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THE ECONOMIC LOSS RULE AND FIDUCIARY DUTY CLAIMS: NOTHING STRICTER THAN THE MORALS OF THE MARKETPLACE?

AMANDA K. ESQUIBEL*

I. INTRODUCTION

COMPENSATION for economic loss is a subject that has long intrigued both practitioners and academics. This vast subject includes a rule known as the economic loss rule ("ELR"). In its broadest formulation, the ELR bars the recovery of economic loss in most tort actions unless the victim has also suffered some sort of personal injury or property damage.¹ The rationale for this rule is that a person spared such harm is, or should be, adequately protected from economic loss through contractual remedies.²

This Article discusses the application of the ELR to bar claims for breaches of fiduciary duties and the propriety of doing so.³ Part

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2. See, e.g., Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987) (noting that contractual remedies such as insurance and warranties can adequately protect purchaser).

3. See Alpert v. Shafer, No. 89 Civ. 0839 (CSH), 1991 WL 222130, at *6 (S.D.N.Y. Oct. 24, 1991) ("Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. . . . The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another."); see also Atlantic Nat'l Bank of Fla. v. Vest, 480 So. 2d 1328, 1332 (Fla. Dist. Ct. App. 1985) ("[A fiduciary relationship] exists . . . where influence has been acquired and abused, and in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and informal relations that exist whenever one man trusts and relies upon another."); In re Estate of Heilman, 345 N.E.2d 556, 540 (Ill. App. Ct. 1976) ("A fiduciary relation arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic or merely personal."); Williams v. Griffin, 192 N.W.2d 283, 285 (Mich. Ct. App. 1971) ("Such a relationship exists when there is a reposing of faith, confidence,

(789)
II provides a general overview of the ELR.\textsuperscript{4} Part III discusses the history and evolution of the ELR in several states that have had experience with the rule’s application to breach of fiduciary duty claims.\textsuperscript{5} Part IV illustrates doctrinal weaknesses of the ELR in the fiduciary context.\textsuperscript{6} In light of these weaknesses, Part V recommends an improved analytical structure for considering issues of economic loss in settings involving allegations of both breach of contract and breach of fiduciary duty.\textsuperscript{7} Such a structure is critical for courts who consider applying the ELR to breach of fiduciary duty claims. Finally, Part VI concludes that the unpleasant experiences of some courts should dissuade other courts from blindly applying the ELR to bar breach of fiduciary duty claims.\textsuperscript{8}

\textsuperscript{4} For a discussion of the ELR generally, see infra notes 9-25 and accompanying text.

\textsuperscript{5} For a discussion of the history and evolution of the ELR doctrine and its application to breach of fiduciary duty cases, specifically for Florida, Illinois, New Jersey and New York, see infra notes 26-249 and accompanying text.

In addition to punitive damages, courts confronted with breach of fiduciary duty claims have fashioned many different types of relief in order to provide victims with full compensation and deter fiduciaries from wrongdoing. See, e.g., Pollack v. Lyde, 175 Cal. Rptr. 81, 86 (Ct. App. 1981) (stating that fiduciary must place injured party in same position he would have enjoyed had fiduciary faithfully performed his duties); Steelman v. Mallory, 716 P.2d 1282, 1286 (Idaho 1986) (ruling that measure of damages in breach of fiduciary duty claim by corporate director is profit that director received); Henderson v. Hassur, 594 P.2d 650, 653 (Kan. 1979) (noting that disloyal agent required to account to his principal for secret profit and also had to forfeit compensation that he had received from principal); Bessman v. Bessman, 520 P.2d 1210, 1211 (Kan. 1974) (requiring faithless servant to forfeit compensation otherwise due for services rendered during period of his faithfulness); Pedro v. Pedro, 463 N.W.2d 285, 288 (Minn. Ct. App. 1990) (ruling that damages for breach of fiduciary duty in connection with buyout of minority shareholder of closely held corporation was difference between fair market value of minority shareholder’s shares and amount he would have received under buyout agreement); Line v. Rouse, 491 N.W.2d 316, 319 (Neb. 1992) (measuring damages as monetary damage to estate caused by personal representative’s breach of fiduciary duty); Stoeckel v. Block, 566 N.Y.S.2d 625, 626 (App. Div. 1991) (stating that former employees who breached fiduciary duty by soliciting employer’s customers are subject to damages in amount employer would have made but for employees’ wrong, including lost opportunities for profits on accounts diverted through employees’ conduct).

\textsuperscript{6} For a discussion of the weaknesses of the ELR in the fiduciary context, see infra notes 250-87 and accompanying text.

\textsuperscript{7} For a discussion of an alternative doctrine in breach of fiduciary duty cases, see infra notes 288-303 and accompanying text.

\textsuperscript{8} For the conclusion of this Article, see infra notes 304-07 and accompanying text.
II. An Overview of the ELR

Far removed from the fiduciary context, the ELR originated in the products liability context, an area in which the prevention and redress of personal injury and property damage are of prime concern. Illustration of the operation of the ELR in the products liability arena is easy. Assume, for example, that an aspiring grass cutter acquires a lawnmower. Because of negligent design, the lawnmower malfunctions upon its first use and self-destructs. The lawnmower injures no one, nor any property other than itself. Unfortunately, however, the lawnmower’s destruction is untimely in that the aspiring grass cutter had several lucrative contracts to mow his or her neighbors’ lawns that he or she must now cancel. Efforts to locate a replacement lawnmower prove futile.

Disappointed, the aspiring grass cutter would like to recover the profits from these contracts. A lawyer tells the aspiring grass cutter that he or she may not recover these profits in a contract action because there is nothing to suggest that at the time of sale, the lawnmower’s seller had reason to know of the aspiring grass cutter’s lucrative contracts. Likewise, it does not appear that the Uniform Commercial Code will permit recovery of such profits in any warranty claims. The lawyer also tells the grass cutter that the


11. See Hadley v. Baxendale, 156 Eng. Rep. 145, 146 (1854) (considering whether mill owner should be able to recover on contract theory against dilatory repair shop for economic loss caused by missed business opportunities). The Court, in its famous decision, rejected this contention on the basis that the loss was not foreseeable to the repair shop, as it was not contemplated by the parties at the time of bargaining for the repair. See id. at 150; see also Kevin R. Sido, Damages Recoverable on Tort Theories in Construction Cases, 62 Def. Couns. J. 78, 79 (1995) ("Generally, a party to a contract may recover [foreseeable] damages that are the proximate result of the breach. . . . On the other hand, in tort cases, the defendant is usually argued as being liable for . . . damages [that] are anticipated or contemplated.").

12. U.C.C. § 2-715 (1994) (limiting buyer’s recovery of consequential damages to losses, which generally in absence of personal injury or property damage
ELR bars any negligence or other tort claims for the recovery of these profits because there is no accompanying personal injury or property damage, other than to the product itself.\textsuperscript{13}

This example demonstrates how the ELR may lead to some harsh results for a prospective plaintiff. The ELR essentially relegates an individual who suffers purely economic loss caused by another's tortious conduct to contract or warranty remedies, which, as illustrated above, may not exist or may not provide the victim with complete compensation.\textsuperscript{14} Not only may the ELR have the effect of foreclosing recovery for such economic losses, but it may also deprive a litigant of the opportunity to seek punitive damages by barring the victim's tort claim.\textsuperscript{15}

Additionally, the plaintiff, without a tort claim, loses several other advantages. For example, courts may disregard disclaimers and exculpatory clauses in a tort action; tort claims may not require

\textsuperscript{13} For an informative discussion in an analogous situation, see generally Rachael Scott Decker, \textit{Court Limits Tort Remedies in Contract}, 46 S.C. L. Rev. 31 (1994). This commentator discusses a case that barred a negligence claim arising from component part's failure, resulting in substantial damage to property not owned by the plaintiff. \textit{See id. at} 35 (discussing Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027 (D.S.C. 1993)).

\textsuperscript{14} \textit{See id. at} 31.

\textsuperscript{15} \textit{See Southern Bell Tel. & Tel. Co. v. Hanft}, 436 So. 2d 40, 42 (Fla. 1983) (holding that punitive damages normally not recoverable in breach of contract action); Pelletier v. Schultz, 276 S.E.2d 118, 120 (Ga. Ct. App. 1981) (ruling that punitive damages may not be demanded in contract claim); Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986) (noting that intentional breach of contract or gross negligence in breach of contract will not entitle injured party to "exemplary" damages); White v. Benkowski, 155 N.W.2d 74, 77 (Wis. 1967) (holding that punitive damages not recoverable in breach of contract action). \textit{But see} Frank J. Cavico, Jr., \textit{Punitive Damages for Breach of Contract—A Principled Approach}, 22 St. Mary's L.J. 357, 372-81 (1990) (discussing various "exception and subterfuges" that courts have employed to allow award of punitive damages in contract cases); Sandra Chutorian, \textit{Tort Remedies for Breach of Contract: the Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm}, 86 Colum. L. Rev. 377, 378-91 (1986) (discussing how some courts, dissatisfied with traditional contract remedies, have applied tort principles, including punitive damages, to various areas of contract law).

Punitive damages are awarded frequently by courts for breaches of fiduciary duty. \textit{See}, e.g., Wagman v. Lee, 457 A.2d 401, 404 (D.C. 1983) (noting punitive damages are reasonable if there exists independent fiduciary relationship); Capital Fed. Sav. & Loan Ass'n v. Hohman, 682 F.2d 1309, 1310 (Kan. 1984) (awarding mortgagors punitive damages for breach of fiduciary duty by bank); Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984) (awarding recovery of actual and exemplary damages against breaching fiduciary); Mulder v. Mittelstadt, 352 N.W.2d 223, 229 (Wis. Ct. App. 1984) (awarding shareholders punitive damages for directors' breach of fiduciary duty).
timely notice and may be subject to a longer statute of limitations. Moreover, tort claims may have fewer obstacles than contract claims that present issues such as parol evidence, statute of frauds, interpretation of terms, uncertainty, illegality or lack of consideration.  

While the ELR has many critics, there are important public policy justifications for its existence. The principal justification is a deeply rooted jurisprudential belief that contract remedies are superior to tort remedies for dealing with issues of economic loss. For instance, in a contractual setting, the parties have the opportunity to allocate risks and, in many instances, should be encouraged to do so. The theory is that parties, having contracted for certain


18. See, e.g., Michael J. Bond, Rebuilding the Citadel of Privity, 30 GONZ. L. REV. 221, 231-34 (1995) (noting that public policy supports ELR); Luther P. House, Jr. & Hubert J. Bell, Jr., The Economic Loss Rule: Fair Balancing of Interests, 11 CONSTRUCTION LAW 1, 29-30 (1991) (advocating fairness of ELR in construction contracts because it “fairly allocates business risks among contracting and known parties” and allows contracting parties to “adjust their respective obligations in their agreements to conform to their expectations and their willingness to bargain”); Frank Nussbaum, The Economic Loss Rule and Intentional Torts: A Shield or a Sword?, 8 ST. THOMAS L. REV. 473, 476 (1996) (“The economic loss rule may have merit in light of current trends . . . to allocate the risk between innocent and negligent parties. . . . [I]t is an inappropriate rule to vitiate common law torts created as a matter of public policy to protect society from intentional wrongdoers.”); Ann O'Brien, Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss, 31 ARIZ. L. REV. 959, 966 (1989) (“One of the most significant concerns with permitting the plaintiff to sue for negligent infliction of economic loss is that the defendant will be subjected to unlimited liability. The judiciary confronts . . . the administrative problem of overloading the courts, and . . . the problem of imposing disproportionate liability on the defendant.”) (footnotes omitted); Kelly M. Hnatt, Note, Purely Economic Loss: A Standard for Recovery, 73 IOWA L. REV. 1181, 1182-83 (1988) (“Courts that deny recovery of purely economic losses often base their decisions on the perception that the policies behind tort law argue for manageable limits on liability, maintaining that a physical harm requirement serves as a convenient touchstone for limiting recovery.”).


20. See id. (noting that contractual bargaining or insurance can afford protection).
rights or remedies, generally ought to be held to their bargain, irrespective of the ex post burdens.\textsuperscript{21} Another popular policy rationale for the ELR is that its application prevents subjecting one to liability disproportionate to the negligent action.\textsuperscript{22} For instance, if one negligently operates an automobile by plowing into an electrical pole and causing a power outage in a busy business district, there are numerous individuals who will suffer business interruption because of the driver’s negligence. The ELR will generally bar tort actions by these individuals, sparing the justice system the agony of sorting out such a mess, while saving the driver of the vehicle from potential bankruptcy for a relatively slight infraction.\textsuperscript{23}

Over the years, perhaps as a result of such policy justifications, the ELR has spread outside the products liability context and into other commercial sectors of tort law.\textsuperscript{24} In these areas, personal injury or property damage is often of little or no concern. Indeed, many torts such as fraud, tortious interference, defamation, conversion and this Article’s concern, claims for breach of fiduciary duty, are designed to redress primarily economic loss.\textsuperscript{25}

III. THE DEVELOPMENT OF THE ELR AND ITS EXPANSION INTO THE FIDUCIARY CONTEXT

A. The Supreme Court’s View

The United States Supreme Court confronted the ELR in \textit{East River Steamship Corp. v. Transamerica Delaval, Inc.}\textsuperscript{26} In \textit{East River}, a shipbuilder contracted for the design, manufacture and installation of several ship turbines that subsequently malfunctioned.\textsuperscript{27} While

\begin{itemize}
  \item \textsuperscript{21} This rationale breaks down when there is uneven bargaining power between the parties. Courts, however, have been reluctant to consider this fact. This may be because of the burden that would be created in case after case by causing courts to inquire into this aspect of the parties’ relationship. Consideration of this aspect is, however, important to achieving rational results in the fiduciary intent.
  \item \textsuperscript{22} For a discussion of the ELR generally, see supra notes 9-25 and accompanying text.
  \item \textsuperscript{23} See \textit{House & Bell}, supra note 18, at 29-30 (supporting policy concerns behind application of ELR).
  \item \textsuperscript{24} For a discussion of cases in which courts applied the ELR to the fiduciary context, see infra notes 26-249 and accompanying text.
  \item \textsuperscript{25} For a discussion of the varying contexts in which courts apply ELR, see infra notes 26-249 and accompanying text.
  \item \textsuperscript{26} 476 U.S. 858 (1986).
  \item \textsuperscript{27} \textit{Id.} at 858. Although the turbines injured only themselves, the charterers of these vessels sued for the cost of repairs and for income lost while the ships were being repaired. See \textit{id.} at 861. The initial complaint contained breach of warranty and contract claims, as well as tort claims. See \textit{id.} The defendant, however, inter-
the plaintiffs filed several claims, the Supreme Court only addressed the tort claims.\textsuperscript{28}  

The Supreme Court noted that products liability law "grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty."\textsuperscript{29} The initial concern with hazards to life and health then expanded to property.\textsuperscript{30} In a traditional "property damage" case, the product damages other property. In \textit{East River}, however, the product damaged only itself.\textsuperscript{31}

The Supreme Court then identified the spectrum of thought with respect to the availability of a tort action when a product injures only itself.\textsuperscript{32} At one end of the spectrum, the majority view, forwarded in \textit{Seely v. White Motor Co.},\textsuperscript{33} held that no tort action was available.\textsuperscript{34} At the other end, the minority view, expressed in \textit{Santor v. A \& M Karagheusian, Inc.},\textsuperscript{35} held that such an action was available despite the lack of personal injury or property damage.\textsuperscript{36} The Supreme Court also made note of a middle ground where courts struggled with the distinction between plaintiffs merely disappointed with the performance of a product and plaintiffs endangered, but fortuitously spared, personal injury or property damage.\textsuperscript{37}

\textsuperscript{28} See \textit{id}. The defendant then moved for summary judgment, arguing that the charterers could not recover under tort theories because they only suffered economic loss. \textit{See id.} at 861-62. This formed the basis for the appeal to the United States Supreme Court. \textit{See id.} at 863.

\textsuperscript{29} \textit{Id.} at 866 (noting public policy origin of products liability law).

\textsuperscript{30} \textit{See id.} at 867.

\textsuperscript{31} \textit{Id.} In this case, because the turbine was an integrated package and only its component parts were destroyed, there was no personal injury or other property damage. \textit{See id.} The lack of such harm is the hallmark of a warranty action. \textit{See id.} at 868. A contracting party can protect itself against purely economic loss by negotiating such warranty protection. \textit{See id.}

\textsuperscript{32} \textit{See id.} at 868-69 (noting spectrum of cases addressing issue of whether tort action can be brought if product injures itself).

\textsuperscript{33} 403 P.2d 145 (Cal. 1965).

\textsuperscript{34} \textit{See East River}, 476 U.S. at 868.

\textsuperscript{35} 207 A.2d 305, 312-13 (N.J. 1965).

\textsuperscript{36} \textit{See East River}, 476 U.S. at 868-69. The Supreme Court had similar concerns about the minority view, believing it would greatly expand liability and impermissibly intrude on the traditional realm of contract. \textit{See id.}

\textsuperscript{37} \textit{See id.} at 869-71 (expressing thoughts on all three views and its impact on liability). With regard to the intermediate position, the Court stated that, irrespective of the nature of the product's damage, gradual or calamitous, the loss remained purely economic, and hence, one that the Court should address through contract theory. \textit{See id.} at 870-71.
Accordingly, the Supreme Court rejected these latter approaches and instead embraced Seely, stating that it "most naturally understood [the plaintiff's claim] as a warranty claim."38 Thus, the Supreme Court left the parties to their contractual bargains and warranty protection.39 The Court concluded that "whether stated in negligence or strict liability, no products-liability claim lies . . . when the only injury claimed is economic loss."40 Therefore, the Supreme Court recognized and applied the ELR in the products liability context, and in so doing, it analyzed the competing public policy concerns of contract and tort.41

In a sense, the Supreme Court saw the tort action as the reserve weapon, only available if the harm suffered extended beyond that available under a contract theory and if the character of that harm triggered public safety concerns. The Supreme Court, however, was not asked to, nor did it explore the interplay of these policy concerns outside the context of products liability actions. It expressed no opinion as to whether its view of the relationship between contract and tort would be context specific. Needless to say, it said nothing about breach of fiduciary duty claims.

It was, perhaps, a general failure to confront the significance of the context that permitted the ELR's rapid expansion into other areas of the law. As a result, courts have had tremendous difficulty determining the ELR's appropriate application outside the products liability context. In particular, Florida courts have had the most experience down this arduous and unpredictable path.

B. The ELR in Florida

1. General Application of the ELR

In 1987, the Florida Supreme Court decided a trilogy of cases concerning the ELR—Florida Power & Light Co. v. Westinghouse Elec-

38. Id. at 872. The Court did not believe that the increased costs to society associated with extending tort remedies were justified, especially when such losses could be, presumably, more efficiently insured against. See id. at 871-72. Warranty claims have inherent limits on liability arising out of privity and the Hadley requirement of foreseeability. See id. at 874. There are no such limits in a tort action. See id. at 874-75.
39. See id. This was despite the Court's acknowledgement of the unavailability of such claims in this case. See id.
40. Id. at 876.
41. See id. The former, in its view, was a method of private ordering by which risk of loss is contemplated, allocated and ultimately respected by the parties or an enforcing court. See id. The availability of tort actions, however, served a different purpose, namely, to protect and redress the individuals in a society who were injured (in their person or property) by a manufacturer's carelessness. See id.
Aetna Life & Casualty Co. v. Therm-O-Disc., Inc. and AFM Corp. v. Southern Bell Telephone & Telegraph Co.

