily injury is an essential element of a cause of action in negligence.").

¹² See Reeder R. Fox & Patrick J. Loftus, *Riding the Choppy Waters of East River: Economic Loss Doctrine Ten Years Later*, 64 DEF. COUNS. J. 260, 260 (1997).

¹³ See Esquibel, *supra* note 11, at 791; *Moransais v. Heathman*, 744 So. 2d 973, 983 (Fla. 1999)

¹⁴ *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

¹⁵ See *id.* at 859.

¹⁶ See *id.* at 861.

¹⁷ See *id.* at 876. Economic loss is defined as "loss due to repair costs, decreased value, and lost profits," "consequential damages in the nature of cost of repair or replacement or lost profits," or "damages resulting from the loss of use of the product." Fox & Loftus, *supra* note 12, at 263 (citing *East River Steamship Corp. v. Transamerica Devaval, Inc.*, 476 U.S. 858, 870 (1986); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 577 A.2d 631, 634 (Pa. Super. Ct. 1990); Ellen S. Pryor, *The Last Ten Years: What Your Students Know That You Should Know Too: Tort Developments, 1985-1996*, 46 J. LEGAL EDUC. 609, 610 (1996).

The foundation of the ELR is based on the *East River Court's* conclusion that contract law, in general, is a superior means of allocating the risks of disappointed economic expectations.¹⁸ The Court explained that plaintiffs are, or should be, adequately protected from economic loss through contract remedies.¹⁹ The *East River Court* reasoned that the injury suffered if a product breaks is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.²⁰ Since no person or other property is damaged, the resulting losses (i.e. repair costs, decreased value, and lost profits) are purely economic.²¹ The damages are essentially the failure of the purchaser to receive the benefit of his bargain, damages that are traditionally the core concern of contract law.²²

The *East River Court* asserted that if a product breaks, "the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."²³ The rationale for this assertion is that contract law and the law of warranty are well suited to commercial controversies because the parties set the terms of their own agreements.²⁴ Courts perceive contract law as a superior means of allocating damages for disappointed economic expectations because contract law contains many tools that limit the expansive and unpredictable scope of economic losses.²⁵ Contract law protects the economic expectations of contracting parties that bargain freely in allocating and limiting liability.²⁶ Alternatively, tort law protects the interests of society by imposing a duty of reasonable care to prevent property damage or physical harm to others.²⁷

Specifically, the *East River Court* suggested that through contract negotiations, manufacturers may restrict their liability by disclaiming

¹⁸ See *East River*, 476 U.S. at 871-875. See also Pryor, *supra* note 17, at 610.

¹⁹ See Esquibel, *supra* note 11, at 789.

²⁰ See *East River*, 476 U.S. at 868.

²¹ See *id.* at 869.

²² See *id.* See also E. ALLAN FARNSWORTH, CONTRACTS § 2.8 at 839 (1982).

²³ *East River*, 476 U.S. at 871.

²⁴ See *id.* at 872-73. Although recognizing that warranty and contract law have some limitations, the *East River Court* believed that "the main currents of tort law run in different directions from those of contract and warranty." *Id.* at 373, n.8. The *East River* decision was very limited in its application to the viability of a products liability claim when a product breaks, damaging only itself. The applicability of the Court's rationale, that parties should be able to contract for increased or limited liability, to professional malpractice cases will be discussed later in this article.

²⁵ See Pryor, *supra* note 17, at 610. Contractors may only be held liable for damages that naturally arise from the breach of contract or arise from special circumstances that the contractors were aware of at the time of the agreement. *Hadley v. Baxendale*, 9 Exch. 341, 354-55, 156 Eng. Rep. 145 (1854).

²⁶ See *Fox & Loftus*, *supra* note 12, at 261.

²⁷ See *Moransais v. Heathman*, 744 So. 2d 973, 981 (Fla. 1999) (citing *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993)).

warranties or limiting remedies.²⁸ In exchange, purchasers pay less for the product.²⁹ At the same time, the damages available in breach of warranty actions give wronged consumers repair costs and lost profits, and places them in the position they would have been if the product had not been defective.³⁰ After *East River*, the ELR quickly spread outside the products liability context and into other commercial sectors of tort law.³¹ The Florida Supreme Court ruled on three cases shortly after *East River* that were subsequently referred to as the *Florida Power, Aetna Life, and AFM* trilogy.³² These cases extended the ELR to other commercial sectors, setting forth the rule that parties cannot recover in tort for damages arising solely out of a contractual relationship.³³ Specifically, in *Florida Power & Light Co. v. Westinghouse Electric Corp.*,³⁴ and *Aetna Life & Casualty Co. v. Therm-O-Disc, Inc.*,³⁵ the ELR precluded negligence and strict liability claims because the parties had contracted for the manufacture of goods. In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, the economic loss rule barred tort claims against a defendant that failed to perform advertising services as contracted by the parties.³⁶ The *Florida*

²⁸ See *East River*, 476 U.S. at 873. See also U.C.C. §§ 2-316, 2-719.

²⁹ See *East River*, 476 U.S. at 873.

³⁰ See *id.* at 873-74. See also L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 60-63 (1936); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.8, at 105 (3d ed. 1986). See also *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

³¹ See *Esquibel*, *supra* note 11.

³² See *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987); *Aetna Life & Cas. Co. v. Therm-O-Disc, Inc.*, 511 So. 2d 992 (Fla. 1987); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987).

³³ See *Winikoff & Bradford*, *supra* note 11, at 94.

³⁴ *Florida Power & Light Co.*, 510 So. 2d at 899. The facts of *Florida Power* are similar to those presented in *East River*. The parties contracted for the design, manufacture, and supply of steam generators. Subsequently, the consumer discovered that the generators were defective and brought an action based on breach of warranty and negligence against the manufacturer. The Eleventh Circuit Court of Appeals certified the question of whether Florida law permits a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property other than the allegedly defective goods. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 785 F.2d 952 (11th Cir. 1986). In 1999, the Florida Supreme Court in *Moransais* asserted that its "holding in *Florida Power & Light* remains sound in its adherence to the fundamental principals of the precedents [the Court] relied upon in applying the so-called economic loss rule." *Moransais v. Heathman*, 744 So. 2d 973, 980 (Fla. 1999).

³⁵ *Aetna Life & Cas. Co.*, 511 So. 2d at 992. Therm-O-Disc manufactured a switch that was purchased by Energy Conservation Unlimited and then incorporated into heat transfer units. The heat transfer units were later installed in military base housing. Subsequently, the switches failed to activate, causing substantial damage. Aetna Life, Energy Conservation Unlimited's insurer, reimbursed the government for the damages then sued Therm-O-Disc for damages in separate counts of negligence, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for particular purpose, and strict liability. The Florida Supreme Court's decision primarily addressed questions of long-arm jurisdiction over Therm-O-Disc.

³⁶ *AFM Corp.*, 515 So. 2d at 180. AFM contracted with Southern Bell for advertising in the yellow

Power, *Aetna Life*, and *AFM* trilogy spawned numerous decisions from Florida's district courts of appeal, as well as several decisions from federal courts in the Eleventh Circuit, holding that absent accompanying personal injury or physical property damage, the ELR bars tort claims if parties are in a contractual setting, regardless of whether the parties had contracted for goods or services.³⁷

During the next ten years, the ELR spread at an alarming rate and was soon applied to bar claims for conversion,³⁸ civil theft,³⁹ Florida RICO,⁴⁰ tortious interference,⁴¹ breach of fiduciary duty,⁴² negligence,⁴³ strict

pages. Upon Southern Bell's failure to comply with the agreement, AFM chose to file an action based solely on a tort theory and specifically announced that it was not basing its tort theory on any agreement between the parties. See *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 796 F.2d 1467 (11th Cir. 1986). The AFM court applied the ELR to bar recovery in tort for purely economic losses arising out of a contract involving the purchase of services. See also Michael E. Hanzman, *Interstate Securities Corporation v. Hayes Corporation: An Unprecedented and Improper Expansion of Florida's "Economic Loss" and "Independent Tort" Rules*, 66 FLA. B.J. 42 (1992).

³⁷ See Esquibel, *supra* note 11, at 797.

³⁸ See *Alafaya Square Assocs., Ltd. v. Great Western Bank*, 706 So. 2d 39 (Fla. 5th DCA 1998); *In re Crestmark of Pinellas Park, Inc.*, 218 B.R. 621 (Bankr. M.D. Fla. 1997).

