

*In re American Law Institute*  
**The American Law Institute Restatement Third Grinds Out  
Yet More Proposals**

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The American Law Institute Restatement Third has been active in recent months. Second Counsel Drafts of the Third Restatement on Liability for Economic Harm have been circulated to members of the various Consultative Groups. The most pertinent sections are as follows:

1. Draft Restatement Section 7 – Economic Loss From Injury to a Third Person or to Property not Belonging to the Claimant;
2. Draft Restatement Section 8 – Public Nuisance Resulting in Pure Economic Loss;
3. Draft Restatement Section 9 –Liability in Tort for Fraud;

It is important for the practitioner in the Commonwealth of Pennsylvania to understand these proposals and the way they impact, if at all, Pennsylvania law pertaining to tort theory on economic loss.

1. Draft Restatement Section 7 – Economic Loss From Injury to a Third Person or to Property not Belonging to the Claimant.

Draft section 7 of the Third Restatement of the Law of Torts on Liability for Economic Harm lays out the principle of law that a claimant cannot recover in tort for pure economic loss caused by 1) unintentional personal injury to another party; or 2) unintentional injury to property in which the claimant has no proprietary interest. The law in Pennsylvania generally seems consistent with the law reflected in draft section 7 of the Restatement. Pennsylvania follows the general rule that a claimant cannot recovery for pure economic loss caused by an unintentional (tort action-based) personal injury to another party or unintentional injury to property where the claimant has no proprietary interest.

The basic doctrine in Pennsylvania is often referred to by courts as the “economic loss doctrine. “Specifically, under Pennsylvania law, the economic loss doctrine provides that no cause of action exists for negligence that results solely for economic damages that are unaccompanied by physical injury or property damage. *Adams v. Copper Beach House Townhome Communities*, 816 A.2d 301, 305 (Pa. Super 2003) (holding that the economic loss doctrine

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applies); *Aikens v. Baltimore & Ohio Railroad Co.*, 501 A.2d 277, 279 (Pa Super 1985)(same); *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002) (same, applying Pennsylvania law); see also *Donaldson v. Davidson Bros.*, 12 Pa. D & C 5<sup>th</sup> 305 (Centre Cty 2010) (same); *Duquense v. Pennsylvania American Water Co.*, 850 A.2d 701 (Pa. Super 2004).

There is at least one well-developed exception to the economic loss doctrine under Pennsylvania case law. Claims for negligent misrepresentation often can fall within an exception to the economic loss doctrine in Pennsylvania, which adapts section 552 of the Restatement (Second) or torts. *Bilt-Rite v. Architectural Studio*, 866 A.2d 270 (Pa. 2005); see also *Federal Home Loan Bank of Pittsburgh v. J.P Morgan Securities LLC*, 9 Pa. D. & C. 5th 32 (Allegheny Cty. 2010). In *Bilt-Rite*, the Pennsylvania Supreme Court held that the economic loss doctrine does not apply to claims of negligent misrepresentation under the Restatement (Second) or Torts Section 552. Additionally, this article will discuss the applicability of the economic loss doctrine in cases of public nuisance set forth in section 8 of the draft Restatement.

In Pennsylvania, the economic loss doctrine is closely related to the “gist of the action” doctrine, which may apply to tort claims filed by third-party beneficiaries of a contract, under the proprietary economic loss doctrine. See, e.g., *Dunkin’ Donuts Franchised Restaurants LLC v. Claudia I, LLC.*, 2013 WL 3716525 (E.D. Pa. Jul. 15, 2013; *David Pflumm Paving & Excavating v. Foundation Svcs. Co.*, 816 A.2d 1164 (Pa. Super. 2003). Pennsylvania courts have fashioned the “economic-loss rule,” and the “gist of the action doctrine.” See *Hospicomm v. Fleet Bank*, 338 F. Supp 2d 578 (E.D. Pa. 2004). “[T]he economic-loss doctrine ‘prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows from a contract.’ ” *Factory Market, Inc. v. Schuller Int’l Inc.*, 987 F. Supp. 387, 395 (E.D.Pa.1997); see also *I & S Assocs. Trust v. LaSalle Nat’l Bank*, No. Civ. A. 99–4956, 2001 WL 1287522, at \*3 (E.D. Pa. Oct. 23, 2001) (finding that “the economic loss doctrine bars a plaintiff from bringing a negligence action solely for economic losses absent physical injury or property damage”). Thus, in such cases plaintiffs are barred from recovery in tort, but may be able to recover in contract, as the “gist of the action” test is used to determine whether the case sounds in tort or in contract.