The Florida Power, 42. 510 So. 2d 899 (Fla. 1987). In this case, Westinghouse agreed to design, manufacture and furnish two nuclear steam supply systems, including six steam generators. See id. at 900. Florida Power & Light Company ("FPL") allegedly discovered leaks in all six generators. See id. It then sued Westinghouse for breach of express warranties in the contract and for negligence. See id. The trial court denied Westinghouse's motion for partial summary judgment on the breach of warranty count, but granted its motion for summary judgment on the negligence count on the ground that Florida law precludes the recovery of economic loss without any claim of personal injury or property damage to other property. See id.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the following question was certified to the Supreme Court of Florida: "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." Id. at 899. In answering the certified question in the negative, the Florida Supreme Court reasoned that the contract between the parties allocated the risks negotiated and that, generally, principles of contract are more appropriate than tort principles to resolve purely economic claims. See id. at 900. The Florida Power court explained:

We . . . find no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public. We hold contract principles more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage. The economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting. Consequently, we hold that the economic loss rule should be applied to the instant case.

Id. at 902.

43. 511 So. 2d 992 (Fla. 1987). The Florida Supreme Court's second 1987 decision concerning the ELR, Aetna Life, arose in a slightly different context than Florida Power, that of a challenge to personal jurisdiction under the long arm statute. See id. at 993-94. The question presented was whether a certain subsection of a Florida statute "permitt[ed] jurisdiction to be obtained over nonresidents for acts arising outside the state which cause financial injury within the state when no personal injury or physical property damage has occurred." Id. at 993; see Fla. Stat. § 48.193(1)(f) (1995) (defining acts subjecting person to jurisdiction of courts of Florida).

The Aetna Life court held that the provisions of the relevant section contemplated only personal injury or physical property damage and, therefore, did not confer jurisdiction when the injury was purely financial in nature. See Aetna Life, 511 So. 2d at 994. In reaching this result, the Florida Supreme Court cited its earlier decision in Florida Power. See id. Accordingly, the "property damage" referred to in Florida Power must be viewed as "physical property damage," not merely economic loss. See id.

The Aetna Life court believed that this statute was intended to permit jurisdiction in products liability actions. See id. In light of the statute's wording and the compelling policy to protect the state's citizenry from harm, however, it was not entirely clear why the Florida Supreme Court felt constrained to limit the statute's reach to personal injury and physical property damage. See id. The different policies at play in applying a jurisdictional statute and permitting a cause of action in tort were not addressed.

44. 515 So. 2d 180 (Fla. 1987). The Florida Supreme Court in AFM moved even farther away from the products liability context in this case. AFM Corporation had contracted with Southern Bell Telephone & Telegraph Company for advertising in the yellow pages. See id. at 180-81. "When AFM moved, the parties
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, which essentially held that absent accompanying personal injury or physical property damage, the ELR bars tort claims where parties are in a contractual setting.\textsuperscript{45}

agreed to a referral service to assist AFM's prospective customers." \textit{id}. at 180. The
distributed yellow pages listed AFM's old telephone number, which, because of the
move, was not the correct current number. \textit{See id.} "The problem was com-
pounded when Southern Bell mistakenly assigned AFM's old number to another
customer, resulting in the automatic referral system disconnection." \textit{Id.}

"In asserting a claim for economic loss, AFM chose to proceed solely on a tort
theory . . . and specifically announced it was not basing its tort theory on any
agreement between the parties." \textit{Id}. at 181. Nonetheless, the court found that
AFM had not proved a tort distinguishable from or independent of the breach of
contract itself, and held that, "without some conduct resulting in personal injury
or property damage, there can be no independent tort flowing from a contractual
breach which would justify a tort claim solely for economic losses." \textit{Id}. at 181-82.
Hence, under the ELR as adopted in \textit{AFM}, when a plaintiff suffers purely eco-
nomic loss as a result of a defendant's negligent or intentional failure to perform
its obligations under a contract to provide services to the plaintiff, the court pre-
cludes the plaintiff from seeking recovery against the defendant under tort theo-
ries. \textit{See id.} at 180-82.

In \textit{AFM}, the plaintiff's strategic pleading forced the court to address the effect
of a contract on the purported tort claims. \textit{See id.} at 181. Hence, the court added
the concept of an independent tort. \textit{See id.} The court suggested, however, that
such an independent tort could not exist in the absence of personal injury or prop-
erty damage. \textit{See id.} at 181-82. It failed to consider the fact that some torts, like
claims for breach of fiduciary duty, generally redress purely economic harm.
Therefore, certain facts might justify the pleading of both a contract and a tort
claim, even in the absence of personal injury or property damage. The Florida
Supreme Court, however, did not contemplate this scenario. \textit{See id.}

\textsuperscript{45} \textit{See Serina v. Albertson's, Inc.}, 744 F. Supp. 1113 (M.D. Fla. 1990). In
\textit{Serina}, an employee sued his employer for fraud. \textit{See id.} at 1115. The employee
charged the defendant with depriving him of bonus monies by basing the bonus
calculations on operating statements that showed smaller profits than the actual
statements provided to corporate officials. \textit{See id.} The defendant moved for sum-
mary judgment on the grounds that the plaintiff could not establish conduct or
damages separate and distinct from his rights pursuant to the contract. \textit{See id.} In
granting the defendant's summary judgment motion, the \textit{Serina} court noted that
the facts surrounding the plaintiff's tort claim would be interwoven with the facts
surrounding a breach of contract claim, had the plaintiff chosen to bring such a
cause of action. \textit{See id.} at 1118. Thus, the \textit{Serina} court applied the ELR to bar a
tort claim between parties in privity, even though a breach of contract claim had
not been specifically pled or asserted by the party seeking recovery.

\textit{Serina} was followed by \textit{Government Personnel Services, Inc. v. Government Personnel
Mutual Life Insurance Co.}, 759 F. Supp. 792 (M.D. Fla. 1991), \textit{aff'd}, 986 F.2d 507
(11th Cir. 1993). In that case, former employees brought an action against their
former employer, asserting that the employer defrauded them by tampering with
computer reports on which their compensation was based. \textit{See id.} at 793. In enter-
ing summary judgment for the defendant, the court ruled that the ELR barred the
fraud claim because the plaintiffs' tort claim was not independent of the plaintiffs'
breach of contract claim. \textit{See id.} at 793-94.

1990), the plaintiff alleged that the defendant negligently misrepresented amounts
due when the parties entered into a contract. \textit{See id.} at 566. The trial court denied
Thereafter, the Florida Supreme Court expanded the ELR’s application to encompass situations where no contract existed between the litigating parties.

In *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, a concrete manufacturer defectively made a batch of concrete used in the repair of several homes. The concrete contained high levels of salt that caused the reinforcing bars to rust; consequently, some of the concrete cracked and broke, damaging some of the homes. Instead of suing the previous homeowners for breach of warranty, the homeowners sought to sue the concrete manufacturer in tort.

The parties framed the arguments before the Florida Supreme Court in terms of the ELR. On the one hand, the concrete manu-
manufacturer simply argued that because the homeowners had suffered no personal injury or property damage, they could state no cause of action in tort. The homeowners, on the other hand, stated that they had been harmed by the manufacturer's negligence, and thus, deserved compensation. The homeowners argued that damage to their homes was "other damage" under the ELR, so as to give them the latitude to sue in tort. They also argued that the existence of a tort remedy should not turn on the character of the loss because the concrete's dangerous condition created substantial risk of other harm occurring.

The Florida Supreme Court, with two partial dissents, mechanically applied the ELR. The only obstacle that the majority saw was the homeowner's argument that they had in fact suffered "property damage" by virtue of the fact that their homes were crumbling. Relying on East River, the Florida Supreme Court stated that the concrete was, like the generators, nothing more than a component of the home. Hence, damage to the home did not constitute the "other property damage" necessary to state a tort claim. Therefore, the ELR barred the homeowners' tort claims against the concrete manufacturer.

The Florida Supreme Court went on to note that its decision did not leave the claimants without a remedy. To the contrary, the homeowners had recourse against the prior owners who sold them their property and with whom there was the opportunity to contract, and hence, protect themselves against such risk. In fact, the court in Casa Clara went so far as to suggest that the homeown-

51. See id. at 1245. To do otherwise, the concrete manufacturer suggested, would subject suppliers in its situation to endless liability. See id. at 1247. The concrete manufacturer said instead that the homeowners should look to the previous owners and sue on their home warranties. See id.
52. See id. at 1246-47 (addressing arguments that homeowners should be excepted from operation of ELR).
53. See id. at 1247.
54. See id. The homeowners urged that they deserved special status because a home is the most substantial investment that most individuals make. See id.
55. See id. at 1248 (prohibiting tort recovery when economic loss is accompanied by no personal injury or property damage other than to product itself).
56. See id. at 1247.
57. See id. (stating that purchasers bargained for finished product, not components).
58. See id. (noting that house comprised one finished product).
59. See id. at 1248 (finding that ELR excludes recovery if there is no personal injury or other property damage).
60. See id. at 1247 (stating that actions should have been contract actions).
61. See id.
ers were the most efficient bearers of the risk of the concrete disintegrating.\textsuperscript{62}

In light of \textit{Casa Clara}, it became evident that Florida courts would apply the ELR very broadly to bar tort actions for economic loss even in the absence of privity between the claimant and the alleged wrongdoer.\textsuperscript{63} With the scope of Florida's ELR in place, this Article can now examine and critique how Florida has applied the ELR, not to products liability tort claims, but instead to breach of fiduciary claims.\textsuperscript{64}

\textsuperscript{62} \textit{Id.} This analysis exalts form over substance and, the court's efficiency arguments aside, seems quite inefficient. The court may have set in motion quite a string of lawsuits for breach of warranty that will culminate with the manufacturer being sued. It seems better to permit the homeowner a direct action to reduce transaction costs and conserve judicial resources. The mere fact that one can contract to protect oneself, through insurance or otherwise, does not justify turning the law of torts on its head so that rational actions against negligent producers are foreclosed. It certainly undermines the incentive that would otherwise exist to carefully manufacture concrete. This result, however, was the product of applying the ELR devoid of its policy base. In effect, it begins to erode worthy causes of action in tort because of an inappropriate fixation on the existence of some privity or a special kind of property damage.

\textsuperscript{63} \textit{See, e.g.,} Sfc Valve Corp. v. Wright Mach. Corp., 883 F. Supp. 710, 714 (S.D. Fla. 1995) (interpreting \textit{Casa Clara} as abolishing "no alternative remedy" exception to Florida's ELR). In another effort to clarify things, the Florida Supreme Court reentered the fray in Airport Rent-A-Car, Inc. v. Prevost Car, Inc., 660 So. 2d 628 (Fla. 1995). This decision was, in essence, an affirmation of the court's decisions in \textit{Casa Clara} and the 1987 trilogy of Florida Power, Aetna Life and AFM. First, the court recognized a very narrow "no alternative theory of recovery" exception to the ELR. \textit{See id.} at 631. The court said that the case giving rise to such an exception was one in which an architect allegedly had failed to adequately supervise a general contractor. \textit{See id.} The key was supervisory responsibilities, and absent these, the exception did not apply. As the instant case was devoid of any such allegations, the general rule prevailed to bar a tort action in which the only damage was to the defective product itself. \textit{See id.} Second, the court noted that despite damage caused "by a sudden calamitous event," without physical injury or property damage, there simply could be no tort recovery. \textit{See id.} at 631-32. Third, without the requisite harm, a failure to warn claim would not circumvent the ELR, especially when the alleged failure occurred subsequent to the manufacture of the product and the formation of any contract. \textit{See id.} at 632.

\textsuperscript{64} \textit{See, e.g.,} Streiff Jewelry Co. v. United Parcel Serv., Inc., 670 F. Supp. 341, 343-44 (S.D. Fla. 1987) (using ELR to bar breach of fiduciary duty claim), vacated, 679 F. Supp. 7 (S.D. Fla. 1988). A few years later in \textit{Kee v. National Reserve Life Insurance Co.}, 918 F. 2d 1538, 1543 (11th Cir. 1990), the Eleventh Circuit Court of Appeals reached the same conclusion as the court in \textit{Streiff Jewelry}. \textit{Id.} In \textit{Kee}, an insurance agent had a contract with an insurance company by which he was to receive commissions for policies he sold. \textit{See id.} at 1539-40. Kee allegedly induced customers to buy policies by paying the first year's premiums himself and applying the customer's payment to give them a second year of coverage. \textit{See id.} at 1540. The fact that Kee's commission was greater than the first year's premium made this scheme profitable. \textit{See id.}

Upon learning of the scheme, the insurance company terminated Kee. \textit{See id.} Litigation ensued and Kee asserted claims for an accounting for commissions owed, breach of contract, breach of implied covenant, conversion and conspiracy.
2. The ELR and Breach of Fiduciary Duty Claims in Florida

Perhaps the most recognized decision in Florida regarding the applicability of the ELR to a breach of fiduciary duty claim is the opinion of the United States Court of Appeals for the Eleventh Circuit in Interstate Securities Corp. v. Hayes Corp.65 Hayes entered into three contracts with Interstate, a brokerage firm, which enabled Hayes to trade various options and commodities through an Interstate margin account.66 Interstate imposed a condition on the margin trading requiring that the President of Hayes execute a written,

See id. The insurance company counterclaimed for breach of contract, breach of fiduciary duty, negligence, fraud, intentional misrepresentation and negligence per se. See id. Kee moved for summary judgment on the grounds that the tort claims were not separate from the breach of contract claim. See id. Kee aligned himself with another entity, CTL Insurance Corporation, because Kee had assigned his rights to this entity. See id. The district court found that the insurance company failed to establish any of the tort counts and granted Kee’s motion. See id. Likewise, it granted the insurance company’s summary judgment motion with respect to all counts. See id. Kee appealed the entry of summary judgment only on his claims for accounting, conversion and conspiracy. See id. His appeal was unsuccessful, as the court affirmed the district court’s adverse ruling on these claims. See id. at 1541-42.

It was in connection with the insurance company’s appeal that the court confronted the issues surrounding the ELR. See id. at 1543. The court began by noting “that the mere existence of a contract claim does not automatically vitiate all causes of action in tort.” Id. The court stated, however, that there had to be wrongful conduct, beyond the breach of contract, amounting to an independent tort. See id.

The court then turned its focus to the damages allegedly suffered by the insurance company. See id. The counterclaim stated:

“[The Insurance Company] was and has been damaged as set forth in paragraph 22 above.” Paragraph 22 sets out the damages for the breach of contract claim which include money paid in commissions and bonuses, expenses in processing applications, risk of indemnity, and loss of use of its money. These are, of course, all losses flowing from the contractual breach. “Where the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, compensatory damages and punitive damages for the tort are not recoverable.”

Id. (footnote omitted) (quoting Rosen v. Marlin, 486 So. 2d 623, 626 (Fla. Dist. Ct. App. 1986)). The Kee court, consequently, affirmed the grant of summary judgment in favor of Kee on the insurance company’s tort claims. See id. at 1544. The court did not separately address the breach of fiduciary duty claim, but instead lumped it with the others. As a result, little can be gleaned from Kee.

65. 920 F.2d 769 (11th Cir. 1991). It may be the case that prior to Interstate Securities, scholars and practitioners had just assumed that Kee was an aberration. Be that as it may, Interstate Securities has been sharply criticized. See, e.g., James G. Dodrill, II, Note, Interstate Securities Corp. v. Hayes Corp.: Should the Economic Loss Doctrine Apply to Actions Against Fiduciaries?, 47 U. MIAMI L. REV. 1193, 1220 (1993) (“Although the economic loss doctrine is appropriate in actions involving product liability and some service contracts, the doctrine’s rationale breaks down when expanded to cover relationships involving fiduciary duties.”).

66. See Interstate Securities, 920 F.2d at 770 (commenting on contractual relations between Hayes and Interstate).
Hayes, through its President, engaged in a considerable amount of risky trading on the Interstate account. Ultimately, Hayes suffered huge losses on this account and Interstate sued to recover the amount owed after liquidation of the account. Hayes's counter-claims against Interstate included a breach of fiduciary duty claim. On appeal, the Eleventh Circuit framed the issue:

Because no personal injury or property damage occurred in this case, the issue is whether, as a matter of Florida law, breach of fiduciary duty is the kind of tort that is foreclosed between parties to a contract under AFM or whether it constitutes a tort separate and independent from an accompanying breach of contract.

To resolve this issue of Florida law, the Eleventh Circuit looked to J. Batten Corp. v. Oakridge Investment 85 Ltd., which, under the ELR, barred what appeared to be a claim of fraud in the inducement. The Eleventh Circuit reasoned that, if the ELR bars a fraud claim under Florida law, the ELR must likewise prohibit a claim for breach of fiduciary duty, especially when the parties were in privity

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67. See id. ("Before agreeing to permit Hayes Corporation to trade on margin, Interstate required Roger Haendiges, the president and sole shareholder of Hayes, to execute a written personal guaranty to cover any obligations incurred by the account.").

68. See id. at 771 (discussing Haendiges's writing of uncovered options through its Interstate account).

69. See id. at 772 (noting that Hayes allegedly owed Interstate $1,867,061 after liquidation of Hayes's account).

70. See id. (summarizing Hayes's counterclaims against Interstate, which included breach of contract, breach of fiduciary duty, negligent handing of accounts and allegation that Interstate violated Regulation T, which governs issuance of credit by securities firms to investors trading on margin).

71. Id. at 776 (determining if, under Florida law, breach of fiduciary duty is type of tort that is foreclosed between contracting parties or whether it constitutes separate and independent tort from breach of contract).


73. Id. at 69 (affirming trial court’s dismissal of fraud claim based on ELR). A general contractor sued a property owner in a construction project under a mechanic's lien and asserted additional claims for breach of contract and fraud. See id. at 68-69. The lien claim alleged that the owner owed money on the project. See id. at 69. The fraud claim alleged that the owner refused to pay for certain work and then induced the contractor to complete construction based on the owner's fraudulent representation that it would pay the amount due. See id. The trial court dismissed the fraud claim at the pleading stage based on ELR. See id. The appellate court affirmed. See id.
and no relationship would have existed but for the contracts. Thus, the court in Interstate Securities concluded that because of application of the ELR, the court should have dismissed the appellants claim for breach of fiduciary duty. This reasoning is dubious. A breach of fiduciary duty claim should not suffer the same fate simply because the ELR barred a fraud claim asserted under different facts. In addition, just because a fiduciary is in privity with someone does not mean that the fiduciary should automatically be responsible merely for breach of contract. Furthermore, as it turns out, the Florida Supreme Court ultimately ruled several years after Interstate Securities that the ELR did not bar fraud in the inducement claims. Thus, the very foundation upon which the Interstate Securities court relied is no longer valid.

74. See Interstate Securities, 920 F.2d at 777 (stating that, under Florida law, both fraud claims and breach of fiduciary duty claims are foreclosed under AFM doctrine when claims are based solely on contractual relationship).

75. Id. (distinguishing appellant’s case from those allowing for recovery for pure economic loss when there was no alternative means of recovery).

76. Indeed, the duty imposed on a fiduciary is among the highest imposed by law. One might think that a court would go to great lengths to try to preserve such a claim.