³⁹ See *Gambolati v. Sarkisian*, 622 So. 2d 47 (Fla. 4th DCA 1993); *Gilman Yacht Sales v. First Nat'l Bank of Chicago*, 600 So. 2d 1131 (Fla. 4th DCA 1992). But see *Burke v. Napieracz*, 674 So. 2d 756 (Fla. 1st DCA 1996) (holding that the ELR did not bar a civil theft claim where the underlying act did not arise out of a failure to perform the contract but rather from an affirmative act of theft independent from the contract). See also *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 24 Fla. L. Weekly S507, 1999 WL 983857 (Fla. 1999) (holding that the ELR does not bar statutory causes of action).

⁴⁰ See *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490 (Fla. 3d DCA 1994); *Futch v. Head*, 511 So. 2d 314 (Fla. 1st DCA 1987). But see *Comptech*, 24 Fla. L. Weekly S507 (holding that the ELR does not bar statutory causes of action).

⁴¹ See *Eclipse Med., Inc. v. American Hydro-Surgical Instruments, Inc.*, No. 96-8532-CIV-RYSKAMP, 1999 WL 181412 (S.D. Fla. Jan. 20, 1999); *Crain v. Sunbank/Gulf Coast, Inc.*, No. 95-1156-CIV-T-17C, 1996 WL 172984 (M.D. Fla. Apr. 11, 1996).

⁴² See *Interstate Secs. Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991); *Powell v. Mactown, Inc.*, 707 So. 2d 825 (Fla. 3d DCA 1998); *Karn v. Coldwell Banker Residential Real Estate, Inc.*, 705 So. 2d 680 (Fla. 4th DCA 1998); *Alafaya Square Assocs., Ltd.*, 706 So. 2d 39; *Ginsberg*, 645 So. 2d 490; *Airlines Reporting Corp.*, 841 F. Supp. 1166; *Rosa v. Florida Coast Bank*, 484 So. 2d 57 (Fla. 4th DCA 1986); *Nautica Int'l, Inc. v. Intermarine USA, L.P.*, 5 F. Supp. 2d 1333 (S.D. Fla. 1998). But see *First Equity Corp. of Florida, Inc. v. Watkins*, 24 Fla. L. Weekly D1758, 1999 WL 542639 (Fla. 3d DCA 1999) (holding that the economic loss rule has not abolished the cause of action for breach of fiduciary duty, even if there is an underlying oral or written contract); *Performance Paint Yacht Refinishing, Inc. v. Haines*, No. 99-7157-CIV-FERGUSON, 1999 WL 1285843 (S.D. Fla. Dec. 15, 1999). The Third District Court of Appeal in *First Equity Corp.* recognized that the Eleventh Circuit held that the ELR barred a breach of fiduciary claim in *Interstate Securities*, but felt that since the decision in *Moransais*, Florida's position regarding this issue had been modified.

⁴³ See *Ocean Ritz of Daytona Condominium v. GGV Assocs., Ltd.*, 710 So. 2d 702 (Fla. 5th DCA 1998); *Smith v. State ex rel. Florida A&M Univ.*, 701 So. 2d 348 (Fla. 1st DCA 1997); *All Am. Semi Conductor, Inc. v. Mil-Pro Servs., Inc.*, 686 So. 2d 760 (Fla. 5th DCA 1997); *Muns v. Shurgard Income*

liability,⁴⁴ product liability,⁴⁵ negligent misrepresentation,⁴⁶ and fraud⁴⁷ - all of which are commercial torts designed to redress primarily economic losses.⁴⁸ Under the ELR, plaintiffs could not allege an independent tort unless the damages were beyond the economic losses caused by a breach of contract.⁴⁹ The economic loss rule was applied to bar "all tort claims for economic losses without accompanying personal injury or property damage," and often prohibited legitimate commercial tort claims, in effect, allowing the ELR defense to be used as a sword rather than as a shield.⁵⁰

Perhaps the most recognized and criticized instance of the unrestrained widening of the ELR is demonstrated in *Interstate Securities Corp. v. Hayes Corp.*,⁵¹ in which the Eleventh Circuit asked whether a breach of fiduciary duty is foreclosed between parties to a contract, or whether it constitutes a tort separate and independent from an accompanying breach of contract, if there has been no physical injury or property damage.⁵² The *Interstate Securities* court relied on the fact that no relationship would have existed between the plaintiff and defendant if they had not entered into a contract.⁵³ Therefore, the court reasoned the defendant's duty of good faith and fiduciary duty came from the contract rather than from common law.⁵⁴

The *Interstate Securities* court used the ELR to bar tort claims without regard to the type of case involved or the ramifications of the result reached, and improperly expanded the ELR and independent tort doctrines beyond their

Properties Fund 16--L.P., 682 So. 2d 166 (Fla. 4th DCA 1996); *Fishman v. Boldt*, 666 So. 2d 273 (Fla. 4th DCA 1996); *Hurtado v. Stewart Title of Miami, Inc.*, 664 So. 2d 1081 (Fla. 3d DCA 1995).

⁴⁴ See *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 788 F. Supp. 1203 (S.D. Fla. 1992).

⁴⁵ See *Fishman*, 666 So. 2d 273; *National Marine Underwriters, Inc. v. Donzi Marine Corp.*, 655 So. 2d 176 (Fla. 3d DCA 1995).

⁴⁶ See *Straub Capital Corp. v. L. Frank Chopin, P.A.*, 724 So. 2d 577 (Fla. 4th DCA 1998); *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412 (Fla. 3d DCA 1995); *Florida College of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 982 F. Supp. 862 (M.D. Fla. 1997).

⁴⁷ See *Bankers Risk Mgmt. Servs., Inc. v. Av-Med Managed Care, Inc.*, 697 So. 2d 158 (Fla. 2d DCA 1997); *Sarkis v. Pafford Oil Co., Inc.*, 697 So. 2d 524 (Fla. 1st DCA 1997); *Dantzler Lumber & Export Co. v. Bullington Lumber Co., Inc.*, 968 F. Supp. 1543 (M.D. Fla. 1997). *But see* *Dantzler Lumber & Export Co. v. Bullington Lumber Co.*, 25 Fla. L. Weekly D203 (Jan. 19, 2000) *revising* 968 F. Supp. 1543.

⁴⁸ See *Esquibel*, *supra* note 11.

⁴⁹ See *Oehler & Campbell*, *supra* note 2.

⁵⁰ *Schwiep*, *supra* note 5, at 40 (citing *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993)).

⁵¹ *Interstate Secs. Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991). See also *Schwiep*, *supra* note 5; *James G. Dodrill II, Interstate Securities Corp. v. Hayes Corp.: Should the Economic Loss Doctrine Apply to Actions Against Fiduciaries?*, 47 U. MIAMI L. REV. 1193 (1991).

⁵² See *Interstate Secs.*, 920 F.2d at 769.

⁵³ See *id.* at 776-77.

⁵⁴ See *id.*

intended scope.⁵⁵ The *Interstate Securities* court was misguided in its assumption that the ELR applied to any type of case in which a plaintiff involved in a contractual relationship sought economic damages.⁵⁶ Essentially, *Interstate Securities* broadly asserted that if the parties' relationship was premised upon a contract, then any act of fraud, negligence, breach of fiduciary duty, or other tort, was classified as a breach of contract. Taking the *Interstate Securities* decision to its logical extreme, consumers of professional services would have been barred from bringing malpractice or breach of fiduciary claims against attorneys, accountants, appraisers, or other professionals who rendered services pursuant to a contract, no matter how egregious their conduct.⁵⁷

The economic loss rule was simply not designed to insulate parties from tort liability merely because the litigants were parties to a contract, the plaintiff's damages were purely economic, or the damages claimed under alternative tort and contract theories were the same.⁵⁸ Critics warn that indiscriminate application of the ELR, such as that employed in *Interstate Securities*, bars clearly appropriate and permissible tort claims.⁵⁹ This type of unfettered expansion of the economic loss rule prompted the Florida Supreme Court in *Moransais v. Heathman* to chastise trial and appellate courts for applying the ELR to situations well beyond the court's original intent.⁶⁰ The court stated:

We agree with the observations of those who have noted that because actions against professionals often involve purely economic loss without accompanying personal injury or property damage, extending the economic loss rule to these cases would effectively extinguish such causes of action. . . This is not what this Court had in mind many years ago when it applied the economic loss rule in *Florida Power & Light*.⁶¹

Within weeks of the *Moransais* decision, Florida's Third District Court of Appeal issued the first opinion applying *Moransais*.⁶² This opinion

⁵⁵ See Hanzman, *supra* note 36, at 42.