## 2. Draft Restatement Section 8 – Public Nuisance Resulting in Pure Economic Loss.

Draft section 8 of the Third Restatement of the Law of Torts on Liability for Economic Harm defines when an actor whose conduct is a public nuisance can result in liability for pure economic loss. The draft section does not attempt to define the broader law of public nuisance, but simply creates an exception to the rule set forth in section 7 which ordinarily prevents monetary recovery for pure economic losses. Draft section 8 creates an exception whereby an actor whose

wrongful conduct harms or obstructs public property or a public resource is subject to liability for resulting pure economic loss if the claimant's losses are distinct from the losses of the public suffered at large.

As the drafters' comments emphasize, recovery under this section is especially difficult because a pure economic injury resulting from a public nuisance is not enough for recovery under this section. Rather, this section further requires a so called "special injury" on behalf of the claimant to qualify as an exception to the economic loss doctrine. The comments define a special injury required for recovery under this exception such that the courts recognize liability for a public nuisance in tort only to a plaintiff who has suffered a "special injury," an injury distinct from the harm suffered by the community at large. As the comments elaborate, this requirement makes it considerably difficult for plaintiffs to recover for a public nuisance resulting in pure economic loss under section 8. The comments discuss several categories of public nuisance resulting in pure economic losses: harm to public resources, obstruction of public property, abatement of nuisance by injunction (generally easier to obtain relief from a court), and products liability (where recovery is very difficult under the public nuisance doctrine and generally reserved to recovery under the law of products liability).

Pennsylvania, unlike some other states, has never recognized a private cause of action for public nuisance. See *Duquense Light Co. v. Penn. Am. Water Co.*, 850 A.2d 701, 704-05 (Pa. Super 2004). Two cases applying Pennsylvania law have considered whether the public nuisance doctrine could apply as an exception to Pennsylvania's public policy of barring claims for recovery for economic losses sustained as a result of tortious conduct under the economic loss doctrine. The Pennsylvania Supreme Court has not opined on the issue of whether public nuisance may function as an exception to the economic loss doctrine. While the federal court in *Fire Litigation* chose to apply the public nuisance doctrine as an exception to Pennsylvania's economic loss doctrine, the only Pennsylvania state court to subsequently consider the issue, Pennsylvania Superior Court in *Duquense Light Co.*, considered *Fire Litigation* and declined to apply the public nuisance exception. Therefore, after *Duquense Light Co.*, it can only be presumed that the public nuisance exception to the economic loss doctrine is not applicable under Pennsylvania law as set forth in the draft Third Restatement section 8.

### 3. Draft Restatement Section 9 – Liability in Tort for Fraud.

Draft section 9 of the Third Restatement of Torts on Liability for Economic Harm, defines fraud in tort as when an actor who knowingly makes a misrepresentation of material fact to subject liability for economic loss caused by another's justifiable reliance on it. The draft Restatement defines all of the elements of fraud in tort and discusses types of misrepresentations, materiality

and justifiable reliance. Scienter and factual causation for fraud are no longer included in this section as it was in the earlier draft, but is now found separately in sections 10 and 11.

The comments include two Pennsylvania cases, *AmOffice of Disciplinary Counsel v. Kieseewetter*, 889 A.2d 47 (Pa. 2005), which discusses the standard of proof in Pennsylvania for fraud; and *Schwartz v. Rockey*, 932 A.2d 885 (Pa. 2007), which discusses the tort of fraud in relation to restitution and contract remedies.

The case law in Pennsylvania makes clear that fraud is an exception to the economic loss doctrine, such that purely economic damages are recoverable for a fraudulent misrepresentation, provided that the basic requirements for proving fraud, as set forth in the draft restatement, are met. *Bilt-Rite Contractors, v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005) (economic loss doctrine did not bar general contractor's damages due to negligent misrepresentation or fraud against architect for purely economic damages), 67 Pa. D & C 4<sup>th</sup> 496 (Lackawanna Cty. 2004) (economic loss doctrine did not bar claim for fraudulent misrepresentation by borrower against bank).

#### 4. Conclusion

In conclusion, the drafters of the Restatement of Torts on Economic Liability have put forth useful proposals, most of which are consistent with Pennsylvania law, and appear to have consulted some Pennsylvania jurisprudence in putting together their draft Restatement proposals. Some of the areas of law which they touch on are basic tenets of Pennsylvania law on the economic loss doctrine and fraud, as well as damages for fraud. However, other sections of the draft restatement include areas related to fraud and the economic loss doctrine that have not been well developed in Pennsylvania law to date.