77. Such a rule threatens to absolve him, at least in substantial part, from a rank breach of fiduciary duty. There is simply no reasoned basis to insulate a wrongdoer in this way. Likewise, there is no valid reason to strip the innocent victim of valuable remedies, such as damages proximately caused or punitive damages, solely because he or she is in privity with the tortfeasing fiduciary. This serves no one other than the self-serving fiduciary.

78. See generally HTP, Ltd. v. Lineas Aereas Costarricenses, 685 So. 2d 1238, 1240 (Fla. 1996) (holding that fraudulent inducement is independent tort from breach of contract and is not barred by ELR); Woodson v. Martin, 685 So. 2d 1240, 1241 (Fla. 1996) (quashing appellate court’s decision that fraud in inducement claims were barred by Florida’s ELR). Prior to this decision, commentators in Florida had sharply criticized the line of case law holding that the ELR barred fraud in the inducement claims. See, e.g., Theresa Montalbano Bennett, Lies and Broken Promises: Fraud and the Economic Loss Rule after Woodson v. Martin, 70 Fla. B.J. 46, 47-48 (1996) (discussing policy reasons for allowing fraud claims arising from contractual relationships under ELR).

79. See Interstate Securities, 920 F.2d at 776-77 (reasoning that if fraud claims between parties to contract are barred by ELR under Florida law, breach of fiduciary duty claims would be as well). In other words, Interstate Securities, a case decided by a federal court attempting to apply federal law, was decided based upon a premise that the Florida Supreme Court ultimately held was erroneous. Therefore, a strong argument can be made that Interstate Securities should no longer be good law. Unfortunately, Interstate Securities became a favorite weapon of defense lawyers as soon as the decision came down. See Moro-Romero v. Prudential Bache Sec., Inc., No. 89-1821-CIV, 1991 WL 494175, at *6 (S.D. Fla. Aug. 26, 1991) (applying Interstate Securities blindly to bar breach of fiduciary duty claim involving fraud by account executive who gave plaintiff worthless certificate of deposit in exchange for approximately $600,000 of plaintiff’s funds that account executive transferred to himself).

The Eleventh Circuit had another chance to consider the application of Florida’s ELR in BankAtlantic v. Blythe Eastman PaineWebber, Inc., 955 F.2d 1467 (11th
Shortly thereafter, a federal district court in Florida considered the application of the ELR in a fiduciary context. In City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco Management, Inc., the plaintiff, a trust, entered into an agreement with the defendant to have the defendant serve as an investment advisor for the trust. Count I of the trust's complaint sought compensatory damages based on a tort theory and reserved the right to seek punitive damages. The defendant moved to dismiss Count I, asserting that the ELR barred it.

The court began with a summary of Florida’s ELR. It stated the general rule that “no independent tort can exist solely for contractually based economic damages, absent personal injury or damage to property other than that which was subject to the contract.” The court also noted that the rule provides an exception for claim-
nants who do not have a contractual remedy.\textsuperscript{85} The court then proceeded to apply this rule and exception.\textsuperscript{86}

The court analyzed Count I of the plaintiff's complaint and concluded that it resembled a claim for breach of fiduciary duty, despite its not being labeled as such.\textsuperscript{87} Hence, the court dismissed the claim because the claim for fiduciary duty was dependent on the existence of the contract and the claim did not include any assertions of personal injury or property damage.\textsuperscript{88} Finally, the court noted that the trust was not without a remedy because the agreement provided a means of redress.\textsuperscript{89}

The court's rationale is easily understood. It ignores, however, the classic policy justifications for claims of breach of fiduciary duty and the heightened duties of care and loyalty that accompany them.\textsuperscript{90} Traditionally, society has sought to reinforce such relationships, not just through compensatory means, but deterrent means as well.\textsuperscript{91} Here, the court foreclosed possible full compensation and any opportunity for punitive damages, but in so doing, did not address whether the alleged breach of duty justified consideration of other policies beyond the parties' contract.\textsuperscript{92}

\textsuperscript{85} See id. at 393-94 ("Thus, it seems clear that invocation of the rule precluding tort claims for only economic losses applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss."). Of course, this observation may no longer be correct in light of Casa Clara's holding and given the fact that Casa Clara expressly disapproved of Latite Roofing v. Urbanek, 588 So. 2d 1381 (Fla. Dist. Ct. App. 1988). Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1248 (Fla. 1993). If one reads Casa Clara to say that the ELR applies as long as there is "a contract in the vicinity," this exception to the ELR may no longer have vitality.

\textsuperscript{86} See City of Miami Firefighters', 789 F. Supp. at 394 (granting Invesco's motion to dismiss trust's tort claim for damages resulting from alleged speculation).

\textsuperscript{87} See id. This fiduciary duty allegedly arose under statute as well as contract. See id. The court saw the case as the factual equivalent of Interstate Securities and stated that, in that case, no duty arose until the parties entered into the investment advisor agreement. See id.

\textsuperscript{88} See id.

\textsuperscript{89} See id. at 394-95 (noting that plaintiffs can still bring breach of contract action). Hence, the exception did not apply to enable the breach of fiduciary duty claim to escape the ELR's application.


\textsuperscript{91} See generally Wagman v. Lee, 457 A.2d 401, 405 (D.C. 1983) (awarding punitive damages as form of deterrent in breach of fiduciary duty claims); Mulder v. Mittelstadt, 352 N.W.2d 223, 229 (Wis. Ct. App. 1984) ("The remedy employed here is one that would prevent the same controversy in the future.").

\textsuperscript{92} See City of Miami Firefighters', 789 F. Supp. at 394 (failing to address policy reasons justifying compensation beyond damages for breach of contract).
This is especially troubling when, as in this case, the parties clearly intended and expressed in their contract that the defendant should not escape responsibility for his negligence, willful misconduct or bad faith.\textsuperscript{93} The reference to the common law tort concepts within the contract suggests that the parties may have been relying on these tort concepts to fill the gaps in their contracts.\textsuperscript{94} Instead, their words had the ironic effect of foreclosing those claims.\textsuperscript{95}

\textsuperscript{93} See id. at 393 ("Section 8 of the Agreement states that '[t]he General Investment Advisor [Invesco] shall not be liable for . . . any loss to or diminution of the property in the Account, except such as is due to its own negligence, willful misconduct, or lack of good faith.").

\textsuperscript{94} See id. For a discussion of the tort concepts referred to in the trust agreement, see supra note 93 and accompanying text.

\textsuperscript{95} See City of Miami Firefighters', 789 F. Supp. at 394-95 (holding that ELR barred breach of fiduciary duty claim because such claim depended on existence of contract). The same court revisited whether the ELR barred claims for breach of fiduciary duty in Bender v. Centrust Mortgage Corp., 833 F. Supp. 1525 (S.D. Fla. 1992). In Bender, the plaintiff was the president of a mortgage company who sued on a variety of claims arising out of his alleged employment relationship. Id. at 1527. The mortgage company was a subsidiary of a bank taken over by the Resolution Trust Company ("RTC"). See id. The RTC repudiated the plaintiff's employment contract on behalf of the bank and the plaintiff sought to impose liability on the subsidiary mortgage company. See id. The court considered the defendant's motion to dismiss the complaint, which included several counts for breach of contract, one for breach of fiduciary duty, one for tortious interference and one for imposition of a constructive trust. See id. at 1527-28.

The court let stand the plaintiff's contract theories, requiring a more definite statement with respect to one. See id. at 1532-36. Despite this, the court also allowed to stand the claim for breach of fiduciary duty arising out of the defendants' alleged setting aside of funds to pay the plaintiff. See id. at 1535-36. Ironically, the court stated that "[t]he defendant [had] provided no authority suggesting that [p]laintiff substantively [could] raise no breach of fiduciary duty claim, or that procedurally this claim [was] not properly raised." Id. (citing AFM and Interstate Securities for this proposition). Unfortunately, the court did not explain why it believed these cases supported its decision. This would have been helpful, especially because these cases generally stand for the contrary position that the ELR would bar such a claim.

Such inconsistency from the court is remarkable, especially in light of the underlying facts. While the facts in City of Miami Firefighters' seemed to offer more hope for a breach of fiduciary duty claim on their face, employment relationships, as a general rule, offer less, especially to the employee/agent because the agent generally is not the beneficiary of fiduciary duties from the principal. See W. Edward Sell, Sell on Agency 2 (1975) ("The agency relationship is essentially a fiduciary relationship, in which the agent agrees to act primarily for the benefit of the principal in connection with the matters he is to transact or services he is to perform."). Moreover, an employment contract nearly always contemplates an employee's pay. Another way to look at this case would be to say that the plaintiff simply was not paid, constituting merely a breach of the employment contract, which he had the opportunity to bargain for and protect himself against. Viewed from this perspective, the court could have held that the parties simply did not stand in a fiduciary relationship. Resort to the ELR to bar the fiduciary duty claim would then have been unnecessary.
This issue again arose on a motion to dismiss before the United States District Court for the Southern District of Florida in Resolution Trust Corp. v. Holland & Knight. The complaint, brought by the Resolution Trust Corporation ("RTC"), alleged that legal work by the defendant resulted in the failure to file a lawsuit for breach of a guaranty agreement executed by one of the bank’s principals and a related entity. RTC claimed that the law firm "was both incompetent and disloyal in its representation of [its client, the bank]” and favored the bank’s principals over the bank. Based on the ELR, the defendant law firm sought to dismiss the second count of a two-count complaint for "legal malpractice-negligence" and breach of fiduciary duty.

In Airlines Reporting Corp. v. Atlantic Travel Service, Inc., 841 F. Supp. 1166 (S.D. Fla. 1993), the same beleaguered court looked at another motion to dismiss implicating the ELR. See id. at 1167. The plaintiff was an agency of certain air carriers and, in that capacity, provided services relating to airline ticketing. See id. The defendant, a travel agency, entered into an agreement with the plaintiff, authorizing the plaintiff to purchase tickets from the defendant and, in turn, sell them to the public. See id. The defendants failed to pay for some tickets. See id. In addition to suing for breach of contract, the plaintiff also alleged breach of fiduciary duty, conversion, fraud and negligence. See id. The defendants sought to dismiss the tort counts, asserting they were barred by the ELR. See id.

The court began again with a brief statement of the rule and noted the existence of an exception when no alternative contractual remedy existed. See id. at 1168. The court reviewed Interstate and AFM and then applied them to the instant facts. See id. at 1168-69. The court stated that the plaintiff’s tort claims were not "independent or distinguishable" from the contract claims. Id. at 1169. Moreover, the court observed that the plaintiff’s claims were "solely for economic damages flowing from [the] alleged breach of contract." Id. Given these findings, the court easily dealt with the plaintiff’s arguments in opposition. See id. The first was that the ELR could not bar the claims against the defendant’s agent because he was not a party to the contract. See id. The court rejected this proposition, stating that the agent was sued in his agency capacity and that his allegedly wrongful conduct was no different than that alleged in the breach of contract claim. See id.

The second argument was in essence one that an independent tort had, in fact, been alleged. See id. The court, however, easily distinguished the cited precedent because it involved property damage, not mere economic loss as in the case before the court. See id. Hence, the court dismissed this argument. See id. Finally, the plaintiff argued that even if the ELR barred tort claims, that it should nonetheless be able to recover punitive damages. See id. The court also rejected this, citing well established Florida law that punitive damages are unavailable in breach of contract actions. See id. Having considered and rejected all of the plaintiff’s arguments, the court dismissed all tort claims. See id.

97. See id. at 1530 (claiming that Holland & Knight’s conclusion that wrongdoing bank’s director and related entity had no liability under guarantee agreement resulted in corporate committee’s abstention from filing suit against wrongdoers).
98. Id. (alleging counts of legal malpractice, negligence and breach of fiduciary duty).
99. See id. (addressing argument that breach of fiduciary duty is not independent tort and is barred by ELR).
The court began its analysis by looking to Rule (8)(e)(2) of the Federal Rules of Civil Procedure, which states in relevant part:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.100

Based on its reading, the court concluded that the RTC had merely taken advantage of this rule and that the two counts were not duplicative, but instead represented two distinct theories of malpractice, which were permissibly pled in the alternative.101 The court then addressed the law firm's argument that the ELR barred the RTC's breach of fiduciary duty claim.102

The court said that it was not clear whether, under Florida law, a malpractice action is a tort or contract claim.103 Hence, the court fell back on its conclusion that, both counts were for legal malpractice, pled in the alternative, and that irrespective of their nature as contracts or torts, the ELR was not a bar.104 Accordingly, the court denied the motion to dismiss.105

The court here did several important things. First, in the face of considerable precedent, the court nonetheless declined to apply the ELR, recognizing that different policies are possibly at play in

102. See id. at 1532. The law firm's argument was predicated on the assertion that the first count of the complaint, that denominated as "legal malpractice-negligence," was really a claim for breach of contract. See id. Because there was no claim for personal injury or property damage, the law firm asserted that, in light of the contract remedy, the ELR was a bar to the breach of fiduciary duty claim. See id. The law firm cast its argument in terms of both the ELR and the independent tort doctrine. See id. The latter is intimately related to the former and states that "there must be a tort distinguishable from or independent of the breach of contract." AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987) (quoting Lewis v. Guthartz, 428 So. 2d 222, 224 (Fla. 1982)).
103. See Holland & Knight, 832 F. Supp. at 1532; see also Kartikes v. Demos, 214 So. 2d 86, 86-87 (Fla. Dist. Ct. App. 1968) (stating that client has cause of action in contract for negligent performance).
104. See Holland & Knight, 832 F. Supp. at 1532 (finding that ELR was not applicable to alternative tort or contract claims). In a footnote following this statement, the court noted that the ELR had yet to be applied in the legal malpractice context, and that it was derived from the very different context of commercial litigation. See id. at 1532 n.7.
105. See id. at 1531-32.
the products liability context than in the legal malpractice context. Malpractice claims often traditionally sound in negligence and, at the same time, recognize the public interest in reinforcing the fiduciary nature of the attorney-client relationship. Additionally, economic loss may oftentimes be the sole, but substantial, injury suffered by the client. For these reasons, extension of the ELR to the malpractice context makes little sense.

Second, the court’s decision illustrates another troubling aspect of the ELR. The ELR is often invoked at the motion to dismiss stage before a plaintiff has had the opportunity to develop its case through discovery. This may have led the court in Holland & Knight to rule as it did. From a defendant’s perspective, however, a motion to dismiss based on the ELR provides a marvelous oppor-

106. See id. at 1532.
107. See id. ("[T]he [c]ourt has concluded that [malpractice] claims . . . sound in tort.").
108. See id. Rule 8 of the Federal Rules of Civil Procedure authorizes pleading in the alternative without regard to the sufficiency or consistency of other claims. Fed. R. Civ. P. 8(a), (e); see also Holland & Knight, 832 F. Supp. at 1531-32 (permitting plaintiff to seek inconsistent remedies under Rule 8 and, therefore, not elect between them at pleading stage); 2A James Wm. Moore, Moore’s Federal Practice ¶ 8.32 (2d ed. 1996) (same); 5 Charles Alan Wright & Arthur R. Miller, Fed. Pract. & Proc. 532-33 (2d ed. 1990) (abrogating “theory of pleadings” doctrine that required plaintiff to seek, and be awarded, recovery on only one theory). Finally, it rejects the “weaker link” doctrine that provided a basis for declaring an entire pleading defective if one alternative was inadequately pled. See id. at 543-44 (noting procedure consistent with policy to promote efficiency in pleading and resolution of disputes on merits, not technical deficiencies).

Furthermore, significant procedural differences exist between contract and tort claims. If a cause of action is labeled a contract claim, plaintiffs often will have a shorter statute of limitations period. Defendants, faced with disproving negligence in a contract case, will not have the benefit of contributory negligence or statutory contribution rights to reduce damages. In addition, plaintiffs who have to sue in contract to recover for a tortious injury will be unable to recover damages for mental distress. Since tort law generally places less restrictions on plaintiffs, it is thought to be more advantageous. . . . The better course is to allow both contract and tort claims to be brought as independent causes of action rather than to ban tort claims that arise in contractual relationships. Plaintiffs will then have the opportunity, or the burden, of alleging and proving facts to support their claims individually. This kind of legal classification leads to a more efficient, logical and rational system and will better serve all parties.

Id. (footnote omitted).
110. Holland & Knight, 832 F. Supp. at 1528 (holding that plaintiff’s malpractice claims were permissibly pled in alternative, and therefore, neither ELR nor independent tort doctrine applied).
tunity to whittle down a complaint to a less threatening contract action.\footnote{See, e.g., First Union Discount Brokerage Servs., Inc. v. Milos, 997 F.2d 835, 844 (11th Cir. 1993) (revisiting ELR in Eleventh Circuit). This case involved a complicated brokerage transaction between an investor and a discount brokerage house. \textit{See id.} at 839. In connection with the transaction, the investor signed a margin agreement with the brokerage firm that gave the brokerage firm "full discretion to protect [itself] by liquidating the [investor's] securities positions without notice." \textit{Id.} This agreement was executed after the investor expressed concerns that he might not be able to monitor his considerable positions while he vacationed in Russia. \textit{See id.} Near the same time, an agent of the brokerage firm told the investor that he would have thirty days following his return from vacation, until November 15, 1987, to cure any margin problems arising from the investor's writing of risky put options. \textit{See id.}

Subsequently, the investor vacationed in Russia from September 28 to October 14, 1987, during which time the stock market went into a decline. \textit{See id.} Margin calls on the investor's account were issued, but not enforced. \textit{See id.} In fact, there was confusion as to whether the calls were a mistake, resulting from difficulties that the brokerage firm's clearing broker was having supplying timely and accurate account information. \textit{See id.} at 839-40. When the investor went to the brokerage firm on October 16 after returning from Russia, it appeared that his account was in order and adequate; but, in reality, it was actually overstated by a considerable amount. \textit{See id.}

As bad luck would have it, the stock market crashed on October 19, generating a huge margin call in the investor's account. \textit{See id.} at 840. The brokerage firm demanded that the investor meet the call immediately. \textit{See id.} When the investor maintained he had an extension through November 15th, the brokerage firm claimed that the agent making that agreement lacked authority. \textit{See id.} When the investor refused to meet the call, the brokerage firm liquidated the account and asserted a deficiency. \textit{See id.}

Despite a notice to do so, the investor never objected to the deficiency. \textit{See id.} The brokerage firm sued to recover the deficiency and the investor counterclaimed. \textit{See id.} The counterclaim included one count alleging breach of contract, two counts alleging statutory violations and three counts alleging tort claims of common law fraud, breach of fiduciary duty and negligence. \textit{See id.} at 840-41.

The brokerage firm moved for summary judgment on its complaint and the investor's counterclaim. \textit{See id.} at 841. It was in consideration of the counterclaim that the court discussed the ELR. \textit{See id.} at 844. The court dismissed the counterclaim because it believed that reliance on false representations were essential to each count and that either there were no such statements, or if there were any, no reasonable reliance on them. \textit{See id.} at 844-47.