⁵⁶ See *id.* at 43. See also *First Equity Corp. of Florida, Inc. v. Watkins*, 24 Fla. L. Weekly D1758, 1999 WL 542639 (Fla. 3d DCA July 28, 1999).

⁵⁷ See Hanzman, *supra* note 36, at 43.

⁵⁸ See *id.*

⁵⁹ See *id.* at 42.

⁶⁰ See *Moransais v. Heathman*, 744 So. 2d 973, 980 (Fla. 1999).

⁶¹ *Id.* at 983 (citing Schwiep, *supra* note 5, at 40, and Manning, *supra* note 8, at 742).

⁶² See *First Equity Corp. of Florida, Inc. v. Watkins*, 24 Fla. L. Weekly D1758, 1999 WL 542639, at *50.

contradicted the Eleventh Circuit Court's *Interstate Securities* opinion. In *First Equity Corp. of Florida, Inc. v. Watkins*, the Third District Court of Appeal asserted that, in light of *Moransais*, "the economic loss rule has not abolished the cause of action for breach of fiduciary duty, even if there is an underlying oral or written contract."⁶³ In a footnote to this opinion, the *First Equity* court suggested that the *Interstate Securities* opinion was based on law that was "not entirely clear,"⁶⁴ and, indeed, was erroneous in light of *Moransais*.

However, *Moransais* does not explicitly overrule *AFM*,⁶⁵ the decision upon which *Interstate Securities* is based. *Moransais* cites *AFM* as an example of a holding that "appeared to expand the application of the [economic loss] rule beyond its principled origins and contributed to applications of the rule by trial and appellate courts to situations beyond [the Florida Supreme Court's] original intent."⁶⁶ Therefore it is not clear whether *Interstate Securities* has been overruled. The *Moransais* court's failure to overturn *AFM* has caused Florida's Southern District Court to make conflicting decisions regarding whether the ELR bars claims for breach of fiduciary duty.⁶⁷ Although *Moransais* was limited to professional malpractice, the *Moransais* court implied that other torts would not be excluded by the economic loss rule, stating that "[t]he rule, in any case, should not be invoked to bar well-established causes of action in tort."⁶⁸ The Third District Court interpreted this to mean that breach of fiduciary duty, as a well-established cause of action in tort, was not barred by the ELR. Thus, the court extended *Moransais* to further curtail the reach of the economic loss rule.⁶⁹ There is no indication that the Florida Supreme Court will affirm this position, nor is there any indication that it will hold otherwise.⁷⁰ This has caused the Southern District to assert that:

⁶³ *Id.*

⁶⁴ *Id.*

AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 (Fla. 1987).

⁶⁶ *Moransais*, 744 So. 2d at 981.

⁶⁷ *See Crowell v. Morgan Stanley Dean Witter*, 87 F. Supp. 2d 1287 (S.D. Fla. 2000) (held breach of fiduciary duty claims are not barred by the economic loss rule) and *Medalie v. FSC Secs. Corp.*, No. 98-3183-CIV-GOLD, 2000 WL 255918 (S.D. Fla. Feb. 1, 2000) ("[T]he court cannot hold that a claim of breach of fiduciary duty is not barred by the economic loss rule in light of *Moransais*.").

⁶⁸ *Moransais*, 744 So. 2d at 983.

⁶⁹ *See First Equity Corp. of Florida, Inc. v. Watkins*, 24 Fla. L. Weekly D1758, 1999 WL 542639 (Fla. 3d DCA July 28, 1999); *Inv Florida, Inc. v. Somerset Venturer, Inc.*, No. 3D98-3174, 2000 WL 276350 (Fla. 3d DCA March 15, 2000).

⁷⁰ *See Crowell*, 87 F. Supp. 2d 1287.

The continued vitality of *AFM* calls into doubt exactly how expansive a ruling *Moransais* intended to be. This question appears to be becoming an issue among the Courts of Appeal in Florida as evidenced by the broader Third District Court of Appeal decision in *First Equity* and the narrower Second District Court of Appeal in *Monroe* . . . [t]he *Moransais* decision is still too new, not specifically on point, and apparently subject to conflicting interpretations.⁷¹

Ultimately, the Florida Supreme Court will have to provide clarification of the *Moransais* decision and refine the scope of the economic loss rule.

III. ARGUMENTS FOR AND AGAINST REDUCING THE SCOPE OF THE ELR

Defendants relied on the ELR to insulate themselves from tort liability in cases in which the parties were involved in a contractual relationship and the plaintiff sought damages for purely economic losses.⁷² This was accomplished by arguing that if the litigants were parties to a contract and the damages alleged were purely economic, recovery in tort was barred by the economic loss rule.⁷³ “Likewise, defendants maintain[ed] that if conduct alleged to be tortious also constitute[d] the breach of a contract existing between the parties, or the damages claimed under alternative contract and tort theories [were] the same, recovery in tort [was] barred as a matter of law due to a failure to establish a tort distinguishable from or independent of the breach of contract.”⁷⁴

Proponents of the ELR believe that the rule, despite its expansive scope, promoted efficiency and predictability in commercial settings by limiting

⁷¹ *Medalie*, 2000 WL 255918, at *7

⁷² See *Hanzman*, *supra* note 36.

⁷³ See *id.*

⁷⁴ *Id.* The doctrinal test applied to determine whether intentional tort claims shall be barred by the ELR is an inquiry into the “independent tort”—that is tortious conduct arising independent from a breach of contract. Plaintiffs must be able to satisfy the elements of an independent tort and distinguish it from claims arising from a wrongful breach of contract to avoid dismissal of their claim. See *Pryor*, *supra* note 17. An example of tortious conduct arising independent from a breach of contract can be found in *Leisure Founders, Inc. v. CUC Int’l, Inc.*, 833 F. Supp. 1562 (S.D. Fla. 1993), wherein a stock purchaser fraudulently induced a stock holder to contract for the sale of shares prior to and distinct from a willful breach of contract. The *Leisure Founders* court explains a tort independent from a breach of contract by providing an example of a builder that steals doors installed in a buyer’s house. In such circumstances, the mere fact that a contract existed between the parties for building the house does not permit the builder to escape liability for stealing the doors. *Id.* at 1574.

liability to that contemplated in the contract.⁷⁵ Contracts and warranties have built-in limitations on liability, whereas tort actions could subject manufacturers to damages of indefinite amounts.⁷⁶ The limitation in a contract action comes from the parties' agreement and the requirement that consequential damages be foreseeable results of a breach.⁷⁷

Advocates of the economic loss rule argue that it encourages parties to contemplate economic risks by refusing to impose tort duties and corresponding cost burdens on the public.⁷⁸ In a free market economy, the ELR encourages people to bargain for private rights and remedies concerning economic issues.⁷⁹ Permitting recovery in tort for purely economic losses could make manufacturers liable for vast sums and cause them to raise the price of their goods.⁸⁰ Absent some measure of certainty regarding the scope of a contracting party's exposure, it is impossible to price goods or services accurately.⁸¹ By limiting a breaching party's liability to that agreed to in a contract, parties can conduct business without the threat of unlimited liability.⁸² However, this argument ignores the fact that manufacturers are rarely able to price goods accurately. The uncertainty arising from the risk of litigation is just one element in pricing goods with which manufacturers must contend.

Furthermore, proponents of the ELR believe the rule preserves the integrity of negotiated contracts. In practice, the economic loss rule precludes parties from seeking tort remedies if the contractual remedies are unfavorable and, in effect, inserting new terms attributing greater liability to a breaching party in previously negotiated agreements.⁸³ This argument disregards traditionally accepted means by which new terms are commonly inserted into prior agreements. Although parties to a contract have the option of negotiating certain terms, in the event that those parties fail to do so, many terms can be implied. Courts, when interpreting ambiguous contractual terms, often look outside the four corners of a contract to consider parol evidence, default provisions, and the previous conduct of the parties. Additionally, if a party to a contract commits an intentional tort, that conduct is outside the negotiated agreement given the parties' mutual obligations to perform a contract in good faith. Therefore, regardless of the terms of the agreement, the

⁷⁵ See Fox & Loftus, *supra* note 12, at 261.

⁷⁶ See *East River Steamship Corp. v. Transamerica Devaval, Inc.*, 476 U.S. 858, 874 (1986).