By doing so, the court avoided what would have been a considerable difficulty associated with applying the ELR to the investor's complaint. \textit{See id.} at 844 n.14. Instead, the court relegated its discussion of this to a footnote. \textit{See id.} It offered the ELR only as an "additional obstacle" to the investor's recovery under the breach of fiduciary duty and negligence counts. \textit{Id.} After laying out the facts of \textit{Interstate Securities}, the court simply said, "[s]imilarly, the [investor] cannot recover under [a] negligence or breach of fiduciary duty claim." \textit{Id.}

The approach taken by the court in its opinion seems more analytically sound than the ELR alternative presented in the footnote. The court assessed the claims and found essential elements missing. \textit{See id.} at 844-47. This approach is superior to wading unnecessarily into the murky waters of the ELR and does not require a foreclosure of legitimate remedies at the pleading stage.
The Eleventh Circuit once again had to deal with the ELR in *Jones v. Childers*.112 The plaintiff, a professional football player, sued his agent and financial advisor, a corporation and its sole shareholder, for fraud, negligence, breach of contract, breach of fiduciary duty and Racketeering Influenced and Corrupt Organization Act (RICO)113 violations.114 On appeal, the defendants argued, among other things, that Florida’s ELR barred the plaintiff’s tort claims, including the claim for breach of fiduciary duty.115

The shareholder defendant argued that the course of dealing between the plaintiff and himself constituted an implied contract, if not an express one.116 The court, however, stated that to suggest an implied contract was to misunderstand Florida law, which essentially uses such fiction only to prevent unjust enrichment.117 Without further discussion of the ELR, the court held that the ELR did not bar the remaining tort claims and the claim for breach of fiduciary duty against the shareholder defendant.118

Interestingly, what saved the plaintiff here was the fortuity of dealing with a sole shareholder with whom he was not in privity, having contracted with the corporation instead. Under a technical reading of *Casa Clara*, however, the Eleventh Circuit could have

112. 18 F.3d 899 (11th Cir. 1994).
114. *See Jones*, 18 F. 3d at 901. The district court found in favor of the plaintiff and made both a compensatory and punitive damage award. *See id.* The defendants appealed. *See id.* The plaintiff had entered into a management contract with the defendant corporation. *See id.* Subsequently the shareholder defendant advised plaintiff to invest in a tax shelter and plaintiff followed his advice unaware of the likelihood of a tax audit that was disclosed in an accompanying prospectus. *See id.* at 902. After the plaintiff made a second investment in a related tax shelter, the Internal Revenue Service (IRS) sent the plaintiff a deficiency notice. *See id.* By the time the deficiency notice was received, the investments had gone bad. *See id.* Prior to this time, the shareholder defendant had assured plaintiff that an audit was nothing to worry about and only a mere formality. *See id.*
115. *See id.* Prior to the trial, the district court had, on the basis of the ELR, dismissed all the tort claims against the corporate defendant because the management contract was between plaintiff and the corporate defendant. *See id.* at 904-05. The court, however, did not dismiss the tort claims against the shareholder defendant because he was not a party to the contract. *See id.* at 905.
116. *See id.* The court rejected this argument finding no legal or factual basis for it. *See id.* The record was devoid of evidence of any contract other than the management contract. *See id.*
117. *See id.* ("Unlike express contracts, which arise by mutual assent of the parties, implied or quasi contracts are ‘a fiction of the law, adopted to achieve justice and enforce legal duties by means of an action ex contractu where no true contract exists.’" (quoting 11 FlA. JUR.2d CONTRACTS, § 236 (1979)).
118. *See id.* (finding that ELR does not bar Jones’s tort claims against Childers).
barred the plaintiff's claims against the sole shareholder as well.\textsuperscript{119} Because the court in \emph{Casa Clara} applied the ELR, even in the absence of privity with the alleged wrongdoer, the court here could have left the plaintiff with only his contractual claim against the corporation.\textsuperscript{120}

If, however, the plaintiff had contracted with both the corporation and its principal, then it appears that the court would have barred the plaintiff's tort remedies and claim for breach of fiduciary duty.\textsuperscript{121} This technical distinction is not policy based, and therefore, is fragile and problematic when the allegations fit our traditional notions of fiduciary obligations. It is odd to think that the likely inadvertent failure to contract with the trusted shareholder is the determinative factor as to whether the ELR should apply to bar a breach of fiduciary duty claim.\textsuperscript{122}

\textsuperscript{119} Compare \emph{Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.}, 620 So. 2d 1244, 1246-47 (Fla. 1993), \emph{with Jones}, 18 F.3d at 901-05 (questioning scope of ELR based on policy reasons).

\textsuperscript{120} Indeed, the fact that there was a contract in the vicinity, i.e., between plaintiff and the defendant corporation, may have been enough to bar tort claims against the sole shareholder under the ELR.

\textsuperscript{121} See \emph{Interstate Sec. Corp. v. Hayes Corp.}, 920 F.2d 769, 776-77 (11th Cir. 1991) (barring breach of fiduciary duty claim among parties to contract because claim is not separate and independent tort, but rather dependent on existence of contract); \emph{City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco Mgmt., Inc.}, 789 F. Supp. 392, 394 (S.D. Fla. 1992) (dismissing claim for breach of fiduciary duty because claim is dependent on existence of contract and noting that recovery is limited to breach of contract claim).

\textsuperscript{122} See, e.g., \emph{Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.}, 912 F. Supp. 469 (D. Kan. 1995). In \emph{Audiotext Communications}, a federal district court in Kansas found itself applying Florida law and struggling with the application of the ELR. \textit{See id.} at 475. The procedural posture was a motion for judgment on the pleadings or, in the alternative, for summary judgment. \textit{See id.} at 472. The plaintiffs, information providers in the telecommunications industry, entered into agreements with the defendants to purchase certain billing and collection services from the defendants. \textit{See id.} The plaintiffs alleged that defendants' conduct, both prior to and throughout the contract period, was tortious. \textit{See id.} at 472-73. Defendants allegedly did not provide accurate information regarding their services, wrongfully withheld money and otherwise failed to provide effective service. \textit{See id.}

The plaintiffs' complaint included claims of fraud, negligent misrepresentation, breach of fiduciary duty and breach of contract. \textit{See id.} at 473. In response, defendants asserted that all of plaintiffs' tort claims were barred by the ELR. \textit{See id.} After determining that Florida law applied, the court looked at \emph{Interstate Securities} and \emph{AFM} for guidance. \textit{See id.} at 474. Although the plaintiffs asserted that their claims for negligent misrepresentation and breach of fiduciary duty were distinct from the contract, the court believed they were the mirror image of the contract claims. \textit{See id.} at 475. Also, there were no allegations of personal injury or property damage in the claims. \textit{See id.} Hence, the court held these claims were barred by the ELR. \textit{See id.} Furthermore, while the court held that the plaintiffs' fraud in the performance claims were barred by the ELR, the court permitted the plaintiffs' fraud in the inducement claims to stand. \textit{See id.}
One could read the court's opinion to mean that it believed that the parties did not stand in a fiduciary relationship, but merely a contractual one. It is also possible to see the opinion as yet another mechanical application of the ELR, however, sans any of the traditional public policy analysis accompanying breach of fiduciary duty claims. If the underlying facts did not suggest such a relationship, then no claim for breach of fiduciary duty was viable, irrespective of the ELR.

The Southern District of Florida looked at the issue in yet a different context in *Keys Jeep Eagle, Inc. v. Chrysler Corp.*, 897 F. Supp. 1437 (S.D. Fla. 1995), aff'd, 102 F.3d. 554 (11th Cir. 1996). The case was before the court on the defendants' motion for summary judgment. See id. at 1440. The dispute arose out of a franchise relationship between the plaintiff, an automobile dealership, and the defendant, Chrysler Corporation, as franchiser. See id. The plaintiff also had a fiduciary arrangement with another defendant, Chrysler Credit Corp. ("CCC"). See id. This arrangement was known as a floorplan line of credit, and the advances made under this line of credit were in CCC's discretion, as was the right to terminate the arrangement. See id. The line of credit was secured by a security interest in the financed vehicles. See id. If a financed car was sold, CCC would receive the amount of the advance it had made on the vehicle immediately and the plaintiff would hold the proceeds in trust for CCC. See id. at 1441. The plaintiff executed a promissory note and provided additional security by way of an assignment of factory credits from the other defendant Chrysler to CCC. See id.

Subsequently, the plaintiff began to sell vehicles without remitting the advance to CCC. See id. Soon a dispute developed as to whether the dealership was adequately financed and, ultimately, the credit line was canceled. See id. The plaintiff accused CCC of improper conduct that ruined plaintiff's business, but did not extend its accusations to defendant Chrysler. See id. Plaintiff sued CCC for breach of contract, fraud, breach of fiduciary duty and statutory violations of the Automobile Dealers' Day in Court Act. See id.; 18 U.S.C. § 1221-1225 (1994) (authorizing contract suits by automobile dealers against manufacturers in federal courts regardless of amount in controversy under Automobile Dealers' Day in Court Act). Plaintiffs sought both compensatory and punitive damages. See *Keys Jeep Eagle, Inc.*, 897 F. Supp. at 1441.

The defendant raised the ELR in an effort to bar the fraud claim. See id. at 1443. The court began by stating that the plaintiff admitted the existence of a contractual relationship with defendant CCC. See id. Analyzing the complaint, the court said that all of the allegations of fraud arose out of, and were directly related to, the contract. See id. Also, the plaintiff alleged no personal injury or property damage in the complaint. See id. Concluding that "[a]ll of the fraud allegations are wholly dependent on the contractual relationship," the court found that the ELR barred the fraud claim and entered summary judgment on the claim in favor of defendant CCC. Id.

The court also granted defendant CCC summary judgment on the breach of fiduciary duty claim for two reasons. See id. The first was that, under Florida law, the lender-debtor relationship does not give rise to a fiduciary duty. See id. The second reason was the ELR. See id. If the fraud claim was barred, so was the claim for breach of fiduciary duty. See id. As noted earlier, this reasoning may be seriously flawed in light of the Florida Supreme Court's subsequent ruling in *HTP* that fraud in the inducement claims are torts that are independent from breach of contract claims, and therefore, are not barred by the ELR. See *HTP*, Ltd. v. Lineas Aereas Costarricenses, 685 So. 2d 1228, 1240 (Fla. 1996).

The court's analysis in *Keys Jeep Eagle* suggests that resort to the ELR, even as an alternative, is unnecessary and perhaps imprudent. See *Keys Jeep Eagle*, 897 F. Supp. at 1443. It appears that plaintiff's real problem was that it could not state a breach of fiduciary duty claim because the lender-debtor relationship generally does not give rise to a fiduciary relationship and plaintiff did not make any allegations to overcome this general presumption against the creation of a fiduciary relationship. See id. Hence, it was analytically sound to dismiss the claim on this basis.
Yet another federal district court in Florida addressed the ELR's application to a fiduciary setting in *McCutcheon v. Kidder, Peabody & Co., Inc.* The Director of Administration for the Palm Beach County Sheriff's Office contracted with the defendant, Kidder Peabody, to have the defendant purchase securities for the plaintiff in his official capacity. The plaintiff's complaint contained five counts, including a breach of fiduciary duty claim and a common law fraud claim. Kidder Peabody argued that the ELR barred the plaintiff's breach of fiduciary duty and fraud claims.

The court first addressed the ELR's application to the breach of fiduciary duty claims. Once again, the court began by looking to *Interstate Securities* and restating its holding. It then addressed the plaintiff's argument that the ELR did not apply because the plaintiff did not assert a claim for breach of contract and that, moreover, the contract did not provide a basis for suit because it did not require Kidder Peabody to manage the plaintiff's account.

In contrast to the suggestion of a "no alternative remedy" exception, as set forth in *City of Miami Firefighters*, the court in *Kidder Peabody* stated: "The case law does not indicate that either a claim or a basis for a claim of contractual breach must exist in order to invoke the economic loss rule." The court opined:

The Florida Supreme Court has made clear that the failure to bargain for adequate contractual remedies does
not provide a party with an exception to the economic loss rule. . . . The [court] has gone so far as to hold that, even where there is no contractual privity between the parties to an action in tort, the economic loss rule will bar recovery in tort.\textsuperscript{131}

Following this lead, the court held that the breach of fiduciary duty claims arose solely by virtue of the contract’s existence, and therefore, the ELR barred the claims, even in the absence of a specifically applicable contract provision.\textsuperscript{132} Hence, the court dismissed these claims.\textsuperscript{133}

Once again, this mechanical application of the ELR fails to consider the policy ramifications associated with different contexts. It is true that the parties had a contractual relationship.\textsuperscript{134} It is also true that the relationship may have been a fiduciary one. If the relationship was a fiduciary one, then the societal concerns with the relationship should be addressed. A conventional way of accomplishing this is to permit claims for breach of fiduciary duty and thereby to authorize tort remedies, such as fully compensatory and punitive damages.

In this case, the application of the ELR on a motion to dismiss forecloses the breach of fiduciary duty claims before there is an opportunity to explore through discovery the true nature of the rela-

\textsuperscript{131} Id. By so doing, it appears that the court suggested its holding may have been the same even in the absence of privity. This is somewhat frightening, for such a rule would essentially end the viability of breach of fiduciary duty claims in Florida. The court went on to analogize this case to \textit{Interstate Securities}. See id. (stating there was no evidence in that case that contract contemplated account management by defendant). The court also analogized the case before it to another Eleventh Circuit opinion. See Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A., 83 F.3d 1317, 1343-44 (11th Cir. 1996) (finding that ELR was bar to negligence claim when court looked, not at whether contract addressed specific conduct complained of, but instead at general subject matter), \textit{vacated sub nom. Hess v. Federal Deposit Ins. Corp.}, 117 S. Ct. 760 (1997); see also \textit{Kidder Peabody}, 938 F. Supp. at 824 (stating that \textit{Motorcity} is indistinguishable from present case).

\textsuperscript{132} See \textit{Kidder Peabody}, 938 F. Supp. at 924 ("Plaintiff’s claims for breach of fiduciary duty arise solely as a result of the existence of a contract between the parties. The fact that . . . there is no provision in the contract dealing with defendant’s duty to render suitable advice does not shelter plaintiff from . . . the economic loss rule.").

\textsuperscript{133} See id. at 825 (stating that lack of privity does not prevent application of economic loss rule). The court then turned its attention to Count V, common law fraud. See id. Once again, the court relied on \textit{Interstate Securities} to bar the plaintiff’s fraud claim. See id. at 824-25.

\textsuperscript{134} See id. at 821.
Without a chance for the plaintiff to prove the nature of this relationship, there is no chance for a court to accurately assess whether it is a special relationship justifying heightened remedies for compensatory as well as punitive reasons.

The Kidder Peabody case may ultimately have provided such justification. A professional investment banking firm was, it seems, entrusted with a pension fund for which the firm accepted responsibility. These facts suggest a fiduciary duty, but they also suggest a contract. Often, contractual obligations accompany fiduciary ones. The mere existence of the former does not suggest that the judicial process should be any less concerned about the latter. In fact, one would think that the parties’ effort to order the nature of their relationship might cause a court to go the extra mile to preserve it. Instead, the converse seems to be true.

The most recent case applying Florida’s ELR to a breach of fiduciary duty claim is Benedict Feeding Co. v. Priest. This dispute arose out of a proposed loan transaction between the plaintiff and a

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135. See id. at 824-25 (finding plaintiff’s argument that lack of contractual provision dealing with defendant’s duty to render truthful and accurate information and advice unpersuasive).

136. See id. at 821.

137. See id. While the ELR devoured the plaintiff’s breach of fiduciary duty claim in Kidder Peabody, such was not the case in Future Tech International, Inc. v. Tae Il Media, Ltd., 944 F. Supp. 1538 (S.D. Fla. 1996). Here, the plaintiff, a distributor of computer equipment, sued several parties for the harm allegedly inflicted on plaintiff’s business in an effort to usurp it. See id. at 1542. On the basis of the ELR, several defendants moved to dismiss the plaintiff’s claims for fraud in the inducement, tortious interference with business relationships, theft of trade secrets and breach of fiduciary duty. See id. at 1566.

The court held that the ELR did not bar the fraud in the inducement claim, the theft of trade secrets claim or the fiduciary duty claim. See id. at 1568 (noting that first two claims constituted “independent torts” and mere existence of contractual claim between parties cannot act as automatic bar of all tort claims). With respect to the breach of fiduciary duty claim, the court said: “As a general matter, [c]ourts have found a fiduciary relation implied in law when confidence is reposed by one party and a trust accepted by the other.” Id. at 1569 (quoting Capital Bank v. MVb, Inc., 644 So. 2d 515, 518 (Fla. Dist. Cl. App. 1994)). The court stated that the ELR did not apply. See id. It used this fact to distinguish Interstate Securities, which suggested that when the contract is the source of the fiduciary duty claim, the economic loss rule may apply. See id. The court also believed the ELR was inapplicable for another reason. See id. Hence, the court also permitted the breach of fiduciary duty claim to stand. See id.

The court here artfully distinguished Interstate Securities and properly focused on the relationship of the parties. See id. Believing that the plaintiff might ultimately prove a fiduciary relationship, the court’s decision did not punish plaintiff for the coincidence of a contractual relationship. See id. It did, however, require independent tortious conduct before permitting the claim to stand. See id. By so doing, the court apparently recognized that the parties may have allocated the risk through contracting and that, if they did so, such allocation should stand.

third party. The plaintiff wanted security to insure the return of the retainer fee, in the event that the loan was not made. Accordingly, the plaintiff entered into an escrow agreement with the three defendants under which two of them would give certain stock to the third, who would serve as the escrow agent. When the loan did not close, the plaintiff did not recover the advance payment and alleged, among other things, breach of the escrow agreement and breach of fiduciary duty against the escrow agent. After finding that the plaintiff adequately alleged a breach of contract claim, the court then went on to consider the plaintiff's claim for breach of fiduciary duty. The defendant escrow agent asserted that the ELR barred the claim, and once again, the court found itself considering a motion to dismiss predicated in part on the ELR.

The court harkened back to Florida Power for the statement that "contract principles are more appropriate than tort principles to resolve purely economic claims." The court, however, also recognized the holding of the Florida Supreme Court in HTP, Ltd. v. Lineas Aereas Costarricenses, that "the economic loss rule does not necessarily bar tort causes of action when the tort alleged is outside the bounds of the contract in question." Despite this statement by the Florida Supreme Court, the court in Benedict Feeding barred the claim and foreclosed plaintiff's recovery of damages for the

139. See id. at *2. As part of this transaction, plaintiff was required to make a substantial payment in advance that was to be returned to plaintiff in the event the loan did not close. See id.

140. See id.

141. See id. (stating that stock would serve as collateral to guarantee return of plaintiff's funds if loan did not go through).

142. See id. at *1. ("Defendant . . . allegedly breached the parties' agreement . . . by retaining the stock, and by not delivering the shares of stock to Plaintiff when it became obvious that the loan would not take place. As a result, Plaintiff did not recover the . . . retainer fee.").

143. See id. at *3.

144. See id. (stating that plaintiff's "claim is barred by the economic loss rule if the claim is factually interwoven with plaintiff's breach of contract claim").

145. Id. (quoting Florida Power & Light Co. v. Westinghouse Elec. Co., 510 So. 2d 899, 900 (Fla. 1987)). The court went on to state: "Therefore, Florida courts apply the economic loss rule to prevent tort recovery 'when damages flow from a breach of contract unless the tort is independent of the breach of contract.' Id. (quoting Brass v. NCR Corp., 826 F. Supp. 1427, 1428 (S.D. Fla. 1993)).

146. 685 So. 2d 1258 (Fla. 1996).