⁷⁷ See *id.* See also *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

⁷⁸ See *Hanzman*, *supra* note 36.

⁷⁹ See *Monroe v. Sarasota County Sch. Bd.*, 746 So. 2d 530 (Fla. 2d DCA 1999).

⁸⁰ See *East River Steamship*, 476 U.S. at 874.

⁸¹ See Fox & Loftus, *supra* note 12, at 261.

⁸² See *Oehler & Campbell*, *supra* note 2.

⁸³ See *Buesing & Johnson*, *supra* note 4.

wronged party should be allowed to recover damages for tortious acts outside of the contract. Rather than inserting new terms into an existing contract, these claims redress behavior, such as civil theft or fraud, that was never contemplated by parties contracting in good faith.

Further, the ELR supporters argue that by facilitating the early dismissal of tort claims, the economic loss rule pares down lawsuits, decreases court congestion, and facilitates the just, speedy, and inexpensive determination of legitimate claims.⁸⁴ However, hastily eliminating tort claims may not be the most prudent or effective way to decrease litigation. For example, in some cases contractual arbitration clauses may accomplish this goal by precluding contractors from involving the courts when resolving questions of liability.⁸⁵ In addition, the strictness of the burden of proof applied to establishing tort claims could determine the length of time for which litigation continues. If the burden of proof is clear, then many questions of liability could easily be determined by the court through summary judgment procedures. Otherwise, liability becomes a murkier question of fact that requires a lengthier jury trial.

Commercial plaintiffs are especially distressed because the economic loss rule has often been used to bar intentional tort claims, such as fraud. Critics argue that the ELR trumped the fundamental common law premise that people that commit intentional torts should be liable in tort alone, and contract claims should not even be considered in this context.⁸⁶ Many attorneys and academics criticize the application of the ELR to intentional tort claims.⁸⁷ At the time that they enter into a contract, plaintiffs simply do not anticipate that intentional torts, such as fraud, conversion, or civil theft, will be committed against them. Even if the parties are bargaining at arm's length, there is a presumption that they all intend to perform the contract in good faith. Therefore, in many cases of intentional torts, contract remedies may not exist or, if they do exist, may not provide the victim with complete compensation.⁸⁸

Furthermore, the ELR may bar tort claims and prohibit a litigant from seeking punitive damages for intentional wrongs that have been committed against him, thereby failing to deter future malicious and intentional acts by the defendant.⁸⁹ This could impede or bar the plaintiff's recovery because tort

⁸⁴ See Oehler & Campbell, *supra* note 2.

⁸⁵ However, in some cases if there are multiple parties to the contract or there are many parties to the litigation that may be liable, then the complex nature of the case may preclude arbitration. This is commonly the case in construction litigation matters involving contractors and subcontractors as well as a buyer.

⁸⁶ See Schwiep, *supra* note 5.

⁸⁷ See *id.* at 41-42.

⁸⁸ See Esquibel, *supra* note 11.

⁸⁹ See *id.*

claims are often subject to longer statutes of limitations than contract claims.⁹⁰ Moreover, tort claims are subject to fewer obstacles than contract claims because issues such as parol evidence, the statute of frauds, interpretation of terms, uncertainty, illegality, or lack of consideration need not be determined.⁹¹

IV. PROFESSIONAL MALPRACTICE -- CONTRACT OR TORT

"The economic loss rule is stated with ease but applied with great difficulty."⁹² "Lawyers and judges alike have found it difficult to determine when the rule applies and when an exception is appropriate."⁹³ Although the ELR is easily and sensibly applied in the products liability context, its application to professional malpractice actions always seemed forced. The cause of action for professional malpractice originated in contract law.⁹⁴ However, contract theories failed to provide adequate remedies for bodily injuries, such as those resulting from medical malpractice.⁹⁵ Therefore, the courts looked to the law of negligence and eventually applied negligence theories to other types of professional malpractice in which damages consisted primarily or purely of intangible economic losses.⁹⁶

Accountants, lawyers, architects, and other professionals providing primarily intellectual services ordinarily do so on the basis of a contract.⁹⁷ Generally, in legal malpractice cases, the plaintiff does not suffer personal injury or property damage; he suffers only intangible economic loss.⁹⁸ If the

⁹⁰ *Id.* Although Florida has adopted a single statute of limitations for contract and tort based professional malpractice actions, other jurisdictions have not. See Dodrill, *supra* note 51, at 1213. FLA. STAT. § 95.11(4)(a) (1998) provides:

(4) Within Two Years—

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in private with the professional.

See generally Joseph H. Koffler, *Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis*, 20 AKRON L. REV. 209, 229-36 (1986).

⁹¹ See Esquibel, *supra* note 11.

⁹² Sandarac Ass'n. v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349, 1352 (Fla. 2d DCA 1992).

⁹³ *Id.* at 1352.

⁹⁴ See Monroe v. Sarasota County Sch. Bd., 746 So. 2d 530, 535 (Fla. 2d DCA 1999).

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111 (1998).

⁹⁸ See William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic*

client is disappointed with the quality of the service and a financial loss is arguably attributable to his attorney's misconduct, the client may have a cause of action for breach of contract and perhaps also for malpractice.⁹⁹ Generally, courts discuss legal malpractice in terms of negligence, but some view it as a breach of contract, limiting recovery to economic losses.¹⁰⁰ The courts have not agreed on whether legal malpractice actions arise in tort from the attorney's breach of a duty of care,¹⁰¹ or in contract from the attorney's breach of the contractual relationship created at the time the parties agreed to the representation.¹⁰² This imprecise classification left legal malpractice claims vulnerable to attack by the economic loss rule.¹⁰³

As courts continued to accept the superiority of contract law in allocating the risks of economic losses, they also noted many contexts in which the ELR did not bar tort recovery.¹⁰⁴ Courts found several "special relationships" and other exceptions to the economic loss rule that prohibited the ELR defense. Exceptions were established for intentional misrepresentation and negligent misrepresentation by a person in the business of supplying information for the guidance of others in their business transactions.¹⁰⁵ Florida's Third District Court of Appeal even recognized an exception to the ELR for certain professional services even if the claimant was not in privity with the service provider.¹⁰⁶ Professionals barred from asserting the ELR defense include abstractors,¹⁰⁷ engineers,¹⁰⁸ appraisers,¹⁰⁹ and accountants.¹¹⁰

Loss" Rule, 23 TEX. TECH. L. REV. 477 (1992).

⁹⁹ See Bernstein, *supra* note 97, at 114.

¹⁰⁰ See Powers & Niver, *supra* note 98, at 494 (citing *Fireman's Fund Am. Ins. Co. v. Patterson & Liberty, Inc.*, 528 S.W. 2d 67, 69-70 (Tex. App. 1975), and *Atkins v. Crosland*, 406 S.W. 2d 263, 264-65 (Tex. App. 1966)). See also Manning, *supra* note 8, for a more complete discussion of the requirements to prevail on a tort-based legal malpractice claim in Illinois.

¹⁰¹ See, e.g., *RTC v. Boyar, Norton & Blair*, 796 F. Supp. 1010 (S.D. Tex. 1992); *Marias v. Marano*, 813 P.2d 350 (Idaho 1991); *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982).

¹⁰² See *Dodrill*, *supra* note 51, at 1213. See also *Zanders v. Jones*, 680 F. Supp. 1236 (N.D. Ill. 1988); *McConico v. Romeo*, 561 So. 2d 523 (Ala. 1990); *Jones v. Wadsworth*, 791 P.2d 1013 (Alaska 1990).

¹⁰³ See *Dodrill*, *supra* note 51, at 1213.

¹⁰⁴ See *Pryor*, *supra* note 17, at 610 (citing *Symposium on the Law of Bad Faith in Insurance and Contract*, 72 TEX. L. REV. 1203 (1994)).

¹⁰⁵ See *Cornelia Honchar Tuite, Limit on Malpractice Claims Promises to Change the Practice*, CHI. DAILY L. BULLETIN, January 3, 1992; *Moorman Mfg Co. v. National Tank Co.*, 435 N.E. 2d 443 (Ill. 1982).

¹⁰⁶ See Daniel M. Bachi & Bard D. Rockenback, *The Practical Limitations of the Economic Loss Rule*, 69 FLA. B.J. 89, 91 (1995).

¹⁰⁷ See *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992).

¹⁰⁸ See *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5 (Fla. 5th DCA 1994); *Bay Garden Manor Condominium Ass'n, Inc. v. James D. Marks Assocs., Inc.*, 576 So. 2d 744 (Fla. 3d DCA 1991).

¹⁰⁹ See *First State Sav. Bank v. Albright & Assocs., Inc.*, 561 So. 2d 1326 (Fla. 5th DCA 1990),

Many courts that have extended the ELR to bar the recovery of economic losses resulting from intentional acts where there was a contractual relationship for service, failed to reconcile the implications of the ELR with existing doctrines, such as the privity requirement for professional malpractice claims.¹¹¹ As a result, the expansion of the ELR to claims involving services led to inconsistent results.¹¹² For example, some states permit professional negligence claims if the parties have entered into a contract,¹¹³ whereas other states only permit such claims in the absence of a contract.¹¹⁴

The essence of professional malpractice actions in general, and legal malpractice actions in particular, is the relationship between the parties and the nature of the services involved.¹¹⁵ In *Resolution Trust Corp. v. Holland & Knight*, the Southern District Court of Florida determined that the ELR cannot bar a legal malpractice claim even if a related contract claim exists.¹¹⁶ The court recognized that Florida law was unclear regarding whether professional malpractice actions were tort or contract claims.¹¹⁷ Ultimately, the *Resolution Trust* court expressed its reluctance to extend the ELR to legal malpractice actions in light of the rule's origin in contracts for goods.¹¹⁸

In 1999, the Florida Supreme Court reached a similar, though broader, conclusion in *Moransais v. Heathman*.¹¹⁹ In addressing the applicability of the ELR defense to malpractice actions against engineers, the court considered whether the rule should apply to any negligence action involving a professional services contract. In *Moransais*, the plaintiff had contracted with an engineering firm to inspect a home prior to purchase.¹²⁰ The plaintiff relied

disapproved in part on other grounds, *Garden v. Frier*, 602 So. 2d 1273, 1277 n.10 (Fla. 1992); *Bachi & Rockenback*, *supra* note 106, at 91.

¹¹⁰ See *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *Durham v. Palm Court, Inc.*, 558 So. 2d 59 (Fla. 4th DCA 1990). See also *Schwiep*, *supra* note 5, at 40. But see *Palau Int'l Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So. 2d 412 (Fla. 3d DCA 1995).

¹¹¹ See *Fox & Loftus*, *supra* note 12, at 266.

¹¹² See *id.*

¹¹³ See *id.* See also *Ward v. Ernst & Young*, 435 S.E.2d 628 (Va. 1993); *Linde Enter., Inc. v. Hazelton City Auth.*, 602 A.2d 897 (Pa. Super. Ct. 1992).

¹¹⁴ See *Fox & Loftus*, *supra* note 12, at 266. See also *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428 (Tenn. 1991); *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378 (Del. Super. Ct. 1990); *Georgetown Steel Corp. v. Law Eng'g Testing Co.*, 7 F.3d 223 (4th Cir. 1993).

¹¹⁵ See *Manning*, *supra* note 8, at 749.

¹¹⁶ See *Resolution Trust Corp. v. Holland & Knight*, 832 F. Supp. 1528 (S.D. Fla. 1993).

¹¹⁷ See *id.* See also *Kartikes v. Demos*, 214 So. 2d 86, 87 (Fla. 3rd DCA 1968) (held malpractice is an action in contract); *cf. Mayo v. Engel*, 733 F.2d 807, 811 (11th Cir. 1984) (held malpractice is an action in tort).

¹¹⁸ See *Resolution Trust*, 832 F. Supp. at 1532 n. 7.

¹¹⁹ *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

¹²⁰ See *id.* at 974.

on the engineers' inspection and advice at the time he purchased the home, only to find that the engineers failed to discover serious structural defects.¹²¹ The plaintiff brought an action against the engineers for professional negligence, not alleging any bodily injury or property damage other than the undetected defects in the home.¹²² The trial court reluctantly granted the defendants' motion for summary judgment and agreed that the economic loss rule barred the plaintiff's claim due to the contractual relationship between the parties.¹²³ The Second District Court of Appeal upheld the dismissal, but found that "the continuing uncertainty surrounding the economic loss rule"¹²⁴ warranted certification to the Florida Supreme Court.¹²⁵

Ultimately, the Florida Supreme Court determined that the economic loss rule did not bar a cause of action against any professional for his negligence even if the resulting damages were purely economic and there was a contractual relationship between the parties.¹²⁶ The court noted that the law imposed on professionals a duty to perform services in accordance with the standard of care used by similar professionals in the community under similar circumstances.¹²⁷ The court relied on *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Inc.*,¹²⁸ in which Florida's Fifth District Court of Appeal explained the difference between the duties created in an ordinary contract for goods or services and the duty imposed in a contract for professional services as follows:

¹²¹ See *id.* at 974-75.

¹²² See *id.* at 975.

¹²³ See *id.* (citing *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992)).

¹²⁴ *Moransais v. Heathman*, 702 So. 2d 601, 602 (Fla. 2d DCA 1997).

¹²⁵ The Second District Court of Appeal certified the question:

When the alleged damages are purely economic, can the purchaser of a residence, who contracts with an engineering corporation for a pre-purchase inspection, maintain a professional negligence action against the licensed engineer who performed the inspection as an employee of the engineering corporation?

The Florida Supreme Court rephrased the certification into two questions:

- (1) Where a purchaser of a home contracts with an engineering corporation, does the purchaser have a cause of action for professional malpractice against an employee of the engineering corporation who performed the engineering service?
- (2) Does the economic loss rule bar a claim for professional malpractice against the individual engineers who performed the inspection of the residence where no personal injury or property damage resulted?

Moransais v. Heathman, 744 So. 2d 973, 974 (Fla. 1999).

¹²⁶ See *id.* at 983.

¹²⁷ See *id.* (citing *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th DCA 1989)).

¹²⁸ *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th DCA 1989).

The duty of a professional who renders services, such as a doctor, lawyer, or engineer is different from the duty of one who renders manual services or delivers a product. The contractual duty of one who delivers a product or manual services, is to conform to the quality or quantity specified in the express contract, if any, or in the absence of such specification, or when the duty and level of performance is implied by law, to deliver a product reasonably suited for the purposes for which the product was intended...or to deliver services performed in a good and workmanlike manner. However, the duty imposed by law upon professionals rendering professional services is to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances.¹²⁹

Additionally, the court sought guidance from opinions regulating the Florida Bar. When the Florida Supreme Court decided to allow lawyers to form professional associations, the court had reservations because it feared that lawyers would be able to use the business entity to shield themselves from personal liability for malpractice.¹³⁰ Although the court approved of the practice of law in a corporate form, the court also expressly recognized that a lawyer rendering professional services owes a duty of care regardless of the lawyer's association with a business entity that limits liability.¹³¹ The *Moransais* court pointed out that these reservations were reflected in statutory regulations that codified the intent to hold professionals personally liable for their negligent acts.¹³²

¹²⁹ *Moransais*, 744 So. 2d at 976 (quoting *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228, 232 (Fla. 5th DCA 1989)).

¹³⁰ See *Moransais*, 744 So. 2d at 976 (citing *In re The Florida Bar*, 133 So. 2d 554, 556 (Fla. 1961)). In *In re The Florida Bar*, the court recognized the uniqueness of the attorney-client relationship, reasoning that:

Traditionally, prohibition against the practice of a profession through the corporate entity has been grounded on the essentially personal relationship existing between the lawyer and his client, or the doctor and his patient. This necessary personal relationship imposes upon the lawyer a standard of duty and responsibility which does not apply in the ordinary commercial relationship. The non-corporate status of the lawyer was deemed necessary in order to preserve to the client the benefits of a highly confidential relationship, based upon personal confidence, ability, and integrity. If a means can be devised which preserves to the client and the public generally, all of the traditional obligations and responsibilities of the lawyer and at the same time enables the legal profession to obtain a benefit not otherwise available to it, we can find no objection to the proposal.

¹³¹ See *Moransais*, 744 So. 2d at 978.