147. Benedict Feeding Co., 1997 WL 75605, at *3. Despite this statement, the court found that the conduct complained of was "interwoven" and not independent of the contract. See id. (stating that "complaint only allege[d] a breach of fiduciary duty created by the contract" and that there was no "intentional or negligent act" independent of those allegations).
breach of fiduciary duty because plaintiff's allegations did not suggest a duty independent of the contract.\textsuperscript{148}

The court myopically focused on the mechanical application of the ELRs.\textsuperscript{149} The irony of this court's decision is that the plaintiff may have actually been hurt by the attempts to protect itself by contract. Without the contract, the court may not have invoked the ELR and the plaintiff's tort remedies would have been preserved.\textsuperscript{150} Although, in light of \textit{Casa Clara}, the lack of privity may no longer rescue breach of fiduciary duty claims from the ELR in Florida.\textsuperscript{151}

Florida's application of the ELR is undesirable in the context of fiduciary relationships. Analysis of these decisions demonstrates a general failure to articulate a stable policy basis for the application of the ELR in the fiduciary context. This has resulted in much unresolved confusion as to when and why the ELR should apply. In

\begin{itemize}
\item \textsuperscript{148} See id.
\item \textsuperscript{149} This prevented the court from seeing the bigger policy picture. Even if there had been no contract between plaintiff and the escrow agent defendant, the latter had accepted a fiduciary obligation to the plaintiff. This having happened, it was irrelevant that the parties sought to memorialize this understanding in a contract. Unless, of course, they had specifically contracted regarding the fiduciary standard or harm in event of breach.
\item \textsuperscript{150} See, e.g., Alfert, supra note 46, at 40 ("In summary, the law surrounding architects' liability in tort for economic losses suffered by third parties is still somewhat unsettled."); Daniel M. Bachi & Bard D. Rockenbach, \textit{The Practical Limitations of the Economic Loss Rule}, 69 FLA. B.J. 89, 92 (1995) ("In cases involving services, professional or otherwise, the independent tort doctrine remains a viable boundary between contract and tort law."); Bennett, supra note 78, at 46 ("Florida's economic loss rule continues to devour commercial torts."); Robert H. Buesing & John E. Johnson, \textit{The Economic Loss Rule: A Trial Lawyer's Guide to Protecting Contract Rights}, 66 FLA. B.J. 38, 38 (1992) ("Lawsuits have sometimes been fueled by a party who, unhappy in hindsight with the negotiated contract, attempts to insert new terms into the agreement by seeking tort remedies when the contractual remedies are unfavorable."); Michael A. Hanzman, \textit{Interstate Securities Corp. v. Hayes Corp.: An Unprecedented and Improper Expansion of Florida's "Economic Loss" and "Independent Tort" Rules}, 66 FLA. B.J. 42, 43 (1992) (criticizing \textit{Interstate Securities} by stating that its blind reliance "upon the economic loss and independent tort rules . . . is inexcusable and its ramifications endless"); Schwip, supra note 17, at 34 ("First, it is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine."); Matthew S. Steffey, \textit{Florida's Economic Loss Rule: A Critical Look at the Cases}, 64 FLA. B.J. 19, 19 (1990) ("Reasoning that negligence law is really designed to protect against personal injury or property damage, Florida courts often limit those suffering economic loss alone to whatever contract remedies they may have. Hence the so-called 'economic loss rule.'"); Wagner & Solomon, supra note 46, at 48 (stating that contract law is designed to protect private parties, while tort law is designed to protect society as a whole from physical harm).
\item \textsuperscript{151} Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247-48 (Fla. 1993) (applying ELR very broadly to bar tort actions for economic loss even in absence of privity between claimant and alleged wrong-doer). For a discussion of \textit{Casa Clara}, see supra notes 46-64 and accompanying text.
\end{itemize}
any event, the ELR continues to frequently bar breach of fiduciary
duty claims in Florida.

C. The ELR in Illinois

1. General Application of the ELR

Florida is not the only state to have a body of law on the ELR.
Illinois has confronted the issue and has generated its own confu-
sion. The Illinois Supreme Court’s first experience with the ELR
was *Moorman Manufacturing Co. v. National Tank Co.* 152 *Moorman*
was a products liability case similar to *East River*, where the plaintiff
purchased a grain storage tank from the defendant, who designed,
manufactured and sold such tanks.153 A crack developed in the
tank and the plaintiff sued to recover damages for the loss of use of
the tank and its repair.154 The plaintiff’s complaint consisted of
four counts, which included strict liability, misrepresentation, negli-
gence and breach of warranty.155 The trial court dismissed the tort
counts, leaving only the breach of warranty claim.156

The Illinois Supreme Court began its opinion with a brief re-
view of the law of products liability.157 The court recited the pre-
vailing majority rule, as delineated in *Seely*, that strict liability denies
recovery for economic loss.158 The court adopted the *Seely* ration-
ale and stated that this rule “has particular relevance when a per-

152. 435 N.E.2d 443 (III. 1982). For a discussion of *Moorman*’s impact on con-
struction litigation, see *Republic National Bank v. Araujo*, 697 So. 2d 164 (III. Dist. Ct.
App. 1997); Mark C. Friedlander, *The Impact of Moorman and Its Progeny on Construc-
154. See id.
155. See id. The court stated:
Count I alleged that the tank was not safe due to certain design and
manufacturing defects. Count II asserted that defendant had made cer-
tain representations, which were in fact untrue, in connection with
the sale of the tank. Count III accused defendant of negligently designing
the tank. [In Count IV, plaintiff claimed] it had relied upon an express
warranty made by the defendant at the time of the sale.

Id.

156. See id. (“The trial court granted defendant’s motion to dismiss the first
two counts, concluding that the cost of repair and loss of profits or income were
economic losses which could not be recovered under the tort theories named in
the complaint.”).

157. See id. (noting that Illinois adopted tort theory of strict liability some
years earlier). At that time, however, the court did not address the question of
whether a consumer could recover under such a theory for strictly economic loss.
See id.

158. See id. at 445-46 (reviewing *Seely* case and holding that plaintiff who was
uninjured when his truck overturned could not recover economic losses under
strict liability in tort from manufacturer).
sonal injury results and to some degree when property damage occurs. It has little relevance to economic loss when neither personal injury nor property damage is involved."

The court also cited the limits of section 402A of the Restatement (Second) of Torts in support of this statement. The court clearly believed that a warranty claim was superior to a tort claim as

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159. Id. at 446-47.

160. See id. at 447 ("[W]e believe the language limiting section 402A . . . reflects sound policy reasons."); see also Restatement (Second) of Torts § 402A (1965). For an excellent discussion of § 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act, see Frederick Davis, Product Liability Under § 402A of the Restatement (Second) of Torts and the Model Uniform Product Liability Act, 16 Wake Forest L. Rev. 513, 545 (1980).
a mechanism for allocating pure economic loss.\textsuperscript{161} Therefore, the court rejected the strict liability claim.\textsuperscript{162}

The concurring opinion agreed with "the general principle that economic loss should not give rise to product liability in tort."\textsuperscript{163} The concurrence, however, was critical of the majority's

\textsuperscript{161} See Moorman, 435 N.E.2d at 447 (noting that warranty rules function well in commercial setting, that parties may exclude or modify warranties and that warranty rules effectively limit scope of manufacturer liability). The court stated:

"Application of the rules of warranty prevents a manufacturer from being held liable for damages of unknown and unlimited scope. If a defendant are held strictly liable in tort for the commercial loss suffered by a particular purchaser, it would be liable for business losses of other purchasers caused by the failure of the product to meet the specific needs of their business, even though these needs were communicated only to the dealer. . . . Finally, a large purchaser, such as plaintiff in the instant case, can protect itself against the use of unsatisfactory performance by bargaining for a warranty. Or, it may choose to accept a lower purchase price for the product in lieu of warranty protection. Subsequent purchasers may do likewise in bargaining over the price of the product. We believe it is preferable to relegate the consumer to the comprehensive scheme of remedies fashioned by the UCC, rather than requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers."

\textit{Id.} at 447-48 (citation omitted). The court also addressed the allegedly arbitrary nature of the rule by quoting the majority in \textit{Seely v. White Motor Co.}, 403 P.2d 145, 181 (Cal. 1965). See Moorman, 435 N.E.2d at 448. The court in \textit{Seely} stated:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.

\textit{Seely}, 403 P.2d at 151.

\textsuperscript{162} See Moorman, 435 N.E.2d at 448. The balance of the court's opinion addressed the theory of "economic loss" and both negligence and misrepresentation claims. See id. at 449-52 (defining "economic loss" and noting that policy considerations against allowing recovery for solely economic loss in strict liability cases applies to negligence and innocent misrepresentation claims as well). Rejection of the latter was based on the court's view that the misrepresentation in the case was innocent, not negligent or intentional. See id. at 452-53. The court stated that "economic loss is recoverable where one intentionally makes false representations." \textit{Id.} at 452.

\textsuperscript{163} Id. at 455 (Simon, J., concurring).
focus on the character of the harm. The opinion continued with its astute observations and discussed the need to cease fixating on the character of the harm. Interestingly, the concurrence also foresaw the difficult choices the ELR required with respect to parties who were not in privity with another.

The concurrence accurately identified the essential doctrinal weakness of the ELR—its fixation on the character of the harm as physical or economic. This fixation leads to the breakdown of the ELR in any context in which the character of the harm is not a good proxy for whether a tort duty has been breached. In products liability actions, characterization of the harm is a relatively decent proxy because of the strong and well developed policies that manufacturers have a duty to create safe products. Personal injury or property damage is some indicator that the manufacturer may have breached a duty owed to the consumer. Even in such cases, however, the ultimate focus is broader than the character of the harm.

164. See id. at 457 (Simon, J., concurring).
165. See id. at 456 (Simon, J., concurring) ("Physical harm has maintained its place only because it is a proxy for the real distinction."). The concurrence stated: The difficulty and disagreements the law has had over the intermediate case of damage to the product itself reflect the fact that whether recovery is permitted is unpredictable; there is no quick answer to the question of whether the loss is economic, and the law has therefore been forced to take a more comprehensive and more sensible approach than merely looking for physical distinctions. The fact that physical harm is a proxy for something else rather than of fundamental legal significance is clearly seen in the widespread idea that if the incident involves any physical harm, all losses are recoverable—an idea that the appellate court discussed and attacked at some length. Such a rule would indeed be out of place if the law were really concerned about what kinds of items of damages are recoverable. It makes sense once we realize that the real issue is whether the incident as a whole belongs in the tort world. The presence of any physical harm tends to indicate that more is involved than an inferior product; the defect and the hazard were probably such that tort treatment is appropriate. Once we treat the incident as tort, the losses are recoverable without regard to whether they are physical.

Id. (Simon, J., concurring).

166. See id. (Simon, J., concurring) (stating that "economic loss should be recoverable out of privity in some circumstances, but not on the same terms as tort losses"). The concurrence did not believe, however, that economic loss should be recoverable in tort. See id. (Simon, J., concurring). The concurrence stated: The proper approach is to develop a system of warranties out of privity to protect warranty-like, that is contract-like, interests, while using a tort theory to protect tort interests... [A] tort approach to enforcing routine commercial expectations is as fictitious as a warranty theory usually is for personal injuries.

Id. (Simon, J., concurring).

167. For a discussion of the policies underlying the ELR’s application in products liability cases, see supra notes 29-41 and accompanying text.
and extends to the existence of a duty, and breach and causation issues.

As one moves out of the products liability context into other commercial torts, the breakdown in the rule becomes apparent. The law designs many commercial torts, namely breach of fiduciary duty, to recompense economic loss.\(^\text{168}\) It may be relatively infrequent that one suffers personal injury or property damage at the hands of such a tortfeasor. Hence, the proxy is no longer reliable, and mechanical application of the ELR can lead courts astray. The only salvation is to look at the public policies underlying the alleged tort and ascertain whether the breach violated these policies. The concurrence in *Moorman* wisely recognized this point.\(^\text{169}\) With this backdrop in place, this Article examines and critiques Illinois’s experience with the ELR and breach of fiduciary duty claims.

2. *The ELR and Breach of Fiduciary Duty Claims in Illinois*

Several years after the Illinois Supreme Court decided *Moorman*, a federal district court in Illinois addressed the application of the ELR to a breach of fiduciary duty claim in *St. Paul Fire & Marine Insurance Co. v. Great Lakes Turnings, Ltd.*\(^\text{170}\) Great Lakes was in the business of collecting, selling and shipping a volatile product.\(^\text{171}\) After Great Lakes obtained insurance, a fire destroyed a shipment of the product.\(^\text{172}\) Great Lakes notified its insurance broker about the fire and the insurance broker told Great Lakes that it would notify the two insurers.\(^\text{173}\) The defendant, however, only notified one of the insurers, and the insurer who never received notice contested coverage on that basis.\(^\text{174}\)

The defendant moved to dismiss based in part on the ELR.\(^\text{175}\) With respect to the ELR, the court said only that it barred the re-

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\(^{168}\) See Weinberger v. UOP, Inc., 457 A.2d 707, 714 (Del. 1983) (concluding equitable and monetary relief appropriate to remedy breach of fiduciary duty).

\(^{169}\) *Moorman*, 435 N.E.2d at 456 (Simon, J., concurring). For a discussion of *Moorman*, see supra notes 152-69 and accompanying text.


\(^{171}\) See id. at 486. In order to get insurance for its business, plaintiff turned to an insurance broker, for assistance and advice with respect to what types of insurance were necessary. See id. at 486-87.

\(^{172}\) See id. at 487.

\(^{173}\) See id.

\(^{174}\) See id.

\(^{175}\) See id. at 487-88, 490. The court gave this argument very little attention, only a short paragraph at the end of the opinion. See id. at 490 (stating that fiduciary duty claims are not barred because Great Lakes’ claims “are based on contract and agency theories,” not negligence). The defendant claimed unsuccessfully that
covery of economic loss in negligence cases. The court stated that the claims in the case were based not on negligence, but on contract and agency theories. Hence, without plumbing the policy considerations underlying the rule or different contexts, the court found the ELR did not apply and denied the motion to dismiss.

Fiduciary duties arise in contractual and agency settings. That fact, however, does not satisfactorily resolve the issue of whether to apply the ELR in a fiduciary context. In the products liability context, the existence of warranty or contractual liability is important because it is these two areas through which the consumer is able to protect himself or herself against economic loss. The court, however, does not explain the significance of contract, or lack thereof, in the fiduciary context. If the parties come to stand in a fiduciary relationship vis-à-vis one another as the court believes, then supplementing contractual remedies with a claim for breach of fiduciary duty is logical. This process reinforces the relationship and fills the gaps in contracts with reasonable societal expectations.

The Illinois federal courts again revisited this issue in Federal Deposit Insurance Corp. v. Miller. There, the Federal Deposit Insurance Corporation (FDIC) sued former officers and directors of a failed bank for fraud, negligence, breach of fiduciary duty and breach of contract. The defendants, relying on the ELR and Moorman, moved to dismiss the tort claims.

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bad faith was an element of a breach of fiduciary duty claim. See id. at 489 (noting instead that good faith is available defense).

176. See id. at 490 (stating that Moorman doctrine is inapplicable because claims in question utilize contract and agency theories).

177. See id.

178. See id. ("The Moorman doctrine does not apply.").

179. The mere statement that this is not a negligence claim and that, ergo, the ELR does not apply is of little help to prospective litigants and judges. It does not explain the policies weighed and the ultimate balance. Because of this point, the ELR becomes unpredictable. This is an especially horrible thing where the judicial expectation, in any given context, may be that one should have protected themselves by contracting. If one cannot ascertain what those situations are, it is hard to efficiently protect oneself. Moreover, one should not have to guess what the law is and compensate for its lack of clarity with disproportionate amounts of protection and endless contracting for every possible contingency. This inefficient use of resources serves no one.


181. See id. at 1273.

182. See id. at 1276 ("The defendants contest the availability of a . . . cause of action for breach of fiduciary duty and negligence based on . . . Moorman."). The opinion granted the motion to dismiss the federal claim that was based on the Financial Institutions Reform Recovery & Enforcement Act of 1989 (FIRREA), 12
The court refused to accept that *Moorman* stood for the oversimplistic statement that tort prohibits recovery of economic loss. The court stated: "Defendants owed their duty of care to [the bank] not solely as a result of any agreement into which they have entered, but rather by virtue of the position they held with [the bank]." Hence, the counts for fraud, negligence and breach of fiduciary duty stood.

This case at least fits a conventional view that a suit against officers and directors of a corporation is often a claim for breach of fiduciary duty with a standard of care that may sound in negligence or gross negligence. It would certainly be strange to bar such claims. Once again, however, the court does not enlighten us as to the policy reasons behind abandoning the ELR in this context. Likewise, it does not explain the relationship between the breach of fiduciary duty claim and the employment contracts of these officers and directors, or more specifically, the effect, if any, of the latter on the former.

It is conceivable that the corporation might protect itself against breaches of its fiduciary obligations in a contract. What good, however, does applying the ELR serve in the light of the strong common law tradition supporting a claim in such a context? Moreover, the possibility of foreseeable compensatory damages and punitive damages is consistent with the fiduciary view of the relationship. Hence, as with the previous case, the result of this case may be correct, but the reasoning is not helpful.

The same court once again looked at *Moorman* and breach of fiduciary duty claims in *Scholes v. Stone, McGuire & Benjamin*. The receiver for a failed partnership and its investors sued two law firms and individual members of those law firms for violations of the federal securities laws, legal malpractice, negligence, fraud and breach of fiduciary duty. One set of defendants argued that the applicability of the language of *Moorman* is constrained to the economic loss context. The court rejected this argument and held that the fiduciary relationships in this case were *not* limited to the economic loss context.

U.S.C. § 1821(k) (1994). See *Miller*, 781 F. Supp. at 1276 (stating that no claim was stated absent allegation of "gross negligence").

183. See *Miller*, 781 F. Supp. at 1277 (stating that *Moorman* forces claims grounded solely on breach of contract to be brought in contract, not tort).

184. *Id.*

185. See *id.* On a motion for reconsideration, the *Miller* court affirmed its denial of the motion to dismiss. See *id.* at 1279 ("[T]he *Moorman* doctrine does not bar the claims.").


188. See *id.* at 1387-88. The case came before the court on its review of the magistrate's report on the defendants' motion to dismiss. See *id.* at 1388. The
tion of Moorman to the “legal malpractice-negligence” claims required their dismissal. The court, however, was not sympathetic to this argument. In rejecting the argument, the court stated that “a different result may be reached where there is fraud present or where extracontractual, fiduciary or ethical duties are at issue, despite the fact that the damages sought to be recovered are really for economic loss.” The court applied this exception to the present case. The court also noted that tort principles were superior to contract principles in the case before it. Hence, the court permitted this claim to stand and did not dismiss the breach of fiduciary duty claim.

Perhaps this, too, was the right result. A look at the complaint revealed that the plaintiff stood in a fiduciary relationship with the defendant. It may also have revealed that the parties could not adequately protect themselves through contracting. This may be especially true when the process is infected by fraud.

In Collins v. Reynard, the Illinois Supreme Court squarely addressed whether Moorman barred legal malpractice claims sounding underlying facts involved a series of complicated and allegedly fraudulent transactions assisted by the defendants. See id. at 1389-92.