¹³² See *id.* citing FLA. STAT. § 612.07 (1998) providing that:

These considerations led the *Moransais* court to conclude that the economic loss rule was "never intended to bar well-established common law causes of action, such as those for neglect in providing professional services."¹³³ The court held that the application of the ELR was limited to situations in which the policy considerations were substantially similar to those underlying product liability cases, and "should not be invoked to bar well-established causes of action in tort, such as professional malpractice."¹³⁴ Although the court recognized that provisions of a contract may impact a legal dispute, including an action for professional services, it held that the mere existence of such a contract should not bar professional malpractice actions.¹³⁵

In addition to the practical problems of limiting plaintiffs to contractual remedies in legal malpractice actions, the *Moransais* court considered ethical problems associated with applying the ELR to professional negligence actions in general.¹³⁶ The court asserted that "it is questionable whether a professional, such as a lawyer, could legally or ethically limit a client's remedies by contract in the same way that a manufacturer could do with a purchaser in a purely commercial setting."¹³⁷ Ultimately, the court concluded that the principles underlying the ELR were insufficient to preclude an action for professional malpractice.¹³⁸

Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct.

See also FLA. STAT. § 471.023 (1998).

¹³³ *Moransais*, 744 So. 2d at 983.

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.* Whether the ELR should bar legal malpractice actions has also been addressed in Illinois, where the economic loss rule provides that negligence actions are strictly limited to cases involving physical injury, property damage, or intentional fraud or misrepresentations. Contrary to Florida's decisions in *Resolution Trust* and in *Moransais*, an Illinois court in *Collins v. Reynard*, barred legal malpractice/negligence actions when only economic losses were sought. *See Collins v. Reynard*, 553 N.E.2d 69, 70 (Ill. App. Ct. 1990). In *Collins*, a client alleged that her attorney negligently drafted, or approved, a sales contract because (1) the contract did not reflect the client's intent to retain a first and prior security interest in the business and assets sold; (2) her attorney advised her to sign the agreement without the security interest; and (3) her attorney failed to advise her to obtain a signed financing statement from the buyer. *Id.* As a result, when the buyer defaulted, the client found that she was an unsecured creditor, whose interests were subordinate to those of a bank that took possession of the business and sold it to another buyer. *Id.* at 70. The client's malpractice suit against her attorney was premised on both negligence and breach of contract theories. *Id.* The district court concluded that the ELR barred negligence claims in legal malpractice cases and based its decision on the fact that injuries resulting from legal malpractice were not personal injuries, but were pecuniary injuries to intangible property interests. *Id.* at 70 (citing *Gruse v.*

Signaling a shift away from the broadening of the ELR's application, the *Moransais* decision was not undisputed. Although the majority of the court concurred with the opinion drafted by Justice Anstead, Senior Justice Overton dissented.¹³⁹ In his dissenting opinion, Senior Justice Overton attempted to reconcile the *Moransais* opinion with the court's prior reasoning in *Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.*¹⁴⁰ In *Casa Clara*, the court held that the consuming public as a whole should not be forced to bear the cost of economic losses sustained by those failing to bargain for adequate contract remedies.¹⁴¹ Senior Justice Overton, concerned with blurring the distinction between contract and tort causes of action,

Belline, 486 N.E.2d 398, 404 (Ill. App. Ct. 1985); *Yates v. Muir*, 474 N.E.2d 934, 937 (Ill. App. Ct. 1985)). See also Manning, *supra* note 8, at 752. Since there must be a showing of harm that exceeded disappointed economic expectations in order to recover damages in a negligence action, a legal malpractice claim based in negligence could not stand. See *Collins*, 553 N.E.2d at 70. The district court reasoned that the exception to the ELR for persons in the business of supplying information for the guidance of others in their business transactions did not apply to lawyers, but applied instead to suppliers of information, such as surveyors, newspapers, accountants, and credit bureaus. See *Collins*, 553 N.E.2d at 71 (citing *Rozny v. Marnul*, 250 N.E.2d 656, 662-63 (Ill. 1969)). In support of this assertion, the court relied on case law and treatises that originated long before the economic loss rule was introduced into Illinois common law.

The Illinois Supreme Court decision reversing the district court employed equally poor reasoning. See *Collins v. Reynard*, 607 N.E. 2d 1185 (Ill. 1992). In its decision to allow legal malpractice actions to be pled either as contract or tort claims, the court baldly disregarded what it perceives as the logic of the district court's decision. See Harry F. Mooney, *What's Happening in the Law: Surveying the New Law Developments: Legal Malpractice*, 60 DEF. COUNS. J. 367, 369-70 (1993); Manning, *supra* note 8. In doing so, the court asserted that, "[l]ogic may be a face card but custom is a trump." *Collins*, 607 N.E.2d at 1186. The Illinois Supreme Court employed what could be called if-it-ain't-broke-don't-fix-it reasoning, asserting that "[i]f something has been handled a certain way for a long period of time and if people are familiar with the practice and accustomed to its use, it is reasonable to continue with that practice until and unless good cause is shown to change the rule." *Id.* at 1186. Although the court was careful in limiting its decision to legal malpractice actions, its reasoning completely disregarded emerging common law, such as the ELR. If applied broadly, this opinion encourages courts to dismiss any common law precedent that is difficult to apply and chills the evolution of novel legal analysis.

The *Collins* decision is salvaged only by a well-reasoned concurrence by Justice Miller who defended the majority opinion, arguing that exempting legal malpractice actions from the ELR defense is required by logic as well as custom. *Id.* at 1187. The keystone of Justice Miller's opinion was the notion that the duty of competence traditionally imposed in the attorney-client relationship arises from the Rules of Professional Conduct and exists without regard to the terms of any contract entered into by a lawyer and her client. *Id.* at 1188-89.

¹³⁹ See *Moransais v. Heathman*, 744 So. 2d 973, 984 (Fla. 1999). Harding, C.J., Shaw and Pariente, JJ. concurred with the opinion written by Anstead, J. Justices Wells and Pariente, however, asserted in a separate concurring opinion that the ELR was improperly applied in *AFM Corp.* Senior Justice Overton dissented in a separate opinion.

¹⁴⁰ *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

¹⁴¹ See *id.* at 1246-47 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 933 (1989)).

lamented that the *Moransais* and *Casa Clara* decisions could not be reconciled. Additionally, Senior Justice Overton expressed apprehension that the majority opinion created too great a risk of liability for attorneys, and feared that the opinion “mean[t] that if there is an express written contract for legal services with a law firm then the aggrieved client may bring causes of action upon the same facts on the basis of (1) a breach of contract and (2) multiple tort claims for malpractice individually against each lawyer who had anything to do with the case.”¹⁴² Senior Justice Overton warned that the immediate effect of this boundless liability would be an increase in malpractice insurance rates and ultimately an overall increase in the cost of professional services imposed on all consumers.¹⁴³

The fact that *Casa Clara* involved a construction contract may have contributed to Senior Justice Overton’s dilemma. Although *Moransais* made it clear that the ELR will not bar causes of action for negligent performance of a professional service contract, although prohibiting claims for breach of a contract for goods, *Moransais* does not provide guidance to courts faced with hybrid contracts involving both goods and services. This is a situation that typically arises in construction litigation, when, for example, a licensed general contractor enters into a construction agreement to build a school. Once the school is built, the walls begin to crumble but there is no injury to any person or property.

Pursuant to the Florida Supreme Court’s recent decisions in *Moransais* and *Comptech*, the plaintiff may sue the contractor for negligence and any building code violations that may have occurred. Additionally, the plaintiff may be allowed to recover damages for the defective walls and any special damages anticipated at the time of the contract under a standard breach of contract for goods theory. In such an instance, the distinction between a contract for services and a contract for goods is blurred, and it appears that under *Moransais* the plaintiff will be permitted to recover damages in tort even though warranty theory and breach of contract theory adequately compensate the plaintiff for the cost of the crumbled walls.

This situation reflects two problems. First, the distinction between a “service contract” and a “contract for goods” is not easily made in the arena of construction litigation. The court has found that the ELR should not bar negligence claims if the contract is strictly for services, such as legal services, for which an outcome cannot be guaranteed. But, should the ELR bar claims for professional malpractice if the service that is the subject of the contract is the service of production of a good that can be quantified and warranted?

¹⁴² *Moransais*, 744 So. 2d at 985 (Overton dissent).

¹⁴³ *See id.*

Second, the Florida Supreme Court's definition of a "profession" as "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida" is too broad.¹⁴⁴ Alternatively, Black's Law Dictionary defines a "professional" even more broadly as "a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."¹⁴⁵ Although the court in *Monroe v. Sarasota County School Board* accepted the Florida Supreme Court's definition of professional, it implied that the definition should be narrowed to include only those activities for which a general standard of care is imposed upon members of that profession.¹⁴⁶ Specifically, the *Monroe* court interpreted *Moransais* as applying "only to allow professionals to be sued personally on established theories of professional negligence."¹⁴⁷ As long as an ambiguity remains in the definition of "professional," courts faced with professional malpractice claims will have difficulty determining which instances require application of the new standard for the economic loss rule.

The field of construction in particular presents some unique and troublesome questions in the ELR debate. There are circumstances that support the application of tort remedies for purely economic losses caused by professional malpractice despite the fact that a building is a type of product.¹⁴⁸ In the field of construction, contracts do exist, but often get lost in the hierarchy of contractors, subcontractors, suppliers, architects and engineers, leaving the intended owner of the building with inadequate remedies.¹⁴⁹ Therefore, courts may ultimately conclude that there is sufficient justification for allowing negligence claims for the limited purpose of resolving construction disputes, despite the fact that the ELR prohibits such claims to be applied to contracts for goods.

On the other hand, one could argue that regardless of the number of parties involved in a construction litigation suit, once all cross claims and counterclaims between and among the contractors, subcontractors, suppliers, etc. have been resolved, the purchaser of the building will still be made whole again through contractual remedies including any special damages. In such

¹⁴⁴ *Moransais*, 744 So. 2d at 976 (citing *Garden v. Frier*, 602 So. 2d 1273, 1275 (Fla. 1992)).

¹⁴⁵ BLACK'S LAW DICTIONARY 1226 (7th ed. 1990).

¹⁴⁶ See *Monroe v. Sarasota Sch. Bd.*, 746 So. 2d 530, 533 (Fla. 2d DCA 1999) ("[B]y longstanding precedent, the relationship created when those teachers/administrators assisted Mr. Monroe in the application process does not support the imposition of a general standard of care upon these teachers to protect his economic interests in future potential employment with the School Board. The risk that he might sustain these intangible economic damages is not a type of risk from which the licensed teachers were required, as a matter of traditional common law, to protect Mr. Monroe.").

¹⁴⁷ *Id.* at 534.

¹⁴⁸ See *id.* at 538.

¹⁴⁹ See *id.*

an instance, allowing tort claims against the "professionals" involved is superfluous.

V. THE ELR, PROFESSIONAL STANDARDS, AND STATUTORY REMEDIES FOR PROFESSIONAL MALPRACTICE

Like other professional service contracts, most attorney-client contracts do not contain specific provisions dealing with the manner in which the lawyer will perform the services.¹⁵⁰ In an attorney-client relationship, unlike most contractual relationships, services are not bargained for, results are not warranted or promised, and, although the client agrees to pay fees, the attorney agrees to do nothing more than be employed.¹⁵¹ Thus, in an attorney-client relationship and in the context of other professional relationships, it is necessary to imply a promise creating an implied contract with provisions that the services will be performed in accordance with professional standards.¹⁵² Generally, an attorney who commits malpractice is liable in tort regardless of a contractual relationship, even though only economic losses are suffered.¹⁵³ A special relationship exists between the attorney and the client that imposes upon the attorney a duty to protect the client from being deprived of economic expectations through the attorney's negligence.¹⁵⁴

Likewise, an attorney's obligation to his client is not based solely on the contract existing between them.¹⁵⁵ The attorney's fiduciary duty provides the foundation of the attorney-client relationship.¹⁵⁶ At least one court has explicitly recognized that this relationship arises outside of the contract between the attorney and client.¹⁵⁷ Rather, the lawyer's duties to his client originate from the ABA Model Rules of Professional Conduct and the ABA Model Code of Professional Responsibility. The Rules of Professional Conduct and the Code of Professional Responsibility provide that it is professional misconduct for a lawyer to engage in acts involving dishonesty, fraud, deceit or misrepresentation.¹⁵⁸ These Rules govern attorney behavior

¹⁵⁰ See Powers & Niver, *supra* note 98, at 494.

¹⁵¹ See Manning, *supra* note 8, at 754.

¹⁵² See Powers & Niver, *supra* note 98, at 494.

¹⁵³ See Schwiep, *supra* note 5, at 40.

¹⁵⁴ See Manning, *supra* note 8, at 754.

¹⁵⁵ See *id.* at 753.

¹⁵⁶ See Dodrill, *supra* note 51, at 1212. See also MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6 and cmt., Rule 1.7 and cmt. - 1.9 and cmt. (1991); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 and EC 4-1 - 4-6 and DR 4-101, Canon 5 and EC 5-1 - 5-24 and DR 5-101 - 5-107 (1983).

¹⁵⁷ See 2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd., 555 N.E.2d 346, 353 (Ill. 1990). See also Dodrill, *supra* note 51, at 1212.

¹⁵⁸ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c); MODEL CODE OF PROFESSIONAL

even if an attorney-client relationship has not been created by contract or otherwise.

The rationale for deferring to the Rules of Professional Conduct when dealing with legal malpractice actions parallels arguments made in considering whether the ELR should apply to statutory claims. In *Rubio v. State Farm Fire & Casualty Co.*, Florida's Third District Court of Appeal rejected the idea that the economic loss rule swallows up statutory causes of action.¹⁵⁹ Subsequently, in *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, Florida's Second District Court of Appeal concluded that the ELR had not eliminated a statutory cause of action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) involving a consumer transaction based on a written sales contract.¹⁶⁰ This sentiment was echoed by Florida's First District Court of Appeal one month later in *Sarkis v. Pafford Oil Co., Inc.*¹⁶¹ The court warned that when determining whether to apply the ELR to statutory causes of action, courts should consider the possibility that, in some cases, precluding the action could amount to judicial interference with authority vested in the legislature.¹⁶² Although acknowledging that some Florida courts held that the economic loss rule could be applied to statutory actions, the *Sarkis* court asserted that such application should be limited to statutory tort claims.¹⁶³

Florida's Third District Court of Appeal struggled, in *Comptech International, Inc. v. Milam Commerce Park, Ltd.*,¹⁶⁴ with the question of whether the ELR should apply to a cause of action for economic damages brought under the South Florida Building Code.¹⁶⁵ Although the Second, Fourth and Fifth District Courts of Appeal agreed that statutory causes of

RESPONSIBILITY DR-102(A)(4). In Florida, a legal malpractice action has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) proof that the neglect of a reasonable duty is the proximate cause of loss to the client. See *Dadic v. Schneider*, 722 So. 2d 921 (Fla. 4th DCA 1998); *Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610 (Fla. 4th DCA 1997); *Resolution Trust Corp. v. Holland & Knight*, 832 F. Supp. 1528 (S.D. Fla. 1993).

¹⁵⁹ See *Rubio v. State Farm Fire & Cas. Co.*, 662 So. 2d 956 (Fla. 3d DCA 1995).

¹⁶⁰ See *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 609 (Fla. 2d DCA 1997). The *Delgado* court was primarily concerned about undermining the power of the legislature.

¹⁶¹ *Sarkis v. Pafford Oil Co., Inc.*, 697 So. 2d 524, 527 (Fla. 1st DCA 1997).

¹⁶² See *id.* at 527.

¹⁶³ See *id.*

¹⁶⁴ *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 711 So. 2d 1255 (Fla. 3d DCA 1998) (Before Cope, Gersten, and Shevin, JJ. Majority opinion by Gersten, J. Dissenting opinion by Cope, J.).