189. See id. at 1396-97.
190. See id. at 1397-98.
191. Id.
192. See id. at 1398.
193. See id. (stating that because fraud is alleged, unforeseen liability principles do not apply). The court stated:

The Moorman Doctrine was created to alleviate the assumed unfairness in exposing professionals to unlimited and unforeseen liability for economic loss to injured parties. It was thought that contract damages were a superior remedy because they do not expose defendants to . . . unfair liability. Where fraud is alleged, as here, these principles do not apply. Any damages owed would not come as a surprise because defendants had knowledge of its wrongful acts.

Id. (citations omitted).

194. See id. (finding that adequate allegations were made to support claim). The court did not discuss Moorman in connection with the breach of fiduciary duty claim. Instead, like in Miller, it simply stated its belief that adequate allegations were made. See id. (stating that if plaintiff proves alleged facts, attorney-client relationship will be established).

195. See id. (stating that attorney-client relationship gives rise to fiduciary duty).

196. See, e.g., Resolution Trust Corp. v. Platt, No. 92-CV-277-WDS, 1992 WL 672942, at *13 (S.D. Ill. Oct. 23, 1992). Simply stating that adequate allegations were made with respect to the breach of fiduciary duty claim again, however, does not explain the role of the ELR. If one assumes that it is because the ELR has no application to breach of fiduciary duty claims because of the very different policies at play, it would be instructive to have the court’s rationale as a guide or, at least, a simple declarative statement that such was true.

in tort, as opposed to contract.\textsuperscript{198} In \textit{Collins}, the plaintiff brought a professional malpractice suit against her lawyer.\textsuperscript{199} The complaint stated both contract and tort claims.\textsuperscript{200}

At the trial court level, the court refused to dismiss the tort claim.\textsuperscript{201} In considering the appellate court’s ruling reversing the trial court, the court again focused on \textit{Moorman}.\textsuperscript{202} The court remarked on \textit{Moorman} and admitted that “[a] different analysis might have started at the beginning with a first consideration given to the relationship between the parties under a traditional contract or tort analysis.”\textsuperscript{203} Having said this, the court went on to contrast the nature of contract law with tort law.\textsuperscript{204} All of this suggested that the appellate court’s analysis was correct. The court, however, then illogically asserted that the tradition of tort in legal malpractice had to win out nonetheless.\textsuperscript{205} To do otherwise, would invite chaos and dysfunction.\textsuperscript{206}

\begin{itemize}
\item \textsuperscript{198} See \textit{id.} at 1186 (holding that “a complaint against a lawyer for professional malpractice may be couched in either contract or tort.”).
\item \textsuperscript{199} See \textit{id.} (“The gist of the complaint is that the lawyer, in drafting certain sales documents for the client, failed to protect the client’s security interest in the property being sold, thus causing a financial loss to the client.”).
\item \textsuperscript{200} See \textit{id.}
\item \textsuperscript{201} See \textit{id.} The appellate court reversed this result. See \textit{id.} at 1185-86. Initially, the Illinois Supreme Court affirmed the appellate court, but on reargument reversed. See \textit{id.} at 1186.
\item \textsuperscript{202} See \textit{id.} (“\textit{Moorman} attempted to distinguish between recovery in tort and recovery in contract by looking at the nature of the damage suffered rather than to the relationship between the parties or to the act which caused the damage.”).
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} See \textit{id.} at 1186-87 (noting different context in which both contract and tort law are applicable). The court stated:
\begin{quote}
Contract law applies to voluntary obligations freely entered into between parties. Damages recoverable under a breach of contract theory are based upon the mutual expectation of the parties. The basic principle for the measurement of contract damages is that the injured party is entitled to recover an amount that will put him in as good a position as he would have been had the contract been performed as agreed. Tort law, on the other hand, applies in situations where society recognizes a duty to exist wholly apart from any contractual undertaking. Tort obligations are general obligations that impose liability when a person negligently, carelessly, or purposely causes injury to others.
\end{quote}
\textit{Id.} at 1186.
\item \textsuperscript{205} See \textit{id.} The court stated:
\begin{quote}
The appellate court, in attempting to extend the rationale of the \textit{Moorman} doctrine to the case at hand, ruled contrary to the ruling we announce today. While we do not fault its logic we do not follow its ruling. Rather, we adhere to long established practice and custom. Logic may be a face card but custom is a trump.
\end{quote}
\textit{Id.}
\item \textsuperscript{206} See \textit{id.} at 1187 (explaining that ruling is limited “to the specific field of lawyer malpractice as an exception to the so-called \textit{Moorman} doctrine and to the distinctions separating contract and tort”). Eschewing logic for precedent, it ap-
The concurrence in *Collins* took issue with the majority's remarks concerning custom and logic.207 The concurrence stated that the proper focus was on the relevant policy considerations, not on the character of the harm.208 The concurrence hinted that the fiduciary nature of the relationship is a central policy reason for the exception, but it did not suggest that the exception should extend beyond the attorney-client relationship.209

In *Illinois Constructors Corp. v. Morency & Associates, Inc.*,210 an Illinois federal district court was again confronted with a defendant's motion to dismiss the plaintiff's claims for breach of contract, negligence and breach of fiduciary duty.211 The facts of this case were similar to *St. Paul Fire & Marine*.212 The defendant was an

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insurance broker hired by the plaintiff to obtain insurance for the plaintiff’s business. The plaintiff alleged that the defendant’s services were inadequate in this regard and left it without coverage for some substantial claims.\textsuperscript{213}

With respect to the breach of contract and fiduciary duty claims, the court cited \textit{St. Paul Fire & Marine} for the proposition that \textit{Moorman} distinguished between tort actions and those brought under contract or agency principles.\textsuperscript{214} In allowing the claims to stand, the court did not expound on this statement. Hence, this court did not advance the understanding of the relationship between the policies underlying \textit{Moorman} and those underlying claims for fiduciary duty.\textsuperscript{215}

In yet another effort to clarify the issue, the Illinois Supreme Court spoke again concerning the ELR in \textit{Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.}\textsuperscript{216} The plaintiff, a church, hired the defendant, an accounting firm, to prepare for its use an unaudited financial statement regarding the most recently com-

\begin{quote}
\textsuperscript{213} See Illinois Constructors, 802 F. Supp. at 187. The insurance contract that plaintiff negotiated failed to provide for pollution coverage. See id. Shortly afterwards, defendant’s tugboat sank in the Mississippi River spilling diesel fuel. See id. As a result, defendant had no coverage for claims arising out of the spill or indemnification for money expended on the clean up. See id.

\textsuperscript{214} See id. at 188 (“The Illinois Supreme Court’s decision in [Moorman] bars recovery of purely economic loss in most tort actions in Illinois. Nonetheless, [plaintiff’s] claims . . . are based on contract and agency theories and thus \textit{Moorman} is inapplicable.”).

\textsuperscript{215} See id. at 188 (recognizing “Illinois’s reluctance to create exceptions to the \textit{Moorman} doctrine’s ban on recovery of economic loss in circumstances analogous to those of the present”). In light of \textit{Moorman}, however, the negligence count was troubling to the court. The court reviewed the Illinois case law barring the recovery of economic loss in negligence cases. See id. at 188-89. Nevertheless, the court thought that “Illinois law supports recovery against an insurance broker on a theory of negligence.” \textit{Id.} The court noted that the relationship between an insurance broker and its principal gives rise to extraneous contractual duties. See id. (stating that defendant served as plaintiff’s insurance broker for seven or eight years and was allegedly granted significant responsibility). Thus, none of the claims were barred, and because they were all adequately pled by the plaintiff, they were allowed to stand. See id. at 189-90.

Permitting the negligence claim to stand in the face of \textit{Moorman} and \textit{Collins} is problematic because the plaintiff sought recovery of pure economic loss. In a sense, the negligence claim could be viewed as inappropriate because the contract supplemented by the breach of fiduciary claim would preserve the expectations of the parties and reinforce the fiduciary relationship. Moreover, the negligence claim would seemingly mirror the contract claim or the breach of fiduciary duty claim. This thought is generated by the court’s own language in describing the negligence claim. In speaking about it, the court emphasized the long nature of the relationship and the trust between the plaintiff and the defendant. See id. at 189. These words more accurately describe a breach of fiduciary claim. The claim inexplicably stood. Once again, it seems tradition prevailed and rightly so.

\textsuperscript{216} 636 N.E.2d 503 (Ill. 1994).
\end{quote}
The defendant decided to record these investments at cost, and as a result, these records did not reflect subsequent market fluctuations. When the plaintiff realized that the financial statements misstated the value of the accounts, the plaintiff sued the defendant on the theories of negligence, breach of fiduciary duty and breach of contract. The trial court awarded damages on the negligence claim to the plaintiff, but failed to award anything on the contract claim.

The supreme court traced the development of the ELR both generally and in Illinois. The court summarized this law:

The evolution of the economic loss doctrine shows that the doctrine is applicable to the service industry only where the duty of the party performing the service is defined by the contract that he executes with his client. Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty. The present case involves professional malpractice by an accounting firm. The underlying issue is whether the duty an accountant owes to his client is defined by his contractual obligations, or is extracontractual.

217. See id. at 505. During the same time, the plaintiff hired an investment advisor who engaged in an arbitrage trading strategy on plaintiff's behalf. See id.

218. See id. at 506. Plaintiff claimed that, in deciding to record the investments at cost, it was deferring to the expertise of defendant because plaintiff did not understand the investments. See id. Defendant, however, claimed that the plaintiff did understand the investment and that the decision to record them at cost was mutual. See id.

219. See id. at 508. Prior to trial, the defendant unsuccessfully argued that Moorman barred the negligence claim. See id. Defendant subsequently moved for a directed verdict on all counts and the court granted the motion with respect to the breach of fiduciary duty claim only. See id. at 509.

220. See id. One of the points raised by the defendant on appeal was the application of Moorman. See id. ("Defendant . . . claims that the lower court judgment awarding damages for purely economic losses in tort is contrary to Moorman . . . "). In considering the negligence count, the court defined the issue as "whether the economic loss doctrine bars recovery in tort for accountant malpractice." Id. at 512.

221. See id. at 512-14 (reviewing prior application of economic loss doctrine). The court summarized Collins v. Reynard, 607 N.E.2d 1185 (III. 1992), and compared the attorney-client relationship with the accountant-client relationship. See Congregation of the Passion, 636 N.E.2d at 514-15 ("An analogy to the accountant-client relationship can be found in the attorney-client relationship.").

222. See Congregation of the Passion, 636 N.E.2d at 514.
The court decided the duties were extracontractual, did not apply the ELR, and therefore, held the claim was proper.223

The dissent, however, called the majority's opinion "incoherent" regarding its discussion of the Moorman doctrine.224 The dissent stated: "Rather than clearly defining the relationship between professional malpractice and Moorman, the majority opinion puts litigants and trial judges in a position of having to guess what the exception of the month is. Yesterday it was attorneys. Today, it's accountants but not architects. Tomorrow, who can say?"225 The dissent continued to rail: "What are these extracontractual duties? If these duties cannot be articulated in a contract, how is it that the client is able to articulate that they have been breached in a complaint?"226 In conclusion, the dissent stated that courts should confine the application of the economic loss doctrine to cases involving products liability.227

The court's consistent failure to ground Moorman in public policy makes its application an act of judicial whimsy. Not only do the dissent's remarks apply to the malpractice context, but they also

223. See id. at 515 (stating that because accountant's duty exists independently of contract, economic loss doctrine does not bar recovery in tort); see also Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 351 (E.D. Ill. 1997) ("Defendant's argument ignores an important limitation on the scope of the economic loss doctrine: 'The economic loss doctrine does not bar recovery in tort for breach of a duty that exists independently of a contract.'"). In the concurrence, Judge Freeman expressed not only his agreement with the result, but also his concern with the majority's handling of prior case law. See Congregation of the Passion, 636 N.E.2d at 519-20 (Freeman, J., concurring) ("I agree with the result . . . . The majority apparently recognized that the extracontractual analysis creates an unnatural tension between this case and Lincoln Park . . . . In my view, Lincoln Park is irreconcilable with this case, and . . . should be overruled.").

224. See Congregation of the Passion, 636 N.E.2d at 520 (Heiple, J., dissenting).
225. Id. at 525 (Heiple, J., dissenting).
226. Id. at 526 (Heiple, J., dissenting).
227. Id. at 528 (Heiple, J., dissenting). The dissent stated:

If one agrees that damages in professional malpractice cases are foreseeable, what theory a plaintiff brings a suit under becomes irrelevant. The extent of damages should be the same in tort or contract . . . . One must also keep in mind that a suit in tort does not mean that a plaintiff suing for purely economic or commercial loss has automatically won. The plaintiff still has to establish the elements of a tort. That is, the burden of proving duty, breach of duty, causation, and damages remains a prerequisite to recovery.

Id. at 527 (Heiple, J., dissenting).

The dissent's characterization of the opinion as incoherent was strong, but not inappropriately so. Illustrated again is the doctrine's weakness outside the products liability context. The cases never answer the question as to why accountants, architects or attorneys should be treated the same or differently with respect to the ELR. They never analyze, except in the most cursory fashion, the underlying relationships and society's concerns with them.
apply to any context in which fiduciary duties develop. Telling a prospective litigant that the line is at the point where duties cease being "contractual" is not helpful. In fact, it is circular logic because what is contractual or extracontractual is, in considerable part, a function of what the parties do at the outset of the relationship, and this is, in turn, a function of what they believe the law protects in the absence of a contractual understanding. In sum, there are no guidelines, policy or otherwise, as to when the ELR will apply.228

Thereafter, an Illinois federal district court held that *Moorman* barred a claim for facilitating a breach of trust in *Ohio Casualty Insurance Co. v. Bank One.*229 In *Ohio Casualty*, an insurance company sued a bank for various claims including one for facilitating a

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228. See, e.g., Continental Leavitt Communications, Ltd. v. Painewebber, Inc., 857 F. Supp. 1266 (N.D. Ill. 1994). In this case, the plaintiff, a distributor of electronic products wholesale, sued the defendant stockbroker for negligent misrepresentation, promissory estoppel and breach of fiduciary duty. See id. at 1268-69. The dispute arose out of the plaintiff’s attempt to secure a line of credit to a customer. See id. at 1268.

The customer offered bearer bonds as security and the plaintiff went to the defendant to verify their authenticity. See id. at 1268-69. In the event of customer’s default, the plaintiff planned to redeem the bonds for cash. See id. The defendant indicated to the plaintiff that the bonds were authentic and that the defendant would dispose of the bonds in the event that the need arose. See id. The customer did default, but before the plaintiff could cash the bonds, they were seized by the Federal Bureau of Investigation (FBI) as stolen goods. See id. at 1269.

The case was before the court on defendant’s summary judgment motion as to all counts. See id. It was only with respect to the negligent misrepresentation count that the court even mentioned *Moorman*. See id. at 1270 (stating that negligent misrepresentation is exception to ELR). The court stated that “economic loss may be recovered for torts such as intentionally false representations . . . and for . . . negligent misrepresentation.” Id. This discussion did not explain the policy rationale for distinguishing these cases other than to cite to the restatement as authorizing such suits. See id. Hence, the balance of the court’s analysis did not concern itself with *Moorman* or the effects of the ELR. The court relied on the Restatement (Second) of Torts § 552, which states in pertinent part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating information.

Restatement (Second) of Torts § 552 (1977).

With respect to the fiduciary duty claim, the court lucidly based its grant of summary judgment on the fact that, although alleged, no fiduciary relationship existed between the plaintiff and defendant. See *Painewebber*, 857 F. Supp. at 1275 (stating that domination, influence and superiority were necessary elements of such relationship and mere reliance one places in expert’s advice is insufficient). The conclusion aside, this analysis is more cogent than introducing the ELR as an eradicator of all breach of fiduciary duty claims when a contractual relationship has been alleged.

breach of trust. The dispute arose after claims against the insurance company were made on fidelity bonds issued by the company for losses caused by a public official's embezzlement. The insurance company alleged that the bank's participation in this official's check kiting scheme contributed to the losses. After dismissing a breach of contract claim with leave to amend, the court turned its attention to the negligence count. The court rejected the argument that the case before it fell within the exception articulated in Congregation of the Passion. Hence, it barred the negligence claim and, subsequently, the claim for facilitating breach of trust.

As there may be little reason to distinguish facilitating breaches of trust from the breach itself, it appears that if breach of fiduciary duty claims in Illinois contain any allegations of negligence, they may be subject to dismissal under Moorman and the ELR. They are certainly threatened, and therefore, practitioners seeking to assert breach of fiduciary duty claims in Illinois must be aware of this potential pitfall and draft their complaints accordingly. This result is a natural, but unfortunate, consequence of the mechanical application of the ELR. Such an approach fails to recognize the significance of a fiduciary relationship and the deleterious effect that barring fiduciary duty claims may have on the conduct of fiduciaries.

230. Id. at *1.
231. See id.
232. See id. at *1-2. Plaintiff alleged that the public official who was in charge of a township's money embezzled township funds through a secret account at the bank, which was hidden from township auditors. See id. at *1. It alleged that the bank permitted him to open this secret township account, even though he had no authority to do so. See id.
233. See id. at *8 (stating that "Moorman doctrine" is applicable in negligence cases).
234. See id. at *9. The court stated:
   We . . . do not believe this case falls within the scope of the court's holding in Congregation of the Passion. That case focused on the traditional duties of competence that exist outside of any contract that a lawyer or accountant owes to his client. We do not believe that a bank, an institution dealing with its clients through multiple employees, has these same traditional responsibilities.
   Id. at *10.
235. See id. The court came to this result by first stating that this claim's title is misleading. See id. (stating that facilitating breach of trust claim is basically negligence amounting to bad faith). With this view in place, the court held that Moorman barred such a claim because it sought to recover only economic loss. See id. (stating that no exception is compatible to case at hand). This was so even though the court recognized the cause of action and believed it was otherwise adequately pled. See id. (noting permissibility of negligence amounting to bad faith claim).
D. *New York's Bout with the ELR in a Fiduciary Context*

Several years before *Ohio Casualty*, a New York court engaged in a similar struggle. In *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 2\textsuperscript{36} several utilities brought suit against the defendant, an engineering firm, for the negligent design and construction of a nuclear facility. 2\textsuperscript{37} The plaintiff asserted claims in both contract and tort. 2\textsuperscript{38}

237. Id. at 657 (stating that central issue is whether, and to what extent, independent cause of action in tort exists under New York law for negligent or grossly negligent performance of contractual services).
238. See id. The defendant initially moved to dismiss. See id. In considering the motion to dismiss, the court framed the issue as "determining the circumstances under which 'a party to a contract may be held liable in tort to another party thereto as a result of some clash in the contractual relationship.'" Id. at 659 (quoting Apple Records, Inc. v. Capital Records, Inc., 529 N.Y.S.2d 279, 281 (App. Div. 1988)). The court first considered whether, in fact, there existed a cause of action for the negligent performance of a contract. See id. at 661 ("[T]his court does not find . . . that there is always a tort cause of action for negligent performance of contractual services.")