¹⁶⁵ See *id.* at 1257 (concluding that the ELR did not permit a cause of action for economic damages brought under the South Florida Building Code where the claims were clearly contractual in nature and the cause of action was *inseparably connected to the breaching party's performance under the agreement*). But see *id.* at 1258 (emphasizing that the ELR did not exclude separate and independent building code violation claims, or claims arising from noncontractual settings).

action were not limited by the economic loss rule, the *Comptech* court decided differently. The court reasoned that where the parties to an agreement negotiated within a contractual setting the same duties as occasioned by a statute, a breach of which would lead to the same economic losses involving identical elements to the claim, the economic loss doctrine would prevail.¹⁶⁶ Thus, the ELR applied if the cause of action founded on the statutory tort was dependent upon the contract.¹⁶⁷ Simply because the cause of action arises out of a statute does not make it an “independent” obligation.¹⁶⁸ Instead, the independence comes from the fact that the claims cannot be asserted in a breach of contract claim.¹⁶⁹

In his dissenting opinion, Judge Cope asked whether the ELR, as applied by the majority, abolished the statutory cause of action for a violation of the building code.¹⁷⁰ Judge Cope asserted that contractual remedies should not replace statutory causes of action. Rather, the contract should supplement the statute, allowing wronged parties to recover damages under both the contract and the statute. Judge Cope specifically referred to language in the disputed statute in *Comptech*, which provided that “[n]otwithstanding any other remedies available, any . . . party . . . damaged as a result of a violation . . . has a cause of action . . . against the . . . party who committed the violation.”¹⁷¹ Judge Cope interpreted the phrase “notwithstanding any other remedies” to mean “notwithstanding any other remedies—including a contract remedy.”¹⁷² This language plainly dictated that a litigant can sue under the statute in addition to demanding any other remedies that may be available to the litigant.¹⁷³ The fact that the plaintiff also had a contract claim was irrelevant.¹⁷⁴ Judge Cope admonished the majority opinion as having the practical effect of eliminating statutory causes of action entirely.¹⁷⁵

Judge Cope further asserted that the ELR should not apply to statutory causes of action at all.¹⁷⁶ He reasoned that the economic loss rule was simply a judge-made rule designed to sort out whether a plaintiff may make a common-law contract claim or common-law tort claim.¹⁷⁷ Since common-law

¹⁶⁶ See *id.* at 1257.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 1257 n.2.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1266 (dissenting opinion).

¹⁷¹ *Id.* at 1266 (dissenting opinion citing FLA. STAT. § 553.84 (1998)).

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 1267.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

contract claims and common-law tort claims are themselves judge-made causes of action, it was permissible for the judiciary to adopt the ELR as a judge-made rule for deciding whether claims can be brought in contract or in tort.¹⁷⁸ However, it was not permissible for judge-made rules to encroach upon rules made by the legislature.¹⁷⁹

In its first opinion citing *Moransais*, the Florida Supreme Court agreed with Judge Cope's analysis and quashed the Third District's decision in *Comptech*.¹⁸⁰ Holding that the ELR could not be used to eliminate a statutory cause of action, the court stated:

It is undisputed that the Legislature has the authority to enact laws creating causes of action. If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area.¹⁸¹

Although the court acknowledged that the ELR has "some genuine, albeit limited, value in tort and contract law," the court held that it cannot be used as a barrier to legitimate causes of action, regardless of whether those are statutory or common law causes of action.¹⁸²

Additionally, when deciding whether the ELR may be applied to legal malpractice actions, courts must consider the positions of the parties at the time contracts for legal services are negotiated. In *East River*, the Supreme Court concluded that "since a commercial situation does not involve large disparities in bargaining power, [there is] no reason to intrude into the parties' allocation of the risk."¹⁸³ This may be true if sophisticated parties are negotiating for the sale of goods; however, if negotiating a contract for legal services the asymmetry of powers is obvious. In most cases, consumers of professional services are not sophisticated parties and are unaware of potential liabilities. Generally, the attorney will have a superior knowledge of contract negotiations and liabilities for potential negligence or malpractice. The client,

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* Subsequently, Florida's Fifth District Court of Appeal adopted Judge Cope's analysis in *Stallings v. Kennedy Elec., Inc.*, 710 So. 2d 195 (Fla. 5th DCA 1998). The *Stallings* court held that "the economic loss rule does not apply to statutory causes of action and should not be used as a sword to defeat them." *Id.* at 197. See also *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, Nos. 93-336 and 93-126, 1999 WL 983857 (Fla. Oct. 28, 1999).

¹⁸⁰ See *Comptech Int'l, Inc.*, 1999 WL 983857.

¹⁸¹ *Id.* at *2.

¹⁸² See *id.* at *7.

¹⁸³ *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 (1986) (citing *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

who is often not a lawyer, has an information deficiency. Most clients do not know to, or are unable to, negotiate for tort liability. In such circumstances, it is unreasonable to expect average consumers of professional services to be adequately protected by contractual remedies.

The present debate regarding the applicability of the ELR to professional malpractice actions is based on the presumption that the contract is the only instrument governing the parties' relationship. Even while criticizing courts for blindly applying the ELR to any circumstance in which there is a contractual relationship, no matter how tenuous the relationship or how great the wrong committed, lawyers and academics fail to consider the extracontractual body of supporting law. There is rarely any concern regarding standard forms, contracts of adhesion, parol evidence, or other means of defining the relationship between the parties outside of their contractual relationship. The *Interstate Securities* court has been criticized for assuming that breach of fiduciary duty claims against a securities broker are per se barred by the ELR simply because the customer signed a standard account agreement.¹⁸⁴ In fact, the ELR as applied in *Interstate Securities*, would extinguish all business torts since, in most commercial tort cases, the litigants are involved in some type of contractual relationship, and the damages sought are generally economic in nature.¹⁸⁵ The *Interstate Securities* decision is contrary to long-standing case law holding that stockbrokers owe customers a fiduciary duty of good faith, loyalty and fair dealing above that required from other contractors.¹⁸⁶ Similarly, courts have traditionally held attorneys to a higher duty of care than other contractors.

For example, in attorney-client relationships, the Rules of Professional Conduct present just one means of defining the extracontractual relationship between an attorney and client. The Rules of Professional Conduct serve as a foundation for the contractual relationship created at the time that a retainer agreement is executed. Clearly, an attorney cannot negotiate to opt out of the Rules. Even if the Rules are not explicitly integrated into the contract between an attorney and her client, these Rules contain the default liability provisions for parties entering into an attorney-client relationship.

Furthermore, the purpose of the ELR, in limiting extracontractual remedies, is to isolate the contractual relationship from its extracontractual context. When limiting plaintiffs to contractual remedies, the court does not consider the parties' relative situations at the time they entered into the contract, unequal bargaining power, knowledge deficiencies, past conduct of the parties, implied contractual obligations, or well-established duties of good

¹⁸⁴ See Hanzman, *supra* note 36, at 43.

¹⁸⁵ See *id.* at 44.

¹⁸⁶ See *id.*

faith and fair dealing. It is neither typical nor wise to view any contract without regard to the circumstances surrounding its origination.

VI. CONCLUSION

Prior and subsequent to the *Moransais* decision there has been much discussion among attorneys, judges, and academics regarding the proper parameters of the economic loss rule. Many warn against the mechanical extension of the ELR to professional and fiduciary relationships, such as the attorney-client relationship.¹⁸⁷ Some propose that intentional tort claims for economic losses should survive the ELR defenses.¹⁸⁸ The Florida Supreme Court appears to agree and has asserted that the ELR should not apply to any contract for professional services.¹⁸⁹

Despite extremely restricting the ELR's application, *Moransais* and *Comptech* are correct in refusing to allow the ELR to bar professional malpractice and statutory causes of action. Given the present use of the economic loss rule, the rule simply is not applicable to professional malpractice actions. First, the ELR does not bar actions that arise independently of a contractual relationship. To the extent that most professionals must comply with the standards set forth for other professionals in their community, these duties are extracontractual and therefore cannot be barred by the economic loss rule.

Secondly, the ELR is based upon the presumption that parties to a contract have pre-negotiated liability in the event of a breach. In most professional service relationships, and especially in an attorney-client relationship, the information disparities between the parties make it impossible to negotiate such terms. Therefore, the economic loss rule cannot force the parties to rely on liability provisions negotiated at the time of the contract.

Finally, although it appears that the ELR accomplishes the function of reducing claims brought before the court, a common law doctrine that simply eliminates legitimate statutory and common law causes of action all together is not a suitable means for achieving this goal. It is impermissible to allow courts to simply eliminate causes of action, and thereby encroaches on the Legislature's power to set forth causes of action and duties between members of the community. Arbitration mechanisms and summary judgment procedures are far better suited to the purpose of reducing docket congestion. Once the standard for any given cause of action, such as professional malpractice, is well defined, it is far easier for the courts to make informed determinations of whether there is a legitimate claim that should be redressed.

¹⁸⁷ See Esquibel, *supra* note 11, at 852.

¹⁸⁸ See Schwiep, *supra* note 5, at 40.

¹⁸⁹ See *Moransais v. Heathman*, 744 So. 2d 973, 983-84 (Fla. 1999).

It is very likely the *Moransais* and *Comptech* decisions will soon be interpreted as striking down the ELR defenses to statutory causes of action such as RICO and civil theft. However, it remains to be seen whether the *Comptech* court's statement that the ELR cannot bar legitimate common law causes of action will serve the court's stated purpose of returning the ELR to the arena of products liability, or whether it will defeat the economic loss rule entirely.