The court said, however, that "the existence of a contract does not necessarily bar a tort claim." Id. The general rule, said the court, was that "the breach of a contract is not actionable in tort in the absence of special additional allegations of wrongdoing which amount to 'a breach of duty distinct from, or in addition to, the breach of a contract.'" Id. at 662 (quoting North Shore Bottling Co. v. Schmidt & Sons, Inc. 292 N.Y.S.2d 86, 92 (App. Div. 1968)). In reviewing the allegations in the complaint, the court commented that the negligence claims "read as . . . an 'afterthought' to the allegations of breach of contract." Id. at 663. To the extent they were merely this, the claims were dismissed. See id. at 666 (repeating that New York does not always recognize tort for negligent performance of contractual services).

Alternatively, plaintiffs asserted that there arose between the plaintiffs and defendant, a relationship of trust and confidence that gave rise to an independent tort duty. See id. at 667. In analyzing this, the court stated that the focus should be on whether a noncontractual duty, a duty imposed as a matter of social policy, was violated. See id. (outlining when societally imposed duty of care can arise). In the present case, the court pointed out that there was an extended relationship and huge sums of money at stake. See id. at 668. Moreover, there were important safety and regulatory concerns. See id. Given this, the court declined to dismiss the action. See id. (stating that status of case makes determination of whether plaintiff will prove relationship of trust and confidence impossible).

This court was sensitive to the fact that the prudent course was between the extremes of creating and destroying a tort action every time a contractual relationship was created. The court also knew that the answer lay in ascertaining the relevant public policies. Furthermore, the court realized that any such judgment on the issue was premature. The plaintiff, as did the court, needed the benefit of discovery to ascertain whether the facts justified permitting a claim for breach of fiduciary duty. In light of this, the ensuing decision on summary judgment is all the more bewildering.

The ITT defendant, subsequently, moved for summary judgment on the tort claims, which included negligence, gross negligence and breach of contract. See id. at 659. In connection with the summary judgment motion, the court addressed the interplay of the existence of a special relationship and the ELR with respect to plaintiff's negligence claims. See id. at *24 (holding that economic loss doctrine
The court first considered whether there was a special relationship between the parties so as to give rise to an independent legal duty of care. With respect to the application of the ELR, the plaintiff argued that such was "inapplicable where a special relationship of trust and confidence has been shown." Despite its willingness to concede the possibility of a special relationship, the court refused to accept plaintiff's argument. The reason for this refusal was not entirely clear. The court stressed that the plaintiff's claim sounded in negligence, not in an intentional tort or breach of fiduciary duty. If the plaintiff predicated the claim on the special relationship and the involved conduct rose to the level of an intentional tort, then it seems the claim would have survived.

bars plaintiff's negligence claims without holding that relationship of trust and confidence guarantees recovery of economic loss damages in tort.

239. See id. at 661. The court looked at two possible sources for such a relationship. See id. First, whether such a relationship grew out of the trust and confidence reposed in the defendant by the plaintiff, and second, whether the relationship arose by virtue of defendant's role as project manager. See id. (stating differentiation is necessary because parties did not analyze each possibility separately). The court found the evidence on the first point to be conflicting, and for that reason it decided any resolution was in the province of the jury. See id. (noting conflicting nature of evidence). While the court was doubtful as to the second point, it nonetheless refused to grant summary judgment with respect to it. See id. at 662 (finding procedural flaws in defendant's offer of proof in support of summary judgment motion).

240. Id. (noting that plaintiff narrowed focus of argument).

241. See id. (refusing to hold that economic loss damages are recoverable in tort when there is finding of special relationship of trust and confidence).

242. See id. at 664 (noting that plaintiff freely admitted intentional torts were absent from this case).

243. See id. at 665 (stating that for plaintiff to prevail on gross negligence tort cause of action, which is analogous to intentional tort, plaintiff must establish existence of special relationship with defendant). In another New York case, the plaintiff research centers sued the defendant, a provider of various administrative services, for breach of contract, negligence, gross negligence, breach of fiduciary duty, malpractice, concealment and negligent and intentional misrepresentation. See Asian Vegetable Research & Dev. Ctr. v. Institute Of Int'l Educ., 944 F. Supp. 1169, 1171 (S.D.N.Y. 1996). The plaintiffs asserted that the defendant mismanaged the retirement plans it was charged with administering. See id. at 1173.

The court began its analysis by looking at the existing contracts between the plaintiff and defendant. See id. at 1171-73. Among the provisions was one that appeared in some, but not all, of the contracts and stated: "Nothing . . . shall cause [the defendant] to be a fiduciary with respect to . . . [the] retirement plans." Id. at 1172. Not only did the court believe this language unambiguously expressed the intent of the parties that they would not stand in such a relationship, but it also believed that the nature of the parties' relationship did not otherwise support the existence of a fiduciary obligation. See id. at 1179 (noting that relationship was simply one between a service provider and its client).

The court also granted the defendant's motion for summary judgment with respect to malpractice, negligence and gross negligence claims. See id. at 1180. With respect to the malpractice claim, the court declined to expand the tort because it did not consider the defendant to be engaged in the practice of a profes-
The court, however, left an important question unanswered or, if answered, muddled. It was not clear from the court's opinion whether plaintiff's claims would have been saved by recasting them in terms of claims for breach of fiduciary duty, even if the breach was not intentional. In other words, the opinion did not resolve whether the ELR would bar, irrespective of the nature of the relationship, all claims alleging negligence in any sense. This is important because many breaches of fiduciary duty may be something less than intentional. The confusion here is similar to that with respect to Collins and Ohio Casualty.

E. New Jersey's Experience with the ELR in a Fiduciary Setting

Courts in New Jersey have also applied some variant of the ELR to breach of fiduciary duty claims. In International Minerals & Mining Corp. v. Citicorp North America, Inc.\textsuperscript{244} the plaintiff sued the defendant, a bank, alleging that the bank improperly denied it a

\textsuperscript{244} 736 F. Supp. 587 (D.N.J. 1990).
loan. The court found that the only obligation undertaken by the defendant was one of good faith consideration of the loan. Because the defendant acted in such a manner, it owed no other contractual obligation to the plaintiff.

The court then went on to consider whether the defendant owed any tort or fiduciary duties to the plaintiff:

It has long been the law that remedies in tort relating to a breach of contract may not be maintained in addition to those established under the contract itself in the absence of any independent duty owed by the breaching party . . . . Where a party does not owe another a duty of care absent the existence of a contract, a separate duty of care cannot arise simply by virtue of the existence of the contract. Indeed, it is fundamental that a party’s liability for breach should be governed strictly by the application of foreseeable damages stemming from the establishment of the contractual relationship. To hold otherwise would chill business relations through the application of unforeseen damages upon one who may elect to effectively breach an agreement. It has, thus, consistently been held that an independent tort action is not cognizable where there is no duty owed to the plaintiff other than the duty arising out of the contract itself.

In light of the court’s finding that there had been no breach of contract and the plaintiff’s failure to allege any other independently tortious behavior or fiduciary relationship, the court’s decision can be simply stated as the plaintiff’s failure to adequately allege factual support for any cause of action, tort or otherwise.

245. Id. at 589. The complaint asserted breach of contract, fraud and misrepresentation, malicious and negligent breach of contract, breach of fiduciary duty and the covenant of good faith and fair dealing, promissory and equitable estoppel and other claims based on state law. See id. The defendant moved for summary judgment on all counts. See id.

246. See id. at 595 (holding that terms of agreement required that defendant bargain in good faith over possibility of granting loan).

247. See id. (stating that as long as defendant made its decision in reasonable manner, no liability can attach to defendant’s decision not to fund).

248. Id. at 597. With respect to the fraud and equitable estoppel claims, the court found them wholly unsupported by the facts. See id. at 598, 600 (stating that reliance by plaintiff was not reasonable under circumstances and that absence of factual support for misrepresentation claim precludes equitable estoppel claim). With respect to the claims for outrageous and wanton conduct, the court likewise found no support for the claims. See id. at 600.

249. See id. at 601. This analysis applied likewise to the breach of fiduciary duty claim. See id. at 597 (noting absence of independent fiduciary duty owed by
IV. Doctrinal Weaknesses of the ELR in the Fiduciary Context

These cases illustrate the breakdown of the ELR as it is applied in a fiduciary context. The fiduciary context is different from the products liability context of the ELR’s origin in many significant respects. The law of products liability is principally concerned with the redress of personal injury and property damage. A related concern is the deterrence of unsafe design and manufacturing processes. The law of fiduciary duty, however, has other concerns. It seeks to redress and deter breaches of trust that generally result in economic loss, not personal injury or property damage.

Moreover, products liability actions may easily be between strangers—an injured customer sues a faceless manufacturer far away in the distribution chain. Breach of fiduciary duty actions, however, are generally between people who have some knowledge of each other, at least to the extent that the fiduciary has accepted the trust and responsibility reposed in him by the other party.

Despite these considerable differences between the products liability and the fiduciary contexts, some courts have held that the ELR bars fiduciary duty claims, while others have confused the issue

lender to borrower). The language about “an independent tort action” is, however, confusing with respect to the fiduciary duty claim. It does not consider that privity and a fiduciary relationship might arise simultaneously. It again does not explain what effect, if any, the contract has on the claim for breach of fiduciary duty. Such loose analysis opens the door to the difficulties encountered by Florida and Illinois.

250. For a further discussion of the difference between the products liability context and the fiduciary context, see infra notes 250-55 and accompanying text.

251. See John W. Wade et al., Prosser, Wade & Schwartz’s Cases and Materials on Torts 694 (9th ed. 1994) (defining products liability as liability of manufacturer, seller or other supplier of chattels, to one with whom there is no privity of contract, who suffers physical harm caused by chattel).

252. See id. at 694 (stating one position that strict liability acts as policing mechanism on product safety).


254. See Wade et al., supra note 251, at 694 (stating that definition of products liability applies to two parties not in privity of contract with one another).

255. See Metcalf, 191 So. at 691 (stating that fiduciary relation exists when confidence is reposed on one side and superiority and influence on other).
beyond predictability.256 Both scenarios are undesirable. Generally, the reason for this confusion has been the courts' improper focus on the common existence of privity between the parties and the characterization of a victim's loss as only economic.

The use of the ELR to bar claims of fiduciary duty relegates an aggrieved party to his or her contractual remedy.257 This remedy is not as likely to make the aggrieved party "whole" as would a claim for breach of fiduciary duty. Furthermore, a contract remedy does not have the same deterrent effect as a claim for breach of fiduciary duty because punitive damages are generally not available even for intentional breaches of contract.258

Generally, therefore, a plaintiff litigant may prefer, all things being equal, to state a cause of action for breach of fiduciary duty over a contract claim. Not only does it increase the expected value of the litigation to plaintiff, but it also increases the defendant's risk of continuing in a lawsuit.259 The defendant, of course, prefers the opposite, and would generally prefer to face only contract claims.

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259. See William M. Landes & Richard A. Posner, Causation in Tort Law: An Economic Approach, 12 J. LEGAL STUD. 109, 110 (1983) (arguing for an economic analysis of accidents). For example, assume the likelihood of a $1,000,000 punitive damage award may be only one percent. This makes the expected value (over compensatory damages) of the litigation to the plaintiff $10,000. The marginal cost of allegations to support a punitive damage claim is low so the plaintiff will more than likely make them. From the defendant's perspective, there is a chance (however small) that he will owe plaintiff $1,000,000. Because most individuals are risk averse, they will choose paying the $10,000 to remove the risk of owing $1,000,000.
But the pertinent question is what, from a public policy perspective, should society prefer.

Application of the ELR to bar breach of fiduciary duty claims erodes the higher standard of loyalty and care that one traditionally associates with a fiduciary relationship. Barring claims for breach of fiduciary duty does not encourage the utmost fairness by a fiduciary, nor does it discourage overreaching by a fiduciary. A fiduciary relationship is, by definition, an unequal one in that the fiduciary is, in some sense, the superior of his charge.260 In this light, relegating a victim of a breach of fiduciary duty to an “arm's length,” “bargained for” remedy infers that a fiduciary relationship has no special meaning to society.

It is also useful to contrast the above outcome with the case of someone who has a fiduciary relationship, but is not in privity of contract with the fiduciary. To date, there has been no decision applying the ELR to bar this type of claim.261 To do so would defy logic, eviscerate the law of fiduciary duty and threaten all tort claims designed to redress principally economic loss.

Putting this speculation aside, the victim in this situation would not be limited to contract damages in the event of a breach of fiduciary duty claim. Instead, he or she could pursue recovery of damages proximately caused by the breach of duty, as well as punitive damages. The beneficiary who has a contract, and therefore, no viable breach of fiduciary duty claim brings to mind the old adage that “no good deed goes unpunished.”262

It does not seem that one should, by operation of the ELR, be made worse off by the mere existence of privity and the consequent allocation of some risks. The ELR closes the tort escape for someone who makes bad bargains or reasonably fails to protect himself or herself. Hence, in economic terms, the ELR encourages investment in contracting because parties expect that the bargain will be upheld, not circumvented. To bar breach of fiduciary duty claims just because the parties are in privity would probably also spur inefficient, excessive efforts at covering all contingencies among parties

260. See Metcalf, 191 So. at 691 (stating that fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on other side).

261. But see Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 ( Fla. 1993) (holding that economic loss doctrine applies to homeowners and purchase of house).

in a contract. Limited time, resources and rationality suggest the lunacy of encouraging such efforts.\textsuperscript{263} Moreover, tort law has traditionally performed a gap-filling function with respect to contractual relationships.\textsuperscript{264} More specifically, fiduciary duties have traditionally stepped in to compensate individuals, even when the relationship was otherwise governed by a contract.\textsuperscript{265}

Before the ELR, parties were fairly confident that at least in the fiduciary context, other law would fill in.\textsuperscript{266} In other words, a court

263. See, e.g., Heidi A. Irvin & Mark S. Carlson, Comment, \textit{Recovery of Pure Economic Loss in Product Liability Actions: An Economic Comparison of Three Legal Rules}, 11 U. Puget Sound L. Rev. 283, 285 (1988) ("[I]n the allocation of pure economic loss caused by product failure, the negligence rule is generally more efficient than a strict liability rule and that a contract rule is almost always more efficient than a negligence rule."). These commentators also stated:

The tort system can be explained in terms of two economic roles it plays in our society. One role is deterrence . . . . A second role tort law plays is to allow victims, who are otherwise eligible, to recover damages that adequately reflect their losses . . . . Consequently, the adequacy of a tort rule in dealing with an injury should be determined by comparing it to the hypothetical rule to which the parties would have agreed if they could have bargained. In contract law, damage measures may act as a substitute for complete contingent contracts. In theory, parties to a contract could bargain for every possible contingency. Damage measures are needed, however, because the cost of bargaining over every contingency is too high and because the occurrence of some contingencies may be difficult or impossible to verify . . . . Commentators are not in complete agreement that the \textit{Hadley} rule is better than other rules, but they do agree that the foreseeability requirement is more efficient than a rule allowing unforeseen damages.

\textit{Id.} at 285-87 (footnotes omitted); see also Jeffrey M. Perloff, \textit{Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale}, 10 J. Legal Stud. 39, 40 (1981) ("[A] breach of contract occurs because the parties involved did not write a full contingent contract that accounted for the special events that led to the breach. The absence of a contingent contract could be due to the parties' lack of foresight . . . . asymmetric information . . . , or high costs of contracting.").


265. See Murphy v. Seabarge, Ltd., 868 S.W.2d 929, 936 (Tex. App. 1994) (holding that breach of partnership agreement also constituted breach of fiduciary duty). A classic example is partnership agreements. It would be folly to bar breach of fiduciary duty claims in such an instance. The legal disruption would be enormous, as traditional expectations of the relationship would be turned on their heads.

would read a contract in the context of the parties' relationship. Some of the decisions discussed above, however, suggest that what the parties previously assumed was incorporated by operation of law in their contracts, namely fiduciary obligations, may no longer be incorporated.267

The irony of applying the ELR beyond the products liability arena in the fiduciary context is that, in the name of preserving the distinction between contract and tort, the traditional policies underlying each may be thwarted.268 Deference to and support of freedom of contract is critical to the success of commercial law and the market system it serves.269 When a party disappoints expectancy interests in a contract, the law must provide a reliable remedy.270

But freedom of contract is, of course, not the only method of allocating risk and resources.271 Tort liability is another classic


268. Cf. Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 62 (1982) (proposing "unlawful means" test to restrict tort liability to cases where defendant's act is independently wrongful). This author stated:

   The tort of interference with contract or prospective relationships is applied in widely divergent settings, yet courts disagree on important fundamentals of the tort and its proper application. . . . Where the defendant's act of interference is independently unlawful, tort objectives predominate; where the defendant's behavior is lawful except for the resulting interference, tort theory should reflect and remain consistent with contract policies.

   Id. at 128.

269. See Summer & Hillman, supra note 258, at 52-53 (discussing private autonomy as substantive basis of contract liability).

270. See Restatement (Second) of Contracts § 347 cmt. b (1981) (discussing expectation interests and appropriate remedies).


   Tort, contract, and property law all allocate the cost of harm . . . . The crucial difference between contracts and torts can be summarized in three sentences: If damages are stipulated in advance, then the victim has efficient incentives to reduce the extent of injury, much as if there were no compensation. By contrast, the victim's incentive to reduce the probability of injury is reduced in part by payment of damages, and is thus lower than if there were no compensation. Precaution against tortious accidents can reduce both their probability and gravity, whereas reduction of reliance on a contract can affect the extent of harm caused by breach, but not the probability of breach.

   Id. at 27, 30 (footnote omitted).
method.\(^{272}\) When society has determined that tort liability should exist, it has decided that such liability would enhance the consequent allocation of such risk and the distribution of resources in accordance with this view.\(^{273}\)

Additionally, society authorizes the recovery of compensatory and punitive damages in tort cases when it wishes to actively promote a system of private enforcement and deterrence of wrongful conduct.\(^{274}\) The assumption is that injured individuals will have the most incentive to sue in an attempt to redress a harm. In the process of doing so, this individual may perform a welfare enhancing function by reducing the likelihood that others will commit the same acts or increasing the likelihood that individuals will take preventive measures. In a sense, both contract and tort, albeit by different means, attempt a rational allocation of risks and resources.\(^{275}\)

It is the purported social need to preserve the boundaries between contract and tort that has led to the development of the ELR.\(^{276}\) The ELR is not, however, an analytically sound way of maintaining the tort/contract boundary in all contexts. Nor should

\(^{272}\) See Winterstein v. Wilcom, 293 A.2d 821, 824 (Md. Ct. Spec. App. 1972) (holding that exculpatory agreements allocating risk to one party are valid if not void against public policy). While harsh, it is necessary to understand that a society might permit victims among its citizenry to bear the risk, and consequent harm, of others’ wrongful deeds, refusing them a compensatory mechanism.

\(^{273}\) See, e.g., U.C.C. §§ 2-505 to 2-311 (1994) (listing provisions supplying terms to sales contracts). This is the same thing, although on a lesser scale, that a court does when it supplies reasonable terms of a contract; it is allocating the risk. It is doing so on the basis of policies, however, that should be evident at the time of the decision.

\(^{274}\) See Wade et al., supra note 251, at 530-31 (discussing functions of punitive damages). The commonly cited tort objective of providing deterrence exists when compensation is provided but not to the same degree as when punitive damages are awarded. See id. at 531 (stating punitive damages have been defended as discouragement of evil motives). Just as importantly, the compensatory mechanism in contract actions provides the same deterrent effect with respect to breaches of contract. In the latter instance, however, punitive damages are not available to further deter the conduct.

\(^{275}\) For a further discussion about tort and contract risk allocations, see supra notes 263-74 and accompanying text.

courts preserve that boundary at all costs. A court must step back to figure out what social purpose the boundary was designed to serve.

The ELR is a mere factual description of a considerable number of scenarios in which policy reasons support a bar of recovery for economic damages, mainly products liability claims involving no personal injury or property damages. Because it is only a factual description, however, the ELR does not stand up well when courts and litigants apply it in other contexts. It ignores the fact that the law specifically sanctions claims for breach of fiduciary duty and other torts designed to redress economic loss. It also ignores the fact that contractual relationships often accompany fiduciary ones. Additionally, it ignores the reality of a beneficiary’s bargaining position vis-à-vis his fiduciary. Perhaps, most significantly, the ELR forces the policy of deterring bad conduct by a fiduciary to the wayside.

Contract seems an inferior method to tort for dealing with these difficulties. This is consistent with the view that a breach of fiduciary duty is a constructive fraud perpetrated on the beneficiary. Courts have found tort claims superior to contract claims in dealing with matters of fraud, especially fraud in the inducement. As the ELR should not logically bar fraud in the inducement claims, neither should it bar claims of constructive fraud because the beneficiary, like someone fraudulently induced, cannot adequately protect himself through bargaining. The very nature of a fiduciary or fraudulently induced relationship often forbids this type of bargaining.


278. See Wade et al., supra note 251, at 1 (stating that one purpose of tort law is to restore injured parties to their original condition through compensation).

279. See, e.g., Metcalf v. Leedy, Wheeler & Co., 191 So. 690, 691 (Fla. 1939) (stating that fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on other side).

280. See, e.g., Salahuddin v. Valley of Cal., Inc., 29 Cal. Rptr. 2d 463, 467 (Ct. App. 1994) (recognizing that breach of fiduciary duty usually constitutes constructive fraud); Rogers v. Mitzi, 584 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 1991) (holding that partners sufficiently pled constructive fraud against defendant partner by alleging breach of fiduciary duty); In re Estate of Snyder, 880 S.W.2d 596, 600 (Mo. Ct. App. 1994) (stating that breach of fiduciary duty is constructive fraud); Wolf v. Walt, 530 N.W.2d 890, 898 (Neb. 1995) (stating that constructive fraud involves breach of fiduciary duty).

281. See, e.g., HTP, Ltd. v. Lineas Aereas Costarricenses, 685 So. 2d 1238, 1239 (Fla. 1996) (recognizing that one who has been fraudulently induced into contract may elect to stand by that contract and sue for damages for fraud).
In fact, contrary to some of the cases previously described, the ELR as applied in negligence cases often contains an exception for "special relationships."\(^{282}\) This relationship has been satisfied by a variety of fiduciary and professional relationships. If the court permitted, for policy reasons, an exception to the bar of negligence claims based on these types of relationships, then the ELR should not bar a fortiori a claim for breach of fiduciary duty.\(^{283}\)

Finally, the defendant at the motion to dismiss stage often raises the ELR.\(^{284}\) This is not surprising because the defendant would like, at the earliest juncture, relief of the threat of tort damages. The mechanical application of the ELR in the fiduciary context, however, has the unfortunate effect of forcing a plaintiff into an involuntary and premature election of remedies because the existence of a contract claim might eliminate a claim for breach of fiduciary duty.\(^{285}\)

\(^{282}\) See, e.g., Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 725 F. Supp. 656, 667 (N.D.N.Y. 1989) (indicating that plaintiff argued that special relationship of trust and confidence with defendant gave rise to independent tort duty to act with care in negligence action).

\(^{283}\) See David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 Ind. L.J. 593, 599 (1986) (advocating narrow exception to economic loss rule to prevent action for negligent performance of services in complex engineering situations). Gaebler stated that:

> Even where the plaintiff suffers exclusively economic loss, courts permit recovery in negligence where there is some special relationship between the parties. A sufficient relationship is found most easily where the defendant stands in a fiduciary or professional relationship to the plaintiff. Thus a trustee may be liable if in fulfilling his trust he negligently injures the economic interests of a beneficiary. Similarly an accountant, attorney, architect, engineer or other professional may be liable to his client for malpractice even though the damages are purely economic. Moreover, liability for economic loss caused by negligent performance of services is not limited to professional malpractice actions but rather may extend to other service transactions as well.

*Id.* at 603-05 (footnotes omitted); see also Hnatt, *supra* note 18, at 1196 ("Courts have developed a second group of exceptions in the context of a 'special relationship.' These cases have involved a special relationship between the negligent tortfeasor and the foreseeable plaintiffs.").

\(^{284}\) See, e.g., Resolution Trust Corp. v. Holland & Knight, 832 F. Supp. 1528, 1530 (S.D. Fla. 1993) (indicating defendant sought to dismiss breach of fiduciary claim based on ELR); *Niagara Mohawk Power Corp.*, 725 F. Supp. at 657, 659 (indicating that defendant moved for dismissal because complaint failed to allege existence of tort duty independent of contractual obligations).

In this sense, the ELR impinges not only on the policies underlying the substantive claim of breach of fiduciary duty, but also on the policies underlying pleading rules.\textsuperscript{286} A principal policy underlying liberal pleading is to prevent the foreclosure of claims based on technicalities without providing the opportunity for parties to develop supporting proof.\textsuperscript{287} Applying the ELR, especially early in the case, deprives a plaintiff of an opportunity to demonstrate what may be egregious conduct on the part of a fiduciary who deserves punishment. Moreover, this is a highly fact-sensitive determination that the courts should not undertake without the benefit of discovery.

V. \textbf{Substitute Analysis}

The starting point in evaluating the propriety of an action to recover economic loss for breach of fiduciary duty is not the ELR. This doctrine should have no role in assessing the viability of claims for breach of fiduciary duty. Neither should the allegation of or existence of other claims for tort or contract.

Instead, the court should examine the plaintiff's allegations and proof of a breach of a fiduciary duty in a relational sense. What is relevant is whether the allegations or proof show the essential elements of a traditional breach of fiduciary duty: whether the plaintiff reposed trust and confidence in the fiduciary to act in the best interest of the plaintiff; whether the alleged fiduciary accepted the confidence reposed in him or her, or accepted responsibility in some sense for the affairs of the plaintiff; whether the alleged fiduciary exerted domination, influence, superiority or control over the plaintiff; and whether the alleged fiduciary abused the plaintiff's trust and confidence resulting in economic loss to the plaintiff.\textsuperscript{288} If the court believes that the plaintiff has adequately alleged or has proof of these things, it should let the claim for breach of fiduciary duty stand.

Moreover, this should be true even if the plaintiff alleges that the breach of fiduciary duty was an act of negligence by the fiduciary, provided that negligence is the applicable standard of care that

\textsuperscript{286} For a further discussion of this area, see \textit{supra} notes 96-111 and accompanying text.

\textsuperscript{287} See Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

\textsuperscript{288} For a further discussion of the nature of fiduciary relationships, see \textit{supra} notes 3, 253-55 and accompanying text.
the fiduciary must use. Once again, the touchstone for the court should be the existence of a fiduciary relationship. On the one hand, if there is no such relationship, it may be appropriate to apply the ELR to bar the claim as nothing more than a tort action for pure economic loss between those with no special relationship.289 On the other hand, if a fiduciary relationship does exist, the court should not discard a claim for breach of fiduciary duty merely because the plaintiff alleges that the fiduciary acted negligently.290 Acts of negligence can be breaches of fiduciary duty, but only in the context of such a relationship. Furthermore, the policies in support of actions for breach of fiduciary duty apply to a negligent fiduciary, as well as a fiduciary perpetrating a fraud, although the acts of the former may not support a claim for punitive damages.

In this regard, courts have uniformly held that in order to receive an award of punitive damages, a plaintiff must establish that the defendant acted willfully, maliciously, wantonly or with reckless indifference to the rights of the plaintiff.291 In light of this, preservation of victims' rights to sue for breaches of fiduciary duty based upon merely negligent conduct will generally not result in exposing defendants to punitive damages awards.292 Therefore, defendants will be liable only to the extent necessary to make the plaintiff whole. A fiduciary that acts willfully, maliciously, wantonly or recklessly, however, will potentially face punitive damages.293

290. See City of Miami Firefighters', 789 F. Supp. at 594 (mentioning negligence concepts in contract).
291. See, e.g., Markey v. Santangelo, 485 A.2d 1305, 1307 (Conn. 1985) (stating that punitive damages are recoverable upon showing of wanton or willful malicious misconduct); Goo v. Continental Cas. Co., 473 P.2d 563, 566 (Haw. 1970) (recognizing that punitive damages are recoverable for willful, malicious, wanton or aggravated wrongs when defendant has acted with reckless indifference to rights of another); Boling v. A-I Detective & Patrol Serv., Inc., 659 So. 2d 586, 588 (Miss. 1995) (noting that plaintiff seeking punitive damages must demonstrate willful or malicious wrong, or gross, reckless disregard for rights of others); Honeywell v. Sterling Furniture Co., 797 P.2d 1019, 1021 (Or. 1990) (stating that punitive damages are allowed to punish willful, wanton or malicious wrongdoer and to deter that wrongdoer and others from like conduct in future).
292. See Summers & Hillman, supra note 258, at 256-66 (discussing generally when punitive damages available in breach of contract actions); see also Chutorian, supra note 15, at 378-91 (discussing how some courts, dissatisfied with traditional contract remedies, have applied tort principles, including punitive damages, to various areas of contract law).
293. See, e.g., Wagman v. Lee, 457 A.2d 401, 404 (D.C. 1983) (noting punitive damages are reasonable if there exists independent fiduciary relationship); Capital Fed. Sav. & Loan Ass'n v. Hohman, 682 P.2d 1309, 1310 (Kan. 1984) (awarding mortgagees punitive damages for breach of fiduciary duty by bank); Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984) (awarding recovery of actual and exem-
This approach also rationally eliminates the procedural problems. If the procedural posture of a case is a motion to dismiss and the plaintiff's allegations are adequate, the court should permit the claim to stand until a subsequent motion for summary judgment. Upon a summary judgment motion, the court can reassess the claim and determine whether there is proof of a fiduciary relationship. If, at this point, the court believes that the plaintiff has failed to establish a "genuine issue as to any material fact," then it may grant summary judgment on the fiduciary duty claim and leave the plaintiff with whatever remedies remain.

Accordingly, courts would grant motions to dismiss on breach of fiduciary duty claims only when the relationship of the parties, as alleged in the four corners of the complaint, was not, as a matter of law, a fiduciary one. Otherwise, the court should give the plaintiff an opportunity to develop its case through the discovery process. In essence, this substitute analysis restores the traditional understanding of alternative pleading and proof of fiduciary duty claims. As a practical matter, if a court permits a breach of fiduciary duty claim to stand, a defendant faces the possibility of having to pay greater compensatory and punitive damages than he or she

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294. See Fed. R. Civ. P. 12(b)(6). The text states in relevant part: If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Id.


297. See Fed. R. Civ. P. 8(a), (e) (1987) (authorizing pleading in alternative without regard to sufficiency or consistency of other claims); Holland & Knight, 832 F. Supp. at 1531-32 (applying Rule 8(e)(2) of Federal Rules of Civil Procedure to plaintiff's complaint); Wright & Miller, supra note 108, at 532-33 (abrogating "theory of pleadings" doctrine that required plaintiff to seek, and be awarded, recovery on only one theory).
might for a breach of contract claim. This is appropriate. Courts should not unfairly shield fiduciaries from the harm they cause their beneficiaries by the existence of a contract.\textsuperscript{298} Furthermore, this analysis recognizes that in a society that promotes complex commercial transactions, there will be transactions that may implicate contractual, tort and fiduciary duties. In light of this, it is impractical, if not unrealistic, to apply the ELR so as to promote artificial, and often times meaningless, distinctions between contract and tort claims and economic and noneconomic loss.

The basis for this substitute analysis is public policy, the relationship of the parties and the resulting societal expectations.\textsuperscript{299} It speaks to the heightened responsibility of a fiduciary with respect to his or her duties, however they may arise and however they may be labeled. This approach also recognizes that where a fiduciary relationship exists, the "bargaining process" may not be at "arm's length," and hence, one of the parties deserves additional protection by the law.\textsuperscript{300} In other words, the likelihood is high that the contract resulting from the "bargaining" of a fiduciary and his or her beneficiary is going to be, from a public policy perspective, inadequate to protect the beneficiary. This scenario is different than a plaintiff outside of the fiduciary context, who simply claims inadequate bargaining power, resources or foresight to prevent an arguably unfair ex post outcome.\textsuperscript{301} The two situations must be carefully distinguished.

In the latter case, the plaintiff and defendant had the opportunity to bargain and to protect themselves accordingly. If they failed


\textsuperscript{299} See East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 876 (1986) (stating that tort actions served different purpose, namely, to protect and redress the individuals in society who were injured by manufacturer's carelessness); Bond, supra note 18, at 231-34 (noting that public policy supports ELR); House & Bell, supra note 18, at 29-30 (supporting policy concerns behind application of ELR).

\textsuperscript{300} For a general discussion of the relationship between the parties in a fiduciary relationship, see supra notes 3 & 253-55 and accompanying text.

\textsuperscript{301} See Bachi & Rockenbach, supra note 150, at 92 ("In cases involving services, professional or otherwise, the independent tort doctrine remains a viable boundary between contract and tort law."); Buesing & Johnson, supra note 150, at 38 ("Lawsuits have sometimes been fueled by a party who, unhappy in hindsight with the negotiated contract, attempts to insert new terms into the agreement by seeking tort remedies when the contractual remedies are unfavorable."); Wagner & Solomon, supra note 46, at 48 (stating that contract law is designed to protect private parties, while tort law is designed to protect society as whole from physical harm).
to do so when they "should" have, courts should not permit tort actions to rescue the plaintiff. This clearly preserves the ex ante incentives to contract. While overexpansion of the ELR is detrimental, the law should also not enter the fray of determining ex post the fairness of arm's length transactions. That is, and should be, largely a market function.

Nothing in this approach, therefore, should be read to permit a plaintiff to circumvent his or her bargain by merely invoking the magical words "breach of fiduciary duty." The differences between contract and tort still have relevance and will as long as private ordering is a prominent feature of the law. Generally, courts should hold parties to the bargain they have made so as to not disrupt the loss allocation scheme made by the parties. To do otherwise would introduce strategic incentives that undermine the reliability of the law.

Additionally, it may be that even in the context of a fiduciary relationship, a contract between the parties may be relevant to determining the existence of a claim for breach of fiduciary duty. This will only be the case when the parties have somehow defined, within the bounds of the law, the fiduciary duties owed or the applicable standards of loyalty or care. Importantly, for our purposes, this determination is, and should be, an exercise in contractual interpretation analytically distinct from the application of the ELR. This approach, therefore, does not relieve courts of the burden of distinguishing contract claims from breach of fiduciary duty claims. In fact, this approach relies heavily, in the common law tradition, on courts' ability to make reasoned, not mechanical, distinctions in this regard.

302. See Collins v. Reynard, 607 N.E.2d 1185, 1186 (Ill. 1992) (explicating difference between contract and tort claims). The court stated:

Contract law applies to voluntary obligations freely entered into between parties. Damages recoverable under a breach of contract theory are based upon the mutual expectation of the parties. The basic principle for the measurement of contract damages is that the injured party is entitled to recover an amount that will put him in as good a position as he would have been had the contract been performed as agreed. Tort law, on the other hand, applies in situations where society recognizes a duty to exist wholly apart from any contractual undertaking. Tort obligations are general obligations that impose liability when a person negligently, carelessly, or purposefully causes injury to others.

Id.

303. See, e.g., Exxon Corp. v. Burglin, 4 F.3d 1294, 1300 (5th Cir. 1993) (holding that sophisticated limited partners who contractually agreed that they were not entitled to certain information could not circumvent agreement by alleging breaches of fiduciary duty by general partner when general partner bought out their interests without disclosing said information).
VI. CONCLUSION

The ELR is a useful device in the products liability context to limit a multiplicity of actions and a defendant's overexposure to liability.304 In that context, economic loss without accompanying personal injury or property damage is sensibly borne by the "failing to contract plaintiff" who knew his or her purposes and could have protected himself or herself in warranty against disappointed expectations. Despite this, experience cautions against mechanical extensions of the ELR to the very different context involving fiduciary relationships.

This Article has discussed cases in which courts applied the ELR to bar claims for breach of fiduciary duty.305 The temptation to do so arises because victims of breaches of fiduciary duty often find themselves in privity with their fiduciary and suffering only economic loss. Courts, however, must resist this temptation. Shielding a wrongdoing fiduciary from fully restoring his or her victim and, perhaps, from paying punitive damages is against a long history of public policy in favor of protecting a beneficiary of a fiduciary relationship to the utmost and, correspondingly, deterring bad conduct by fiduciaries.306

304. See, e.g., Pollack v. Lyle, 175 Cal. Rptr. 81, 86 (Ct. App. 1981) (stating fiduciary must place injured party in same position he would have enjoyed had fiduciary faithfully performed his duties); Steelman v. Mallory, 716 P.2d 1282, 1286 (Idaho 1986) (ruling that measure of damages in breach of fiduciary duty claim by corporate director is profit that director received); Henderson v. Hassur, 594 P.2d 650, 653 (Kan. 1979) (noting that disloyal agent required to account to his principal for secret profit and also had to forfeit compensation that he had received from principal); Bessman v. Bessman, 520 P.2d 1210, 1211 (Kan. 1974) (requiring faithless servant to forfeit compensation otherwise due for services rendered during period of his faithfulness); Pedro v. Pedro, 463 N.W.2d 285, 288 (Minn. Ct. App. 1990) (ruling that damages for breach of fiduciary duty in connection with buyout of minority shareholder of closely held corporation was difference between fair market value of minority shareholder's shares and amount he would have received under buyout agreement); Line v. Rouse, 491 N.W.2d 316, 319 (Neb. 1992) (measuring damages as monetary damage to estate caused by personal representative's breach of fiduciary duty); Stoeckel v. Block, 566 N.Y.S.2d 625, 626 (App. Div. 1991) (stating that former employees who breached fiduciary duty by soliciting employer's customers are subject to damages in amount employer would have made but for the employees' wrong, including lost opportunities for profits on accounts diverted through employees' conduct).

305. For a discussion of the application of the ELR to fiduciary duty claims, see supra notes 26-249 and accompanying text.

Judge Cardozo spoke to this history and said:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court. 307

For this reason, the ELR should not operate to bar claims for breach of fiduciary duty. Instead, where a plaintiff has alleged a breach of fiduciary duty, the court should assess the relationship between the parties. If the relationship is one that has the hallmarks of fiduciary duty, including superiority, dominance, influence, trust and confidence, and the claim is otherwise consistent with the social policies underlying claims of this nature, the court should permit the claim for breach of fiduciary duty to stand pending an assessment of plaintiff’s proof.

Emphasis on the relational aspects of the plaintiff’s pleading and proof of the breach of fiduciary duty should produce more rational results than the sometimes seemingly random ones produced by application of the ELR. This approach will afford the traditional protection to those harmed at the hands of their fiduciary but still respect the important policy differences between contract and tort. Hence, it will permit defendants to eliminate the risk of breach of fiduciary duty claims when they owe merely contractual duties, but it will also permit plaintiffs to pursue remedies for both breach of contract and breach of fiduciary duty when appropriate.
